Submission No 34

INQUIRY INTO IMPACT OF TECHNOLOGICAL AND OTHER CHANGE ON THE FUTURE OF WORK AND WORKERS IN NEW SOUTH WALES

Organisation: Revenue NSW

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NSW GOVERNMENT | Revenue

The Director
Select Committee on the Impact of Technological and Other Change
on the Future of Work and Workers in New South Wales
Parliament House, Macquarie Street

SYDNEY NSW 2000

Dear Director

I refer to the email of 6 October 2020 from the Chair of the Select Committee on the *Impact of Technological and Other Change on the Future of Work and Workers in New South Wales*, the Hon Daniel Mookhey MLC, inviting Revenue NSW to make a submission to the Inquiry. Revenue NSW thanks the Committee for the opportunity to make a submission.

The Inquiry's terms of reference on which Revenue NSW is able to offer some comment concern the impact of the on-demand or gig economy on payroll tax or other taxes. However, at the outset, I should stress that, while Revenue NSW has responsibility for administering the State's taxation laws, it is not responsible for taxation policy. The latter is primarily the responsibility of the Treasurer and his department, the Treasury, and it would not be appropriate for Revenue NSW to offer any comment or make any recommendations on possible changes to taxation laws to deal with any of the issues raised by this Inquiry.

Key elements of the Payroll Tax Act 2007

I would like to set out some aspects of the *Payroll Tax Act 2007* (the Act) that are relevant for the purposes of discussing issues relating to the gig economy.

The Act is administered by Revenue NSW and sets out the current laws governing the taxation of wages and other forms of remuneration in NSW. The Act was initially introduced in 1971 in NSW. In 2007, it was rewritten through the harmonisation process with Victoria (in relation to harmonisation, see further below).

The Act imposes payroll tax on certain wages employers pay their common law employees. Payments to independent contractors may also be liable to payroll tax even though such contractors are not common law employees. Under the "relevant contract provisions", payments made to contractors may be taxable if –

- there is a relevant contract – that is, a contract, agreement or arrangement under which the contractor provides its services, or the services of other workers, when performing work for the business; and
- none of the exemptions under the Act apply (such exemptions generally relate to situations where the contractor's services for the particular business are of a limited or transient nature, or incidental to the activities of the business, such as where the

type of work provided by the contractor is not normally required by the business or is for a relatively short period of the year).

Where such payments to independent contractors are liable to payroll tax, the contractor is deemed to be an employee and the business that engages the contractor is deemed to be an employer.

The legislation also extends payroll tax liability to employment agents who procure employees and contractors to work for a third party, where the workers are part of the workforce and work in a similar way to employees. In cases where the worker is procured by an employment agent to work for a client of the agent and the worker forms part the workforce of the client, the agent is liable if its annual Australian wages exceed the threshold. An example would be an agent who procures building industry workers such as carpenters or plumbers to work for builders.

If the worker is procured by an agent for a client who does not conduct a business, the agent's liability for payroll tax will depend on the circumstances of the case. If the worker is a common law employee of the agent, liability will arise if the agent's annual wages exceed the threshold. However, if the worker is engaged as an independent contractor, liability will depend on the individual facts of each case. An agent may also be liable under the relevant contractor provisions, provided none of the exemptions apply.

Assessing payroll tax liability in the gig economy

There are some issues that commonly arise in assessing whether payments made to workers in gig industries are taxable. Critically, it must be established if there is a common law employer/employee relationship, or whether the relationship is one of principal and contractor which may then be exempt from payroll tax. It is not always clear one way or the other, and numerous court decisions have held that the totality of the relationship must be considered in determining whether payments to a worker are taxable.

To determine if a worker is a common law employee or a contractor, factors that have been considered by the courts include, but are not limited to, the following.

1. Control and direction. The right of an employer to control or direct how, where, when and who is to perform the work in question is a strong indicator that a worker is an employee. In some instances, the employer may not exercise much control or direction, but their right or authority to do so is significant.

