Submission No 2

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

Organisation: ARA Group Limited

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29 January 2025

Portfolio Committee No. 1 – Premier and Finance
NSW Legislative Council
6 Macquarie Street
Sydney NSW 2000

By email: portfoliocommittee1@parliament.nsw.gov.au

Dear Sir / Madam,

Submission on the inquiry into the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007* (NSW) ('Inquiry')

ARA welcomes the opportunity to make a submission to the Portfolio Committee No. 1 – Premier and Finance (**Committee**) in respect of the Inquiry,[1] which will focus on the:[2]

- *relevant contractor* and *employment agent* provisions in the *Payroll Tax Act 2007* (NSW) (**PTA**);
- revenue rulings and Commissioner's practice notes issued by Revenue NSW dealing with the provisions;
- decisions of courts in cases dealing with the provisions; and
- the applicability of the provisions to particular industries.

The Inquiry is important, necessary and timely, as businesses have been seeking clarity for many years on their liability to payroll tax under the *relevant contractor* and *employment agent* provisions. Many businesses have had to deal with the uncertainty of continuing to operate while being exposed to the risk of Revenue NSW potentially asserting historical payroll tax liabilities plus penalties and interest at significant amounts. Some businesses have been destroyed and no longer exist because of such historical payroll tax liabilities. In this environment of uncertainty, ARA thanks the Committee for having identified the *relevant contractor* and *employment agent* provisions as a topic needing review.

This Inquiry is not just a state issue but a national one, as payroll tax laws are largely harmonised across Australia. Industry is hopeful that the Inquiry leads to much needed reform and clarification of the *relevant contractor* and *employment agent* provisions at the national level, as many businesses have Australia-wide operations.

About ARA

[1] Application of the contractor and employment agent provisions in the Payroll Tax Act 2007
[2] Microsoft Word - Terms of reference - PC 1 - Application of the contractor and employment agents provisions in the Payroll Tax Act 2007 25 November 2024.docx

ARA delivers fully integrated essential services for infrastructure and facilities.

ARA is an employee-owned company established in 2001 and has more than 3,700 employees working across four operating Divisions: Fire & Security, Electrical, Property Services and Products.

Like many other businesses in the industry, ARA supplements its workforce with genuinely independent, third party subcontractors where, for example:

- ARA does not have a sufficient number of employees to undertake the services;
- ARA considers that it is appropriate to outsource the performance of its services (and accordingly the associated business risk) to subcontractors that themselves employ / engage a number of personnel and so can perform the services efficiently and on time;
- specialist equipment and materials are required for a job and this can be provided by the subcontractor at the subcontractor's own risk and cost;
- it would not be economically / commercially feasible for ARA to engage a full time employee to undertake a small job. This is typically the case in regional areas, where subcontractors perform services for multiple principals (who are competitors of each other); and
- it would not be economically / commercially feasible for ARA to engage a part-time employee or casual employee to undertake a small job, where the specific requirements in the relevant Award cannot be met.

ARA's main concerns with the PTA are:

1. retrospectivity;
2. harshness in how the *relevant contract* provisions apply in practice.
3. uncertainty about the application of the *employment agent* provisions;
4. an attempted widening of scope of the *employment agent* provisions by the Chief Commissioner;
5. the potential for the *employment agent* provisions to capture genuine independent contractors; and
6. unclear guidance from Revenue NSW; and
7. audits of taxpayers on different hypotheses at different points in time on the same set of facts.

It is helpful to begin with the purpose of the *relevant contractor* and *employment agent* provisions.

Purpose of the provisions

The *relevant contractor* and *employment agent* provisions have the purpose of bringing to tax wages paid to persons who perform duties similar to those of employees.

An overview of the legislative history of the *relevant contractor* and *employment agent* provisions has been provided in the cases of:

- *Freelance Global Ltd (as trustee for the Freelance Trust No 1) v Chief Commissioner of State Revenue* [2014] NSWSC 127 at paragraphs [142]–[149] per White J;
- *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 from paragraph [32] per White J; and
- *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at paragraph [21] per Bell CJ, Gleeson JA, Leeming JA.

