# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Brisbane Bears – Fitzroy Football Club Ltd v Commissioner of State Revenue* [2016] QSC 231 |
| PARTIES: | **BRISBANE BEARS – FITZROY FOOTBALL CLUB LIMITED**<br>(appellant)<br>**v**<br>**COMMISSIONER OF STATE REVENUE**<br>(respondent) |
| FILE NO/S: | SC No 12308 of 2013 |
| DIVISION: | Trial Division |
| PROCEEDING: | Hearing |
| DELIVERED ON: | 14 October 2016 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 3 May 2016 |
| JUDGE: | Bond J |
| ORDER: | **The orders of the Court are that:**<br>**1. The appeal is dismissed.**<br>**2. The appellant must pay the respondent's costs of and incidental to the appeal.** |
| CATCHWORDS: | TAXES AND DUTIES – PAYROLL TAX – LIABILITY TO TAXATION – WHAT ARE WAGES – where appellant employs players and coaches – where players and coaches entered into agreements with the appellant whereby they agreed to provide promotion or marketing services – where the relevant agreements permitted the use of image rights – whether payment made by the appellant was payment in respect of the exploitation of an asset or was payment in respect of taxable wages<br>*Payroll Tax Act* 1971 (Qld), s 9, s 10, s 13B, s 50, s 51<br>*Murdoch v Commissioner of Payroll Tax (Victoria)* (1980) 143 CLR 629, cited |
| COUNSEL: | D G Russell QC, with H G Lakis, for the appellant<br>M D Hinson QC, with M Brennan QC, for the respondent |
| SOLICITORS: | KPMG Law for the appellant<br>Sparke Helmore for the respondent |

## Introduction

[1] Brisbane Bears – Fitzroy Football Club Ltd is a member of the Australian Football League, which conducts the elite Australian Football competition throughout Australia. The Club's team is known as the "Brisbane Lions".

[2] The Club employs various players and coaches, for obvious purposes. The Club is the subject of payroll[1] tax under the *Payroll Tax Act* 1971 (Qld) ("the Act") in respect of taxable wages which it pays its players and coaches.

[3] On 30 October 2013, the Commissioner of State Revenue disallowed the whole of the objections lodged by the Club in relation to payroll tax reassessments for each of the financial years ending 30 June 2008 to 30 June 2012. The reassessments increased the payroll tax which the Club would have to pay, on a number of bases.

[4] The Club now appeals against the Commissioner's decisions, but only to the extent which the decisions assert a liability for payroll tax on payments which the Club has made to various players and coaches (or their associated corporate entities) for the use of image rights. The Club contends that those payments were not payments of taxable wages and, accordingly, were not payments which were liable to payroll tax under the Act.

[5] If that issue of principle is determined in its favour, the Club seeks a partial allowance of its objection and ancillary orders setting aside the Commissioner's decisions and requiring the Commissioner to reassess and reduce the payroll tax liability and associated penalties and interest and to repay overpaid amounts.

[6] In order to determine whether the Club's contention concerning image rights payments is correct, it is necessary -

(a) first, to explain the way in which the Act relevantly operated during the five financial years in question;

(b) second, to examine the factual context in which the Club made payments for the use of image rights; and

(c) finally, to perform the characterisation exercise which the Act requires.

## The relevant operation of the Act

[7] Generally speaking, payroll tax is a tax on taxable wages paid by an employer to employees for services performed or rendered during each financial year. In order to determine whether the tax is payable in respect of particular payments, it is necessary to focus on the relevant definitions, particularly on "taxable wages" and "wages".

[8] Although the broad concept just described stayed the same during the five financial years which are relevant for the purposes of this appeal, there were relevant changes in the legislative regime which applied from time to time.

[9] It is necessary to differentiate between the regime which applied during the following periods:

(a) the period 1 July 2007 to 30 June 2008;

(b) the period 1 July 2008 to 25 March 2010;

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[1] For consistency I will adopt the spelling "payroll" rather than "pay-roll" throughout this judgment, although some versions of the statute use the latter spelling.

(c) the period 26 March 2010 to 30 June 2012.

