The Tax Institute

# NSW Tax Forum

## Session 14C:
## Revenue NSW payroll tax reviews and audits

Presented at the NSW Tax Forum on 17-18 May 2023

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# Contents

# 1. Acknowledgment

The author gratefully acknowledges the assistance provided by Revenue NSW in the compilation of technical research for this paper.

# 2. Overview

The *Payroll Tax Act 2007* (NSW) ('***the Act***') is part of a harmonised State and Territory based legislative scheme. If you are an employer who pays wages in NSW, you must register for payroll tax if your total Australian wages exceed the relevant monthly threshold.

The monthly threshold in NSW, where total wages (including grouped entities) exceed the sum of $1,200,000, payroll tax is payable at a rate of 5.45%.[1] The monthly threshold is calculated using the number of days in the month, divided by the number of days in the year, multiplied by the threshold.

The law stated within this paper is the jurisdiction of the state of New South Wales.

This session is divided into two parts – Parts 1 and 2.

## 2.1 Part 1 – Payroll Tax Audits

Revenue NSW continues with its payroll tax reviews and audits of clients across NSW and across industries. Part 1 focuses upon the following:

1. Chief Commissioner's approach in recent payroll tax audits and payroll tax related appeals.

2. A focus area for payroll audits has been the contractor provisions and the employment agency provision in the NSW payroll tax legislation.

3. The Chief Commissioner has a distinct approach to audit a medical practice and this approach is discussed within Part 1 of the Session.

4. Payroll Tax Objections; and

5. Payroll Tax Practice Notes.

## 2.2 Part 2 – Relevant Contract – Recent case law

A contentious area for the payroll tax audits relates to the concept of a "*relevant contract*" under the Act. Broadly speaking, a "*relevant contract*" is a contract, agreement, arrangement or undertaking under which a contractor provides another person with the services of a worker. The individual who performs the work may be the contractor or another worker engaged by the contractor. The person who receives the services is deemed to be an employer. The contractor or the individual who provides the services is deemed to be an employee.

Payments by the deemed employer that relate to the performance of work by the contractor are liable for payroll tax unless an exclusion applies.

Part 2 covers the main issues arising from the audits for the contractor provisions that have been later litigated – this session discusses the recent case law.

[1] After 1 July 2022.

# 3. Part 1 of the Session

# - The Chief Commissioner's approach in recent audits and appeals.

Revenue NSW has a distinct approach to enforcement and that approach does not include the targeting of a specific industry, but rather, adopts an overall audit approach that aims to:

- encourage and assist clients to comply by providing information, education, and tools to help them understand their obligations and the grants to which they are entitled;
- best practice principles to minimise disruption and red tape;
- provide a level playing field and minimise business disruption.

Revenue NSW uses data analytics and risk assessment processes to identify customers that may be non-compliant in their tax obligations. By using advanced analytics, Revenue NSW achieves a success rate that is better than a random audit and reduces the inconvenience to those doing the right thing.

Further detailed discussion of data analytics is outside the scope of the Paper.

## 3.1 Revenue NSW best practice principles

Revenue NSW use best practice principles to focus their efforts on areas that require greater education to comply, to minimise disruption and red tape for most people and businesses that do the right thing. There is a large amount of information provided relating to Payroll Tax information on the Revenue NSW website.[2]

Revenue NSW has developed a Step-by-Step Guide to educate the community about Payroll Tax. See Website: https://www.revenue.nsw.gov.au/help-centre/resources-library/step-by-step-guide-to-payroll-tax

## 3.2 Payroll tax audit data (source: Revenue NSW)

The most recently reported payroll tax audit data (reported internally within Revenue NSW and sourced directly from the Revenue NSW), is stated below:

[2] See Website: https://www.revenue.nsw.gov.au/taxes-duties-levies-royalties/payroll-tax

| Year | 2019 | 2020 | 2021 | 2022 |
|---|---|---|---|---|
| Total Audits (all businesses) | 7,091 | 4,215 | 5,207 | 1,859 |
| Medical Related Audits | 45 | 97 | 85 | 12 |
| Medical liable | 22 | 42 | 35 | 9 |
| % Liable | 49% | 43% | 41% | 75% |

The table above discloses that the number of Medical Related Audits conducted by Revenue NSW as a percentage of total payroll tax audits was a very low percentage and in comparison, to the total number of payroll tax audits being conducted by Revenue NSW.

That said, a very high percentage of Medical Practices, a percentage ranging between 49% to 75%, did have payroll tax related issues arising from the payroll tax audit. It is for this reason that the Session focuses on the Contractor provisions of the *Act* as these provisions have been a large source of payroll tax related issues for the Medical Practices in the state of NSW.

## 3.3 Chief Commissioner's approach to payroll tax audits for medical practices

The Chief Commissioner has a distinct approach to payroll tax audits for medical practices that include the following:

- A Medical Centre that engages Practitioners to provide health-related services to patients conducts a business of providing patients with access to medical services provided by Practitioners, and each contract with a Practitioner may be a relevant contract unless an exemption applies.

- Each Practitioner (or Practitioner's entity) who conducts a business of providing medical services to patients for or on behalf of a Medical Centre is providing services to the Medical Centre's business as well as to patients.

- A lease or licence agreement between a landlord and a Practitioner is not a relevant contract if the Practitioner does not supply services to patients for or on behalf of the Landlord.

- A contract between a service entity and a Practitioner may be a relevant contract if the Practitioner provides services to patients on behalf of the service entity.

- Each contract must be individually assessed in determining whether it is a relevant contract.

- There are 7 categories of exemptions under the relevant contracts provisions, but there are 3 that are more likely to be available to a Medical Centre:

    - the Practitioner provides services to the public generally in a financial year;

    - the Practitioner performs work for no more than 90 days in a financial year;

    - the services provided by the Practitioner are performed by two or more persons.

- If there is a relevant contract between a Medical Centre and a Practitioner or the Practitioner's company:
    - the Medical Centre is taken to be an employer under section 33 of the *Act*.
    - the Practitioner (or the Practitioner's entity) is taken to be an employee under section 34 of the *Act*.
    - money paid or payable under the contract by the Medical Centre to the Practitioner (or the Practitioner's company) may be taken to be wages under section 35 of the *Act*.
    - Indirect payments relating to a relevant contract may be taxable wages paid or payable by a Medical Centre under section 46 of the *Act*.

## 3.4 Payroll Tax Objections

Pursuant to section 89 of the *Taxation Administration Act* 1996 (NSW), an employer may lodge an objection to an assessment, and this objection must be lodged with the Chief Commissioner of State Revenue no later than sixty (60) days after the date of service of the notice of assessment or written decision.

The reasons for objection to a payroll tax assessment include (inter alia):

1. Contractors (assessed as employees);
2. Contractors (application of the exemption provisions)
3. Employment Agency Contracts
4. Grouping and exclusions
    - Grouping of related corporations
    - Grouping by common employees
    - Grouping of commonly controlled businesses
    - Exclusions from groups.

## 3.5 Commissioner's Practice Notes

Revenue NSW is presently preparing a finalised Commissioner's Practice Note on the application of the contractor provisions to medical centres and has consulted with industry and professional bodies on drafts of the CPN. The final version has not yet been published and the draft version is also not presently available.

Payments to contractors who are not employees may be liable to payroll tax under the *Act*. The Commissioner has several relevant published practice notes.

These provisions are explained in the following Commissioner's Practice Notes:

- CPN 007: Payroll tax contractors;
- CPN 016: Relevant contracts - Australian Financial Services Licences and Australian Credit Licences;
- CPN 022 (Not Published): Relevant Contracts – Medical Centres – the finalised practice note is not yet published – the Draft Practice Note is no longer available to the Public.

# 4. Part 2 of the Session – Contentious Areas of Payroll Tax

The concept of "*Wages*" and the concept of an "*Employer"* are a source of dispute and litigation.

## 4.1 Broad Definition – "Wages"

Payroll tax is imposed on "*taxable wages*" [3] paid or payable to an "*employee*" or a "*deemed employee*". The definition of *wages* is broadly defined as follows:[4]

- Ordinary salary and wages
- Superannuation contributions
- Director's fees
- A bonus, commission, or allowance
- Wages will include:[5]
    - Certain payments to contractors under the "***relevant contract***" provisions.

## 4.2 Broad Definition – "Employer"

The employment agent under an employment agency contract is taken to be an employer for payroll tax purposes[6] for certain payments to employment agents. It is important to note that the *Act* contains anti-avoidance provisions aimed at artificial payment arrangements designed to defeat the payroll tax regime.

## 4.3 Recent case law – 2022 to date

The papers outline three broad categories for payroll tax disputes over the two years:

**i** Contractor provisions and cases;

**ii** Employment agency contract provisions and cases;

**iii** Grouping provisions and cases.

Detailed discussion of anti-avoidance provisions, the interest and penalty tax provisions and the recent amendments to the *Taxation Administration Act* 1996 (NSW), are all outside the scope of the paper.

[3] Section 10 of the *Act.*
[4] Section 13 of the *Act.*
[5] Section 35 of the *Act.*
[6] Section 38 of the *Act.*

## 4.4 Contractor provisions and cases

### 4.4.1 What is a "relevant contract"?

A "*relevant contract*"[7] generally arises where there is a supply of services "*for or in relation to work*":

- There is an agreement, understanding or undertaking under which a person provides an employer with the services of a worker who is not an employee.
- The service can be by the contracted person (or company) themselves, or they can procure another person to perform the services.
- The contractor is deemed to be an "*employee*" and the recipient of the services is deemed to be an "*employer*".
- The payments are treated as "*wages*" and can be subject to payroll tax.

Not all contracts will be "*relevant contracts*" …..

There are several exceptions to the "*relevant contract*" rules, including:

- The contractor performs the work for 90 days or less each year.
- The contractor performs similar services to the general public (i.e., multiple clients);
- The contractor conducts a business and engages 2 or more workers to provide the contracted services.

The specific arrangements are generally determinative of all taxation issues – and this applies to Payroll Tax.

### 4.4.2 Recent contractor payroll tax cases

The acronym "**CCSR**" within the Paper refers to the Chief Commissioner of State Revenue.

- *BSA Ltd v CCSR* [2022] NSWCATAD 275.
- *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259.
- *Thomas and Naaz Pty Ltd v CCSR* [2022] NSWCATAP 220.
- *Thomas & Naaz Pty Ltd* v CCSR [2023] NSWCA 40.

[7] Section 32 of the *Act*.

### 4.4.3 *BSA Ltd v CCSR* [2022] NSWCATAD 275[8]

**Facts[9]**

- The Applicant (BSA) engaged contractors (technicians) who attended the premises of the Applicant's clients to install broadband and pay TV services.

