The Tax Institute

# VIC Tax Forum

## Relevant Contractors & Payroll Tax

Presented at VIC Tax Forum 21-22 March 2024

**Jack Nathan Aquilina**
Dentons

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# 1. Overview

The purpose of this paper is to provide an overview of the 'relevant contractor' provisions contained in the broadly harmonised payroll tax acts of all States and Territories, except for Western Australia.[1]

The paper will explore the following:

- The history and context of the uniform payroll tax law and the policy behind the uniform approach taken by legislatures to impose payroll tax on contractor relationships.
- Developments in the application of the relevant contractor provisions by State Revenue Offices and key decisions of State Courts.
- The application of the relevant contractor provisions to medical practices, including key recent developments in both case law and State Revenue rulings.
- The application of the relevant contractor provisions to the mortgage aggregation sector including an update on the first mortgage aggregation case in *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* (2020/27826).
- Insights into the types of arrangements that are likely to experience payroll tax risk in the future, in particular intermediary technology platforms and/or introducer and facilitation arrangements.

Given the uncertainty surrounding the limits and proportions of the relevant contractor provisions and the growing tendency for State revenue authorities to seek to apply the provisions to an ever-broadening class of arrangement, both businesses and practitioners are encouraged to think carefully about the potential application of payroll tax to contractor arrangements.

[1] See relevantly *Payroll Tax Act 2007* (Vic), Division 7 section 32; *Payroll Tax Act 2007* (NSW) Division 7 section 32, *Payroll Tax Act 2009* (SA), Division 7 section 32; *Payroll Tax Act 2008* (TAS), Division 7 section 32; *Payroll Tax Act 1971* (QLD), Division 1A section 13B; *Payroll Tax Act 2011* (ACT), Division 3.7 section 32; *Payroll Tax Act 2009* (NT), Division 7 section 32.

# 2. The 'relevant contractor' provisions

## 2.1 History and purpose

The 'relevant contractor' provisions owe their genesis to section 7 of the *Pay-roll Tax (Amendment) Act 1983* (Vic), which inserted a new section 3C into the formerly operative *Pay-roll Tax Act 1971* (Vic).[2] Identical provisions were adopted in New South Wales and were inserted into section 3A(1) of the former *Pay-roll Tax Act 1971* (NSW).

In 2007, the Parliaments of Victoria and New South Wales enacted harmonised payroll tax provisions that incorporated the relevant contractor provisions into Division 7 of each respective Act. Every other State and Territory (but for Western Australia) have also incorporated the same approach to the relevant contractor provisions in their respective payroll tax legislation.

In his second reading speech for the *Pay-roll Tax (Amendment) Bill 1983* (Vic), the then Victorian Treasurer, Mr Jolly, set out the legislative purpose of the relevant contractor provisions as follows:[3]

> "*It has been drawn to the attention of the Government that the pay-roll tax base has been eroded considerably* ***during recent years because an increasing number of employees have become or purported to become independent contractors and their employers or former employers no longer pay pay-roll tax on the remuneration paid to these contractors, notwithstanding that for intents and purposes the relationship between the parties is almost identical****. This trend has accelerated in recent years and is continuing to accelerate.*
>
> …
>
> *The other provisions deal with all other contracts involving the supply of labour where it is considered that the pay-roll tax legislation should apply.* ***In essence, the legislation is intended to catch those relationships where the sub-contractor works exclusively or primarily for one person and where the object of the contract between the parties is to obtain the labour of the subcontractor****.*
>
> *Further exclusions are provided where the sub-contractor does not work exclusively or principally for the one person.* ***These exclusions are expressed in a somewhat complicated form. This is a matter of regret, but it is a fact of life that complicated legislation is needed to close loopholes in tax legislation, otherwise the fertile minds engaged by the tax avoidance industry will find weaknesses in any simplified amending provisions and exploit those weaknesses to the disadvantage of the revenue.***
>
> *As a final protection, however, there is provision for the Commissioner of Pay-roll Tax to exclude a contract from the operation of these provisions where he is satisfied that the services provided under the contract are rendered by a person who ordinarily renders services of the kind provided under the contract to the public generally."*

The second reading speech highlights that the policy of the relevant contractor provisions is to ensure that contractor arrangements that bear an almost identical character to an employment relationship (particularly where the arrangement relates to exclusivity of engagement for labour-like work) be deemed to be employment relationships for payroll tax purposes.

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2 *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J).

3 Victoria, *Parliamentary Debates,* Legislative Assembly, 27 October 1983, 1479-1580; Emphasis Added; see also *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J).

Given the policy of extending the definition of employee to capture contractor arrangements that are in substance employment relationships, it is necessary to ask, at least conceptually: what exactly is the difference between an 'employment relationship' or employment-*like* relationship on the one hand, and a *bona fide* 'independent contractor' relationship on the other?

The typical distinction between an employment relationship and a contractor relationship has been the distinction between a contract **of** service and a contract **for** services. This distinction was explored by the New South Wales Supreme Court when considering the application of the relevant contractor provisions (as they then existed in the *Pay-roll Tax Act 1971* (NSW)). Gzell J relevantly remarked that:[4]

> *[178] In Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Operative Assurance Co of Australia Ltd (1931) 46 CLR 41, 48 Dixon J highlighted identification and representation in distinguishing between an employee and an independent contractor, thus:*
>
> > *"the work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal"*
>
> *[179] In Hollis v Vabu Pty Ltd (2001) 207 CLR 21 at [40] the High Court said that this passage merited close attention because it indicated that the circumstance that the business enterprise of a person said to be an employer is benefited by the activities of the person said to be an employee, cannot be a sufficient indication that the person is an employee. The Court pointed out that Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor.*

From a policy perspective and given the 'relevant contractor' provisions are designed to capture arrangements where *'employees have become or purported to become independent contractors…, notwithstanding that for intents and purposes the relationship between the parties is almost identical [to an employment relationship]'*,[5] one would expect that the provisions would only deem arrangements that are in substance contracts of service, but masquerading as contracts for service, to be an employment relationship for payroll tax purposes. However, as will be seen in subsequent parts of this paper, the legislative drafting goes much further.

## 2.2 The relevant contractor test: section 32(1)

In view of the policy purpose of the provisions set out in part 2.1 of this paper, the legislature enacted a broad test to be applied when seeking to establish the existence of a 'relevant contract' in subsection 32(1).

For the purpose of this paper, focus will be had on the harmonised Victorian and New South Wales provisions, set out in Division 7 of the harmonised Acts.[6] However, as has been noted earlier, the same formulation has been adopted in every other Australian State and Territory except for Western Australia.[7]

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4 *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788.

5 Ibid.

6 All legislative references are to the *Payroll Tax Act 2007* (Vic) unless otherwise specified.

7 See relevantly *Payroll Tax Act 2007* (Vic), Division 7 section 32; *Payroll Tax Act 2007* (NSW) Division 7 section 32, *Payroll Tax Act 2009* (SA), Division 7 section 32; *Payroll Tax Act 2008* (TAS), Division 7 section 32; *Payroll Tax Act 1971* (QLD),

### 2.2.1 What are 'wages'?

Payroll tax is a tax imposed on 'taxable wages'[8] and is payable by the employer by whom the taxable wages are paid or payable.[9] 'Wages' mean wages, remuneration, salary, commission, bonuses or allowances paid or payable to an **employee** including…an amount that is included as or taken to be wages by any other provision of the Act.[10]

Section 35 extends the concept of 'wages' to include amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a 'relevant contract'.[11] Section 33 generally deems the principal of a relevant contractor arrangement to be an 'employer' for section 35 purposes.[12] But what is a relevant contract?

### 2.2.2 What is a 'relevant contract'?

Section 32(1) establishes the principal test for determining the existence of a 'relevant contract'.

Section 32(1) is set out below (emphasis added at b):

> "*…a **relevant contract** in relation to a financial year is a contract under which a person (the **designated person**) during that financial year, in the course of a business carried on by the designated person-*
>
> *a) Supplies to another person services for or in relation to the performance of work; or*
> *b) **Has supplied to the designated person the services of a person for or in relation to the performance of work**; or*
> *c) Gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person, or where the designated person is a member of a group, to another member in the group."*

For the purposes of this paper, and given the state of the contemporary authorities, focus will be dedicated to subsection 32(1)(b).

Section 32(1) requires the identification of a contract or agreement that is said to capture the relationship between the designated person and those persons said to be supplying services for the performance of work to the designated person in the course of the designated person's business. Importantly, the services provided to the designated person must arise 'under' the contract or arrangement that is putatively subjected to the test in section 32(1). Services that do not arise under a relevant contract, are not captured by section 32(1).

Who exactly the 'designated person' is, is dependent on which subparagraph of section 32(1) is being applied. If subparagraph 32(1)(a) is being applied, the designated person would be the person supplying services to another person (i.e the contractor). If subparagraph 32(1)(b) is applied, the designated person refers to the person to whom the services were supplied (i.e the principal). Finally, should subsection 32(1)(c) be applied, the designated person is the person supplying out goods to other natural persons to perform work.

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Division 1A section 13B; *Payroll Tax Act 2011* (ACT), Division 3.7 section 32; *Payroll Tax Act 2009* (NT), Division 7 section 32.

8 *Payroll Tax Act 2007* (Vic), section 6; see generally the commentary of Gzell J in *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [177]-[184].

9 *Payroll Tax Act 2007* (Vic), section 7.

10 Ibid, section 13(1)(e).

11 Ibid, section 35(1).

12 Ibid, section 33.

Section 31 defines **contract** broadly to include any agreement, arrangement or undertaking, whether formal or informal and whether express or implied.

A **supply** in relation to services includes the providing, granting or conferring of services. **Services** broadly includes results of work performed.

The High Court in *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43; 64 ALJR 606 (***Odco***) considered the meaning of the words 'services of persons for or in relation to the performance of work' when considering identically worded provisions in the *Accident Compensation Act 1985* (Vic). The Court (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) found that:[13]

> *"…It is a mistake to read the expression 'for or in relation to the performance of work', where it appears in section 9(1) and elsewhere, as doing anything more than qualifying the content or scope of the word 'services'. All that expression is saying is that the services must be work-related: it is not stipulating that the services are wholly distinct from the work or that the supplier of the services is a person other than the performer of the work."*

The identification of both the service purported to be provided from the supplier to the designated person and the work-related character of the same are paramount considerations. As will be seen when reviewing the key developments in the recent case law, what constitutes a 'service' in this context is highly fact dependent and need not necessarily be clearly defined or specifically identified as a 'service' in the text of the relevant contract.[14]

As such, the elements of the test in section 32(1)(b) that need to be satisfied prior to a relevant contract arising can be summarised as follows:

a. 'A person';

b. 'During a financial year';

c. 'Under a contract';

d. 'In the course of business carried on by that person';

e. 'Had supplied to them by another person';

f. 'Services for or in relation to the performance of work'.

