

# Local Tax Club - Geelong

## Session 6: Employment law and tax update

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# 1. Overview

Getting the distinction between employee and contractor wrong has far-reaching consequences across the tax and employment law landscape. It is also very expensive.

Yet, between the common law test and the numerous statutory adaptations that have the effect of imposing “employer-like” obligations on principals engaging common law contractors, there is considerable complexity around getting it right.

It is also an area that has been the subject of significant recent change, in both the employment law and tax law spheres.

In this paper we aim to break down the complexity by outlining why the difference matters and the impact it has for application of tax laws and some workplace laws as well as profiling current issues and recent changes.

With the modes of working continuing to change and adapt, we expect this to be an area of ongoing focus for regulatory change and disputation. With that in mind, if you take one point from this paper, we hope that it is the need to consider the nature of the relationship that is desired upfront.

## 2. The distinction matters

### 2.1 Tax

Tax reporting obligations and tax liabilities that arise differ between contractors and employees. The main differences are:

Tax	Employee		Contractor	
	Engaging entity	Worker	Engaging Entity	Worker
Reporting	Report via single touch payroll	Not entitled to an ABN	Taxable payments annual reporting may apply	Entitled to an ABN
PAYG/income tax	PAYG withholding required		Withhold only if no ABN provided or there is a voluntary agreement	PAYG instalments, personal services income to be considered
Superannuation	Superannuation contributions required		No superannuation contributions (unless extended definitions apply)	
FBT	Fringe benefits tax obligations		No fringe benefits tax obligations	
GST	No input tax credits for wages paid	Not entitled to register for GST	Can claim input tax credits for payments	Can (may have to) register for and pay GST
Payroll tax	Payroll tax required if thresholds exceeded		No payroll tax (unless extended definitions apply)	

### 2.2 Workplace rights

Employees and contractors have different rights and protections in the workplace.

There has been significant change of recent times to both the substance of those rights and protections and the procedures to be followed around confirming status. With the passage of two key

pieces of legislation toward the end of 2023 and beginning of 2024<sup>1</sup> changes that have been recently made or will soon come into play include:

- From 15 December 2023:
  - New rules for engaging labour hire workers.
  - Criminalisation of wage underpayments.
  - Small business redundancy exceptions for businesses downsizing.
  - New workplace delegate rights.
  - New discrimination protections for employees experiencing family and domestic violence.
  - Right of entry changes.
  - Workplace health and safety and workers compensation changes.
- From 27 February 2024:
  - Changes to penalty amounts.
  - Changes to thresholds for serious contraventions.
  - Changes to enterprise bargaining.
  - Changes to sham contracting rules.
  - New compliance notice measures.
- From 1 July 2024:
  - Changes to notice requirements for investigating underpayments.
  - Increases to work health and safety penalties and introduction of industrial manslaughter criminal offence.
- From 26 August 2024
  - New *Fair Work Act 2009* definitions of employer and employee.
  - Changes to casual employment.
  - New minimum standard protections for gig economy and road transport workers.
  - Additional rights for workplace delegates who are regulated workers.
  - Right to disconnect outside hours for some workers.
- From 1 January 2025 new rules criminalising wage underpayments start.
- From 26 February 2025 changes to how enterprise agreement model terms are set.
- From 26 August 2025 new right to disconnect rules start for small business employees.

We focus in more closely on the changes to casual employment, definition of employment and the right to disconnect below.

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<sup>1</sup> *Fair Work Legislation Amendment (Closing Loopholes) Act 2023; Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024.*

## 3. Common law definition of employment

### 3.1 History

The Australian common law test for whether an individual is an employee or contractor has always centred around whether the relationship between engaging entity and engaged party is:

- “of service” being an employment relationship; or
- “for services” being a contracting relationship.

That remains the case today. However, the criteria against which the existence of such relationship is to be assessed has changed with time.

Traditionally, the predominant test in Australia for whether an individual was an employee or contractor was the control test. The control test focused not so much on the actual exercise of control but on the right to exercise it. As stated, in *Humberstone*:<sup>2</sup>

*The question is not whether in practice the work was in fact done subject to a direction and control exercised by an actual supervision or whether an actual supervision was possible, but whether ultimate authority over the man in the performance of his work resided in the employer so that he was subject to the latter's order and directions.*

Progressively from the 1940s through to 1980's limitations of that test were observed, particularly where individuals were required to exercise particular skill that the engaging entity itself may not have.

Consistent with those criticisms in *Stevens* (a case decided in 1986) the High Court observed that the control test had not kept up with modern ways of contracting; that it was a test “more suited to social conditions of earlier times in which a person engaging another to perform work could and did exercise closer control and more direct supervision than is possible today”.

