Submission No 15

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

Organisation: Dentons Australia

Date Received: 7 February 2025

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Chair and Members
Legislative Council of the Parliament of New South Wales
Portfolio Committee No 1 - Premier and Finance
Inquiry into the application of the
contractor and employment agent
provisions in the Payroll Tax Act 2007.

7 February 2025

Dear Chair and Members,

Inquiry into the Payroll Tax Relevant Contractor Provisions – Dentons Australia Tax Submission

We refer to the establishment of the '*Inquiry into the application of the contractor and employment agent provisions in the Payroll Tax Act 2007*' by the Legislative Council on 26 November 2024 and the associated terms of reference (**Inquiry**). We believe that this Inquiry presents a unique and important opportunity for the Parliament to lead the Nation in the modernisation of the way in which contractor relationships are treated under the payroll tax system.

Dentons Australia's National tax practice welcomes the opportunity to assist the Inquiry by making the **attached** submission (**Submission**). The Submission provides our assessment of the current state of the payroll tax system and associated recommendations for reform of the relevant contractor provisions contained in Division 7 of the *Payroll Tax Act 2007* (NSW) (**Act**) (**Relevant Contractor Provisions**).

Based on our extensive work representing taxpayers across all industries on matters related to the Relevant Contractor Provisions, our tax policy expertise and research, we are significantly concerned about the current approach to the extended definition of employment relationship adopted by the Relevant Contractor Provisions.

The research and analysis undertaken in our Submission reveals that the Relevant Contractor Provisions:

1. Are not appropriately adapted to the realities of the modern economy.
2. Apply to *bona fide* independent contractor arrangements contrary to the stated purpose of the provisions to only apply to employment-like relationships.
3. Adopt an ineffective and unprincipled 'services' test to assess whether an independent contractor relationship is employment-like.
4. Have been interpreted such that the concept of services goes well beyond any reasonable standards of commercial practice.
5. Have been broadly applied to *bona fide* independent contractor arrangements, which exceeds the scope and policy design of the payroll tax law, which is meant to be a tax on employment.
6. Has exemptions that are antiquated, poorly drafted, complicated and too narrowly and specifically defined, failing to ensure *bona fide* independent contractors are excluded, particularly purported services that arise under genuine intermediary arrangements.
7. Artificially imposes payroll tax on vulnerable small and micro businesses to the advantage of larger businesses.

8. Creates substantial uncertainty in the tax system that leads to significant increases in both the complexity and the costs of complying with the tax law.
9. Imposes significant and unjustified additional costs to production and service delivery that result in the provisions not being tax efficient.
10. Undermines the payroll tax system from achieving desirable outcomes of fairness and equity.

We are concerned that the above failings are undermining NSW's economy, putting vast numbers of businesses and industries at risk and puts into question the integrity of the payroll tax system as a tax on employment.

Given this, we make the following recommendations to Parliament:

Recommendation 1	That the Relevant Contractor Provisions be reformed so that they only capture employment-like contractor relationships and do not capture *bona fide* independent contractor relationships.
Recommendation 2	That the Relevant Contractor Provisions be modernised to better reflect contemporary business and economic conditions in the modern economy.
Recommendation 3	That section 32(1) of the Act be amended to recast the threshold for a relevant contract away from a 'services' test to a 'control and integration' test.
Recommendation 4	That section 32(2) be amended to include a new exemption for services arising in respect of genuine intermediary arrangements where the services relate to the performance of obligations imposed under law and/or where the benefits accruing to a principal are merely ancillary or incidental.

We have included proposed draft amendments to the Relevant Contractor Provisions in **Appendix A** of our Submission.

By adapting the law to align with contemporary business realities, NSW can set a new benchmark for other jurisdictions, leading the nation with a 21st-century payroll tax system which is fairer and better fosters innovation and entrepreneurship.

We would welcome the opportunity to assist the Inquiry further by attending to meetings with the Chair and members. Further, we would be willing to assist by presenting and responding to questions at formal public hearings conducted by the Inquiry.

Yours sincerely,

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SUBMISSION

Parliament of New South Wales, Legislative Council

Inquiry into
Application of the contractor and employment agent provisions in the Payroll Tax Act 2007

DENTONS AUSTRALIA

7 FEBRUARY 2025

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PART 1 - INTRODUCTION

1. Dentons Australia's National Taxation Practice is proud to be able to prepare this submission and to contribute to the Parliament's consideration of the current payroll tax landscape, in particular the effectiveness of the relevant contractor and employment agency provisions within the *Payroll Tax Act 2007* (NSW) (**Act**).

2. We have considerable experience advising taxpayers in both NSW and nationally regarding the complex provisions contained in the Act and have witnessed the adverse impacts those provisions are having on businesses of all sizes across all sectors of the economy.

3. The scope of this Submission will be limited to our review of the effectiveness of the relevant contractor provisions contained in Division 7 of the Act (**Relevant Contractor Provisions**). Our Submissions will not address the operation of the employment agency provisions contained in Division 8 of the Act.

4. We are significantly concerned that the current approach to the extended definition of employment relationships is having substantial adverse impacts on small and emerging businesses in the modern economy. Concerningly, the Relevant Contractor Provisions are being applied to *bona fide* independent contractor arrangements that were never intended to fall within the scope of the payroll tax provisions. We are concerned that this is undermining NSW's economy, putting vast numbers of business and industries at risk and undermining the integrity of the payroll tax system as a tax on employment.

A. The evolving nature of business and contractor relationships in the modern economy

5. The world stands at a pivotal juncture in the evolution of modern commerce, where digital technologies, platform-based transactions, and innovative business models are rapidly supplanting traditional modes of economic exchange. Where traditionally, physical institutions and capital served as the bedrock for economic growth,[1] the expansion of the global digital economy in recent years has irrevocably transformed the way goods and services are produced, delivered, and consumed.

6. This shift to a global digital economy has profoundly impacted the predominant forms of wealth creation for individuals. "Sharing platforms" such as Uber or AirBnB, which provide independent micro-entrepreneurs with recourse to additional income streams, comprises the second largest income source in the US, with the national market value expected to reach USD $335 billion in 2025.[2] The proportion of individuals who perform work through digital platforms is also increasing exponentially, with younger demographics, students and migrants making significant use of collaborative trading platforms in order to monetise previously unavailable assets.[3] The digital economy has itself become a foundational pillar of the modern economy, with estimates suggesting it added an economic value of USD $38.1 trillion in 2021, which constituted 45% of the global GDP.[4]

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[1] Zhang et al, *Digital transformation and economic growth efficiency improvement in the digital media era: digitalisation of industry or digital industrialisation?* (2024) International Review of Economic and Finance, Vol 92, page 667.

[2] Mukhoryanova et al, 'Sustainability of micro-enterprises in the digital economy', *E3S Web of Conferences* 250, 06008 (2021), page 4.

[3] McDonald et al., *Digital Platform Work in Australia: Preliminary findings from a national survey* (Preliminary Report, 18 June 2019) 5; Mukhoryanova 4.

[4] Zhang 667.

7. Flowing from this, multiple conceptions of business models in the digital age bear relevance to current conceptions of the employment and contractor relationship under Australian taxation principles:

    - **Microbusinesses**: small businesses play an increasingly critical role as a key economic driver in the digital economy, with current estimates suggesting that they are responsible for over 50% of the workforce, and over 1/3 of new jobs created in the US.[5] Yet as digital transformation continues to lower barriers to entry in traditionally incumbent markets, small businesses also serve to underpin increased economic mobility because they facilitate economic independence and create structural resistances to recession.[6] Consistent small business activity is therefore said to be highly correlated with strong social benefits due to increased levels of individual empowerment and choice.[7]

    - **Intermediary platforms**: innovation is becoming increasingly important as a means to promote competition between micro-businesses, independent entrepreneurs, and large firms.[8] Intermediary platforms act as an integral facilitator of communication between individuals in the innovation process, as they allow for greater transfer of knowledge between creators and users.[9] This has resulted in an increase in the proportion of workers who earn income outside of traditional employment relationships.[10] Intermediaries therefore act to remedy information and economic asymmetries that have traditionally precluded competition between smaller firms by promoting greater access to information, collaboration and marketplaces for small actors. This increased emphasis on innovation also carries with it strong social benefits, as intermediaries act to facilitate developments in education and healthcare as barriers to knowledge transfers are reduced through digital collaboration.[11]

    - **Knowledge-based capital driven by small, digital and innovative firms**: as goods and services become increasingly commercialised in the digital sphere, IP and other digital assets have begun to comprise increasingly valuable aspects of the transaction itself.[12] IP represents the intangible assets which drive innovation and facilitate competition amongst small businesses in a digital economy, through efficiency-driven creations like algorithms, software, or digital marketing. It is modern and small businesses, collaborating through contracting and information sharing platforms that are driving the creation of these economy growing and job creating assets and innovations.

8. It is in this environment which the relevant contractor provisions in the Act have struggled to keep pace. Whilst originally introduced in 1983 to prevent employers from misclassifying workers as contractors, these provisions now ensnare *bona fide* business-to-business dealings, creating undue tax burdens and uncertainty for legitimate contractors and the enterprises who engage them.

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5 Mukhoryanova 6.

6 Mukhoryanova 6.

7 Perset, 'The Economic and Social Role of Internet Intermediaries', *OECD Digital Economy Papers*, No. 171, OECD Publishing, Paris 8.

8 Department of Industry, Tourism and Resources, *Study of the Role of Intermediaries in Support of Innovation* (Research Paper, April 2007) 3.

9 Mukhoryanova 5.

10 OECD, *Tax Challenges Arising from Digitalisation: Chapter 7 – Beyond the international tax rules* (Interim Report, 2018) 195.

11 OECD, *The Role of Internet Intermediaries in Advancing Public Policy* Objectives, OECD Publishing 3.

12 WIPO, *IP in the Digital Economy* (Online Module) < https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_8_learning_points.pdf> 5.

9. This misalignment between the law and reality has far-reaching implications for NSW's economic growth and competitive standing. From the perspective of economic growth and innovation, businesses rely on flexible and agile contractor relationships to scale operations, pivot quickly, and capitalise on emerging opportunities. However, they find themselves unclear about whether and how payroll tax might apply. The legislation's broad and imprecise definitions make it difficult to distinguish *bona fide* contractor relationships from disguised employment, forcing taxpayers to navigate grey areas at a significant cost. These ambiguities foster legal disputes that divert resources from productive, growth-oriented activities. By mischaracterising these contractor relationships, the payroll tax law not only imposes an unwarranted tax burden, but stifles growth and innovation in the NSW economy.

10. Whilst the problem must be acknowledged, the purpose of the provisions remains vital: artificial contractor relationships should rightly fall within the taxation net to protect the revenue and ensure a level playing field. The challenge lies in reforming the provisions so that they serve their purpose without sweeping up *bona fide* contracting arrangements. Striking this balance will reinforce the integrity of the tax base whilst also encouraging the agility and growth that define NSW's modern economy.

11. Against this background, this submission offers a comprehensive examination of how the relevant contractor provisions have evolved and why they require recalibration. We start by exploring the legislative context and historical underpinnings that have led to overly broad interpretations of 'services.' Building on these insights, we analyse the key legal and policy concerns under the current framework, and consider principles of certainty, efficiency, equity, and adaptability which should guide tax reform. The reforms that we propose in this submission focus on clarifying exemptions and moving beyond the ambiguous notion of a 'service' towards more nuanced tests. Alongside enhancing fairness, the proposed changes promise to bolster NSW's economic competitiveness, protect revenue streams and lighten the complex compliance burdens currently shouldered by industry.

12. A modern, better-targeted approach to contractor provisions can create a fairer environment for all market participants. By adapting the law to align with contemporary business realities, NSW can set a new benchmark for other jurisdictions, leading the nation with a 21st-century payroll tax system which fosters innovation and entrepreneurship.

B. Summary of recommendations

13. In short, reform is necessary and NSW has a unique opportunity to lead the nation in realigning the provisions with their intended scope, modernising the law to create a 21st century payroll tax system and to alleviate the injustices and inequities caused by the current provisions.

14. To achieve these outcomes, we make the following recommendations to Parliament:

Recommendation 1	That the Relevant Contractor Provisions be reformed so that they only capture employment-like contractor relationships and do not capture *bona fide* independent contractor relationships.
Recommendation 2	That the Relevant Contractor Provisions be modernised to better reflect contemporary business and economic conditions in the modern economy.
Recommendation 3	That section 32(1) of the Act be amended to recast the threshold for a relevant contract away from a 'services' test to a 'control and integration' test.
Recommendation 4	That section 32(2) be amended to include a new exemption for services arising in respect of genuine intermediary arrangements where the services relate to the performance of obligations imposed under law and/or where the benefits accruing to the principal are merely ancillary or incidental.

15. At **Appendix A** to this submission are proposed draft amendments to the Act to give effect to the recommendations above.

PART 2 – THE RELEVANT CONTRACTOR PROVISIONS AND HISTORY

A. Overview of the relevant contractor provisions in section 32 of the Payroll Tax Act 2007

16. The 'relevant contractor' provisions owe their genesis to section 7 of the *Pay-roll Tax (Amendment) Act 1983* (Vic), which inserted a new section 3C into the formerly operative *Pay-roll Tax Act 1971* (Vic).[13] Identical provisions were adopted in New South Wales and were inserted into section 3A(1) of the former *Pay-roll Tax Act 1971* (NSW).

17. In 2007, the Parliaments of Victoria and New South Wales enacted harmonised payroll tax provisions that incorporated the relevant contractor provisions into Division 7 of each respective Act. Every other State and Territory (but for Western Australia) have also incorporated the same approach to the relevant contractor provisions in their respective payroll tax legislation.

