SUPREME COURT OF QUEENSLAND

CITATION:	*Brisbane Bears – Fitzroy Football Club Limited v Commissioner of State Revenue* [2017] QCA 223
PARTIES:	**BRISBANE BEARS – FITZROY FOOTBALL CLUB LIMITED** ABN 43 054 263 473 (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	Appeal No 11614 of 2016 SC No 12308 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 231 (Bond J)
DELIVERED ON:	6 October 2017
DELIVERED AT:	Brisbane
HEARING DATE:	26 April 2017
JUDGES:	Sofronoff P and Philippides JA and Atkinson J
ORDERS:	**1. The appeal is dismissed.** **2. The appellant is to pay the respondent's costs of the appeal, to be assessed on the standard basis.**
CATCHWORDS:	TAXES AND DUTIES – PAYROLL TAX – LIABILITY TO TAXATION – WHAT ARE WAGES – where the appellant as a member of the AFL employed coaches and players – where the agreements governing the employment relationships provided for marketing and promotional services – where the appellant made payments to players and coaches for the use of their image – where the appellant contends that the payments made for the use of the players' and coaches' images were not "wages" that were liable to payroll tax – whether the payments made by the appellant for the use of image rights were made in the course of the provision of marketing and promotional services – whether those payments were "taxable wages" and therefore liable to payroll tax *Payroll Tax Act* 1971 (Qld), s 9, s 10 *Taxation Administration Act* 2001 (Qld), s 70

Brisbane Bears – Fitzroy Football Club Ltd v Commissioner of State Revenue [2016] QSC 231, related
Murdoch v Commissioner of Pay-roll Tax (Vic) (1980) 143 CLR 629; [1980] HCA 33, applied
Mutual Acceptance Co Ltd v Federal Commissioner of Taxation (1944) 69 CLR 389; [1944] HCA 34, applied
Starrim Pty Ltd v Commissioner of Taxation (2000) 102 FCR 194; [2000] FCA 952, distinguished
WA Flick & Co Pty Ltd v Federal Commissioner of Taxation (1959) 103 CLR 334; [1959] HCA 46, applied

COUNSEL: M Richmond SC, with M Lakis, for the appellant
M Brennan QC, with G Hartridge, for the respondent

SOLICITORS: KPMG Law for the appellant
Sparke Helmore for the respondent

[1] **SOFRONOFF P:** I agree with the reasons of Philippides JA and with the orders her Honour proposes.

[2] **PHILIPPIDES JA:** The appellant, Brisbane Bears – Fitzroy Football Club Ltd, a member of the Australian Football League (AFL) whose team, known as the "Brisbane Lions", competed in competitions conducted by the AFL, employs players and coaches and is subject to payroll tax under the *Payroll Tax Act* 1971 (Qld) (the Act) on taxable wages paid to players and coaches.

[3] The appellant's appeal is against the decision of the primary judge dismissing its application pursuant to s 70 of the *Taxation Administration Act* 2001 (Qld) for review of part of the decision of the respondent, the Commissioner of State Revenue, disallowing objections against reassessment of payroll tax under the Act for the years ended 30 June 2008 to 2012.

[4] The central issue at trial was the characterisation, for the purpose of the Act, of payments made, pursuant to certain agreements, to players and coaches employed by the appellant for the use of image rights. The primary judge held that the payments were correctly characterised as payments made by the Club (directly or through the associated entity) to the player as an employee and in consideration of promotional and marketing services performed or rendered by that employee[1] and thus "taxable wages" under a two stage approach.

[5] The question in this appeal is whether the primary judge erred in finding[2] that payments made by the appellant to players and coaches for use of images, whether directly or indirectly, are liable to payroll tax under s 9 and s 10 of the Act as taxable wages, which in turn raises the issue of whether the payments constituted "wages for the purposes of the Act".

Factual background

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1 *Brisbane Bears – Fitzroy Football Club Ltd v Commissioner of State Revenue* [2016] QSC 231 at [57].

2 See [2016] QSC 231 at [57]-[58].

[6] At trial, the facts were agreed between the parties and set out in a Statement of Agreed Facts and an agreed bundle of documents. The relevant facts and provisions of the various agreements are summarised in the primary judge's reasons.

The contracts relevant to players

[7] The appellant as a member of the AFL employed various players in the AFL competition. The relevant agreements governing players' employment and all payments from the appellant were:[3]

(1) two Collective Bargaining Agreements (CBAs) (the first being for the years 2007-2011 and the second for the years 2012-2016);

(2) the individual Standard Playing Contracts (SPCs); and

(3) the individual Additional Services Agreements (ASAs).

The Collective Bargaining Agreements

[8] The CBAs (to which the parties were the AFL and the Players' Association) operated as binding agreements between those parties and also each AFL Club and each player,[4] and so were overarching agreements.

[9] Each CBA provided that each player who was employed by an AFL Club must enter into a SPC with the AFL and the relevant AFL Club.[5] The SPC was agreed to be the form of contract for the employment of a player by an AFL Club to play Australian Football.[6] Certain minimum terms and conditions of employment were specified in a schedule to the agreement and stated to apply to, and be incorporated into, any player contract.[7]

[10] The CBAs also contained certain terms which regulated the players' involvement in promotion and marketing:[8]

(a) The term "Image" was defined to include a player's "name, photograph, likeness, reputation and identity".[9]

(b) All players were required to make a certain number of appearances for the purposes of "game development and promotion".[10] Each player authorised the use of his Image by the AFL and the Club, at no cost to them, for certain promotional activities.[11]

(c) Players were also specifically authorised to use their own Image or licence its use in certain circumstances.[12] One of the permitted means under the CBAs

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3 [2016] QSC 231 at [33].