The period 1 July 2007 to 30 June 2008

[10] Section 10 imposed payroll tax on "taxable wages" in the following terms:

> **10 Imposition of payroll tax on taxable wages**
>
> Subject to, and in accordance with, the provisions of this Act, there shall be charged, levied and paid for the use of Her Majesty on all taxable wages payroll tax at the following rate of the wages—
>
> (a) for wages paid or payable in the financial year ending 30 June 2002—4.8%;
>
> (b) for wages paid or payable in a later financial year—4.75%.

[11] "Taxable wages" was defined in the Dictionary set out in a schedule to the Act as follows:

> **Taxable wages** means wages that, under section 9, are liable to payroll tax.

[12] "Wages" was defined in the Dictionary as follows (emphasis added):

> ***wages*** means any **wages, remuneration, salary, commission, bonuses or allowances paid or payable … to, or in relation to an employee as an employee, or applied for the employee's benefit**, and, without limiting the generality of the foregoing, includes—
>
> (a) any amount paid or payable by way of remuneration to a person holding office under the Crown in right of the State of Queensland or in the service of the Crown in right of the State of Queensland; and
>
> (b) any amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour; and
>
> (c) any amount paid or payable by a company by way of remuneration to a director of that company; and
>
> (d) any amount paid or payable by way of commission to an insurance or time payment canvasser or collector; and
>
> (e) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services; and
>
> (f) remuneration mentioned in the definition *employment agent*, paragraph (b); and
>
> (g) fringe benefits; and
>
> (h) a superannuation contribution, other than a superannuation contribution for the employee's services performed or rendered by an employee before 1 January 2000; and
>
> (i) a taxable ETP.

[13] Section 9(1) relevantly provided (emphasis added):

> **9 Wages liable to payroll tax**
>
> (1) … the **wages liable to payroll tax** under this Act **are wages that are paid or payable by an employer** after the month of August 1971 (**whether in respect of services performed or rendered before, during or after that month**), and—
>
> (a) **that are paid or payable in Queensland, other than wages so paid or payable to a person for services performed or rendered**—
>
> (i) entirely in another State; or
>
> (ii) entirely in another country for more than 6 months after wages were first paid to the person for the services; or
>
> (b) **that are paid or payable elsewhere than in Queensland in respect of services performed or rendered wholly in Queensland**;
>
> …

[14] "Employer" was a term defined in the Dictionary as:

***employer*** means 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 who is an employment agent

[15] Three propositions are evident from the foregoing.

[16] **First**, the proper approach is to determine whether a payment falls within the definition of "wages" and then to apply s 9 to determine whether that payment is "liable to payroll tax".

[17] **Second**, payroll tax is a tax imposed upon payments which bear a particular character. The process of characterisation requires a determination of the nature of the payment and whether or not they meet the statutory description. As Gibbs J observed in *Murdoch v Commissioner of Payroll Tax (Victoria)*[2] "[t]he whole of the circumstances must be considered in determining the nature of the payment". In the same case, Mason, Murphy and Wilson JJ said "… the solution to the problem is to be found in the application of the provisions of the Act to the particular circumstances of the case".[3]

[18] **Third**[4], the requisite characteristics of such payments are these:

(a) they are payments of wages, remuneration, salary, commission, bonuses or allowances paid or payable to, or in relation to an employee as an employee, or applied for the employee's benefit (or they otherwise fall within the wording of the subparagraphs of the definition of "wages"); and

(b) they are payments liable to payroll tax under s 9, which means they are–

(i) paid or payable by an employer; and

(ii) paid or payable in respect of services performed or rendered.

[19] It remains to note that the Act contained an anti-avoidance provision. The following observations may be made:

(a) Section 50 provided:

**50 Arrangements for avoidance of tax may be disregarded**

(1) Where any person enters into any agreement, transaction, or arrangement, whether in writing or otherwise, whereby a natural person performs or renders, for or on behalf of another person, services in respect of which any payment is made to some other person related or connected to the natural person performing or rendering the services and the effect of such agreement, transaction or arrangement is to reduce or avoid the liability of any person to the assessment, imposition or payment of payroll tax, the commissioner may—

(a) disregard such agreement, transaction, or arrangement; and

(b) determine that any party to such agreement, transaction or arrangement shall be deemed to be an employer for the purposes of this Act; and

(c) determine that any payment made in respect of such agreement, transaction or arrangement shall be deemed to be wages for the purposes of this Act.