- The contractors provided and installed equipment such as satellite dishes, set top boxes and modems at the customers' premises, and connected that equipment to the providers' pay TV and broadband networks.

- The Respondent (the Chief Commissioner) assessed BSA for payroll tax under the contractor provisions.

**Issue 1 – whether relevant contracts exemptions in s.32(2) of the *Act* applied.**

**Applicant's Submissions**

- The Applicant argued that the services provided were ancillary to the supply of goods applied with the application of section 32(2)(a) of the Act:

> *(2) However, a relevant contract does not include a contract of 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—*
>
> *(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.*

- The Applicant relied on the Court of Appeal authority *Chief Commissioner of State Revenue v Downer EDI Engineering Pty Ltd* [2020] NSWCA 126 ("***Downer***") and submitted that the correct meaning to be attributed to the word "*ancillary*" within sub-s. 2(a) was "*supplementary or auxiliary or accessory*". The relevant tax years in *Downer* were those ending 30 June 2010 to 30 June 2013.

- It was contended that certain tasks carried out by the subcontractors including "*collecting, transporting and delivering … equipment, discussing with the customer any specific preferences or requests and placing items of equipment in their place*" were ancillary to the supply of goods and therefore satisfied the exemption in section 32(2)(a) of the *Act*.

- The Chief Commissioner conceded that due to the similarities between Downer and the present case, the exemption requirements in s 32(2)(a) of the *Act* (services ancillary to the supply and/or use of goods and s.32(2)(d) of the *Act* (conveyance of goods) applied to BSA's contracts with technicians.

[8] This judgment is under appeal. BSA has appealed against the Tribunal decision. The appeal was heard in late 2022 and the decision is awaited.

[9] The Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal.

**Commissioner's Submissions**

- That section 32 of the *Act* was amended with effect from 1 July 2014 to add a new sub-section s.32(2B) of the *Act*, which relevantly provides:

> *(2B) Subsection (2) (a), (b), (c) or (d) does not apply to a contract under which any additional services or work (of a kind not covered by the relevant paragraph) are supplied or performed under the contract.*

- The Chief Commissioner submitted that "*additional services*" of a kind not covered by sub-sections 32(2)(a) and (d) of the *Act*), were supplied or performed under the arrangements between BSA and its contractors.

- The Chief Commissioner submitted that the "*additional services*" included in these proceedings:

  - service calls where no new equipment was supplied or conveyed, often after the initial installation.

  - those additional services were not "*solely for the conveyance of goods by means of a vehicle provided by the person conveying them*"[10] under section 32(2)(a) of the *Act*, nor were they ancillary to the supply or conveyance of goods under section 32(2)(d) of the *Act*.

- Consequently, the Chief Commissioner argued that s 32(2B) of the *Act* applied, in which case the exemptions in section 32(2)(a) of the *Act* (supply or use of goods) and section 32(2)(d) of the *Act* (conveyance of goods) did not apply, and the arrangements between BSA and its contractors were "*relevant contracts*".

**Tribunal decision**

- Senior Member Isenberg accepted the Chief Commissioner's submissions that additional services were provided, noting that the evidence before the Tribunal included several examples of work by subcontractors who were not the subcontractors who conveyed the original goods for installation and performed work which did not require the use of goods conveyed under a relevant agreement.

- Senior Member Isenberg at paragraph [67] in *BSA Ltd v Chief Commissioner of State Revenue* [2022] NSWCATAD 275 that:

> *67 Having regard to my above findings I am satisfied that the contracts made between the Applicant and the subcontractors are relevant contracts for the purpose of Division 7 of the Payroll Tax Act 2007 in respect of the period 1 July 2016 to 30 June 2017.*

[10] *BSA Ltd v Chief Commissioner of State Revenue* [2022] NSWCATAD 275 at [26] included in the Applicant's submissions – citing the Minister's second reading speech:

> "*The bill makes it clear that the exemption for owner drivers is limited to a contract that provides solely for the conveyance of goods, and ancillary services such as loading and unloading the vehicle. The legislation has been administered by the Chief Commissioner on this basis since 1986. However, recent decisions of the New South Wales Supreme Court and Court of Appeal indicate the exemption can be claimed for contracts under which other types of services or other kinds of work are provided.* ***This has opened up significant tax avoidance opportunities***."

**Issue 2 - Non-labour component - dispute about the % of non-labour component**

- The Applicant's objection included a claim that the non-labour component should be 36.04%.[11] To support that calculation, the Applicant's evidence included several affidavits and reports to express an opinion regarding its contractors, including expenditure on materials, and an alleged allocation of capital costs of motor vehicles, based on assumptions of their economic life and resale value.

- Notably, the Applicant's evidence relied upon did not include actual costs incurred by contractors.

- The Chief Commissioner disputed various assumptions on which the Applicant's calculations were based. The assessments had applied a figure of 25% as the non-labour component.

- The Chief Commissioner argued that the Applicant had not satisfied its onus of proving that the nonlabour component of contractor payments exceeded 25%, noting that even if one or two of the platforms exceeded 25% (for example, Foxtel and/or Optus), that may be counterbalanced by a lower non-labour component on other platforms (for example, NBN).

**Tribunal decision**

- Senior Member Isenberg found that the Applicant had not satisfied the Tribunal on the balance of probabilities that the average non-labour component of its contractor payments exceeded 25%.

  The Tribunal opined the following at [16] and [17] in *BSA Ltd v Chief Commissioner of State Revenue* [2022] NSWCATAD 275 that:

  > *16 There is no dispute that s 100(3) of the Taxation Administration Act 1996 (NSW) (TA Act) provides that* ***the Applicant has the onus of proving its case*** *in a review by the Tribunal.*
  >
  > *17 The* ***requisite standard of proof is the "balance of probabilities"*** *(Cornish Investments Pty Limited v Chief Commissioner of State Revenue (RD) [2013] NSWADTAP 25 at [31] and B & L Linings Pty Ltd v Chief Commissioner of State Revenue [2008] NSWCA 187; (2008) 74 NSWLR 481 at [104]).*

- A key factor in the Tribunal's decision appeared to be that some reports relied upon by BSA identified amounts attributable to the labour and non-labour components based upon rate cards for each platform rather than actual costs incurred by contractors.[12]

  The Tribunal observed at [122] ('***emphasis added***'):

  > *122 Mr Algie's evidence at T2.117 was that he was instructed that the spreadsheets he received "were based on the rate cards between BSA and its contractors" and he based his calculations on the spreadsheets given to him. At T2.119 Mr Algie said he did not know the difference between the spreadsheets provided to him and what has been referred to as a "rate card".* ***He could not comment on whether the spreadsheets were or were not the actual rate cards****.*

[11] *BSA Ltd v Chief Commissioner of State Revenue* [2022] NSWCATAD 275 at [4].
[12] *Ibid* at [120] and [121].

### 4.4.4 *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259

**Facts** [13]

- Dr Thomas and Ms Naaz were the directors of the Naaz (**Applicant**).
- Naaz Pty Ltd operated a business comprised of three medical centres: the Windsor Family Practice, McKenzie House Specialist Medical Centre and The Ponds Family Medical Practice.
- Various doctors operated from Naaz's medical centres (**Doctors**).
- Each Doctor, or a related entity of the Doctor, entered into a written agreement with Naaz (**Agreement**).
- Revenue NSW assessed Naaz on the basis that the arrangement between the Doctors and Naaz was a '*relevant contract*' under section 32 of the *Act*.
- The written agreement between the Doctors and Naaz was as follows:

**Written Agreement**

1. Naaz provided rooms at its medical centres to the Doctors, as well as shared administrative and medical support services (including nurses, reception, administrative staff).

2. The Doctors saw patients at Naaz's medical centres.

3. There was a roster and hours of work for the Doctors. The Doctors had obligations to comply with protocols and promote the business of the medical centre.

4. There was a leave policy and payment of hourly rates in certain circumstances.

5. The Doctors 'bulk billed' each patient and the patients assigned their Medicare benefits to the Doctors by completing a Medicare 'Bulk Bill Assignment of Benefit' form.

6. The Doctors had the option of dealing directly with Medicare to obtain the benefits that had been assigned to them by the patients or having Naaz do so. All Doctors, other than three, requested that Naaz do so;

7. Naaz, on behalf of the Doctors, made claims on Medicare and the funds received by Naaz from Medicare were placed into an account held by the medical centre in which the Doctor saw the patient. Each medical centre had a separate account and all the billings of the Doctors relating to that medical centre were received into that account;

[13] *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259 at [7] to [13].

8. 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 any deductions for tax or superannuation or otherwise) were paid from the medical centre's bank account to that Doctor (Payments). The remaining 30% was retained by Naaz as a service fee;

9. Doctors chose the days and times in which they attended the medical centres to provide medical services to patients;

10. Doctors used their own medical equipment when treating patients;

11. the Doctors had clinical independence, both in how and when they saw patients and what they prescribed for patients;

    and

12. There was a restrictive covenant, which would become operational upon the Doctor leaving the medical centre owned by Naaz, with such covenant to have an 'exclusion zone' of 5 kilometres from that medical centre and to be in place for two years after the Doctor's departure.

**Applicant applied for review of the assessments by the Tribunal[14]**

- The Chief Commissioner levied payroll tax under the *Act* on the payments by the applicant to the doctor on the basis that the agreements were "*relevant contracts*" and that the payments to the doctors were made "for or in relation to the performance of work relating to a relevant contract".

- The Applicant and all, except 3 of the doctors, had an arrangement outside of the agreements, where each doctor opted to direct Medicare to pay all benefits paid in respect of patients into a bank account held in the name of the Applicant.

- Administrative staff employed by the Applicant would record and reconcile all Medicare benefits received for the doctor and would then pay 70% of those amounts to the doctor, with the remaining 30% retained by the Applicant, representing the payment to be made to it by the doctor under the agreement.

**Applicant's submissions**

- The Applicant submitted that the agreements with the doctors were not '*relevant contracts*' for the purpose of section 32(1)(b) of the *Act* due to:

  > (1) the agreements involved the doctors providing services to the patients and the doctors paying a service fee to the applicant for the provision of various administrative services, but no

[14] Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal.

services were provided by the doctors to the applicant; [15]

(2) the exemption in section 32(2)(b)(iv) of the *Act* should apply as the doctors ordinarily performed their services to members of the public generally in each financial year.[16]

- The Applicant also submitted that the payments made to the doctors were not '*for or in relation to the performance of work*' for the purposes of s. 35 of the *Act*.

