# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Compass Group Education Hospitality Services Pty Ltd & Anor v Commissioner of State Revenue* [2020] QSC 184 |
| PARTIES: | **COMPASS GROUP EDUCATION HOSPITALITY SERVICES PTY LTD**<br>ABN 60 129 203 998<br>(first appellant)<br>**COMPASS GROUP HEALTHCARE HOSPITALITY SERVICES PTY LTD**<br>ABN 79 114 320 615<br>(second appellant)<br>**v**<br>**COMMISSIONER OF STATE REVENUE**<br>(respondent) |
| FILE NO: | BS 1026 of 2019 |
| DIVISION: | Trial Division |
| DELIVERED ON: | 24 June 2020 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 2 March 2020 |
| JUDGE: | Holmes CJ |
| ORDER: | **The appeal is disallowed.** |
| CATCHWORDS: | TAXES AND DUTIES – PAYROLL TAX – OBJECTIONS, APPEALS AND REVIEWS – where the appellants employed workers to perform services which the appellants contracted to provide to their clients – where the appellants objected to the respondent's assessment of payroll tax on payments made to the appellants' employees – where the respondent disallowed the objection – where the appellants appeal that decision pursuant to s 69 of the *Taxation Administration Act* 2001 – where the appellants argue that they procured the services of their employees for their clients under agreements which met the definition of 'employment agency contract' in s 13G(1) in Div 1B of Pt 2 of the *Payroll Tax Act* 1971 – where the appellants argue that because their clients were exempt from payroll tax, wages paid to their employees for providing services to their clients were not subject to payroll tax, by virtue of s 13J(2) of that Act – where the respondent argues that s 13G and s 13J do not apply to the appellants because they are common law employers or, alternatively, because the appellants did not 'procure' the services of their employees but instead contracted to provide the services themselves through their employees – whether the appellants' agreements with their |

clients and employees meet the definition of 'employment agency contract' in s 13G(1) – whether Div 1B of Pt 2 of the *Payroll Tax Act* applies to common law employers – whether the appellants are entitled to be relieved from payroll tax liability under s 13J(2)

*Payroll Tax Act* 1971 (Qld), s 9(1)(a), s 12, s 13G, s 13H, s 13I, s 13J, s 14(2)
*Pay-roll Tax Act* 1971 (NSW), s 3C
*Payroll Tax Act* 2007 (NSW), s 36A, s 37, s 38, s 39, s 40

*Accident Compensation Commission v Odco Pty Ltd* (1990) 95 ALR 641; [1990] HCA 43, cited
*Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)* (2009) 239 CLR 27; [2009] HCA 41, applied
*Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* (2005) 222 ALR 599; [2005] NSWSC 788, cited
*CXC Consulting Pty Ltd v Commissioner of State Revenue* (2013) 96 ATR 796; [2013] VSC 492, considered
*Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304, referred to
*Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (2000) 2 VR 635; [2000] VSCA 122, considered
*Freelance Global Ltd v Chief Commissioner of State Revenue (NSW)* [2014] ATC 20-445; [2014] NSWSC 127, considered
*Health Service Pty Ltd v Chief Commissioner of State Revenue* [2014] NSWCATAD 83, considered
*Hollis v Vabu Pty Ltd* (2001) 207 CLR 21; [2001] HCA 44, distinguished
*HRC Hotel Services Pty Ltd v Chief Commissioner of State Revenue* (2018) 108 ATR 84; [2018] NSWSC 820, considered
*JP Property Services Pty Ltd v Chief Commissioner of State Revenue* (2017) 106 ATR 639; [2017] NSWSC 1391, considered
*Moore Park Gardens Management Pty Ltd v Chief Commissioner of State Revenue* (2004) 56 ATR 155; [2004] NSWSC 417, considered
*Moore Park Gardens Management Pty Ltd v Chief Commissioner of State Revenue* (2006) 62 ATR 628; [2006] NSWCA 115, considered
*UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2016) 104 ATR 577; [2016] NSWSC 1852, considered

COUNSEL: B O'Donnell QC, with E Goodwin and D Lewis, for the appellants
M H Hindman QC, with A G Psaltis, for the respondent

SOLICITORS: Herbert Smith Freehills for the appellants

Crown Solicitor for the respondent

[1] The appellants, Compass Group Education Hospitality Services Pty Ltd ("Compass Group Education") and Compass Group Health Care Hospitality Services Pty Ltd ("Compass Group Health Care"), appeal pursuant to s 69 of the *Taxation Administration Act* 2001 against a decision by the respondent Commissioner of State Revenue to disallow their objections to the Commissioner's assessment of payroll tax on wages paid to their employees.

[2] Division 1B of Pt 2 of the *Payroll Tax Act* 1971 deals with "Employment agents". In s 13G(1), it defines an "employment agency contract' as one where an employment agent procures the services of another for a client. Sections 13H and 13I deem the employment agent and the service provider under an employment agency contract respectively to be employer and employee; and s 13J(1) provides that payments passing from the first to the second for the provision of services are taken to be wages. Section 13J(2), however, renders s 13J(1) inapplicable where the payment if made by the client would be exempt from payroll tax, and where the client gives a declaration, oddly, not as to the facts, but as to the non-application of s 13J(1).

*The competing positions*

[3] The appellants contended that they were employment agents procuring the services of service providers under employment agency contracts within the meaning of s 13G of the *Payroll Tax Act*. The relevant services were provided by Compass Group Education's employees to the Anglican Church Grammar School ("the ACGS") and by Compass Group Health Care's employees to the Children's Health Queensland Hospital and Health Service ("CHQ") at the Queensland Children's Hospital. Since wages paid by ACGS and CHQ were exempt from payroll tax (one being a charitable institution running a non-tertiary educational institution, and the other running a public hospital) amounts they, the appellants, paid to their employees for providing services to those entities, both of which had given the necessary declarations, were not, by virtue of s 13J(2) of the *Payroll Tax Act,* to be regarded as wages subject to payroll tax.

[4] The Commissioner, however, decided that the appellants were not employment agents and that s 13J(2) consequently had no application. The Commissioner's decision was originally made on the basis that the appellants' employees did not become part of the workforce of ACGS or CHQ, respectively. He no longer takes that position, but instead argues that the appellants as common law employers were liable to pay payroll tax on their employees' wages under the general provisions of the *Payroll Tax Act*, and that s 13G and s 13J had no application to their arrangements. The Commissioner advances an alternative ground: there was no employment agency contract within the meaning of s 13G because the appellants did not procure the services of its employees for ACGS and CHQ but instead contracted to provide the relevant services themselves, through their employees.

