Submission No 37

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

Organisation: Chief Commissioner of State Revenue, NSW

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The Director
Portfolio Committee no. 1 – Premier and Finance
Parliament House, Macquarie Street
SYDNEY NSW 2000

By email: portfoliocommittee1@parliament.nsw.gov.au

Dear Director

I refer to the email of 16 December 2024 from the Chair of the NSW Legislative Council's Portfolio Committee no. 1 – Premier and Finance, the Hon. Jeremy Buckingham MLC, inviting me to make a submission to the Inquiry into the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007* (the Inquiry). I thank the Committee for the opportunity to make a submission.

Please find enclosed my submission to the Inquiry.

Revenue NSW has responsibility for administering the State's taxation laws as written, fairly and impartially. Tax policy is led by the Treasurer, the Hon. Daniel Mookhey MLC and his department, and it would not be appropriate for me to offer policy advice or make recommendations of a policy nature to the Committee.

Additionally, I would also like to highlight that payroll tax legislation is largely harmonised across states and territories. Any potential legislative change in NSW needs to be carefully considered in the context of the harmonised framework.

Yours sincerely

Scott Johnston
Deputy Secretary
Commissioner of Fines Administration
Chief Commissioner of State Revenue

Date: 07/02/25

REVENUE NSW SUBMISSION

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

Introduction

This Submission to the Legislative Council inquiry into application of the contractor and employment agent provisions in the *Payroll Tax Act 2007* (**Inquiry**) will detail key matters relevant to the Inquiry:

1. the legislative framework including the harmonisation of payroll tax across jurisdictions,
2. history and policy underpinnings of payroll tax including the contractor and employment agent provisions,
3. basic operation of the contractor and employment agent provisions,
4. administration and compliance matters including guidance,
5. significant case law, and
6. payroll tax issues posed by the on-demand and gig economies.

1. Legislative framework

Payroll Tax Act 2007

The *Payroll Tax Act 2007* (the **Act**) governs the taxation of wages and certain other forms of remuneration in NSW.

Payroll tax in NSW is a tax payable by employers on gross Australian wages that they pay their workers. Payroll tax in NSW is calculated only on total wages above $1,200,000 for a financial year. The payroll tax rate is 5.45%. In 2024-25, Revenue NSW is expected to collect over $12.9 billion in payroll tax.

Wages are liable to payroll tax if they are "*taxable wages*", but not if they are "*exempt wages*" or paid by an exempt body or organisation.

Part 3 of the Act sets out the types of wages that are taxable, subject to any exemptions that may apply. These extend from basic salaries paid to an employee to various forms of remuneration including superannuation contributions, commissions, bonuses, allowances, fringe benefits, directors' fees, termination payments, certain payments to contractors and payments made under an employment agency contract.

It is important to stress that the Act's reach is not confined to wages paid to persons who are engaged under a traditional contract of service; that is, persons who are employees after applying common law employee tests to the arrangements. Many employers engage workers outside of traditional employment arrangements, including under "*relevant contracts*" and "*employment agency contracts"*. The payroll tax legislation has specifically catered for these arrangements for some time: since 1985 (in the case of employment agents) and 1986 (in the case of contractors).

For payroll tax purposes:

- ***Relevant contracts*** may arise when workers are engaged as contractors rather than employees and certain conditions are met. Payments made by an employer to contractors are liable for payroll tax unless the contract is an excluded class of contract.

- ***Employment agency contracts*** may arise when an employment agent procures the services of a service provider for a client of the employment agent. The employment agent may be liable for payroll tax.

These arrangements will be discussed in further detail below.

Harmonisation of payroll tax legislation in Australia

The payroll tax regime was harmonised across most states and territories in 2007 to align the treatment of core payroll tax requirements. Harmonisation reduced costs on businesses by removing the need to navigate completely different payroll tax regimes. Any potential legislative changes in relation to payroll tax would need to consider the largely harmonised framework applying to payroll tax and the impact this may have on businesses operating in different states and territories or deciding which state or territory they should operate in.