## 2.3 The relevant contractor exemptions: section 32(2)

The general test in section 32(1) is accompanied by several 'somewhat complicated' exemptions (or as the Treasurer called them 'protection[s]') contained in subsection 32(2).[15]

Subsection 32(2) commences by providing that a 'relevant contract' does not include a contract for service or a contract under which a person (the **designated person**) during a financial year in the course of a business carried on by the designated person falls within the following exemptions set out in the table below:

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13 *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43; 64 ALJR 606, 612.

14 See for example *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40.

15 Ibid.

| Item | Exemption | Statutory Text |
|---|---|---|
| 1 | **Service ancillary to the supply of goods** | a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person |
| 2 | **Service not ordinarily required where supplier ordinarily performs service to the public** | b) is supplied with services for or in relation to the performance of work where—<br>(i) those services are of a kind not ordinarily required by the designated person and are performed by a person who ordinarily performs services of that kind to the public generally; or |
| 3 | **Service ordinarily required for less than 180 days per financial year** | (ii) those services are of a kind ordinarily required by the designated person for less than 180 days in a financial year; or |
| 4 | **Services provided for 90 days or less in a financial year** | (iii) those services are provided for a period that does not exceed 90 days or for periods that, in the aggregate, do not exceed 90 days in that financial year and are not services—<br>(A) provided by a person by whom similar services are provided to the designated person; or<br>(B) for or in relation to the performance of work where any of the persons who perform the work also perform similar work for the designated person—<br>for periods that, in the aggregate, exceed 90 days in that financial year; or |
| 5 | **Services of that kind provided to the public generally in the financial year** | (iv) those services are supplied under a contract to which subparagraphs (i) to (iii) do not apply and the Commissioner is |

| | | |
|---|---|---|
| | | satisfied that those services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year; or |
| **6** | **Services provided by two or more persons** | (c) is supplied by a person (the contractor ) with services for or in relation to the performance of work under a contract to which paragraphs (a) and (b) do not apply where the work to which the services relate is performed—<br>(i) by two or more persons employed by, or who provide services for, the contractor in the course of a business carried on by the contractor; or<br>(ii) and (iii) omitted |
| **7** | **Services solely for or ancillary for conveyance of goods by means of a vehicle provided by the person conveying them.** | (d)(i)<br>Statutory text omitted. |
| **8** | **Services solely or in relation to the procurement of persons desiring to be insured by the designated person** | (d)(ii)<br>Statutory text omitted. |
| **9** | **Services solely for or in relation to the door-to-door sale of goods solely for domestic purposes on behalf of the designated person.** | (d)(iii)<br>Statutory text omitted. |

Again, given the scope of this paper, focus will be given to the exemptions described in items 4 to 6 in the table above.

### 2.3.1 Services provided for 90 days or less in a financial year

Subsection 32(2)(b)(iii) provides that where services under the relevant contract are provided for a period not exceeding 90 days in a financial year such arrangements are exempt. In Revenue Ruling PTA-035v2[16] the Revenue has set out its view that for the purpose of this exemption:

- the carrying out of any work on a given day will count as a full day; and

[16] Which applies identically in both Victoria and New South Wales.

- the days worked do not have to be consecutive, rather it is the total number of days worked in a financial year that is relevant.

Once the 90-day limit is exceeded, the total payments made to the contractor during the financial year, including the payments captured in the first 90 days, will be subject to payroll tax. Where the actual number of days cannot be ascertained, the Revenue has recommended a methodology called the 'replacement method' to calculate an accepted estimate of days worked in any given year.

Ultimately, however, the question of whether a contractor has been engaged for a period of time will be a question of fact and degree that must be proven by the taxpayer on the balance of probabilities. This means that contemporaneous documentation and record keeping will be paramount both at the audit / investigation stage and in any litigation. Records that evidence when contractors were engaged, the work they actually performed during each period and clear terms of engagement will be important evidence that will need to be adduced when making any claim for this exemption.

### 2.3.2 Services of that kind provided to the public generally

Subsection 32(2)(b)(iv) provides that where the Commissioner is satisfied that services supplied under a relevant contract are performed by a person who ordinarily performs services of that kind to the public generally in a financial year, that such arrangements are exempt.

As such, in order for a relevant contract to fall within the terms of the exception contained in section 32(2)(b)(iv) the following propositions must be satisfied:

1. There must be a relevant contract;
2. The relevant contract must include services under which the designated person:
    a. In a financial year;
    b. In the course of its business;
    c. Is supplied with services by persons for or in relation to the performance of work;
3. Where the Commissioner is satisfied that:
    a. Those services performed by the persons, under the relevant contract, for the designated person in the course of the designated person's business;
    b. Are of the same kind of services performed by the person to the public generally;
    c. In the financial year in question.

The core matters of satisfaction that the Commissioner must obtain is whether the services performed by the contractor to the designated person are the 'kind of services' that the contractor performs to the 'public generally'.

**'Services of that kind'**

The first issue of construction relates to the question of what is meant by 'services of that kind'.

In PTA-012v2,[17] the Commissioner does not spell out what exactly is meant by the phrase 'services of that kind' but rather sets out 'factors [that] may be relevant and would generally support a finding that the exclusion applies' as follows:

- The contractor provides the same type of services to a range of principals in the financial year (however, providing the same type of services to members of the same payroll tax group is not a strong factor supporting a finding that the contract is not a relevant contract).
- The contractor derives income from principals other than the principal claiming the exclusion in the financial year. The case for exclusion is stronger when the proportion of the contractor's income obtained from other principals is greater.
- The contractor enters into contracts which do not tie the contractor to the principal and do not restrict the contractor from providing the same type of services to other principals in the financial year.
- The contractor is proactive in sourcing work from a range of principals in the financial year for example, by advertising to the public. However, merely advertising to the public without actually providing services to the public is not a strong factor supporting a finding that the contract is not a relevant contract.
- The contractor performs work on separate contracts with separate principals concurrently in the financial year.

The Commissioner notes that none of the above factors are conclusive on their own. And in addition to the above factors, the Commissioner will also consider any other factors that are relevant to the particular circumstances.

The Commissioner's guidance provides little by way of a principled identification of the degree of similarity required to be substantiated between two purported services to fall within the exception, but rather focusses on circumstances where two congruent services can be shown to be offered to the public at large.

Accepting that the determination of whether two sets of services are of the same kind is necessarily a fact dependent analysis, there has been some useful authorities that have considered the meaning of the phrase 'services of a kind' and have applied it to real world examples of service delivery in the payroll tax context.

In *BSA Ltd v Chief Commissioner of State Revenue* [2023] NSWCATAP 159, the New South Wales Civil and Administrative Tribunal (Appeals Division) accepted that the phrase 'services…of a kind' should not be read as requiring that services be 'the same '.[18] Given that the ordinary meaning of the word 'kind' includes matters of the same nature or character as determining likeness or difference between things, or being of a particular character or class[19] and that in PTA-012v2 the Commissioner uses the phrase 'same type' to describe the same kind of services that would attract an exemption, it seems apparent that section 32(2)(b)(iv) does not require a complete congruence between the

[17] Which applies identically in both Victoria and New South Wales.
[18] *BSA Ltd v Chief Commissioner of State Revenue* [2023] NSWCATAP 159, [18].
[19] Macquarie Essential Dictionary and the Shorter Oxford English Dictionary: On Historical Principles (Volume 1).

services supplied by the person to the public and those services it purportedly supplies to the designated person. A sufficient level of overlap is adequate.[20]

Such a characterisation is on all fours with the approach taken by the Victorian Supreme Court in *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609 (***Nationwide Towing***). In *Nationwide Towing,* the Royal Automobile Club of Victoria (**RACV**) provided 'roadside assistance' to its members. RACV contracted out the provision of these 'roadside services' to Nationwide Towing. Nationwide Towing engaged subcontractors to attend to RACV members that required roadside assistance. RACV paid Nationwide Towing certain amounts for the assistance given, that was covered by their policy with their members. However, not all of the roadside assistance that the subcontractors provided RACV members was covered by RACV's policy. Those things not covered included things like petrol, globes and battery terminals, which the subcontractor fitted or dealt with. The subcontractors supplied these ancillary services to RACV members directly and was not related to the arrangements that Nationwide Towing had with RACV. The Court held, despite the fact that under the arrangement the contractor provided distinct services to the public directly and separate services under a contract with the designated person, that both services were of the same kind because they related to 'mechanical repair services'.[21]

**'Public generally'**

The second issue of construction relates to the question of what is meant by the 'public generally'.

The Commissioner's ruling in PTA-012v2 suggests that the relevant 'public' may include different types of principals that generally require the types of services provided by the person to the designated person. The wording and context of the statute itself supports this approach given that the general reference to 'public generally' is pre-conditioned on the identification of classes and kinds of services.

Naturally, therefore, the relevant 'public' or class of people that make up the 'public generally' will be influenced by the nature of the purported services themselves and their adaptability and relevance to particular classes of recipients in the public generally. For example, in *Nationwide Towing* the relevant public was the public who were RACV roadside assist members. This is because the services provided by RACV, Nationwide Towing and the subcontractors were all adapted for and targeted to that class of person. Characterising the class of persons that are best adapted to receive the services, therefore, will be a fundamental matter for taxpayers to address when seeking to claim this exemption.

### 2.3.3 Services provided by two or more persons

Subsection 32(2)(c) sets out that where a contractor provides the designated person with services for or in relation to the performance of work and two or more persons employed by, or who provide services for, the contractor in the course of the contractor's business, then such arrangements are exempt.

This exemption has the effect of excluding from the pool of relevant contractor arrangements those arrangements that are not limited to the activities of a single entity delivering the services. The calculation of two or more persons includes the contractor and one other person that performed the

[20] See generally*, Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609 (Croft J).
[21] *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609,[57] (Croft J).

services in a financial year.[22] This reflects the policy objective of the provisions to '*catch those relationships where the sub-contractor works exclusively or primarily for one person and where the object of the contract between the parties is to obtain the labour of the subcontractor*'.[23]

### Individuals employed by contractor

In circumstances where the contractor employs another to provide the services to the designated person it is reasonably straightforward to evidence the incidence of employment. In such cases the question will turn on whether the employee also performed the work that constituted the services in the relevant financial year in addition to the contractor themselves.