18. Fundamentally, payroll tax is a tax on employment relationships with the revenue collected being calculated as a percentage of the regular salary and returns (i.e wages) processed by employers when paying employees for work conducted. That is, payroll tax is a tax on employment, particularly on the wages paid by employers to employees.[14]

19. Given that payroll tax is a tax on employment, the traditional concepts that determine what is an 'employment relationship' have been central to the operation of the provisions and operated as the general limiter on their scope. This has traditionally been the same for other regimes that regulate employment relationships, including the superannuation[15] and work-place relations[16] systems.

20. Acknowledging that sometimes parties may attempt to enter into contrived arrangements to overcome technical definitions of employment for the purpose of avoiding obligations to pay tax, regimes such as payroll tax have attempted to prevent abuse by providing an extended definition of employment relationships. These extended definitions are intended to capture in-substance employment relationships within the general meaning of the terms employers and employees. For example, in the superannuation context, the approach taken to extend the traditional meaning of employment includes work performed by a person under a contract that is wholly or principally for the labour of the person.[17]

21. The Act's approach to the extended definition of employment relationships is contained in Division 7 of the Act, the principal test being set out in section 32 (**Relevant Contractor Provisions**).

22. Given this, it is suggested that the paths of investigation relevant for this Parliamentary Inquiry with respect to the Relevant Contractor Provisions, include:

    - the assessment of the extent to which the extended definition operates to expand the traditional concept of employment under the Act to capture contrived arrangements;
    - the appropriateness of the approach to extend the definition of employment; and

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13 *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J).

14 See for example, *Payroll Tax Act 2007* (NSW), sections 6 and 7; see also the Revenue NSW website description of Payroll Tax as being 'tax paid by employers…assessed on the wages paid to employees' accessible at Payroll tax | Revenue NSW (Accessed: 3 February 2025).

15 See the *Superannuation Guarantee (Administration) Act 1992* (Cth).

16 See generally the *Fair Work Act 2009* (Cth).

17 *Superannuation Guarantee (Administration) Act 1992* (Cth), section 12.

- whether the current approach is appropriately adapted to meeting its objectives in the modern economy.

Purpose of the Relevant Contractor Provisions

23. In his second reading speech for the *Pay-roll Tax (Amendment) Bill 1983* (Vic), the then Victorian Treasurer, Mr Jolly, set out the legislative purpose of the relevant contractor provisions as follows:[18]

> "*It has been drawn to the attention of the Government that the pay-roll tax base has been eroded considerably* ***during recent years because an increasing number of employees have become or purported to become independent contractors and their employers or former employers no longer pay pay-roll tax on the remuneration paid to these contractors, notwithstanding that for intents and purposes the relationship between the parties is almost identical****. This trend has accelerated in recent years and is continuing to accelerate.*
>
> …
>
> *The other provisions deal with all other contracts involving the supply of labour where it is considered that the pay-roll tax legislation should apply.* ***In essence, the legislation is intended to catch those relationships where the sub-contractor works exclusively or primarily for one person and where the object of the contract between the parties is to obtain the labour of the subcontractor****.*
>
> *Further exclusions are provided where the sub-contractor does not work exclusively or principally for the one person.* ***These exclusions are expressed in a somewhat complicated form. This is a matter of regret, but it is a fact of life that complicated legislation is needed to close loopholes in tax legislation, otherwise the fertile minds engaged by the tax avoidance industry will find weaknesses in any simplified amending provisions and exploit those weaknesses to the disadvantage of the revenue.***
>
> *As a final protection, however, there is provision for the Commissioner of Pay-roll Tax to exclude a contract from the operation of these provisions where he is satisfied that the services provided under the contract are rendered by a person who ordinarily renders services of the kind provided under the contract to the public generally."*

24. The second reading speech highlights that the policy of the Relevant Contractor Provisions is to ensure that contractor arrangements that bear an **almost identical character** to an employment relationship (particularly where the arrangement relates to exclusivity of engagement for labour-like work) be deemed to be employment relationships for payroll tax purposes.

25. This means that the Relevant Contractor Provisions were designed to ensure that the revenue would not suffer from payroll tax leakage as a result of employers and employees adopting contrived contractual relationships that are in substance employment relationships, in all but form.

26. Given the policy of extending the definition of employee to capture contractor arrangements that are in substance employment relationships, it is necessary to ask, at least conceptually:

    - what exactly is the difference between an 'employment relationship' or employment-*like* relationship on the one hand, and
    - a *bona fide* 'independent contractor' relationship on the other?

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[18] Victoria, *Parliamentary Debates,* Legislative Assembly, 27 October 1983, 1479-1580; Emphasis Added; see also *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J).

The difference between an employment like relationship and *bona fide* independent contractors

27. The hallmarks of an employment relationship have traditionally been understood through the prism of the 'master' and 'servant' relationship as described in case law dating back to the 19th century. The modern distinction between employee and independent contractor is primarily drawn from the development of the common law doctrine of vicarious liability. An important factor which the courts have historically considered in determining the existence of vicarious liability has been that of control. The distinction was said to be that:

    - An employer was vicariously liable for the acts of its employee over whom the employer exercised control in the manner of performance of work.

    - Whereas for an independent contractor, whom a principal might only direct as to what the contractor should do but not how it should be done, the principal was not vicariously liable.

28. Prior to recent developments in the case law that hold that Courts will not second guess the existence of an independent contractor relationship where the parties have committed the same to the terms of a written contract, the Court's applied what was called the multi-factorial approach.[19] In the context of the *Fair Work Act 2009* (Cth), the Commonwealth Parliament recently codified the multi-factorial approach as the proper test for assessing employment relationships under that act. The multi-factorial approach to assessing whether a relationship is in substance an employment relationship[20] provided that control is a significant factor to be considered in assessing the character of a personal services arrangement under the common law.

29. As Issacs J said in *Bugge v Brown* (1919) 26 CLR 110:

> *[114] The question is whether the respondent, who **controlled** the servant, is responsible to make good the damage, or whether it must be borne by the appellant, who was helpless in the matter.*

30. However, as acknowledged by the High Court in *Hollis v Vabu* (2001) 207 CLR 21 at [44]:

> *"With the invention and growth of the limited liability company and the great advances of science and technology, the conditions which gave rise to the control test largely disappeared. Moreover, with the advent into industry of professional men and other occupations performing services which by their nature could not be subject to supervision, the distinction between employees and independent contractors often seemed a vague one."*

31. As a result, when assessing whether an arrangement is a *bona fide* employment relationship or contractor relationship, regard has traditionally been had to the distinction between a contract ***of*** service as opposed to a contract ***for*** services.

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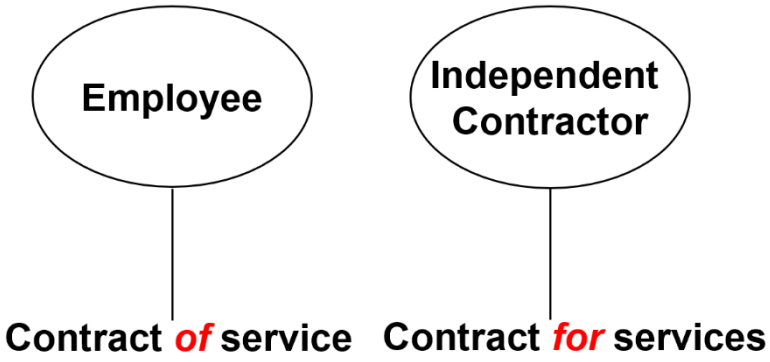
[19] *CFMEU v Personnel Contacting Pty Ltd* [2022] HCA 1; *ZG Operations Australia Pty Ltd & Anor v Jamsek & Ors* [2022] HCA 2; *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48; *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

[20] See *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 63 ALR 513; also the codification of the multifactorial test in the employment context per the *Fair Work Act 2009* (Cth), section 15AA.



32. This distinction was explored by the New South Wales Supreme Court when considering the application of the relevant contractor provisions (as they then existed in the *Pay-roll Tax Act 1971* (NSW)). Gzell J relevantly remarked that:[21]

> *[178] In Colonial Mutual Life Assurance Society Ltd v Producers and Citizens Co-Operative Assurance Co of Australia Ltd (1931) 46 CLR 41, 48 Dixon J highlighted identification and representation in distinguishing between an employee and an independent contractor, thus:*
>
> > *"the work, although done at his request and for his benefit, is considered as the independent function of the person who undertakes it, and not as something which the person obtaining the benefit does by his representative standing in his place and, therefore, identified with him for the purpose of liability arising in the course of its performance. The independent contractor carries out his work, not as a representative but as a principal"*
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> *[179] In Hollis v Vabu Pty Ltd (2001) 207 CLR 21 at [40] the High Court said that this passage merited close attention because it indicated that the circumstance that the business enterprise of a person said to be an employer is benefited by the activities of the person said to be an employee, cannot be a sufficient indication that the person is an employee. The Court pointed out that Dixon J fixed upon the absence of representation and of identification with the alleged employer as indicative of a relationship of principal and independent contractor.*

33. In *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 63 ALR 513, 526-527, Wilson and Dawson JJ of the High Court said:

> *Those suggesting a contract of service rather than a contract for services include the right to have a particular person do the work, the right to suspend or dismiss the person engaged, the right to the exclusive services of the person engaged and the right to dictate the place of work, hours of work and the like.*
>
> *The ultimate question will always be whether a person is acting as the servant of another or on his own behalf and the answer to that question may be indicated in ways which are not always the same and which do not always have the same significance.*

34. In essence, the multifactorial test for characterising whether a relationship is an independent contractor or employment relationship turns on the extent to which the parties are integrated and controlled by one another.

35. Given the Relevant Contractor Provisions are designed to capture arrangements where *'employees have become or purported to become independent contractors…, notwithstanding that for intents and purposes the relationship between the parties is almost identical [to an employment relationship]'*,[22] it would be expected that the provisions should only deem arrangements that are in substance contracts

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[21] *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788.

[22] Ibid.

of service, but masquerading as contracts for service, to be an employment relationship for payroll tax purposes.

36. One would expect this assessment to be made by reference to greater degrees of control and integration that exists between the parties to a contract, the degree or lack thereof of either factor being indicative of whether the contract is properly one of service as opposed to being for service in the ordinary sense. This is largely reflected in the approach taken under the superannuation legislation that extends the ordinary meaning of employee to include directed, controlled and integrated labour activities undertaken under a contract.[23]

37. As discussed in more detail below, the interpretation and administration of the Relevant Contractor Provisions, including how they have been drafted, have far exceeded this mandate. There is no real focus on control or integration under the current provisions, rather they regrettably apply a test for 'services' to determine the scope of captured arrangements. Given the very broad net cast when adopting a services-based approach to assessing contractual relationships, harsh results necessitate,[24] which are exacerbated given that the exemptions fail to exclude *bona fide* intermediaries from being taxed as employers in respect of their relationships with customers with whom they contract.

The core test for 'relevant contracts' in section 32(1)

38. Section 32(1) establishes the principal test for determining the existence of a 'relevant contract'. It is a gateway provision, that is, if an arrangement satisfies section 32(1) it is deemed to be a taxable employment-like arrangement unless a specific exemption can be applied.

39. Section 32(1) requires the identification of a contract or agreement that is said to capture the relationship between the designated person and those persons said to be supplying services for the performance of work to the designated person in the course of the designated person's business. Importantly, the services provided to the designated person must arise 'under' the contract or arrangement that is putatively subjected to the test in section 32(1). Services that do not arise under a relevant contract, are not captured by section 32(1).

40. Who exactly the 'designated person' is, is dependent on which subparagraph of section 32(1) is being applied. If subparagraph 32(1)(a) is being applied, the designated person would be the person supplying services to another person (i.e the contractor). If subparagraph 32(1)(b) is applied, the designated person refers to the person to whom the services were supplied (i.e the principal). Finally, should subsection 32(1)(c) be applied, the designated person is the person supplying goods to other natural persons to perform work.

The broad and ambiguous concept of 'services' in section 32(1)

41. Section 31 defines **contract** broadly to include any agreement, arrangement or undertaking, whether formal or informal and whether express or implied.

42. A **supply** in relation to services includes the providing, granting or conferring of services.

43. **Services** broadly includes results of work performed. The only limiter on the concept of services under the provisions is that the identified services need to be for or in relation to the performance of work by the service provider.

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[23] See *Jamsek v ZG Operations Australia Pty Ltd (No 3)* [2023] FCAFC 48; *JMC Pty Ltd v Commissioner of Taxation* [2023] FCAFC 76.

[24] See *Loan Market Group v Chief Commissioner of State Revenue* [2024] NSWSC 390 at [207]-[208].

44. The High Court in *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43; 64 ALJR 606 (***Odco***) considered the meaning of the words 'services of persons for or in relation to the performance of work' when considering identically worded provisions in the *Accident Compensation Act 1985* (Vic). The Court (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ) found that:[25]

> *"…It is a mistake to read the expression 'for or in relation to the performance of work', where it appears in section 9(1) and elsewhere, as doing anything more than qualifying the content or scope of the word 'services'. All that expression is saying is that the services must be work-related: it is not stipulating that the services are wholly distinct from the work or that the supplier of the services is a person other than the performer of the work."*

45. The High Court went on further to say:[26]

> *"Once it is accepted that there was (1) an agreement between TSA and the builder for the supply of a tradesman to the builder to do certain work on terms that the builder was to remunerate TSA for supplying the tradesman and for the work which he did, and (2) an agreement between TSA and the tradesman whereby the tradesman agreed to perform work at the site at the builder's direction for remuneration to be paid to TSA, it follows as a matter of plain language that the tradesman supplies services to TSA by attending at the site and doing work there. By attending there and doing work, he supplies services to TSA for the purposes of its business, not withstanding he also at the same time supplies the same services to the builder for the purposes of its business."*

46. The identification of both the service purported to be provided from the supplier to the designated person and the work-related character of the same are paramount considerations. As is evident in recent case law authorities, what constitutes a 'service' in this context is highly fact dependent and need not necessarily be clearly defined or specifically identified as a 'service' in the text of the relevant contract.[27]

47. For example, in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, the applicant entered into an agreement with certain GPs under which it provided rooms, as well as shared administrative support services to those GPs, in exchange for a fee. The Court found that while services were clearly performed by the GPs when treating the patients, they were also **provided by the practitioners to the applicant itself**. The context behind the contractual arrangement was critical. The Court gave consideration to the business of the applicant, which was dependent on the "*notion that people would attend its centres in order to receive medical treatment*".[28] The attendance of GPs at the premises was critical to the operation of the applicant's business, meaning the contractual promises to act as a medical practitioner at the premises itself involved the provision of valuable services to the applicant under the agreement.