- The Applicant relied on the authority of *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145 ("*Homefront Nursing*") and submitted that the relationship between the payments and the performance of work was too remote because the Medicare payments factually belonged to the doctors and the applicant was simply returning that money to the doctors.[17]

**Chief Commissioner's submissions**

- The Chief Commissioner submitted that the agreements between the medical centres and the doctors were '*relevant contracts'* for the purposes of section 32(1)(b) of the *Act* as the agreements involved doctors providing services to the Applicant to ensure that it could carry on business at its medical centres.

- It was contended that the present circumstances are analogous to the facts in *Levitch Design Associates Pty Ltd as Trustee for the Levco Unit Trust v Chief Commissioner of State Revenue* [2014] NSWCATAD.[18]

- The Chief Commissioner also submitted that the exemption in section 32(2)(b)(iv) of *Act* could not be granted because the Applicant's evidence was unsatisfactory, and no business records had been tendered.[19]

- The Chief Commissioner submitted that the payments made to the doctors were '*for or in relation to the performance of work*' for the purposes of s. 35 of the *Act* as the agreements were entered into for the central purpose of each doctor performing clinical services in the medical centre.

  It was contended that the current facts:

  - contrasted to the facts in the authority of *Homefront Nursing;*

  - the circumstances of the payment in the case did not matter[20] as this section simply required the provision of money from one person to another - as

[15] *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259 at [27].
[16] *Ibid* at [46] – [48].
[17] *Ibid* at [61].
[18] *Ibid* at [27] – [29].
[19] *Ibid* at [49].
[20] The circumstances such as beneficial ownership of the money.

determined by the Victorian Court of Appeal in *Commissioner of State Revenue v The Optical Superstore [2019] VSCA 197* at [62].

**Decision**

- On 3 September 2021 the NSW Civil and Administrative Tribunal handed down the decision in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259. The circumstances in Thomas and Naaz were more conventional than those in earlier case of *Optical Superstore.*[21]

- The Tribunal held that:

    - the agreements satisfied the "*performance of work*" requirement in section 32(1)(b) of the *Act* which requires that the services provided were provided for or in relation to the performance of work.

    - the provision requires the services supplied under the Agreement to be work-related, citing *Accident Compensation Commission v Odco Pty Ltd* at 612 and *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* at [32] and [60].[22]

    - 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 Tribunal determined that the Doctors provided services not only to the patients, but also to the Applicant.[23]

    - that the exemption in section of 32(2)(b)(iv) the *Act*[24] did not apply because it was not satisfied that none of the exemptions in s. 32(2)(b)(i)-(iii) applied (at [50]).

    - even if it had been satisfied that none of the exemptions in sections 32(2)(b)(i)-(iii) of the *Act* applied, the evidence submitted by the Applicant was insufficient to prove that the doctors (with 2 exceptions) performed similar services to the public generally.[25]

- The Tribunal concluded that all the contracts were relevant contracts under s.32(2) of the *Act*.[26]

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[21] In September 2019 the Court of Appeal of the Supreme Court of Victoria in *Commissioner of State Revenue v The Optical Superstore Pty Ltd* [2019] VSCA 197 delivered a judgment that provided that the relevant contract provisions have a broader application than many thought (the **Optical Superstore CA Decision**).

[22] *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259 at [40].

[23] *Ibid* at [39].

[24] Performance of services of that kind to the public generally.

[25] *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259 at [57] – [58].

[26] *Ibid* at [59].

- The Tribunal held that section 35 of the *Act* operates to deem the applicant's payments to the doctors to be wages.

- The Tribunal considered the provision of the services by the doctors to patients to be the '*performance of work*',[27] and was satisfied that those services related to the agreements made with the applicant.[28]

- The Tribunal held that there was a clear relationship between the provision of the services and the payments, accepting the reasoning in *Optical Superstore* (VSCA)[29] and stating that the decision in *Homefront Nursing* was not determinative of this case.[30]

- The Applicant appealed to the Appeal Panel of NCAT.

### 4.4.5 *Thomas and Naaz Pty Ltd v CCSR* [2022] NSWCATAP 220

- The Appellant raised seven grounds of appeal during the appeal which were particularised in an Amended Notice of Appeal filed following the hearing.

- In substance, these grounds contended that the Tribunal at first instance erred in construing and applying sections 32 and 35 of the *Act* in determining whether the amounts paid to the doctors were deemed wages.

- In doing so, the Appellant challenged a factual finding of the Tribunal, being that the doctors provided services to the Appellant. It asserted that no services were provided to the Appellant, and instead that the doctors provided services to patients and the Appellant provided services to the doctors.

- By grounds 1, 2 and 3, the Appellant contended that the Tribunal erred in construing and applying s. 35(1) of the *Act*, by concluding that the agreements were relevant contracts.

- During the hearing, the Appellant sought leave to raise a new argument on appeal, which became ground 4. By this ground, the Appellant asserted that the exemption to the relevant contract provisions in s. 32(2)(b)(i) applied. This would require that the doctors' services were not ordinarily required by the Appellant, and that the doctors ordinarily provided services to the public generally.

- By grounds 5 and 6, the Appellant asserted that the Tribunal erred in law in finding that there was a clear relationship between the provision of services and the payments made by the Appellant to the doctors and the conclusion that these payments are deemed wages, because the doctors did not in fact provide services to the Appellant, and only provided services to patients.

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[27] *Thomas and Naaz Pty Ltd v CCSR* [2021] NSWCATAD 259 at [64].
[28] *Ibid* at [65].
[29] *Ibid* at [71] – [72].
[30] *Ibid* at [70].

- By ground 7, the Appellant submitted that the Tribunal made a legal error by failing to follow or, as a matter of comity, apply *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145 ("*Homefront Nursing*"), which considered a similar factual scenario.

**Decision**

- The Appeal Panel refused leave for the Appellant to raise a new argument on appeal, being the argument contained in ground 4, and dismissed the appeal.

- The Appeal Panel commented that the Appellant impermissibly asserted that the Tribunal erred in its construction and application of certain provisions of the Act without also identifying how those errors purportedly occurred.[31]

- In respect of the grounds advanced by the Appellant, the Appeal Panel reached the following conclusions:

    - grounds 1, 2 and 3 were rejected by the Appeal Panel on the basis that no question of law was raised and these grounds merely disputed the Tribunal's findings of fact; [32]

    - leave was refused to rely on the argument contained in ground 4, as the Appellant had the opportunity to run that argument at first instance but chose not to and made no submissions about the basis upon which the Appeal Panel should exercise its discretion to allow the argument to be raised on appeal; [33]

    - grounds 5 and 6 were rejected as they did not involve a question of law and instead sought to dispute the Tribunal's finding of fact that the doctors provided services to the Appellant under the agreements;[34] and

    - the decision in *Homefront Nursing* was reached before, and therefore without the benefit of the Victorian Court of Appeal decision of Commissioner of State Revenue v The Optical Superstore [2019] VSCA 197, which clarified the relationship required by s. 35 of the Act.

    - ground 7 was rejected, the Tribunal should ordinarily follow decisions of the Appeal Panel and decisions of the Tribunal as constituted by the President or a Deputy President, unless they are clearly wrong: *Rittau v Commissioner of Police [2000] NSWADT* 186 at [60].[35]

- The Tribunal found that s 32(2)(b)(i) of the *Act* did not apply and no challenge was brought in this appeal against that conclusion of fact.[36]

- On 3 March 2023, the Applicant taxpayer has sought leave to appeal to the Court of Appeal.

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[31] *Ibid* at [59].
[32] *Ibid* at [68].
[33] *Ibid* at [75] and [77].
[34] *Ibid* at [91].
[35] *Ibid* at [97] - [99].
[36] *Ibid* at [76].

### 4.4.6 *Thomas & Naaz Pty Ltd v CCSR* [2023] NSWCA 40

- The Court of Appeal handed down its decision on 14 March 2023 and dismissed the summons filed 3 August 2022, seeking leave to appeal with costs.

- Leeming JA wrote the majority judgment (with Meagher JA and Griffiths JA agreeing). The Court of Appeal applied the reasoning of the Victorian Court of Appeal in *Commissioner of State Revenue v The Optical Superstore Pty Ltd* [2019] VSCA 197; 110 ATR 651 at [64]-[68].

- The main issue in this appeal is whether payments made by the Applicant to medical practitioners working at its centres should also contribute to "*taxable wages*" and thereby increase the burden of payroll tax levied upon the Applicant. The Plurality of the Court held that ('**emphasis added**'):

> *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 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).*[37]

- Leeming J further opined:

> *"I am also unpersuaded that any question of law arises….";* [38]
>
> *"The provision of medical services by the practitioner to a patient is plainly the performance of work, and equally plainly it is work relating to the relevant contract";*[39]
>
> *"I respectfully agree with the reasoning of the Victorian Court of Appeal*[40] *that "payable" or "paid" (in s.35) … does not exclude payments to which the payee is contractually or even beneficially entitled"* [41]
>
> *"… this application (by Thomas and Naaz) illustrates the importance of those contemplating bringing an appeal which is confined to a question of law attending to the statute and identifying the question of law*". [42]

[37] *Thomas & Naaz Pty Ltd v CCSR* [2023] NSWCA 40 at [45] per Leeming JA with Meagher JA and Griffiths AJA agreeing.
[38] *Ibid* at [48] per Leeming JA with Meagher JA and Griffiths AJA agreeing.
[39] *Ibid* at [61] per Leeming JA with Meagher JA and Griffiths AJA agreeing.
[40] Victorian Court of Appeal in *Commissioner of State Revenue v The Optical Superstore Pty Ltd* [2019] VSCA 197; 110 ATR 651 at [64]-[68].
[41] *Thomas & Naaz Pty Ltd v CCSR* [2023] NSWCA 40 at [64] per Leeming JA with Meagher JA and Griffiths AJA agreeing.
[42] *Ibid* at [71] per Leeming JA with Meagher JA and Griffiths AJA agreeing..

# 4.5 Employment agency contract provisions and cases;

## 4.5.1 Overview

The relevant provisions relating to employment agency are found within Part 3 Division 8 of the *Act* ("*Employment Agents*"), sections 36A to 42 of the *Act* ("the EAC provisions").