4 [2016] QSC 231 at [34] referring to Recitals A to D and cl 2.1 of the 2007 CBA and Background A to D and cl 2(a) of 2012 CBA.

5 [2016] QSC 231 at [35] referring to cl 18.1 of the 2007 CBA and cl 24.1 of the 2012 CBA.

6 [2016] QSC 231 at [35] referring to cl 1.1 (definition of "Standard Playing Contract") of the 2007 CBA and cl 1.1 (definition of "Standard Playing Contract") of the 2012 CBA.

7 [2016] QSC 231 at [35] referring to cl 5 and sch B of the 2007 CBA and cl 4 and sch C of the 2012 CBA.

8 [2016] QSC 231 at [36].

9 [2016] QSC 231 at [36](a) referring to cl 1.1 (definition of "Image") of the 2007 CBA and cl 1.1 (definition of "Image") of the 2012 CBA.

10 [2016] QSC 231 at [36](b) referring to cl 20 of the 2007 CBA and cl 26 of the 2012 CBA.

11 [2016] QSC 231 at [36](b) referring to cl 21.7 of the 2007 CBA and cl 28(h) of the 2012 CBA.

12 [2016] QSC 231 at [36](c) referring to cl 21.1(a) of the 2007 CBA and cl 28(a) of the 2012 CBA.

by which a player could monetise the use of their own Image was by entering into an *ASA* with their employer either directly or indirectly.[13]

(i) By cl 16.1 it was stated:[14]

- A Player, or an Associate of a Player which has been licensed to use the Player's Image, may contract with an AFL Club and/or Sponsor of an AFL Club to derive payments as a direct result of bona fide promotions/marketing by that Player in accordance with the Guidelines for ASAs and the definition of Football Payments.
- Such arrangements are separate and distinct from the SPC which regulates the employment of a Player to play Australian Football for an AFL Club.
- Payments made pursuant to a marketing contract shall be in addition to and separate from payments made to the Player for performance of service as a professional footballer and shall not be taken into account in calculating Total Player Payments[15] except as provided in sub-clause 16.2.

(ii) By the Guidelines for ASAs, it was provided:[16]

1. A Player may contract with an AFL Club and/ or Sponsor of an AFL Club to derive payments as a direct result of bona fide marketing by that Player in accordance with the Guidelines agreed between the AFL and AFLPA for the AFL Club and/or Sponsor of an AFL Club. Such payments shall be in addition to and separate from payments made to the Player for performance of service as a professional footballer and not taken into account in calculating Total Player Payments.

2. Player marketing contracts may include arrangements of the types set out below:

   Type 1
   Player enters into an agreement directly with a sponsor of the Player's AFL Club for marketing work.

   Type 2
   Player enters into an agreement with his AFL Club to promote sponsors of the AFL Club and to promote the AFL Club itself.

   Type 3

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13 [2016] QSC 231 at [36](d)(i)-(ii).

14 The equivalent term in the 2012 CBA was cl 11.1 and it was not materially different.

15 The CBAs also included salary cap provisions, which operated by reference to the defined term "Total Player Payments": [2016] QSC 231 at [37](e).

16 Schedule D of the 2007 CBA. The equivalent Guidelines in the 2012 CBA were in sch H and are not materially different.

> Player licenses the right to use his name, image and likeness to a related entity (as defined in the AFL Player Rules). The related entity contracts with the Player's AFL Club or sponsors of the AFL Club for endorsements and promotions. The related entity employs the Player.

Standard Playing Contracts

[11] The terms of the CBAs were by cl 2 expressly incorporated into the SPCs (tripartite contracts between the Club, the relevant player and the AFL) and governed the terms of employment of the player by the Club. Accordingly, the provisions of the CBAs concerning the use of Image and the player's involvement in promotion and marketing were specifically acknowledged and preserved by the terms of the SPCs.[17]

[12] The SPC:[18]

(a) Outlined the services to be performed and rendered by the player in his capacity as an employee of the Club, including playing football for the Club (see cl 4: "Player's Duties").

(b) Provided for the payments to be made by the Club to the player in respect of the services to be performed and rendered by the player (in cl 6).

Additional Services Agreements

[13] As mentioned by cl 16 of the CBAs, a player could monetise the use of their own Image by entering into an Additional Services Agreement. Consistent with the terms of the CBAs, the Club entered into two types of ASAs with players during the relevant period:[19]

(a) a direct ASA, being an agreement between the Club and a player personally; and

(b) an indirect ASA, being an agreement between the Club, an associated entity of a player and the player.

[14] The relevant terms from the template for each form of ASA were identified by the primary judge in the table extracted below:[20]

Provision	**Direct Additional Services Agreement**	**Indirect Additional Services Agreement**
Parties	The Club and the player	The Club, the player and a company licensed by the player
Recitals	B. The AFL Player Rules and the CBA prescribe that the Club and the **Player may enter into an arrangement for the Player to perform Additional Services.** C. **The Player's Image is valuable and**	C. **The player has granted to the company a non exclusive right and licence** to use and exploit the name, likeness, image, reputation and expertise of the Player.

17 [2016] QSC 231 at [38]-[39].
18 [2016] QSC 231 at [40].
19 [2016] QSC 231 at [41]-[42].
20 [2016] QSC 231 at [43].