48. A similar interpretation was adopted in *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, where Bridges, a stockbroker, entered into various agreements under which it authorised various individuals to act as securities representatives for the purpose of brokering life insurance. While the agreements did not impose obligations upon the representatives to actually provide any financial service advice, the Court found that the act of dealing in securities as agent of Bridges was itself a service provided to Bridges under the agreement, because it facilitated the carrying on of the business.[29]

49. The decision of *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 further highlights the potential breadth of the meaning of "services". When determining payroll tax

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[25] *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43; 64 ALJR 606, 612.

[26] Ibid, at [30]

[27] See for example *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40.

[28] *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA at [42].

[29] *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788 at [226].

liability for a ridesharing service, the Court found certain "Driver Contracts", which provided the right for a driver to accept a ride in exchange for a fee, effectively required the driver to provide Uber with services.[30] This was because the act of driving for a fee was a critical aspect to the Uber business model.

50. This board concept of services has manifested itself in an ever-expansive way, capturing a significant class of contractor arrangements within the scope of the Relevant Contractor Provisions, representing a contentious part of the existing law.

The concept of taxable 'wages'

51. Payroll tax is a tax imposed on 'taxable wages'[31] and is payable by the employer by whom the taxable wages are paid or payable.[32] 'Wages' mean wages, remuneration, salary, commission, bonuses or allowances paid or payable to an **employee** including…an amount that is included as or taken to be wages by any other provision of the Act.[33]

52. Section 35 extends the concept of 'wages' to include amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a 'relevant contract'.[34] Section 33 generally deems the principal of a relevant contractor arrangement to be an 'employer' for section 35 purposes.[35]

The exemptions in section 32(2)

53. The general test in section 32(1) is accompanied by several 'somewhat complicated' exemptions (or as the Treasurer called them 'protection[s]') contained in subsection 32(2).[36]

54. Subsection 32(2) commences by providing that a 'relevant contract' does not include a contract for 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 falls within the following exemptions set out in the table below:

Item	Exemption	Statutory Text
1	**Service ancillary to the supply of goods**	a) is supplied with services for or in relation to the performance of work that are ancillary to the supply of goods under the contract by the person by whom the services are supplied or to the use of goods which are the property of that person

[30] *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 at [80].

[31] *Payroll Tax Act 2007* (Vic), section 6; see generally the commentary of Gzell J in *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [177]-[184].

[32] *Payroll Tax Act 2007* (Vic), section 7.

[33] Ibid, section 13(1)(e).

[34] Ibid, section 35(1).

[35] Ibid, section 33.

[36] Ibid.

2	**Service not ordinarily required where supplier ordinarily performs service to the public**	b) is supplied with services for or in relation to the performance of work where— (i) those services are of a kind not ordinarily required by the designated person and are performed by a person who ordinarily performs services of that kind to the public generally; or
3	**Service ordinarily required for less than 180 days per financial year**	(ii) those services are of a kind ordinarily required by the designated person for less than 180 days in a financial year; or
4	**Services provided for 90 days or less in a financial year**	(iii) those services are provided for a period that does not exceed 90 days or for periods that, in the aggregate, do not exceed 90 days in that financial year and are not services— (A) provided by a person by whom similar services are provided to the designated person; or (B) for or in relation to the performance of work where any of the persons who perform the work also perform similar work for the designated person— for periods that, in the aggregate, exceed 90 days in that financial year; or
5	**Services of that kind provided to the public generally in the financial year**	(iv) those services are supplied under a contract to which subparagraphs (i) to (iii) do not apply and the Commissioner is satisfied that those services are performed by a person who ordinarily performs services of that kind to the public generally in that financial year; or

6	**Services provided by two or more persons**	(c) is supplied by a person (the contractor) with services for or in relation to the performance of work under a contract to which paragraphs (a) and (b) do not apply where the work to which the services relate is performed— (i) by two or more persons employed by, or who provide services for, the contractor in the course of a business carried on by the contractor; or (ii) and (iii) omitted
7	**Services solely for or ancillary for conveyance of goods by means of a vehicle provided by the person conveying them.**	(d)(i) Statutory text omitted.
8	**Services solely or in relation to the procurement of persons desiring to be insured by the designated person**	(d)(ii) Statutory text omitted.
9	**Services solely for or in relation to the door-to-door sale of goods solely for domestic purposes on behalf of the designated person.**	(d)(iii) Statutory text omitted.

55. Notably, there is no exception that applies to *bona fide* intermediary arrangements such as to exclude a genuine facilitator or intermediary from the application of the broad Relevant Contractor Provisions. A flaw that will be highlighted later in this submission.

PART 3 – INDUSTRY CASE STUDIES

56. Given that the object of both the Victorian and New South Wales payroll tax bills was to 'harmonise payroll tax legislation…thereby increasing inter-jurisdictional consistency',[37] case law in either State remains highly relevant (and it is suggested quasi-binding) on the interpretation and administration of the provisions across both jurisdictions.

57. Because of this reality, this Part will walk through the case law developments in both Victoria and New South Wales when exploring the way the relevant contractor provisions have been administered across both States (if not all jurisdictions except Western Australia). This part of the submission is by no means an exhaustive list of all payroll tax cases that have considered the application of the Relevant Contractor Provisions, but rather a selection of those cases that the authors believe to be the most consequential as reflected in more contemporary developments.

58. The different case studies of the relevant contractor provisions being applied in the context of a variety of industries, provides great insight into the revenue authority's views on the breadth of the provisions, including the judicial appetite to accept invitations by revenue authorities to apply the provisions more broadly. The approach that has manifested, as this submission argues, goes beyond the scope of Parliament's intended operation of the provisions and undermines the objectives of the Payroll Tax Law.

59. By canvassing how the Relevant Contractor Provisions have been applied across different industries, it will be possible to identify how the overly broad concept of 'services' (that is central to the current approach) has artificially extended the application of the provisions well beyond the scope of contractor arrangements that bear an **almost identical character** to an employment relationship and to sectors of the economy that did not exist at the time the provisions were created.

A. Medical sector

60. One area of growing controversy is the efforts of revenue authorities to extend the application of the relevant contractor provisions to arrangements entered into between medical practitioners and medical practice facilities. Such efforts have resulted in a series of significant authorities that examine the breadth of the concept of 'service for or in relation to the performance of work' under the relevant contractor provisions and the extent to which obligations imposed on a party that receives services from another can themselves amount to a service flowing in the other direction. The recent case law has resulted in various responses from revenue authorities across Australia, including the imposition of temporary amnesties in some jurisdictions and the rejection of amnesties in others.

Optical Superstores

61. In *Optical Superstores Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2018] VCAT 169, Optical Superstores Pty Ltd (**Trustee**) was the trustee of four related trusts that together carried on an optical dispensary business known as The Optical Super Store (**TOSS**). The TOSS business was carried on through stores owned by the Trustee, or licenced by the Trustee to other parties. The Trustee supplied lenses and frames to TOSS stores and to some other parties.

62. The Trustee entered into a contractual relationship with individual optometrists, or companies or trusts associated with optometrists, through which the optometrists undertook eye tests at TOSS stores. Under this agreement, the relationship between the Trustee and the optometrists was described as '*an*

[37] Explanatory Memorandum, *Payroll Tax Bill 2007* (Vic).

independent Landlord and independent Tenant who is paying a licence fee to occupy space and use equipment on a non-exclusive basis'.

63. Under the agreement:

    - The optometrists were required to nominate the Trustee as the recipient of any Medicare payments to which the relevant optometrist was entitled. Where a patient was not covered by Medicare, an invoice was to be rendered by the optometrists which provided for payment to be made to the Trustee;

    - At the end of each month, the optometrists were to submit the number of hours worked in a given TOSS store. A monthly payment would be made to the optometrists of a 'reimbursement amount' which was calculated by multiplying the number of hours worked by agreed rates. No invoice was raised by the optometrists to the Trustee for this amount on the basis that it was said to be a return of moneys belonging to the optometrist; and

    - The balance of the consultation fees were retained by the Trustee as occupancy fees due from the optometrist.

64. The Trustee argued that the agreements were tenancy arrangements, not contracts for service. Because the optometrists provided their services to patients and not to the Trustee, there was no relevant contract under section 32(1)(b).

65. The Victorian Civil and Administrative Tribunal found that under the agreement the Trustee had been supplied services of optometrists for or in relation to the performance of work. Member Tang (as he was known then) relevantly observed that:[38]

    > *[84] In my view, the essential arrangement between the Trustee and the optometrists was that the optometrists would ensure their attendance…at locations and times to be agreed, in order that those optometrists would provide optometry services to actual or anticipated customers of the Trustee.*
    >
    > *[85] The arrangements were put in place for the benefit of the Trustee…because the provision of optometry services on site would lead to increase sales in frames, lenses and other optometry products. The provisions of, and the language used, in the agreements are consistent with attempts to secure those benefits. Given the breadth of the terms used in the payroll tax legislation, there is no incongruity in finding that the services of the optometrists were provided to the Trustee as well as to the patients.*

66. *Optical Superstores* demonstrates the willingness of decision makers to take an expansive approach in identifying a 'service for or in relation to the performance of work' for payroll tax purposes. This broad conception of 'service' is captured in contractual arrangements whereby obligations imposed by a principal on a contractor are designed to secure to the principal particular benefits to their business as a result of the work-related performance of those obligations by the contractor. This is capable of including the provision by the contractor of services to third parties that are also customers of the principal.

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[38] *Optical Superstores Pty Ltd v Commissioner of State Revenue (Review and Regulation)* [2018] VCAT 169, [84]-[85].

Homefront Nursing

67. In *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145, the New South Wales Civil and Administrative Tribunal (Appeals Division) considered whether the relevant contractor provisions applied to arrangements between Homefront Nursing and general practitioners (**GPs**).

68. Homefront Nursing engaged GPs to provide general practice medical services on its behalf under a service agreement as independent contractors at medical centres operated by Homefront Nursing. The GPs were provided with administrative services, staff, facilities, and the plant and equipment necessary at a medical centre operated by Homefront Nursing. The agreements could be terminated on four weeks' notice. The GPs were entitled to four weeks leave of absence under the agreement and was directed to provide the services for a minimum of 10 four hour sessions per week. All patient documents were required to be provided to Homefront Nursing and the agreement provided that all of those documents, including patients, were Homefront Nursing's. The GPs were also required to promote the best interests of Homefront Nursing. The GPs were remunerated by way of Medicare and Department of Veteran Affairs (**DVA**) payments and direct payments from patients. The payments were required to be first made to Homefront Nursing who would then on disburse the payments to the GPs based on an agreed rate.

69. Homefront Nursing argued that the relevant contractor provisions did not apply to its arrangements because it acted on behalf of the GPs in relation to the collection of fee entitlements from Medicare and DVA. As such, it did not remunerate the GPs for medical services provided by them to the public. Rather, the GPs were remunerated by Medicare, DVA and cash payers and Homefront Nursing collected payments and deducted the service fee and paid the balance to the GPs. The Commissioner argued that Homefront Nursing provided services to patients and engaged GPs to perform this work on their behalf. Homefront Nursing argued that this was not a correct characterisation of its business nor the activities provided for under the contract. Rather, the GPs serviced patients as part of their own business and Homefront Nursing simply provided the facilities and services to the GPs at the medical centres, not services to patients themselves.

70. Senior Member Hamilton rejected Homefront Nursing's submissions as follows:[39]

> *[48] I reject the applicant's argument. It runs counter to the authorities mentioned. The applicant conducts a business of providing a medical centre at which general practitioner services are provided. It ordinarily requires the services of GPs in order for it to carry on business.*

71. However, the Tribunal ultimately did not apply payroll tax to the Medicare and DVA payments on the basis that it concluded that Homefront Nursing received these payments as a collecting mechanism and as a matter of convenience, as such the payments were not in relation to the relevant contract under section 35. The non-bulk billed payments however were said to be captured by the extended concept of wages in section 35 given their connection to the relevant contract. The authors note that this is a peculiar outcome given the conclusion of the Victorian Court of Appeal in *Optical Superstores* when it found that similar payments made to optometrist where wages under section 35 (although that case turned on the issue of whether distributions of amounts beneficially owned by the contractor could be said to be 'paid' or a payment of a wage).

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[39] *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145, [48].

Thomas and Naaz

72. In *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259 the New South Wales Civil and Administrative Tribunal considered the application of the relevant contractor provisions to three medical centres operated by Thomas and Naaz Pty Ltd (**Thomas and Naaz**). Various GPs operated from the medical centres. Each GP, or a related entity, entered into a written agreement with Thomas and Naaz.