### Individuals providing services for contractor

What is less clear, however, is the scope of persons that are captured in the phrase 'provide services for' as an alternative to those employed by the contractor. There is limited revenue authority guidance on this point, and the case law is also scant in considering the acceptable limits and proportions of persons that are considered to have 'provided services for' the contractor in a given financial year. Although, the upper limits of the phrase were somewhat tested in *Bridges* when Gzell J held that a receptionist that took a contractor's phone calls was not captured by the provision because the performance of that work was *de minimis* with respect to the services provided by the contractor to the designated person.[24] This is despite the fact that Gzell J accepted, as a general proposition, that personal assistants and administrative staff are capable of being captured where they perform work and provide services to the designated person in the course of the contractor's business.[25] Presumably, the concept of 'provide services for' also is capable of capturing subcontractors engaged in the contractor's business, referrers and other affiliates that may not be formal subcontractors but nonetheless assist the contractor to provide services for them in a financial year and other third parties.

Again, contemporaneous documentation of the activities of ancillary staff or persons who provide services to a designated person in a contractor's business will be crucial in assisting the taxpayer to substantiate a claim that certain contractors should be excluded under the two or more exemption.

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22 See for example the discussion of Gzell J in *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [232]-[235].

23 Victoria, *Parliamentary Debates,* Legislative Assembly, 27 October 1983, 1479-1580; Emphasis Added; see also *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J).

24 *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [232]-[235].

25 Ibid.

# 3. Key developments in the case law and administration

Given that the object of both the Victorian and New South Wales payroll tax bills were to 'harmonise payroll tax legislation…thereby increasing inter-jurisdictional consistency',[26] case law in either State remains highly relevant (and it is suggested quasi-binding) on the interpretation and administration of the provisions across both jurisdictions.

Because of this reality, case law developments in both Victoria and New South Wales will be considered when exploring the way the relevant contractor provisions have been administered across both States (if not all jurisdictions except Western Australia) now and into the future. This part of the paper is by no means an exhaustive list of all payroll tax cases that have considered the application of the relevant contractor provisions, but rather a selection of those cases that the author believes to be the most consequential as reflected in more contemporary developments.

The different case studies of the relevant contractor provisions being applied in the context of a variety of industries, provides great insight into the revenue authorities views on the breadth of the provisions, including the judicial appetite to accept invitations by revenue authorities to apply the provisions more broadly. The development in the case law also allows us to anticipate with a degree of certainty other types of arrangements that may be targeted by the Revenue into the future.

## 3.1 Goods distribution agreements

### 3.1.1 *Smith's Snackfood Company Ltd*

In *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 470, the New South Wales Court of Appeal considered the application of the relevant contractor provisions to a 'Goods Distribution Agreement' (**GDA**) entered into between Smith's and independent contractors. Smith's sold various snack foods and drinks in vending machines throughout Australia. In doing so, it engaged and paid independent contractors to store, transport and restock the vending machines, to remove and transport goods which had passed their used by date, to collect money paid by customers in the form of notes and coins and to deliver the same to a cash handling company.

The contractors were required to sign a new GDA each financial year. The commission payable to the contractors under it was a percentage of the retail sales through the contractor's vending machine.

The obligations under the GDAs included:

- The distribution of goods by stocking the vending machines at sites allocated to the contractor, the collection of cash taking and the removal of spoilt product; and
- The provision and maintenance at the contractor's expense of a reliable and roadworthy vehicle of less than 5 years old, suitable to carry Smith's goods.

Smith's submitted that the GDA was not a contract for the provision of services of persons 'for or in relation to the performance of work' under section 32(1)(b). Both the Supreme Court and the Court of

[26] Explanatory Memorandum, *Payroll Tax Bill 2007* (Vic).

Appeal found to the contrary. In the Court of Appeal, Gleesson JA, with whom Beazley P and Sackville AJA agreed, held that:[27]

> *[56] In my opinion, there was no error in the primary judge's reasoning. The question is whether the contract, in this case the GDA, answer the description of the broad terms of a 'relevant contract' in section 32(1)(b). All that is necessary is that the serviced supplied by the contractors under the GDAs are work-related [Citing Odco at 612].*
>
> *…*
>
> *[61] There is no error in the primary judge's finding that the GDA answers that description.*

In making this finding, the Court of Appeal confirmed that all that is necessary to identify 'services for or in relation to the performance of work' under a contract is to identify terms (including obligations) that are capable of being characterised as work-related. In Smith's case, this meant that the obligations placed on the contractors under the GDA, although not described as services under the contract, were capable of being service-like and work-related.

## 3.2 Optical dispensary and optometry businesses

### 3.2.1 *Optical Superstores Pty Ltd*

In *Optical Superstores Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2018] VCAT 169, Optical Superstores Pty Ltd (**Trustee**) was the trustee of four related trusts that together carried on an optical dispensary business known as The Optical Super Store (**TOSS**). The TOSS business was carried on through stores owned by the Trustee, or licenced by the Trustee to other parties. The Trustee supplied lenses and frames to TOSS stores and to some other parties.

The Trustee entered into a contractual relationship with individual optometrists, or companies or trusts associated with optometrists, through which the optometrists undertook eye tests at TOSS stores. Under this agreement, the relationship between the Trustee and the optometrists was described as '*an independent Landlord and independent Tenant who is paying a licence fee to occupy space and use equipment on a non-exclusive basis*'.

Under the agreement:

- The optometrists were required to nominate the Trustee as the recipient of any Medicare payments to which the relevant optometrist was entitled. Where a patient was not covered by Medicare, an invoice was to be rendered by the optometrists which provided for payment to be made to the Trustee;

- At the end of each month, the optometrists were to submit the number of hours worked in a given TOSS store. A monthly payment would be made to the optometrists of a 'reimbursement amount' which was calculated by multiplying the number of hours worked by agreed rates. No invoice was raised by the optometrists to the Trustee for this amount on the basis that it was said to be a return of moneys belonging to the optometrist; and

[27] *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 470, [56]-[61].

 

- The balance of the consultation fees were retained by the Trustee as occupancy fees due from the optometrist.

The Trustee argued that the agreements were tenancy arrangements, not contracts for service. Because the optometrists provided their services to patients and not to the Trustee, there was no relevant contract under section 32(1)(b).

The Victorian Civil and Administrative Tribunal found that under the agreement the Trustee had been supplied services of optometrists for or in relation to the performance of work. Member Tang (as he was known then) relevantly observed that:[28]

> *[84] In my view, the essential arrangement between the Trustee and the optometrists was that the optometrists would ensure their attendance…at locations and times to be agreed, in order that those optometrists would provide optometry services to actual or anticipated customers of the Trustee.*
>
> *[85] The arrangements were put in place for the benefit of the Trustee…because the provision of optometry services on site would lead to increase sales in frames, lenses and other optometry products. The provisions of, and the language used, in the agreements are consistent with attempts to secure those benefits. Given the breadth of the terms used in the payroll tax legislation, there is no incongruity in finding that the services of the optometrists were provided to the Trustee as well as to the patients.*

*Optical Superstores* once again demonstrates the willingness of decision makers to take an expansive approach in identifying a 'service for or in relation to the performance of work' for payroll tax purposes. This broad conception of 'service' is captured in contractual arrangements whereby obligations imposed by a principal on a contractor are designed to secure to the principal particular benefits to their business as a result of the work-related performance of those obligations by the contractor. This is capable of including the provision by the contractor of services to third parties that are also customers of the principal.

## 3.3 Financial services agents

### 3.3.1 *Bridges Financial Services*

#### Relevant background

In *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, the Supreme Court of New South Wales considered the application of the relevant contractor provisions (as they were then enacted in the *Pay-roll Tax Act 1971* (NSW)) to the financial services sector, in particular agency type arrangements between a stockbroker and sub-contractors.

Between 1 July 1995 and 31 March 2000, Bridges was a stockbroker, agent for various life insurance companies and authorised to deal with securities under the *Corporations Law*. Bridges authorised 79 people based in New South Wales to act as its representative under section 94(2) of the *Corporations Law*, which facilitated the appointment by a securities licensee of securities representatives under a 'proper authority'. The representatives were also appointed by Bridges as agent under the relevant contract, particularly for the purpose of brokering in its life insurance business.

[28] *Optical Superstores Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2018] VCAT 169, [84]-[85].

Evidence was adduced to establish that the representatives operated under the banner of Bridges. For example, telephone listings identified offices as branches of Bridges and the use of Bridges letterheads and its name on business cards had the appearance to the representative's clients that the representative operated with the stamp of approval of Bridges and within its business.

Under the terms of the agreements between Bridges and the representatives, brokerage and commission in connection with transactions initiated by representatives were shared. All fees, brokerage and commission were to be paid direct to Bridges and received '*on account of and for the benefit of the representative or agent*'. The balance owing to the representative or agent was paid after deduction of fees and charges payable to Bridges. The agreement provided that the representative or agent may sell their 'Bridges business' or any part to any third party, provided that the third party was or became the holder of a proper authority issued by Bridges and entered into a representative and agent agreement. The relevant contracts expressly provided that brokers were acting as agents of Bridges, trading in Bridges' name and solely for the benefit of and as an incorporated representative of Bridges' business. The services the brokers delivered to their clients were delivered as agent of Bridges and wholly consistent with the services that Bridges itself independently provided to those clients.

### Contentions of the parties

The Chief Commissioner argued that the brokers were common law employees of Bridges and in the alternative that the arrangements between Bridges and the representatives under which they generated commission, brokerage and fees constituted a contract under which Bridges was supplied with the contractors' services in relation to its performance of work. Bridges resisted the submission that the brokers were common law employees. It also argued that the relevant contractor provisions were limited to arrangements under which the person in question only provided services to the designated person (rather than the person and third parties). Since the representatives conducted their own businesses in addition to providing services, it was argued that the provision had no application.

### Findings

Whilst Gzell J rejected the Commissioner's contention that the brokers were common law employees, he also rejected Bridges' submission that the relevant contractor provisions did not apply by observing that:[29]

> *[221] The structure of the [Act]…is to define, in broad terms, a relevant contract. If an arrangement answers that description, the second step is to determine whether any of the exceptions apply. It is because of the exceptions, that the legislation does not catch bona fide independent contractors. It is because of the non-application of an exception that the object of taxing the putative subcontractor who works exclusively, or primarily, for one person under a contract whose object it to obtain the labour of that person, is achieved. If [the relevant contractor provisions] were confined in the manner submitted on behalf of Bridges, there would be little scope for the operation of the exceptions.*

Bridges also submitted that the provision did not apply because the contract with the representatives did not oblige them to provide any financial advice on behalf of Bridges to any clients. They could do so if they chose. Gzell J rejected that submission on the basis that once a representative chose to

[29] *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [221].

supply Bridges with services, those services were provided under the contractual arrangements between the representatives and Bridges:

> *[226] When a representative chose to recommend a financial plan to a client and, upon the client's instructions, lodged documentation to buy or sell securities in the name of Bridges as the authorized dealer, the representative supplied Bridges with services and that was done in the terms of the representatives and agents agreements or in terms of the arrangements that the agreement recorded. And the services were work-related and Bridges was supplied with them in the course of carrying on its business.*

### 3.3.2 *D&D Tolhurst*

In *Re D&D Tolhurst Pty Ltd v Commissioner of State Revenue (Vic)* (1997) ATC 2179, the Victorian Civil and Administrative Tribunal constituted by Member Nettle (as he was then known) considered the application of the relevant contractor provisions (as they were then enacted in the *Pay-roll Tax Act 1971* (VIC)) to 13 investment advisers associated with the stockbroking operations of D&D Tolhurst Pty Ltd (**D&D**).