(b) For analytical purposes the section may be reformatted, as follows (emphasis added):

(1) Where

(a) any person enters into any agreement, transaction, or arrangement, whether in writing or otherwise,

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2 (1980) 143 CLR 629 at 636. His Honour dissented in the result.

3 (1980) 143 CLR 629 at 644.

4 Because they are not presently relevant, I set to one side the geographical issues referred to in s 9.

(i) **whereby a natural person performs or renders, for or on behalf of another person, services**; and

(ii) **payment is made in respect of those services to some other person related or connected to the natural person performing or rendering the services**

(b) and the effect of such agreement, transaction or arrangement, is to reduce or avoid the liability of any person to the assessment, imposition or payment of payroll tax,

the commissioner may—

(c) disregard such agreement, transaction, or arrangement; and

(d) determine that any party to such agreement, transaction or arrangement shall be deemed to be an employer for the purposes of this Act; and

(e) determine that any payment made in respect of such agreement, transaction or arrangement shall be deemed to be wages for the purposes of this Act.

(c) What is significant is that the threshold consideration for the operation of the provision is that a natural person performs or renders services for which payment is made. This reveals an intention consistent with the analysis just expressed that a critical issue for rendering payments liable to payroll tax is that the payments are paid or payable in respect of services performed or rendered.

The period 1 July 2008 to 25 March 2010

[20] Section 10 continued to impose payroll tax on "taxable wages" and that term continued to be defined in the same way. Section 9 was not altered.

[21] However the definitions of "employer" and "wages" were altered to read as follows (emphasis added):

***employer*** means **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**.

Note—

For provisions under which persons are taken to be employers, see, for example, sections 13C (relevant contract employers) and 13H (employment agents under employment agency contracts).

…

***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—

(a) any amount paid or payable by way of remuneration to a person holding office under the Crown in right of the State of Queensland or in the service of the Crown in right of the State of Queensland; and

(b) any amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour; and

(c) any amount paid or payable by a company by way of remuneration to a director of that company; and

(d) any amount paid or payable by way of commission to an insurance or time payment canvasser or collector; and

(e) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services; and

(f) fringe benefits; and

(g) a superannuation contribution, other than a superannuation contribution—

(i) paid or payable by a company for a director of the company before 1 July 2008; or

(ii) for services performed or rendered by an employee before 1 January 2000; and

(h) a termination payment; and

(i) an amount taken to be wages under another provision of this Act; and

Note—

See, for example, sections 13E (amounts paid or payable under a relevant contract), 13J (amounts paid or payable under an employment agency contract) and 51 (amounts paid or payable by or to third parties).

(j) a share or option granted—

(i) by an employer to an employee in respect of services performed or rendered by the employee; or

(ii) by a company to a director of the company by way of remuneration for the appointment or services of the director.

Note—

See part 2, division 1C for provisions that apply for interpreting this paragraph.

[22] The amendments to the definitions of "employer" and "wages" did not alter the first and second propositions stated at [16] and [17] above. They did necessitate a slight alteration to the identification of the requisite characteristics expressed at [18] above. The requisite characteristics of payments which are liable to payroll tax are as follows[5]:

(a) they are payments of wages, remuneration, salary, commission, bonuses or allowances paid or payable to an employee as an employee (or they otherwise fall within the wording of the subparagraphs of the definition of "wages"); and

(b) they are payments liable to payroll tax under s 9, which means they are–

(i) paid or payable by an employer; and

(ii) paid or payable in respect of services performed or rendered.

[23] It remains to observe that the Act continued to express other provisions consistent with the analysis just expressed that a critical issue for rendering payments liable to the tax is that the payments are paid or payable in respect of services performed or rendered. Thus:

(a) The anti-avoidance provision in s 50 continued un-amended.

(b) Subparagraph (i) of the definition of "wages" made it clear that some other provisions of the Act operated to deem certain payments to be "wages", even if they did not fall within the general words of the chapeau of the definition or any of the other subparagraphs of the definition. Each of the examples mentioned in the note to the subparagraph carried the requirement of the provision of services. It suffices only to quote the last example mentioned.

(c) Section 51 commenced from 1 July 2008, and relevantly provided (emphasis added):

**51 Wages paid by or to third parties**

(1) **Subsection (2) applies if money or other consideration**—

(a) **for an employee's services as an employee of an employer**, is paid or given or to be paid or given—

(i) to the employee, by a person other than the employer; or

(ii) **to a person other than the employee, by the employer**; or

(iii) to a person other than the employee, by a person other than the employer; and

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5 I again set aside - because they are presently irrelevant - the geographical issues referred to in s 9.