73. As part of the agreements, Thomas and Naaz provided rooms at its medical centres to the GPs, as well as shared administrative and medical support services (including nurses, reception, administrative staff and the charging and collection of Medicare fees on behalf of GPs). The patients did not pay the GPs directly for the medical services, instead:

    - The GPs bulk billed each patient and the patients assigned their Medicare benefits to the GPs.
    - The GPs had the option of dealing directly with Medicare to obtain the benefits that had been assigned to them by the patients or having Thomas and Naaz do so. All GPs, other than three, requested that Thomas and Naaz do so;
    - Thomas and Naaz, on behalf of the GPs, made claims on Medicare and received payments from Medicare;
    - Administrative staff employed by Thomas and Naaz recorded and reconciled those payments; and
    - At the end of the first four weeks of the agreement, and every fortnight thereafter, amounts equal to 70% of the claims paid by Medicare for a particular doctor (without deductions for tax or superannuation or otherwise) were paid from the medical centre's bank account to that doctor. The remaining 30% was retained by Thomas and Naaz as a service fee.

74. There were a number of significant clauses within the agreement between Thomas and Naaz and the GPs, which included:

    - clause 1 described the agreement as being 'in respect of the provision of The Services by the GP, at times agreed by the parties, in The Clinic operated by Thomas and Naaz';
    - the services were described as 'medical services normally provided in most general practices and shall not include services of a special nature provided by some GPs, such as, acupuncture, cosmetic service, etc';
    - the GPs appointed the medical centres as agent for the claiming and receiving of Medicare benefits;
    - the GPs were required to promote the best interests of the medical centre;
    - the medical centre had sole ownership over the business records of the GPs;
    - the medical centre had control over the roster and work commitments of the GPs;
    - the GPs could not divert customers away from the medical centre; and

- the GPs were required to comply with an onerous restrictive covenant that would prevent them from servicing clients within a 5-kilometre zone for two years after the ending of the agreement (indicating that the medical centre has ownership of the GP's clients).[40]

75. The New South Wales Civil and Administrative Tribunal found that the agreements were 'relevant contracts'. Senior Member Goodman observed that:[41]

> *[36] … services are most directly supplied to patients of the particular Doctor providing them, rather than to the applicant.*
>
> *[37] However, this does not prevent a conclusion that the Doctors provided services to the applicant, as is illustrated by Levitch Design Associates at [54] and the authorities there cited, namely Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue [2005] NSWSC 788; (2005) 222 ALR 599 at [223]-[226] and Smith's Snackfood Co Ltd v Chief Commissioner of State Revenue [2013] NSWCA 470; (2013) 97 ATR 904 at [56].*
>
> *…*
>
> *[39] These clauses indicate that the Agreement secured the provision of the Services provided by the Doctors to the patients of the applicant's medical centres. In circumstances where such services were a necessary part of the applicant's medical centre business, the Doctors provided them not only to the patients but also to the applicant.*

76. Thomas and Naaz sought leave to appeal to the New South Wales Court of Appeal. The application was dismissed, however Leeming JA (with whom Meagher JA and Griffiths AJA agreed) addressed in his reasons the merit of the argument that services were not provided by the GPs to Thomas and Naaz, when he said:[42]

> *[42] The applicant was running a business. Central to its business was the notion that people would attend its centres in order to receive medical treatment. To that end the applicant provided the premises, and employed administrative and receptionist staff. It was also to that end that the applicant employed nurses who also provided services to patients.*
>
> *[43] To the extent that part of the applicant's business used the services of the nursing and reception and administrative staff employed by the applicant, the medical practitioner's attendance at the applicant's medical centre in order to provide medical services to patients was an important aspect of the business. Indeed, so far as the evidence disclosed, there was no source of income for the wages of nursing and reception and administrative staff other than the 30% of the receipts from Medicare (and other government agencies) generated by the medical practitioners.*
>
> *[44] The position may also be examined from the perspective of a prospective purchaser of the medical centre business operated by the applicant (or, more likely, of 100% of the applicant's shares). The purchaser would be acquiring the valuable contractual rights enjoyed by the applicant in respect of the contracts with medical practitioners. They included promises by the practitioners to attend at the premises in accordance with a roster (ordinarily, five days each week), to adhere to guidelines issued by the applicant, not to solicit patients away from the applicant's centres, and a non-compete covenant after the contract came to an end. All of those promises added to the value of the business.*
>
> *[45] Unquestionably the medical practitioners provided valuable contractual promises to the applicant, which were conducive to the conduct of the applicant's business. The performance of those promises required positive actions by the medical practitioners on a continual basis while the contract was in force. It is no strain of language to regard the totality of the performance by the medical practitioners (including the provision of medical services to patients, but extending to the other promises in the contract such as attending the medical centre, adhering to its protocols and taking leave as permitted) as amounting to the provision of services to the applicant. Indeed, it does not strain language to regard the provision of medical services to patients as amounting also to the provision of a service to the applicant, in order to*

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[40] *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, [21]; *see also Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2021] NSWCATAD 259, [36]-[41].

[41] *Thomas and Naaz Pty Ltd v Commissioner of State Revenue* [2021] NSWCATAD 259, [36]-[39].

[42] *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40, [42]-[45].

permit it to operate its medical centre business (and without which services the applicant would be unable to operate its business).

Interventions to prevent the relevant contractor provisions from applying to medical arrangements

77. The application of the relevant contractor provisions to relationships between medical centres and GPs has provoked a range of reactions from State revenue authorities around Australia. Revenue South Australia put into effect a payroll tax amnesty for medical practices which ended on 30 November 2023.[43] Medical practices that successfully applied for the amnesty will not be required to pay payroll tax on payments made to contracted general practitioners for the period of 1 July 2018 to 30 June 2024. However, operations that commenced on or after 22 June 2023 will be subject to payroll tax and compliance activity will be pursued to enforce the approach taken in *Thomas and Naaz*. Similarly, Revenue Queensland offered an amnesty to medical practitioners which closed on 10 November 2023.[44] Medical practices that successfully applied for the amnesty will not be required to pay payroll tax on payments made to contracted GPs up to 30 June 2025 for the period of 2018 to 2025. Revenue ACT announced on 26 August 2023 that it would waive any payroll tax liabilities up and until 30 June 2023 for medical practices that had not paid payroll tax on payments to medical practitioners.[45] A further temporary amnesty will also apply until 30 June 2025 for medical centres that bulk bill at least 65% of GP attendances, have registered for 'MyMedicare' and registered for the amnesty with the revenue by 29 February 2024. Tasmania and the Northern Territory have not made announcements regarding any amnesty from payroll tax for these purposes.

78. Unlike South Australia, Queensland and the ACT, Victoria and New South Wales have not implemented an amnesty for medical centres in response to the decision in *Thomas and Naaz*. Rather, both Victoria and New South Wales released PTA-041 on 11 August 2023 confirming that the relevant contractor provisions apply to the relationships between medical centres and GPs.[46] Citing both *Thomas and Naaz* and *Optical Superstores*, both the Victorian and New South Wales revenue authorities indicated that reviews and investigations would continue and that taxpayers were expected to comply. Although, with the passage of amendments to the *Taxation Administration Act 1996* (NSW), a 12 month 'pause' commencing 4 September 2023 has been imposed on any new audit activity by Revenue NSW in connection with medical centre payroll tax issue. This pause does not prevent audits post-4 September 2024 from reviewing non-compliance of medical centres in prior years (unlike the administrative amnesty announced in other States and Territories).

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[43] See https://www.revenuesa.sa.gov.au/payrolltax/contractors/amnesty-for-medical-practitioners-with-contracted-general-practitioners#:~:text=2.-,Comply%20with%20your%20ongoing%20payroll%20tax%20obligations,contract%20provisions%20does%20not%20apply) (Access 25 February 2024).

[44] See https://qro.qld.gov.au/payroll-tax/liability/contractor-payments/amnesty/ (Accessed 25 February 2024).

[45] See https://www.revenue.act.gov.au/payroll-tax?result_1060955_result_page=9#:~:text=Medical%20practices%20that%20register%20for,up%20until%2030%20June%202025. (Accessed 25 February 2024).

[46] See https://www.sro.vic.gov.au/legislation/relevant-contracts-medical-centres

B. Goods distribution agreements

Smith's Snackfood Company

79. In *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 470, the New South Wales Court of Appeal considered the application of the relevant contractor provisions to a 'Goods Distribution Agreement' (**GDA**) entered into between Smith's and independent contractors. Smith's sold various snack foods and drinks in vending machines throughout Australia. In doing so, it engaged and paid independent contractors to store, transport and restock the vending machines, to remove and transport goods which had passed their used by date, to collect money paid by customers in the form of notes and coins and to deliver the same to a cash handling company.

80. The contractors were required to sign a new GDA each financial year. The commission payable to the contractors under it was a percentage of the retail sales through the contractor's vending machine.

81. The obligations under the GDAs included:

    - The distribution of goods by stocking the vending machines at sites allocated to the contractor, the collection of cash taking and the removal of spoilt product; and

    - The provision and maintenance at the contractor's expense of a reliable and roadworthy vehicle of less than 5 years old, suitable to carry Smith's goods.

82. Smith's submitted that the GDA was not a contract for the provision of services of persons 'for or in relation to the performance of work' under section 32(1)(b). Both the Supreme Court and the Court of Appeal found to the contrary. In the Court of Appeal, Gleesson JA, with whom Beazley P and Sackville AJA agreed, held that:[47]

    > *[56] In my opinion, there was no error in the primary judge's reasoning. The question is whether the contract, in this case the GDA, answer the description of the broad terms of a 'relevant contract' in section 32(1)(b). All that is necessary is that the serviced supplied by the contractors under the GDAs are work-related [Citing Odco at 612].*
    >
> …
    >
> *[61] There is no error in the primary judge's finding that the GDA answers that description.*

83. In making this finding, the Court of Appeal confirmed that all that is necessary to identify 'services for or in relation to the performance of work' under a contract is to identify terms (including obligations) that are capable of being characterised as work-related. In Smith's case, this meant that the obligations placed on the contractors under the GDA, although not described as services under the contract, were capable of being service-like and work-related.

84. The idea that services can include mere performance of obligations that have some value to the party imposing them demonstrates the substantially broad and ambiguous scope of this concept which sits at the centre of the Relevant Contractor Provisions.

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[47] *Smith's Snackfood Company Ltd v Chief Commissioner of State Revenue* [2013] NSWCA 470, [56]-[61].

C. Financial services agents and mortgage intermediaries

85. The financial services sector has also been subject to rigorous scrutiny by the Revenue, resulting in a series of cases that test the limits of the scope and application of the Relevant Contractor Provisions to a multitude of agents and intermediary relationships.

86. Given the rapid expansion of technology and its deployment in the economy, it is fair to say that the characteristics of the financial services sector have undergone unimaginable change since 1983 and that many of the intermediary relationships that now exist in that sector have been captured by the Relevant Contractor Provisions in circumstances where those arrangements were not even able to be imagined at the time those provisions were enacted.

87. This is particularly the case in respect of the mortgage aggregation industry, where the services provided by mortgage intermediaries are largely technology based (especially in the case of wholesale mortgage aggregators), with the obligations placed on contractors (i.e mortgage brokers) existing artificially as a result of complex Commonwealth regulation that underpins the operation of Australia's financial services regulatory environment.

88. The relevant case law reveals the tension between intermediary relationships that are based on integration, control and agency versus those that are simply intermediaries providing technology services to customers in a highly regulated environment. Based on the approach taken by the Revenue to date, there is a not-insubstantial risk that the Relevant Contractor Provisions could be applied to all these arrangements (a matter that will ultimately be determined by the Courts in currently pending litigation. See for example, *Finsure Finance and Insurance Pty Ltd v Chief Commissioner of State Revenue* [2023/00444254] and the Revenue's appeal in the NSW Court of Appeal being heard in March 2025 against the decision of the Supreme Court in *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124).

Bridges Financial Services

89. In *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, the Supreme Court of New South Wales considered the application of the relevant contractor provisions (as they were then enacted in the *Pay-roll Tax Act 1971* (NSW)) to the financial services sector, in particular agency type arrangements between a stockbroker and sub-contractors.

90. Between 1 July 1995 and 31 March 2000, Bridges was a stockbroker, agent for various life insurance companies and authorised to deal with securities under the *Corporations Law*. Bridges authorised 79 people based in New South Wales to act as its representative under section 94(2) of the *Corporations Law*, which facilitated the appointment by a securities licensee of securities representatives under a 'proper authority'. The representatives were also appointed by Bridges as agent under the relevant contract, particularly for the purpose of brokering in its life insurance business.

91. Evidence was adduced to establish that the representatives operated under the banner of Bridges. For example, telephone listings identified offices as branches of Bridges and the use of Bridges letterheads and its name on business cards had the appearance to the representative's clients that the representative operated with the stamp of approval of Bridges and within its business.

92. Under the terms of the agreements between Bridges and the representatives, brokerage and commission in connection with transactions initiated by representatives were shared. All fees, brokerage and commission were to be paid direct to Bridges and received '*on account of and for the benefit of the representative or agent*'. The balance owing to the representative or agent was paid after deduction of fees and charges payable to Bridges. The agreement provided that the representative or agent may sell their 'Bridges business' or any part to any third party, provided that the third party was or became the holder of a proper authority issued by Bridges and entered into a representative and agent agreement. The relevant contracts expressly provided that brokers were

acting as agents of Bridges, trading in Bridges' name and solely for the benefit of and as an incorporated representative of Bridges' business. The services the brokers delivered to their clients were delivered as agent of Bridges and wholly consistent with the services that Bridges itself independently provided to those clients.