D&D was a stockbroker and licensed dealer that held a licence for those purposes during the relevant period, being November and December 1993. The investment advisors were representatives of D&D under the *Corporations Law* and appointed as agent under the relevant contract. Although the advisors were left to their own devices, given freedom to determine how their services would be delivered and cultivating their own client base, the advisers were for all practical purposes the conduit through which the investment advisory services of D&D were delivered to prospective buyers and sellers of securities. The advisors were D&D's factotum, supported by both the context of the licensing arrangements under the *Corporations Law* and the evidence of the parties conduct and obligations under the contract.

The Commissioner argued that the advisers were common law employees of D&D. The Tribunal accepted this submission, observing that:[30]

> *[21] Against that background I turn to the first question of whether the D&D investment advisers are employees of D&D as such. On balance, I think they are. Although the relationship between advisers and D&D is one whereby D&D engages the advisers as contractors, to write business in the name of and on behalf of D&D, and in consideration of the advisers' services agrees to share with the advisers the commission payable on each transaction, the degree of control exercised by D&D over the advisers, the fact that the advisers represent D&D exclusively and the fact that the advisers are held out and act in all things as representatives of D&D, lead me to the view that the advisers are employees.*
>
> *…*
>
> *[36] In the end it is a matter of perception. But my perception, based on all of the evidence and the authorities to which I have been referred, is the that the investment advisers are employees of D&D as such.*

Alternatively, the Tribunal considered whether the arrangements between D&D and the investment advisers were captured by the relevant contractor provisions. The Commissioner argued that each investment adviser supplied services to D&D under a contract between the adviser and D&D: the service being supplied being the totality of those things which the adviser does as the agent of D&D in transacting business with its clients; and the contract under which the services are provided being the contract whereby D&D and the adviser agreed that the adviser should be a dealer's representative of

[30] *Re D&D Tolhurst Pty Ltd v Commissioner of State Revenue (Vic)* (1997) ATC 2179, [21]-[22].

D&D. It was contended that D&D had supplied to it services of persons for or in relation to the performance of work. D&D submitted that the provisions did not apply either because the advisers did not supply services to D&D or because, if they did, they did not supply them for or in relation to the performance of work. Alternatively, if the investment adviser did supply services to D&D for or in relation to the performance of work, they did not do so under a contract.

In rejecting D&D's submissions, the Tribunal held:[31]

> *[39] In my view the investment advisers do provide services to Tolhurst, namely, the services of acting as the agent of Tolhurst in advising clients on the purchase and sale of securities and in selling and purchasing securities on behalf of clients as the agent of Tolhurst. I also think it to be clear that the services which the investment advisers supply to Tolhurst are properly to be described as services for or in relation to the performance of work. The provisions of s. 3C are very similar if not identical to s. 9 of the Accident Compensation Act (1985) which fell for consideration by the High Court in Accident Compensation Commission v Odco Pty Ltd (1990) 95 ALR 641…*
>
> *[40] There is then the question of whether the services supplied by the investment advisers to Tolhurst are supplied ``under a contract". In my view that question is also to be answered affirmatively. The same question arose in Accident Compensation Commission v Odco, supra. It was not doubted that the services supplied in that case by the tradesmen to the labour organisation were services provided under a contract within the meaning of s. 9 of the Accident Compensation Act…*
>
> *[41] I cannot see why the result here should be any different. ``Services" has the same meaning under this Act as it had under the Accident Compensation Act 1985: see s. 3C(6)(d) and, under this Act, ``contract" includes an agreement, arrangement or understanding, whether formal or informal and whether express or implied: ibid. There can be no doubt that there was an agreement or arrangement or understanding between Tolhurst and each of the advisers that the advisers would render services to clients as the agent of Tolhurst, at the client's request. In my view it follows, as a matter of plain language, that the advisers supplied services to Tolhurst by servicing the needs of the clients. By so doing they supplied services to Tolhurst for the purpose of its business, notwithstanding that they also at the same time supplied services to the clients.*

### 3.3.3 *Novus Capital*

In *Novus Capital Ltd v Chief Commissioner of State Revenue* (2018) NSWNCATAD 72, the New South Wales Civil and Administrative Tribunal (Appeal Division) constituted by Senior Member Isenberg considered the application of the relevant contractor provisions to the practices of authorised representatives and agents in supplying financial services to clients.

Novus entered into contractual relationships with authorised representatives that were engaged to provide financial services to the public as both authorised representatives of Novus under the *Corporations Law* and as sales agents under the contract. The authorised representatives would provide services to clients and be remunerated by Novus by receiving an entitlement to a portion of the commission attributable to the same. There was evidence accepted by the tribunal that 'as between the client and Novus, the contractual relationship is that the clients are clients of Novus', indicating a significant degree of integration between the services offered by Novus to the public and the corresponding service offered by its agents to the public. The congruence of services in this context, meant that Novus was receiving the benefit of work-related services from the representatives when they engaged with clients in the course of both Novus' and their own business in providing financial services as both representative and agent of Novus.

[31] Ibid, [39]-[41].

Relying on the holding in *Bridges*, the Tribunal concluded that the arrangements between Novus and its representatives were contracts under which Novus was provided, in the course of its business, services by the representatives for or in relation to the performance of work.

**Key takeaway from authorities on financial services providers**

Each of the authorities establish that where a principal engages a contractor to trade in its name as agent (in conjunction with formal appointment as representative under the *Corporations Law*) and the agent does so in the name of the principal and for the principal's benefit, the relevant contractor provisions apply. This is because the agents of the principal can be seen to be providing services to their own clients in the principal's name and that by providing services of that kind to clients, they also provide work related services to the principal as its representative, of which commission distributions is remuneration.

The above authorities have formed the basis of the Chief Commissioner of New South Wales practice note CPN 016 v2 (which is yet to be formally adopted in Victoria) entitled '*Payroll Tax Act – Relevant Contracts – Australian Financial Services Licenses and Australian Credit Licenses*'.

In CPN 016 v2, the Chief Commissioner sets out his view concerning the application of the relevant contractor provisions to businesses providing:

- Financial services under an Australian Financial Services License (**ASFL**) issued under the *Corporations Act 2001* (Cth); and
- Credit services under an Australian Credit License (**ACL**) issued under the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**).

The Chief Commissioner broadly contends that payments of commissions or other forms of remuneration by entities that hold an ASFL or ACL to their authorised representatives are liable to pay payroll tax.

It is noteworthy that the underlying assumption in CPN 016 is that representatives of either an ASFL or ACL are 'agents' at law. This is despite that fact that in each of the abovementioned authorities, the agency relationship was either expressly provided for under the contract or implied in the conduct of the parties with the relevant authorised representative status being largely non-determinative.

As will be seen in part 3.5 of this paper, the Chief Commissioner has relied on the reasoning in CPN 016 v2 to justify attempts to impose payroll tax on the relationships between mortgage aggregators and mortgage brokers, on the basis that mortgage brokers are appointed as authorised representatives of an aggregator's ACL when engaging in their own business of mortgage brokering.

## 3.4 Medical practices

One area of growing controversy are the efforts of revenue authorities to extend the application of the relevant contractor provisions to arrangements entered into between medical practitioners and medical practice facilities. Such efforts have resulted in a series of significant authorities that examine the breadth of the concept of 'service for or in relation to the performance of work' under the relevant contractor provisions and the extent to which obligations imposed on a party that receives services from another can themselves amount to a service flowing in the other direction. The recent case law

has resulted in various responses from revenue authorities across Australia, including the imposition of temporary amnesties in some jurisdictions and the rejection of amnesties in others.

### 3.4.1 *Homefront Nursing*

In *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145, the New South Wales Civil and Administrative Tribunal (Appeals Division) considered whether the relevant contractor provisions applied to arrangements between Homefront Nursing and general practitioners (**GPs**).

Homefront Nursing engaged GPs to provide general practice medical services on its behalf under a service agreement as independent contractors at medical centres operated by Homefront Nursing. The GPs were provided with administrative services, staff, facilities, and the plant and equipment necessary at a medical centre operated by Homefront Nursing. The agreements could be terminated on four weeks' notice. The GPs were entitled to four weeks leave of absence under the agreement and was directed to provide the services for a minimum of 10 four hour sessions per week. All patient documents were required to be provided to Homefront Nursing and the agreement provided that all of those documents, including patients, were Homefront Nursing's. The GPs were also required to promote the best interests of Homefront Nursing. The GPs were remunerated by way of Medicare and Department of Veteran Affairs (**DVA**) payments and direct payments from patients. The payments were required to be first made to Homefront Nursing who would then on disburse the payments to the GPs based on an agreed rate.

Homefront Nursing argued that the relevant contractor provisions did not apply to its arrangements because it acted on behalf of the GPs in relation to the collection of fee entitlements from Medicare and DVA. As such, it did not remunerate the GPs for medical services provided by them to the public. Rather, the GPs were remunerated by Medicare, DVA and cash payers and Homefront Nursing collected payments and deducted the service fee and paid the balance to the GPs. The Commissioner argued that Homefront Nursing provided services to patients and engaged GPs to perform this work on their behalf. Homefront Nursing argued that this was not a correct characterisation of its business nor the activities provided for under the contract. Rather, the GPs serviced patients as part of their own business and Homefront Nursing simply provided the facilities and services to the GPs at the medical centres, not services to patients themselves.

Senior Member Hamilton rejected Homefront Nursing's submissions as follows:[32]

> *[48] I reject the applicant's argument. It runs counter to the authorities mentioned. The applicant conducts a business of providing a medical centre at which general practitioner services are provided. It ordinarily requires the services of GPs in order for it to carry on business.*

However, the Tribunal ultimately did not apply payroll tax to the Medicare and DVA payments on the basis that it concluded that Homefront Nursing received these payments as a collecting mechanism and as a matter of convenience, as such the payments were not in relation to the relevant contract under section 35. The non-bulk billed payments however were said to be captured by the extended concept of wages in section 35 given their connection to the relevant contract. The author notes that this is a peculiar outcome given the conclusion of the Victorian Court of Appeal in *Optical Superstores* when it found that similar payments made to optometrist where wages under section 35 (although that case turned on the issue of whether distributions of amounts beneficially owned by the contractor could be said to be 'paid' or a payment of a wage).