*The contracts*

[5] Compass Group Education entered a catering services agreement with ACGS in October 2012, the original four year term of which was subsequently extended. Under the contract, ACGS granted Compass Group Education the right to provide catering, cleaning and laundry services at the school. Clause 4.1 of the contract required Compass Group Education to

> "…provide all necessary employees and contractors (as applicable), who shall be adequately trained and hold all necessary permits and qualifications to complete their duties under this Agreement…"

Compass Group Education was to supervise the staff and require that they comply with occupational health and safety requirements. It was responsible for any redundancy payments for staff, unless they arose as a result of ACGS' closing its premises, reducing the level of services required or terminating the agreement; in which case the latter would bear the cost of redundancy. In consideration of its provision of the services, Compass Group Education was to be reimbursed for all its costs involved in their performance, those costs including wages and payroll tax. It was also paid an annual performance fee, determined according to whether it met various performance indicators.

[6] The contract between Compass Group Health Care and CHQ, also entered in October 2012 and extended, was titled "Facilities Management Services Contract". Its significant terms for present purposes were similar to those of the contract between Compass Group Education and ACGS. Under it, Compass Group Healthcare was to provide catering, laundry, cleaning and security services at various locations at the Queensland Children's Hospital campus. It was to ensure that suitably trained and qualified persons were available to perform the services and to ensure their compliance with various requirements. It was required to have a representative supervising its performance of the services and liaising with CHQ's representatives. CHQ was to pay fees to Compass Group Health Care, in part fixed and in part varied according to specified hourly rates for labour.

[7] Each of the appellants also entered into employment contracts with their own workers to provide the services at the school and hospital respectively, at a specified hourly rate of pay. The two entities' contracts with their employees were in very similar terms. The worker was employed on a full time basis at the school or hospital, where he or she was required to carry out duties as described in a position description or as directed. If there were to be any change in the employee's position or work location, a new contract would be entered. If the position were no longer available because of changes in "operational requirements", alternative arrangements would be considered. The employer had the right to terminate the employment by giving notice. The worker was required to comply with the employer's code of business conduct, and also to

> "…observe the Client's reasonable working conditions and policies and procedures".

[8] Argument on this appeal proceeded on the basis that in each case, the client contract and the employment contracts were to be considered together as the relevant contracts capable of constituting the employment agency contract for the purposes of s 13G (an approach consistent with that taken by judges of the New South Wales Supreme Court in the cases of *JP Property Services Pty Ltd v Chief Commissioner*

*of State Revenue*[1] and *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue*[2]).

*The relevant Payroll Tax Act provisions*

[9] The long title of the *Payroll Tax Act* is

> "An Act to impose a tax upon employers in respect of certain wages".

Part 2 of the Act is titled "Liability to taxation". Division 1 of that Part deals with imposition of liability. Section 10, in that Division, imposes payroll tax at a specified rate on taxable wages. "Taxable wages" is defined in the schedule to the Act as meaning

> "wages that, under section 9, are liable to payroll tax".

The definition of the term 'wages' begins with a general and conventional definition, followed by a number of specified inclusions. Relevantly, it is as follows:

> '***wages*** –
>
> 1 means any wages, remuneration, salary, commission, bonuses or allowances paid or payable (whether at piecework rates or otherwise and whether paid or payable in cash or in kind) to an employee as an employee, and, without limiting the generality of the foregoing, includes –
>
> …
>
> (i) an amount taken to be wages under another provision of this Act…".

(There are another ten other forms of payment and benefits, not relevant in this case, added as inclusions to the definition.)

[10] Under s 9(1)(a), wages are liable to payroll tax if they are

> "…paid or payable by an employer in relation to services performed or rendered by an employee entirely in Queensland…"

and s 12 provides that the taxes are to be

> "…paid by the employer by whom the taxable wages are paid or payable".

"Employer" is defined in the Dictionary in the schedule to the Act as meaning

> "…any person who pays or is liable to pay any wages and includes the Crown in right of the State of Queensland and any person taken to be an employer under another provision of this Act".

A note to the definition refers to s 13H as an example of such a provision.

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1 (2017) 106 ATR 639.
2 [2019] NSW SC 657.

[11] The relevant provisions of Div 1B of Pt 2 are as follows:

**13G Meaning of *employment agency contract***

(1) An ***employment agency contract*** is a contract 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 if it is, or results in the creation of, a contract of employment between the service provider and the client.

(3) Subsection (1) applies to a contract whether it is formal or informal, express or implied.

(4) For this section—

***contract*** includes agreement, arrangement and undertaking.

**13H Persons taken to be employers**

For this Act, the employment agent under an employment agency contract is taken to be an employer.

**13I Persons taken to be employees**

For this Act, the person who performs work in relation to which services are supplied to the client under an employment agency contract is taken to be an employee of the employment agent under the contract.

**13J Amounts taken to be wages**

(1) For this Act, the following are taken to be wages paid or payable by the employment agent under an employment agency contract—

(a) an amount paid or payable in relation to the service provider in respect of the provision of services in connection with the contract;

(b) the value of a benefit provided in relation to the provision of services in connection with the contract that would be a fringe benefit if provided to a person in the capacity of an employee;

(c) a 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) However, subsection (1) does not apply to an amount, benefit or payment mentioned in the subsection if—

(a) the amount, benefit or payment would be exempt from payroll tax under division 2, other than section 14(2)(j), (k) or (l) or 14A, if it had been paid

or provided by the client in relation to the service provider as an employee; and

(b) the client has given the employment agent a declaration, in the approved form, that subsection (1) does not apply to the amount, benefit or payment.

The remaining provisions of Div 1B protect other parties from liability where an employment agent has paid the payroll tax on wages, including those paid for the service providers' performance of services for the client (s 13K), and deal with the consequences of payroll tax avoidance (ss 13L and 13LA).

[12] The exemption on which the appellants relied for the purposes of s 13J(2) was contained in s 14(2), which appears under Div 2 of Pt 2 ("Exemptions"). Headed "Exemption from payroll tax", it provides that the wages liable to payroll tax under the Act do not include wages paid or payable by entities of various specified types, including public hospitals and charitable institutions operating schools. It was common ground that both ACGS and CHQ were entitled to exemption from liability to payroll tax under s 14(2) and that each had given the required declaration under 13J(2).