To briefly summarise (note bolding is our emphasis):

- In 1985, both the *relevant contract provisions* and the *employment agent* provisions were introduced into the NSW payroll tax legislation by the *Payroll Tax (Amendment) Act 1985* (NSW)[3].
    - The new *relevant contract* provisions were introduced in a form that remains substantially similar to today's version.
    - The new *employment agent* provisions provided that a person would be an employment agent if (i) the person procures by an arrangement the services of a worker for a client, under which the worker does not become the employee of either the agent or the client but **carries out duties of a similar nature to those of an employee**, and (ii) remuneration is paid directly or indirectly by the agent to the worker or to some other person in respect of the services provided by the worker.
- In introducing the 1985 amendments, the NSW Minister for Employment and Minister for Finance said:

> This bill includes a number of measures which will catch schemes designed to avoid liability for pay-roll tax by severing the employer-employee relationship. Such arrangements have included the use of so-called contractors to replace wages staff. Typical of the situations that are known to exist and are **the target of the legislation is the employer who, by arrangement with an employee, enters into a contract for service with the employee's family trust, partnership or company for the provision of the employee's services. The employee then performs the services for the employer but his salary is paid to the trust, partnership or company,** resulting in the avoidance of pay-roll tax by the employer. Certain contracts will be exempted from liability for pay-roll tax, including contracts in excess of $500,000 where the contractor would need to hire staff and would therefore be liable for pay-roll tax. **Bona fide independent contractors will not be caught by the legislation.**
>
> A second area of avoidance that is dealt with by this bill is the use of employment agents. Such agents are being used increasingly by employers, **particularly in the recruitment of professional people and also for temporary staff**. In some cases it has been claimed, by virtue of the arrangements entered into, that the person whose services are provided is employed by neither the contract agent nor the client. The arrangements entered into have sometimes also involved the use of trusts, partnerships or companies. The legislation will confirm that payments by an employment agent made in respect of the provision of services to a client of the agent are liable for payroll tax.

- In 1987:

[3] Available at: https://www.austlii.edu.au/au/legis/nsw/num_act/pta1985n175262.pdf

- the *employment agent* provisions were repealed;[4] and
- the *relevant contract* provisions were amended to shift the payroll tax liability to a client using the worker's services. It was also clarified that a person who arranged for services to be provided to a client under a *relevant contract* would not be a deemed employer.[5]

With regard to the *relevant contract* provisions, the Minister for Employment and Finance noted in his second reading speech in the Legislative Assembly on 29 April 1986 that "In effect, only contracts that are similar to a normal contract of service are subject to payroll tax; that is, only if a contractor works solely or mainly for one employer for an extended period or periods does the employer become liable for payroll tax."

- In 1998, the 1971 Victorian Pay-roll Tax Act was amended to introduce the *employment agency contract* provisions following the decision of Balmford J in *Drake Personnel Ltd v Commissioner of State Revenue* (1998) 98 ATC 4915. In that case, Drake Personnel supplied office staff, nurses, medical secretaries and professional people such as accountants, labourers and tradesmen to work in the businesses of its clients. The question was whether the temporary staff were employees of Drake Personnel. Balmford J held that they were not. An appeal from that decision was allowed and the Full Court of the Supreme Court of Victoria held that each temporary staff was an employee of Drake Personnel.[6] However, in the meantime the legislation was amended in both Victoria and NSW. In Victoria, the *employment agent* provisions were introduced. In NSW, the *employment agent* provisions were reintroduced and amended so that the payroll tax liability was shifted back to the employment agent.[7] In his Second Reading Speech on the amendments to the NSW Act the Minister said:

> The Pay-roll Tax Act currently provides that wages paid to temporary staff provided through employment agents are taxable in the hands of the end user of the labour services. An administrative arrangement allows the agent to take responsibility for the tax but only if the end user agrees. Traditionally, the majority of temporary staff have been accepted as common law employees of the end user. Some are deemed to be employees under the relevant contract provisions. The relevant contract provisions are anti-avoidance provisions designed to bring to tax wages paid to **persons who are, for all intents and purposes, performing duties similar to those of employees. Recent judicial pronouncements in other jurisdictions have confused the issue of liability to the point that employers and employment agents are unsure of their obligations.** The uncertainty has prompted refund claims by employment agents which are likely to reach some $200 million in New South Wales alone. Those claims represent windfall gains for employment agents as the payroll tax would already have been passed on to the clients.
>
> **To secure the traditional tax base and make taxpayers obligations and point of liability absolutely clear, the bill introduces specific provisions relating to payments to workers engaged through employment agents.** The agent will now be liable for payroll tax, bringing New South Wales into line with Victoria, Western Australia, South Australia and Queensland. The other jurisdictions do not have specific agency provisions.

