Chief Commissioner of State Revenue (NSW)

v

Integrated Trolley Management Pty Ltd

(2023/199686)

APPELLANT'S WRITTEN SUBMISSIONS

A. Overview

1. The respondent (**ITM**) provides trolley collection services and cleaning services to supermarkets. The appellant (**Chief Commissioner**) issued payroll tax assessments and reassessments to ITM for the financial years ended 30 June 2016 to 30 June 2019 (**relevant years**). In the proceedings below, ITM sought review under s 97 of the *Taxation Administration Act 1996* (NSW) (**TAA**) of those assessments and reassessments. At issue was the Chief Commissioner's determination under s 37 of the *Payroll Tax Act 2007* (NSW) (**PTA**) that ITM's trolley collectors and cleaners provided services "in and for the conduct of the businesses of" ITM's supermarket clients. The consequence of that determination was that ITM was an "employment agent" liable to payroll tax on payments it made to subcontractors during the relevant years.

2. The primary judge, Parker J, found in ITM's favour that ITM was not an employment agent in the above sense, and that the assessments and reassessments should therefore be revoked: *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557 (**J**) [194]-[196] Red 104I-105L. The Chief Commissioner appeals from that decision on the basis that the primary judge misconstrued and misapplied the "in and for" test. His Honour should have found, consistent with relevant indicia and authority, that ITM provided trolley collection and cleaning services "in and for" the businesses of its supermarket clients.

B. Facts

B.1 Background

3. The background facts are uncontroversial: J [3]-[7] Red 36T-37T. ITM operates a business providing trolley collection services to supermarkets. During the relevant years, ITM had written or oral agreements (**trolley collection contracts**) with three supermarket clients: Woolworths Ltd (**Woolworths**), ALDI Foods Pty Ltd (**ALDI**), and IGA Supermarkets (**IGA**).

The services involved collecting trolleys from car parks, external trolley bays and surrounding streets, and returning them to internal trolley bays at the front of each store. To provide the services, ITM used trolley collectors supplied by subcontractors under written agreements (**trolley collection subcontracts**). During the relevant years, ITM also had contracts to provide cleaning services to two ALDI stores (**cleaning contracts**), again using subcontractors.

4. The Chief Commissioner considered that the trolley collection contracts and cleaning contracts were "employment agency contracts" within the meaning of s 37(1) of the PTA. The definition in s 37(1) has been interpreted to mean a contract under which a person (the employment agent) procures the services of another person (the service provider) "in and for the conduct of the business of" the employment agent's client. Applying that interpretation, the Chief Commissioner considered that the trolley collection contracts and cleaning contracts were contracts under which ITM (the employment agent) procured the services of others (trolley collectors or cleaners) "in and for the conduct of the business of" ITM's supermarket clients. Consistent with that position, the Chief Commissioner assessed ITM to payroll tax in respect of payments made by ITM to its subcontractors in respect of the trolley collection and cleaning services during the relevant years. On that basis, the payments were deemed as wages under s 40(1)(a) of the PTA, and were liable to payroll tax. The Chief Commissioner issued payroll tax assessments dated 19 October 2020, followed by reassessments dated 26 May 2021 (correcting an error in respect of GST).[1]

5. In the proceedings below, ITM sought review of the assessments and reassessments pursuant to s 97 of the TAA. ITM and the Chief Commissioner accepted the "in and for" test developed by White J in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2016) 104 ATR 577 at 593 [62] and confirmed by the Court of Appeal in *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at [11]. According to that test, an "employment agency contract", for the purposes of PTA s 37(1), means a contract under which a person (the employment agent) procures the services of another person (the service provider) "in and for the conduct of the business of" the employment agent's client. The sole issue between the parties was whether the "in and for" test was satisfied – that is, whether the trolley collectors and the cleaners worked "in and for" the conduct of the supermarkets' businesses (**"in and for" issue**). The Chief Commissioner contended that they did, while ITM contended they did not. Parker J found in ITM's favour: J [167] Red 98, J [184] Red 101-102, J [189] Red 103, J [193] Red 104.

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[1] CB1.38-49 (assessments); CB1.52-63 (reassessments); CB1.83 (Objection Determination Notice).

6. Before turning to the relevant principles and grounds of appeal, it is convenient to describe the trolley collection contracts and cleaning contracts in more detail.

B.2 Woolworths contracts

B.2.1 Trolley collection contracts

7. ITM had two trolley collection contracts with Woolworths (**Woolworths contracts**).[2] These covered different stores,[3] but are materially identical. Under clauses 1.1 and 3.1, ITM agrees to provide trolley collection services. Clause 4 acknowledges that Woolworths owns the trolleys. Under Schedule 1, ITM is to "collect trolleys on a continuous basis during trading hours" from the shopping centre where each store is located (including car parks and loading docks), and within a 1-kilometre radius of the store. ITM must also collect trolleys "at least once daily or as required from time to time by the store manager" within a 2-kilometre radius of each store, and "as required by the store manager from time to time" in other locations. ITM "must collect the trolleys into the [store's] external trolley bays and feed clean and dry trolleys to the internal trolley bays." The internal bays are to "hold no less than 75% of the full quota of trolleys during trading hours".

