Submission No 17

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

Organisation: Quad Services Pty Ltd

Date Received: 7 February 2025

Who we are

Quad Services is a family-owned business that provides cleaning, security and building maintenance services to companies across Australia and New Zealand. It engages over 3,000 cleaners across Australia and some 2,000 of those are in New South Wales. The company has been in existence for over fifty-two years.

Why we are making a submission

We are making a submission to this Inquiry because Quad Services has been and continues to be deeply affected by the steps Revenue NSW has taken to enforce its interpretation of the deemed employment agency provisions of S. 37 (1) of the Payroll Tax Act 2007 ("the Act").

Key points of our submission:

1. We disagree with the application of employment agency to the kind of service that we provide to our clients.
2. If the courts so rule that these services are an employment agency agreement, any application should be post that ruling and not retrospective prior to that date.
3. Specific to our company, we have, in writing, findings in a previous assessment that our service arrangements satisfied the "relevant contractor" provisions, hence there certainly should be no retrospectivity applied for dates prior to the change in Revenue NSW's interpretation of employment agency agreement.
4. Revenue NSW is giving conflicting information to us and our contractors, resulting in duplicate payments being demanded. There is not a clear and concise understanding of the new interpretation within Revenue NSW, and certainly not in the wider business community.

If Revenue NSW succeeds in its interpretation of these provisions and is likewise successful in claiming five (5) years retrospectivity of payroll tax, then there is little hope that many of the businesses in the affected industries will survive. This is a disaster in the making and is particularly frustrating as we believe Revenue NSW is conducting a campaign against numerous industries based on a flawed premise.

What is the flawed premise?

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

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37 Definitions

(1) For the purposes of this Act, an ***employment agency contract*** is a contract, whether formal or informal and whether express or implied, under which a person (an ***employment agent***) procures the services of another person (a ***service provider***) for a client of the employment agent.

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

> Control, similar to the control exercised over employees can be exercised indirectly, by the agent managing the way in which work is performed in accordance with the client's requirements or specifications. Indirect control may be exercised by the client specifying customer service requirements, or specifying the tasks to be performed, where when and how the work is performed, and requiring workers to comply with the client's operating procedures that apply to employees.
>
> Even an absence of direct control, does not mean there is no employment agency contract.

Our company found out that such a policy existed when it was advised by a Revenue NSW Compliance Officer after an assessment was issued in 2024. Reading the opening sentence of the policy it is evident that almost any relationship where a worker is sent somewhere to do something is caught by the definition of "control". It seems irrational. Even more irrational is the final sentence of the policy which states that even where there is no direct control there can still be a deemed employment agency in existence. How that can be considered as a reasonable interpretation of S. 37(1) of the Act eludes us. We asked for examples which would fall outside the deemed employment agency provisions and Revenue NSW informed us that the following would fall outside provisions:

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

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

The Legal Landscape

The Supreme Court of NSW has handed down numerous decisions on the issue of the deemed employment agency provisions. Until the Court of Appeal decision in ***Integrated Trolley Management***

in December 2023 we had understood, and had received confirmatory advice from Revenue NSW, that the following criteria applied for an employment agency to exist:

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

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

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

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

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

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

Context Specific to Quad Services

In 2017, Revenue NSW conducted a comprehensive payroll tax audit of Quad Services. At that time, Revenue NSW confirmed, in writing, that our payroll tax practices were compliant under the "relevant contractor" provisions of the Payroll Tax Act 2007 (NSW). Specifically, it was established that many subcontractors qualified for exemptions under sections 32(2)(b)(iv) and 32(2)(c) of the Act.

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Despite no legislative changes to these provisions, a subsequent audit, for the 2017 to 2022 period, finalised by the department in 2024, disregarded the previous findings and advice, retrospectively applying a different interpretation based on the "employment agency" provisions.