93. The Chief Commissioner argued that the brokers were common law employees of Bridges and in the alternative that the arrangements between Bridges and the representatives under which they generated commission, brokerage and fees constituted a contract under which Bridges was supplied with the contractors' services in relation to its performance of work. Bridges resisted the submission that the brokers were common law employees. It also argued that the relevant contractor provisions were limited to arrangements under which the person in question only provided services to the designated person (rather than the person and third parties). Since the representatives conducted their own businesses in addition to providing services, it was argued that the provision had no application.

94. Whilst Gzell J rejected the Commissioner's contention that the brokers were common law employees, he also rejected Bridges' submission that the relevant contractor provisions did not apply by observing that:[48]

> *[221] The structure of the [Act]…is to define, in broad terms, a relevant contract. If an arrangement answers that description, the second step is to determine whether any of the exceptions apply. It is because of the exceptions, that the legislation does not catch bona fide independent contractors. It is because of the non-application of an exception that the object of taxing the putative subcontractor who works exclusively, or primarily, for one person under a contract whose object it to obtain the labour of that person, is achieved. If [the relevant contractor provisions] were confined in the manner submitted on behalf of Bridges, there would be little scope for the operation of the exceptions.*

95. Bridges also submitted that the provision did not apply because the contract with the representatives did not oblige them to provide any financial advice on behalf of Bridges to any clients. They could do so if they chose. Gzell J rejected that submission on the basis that once a representative chose to supply Bridges with services, those services were provided under the contractual arrangements between the representatives and Bridges:

> *[226] When a representative chose to recommend a financial plan to a client and, upon the client's instructions, lodged documentation to buy or sell securities in the name of Bridges as the authorized dealer, the representative supplied Bridges with services and that was done in the terms of the representatives and agents agreements or in terms of the arrangements that the agreement recorded. And the services were work-related and Bridges was supplied with them in the course of carrying on its business.*

D&D Tolhurst

96. In *Re D&D Tolhurst Pty Ltd v Commissioner of State Revenue (Vic)* (1997) ATC 2179, the Victorian Civil and Administrative Tribunal constituted by Member Nettle (as he was then known) considered the application of the relevant contractor provisions (as they were then enacted in the *Pay-roll Tax Act 1971* (VIC)) to 13 investment advisers associated with the stockbroking operations of D&D Tolhurst Pty Ltd (**D&D**).

97. D&D was a stockbroker and licensed dealer that held a licence for those purposes during the relevant period, being November and December 1993. The investment advisors were representatives of D&D under the *Corporations Law* and appointed as agent under the relevant contract. Although the advisors were left to their own devices, given freedom to determine how their services would be delivered and cultivating their own client base, the advisers were for all practical purposes the conduit

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[48] *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788, [221].

through which the investment advisory services of D&D were delivered to prospective buyers and sellers of securities. The advisors were D&D's factotum, supported by both the context of the licensing arrangements under the *Corporations Law* and the evidence of the parties conduct and obligations under the contract.

98. The Commissioner argued that the advisers were common law employees of D&D. The Tribunal accepted this submission, observing that:[49]

> *[21] Against that background I turn to the first question of whether the D&D investment advisers are employees of D&D as such. On balance, I think they are. Although the relationship between advisers and D&D is one whereby D&D engages the advisers as contractors, to write business in the name of and on behalf of D&D, and in consideration of the advisers' services agrees to share with the advisers the commission payable on each transaction, the degree of control exercised by D&D over the advisers, the fact that the advisers represent D&D exclusively and the fact that the advisers are held out and act in all things as representatives of D&D, lead me to the view that the advisers are employees.*
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> …
>
> *[36] In the end it is a matter of perception. But my perception, based on all of the evidence and the authorities to which I have been referred, is the that the investment advisers are employees of D&D as such.*

99. Alternatively, the Tribunal considered whether the arrangements between D&D and the investment advisers were captured by the relevant contractor provisions. The Commissioner argued that each investment adviser supplied services to D&D under a contract between the adviser and D&D: the service being supplied being the totality of those things which the adviser does as the agent of D&D in transacting business with its clients; and the contract under which the services are provided being the contract whereby D&D and the adviser agreed that the adviser should be a dealer's representative of D&D. It was contended that D&D had supplied to it services of persons for or in relation to the performance of work. D&D submitted that the provisions did not apply either because the advisers did not supply services to D&D or because, if they did, they did not supply them for or in relation to the performance of work. Alternatively, if the investment adviser did supply services to D&D for or in relation to the performance of work, they did not do so under a contract.

100. In rejecting D&D's submissions, the Tribunal held:[50]

> *[39] In my view the investment advisers do provide services to Tolhurst, namely, the services of acting as the agent of Tolhurst in advising clients on the purchase and sale of securities and in selling and purchasing securities on behalf of clients as the agent of Tolhurst. I also think it to be clear that the services which the investment advisers supply to Tolhurst are properly to be described as services for or in relation to the performance of work. The provisions of s. 3C are very similar if not identical to s. 9 of the Accident Compensation Act (1985) which fell for consideration by the High Court in Accident Compensation Commission v Odco Pty Ltd (1990) 95 ALR 641…*
>
> *[40] There is then the question of whether the services supplied by the investment advisers to Tolhurst are supplied ``under a contract''. In my view that question is also to be answered affirmatively. The same question arose in Accident Compensation Commission v Odco, supra. It was not doubted that the services supplied in that case by the tradesmen to the labour organisation were services provided under a contract within the meaning of s. 9 of the Accident Compensation Act…*
>
> *[41] I cannot see why the result here should be any different. ``Services'' has the same meaning under this Act as it had under the Accident Compensation Act 1985: see s. 3C(6)(d) and, under this Act, ``contract'' includes an agreement, arrangement or understanding, whether formal or informal and whether express or implied: ibid. There can be no doubt that there was an agreement or arrangement or understanding between Tolhurst and each of the advisers that the advisers would render services to clients as the agent of Tolhurst, at the client's request. In my view it follows, as a matter of plain language, that the*

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[49] *Re D&D Tolhurst Pty Ltd v Commissioner of State Revenue (Vic)* (1997) ATC 2179, [21]-[22].

[50] Ibid, [39]-[41].

advisers supplied services to Tolhurst by servicing the needs of the clients. By so doing they supplied services to Tolhurst for the purpose of its business, notwithstanding that they also at the same time supplied services to the clients.

Novus Capital

101. In *Novus Capital Ltd v Chief Commissioner of State Revenue* (2018) NSWNCATAD 72, the New South Wales Civil and Administrative Tribunal (Appeal Division) constituted by Senior Member Isenberg considered the application of the relevant contractor provisions to the practices of authorised representatives and agents in supplying financial services to clients.

102. Novus entered into contractual relationships with authorised representatives that were engaged to provide financial services to the public as both authorised representatives of Novus under the *Corporations Law* and as sales agents under the contract. The authorised representatives would provide services to clients and be remunerated by Novus by receiving an entitlement to a portion of the commission attributable to the same. There was evidence accepted by the tribunal that 'as between the client and Novus, the contractual relationship is that the clients are clients of Novus', indicating a significant degree of integration between the services offered by Novus to the public and the corresponding service offered by its agents to the public. The congruence of services in this context, meant that Novus was receiving the benefit of work-related services from the representatives when they engaged with clients in the course of both Novus' and their own business in providing financial services as both representative and agent of Novus.

103. Relying on the holding in *Bridges*, the Tribunal concluded that the arrangements between Novus and its representatives were contracts under which Novus was provided, in the course of its business, services by the representatives for or in relation to the performance of work.

Loan Market

104. In *Loan Market Group v Chief Commissioner of State Revenue* [2024] NSWSC 390, Loan Market Group (**Loan Market**) provided mortgage aggregation services to various brokers, through which they assisted brokers in setting up and running their business, in exchange for various fees. This was given effect through a series of separate but related agreements:

- **Broker Agreements:** These were agreements between Loan Market and individual mortgage brokers which facilitated the mortgage brokering business. Under the Broker Agreements, brokers were permitted to (broadly speaking) act as authorised representatives under Loan Market's ACL, which was used by brokers to assist clients when applying to lenders for loans. Brokers were also required to "*operate their business strictly in accordance with the LM Group Operations Manual*", and to "*conduct their activities in compliance with the requirements of clause 7, including "protect and enhance the good name and reputation of the Loan Market Group and the Intellectual Property*".[51]

- **Originator Agreements:** These were agreements between an entity which was related to Loan Market (eMOCA) and the lenders themselves, which provided for payment of commissions to lenders (via eMOCA). When loans were approved, lenders would pay a commission on the loans to an entity which was related to Loan Market (**eMOCA**). eMOCA would then pass this commission on to the brokers, less any fees payable to Loan Market.

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[51] at [75].

105. Unlike wholesale mortgage aggregators that do not co-brand and are essentially technology platform providers,[52] franchise aggregators such as LML exercised a not insignificant degree of control over their contracted brokers and integrated branding, marketing and goodwill.

106. Ruling on these franchise arrangements, Richmond J found that the broker agreements were a relevant contract because they were contracts under which a designated person had provided services for or in relation to the performance of work.

- The Court held that "*services has a wide meaning. In the Macquarie Dictionary, the first two meanings given to "service" are "an act of helpful activity" and "the supplying or supplier of any articles, commodities, activities etc required or demanded". In the Oxford Dictionary, the first two meanings of "service" are "the action of helping or doing work for someone" and "an act of assistance".*"[53]

- The fact that brokers were required under the Broker Agreements to conduct their business in a certain way was sufficient to bring their conduct within the meaning of "services". *"The key promise throughout the Relevant Period was to conduct that business under the Loan Market brand adopting practices and procedures mandated by LML. These were valuable promises to LML."*[54]

- The promise to undertake the work in a specific way was therefore sufficient to characterize the arrangement as one under which services were provided to Loan Market under a relevant contract.

107. Richmond J himself acknowledged that this outcome (emphasis added):

> *[207]* ***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":*** *see Bridges Financial Services at [218]–[219]; Downer EDI Engineering Pty Ltd v Chief Commissioner of State Revenue [2019] NSWSC 743 at [101]–[110]. But the way the legislature approached the implementation of that purpose was to cast the net of 'relevant contract' very widely and then to give exclusions which were intended to catch the bona fide independent contractor relationships.*

108. The Supreme Court expressly acknowledges that the operation of the Relevant Contractor Provisions is such that even *bona fide* independent contractor relationships, that are not employment like, are capable of being caught. This is despite clear policy intentions to the contrary.[55]

109. The decision in *Loan Market* also demonstrates the narrow scope of exceptions in section 32(2)(b). The aggregation services of Loan Market were found to fall outside the scope of the "general public" exemption in s 32(2)(b)(iv) because brokers were required to originate loans in accordance with LML policies. The services performed were characterised as being different to the services a broker would

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[52] See for example, Finsure | The aggregator built for growth; Specialist Finance Group; Connective; AFG - Brokering a Better Future - Mortgage Aggregator; YBR Aggregator | YBR Brokers;

[53] at [200].

[54] at [201].

[55] See Victoria, *Parliamentary Debates,* Legislative Assembly, 27 October 1983, 1479-1580; Emphasis Added; see also *Nationwide Towing & Transport Pty Ltd v Commissioner of State Revenue (No 2)* [2018] VSC 609, [31] (Croft J); also *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788 at [218]-[219], *Downer EDI Engineering Pty Ltd v Chief Commissioner of State* Revenue [2019] NSWSC 743 at [101]–[110].

perform to members of the public generally because they were bound by certain obligations.[56] This suggests that any contract under which obligations are imposed upon one party in relation to the way work is performed under a contract will meet the definition of a relevant contract for the purposes of payroll tax.

110. As Richmond J remarked:

> *[208] 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.*

D. Technology service providers and gig economy platforms

111. The decision in *Loan Market* is authority for the proposition that the Relevant Contractor Provisions could be extended to intermediary technology services providers where there are degrees of integration and control by the principal and the contractor. The case also expressly acknowledged that the current provisions may *harshly* capture *bona fide* independent businesses that contract in circumstances where there is just a mere co-dependency or reliance on their respective operational roles in a particular market segment. This is despite that there are no real or in substance service flows from the contractor to the principal, that the parties to agreement never intended for there to be and that these very types of arrangements are not typically characterised as employment like relationships at common law or under other extended definitions.

112. Given the trend in the revenue authorities' approach to broadly applying the Relevant Contractor Provisions to new market segments and industry relationships, other intermediary and facilitation arrangements are at significant risk of having payroll tax apply to fund flows. This places intermediary technology platforms and solutions at particular risk, for example technology-based telehealth solutions that connect patients with GPs and other introducer platforms that introduce consumers to other business providers.

113. Indeed, a large proportion of the technology service provider solutions that act as facilitators, introducers or intermediary services providers between various actors (large and, more commonly, small businesses) in the economy are at risk of artificially being deemed to be 'employers' under the Relevant Contractor Provisions and subject to payroll tax. The extent to which the nebulous and ambiguous concept of services may apply was further tested in *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 (*Uber*) (which is currently being appealed by the Revenue in the NSW Court of Appeal).

Uber

114. In *Uber*, Uber provided a ridesharing app which allowed drivers and riders to connect, enabling drivers to provide transport to riders in exchange for a fee. When using the app, drivers had complete autonomy to accept, ignore or reject requests from riders. At the end of a journey, riders pay the fee automatically to Uber at the end of the journey. Uber then deducts a "service fee" from this payment before passing on the balance to the driver.

115. The arrangement was given effect through Driver Contracts (contracts between each driver and Uber) and Rider Contracts (contracts between each rider and Uber). Under the relevant contracts:

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[56] at [227].

- it was acknowledged that Uber did not provide transport services, but rather lead generation services, via the app (i.e it was a technology service provider).

- Uber was contractually obligated to remit the driver the fare, less any service fee.