*The arguments as to whether Div 1B applied to the appellants*

[13] It was also common ground that Compass Group Education and Compass Group Healthcare employed, respectively, the workers at the school and the hospital. Nonetheless, they contended, they had procured the services of those employees for their clients, ACGS and CHQ, under agreements which met the definition of "employment agency contract" in s 13G, and were entitled to be relieved from payroll tax liability under s 13J(2). There were two limbs to the Commissioner's argument against this proposition: the first, that Div 1B had no application to common law employers, and the second, that even if it were to be assumed, to the contrary, that the Division could apply to the appellants, they had not procured the services of others for their clients within the meaning of s 13G(1). (These were advanced as separate arguments, but they are not entirely unrelated. If one were to conclude that the language of s 13G(1) could extend to a common law employer providing the services of its employees, it might go some way to suggesting a legislative intent that the Division apply to them.)

[14] The Commissioner argued that the very fact that on the appellants' construction, ss 13H, 13I and 13J(1) would respectively deem them to be employers, those working for them their employees, and the amounts paid them their wages, when all of those things were already the reality, demonstrated that the provisions were not intended to deal with an actual employment relationship. And even if the arrangements between the appellants, their clients and their employees could be characterised as an employment agency contract, the Div 1B provisions merely operated to extend liability to payroll tax and were not engaged when an employment agent was already liable under the Act as a common law employer.

[15] The Commissioner's principal point is this: s 13J(2) creates no exemption from payroll tax but simply renders s 13J(1) inapplicable where an amount paid by the client to its employee would have been exempt and a declaration by the client as to the non-application of s 13J(1) is made. The result in the present case, says the

Commissioner, even if the appellants were employment agents, would be that s 13J(1) had no application: amounts paid by the appellants to their employees would not be taken to be wages paid under an employment agency contract. But it would remain the case that they were taxable wages for the purposes of liability to taxation under Pt 2 Div 1.

[16] The appellants responded that the definition of "employment agency contract" did not exclude the situation where a contract of employment existed between the employment agent and the service provider, and references in s 13J(1) to amounts paid or benefits provided could readily apply to payments made by an employer to an employee. The Div 1B provisions were exhaustive as to what were to be regarded as wages where an employment agent paid remuneration to a worker. There was a conflict between s 13J and the definition of "wages" in the schedule to the Act which should be resolved by regarding s 13J as displacing the definition. Moreover, the schedule definition applied except insofar as context or subject matter otherwise indicated.[3] Div 1B contained a contrary indication by making specific provision as to when payments constituted "wages" where they were paid by an employment agent under an employment agency contract. Further support for that construction was to be found in the opening words of ss 13H, 13I and 13J, "For this Act…". Those words at the commencement of s 13J made it clear that wages payable by an employment agent were not, by virtue of s 13J(2), to be taken to be wages for the purposes of the Act. There was no wage to which s 12 of the Act could apply.

[17] If the Commissioner's construction were correct (the appellants argued), s 13J(2) would never have work to do. An example was the situation where the employment agent engaged contractors to provide labour to a charity. Sections 13H and 13I had the effect of establishing the employer-employee relationship between agent and contractors. If the effect of s 13J(2) were simply to remove the deeming provision in s 13J(1) and achieve no more, any remuneration passing from the employment agent to the contractors, because they were deemed employer and employee, would come within the ordinary definition of wages under the Act and be liable to payroll tax. In no circumstances, then, would s 13J(2) have any effect.

[18] As to the second limb of his argument, the Commissioner's position was that under the ACGS and CHQ contracts the appellants undertook to perform services for those entities, providing those services through their own employees; they did not procure the services of others for them within the meaning of s 13G(1). It was implicit in the definition of "employment agency contract" that the third person service provider, not the employment agent, provide the services in and for the client's business. The role of the employment agent (as contemplated by s 13G) was limited to being facilitator or intermediary, consistently with the traditional concept of an agent. The language was apt to capture the situation where independent contractors were procured to provide services to clients.

[19] In addition, the nature of an employment contract was such that employees effectively became their employer when working in the latter's business; their work was the employer's work, their actions were the employer's actions. Accordingly, provision of services through employees could not be regarded as the procuring of

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3 *Acts Interpretation Act* 1954 s 32A.

"another person". For that proposition the Commissioner referred to the High Court's decision in *Hollis v Vabu Pty Ltd,*[4] in which the distinction was drawn, for the purpose of considering vicarious liability in tort, between the relationships of employer and employee, on the one hand, and principal and independent contractor on the other, the former relationship involving an identification of the employee with the employer.[5]

[20] The appellants countered that an employer who caused its employee to go to a client's worksite and perform work for the client there was procuring the services of the employee for the client's business. It was not to the point that the appellants were also providing a service to their clients; the Commissioner's argument that the appellants were providing a service to the clients rather than procuring the services of another person created a false dichotomy which was not to be found in s 13G(1). And it was irrelevant whether the worker was an employee of an employment agent or a contracted worker or a subcontractor; the worker was a different person from the employment agent.

[21] Both the appellants and the Commissioner placed a good deal of reliance on the history of Div 1B's insertion into the Act and on authorities in other States dealing with similar provisions.

*The history of the employment agent provisions in Queensland and New South Wales*

[22] The employment agent provisions were inserted in the *Payroll Tax Act* 1971 by the *Pay-roll Tax Act Amendment Act* 1984. Section 5 of that Act expanded the definition of "wages" in the principal Act by including remuneration paid by an employment agent in circumstances where: it "engaged [the worker] …to provide services for a client"; the employment agent was paid during or for the period when the services were provided; but the worker did not become the employee of either the employment agent or the client, although carrying out duties similar to those of an employee. The Commissioner submits that the qualification about the worker's not becoming an employee of either employment agent or client was included in order to avoid double taxation should the worker actually become an employee of either, while the reference to "remuneration", rather than wages, made it clear that the provision was directed to independent contractors. Its intent was to extend employment agents' liability for payroll tax beyond their own employees.