The control test was therefore replaced by a multi-factorial test endorsed by the High Court in *Stevens*.<sup>3</sup> Multi-factorial tests had to an extent been applied by lower courts prior to that time where the control test alone had been considered insufficient.

Under the multi-factorial test control remained significant, but not the sole criterion to gauge whether a relationship was one of employment. The multi-factorial test looked to the totality of the relationship, which included consideration of other criteria that included (but were not limited to):<sup>4</sup>

- mode of remuneration;
- provision and maintenance of equipment;
- obligation to work;
- hours of work and provision for holidays; and
- delegation of work.

Applying that test, the appellants in *Stevens*—a truck drivers and a snigger – were held to be contractors and not employees. Factors weighed in that case included:

<sup>2</sup> *Humberstone v Northern Timber Mills* (1949) 79 CLR 389, 404.

<sup>3</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

<sup>4</sup> *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16, 20.

Pointing toward employment	Pointing toward contractor
Brodribb was able to exercise a degree of control. That control included that when working Gray and Stevens were expected to cart at least two loads of logs per day. Brodribb also employed a bush boss who was responsible for the overall co-ordination of activities within the logging areas and the task of ensuring a steady flow of timber to the saw mill. Gray and Stevens were subject to the bush bosses direction which included allocation of particular areas to undertake logging operations in, decisions about whether to operate given weather conditions, oversight of ramp construction locations, giving directions as to the type of logs to be snigged and monitoring of volume and quality of production.	Stevens and Gray had extensive experience in their fields.
	Stevens and Gray provided their own equipment, including their trucks.
	Stevens and Gray were able to delegate – and Gray did employ his son to drive his truck on occasion.
	Stevens and Gray were engaged as individuals but some truck drivers were engaged by Brodribb to carry out like activities through partnerships.
	Stevens and Gray set own hours of work.
	Received fortnightly payment determined by the volume of timber delivered to the saw mill.
	Not guaranteed work and free to seek other employment.

Ultimately, the High Court concluded that whilst Brodribb was able to exercise a degree of control the level of control was not sufficient to render the relationship one of employment or of service – critical to that conclusion was that Stevens and Gray each retained flexibility as to how they operated and maintained their equipment and had a degree of freedom and control within the parameters set by Brodribb and the bush boss.

In applying the multi-factorial test Courts frequently had regard to both pre-contractual and post-contractual conduct to assess how the factors applied. For example, in *Stevens* it was considered relevant that Steven’s financial accounts showed his expenditure to earnings ratio to be 71%. Similarly, in *Hollis*, the bicycle courier case decided in 2001, the work practices that were imposed on bicycle couriers and how those practices were complied with in practice were considered relevant.<sup>5</sup>

At the same time, alongside these cases there existed others that treated the contract as paramount. Those cases included the Privy Council case of *Narich Pty Ltd v Commissioner of Payroll Tax*<sup>6</sup> which held that:

*where there is a written contract between the parties whose relationship is in issue, a court is confined, in determining the nature of that relationship, to a consideration of the terms, express or implied, of that contract in the light of the circumstances surrounding the making of it; and it is not entitled to consider also the manner in which the parties subsequently acted in pursuance of such contract.*

<sup>5</sup> *Hollis v Vabu Pty Ltd* [2001] HCA 44.

<sup>6</sup> [1983] 2 NSWLR 597.

## 3.2 Current position

In February 2022 the High Court published two decisions – *CFMMEU* and *Jamsek*<sup>7</sup> - that clarified/changed the criteria against which whether a relationship is “of service” and therefore of employment or “for services” and therefore a contracting relationship is to be assessed for common law purposes.

In those cases the High Court maintained that in deciding whether a relationship is one of employment it is the totality of the relationship that must be considered. However, there was an important clarification from the majority as to how the totality of the relationship is to be assessed. The clarification addressed the apparent inconsistency that existed between cases such as *Stevens* and *Narich*.

The clarification was that the contract is paramount. Or as expressed by Gordon J:<sup>8</sup>

*in the case of a wholly written employment contract, the “totality of the relationship” which must be considered is the totality of the legal rights and obligations provided for in the contract. To ascertain those legal rights and obligations the contract in issue must be construed according to the established principles of contractual interpretation. The statutory command to give “employee” and “employer” their ordinary meanings requires no less and permits no more.*

Key contractual terms to be considered in characterising the relationship remain similar to the criteria set out in *Stevens* – but with the revised focus being the contractual provision and not post-contractual conduct. Those contractual terms include those that go to:

- mode of remuneration;
- provision and maintenance of equipment;
- obligation to work;
- hours of work and provision for holidays;
- delegation of work;
- control; and
- the nature of contracting parties – that is whether they engaged as individuals, or through partnership, trusts, companies or some other vehicle – was also considered of relevance.