Provision	Direct Additional Services Agreement	Indirect Additional Services Agreement
	can be beneficially used by the Club in or in connection with the conduct of the Club's business. D. **The Player has agreed to perform Additional Services for the Club** in accordance with the terms and conditions recorded in this Agreement.	D. The Player has been engaged by the Company to provide services to enable the Company to carry on its business. E. **The Company has agreed to grant the Club the right to use the Player's Image and the Company will procure the Player to perform the Additional Services for the Club** in accordance with the terms and conditions recorded in this Agreement.
Definitions	"**Additional Services**" has the same meaning in the AFL Player Rules and for this Agreement, **includes the Additional Services set out in Schedule 1**. "**Fee" means the amount specified** in item 1 of Schedule 2. **"Player's Image" includes the Player's name, photograph, likeness, reputation and identity**.	"**Additional Services**" has the same meaning in the AFL Player Rules and for this Agreement, **includes the Additional Services set out in Schedule 1**. "**Fee" means the amount specified** in item 1 of Schedule 2. **"Player's Image" includes the Player's name, likeness, image, reputation and expertise.**
Clause 2	2.1 Engagement to Perform Additional Services **The Player shall perform the Additional Services for the Club** during the Term. 2.2 Term (a) The Player shall perform the Additional Services for the period set out in item 4 of Schedule 2, unless terminated earlier in accordance with the provisions of this Agreement.	2.1 Engagement to Perform Additional Services **The Company will provide the Club with a non-exclusive right to use the Players Image and will ensure that the Player shall perform the Additional Services for the Club** during the Term. 2.2 Term (a) The Club will have the right to use the Players Image and the Company will ensure the Player performs the Additional Services for the period set out in item 4 of Schedule 2, unless terminated earlier in accordance with the provisions of this Agreement.
Clause 3	3.1 Duties **The Player must for the Term:** **(a) perform the Additional Services in a diligent, faithful and efficient manner**; (b) **comply with all lawful orders and directions given by the Club**, or any person authorised by the Club, **in relation to the performance of the Additional Services**; … 3.2 Use of Player's Image **The Player agrees that the payment of the Fee entitles the Club to use the Player's Image for purposes related or connected to the Additional Services** as specified on [sic] Schedule 1 of this Agreement.	3.1 Duties **The Company shall and shall procure that the Player:** **(a) performs the Additional Services in a diligent, faithful and efficient manner**; (b) **complies with all lawful orders and directions given by the Club**, or any person authorised by the Club, **in relation to the performance of the Additional Services**; … 3.2 Use of Player's Image **The Company agrees that the payment of the Fee entitles the Club to use the Player's Image. In addition, the Club may also use the Player's Image in connection to and in relation to the Additional Services as specified in Schedule 1 of this Agreement**, provided the prior written consent of the Player is

Provision	Direct Additional Services Agreement	Indirect Additional Services Agreement
		obtained which consent shall not be unreasonably withheld.
Clause 11 (10 for the Indirect Additional Services Agreement)	**The parties acknowledge and agree that the terms of this Agreement are subject to the terms and conditions of the CBA**. Where a term or condition of the CBA is inconsistent with any term or condition contained in this Agreement, the term or condition of the CBA shall prevail to the extent necessary to remove the inconsistency.	**The parties acknowledge and agree that the terms of this Agreement are subject to the terms and conditions of the CBA**. Where a term or condition of the CBA is inconsistent with any term or condition contained in this Agreement, the term or condition of the CBA shall prevail to the extent necessary to remove the inconsistency.
Schedule 1	Additional Services **Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed**. **Where a Player is also being paid for use of image, provide details of how image is to be used and the Fee associated with image use**. The Club must also separately detail the Player's performance requirements under Clause 21 of the CBA. [The template then set out blank space for completion in respect of each individual contract.]	Additional Services **Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed**. **Where a Player is also being paid for use of image, provide details of how image is to be used and the Fee associated with image use**. The Club must also separately detail the Player's performance requirements under Clause 21 of the CBA. [The template then set out blank space for completion in respect of each individual contract.]

Coaches' contracts

[15] The relevant agreements for coaches were the coaching contract and a Marketing and Promotional Services Agreement (MPSA). Those in evidence took the form of an agreement similar in structure to the Indirect ASAs.[21] It was common ground that the same issues arose as to characterisation of the payments made under those agreements as arose under the Direct and Indirect ASAs.[22]

Relevant legislation

[16] During the relevant period, s 10 of the Act imposed payroll tax on "taxable wages". "Taxable wages" was defined in the Dictionary set out in a schedule to the Act to mean "wages that, under section 9, are liable to 'payroll tax'". "Wages" was defined in the Dictionary in terms of a "means and includes" approach. The first part of the definition may be referred to as the chapeau. The second part contained inclusionary subparagraphs identifying what was deemed to be "wages".

[17] Some amendments were made to the payroll tax regime during the relevant period, but it is not necessary to do more than briefly mention them as there is no dispute that the amendments made no material difference to the concept of wages for present purposes. By amendments introduced on 1 July 2008, three changes were made to the definition of "wages". Firstly, the word "remuneration" was inserted into the chapeau; secondly, the words "in relation to" and "or applied for employees benefit" in the chapeau were removed (in conjunction with the introduction of s 51

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21 [2016] QSC 231 at [50]-[51].