Harmonisation was initially driven by the NSW and Victorian Governments as a means of reducing red tape for businesses, particularly those that operated across borders. NSW and Victoria each enacted a rewritten Payroll Tax Act with effect from 1 July 2007. Sections of the Payroll Tax Act which were harmonised included:

- the meaning of "*taxable wages*"
- when payroll tax is imposed
- the treatment of fringe benefits
- the treatment of superannuation contributions and termination payments
- the contractor provisions
- the grouping of certain entities
- employment agents
- registration and returns
- adjustments, and
- some exemption provisions.

Other sections, for example those concerning rates and thresholds and the grandfathering of certain exemptions, were included in Schedules of the Act as state specific. Subsequently, payroll tax harmonisation was endorsed by the Council of Australian Governments (**COAG**) as one of 27 projects identified in *The National Partnership Agreement to Deliver a National Seamless Economy* adopted by COAG on 29 November 2008. Under the agreement, the States and Territories worked to produce a nationally coordinated approach in relation to payroll tax. The template legislation enacted by Victoria and NSW was adopted by most jurisdictions. Although Western Australia and Queensland decided not to adopt this legislation in totality, a significant degree of harmonisation was nonetheless achieved.

As noted above, harmonisation of payroll tax legislation was pursued to minimise costs to businesses operating in more than jurisdiction. Businesses and tax practitioners continue to emphasise its importance.

Any proposed amendments by NSW to its legislation would therefore require consultation with those jurisdictions that adopted the NSW and Victorian template legislation if harmonisation among these jurisdictions is to be retained.

2. History of payroll tax in NSW and policy underpinnings

Payroll tax in Australia was first introduced in 1941 by the Commonwealth Government. It was levied as a tax on employers based primarily on "wages" they paid their employees, but even at this stage it also extended to commissions, director payments and certain prescribed contracts.

In 1971, payroll tax was transferred to the states and territories as part of broader reforms to revenue sharing arrangements between jurisdictions. NSW's legislation was the *Pay-roll Tax Act 1971*. Again, payroll tax was primarily focused on taxing wages paid to common law employees, reflecting the practices of medium and larger businesses whose workforces were predominantly common law employees. However, over time, the mechanisms by which labour was procured continued to evolve. Businesses increasingly made use of contractors and employment agents rather than maintaining workforces made up exclusively or predominantly of common law employees. As the law at the time imposed payroll tax primarily on wages paid by an entity to its common law employees, these shifts in the procurement of labour posed a potential risk to public revenue. The law therefore needed to be modernised to reflect changing employment practices.

In 1985, specific provisions were brought in to deal with employment agents, and in 1986 provisions applying to "certain contracts" were introduced. These provisions were essentially designed to ensure that, where workers are engaged to perform work for an entity, the payments made to those workers will, subject to meeting threshold requirements, be liable to payroll tax if the workers are in an employment-like relationship with the entity.

Over many decades, the policy underpinning the payroll tax legislation has therefore remained largely intact. That is, payroll tax is to be levied on remuneration paid to workers who are employees or who, for all intents and purposes, are in an employment-like relationship with that business. While the payroll tax legislation has been updated from time to time to ensure that the original policy objectives continue to be met amidst changes in the way labour is procured, the legislation has remained largely stable since the introduction of the employment agent and contractor provisions.

