

30 April 2025

Portfolio Committee 1 - Premier and Finance
Legislative Council
NSW Parliament

Sent via email to PortfolioCommittee1@parliament.nsw.gov.au

Dear Committee Members,

**INQUIRY INTO THE APPLICATION OF THE CONTRACTOR AND EMPLOYMENT AGENT PROVISIONS IN
THE PAYROLL TAX ACT 2007**

Thank you again for the opportunity to give evidence on this very important issue on 21 March 2025.

In summary, with respect to the present employment agent provisions (these being the provisions that have caused immense disruption to the Mastercare business), my view is:

1. the current legislation is entirely unfit for purpose in a contemporary business environment (it was drafted circa 40 years ago in a very different business world to the one which exists today);
2. a consequence of that unfitness has led Justice White to observe in respect of the employment agent provisions that it "... *is not a case in which a literal construction [of these provisions] fails to address the mischief that Parliament was concerned to address, but rather a case in which the literal words used to address that mischief go far beyond the mischief intended to be addressed*", with that intended mischief understood to be (as outlined by the Honourable Ernest Page when these provisions were introduced) to "... *pick [up] those who are avoiders. The Minister has made it quite clear that there is no suggestion that anyone who is a legitimate contract worker, or a firm, should face an undue imposition of payroll tax*"; and
3. such as to ensure the unjust outcomes of the present legislation do not continue a moment longer and allow the desperately needed legislative intervention time to take place, a moratorium of 12 months is required (which would halt all pending Court cases).

Further to the email received from Lauren Evans on 9 April 2025, please see *enclosed*:

1. within **Annexure A**, proposed legislative and administrative reform (including draft indicative legislation and explanatory notes) designed to resolve the present issues faced by the subject legislation; and
2. within **Annexure B**, responses to your supplementary questions.

* * *





If you have any questions or wish to discuss any aspect of this important matter, please do not hesitate to contact me on .

Yours Sincerely,

Colin Walker
Managing Director



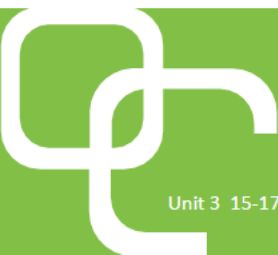
Mobile:

Phone: 02 9429 6200

Fax: 02 9429 6299

Email:

Web: www.mastercare.com.au



A Quality Assured company AS/NZS ISO 9001:2000 Benchmark Certification 1419

Unit 3 15-17 Chaplin Drive (PO Box 340) Lane Cove NSW 2066 P +61 (2) 9429 6200 F +61 (2) 9429 6299 W www.mastercare.com.au ABN 99 091 788 233

ANNEXURE A
PROPOSED LEGISLATIVE AND ADMINISTRATIVE REFORM

LEGISLATIVE REFORM

1. The below draft legislation is designed to amend the *Payroll Tax Act 2007* (NSW) in order to achieve its proper objectives as explained in our first submission.
2. The amendments in particular are designed to modernise the provisions concerning contractors and employment agents to ensure their scope is appropriate and legal operation is certain.
3. In relation to employment agents, it is important that the provisions are amended to ensure that they apply as originally intended, that is as anti-avoidance rules, and do not impose tax on legitimate businesses that should be borne by subcontractors. This will achieve the foundational tax policy perspective, namely, that payroll tax should apply to the real employer, the subcontractor that directly employs workers.
4. In addition to the proposed amendments, the Government should introduce Explanatory Notes with the Bill that give practical examples that can then be promulgated by Revenue NSW in its rulings and guidance. These examples would cover typical cases caught by the *Payroll Tax Act 2007* (NSW) as amended and those that would not. In this respect, please see paragraphs 2, 3 and 7 of the Explanatory Notes.

Transitional Rules

1. Transitional rules are necessary and appropriate. The legislative amendments we recommend to both the Contractor and Employment Agent Rules should have retrospective effect, following the approach legislated to provide relief from the Contractor Rules for medical practices in 2024: see section 61A of the *Taxation Administration Act 1996* (NSW).
2. That is, where taxpayers have not paid payroll tax, they should be retrospectively relieved of paying payroll tax provided that they would not be liable to payroll tax under the amended rules. Refunds would not be available if payroll tax has already been paid.

