



## Précis Paper

### The Employment Agency Contract Rules and Payroll Tax

This is a useful discussion about recent developments in payroll tax, and important considerations for all businesses engaging contractors.

#### **Discussion Includes**

- Background to payroll tax in NSW
- The Employment Agency Contract Provisions
- Key elements of an employment agency contract
- The decision in *UNSW Global v Chief Commissioner of State Revenue*
- Trends in payroll tax litigation
- Statutory interpretation
- Lessons for practitioners

## Précis Paper

### The Employment Agency Contract Rules and Payroll Tax

1. In this edition of BenchTV, Keni Josifoski (Barrister, New Chambers, Sydney) and Adam Nicholas (Director, PwC, Sydney) discuss the recent decision of *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852.

#### Background and Material Facts

2. UNSW Global involved a wide range of services, and had a business unit called Unisearch which administered a database of thousands of experts, some of which were employed by UNSW and some of which were external to the university. The services included expert opinion services, in which a law firm, for example, would engage Unisearch to find an expert; consulting projects, both domestically and internationally; and testing services.
3. In the domestic consulting service line, Unisearch provided the services of experts to provide reports or sometimes other services, for jobs in Australia. The experts were not retained as witnesses in connection with litigation, but were engaged to provide expert services in relation to the client's business. In most cases, the work of the expert involved providing a written report.
4. There was no dispute that the experts retained by Unisearch were independent contractors. They were not subject to control or direction by Unisearch in how they were to undertake their engagement.

#### Payroll Tax and the Employment Agency Contract Provisions

5. The dispute before the Supreme Court involved an appeal from a payroll tax assessment. Both s 3C of the *Pay-roll Tax Act 1971* (NSW) and ss 37-42 of the *Payroll Tax Act 2007* (NSW) applied to the dispute, which covered a period from 2007 to 2012. Both Acts were in substance the same.
6. Payroll tax was introduced in to impose tax on wages and compensation paid to employees. This was then extended to apply to some contractors, where the contractor was viewed as being more akin to an employee. However, over the years, it was observed that if an intermediary was placed in between a principal organisation and the contractor providing the services, a different outcome on payroll tax might be reached such that there was no payroll tax liability. As a result, the Employment Agency Provision rules were brought in to ensure that where there was an intermediary, a similar outcome would be achieved.

7. The question in this case was whether or not the interpretation of these rules had been expanded to mean that other businesses have been captured which ordinarily one would not expect to have been caught by these provisions. The sections were originally intended to be anti-avoidance provisions, designed to capture contractors or people who were using intermediaries to avoid payroll tax. The issue was therefore whether the provisions could capture conduct which was not designed to avoid payroll tax liability.
8. Under s 37 of the *Payroll Tax Act 2007*, an employment agency contract contains three elements: (1) a contract between the principal and intermediary; (2) a contract for the procurement of services; and (3) services that are procured for a client of the employment agency.
9. The primary focus of recent cases has been on whether or not a contractor or a service provider has been "procured". "Procured" has been interpreted broadly to mean to make available, to facilitate, to supply or to enable, which will generally capture most conduct by an intermediary.
10. *UNSW Global v Chief Commissioner of State Revenue* focused more on the third element, whether the services have been procured for a client. In interpreting the meaning of "for a client", White J considered the "mischief" of ss 3C and 37, stating "the mischief to which s 3C and s 37 was directed was where a person procured the services of another to perform services in and for the purposes of its client's business where the person's status as employee or independent contractor might be unclear" (at [30]). White J had regard to the history of the provisions and when they were amended, as well as the Second Reading Speech which suggested that bona fide independent contractors should not be caught by the legislation. Moreover, the purpose of amendments to the Acts had not been to broaden the tax base but to strengthen the tax base.
11. White J thus read words into the phrase "for a client", holding (at [62]):

*Applying a purposive construction, as mandated by s 33 of the Interpretation Act, I think that the definition of an employment agency contract as being a contract under which a person (the employment agent) "... procures the services of another ... for a client of the employment agent" can be read as meaning 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.*
12. White J continued at [65] that "where the services, although provided for the client's benefit, are not provided by the service provider working in the client's business, the arrangement does not fall within the intended scope of the provision".