22 [2016] QSC 231 at [49].

and an amendment of the definition of employer[23]); and, thirdly, additional inclusionary paragraphs were added to the definition of wages.[24]

[18] The definition of "wages" in the chapeau (the only pertinent part of the definition) effective after the amendments were made was as follows:

> "***wages*** means any wages, remuneration, salary, commission, bonuses or allowances paid or payable … to an employee as an employee, and, without limiting the generality of the foregoing, includes—
> …"

[19] Section 9 was also amended by the deletion of the words "in respect of" and insertion of "in relation to". The only pertinent alteration to the legislation, concerning the replacement of s 9 of the Act effective from 26 March 2010 by the following provision, also has no material bearing:

> **"9 Wages liable to payroll tax – nexus with Queensland**
>
> (1) Wages are liable to payroll tax under this Act if—
>
> (a) the wages are paid or payable by an employer in relation to services performed or rendered by an employee entirely in Queensland; or
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> (b) the wages are paid or payable by an employer in relation to services performed or rendered by an employee in 2 or more States, or partly in at least 1 State and partly outside all States, and—
>
> (i) the employee is based in Queensland; or
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> (ii) if the employee is not based in a State—the employer is based in Queensland; or
>
> (iii) if both the employee and the employer are not based in a State—the wages are paid or payable in Queensland; or
>
> (iv) if both the employee and the employer are not based in a State and the wages are not paid or payable in a State—the wages are paid or payable for services performed or rendered mainly in Queensland; or
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> (c) the wages are paid or payable by an employer in relation to services performed or rendered by an employee entirely outside all States and are paid or payable in Queensland.
>
> …"

The primary judge's reasons

The scheme of the Act

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23 The definition of "employer" was relevantly altered to mean "any person who pays or is liable to pay any wages … and any person taken to be an employer under another provision of this Act".

24 Section 50 was also introduced but did not widen the definition of "wages".

[20] The primary judge summarised the relevant operation of the Act during the periods in question as follows:[25]

> "**First**, the provisions of the Act have made it clear that the tax is a tax imposed upon payments which bear a particular character… that requires a consideration of the application of the Act in all the circumstances of the case concerned.
>
> **Second**, that process of characterisation is done in two stages: first by reference to whether the payment falls within the definition of 'wages', and then by reference to whether the payments that fall within that definition are rendered liable to payroll tax under s 9.
>
> **Third**, subject to one qualification and except where a payment might be said to fall within one of the subparagraphs of the definition, the question whether a payment falls within the definition of 'wages' turns on whether it is a payment 'paid or payable to an employee as an employee'. The qualification is that, for the first year, the words were of apparently wider ambit, namely 'paid or payable … to, or in relation to an employee as an employee, or applied for the employee's benefit'.
>
> **Fourth**, the question whether the payments falling within the definition of 'wages' were rendered liable to payroll tax under s 9, turned on whether the payments were –
>
> (a) paid or payable by an employer (as defined); and
>
> (b) paid or payable for or 'in respect of' (or, for the last few years, 'in relation to') services performed or rendered."

The provisions of the Additional Services Agreements

[21] The primary judge made the following comments concerning the "Additional Services Agreement" clause in the CBAs:[26]

> "… [they] were intended to be agreements in which players would contract to derive payments as a direct result of bona fide promotions/marketing by that player in accordance with the Guidelines for Additional Services Agreements. Those Guidelines also emphasised that what was authorised was the deriving of payments 'as a direct result of bona fide marketing' by the player. The context makes clear that the whole point of the agreements which players were authorised to enter into with their club or its sponsors was for the provision of promotion or marketing services by the players."

[22] His Honour found that the Direct and Indirect ASAs were consistent with the form of such agreements contemplated by the CBA, stating that:[27]

> "They were a fulfilment of the existing contractual intention ... that players could monetise the use of their own Image by entering into

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25 [2016] QSC 231 at [28]-[31] (original emphasis).
26 [2016] QSC 231 at [37].
27 [2016] QSC 231 at [45].

contracts to derive payments as a direct result of the provision by the players of bona fide promotions/marketing services to the Club or its sponsors… The agreement to permit use of image was integral to the agreement to provide those services…"

[23] In that regard, while sch 1 of the ASAs in evidence differed from case to case, his Honour noted:[28]

"(a) In each case, the details in the schedule consisted of a table breaking up the lump sum agreed Fee for a particular year by reference to 'additional services' detailed by reference to descriptions of different types of promotional activities which the player was obliged to perform in that year, for example:
(i) sponsor promotion;
(ii) game development promotion;
(iii) Sunshine Coast promotion;
(iv) membership promotion;
(v) public relations appearances; and
(vi) media.

(b) All of the promotional activities concerned were such that it would be inevitable that they involved some degree or other of use of the player's Image (as defined) as an incident to the player actually performing the activity concerned. That was so not least because Image was defined to include name, reputation and identity. This is entirely consistent with the cl 3.2 authorisation of the use of the player's Image 'for purposes related or connected to the Additional Services'. Use of image was necessarily integral to the performance of the promotional services.

(c) In some cases, no specific mention was made of Image and, it would follow, no fee was specified as associated with the use of the player's Image, even though a fee was specified for the player's involvement in the activity.

(d) In other cases, usually involving 'membership promotion', the schedule made specific mention that the player's Image would be used in 'membership brochures, billboard, direct sale information and renewal information', a specific fee was mentioned for the involvement in 'membership promotion', but it was specifically stated that the player would not be paid for image use.

(e) In only a few cases, did the schedule specify a particular fee for image use, but the use of image was also associated with the player's actual performance of promotional activities, such as –
(i) marketing work for the Club;
(ii) promotional work for a Club sponsor;
(iii) appearance work; and
(iv) media work on the internet or TV."

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28 [2016] QSC 231 at [44].