3. Operation of the contractor provisions and employment agent provisions

Contractor provisions – Part 3, Division 7 of the *Payroll Tax Act 2007*

Payments to contractors may be liable to payroll tax. In summary, under the "*relevant contract*" provisions, payments made to contractors will be liable if –

1. There is a *relevant contract* – that is, a contract, agreement or arrangement under which the contractor provides its services, or the services of other workers, when performing work for the business[1];

2. Amounts paid or payable by a business to the contractor are for or in relation to the performance of work relating to a relevant contract[2]; and

[1] Section 32(1)
[2] Section 35

3. None of the excluded classes of contract under the Act apply[3]. These "exemptions" are designed to capture scenarios where the contractor is not in an employment-like relationship with the business for whom it is providing services. Thus, the services may be of a limited or transient nature, or incidental to the activities of the business, such as where the type of work provided by the contractor is not normally required by the business or is for a relatively short period of the year.

Where such payments to contractors are deemed wages and liable to payroll tax, the contractor is deemed to be an employee[4] and the business that engages the contractor is deemed to be an employer[5].

Whether payments to contractors are liable for payroll tax will depend on the circumstances of each arrangement between the contractor and the business. The starting point is to ascertain whether the worker is actually a common law employee (notwithstanding that the worker may be engaged under a contract, which refers to the worker as a "contractor"). If the worker is not a common law employee but falls under the relevant contract provisions, then consideration must be given to whether any of the excluded classes of contract apply.

In many cases, determining whether a worker is a common law employee will be relatively straightforward; in some cases, that determination will be more complex, requiring consideration of a range of factors including the following:

- *Control and direction*: The right of a business to control or direct how, where, when and who is to perform the work in question is generally a strong indicator of an employment-like relationship. In some instances, the business may not exercise much control or direction, but their right or authority to do so is significant.

- *Contract and practical relationship between parties*: The terms of the contract between the two parties provides evidence of the nature of the relationship. However, the written contract may not be determinative. It is necessary to consider all the facts and circumstances of the relationship between the parties to the contract at the time of entering into the contract and after it has been executed.

- *Contracts to achieve a 'given result'*: A contract that is focused on providing a given result rather than the provision of labour can be an indicator of a relationship that is not employment-like. This is particularly the case where the contract is for a fixed price, or where payment is made subject to meeting various milestones specified in the contract or at its completion.

- *Independent business*: If a worker is engaged by a business in the ordinary course of operating the worker's own independent business, this will generally indicate that the worker is not effectively engaged as an employee. The issue to be considered is whether the worker is conducting their own business as distinct from participating in the business of the entity. Some of the factors that assist in determining this include (but are not limited to) how the worker sources or obtains clients, whether the worker bears risk and supplies their own materials or incurs expenditure in earning the income, and whether the worker can delegate the work.

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[3] The excluded classes of contract are set out in section 32(2). This provision is subject to sections 32(2A) & (2B).

[4] Section 34

[5] Section 33

- *Power to delegate:* The power to delegate is a factor that generally indicates that the worker is a genuinely independent contractor. In this context, the power to delegate refers to the capacity of the worker to engage others to undertake the services for which the worker was engaged. In these circumstances, the worker is the party responsible for paying the other persons.

- *Risk*: A worker who bears the commercial risk and responsibility for any poor workmanship or injury sustained in the performance of the work will tend to indicate that the worker is a genuinely independent contractor. An independent contractor typically carries their own insurance and indemnity policies.

- *Provision of tools and equipment:* Providing tools and equipment and incurring overheads will generally indicate that the worker is an independent contractor.

None of these factors will, in and of themselves, be determinative. As consistently held by the courts, it is the contract and the totality of the relationship which must be considered. If after considering all relevant facts, it is established that a common law employer/employee relationship exists, then, provided the overall Australian wages exceeds the threshold, a payroll tax liability will arise. If it is determined that a contractual relationship exists, then payroll tax will also be payable unless any of the contractor exemptions apply.

Employment agent provisions – Part 3, Division 8 of the *Payroll Tax Act 2007*

The employment agent provisions are designed to capture situations where businesses (clients) engage a service provider through a third party rather than directly employing or contracting with them. The provisions apply when there is an '*employment agent contract*' between the employment agent and the client[6], where the service providers form part of the client's workforce and work in a similar way to employees. If there is such a contract, the employment agent is deemed to be the employer[7] and the workers who perform the work for the agent's client are deemed to be employees[8]. The employment agent incurs the payroll tax liability.