(b) **had it been paid or given, or to be paid or given, directly by the employer to the employee, would be wages paid or payable by the employer to the employee for this Act**.

*Example of other consideration—*

the grant of a share or option

(2) **The money or other consideration is taken to be wages paid or payable by the employer to the employee**.

...

The period 26 March 2010 to 30 June 2012

[24] Section 10 continued to impose payroll tax on "taxable wages" as before and that term and the terms "employer" and "wages" continued to be defined in the same way.

[25] Section 9 was replaced effective from 26 March 2010 by a new section which provided (emphasis added):

**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

(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

(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

(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.

*Note—*

Section 15A provides an exemption for wages paid or payable for services performed entirely in another country for a continuous period of more than 6 months.

(2) Subject to subsections (4) and (5), **the question of whether wages are liable to payroll tax under this Act must be decided by reference only to the services performed or rendered by the employee for the employer during the month** in which the wages are paid or payable.

(3) Wages paid or payable by an employer for an employee in a particular month **are taken to be paid or payable in relation to the services performed or rendered by the employee for the employer during the month**.

*Example—*

If wages paid in a month are paid to an employee for services performed or rendered over several months, the question of whether the wages are liable to payroll tax under this Act must be decided by reference only to the services performed or rendered by the employee in the month the wages are paid. The services performed or rendered in previous months are disregarded. However, the services performed or rendered in previous months are relevant to the question of whether wages paid in the previous months are liable to payroll tax under this Act.

(4) If no services are performed or rendered by an employee for an employer during the month in which wages are paid or payable in relation to the employee—

(a) the question of whether the wages are liable to payroll tax under this Act must be decided by reference only to the services performed or rendered by the employee for the employer during the most recent earlier month in which the employee performed or rendered services for the employer; and

(b) the wages are taken to be paid or payable in relation to the services performed or rendered by the employee for the employer in that most recent earlier month.

(5) If no services were performed or rendered by an employee for an employer during the month in which wages are paid or payable in relation to the employee or in any earlier month—

(a) the wages are taken to be paid or payable in relation to services performed or rendered by the employee in the month in which the wages are paid or payable; and

(b) the services are taken to have been performed or rendered at a place where it may reasonably be expected that the services of the employee for the employer will first be performed.

(6) All amounts of wages paid or payable in the same month by the same employer for the same employee must be aggregated for deciding whether the wages are liable to payroll tax under this Act.

*Example—*

If 1 amount of wages is paid by an employer in a particular month in relation to services performed or rendered in Queensland, and another amount of wages is paid by the same employer in the same month in relation to services performed or rendered by the same employee in another State, the wages paid must be aggregated as if they were paid or payable in relation to all services performed or rendered by the employee in that month. Subsection (1)(b) would be applied to decide whether the wages are liable to payroll tax under this Act.

(7) If wages are paid in a different month from the month in which they are payable, the question of whether the wages are liable to payroll tax under this Act must be decided by reference to the earlier of the relevant months.

[26] The amendments to s 9 did not alter the first and second propositions stated at [16] and [17] above, or the identification of the requisite characteristics of payments which are liable to payroll tax expressed at [18] above, save that the requirement that payments be "paid or payable **in respect of** services performed or rendered" became a requirement that they be "paid or payable **in relation to** services performed or rendered". If anything, the amendments emphasised more strongly the need for a connection between the payments and services performed or rendered. The observations made at [23] above continued to apply.

Summary

[27] The relevant operation of the Act during the period with which I am concerned may be summarised in this way.

[28] **First**, the provisions of the Act have made it clear that the tax is a tax imposed upon payments which bear a particular character. For reasons I have already explained, that requires a consideration of the application of the Act in all the circumstances of the case concerned.

[29] **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 fall within that definition are rendered liable to payroll tax under s 9.

[30] **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".

[31] **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 factual context for the image rights payments**

[32] The facts were agreed between the parties and set out in a statement of agreed facts and an agreed bundle of documents.

Contracts relevant to players

[33] For players, the relevant agreements were:

(a) two Collective Bargaining Agreements, the first relating to the years 2007 – 2011 and the second relating to the years 2012 – 2016;

(b) individual Standard Playing Contracts; and

(c) individual Additional Services Agreements.