- Invoices also identified the driver as the recipient of payments (and not Uber itself).

116. Uber argued that the contracts with drivers were not relevant contracts under section 32(1)(b) of *the Payroll Tax Act 2007* (NSW) because the "transportation services" were provided "*by drivers … to riders … under the drivers' contract with the rider*".[57]

117. The Court found that the drivers did provide Uber services for or in relation to the performance of work and were thus subject to the Relevant Contractor Provisions. The following observations were made when considering whether services were performed under a relevant contract:

- When determining whether a service is performed under a relevant contract, it must be asked whether the contract is the source of the obligation to perform the relevant services.[58]

- The fact that the contracts give drivers the right to use the driver app was sufficient to render them "relevant contracts" because they provide the opportunity to drive for gain (meaning they are the source of the obligation to drive).[59]

118. As such, the technology service provider arrangements entered into between Uber and contracted drivers did fall into the scope of the Relevant Contractor Provisions, given the very broad construal of the definition of 'service' and despite the acknowledgement that Uber was in substance a *bona fide* intermediary between drivers and passengers through its technology platform.

119. Despite the arrangements being relevant contracts captured by the extended definition, the Court ultimately concluded that the payments made by Uber to its drivers were not 'wages' for payroll tax purposes and could not be taxed. This is because, for the amounts paid pursuant to the relevant contracts to be taxable, the payments must have been made for or in relation to work under the contracts. In determining whether such a relationship existed, the Court considered the purpose of Division 7, which was "*to capture several means of disguising the employer – employee relationship by contractual arrangements*".[60] Under the contracts, the rider is the one who pays the driver, and Uber was found to act as a mere payment collection agent. Therefore, the relationship between Uber's payments and the work performed was not one which was intended to be caught as wages under Division 7.

120. In our view, little solace should be taken from the result, from a policy perspective, given that the result relies on peculiar application of the facts to the definition of wages rather than the core threshold test concerning whether the arrangements were employment like relevant contracts under section 32. This is because in this case, the arrangements between the intermediary technology platform provider and the contractors were found to fall within the scope of the Relevant Contractor Provisions because the broad definition of 'services' deemed the drivers to be providing the same service to Uber by virtue of using the Uber Application.

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[57] at [19].

[58] at [163].

[59] at [170] – [171].

[60] at [171].

121. *Uber* demonstrates the willingness of the Court to adopt an inclusive approach when identifying a "*service for or in relation to the performance of work*" under a relevant contract. The case still clearly leaves room for a wide range of dealings to be caught by payroll tax due to the broad interpretation given to "relevant contract" and extends the application of the provisions well beyond the typical in substance employment relationships referred to in the second reading speech to technology services providers.

E. Interpretative challenges and ambiguities

122. The development in the authorities and approach to administering the relevant contractor provisions has resulted in a complicated and uncertainly broad application of the provisions to a substantially large class of arrangements. The express acknowledgment by the Supreme Court of New South Wales in *Loan Market* that the provisions are harsh and capable of applying to genuine independent contractor relationships, that are not employment-like, further highlights the gulf that exists between the policy purpose of the provisions and their ever-expanding application in reality.

123. Far from capturing only those independent arrangements that bear near identical resemblance to an employment relationship, the relevant contractor provisions have captured what have traditionally been seen to be *bona fide* independent contractor arrangements. Recent case law highlights the potentiality that the provisions may even be applied to arrangements where the relevant agreements only specify a unidirectional flow of services from the principal to the contractor and not the other way around.

124. This fundamental structural problem with the Relevant Contractor Provisions largely centres on the ambiguous and substantially broad approach to defining 'services' and the use of that concept as the basis for defining the relationship as an 'employment' relationship for payroll tax purposes. The fact that the exemptions do not exclude genuine intermediaries also has the effect of artificially characterising intermediary service providers as 'employers' of consumers and other contractors in a supply chain, in a way that was never intended at the time the provisions were enacted and in respect of technology-based relationships that were even unimaginable at that time.

125. Given the complexity and continually evolving authorities, it is fair to observe that both business and the legal profession are grappling with significant uncertainty regarding the scope and coverage of the relevant contractor provisions to everyday life. Given the persistence of a globalised, digitalised and information economy, the ongoing importance of contracting arrangements between independent businesses is likely to become more rather than less entrenched. This is particularly the case where new innovative and technology-based businesses become more prevalent in the economy and as part of their market offering are commercially required to partner and contract with third parties to deliver their services.

126. Both the approach being taken by revenue authorities and the uncertainty creates a very difficult environment for businesses of all sizes to operate in. It builds into what are usually low margin business models further imbedded cost and risk and, in the authors opinion, extends the role of payroll tax far beyond its stated and legitimate function within the State taxation scheme.

127. Given this, either the line will be drawn by the Courts in interpreting and applying the law as currently drafted or the New South Wales Parliament and Government will take leadership in adapting the Relevant Contractor Provisions to better meet the needs of actors operating in the realities of a modern digital economy (which this Submission suggests is the preferred solution to the uncertainty that exists).

PART 4 – KEY LEGAL AND POLICY CONCERNS UNDER THE CURRENT PROVISIONS

128. As foreshadowed in Part 3, there are several structural challenges and concerns that undermine the effectiveness of the Relevant Contractor Provisions and lead to significant unintended consequences when applied in the modern economy.

129. These challenges evidence the need for reform and adaptation of the provisions to overcome significant structural deficiencies in its design and to ensure that the tax system is more responsive to modern economic and social needs.

A. Misapplication to genuine independent contractors and the erroneous reliance on the 'services' test to extend the definition of employment

130. The Relevant Contractor Provisions were enacted as anti-avoidance provisions to prevent contracting parties from artificially recasting their employment-like relationships as genuine independent contractor relationships so as to avoid paying payroll tax. This purpose was expressly stated by the relevant Minister at the time the provisions were drafted, and Parliament relied on those representations when enacting the provisions.

131. Unfortunately, both the terms of the provisions and their subsequent administration and interpretation have resulted in their application to genuine independent contractor relationships that cannot fairly be characterised as employment-like. This harsh and anomalous outcome has recently been acknowledged by the Supreme Court in the *Loan Market* decision when it lamented the unintended consequences of the provisions.

132. The failure of the Relevant Contractor Provisions to limit their extended definition of employment to truly employment-like relationships results in an outcome that is an anathema to the stated policy purpose of the Relevant Contractor Provisions themselves and undermines the legitimate purpose and objective of the Act in its totality. This is because payroll tax is a tax on employment and not on genuine independent contractor relationships. The wholesale inclusion of independent contractors within the expanded definition of employment in section 32(1) expands the payroll tax provisions substantially beyond the legitimate scope of the tax.

133. This has been reflected in the developing legal authorities that have seen the Relevant Contractor Provisions apply to an ever-expanding class of arrangements that were never intended to be included within the scope of the provisions and, more pertinently, were not even imaginable at the time that the provisions were first enacted in 1983. The effect of this has been to characterise genuine business to business and intermediary service providers as employers, unnaturally and contrary to over 150 years of precedent that has set the boundaries of what employment like relationships actually are.

134. The expanding nature of the Relevant Contractor Provisions has gone so far that, under present authority, there is a real risk that *bona fide* independent contracts entered into between businesses that operate within the same market segment or sector, that impose ordinary commercial obligations in a contract, will be construed as a form of service delivery when ultimately the parties only ever intended for a unilateral flow of services. Given the outcome in *Loan Market* (dealing with a franchise mortgage aggregation model), the current trend opens up a further expanded application to a broader set of non-employment like relationships, particularly in the form of contractual intermediary arrangements, where there are flows of payments through third parties.

135. The disconnect between the drafting of the provisions and the achievement of its intended policy scope is untenable. The absurdity of the real-world outcomes that are being caused by the current

design expose serious conceptual flaws in the Relevant Contractor Provisions that necessitate reform and change.

136. At the core of the fundamental design flaw of the Relevant Contractor Provisions is its misconstrued and unprincipled use of a 'services' test to identify the existence of an employment-like contractual relationship. This is exacerbated substantially by the overly broad conceptualisation of 'services' under the existing precedent. A broad conceptualisation that potentially defines indirect and ancillary benefits derived by a principal, where a contractor complies with non-service like obligations, to nonetheless be a 'service'. Such a broad interpretation of 'services' is impracticable and creates serious commercial uncertainty. It operates contrary to any reasonable standards of commercial practice and broadens the payroll tax net well beyond its legitimate purpose.

137. In any event, the identification of 'services' is not an appropriate measure of employment like relationships. As the precedents and other statutory approaches demonstrate, employment like relationships are properly assessed by reference to the degree of control and integration that exists between the principal and contractor, not whether the parties mutually benefit from commercial arrangements they enter into.

138. By using 'services' as the defining tool to deem a contractual relationship as being an employment relationship, the provisions necessarily inflict harsh, anomalous and far reaching economic and social consequences, especially in the context of the modern digital economy.

B. The disproportionate impact on small and micro businesses

139. Because the current exemptions only exempt larger contractors (that is contractors that have two or more people involved in the service delivery and/or operate for more than 90 days a year), the law disproportionately impacts vulnerable small businesses.

140. This is because small businesses fall outside the scope of the exemptions where they are operated by a single person for more than 90 days and there is a deemed service flow between the individual (whether a natural person or company) and the principal. Given the low margin nature of most contracting relationships and commercial realities, the imbedded costs of payroll tax attributed to the principal will inevitably be passed down to the small business contractor, with the cost being ultimately borne by them. This has the obscure result of imposing significant costs on vulnerable small businesses that do enter into *bona fide* independent contractor relationships with service providers. The added cost to their business puts them at greater risk of failure and creates significant hurdles, putting them artificially at a competitive disadvantage in the marketplace. This is despite the fact that the current law does not appear to have a principled policy justification for this anomalous outcome for small business.

141. Small and micro businesses are the engine room of economic growth, innovation and new job creation in modern economies such as NSW. They operate on low margins and are highly vulnerable, usually constituted by ordinary members of the public who are seizing on the new opportunities made available by technology to make a living and contribute to the community at large. A tax system that disproportionately discriminates against small and micro businesses is by definition a system that is anti-job creation and anti-economic growth because it disincentivises continued investment into these foundational aspects of the digital economy. This has a necessarily anti-competitive effect given that artificial increases in the economic burdens placed on small actors preclude them from competing against larger and more institutional firms who do not bear that cost.

C. The failure for the exemptions in section 32(2) to exclude *bona fide* intermediaries

142. In addition to the core test in section 32(1) failing to meet its objectives and giving rise to substantial anomalous results in the modern economy, the exemptions contained in section 32(2) also fail to ensure that only employment like arrangements are taxed. The Minister responsible for introducing the Relevant Contractor Provisions himself conceded in his second reading speech that the exemptions are complicated and, by implication, poorly drafted. The complication was said to be necessary to prevent the 'tax avoidance industry' from exploiting 'loopholes' by presenting in substance employment relationships as *bona fide* independent contractor arrangements, when they are not. As the Supreme Court has acknowledged in both *Loan Market* and *Bridges*, the exemptions are too narrow and difficult to apply, conceding that they inappropriately capture *bona fide* independent contractor arrangements. This highlights the fact that the current approach fails to adequately exclude genuine independent contractor relationships from the mix.

143. The exemptions need to be reformed to ensure that any potential class of *bona fide* independent contract that may be deemed to be employment relationships, through the inevitable leakage that will arise from the applying the threshold test in section 32(1), are exempted.

144. This is particularly the case for genuine intermediary service providers that because of their role in the supply chain may be required to impose or pass on certain contractual obligations to parties to which it provides unilateral services. Similarly, in an increasingly regulated economy, intermediaries are sometimes subject to certain legislative and regulatory requirements that give such entities no choice but to recognise and impose said statutory obligations on other parties when delivering services under a contract (for example, the transportation industry, financial services industries, medical practices and health service providers etc). The recognition and enforcement of statutory and other supply chain related obligations on the recipients of services, should never be capable of being construed as an employment like relationship, which under the current provisions and approach adopted by the Revenue is being attempted.

145. Further, given that the Employment Agency Provisions, contained in Division 8 of the Act impose tax on those intermediaries that procure services of another person for a client as an employment agent, there is no policy purpose justifying genuine intermediary service providers being subject to taxation by virtue of the extended definition of employment in the Relevant Contractor Provisions. For completeness, given that appropriately defined employment agents that are intermediaries are taxed under the Employment Agency Provisions, there is no risk to the revenue in clarifying the exclusion of genuine intermediary service providers from the Relevant Contractor Provisions.

D. Costly and complex compliance burdens

146. The more complex and uncertain a payroll tax law is, the higher the imbedded cost and risk that applies to entities when conducting their businesses in NSW. Especially in light of aggressive Revenue audits and investigations that are being pursued across industry in the State, the cost of doing business and defending ordinary commercial independent contractor relationships has risen significantly. Audits and reviews, regardless of the end result, are highly inefficient and expensive exercises for firms to complete. The significant resource costs that need to be distributed to engaging advisers, preparing and responding to information requests and defending position taken should not be underestimated. Litigation is always a costly affair, however, given in tax disputes there exists a reverse onus of proof where the taxpayer need to positively defend their position, the costs to firms in defending their arrangements can be substantial.

147. Even if the law were to be settled and it accepted that it is appropriate that *bona fide* independent contractor arrangements should be subject to payroll tax (which this Submission denies as being correct), given that principals under *bona fide* contractor arrangements have no real control over or are in any meaningful way integrated with their deemed employee (customer or contractor), there will be significant imbedded compliance costs with entering into these arrangements given that the principal

will need to gather information at the individual level to substantiate any applicable exemptions. In other words, *bona fide* principals who are not employers will be required to bear the cost of information gathering at the level that an employer would be required, even if an applicable exemption applies to their arrangements.

