



Navigating the M&Aze: The Employment Tax Risks That Could Complicate Your Deal

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Recently, the increased focus on wage underpayments in the Australian media and political landscape has started to encroach into the mergers and acquisition (M&A) space. In the past few years, many prominent organisations have dealt with negative publicity after being found to have underpaid their workers. This reached new heights last year with the passage of the *Closing Loopholes Act 2023*^[1] which criminalises ‘wage theft’.

In this current environment, with potential criminal penalties for directors, a cursory glance of payroll figures simply won’t suffice during transaction due diligence. Notwithstanding the reputational risk of being caught out, even unintentional wage underpayments (which do not fall under criminalised ‘wage theft’) will draw the ire of the Australian Taxation Office (ATO) and as we have seen, the Australian media. After all, employment taxes and wage underpayments are inextricably linked: an underpayment of (ordinary) wages naturally lends itself to an underpayment of superannuation and payroll tax. In any case, these potential latent liabilities are very much avoidable headaches for future owners – and thus something to keep track of, and keep an eye on, during a transaction.

Employment on-costs can add up to an additional 20 percent on labour costs. Unidentified, understated employment taxes & charges can cripple unsuspecting future owners.

Superannuation

There is no materiality or statute of limitations under the superannuation legislation, which means a historical error could be traced all the way back to 1992 when the legislation was introduced. Applying the legislated 10 percent p.a. interest rate to any shortfall, as well as up to 200 percent penalties and administration charges, can transform even the smallest oversight into a debilitating debt for a new owner. Unfortunately for employers, the superannuation guarantee amnesty ended in 2020, which provided employers an opportunity to catch up on payments without needing to pay some penalties and fees.

It is worth noting that the amnesty resulted in over \$850 million in additional payments to superannuation funds to almost 700,000 employees nationwide^[2]. With quantities that high, it is no wonder that ATO activity in this area is high. In FY23, the ATO received nearly 25,000 notifications, 95 percent of which were a result of employees contacting the ATO directly and asking for an investigation on their behalf^[3]. The ATO remains committed to investigating 100 percent of employee complaints, and a single complaint can lead the ATO to launch a company-wide investigation – don’t assume it will simply focus on the specific complainant.

Payroll Tax

Payroll tax is a notoriously fastidious and administratively cumbersome tax, which varies based on jurisdiction (and even within

jurisdiction), employer & payroll size, employee type and even days in the calendar month. Payroll tax requires cooperation between multiple departments, with only a few days in which to coordinate during each reporting period.

As soon as an employer is in more than one jurisdiction or if there are related entities (such that grouping mechanisms may be in play), the complexity of calculations increases, especially to ensure accruals are accurate and large adjustments aren't required when the annual return is lodged.

Although the states and territories have harmonised some of their rules to assist with tax administration (such as the nexus provisions to determine if wages paid in one state/territory may be 'double counted' in another), there is ultimately a residual level of variance between them that requires a level of thought and care by organisations. One such topical example is determining the (additional) payroll tax liability if a wage underpayment has occurred. In NSW, while section 9 of the Payroll Tax Act is quite clear already, there is an additional Commissioner's practice note (CPN021) that outlines the *"payroll tax liability on the underpaid wages arises when the wages are paid or become payable, whichever occurs first"*. It follows that if the underpaid wages arose in a previous financial year, there may be a compliance obligation to amend a prior year's payroll tax return. However, we note for completeness the additional complexity that any additional superannuation paid as a result of the wage underpayment would be subject to payroll tax at the time it was actually paid.

With payroll tax grouping comes joint & several liability. Therefore if you are purchasing an entity, you are not only inheriting its potential payroll tax shortfalls, but conceivably those of any historic group members. As such, it is imperative that payroll tax is thoroughly reviewed as part of any M&A deal.

Employees vs Contractors

More broadly, one of the most important qualitative assessments for any transaction would be testing onboarding practices and worker classification protocols to ensure they have been correctly applied in the first place.

The distinction between 'employee' and 'contractor' is an important one. For example, employees are guaranteed a minimum wage under the NES and are entitled to superannuation payments. Contractors, on the other hand, generally manage their own tax obligations. Correct designation is important as courts can impose penalties for 'sham contracting' arrangements. Even if an organisation does not wilfully incorrectly designate an employee as a contractor to avoid certain responsibilities, there is a continuing string of case law that considers this issue. The recent *ZG Operations Australia Pty Ltd v Jamsek & Ors* [4] case is a recent example that shows that this distinction is not always clear: while the primary judge ruled that Jamsek and Whitby were employees, this was overturned by the Full Federal Court, which was then overturned by the High Court.

While it is not in question that payroll tax and superannuation are payable for an employee, the rules vary for contractors. For example, if a contractor is paid mainly for their labour, superannuation becomes payable. The rules for payroll tax also add significant complexity. Generally, payments to contractors are taxable in the first instance, but the set of exemptions differs on the jurisdiction. For example, Western Australia has not harmonised the payroll tax (non-labour) deductions available in New South Wales or Victoria.

The takeaway is that clarity over the treatment of an organisation's workforce is not something to be taken lightly. With a litany of case law already written, and continuing to be written, the reward for tightening up employee vs. contractor arrangements is likely to be high.

How can A&M Help?

At A&M, our team has unique experience on both the advisor and client sides. We understand how to work with internal teams and balance professional services, and we use advanced analytics that can review large payroll data sets quickly and efficiently.

Within the first 100 days post-acquisition, A&M can leverage our in-house tax merger integration specialists. This team is dedicated to integrating finance and tax functions post-transaction, and due to A&M's international reach, can apply global best practices to support your team. A&M's governance-first approach ensures audit and tax authority readiness is front of mind.

Should you require any assistance with the above, please contact Managing Director Amanda Spinks and Associate Director Johann Blanco.

[1]: Fair Work Legislation Amendment (Closing Loopholes) Act 2023: <https://www.legislation.gov.au/C2023A00120/asmade/text>

[2]: Superannuation guarantee amnesty:

<https://www.ato.gov.au/businesses-and-organisations/super-for-employers/misled-and-late-super-guarantee-payments/the-super-guarantee-charge/superannuation-guarantee-amnesty>

[3]: Super guarantee compliance snapshot 2022–23: [caat-](https://www.caat-p-001.sitecorecontenthub.cloud/api/public/content/1b58a7a92e5a461e80342a74220de944)

[p-001.sitecorecontenthub.cloud/api/public/content/1b58a7a92e5a461e80342a74220de944](https://www.caat-p-001.sitecorecontenthub.cloud/api/public/content/1b58a7a92e5a461e80342a74220de944)

[4]: Case S27/2021, *ZG Operations Australia Pty Ltd & Anor v. Jamsek & Ors*,

https://www.hcourt.gov.au/cases/case_s27-2021

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