13. In the course of the litigation, UNSW Global had pointed out the anomaly that would arise should ss 3C and 37 be interpreted literally. A strict interpretation would lead to a wide range of conduct being captured and subject to payroll tax, including law firms who brief barristers or investment banks that engage valuers. Reflecting on this point, the Commissioner essentially conceded that the Expert Opinion Services would not be captured by the relevant provisions, and the Court concluded that none of the payments made by UNSW Global to consultants who provided opinions or appeared as expert witnesses were taxable wages. In none of those cases could it be said that the work done by the consultant was being done in the conduct of the client's business. The same was true of the moneys paid to the experts for undertaking testing in the laboratory facilities of the University of New South Wales.
14. However the Chief Commissioner disputed that this was so in relation to UNSW Global's domestic consulting project line of business. The Commissioner contended that such consultants provided services "in, and for the purposes of, the ordinary conduct of the client's businesses". However, the Court concluded that the evidence as to the work done by experts retained by UNSW Global for clients in the domestic and international consulting project service lines showed that the work done by such experts was provided for the benefit of the client's business, but is not carried out in the client's business.
15. Another relevant consideration was the fact that had UNSW Global engaged the contractors directly, they would have been independent contractors and may have been eligible for an exemption to payroll tax. By applying the rules literally, the result could have been that an intermediary, who is providing independent contractors who would have been eligible for an exemption if hired directly, would attract a payroll tax liability. This would broaden the tax base, rather than strengthening, contrary to the policy of the Act, and could act as a deterrent to doing certain types of business.
16. At the start of the litigation, the parties agreed to select a few contractors to be representative of Unisearch's business. Following White J's decision, UNSW Global sought a declaration that it was not an employment agent for the purposes of ss 3C or 37. The Commissioner resisted the making of these declarations, arguing that the declarations sought went beyond the matters that had been the subject of evidence and submissions. The Court rejected this contention, finding that the declarations were appropriate because the evidence before the court was representative of Unisearch's business more broadly: *UNSW Global Pty Ltd v Chief Commissioner of State Revenue (No. 2)* [2017] NSWSC 26.
17. The presenters reminded viewers that the key lesson to be drawn from this case is that the payroll tax system can apply to contractors as well as employees, but it can be difficult to

form a view as to whether the employment agency rules apply by simply looking at the direct contractor engagement on its own. A practitioner should look at the big picture of the business: What is the business doing? What is the deliverable that it is providing to its clients? What role do contractors play in providing that deliverable to the client? Ultimately, the key consideration is how involved the contractor will be in the business of the client. Where a contractor must be, by definition, independent, such as an expert for a law firm or a valuer for a bank, the contractor will not attract a payroll tax liability.

## **BIOGRAPHY**

### Keni Josifoski

Barrister, New Chambers, Sydney

Keni Josifoski was admitted to the legal profession in 2011 and called to the Bar in 2015. His primary practice is in taxation, insolvency, commercial law, corporate law, equity and administrative law.

### Adam Nicholas

Director, PwC, Sydney

Adam is a Chartered Accountant currently working as a Director in the Employment Taxes Team within PwC's People & Organisation Group, with 10 years of experience across tax and financial assurance.

## **BIBLIOGRAPHY**

### Focus Case

*UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852

### Benchmark Link

[https://benchmarkinc.com.au/benchmark/insurance/benchmark\\_07-02-2017\\_insurance.pdf](https://benchmarkinc.com.au/benchmark/insurance/benchmark_07-02-2017_insurance.pdf)

### Judgment Link

<https://www.caselaw.nsw.gov.au/decision/58572a60e4b058596cba2d8c>

### Cases

*UNSW Global Pty Ltd v Chief Commissioner of State Revenue (No. 2)* [2017] NSWSC 26

### Legislation

*Pay-roll Tax Act 1971* (NSW)

*Payroll Tax Act 2007* (NSW)

*Interpretation Act 1987* (NSW)