*The Collective Bargaining Agreements*

[34] The Collective Bargaining Agreements took the form of an agreement between the AFL and the AFL Players' Association, but operated as binding agreements between those two parties and also each AFL Club and each player[6].

[35] Each Collective Bargaining Agreement provided that each player who was employed by an AFL Club must enter into a Standard Playing Contract with the AFL and the relevant AFL Club[7]. That contract was agreed to be the form of contract for the employment of a player by an AFL Club to play Australian Football[8]. 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[9].

[36] The Collective Bargaining Agreements contained certain terms which regulated the players' involvement in promotion and marketing. Thus:

(a) The term "Image" was defined to include a player's "name, photograph, likeness, reputation and identity"[10].

(b) All players were required to make a certain number of appearances for the purposes of game development and promotion[11]. Players were obliged not to unreasonably

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6 Recitals A to D and cl 2.1 of the 2007 Collective Bargaining Agreement and Background A to D and cl 2(a) of 2012 Collective Bargaining Agreement.

7 Clause 18.1 of the 2007 Collective Bargaining Agreement and cl 24.1 of the 2012 Collective Bargaining Agreement.

8 Clause 1.1 (definition of "Standard Playing Contract") of the 2007 Collective Bargaining Agreement and cl 1.1 (definition of "Standard Playing Contract") of the 2012 Collective Bargaining Agreement.

9 Clause 5 and Schedule B of the 2007 Collective Bargaining Agreement and cl 4 and Schedule C of the 2012 Collective Bargaining Agreement.

10 Clause 1.1 (definition of "Image") of the 2007 Collective Bargaining Agreement and cl 1.1 (definition of "Image") of the 2012 Collective Bargaining Agreement.

11 Clause 20 of the 2007 Collective Bargaining Agreement and cl 26 of the 2012 Collective Bargaining Agreement.

withhold consent to the use of their Image in some aspects of this promotion[12]. There were other promotions which the AFL and its sponsors were expressly entitled to use a player's Image, for example:

(i) in connection with particular awards[13];

(ii) in accordance with AFL Licensing & Marketing Operational Guidelines[14] or AFL Licensing and Commercial Operations Guidelines[15]; and

(iii) generally for promotions which included promotion of particular types of sponsors[16].

(c) Players were specifically authorised to use their own Image or license its use provided that such use did not conflict with certain types of sponsor, was not prejudicial to Australian Football and complied with certain other constraints[17].

(d) One of the permitted means by which a player could monetise the use of their own Image was by entering into Additional Services Agreements with their employer either directly or indirectly. In this regard the Collective Bargaining Agreements provided:

(i) By cl 16.1[18] (emphasis added):

> **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 Additional Services Agreements** and the definition of Football Payments. Such arrangements are separate and distinct from the Standard Playing Contract 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 except as provided in sub-clause 16.2.

(ii) By the Guidelines for Additional Services Agreements[19] (emphasis added):

> **Guidelines for Additional Services Agreements**
>
> 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**

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12 Clause 20.12 of the 2007 Collective Bargaining Agreement and cl 4.2 of Schedule E of the 2012 Collective Bargaining Agreement.

13 Clause 21.4 of the 2007 Collective Bargaining Agreement and cl 28(e) of the 2012 Collective Bargaining Agreement.

14 Clause 21.6 and Schedule E of the 2007 Collective Bargaining Agreement.

15 Clause 28(g) and Schedule E of the 2012 Collective Bargaining Agreement.

16 Clause 21.7 of the 2007 Collective Bargaining Agreement and cl 28(h) of the 2012 Collective Bargaining Agreement.

17 Clause 21.1(a) of the 2007 Collective Bargaining Agreement and cl 28(a) of the 2012 Collective Bargaining Agreement.

18 The equivalent term in the 2012 Collective Bargaining Agreement was cl 11.1 and it was not materially different.

19 Schedule D of the 2007 Collective Bargaining Agreement. The equivalent Guidelines in the 2012 Collective Bargaining Agreement was in Schedule H and are not materially different.