[23] According to the Second Reading Speech,[6] the Bill which became the Act contained provisions to

> "…counter the potential for pay-roll tax avoidance through certain employment schemes".[7]

The aim was to deal with schemes which sought to blur the employer/employee relationship so as to avoid payroll tax liability. Specific reference was made to the type of arrangement where an employment agency hired the services of a person to

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4 (2001) 207 CLR 21.
5 At [40].
6 *Parliamentary Debates Legislative Assembly (Hansard)* 21 December 1983 at 1081-1083.
7 At 1081.

a client while paying that person's wages under an agreement with the hired person which avoided

> "…most of the conditions applicable to a usual master/servant relationship",[8]

but the client could not be taxed because it did not employ the person. The intention was to enable the employment agent, as the real employer, to be taxed.

[24] A similarly expanded definition of "wages" was inserted into the New South Wales *Pay-roll Tax Act* 1971 in 1985.[9] As in Queensland, there was a qualification to the effect that it applied where the worker was not the employee of either the employment agent or the client. According to the Second Reading Speech for the *Pay-roll Tax (Amendment) Bill*, the provisions were inserted to deal with tax avoidance by the use of employment agents through arrangements in relation to which it was claimed that the person whose services were provided was employed by neither the contract agent nor the client.[10] The New South Wales Act was amended in 1988[11] with the effect that liability for payroll tax for workers engaged through an employment agent was now borne by the client, rather than the agent.

[25] In Queensland, the *Revenue Laws Amendment Act (No 2)* 1996 altered the *Pay-roll Tax Act* by adding a definition of "employment agent" as an agent who

> "…by an arrangement procure[d] (either directly or indirectly through interposed individuals, companies or trusts) the services of an individual.."

for a client, again in circumstances where the worker became the employee of neither, and the employment agent paid remuneration to the worker in exchange for payment from the client. The definition of "wages" was correspondingly simplified by changing the reference to "remuneration" paid in the circumstances previously set out to include "remuneration" as referred to in the new definition of "employment agent". According to the Explanatory Notes,[12] payments by employment agents to contract workers would be taxed if the workers were performing for the client duties similar to those of an employee. The amendment was designed to ensure that the provision applied where an employment agent directly or indirectly through other interposed entities procured a worker's services for a client in circumstances where the worker became an employee of neither agent nor client.[13]

[26] In 1998, New South Wales amended its *Pay-roll Tax Act* 1971[14] by adding s 3C, which consisted of a series of sub-sections dealing with employment agents. Section 3C(1) defined "employment agency contract". To meet the definition, the arrangement by which the services of a worker was procured for a client had to be

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8 At 1082.
9 *Pay-roll Tax (Amendment) Act* 1985 (NSW) sch 1.
10 *New South Legislative Assembly Parliamentary Debate (Hansard)* 13 November 1985 at 9559.
11 *Pay-roll Tax (Amendment) Act* 1987 (NSW).
12 *Explanatory Notes Revenue Law Amendment Bill (No. 2)* 1996.
13 At 7.
14 *State Revenue Legislation (Miscellaneous Amendment) Act* 1998.

> "…a means other than a contract of employment between the contract worker and the client".[15]

There was no equivalent exclusion where the contract of employment was between the worker and the employment agent. Section 3C(2) deemed the employment agent to be an employer; the contract worker, its employee; and payments made in connection with the contract for the provision of services to be wages. Liability thus fell once more on the employment agent, not the client (consistent with the position in other States). However, s 3C(4) provided that an employment agent was not liable to payroll tax in certain circumstances, including where the payment which was deemed to be wages would have been exempt from payroll tax if the client had paid the wages to the contract worker, and the client had given a declaration to that effect. Section 10 of the Act provided for such exemptions; the wages liable to payroll tax did not include, inter alia, wages paid by various entities (such as, for example, public hospitals and schools).

[27] In his Second Reading Speech,[16] the Minister noted uncertainty as a result of "judicial pronouncements in other jurisdictions" (apparently a reference to the first instance decision in *Drake Personnel Ltd v Commissioner of State Revenue (Vic)*,[17] discussed later in these reasons) which had confused the issue of liability in relation to temporary staff, who had traditionally been accepted as "common law employees of the end- user". The employment agent in those cases would now be liable for payroll tax, bringing New South Wales into line with other jurisdictions.

[28] In 2007, New South Wales introduced new payroll tax legislation in the form of the *Payroll Tax Act* 2007. Division 8 of Pt 3 of the Act dealt with employment agents, with provisions (ss 37-40) later reflected in ss 13G – 13J of Div 1B. Where s 3C of the earlier legislation had referred to a "contract worker", the reference now was to a "service provider". Exemptions from liability to payroll tax were continued for various entities, non-profit organisations and health care service providers among them, but the previous Act's express exclusion, in s 3C(4), of liability to payroll tax where the client held an exemption and had given a declaration was not continued. Instead, s 40 of the Act rendered the provision deeming certain amounts to be wages paid or payable by the employment agent inapplicable to the extent that any payment would be exempt had it been paid by the client to the service provider as an employee, subject to the client's giving the declaration to that effect. (The Explanatory Note[18] offers no assistance as to the legislative intent in this instance; it simply recites the effect of the provisions.)

[29] In 2008, Div 1B was introduced into the Queensland legislation by the *Pay-roll Tax (Harmonisation) Amendment Act* 2008. Its chief intent, as the Explanatory Notes for the relevant Bill[19] made clear, was to achieve substantial consistency with other jurisdictions, particularly New South Wales and Victoria. The Commissioner relied on this description in the Explanatory Notes of the existing Queensland provisions:

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15 Section 3C(1).

16 New South Wales Legislative Assembly, Parliamentary Debates (Hansard), 14 October 1998 at 8287.

17 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304.

18 *Payroll Tax Bill 2007 Explanatory Note.*

19 *Explanatory Notes Payroll Taxation Amendment (Harmonisation) Bill* 2008.

> "…pay-roll tax applies to certain payments made by employment agents which would not fall within the common law definition of 'wages'. Liability arises where an agent procures for the client the services of an individual worker to perform employee-like functions and the worker does not become an employee of either the agent or the client. The employment agent is treated as the worker's employer if the agent receives payment from the client and pays the worker for the services."

The example was given of temporary staff engaged through an agent. The Explanatory Notes went on to record that the position in New South Wales and Victoria differed from Queensland in that, in the southern States, the employment agent could claim the benefit of a payroll tax exemption if its client could claim it; so for example, if the client were a charitable institution, with wages paid to its directly employed workers exempt, the remuneration paid by the agent to the workers would also be exempt. Other differences were that the legislation in Victoria and New South Wales extended to payments which were fringe benefits or superannuation and incorporated anti-avoidance provisions in respect of employment agents. The *Pay-roll Tax Act* was to be amended to bring the Queensland provisions into alignment.