The 1998 amendments to the Victorian and NSW payroll tax legislation have been explained in the following way: "The mischief apprehended by the legislature following the first instance decision in *Drake Personnel* was that the supply of temporary personnel by a labour hire company resulted in the avoidance of payroll tax because it muddied the waters as to

[4] *Pay-roll Tax (Amendment) Act 1987* (NSW) (see Schedule 1, items (1)(a), (1)(b) and (1)(c)). Available at: https://legislation.nsw.gov.au/view/pdf/asmade/act-1987-230. See also Explanatory Note to the *Pay-roll Tax (Amendment) Act 1987* (NSW), available at: https://www4.austlii.edu.au/au/legis/nsw/bill_en/ptb1987245.pdf.
[5] *Pay-roll Tax (Amendment) Act 1987* (NSW) (see Schedule 1, items (2)(a) and (2)(b)). Available at: https://legislation.nsw.gov.au/view/pdf/asmade/act-1987-230. See also Explanatory Note to the *Pay-roll Tax (Amendment) Act 1987* (NSW), available at: https://www4.austlii.edu.au/au/legis/nsw/bill_en/ptb1987245.pdf.
[6] *Drake Personnel Ltd v Commissioner of State Revenue* (2000) 2 VR 635.
[7] *State Revenue Legislation (Miscellaneous Amendments) Act 1998* (NSW). Available at: https://legislation.nsw.gov.au/view/pdf/asmade/act-1998-104.

whether the individuals concerned might be classified as independent contractors, although they would be serving the same function for the client as its employees."[8]

***Relevant contract* provisions – harshness**

The exclusions in the *relevant contract* provisions were 'designed to exclude from the scope of the Act services provided by "genuine" independent contractors'.[9] As outlined above, in the Second Reading Speech for the *Pay-roll Tax (Amendment) Bill 1985* (NSW) that introduced the *relevant contract* provisions, the Minister stated that "bona fide independent contractors will not be caught by this legislation".

Notably, the *relevant contract* provisions today remain substantially similar to the provisions as introduced in 1985. The exclusions are identical, except for the removal of the exclusion for a contract with consideration of at least $500,000 per annum.[10] The exclusions have not been updated in 40 years to account for developments in modern contracting. This is causing harshness in how the *relevant contract* provisions apply in practice.

For example, in the recent *Loan Market* case,[11] the NSW Supreme Court upheld payroll tax assessments issued by Revenue NSW for the 2012 to 2018 financial years, on the basis that the agreements between Loan Market (an aggregator) and its mortgage brokers were *relevant contracts* and so the mortgage broker commissions were *taxable wages*.

The NSW Supreme Court remarked that:

- 'The conclusion that the Broker Agreements constitute a relevant contract under s 32 may be seen as a harsh outcome for LML because the contractor provisions now found in s 32 were originally introduced as an anti-avoidance measure which was not intended to catch "bona fide independent contractors"';[12]
- 'the application of the law to the LM Group may appear harsh – that is a matter for Parliament to correct by amending the legislation, and is ameliorated to some degree by the exemption provisions';[13] and
- 'The potential difficulty for a taxpayer is that the exclusions are very specific and may leave a subset of relationships such as those in the present case where the contractor is a genuine independent contractor but may not come within any of the exclusions.'[14]

The above is an acknowledgement by a court that the *relevant contract* provisions are deficient and can have the unintended effect of catching a genuine independent contractor

[8] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 at paragraph [63].
[9] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 at paragraph [19].
[10] Section 3A(e)(iv) of the *Pay-roll Tax (Amendment) Act 1985* (NSW).
[11] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390.
[12] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 at paragraph 207.
[13] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue (No 2)* [2024] NSWSC 1393 at paragraph 105.
[14] *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue; Loan Market Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 at paragraph 208.

in its net, resulting in taxation that is not consistent with the original intent of the provisions.

The Victorian Government has sought to ameliorate some of the harshness of the *relevant contract* provisions by granting general practitioners (**GPs**) relief from backdated payroll tax assessments and audits of historical tax years, a payroll tax amnesty to 30 June 2025 and a payroll tax exemption for payments to contractor GPs and employee GPs for providing bulk billed consultations.[15] A broadly similar approach has been taken by South Australia,[16] Queensland[17] and the ACT.[18] The NSW Government provided a 12-month pause of payroll tax audits on medical practices from 4 September 2023, but audits recommenced on 4 September 2024. From this same date, RevenueNSW grants a rebate on payroll tax for payments made by medical centres to contractor GPs only if they meet certain bulk billing / veterans billing targets for their overall billings (being 80% for metropolitan Sydney and 70% in other areas). This is an acknowledgement of the risk of unintended application of the *relevant contract* provisions (noting these provisions do not exist in WA), the unique nature of independent contractor arrangements in different industries in a modern world and the need for reforms.

