Submission No 25

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

Organisation: Alvarez & Marsal Australia

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MEMBER OF TAXAND GLOBAL NETWORK

The Hon Jeremy Buckingham, MLC
Chair and Member of the Legislative Council
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07 February 2025

Dear Chair and Member of the Legislative Council,

Inquiry into the application of the contractor and employment agency provisions in the Payroll Tax Act 2007 (NSW)

We, Alvarez & Marsal ('**A&M**'), welcome the opportunity to make a submission to the NSW Legislative Council's inquiry. In this submission, we focus on some of the key industry issues we have observed when advising clients on the contractor and employment agent provisions.

The *Payroll Tax Act 2007 (NSW)* ('**Act**') plays a vital role in regulating the imposed tax on contractors and employment agents. However, as it stands, the current provisions have an overly complex and far-reaching scope that often causes misapplication and confusion to the taxpayer when assessing their payroll tax liabilities. In particular, we suggest that the contractor provisions are overly broad and recent interpretations of the legislation have extended beyond the original intention of the provisions when enacted, inadvertently encompassing contemporary business arrangements. Similarly, the current framework of the employment agent provisions lacks clarity when distinguishing between genuine labour hire arrangements and commercial outsourcing arrangements.

We set out below our observations and recommendations for your consideration.

Should there be any questions in relation to this submission, please do not hesitate to contact Alston Kam

Yours faithfully,

Amanda Spinks
Managing Director
Alvarez & Marsal Australia

1. Contractor Provisions

a. Purposive Approach & Anti-Avoidance Focus

Currently, literal court interpretations of the wording in the contractor provisions have broadened their application to such an extent that complex and contemporary business arrangements, which historically fell outside of their scope, are now captured. Examples of these business arrangements include:

- Medical and Health service arrangements
- Financial advisory arrangements
- Mortgage lending arrangements
- Gig economy arrangements

The cases dealing with the above business arrangements have created opposing, yet broad, interpretations of the contractor provisions. In situations where arrangements between service provider and business are a genuine independent business-to-business arrangement, the absence of a clear limitation within the scope of the contractor provisions has led to these being deemed contractor arrangements. A recent example of this is the classification of GPs as contractors in *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40. This decision overlooked the fact that most GPs are genuine independent businesses and that patients seek out GPs based on their relationships developed with the GP, not on the basis of a relationship with, or branding of, a medical centre operator itself.

While the contractor provisions were drafted with a broad anti-avoidance focus, recent court decisions have extended their reach, arguably disproportionately affecting genuine commercial arrangements. This has the effect of placing significant and often unknown burdens on taxpayers that can only be alleviated by narrowing down the scope of the provisions. The extent of this overreach is evident in the recent *Loan Market Group Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 390 (‘***Loan Market case***’) decision. In this case, the Court ruled that mortgage aggregators are required to pay payroll tax on commissions paid to mortgage brokers on the basis that Broker Agreements constitute a ‘relevant contract’ under section 32 of the Act. This literal interpretation of the legislation has resulted in capturing arrangements likely not contemplated when the provisions were originally drafted. Notably, in the *Loan Market case*, Richmond J acknowledged this harsh outcome and the limitations of the available exemptions.

Recent attempts by the Revenue Authority to capture gig economy arrangements within the contractor provisions further highlight the overreach in interpretation and administration of the contractor provisions. Although their efforts were most recently rebuffed in the latest iteration of cases involving *Uber,* if the Revenue Authority is ultimately successful in its appeal, this could have a significant impact on the gig and on-demand economy.

Recommendation: We recommend the contractor provisions be redrafted to realign with their original anti-avoidance intent, moving away from wide and literal interpretations that diverge from this purpose. Legislation with a purposive approach would more closely reflect the underlying legislative objectives, avoiding outcomes that inadvertently penalise legitimate service-provider-to-business relationships. A clear example of the effectiveness of a purposive approach, albeit in the context of the employment agency provisions, is the decision in *UNSW*

Global Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1852 (‘***UNSW Global***’). In this case, the court sensibly contained the expansive scope of the employment agency provisions by establishing the ‘in and for’ test. We recommend adopting a similar approach when redrafting the contractor provisions. The fact that such a sensible interpretation by one court has been subsequently undermined by more literal decisions is, in our view, indictive of the need for the legislative rules themselves to be rewritten.

b. *Exemptions & a Need for Simplification*

As it stands today, the contractor provisions and the application of its seven exemptions are overly complex and administratively burdensome to taxpayers. In our experience, it is often a difficult administrative task for businesses to identify which contractors, if any, are captured by the provisions, whether an exemption is applicable and then to document those conclusions.