[30] The Commissioner relied on the Explanatory Notes as showing that there was no intention to change the purpose for which the provisions were enacted in the first place, of capturing arrangements not otherwise giving rise to payroll tax liability. He pointed out that it had historically been the position in both New South Wales and Queensland that the employment agent provisions did not apply where the employment agent employed the worker. That was express in New South Wales until 1998, and in Queensland until 2008. The removal of the specific exclusion in relation to the situation where the worker was employed by the employment agent had produced some doubt, but was not inconsistent with the construction for which the Commissioner argued. It would be a curious result if Div 1B, which was enacted to expand liability for payroll tax, had the effect of freeing a common law employer of a liability which would otherwise exist. That was not consistent with the intent manifest in the Explanatory Notes.

[31] The appellants, on the other hand, relied heavily on the use of the language of exemption in the Explanatory Notes. They argued that the insertion of Div 1B demonstrated an intention that if a charity would be exempt were it paying wages, the same exemption should flow to the employment agent providing labour to the charity, so as to avoid the latter's having to meet the economic burden of payroll tax which would otherwise be passed on by the employment agent. The appellants also emphasised the fact that as introduced in 2008, and as it remains, Div 1B no longer excludes the situation where the worker becomes the employee of the employment agent; the intention being, they said, to enlarge the concept of employment agent to include someone who provides their own employees as labour. The combination of that result with the provision of what in their argument is the exemption from payroll tax for employment agents providing workers for charities made it clear that the intention was that the vicarious exemption apply to all employment agents, common law employers or not. The Commissioner's interpretation would defeat that legislative intent.

[32] The last chapter in this legislative story comes in 2017, when Div 8 (the employment agents Division) of the New South Wales Act was amended[20] by insertion of s 36A, headed,

> "Division not applicable to wages paid to common law employees".

Although the heading suggests that Div 8 has no application at all to wages paid to common law employees (which is the Commissioner's position here), in fact, s 36A renders the Division inapplicable to wages which other provisions[21] make exempt. Those exemptions arise where wages are paid for services performed under an employment agency contract by the service provider as an employment agent's employee for the latter's client and where those wages would have been exempt had the service provider been the client's employee and the latter made the necessary declaration. The Explanatory Note to the relevant Bill[22] said of the amendment that it removed

> "…doubt that wages paid to a service provider who is a common law employee of the employment agent are exempt from payroll tax if they would be exempt from payroll tax had the service provider performed the services as an employee of the client".[23]

[33] The appellants said that the amendment was explicable only on a construction of the New South Wales provisions under which an arrangement by which an employment agent provided its own employees to a client fell within the definition of "employment agency contract". The Queensland provisions, which were introduced in order to align the legislation with the New South Wales legislation, should be interpreted consistently with those of the New South Wales Act. The Commissioner, on the other hand, contended that the change showed no more than that there had previously been doubt in New South Wales as to the circumstance where employment agents used their own employees to meet their clients' requirements, so that legislative change was required.

*Decisions of other jurisdictions on analogues to Div 1B*

[34] Both parties referred to decisions from Victoria and New South Wales on the payroll tax legislation in those States (Victoria's legislation being very similar to New South Wales'). The Commissioner placed some reliance on a decision of the Victorian Court of Appeal in *Drake Personnel Ltd v Commissioner of State Revenue,*[24] which pre-dated the insertion of employment agent provisions in the *Pay-roll Tax Act* 1971 (Vic). In *Drake,* the question was whether s 3C of the *Pay-roll Tax Act* 1971 (Vic), a provision concerning contracts for the supply of services, operated to deem the appellant, which maintained a register of temporary workers whose services it supplied to clients, an employer; the workers, its employees; and its payments to them wages. No contract arose between the client and the worker, and the appellant paid each temporary employee an agreed remuneration for each placement he or she undertook.

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20 *State Revenue Legislation Amendment Act* 2017 (NSW).
21 Section 66B and sch 2 s 13B *Payroll Tax Act* 2007 (NSW).
22 *State Revenue Legislation Amendment Bill* 2017 (NSW).
23 *State Revenue Legislation Amendment Bill* 2017 Explanatory Note at 6.
24 (2000) 2 VR 635.

[35] The structure of the Victorian legislation in imposing liability was similar to that of the Queensland Act: "wages" were defined to mean wages paid to an "employee as such", but also included amounts deemed by s 3C to be wages, paid to persons deemed by the provision to be employees. Payroll tax was levied generally on "taxable wages", which were in turn defined as meaning "wages liable to payroll tax", and payroll tax was to be paid by the employer by whom the taxable wages were paid or payable. The Court of Appeal held that the relationship between the appellant and the temporary employees was that of employer and employee. Consequently, the payments made by the former to the latter were amounts paid to them as employees, and were thus wages, without any occasion to consider the deeming provisions. Payroll tax was hence payable on those amounts as taxable wages. In any event, the respondent Victorian Commissioner of State Revenue would have been entitled to succeed under s 3C, but it was not necessary to have recourse to its provisions.

[36] The Commissioner relied on the Court's recognition in *Drake* that there was no need to consider the deeming provisions where the sums paid were actually wages. The appellants, on the other hand, stressed the acknowledgement that the Commissioner could have succeeded on the basis of those provisions, pointing out that because no question of exemption arose, the basis of liability was not critical in that case.

[37] *Drake* was not referred to when the New South Wales Supreme Court decided (at first instance and then on appeal) *Moore Park Gardens Management Pty Ltd v Chief Commissioner of State Revenue*.[25] The Commissioner relied in particular on the first instance decision, while the appellant relied on the Full Court's judgment in the same case. As in the present case, the prospective payer of payroll tax was the employer of the workers providing a service to a client. It was seeking exemption from liability under s 3C of the *Pay-roll Tax Act* 1971 (NSW), which, it will be remembered, expressly provided that the employment agent was not liable where the client was exempt and had given the necessary declaration. The judge at first instance held that s 3C did not apply, because the taxpayer was already an employer. The purpose of s 3C(2) was to deem an employment agent to be an employer where they did not already have that status; there was no point in the provision for someone who already was an employer.