8. Schedule 3 gives the store locations, store types ("Woolworths", "Big W", or "Dan Murphy's"), store operating hours ("Site Operating Hours"), trolley collection hours ("Site Labour Hours"), and specifies whether ITM is to provide a "Full service" (which is most cases) or a "Street Run Only" service (that is, a service which only collects and returns trolleys from nearby streets). For "Full service" stores, the number of trolley collection hours often equals the number of store operating hours (for example, 74 hours a week for each), although there is some variation. Clause 5.4 of the Woolworths contracts makes ITM liable for the conduct of its subcontractors.[4]

9. The Woolworths contracts further provided that:

   (a) ITM was to comply with all reasonable directions of Woolworths staff.[5]

   (b) ITM was to provide, at each store, a "representative" to receive "instructions, requests or requirements from…Woolworths", and a "supervisor…who can liaise with the store or duty manager on any day to day issues that may arise".[6]

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[2] CB1.141-196 ("Trolley Collection Services Agreement" commencing 1 October 2011); CB1.197-234 ("Trolley Collection Services Agreement" commencing 25 June 2012).
[3] CB1.120-1 (affidavit of Dennis Vickery sworn 27 January 2012).
[4] CB1.145; CB1.201.
[5] CB1.145; CB1.201, clause 6.2(d).
[6] CB1.152; CB1.208, clauses 16.1(g), 16.1(h).

(c) Woolworths could reasonably request the removal or replacement of any "Representative" (including any trolley collector).[7]

(d) Woolworths had the right to direct ITM to collect trolleys "as required" outside a 2-kilometre radius from each store.[8] Similarly, ITM was required to pick up, within 24 hours, abandoned trolleys reported via the "Trolley Tracker" system.[9]

(e) ITM was to comply with all Woolworths policies notified to ITM.[10] The relevant policies instruct trolley collectors on matters such as not wearing MP3 players, the types of straps permitted for securing trolleys, the maximum number of trolleys that can be nested, the position of trolley collectors (one at the front and one at the rear of a trolley chain), and cleaning up water during wet weather.[11]

(f) ITM was to comply with Woolworths' "Trolley transport safety requirements" and "Trolley maintenance" requirements set out in the Woolworths contracts, which specified in detail how the trolley collection services were to be performed.[12] For example, those clauses set out Woolworths' requirements around the trolley collectors' clothing and footwear; the number of trolleys that may be grouped together by one person (12 trolleys) or two people (20 trolleys); a requirement not to use electrical devices while transporting trolleys; and the types of straps that may be used to secure trolleys.

B.2.2 Trolley collection subcontracts

10. ITM had standard form agreements with its subcontractors for Woolworths stores.[13] Under these agreements, the subcontractor "undertakes to take directions from the Store managers" (clause 10). The subcontractor must also comply with "all aspects" of the head Woolworths contract (clause 5.k); must maintain "goodwill and friendliness" with parties including the management, staff and customers of each store (clause 5.l); and must make weekly personal contact with the store or area manager (clause 5.p). The subcontractors in turn entered employment contracts with individual trolley collectors. These employment contracts direct the collector to "[o]bey all reasonable requests from your supervisors, store and Centre Management or security staff".[14]

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[7] CB1.153; CB1.209, clause 16.3.
[8] CB1.165 and CB1.221, Schedule 1 clause 2.
[9] CB1.152; CB1.208. See also the description of "Trolley Tracker" at CB2.926.
[10] CB1.147-148 and CB1.203-204, clauses 12.1, 12.5.
[11] CB1.564.6-564.17; CB1.689-712; CB2.1139-1158; CB2.1238-1257.
[12] CB1.149-152 and CB1.205-208, clauses 14 and 15.
[13] CB1.112 [13]-[14] (affidavit of Dennis Vickery sworn 4 November 2021); CB1.284-291 (subcontract).
[14] CB2.1351 and CB2.1353, clause 12.i.

B.2.3 Practical operation of the contracts

11. Woolworths spoke directly to the trolley collectors about day-to-day issues. ITM's site audit reports, and Woolworths' "Improvement Notices" issued to ITM, give examples of such contact.[15] Mr Vickery, a director of ITM, accepted that the usual practice was for any complaints or issues with the trolley collection services to contact ITM's subcontractor directly in the first instance: T1.46.9-20. That is, in the majority of cases, the store manager first contacts the subcontractor, and only if the problem persists do they escalate the matter to ITM: T1.46.35-47. Further, ITM's clients are typically happy with the trolley collection services, and what is typical of a well-functioning relationship is that ITM's subcontractor meets the client regularly, has a good working relationship with the client, and is responsive to any issues the client raises that require action: T1.42.41-44; T1.43.34-T1.45.12. The trolley collectors also had daily contact with the front desk to pick up any handwritten messages from the store (passing on requests from customers) about trolleys that needed to be picked up: T1.41.15-34.

12. ITM's subcontractors had day-to-day contact with Woolworths' customers. ITM directed its Woolworths subcontractors to be "[c]lean, courteous and friendly to all customers, store staff and centre users."[16] The employment contracts of individual trolley collectors similarly directed them to "maintain friendly and helpful relations with centre customers and other centre workers at all times."[17] ITM directed trolley collectors to "[k]eep a watchful eye on the customers in front and either side of the trolleys being pushed", and to give way to customers.[18] Customers sometimes complained about the behaviour, driving, hygiene or odour of trolley collectors.[19] Some trolley collectors helped customers load goods into their cars,[20] or helped with shopping baskets.[21] Customers sometimes handed trolleys directly to trolley collectors, or asked them for assistance finding their car.[22]

13. Aside from day-to-day contact, there were regular meetings between Woolworths and the subcontractors. Mr Vickery "agree[d] that store managers and contractors in the majority of cases caught up on a regular basis": T1.40.6-7. One store manager requested "interaction with subcontractor on a weekly basis",[23] which Mr Vickery was happy to arrange: T1.45.14-19. Other examples of contact between trolley collectors and Woolworths are that trolley

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[15] Chief Commissioner's closing written submissions [53].
[16] CB2.1114 (item 21).
[17] CB2.1351 and CB2.1353, clauses 12.g, 12.i and 12.k. These are the only employment contracts in evidence.
[18] CB2.1054 ("Staff Induction Training"); CB2.1120 ("Safe Work Method Statement" for travelators).
[19] CB3.1701, CB3.1829 (audit reports dated 6 December 2016 and 12 July 2017).
[20] CB3.2093 (audit report dated 15 February 2019).
[21] CB3.1849 (audit report dated 16 August 2017).
[22] CB1.116 [40] (affidavit of Dennis Vickery sworn 4 November 2021).
[23] CB3.1957 (audit report dated 14 February 2018).

collectors reported damaged trolleys to Woolworths,[24] and notified store managers of wet weather and would ask for a mop to clean up water if necessary:[25] T1.50.41-T1.51.3.