Employment agent **provisions – uncertainty**

[15] On 22 May 2024, Victorian Treasurer Tim Pallas announced the following measures:
1. all Victorian general practices will receive an exemption from any outstanding or future payroll tax assessments issued up to 30 June 2024 – that is, the SRO will not audit previous financial years and will not pursue retrospective or backdated payroll tax assessments relating to previous financial years;
2. a 12-month exemption / amnesty from 1 July 2024 to 30 June 2025 will be available "for any general practice business that has not already received advice and begun paying payroll tax on payments to their contractor GPs"; and
3. from 1 July 2025, the government will also provide a payroll tax exemption for payments to contractor GPs and to employee GPs for providing bulk billed consultations – this has now been legislated by the *State Taxation Further Amendment Act 2024* (Vic) assented to on 3 December 2024.

On 11 August 2023, the SRO issued Ruling PTA 041 (*Relevant contracts - medical centres*) to explain the application of the relevant contract provisions in the *Payroll Tax Act 2007* (VIC) to medical centre businesses. This ruling is harmonised with the revenue ruling issued by NSW on the same day.

[16] The following measures were implemented in SA:
1. the SA Government approved a temporary payroll tax amnesty on payments made to contracted general practices between 1 July 2018 to 30 June 2024; and
2. effective from 1 July 2024, the SA Government intends to provide a payroll tax exemption for wages earned by GPs through bulk-billed services provided to patients, whether the GPs are engaged as employees or deemed as contractors. This change was introduced by the *Statutes Amendment (Budget Measures) Bill 2024* (SA) which was received in the Legislative Council on 29 August 2024, but has not yet received assent.

On 22 November 2023, RevenueSA issued Revenue Ruling PTA041 (*Relevant Contracts – Medical Centres*) to explain the application of the relevant contract provisions in the *Payroll Tax Act 2009* (SA) to medical centre businesses. This is harmonised with the revenue rulings issued earlier by Victoria and NSW on 11 August 2023.

[17] In Queensland, from 1 December 2024, wages paid by a medical practice to a contracted or employee GP are exempt under an administrative arrangement set out in Public Ruling PTAQ014.1.1 (*Payroll Tax Act: Payroll tax exemption for wages paid to general practitioners*).

[18] The following measures were implemented in the ACT:
1. the ACT Government granted an automatic retrospective amnesty on historical payroll tax liabilities for payments to contracted GPs from 1 July 2018 to 30 June 2023; and
2. for 1 July 2023 to 30 June 2025, the ACT Government has provided a further temporary payroll tax amnesty to GP clinics that bulk-bill at least 65% of their patients, have registered for MyMedicare and have registered to receive the amnesty with the ACT Revenue Office by 29 February 2024.

On 23 September 2023, the ACT Revenue Office issued *Revenue Circular PTA041 - Relevant Contracts – Medical Centres – Payroll Tax Act 2011*, which explains the application of relevant contract provisions in the *Payroll Tax Act 2011* (ACT) to a medical centre business.

There is a great deal of uncertainty about the application of the *employment agent* provisions.

Prior to the 2023 case of *ITM*,[19] case law emphasised that it was relevant to undertake a fact-sensitive analysis and consider several factors about the provision of the services in practice, including location, regularity / continuity, level of interaction with client's customers, level of direction and supervision by the client, whether any uniform requirement, use of client's staff facilities and whether the services involved adding personnel to the workforce of the client for the conduct of the client's business so that the personnel performed work in a similar way to employees.

The 2023 case of *ITM* effectively put forth a new approach of only analysing the contractual agreement between the purported employment agent and the client (**Head Contract**) to determine the nature of the client's business and whether the client is empowered to exert control over the subcontractors. It is no longer relevant to undertake a 'fact-sensitive analysis' to understand what actually happens in practice. For example, a client may have a contractual right to direct subcontractors on how to perform their services, but may not actually exercise that right in practice.

ITM introduces a lot of uncertainty about the application of the *employment agent* provisions, particularly for contracts entered into many years ago that remain on foot today. It may be the case that some contracts would not have been caught by the *employment agent* provisions under the pre-*ITM* interpretation of the law, but may today be caught by the post-*ITM* interpretation of the law. The possibility of this anomalous outcome indicates that legal reform is needed to clarify the interpretation of the *employment agent* provisions, as the new change in interpretation usurps the body of case law that has been developed to date.