2. Control and practical relationship between the parties. The terms of the contract between the two parties provide evidence of the nature of the relationship. However, it is necessary to consider all the facts and circumstances of the relationship between the parties to the contract at the time of entering into the contract and after it has been executed.

3. Contracts to achieve a "given result". A contract that is focused on providing a given result rather than the provision of labour can be an indicator of a principal/contractor relationship. This is particularly the case where the contract is for a fixed price, or where payment is made subject to meeting various milestones specified in the contract or at its completion.

4. Independent business. If a worker is engaged by an employer in the ordinary course of operating the worker's own independent business, this will generally

indicate that the worker is not engaged as an employee. The issue to be considered is whether the worker is conducting their own business as distinct from participating in the business of the employer. Some of the factors that assist in determining this include (but are not limited to) how the worker sources or obtains clients, whether the worker bears risk and supplies their own materials or incurs expenditure in earning the income, and whether the worker can delegate the work.

5. Power to delegate. The power to delegate is a factor that generally indicates that the worker is an independent contractor rather than an employee. In this context, the power to delegate refers to the capacity of the worker to engage others to undertake the services for which the worker was engaged. In these circumstances, the worker is the party responsible for paying the other persons.

6. Risk. A worker who bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of the work will tend to indicate that the worker is an independent contractor. An independent contractor typically carries their own insurance and indemnity policies.

7. Provision of tools and equipment. Providing tools and equipment and incurring overheads will generally indicate that the worker is an independent contractor. However, it must be noted that in some circumstances common law employees also provide tools and equipment and are reimbursed for these costs.

As noted above, if, after considering all relevant facts, it is established that a common law employer/employee relationship exists, then, provided the overall Australian wages exceeds the threshold, a payroll tax liability will arise. If, however, it is determined that a contractual relationship exists, then payroll tax will be payable if none of the contractor exemptions applies. Some of the exemptions may apply to gig industries depending on the facts of individual cases. For instance:

- where the workers provided services to the employer for less than 90 days in a financial year;
- where the workers provided their services to at least another employer in that financial year; or
- where the workers' services are ancillary to the conveyance of goods by a vehicle provided by the person conveying them.

I should emphasise that consideration of the above issues, which go to the nature of the working arrangement between the employer and the worker, is not unique to employment arrangements in gig industries, and arises in respect of various businesses and industries which seek to engage workers (whether directly or indirectly) on a basis other than as common law employees.

Harmonisation of payroll tax legislation

In considering any potential legislative changes in relation to tax, I should draw the Committee's attention to the largely harmonised framework applying to payroll tax.

Harmonisation was initially driven by the NSW and Victorian Governments as a means of reducing red tape for businesses, particularly those that operated across borders. NSW and Victoria each enacted a rewritten Payroll Tax Act with effect from 1 July 2007. Sections of the Act which were harmonised included the meaning of "taxable wages", when payroll tax is imposed, the treatment of fringe benefits, superannuation contributions and termination payments, contractors, the grouping of certain entities,

employment agents, registration and returns, adjustments and some exemption provisions. Other sections, for example those concerning rates and thresholds and grandfathering of certain exemptions, were included in Schedules of the Act as state specific.

Subsequently, payroll tax harmonisation was endorsed by the Council of Australian Governments (COAG) as one of 27 projects identified in *The National Partnership Agreement to Deliver a National Seamless Economy* adopted by COAG on 29 November 2008. Under the agreement, the States and Territories worked together to produce a nationally coordinated approach in relation to payroll tax. The template legislation enacted by Victoria and NSW was adopted by most jurisdictions. Although WA and QLD decided not to adopt this legislation, a significant degree of harmonisation was nonetheless achieved.

As noted above, harmonisation of payroll tax legislation was pursued to minimise costs to businesses operating in more than jurisdiction. Businesses and tax practitioners continue to emphasise its importance. Any proposed amendments by NSW to its legislation would therefore require consultation with those jurisdictions that adopted the NSW and Victorian template legislation if harmonisation among these jurisdictions is to be retained.

Yours sincerely

Scott Johnston
Deputy Secretary, Chief Commissioner of State Revenue
Revenue NSW