Payments actually made to the players

[24] The primary judge also had regard to the sch 7B Reconciliation forms,[29] noting they were the subject of the agreed facts. The parties agreed that the appellant recorded each appearance and each use of Image provided under each player's ASA on such a form.[30] The form also set out the total of all amounts paid under the player's ASAs for the season attributed as between the market value for the player's marketing and promotional services and the market value for use of the player's image.[31]

[25] His Honour observed that in respect of the sch 7B forms:[32]

> "(a) activities were described, their duration recorded, the payment made for the activity recorded, and the payment was categorised into one or more of the four categories 'Membership', 'Media', 'Sponsorship' and 'Special Events';
>
> (b) where an activity was described as use of image, it was nevertheless attributed to one or other of those categories, with an amount associated with it; and
>
> (c) otherwise the form recorded total 'appearances' and, because the total appearances were allocated as between 'Additional Services Agreement appearances', 'Collective Bargaining Agreement appearances (AFL)', 'Collective Bargaining Agreement appearances (Club)', 'Use of Image' and 'Use of Signature', plainly regarded use of image as a type of appearance."

[26] His Honour thus concluded:[33]

> "… the forms did not record any split between payments made for marketing and promotional services on the one hand and payments made for use of the player's Image on the other hand. Rather, the forms treated payments made for use of image as either a type of appearance by the player or as capable of categorisation into a type of marketing or promotional activity."

Conclusion

[27] Having analysed the relevant agreements, the provision made for payments in consideration of promotional and marketing services performed or rendered by the players and coaches, and the actual payments made for use of Image, the primary judge concluded[34] that the evidence did not support the appellant's contention that payments made under the Direct and Indirect ASAs and the MPSAs that related to the use of player or coach image:[35]

> "(a) **were** payments in consideration for the use and/or exploitation of image rights; and

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29 [2016] QSC 231 at [46].
30 Para 36 of the Agreed Facts.
31 Para 37 of the Agreed Facts.
32 [2016] QSC 231 at [47].
33 [2016] QSC 231 at [47].
34 [2016] QSC 231 at [56].
35 [2016] QSC 231 at [56].

(b) **were not** payments in relation to services rendered or performed by those players and coaches."

[28] The primary judge found that the Direct and Indirect ASAs were the means by which it had been agreed that the players could derive payments as a direct result of the provision of promotional or marketing services to the Club or its sponsors. His Honour also found that the indicia relevant to the characterisation of the payments made pursuant to the Direct and Indirect ASAs were all one way, being:[36]

> "The use of the player's Image was for purposes related or connected to the player's actual performance of promotional or marketing activities. In fact it was necessarily integral to that performance. The result was that it was correct for the payments made by the Club under the Direct and Indirect Service Agreements to be characterised as payments made by the Club directly or through the associated entity to the **player as an employee** and in consideration of promotional and marketing **services performed or rendered by that employee**. There was no warrant for a conclusion that payments made for the use of image rights were made other than in the course of the provision of such services, or independently from the provision of such services" (emphasis added)

The appellant's arguments

[29] The grounds of appeal were amended and at the hearing of the appeal the appellant distilled its contentions in respect of the grounds of appeal into the following five propositions:

1. The chapeau of the definition of "wages" in the Act applies to payments for services rendered by an employee as an employee (i.e. in the capacity of an employee), and not payments made to an employee for something else (i.e. in another capacity).
2. Sportspersons acquire a reputation in their sporting field and the unauthorised use of their name or likeness (referred to as "image rights") in connection with goods or services can be restrained by them by an action for breach of s 18 of the *Australian Consumer Law* (formerly s 52 of the *Trade Practices Act*) or in passing off (for which the remedies include an injunction and damages).
3. A payment to an employee for the exploitation of his or her image rights is not a payment for services rendered in the capacity of an employee, but rather a payment for a licence to do something which would otherwise be unlawful and therefore capable of being restrained by injunction.
4. When a payment is made for both services rendered by an employee and for exploitation of his or her image rights, an apportionment is necessary, and only that part referrable to the services rendered by an employee will be taxable as wages.
5. The payments made by the appellant here are, in part, for the use of the image rights of players and coaches under the licence contained in cl 3.2 of each

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36 [2016] QSC 231 at [57].

> Direct ASA, Indirect ASA and MPSA. To that extent, they are not payments for services rendered by them as employees and, therefore, not taxable as wages.

The first proposition

[30] The first proposition put forward was that the chapeau of the definition of "wages" applies to payments ***for*** services rendered by an employee as an employee, that is, in the capacity of an employee and not payments made to an employee in another capacity.

[31] It should also be noted that it was not disputed that, so far as payments were made by the appellant pursuant to an ASA for the bona fide marketing by that player, those payments were for services and therefore wages. However, it was contended that those payments which the parties have appropriated or attributed to the use of image did not fall within the definition of wages as they were not "paid or payable … to an employee as an employee".

[32] It was argued that the relevant test for determining whether a payment is made to an employee "as an employee" was whether the payment was "for" services performed or rendered by the employee. In advancing that contention, it was submitted that the chapeau does not utilise the words "*in respect of*" (which appear in s 9) and that a narrower concept of wages as meaning payment *for* services rendered was supported by the authorities concerning payroll tax legislation in relevantly similar terms as that presently under consideration that imposed a levy on wages paid or payable "to any employee as such".