ADMINISTRATIVE REFORM

1. Payroll Tax administration is ripe for reform to improve tax compliance and improve the efficiency and cost of the experience for taxpayers and Revenue NSW.
2. We respectfully recommend the following steps.
3. *First*, to ensure compliance with the Contractor and Employment Agent Rules (as amended in accordance with our recommendation to add section 40A) the system must move from paper based to online/digital administration in respect of Subcontractor Statements, which are already a key compliance requirement. These Statements should be lodged online by the subcontractor with the principal contractor and at the same time lodged with the NSW Government (remembering that these statements cover not just payroll tax but also other areas for employee protection, for example, the Workers compensation Act, Industrial Relations Act). These statements might also contain further information to enable compliance review by NSW Revenue, for example, identify specific payroll details.
4. The present process of lodgement of statements with the principal contractor in paper form is inefficient and the Government does not receive the data. The online system will enable efficient identification of all subcontractors and efficient Revenue NSW compliance to ensure timely payment of payroll tax. Even if a subcontractor is below the payroll tax threshold, they would be required to lodge Subcontractor Statements through the proposed system. This would provide complete transparency to Revenue NSW and, with view to the proposed new section 40A, will provide a powerful incentive for parties dealing with subcontractors to insist on lodgment by the subcontractor of Subcontractor Statements.
5. *Second*, this new data will facilitate improved tax and other legislative compliance by data matching and automated compliance to best practice digital standards and data sharing with other agencies.
6. *Third*, the Government should investigate integration of payroll tax lodgements, including the Subcontractor Statement, with online processes for payroll and tax payments at the

Federal and NSW level. This would involve integration with the “Single Touch Payroll” system developed at the Federal level. A desired outcome would be that subcontractors pay their payroll tax at the same time as they lodge the subcontractor statement.

SUMMARY

1. *In summary*, these legislative and administrative recommendations should ensure that the subcontractor, being the true employer, bears the payroll tax cost (not principal contractors, erroneously identified employment agents or end users). Mandatory digital lodgment of the Subcontractor Statement will give NSW Revenue transparency that it currently does not have to more effectively and efficiently ensure compliance with the Payroll Tax Act.

INDICATIVE DRAFT LEGISLATION

(AMENDMENTS ARE UNDERLINED OR IN STRIKETHROUGH)

DIVISION 7 - CONTRACTOR PROVISIONS

32 What is a relevant contract?

...

- (2) However, a *relevant contract* does not include a contract of service or a contract under which a person (the *designated person*) during a financial year in the course of a business carried on by the designated person—

...

(e) operates as a payment agent to other parties who may contract between themselves; or

(f) provides administrative, marketing and other support services to another party who contracts directly with their customer.

DIVISION 8 - EMPLOYMENT AGENTS

37 Definitions

- (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~~ between a person (an *employment agent*) and the client under which the employment agent procures the services of another person (a *service provider*) for a client of the employment agent involving the supply of workers for use in and for the business of the client.

(2) ...

(3) In this section—

client means the end user of the services.

involving the supply of workers for use in and for the business of the client

(a) requires that the workers supplied by the service provider must be:

- i. under the control and direction of the client;
- ii. indistinguishable from an employee of the client when on a site occupied by the client or in a vehicle operated by the client;
- iii. working as if they are or were employees of the client; and

- iv. in respect of functions that do not form part of the client's business.
- (b) for the avoidance of doubt, excludes where the workers are supplied as part of a service or services which is:
 - i. not solely or largely in the nature of labour hire or labour supply; and
 - ii. managed and undertaken by a third party to the client:
 - i. to achieve specified results; and
 - ii. in respect of the workers, the third party undertakes management functions such as:
 - 1. recruitment;
 - 2. training;
 - 3. control and direction of the workers;
 - 4. management of workers and the services using systems operated by the third party;
 - 5. setting and monitoring of quality and other performance standards; and
 - 6. responsibility for compliance with regulatory or industry standards and obligations.

40 Amounts taken to be wages

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

(a) any amount paid or payable to or in relation to the service provider in respect of the provision of services in connection with the employment agency contract,

...

(3) Subsection (1)(a) does not apply to any amount in respect of the provision of goods or equipment ancillary or incidental to the provision of services.

40A Employment Agent Not Liable If Service Provider Provides Written Statement

An employment agent is not liable under this Part for the payment of any payroll tax payable in respect of wages paid or payable for a period if the employment agent has been given a written statement by a service provider in respect of that period that is a written statement under subsection 18(2) of Part 5 of Schedule 2 of this Act.