The table below summarises the cases on the *employment agent* provisions in recent years. The application of a fact-sensitive analysis to the individual circumstances of taxpayers has effectively resulted in a roughly equal number of outcomes favourable and unfavourable to taxpayers. This is because evidence of how a contractual agreement operates in practice is able to be produced and tested in court. However, the new post-*ITM* interpretation of the law would simply result in a 'desktop review' of a Head Contract being conducted, which would nearly inevitably result in a Head Contract being caught by the *employment agent* provisions.

Industry	Outcome favourable to taxpayer	Outcome unfavourable to taxpayer
Cleaning and property maintenance services	• *JP Property Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWSC 139	• *HRC Hotel Services Pty Ltd & Anor v Chief Commissioner of State Revenue* [2018] NSWSC 820

[19] *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302.

Industry	Outcome favourable to taxpayer	Outcome unfavourable to taxpayer
		• *Bayton Cleaning Company Pty Ltd v Chief Commissioner of State Revenue; International Hotel Services Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 657
Security guard services	• *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 • ***Infinity Security Group Pty Ltd v Chief Commissioner of State Revenue*** [2023] NSWCATAD 28	• *Southern Cross Group Services Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 666 • *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 744
Support workers providing in-home care services for severely disabled, frail, and aged persons	• *Southern Cross Community Healthcare Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1317	
Expert consultants who provide opinions or appear as expert witnesses	• *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852	

Employment agent **provisions – potential to catch genuine independent contractors**

In *UNSW Global*, White J accepted that "the mischief against which the employment agency contract provisions was directed was the avoidance of payroll tax through the interposition of an agent to give the appearance of a contractor relationship where one did not exist in substance. The mischief to which the provisions were directed was not where the service provider was a genuine independent contractor whose services were provided to a client through an intermediary."[20]

However, the fact that the post-*ITM* interpretation now prohibits a fact-sensitive analysis of a taxpayer's circumstances also has the potential to catch arrangements under which a worker is actually a genuine independent contractor.

In the first instance decision in *ITM,* Parker J acknowledged that the trolley collectors were subcontractors in noting that, "ITM does not itself employ the people who perform the trolley collection services. It engages subcontractors to perform those services. ITM's subcontractors are a mixture of sole traders, partnerships, and small proprietary companies. Some of these operate as trustees for family trusts. The individuals who perform the actual trolley collection work may thus be sole traders, partners, employees or (in the case of the small proprietary companies) shareholders, directors, or other agents of the company."[21]

[20] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 at paragraph [41].
[21] *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557 at paragraph 5.

The NSW Chief Commissioner of State Revenue (Chief Commissioner) did not seek to argue that the *relevant contract* provisions applied to the contracts between ITM and the trolley collectors (who themselves may have been entities that further subcontracted the work to other parties).

As the trolley collectors were genuine independent contractors, there is no clear reason why the *employment agent* provisions should apply to treat the trolley collectors as deemed employees of Woolworths, ALDI and IGA, if they could not have been deemed employees of ITM under the *relevant contract* provisions.[22] The *employment agent* provisions should not apply where the workers are genuine independent contractors.

***Employment agent* provisions – attempted widening of scope by the Chief Commissioner**

The interpretation of the *employment agent* provisions today largely depends on the test developed by White J in the case of *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 (***UNSW Global***).

The *employment agent* provisions on their face refer to a contract under which a person (the employment agent) "*… procures the services of another …for a client of the employment agent*". Read literally, this produces a harsh outcome. Accordingly, the "in and for" test had to be developed by White J in the *UNSW Global* case in order to give sensical operation to the *employment agent* provisions. The test is that an *employment agency contract* is "*a contract under which a person procures the services of another person* ***in and for the conduct of the business of*** *the employment agent's client*". The fact that the bolded words had to be read into the interpretation by a court demonstrates the deficient drafting of the *employment agent* provisions. Parliament should pass taxation legislation that is clear on its face and that can be understood literally without the need for taxpayers to litigate with revenue authorities in court in order to confirm their correct interpretation.

In the *UNSW Global* case, White J' raised the concern that, "It does not follow that the text of the employment agency contract provisions admits of an interpretation that they do not apply where the service provider is a genuine independent contractor."[23]

White J noted also that "giving the [*employment agent*] provisions their natural and ordinary, or literal, meaning does lead to an absurd or unreasonable result".[24] Further, "This is not a case in which a literal construction 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."[25]

[22] We note that subsection 32(3) of the *Payroll Tax Act 2007* (NSW) states, "For the purposes of this section, an employment agency contract under which services are supplied by an employment agent, or a service provider is procured by an employment agent, is not a relevant contract."
[23] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 by White J at paragraph 42.
[24] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 by White J at paragraph 46.
[25] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 by White J at paragraph 49.