In *CFMMEU* the judges expressly addressed the apparent conflict between *Stevens* and *Narich*.

The majority stated that there was no conflict – an interpretation that is consistent is possible. The majority judges were of the view that the High Court did not suggest in either *Stevens* or *Hollis* that where “one person has done work for another pursuant to a comprehensive written contract, the court must perform a multifactorial balancing exercise whereby the history of all the dealings between the parties is to be exhaustively reviewed even though no party disputes the validity of the contract.”<sup>9</sup> The points of distinction that the majority judges observed were that *Stevens* and *Hollis* concerned contracts that were not committed completely to writing and issues of negligence and duty of care that have common law meaning that is not based solely in principles of contract but which also require consideration of what conduct actually occurred at the time of the alleged contravention. As such, the majority observed that post contractual conduct appropriately became relevant to the determination of the issues in questions.

<sup>7</sup> *CFMMEU v Personal Contracting Pty Ltd* [2002] HCA 1; *ZG Operations Australia Pty Ltd & Anor v Jamsek* [2022] HCA 2.

<sup>8</sup> *CFMMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [173], see also [43].

<sup>9</sup> *CFMMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [55].

The minority did not agree – in their dissenting judgment Gageler and Gleeson JJ maintained that *Stevens* should remain good law in Australia and that *Stevens* did hold that conduct as well as contractual terms were relevant for all employment/contracting relationships including those wholly in writing. They relevantly stated:<sup>10</sup>

*Faced with contracts wholly in writing, some trial and intermediate appellate courts in Australia have done their best to limit their analysis to the identification and interpretation of contractual terms in conformity with the approach indicated in Narich. In so doing, they have sometimes been driven to engage in the rather artificial exercise of treating conduct engaged in by the parties in the performance of the contract as a “course of dealing” from which then to infer a mutual intention to supplement the written contract with further contractual terms making more specific provision for the conduct found in fact to have occurred.*

*Mostly, however, trial and intermediate appellate courts have taken their cue from Stevens and Hollis in assuming that, despite what was said in Narich, “the nature of the relationship may be legitimately examined by reference to the actual way in which work was carried out....*

*The assumption on which lower courts have mostly proceeded is, in our opinion, correct.*

*The true principle, in accordance with what we understand to have been the consistent doctrine of this Court until now, is that a court is not limited to considering the terms of a contract and any subsequent variation in determining whether a relationship established and maintained under that contract is a relationship of employment. The court can also consider the manner of performance of the contract. That has been and should remain true for a relationship established and maintained under a contract that is wholly in writing*

Obviously, from the above Gageler and Gleeson considered all conduct outside of the terms of a contract to be relevant.

For the majority, there were differences in reasoning but collectively the view was reached that factors outside of the contract and post contractual conduct were relevant only where:<sup>11</sup>

- a contract of employment was partly oral and partly in writing, or oral only – the relevance then being to establishing whether a contract is formed and to give context to its terms;
- sham was alleged;
- subsequent agreement or conduct was argued to effect a variation to the terms of the original contract or give rise to estoppel or waiver; or
- to determine common law questions relating to the rights and duties of the parties.

As to the extent to which extraneous factors could be considered Gordon and Steward J noted some limitations. Those included that for establishing whether a contract was formed it is permissible to have regard to events, circumstances and things external to the contract which are objective, which are known to the parties at the time of contracting and which assist in identifying the purpose or object of the contract.<sup>12</sup> It is also permissible to have regard to conduct as evidence of a contract having been formed or as to the terms of an oral or partly written and partly oral contract.<sup>13</sup> However, once the contract is formed it is not “legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made” other than in the circumstances noted above.<sup>14</sup>

<sup>10</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [138] – [143].

<sup>11</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [42], [48], [173], [203].

<sup>12</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [175].

<sup>13</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [177].

<sup>14</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [176].

All judges agreed that giving primacy to the contractual characterisation does not extend to attaching a label inconsistent with underlying rights and duties or to being bound by a label attached where the arrangements are in effect a sham.<sup>15</sup>

Amongst those who supported it, the justification for the contract centric approach were framed around the relationship being one that is based on contract and established principle that in determining the character of a legal relationship a Court can consider only the legal rights and obligations which constitute that relationship.<sup>16</sup> In addition Kiefel, Keane and Edelman JJ focused on the promotion of certainty in a relationship of such fundamental importance as the employment relationship<sup>17</sup> - and that a contract centric approach achieved that certainty to a greater extent than an approach that required consideration of all aspects of the parties interactions.

In *Jamsek* Gleeson and Gageler observed that “the distinction between an employee and an independent contractor is and has always been a true dichotomy.”<sup>18</sup> As such persons who have contracted with each other cannot simultaneously, through a single relationship, be an employer and an employee and a hirer and an independent contractor.