[38] The appeal against that decision was unsuccessful because the Full Court decided that the appellant did not have an effective declaration to permit it to claim exemption from liability. It was, therefore, unnecessary to decide whether if the exemption had been available, the appellant would nonetheless be liable to payroll tax as a common law employer under the general provisions of the Act. But the views of all three judges on appeal, as expressed in *obiter dicta*, ran counter to those of the primary judge. Santow JA described himself as inclined to the view that s 3C was a "self-contained regime"[26] exhaustively dealing with employment agents' liability to payroll tax, provided there was no contract between worker and client. Handley JA concurred; Bryson JA, although remarking that he did not share the view (presumably that of the judge at first instance) that the exemption provision

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25 The first instance decision is reported at (2004) 56 ATR 155, the decision on appeal at (2006) 62 ATR 628.

26 (2006) 62 ATR 628 at 641.

operated only where liability was deemed under the other employment agent provisions, said he preferred not to make observations on the subject.

[39] The *obiter* of the Full Court in *Moore Park*, the appellants contended, supported their position that Div 1B, and in particular s 13J(2), dealt exhaustively with what remuneration paid by an employment agent should be taken to be wages. (They did not, however, suggest that Div 1B should be regarded as a self-contained regime.) Significantly, it was also accepted on appeal in that case that although the appellant there had engaged the service providers and paid their wages, it could nonetheless be regarded as having "procured the services of" the workers.

[40] As a case directly on point, the appellants referred to a decision of the New South Wales Civil and Administrative Tribunal, *Health Service Pty Ltd v Chief Commissioner of State Revenue*, in relation to Div 8 of the *Payroll Tax Act* 2007 (NSW).[27] The applicant provided aged and disability care services to non-profit organisations entitled to exemption under the New South Wales Act, under arrangements very similar to those in the present case. It was common ground that it was in a common law employee/employer relationship with its workers and paid them wages. The Tribunal member who decided the matter regarded Santow JA's obiter view in *Moore Park Gardens* as highly persuasive. In addition, the senior member noted, Div 8 did not define "employment agent"; which led to a conclusion that it was irrelevant whether or not the person entering the employment agency contract was a common law employer or not. The engagement of the service providers as employees rather than as independent contractors did not make any difference; "procures" could extend to the procuring of workers as employees to perform contracted work.

[41] If the Division had no application to a common law employer, the senior member reasoned, concessions in s 40 of the Act, the equivalent of s 13J(2), would only apply to persons other than common law employers, producing an inequitable outcome and two different regimes for employment agents. And if the Division did not apply to common law employers, they would not be subject to the anti-avoidance provisions it contained. Finally, it was significant that the previous legislation's exclusion of arrangements where there was an employer/employee relationship between the worker and the employment agent had been removed; that was an indication that Parliament intended now to capture such an arrangement in the employment agency provisions. Div 8, the senior member concluded, dealt exhaustively with the payroll tax consequences in relation to employment agency contracts, but was not a regime governing employment agents' liability to payroll tax.

[42] The Commissioner criticised the Tribunal's decision in the *Health Services* case on a number of grounds. Firstly, to treat s 40 (s 13J(2)'s analogue) as containing concessions was mistaken; all it did was limit the deeming provision concerning wages to particular circumstances. The fact that the deeming provision did not apply did not mean that the contract itself could not be an employment agency contract to which the anti-avoidance provisions in the relevant Division of the Act would apply; but in any case, where an employer was liable under the general provisions of the Act, the general anti-avoidance provisions would also apply. It

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27 [2014] NSWCATAD 83.

was not correct to say that the Division in question dealt exhaustively with the payroll tax consequences in relation to employment agency contracts, because, as in the Queensland Act, the actual imposition of liability required recourse to other provisions.

[43] Both parties relied on observations in a number of other first instance decisions as supporting their position, both as to the application of Div 1B to common law employers and as to the meaning of "procure the services of another" in s 13G. The appellants pointed to the decision of *Freelance Global Ltd v Chief Commissioner of State Revenue (NSW)*,[28] in which White J, having considered the language of Div 8 of the 2007 New South Wales Act and that of its predecessor, s 3C of the 1971 Act, concluded that the provisions were not limited in their application to employment agents or labour hire firms in the usual sense.[29] That conclusion was reiterated by other judges sitting at first instance in the New South Wales Supreme Court in *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue*[30] and *Banfirn Pty Ltd v Chief Commissioner of State Revenue*[31] and by White J himself in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue.*[32]

[44] Each side found something to advance its argument in the last of those decisions, *UNSW Global.* Having undertaken a review of the New South Wales legislative history, White J noted that the first instance decision in *Drake*[33] had led to the amendment of the New South Wales provisions in 1998, because it had opened up the possibility that where temporary personnel were supplied by a labour hire company they might be classified as independent contractors, although they would be working for the client as though they were its employees. (Subsequently, of course, the Victorian Court of Appeal found that the employment agent was the employer of the temporary personnel in that case.) The Victorian legislation was amended to avoid the prospect that payments to such temporary staff would be exempt from payroll tax liability, and the New South Wales legislature promptly followed suit.

[45] The Commissioner relied on White J's characterisation of the mischief to which the provisions were directed as the avoidance of payroll tax:

> "…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…".[34]

That was, the Commissioner argued, consistent with his contention that the provisions extended the scope of payroll tax liability where the status of employer and employee was uncertain; it was not concerned with the situation where the employer/employee relationship was clearly established.

[46] White J concluded that the focus of the provisions of the New South Wales payroll tax legislation was on whether the service providers were in substance working for

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28 [2014] ATC 20-445.
29 At 15,970.
30 [2019] NSWSC 657 at [94].
31 [2019] NSWSC 1058 at [25].
32 (2016) 104 ATR 577 at 587.
33 *Drake Personnel Ltd v Commissioner of State Revenue (Vic)* (1998) 40 ATR 304.
34 At 587.

the client as its employees would. But the legislation was not directed to the situation where the service provider was genuinely an independent contractor providing services to a client through an intermediary.[35] The appellants emphasised his Honour's observation in that context that

> "whether the worker is to be characterised as an employee or a contractor…",

the employment agency contract provisions were intended to apply where the workers provided would be added to the client's workforce for the conduct of the client's business.[36] That view was subsequently endorsed by Kunc J in *JP Property Services Pty Ltd v Chief Commissioner of State Revenue*:[37] The issue there was whether the service providers became part of the workforce of the client. Accepting a submission made by the relevant Commissioner, his Honour went on to express the view that:

> "Whether a service provider is an employee or an independent contractor of the employment agent is not determinative of whether the EAC [employment agent contract] provisions apply."[38]

[47] The appellants cited those observations in *UNSW Global* and *JP Property Services* as showing that the judges in those cases regarded the common law employee-employer relationship as within the contemplation of the employment agency contract provisions. But, of course, neither case actually involved common law employees. In *UNSW Global*, the service providers were experts providing forensic and other services, whom White J held to be independent contractors; in *JP Property Services*, they were sub-contractors providing cleaning services.