[32] *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145, [48].

### 3.4.2 *Thomas and Naaz*

In *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259 the New South Wales Civil and Administrative Tribunal considered the application of the relevant contractor provisions to three medical centres operated by Thomas and Naaz Pty Ltd (**Thomas and Naaz**). Various GPs operated from the medical centres. Each GP, or a related entity, entered into a written agreement with Thomas and Naaz.

As part of the agreements, Thomas and Naaz provided rooms at its medical centres to the GPs, as well as shared administrative and medical support services (including nurses, reception, administrative staff and the charging and collection of Medicare fees on behalf of GPs). The patients did not pay the GPs directly for the medical services, instead:

- The GPs bulk billed each patient and the patients assigned their Medicare benefits to the GPs.
- The GPs had the option of dealing directly with Medicare to obtain the benefits that had been assigned to them by the patients or having Thomas and Naaz do so. All GPs, other than three, requested that Thomas and Naaz do so;
- Thomas and Naaz, on behalf of the GPs, made claims on Medicare and received payments from Medicare;
- Administrative staff employed by Thomas and Naaz recorded and reconciled those payments; and
- At the end of the first four weeks of the agreement, and every fortnight thereafter, amounts equal to 70% of the claims paid by Medicare for a particular doctor (without deductions for tax or superannuation or otherwise) were paid from the medical centre's bank account to that doctor. The remaining 30% was retained by Thomas and Naaz as a service fee.

There were a number of significant clauses within the agreement between Thomas and Naaz and the GPs, which included:

- clause 1 described the agreement as being 'in respect of the provision of The Services by the GP, at times agreed by the parties, in The Clinic operated by Thomas and Naaz';
- the services were described as 'medical services normally provided in most general practices and shall not include services of a special nature provided by some GPs, such as, acupuncture, cosmetic service, etc';
- the GPs appointed the medical centres as agent for the claiming and receiving of Medicare benefits;
- the GPs were required to promote the best interests of the medical centre;
- the medical centre had sole ownership over the business records of the GPs;
- the medical centre had control over the roster and work commitments of the GPs;
- the GPs could not divert customers away from the medical centre; and

- the GPs were required to comply with an onerous restrictive covenant that would prevent them from servicing clients within a 5-kilometre zone for two years after the ending of the agreement (indicating that the medical centre has ownership of the GP's clients).[33]

The New South Wales Civil and Administrative Tribunal found that the agreements were 'relevant contracts'. Senior Member Goodman observed that:[34]

> *[36] … services are most directly supplied to patients of the particular Doctor providing them, rather than to the applicant.*
>
> *[37] However, this does not prevent a conclusion that the Doctors provided services to the applicant, as is illustrated by Levitch Design Associates at [54] and the authorities there cited, namely Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue [2005] NSWSC 788; (2005) 222 ALR 599 at [223]-[226] and Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue [2013] NSWCA 470; (2013) 97 ATR 904 at [56].*
>
> *…*
>
> *[39] These clauses indicate that the Agreement secured the provision of the Services provided by the Doctors to the patients of the applicant's medical centres. In circumstances where such services were a necessary part of the applicant's medical centre business, the Doctors provided them not only to the patients but also to the applicant.*

Thomas and Naaz sought leave to appeal to the New South Wales Court of Appeal. The application was dismissed, however Leeming JA (with whom Meagher JA and Griffiths AJA agreed) addressed in his reasons the merit of the argument that services were not provided by the GPs to Thomas and Naaz, when he said:[35]

> *[42] The applicant was running a business. Central to its business was the notion that people would attend its centres in order to receive medical treatment. To that end the applicant provided the premises, and employed administrative and receptionist staff. It was also to that end that the applicant employed nurses who also provided services to patients.*
>
> *[43] To the extent that part of the applicant's business used the services of the nursing and reception and administrative staff employed by the applicant, the medical practitioner's attendance at the applicant's medical centre in order to provide medical services to patients was an important aspect of the business. Indeed, so far as the evidence disclosed, there was no source of income for the wages of nursing and reception and administrative staff other than the 30% of the receipts from Medicare (and other government agencies) generated by the medical practitioners.*
>
> *[44] The position may also be examined from the perspective of a prospective purchaser of the medical centre business operated by the applicant (or, more likely, of 100% of the applicant's shares). The purchaser would be acquiring the valuable contractual rights enjoyed by the applicant in respect of the contracts with medical practitioners. They included promises by the practitioners to attend at the premises in accordance with a roster (ordinarily, five days each week), to adhere to guidelines issued by the applicant, not to solicit patients away from the applicant's centres, and a non-compete covenant after the contract came to an end. All of those promises added to the value of the business.*
>
> *[45] Unquestionably the medical practitioners provided valuable contractual promises to the applicant, which were conducive to the conduct of the applicant's business. The performance of those promises required positive actions by the medical practitioners on a continual basis while the contract was in force. It is no strain of language to regard the totality of the performance by the medical practitioners (including the*

[33] *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, [21]; *see also Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2021] NSWCATAD 259, [36]-[41].

[34] *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2021] NSWCATAD 259, [36]-[39].

[35] *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, [42]-[45].

 

> *provision of medical services to patients, but extending to the other promises in the contract such as attending the medical centre, adhering to its protocols and taking leave as permitted) as amounting to the provision of services to the applicant. Indeed, it does not strain language to regard the provision of medical services to patients as amounting also to the provision of a service to the applicant, in order to permit it to operate its medical centre business (and without which services the applicant would be unable to operate its business).*

### Testing the limits of 'service for or in relation to work'

Again, relevant contractor cases in the medical centre context have tested the limits and proportions of the concept of 'service for or in relation to the performance of work'. The idea that the positive performance of 'valuable contractual promises' or obligations that are conducive to the principal conducting its business, amounts to a 'service', further extends the scope of the analysis needing to be conducted under section 32(1). Rather than focussing on the identification of contractual terms that specify services expressly or impliedly provided from one party to another, it now becomes necessary to consider the value of a contractor's performance of its obligations under a bargain, from the perspective of the principal in the conduct of its business and the associated increases to the value of its goodwill. The more integral the performance of the obligations are to the principal's business and the greater the degree of the principal's dependency on the performance by the contractor of its obligations, the more indicative that such obligations amount to the performance of a service under the relevant contractor provisions.

### Response by revenue authorities

The application of the relevant contractor provisions to relationships between medical centres and GPs has provoked a range of reactions from State revenue authorities around Australia. Revenue South Australia put into effect a payroll tax amnesty for medical practices which ended on 30 November 2023.[36] Medical practices that successfully applied for the amnesty will not be required to pay payroll tax on payments made to contracted general practitioners for the period of 1 July 2018 to 30 June 2024. However, operations that commenced on or after 22 June 2023 will be subject to payroll tax and compliance activity will be pursued to enforce the approach taken in *Thomas and Naaz*. Similarly, Revenue Queensland offered an amnesty to medical practitioners which closed on 10 November 2023.[37] Medical practices that successfully applied for the amnesty will not be required to pay payroll tax on payments made to contracted GPs up to 30 June 2025 for the period of 2018 to 2025. Revenue ACT announced on 26 August 2023 that it would waive any payroll tax liabilities up and until 30 June 2023 for medical practices that had not paid payroll tax on payments to medical practitioners.[38] A further temporary amnesty will also apply until 30 June 2025 for medical centres that bulk bill at least 65% of GP attendances, have registered for 'MyMedicare' and registered for the amnesty with the revenue by 29 February 2024. Tasmania and the Northern Territory have not made announcements regarding any amnesty from payroll tax for these purposes.

Unlike South Australia, Queensland and the ACT, Victoria and New South Wales have not implemented an amnesty for medical centres in response to the decision in *Thomas and Naaz*.

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[36] See https://www.revenuesa.sa.gov.au/payrolltax/contractors/amnesty-for-medical-practitioners-with-contracted-general-practitioners#:~:text=2.-,Comply%20with%20your%20ongoing%20payroll%20tax%20obligations,contract%20provisions%20does%20not%20apply) (Access 25 February 2024).

[37] See https://qro.qld.gov.au/payroll-tax/liability/contractor-payments/amnesty/ (Accessed 25 February 2024).

[38] See https://www.revenue.act.gov.au/payroll-tax?result_1060955_result_page=9#:~:text=Medical%20practices%20that%20register%20for,up%20until%2030%20June%202025. (Accessed 25 February 2024).

Rather, both Victoria and New South Wales released PTA-041 on 11 August 2023 confirming that the relevant contractor provisions apply to the relationships between medical centres and GPs.[39] Citing both *Thomas and Naaz* and *Optical Superstores*, both the Victorian and New South Wales revenue authorities indicated that reviews and investigations would continue and that taxpayers were expected to comply. Although, with the passage of amendments to the *Taxation Administration Act 1996* (NSW), a 12 month 'pause' commencing 4 September 2023 has been imposed on any new audit activity by Revenue NSW in connection with medical centre payroll tax issue. This pause does not prevent audits post-4 September 2024 from reviewing non-compliance of medical centres in prior years (unlike the administrative amnesty announced in other States and Territories).

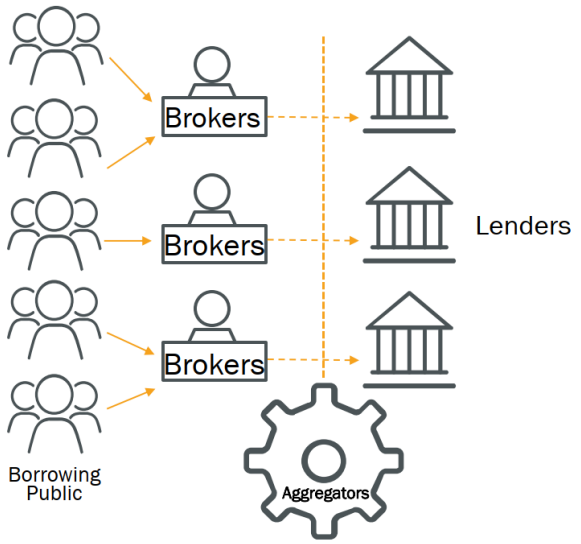
## 3.5 Mortgage aggregators

As flagged in part 3.3, an emerging area of novelty in respect to the application of the relevant contractor provisions is in respect to the relationships that exist between mortgage aggregators and mortgage brokers. Revenue NSW audits, investigations and now litigation (as seen in *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* (2020/0027826) and the recently announced dispute between *Finsure Finance and Insurance Pty Ltd v Chief Commissioner of State Revenue*[40]) has put the question of the scope, limits and proportions of the broad approach to determining 'services for or in relation to the performance of work' back in the spotlight, when these provisions have been applied in novel circumstances.