### 3.3 Statutory adaptations

It is important to bear in mind that whilst employment relationship are principally based in contract at common law, they may be affected by statutory provisions and awards made under statutes.

Where the relationship is affected by statutory provisions and awards made under statutes, aspects of the way the relationship plays out “on the ground” can become relevant for specific statutory purposes<sup>19</sup> or indeed for determining legal questions other than whether the relationship is of employment or for contracting. In other statutory contexts there are adaptations that have the effect of imposing “employer-like” obligations on principals engaging common law contractors. Examples of statutes that adopt such adaptations include: superannuation, payroll tax and workers compensation legislation. Each incorporates the common law definition as well as expanded definitions for some purposes. Superannuation and payroll tax are considered further below.

From 26 August 2024, there will be a divergence from the common law test for *Fair Work Act 2009* purposes also. More on that below.

<sup>15</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [63].

<sup>16</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [44], [172].

<sup>17</sup> *CFFMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [58].

<sup>18</sup> *ZG Operations Australia Pty Ltd & Anor v Jamsek* [2022] HCA 2, [85].

<sup>19</sup> *CFMMEU v Personal Contracting Pty Ltd* [2002] HCA 1, [41].

## 4. Fair Work Act changes

### 4.1 Casual employment definition

Casual employees are exempt from entitlements to paid leave, notice and redundancy pay provided in the National Employment Standards of the *Fair Work Act 2009* (Cth). This will continue to be the case going forward.

But from 26 August 2024 the definition of casual employment will be changed. The definition from that date will be that an employee will be a casual employee if:

1. there is no firm advance commitment to continuing indefinite work; and
2. the employee is entitled to a casual loading or a casual rate of pay under the relevant award, enterprise agreement or employment contract.

This is in large part a return to the understood position, pre-*Skene v WorkPac Pty Ltd*.<sup>20</sup> That is that broadly an employment relationship will not be a casual engagement if the practical reality of the employment relationship is one of permanent employment.

A broader number of factors will be considered to make that assessment including whether:

- there is a mutual understanding or expectation between the employer and employee;
- the employee can elect to accept or reject work;
- it is reasonably likely that there will be continuing work available to the employee;
- there are full-time/part-time employees performing the same kind of work; and
- there is a regular pattern of work.

A casual employee who has a regular pattern of work may still be a casual employee if there is no firm advance commitment to continuing and indefinite work.

For example, an employee might indicate they can only accept casual shifts on Friday and Saturday nights, and in fact is only offered shifts at these times. However, if the employer makes it clear in the contract that there is no firm advance commitment to continuing and indefinite work in the business, then the employee correctly classified as a casual within the meaning of the *Fair Work Act 2009* (Cth).

### 4.2 Casual employment conversion rights

From 1 July 2024, the positive obligation for an employer to offer casual conversion will cease, and it will subsequently be the casual employee's obligation to notify the employer that they no longer meet the definition of a casual employee.

The employee needs at least 6 months' employment to exercise this right (12 months for employees of a small business). They will not be able to exercise this right within 6 months of having a prior notification rejected.

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<sup>20</sup> (2018) 264 FCR 536.

The Fair Work Commission will have the power to determine, by mandatory arbitration, whether an employer had reasonable grounds to refuse to make an offer or decline a request for casual conversion.

### 4.3 Defining employment

From 26 August 2024, the definition of “employee” will be changed. For the purposes of the *Fair Work Act 2009* (Cth), it is intended that the distinction between contractors and employees be based on the totality of the relationship which includes both the terms of the contract and how it the contract is performed in practice.

It is to be an assessment based on the “real substance and practical reality and true nature of the relationship”. The explanatory memorandum signals a clear intent to return to the multi-factorial test applied at common law based on *Stevens v Brodribb* rather than the more recent High Court decisions.<sup>21</sup>

There will be an opt out mechanism – exercisable at a contractor’s initiative and only if the contractor is earning above a set high income threshold. A contractor that uses that process can only give notice once and can only revoke the notice once in respect of a relationship.

The defence to the civil liability offence of “sham contracting” is also to be made harder for alleged offenders, by requiring putative principals to prove their belief that the putative contractor they had engaged was in fact a contractor, was objectively reasonable.

It is no longer a defence to claim that an employer “did not know” and “was not reckless” as to the misrepresentation of employment as an independent contractor arrangement.

### 4.4 Right to disconnect

From 26 August 2024 (or 26 August 2025 for small business employers), employees will have the right to refuse contact or attempted contact from their employer (or from a third party where the contact or attempted contact relates to their work) outside the employee’s working hours.