EXPLANATORY NOTES

1. The proposed amendments to current provisions of the *Payroll Tax Act 2007* (NSW) are in underline or strikethrough text.

DIVISION 7 - CONTRACTOR PROVISIONS

2. Subsection 32(2)(e) is amended to confirm the principle in the *Uber* case¹ (on appeal).
3. Subsection 32(2)(f) is amended to exempt shared service models, such as in the medical/dental sector and in the mortgage broking and financial advisory sectors.

DIVISION 8 - EMPLOYMENT AGENTS

4. Subsection 37(1) is amended to clarify the current test, known as the *UNSW Global* test, by making the test explicit and designating the employment agency contract to be the contract with the client not the service provider.
5. Subsection 37(1) is amended to define the client as the end user. This will prevent the potential for double taxation and confusion. This problem is currently avoided by the Commissioner's administrative "chain of hire" policy to generally tax the taxpayer closest to the end user provided that the taxpayer is registered and able to pay the tax. There is currently potential for unfairness for intermediate entities where the closest entity is unregistered and/or insolvent. Also, there is potential unfairness where a corporate group may seek to contract with service providers through a subsidiary for legitimate commercial reasons and then face a view that the parent company is "the client".
6. The position of commercial facility managers² would be unchanged because it would be the end user client (rather than, for example, its ultimate client such as a shopping centre or commercial building owner).
7. Subsection 37(3) is amended to define the new term "involving the supply of workers for use in and for the business of the client". This term is taken from the *UNSW Global* test which is practically uncertain in its application as each case depends upon its facts. This definition seeks to provide practical certainty whilst adhering to the same concept in *UNSW Global*. For example:
 - a. a taxpayer that is solely or predominantly a labour hire or labour supply company will be caught by the provisions;
 - b. a taxpayer that is supplying workers that are integrated with and additional to the business of the end user client will be caught; and
 - c. a taxpayer that is providing a service to the end user client to achieve specified results will not be caught by the provisions.
8. Subsection 40(3) is amended to make it clear that payroll tax does not apply to payments for goods and equipment that may be supplied ancillary or incidental to services. The

¹ *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* (NSW) [2024] NSWSC 1124.

² *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 744.

easiest way to achieve compliance will then be to ensure that contracts with and invoices from service providers breakdown payments for services from other payments.

9. Section 40A is amended to provide a simple carve out from the Employment Agent Rules where the service provider provides a written statement in the same form as presently provided for under the Contractor Rules. This amendment will promote practical and simple administration of payroll tax obligations because it utilises an established reporting system.

**ANNEXURE B
RESPONSES TO SUPPLEMENTARY QUESTIONS**

What communications (including letters, emails and meetings) have you had with NSW Government Ministers and/or Ministerial staff on payroll tax issues since 2017?

1. Over the course of the past circa 12 months and with view to raising awareness of the issues arising for the NSW business community from the employment agent provisions and the need for legislative reform, Mastercare's Managing Director, Colin Walker, has written to and/or met with a vast range of NSW's members of parliament across the political spectrum.

Please describe the employment relationships or contract relationships in each tier of your subcontracting chain

2. With view to the present payroll tax appeal on foot in the Supreme Court of New South Wales between the Mastercare business and the Chief Commissioner of State Revenue, we respectfully do not wish to engage in specifics of Mastercare's operations.

Please provide details of the number of staff you directly employ, in what role and under what industrial instrument they are paid

3. With view to the present payroll tax appeal on foot in the Supreme Court of New South Wales between the Mastercare business and the Chief Commissioner of State Revenue, we respectfully do not wish to engage in specifics of Mastercare's operations.

Please provide details of the number and size of the contractors you undertake to complete work for your clients

4. With view to the present payroll tax appeal on foot in the Supreme Court of New South Wales between the Mastercare business and the Chief Commissioner of State Revenue, we respectfully do not wish to engage in specifics of Mastercare's operations.

Do you audit your subcontractors to determine if they are paying payroll tax?

5. Every time that a subcontractor renders an invoice to the Mastercare business they must provide a completed subcontractor statement. **Within that statement is a declaration that the subcontractor will make payment of payroll tax in respect of its workers utilised to carry out its services.**
6. **The Mastercare business will not make payment of any subcontractor's invoice unless an accompanying subcontractor statement is also provided.**