Section 37 of the Act contain the following definitions:

> ***37 Definitions***
>
> *(1) For the purposes of this Act, an employment agency contract is a contract, whether formal or informal and whether express or implied, under which a person (an employment agent) procures the services of another person (a service provider) for a client of the employment agent.*
>
> *(2) However, a contract is not an employment agency contract for the purposes of this Act if it is, or results in the creation of, a contract of employment between the service provider and the client.*
>
> *(3) In this section—*
> *contract includes agreement, arrangement and undertaking.*

Section 40 of the *Act* contain the following provision:

> ***40 Amounts taken to be wages***
>
> *(1) For the purposes of this Act, the following are taken to be wages paid or payable by the employment agent under an employment agency contract—*
> *(a) any amount paid or payable to or in relation to the service provider in respect of the provision of services in connection with the employment agency contract,*
>
> *(b) the value of any benefit provided for or in relation to the provision of services in connection with the employment agency contract that would be a fringe benefit if provided to a person in the capacity of an employee,*
>
> *(c) any payment made in relation to the service provider that would be a superannuation contribution if made in relation to a person in the capacity of an employee.*
>
> *(2) Subsection (1) does not apply to an employment agency contract to the extent that an amount, benefit or payment referred to in that subsection would be exempt from payroll tax under Part 4 (other than under section 50 or Division 4 or 5 of that Part), or Part 3 of Schedule 2 (other than clause 5 or 13A), had the service provider performed the services as an employee of the client, if the client has given a declaration to that effect, in the form approved by the Chief Commissioner, to the employment agent.*

- The Commissioner's view is stated within the *Commissioner's Practice Note CN 005 V2* (1 March 2021) Practice Note, re-produced below.

  [ Link: https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/commissioners-practice-note-employment-agency-contracts-guidelines-v2 ]

## 4.5.2 Commissioner's Practice Note CN 005 V2

**Overview**

An employment agency contract is defined in section 37(1) of the *Act* as a contract under which an employment agent procures the services of a service provider for a client of the agent.

A service provider may be a natural person who performs work for the client, or an entity that engages workers to perform work for the client.

If a contract is an employment agency contract:

- the "employment agent" who procures a service provider for a client is taken to be an employer (section 38 of the *Act*);
- the service provider may engage workers to perform the work required under the contract;
- the persons who perform the work for the client's business are taken to be "employees" of the employment agent (section 39 of the *Act*);
- any amounts paid or payable by the employment agent under the contract, including amounts attributable to non-labour costs or commissions payable to another employment agent, are taken to be wages (section 40(1) of the *Act*); and
- the client of the "*employment agent*" does not incur payroll tax on payments to the agent under the contract.

- The employment agent performs most of the administrative functions normally performed by an employer, including payment of remuneration, and may include withholding income tax and paying employer superannuation contributions.

- The employment agency contract provisions apply when workers are engaged by an agent to work in and for the conduct of a client 's business, in a similar way to an employee.

**What are the key elements of an employment agency contract?**

Key factors in the cases that determine whether a contract is an employment agency contract include whether the service providers:

- work on site at the clients' workplaces.
- are under the supervision or direction of the clients;
- have meaningfully interaction with staff of the clients;
- wear clothing, uniforms or logos which are the same as the clothing, uniforms or logos of the client;
- use specialist equipment provided by the clients;
- use the clients' on-site facilities that are available to staff of clients.

- A contract is not an employment agency contract if there is a contract of employment between the worker and the client. Nonetheless, the EAC provisions may apply if the service providers are engaged as employees of the agent. That means an exemption may apply if the client is entitled to most of the payroll tax exemptions.

- The agent should obtain an exemption declaration at the time of arranging the employment agency contract. NSW and most jurisdictions other than Victoria will consider retrospective

declarations.[43]

- The EAC provisions do not apply if service providers perform[44] services for the client's benefit, but does not work in and for the conduct of the client's business in a similar way to an employee.

### 4.5.3 Recent agency payroll tax cases:

The acronym "**CCSR**" within the Paper refers to the Chief Commissioner of State Revenue.

- *Bonner v CCSR* [2020] NSWCATAD 231
- *Bonner v CCSR* [2021] NSWCATAP 180
- *Bonner v CCSR* [2022] NSWSC 441
- *E Group Security Pty Ltd v CCSR* [2021] NSWSC 1190
- *CCSR v E Group Security Pty Ltd* [2022] NSWCA 115
- *CCSR v E Group Security Pty Ltd* (No 2) [2022] NSWCA 259
- *Infinity Security Group Pty Ltd v CCSR* [2023] NSWCATAD 28

These cases are discussed below.

### 4.5.4 *Bonner v CCSR* [2020] NSWCATAD 231

**Facts[45]**

- The Applicants, Ms Chelsea Bonner and Bella Management Group Pty Ltd, operate a modelling agency, "Bella Management". That business was operated by Ms Bonner as a sole trader from 2002 until 30 June 2015.
- Since 1 July 2016, Bella Management Group Pty Ltd has operated the business ("collective referred to as *Bella*").
- Bella represents models who feature in promotional and advertising material produced by Bella's clients, which include advertising companies and production companies ("*end users*") and retailers, publishers, broadcasters, and event companies ("*brands*"). Under the tripartite arrangements between Bella, its clients and models, the client pays Bella a fee for the model's services, and after deducting a commission of 20%, Bella pays the balance of that

[43] The Queensland EAC provisions do not apply if service providers are employees of the putative agent (see *Compass Group Education Hospitality Services Pty Ltd & Anor v Commissioner of State Revenue* [2020] QSC 184, confirmed by the Qld Court of Appeal).
[44] This was decided by the NSW Supreme Court in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (No. 2) [2017] NSWSC 26 and confirmed by the *Court of Appeal in Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115.
[45] The matter was heard in the Administrative and Equal Opportunity Division of the NSW Civil and Administrative Tribunal.

fee to the model.

- In December 2017 following a payroll tax investigation, the Chief Commissioner of State Revenue (the "CCSR") assessed Bella as being liable for payroll tax in respect of payments it made to models during the 2014, 2015 and 2016 financial years and the first five months of the 2017 financial year.

- Bella lodged an objection to that assessment with the Chief Commissioner.

- In a determination made on 26 March 2019 (the "*Determination*"), the Chief Commissioner substantially disallowed Bella's objection concluding that the "arrangements" between Bella, its clients and the models were "employment agency contracts" within the meaning of s 37(1) *Act*. The Chief Commissioner concluded that that Act operated to deem Bella to be the employer of the models and the payments made by Bella to the models to be "*wages*".

- In May 2019, Bella sought administrative review by the NSW Civil and Administrative Tribunal ("NCAT") of the Determination.

**Issue 1 – whether the Applicants were employment agents?**

- The key issue was whether the Applicants were "*employment agents*" under section 37 of the *Act*.

**Respondent's Submissions**

The Chief Commissioner made the following submissions in support of the contention that the Applicants were employment agents:

- The modelling arrangements were "*contracts*" - since a "*contract*" includes an "*arrangement*": section 37(3) of the Act.

- As part of (and therefore "*under*") the modelling arrangements, the Applicants "*procured*" (brought about by care or effort) the services of models. They did this by liaising between clients and models and negotiating the terms of the models' engagements.

- The Applicants' models worked in and for the conduct of their clients' businesses.

The relevant factors determining that the "*in and for the business of the client*" test was satisfied in *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 657 [46] were:

  - whether the services are provided on-site,

  - whether they are provided with a degree of continuity or regularity (or are ad hoc),

[46] *Bonner v Chief Commissioner of State Revenue* [2020] NSWCATAD 231 at [43].

- the extent of interaction and supervision with or by the client's staff, the client's customers and/or the residents or users of service. [47]

In *Bonner,* the Chief Commissioner argued that:

- The models worked at the clients' sets designed by clients to create advertising material.
- Continuity or regularity of work was likely absent, as models are engaged for specific jobs.

but there was significant regularity of services.

- Models worked under the clients' supervision and direction.
- Models had essentially no creative input.

**Applicant's Submissions**

The Applicants argued against the proposition they were employment agents since:

- The models work on a photo shoot that is not the client's site, for example, a clothing store.
- A photo shoot is an irregular and largely irrelevant location to the end user's business.
- Models' work was ad hoc and on call: there is no expectation of future or further work.
- The models have creative input.
- Clients can be dissatisfied with the outcome but cannot control the model's performance.

NS Isenberg RFD, Senior Member in the NCAT judgment cited the authority of the Supreme Court, the case of *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 657, and applied the authority at [58] and [59] ('***emphasis added***') below:

> *58. With respect I observe, and accept as applicable in this matter, Ward CJ in Equity's terminology at [271] in Bayton Cleaning "I consider that, having regard to the evidence as a whole, in a practical sense [the models formed]… an addition to the client's workforce and did provide [their] services in much the same way as the client's staff would otherwise have done had the services not been outsourced."*
>
> *59. Having regard to the evidence before me as a whole, and the positive onus on the Applicants**, I am not satisfied that the models, as service providers, are not effectively added to the workforce** of the client for the conduct of the client's business in circumstances where those models have agreed to provide services to the relevant client in accordance with agreements negotiated between the relevant*

[47] *Bonner v Chief Commissioner of State Revenue* [2020] NSWCATAD 231 at [57].

*model and the client and perform work in accordance with those agreements.*

- The Applicant appealed to the Appeal Panel of NCAT.

  Where, as here, a taxpayer is dissatisfied with the Chief Commissioner's determination of an objection, they may apply to NCAT for administrative review of that determination under the *Administrative Decisions Review Act* 1997 (NSW).[48]

- In an application for review the Applicant taxpayer has the onus of proving their case.[49]

### 4.5.5 *Bonner v CCSR [2021] NSWCATAP 180*

- On 22 January 2021, the internal NCAT panel heard the appeal.

- This appeal concerned Division 8 of Part 3 of the *Act* which operates to impose liability for payroll tax on "*employment agents*" who provide the services of third parties to their "*clients*".

- The Appeal Panel summarised the Tribunal's findings that were under appeal as follows: [50]

  1. *Bella's models worked at locations selected by Bella's clients: at [49];*
  2. *some models worked regularly for the same client: at [50]–[52];*
  3. *it was unlikely the models determined entirely for themselves how they would work in a practical sense. However, the evidence was not clear as to where demarcation lines of "creative" control would lie: at [53]–[56];*
  4. *"having regard to the evidence … as a whole, and the positive onus on [Bella], I am not satisfied that the models, as service providers, are not effectively added to the workforce of the client for the conduct of the client's business…" at [57]–[58].*

  *("**the findings under appeal**")*

- The Appellants argued ("*impugned*") 3 "*purported*" 'findings of the Tribunal.

  (1) that the models work "on site" of the clients: at [47]–[49] of the decision;
  (2) that the models were continuously or regularly employed by the clients: at [50]–[52];
  (3) that the models were akin to the clients' staff: at [53]–[59].

- In written submissions, the Appellant asserted that these findings were "factually incorrect and, even if factually correct, were wrong at law as a misapplication of the relevant tests".