Some exemptions require businesses to obtain and analyse data that may only be available to the contractor or the Revenue Authority. Additionally, during reviews or audits Revenue Authorities has access to information from other government agencies in order to assess the value of contractor payments that should have been declared in the payroll tax return. This often leads to discrepancies between the figures disclosed by the businesses and those identified by the Revenue Authorities, primarily due to the businesses’ limited access to critical data.

Further, the current exemptions are time and resource consuming, not just for the taxpayers, but also for the Revenue Authority to review. Certain exemptions, such as the ‘*Services by a person who ordinarily provides services of that kind to the public generally*’ exemption, technically require the business to apply to the Chief Commissioner of State Revenue for a determination. In reality, neither taxpayers nor the Revenue Authority, have the time or resources to make or renew such applications every time this exemption could be applicable.

Recommendation: We recommend a simplification of the current contractor provisions and their associated exemptions to ensure more practical decision-making and streamlined compliance. Proposed simplifications include:

- The introduction of a contractor declaration that allows for the contractor to be excluded for payroll tax purposes based on a declaration completed. This can mitigate the need for the business to receive and analyse contractor data that is not readily available to them.
- The implementation of automatic exclusions triggered by a predetermined threshold. This could be established by introducing a minimum contractor payment amount that automatically exempts the taxpayer from payroll tax liabilities where the amount paid to a contractor is below the threshold for the year, on the basis that only a minimal number of days would have been worked to be paid below the threshold amount. Similarly, amounts exceeding a higher threshold could also work to exclude contractors on the assumption that there must have been more than two people providing the services to warrant the level of payments.
- Removing the need for Commissioner approval from the ‘*Services To the Public*’ exemption to alleviate the burden on both the business and Revenue Authorities.

- Redrafting the provisions in such a way that recognises the legal contract between the parties, consistent with the High Court's recent approaches in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *G Operations Australia Pty Ltd v Jamsek* [2022] HCA 2. This approach focuses on the documented terms of the contractual relationship (where a contract is sufficiently in writing and is not otherwise a sham or subsequently varied) rather than external factors, emphasising the substance of the legal arrangement. This negates the need for taxpayers to seek additional information not readily available to them and instead assess the potential for payroll tax based solely on their documented agreement with the contractor.

2. Employment Agent Provisions

a. Adoption of the 'In and For' Test and an Industry-Specific Focus

An 'employment agency contract' is defined in section 37 of the Act as a contract under which the employment agent arranges for workers to provide services to a client. This is distinct from direct employment as the workers remain under the agency's employment or engagement. Similar to the contractor provisions, we submit that the interpretation and application of the employment agency provisions have expanded beyond their original and intended scope, inadvertently capturing emerging business models and industries that were never intended to be included when the legislation was drafted. In particular, industries such as cleaning and security have been adversely impacted by this broad interpretation. Further, recent court decisions seemingly create the potential to more broadly impact many commercial outsourcing arrangements.

As mentioned above, we have seen the courts place limits on the wide-reaching scope of employment agency provisions through establishing the 'in and for' test in *UNSW Global*. This test looks at whether services provided are 'in and for' the conduct of a client's business, and if they are, the relationship would be deemed an employment agent relationship.

Unfortunately, the effectiveness of this purposive approach has been undermined by subsequent decisions, including *Bonner v Chief Commissioner of State Revenue* [2022] NSWSC 441, *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302 and *XL Retail Services P/L v CCSR* [2025] NSWCATAD 22. These cases have shifted towards a more literal interpretation of the provisions, diminishing the practical value of the 'in and for' test.

We submit that the original intention of the provisions was to catch scenarios where workers were provided to be utilised by the client in the client's business, The provisions were not intended to catch scenarios where the workers were engaged in the business of the "putative" employment agent providing contracting or consulting services to the client, as in the *UNSW Global* case.

However, under current interpretations, entire sections of outsourcing engagements and construction contracting could now potentially fall within the employment agent rules, leading to outcomes that diverge significantly from the provisions' original purpose.

Recommendation:

- We recommend revision of the legislation to incorporate a test similar to the 'in and for' test. This would clarify that the provisions do not apply where workers are engaged in a business

conducted by the party engaging them, except in cases where the business is solely focused on the supply of labour.

- We recommend limiting the application of the provisions to businesses with the Labour Supply Services code within the Australian and New Zealand Standard Industrial Classification (ANZIC). This targeted approach would narrow the scope of the provisions, preventing the unintended capture of modern business arrangements that where not originally contemplated.