B.3 ALDI contracts

B.3.1 Trolley collection contracts

14. During the relevant years, ITM had 5 trolley collection contracts with ALDI (**ALDI contracts**). These commenced on 1 June 2015,[26] 4 July 2016,[27] 1 December 2017 (two contracts),[28] and 1 September 2018.[29] They covered the "Minchinbury" and "Prestons" regions in NSW. Each contract required ITM to provide "Trolley Collection Services"[30] – mostly "Full Service", but sometimes "Street Run" services, for a fixed number of weekly hours at each store.[31] Descriptions of the services vary:

    (a) The 2015 contract only refers to "Trolley Collection Services".[32]

    (b) The 2016 contract refers to the "Specifications" in the "MIN [Minchinbury] & PRE [Prestons] tender 2016 - 2017".[33] ITM's "PRE" tender dated March 2016 describes the trolley collection services as ensuring there are sufficient trolleys for ALDI customers, and collecting trolleys from the car park and surrounding streets and returning them to the bay at the front of the store.[34]

    (c) The first 2017 contract contains an Appendix (4) specifying the scope of the services as: collecting trolleys and filling the trolley bay with them every shift; removing rubbish from trolleys; collecting rubbish from car park areas in standalone stores; notifying ALDI staff of required trolley repairs; and checking the trolleys belong at the site.[35]

    (d) The second 2017 contract similarly refers to the "Specifications" in "[A]ppendix (4)",[36] but Appendix (4) is missing from the copy supplied. It was presumably in similar terms.

    (e) In the 2018 contract, Annexure 1 describes the services in similar terms to the first 2017 contract, but in more detail (for example, adding a requirement to check that

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[24] CB2.945; CB2.1068.
[25] CB2.1058-1059.
[26] CB1.235-253.
[27] CB1.254-267.
[28] CB1.292-336 and CB1.337-352.
[29] CB1.353-363.3.
[30] Clause 3.1 and front page of each contract.
[31] CB1.243A (2015 contract); CB1.254-255 and CB1.263 (2016 contract); CB1.308 and CB1.310-336 (first 2017 contract); CB1.351 (second 2017 contract); CB1.362 (2018 contract).
[32] CB1.235.
[33] CB1.255.
[34] CB2.951.
[35] CB1.309.
[36] CB1.337.

baby straps are working, and "[c]ollection of impounded ALDI Trolleys from Council").[37]

15. The contracts required ITM to comply – and ensure its subcontractors complied – with all reasonable instructions and directions given by ALDI, and with ALDI policies and procedures.[38]

B.3.2 Trolley collection subcontracts

16. ITM had standard form agreements with its subcontractors for ALDI stores.[39] Under these agreements, the subcontractor "undertakes to take directions from the Store managers" (clause 10). The subcontractor must also comply with "all aspects" of the head contract (clause 5.k); maintain "goodwill and friendliness" with parties including the management, staff and customers of each store (clause 5.l); and make weekly personal contact with the store or area manager (clause 5.p).

B.3.3 Practical operation of the contracts

17. There was regular contact between ALDI and the trolley collectors.[40] ALDI usually contacted ITM's subcontractors directly for any complaints or issues with the trolley collection services, and it was only if the problem persisted that they would escalate matters to ITM: T1.46.9-20; T1.46.35-47. Further, it was typical for ITM's subcontractors to meet with the client regularly, to have a good working relationship with the client, and to be responsive to any issues the client raised that require action: [11] above. ITM's 340 audit reports[41] (of which about 75 relate to ALDI) mostly record that subcontractors were meeting weekly with the ALDI store managers. ITM also directed its ALDI subcontractors to report water accumulating in trolley bays and to ask the manager for a warning sign and if necessary a mop and bucket.[42]

18. ITM's subcontractors had day-to-day contact with ALDI's customers. ITM directed its ALDI subcontractors to give customers "full right of way", and to "[m]ake customers feel welcome – smile – say hello – be friendly and courteous always." Some customers complained that trolley collectors were yelling at them or collided with them,[43] and that one collector

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[37] CB1.360.
[38] CB1.237 clauses 3.5(a) and (d), CB1.239 clause 14.3(b) (2015 contract); CB1.257 clause 3.2, CB1.260 clauses 14.3(b) and (c) (2016 contract); CB1.298 clause 3.2, CB1.301 clauses 14.3(b) and (c) (first 2017 contract); CB1.343 clause 3.2, CB1.346 clauses 14.3(b) and (c) (second 2017 contract); CB1.354.1 clause 3.4, CB1.357 clauses 14.3(b) and (c) (2018 contract).
[39] CB1.112 [13]-[14] (affidavit of Dennis Vickery sworn 4 November 2021); CB1.277-283 (subcontract).
[40] Chief Commissioner's closing written submissions [73].
[41] CB3.1416-2095 (audit reports, 22 July 2015 to 15 February 2019).
[42] CB2.1113 ("Contractor Guide – Aldi Trolley Checklist").
[43] CB2.1305 ("Customer…is not sure of if they're an ALDI employee but they're collecting the trolleys and yelling at them"); CB2.1329 ("Customer would like to report the trolley person from the store. Customer said very aggressive and is yelling at people"); CB2.1332-1333 (record of complaint where Umina collectors collided with a customer).