In the *UNSW Global* case, "the Chief Commissioner ultimately accepted that a literal interpretation would have far-reaching and unintended consequences."[26]

However, since the development of the "in and for" test by White J in the *UNSW Global* case, the Chief Commissioner has sought to challenge the correctness of the test and widen it. For example, six years later in the *E Group Security*[27] case, the Chief Commissioner argued that the test developed in *UNSW Global* imposed an "unwarranted gloss" on the definition of *employment agency contract*, thereby departing from and narrowing the statutory text, contrary to ordinary principles of statutory interpretation.

The Chief Commissioner also argued that when the NSW *employment agent* provisions were repealed in 1987, this included a repeal of the requirement that a worker "carry out duties of a similar nature to those of an employee", and this requirement was not reinstated in 1998. Accordingly, the *UNSW Global* test was incorrect as it reintroduced this requirement. The NSW Court of Appeal rejected this argument on the basis of the fact that the *Payroll Tax Act 2007* (NSW) had been reviewed and amended regularly and the NSW Chief Commissioner had himself consistently propounded the test in *UNSW Global*, which was originally proposed by him in 2016. This meant that "there is a powerful inference that the Legislature is to be taken to have endorsed the construction in *UNSW Global*".[28]

The NSW Court of Appeal noted that if a different interpretation is sought, given that the payroll tax legislation is harmonised throughout Australia, "It is in those circumstances far better for the law to be changed, if indeed it is to be changed, by legislation, and with clearly stated transitional provisions."[29]

The frequent litigation between taxpayers and the Chief Commissioner regarding the application of the *employment agent* provisions is evidence of the fact that the provisions are unclear. Further, the litigative approach taken by the Chief Commissioner for the sake of re-interpreting legislation, as demonstrated in the *E Group Security* case, creates uncertainty for taxpayers and is an unproductive use of taxpayers' time and resources.

Unclear guidance from Revenue NSW

In recent years, Revenue NSW has expressed contradictory views in its Commissioner's practice notes (**CPN**). This has caused confusion for taxpayers.

For example, in the context of the *employment agent* provisions, in CPN 005 (in effect from 20 February 2019 to 1 March 2021),[30] the Commissioner took the view that the employment agency "provisions only apply to labour hire type contracts, consistent with the intention of the provisions and recent decisions of the NSW Supreme Court".

[26] *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 by White J at paragraph 50.
[27] *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115.
[28] *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at paragraph 33.
[29] *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at paragraph 52.
[30] *Commissioner's practice note: Employment Agency Contracts Guidelines* (number CPN 005, issued 20 February 2019 and in effect from 20 February 2019 to 1 March 2021).

However, the Commissioner revised his view in CPN 005v2 (effective from 1 March 2021 to present)[31] to state, "A contract may be an employment agency contract even if the agent is not an employment agent or labour hire firm as those terms are commonly understood, or as defined in other legislation".

Significant and abrupt changes in view without consultation with industry, such as this one, have a distortive effect for businesses and prevent businesses from making investment / pricing decisions and reaching commercial bargains with certainty.

Another example is Revenue NSW's view regarding chain of on-hire arrangements, being the situation where there are multiple employment agents in a chain of employment agents. The general practice of state revenue authorities, including that of Revenue NSW, is to collect payroll tax from the employment agent that is positioned closest to the ultimate client. This position is stated by Revenue NSW in Revenue Ruling PTA 027 (*Employment agency contracts: chain of on-hire*, in effect from 1 July 2007 to present), which outlines the Commissioner's interpretation of the law and approach to compliance.