The Fair Work Commission will be able to deal with disputes between an employer and an employee about this ‘right to disconnect’. This includes making orders to stop an employee from refusing *reasonable* contact or to stop an employer making *unreasonable* contact with the employee.

The employee’s right to refuse contact will not apply if refusal is unreasonable.

What is *reasonable* is to be determined having regard to the:

- reason for contacting (or attempting to contact) the employee;
- level of disruption the contact or attempted contact causes the employee;
- method of contact (or attempted contact);
- extent to which the employee is compensated (in both a monetary and non-monetary sense) to remain available to perform work during the period in which the contact (or attempted contact) is made, or for working additional hours outside of the employee’s ordinary hours of work;
- nature of the employee’s role and their level of responsibility; and

<sup>21</sup> *Construction, Forestry, Maritime, Mining And Energy Union & Anor v Personnel Contracting Pty Ltd* [2022] HCA 1; *ZG Operations & Anor v Jamsek & Ors* [2022] HCA 2.

- employee's personal circumstances (including family or caring responsibilities).

The right to refuse will be unreasonable if the contact is required under other laws.

This 'right to disconnect' will be added to the workplace rights that form part of the *Fair Work Act 2009* (Cth) general protections.

## 5. Employment taxes

### 5.1 Australian Taxation Office administration of common law test

The ATO has published a new taxation ruling: TR 2023/4: Income tax: pay as you go withholding – who is an employee and a new practical compliance guideline PCG 2023/2: Classifying workers as employees or independent contractors - ATO compliance approach updating existing guidance materials for the contract centric approach to determining employment.

A critical feature of PCG 2023/2 to be aware of is that in the compliance context the ATO will only consider arrangements low or medium risk if the party being reviewed sought advice from a qualified professional about both the common law and superannuation definitions that apply to their arrangements. This highlights the complexity that such classifications can have – especially for border line cases. But it also heightens the importance for the engaging entity and employee/contractor to act proactively to obtain that advice.

The taxation ruling position is binding. The practical compliance guideline is not binding but is indicative of what taxpayer's should expect if subjected to compliance activity. Which category arrangements fall into under a practical compliance guideline (as self-assessed by taxpayers) – that is low medium or high risk – is a question that the ATO now frequently asks in the context of risk reviews and audits and in reportable tax provision reporting questionnaires for entities subject to that regime. Therefore, it is important to be aware of it.

In TR 2023/4 the ATO accepts the overarching principal that whether a person is an employee at common law is “a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties, having regard only to the legal rights and obligations which constitute that relationship.”<sup>22</sup> That the circumstances in which regard can be had to how a contract is actually performed are limited is also acknowledged.

The circumstances in which the ATO has said regard will be had to some conduct in compliance activities are to:<sup>23</sup>

- establish formation of the contract;
- identify the contractual terms that were agreed to – particularly where the contract is oral or partly oral;
- demonstrate that a subsequent agreement has been made varying, waiving or discharging one or more of the terms of the original contract;
- to show that the contract was a sham; or
- establish evidence of an estoppel, rectification or other legal, equitable or statutory right or remedy.

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<sup>22</sup> TR 2023/4, [7].

<sup>23</sup>TR 2023/4, [10].

## 5.2 Superannuation

For superannuation purposes employee and employer have an expanded definition that includes the common law definition as well as:<sup>24</sup>

- a person who works under a contract that is wholly or principally for the labour of the person;
- persons who are entitled to payment for performance of duties as a member of an executive body of a body corporate;
- members of Parliament and certain government appointees; and
- musicians, actors, dancers, entertainers and sports persons when carrying out certain activities.

The adaptation to include persons who work under contracts wholly or principally for their labour has been considered by the Courts, recently as a result of the issue arising in *Jamsek* when heard by the High Court and being remitted to the Full Federal Court to hear and determined. The Full Federal Court decision was published in March 2023.<sup>25</sup> The Full Federal Court held that there are three elements that must be met for that extended definition to apply. Those elements are:

1. There must be a contract.
2. The contract must be principally for the labour of a person; and
3. That the person must work under the contract.

With respect to the requirement there be a contract – it need not be a bilateral contract. There can be two or more parties. But the putative employee identified must be a natural person and must be party to the contract. For this reason, Mr Jamsek and Mr Whitby were not employees as they engaged with the Company through partnership entities rather than in their individual capacities. That the partnership was able to be considered a separate legal entity was due to the operation of section 72 of the *Superannuation Guarantee (Administration) Act 1992* which provides that partnerships are to be treated as legal entities for the purpose of that Act.