[48] As to whether an employer could be said to procure the services of its employees for its clients, the Commissioner relied on a decision of Ginnane J in the Victorian Supreme Court in *CXC Consulting Pty Ltd v Commissioner of State Revenue*[39] as supporting his construction of the word "procure". In that case, his Honour took the view that in the context of an equivalent provision to s 13G, the word "procure" referred to both the provision of services and to the person providing the services; which supported the view, the Commissioner contended, that a three party relationship was required between the employment agent, the client and a separate person providing the services. The Commissioner also placed some emphasis on a statement by Payne J in *Banfirn Pty Ltd v Chief Commissioner of State Revenue*[40] that the effective of Div 8 of the New South Wales Act was to impose payroll tax on employment agents

> "…who provide the services of third parties to their 'clients'".[41]

[49] In *Freelance Global,* White J expressed agreement with Ginnane J's approach in *CXC Consulting*. His Honour said of the verb "procure" in this context that it

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35 At 589.
36 At 593.
37 (2017) 106 ATR 639.
38 At 659.
39 (2013) 96 ATR 796.
40 [2019] NSWSC 1058.
41 At [22].

> "…means more than facilitate or enable and requires that the employment agent cause the services of a contract worker (or service provider) to be provided to the employment agent's client, with the expenditure of care or effort by the employment agent".[42]

In that case, the taxpayer undertook to provide services to a client and then arranged for an independent contractor to perform the services. His Honour held that a contractor could both supply its services to the client for the purpose of the client's business and at the same time supply those services to the taxpayer for the purposes of its business.

[50] The appellants here argued that the same was true of their arrangements: when they directed a worker to go to the school or hospital and work there, the worker was providing his or her services both to the client and the appellant. They relied, in addition, on two decisions referred to in *Freelance*, *Accident Compensation Commission v Odco Pty Ltd*[43] and *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue,*[44] where it had similarly been held that the same service provided by a contractor could simultaneously constitute the supply of that service to both principal and client.

[51] The appellants also referred to two decisions of Ward CJ in Eq, the first of which was *HRC Hotel Services Pty Ltd v Chief Commissioner of State Revenue.*[45] The relevant contracts there were made between companies and hotel clients for the cleaning of hotel rooms. The dispute related to the companies' liability to payroll tax, assessed on payments made to third party subcontractors who provided additional cleaning staff as needed. Her Honour considered what was required in order for a person to "procure the services" of another under a contract and expressed the view that it was sufficient

> "… for the procurement of the services of the service provider to be something that is done in order to perform the obligations contained in the asserted employment agency contract".[46]

In order to procure the services of another person for a client, the first person had to obtain those services; which meant facilitating or enabling them with the expenditure of care or effort "in and for the conduct of the business of the employment agent's client"[47]; it was not enough that it was merely for the client's benefit.

[52] Applying that logic to the present case, the appellants said that when they directed their employees to go to the client's worksite and do work, providing a service to the school or hospital, they had procured that service under the employment agency contract, by directing (and thus causing) their employees to provide the service to the client in order to discharge their contractual obligations.

*Consideration*

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42 At 15, 963.
43 (1990) 95 ALR 641.
44 (2005) 222 ALR 599.
45 (2018) 108 ATR 84.
46 At 109.
47 At 109.

[53] I have found those authorities to be illuminating in considering the legislative intent behind, and the structure of, the employment agent provisions, but they were not of any immediate assistance in resolving the issues of construction in this case. In none of them apart from *Health Service* was there occasion to consider the common law employment situation in any depth; and there is some substance to the points the Commissioner makes in respect of that case. At any rate, I have reached different conclusions from those in *Health Service* in relation to the Queensland legislation.

[54] The High Court in *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (Northern Territory)*[48] summarised the principles on which tax statutes, as other statutes, are to be construed:

> "…the task of statutory construction must begin with a consideration of the text itself. Historical considerations and extrinsic materials cannot be relied on to displace the clear meaning of the text. The language which has actually been employed in the text of legislation is the surest guide to legislative intention. The meaning of the text may require consideration of the context which includes the general purpose and policy of the provision, in particular the mischief it is seeking to remedy."[49]

The fact that a statute is a taxing Act is part of the context relevant to construction.[50]

[55] Taking first the question of how the phrase "procure the services of another" in s 13G(1) should be construed, I do not find very compelling the Commissioner's argument that an employer cannot procure the services of its employee because the two are legally indistinguishable. Reliance on *Hollis v Vabu* in this context seems to me misplaced. In that case, the identification of the worker with the principal was indicative of an employer/employee relationship, giving rise to vicarious liability; it was not proposed that the existence of an employer/employee relationship produced an utter identification of the two for all purposes. There is, I think, some peril in endeavouring to transpose a common law concept discussed in a particular context to a process of statutory construction.

[56] A reading of the phrase as broad enough to capture the situation where an employer enters a contract of employment with the employee for the specific purpose of having that employee provide services in and for the business of a client seems to me at least open. It is less obvious that direction to an existing employee to perform work for a client would meet the description of procuring the services of another, although there are statements from the New South Wales Supreme Court, referred to above, which would suggest a sufficiently broad meaning of "procure" for that to be the case. But although it might be possible to read s 13G as extending to those situations, read in the larger context of Div 1B, the mischief it was intended to address, and the purpose of the *Payroll Tax Act* as a whole, I do not consider that to be the correct construction of the section.