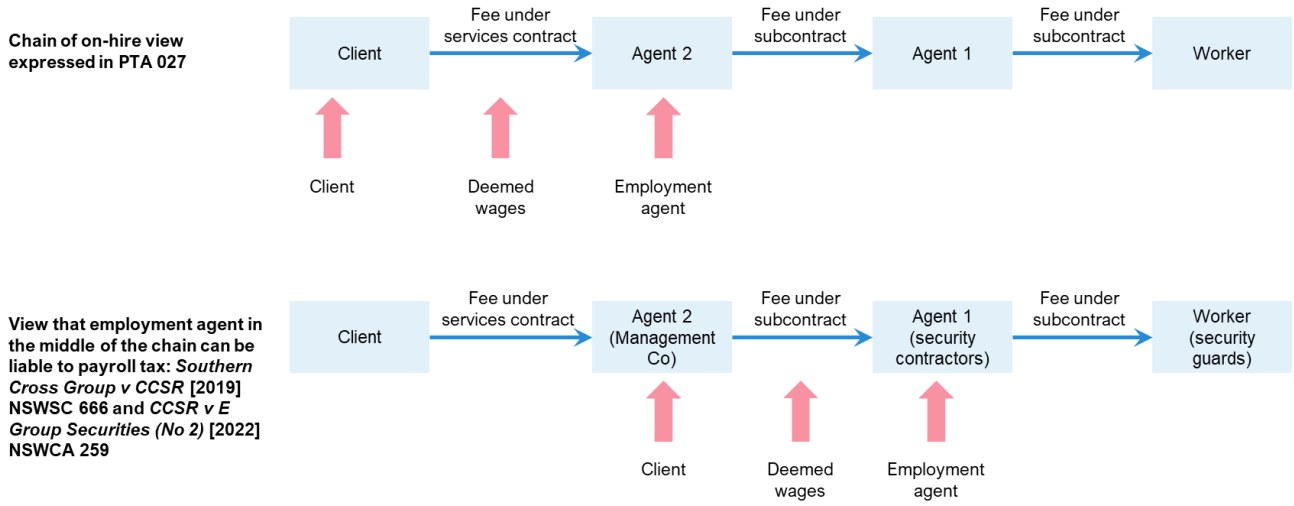
However, despite this administrative approach, Revenue NSW has enforced the *employment agent* provisions against an employment agent in the middle of the chain (i.e. not closest to the ultimate client), including in the following cases handed down in June 2019:

- *Southern Cross Group Services Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 666; and
- *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWSC 744.

In both cases, property managers, operators and other security companies (Management Co / Agent 2) had contracts with property owners (Client) to manage the operational aspects of the businesses.
Management Co contracted with security businesses (security contractors / Agent 1) for those security contractors to provide security services. The security contractors contracted with service providers (either security guards or other subcontractors again) to provide services to Management Co and, therefore, the Client. Revenue NSW assessed the security contractors for payroll tax under the *employment agent* provisions, despite Revenue Ruling PTA 027 providing that Revenue NSW would only collect payroll tax from the employment agent that is positioned closest to the ultimate client (in this case the Management Co).

The contrast between the two approaches is depicted below:

[31] *Commissioner's practice note: Employment Agency Contracts Guidelines* (number CPN 005v2, issued 1 March 2021 and in effect from 1 March 2021 to present).



In *Southern Cross Group,* the NSW Supreme Court remarked:

> 53. There was reference in the course of argument to the fact that the imposition of payroll tax liability on the plaintiffs (not being closest in the chain to the shopping centre owners or the like) is not consistent with the Chief Commissioner's own administrative procedure and ruling (a reference, as I understand it, to the Chief Commissioner's Revenue Ruling No. PTA 027 that was considered in *Knight Watch*[32] (see [28]-[61]) – that Ruling providing that the Chief Commissioner will hold the employment agent "closest to the ultimate client" liable for relevant payroll tax (see [31] of *Knight Watch*)). However, it was not suggested that the ruling had any binding force (it being described in *Knight Watch* at [60] as representing no more than "an administrative procedure adopted by the Chief Commissioner"). Nor do the Chief Commissioner's administrative processes have any legislative force (see the discussion from T 37.26).

When a revenue authority has issued a public ruling to provide guidance to taxpayers regarding its administrative approach, taxpayers should expect that they can rely on the ruling and be treated in accordance with the ruling. Where a revenue authority takes enforcement action that is at odds with its own ruling, that has the potential to seriously undermine taxpayers' confidence in the tax system, as the enforcement action can be seen as discretionary or arbitrary.

Audits of taxpayers on different hypotheses at different points in time on the same set of facts

There has been a trend of RevenueNSW auditing taxpayers on different hypotheses and alternate arguments under the *relevant contractor* and *employment agent* provisions across time, as opposed to testing them at the same time under the one audit.

ARA has experienced this in respect of two subsidiaries which were originally audited in 2019 in respect of FY2016 to FY2018. RevenueNSW concluded that the *relevant contractor* provisions did not apply, in fact gave a refund for over-declared taxable wages and did not

[32] *Knight Watch Security Services Pty Ltd v Chief Commissioner of State Revenue* [2017] NSWCATAD 223.

otherwise raise any other payroll tax related concerns (including under the *employment agent* provisions). Accordingly, the two subsidiaries continued business as usual.

However, the two subsidiaries were audited again in 2024, this time under the *employment agent* provisions in respect of FY2021 to FY2024. This has required ARA to spend significant time and resources on defending its position.