The Full Federal Court observed it has to be assessed from the perspective of the putative employer. In doing so, a contract that allows for delegation cannot meet the requirement as such a contract is not “wholly or principally for the labour of the person”. Also a contract that is for a result is not “wholly or principally for the labour of the person” – but if such contract does provide for some services to be reimbursed based on result and others based on labour expended the parts based on labour expended could still come within its ambit. Again, the provision was held not to apply to either Mr Jamsek or Mr Whitby as they were able to delegate and were paid for results.

The third requirement was not specifically considered.

The adaptation to include persons who work under contracts wholly or principally for their labour has been considered further in *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76, a case which went all the way to a High Court special leave application. The main points of principal to come from *JMC* with respect to the principally for labour limb were<sup>26</sup> that:

- A requirement for consent to be obtained for delegation to occur is not an impediment to a worker being considered an independent contractor; and

<sup>24</sup> *Superannuation Guarantee (Administration) Act 1992* s 12.

<sup>25</sup> *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48

<sup>26</sup> *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

- A contract that allows for the whole of a person's role to be delegated to another person is not "principally for the labour" of the person named in the contract. It could be different (although the Court did not have to decide if, for example, the delegation power was limited in scope, for example relating only to discrete tasks as opposed to the whole".

## 5.3 Payroll tax

Payroll tax provisions that apply to contractors differ significantly from other tax categories and the common law distinction between employees and contractors.

There are both relevant contractor provisions and employment agency provisions in the payroll tax legislation that mean amounts paid to many contractors are considered "wages" and are subject to payroll tax obligations for engaging entities, even if they are not captured as salaries or wages for other tax or legal purposes. Wages are defined as "wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee" and including amounts payable under "relevant contracts."<sup>27</sup>

Both sets of provisions were created to "catch those relationships where the sub-contractor works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor". As such, the types of relationships that were meant to be captured by the relevant contractor provisions are, for all intent and purposes, those arrangements that are identical in substance to the typical employment relationships.

However, the actual ambit of the provisions is much wider.

Recent court authorities have reinforced the breadth of these provisions, confirming that intermediaries and businesses that rely on contractors to carry out their normal business activities increase the risk of having amounts paid to those contractors considered as "wages" for payroll tax purposes. These decisions have challenged previously held common understandings of how the payroll tax provisions apply.

State revenue authorities are increasing their scrutiny of how payroll taxes are applied to contractors on the back of these decisions.

There have been both legislative amendments and amnesties enacted (differentially across States at this point) for medical practitioners impacted by the earlier cases confirming the wider ambit. For example, in Victoria there is to be a specific exemption for medical practitioners.

But those provisions and amnesties do not assist those in other industries. For example, they do nothing to assist mortgage brokers who are also within the wide ambit.<sup>28</sup>

Reviews are currently being conducted across various industries that are heavily reliant on contractors or intermediaries, such as the finance, technology, hospitality and construction industries. Other industries are also under review.

Data matching and data sharing that takes place means that errors and discrepancies are very visible to the state revenue authorities.

<sup>27</sup> See eg. *Payroll Tax Act 2007* (Vic) s 13, Division 7.

<sup>28</sup> *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.

We have also seen increased audit activity around how payroll tax grouping provisions apply to related entities.

### 5.3.1 Relevant contractor provisions

Relevant contractor provisions deem contractors to be employees for payroll tax purposes. Under these provisions, amounts paid or payable by a relevant contractor employer to a relevant contractor are treated as wages in relation to the work or services provided under the contract.

Relevant contracts include various agreements for services provided by independent contractors – including more specifically contracts under which a designated person in the course of a business carried on the designated person:

- (a) supplies services for or in relation to work;
- (b) has supplied to the designated person the services of persons for or in relation to the performance of work; or
- (c) gives out goods to natural persons for work to be performed in certain circumstances,

unless an exemption applies.

Contracts for this purpose include agreements, arrangements or undertakings, whether formal or informal and whether express or implied.<sup>29</sup>

Exemptions include: services being limited to ancillary services, the service provider providing the services generally to the public, or for limited time frames or having the services conducted by a number of persons.

The breadth of the definition was brought home in the recent decision *Thomas and Naaz Pty Ltd v Commissioner of State Revenue*.<sup>30</sup>

In *Thomas and Naaz* the applicant operated three medical centres from which various medical practitioners operated. There were written agreements between the medical practitioners and applicant. The main issue was whether the payments from the applicant to the medical practitioners of Medicare benefits were “taxable wages” for payroll tax purposes.

Written agreements between the medical practitioners and applicant included a clause that the medical practitioners shall ‘bulk bill’ the patients and will pay the applicant 30% plus GST of the total billing. Whilst the contractual position was that the medical practitioners would make Medicare claims and remit 30% of the amount to the applicant, in practice all except for three medical practitioners working in the centres had agreed to have the applicant deal directly with Medicare on their behalf. Medicare paid the bulk billing payment into a bank account in the applicants name – the applicant’s administrative staff then attributed the payments to each practitioner for their services and paid 70% of the amounts to the medical practitioner, with the applicant retaining 30% plus GST of the total billings.

