Submission No 19

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

Organisation: Australian Dental Industry Association and Dental Service Business Council

Date Received: 7 February 2025

7 February 2024

Portfolio Committee 1 – Premier and Finance

Dear Committee Members,

Submission regarding application of the contractor and employment agent provisions in the *Payroll Tax Act 2007*

The Australian Dental Industry Association (**ADIA**) and the undersigned dental service organisations (the **Dental Service Business Council**) welcome the inquiry into the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007 (*the **Act**).

This submission focuses on the application of the contractor provisions in in Division 7 of Part 3 of the Act and the impact on the healthcare industry (items (a), (c) (d) and (e) of the Inquiry Terms of Reference).

About the ADIA and the Dental Service Business Council

The Australian Dental Industry Association (ADIA) is the peak industry body representing suppliers, manufacturers and wholesalers to Australian oral health practitioners, including DSO's. ADIA's vision is for an industry that empowers oral health professionals to advance the health and wellbeing of all Australians. The Dental Service Business Council comprises various dental clinic operators including Abano Healthcare Group, National Dental Care, Pacific Smiles Group and Primary Dental.

The Dental Service Business Council members between them operate approximately 128 dental clinics in New South Wales (including in regional areas) and support over 832 clinicians to deliver dental care to the NSW public. In addition, these clinics support the public system in the delivery of services to local hospitals and public dental services. The members between them operate 403 dental clinics throughout Australia and support over 2502 clinicians to deliver dental care Australia wide.

Uncertainty caused by payroll tax case law

The contractor provisions in the Act have been subject to significant case law developments in recent years. This commenced with the *Optical Superstores* case and continued with the *Thomas and Naaz* and *Loan Markets Group* cases. Most recently, the *Uber* decision in the NSW Supreme Court has added to the uncertainty and complexity for businesses impacted by these provisions. We understand the *Uber* case has been appealed by NSW Revenue to the NSW Court of Appeal.

Regardless of the outcome of the *Uber* appeal (and any subsequent appeal to the High Court), the *Uber* decision shows that there is, and continues to be, significant complexity and uncertainty in this area. This uncertainty makes it extremely difficult for businesses impacted by these provisions to operate with any confidence, including in relation to potential historical tax liabilities. Historical tax liabilities in particular are devastating to businesses and threaten their viability, particularly when interest and penalties can be imposed.

The impact of the *Uber* decision extends beyond the gig economy as there are analogous features of the *Uber* model and the facilities and services models which are commonly used in the medical and dental industries. Under the facilities and services model, the practitioner engages the clinic operator to provide various facilities and services to enable the practitioner to operate its independent business of providing medical services to patients, usually as a sole trader with an ABN or through a service company.

This is an appropriate arrangement in healthcare settings as it more clearly separates the liability of practitioners and clinic operators in respect of patient care. The business arrangement is not an employment- like arrangement which the contractor provisions in the Act were intended to capture.

We believe it is grossly unfair for historical liability to be imposed in circumstances where so much uncertainty and inconsistency exists and decisions are made which change previously understood interpretations. While the response of various state revenue offices has been that there is no change to this law, there has clearly been a change in interpretation of how this law applies which has led to new guidance being issued by various state revenue offices and subsequent audit activity being undertaken.

Issues with current legislation and its interpretation

Our view is that Division 7 of the Act should be drafted, interpreted and applied as anti-avoidance rules consistent with Parliament's clear original intent, as opposed to a literal reading of the legislation without regard to purpose or context. Accordingly, the division 7 provisions should not apply to genuine independent contractor arrangements, including between dental practitioners and dental clinics.

In the *Uber* case, Hammerschlag CJ specifically noted the difficulty of applying the division 7 provisions to Uber's independent contractor arrangements, which did not remotely exist when the provisions were introduced:

> *[17] It is worthy of observation that in the Second Reading Speech when Division 7 was introduced, it was said to be "to deal with the practice of using contractors who provide services on a similar basis to ordinary employees but who are regarded at law as independent contractors", as a basis to avoid, amongst others, charges and taxes such as payroll tax. There is no suggestion in this case that the Uber system is structured to avoid tax obligations…*
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> *[171] The overall intention behind Division 7… as elucidated by the Explanatory Note to the 1985 Bill… is to capture several means of disguising the employer-employee relationship by contractual arrangements which had been increasingly resorted to by persons seeking to defeat the objects of the Act. That is not this case [here].*

Similarly, Richmond J observed in the *Loan Market* case:

> *[207] The conclusion that the Broker Agreements constitute a relevant contract may be seen as a harsh outcome because the contractor provisions were originally introduced as an anti-avoidance measure which was not intended to catch "bona fide independent contractors"… 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.*

> *[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.*

The definition of "relevant contract" is simply too broad and it's incongruous that a genuine independent contractor relationship is recognised not to be an employer-employee relationship for the purposes of statutory entitlements like annual leave and superannuation, but because of the broad drafting of the division 7 provisions, the arrangement is deemed an employer-employee arrangement for the purposes of payroll tax. Parliament should give consideration to the absurd and unfair outcomes these provisions are having on independent contractor arrangements, and the damage being caused to small and medium business.

If the current mechanics of division 7 are to be retained, the exceptions should be reviewed and updated to ensure they reflect and are relevant to modern business arrangements and relationships. For example, exemptions that are based on days worked are no longer fit for purpose and should be replaced with tests based on hours worked.