### 3.5.1 Overview of mortgage aggregation industry

In order to understand the direction that the revenue is pursuing in its relevant contractor arguments in this industry, it is necessary to set out the key players involved in the mortgage lending market and their respective roles and functions.

A brief overview of the role of mortgage aggregators is set out in **Diagram A** below:




- Aggregators play an important role in protecting consumers and undertaking quality control of credit activities under the NCCP.
- Aggregators provide important business building services to brokers to empower them to run and grow their independent businesses.
- Aggregators act as an important conduit between lenders and brokers to enable competition in the lending market and for brokers to independently secure the best loan arrangements for their borrower customers.
- Aggregators play a fundamentally important role in creating efficiency and commerciality in the lending market, particularly when facilitating the remittance of commissions from lenders to brokers.

[39] See https://www.sro.vic.gov.au/legislation/relevant-contracts-medical-centres

[40] See generally, https://www.brokernews.com.au/news/breaking-news/finsure-takes-revenue-nsw-to-supreme-court-over-payroll-tax-283933.aspx

Mortgage aggregators act as an intermediary between lenders and brokers.[41] An 'intermediary' refers to one who acts between others (i.e the brokers (including their clients) and the lenders), a go-between, mediator, a medium means.[42] Put another way, aggregators act as a conduit[43] between a broker and a credit provider (i.e lender).[44]

Put simply, the role of the aggregator is to provide a connective link between independent brokers and independent lenders (where the aggregator does not engage in or undertake the activities or businesses of either the brokers or the lender). In doing so, the aggregator provides value-add services to brokers to support and enable the growth of the broker's independent business. Lenders also benefit when aggregators provide access to brokers (and their clients) via the aggregator's lending panel.

Aggregators enter into contractual agreements to provide services to brokers, such as access to administrative support and information technology systems.[45] They also operate as a single point of contact between large numbers of brokers and particular lenders.[46] The typical range of services provided by aggregators to brokers under these agreements include:

a) use of the aggregator's customer relationship management software as an end to end system for brokers to (amongst other features):

   i) compare products available from panel lenders;

   ii) calculate their customer's borrowing capacity;

   iii) manage their compliance and reporting;

   iv) manage their marketing; and

   v) apply for loans on behalf of their clients;

b) professional development programs;

c) sublicensing the aggregator's ACL for authorised brokers (who do not have their own ACL) to use in the conduct their business; and

d) collecting and distributing upfront and trail commissions from lenders, on behalf of brokers.

For the purposes of the *National Consumer Credit Protection Act 2009* (Cth) (**NCCP**), an aggregator acts as an 'intermediary'[47] and therefore provides a 'credit service'[48] and must hold ACL.[49]

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41 MFAA | Aggregator members; see also ASIC Regulatory Guide 203 - RG203.75(c); Original credit provider or intermediary | ASIC - Australian Securities and Investments Commission.

42 *Oxford Shorter English Dictionary on Historical Principles*, page 1096; Macquarie Encyclopedic Dictionary, page 642.

43 That being semantically defined as 'a pipe, tube, or the like, for conveying water or other fluid', 'some similar natural passage' (and clearly metaphorically deployed in describing the role of aggregators) within *Macquarie Encyclopaedic Dictionary*, page 262.

44 ASIC Regulatory Guide 203 - RG203.75(c); Original credit provider or intermediary | ASIC - Australian Securities and Investments Commission.

45 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 83.

46 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 83.

47 NCCP, section 9.

48 NCCP, section 7.

49 NCCP, section 29.

One of the services that aggregators provide brokers is the ability to meet their legal requirements by becoming a credit representative of an aggregator. Accordingly, some brokers (who do not hold their own ACL) are 'credit representatives' of aggregators for the purposes of the NCCP.

As credit representatives, brokers are authorised by a credit licensee to engage in specified credit activities on behalf of the licensee. [50] A credit representative may provide a credit service without holding their own licence in relation to those services.

The NCCP expressly prohibits an agency relationship between aggregators and mortgage brokers. Brokers, as credit representatives have legal obligations to:

a) act in the best interests of the consumer; and[51]

b) give priority to the consumer's interests over an aggregator, themselves, or any associated entity.[52]

Typically, the agreements of aggregators with their brokers have three broad categories of obligations that operate as a term of service which include:

a) **Independence Obligations:** which are included to reflect an agreement by the parties for there to be a clear distinction of the businesses of the aggregator, lenders and brokers, including that the brokers are independent contractors.

b) **Regulatory Compliance Obligations:** which can broadly be described as obligations for brokers to comply with applicable statutory and regulatory obligations imposed on the brokers, aggregators and lenders by the NCCP.

c) **Payment for Service Obligations**: requirement that the brokers pay fees for the services they are acquiring from the aggregator.

Brokers assist borrowers to connect with lenders and seek out the financial product that best fits the borrower's financial situation and interest rate needs.[53] Brokers also gather paperwork from their borrower clients, assess the same and pass that paperwork along to a Lender for underwriting and approval purposes.[54]

Brokers facilitate the comparison and sale of loan products from a range of lenders.[55] They not only give advice about the best financial product for borrowers, they submit loan applications on the borrower's behalf, and to the extent the terms are negotiable, negotiate the terms of the loan for the borrower.[56] Brokers have a positive and specific statutory duty to act independently in the best interests of their borrower clients.[57] Brokers also have their own independent contractual relationship with their borrower clients. Put simply, brokers are the primary intermediary between borrowers (who could be any member of the public) and lenders.

Lenders are financial institutions that provide unsecured and secured credit facilities to consumers and also provide other deposit taking services to consumers and the public. Lenders have a commercial interest in providing credit facilities to consumers, as such, lending institutions are

50 NCCP Act, s64 and 65.
51 NCCP Act, s158LE(1).
52 NCCP Act, s158LF(1).
53 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 61-62.
54 Ibid.
55 Ibid.
56 Ibid.
57 NCCP, Part 3-5A, sections 158LA and 158LE; ASIC Regulatory Guide 273 'Mortgage brokers: Best interests duty' (June 2020).

typically in the business of deriving income from the interest and fees charged to the consuming public for borrowing a principal sum.

Aggregators do not consider themselves to be either a mortgage broker[58] or a lender.[59] Rather aggregators see themselves to be in the business of aggregation that requires service delivery to brokers. Typically:

a) Aggregators does not complete mortgage applications. They do not deal with the customers of brokers', originate loan applications, make recommendations regarding suitable financial products, and do not assist customers or brokers in the preparation and submission of applications to lenders.[60]

b) Aggregators does not develop or provide any credit products. They do not determine loan applications, or have a say in decision as to whether or not a loan will be granted to borrowers. Aggregators are typically not in the business of commercial or residential lending.[61]

Given that aggregators are an intermediary between lenders and brokers,[62] they necessarily provide a link between independent brokers and independent Lenders (without engaging in or undertaking the activities or businesses of either). Typically, aggregators enter into agreements with lenders to provide a framework between an aggregator and a lender, in effect, for the benefit of brokers. The lender agreements usually achieve this by creating a framework for a commercial accounting mechanism whereby an aggregator accounts, manages and disburses the commission that the lenders have agreed to pay the brokers.[63] The agreements also provide a framework through which the brokers and lenders may independently deal with one another and relies on the lenders independently accrediting and managing brokers as they engage with lenders on behalf of their borrower clients.

As a consequence, commissions payable by lenders for brokers are distributed to aggregators, who account, manage and on-disburse those commissions to brokers, usually on the brokers' behalf.

Aggregators offer various fee models that are made available to brokers for the payment of their services. Usually these take the form of a commission split model, where the aggregator will retain a percentage of the commission payable to the broker as payment for services or a flat fee upfront payment model where brokers pay a monthly subscription fee for the aggregator's services regardless of the volume of the loans they settle.

Broadly, there are two types of aggregation models in the industry, the wholesale model and the franchise model.

58 NCCP, section 15B as against section 15C and section 9; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 72.

59 Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 61-71.

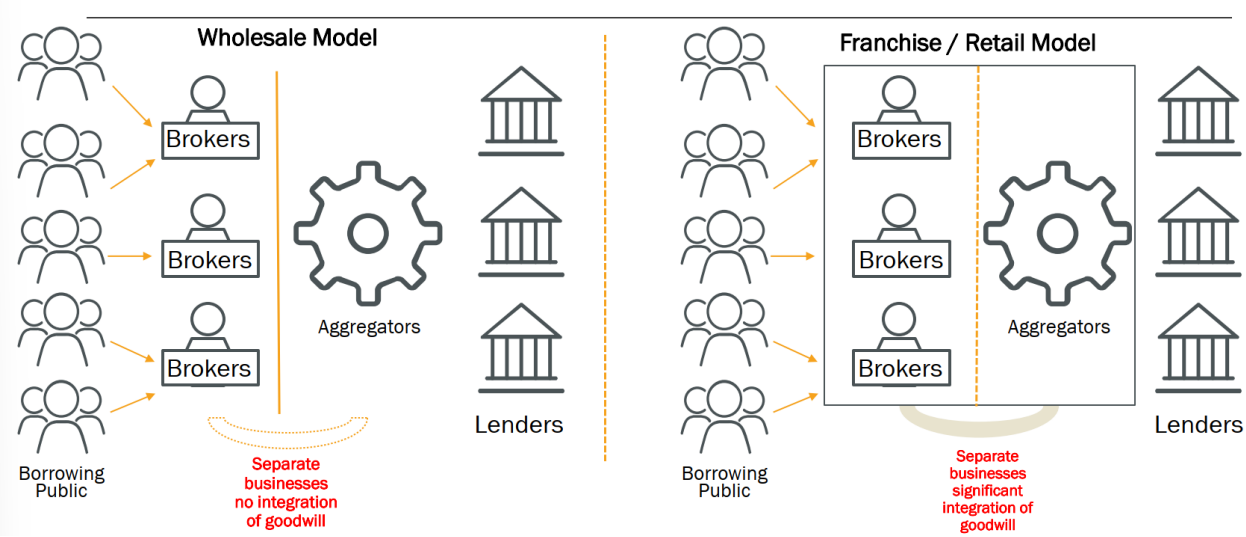
60 NCCP, section 15B as against section 15C and section 9; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 72.

61 NCCP, section 6(1) definition of 'Credit Activities', section 7(a)&(b), section 15B and section 15C.

62 NCCP, section 15C and section 9; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Final Report, Volume 1 (Commonwealth of Australia, 2019), page 83.