***Firstly*, Impugned finding 1: the models worked "on site" of the client.**

- The Appeal Panel rejected the Appellants' contention that the Tribunal made a factually incorrect finding that the models worked at a worksite of the client. Rather, the Appeal Panel considered that the Tribunal simply noted the unchallenged evidence that the models were

[48] Section 96(1)(a) of the *Taxation Administration Act* 1996 (NSW).
[49] Section 100(3) of the *Taxation Administration Act 1996* (NSW).
[50] *Bonner v Chief Commissioner of State Revenue* [2021] NSWCATAP 180 at [18].

engaged to work at sites determined by each client. [51]

- The Appeal Panel also rejected the contention that the Tribunal misapplied the test in *Bayton Cleaning*. The Appeal Panel did not regard *Bayton Cleaning* as authority for the proposition that the provision of services at the place of business or workplace of the client is a pre-condition to a finding that the subject individuals are working *"in and for the conduct of the client's business*." [52]

- It noted that the Tribunal was not required to be satisfied that a location selected by the client was the client's usual place of business or workplace. Rather, it was for the Tribunal to determine the factors relevant to whether the models were working "*in and for the conduct of the client's business*" and the weight to be given to each of those factors. [53]

***Secondly,* Impugned finding 2: the models were continuously or regularly employed**

- The Appeal Panel rejected the contention by the Appellants that the models work "*ad hoc and on call*" and that "there is no expectation of future or further work." [54]

- The Appeal Panel held that it was open to the Tribunal to conclude as such having regard to the available evidence.

***Thirdly,* Impugned finding 3: the models were akin to the client's staff**

- The Appeal Panel observed that the Appellants' challenge to this finding conflated two questions, namely:

    1. whether the models were subject to the supervision and direction of the client; and
    2. whether the models were "*effectively added to the workforce of the client for the conduct of the client's business*."

- The Appeal Panel observed that the Tribunal was "*unclear*" about where the demarcation lines of creative control lay and that it did not make a positive finding either way about supervision and control.[55] Therefore, the Appeal Panel rejected the Appellants' contention that this finding of the Tribunal was wrong or against the weight of the evidence. [56]

- The Appeal Panel referred to the Tribunal's finding (at [59] of the Tribunal's decision) that:

    > *…..I am not satisfied that the models, as service providers, are not effectively added to the workforce of the client for the conduct of the client's business in circumstances where those models have agreed to provide services to the relevant client in accordance with the agreements negotiated between the relevant model and the client and perform work in accordance with those agreements*. [57]

- In the Appeal Panel's view, the above conclusion was not based on Impugned Finding 3, but rather on all three Impugned Findings. [58] The Appeal Panel found that the Appellants failed

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51 *Bonner v Chief Commissioner of State Revenue* [2021] NSWCATAP 180 at [30].
52 *Ibid* at [31].
53 *Ibid* at [33].
54 *Ibid* at [42].
55 *Ibid* at [50].
56 *Ibid* at [52].
57 *Ibid* at [54].
58 *Ibid* at [55].

to refer to evidence to support their contention that the models could not be added to their clients' workforce. Consequently, this ground of appeal failed. [59]

- Leave was refused to Appeal and the Appeal was ultimately dismissed.

- The Applicant taxpayer has sought leave to appeal from the NCAT to the Court of Appeal.

### 4.5.6 *Bonner v CCSR* [2022] NSWSC 441

- The Supreme Court has dismissed an appeal by Ms Chelsea Bonner and Bella Management Group Pty Ltd ("Bella") ("**the Appellants**") from a decision of the NSW Civil and Administrative Tribunal (NCAT). Appeal Panel refusing an appeal from the Chief Commissioner's assessment of payroll tax, penalty tax and interest.

- The Appellants, Ms Bonner, and Bella acted as sole agents for people seeking work as models in advertising and promotional material. They entered into contracts with clients to supply the services of such models. The clients included major retailers and production companies.

- Clients paid Ms Bonner fees for the models' services and, after deducting a commission of 20%, Ms Bonner paid the balance of the fees to the relevant models. The Chief Commissioner assessed the plaintiffs' payroll tax liability for the relevant financial year on the basis that they entered into "*employment agency contracts*" under Part 3, Division 8 of the *Act* (Payroll Tax Act 2007 (NSW)).

- Section 37 defines an employment agency contract as "*a contract ... under which (an employment agent) procures the services of another person (a service provider) for a client of the employment agent*".

- On 15 September 2020, NCAT affirmed the Chief Commissioner's decision.

- On 22 June 2021, an Appeal Panel of NCAT dismissed the plaintiffs' appeal from that decision.

- On 20 July 2021, the Appellants sought leave to appeal to the Supreme Court on a question of law. They submitted that:

    - (i) the purpose of s 37 is to prevent businesses from avoiding payroll tax by disguising employment relationships through third-party agencies;

    - (ii) accordingly, section 37 only applies to arrangements where the service provider is integrated into the client's business, and not when working as a genuine independent contractor;

    - (iii) the correct test is whether the contracts procure the services of another person "in and for the conduct of the business" of the client, and
      (iv) the agency did not employ its models because *the Entertainment Industry Act*

[59] *Ibid* at [56] – [58].

*2013* (NSW) assumes an agency relationship between performers and performer representatives.

- Justice Basten of the Supreme Court of NSW heard the appeal on 18 March 2022 and delivered judgment on 13 April 2022.

- The Court noted that the proposed test created implications that were not supported by the statutory language which referred to procuring services *"for"* a client. The legislative history of the Payroll Tax Act did not support an implication that section 37 only applied to employment agents who procure service providers to work *"in"* a client's business. Conversely, the Court determined the appeal on the basis that the proposed test was correct because it was accepted by both parties. The Court found that the Appeal Panel's findings did not raise any error of law.

- Despite the Court granting the Appellant legal to appeal, the appeal was dismissed.

- The Court opined that "*the issues raised above should not, and cannot, be resolved in this case.*"[60]

**Challenges to the Appeal Panel's findings**

- The Plaintiffs challenged the findings of the Appeal Panel in arguing that it erred in its application of section 37 of the *Act*. All challenges to the Panel's findings were rejected.

**Were the models working in and for the businesses of clients?**

- Justice Basten observed:

    - that the NCAT Appeal Panel had accepted that the correct test to be applied was the test of whether work was done by the models "*in and for the conduct of the business of the employment agent's client*" as resulting from the decision of White J in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 ("UNSW Global").[61]

    - The NCAT Appeal Panel also applied the factors specified by Ward CJ in the Bayton Cleaning case, ("*the Bayton factors*").

- His Honour held that the NCAT Appeal Panel correctly applied the UNSW Global test based on Ward CJ's reasoning in *Bayton Cleaning*, by undertaking a fact-sensitive analysis, which had regard to the more meaningful factors in the circumstances of the case. [62]

- His Honour concluded that the NCAT Appeal Panel's reasoning was consistent with this approach and involved no error of law, noting that the question of whether the modelling services were provided on-site may be less relevant than in the provision of cleaning services (as was the case in *Bayton Cleaning*).

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60 *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441 at [119].
61 *Ibid* at [64].
62 *Ibid* at [67].

**Were the models working with a sufficient degree of continuity or regularity?**

- The Appellant challenged the Appeal Panel's rejection of the contention that the Tribunal made a "selective" finding that some models worked continuously for the same client.

- His Honour observed that the precise error of law revealed by this finding was not articulated and held that it was not possible to derive any error of law from the Panel's reasoning. The Tribunal had made a finding of fact that the Appellants had not established that there was "*discontinuous employment*" of the models. [63]

**Were the models directed or controlled by the clients?**

- The Appellants contended that the NCAT Appeal Panel had made an error of law by failing to find that the Tribunal made an error of law in determining that the clients or their staff had the ability to direct or control the performance of the models, or involved a misapplication of principle.

- This finding correlated to one of the factors observed in *Bayton Cleaning*, which was whether the cleaning agency's workers were effectively added to the client's workforce and provided their services in a similar way to the client's staff. The Appellants argued that the correct conclusion was that the client was not able to direct or control the performance of the models.

- His Honour held that it was difficult to identify any error of law in the NCAT Appeal Panel's reasoning, noting that a finding of fact which was claimed to be "*against the weight of evidence*" did not involve an error of law. [64]

**Failure to apply the *Entertainment Industry Act* 2013 (NSW)**

- The Appellants argued that the NCAT Appeal Panel did not have regard to the terms and operations of the *Entertainment Industry Act* 2013 (NSW) in interpreting section 37 of the *Act*.

- His Honour rejected this ground for three reasons:[65]

    - the *Entertainment Industry Act* 2013 (NSW) covered "*entirely different territory*" to the *Act* such that the meaning of section 37 of the Act was not affected;

    - the Appeal Panel did not err in failing to consider the operation of the *Entertainment Industry Act* 2013 (NSW) because it was not raised as a ground of appeal before it;

    - no error was identified in the reasoning of the Tribunal which might have been implicit in the reasoning of the Appeal Panel.

[63] *Ibid* at [71] – [73].
[64] *Ibid* at [79] – [81].
[65] *Ibid* at [85] – [88].

## 4.5.7 Supreme Court decision – *E Group Security Pty Ltd v CCSR* [2021] NSWSC 1190

**Facts**

- The plaintiff sought review of a determination by the Chief Commissioner that the plaintiff was an *"employment agent"* and liable for payroll tax on payments made to its service providers.

- The determination related to the provision of security guarding services by the plaintiff to its clients.

- The key legal issue was whether the arrangements between the plaintiff and its clients (or, alternatively, the arrangements between the plaintiff and its wholly owned subsidiaries) were "*employment agency contracts*" within the meaning contained in section 37 of the *Act*.

**Decision**

- The Supreme Court has revoked payroll tax assessments imposed by the Chief Commissioner of State Revenue (the Commissioner) on the plaintiff, E Group Security Pty Ltd (E Group Security) (a security services company) in respect of the wages of security guards that it had sub-contracted to clients for the 2015 to 2018 tax years.

- E Group Security provides clients across various industries (including government, non-profit establishments (such as sports and leagues clubs), commercial properties and food production) with security services including typical security services (such as access control, crowd control, patrolling) and other services (such as loading dock control, weighbridge services and concierge services).

- The payroll tax assessments were raised on two bases.

    - *First*, that the arrangements between E Group Security and its clients were "employment agency contracts" as defined in section 37 of the Act; and second, that the arrangements between E Group Security and certain of its wholly owned subsidiaries (the Related Entities) were themselves "*employment agency contracts*".

    - Second, as to the arrangement between E Group Security and its clients, E Group Security did not dispute that it procured the services of its security guards for its clients. Conversely, E Group Security disputed that it procured the services *"in and for"* the conduct of the business of its clients.