"need[ed] to be more professional in his dealings with staff, especially in front of customers."[44]

B.3.4 Cleaning contracts

19. During the relevant years, ITM had agreements to provide regular cleaning services to two ALDI stores.[45] ITM cleaned the stores from "7am-12pm Mondays and Fridays in Gunnedah and 7am-12pm Mondays and Thursdays in Tamworth."[46] ALDI supplied a detailed checklist and schedule of areas to be cleaned (and rubbish collected) each week, fortnight or month.[47] ITM cleaned all major areas at these stores: outside areas, the shop floor, the warehouse, and amenities (lunchroom, office, and bathroom). ALDI advised ITM: "All cleaning material/ equipment that is available in store can be used by your team, additional equipment will need to be brought in."[48] ITM and ALDI later entered a written contract commencing 4 July 2016 for the Gunnedah store.[49] The written contract required ITM to comply with ALDI's reasonable directions.[50] ITM's subcontractors otherwise provided the cleaning services in accordance with ALDI's detailed specifications in its checklist,[51] and ALDI's "expectations for those cleaning tasks" as advised by the manager in each store.[52]

B.4 IGA contracts

20. A predecessor of ITM provided trolley collection services to two Franklins supermarkets pursuant to a contract commencing 10 June 1999 (**Franklins contract**). IGA took over the stores in about 2001, and ITM at some point became involved and provided trolley collection services without entering a new contract.[53] The Franklins contract refers only to a store in Wentworthville,[54] whereas ITM says (with supporting invoices) that the IGA stores it serviced were in Coffs Harbour and Summer Hill.[55] For the Wentworthville store, the services were required 7 days a week throughout the opening hours of the supermarket (other than the first 20 minutes on Mondays, Tuesdays and Saturdays).[56]

21. The terms of the Franklins contract, or broadly similar terms, continued to apply during the relevant years. IGA and ITM, by their conduct in continuing to provide and receive the same services under the Franklins contract, arguably adopted the terms of the Franklins contract:

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[44] CB2.1390 (Q1:STP item 1).
[45] CB1.111 [8] (affidavit of Dennis Vickery sworn 4 November 2021); CB1.284-291 (subcontract).
[46] CB2.875 (request for services); CB2.884 (acceptance by ITM); CB2.906-910 (emails confirming acceptance); see CB1.111 [8]-[9] (affidavit of Dennis Vickery sworn 4 November 2021).
[47] CB2.876-880.
[48] CB2.875.
[49] CB1.268-276.
[50] CB1.270 clause 3.2, CB1.273 clauses 14.3(b) and (c).
[51] CB2.876-880.
[52] CB2.911 (email from ALDI dated 27 May 2015 when first arranging the cleaning services).
[53] CB1.111 [10] (affidavit of Dennis Vickery sworn 4 November 2021); CB1.122-140 (contract).
[54] CB1.138-139.
[55] CB1.111 [10] (affidavit of Dennis Vickery sworn 4 November 2021); CB2.1288-1289 (invoices).
[56] CB1.139 (for store 118; the hours for the other store are not stated).

see *Empirnall Holdings Pty Ltd v Machon Paull Partners Pty Ltd* (1988) 14 NSWLR 523; *Fightvision Pty Ltd v Onisforou* (1999) 47 NSWLR 473. If so, ITM's basic obligations under the Franklins contract were to perform trolley collection services "to the reasonable satisfaction of the Store Manager" and in accordance with "specifications or guidelines" notified by IGA from time to time; to "[e]nsur[e] at all times that the [IGA stores have] sufficient trolleys for [their] purposes"; and to store the trolleys "as required by Franklins [IGA]": clause 9.1(d); Schedule items 10.1(1) and (3).[57] However, the primary judge did not accept that the evidence established any novation of the Franklins contract: J [193] Red 104. The alternative analysis is that the same basic obligations of ITM would be implied for business efficacy: see *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266, 282-3. That is, in the absence of detailed specifications, ITM would be obliged to act in accordance with the reasonable directions of IGA as to how the services were to be performed.

C. Legal principles

C.1 Employment agency contracts

22. The PTA requires employers to pay payroll tax on wages paid in relation to the services of their employees: PTA ss 6, 7, 11. In some circumstances, the PTA also requires persons to pay payroll tax on payments made in relation to the services of workers who are not their employees, such as independent contractors. One of those circumstances is where the person is an "employment agent" and the worker is provided to the person's client under an "employment agency contract." In those circumstances, amounts paid with respect to the worker's services are deemed to be wages and are taxable. This is the effect of Part 3 Division 8 of the PTA (ss 36A-42).

23. An "employment agency contract" is defined in PTA s 37:

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

[57] CB1.126; CB1.133.

24. The effect of s 37(2) is that an employment agency contract cannot exist if there is an employment contract between the client and the service provider. In other words, in an employment agency situation, the relationship between the client and the service provider (or individual worker) will necessarily fall short of an employment relationship. The primary judge appeared to misunderstand this point: J [151] Red 93R-W.

C.2 The "in and for" test

25. The definition of an "employment agency contract" in PTA s 37(1) has been interpreted to mean a contract under which a person (the employment agent) procures the services of another person (the service provider) "in and for the conduct of the business of" the employment agent's client: *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* (2016) 104 ATR 577 (***UNSW Global***), 593 [62] (emphasis added); *E Group Security Pty Ltd* [2022] NSWCA 115 (***E Group appeal***), [11]. That is, the scope of s 37 extends only to "persons who provide services in and for the business of [the employment agent's] client": *E Group appeal*, [47]. The "in and for" test is helpfully summarised by Payne JA in *Banfirn Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 1058 at [25(4)] and Emmett AJA in *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317 at [241]: J [124] Red 86.