63 ASIC Report 516 – Review or Mortgage Broker Remuneration, page 51.

The wholesale and franchise models are represented in **Diagram B** below:




As can be seen, the biggest differentiation between the wholesale and franchise model is that under the franchise model brokers and the aggregator operate with there being significant integration of the goodwill of either business. This includes shared branding, referral services, marketing and policies. The wholesale model has no integration of goodwill between the aggregator and brokers.

Given that brokers are credit representatives of the aggregator's ACL, Revenue NSW has sought to apply the principles arising from cases concerning financial sector agents (discussed in part 3.3) to the relationships between aggregators and brokers. This reasoning relied in CPN 016 v2 justifies the imposition of payroll tax on the relationships between mortgage aggregators and mortgage brokers on the basis that mortgage brokers are appointed as authorised representatives of an aggregator's ACL when engaging in their own business of mortgage brokering.

This approach in effect treats the aggregator as a mortgage broker and the mortgage broker the contracted labour for the aggregator to pursue its business of mortgage brokering. The Revenue's basis for asserting that a relevant contractor relationship exists per CPN 016 is set out below:

a) NCCP ACL credit representative arrangements creates/makes brokers the agent of an aggregator when engaging with borrowers;

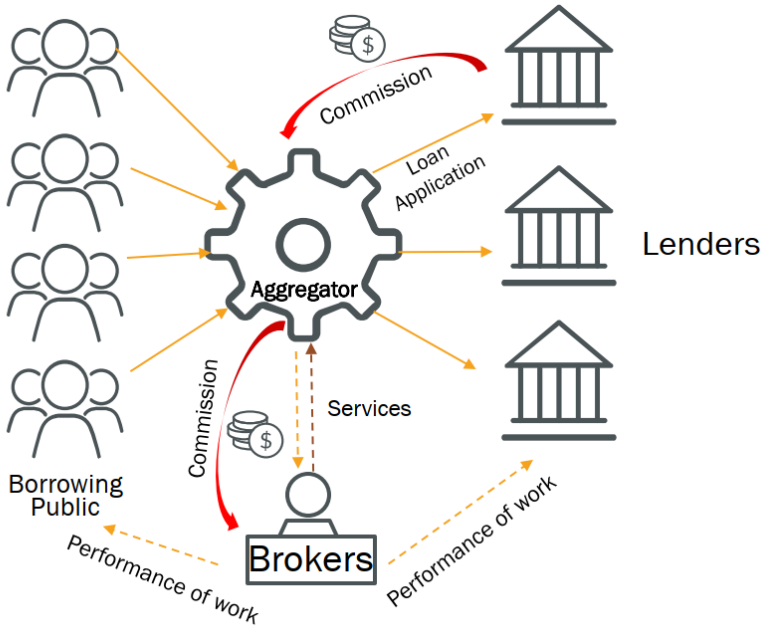
b) Broker contracts appoint or make brokers agents of the aggregator;

c) Decision in *Bridges* supports a conclusion that brokers are agents for aggregators;

d) As such, an indirect service is provided by brokers to aggregators for payment.

The brokers are said to provide services to aggregators for or in relation to the performance of work when engaging in their business of mortgage brokering with borrowers and when originating loan applications with lenders. The subsequent origination of commission from lenders and the payment of those commissions by aggregators as intermediary is said to constitute taxable wages.

The Revenue's understanding of aggregation businesses and arrangements in CPN 016 is set out in **Diagram C** below:




C

### 3.5.2 *Loan Market Group*

The matter of *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* (2020/0027826) represents the first case to be brought before a State Supreme Court dealing with the issue of the application or otherwise of the relevant contractor provisions to the relationships between mortgage aggregators and brokers.

Loan Market Group Pty Ltd (**LMG**) and Loan Market Pty Ltd (**LML**) (together the "**Plaintiff**") (a mortgage aggregator) are in dispute with the Chief Commissioner of State Revenue of New South Wales concerning the application of the relevant contractor provisions to commission payments made pursuant to arrangements with mortgage brokers. The Loan Market dispute also considered the role and function of an entity called 'EMOCA Pty Ltd', which although not a party to the dispute, was the entity within the Loan Market Group that entered into contracts with lenders for the payment of commission.

The matter was heard by the Supreme Court, first, from 10 May 2023 to 12 May 2023 and then on 15 June 2023. The hearings conducted on 10 May 2023 to 12 May 2023 were concerned with Loan Market's opening statement and the cross examination of its witnesses by the Commissioner. The hearing conducted on 15 June 2023 related to the parties' legal submissions, where both Loan Market and the Commissioner argued their respective legal cases under questioning by the Court. At the time of writing this paper, the judgment in the *Loan Market* decision is reserved. However, significant insight regarding the issues in dispute in the proceeding, including the various submissions of the parties can be gleaned from the public proceedings of the matter when heard in Court.

The relevant facts in the case were largely not in dispute between the parties. Rather, the matter in controversy before the Court related to the proper characterisation of those facts in determining a number of legal issues.

There was no dispute between the parties that the brokers were independent contractors and interestingly that the brokers were not agents (either at common law or statutorily under the NCCP) of either LML or LMG. The Chief Commissioner did not expressly rely on the fact that brokers were conducting their businesses as authorised representatives of LML's credit licence – describing this point as 'one small part of [the] overall submission, it doesn't depend upon it…'.

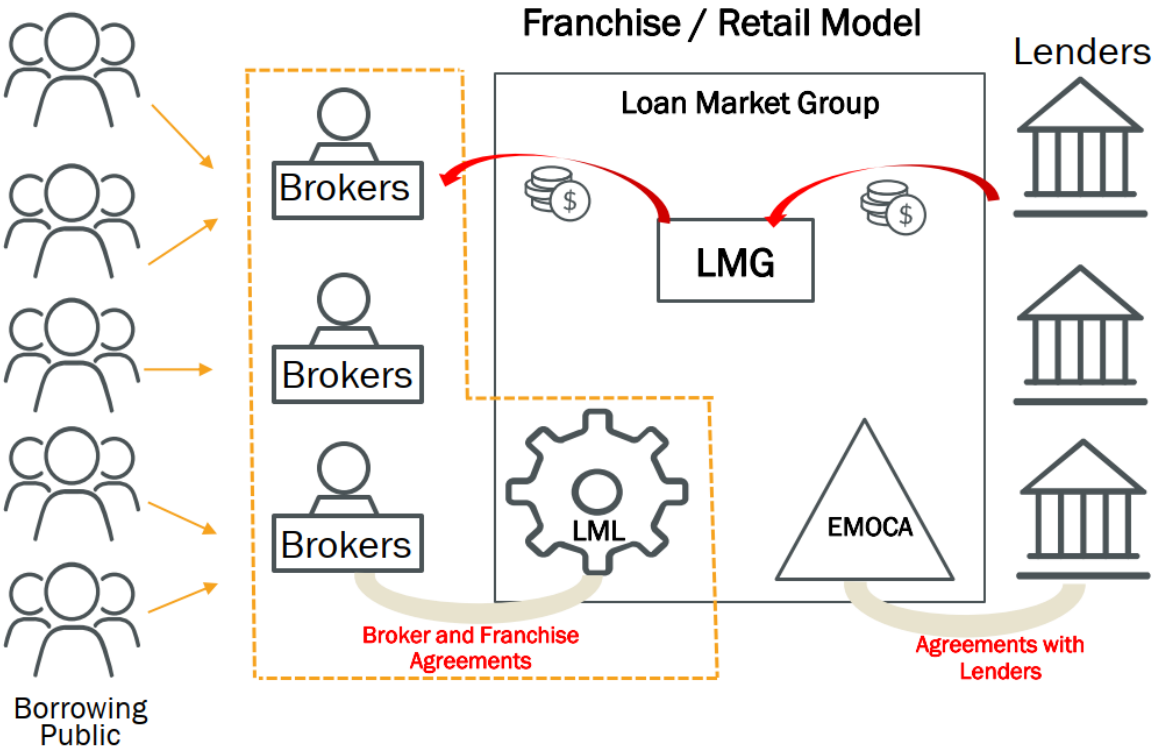
It is important to note the following features of the Loan Market Group structure that were relevant in the proceedings:

a) LMG is an employment entity that retained employees of the Loan Market Group. LMG did not enter into agreements with brokers or lenders. LMG did have control over the bank account into which lender commissioners were paid and from which broker commissions were disbursed.

b) LML is the entity that entered into agreements with brokers.

c) EMOCA is the entity that entered into agreements with lenders.

**Diagram D** below sets out the structure of the Plaintiff's aggregation structure, which is a franchise aggregation model:




There were a number of broad and subsidiary legal issues that were litigated before the Court. The legal questions in dispute can broadly be described as:

- **Issue 1:** Whether the contracts and arrangements entered into between LML and brokers are relevant contracts for the purpose of section 32(1)(b)?

  Subsidiary issues:

  i) The proper legal characterisation of the broker agreements by reference to evidence adduced of what the brokers actually do.

  ii) The proper legal characterisation of LMLs business.

- **Issue 2:** Whether brokers who are credit representatives of LML for 90 days or less (according to ASIC records) and who received only trail commissions and no upfront commissions, fall within the 90 day or less exception in section 32(2)(b)(iii)?

- **Issue 3:** Whether the purported services provided by the broker to LML where of the same kind as those services provided by the broker to the public at large to engage the exception in section 32(2)(b)(iv)?

- **Issues 4 to 8:** whether one or more of the generic services used by an authorised broker engage the two or more exception in section 32(2)(c)?

Given the complexity of the Loan Market dispute, brief focus will be had on issues 1 and 3.

**Issue 1: Whether the contracts and arrangements entered into between LML and brokers are relevant contracts for the purpose of section 32(1)(b)?**

The first issue related to the application of the relevant contractor provisions in section 32(1) to LML's contracts and arrangements with mortgage brokers. LML advanced this threshold submissions as its primary contention, arguing the exemptions contained in section 32(2) as alternatives.

The Plaintiff argued that the 'designated person' for the purposes of the matter was LML, because it was the only entity that had entered into contracts and arrangements with brokers during the relevant years.

There was agreement between the parties that the 'relevant contract' for the purposes of section 32(1) was the introducer and broker agreements and did not include any other arrangement or understanding outside the terms of those written contracts. There was some significant degree of conflation between different agreements entered into between brokers over time, with it being accepted that brokers moved away from introducer agreements to 'broker agreements' in a franchise model from 2014.

Given this, both in opening statements and closing submissions of the Plaintiff and the Commissioner took the Court through the key terms and features of the introducer and broker agreements

The central question in dispute concerned whether the terms of the broker agreements supported a conclusion that brokers were providing services for or in relation to the performance of work to LML.

In dealing with the threshold issue, LML put the following propositions to the Court:

a) What is the proper legal characterisation of the broker agreements when regard is had to evidence of what the brokers actually do?

b) What is the proper legal characterisation of LMLs business?