148. Not all of these costs of compliance can be shifted downstream by the principal to the contractor. Given this, the cost of the delivery of services will likely rise and / or some low margin businesses will no longer be able to operate.

PART 5 – GUIDING PRINCIPLES FOR A MODERN APPROACH TO APPLYING PAYROLL TAX TO EMPLOYMENT-LIKE CONTRACTORS

149. Given the fundamental structural deficiencies of the Relevant Contractor Provisions and the significant consequences that flow, the provisions must be reformed to be better aligned to their original purpose of only capturing employment-like relationships and to better reflect the social and economic realities that exist in the modern economy.

150. In addition to specifically overcoming the deficiencies that have been identified, there are well established theories of tax policy that are important criterions to assess against when proposing amendments to tax instruments. These conceptual policy considerations and frameworks are important because they advance economically and socially desirable objectives and assist in aligning the mechanical provisions of a taxing statute with the achievement of both desirable general and tax policy outcomes.

151. Given this, prior to proposing amendments to the mechanical components of the Relevant Contractor Provisions to overcome the deficiencies identified in Parts 3 and 4, relevant tax policy principles that should inform Parliament when drafting and enacting reforms, and which have influenced the proposed reforms contained in Part 6 of this paper, are set out below.

A. Certainty and adaptability to modern businesses in the economy

Principle

152. Certainty is critical to the effective imposition of any system of taxation because it facilitates the ability of any purported tax to give effect to its normative goals. Broadly speaking, the purposes of tax can be split into various justificative categories, the most relevant of which are detailed below:

- **State building:** one of the key purposes of taxation is to establish control over the population in order to give effect to a proper system of governance. This requires resources to fund legislators, judicial and police, as well as to build critical infrastructure which is necessary for social function.[61]

- **Internal management:** taxation is critical to manage the social order of a populace, where resources are pooled through tax to fund goods and services which benefit the public as a whole, such as education or healthcare.[62] It is also often used to address inequality more directly through the redistribution of resources, where measures such as a proportionate system of taxation, or publicly funded benefits, are ultimately implemented to transfer resources from one segment of society to another.[63]

153. The ability of a government to effectively impose a system of tax which actually achieves these goals is contingent upon its ability to ascertain with a degree of certainty both who will be taxed, and by what amounts.[64] A proper system of governance cannot be properly funded and implemented unless the amount of revenue which will be raised from tax can be identified with sufficient certainty. [65] Effective internal management is also contingent upon certainty to the extent that any intended redistribution of

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61 Allison Christians, "*Introduction to Tax Policy Theory*, 4.

62 Ibid 5.

63 Ibid.

64 Australian Government, *Re:Think – Tax Discussion Paper* (Discussion Paper, March 2015) 167 – 168, 175.

65 Christians 23; Australian Government, *Re:Think – Tax Discussion Paper* (Discussion Paper, March 2015) 169.

wealth cannot be given effect unless the government is able to predict which parties will be affected by a proposed tax, and how this tax will impact consumption and production.

154. One of the fundamental guiding principles of tax policy lies in the idea that a government must be able to enforce a system of taxation in order for it to be effective.[66] This is heavily interconnected to the principle of certainty, to the extent that the effect of a given tax must be such that it is certain to raise sufficient revenue to enforce the administrative functions of government.[67] Yet the economy is continually being impacted by unforeseen externalities due to exponential technological growth, changes in social perspectives, and increasing trends towards globalisation. This necessarily impact the ability of a system of tax to be effectively enforced as it is required to adapt to new trends in consumption and production. To this extent, an effective system of taxation must be adaptable to new business models and economic trends in order to remain certain, and enforceable, in response to changes to the modern economy.

Application to the reform of the Relevant Contractor Provisions

155. When reforming the Relevant Contractor Provisions, it is necessary that more precision be adopted in specifying, with certainty, the class of taxpayers that will be subject to the imposition of payroll tax under the extended definition of employment relationship. This will necessarily require the provisions to overcome the current uncertainty and ambiguity regarding scope, that is exposed by the case law and also a comparison of the provisions application against its intended purpose. This complexity stems in part from the ambiguity within the definition of "service", and the scope of work done "for" the principle under the current Relevant Contractor Provisions. Given that the intended purpose of the provisions is to capture artificially contrived contractor relationships that are in substance employment-like relationships, both the threshold test and exemptions should be carefully amended to restrict the operation of the Relevant Contractor Provisions to that class of taxpayer.

B. Tax efficiency

Principle

156. The principle of economic efficiency suggests that **tax should not distort economic outcomes**.[68] But economic efficiency is a measuring tool rather than a normative goal. The proper efficiency goal of taxation is one of **minimum disruption,** meaning policymakers ought to predict the relative economic impact of various taxes, and favour those which produce the least distortion.[69]

157. This is underpinned by a desire to maximise production and consumption in the economy. The idea presupposes that, all else being equal, money which is used to contribute to the economy produces greater social benefit than money used for another purpose (e.g. saving) because it can be used to stimulate continued production and growth in the economy.

158. In order to achieve this from a taxation perspective, policymakers must ask what level of tax will have the lowest impact upon the level of supply and demand in the economy. At a basic level, supply is higher when the price of goods is higher (because people are more inclined to sell for a higher price), while demand is generally higher when the price of goods is lower (because people are more willing to buy when things are cheap). The level of consumption in the economy can therefore, at its most basic conception, be interpreted as the point at which supply and demand meet within a given market.

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66 Christians 23.

67 Ibid.

68 Ibid 16.

69 Ibid 17.

159. Tax imposes an additional cost to production, because it acts to artificially increase the cost of goods and services above that at which they would have otherwise been sold.[70] However consumer behaviour is not linear nor entirely rational, meaning a given increase (or decrease) in tax may have a disproportionate effect on consumption. This often occurs where individuals use their resources to reduce their taxes, as opposed to maximising the total amount of production in the economy.[71] To this extent, the principle of economy efficiency seeks to increase social wellbeing by imposing a tax which results in the minimum level of disruption to consumption.

Application to reform of the Relevant Contractor Provisions

160. Given that small and micro businesses, technology service providers, modern intermediary service providers, digital goods and services and cross platform collaboration are key drivers of economic growth, new employment, innovation and increases in societal living standards in economies such as NSW, the Relevant Contractor Provisions should have minimum disruption on the development and manifestation of those key elements of the modern economy.

161. The principle of tax efficiency requires that the payroll tax provisions only apply to the extent necessary to achieve desirable ends (that is to prevent exploitation and contrivance of the law to avoid paying tax) in a way that has the lowest impact on the level of supply and demand in the economy that underpins continued production and growth. In order to give effect to this end, there must be legal recognition that intermediary businesses are not generally employers, and section 32(1) must be applied to reflect the economic substance of the relevant transaction. This means that where the intermediary does not direct, control or otherwise benefit from the users work in a manner which is akin to an employment arrangement, payroll tax should not apply. If the provisions continue to mischaracterise dealings between independent small businesses and intermediaries as employment arrangements, they risk distorting supply by increasing the cost of competition amongst micro businesses.

162. It is submitted that having an extended definition of employment to capture artificial arrangements that are in-substance employment relationships is an appropriate and desirable basis for the Relevant Contractor Provisions to exist. However, to promote tax efficiency and not stifle economic growth the provisions must be reformed to be carefully tailored to only achieve that end and no more. Otherwise, the current consequences that impose significant tax cost on businesses that engage in *bona fide* independent contracting (especially small businesses) will continue and the principle of tax efficiency will be unable to be reflected in the law.

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[70] Ibid 19.

[71] Australian Government, *Re:Think – Tax Discussion Paper* (Discussion Paper, March 2015) 170.

C. Equity and fairness

Principle

163. In a tax policy context, equity and fairness are terms which are often used interchangeably to define the concept that taxes should be allocated in an equitable or fair manner. [72] This is at its core a distributional question which can be split into two main schools of thought – *ability to pay theory* and *benefits theory*.

164. **Ability to pay theory** suggests that people ought to pay taxes in proportion to their relative ability to do so. This means that two people who have the same ability to pay ought to pay the same amount of tax, irrespective of the source of this ability to pay (**horizontal equity**).[73] But it also requires that a person who is less well-off should not be required to pay as much tax as someone who has more resources (**vertical equity**).[74]

165. **Benefits theory** holds that people should pay taxes in relation to the benefits they received from society. A key issue arises in the practical implementation of this theory, to the extent that it is often difficult to price (and subsequently allocate) the value of the goods and services which are provided to individuals.[75] Some view benefits theory from an economic perspective , meaning that an individual's success in the market is an appropriate proxy for the benefits they have received from the government.[76] On this view, benefits theory and ability to pay theory become much more aligned, as fairness is given effect via a taxation system which imposes taxes on the basis of the relative wealth of the taxpayer.

Application to the reform of the Relevant Contractor Provisions

166. On all available perspectives of equity and fairness considerations the current approach fails on all fronts. The inequitable and disparate treatment of small businesses when compared to larger businesses is an afront to the policy desire to ensure equity tax treatment under the law, undermining the ability to pay and benefit theory principles. Further, the imposition of payroll tax, as a tax on employment, on non-employment related and *bona fide* independent contractor arrangements does not result in equitable outcomes or fairness for those taxpayers caught in the scope of arrangements that have a readily identifiable and contradictory purpose.

167. Any reform to the Relevant Contractor Provisions will need to ensure that equity and fairness considerations are applied to restrain the provisions from giving rise to unfair outcomes to taxpayers, especially vulnerable small businesses, and better captures the revenue mix that is intended to be subject to tax. This will mean more carefully defining the scope of arrangements caught by the provisions and carefully tailoring the arrangements so that *bona fide* independent contractors are not subject to payroll tax.

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[72] Christians 11.

[73] Ibid.

[74] Ibid 16.

[75] Ibid 12.

[76] Ibid 15.

PART 6 – PROPOSED REFORMS AND SOLUTIONS

168. It can be concluded that the Relevant Contractor Provisions:

a) Are not appropriately adapted to the realities of the modern economy.

b) Apply to *bona fide* independent contractor arrangements contrary to the stated purpose of the provisions to only apply to employment-like relationships.

c) Adopt an ineffective and unprincipled 'services' test to assess whether an independent contractor relationship is employment-like.

d) Have been interpreted such that the concept of services goes well beyond any reasonable standards of commercial practice.

e) Have been broadly applied to *bona fide* independent contractor arrangements which exceeds the scope and policy design of the payroll tax law, which is meant to be a tax on employment.

f) Has exemptions that are antiquated, complicated and too narrowly and specifically defined, failing to ensure *bona fide* independent contractors are excluded, particularly purported services that arise under genuine intermediary arrangements.

g) Artificially imposes payroll tax on vulnerable small and micro businesses to the advantage of larger businesses.

h) Creates substantial uncertainty in the tax system that leads to significant increases in both the complexity and the costs of complying with the tax law.

i) Imposes significant and unjustified additional costs to production and service delivery that result in the provisions not being tax efficient.

j) Undermines the payroll tax system from achieving desirable outcomes of fairness and equity.

169. Given the above, Part 6 proposes reforms to both the core gateway test to characterising a relevant contract in section 32(1) and to the exemptions contained in section 32(2).

170. This Part sets out the explanatory basis for the proposed changes to the provisions and provides explanation concerning the mechanical amendments proposed.

171. Proposed draft provisions, incorporating the amendments in purple, are set out in full in **Appendix A** to this submission.

A. Modernising the law: moving away from the concept of 'service' to 'integration & control'

172. It is proposed that core threshold test in section 32(1) should be reformed. This means moderating the current use of a 'services' test to assess the employment-like character of contractor relationships and instead rebalancing the test towards a newly enacted 'control and integration' test. It is submitted that this test is a more appropriate filter for arrangements that may be objectively determined to be 'employment-like'.

173. As highlighted in Part 1, both common law authorities and other statutory approaches provide guidance as to the types of factors that should be considered when assessing whether a contractor relationship is employment-like. These factors relate to the extent to which there is control and integration between the parties to a contract in the performance of the work.

174. Given that the Relevant Contractor Provisions are designed to create an extended definition to the traditional common law test and to ensure that the provisions capture contrived arrangements, the new proposed test must be able to achieve both aims, and no more, when reformed.

175. With that in mind, it is proposed that slight modifications be made to section 32(1) to improve the readability of the current services test and that the defined terms be modified to provide clarity when attempting to identify the statutory reference to the designated person, principal and the services flows between the parties.

176. In addition to the small modifications to section 32(1), a new proposed section 32(1)(d) should be inserted to reflect the incorporation of the 'control and integration' test into the provisions. The control and integration test, where services are supplied to a principal by the designated person, provides that section 32(1) will only apply if '*the designated person is substantially controlled by and integrated with the principal'*.

177. A new section 32(1A) is proposed to provide statutory guidance as to the types of factors that will be relevant to the determination of whether a designated person is substantially controlled by and integrated with the principal. These non-exhaustive factors include the extent to which the designated person:

    i) controls how, when and where the work is performed;
    ii) determines their own fees;
    iii) is able to negotiate or determine payment terms;
    iv) can delegate work to other persons;
    v) bears the financial risk of the service delivery;
    vi) retains the ownership and control of intellectual property and assets used in the course of its business;
    vii) is required to share or adopt the branding and other trademarks of the principal in the course of its business;
    viii) can suspend or terminate the contract.

178. As such, under the reformed version of section 32(1), the contractual relationship between the designated person and the principal will only be deemed an employment-like relationship where:

    a) The designated person supplies services to the principal for on in relation to the performance of work; and
    b) the designated person is substantially controlled by and integrated with the principal.