26. The phrase "under which", in PTA s 37(1), "requires consideration of whether the services of the service provider are procured in order for the party procuring those services to meet its obligations under the asserted employment agency contract"; and in this regard, it is sufficient that the services are procured in order to perform those obligations: *HRC Hotel Services Pty Ltd v Chief Commissioner of State Revenue* (2018) 108 ATR 84, 108 [114], 109 [116]. Similarly, "the fact that a contract might provide for the provision of a particular outcome or result" – in ITM's case, ensuring trolley bays have a certain percentage of trolleys during trading hours – "says little as to whether the provision of services for the purpose of achieving or producing that outcome or result is 'in and for the conduct' of the relevant client's business": *Bayton Cleaning Co Pty Ltd v Chief Commissioner of State Revenue* (2019) 109 ATR 879, 899 [105] (***Bayton***).

C.3 The proper approach and the factual indicia

27. When applying the "in and for" test, it is helpful to examine the context in which the test was first stated. In *UNSW Global,* White J considered whether UNSW Global was an employment agent because it procured the services of UNSW academic staff to provide expert opinions for UNSW Global's clients. The academic staff either acted as expert witnesses in litigation, undertook laboratory testing or provided other consulting work for UNSW Global clients which mostly involved delivering a written report. His Honour found

that s 37 was directed to remedying the mischief that arose when a person who was carrying out duties akin those of an employee appeared to be a contractor (and therefore not subject to payroll tax) because of the interposition of an employment agent: 589 [41]. Applying a purposive construction, White J held that s 37 applied to payments made to individuals who worked for the client in much the same way as would an employee of the client: 594 [64]. That is, payments to individuals were subject to payroll tax if the individuals providing the services worked in and for the purpose of the conduct (or ordinary conduct) of the client's business: 586 [26], 586 [28], 587 [30], 593 [65]. Applying that construction, his Honour found that the academic staff did not work in the ordinary conduct of the clients' businesses: 594 [69]. That is because they were engaged to provide ad hoc work on specific projects that would not otherwise have been done by the client's employees: 593-594 [66]-[68].

28. In *Bayton* at 926 [267] and *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 at [318], Ward CJ in Eq identified some of the factors or indicia which may tend to show that a person is working "in and for" a client's business. Consistent with *UNSW Global* and the need to identify whether the services are provided in the (ordinary) conduct of the client's business or in much the same way as an employee of the client would provide those services, the Court of Appeal should hold that the more meaningful factors are whether the services are provided with continuity and regularity (or are instead ad hoc), and the extent of control or direction exercised by the client in relation to the services.

29. When applying s 37 in this way, it must be remembered that the intervention of an employment agent will mean that the individuals are not common law employees of the client: PTA s 37(2). Thus, while an employment agency situation will in some ways resemble an employment relationship (between the worker and client), it will necessarily fall short of that designation. For example, in an employment agency situation, it can be expected that the employment agent will retain a degree of control over the worker's services. The employment agent, and the employment agency contract, may also be conduits by which the client can exercise *indirect* control over the worker's services (as opposed to more direct control of the kind that would exist under an employment relationship). In short, the client's control will be incomplete, and may be shared.

C.4 Appellate review

30. Pursuant to s 75A(5) of the *Supreme Court Act 1970* (NSW), an appeal from a decision of a single judge is to be conducted as a rehearing. While the "in and for" issue is one on which reasonable minds may differ, it demands a unique outcome, in the sense that a person either does or does not work "in and for" the conduct of the client's business.

Accordingly, the "correctness" standard of review applies: see *Minister for Immigration v SZVFW* (2018) 264 CLR 541, 563 [49] (Gageler J). The question then is simply whether the appellate court disagrees with the primary judge's decision. Further, in the present case, the "in and for" issue depends on inferences from largely uncontested primary facts and documents: there was only one substantive witness, Mr Vickery, and there was no significant challenge to his credibility. Accordingly, the Court of Appeal is in as good a position as the primary judge to decide the "in and for" issue: see *Lee v Lee* (2019) 266 CLR 129, 148-149 [55]; *Chief Commissioner of State Revenue v Godolphin Australia Pty Ltd* [2023] NSWCA 44, [47] (Kirk JA), [129] (Simpson AJA).

31. The Chief Commissioner's grounds of appeal fall into three categories: errors in the construction of PTA s 37(1) and the "in and for" test (section D below); errors in the application of that test to the trolley collection services (section E below); and errors in the application of that test to the cleaning services (section F below).

D. Ground 1: the primary judge misconstrued PTA s 37(1)

D.1 The primary judge wrongly held that an employment agency contract can only exist between the employment agent and the service provider

32. In the proceedings below, the Chief Commissioner identified the employment agency contracts as the trolley collection contracts and cleaning contracts between ITM and its supermarket clients.[58] That is, the alleged employment agency contracts were between the employment agent and its clients. Against this, Parker J accepted the minority view of Brereton JA in *Chief Commissioner of State Revenue v E Group Security Pty Ltd (No 2)* [2022] NSWCA 259 (***E Group (No 2)***) at [7] that an employment agency contract *must* be between the employment agent and the service provider: J [143]-[144] Red 91M-U.

33. This was an error. There is nothing in the language of s 37 that dictates this result. The correct position is that an employment agency contract may be between an employment agent and either its client and its subcontractor, or both of them. Parker J's finding is also contrary to the approach of the majority in *E Group (No 2),* which accepted that an employment agency contract can be between the client and the employment agent. In *E Group (No 2)* at [68]-[70], Griffiths AJA, with whom Simpson AJA agreed, determined that there was an employment agency contract between E Group Security as the client, and its subsidiaries (the "Grouped Entities") as employment agents. Special leave to appeal from *E Group (No 2)* was refused: *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2023] HCASL 48. *E Group (No 2)* therefore stands as authority for the proposition

[58] Chief Commissioner's closing written submissions [68], [81], [91].

that an employment agency contract can exist between the client and the employment agent. The primary judge erred in rejecting that proposition.