> Player enters into an agreement directly with a sponsor of the Player's AFL Club for marketing work
>
> eg. A Hawthorn Player contracts with HSBC to be paid $15,000 for promoting HSBC.
>
> **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**:
>
> eg. A Collingwood Player contracts with Collingwood to be paid $40,000 for marketing Emirates, Primus and Adidas exclusively for the club.
>
> **Type 3**
>
> 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 APL Club for endorsements and promotions**. The related entity employs the Player.

(e) As is apparent from the quoted terms, the Collective Bargaining Agreements also included salary cap provisions, which operated by reference to the defined term "Total Player Payments". Save to observe that payments made to payers under Additional Services Agreements within an agreed numerical limit each year were excluded from (and payments above the limit were included in) the payments taken into account to determine salary cap compliance[20], it is not necessary further to consider how that mechanism operated.

[37] A consideration which is critical to the determination of this appeal is that the intention revealed by the Collective Bargaining Agreements was that players could monetise the use of their own Image by entering into Additional Services Agreements in which they agreed to provide particular services to their employer, either directly or indirectly. Additional Services Agreements 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.

*The Standard Playing Contracts*

[38] The Standard Playing Contracts were tri-partite contracts between the Club, the relevant player, and the AFL and governed the terms of employment of the player by the Club.

[39] The Club and the player were bound to observe and implement the relevant provisions of the Collective Bargaining Agreement, and that the Collective Bargaining Agreement prevailed over any inconsistent provisions in the contract[21]. Indeed, the terms of the Collective Bargaining Agreement were expressly incorporated into the Standard Playing Contract[22]. It follows that the provisions of the Collective Bargaining Agreement concerning the use of image and the player's involvement in promotion and marketing were specifically acknowledged and preserved by the terms of the Standard Playing Contract.

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20 Clause 16 of the 2007 Collective Bargaining Agreement and cl 11 of the 2012 Collective Bargaining Agreement.

21 Recitals I, J and K of the Standard Playing Contract.

22 Clause 2 of the Standard Playing Contract.

[40] Otherwise, it suffices to note that, among other things, each Standard Playing Contract outlined:

(a) the services to be performed and rendered by the player in his capacity as an employee of the Club; and

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

*The Additional Services Agreements*

[41] The Club entered into two types of such agreements with players during the relevant period:

(a) an agreement between the Club and a player personally; and

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

[42] The former type of agreement fell within the description of "type 2" of the three types of Additional Service Agreement referred to in the Collective Bargaining Agreement. It may be referred to as a "Direct Additional Services Agreement". The latter type of agreement fell within the description of "type 3" of the three types of Additional Service Agreement referred to in the Collective Bargaining Agreement. It may be referred to as an "Indirect Additional Services Agreement".

[43] The relevant terms from the templates for each form of Additional Services Agreement are identified in the table below (emphasis added):

| **Clause** | **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 Collective Bargaining Agreement prescribe that the Club and the Player may enter into an arrangement for the Player to perform Additional Services.<br><br>C. The Player's Image is valuable and can be beneficially used by the Club in or in connection with the conduct of the Club's business.<br><br>D. **The Player has agreed to perform Additional Services for the Club** in accordance with the terms and conditions recorded in this Agreement. | 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.<br><br>D. The Player has been engaged by the Company to provide services to enable the Company to carry on its business.<br><br>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**.<br><br>"**Fee" means the amount specified** in item 1 of Schedule 2.<br><br>"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**.<br><br>"**Fee" means the amount specified** in item 1 of Schedule 2.<br><br>"Player's Image" includes the Player's name, likeness, image, reputation and expertise. |
| 2 | 2.1 Engagement to Perform Additional Services<br><br>**The Player shall perform the Additional Services for the Club** during the Term. | 2.1 Engagement to Perform Additional Services<br><br>**The Company will provide the Club with a non-exclusive right to use the Players Image** |