179. The incorporation of the 'control and integration' test into section 32(1) ameliorates the harshness and uncertainty attributed to the 'services' test and ensures only those relationships that truly bear the character of employment-like relationships are bought within the extended definition of employer and employee under Division 7.

B. Clarifying the exemptions in section 32(2) to exempt genuine intermediaries

180. In addition to the inclusion of the 'control and integration' test in section 32(1), it is also proposed that a new exemption should be inserted in section 32(2) to limit the application of the provisions where a genuine intermediary is deemed to have been supplied certain classes of services, given the very broad test for services that exists under the contemporary case law authority.

181. This 'new genuine intermediary exemption' would seek to exempt a contract where the designated person (here for section 32(2) purposes the principal):

> is supplied with services in the capacity of intermediary between the service provider and another person and the services relate to:
>
> a) Benefits directly or indirectly accruing to a person from obligations imposed under a contract that are consistent with obligations imposed on either party under law or regulation; or
> b) Benefits directly or indirectly accruing to a person from the performance of obligations imposed under a contract that are merely incidental or ancillary in nature.

182. The new exemption recognises that genuine intermediaries, that are not employment agents, are generally *bona fide* independent contractors and that where the deemed services only arise as a consequence of contractual obligations that merely reflect statutory or regulatory requirements and/or mere incidental or ancillary benefits that arise from another party in the supply chain complying with contractual obligations, they should be exempted.

183. This new exemption assists in ensuring that only genuine employment-like relationships are caught by the provisions and ensures that genuine intermediary arrangements, which are more common in the modern economy, are not artificially defined as employment like relationships where the purported services are of a kind that are not typically characteristic of an employment relationship.

PART 7 – ECONOMIC AND SOCIAL OPPORTUNITIES FOR NSW IF THE RELEVANT CONTRACTOR PROVISIONS ARE REFORMED

A. Reforms will improve NSW's economic competitiveness

184. The strength of a jurisdiction's tax policy is a key determinant of its economic competitiveness. A system that fosters certainty and efficiency encourages investment, entrepreneurship and enterprise. Conversely, laws which are ambiguous, unpredictable, and overly broad in their application distort economic decision making, reduces productivity, and weakens market efficiency. [77] The current operation of the Relevant Contractor Provisions creates a significant compliance burden and financial risk for businesses operating using *bona fide* contractor arrangements.

185. The provisions as they stand, and the manner in which they have been interpreted by the Courts, mean that businesses which merely facilitate transactions or provide infrastructure to independent service providers may be erroneously classified as employers. From an economic competitiveness perspective, this has various negative effects including:

- **Creation of barriers to entry:** increased payroll tax liabilities are ultimately passed through the supply chain, disproportionately affecting small and independent businesses that often operate on tight margins.[78] This discourages new entrants into service-based industries and reduces competition and consumer choice.

- **Market distortions:** the current provisions create an incentive for businesses to restructure into more rigid franchise models or other inefficient structures solely to avoid payroll tax risk, leading to less flexible, innovative and competitive markets.

- **Disincentivising investment:** NSW competes with other Australian states and international markets for investment. A clear, targeted Relevant Contractor regime that aligns with modern business models would enhance NSW's attractiveness for businesses in high-growth industries.

186. Reforming the Relevant Contractor Provisions to align with modern realities will allow NSW to create a fairer and more predictable regulatory environment and reinforce its status as a leader in economic competitiveness within Australia.

B. Reforms will protect the revenue and minimise compliance burdens

187. Whilst the proposed reforms potentially narrow the scope of the Relevant Contractor Provisions, this does not mean shrinking the payroll tax base. Rather, it means clarifying and aligning the provisions with their intended purpose, ensuring that tax is collected where it should be.

188. The revenue protection function of the proposed reforms are twofold:

- **Clarifying the tax base and reducing litigation:** the existing broad and highly discretionary interpretation of the Relevant Contractor Provisions has created a system where businesses are forced to challenge the Chief Commissioner's position through costly litigation. This results in uncertain revenue collection, as contested payroll tax assessments often take years to resolve. By refining the statutory language to better distinguish between true employment-like relationships and B2B contracting, reform would increase voluntary compliance, reduce costly disputes, and improve revenue predictability in NSW.

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[77] Australian Government, *Re:Think – Tax Discussion Paper* (Discussion Paper, March 2015) 169, 175.

[78] Ibid 112; Ralston, *Does Payroll Tax Affect Firm Behaviour* (Treasury Working Paper, February 2018) 2.

- **Reducing tax avoidance and ensuring integrity:** a more precise, targeted contractor test would also strengthen the integrity of the tax system. The current broad approach has the perverse effect of forcing businesses into defensive tax planning, restructuring, or seeking artificial exemptions. A clearer, narrower definition would reduce grey areas, ensuring that businesses cannot exploit ambiguities whilst also preventing tax from being imposed on businesses that should never have been liable in the first place.

189. It is important to note that while the proposed changes would rightfully exclude certain genuine B2B relationships, they would not reduce tax obligations for businesses that engage in disguised employment structures. If anything, greater clarity would enhance enforcement efforts against entities that are genuinely misclassifying employees.

C. Reforms will better level the playing field for modern small businesses and create a fairer and more equitable tax system

190. As noted above, vertical and horizontal tax equity are core principles of sound tax policy. The current application of the Relevant Contractor Provisions violates both principles. Small businesses and independent operators – many of whom have limited financial resources – are often disproportionately impacted by payroll tax assessments that treat them as employees of an intermediary rather than as standalone businesses.

191. Because payroll tax is ultimately a tax on employment, its misapplication to small independent operators results in an inequitable distortion that:

- Forces small contractors to bear a hidden tax burden, as principals inevitably pass on payroll tax costs to their contractors in the form of lower earnings.
- Gives larger corporate structures a competitive advantage, as they can absorb payroll tax liabilities more easily than small operators (or simply pass them downstream).
- Undermines self-employment as a viable career path by artificially inflating costs associated with independent business models.

192. This indirect passing-on of payroll tax to contractors represents a fundamental misalignment with the 'ability to pay' principle and actual tax outcomes. Reforming the Relevant Contractor Provisions would ensure that only genuinely employment-like arrangements are subject to tax while preserving the economic independence of small businesses and ensuring a more equitable tax landscape.

D. NSW can lead the nation by adopting a 21st payroll tax system

193. The Australian state tax systems exists within the framework of federalism - where each state has the ability to refine and modernise its taxation laws. This presents an opportunity for NSW to lead the nation by adapting its payroll tax system to the realities of the modern 21st century economy.

194. Although most Australian states have harmonised payroll tax legislation, harmonisation should not come at the expense of efficiency, clarity, fairness or economic competitiveness. States have the ability to refine laws in ways that improve business and confidence and create a more predictable regulatory environment. By leading reform of the Relevant Contractor Provisions, NSW would:

- Set a new standard for clarity, efficiency and fairness in payroll tax law across the nation.
- Encourage other jurisdictions to follow suit, improving national consistency while correcting the distortions that the current provisions have caused.

- Enhance business confidence in NSW as a jurisdiction that values regulatory certainty and supports independent enterprise.

- Reduce the unnecessary costs of litigation and compliance that currently burden both businesses and government.

195. This is a rare opportunity for NSW to move ahead of the curve in its tax policy. Rather than waiting for incremental changes across jurisdictions, or continued uproar in the business community, NSW can set a precedent by refining its contractor provisions in a way that protects the tax base, fosters economic growth, and ensures fair outcomes for all taxpayers.

APPENDIX A – PROPOSED LEGISLATIVE AMENDMENTS TO PROVISIONS

Section 32(1)

What is a relevant contract?

(1) In this Division, a 'relevant contract' in relation to a financial year is:

a) a contract under which a person (**the designated person**);
b) during that financial year;
c) in the course of a business carried on by the designated person;
   i) supplies to another person (**principal**) services for or in relation to the performance of work; or
   ii) has supplied to ~~the designated person~~ a principal the services of persons for or in relation to the performance of work; or
   iii) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group; and
d) for the purposes of subparagraph (c)(i) and (ii), the designated person is substantially controlled by and integrated with the principal.

(1A) Without in anyway limiting the relevant factors that may be considered for the purpose of determining whether the designated person is substantially controlled by and integrated with the principal, the following factors may be considered:

a) the extent to which the designated person:
   i) controls how, when and where the work is performed;
   ii) determines their own fees;
   iii) is able to negotiate or determine payment terms;
   iv) can delegate work to other persons;
   v) bears the financial risk of the service delivery;
   vi) retains the ownership and control of intellectual property and assets used in the course of its business;
   vii) is required to share or adopt the branding and other trademarks of the principal in the course of its business;
   viii) can suspend or terminate the contract.

Section 32(2)

(2) however a relevant contact 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) is supplied with services in the capacity of intermediary between the service provider and another person and the services relate to:
   a) Benefits directly or indirectly accruing to a person from obligations imposed under a contract that are consistent with obligations imposed on either party under law or regulation; or
   b) Benefits directly or indirectly accruing to a person from the performance of obligations imposed under a contract that are merely incidental or ancillary in nature.

APPENDIX B – CURRICULA VITAE OF SUBMISSION AUTHORS

Sue Williamson
BCom, LLB, LLM(Tax), CTA (Life)

Partner

Sue is the lead Partner of Dentons Australia's national tax practice. Sue has more than 30 years' experience in federal and state tax risk and dispute management.

Within her tax practice, Sue advises on federal and state tax audits, alternative dispute resolution and tax litigation. She also provides tax support to transactions including obtaining rulings to ensure risk is managed. Sue's experience spans all industries, with significant experience in energy and resources, build-to-rent and property.

Due to her commercial approach to finding solutions that ensure transactions are not precluded by tax risks, Sue has been recognized for her expertise by various publications including Best Lawyers Australia, Doyle's Guide, and ITR World Tax, and was most recently a finalist in the Lawyers' Tax Partner of the Year Awards.

Sue is a former President of The Tax Institute (and life member) and acted as Chair of the Tax Institutes Dispute Resolution Committee between 2020 and 2022. She also has membership with the following legal and educational institutions:

- *Senior Fellow*, University of Melbourne Law School, Law Masters Program teaching in State Taxes and Duties;
- *Life Member*, CPA Tax Centre of Excellence; and
- *Accredited Mediator and Member*, Resolution Institute.

Although Sue typically acts for taxpayers, she has also advised governments and regulators from time to time, including in relation to state tax policy reforms. This involvement has included participation in various consultations and roundtables with Government, Treasury and the ATO concerning the reform of tax legislation such as the Tax Agents Services Act 2009 and the Part IVA reforms.

Throughout her career Sue has been a Senior Tax Partner at several of Australia's big 6 law firms and within the big 4 professional services firms.

Sue holds a Bachelor of Commerce and Law from the University of Melbourne, and a Master of Law (Tax) from Monash University.

Jack Aquilina
BA, LLB(Hons), LLM(Tax), GDLP, FTI
Doctoral Candidate, Tax Law (Deakin University Law School)

Managing Associate (Tax)

Jack is a Managing Associate in Denton's national tax law practice, specialising in complex tax law disputes and controversy.

Jack represents clients in the tax dispute and litigation process and manages interactions with revenue authorities, including tax audits and reviews. Jack also advises clients extensively as to the revenue consequences of their transactions and corporate structures, particularly in minimising tax risk and enabling early compliance.

In addition to practicing as a full-time tax disputes expert, Jack is also engaged with academic appointments with the following law schools:

- *Senior Fellow*, University of Melbourne Law School, Law Masters Program teaching State Taxes and Duties;
- *Academic Practitioner*, La Trobe University Law School, teaching in income tax law, GST and superannuation;
- *Teaching Scholar & Lecturer*, Deakin University Law School, teaching in income tax law, GST and superannuation.

Jack is also a Doctoral Candidate at Deakin University Law School, where he is completing his PhD as a specialist in tax law. Jack's tax law research and thesis is concerned with reforming the Commonwealth research and development tax incentive to better capture new knowledge creation by proposing a new whole of innovation incentive.

Jack has been recognised in industry, media and the tax profession for his work and expertise in the payroll tax space as demonstrated in his appearances and publications, set out below:

- Jack Nathan Aquilina, *Relevant Contractor Provisions & Payroll Tax* (2024) VIC Tax Forum, 21-22 March 2024, The Tax Institute.
- Unpacking payroll tax: essential broker insights from industry experts - The Adviser
- Payroll tax push fails to recognise different aggregator models | Mortgage Professional Australia (mpamag.com)
- Aggregators urged not to lose sight of NSW payroll tax issue | Mortgage Professional Australia (mpamag.com)
- Mortgage Aggregators: are you ready to defend your broker relationships from payroll-tax and superannuation reviews? - Lexology

Jack has practiced in complex tax disputes at two of the big 4 professional services firms and a large national law firm, after having commenced his career as a Senior Associate to three senior judges of the Court of Appeal of the Supreme Court of Victoria.

Nik Sachdev
BA, JD, LLM(Tax), GDLP, ATI

Senior Associate

Nik is a Senior Associate in Dentons' national tax practice, advising clients on complex tax advisory, compliance and dispute matters. His experience spans both federal and state taxation, including income tax, capital gains tax, GST, and state taxes such as payroll tax and land tax.

Nik represents a diverse range of clients, including listed and private corporate clients, founders, startups, and high net-worth individuals. He assists clients in managing tax risks, engaging with revenue authorities, responding to audits and investigations, and resolving disputes. His strong commercial and technical approach allow him to provide practical, outcomes-based solutions that align with his clients' broader strategic goals.

Nik has been recognised as an emerging leader in tax law and was named a finalist in the Lawyers Weekly 30 Under 30 Awards in the taxation category in each of 2022 and 2023.