34. This error was material. It led the primary judge wrongly to conclude, firstly, that "the focus [under the "in and for" test] is on the subcontracts [between ITM as the employment agent and its subcontractors as service providers]"; and, secondly, that the evidence recorded in ITM's audit reports (as to "the actions of individual Woolworths store managers") was largely irrelevant to the "in and for" issue, because it could at best assist in characterising "the individual subcontracts in question", and "could on no view be relevant to the characterisation of other subcontracts": J [147] Red 92L-Q. On the correct approach, the audit reports had a significant and broader relevance than the primary judge allowed, because they showed what happened in practice under the trolley collection contracts between ITM and its clients (which were the alleged employment agency contracts). What happened in practice was that the supermarket's staff – especially managers – regularly interacted with trolley collectors and gave directions to them, thereby fulfilling two recognised indicia of working "in and for" the supermarket's business.[59]

D.2 The primary judge wrongly held that the characterisation of a contract as an employment agency contract depends solely on its terms

35. Parker J took the "essential question" under PTA s 37, and under the "in and for" test, to be "one of characterisation of the written contracts" (that is, the alleged employment agency contracts). It is, his Honour held, "a matter of identifying the terms of the contract, arrangement or undertaking between the relevant parties and asking whether that contract, arrangement or undertaking is an 'employment agency contract'" based on those terms (and those terms alone). Consequently, "evidence about the way in which the contracts operated in practice may not be relevant": J [145]-[147] Red 91V-92Q.

36. This was an error, because previous authorities have treated how the parties acted under the contracts as relevant to the "in and for" test (and thus to the characterisation of the contracts as employment agency contracts): *UNSW Global*, 593-594 [67]; *HRC Hotel Services Pty Ltd v Chief Commissioner of State Revenue* (2018) 108 ATR 84, 116 [153]; *Bayton* 927-928 [271]-[278]; *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190, [325], [331]-[339]. This follows from the text of s 37(1) (as interpreted in *UNSW Global*), which is directed to the activities of the alleged employment agent (whether it procured the services of another person) and the activities of the service provider (whether it provided services in and for the conduct of the business of the alleged

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[59] Chief Commissioner's closing written submissions [53]-[53D], [73]-[73A]; see also [86].

employment agent's client). Accordingly, the "in and for" test looks to how the parties acted in practice and not simply to what can be gleaned from the terms of the contract alone.

37. The primary judge's error here was material, because it led his Honour to reject or minimise the relevance of evidence as to how the contracts operated in practice, such as "the actions of individual Woolworths store managers, as recorded in the audit reports": J [147] Red 92M-O. Again, that evidence showed that the supermarket's staff interacted with and gave directions to the trolley collectors, which are indicia of working "in and for" the client's business.

D.3 The primary judge wrongly held that, for the purposes of PTA s 37(1), a person cannot work in more than one client's business at the same time

38. Parker J regarded as "important...the fact that ITM's subcontractors could, and in some cases did, perform work for more than one store at the same shopping centre": J [160] Red 96C-D; see J [32] Red 43P-U. His Honour regarded it as important because he rejected the proposition that, under an employment agency contract, a person could work for multiple clients simultaneously, finding this "hard to fit into [PTA] s 37": J [160] Red 96G-H. It would follow, on this reasoning, that the trolley collectors were not working in and for the clients' businesses.

39. However, the key premise of this reasoning is flawed. First, because there is nothing in s 37 that says a service provider cannot provide services for multiple clients simultaneously. Secondly, because the court have held that a person can work for more than one business at the same time: *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* (2017) 106 ATR 639, 654 [54(14)], 658 [69]; *Freelance Global v Chief Commissioner of State Revenue* [2014] NSWSC 127, [173]; see also *CFMMEU v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89, 112 [84] (Kiefel CJ, Keane and Edelman JJ), 125 [152] (Gageler and Gleeson JJ). The usual situation, as those authorities illustrate, is where the worker provides the same services "in and for" the businesses of the client and the employment agent. Logically, however, the same reasoning shows that a person can work in the businesses of multiple "clients". If that is accepted, then a key aspect of the primary judge's reasoning falls away.

D.4 Conclusion: the primary judge misconstrued PTA s 37 and the "in and for" issue

40. Parker J concluded that the trolley collection services and cleaning services were not provided "in and for" the businesses of ITM's supermarket clients: J [167] Red 98, J [184] Red 101-102, J [189] Red 103, J [193] Red 104. Given the above errors, the basis upon which his Honour reached that conclusion (particularly for trolley collection services) was materially unsound. Ground 1 should be upheld and the Court of Appeal should determine

the "in and for" issue for itself. The "correctness" standard of review requires this in any event.

E. Grounds 2 and 3: errors in applying the "in and for" test to the trolley collection services

41. Having misconstrued the "in and for" test, the primary judge also erred in its application. Ground 2 is that his Honour treated irrelevant or unimportant factors as significant. Ground 3 is that his Honour should have concluded, based on relevant indicia – and the primary facts as correctly found – that the trolley collection services occurred "in and for" the supermarkets' businesses.

E.1 The primary judge relied on irrelevant or insignificant factors

42. In concluding that the trolley collectors did not work "in and for" the supermarkets' businesses, the primary judged incorrectly relied on several factors.