[57] To begin with, to read the definition of "employment agency contract" as extending to employers produces the absurdity that the succeeding provisions would then

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48 (2009) 239 CLR 27.
49 At [47].
50 At [57].

result in what is in fact the case being taken by statute to be the case. That is not an impossible result, but the *Payroll Tax Act* is described as an Act to impose a tax, and the clear legislative intent in inserting Div 1B and its predecessors was to extend liability to payroll tax. The mischief at which those provisions were directed was the avoidance of tax by providers of labour. To include actual employers, already and independently liable to tax, in the compass of Div 1B would be entirely superfluous.

[58] For similar reasons, I do not think that the absence, from 2008, in the definition of "employment agent contract" in s 13G, of any exclusion where the service provider is employed by the putative agent is particularly telling. It is likely to have been regarded as unnecessary, since employers who might be regarded as employment agents were already caught by the general provisions. There was a reason to retain the exclusion where the client was the employer, because to deem a different entity, the employment agent, also to be the employer in that situation would be apt to produce confusion and, perversely, to shift the burden of payroll tax from the actual employer, the client, to the employment agent. The client, of course, was now protected by s 13K from liability from payroll tax on wages paid for services performed for it once the employment agent had paid tax; an odd result if it was in truth the employer. It is not difficult to see why contracts of employment between clients and service providers continued to be excluded from the definition of employment agency contract.

[59] Turning to the pivotal provision, as the Commissioner points out, s 13J(2) simply produces the result that in the circumstances it sets out, the deeming effect of s 13J(1) does not apply, so that the payments to which it refers are not taken to be wages. Section 13J(2) does not create a negative; it does not say that wages paid by an employment agent are to be taken *not* to be wages; but that is what the appellants would have it do. The appellants' construction runs counter to the legislative intent of expanding liability for payroll tax, and to the extent that it entails enlarging the sphere of operation of s 13J by the reading in of words, is impermissible. [51]

[60] The provisions of Div 1B do not have the contended-for effect of displacing the definition of "wages" in the schedule. To the contrary, that definition explicitly makes payments falling within the embrace of the Division so as to be deemed wages an addition to, not a replacement of, wages falling within the general part of the definition. Similarly, the definition of "employer" is a cumulative one, adding, to the ordinary concept of a person liable to pay wages, persons taken to be employers under other provisions such as s 13H. As to the significance of the expression "[f]or the Act", s 13J(1) describes what will be wages for the purposes of the Act, bringing those payments within the definition of "wages" in the schedule. It does not purport to say what will *not* be wages for the Act. There is no conflict between the schedule definition and Div 1B which would warrant a *generalia specialibus non derogant* approach.

[61] It was argued that construing Div 1B as having no application to common law employees would result in negating the benefit of s 13J for employment agents in all circumstances, because they would be deemed employers and the service providers their employees, so that payments passing between them would be captured in the

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51 *R v PLV* (2001) 51 NSWLR 736 at 743-744.

opening general part of the Schedule definition of "wages". I do not think that is so. The general part of the definition refers to payments made "to an employee as an employee". Payments made, for example, to an independent contractor might be said to be made to an employee because of the deeming effect of s 13I, but they are not made to him or her "as an employee". They are made pursuant to a contract for the provision of services. That position is captured, if at all, by the extended part of the definition, where payments are included as wages because they are "taken to be wages by another provision" of the Act.

[62] On the construction which I have concluded is correct, Div 1B was not intended to apply to common law employees, and the expression "procure services of another" was correspondingly not intended to apply in the circumstance where an employer directs, or even engages, an employee to provide services for a client. Employers are not employment agents within the meaning of the definition in s 13G, so the difficulty suggested in *Health Service*, that a construction of (the equivalent of) Div 1B as inapplicable to common law employers produces two different regimes for treatment of employment agents, does not arise.

[63] It is true that there will be a difference in the payroll tax implications where workers provide their services to institutions entitled to exemption, according to whether those workers are employees or independent contractors. But that is not a remarkable result. As the Commissioner pointed out, there might be considerable complexity otherwise in applying the Act where an employee worked for more than one entity, one of which was entitled to claim an exemption and the others not. Had the legislature wished to create an exemption from payroll tax in any circumstance where monies were paid for provision of services to an organisation entitled to an exemption, it would have been a simple matter to do so; for example by s 13J(2) providing that "the Act", rather than "ss (1)", did not apply in the specified circumstances. The mechanism adopted, of simply removing the consequence of those payments being deemed wages under s 13J(1), very much suggests an intent to avoid such a comprehensive result.

[64] I do not consider that recourse to extrinsic material leads to any different view. The 1983 Second Reading Speech prior to the introduction of the employment agent provisions and the 1996 Explanatory Notes on their amendment make it clear that the legislative intent was to ensure that providers of labour could not, by virtue of some uncertainty as to the identity of the workers' employer, produce the result that no payroll tax was paid in respect of those workers. The Explanatory Notes to the 2008 amending Act, in referring to remuneration paid by an employment agent to a worker as "exempt", were, in my view, doing no more than using a form of shorthand to describe the net result. The Notes do not suggest any equation of remuneration in that context with actual wages paid by an employer.

[65] And the 2008 Explanatory Notes do not suggest any intention to effect an inclusion of employers by removing their express exclusion. To the contrary, they describe the application of payroll tax to payments

> "…which would not fall within the common law definition of 'wages'

and note that liability arises where

> '…the worker does not become an employee of either the agent or the client'".

No intention was expressed to change that state of affairs or to widen the application of the employment agent provisions; instead the changes effected by the amending Act were expressed to be for the purpose of aligning the Payroll Tax Act with the legislation in the southern states by passing on the benefit of exempt payments to employment agents in that capacity; introducing an anti-avoidance provision; and extending the deeming effect to fringe benefits and superannuation payments.

[66] Plainly, having regard to its 2017 amendments, the New South Wales legislature has determined that a more extensive protection from payroll tax consequences should be given to common law employers; which suggests a starting premise in that State that employers should be considered as within the embrace of the employment agent provisions. But that broader application of the provisions was not apparent on the face of the New South Wales legislation in 2008, and it does not follow from the fact that there was then a concern on the part of the Queensland legislature to align the State's payroll tax provisions with those of other States that it was also contemplated that the employment agents provisions would be construed as extending to common law employers. The absence of any amendments in this State with similar effect to those made in New South Wales in 2017 suggests the contrary.

*Orders*

[67] For the reasons given, I conclude that Div 1B of the *Payroll Tax Act* has no application to common law employers. This appeal is, accordingly, disallowed. Subject to contrary submission, the appellants should pay the Commissioner's costs.