[33] In that regard, reliance was placed on *Mutual Acceptance Co Ltd v FCT*,[37] where it was held that allowances paid by an employer to employees, engaged to collect instalments, for use of their motor vehicles were "wages … paid or payable … to any employee as such". The sums in issue there were referrable to the use of a motor vehicle in the course of employment but reflected a global sum on the basis of a rough and ready estimate only. Latham CJ said of the words "to any employee *as such*":[38]

> "They therefore comprehend only payments made to an employee *in connection with and by reason* of his service as an employee or *in respect of some incident of* his service. Thus a merely personal gift by an employer to a person who happened to be an employee would not be included within 'wages,' though a bonus paid to employees because they were employees would be so included." (emphasis added)

[34] Although dissenting in the outcome, Dixon J[39] stated that wages referred to the ordinary form of remuneration for work.

[35] Reference was also made to *WA Flick & Co Pty Ltd v FCT*,[40] where it was observed that *Mutual Acceptance* required:

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37 (1944) 69 CLR 389.
38 (1944) 69 CLR 389 at 396.
39 (1944) 69 CLR 389 at 403.
40 (1959) 103 CLR 334 at 339-340.

> "… that the allowance be looked at from the point of view of what the employer pays rather than what the employee makes and poses as the critical question, whether the payment is one which the employer makes to the employee because of something *done* in the service of the employer. As Williams J. said, the Act is concerned 'with the actual remuneration which he is entitled to receive in respect of his employment, quite irrespective of the expenses to which he has been put to earn that remuneration'" (emphasis added)

[36] Drawing on this, the appellant sought to argue that, in order that a payment come within the definition of wages, it must be because of something done in the service of the employer and thus a payment "for" the performance of services.

[37] The appellant also relied on *Murdoch v Commissioner of Pay-roll Tax (Vic)*.[41] The majority, in observing the significance attaching to the fact that to come within the definition of "wages" the payments must be made "to any employee as such", adopted the emphasis made by Latham CJ in *Mutual Acceptance* in the dicta extracted above. Although dissenting in the outcome, Gibbs J also referred to *Mutual Acceptance*, stating:[42]

> "… the critical question is 'whether the payment is one which the employer makes to the employee because of something *done* in the service of the employer': *W.A. Flick & Co. Pty. Ltd. v. Federal Commissioner of Taxation* (1959) 103 CLR 334, at p. 339. In other words, as Starke J. said in *Mutual Acceptance Co. Ltd. v. Federal Commissioner of Taxation* (1944) 69 CLR 389, at p. 401, the tax is payable 'upon payments made in cash or in kind *for* services rendered'. In the same case, both Dixon J. (1944) 69 CLR 389, at p. 403 and Williams J. (1944) 69 CLR 389, at p. 406 indicated that the subject of the tax is remuneration *for* work. The necessity for a close connexion between the payment and services rendered by an employee is indicated not only by the provisions of s. 6, but also by the fact that a payment only comes within the definition of 'wages' if it is paid to an employee 'as such'. Those words, in their ordinary sense, simply mean 'as an employee' or 'in the character of an employee', and have the effect that the definition of 'wages' comprehends 'only payments made to an employee *in connection with and by reason of* his service as an employee *or in respect of some incident of* his service': *Mutual Acceptance Co. Ltd. v. Federal Commissioner of Taxation* (1944) 69 CLR 389, at p. 396. However, if the critical test is satisfied, it is not necessary that the payment should be one to which the employee is contractually entitled; the definition of 'wages' includes a bonus, which, as Kitto J. said in *Attorney-General (Cth) v. Schmidt [No. 3]* (1963) 109 CLR 169, at pp. 172-173, generally means 'a gratuitous addition to contractual remuneration'.
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> … to attract tax the payments must be made to the employees *in respect of* the services which they rendered." (emphasis added)

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41 (1980) 143 CLR 629.

42 (1980) 143 CLR 629 at 634-636; see also Mason, Murphy and Wilson JJ at 642.

[38] In stating that the words "as such" in the definition of "wages", in their ordinary sense, simply meant "as an employee" or "in the character of an employee", his Honour expressed the test as being whether in that sense the payment was "in respect of" the services rendered interchangeably with the following tests; that the payments were made:

- "because of something done" in the service of the employer (referring to *Flick*); or
- "for" services rendered or work or "in connection with and by reason of" the employee's service as an employee or "in respect of some incident of" the employee's service (referring to *Mutual Acceptance*).

[39] I should mention that the appellant also made reference to *Starrim Pty Ltd v Commissioner of Taxation*,[43] which concerned a payment of a "fringe benefit" under legislation which specified that the benefit be provided to the employee by the employer "in respect of" the employment of the employee, which was held to require a sufficient or material connection between the payment of the benefit and the employment. Apparently, the purpose in referring to *Starrim* was to make a contrast between that concept and the definition of "wages", which was said to be narrower as being one where the payment was "for" services. I do not find that case of assistance, dealing as it does with different legislation. It is preferable to have regard to the authorities dealing directly with the scope of the meaning of "wages".

[40] Clearly, to constitute "wages", the payment must be made by the employer to the employee in the latter's capacity as employee. However, the authorities referred to by the appellant do not support the proposition that, in order that a payment be made by an employer to an employee in that capacity, it must be "for" services rendered as if that connotes a narrower test than those identified in *Flick* and *Mutual Acceptance*, namely, "because of something done" in the service of the employer, or "in connection with and by reason of" the employee's service or "in respect of some incident of" the employee's service as an employee.

[41] Proceeding on that basis, the issue for determination may be reduced to a question of whether the relevant terms of the ASA (in particular cls 2 and 3 read together with sch 1) and the MPSA have the result that the payments which the parties have appropriated or attributed to the use of images were payments made to players "as employees" in terms of the tests set out above. That is, whether the payments were "for" services rendered, in the sense that they were "in connection with and by reason of" the player's service as an employee or "in respect of some incident of" his service as an employee.