- The characterisation turned on whether the security guards were integrated into the clients' businesses, such that they were an addition to the clients' workforce. Such an analysis required consideration of the location at which the services are provided, the regularity of the services, the level of interaction between the client's employees/customers and the workers, the level of direction or instruction provided by the client to the workers, the workers access to the client's staff facilities and the relevance of the services provided to the client's business.

- Ward CJ endorsed the view of White J in *UNSW Global*, that the relevant test to apply in determining whether the arrangements between the plaintiff and its clients were "employment agency contracts" within section 37 of the *Act*, required "*an analysis as to whether the workers in question were integrated into the client's business (or added in effect to its workforce), not whether the workers or the provision of their services were integral or*

*essential (as opposed to ancillary) to the client's business or workforce; nor whether the client could itself have performed the relevant tasks*".[66]

- In applying the indicia, Ward CJ made the following findings:

    1. the capacity to direct or control the tasks that are performed, or the way they will be performed, is a relevant but not necessarily determinative consideration; [67]

    2. her Honour accepted the plaintiff's evidence that the security guards were directed to comply with the plaintiff's instructions and to report back to the plaintiff; [68]

    3. the location at which the services were provided by the workers is generally that of the client's premises; [69]

    4. there was a regularity with which the workers provide the services to the clients in the commercial sector but there was a more ad hoc provision of services in the health and event sectors; [70]

    5. the level of interaction between the workers and the client's customers or contractors varies but there is generally at least some interaction between them; [71]

    6. there is some level of direction or instruction reserved to the client under the contractual documentation that was in evidence, though her Honour did not accept that it would extend to the control over or giving of binding instructions as to security decisions of a kind required under the legislation to be made by the security licence holder; [72]

    7. the workers' access to and use of client staff facilities was limited; [73] and

    8. there was an obvious significance to the clients of the security services provided by the plaintiff's workers. [74]

- Balancing all of those factors, Ward CJ concluded that the arrangements by which the plaintiff provided security guard services to the clients in the present case did not constitute "*employment agency contracts*" and did not give rise to a payroll tax liability. [75]

- In relation to the Chief Commissioner's alternative contention, that the arrangements between the plaintiff and its related entities were "*employment agency contracts*", Ward CJ found that the term "*client*" within section 37(1) of the *Act* should be given its ordinary meaning.

- Ward CJ opined that:

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66 *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 at [323] per Ward J in Eq.
67 *Ibid* at [324] per Ward J in Eq.
68 *Ibid* at [325] per Ward J in Eq.
69 *Ibid* at [326] per Ward J in Eq.
70 *Ibid* at [328] per Ward J in Eq.
71 *Ibid* at [328] per Ward J in Eq.
72 *Ibid* at [326] per Ward J in Eq.
73 *Ibid* at [328] per Ward J in Eq.
74 *Ibid* at [328] per Ward J in Eq.
75 *Ibid* at [329] per Ward J in Eq.

> *as someone with whom there is some form of relationship whereby (for reward or otherwise) one party does something on behalf of or at the request of another at least where that is in a professional or business context.* [76]

- In that sense, her Honour noted that:

> *it might be said that E Group Security is the client of the Related Entities insofar as the Related Entities perform an invoicing service for E Group Security but that does not make E Group Security a client for the purpose of procuring of workers. However, more likely to my mind is that the payroll arrangements were not 'client' arrangements but were instances of compliance by the subsidiary with a direction from the parent company.* [77]

- In finding that E Group Security's security guards were not integrated into the workforce of its clients, the Court observed that, while some level of direction was reserved to the client, control over security decisions was maintained by E Group Security (in accordance with its security industry licence).

- The security guards' use of the clients' staff facilities was limited, or in most cases non-existent, and guards wore uniforms with E Group Security's branding.

- Evidence was given by representatives of various clients, including the Australian Turf Club, Cronulla Sharks Leagues Club, Western Suburbs Leagues Club, Baiada Poultry, and various commercial office buildings such as the International Towers at Barangaroo and Chifley Tower. The Court was satisfied that the E Group Security guards were not sufficiently integrated in the relevant client's workforce to give rise to a payroll tax liability.

- The Court was similarly satisfied that the contracts between E Group Security and its Related Entities were not employment agency contracts. The Court held that the term *"client"* in section 37(1) of the *Act* should be given its ordinary meaning – as someone with whom there is some form of relationship whereby (for reward or otherwise) one party does something on behalf of or at the request of another at least where that is in a professional or business context.

- The Court reasoned that the Related Entities performed an invoicing service for E Group Security, it considered this was more likely an instance of compliance by a subsidiary with a direction from the parent company.

- Furthermore, the Court observed that "*procure*" in s 37(1) of the *Act* requires that the employment agent cause the services of a contract worker to be provided to the client with the expenditure of care and effort; and found that the Related Entities did not procure the services of the security guards for E Group Security, but merely facilitated E Group Security's provision of services to its clients by fulfilling a payroll function.

[76] *Ibid* at [340] per Ward J in Eq.
[77] *Ibid* at [340] per Ward J in Eq.

- The question of costs was reserved for further submissions. The Chief Commissioner sought leave to appeal against aspects of the decision of the Supreme Court.

### 4.5.8 Court of Appeal decisions - *E Group Security Pty Ltd Court of Appeal cases*

**The acronym "CCSR" within the Paper refers to the Chief Commissioner of State Revenue.**

**First Judgment - Appeal 1 - *CCSR* v E Group Security Pty Ltd [2022] NSWCA 115 per Bell CJ, Gleeson JA, Leeming JA – Grounds 1 to 3.**

**Second Judgment - Appeal 2 - *CCSR* v E Group Security Pty Ltd (No 2) [2022] NSWCA 259 per Brereton JA, Simpson AJA, Griffiths AJA – Grounds 4 and 5.**

- The Court of Appeal on 6 July 2022 has unanimously dismissed **grounds 1-3 of appeal** from a decision in the NSW Supreme Court to revoke various payroll tax assessments made by the Chief Commissioner of State Revenue in respect of the payroll tax payable by E Group Security Pty Ltd.
    - Grounds 1 to 3 of its amended notice of appeal, which related to its primary claim below, were dismissed by the Court in *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115.
- The Court of Appeal on 13 December 2022 has unanimously upheld **grounds 4-5 of appeal** from a decision in the NSW Supreme Court to revoke various payroll tax assessments made by the Chief Commissioner of State Revenue in respect of the payroll tax payable by E Group Security Pty Ltd.
    - The remaining grounds of appeal, grounds 4 and 5, related solely to the issue whether the "*employment agency contracts*" provisions in the *Payroll Tax Act* applied to make the respondent liable to pay payroll tax on that basis.

**Facts**

- E Group Security Pty Ltd sought a review in the NSW Supreme Court of a determination made by the Chief Commissioner of State Revenue that it was liable for payroll tax as an employment agent under the *Act*.
- Division 8 of Part 2 of that *Act* deems an "*employment agent*" who procures the services of a "service provider" for one of the employment agent's clients to be an "employer", and the person who does the work for the client to be an "employee", with the effect that the employment agent may be liable to payroll tax on payments made by it to the employee.
- It was common ground before the primary judge that the definition of "*employment agency contract*" in section 37 of the *Act* was to be construed in accordance with the reasoning in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852; 102 ATR 577 at [62], that an employment agency contract was a contract under which "*a person procures the services of another person in and for the conduct of the business of the*

*employment agent's client*".

- After the hearing at first instance but before the hearing of the appeal, judgment was delivered in *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441, which suggested that that construction was erroneous and warranted appellate review.

- The Chief Commissioner contended by grounds 1-3 of an amended notice of appeal that UNSW Global had been wrongly decided and that section 37 should have been construed according to its ordinary and natural meaning. The unamended grounds of appeal related to the application of the grouping provisions of the Payroll Tax Act.

- The principal issue on appeal was whether the line of authority stemming from *UNSW Global* should be reconsidered. The Court heard full argument on grounds 1-3 and determined that the balance of the appeal be heard separately.

- In the Supreme Court proceedings before the primary judge (Ward CJ in Eq), neither the Chief Commissioner nor E Group disputed that the definition of "*employment agency contract*" in section 37 of the *Act* was to be construed in accordance with the reasoning in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852; 102 ATR 577 ("*UNSW Global*").[78]

    - In *UNSW Global,* White J held that an employment agency contract was a contract under which "a person procures the services of another person in and for the conduct of the business of the employment agent's client". [79]

    - Ward CJ in Eq applied the *UNSW Global* construction and found that the arrangements by which E Group provided security guard services to its clients did not constitute "employment agency contracts" and did not give rise to a payroll tax liability.

- After the hearing at first instance but before the hearing of this appeal, judgment was delivered in *Bonner v Chief Commissioner of State Revenue [2022] NSWSC 441* ("Bonner"), in which Basten J suggested that the UNSW Global construction was erroneous and warranted appellate review.

- The principal issue on appeal was whether the line of authority stemming from UNSW Global should be reconsidered. The Court heard full argument on grounds 1-3 and determined that the balance of the appeal be heard separately.

- The Court of Appeal held, dismissing grounds 1-3 of the amended notice of appeal, that there should be no departure from the construction of section 37 in the existing case law, where the Payroll Tax Act had been reviewed and amended regularly, and where the Chief Commissioner had himself consistently propounded the test in *UNSW Global*, originally proposed by him in 2016.

[78] *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 at [2] per Ward J in Eq.
[79] *Ibid* at [11] per Ward J in Eq.

**Chief Commissioner of State Revenue Submissions**

The Chief Commissioner submitted:

1. the points made by Basten J in *Bonner* were correct, in that the *UNSW Global* construction imposed an unwarranted gloss upon the definition of "*employment agency contract*", thereby departing from and narrowing the statutory text, contrary to ordinary principles of statutory construction. In particular, the requirement that the services be provided "in and for" the conduct of a business of a client excluded from the scope of the provisions cases where entities caused services to be provided domestically (and not in a business); and

2. the *UNSW Global construction* involved the restoration of a statutory proviso which had been removed from the legislation. That proviso was that the worker "carry out duties of a similar nature to those of an employee", which had been removed by amendments in 1987, and were effectively reinstated by the UNSW Global construction.

