Submission No 14

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

Organisation: SKG Group Australia Pty Ltd

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The Hon. Jeremy Buckingham MLC
Chairman, Parliamentary Inquiry on the application of contractor and employment agent provisions in the Payroll Tax Act 2007

Sent by email: jeremy.buckingham@parliament.nsw.gov.au

Dear Mr. Chairman

Who we are

SKG Group is a family owned business that provides services to Australian and New Zealand businesses in the cleaning, security and building maintenance space. It is best described as a medium sized business but on the large side of the medium scale. It has over 200 employees in New South Wales alone and has been in existence for fifty years.

Why we are making a submission

We are making a submission to this Inquiry because SKG Group has been and continues to be deeply affected by the steps Revenue NSW has taken to enforce its interpretation of the deemed employment agency provisions of S. 37 (1) of the Payroll Tax Act 2007 ("the Act"). So profoundly affected is the SKG group that we have been compelled to go to the Supreme Court of NSW to seek relief from what we see as a completely unsupportable interpretation of what is and what is not a "deemed employment agency". If Revenue NSW succeeds in its interpretation of these provisions and is likewise successful in claiming five (5) years retrospectivity, then there is little hope that our business could survive. This is the drastic state of affairs to which our business has been brought and we believe Revenue NSW is conducting a campaign against our company and others in the cleaning industry based on a flawed premise.

What is the flawed premise?

S. 37(1) of the Act is not of itself an unclear statutory provision. It says this:

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 a person (an ***employment agent***) procures the services of another person (a ***service provider***) for a client of the employment agent.

As stated above that seems clear enough on its face. However, Revenue NSW applies a policy that sits on top of this provision. The policy deals with what constitutes "control" for the purpose of interpreting the deemed employment agency provision and says this:

> Control similar to the control exercised over employees can be exercised indirectly, by the agent managing the way in which work is performed in accordance with the client's requirements or specifications. Indirect control may be exercised by the client specifying customer service requirements, or specifying the tasks to be performed, where when and how the work is performed, and requiring workers to comply with the client's operating procedures that apply to employees.

Even an absence of direct control, does not mean there is no employment agency contract.

Our company found out that such a policy existed when it was advised by a Revenue NSW Compliance Officer on 2 September 2022. Reading the opening sentence of the policy, it is evident that almost any relationship where a worker is sent somewhere to do something is caught by the definition of "control". It seems absurd. Even more absurd is the final sentence of the policy which states that even where there is no direct control there can still be a deemed employment agency in existence. How that can be considered as a reasonable interpretation of S. 37(1) of the Act eludes us. We asked for examples which would fall outside the deemed employment agency provisions and Revenue NSW informed us that the following would fall outside provisions:

"… a financial services company engaging a gardener or an electrician or another contractor to do repairs and maintenance."

What this mean is that virtually all instances of a business providing a labour based service to a client or customer would be deemed to be an employment agency. The policy that Revenue NSW relies upon is a false premise in our respectful opinion, and we believe this needs to be corrected urgently.

The Legal Landscape

The Supreme Court of NSW has handed down numerous decisions on the issue of the deemed employment agency provisions. Until the Court of Appeal decision in ***Integrated Trolley Management*** in December 2023 we had understood that the following criteria applied for an employment agency to exist (assuming the Supreme Court judges did not change their minds):

a) In order for an employment agency contract to exist the so called "employment agent" must procure the services of another person **in and for the conduct of the business** of the asserted employment agent's client.

b) The so called "employment agent" must provide individuals who would be **added to the workforce of the client**.

c) The services of an individual are provided through the so called "employment agent" to help the client conduct its business **in the same way, or much the same way, as it would through an employee**.

d) The test as to whether the services of a service provider are procured "for" the client is whether the service provider is **sufficiently integrated** into the client's business to be seen as **an addition to the client's workforce**.

That all seemed to change when the ***Integrated Trolley Management*** decision was handed down. The court appeared to be saying that a worker was considered to be working "in the business" of our client if all the worker was doing was turning up, cleaning the premises and then leaving. How can a cleaner who simply arrives, cleans and then leaves be "in the business" of our client whomever that client may be?

On top of this, we note that the Supreme Court of NSW itself remains divided over what the provisions mean. The recent court decision in September 2024 in the ***Uber Case*** (now on appeal) is critical of the ***Integrated Trolley Management Case***. If the court is unable to agree within its ranks on what is and what is not a deemed employment agency, how can business have any faith that the assessment process of Revenue NSW is reliable and an accurate reflection of what the law says?

Retrospectivity

The very worst aspect of this matter is the application by Revenue NSW of five (5) years retrospective payroll tax using the deemed employment agency provisions. As the Inquiry is aware, once a business is a deemed employment agency, then all its subcontractor payments are caught for the purpose of Payroll Tax assessment, whether some or all of those subcontractors have themselves paid Payroll Tax. The application of the deemed employment agency provisions means that a business which has hitherto engaged subcontract labour can no longer be exempted from Payroll Tax in relation to those subcontractor payments.

The increase in tax liability is huge. On top of that Revenue NSW is opportunistically applying five (5) years of retrospectivity. Businesses such as ours are now receiving assessments from Revenue NSW for millions upon millions of dollars. It will be an extinction event for the vast majority of small to medium-sized cleaning and security businesses including ours. Revenue NSW has not indicated any willingness to consider the likely job losses that the aggressive pursuit of five years of retrospective Payroll Tax will bring. However, it is safe to assume that thousands of jobs in these industries will be lost.

It is particularly ironic when one considers that the ***Integrated Trolley Management*** decision (which features on a repeated basis in the correspondence that we and others are receiving from Revenue NSW) was only handed down on 13 December 2023. How can any business budget for five years of retrospectivity arising from a court decision handed down 14 months ago?

What does SKG Group ask this Inquiry to do?

We ask this Inquiry to recommend the following:

(i) that the government take urgent action to cause Revenue NSW to cease and desist the attempted recovery of Payroll Tax from all businesses in New South Wales where such recovery is being taken on a retrospective basis; and

(ii) that the government undertake an urgent revision of the Payroll Tax laws recognising that those laws have become a major disincentive to employ workers in New South Wales; and

(iii) that the government take urgent action to cause a fundamental change in the policy being applied by Revenue NSW as to what constitutes a deemed employment agency and that such change be published to all businesses twelve (12) months prior to the introduction of any new policy.

We greatly appreciate the opportunity for our voice to be heard through this submission.

Yours sincerely
SKG Group Australia Pty Ltd

Niko Mavro
Chief Executive Officer