[42] The appellant criticised the trial judge's reference to the words "in relation to services rendered or performed"[44] and use of the terms "related or connected to"[45] as impermissibly broadening the scope for the meaning of "wages". However, I do not discern any error in the test adopted by the trial judge as to the nexus required in terms of the tests referred to in the authorities. His Honour identified that nexus, on the facts of the present case, as one related to or connected to actual performance of services or necessarily integral to that performance. His Honour thereby found that payments made by an employer to an employee were "in consideration of services

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43 (2000) 102 FCR 194.
44 [2016] QSC 231 at [56].
45 [2016] QSC 231 at [57].

performed or rendered" by that employee or "in the course of the provision of the services". Accordingly, there can be no complaint as to the test used in the findings of the connection between the payments and the services rendered or performed, which are entirely in conformity with the authorities. Nor, in the circumstances of this case, did his Honour's use of the words "in relation to services performed or rendered" or the words "related to or connected to actual performance" of services result in an erroneous enlarging of the meaning of "wages".

[43] A related complaint concerned the two step process adopted by the trial judge of first considering whether the payments fell within the definition of wages and then considering whether they came within s 9 as payments made "in respect of" (or "in relation to") marketing and promotional services performed or rendered. The argument was that the trial judge fell into error in applying the latter provision in a manner that added "an additional element" to the concept of "wages" that did not appear in the definitional provision. The two step approach adopted by the trial judge was one urged by the appellant. It required that the payment satisfy the definition of wages and that regard then be had to s 9. The concept of "wages" in s 9 is that set out in the definition. Section 9 looks to whether the "wages" have the required nexus with Queensland that "wages" are paid "in respect of services performed" and for those purposes uses various terminology; "for", "in respect of" and "in relation to". The primary judge was well aware of the jurisdictional aspect to s 9 and was not mistaken as to its purpose. The argument that his Honour added a further element to the definition of wages[46] so as to broaden, erroneously, the scope of "wages" has no substance and is another way of putting the submission previously made by the appellant that the definition of "wages" is confined to payments ***for*** services rendered.

The second and third propositions

[44] The second and third propositions are directed to the appellant's contention in its outline as to the proper characterisation of the payments in question.

[45] The second proposition put forward was that "sportspersons acquire a reputation in their sporting field and the unauthorised use of their name or likeness (referred to as 'image rights') in connection with goods or services can be restrained by them by an action for breach of s 18 of the *Australian Consumer Law* (formerly s 52 of the *Trade Practices Act*) or in passing off (for which the remedies include an injunction and damages)". In support of the proposition the appellant relied on *Talmax Pty Ltd v Telstra Corporation Limited*;[47] *Hogan v Koala Dundee Pty Ltd*;[48] *Henderson v Radio Corporation Pty Ltd*;[49] *Irvine v Talksport Ltd*;[50] and *Fenty v Arcadia Group Brands Ltd*.[51]

[46] This proposition does not advance matters in any material way. It may be observed that there was no dispute that a right to use an image, such as conferred by cl 3 of the ASA, was a valuable right in the sense of valuable in law. However, it was also argued that merely because a player is an employee of the club did not entitle the club to use the player's image in its marketing or allow sponsors of the club to use

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46 [2016] QSC 231 at [61].
47 [1997] 2 Qd R 444 at 451.
48 (1988) 20 FCR 314 at 323-4.
49 [1960] SR (NSW) 576 at 594-5.
50 [2002] 1 WLR 2355 at [38]-[39] and [46].
51 [2013] EWHC 2130 (Ch) at [38]-[40] and [43].

the image in their marketing. The real point of the second proposition was to aid the appellant in its third proposition.

[47] The third proposition was that "a payment to an employee for the exploitation of his or her image rights is not a payment for services rendered in the capacity of an employee, but rather a payment for a licence to do something which would otherwise be unlawful and therefore capable of being restrained by injunction". In that regard,[52] reliance was placed on *Sports Club plc v Inspector of Taxes*;[53] and *H Coles Pty Ltd v Need*.[54]

[48] The third proposition was used to advance an argument that, as a matter of principle, a payment that is made to an employee for the use of his or her image would not be wages, but rather a payment for a licence to do something which otherwise would be unlawful. That was put forward, in effect, as the respondent submitted, as a prelude to the contention that the payments in question ought to have been characterised differently, as a separate and distinct and independent payment for the exploitation of an asset, and reference to the passing of cases. That matter depends on the construction of the relevant agreements which is addressed by proposition five.

The fourth proposition

[49] The appellant's fourth proposition was that when a payment is made for both services rendered by an employee and for exploitation of his or her image rights (therefore, for more than just the services rendered), an apportionment is necessary, and only that part referrable to the services rendered by an employee will be taxable as wages.

[50] The appellant referred to *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue*;[55] *Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue (NSW)*;[56] *Roadshow Distributors Pty Ltd v Chief Commissioner of State Revenue*;[57] and *Ronpibon Tin NL v FCT*[58] in support of that proposition. The proposition was put forward as a step in the argument that the amount paid to the players and coaches under the ASAs and the MPSAs in the present case required apportionment so that the amounts attributed by the parties to the use of a players image in accordance with the attribution in para [37] of the agreed facts were excluded from "wages".

[51] The appellant accepted that the proposition was premised on an interpretation of the ASAs and MPSAs as providing for the use of an image as separate and distinct from the provisions of promotional and marketing services. If that premise was flawed, the apportionment argument did not assist the appellant.