For Medicare benefits claimed and collected by the applicant then remitted to medical practitioners the Court held such amounts were taxable wages. Where the medical practitioners processed their own Medicare claims and remitted 30% to the applicant it was accepted by the Respondent that those amounts were not taxable wages. Whilst this was the accepted position in the Court case it is important to note there are deeming provisions in the Payroll Tax Acts across the various states that do mean

<sup>29</sup> See eg. *Payroll Tax Act 2007* (Vic) s 31.

<sup>30</sup> [2023] NSWCA 40.

even these amounts can be captured – that is because the deeming provisions do not require the amount be paid from the putative employer to putative employee. It can be from a third party to the putative employee; from the putative employer to a third party at the direction of the putative employee, or between third parties entirely at the direction of both the putative employer and employee.<sup>31</sup>

At first instance, the conclusion that the relevant contractor provisions applied was reached on the basis that the medical practitioners provided services to the applicant. That was because it was central to the applicant's business that people would attend its centres in order to receive medical treatment and that to that end the applicant provided the premises, employed administrative and receptionist staff and nurses. Further, that 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 and was indeed the source of income for paying administrative, reception and nursing staff.<sup>32</sup> This issue was not considered or determined on appeal as it was a question of fact and not law.

The appeal point was whether there needed to be a 'quid pro quo' for wages. The Court was of the view that issue was likewise not a question of law but rather one of fact – but did state that quid pro quo is not required and that wages can include on-payment of amounts to which the payee is already contractually or beneficially entitled.<sup>33</sup> There is an earlier decision of the Victorian Court of Appeal to the same effect.<sup>34</sup>

The larger body of case law considering the relevant contractor provisions goes further. Those cases confirm that:

- the requirement that amounts be paid for or in relation to performance of work requires no more than that services be work-related. That is, a payment made need not be for services provided to the payer to constitute wages – it is sufficient that they are work-related services to someone. For example, services provided by medical practitioners to end patients.
- the term "services" has a broad meaning and can include "an act of helpful activity", "the action of helping or doing work for someone" and an "act of assistance". By way of example, a mortgage broker's commitment to undertake work in a particular way was characterised as the performance of a service to the mortgage aggregator, even though it was also the performance of a service to a client for whom a loan was arranged.<sup>35</sup>
- there need not be proportionality between the services performed and the amounts paid for that amount to constitute wages.
- wages include amounts paid or payable by an intermediary to a service provider where the funds flow through the intermediary entity – even where the service provider is beneficially entitled to those funds at all times. For example, Medicare benefits paid to a medical practice and passed onto medical practitioners.

### 5.3.2 Employment Agency provisions

The employment agency provisions capture a chain of on-hire arrangements rendering each entity within the chain potentially liable for the payroll tax owing on the services provided by the end service provider.

<sup>31</sup> See eg. *Payroll Tax Act 2007* (Vic) s 46.

<sup>32</sup> *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2023] NSWCA 40, [40]-[43].

<sup>33</sup> *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2023] NSWCA 40, [64].

<sup>34</sup> *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197.

<sup>35</sup> *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.

The most recent decision considering the employment agency provisions is *Integrated Trolley Management Pty Limited V Chief Commissioner of State Revenue*.<sup>36</sup> In that case *Integrated Trolley Management (ITM)* provided trolley collection services by engaging independent contractors (service providers) to locate, collect, and return supermarket trolleys to the clients' [Woolworths, ALDI, IGA] stores. The main principles that come out of the case are:

- It is the contract between ITM and its clients [Woolworths/ALDI/IGA] that is the relevant contract – not that between ITM and trolley collectors.
- That it is the terms of the contract, not how the parties interacted in practice, that takes precedence in determining the character of the relationship.
- That the core question to be considered is whether services (trolley collection) of individual subcontractors provided through the agent [ITM] to allow clients [Woolworths, ALDI, IGA] to conduct their business in same or similar way as would do through an employee.
- That it is misleading to give too much weight to indicia from other cases as there are many and different ways in which the concept of “in and for” the client's business have been expressed and can be expressed in different business contexts and that therefore there is risk created in relying on semantic distinctions that may put an impermissible gloss on the statutory language.

Previous cases have established that where there are chain of on hire arrangements there can be more than one putative employer when the employment agency provisions are applied – and in that instance that the State Revenue Authority can seek to recover the payroll tax from each putative employer in that chain of on-hire.