43. The first factor his Honour relied upon was the location of the services. The primary judge saw as "significant" the fact that "the trolley collection services involved activities which take place outside Woolworths' premises": J [154] Red 94. In *Bonner v CCSR* [2022] NSWSC 441 at [35], Basten JA correctly found that there is no necessary implication in the legislation that the work must be performed "at" the workplace of the client. In any event, the trolley collectors provided services at and to the supermarkets' premises, and at locations where the supermarkets' property – their trolleys – are located: J [4] Red 37, J [135] Red 89. In that sense, the services are directly physically connected to the real and personal property of the supermarkets' businesses, suggesting they are provided "in and for" those businesses. If "location" is to be relied upon, what is more significant is that the services are centred upon the supermarkets' premises and their point is to return the supermarkets' physical property to those premises.

44. The other factors his Honour treated as "significant" or "important" – but incorrectly so – were as follows:

    (a) The trolley collection services were a "discrete, defined task", and the supermarkets could not direct individual trolley collectors to "step outside that area", such as by working on a checkout: J [157] Red 95, J [161]-[162] Red 96. This factor is irrelevant, because a person working "in and for" a business can equally be given a narrow or broad range of tasks depending on their role.

(b) Trolley collection is an "established market": J [157] Red 95H. This factor is irrelevant, because nothing in the "in and for" test or in the authorities suggests the test can only apply to newly emerging markets.

(c) "[T]he subcontractors were responsible for supplying and maintaining the equipment needed to collect the trolleys, some of which was quite substantial": J [159] Red 95. This factor is difficult to square with the "true dichotomy" which the primary judge saw between working "in and for" the business of the client on the one hand, and conducting one's own business as an independent contractor on the other: J [149]-[150] Red 93. That dichotomy may provide some useful guidance (though no more) on the "in and for" issue. If so, what is arguably relevant is not whether the *subcontractors* provided substantial pieces of equipment, but whether the *individual trolley collectors* did so – because if they did, then that may suggest they worked in their own business as distinct from the client's business: see *CFMMEU v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89, 117 [113] (Gageler and Gleeson JJ). There is, however, no suggestion that individual trolley collectors provided their own trolley collecting equipment.

(d) ITM's subcontractors had the ability to, and in some cases did, perform work for more than one store at the same shopping centre simultaneously. The primary judge placed weight on this factor because of his Honour's view that it is "hard to fit" into s 37 the notion that a service provider may work for multiple clients simultaneously: J [160] Red 96. As argued in connection with ground 1, this was incorrect and contrary to authority: [39] above.

45. In short, the primary judge erred by treating those factors as relevant or important.

E.2 The primary judge should have concluded that the trolley collectors worked "in and for" the supermarkets' businesses

46. The primary facts as found by Parker J, or otherwise not significantly disputed, should have led to a finding that the trolley collection services were provided in and for the conduct of the supermarkets' businesses. In examining those facts, it is helpful to remember the principles set out at [27]-[29] above and that the employment agency contract provisions are "intended to apply to cases where the employment agent provided individuals who *would comprise, or be added to*, the workforce of the client for the conduct of the client's business" (emphasis added): *UNSW Global,* [63]

47. First, like employees, the trolley collectors provided a service that was used in the *ordinary* conduct of the supermarket business – that is, the retrieval of trolleys and the delivery of them to the supermarket premises (cf. the consultants in *UNSW Global,* [69]). A "ready

supply of trolleys for customers is an important, and perhaps vital, part of the conduct of Woolworths' business": J [155] Red 94. That applies equally to other supermarkets, because the "business" of a supermarket is the same in each case: J [23]-[24] Red 41-42, [166] Red 97.

48. Secondly, like employees who are part of the workforce, the trolley collectors turn up *to work regularly* to assist the supermarkets in running their businesses. The trolley collectors provided services continuously and regularly during the clients' business hours: [7], [14] and [20] above; J [130] Red 87-88 (apparently accepting a submission that this was so). The primary judge failed to address or consider the Chief Commissioner's submission – consistent with authority (*Bayton* at 926 [267]) – that this was an "important factor": see J [130] Red 87.

49. Thirdly, just like employees (and unlike the academics at UNSW who were retained to give independent advice), the trolley collectors work with and take instructions from store management about how to do their job. The contractual arrangements gave the supermarkets significant control over the trolley collection services, both by contractual specifications and by the ability to issue directions in respect of those services: [9], [15] and [21] above; J [38] Red 45 (Schedule 1 clause 2), J [43] Red 49 (clause 6.2(d), J [50] Red 53-54 (clause 12.5), J [52] Red 55-56, J [53] Red 57-58 (clause 15), J [54] Red 59-60 (clauses 16.1(a)(ix), (g) and (h)), J [131] Red 88, J [176] Red 99-100, J [178] Red 100. The store management routinely exercised these powers by giving directions to the trolley collectors (Chief Commissioner's closing written submissions, [53]). Parker J dealt with this by observing that "[t]he power to give a direction would have been limited to directions having some relevant connection with the discharge of ITM's functions under the contract": J [161] Red 96. No doubt that is so; but it does not detract from control as a relevant and significant factor in support of a finding that the trolley collectors worked "in and for" the supermarkets' businesses.

50. Fourthly, like other members of the workforce, the trolley collectors interacted with other employees. The trolley collectors interacted with the supermarkets' staff (and to a lesser extent, customers), including by way of regular meetings, direct contact to raise issues with the trolley collection services, receiving messages through the supermarket's front desk, and notifying supermarket staff of damaged trolleys or wet weather: [11]-[13], [17]-[18] above; see J [132]-[133] Red 88-89, J [147] Red 92 and Chief Commissioner's closing written submissions, [53ff]. This is an important factor which the primary judge incorrectly ignored or discounted because it relates to how the alleged employment agency contracts operated in practice: see J [146]-[147] Red 92.