| Clause | Direct Additional Services Agreement | Indirect Additional Services Agreement |
|---|---|---|
| | 2.2 Term<br>(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. | **and will ensure that the Player shall perform the Additional Services for the Club** during the Term.<br>2.2 Term<br>(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. |
| 3 | 3.1 Duties<br>**The Player must for the Term:**<br>**(a) perform the Additional Services in a diligent, faithful and efficient manner**;<br>(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**;<br>…<br>3.2 Use of Player's Image<br>**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<br>**The Company shall and shall procure that the Player:**<br>**(a) performs the Additional Services in a diligent, faithful and efficient manner**;<br>(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**;<br>…<br>3.2 Use of Player's Image<br>**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 obtained which consent shall not be unreasonably withheld. |
| 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 Collective Bargaining Agreement**. Where a term or condition of the Collective Bargaining Agreement is inconsistent with any term or condition contained in this Agreement, the term or condition of the Collective Bargaining Agreement 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 Collective Bargaining Agreement**. Where a term or condition of the Collective Bargaining Agreement is inconsistent with any term or condition contained in this Agreement, the term or condition of the Collective Bargaining Agreement shall prevail to the extent necessary to remove the inconsistency. |
| Schedule 1 | Additional Services<br>**Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed**.<br>**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**. | Additional Services<br>**Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed**.<br>**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**. |

| Clause | Direct Additional Services Agreement | Indirect Additional Services Agreement |
|---|---|---|
| | The Club must also separately detail the Player's performance requirements under Clause 21 of the Collective Bargaining Agreement.<br><br>[The template then set out blank space for completion in respect of each individual contract.] | The Club must also separately detail the Player's performance requirements under Clause 21 of the Collective Bargaining Agreement.<br><br>[The template then set out blank space for completion in respect of each individual contract.] |

[44] The agreed bundle of documents contained 18 individual Additional Services Agreements and 11 individual Indirect Additional Services Agreements. The details set out in Schedule 1 differed from case to case, but the following observations may be made:

(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.

[45] The Direct and Indirect Additional Services Agreements actually entered into by the Club were consistent with the form of such agreements which was contemplated by the Collective Bargaining Agreements. They were a fulfillment of the existing contractual intention to which I have referred at [37] above that players could monetise the use of their own Image by entering into 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 services were to be provided in a diligent, faithful and efficient manner and in compliance with the Club's directions. The agreement to permit use of image was integral to the agreement to provide those services in that way and, indeed, the capacity of the player or the associated entity to provide the services contracted to be provided.

Payments actually made to players

[46] The parties agreed that –

(a) throughout the AFL season, the Club would record each appearance and each use of image provided under each player's Additional Services Agreement in a Schedule 7B Reconciliation form; and

(b) that form also set out the total of all amounts paid under the player's Additional Services Agreement 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.

[47] The forms were in evidence before me. In many cases they recorded total payments made to players in excess of the Fee which was the subject of agreement in the player's Additional Services Agreement. Nothing was suggested to turn on that for present purposes. However 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. Thus:

(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.

[48] The agreed facts and the agreed documents do not provide any reason to alter the observations I made at [44] and [45] above. In particular, where the forms recorded an activity describing the use of image and the fact that a payment was made in respect of the use of an image, they recorded payments in a way which was consistent with the contractual authorisation of the use of the player's Image for purposes related or connected to the player's actual performance of promotional or marketing activities as required by the Direct or Indirect Additional Services Agreements.

Contracts relevant to coaches

[49] The parties were agreed that the same issues arose as to the characterisation of the payments made under the agreements with coaches as arose under the Direct and Indirect Additional Services Agreements.

[50] During the period relevant to this appeal, the Club and its coaches also entered into coaching contracts, the terms of which governed the terms of employment of the coach by the Club. Each such contract outlined the services to be performed and rendered by the coach in his capacity as an employee of the Club and the payments which would be made to the coach in return. Each such contract also contemplated that the Club and the coach would enter into a Marketing & Promotional Services Agreement.

[51] Three examples of agreements entered into between the Club and coaches were in evidence before me. They each took the form of an agreement similar in structure to the Indirect Additional Services Agreements in which the coach had granted to a company a right to exploit the coach's Image and the Club contracted with the company for the right to use the coach's image and to have the company procure the coach to perform marketing and promotional services for the Club, in compliance with directions given by the Club. The coach agreed with the Club and the company that he would make himself available as and when reasonably required by the company and the Club to ensure that the company complied with its obligations (including the obligation to procure the coach to provide the marketing and promotional services).

[52] For completeness, I should mention that an attempt was made to differentiate two of the coaching agreements on the basis that the only services agreed to be provided were the use of image rights. That proposition could not be accepted. It was true that the schedule to the agreement listed only image use. But the term "Marketing & Promotional Services" was defined only to include the things listed in the schedule, and not as limited to those things. The context of each of the agreements indicated that the term otherwise was not limited exclusively to the items listed in the schedule because there were many terms in the operative part of the agreement which made sense only if the contractual intention was to govern actual performance of marketing and promotional services by the coach concerned[23].