### 5.3.3 Payroll tax grouping

Payroll tax grouping has important implications for calculating threshold entitlements for payroll tax. For example, where a payroll tax group exists:

- the gross wages of all group members must be added together and a single threshold deduction applies to the group.
- the threshold entitlement is based on the proportion of NSW wages against total Australian wages.
- every member of the group is liable for any unpaid payroll tax of any other group members.

The payroll tax grouping provisions are exceptionally broad in their ambit. Payroll tax groups can arise as a result of there being:

#### 1. Related body corporates

The entities are corporations which are related to each other by virtue of section 50 of the Corporations Act 2001 (Cth). The definition includes all holding companies and their subsidiaries (direct and indirect) where one entity is a subsidiary of a second entity if the second entity:

- can control the composition of the first entities board;
- is in a position to cast or control the casting of more than 50 per cent of votes in the first entity; or
- holds more than 50 per cent of the share capital in the first entity.

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<sup>36</sup> [2023] NSWCA 302

Entities grouped under this provision cannot be de-grouped.

## 2. Common employees

At least one employee of an entity performs any duties for or in connection with a business conducted by another entity or there is an agreement between two entities for the employee of one of them to perform duties in the business conducted by the other entity.

## 3. Common control and controlling interests

A person or set of persons (individual, corporation, partnership, trust or other entity type) together have a controlling interest in two or more entities. A controlling interest being where the person or set of persons:

- is or are the sole owner(s) of a business however constituted;
- is in a position to cast or control the casting of more than 50 per cent of votes in a corporation, holds more than 50 per cent of the capital in a partnership or is the beneficiary of more than 50 per cent of the interests in a trust (whether as trustee or beneficiary);
- holds more than 50 per cent of the share capital in a corporation or is entitled to more than 50 per cent of the profits from a partnership;
- constitute more than 50 per cent of the board or controlling organ of an entity or can control the composition of that controlling organ of an entity; or
- have authority that mean an entity is under an obligation whether formal or informal to act in accordance with the direction, instructions or wishes of that person or set of persons.

There are also tracing provisions to connect entities of the above classes through interconnections. Further, default beneficiaries of discretionary trusts are taken to have a beneficial interest in more than 50 per cent of the value of interests in the trust. This means that if a discretionary trust is part of a corporate group, it will almost always be part of a payroll tax group. The discretionary trust can be a link between many other entities in the group, causing them to also fall under the payroll tax group.

It is important to note that the term 'entities' in the explanation above can also refer to non-employing entities (companies without employees) and dormant entities (companies that are not actively trading). Both types of entities can serve as a link between other entities that are employers.

Where a business is a member of more than one group, all businesses in each group are subsumed into a single payroll tax group.

Fortunately, there is an exception. It is one that is dependent on the Commissioner of State Revenue in the relevant State exercising a discretion in writing and therefore requires there be active engagement with the State Revenue Office. The discretion can broadly be exercised by the Commissioner where satisfied having regard to the nature and degree of ownership and control of the businesses, the nature of the businesses and any other matters the Commissioner considers relevant, that a business carried on by the person, is carried on independently of, and is not connected with the carrying on of, a business carried on by any other member of that group.

It is a highly fact specific enquiry that looks not just to the contractual and formal legal arrangements are in place but to how entities interact in practice.

Those looking to avail themselves of the discretion ought to seek advice early, ensure policies and procedures are implemented to maintain independence and have the records necessary to prove the position down the track if necessary.

For those subject to a current review or audit that involves grouping considerations – invest the time in fully understanding your position and its strengths and weaknesses before putting submissions forward, focus on the facts and speak to specialists as to where you stand and what options you have.

## 5.4 Director penalty regime

Director penalty notices (**DPNs**) can be issued where a corporate entity has unpaid tax debts that are PAYG withholding amounts, superannuation guarantee charge amounts or GST liabilities. DPNs are a means to personally pursue directors for company tax debts.

Directors of entities that have lodged on time but failed to pay have options other than paying the debt in full to avoid the personal liability. DPNs issued in these circumstances are known as “Non-Lockdown DPNs”. In contrast, directors of entities that have reported PAYG or GST debts more than three months late or superannuation guarantee charge debts more than one month late do not. Their only option to avoid personal liability is paying the debt in full. These DPN’s are known as “Lockdown DPNs”.

It is therefore important to remain on top of company tax lodgement obligations and debts and take prompt action to seek formal extensions where not possible to do so.

If a DPN is received it is important to take prompt action. There are defences but they are limited. The main defence is having taken reasonable steps to ensure the company's compliance with its tax obligations and to show that the company was not insolvent during the relevant period. There is another for misclassification of a person as independent contractor where there has been both reasonable care, and it is reasonably arguable. But the longer the passage of time between receipt of a notice and taking action, the less proactive consideration there has been to these issues and to engagement with the ATO, the harder these defences are to make out.