51. A fifth factor is "whether the work would otherwise have been done by an employee of the client if it had not been outsourced": *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317, [242]; *UNSW Global*, 594 [68] ("work that would otherwise have been done by the [client's] employees"). Of the major supermarkets, Coles (not an ITM client) used their own employees for trolley collection, Woolworths and IGA used a mix of their own employees and contractors, while ALDI exclusively used contractors: J [23]-[24] Red 41-42. Having correctly made those findings, the primary judge should have drawn the following conclusions: trolley collection clearly occurs "in and for" the conduct of a supermarket's businesses when done by its own employees; the "business", for the purposes of PTA s 37, is unlikely to differ based on the particular mix of employees and contractors used for trolley collection; therefore, trolley collection occurs "in and for" the conduct of those businesses whether it is done by employees or by contractors (also see the Chief Commissioner's written closing submissions, [62]).

52. Sixthly, just like employees attached to a particular shop (and unlike the consultants in *UNSW Global*), the trolley collectors were allocated to particular stores and remained attached to those stores. ITM allocated only one subcontractor to each store, and where possible gave them continuity of work: T1.32.17-31; T1.37.24-33. Clause 16.1(b) of the Woolworths contracts required ITM to use its best endeavours to provide the same personnel to perform the trolley collection services at each Woolworths store.[60] Samples of visitor books and rosters confirm that the same trolley collectors tended to work regularly at each store: Chief Commissioner's closing written submissions, fn 47.

53. Finally, to the extent there is a "true dichotomy" between working "in and for" the business of the client on the one hand, and conducting one's own business as an independent contractor on the other (J [149]-[150] Red 93; *UNSW Global* 589 [41]), the better view is that individual trolley collectors – as opposed to the entities that employed or engaged them – worked in and for the "business of the client", because those individual collectors did not operate (and were not found to operate, and could not sensibly be said to operate) their own businesses.

54. Based on those factors, the primary judge should have found that the trolley collectors worked in and for the conduct of the supermarkets' businesses. The Court of Appeal should now make that finding.

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[60] CB1.120-121 [7]-[11] (affidavit of Dennis Vickery sworn 27 January 2022); CB1.571-572 (weekly timetables provided with tender for "region 7" stores); CB1.659-663 (weekly timetables provided with tender for further "region 7" stores).

F. Ground 4: the primary judge erred by following *JP Property Services*

F.1 Findings in relation to cleaning services

55. The primary judge determined that the regular on-site cleaning services provided by ITM (through its subcontractors) to ALDI were not provided in and for ALDI's business: J [185]-[189] Red 102-103. The basis for that finding was *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* (2017) 106 ATR 639 (***JP Property Services***), where Kunc J found that regular cleaning services provided to Franklins supermarkets were not provided "in and for" Franklins' business. This was because those services were "incidental" services (not "integrally part of Franklins' business of selling goods to the public"), and were provided outside normal trading hours: *JP Property Services*, 559-260 [78]-[80], 662 [90] & [92]. If the cleaning services had been for detecting and cleaning spills during shopping hours (to prevent slips and falls), Kunc J would have found that they were provided "in and for" Franklins' business, because such services are "integral to the safe and lawful operation of the supermarket during that time": at 660 [80].

56. Parker J characterised Woolworths' business (and, by parity of reasoning, that of ALDI and IGA) "as one of selling goods by retail using a supermarket format": J [156] Red 94U. His Honour applied *JP Property Services* to conclude that the cleaning services provided to ALDI, though provided during store hours, were not provided "in and for" ALDI's business, because "the cleaning was not done to protect members of the public while they were shopping and therefore was not directly related to the sale of goods": J [188] Red 103. That is, the *sole* basis for finding that the cleaning services were not provided "in and for" ALDI's business was that they were "not directly related to the sale of goods".

F.2 *JP Property Services* relies on a discredited distinction between "core" and "incidental" services

57. As that exposition indicates, the primary judge's findings on cleaning services relied on a premise that services must be "directly related" to the core activities of the business – in this case, the sale of goods – in order to be provided "in and for" that business. That premise is wrong, because the "incidental" activities of a business are still part of its conduct. For that reason, the distinction between "core" versus "incidental" services (in the context of the "in and for" test) was disapproved in several cases after *JP Property Services*: see *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 744, [97]; *Bayton* 926 [266]; *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190, [318]; *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441, [35]. The primary judge erred in reviving that distinction.

F.3 The primary judge should have applied *Bayton*

58. In *Bayton* at 928 [277], Ward CJ in Eq, having rejected the "core" versus "incidental" distinction, found that commercial office cleaners – who provided regular on-site cleaning services at the offices of clients in various industries – worked in and for the conduct of those clients' businesses. Rather than following *JP Property Services*, the primary judge should have followed and applied *Bayton* to conclude that the regular on-site cleaning services provided by ITM to ALDI occurred in and for the conduct of ALDI's business.

G. Conclusion

59. ITM's trolley collectors and cleaners worked "in and for" the conduct of the businesses of ITM's supermarket clients – Woolworths, ALDI, and IGA. The workers assisted in those supermarkets' business activities by providing trolleys to customers and cleaning the stores; they provided regular services at and to the clients' premises; they took directives from the stores; and they interacted with the clients and their customers. The reassessments under review are therefore correct.

60. The Chief Commissioner seeks the following orders:

(1) Appeal allowed.

(2) Set aside orders 1 and 2 made on 25 May 2023 and order 1 made on 26 June 2023.

(3) Dismiss the respondent's Summons filed in the proceedings below on 6 August 2021.

(4) The respondent is to pay the appellant's costs of the appeal and the proceedings below.

[redacted]

[redacted]

Stefan Balafoutis
Tenth Floor Chambers
[redacted]

Dean Stretton
Tenth Floor Chambers
[redacted]

3 August 2023