**Findings of the Court**

This decision was based on the following findings of the Court:

1. it was difficult "*to draw any inference from the absence of a proviso in 1998 legislation when the previous legislation had been repealed a decade before, and when the 1998 legislation was hastily enacted*"[80];

2. the Court referred to the principle of statutory construction set out by the High Court in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1; [2018] HCA 4 at [52], to find that "*legislative amendment to other provisions in a statute sustains the inference that a legislature is to be understood as endorsing the construction given to unamended provisions of the same statute*" [81];

3. the fact that the *Act* had been reviewed and amended regularly and where the Chief Commissioner had himself consistently propounded the test in *UNSW Global*, which was originally proposed by him in 2016, meant "*there is a powerful inference that the Legislature is to be taken to have endorsed the construction in UNSW Global*". [82] Further, the Court relied on *Olde English Tiles Australia Pty Ltd v Transport for New South Wales* [2022] NSWCA 108 to find that "*the enactment of the 2017 amendments militate strongly against overturning the construction given to the statute in 2016*". [83]

4. there was "*no artificiality in attributing to the Legislature an understanding that the term "employment agency contracts" bore the meaning given in UNSW Global*". [84]

5. there was no compelling reason to depart from the UNSW Global test (although the Court acknowledged that, *"if the construction in UNSW Global were palpably wrong, this Court would overturn it*". [85]

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[80] *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at [24] per Bell CJ, Gleeson JA, Leeming JA.

[81] *Ibid* at [29] per Bell CJ, Gleeson JA, Leeming JA.

[82] *Ibid* at [33] per Bell CJ, Gleeson JA, Leeming JA.

[83] *Ibid* at [42] per Bell CJ, Gleeson JA, Leeming JA.

[84] *Ibid* at [40] per Bell CJ, Gleeson JA, Leeming JA.

[85] *Ibid* at [43] per Bell CJ, Gleeson JA, Leeming JA.

6. the construction in *UNSW Global* reflects a "*not unnatural meaning of the statutory words 'procures the services of another person for a client of the employment agent*'". [86] Further, that construction accords with the purpose of the Act, by taking relationships which fall short of traditional employer/employee relationships and deeming them to be such.

7. the broader construction for which the Chief Commissioner contended gave rise to difficulties, and whilst the Court "would not place great weight on this consideration on which E Group relied, but nonetheless disfavouring impractical outcomes is an orthodox principle of construction" [87]; and

8. the significance of the harmonised payroll tax legislation in other jurisdictions, as well as the fact the change in the legal meaning of the law as contended by the Chief Commissioner would have retrospective effect, led the Court to conclude it would be "far better for the law to be changed, if indeed it is to be changed, by legislation, and with clearly stated transitional provisions". [88]

    - The Chief Commissioner also submitted (grounds 4 and 5) that the primary judge erred in finding as a fact that the related entities did not *"procure"* the security guards, but merely performed a payroll function.[89]

**The Chief Commissioner contended that:**

1. the related entities entered into contractual relationships (or arrangements) with the subcontractors under which the related entities procured service providers to work in E Group's business, in a way that satisfies the definition of "employment agency contract" in section 37(1) of the *Act*; and

2. the documentary evidence supported the Chief Commissioner's claim that the related entities procured service providers to work in and for the business of E Group, rather than just providing a payroll function.

**Decision**

***The Court of Appeal that considered grounds 4 and 5 was constituted by Brereton JA, Simpson AJA and Griffiths AJA.***

- The Court of Appeal allowed the Chief Commissioner's appeal, finding that there was sufficient documentary evidence, apart from the Group Payroll Agreements, which indicated that there was an arrangement which involved the related entities in procuring the supply of security guards for E Group.

- Griffiths AJA (with whom Simpson AJA and Brereton JA agreed), accepted the Chief Commissioner's contention that there were at least three categories of documents which demonstrated there were arrangements in place under which the related entities performed more than a payroll function for the group:

[86] *Ibid* at [46] per Bell CJ, Gleeson JA, Leeming JA.
[87] *Ibid* at [48] per Bell CJ, Gleeson JA, Leeming JA.
[88] *Ibid* at [53] per Bell CJ, Gleeson JA, Leeming JA.
[89] *Chief Commissioner of State Revenue v E Group Security Pty Ltd (No 2)* [2022] NSWCA 259 at [44] per Brereton JA, Simpson AJA, Griffiths AJA.

1. invoices issued by various external subcontractors to one of the three related entities, which contained statements by the subcontractors that they had entered into contractual relations with one of the three related entities (and not with E Group). This indicated that the subcontractors provided security guards to one of the three related entities and not to E Group, and suggested that the related entities procured the supply of security guards for E Group[90];

2. various internal documents, such as a group organisational chart, stated that the related entities employed and paid all security guards. Further, tax invoices issued by the related entities during the relevant period to E Group were stated to expressly relate to "Labour Hire Services", and these were "*strongly suggest that the (related) Grouped Entities were not simply confined to performing a payroll function during the Relevant Years*" [91]; and

3. invoices sent by E Group to clients all contained a statement that the relevant security services were supplied by one or other of the related entities. In making this finding, the Court noted that a fundamental difficulty with E Group's position was that it relied very heavily on the subjective views of its sole director as to how the related entities were intended to operate. Those views were contradicted in varying degrees and respects by the various categories of documents. The Court emphasised that "*the relevant legal issues fall to be determined primarily by reference to the contemporaneous documentation*" [92].

### 4.5.9 Infinity Security Group v Chief Commissioner of State Revenue [2023] NSWCATAD 28

- This was an application to the Tribunal[93] under s 55 of the *Administrative Decisions Review Act* 1997 (NSW) (ADR Act) for a review of assessments of payroll tax for each of the 2016 to 2019 tax years issued to the Applicant on 11 March 2020 under s 37 of the Payroll Tax Act 2007 (NSW) (PTA) (Assessment).

- The application was heard on 13 - 14 October 2022.

- The Applicant carried on business as a private security contractor. Under agreements with its clients, the Applicant provided:

    - security guards to licensed venues such as pubs and clubs and at commercial businesses;

    - it also acted as a subcontractor supplying guards to other security companies;

    - to provide these services, the applicant used its own employees as well as additional guards supplied by third party subcontractors.

- The Applicant sought review of a determination by the Chief Commissioner that the applicant was an "*employment agent*" and liable for payroll tax on payments it made to its

[90] *Ibid* at [73] per Brereton JA, Simpson AJA, Griffiths AJA.
[91] *Ibid* at [88] per Brereton JA, Simpson AJA, Griffiths AJA.
[92] *Ibid* at [97] per Brereton JA, Simpson AJA, Griffiths AJA.
[93] Administrative and Equal Opportunity Division.

subcontractors.

- The determination related to the provision of security guarding services by the applicant to its clients.

**Applicant's submissions**

- The Applicant's primary submission was that it does not procure the services of the security guards.
    - while they were performing necessary and, in some cases, integral functions for the clients, in so far as the pubs and clubs clients are concerned, the guards were not integrated into the clients' businesses (or effectively added to their workforces). As such that they were not providing services "*in and for*" the conduct of the clients' businesses.
    - it follows that the arrangements between Infinity and its pubs and clubs clients in respect of the guards were not employment agency contracts within section 37 of the *Act*.
    - "for" (in the sense of "in and for the conduct of the business of") its clients (referring to *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 ("*UNSW Global*") at [62] per White J, as his Honour then was). It was noted that this construction of section 37 of the Act was recently accepted by the Court of Appeal in *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115.[94]
- In this regard the applicant submitted:

1. under the *Security Industry Act* 1997 a licensee is prohibited from delegating its functions to another person who is not the holder of the relevant class of licence, and individuals carrying out security activities must be employed by the holder of a master licence; [95] and
2. for policy reasons, the *Security Industry Act 1997* prohibits security guards from operating as a labour force available for hire to be added to an unlicensed person's workforce (the policy reason being that an unlicensed person does not have the ability or expertise to control, direct and supervise security guards in a way that will promote the safety of those guards and members of the public).[96]

**Chief Commissioner's submissions**

- The Chief Commissioner submitted that the *Security Industry Act* 1997 does not support the proposition – either in law or in fact – that security firms necessarily maintain control and supervision over their guards to the exclusion of the firms' clients.[97]

[94] *Infinity Security Group v Chief Commissioner of State Revenue* [2023] NSWCATAD 28 at [23] per S Dunn, Senior Member.
[95] *Ibid* at [107] per S Dunn, Senior Member.
[96] *Ibid* at [109] per S Dunn, Senior Member.
[97] *Ibid* at [110] per S Dunn, Senior Member.

**Tribunal's comments**

- Senior Member Dunn referred to the judgment of Ward CJ (as Her Honour then was) in *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 at [318], endorsing comments that:
    - the analysis is a fact sensitive one and much was made of the indicia identified in cases such as *HRC Hotel Services* when determining whether there is the requisite integration of the service providers into the relevant client's workforce;[98]
    - the mere fact that two cases may concern the provision of services of security guards does not mandate a similar conclusion. [99]

**Tribunal decisions**

**1. Pubs and clubs clients**

- Senior Member Dunn found that that the arrangements between the applicant and its pubs and clubs clients were not employment agency contracts within section 37 of the *Act*.
- Senior Member Dunn decided that the guards were not integrated into those clients' businesses; and not effectively added to their workforces, such that they were not providing services "*in and for*" the conduct of those clients' businesses. [100]

Senior Member Dunn's key findings in respect of the relevant factors included:

a. the interactions between the guards and the customers (and between the guards and the clients' staff) were all interactions which were necessary in order for the guards to perform their security duties;

b. while the evidence did not establish that the applicant's logo was clearly visible on the guard's uniforms, "nonetheless the guards' uniforms clearly identified them as security guards and distinguished them from the clients' staff members"; [101]

c. the clients did not have control over the guards in the performance of their security duties – in particular, the security guards were trained by the applicant, rostered on by the applicant, took their instructions from and were supervised by either their Infinity supervisor or the Applicant;

d. as "a matter of law, the security guards could not actually have been added to the clients' workforces" [102] because of the operation of the *Security Industry Act* 1997;

e. whist there was some overlap between the guards' security functions and the staff's non-security functions, "as a general rule the security guards generally carried out the security duties they were trained to do and the venue staff did not"; [103] and

98 *Ibid* at [118] per S Dunn, Senior Member.
99 *Ibid* at [119] per S Dunn, Senior Member.
100 *Ibid* at [124] per S Dunn, Senior Member.
101 *Ibid* at [120(4)] per S Dunn, Senior Member.
102 *Ibid* at [120(7)] per S Dunn, Senior Member.
103 *Ibid* at [120(9)] per S Dunn, Senior Member.

f. whilst it was part of the clients' businesses to provide a safe environment for customers, it does not follow that the venues were in the business of providing security services.

- Senior Member Dunn concluded that "*the services provided by the guards were not services provided to help conduct the client's business in the same way, or much the same way, as it would through an employee. They were generally quite separate and distinct services which, in fact, the employees generally did not and could not provide*". [104]

**2. Other clients**

- In respect of the arrangements between the applicant and its clients other than its pubs and clubs clients, Senior Member Dunn found that the applicant had not discharged its onus of establishing those arrangements were not employment agency contracts, or that the assessments were incorrect.