Most importantly, there needs to be certainty on the scope of the division 7 provisions. Taxpayers currently face difficulty and substantial compliance costs in seeking to understand and comply with these rules. While the wording has remained static for many years, its interpretation is subject to conflicting judicial decisions and statutory guidance/practice notes and has broadened over time. Taxpayers are in a position where they may comply with the law (as understood at that time), but a subsequent (and inconsistent) case renders their approach incorrect. As noted earlier in our submission, this is particularly unfair and onerous where it results in historical tax liabilities along with interest and penalties.

Payroll tax harmonisation

While payroll tax is legislated at a state and territory level, we understand that the objective is for payroll tax to be harmonised. It is reflective of the significant uncertainty surrounding this issue that each state and territory has adopted very different positions on this issue with regard to historical amnesties and/or future exemptions, often in response to political pressures.

For example, in NSW the Government has granted amnesties from historical payroll tax liability for general medical practitioners who meet certain bulk-billing thresholds. However, no such amnesties have been granted to dental practitioners. We do not understand the basis for any differential treatment and believe this is grossly unfair. To further highlight the absurdity of this position, in many cases dentists operate in the same clinics or health hubs alongside GPs under the same or very similar contractual arrangements.

In Queensland, the Government has granted an amnesty for GPs and dentists as well as a 3 year future exemption for GPs (but not dentists). The Queensland Government has also provided an exemption from payroll tax where clinic operators change their payment systems to facilitate a direct payment of fees from the patient to the practitioner, rather than from the patient to the operator to then distribute to the practitioner. This solution (known as the "flow of funds solution" which arose from the *Thomas and Naaz* case) is extremely difficult and prohibitively expensive for clinic operators to implement. It increases the administrative burden on practitioners who should be focusing on delivering care to patients and has simply created an industry in software solutions aimed at solving this issue with no tangible benefit to the delivery of healthcare.

In South Australia, the Government has granted an historical amnesty for GPs and dentists with no future payroll tax exemptions available.

These differing positions highlight a significant lack of harmonisation which has caused confusion and complexity for healthcare operators to navigate. This has created significant challenges for healthcare operators, particularly at a time when many operators are still recovering from the impact of COVID-19 and the ongoing impact of the cost of living crisis as more and more Australians delay access to preventative dental care.

Impact on the dental industry and access to dental care

Impact on dental clinics

We estimate that dental clinics with 3 or more dentists (plus support staff) would likely be impacted by payroll tax liabilities being imposed both historically and going forward. We note that these clinics already pay payroll tax on the wages paid to their employees (for example, dental assistants, receptionists, practice managers). It is not a case of these operators seeking to avoid their payroll tax obligations.

The imposition of historical and ongoing payroll tax liability on these operators is potentially devastating. While each operator's circumstances will dictate how they respond to the additional tax burden, it is expected that many operators would be forced to pass on all or some of the cost to patients.

However, regardless of any ability to pass on this cost to patients, the burden of historical payroll tax liabilities may be too great and force clinics to cease operating. This would further impact the ability of patients to access essential dental care, particularly if this occurs in regional areas where access to care is more limited than in metropolitan areas.

Access to dental care and impact on public hospitals

Accessing affordable dental care is already challenging for many Australians. The cost to deliver quality dental care is significant, and more expensive than the delivery of medical services by GPs. This is primarily due to the high cost of equipment (dental chairs, scanners, sterilisation machines etc) and staffing costs (with most dentists requiring a dental assistant to deliver treatment).

For patients who are unable to afford preventative dental services, many will simply delay or avoid obtaining care which inevitably leads to more acute issues. These often result in emergency dental care, often accessed through public hospital emergency departments which puts further pressure on the public hospital system.

We note that a recent report released by the Australian Institute for Health and Welfare reported that 87,000 public hospital admissions in 2022-2023 related to dental issues which could have been avoided with appropriate and timely dental care.[1] In New South Wales, there were 24,306 preventable public hospital admissions in 2022-2023 due to dental conditions. This number has been steadily increasing since COVID-19 and the onset of the cost of living crisis which has forced many people to delay or cease accessing essential dental care.

Impact on state and federal funded dental schemes

It is also possible that operators who deliver dental services through Government schemes (such as the state voucher system, Child Dental Benefit Scheme and Veteran Affairs funded schemes) could opt out of these schemes given payroll tax costs can't be passed on to patients

[1] Oral health and dental care in Australia, Potentially preventable hospitalisations - Australian Institute of Health and Welfare

through these funding arrangements. Alternatively, operators may seek to pass these costs on to privately funded patients which would further increase the cost burden.

Our submission

We submit that:

- Division 7 of Part 3 of the Act should be reviewed and amended so that genuine independent contractor arrangements are not subject to payroll tax; or
- The definition of "relevant contract" in the Act should be amended such that contracts between dental professionals and dental clinic operators are not subject to the relevant contract provisions or alternatively, are specifically exempted; and
- there should be no retrospective application of payroll tax liabilities on impacted taxpayers given the unfairness of imposing these liabilities in circumstances where there has been, and continues to be, significant uncertainty with the legal interpretation of these provisions and differing decisions in the courts.

Thank you for your consideration of this submission.

Yours faithfully

ADIA

Abano Healthcare Group

ForHealth / Primary Dental

National Dental Care

Pacific Smiles Group