It is unclear why RevenueNSW has taken such an approach. When a tax authority audits a taxpayer and has gathered sufficient information to enable the tax authority to conclude on the compliance levels of the taxpayer, the tax authority is in a position to communicate to the taxpayer its concerns and allow the taxpayer to have the opportunity to disclose any prior non-compliance and take steps to rectify any non-compliance going forward.

At the time when ARA's subsidiaries were audited in 2019, there was no communication by RevenueNSW, including in the finalisation letters, regarding any concern about the application of the *employment agent* provisions. This encouraged a sense of comfort and belief in ARA that it was compliant with its payroll tax obligations and so ARA reasonably continued business as usual. ARA did not expect to be audited so soon again on a matter in respect of which it had already provided relevant and detailed information to RevenueNSW (noting that the template form of ARA's contracts with subcontractors has broadly remained the same across time and ARA's contracts with clients are multi-year contracts that had not changed).

It concerns ARA that it was (and likely other taxpayers were) subject to multiple audits in respect of the same subject matter in a relatively small period of time. RevenueNSW notes in its finalisation letters that an audit is based on the records and information provided at the time, but it is possible that RevenueNSW may wish to re-examine the same or similar issues in the future. This is an acceptable proposition only if the taxpayer's arrangements have changed. It is not an acceptable proposition if the taxpayer is carrying on business as usual, in the same way as it had been when audited by RevenueNSW.

A false sense of security is created for taxpayers when RevenueNSW contradicts a positive finalisation letter with a subsequent audit. Positive finalisation letters are generally interpreted as confirmation by a tax authority that the taxpayer is fully compliant. Accordingly, a tax authority should undertake their audits thoroughly with in-depth technical analysis so that they can issue their finalisation letters with a definite conclusion and stand by that conclusion going forward for taxpayers whose businesses or the facts have not materially changed. Tax authorities should not test different hypotheses at different points in time for the same set of facts, as such action can arguably be seen as targeting a particular taxpayer and for the purpose of generating an outcome.

Retrospectivity

It is difficult for taxpayers to carry on their businesses when a court case that is decided years later in respect of historical tax years for a particular taxpayer in their specific

circumstances gives impetus to Revenue NSW to audit other taxpayers in the same industry that had been operating based on the law as it stood at that time.

This has been acknowledged in cases. For example, in *E Group Security,* the NSW Court of Appeal remarked that if it were to adopt the NSW Chief Commissioner's proposed reinterpretation of the *employment agent* provisions, "the change in the legal meaning of the law will have retrospective effect. It is far from improbable that there will be pending disputes and pending litigation which will be affected."[33]

There is a significant cost paid by a taxpayer whenever it is reviewed / audited. This is not limited to adviser fees. There is also a diversion of time and resources away from doing business as usual to managing the review / audit and potentially progressing to litigation. Retrospective tax liabilities, penalties and interest have caused considerable uncertainty and hardship for some businesses. For example, Integrated Trolley Management, which collected shopping trolleys for Woolworths, Aldi, and IGAs, went into voluntary administration after the NSW Full Federal Court found that it was liable for payroll tax on payments to subcontractors in December 2023.

To date, in our experience, Revenue NSW has been the most active State revenue authority in terms of reviews / audits and litigation. There has been a trend of Revenue NSW retrospectively applying a change in interpretation of law to taxpayers. This:

- undermines the ability of a taxpayer to determine the law applicable to them at any given date;
- has the increased potential for unintended consequences and significant, adverse flow-on effects;
- creates confusion for taxpayers and disrupts business planning processes, resulting in high compliance costs which are often passed onto customers; and
- can expose taxpayers to significant tax liabilities that they are unable to fund, where they are issued assessments for an asserted tax shortfall, together with penalties and interest that have accrued over 5 years at a penal rate.

As a matter of general policy, changes in the interpretation and enforcement of law should apply prospectively. Prospective and certain laws are integral to the proper functioning of the tax system.

Where a new court decision represents a significant "U-turn" in the interpretation of tax law, that new interpretation should only be applied prospectively by a tax authority. This is because it is often the case that the view that was previously expressed by the courts, and applied by the Revenue NSW (including in binding guidance), would have facilitated and contributed to taxpayers applying the former view of the law. This would have flowed through into the way in which taxpayers conducted their business, priced their services, structured their contracts / fee arrangements and managed their commercial operations.

[33] *Chief Commissioner of State Revenue v E Group Security Pty Ltd* [2022] NSWCA 115 at paragraph 51.

Any change in the interpretation of tax laws should only apply prospectively, so that taxpayers can have faith that they can undertake their business activities in compliance with the current tax laws without future penalty, and minimise their compliance costs in trying to analyse and apply new law to old arrangements.

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