- Senior Member Dunn noted that, in relation to the applicant's provision of guards to other security companies:

> "*Such arrangements strike me as being of an entirely different nature and the services that the guards would likely be providing under those arrangements might well be the same as the services of the workforce of those clients*". [105]

## 4.6 Grouping Provisions

### 4.6.1 Overview

- The grouping provisions were introduced in 1975 to combat a tax avoidance practice of creating multiple entities to employ workers engaged in a single business or enterprise, allowing each entity to claim a separate threshold.

- The grouping provisions prevent groups of commonly controlled businesses from claiming multiple thresholds. However, the provisions may apply even though avoidance of payroll tax was not one of the purposes of establishing any of the members of a group.

The Chief Commissioner' application of the grouping provisions is explained within the Commissioner's Practice Note CPN 009.

### 4.6.2 Commissioner's Practice Note CPN 009 – Payroll Tax Grouping

This practice note explains:

- How corporations that are related within the meaning of section 50 of the *Corporations Act* 2001 (Cth) are grouped and are not able to be excluded from the group.

[104] *Ibid* at [123] per S Dunn, Senior Member.
[105] *Ibid* at [126] per S Dunn, Senior Member.

- How businesses can be grouped where an employee performs duties for another business.
- How a person, or persons together, have a controlling interest in a business.
- How an entity has a controlling interest in a corporation under the tracing provisions.
- When groups are amalgamated to form a larger group.
- The implications of grouping for interstate employers.
- How the discretion to exclude a member from a group is applied.

[ Website: https://www.revenue.nsw.gov.au/help-centre/resources-library/cpn/cpn009 ]

### 4.6.3 How are employers grouped?

Groups may arise in the following circumstances:

- Corporations that are related bodies corporate within the meaning of the *Corporations Act* 2001 (Cth);
- The use of common employees;
- Common control of businesses by the same person or set of persons; or
- Tracing of interests in corporations.

Groups of employers may include individuals, corporations, partnerships and trustees.

An entity that is not an employer may be part of a group even though the business conducted by the entity has no employees and does not make any payments that are taxable "wages" as defined in the Act; (see *Edgely Pty Ltd v CCSR [2015] NSWCATAD 16*).

If an entity is a member of 2 or more groups, those smaller groups become a single larger group.

### 4.6.4 Extended meaning of "business" [106]

A person may be conducting a business for payroll tax purposes even if its activities do not satisfy the ordinary or accepted definition of a "business".

The ordinary concept of a "business" is an activity or enterprise carried on for profit or gain on a continuous or repetitive basis.

The *Act* extends this ordinary meaning to include a number of activities or circumstances that are not usually regarded as a business, including:

- any activity carried on for fee, gain or reward, such as the leasing of a property;

[106] *Edgely Pty Ltd v CCSR* [2015] NSWCATAD 16.

- employing a person to work in or in connection with another business; for example, a family company may engage a family member to work for another business;

- carrying on a trust, including a dormant trust;

An example of "*carrying on a trust*" is a bare trust under which the trustee's only active duties are to hold assets and deal with the assets in accordance with directions given by the beneficiary;

An example of a dormant trust is a trust that does not conduct any transactions.

- holding money or property in connection with another business, for example where a person (which may be an individual or a corporation) is the owner of a building which is used in a business conducted by another person (who may be either an individual or a corporation).

### 4.6.5 Recent grouping payroll tax cases

The acronym "**CCSR**" within the Paper refers to the Chief Commissioner of State Revenue.

- *CCSR v Elanor Operations Pty Ltd* [2022] NSWCA 222

### 4.6.6 *CCSR v Elanor Operations Pty Ltd* [2022] NSWCA 222

**Background**

- The plaintiffs sought review of a decision by the Chief Commissioner not to exercise the discretion under section 79 of the *Act* to exclude the plaintiff companies from a single payroll tax group for the purposes of assessment of payroll tax.

- The plaintiffs had identified five groups of companies within its overall corporate structure and did not challenge the Chief Commissioner's decision that the plaintiff companies properly formed a single "*group*" for payroll tax purposes.

- Nevertheless, the plaintiffs maintained that they were entitled to exclusion from grouping under section 79 of the *Act* with the effect of separating that single payroll tax group into five separate groups.

  The plaintiffs are all companies of which Mr Glenn Norman Willis is a director, all but one of which he is the sole director. [107]

**The assessments**

- There were two payroll tax assessments in issue, both being notices issued on 26 May 2017 to Clarence Hotel Management Pty Ltd, one for the period between 10 October 2014 and 30

[107] *Elanor Operations Pty Ltd* v *CCSR* [2022] NSWSC 104 at [1] per Ward CJ in Eq.

June 2015, and the other for the year ended 30 June 2016. Accordingly, the relevant period in relation to de-grouping was from 10 October 2014 to 30 June 2016.

**Relevant issues considered by the Court**

The Court considered the relevant issue to be decided was (as per section 79 of the *Act*):

> *58. Thus the relevant question in the present case is as to whether, and to what extent, the business carried on by each plaintiff is carried on independently of, and not in a way that is connected with the carrying on of, of a business carried on by another plaintiff. That issue is to be determined having regard to matters such as the nature and degree of ownership and control of the businesses; and the nature of the relevant businesses.* [108]

**Decision**

Her Honour opined the following:

> *160. To my mind, the businesses of the plaintiff companies within each of sub-groups 2-5 respectively, are relevantly carried on independently of, and not connected sufficiently in a material sense with the businesses carried on by any other sub-group or by the companies in sub-group 1.* [109]

> *161. Therefore I have concluded that the discretion to de-group should be exercised. I do not consider it necessary to make the declaration sought by the plaintiffs. I consider it sufficient to revoke the decision not to exercise the discretion to exclude the plaintiff companies from the Payroll Tax Group and to remit the matter to the defendant for determination. As to costs, they should follow the event.* [110]

The Court's reasoning is set out at the following paragraphs [148]-[159], summarised below:

- The test, as framed in section 79 of the *Act*, is not one of reasonableness; nor is it expressed by reference to whether there is an intentional association or limited to groups of companies within a family or small business context. [111]
- The connections between the businesses "*must be material connections*". [112]
- The various businesses operated as separate managed investment funds under a strict regulatory scheme, which required that priority be given to the interests of the members of those funds, and that it would be inconsistent with that regulatory scheme for control to be exercised in respect of one business that would be to the detriment of another business outside that managed investment fund.[113]

[108] *Elanor Operations Pty Ltd* v *CCSR* [2022] NSWSC 104 at [58] per Ward CJ in Eq.
[109] *Ibid* at [160] per Ward CJ in Eq.
[110] *Ibid* at [161] per Ward CJ in Eq.
[111] *Ibid* at [148] per Ward CJ in Eq.
[112] *Ibid* at [149] per Ward CJ in Eq.
[113] *Ibid* at [151] per Ward CJ in Eq.

- In relation to the degree of control:
    - despite common directorship, there is ultimately not a majority shareholding of Elanor Investors Ltd in any of the entities in the underlying funds; and
    - whilst there is a capacity to influence and control (which is relevant), the capacity legitimately to control the businesses of other companies in the group was constrained, as the businesses were required to be run in the interests of members of the discrete fund.
- In relation to the commonality of ownership:
    - it was significant that the respective funds largely have discrete groups of investors;
    - "there is much force in the submission that investors in one managed investment scheme would not expect to be liable for payroll tax liabilities of discrete managed investment scheme entities". [114]
- The key personnel supplied by Elanor Operations Pty Ltd have a function that is restricted largely to oversight, [115] and it was performed for various separate clients, each of whom would expect individual consideration.
- The fact that arrangements for the charging of fees between entities are not on an arm's length basis (e.g. no written agreements were in place) was a factor that tends towards a finding of connection,[116] but ultimately little weight should be placed on this factor because the fees for the services were charged by Elanor Operations Pty Ltd to the trustee and not directly to the plaintiff companies.

**The issue that was not addressed at first instance.**

- The Chief Commissioner's assessments resulted from a voluntary disclosure by the Plaintiffs, who, in submissions to the Chief Commissioner, identified five groups of companies within the overall corporate structure of the group.
- In the appeal to the Supreme Court, there was no challenge to the Chief Commissioner's decision that the plaintiff companies properly form a single "*group*" for payroll tax purposes, and the Court accepted the grouping was correct without argument from either side.
- The Court noted that Mr Willis was a director of the first plaintiff (Elanor Operations Pty Ltd ("Elanor Operations"), and the sole director of each of the other plaintiffs. Accordingly, the provisions of s 72(2)(c) of the *Act* would apply and each of the five groups of companies would constitute a (single, larger) group:[117] (by application of "*subsuming*" under section 79 of the *Act*).
- Under section 72((2)(c)(ii) of the *Act* a sole director of a company has a controlling interest in the company's business, meaning all the plaintiff companies except Elanor Operations were purportedly grouped by section 74 of the *Act* and the smaller groups were subsumed into a

[114] *Ibid* at [156] per Ward CJ in Eq.
[115] *Ibid* at [158] per Ward CJ in Eq.
[116] *Ibid* at [159] per Ward CJ in Eq.
[117] *CCSR v Elanor Operations Pty Ltd* [2022] NSWCA 222 at [3].

single, larger group.

- Nevertheless, section 72(2)(g) of the *Act* provides that if a business is conducted by a trustee, a beneficiary, or beneficiaries of the trust together who is or are entitled to more than 50% of the value of the interests in the trust have a controlling interest in the trust business.

    - The company does not have a controlling interest in the business conducted by the trustee merely because the person is a sole director of the company, because the company grouping provisions in S.72(2)(c) of the *Act* do not apply to a business conducted by a trustee, whether it's a corporation or not.

- There are other *"indirect*" grouping provisions that apply to trustees, and these may have applied to the businesses conducted by the Plaintiff companies in this case. However, because the Plaintiffs admitted to being grouped under the company grouping provisions, the application of the grouping provisions was not examined by the Court, nor by the Chief Commissioner.

# 5. Conclusion

- Revenue NSW use best practice principles to focus our efforts on areas that require greater education to comply, to minimise disruption and red tape for most people and businesses that do the right thing.

- Revenue NSW continues with its payroll tax reviews and audits of clients across NSW and across industries.

- The case law cited within the paper illustrates the range of contention for Payroll Tax disputes within the state of NSW.

- Taxpayers are urged to get advice about their circumstances in a timely way - payroll tax has complexities and it necessary to obtain advice from appropriate professionals.