As stated above, the change in interpretation appears to have been influenced by the **Integrated Trolley Management** decision handed down on 13 December 2023, which falls well outside the audit period. The resulting amended assessment, despite no major change to the operation of the business, and seemingly no announcement from Revenue NSW regarding this new interpretation, has resulted in an extraordinary burden on the company.

Our verbal and email dialogue with officers of Revenue NSW show quite clearly it is evident that the officers themselves do not have any consistency of approach when administering the new policy.

We have received advice from Revenue NSW that, as the closest entity, we are liable for the payroll tax for all relevant contractor payments. Subsequently when the same contractors have requested clarification from Revenue NSW, they have also been advised that they too must pay payroll tax on the same work.

There are currently, multiple businesses in NSW paying payroll tax, for the exact same work, purely because there is no consensus within the department. The threat of penalty exists if these duplicate payroll tax payments are not made every month by both parties. There does not appear to be a single point in which a resolution to this situation can be found outside a courtroom, nor does there appear to be any updated advice from any government resource in this regard. We note that if we consult the government's "worker or contractor tool" as it pertains to Workers Compensation, every instance in which Revenue NSW has deemed employee, in our case, the tool deems as contractor.

https://www.sira.nsw.gov.au/workers-compensation/worker-or-contractor-status-tool

The result of Revenue NSW's new interpretation is that we are being charged payroll tax, even though we meet the government's own definition of a contractor arrangement.

Finally, there does not appear to be any clear demarcation of what services/contractor payment will be considered by Revenue NSW as applicable under the new interpretation. Specialist service

providers such as plumbers, painters, and electricians have all been included in our amended assessment as a cleaning contractor, which appears to be in defiance of what Revenue NSW had told us in 2024. We are currently paying payroll tax, interest and penalties on these inclusions while we go through the process of trying to have them removed, however we do not know if the inclusions were intentional or not as, again, there is no clear advice. This is a process that takes months.

Impact on Business

The amended payroll tax assessments have placed a significant burden on Quad Services. The specific impacts include:

1. **Retrospective Assessment:** Despite a 2017 audit confirming compliance with "relevant contractor" provisions, a subsequent audit disregarded these exemptions, applying newer legal interpretations retrospectively.
2. **Incorrect Inclusions:** Payments for interstate operations and irregular, out-of-scope, and specialist services were inappropriately included in the assessments. The process of having these inclusions removed is ongoing.
3. **Financial Viability:** The imposition of substantial retrospective tax debts, interest, and penalties threatens businesses with no clear advice on what should be considered in future payroll tax payments.

Retrospectivity

The very worst of the impacts on business identified above is the application by Revenue NSW of five (5) years retrospective payroll tax using the deemed employment agency provisions. As the Inquiry is aware, once a business is a deemed employment agency then all its subcontractor payments are caught for the purpose of Payroll Tax assessment whether some or all of those subcontractors have themselves paid Payroll Tax.

The increase in tax liability is huge. On top of that Revenue NSW is opportunistically applying five (5) years of retrospectivity. Businesses such as ours are now receiving assessments from Revenue NSW for millions upon millions of dollars. This has already caused numerous companies in the industry to

immediately become insolvent and will continue as further retrospective assessments are handed down.

Revenue NSW has not indicated any willingness to consider the likely job losses that the aggressive pursuit of five years of retrospective Payroll Tax will bring. However, it is safe to assume that thousands of jobs in these industries will continue to be lost. It is particularly ironic when one considers that the ***Integrated Trolley Management*** decision (which features on a repeated basis in the correspondence that we and others are receiving from Revenue NSW) was only handed down on 13 December 2023. How can any business budget for five years of retrospectivity arising from a court decision handed down 14 months ago?

What does Quad ask this Inquiry to do?

We ask this Inquiry to recommend the following:

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

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

(iii) suitable resources and clear-cut advice be produced and published by Revenue NSW to ensure businesses can adequately ensure they are compliant with any new policy or fundamental change in the application of specific legislation.

7 February 2024

Ravindra Naidoo
Financial Controller