Image rights payments made to coaches

[53] Unlike the situation in relation to players, I was not provided with evidence of the amounts which were paid to the coaches. I will infer that payments were made to them consistently with the terms of their agreements.

**Are the image rights payments liable to payroll tax under s 9?**

[54] The four grounds of the appeal relied on by the Club were:

(a) First, payments made in respect of the exploitation of an asset (being the relevant employee's image rights) are not made in respect of services, and therefore do not meet the definition of wages in the Act.

(b) Second, payments made to an entity that has been assigned the employee's image rights, to the extent they were consideration for the use and/or exploitation of those

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[23] See cl 2 (which required the company to provide the right to use his image and cause the coach to perform the relevant services), 3.1 (which sets out the manner in which the coach is to carry out the relevant services) and 7 (which stipulates the coach work such hours as reasonably required to properly perform the relevant services and for the club to exploit the coach's image).

image rights, do not fall within the "relevant contract" provisions in s 13B of the Act, as they do not represent payment in respect of services.

(c) Third, to the extent that the payments which were subject to the Commissioner's decision were:

(i) payments made in respect of agreements between the Club and certain employees (or their associated entities);

(ii) such agreements granted the Club the rights to use and/or exploit the images of the relevant employees; and

(iii) the payments were consideration for the use and/or exploitation of those image rights,

the payments were not payments made in respect of services performed or rendered by employees of the Club.

(d) Fourth, by reason of the third ground, the payments were not taxable wages which were liable to payroll tax under s 9 of the Act.

[55] Consistently with its grounds of appeal, the Club's submissions characterised the central issue for determination by me as whether liability for payroll tax under the Act -

(a) was confined to the payments that were made under the Additional Services Agreements and the Marketing and Promotional Services Agreements for the performance of work or the rendering of services; and

(b) did not extend to the payments that were made for the use of image rights.

[56] I agree with the Commissioner's submission that the Club's appeal was based on a premise which was flawed because it was not supported by the facts of the case, namely that payments made under the Direct and Indirect Services Agreements and the Marketing and Promotional Services Agreements that related to the use of player or coach image –

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

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

[57] As I have observed at [44], [45] and [48] above, the indicia relevant to the characterisation of the payments made pursuant to Direct and Indirect Services Agreements were all one way. The Direct and Indirect Services Agreements 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. 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 Services 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.

[58] There is nothing in the agreements to which the coaches were party which warranted any different conclusion (and, in any event, the parties were agreed that they should be treated the same way).

[59] The Club advanced quite a number of other contentions during the argument of this case, but they became unnecessary to consider once I had resolved the fundamental question of characterisation against the Club. When one applies that characterisation within the analytical framework which I expressed at [10] to [31] above, one reaches the conclusion in each of the relevant years that the payments were payments of taxable wages and, therefore, liable to payroll tax under the Act.

[60] In relation to the first stage, namely whether the payment falls within the definition of "wages", I observe:

(a) The Club conceded that payments made directly to players for marketing and promotional services performed under Direct Additional Services Agreements were included in the definition of wages.

(b) The Club conceded that as from 1 July 2008, payments made indirectly, to entities associated with players or coaches, for marketing and promotional services performed by the individuals pursuant to the Indirect Additional Services Agreements or the equivalent arrangements for coaches were also included in the definition of wages.

(c) The Commissioner contended, and I agree, that s 50 applied to reach the same conclusion in relation to payments made indirectly in the year prior to 1 July 2008. That must be so once the conclusion is reached that the payments were for marketing and promotional services rendered and not solely for image rights. That conclusion permitted the Commissioner to disregard the indirect nature of the agreement and to reach the same conclusion as was admittedly justified in relation to the Direct Additional Services Agreements.

[61] In relation to the second stage, namely whether the payments were paid or payable by an employer (as defined) for or "in respect of" (or, for the last few years, "in relation to") services performed or rendered, I observe:

(a) For each year the Club fell within the definition of "employer" because it was a person who was liable to pay "wages".

(b) The payments were, for reasons already explained, "in respect of" (or "in relation to") marketing and promotional services performed or rendered.

## Conclusion

[62] The appeal must be dismissed and the Club should pay the Commissioner's costs of and incidental to the appeal.