[52] Given my conclusion as to the proper interpretation of the agreement, proposition four does not avail the appellant. Moreover, the proposition is a diversion from the critical issue which is one as to the characterisation of payments and whether those

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52 Appellant's further amended outline footnote 44.
53 [2000] STC (SCD) 443 at [100]-[101].
54 (1933) 49 CLR 499 at 503.
55 (2002) 222 ALR 599 at [236]-[239].
56 [2013] NSWCA 470 at [170]-[178].
57 [1998] 1 VR 523 at 528-530.
58 (1949) 89 CLR 47 at 59.

payments fall within the statutory definition. As stated below, in my view, the primary judge was correct to conclude that as a matter of characterisation, the appellant has failed to establish that the payments for use of image were other than payments in consideration of services rendered.

The fifth proposition

[53] The appellant's fifth proposition is central to its appeal. It was that payments made by the appellant in the present case were, in part, for the use of the image rights of players and coaches under the licence contained in cl 3.2 of each Direct ASA, Indirect ASA and MPSA. It is said that, to that extent, they are not payments for services rendered by them as employees and, therefore, not taxable as wages.

[54] The appellant accepted that in relation to the types of additional services, the primary judge correctly identified[59] that only in a few cases did sch 1 specify a particular fee for image use.[60] However, the appellant's proposition challenges the trial judge's rejection of the proposition that the payments for use of image were made by the club, as an employer, (or in the tripartite arrangements, the deemed employer) other than in the course of the provision of the additional services and that, even if they were provided contemporaneously with the provision of the additional services, they are to be understood as being provided separately and independently of the provision of those additional services.

[55] The appellant's submission requires the ASAs and MPSAs to be construed so that cl 3.2 is understood as the grant of a "license" by the player to the club to use the player's image in two separate respects; a license to use the image for the purposes related to or connected to the Additional Services, but also as a freestanding grant of a right to use the player's image, that is not tied expressly to the player performing services. In that respect it is said that the agreements grant a licence to use an image ancillary to services but also an independent right granted by a person who happens to be an employee.

[56] There is a fundamental difficulty of construction presented by the appellant's argument. Clause 2.1 of the ASA makes it clear that the player (or in the case of an indirect ASA that the company will ensure that the player) "shall perform" the Additional Services. Clause 3.2 of the direct ASA provides that it is agreed that the Fee (being the fee specified in sch 2) entitles the club to the use of the player's image "for purposes related or connected to additional services as specified in schedule 1". The difficulty that arises, given that drafting of the ASA, is in seeing how one can sensibly extract the use of the image from the stated purpose which limits use to "purposes related or connected to additional services as specified in schedule 1" as if the use was entirely separate from and had nothing to do with the performance of the additional services.

[57] The appellant's answer, however, is that cls 2.1 and 3.2 are to be construed in light of sch 1. And, in that regard, it was said that sch 1 distinguished between two types of payments. The first concerned "all services to be performed", whereas the second paragraph referred to the situation where a player was also being paid for use of an image and identifying that use, separately from the performance of

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59 [2016] QSC 231 at [44](e).

60 Appellant's further amended outline para 2.8.

Additional Services. The submission is premised on a strained reading of "also" as meaning "separately from the Additional Services", which does not sit well with the definition of "Additional Services" in terms of the Additional Services set out in sch 1. The drafting difficulty created by the constraint imposed by cl 3.2, which, even if it confers a license (rather than defence to an action for passing off or for contravention of s 18), only licenses the use of the player's image for purposes related or connected to the player's performance of Additional Services, is an insurmountable one. The different wording of the indirect ASA makes no material difference.

[58] The appellant's submission is that the "Additional Services" concept has brought together two things: the performance of services on the one hand; and the use of the image without services on the other. And that sch 1, like the other sch 1, in the way it is structured, informs how one construes the corresponding clauses which are in the very similar form: cl 2.1 and cl 3.2. (Cl 2.1 is a little different as is 3.2. in part, because a company has been interposed in this case.)

[59] There is a further hurdle that confronts the appellant. It is that the "Fee" is defined to mean the amount specified in item 1 of sch 2, which specified in each agreement was one composite payment and did not provide for any apportionment, nor did any other provision in the relevant agreements. The appellant's position, nevertheless, was that a composite payment could be apportioned between two amounts "if it related to two different things". In that regard, the appellant relied on the statement of agreed facts as recording how the parties in fact apportioned the Fee in terms of the sch 7B forms by attributing the payment between the market value of services on the one hand and the market value of the use of the player's image on the other.

[60] It remains, however, that what was attributed to the use of an image by the parties was not the issue at hand, rather it was the characterisation of the payments made by the appellant as employer to the player as employee pursuant to the contract. The agreed facts cannot alter the nature of the obligations in the contract itself, nor the character of the payments which, for present purposes, are to be examined from the point of view of the employer.

[61] The primary judge's finding was, correctly, that there was no warrant for a conclusion that payments made by the appellant, for the use of image rights, were made other than in the course of the provision of such services or independently from the provision of promotional or marketing services. The payments made by the appellant under the ASA and MPSA were thus "wages" as defined in the Act and "taxable wages" that under s 9 of the Act were liable to payroll tax.

Orders

[62] For the reasons above I propose the following orders:

1. The appeal is dismissed.

2. The appellant is to pay the respondent's costs of the appeal, to be assessed on the standard basis.

[63] **ATKINSON J:** I agree with the orders proposed by Philippides JA and with her Honour's reasons.