***LML's submissions***

The submissions concerning the proper legal characterisation of the broker agreements and LML's business largely turned on each party's approach to characterising the rights and obligations of both LML and the brokers under those agreements.

LML submitted, that in order for the Court to be satisfied that section 32(1) applied to LML's relationships with brokers, it need be satisfied of the following five propositions:

i) That the broker agreement is the relevant contract.

ii) That the broker agreement provides for the source of relevant rights or obligations placed on the broker to provide services to LML.

iii) That the business carried on by LML was a mortgage brokering business.

iv) The services provided by the brokers to their borrower clients constituted services provided to LML in the course of its brokering business.

v) That the services provided by brokers to LML were for the performance of work to LML and not somebody else.

LML advanced the following submissions that the introducer and broker agreements are not 'relevant contracts' under section 32(1):

i) That the broker agreement is the only agreement relevant for the purposes of considering the application or otherwise of section 32(1), that is, the broker agreement is the 'relevant contract'.

ii) That the broker agreement, properly characterised, is not the source of any right or obligation placed on the broker to provide services to LML.

iii) That the business carried on by LML, as the designated person during the financial year, was not one of mortgage brokering, and instead, LML was in the business of providing services to the broker.

iv) That the services provided by brokers to their borrower clients did not constitute services provided to LML in the course of a brokering business. The services of the broker were not supplied to LML as required under section 32(1).

v) The work undertaken by the broker in respect of its borrower clients does not permit a conclusion that services were provided to LML.

LML generally contended that in order for a service to exist under the broker agreements it must be shown that:

i) That there are terms requiring a broker to be obliged to provide a service; and

ii) There is evidence that demonstrates that the broker did, in fact, provide that service.

LML submitted that entering into a contract does not amount to the rendering of a service.

Further, LML suggested that the Commissioner was unable to demonstrate that by assisting their borrower clients to submit loans to lenders, brokers were providing a service to LML.

In respect to the lender agreements, LML acknowledged that those documents demonstrated that throughout the relevant period there was not only inconsistency of labels applied, there was great variation as between lenders.

LML submitted that the inconsistencies, which it acknowledged, were not fatal to its core submission that the focus in applying the relevant contractor provisions must remain on what is actually done by the brokers – relevantly, that there is no referring by the mortgage broker to Loan Market of applicants to Loan Market, rather they use software and upload them straight to the lender. It was further submitted that the Commissioner's focus on inconsistencies and the 'various parts of the agreement' are not conclusive of the threshold issue.

LML argued that it did not refer applicants but instead this was done by brokers and that:

a) in effect, the lender agreements are a contract for the benefit of the Broker who gets the benefit; and

b) the introducer agreements *"confer a right*" on the applicants to avail themselves of LML's services as opposed to an obligation to do any act.

***Commissioner's submissions***

The Commissioner contended that by reason of the broker agreements entered into between LML and each broker, there was a relevant contract by which LML is the designated person, and the brokers were the relevant persons supplying services to LML. The brokers were said to supply services to LML in the form of assistance in referring new customers to lenders, thereby earning income for the Loan Market Group. LML was in the business of earning commissions from lenders – in other words, broking, and LML's business was to assist in that aim by engaging brokers to refer customers to lenders – a conclusion said to be clearly supported by the broker agreements.

The Commissioner first contended that the business model LML adopted when it was a bona fide brokerage carried over and was reflected in the subsequent introducer and broker agreements considered in the Loan Market Dispute. It was suggested that the business model of LML as a brokerage is reflected equally in the broker agreements where it describes itself as aggregator or an intermediary.

The Commissioner relied on a number of contractual terms in the broker agreement in support of this contention.

When queried more generally about what exactly was the services provided by the broker to LML, the Commissioner contended that the service was introducing the borrower to the lender and thereby procuring the commission which is paid by the lender to the aggregator.

The Commissioner argued that there does not need to be an express contractual provision in the relevant contract for the supply of service, rather it is sufficient that the services are done in order to perform the obligations contained in the contracts or if there's a connection between them.

The Commissioner's overall submission is that the broker agreement provides for a comprehensive framework governing how the brokers are to deliver their services to LML and requires them to deliver those services. Those services being that brokers must:

i) Use LML's branding;

ii) Comply with its manuals;

iii) Participate in its marketing;

iv) Only work for LML;

v) Offer LML's products;

vi) Comply with any direction that LML specifies.

More broadly, the Commissioner sought to characterise LML's business as being a mortgage broker or, put another way, the business of assisting the bank to find customers. The Commissioner pointed to:

- Imprecise language and terms within the lender agreements entered into between EMOCA and banks that refer to the Loan Market Group as an originator of mortgage applications.

- The financial reports of the Loan Market Group that account for commissions paid by lenders as revenue and commissions paid to brokers as expenses. The notes to the accounts specifically provided that 'the group's principle continuing activities during the year consist of mortgage and insurance brokering services'.

- The issuing of RCTIs from the lenders to EMOCA and the issuing of RCTIs by LML in respect of payments of broker commission that are said to evidence supplies of services from the aggregator to the lender and corresponding supplies to the aggregator by the broker. The

Commissioner submitted that the RCTIs cannot be explained by reference to the GST agency provisions in section 153-50 of the *A New Tax System (Goods and Services Tax) Act 1999* because the broker agreements do not satisfy the requirement that those provisions apply in writing.

**Issue 3: Whether the purported services provided by the broker to LML where of the same kind as those services provided by the broker to the public at large to engage the exception in section 32(2)(b)(iv)?**

LML raised the public at large exemption in section 32(2)(b)(iv) as an alternative that would apply in the event that the Court found the broker agreements to be relevant contracts. The core contention was that the services provided by brokers to LML (if any) were of the same kind provided to the public generally.

There was discussion about whether a 'complete congruence' between the service supplied to the public and LML was required, or a sufficient level of overlap was sufficient. LML submitted that there is no requirement for the services to be the 'same.'

**Observations arising from the *Loan Market* dispute**

Given that the judgment in *Loan Market* is still reserved it is difficult to predict the outcome that the Court will ultimately reach, especially given the broad approach taken to determining the existence of a relevant contract in the more contemporary authorities.

One of the more interesting observations arising from the public proceedings of the case is the fact that at trial the Chief Commissioner appeared to place very little emphasis on the characterisation of brokers as agents of LML as he does in CPN 016. The fact that the Commissioner's counsel expressly stated that they did not 'depend upon' a submission that the relevant contractor provisions applied because of a purported agency relationship existing between the aggregator and broker arising from the credit representative regime the NCCP sheds light on perhaps the weaknesses of the argument that aggregators should be treated in the same way as those cases dealing with financial services agents (see part 4.3 of this paper). This also raises questions about the correctness of CPN 016 when applied to mortgage aggregators more generally.

In any event, both the Loan Market dispute and the Revenue's increasing activity to apply the relevant contractor provisions to the mortgage aggregation sector represents a further development in attempts to broadly assert that such contractual arrangements give rise to services for or in relation to the performance of work. At the very least, it appears that even in the absence of strict obligations requiring a contractor to positively perform activities for the benefit of a principal (as was seen in *Thomas and Naaz*) the Commissioner will seek to assert that services nonetheless exist where the activities of the contractor enable the principal to derive income, that is and of itself evidences an implied work-related service under a contract.

Should the Commissioner be successful in the *Loan Market* (dealing with a franchise aggregation model) and/or the *Finsure* (dealing with a wholesale aggregation model) disputes, it is likely to result in a further expanded approach to the relevant contractor provisions and them being applied to an even broader set of contractual intermediary arrangements, particularly where there are flows of payments through third parties.

# 4. An uncertain future for contractor arrangements

It seems uncontroversial to note that the development in the authorities and approach to administering the relevant contractor provisions has resulted in a complicated and uncertainly broad application of the provisions to a substantially large class of arrangements.

Far from capturing only those independent arrangements that bear near identical resemblance to an employment relationship, the relevant contractor provisions have captured what have traditionally be seen to be *bona fide* independent contractor arrangements, potentially even capturing arrangements where the relevant agreements only specify a unidirectional flow of services from the principal to the contractor and not the other way around.

Given the complexity and continually evolving authorities, it is fair to observe that both business and the legal profession are grappling with significant uncertainty regarding the scope and coverage of the relevant contractor provisions to everyday life. Given the persistence of a globalised, digitalised and information economy, the ongoing importance of contracting arrangements between independent businesses is likely to become more rather than less entrenched. This is particularly the case where new innovative and technology-based businesses become more prevalent in the economy and as part of their market offering are commercially required to partner and contract with third parties to deliver their services.

The real risk under present authority is that where those *bona fide* independent contracts are entered into between businesses that operate within the same market segment or sector, that ordinary commercial obligations imposed in contract will be construed as a form of service delivery when ultimately the parties only ever intended for a unilateral flow of services.

Should intermediary arrangements such as those in the mortgage aggregation context fall within the relevant contractor provisions, there is a further risk that *bona fide* independent businesses that contract in circumstances where there is even a co-dependency or reliance on their respective operational roles in a particular market segment will be subject to payroll tax.

Given the trend in the revenue authorities' approach to broadly applying the relevant contractor provisions to new market segments and industry relationships, it is the author's view that introducer and facilitation arrangements whereby one set of service provider are introduced to consumers or other service providers and adopt a flow through mechanism for fees, will be at significant risk of payroll tax being applied. This places intermediary technology platforms and solutions at particular risk, for example technology based telehealth solutions that connect patients with GPs and other introducer platforms that introduce consumers to other business providers.

Both the approach being taken by revenue authorities and the uncertainty creates a very difficult environment for businesses of all sizes to operate in. It builds into what are usually low margin businesses models further imbedded cost and risk and, in the author's respectful opinion, extends the role of payroll tax far beyond its stated and legitimate function within the State taxation scheme. Either the line will be drawn by the Courts in interpreting and applying the law as currently drafted or Governments across Australia will need to work together to enact sensible reform.

Until certainty is obtained, practitioners and businesses people need to take stock of their current and proposed arrangements and take seriously the assessment of payroll tax risk. This will mean paying close attention to the structure and flows of monies between parties, the types of obligations

embedded in their contracts and the relative dependency of their business on the functional role of the other contracting party in that context.

As is always the case, it is better to prepare early to properly structure or prepare defences of your arrangements than to attempt to defend your position down the line when an audit or dispute arises. This will mean engaging early with specialist advisers in the payroll tax context and investing upfront to mitigate your tax risk. Given that revenue authorities have an effective power of review that can be extended beyond five years, where it is determined that the Commissioner did not have sufficient information to make an appropriate assessment in a given year,[64] it is fundamentally important that proactive steps are taken now.

[64] See for example *Taxation Administration Act 1997* (Vic), subsection 9(3)(b).