The existence of an employment agency contract between the client and the agency will essentially depend on whether the service providers procured by the agency perform work '*in and for the conduct of the client's business*' (*UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852). This means that the service provider performs the work in much the same way as would an employee of the client. The totality of the relationship between the employment agent and its client and the relationship between the agent and the service providers must be considered.

Key factors to be considered in determining whether a contract is an employment agency contract are:

- *Continuity or regularity of services performed by the workers:* If the type of services performed by a worker are ordinarily required for the operation of the client's business or for continuous or regular periods, a contract may be an employment agency contract.

- *Control and direction of workers including time and place of work:* An arrangement is likely to be an employment agency contract if there is a high degree of day to day control

[6] Section 37
[7] Section 38
[8] Section 39

exercised by the client over the time and place of work, and the way in which the worker provides services 'in and for the conduct of the client's business'. Control may be exercised directly or indirectly, such as specifying customer requirements or tasks to be performed or requiring workers to comply with the client's operating procedures that apply to employees.

- *Perceived employees:* A factor indicating that a worker is working in and for the conduct of the client's business is where there is no real or apparent distinction between the client's employees and the procured workers, including wearing the client's uniform, liaising with customers and other staff of the client, and use of the client's facilities available to staff, such as a staff dining room, canteen and toilet facilities.

- *Material and equipment:* If an agent procures workers to work in and for the conduct of the business of a client, the supply of materials and equipment by the agent under the contract does not mean the contract cannot be an employment agency contract.

- *Services that are incidental to core business:* The employment agency contract provisions may apply if workers are procured to work in and for the business of a client to perform ancillary, incidental or non-core services, or where services are performed outside normal business hours.

- *Outsourcing of a business function:* Outsourcing may give rise to an employment agency contract, especially if employees who previously performed the function are transferred to a contractor along with the function.

As with the contractor provisions, none of these factors will, in and of themselves, be determinative in establishing whether service providers are working in and for the client's business. That said, allowing for differing arrangements, certain factors, such as the degree of control that the client exercises over the service providers, will tend to carry weight in making any determination.

4. Administration of payroll tax

Liability for payroll tax arises at the time wages are paid or become payable. As payroll tax is a self-assessed tax, Revenue NSW starts from a position of trust that taxpayers across all industries generally want to do the right thing.

As with all taxes, compliance activities are undertaken for payroll tax to support revenue integrity. If an audit discloses that tax that is payable has not been paid, Revenue NSW may issue an assessment requiring the payment of tax calculated from the date the liability arose. If an assessment has been issued and Revenue NSW identifies an underpayment of tax, it may issue a reassessment up to 5 years after the initial assessment (or a longer period under certain circumstances). Interest and penalty tax may be imposed depending upon the circumstances.

Notwithstanding Revenue NSW's powers to undertake compliance, its focus is very much on voluntary compliance – that is, encouraging and supporting taxpayers to pay their taxes. To this end, Revenue NSW places considerable emphasis on:

- up-front education so that taxpayers and practitioners have the tools to enable them to meet their payroll tax obligations; and

- allowing flexibility in payment arrangements, particularly in cases where taxpayers may be experiencing financial difficulties.

Education

To assist taxpayers in understanding their payroll tax obligations and liabilities, Revenue NSW provides educational resources on the Revenue NSW website which are accurate and detailed enough for both taxpayers and their professional representatives. Revenue NSW also issues revenue rulings and Commissioner's practice notes. Revenue rulings, which are broadly harmonised across jurisdictions, provide guidance on the interpretation of provisions within the Act. Commissioner's practice notes provide additional guidance through practical examples or scenarios.

There are a number of revenue rulings and Commissioner's practice notes which provide guidance on the contractor provisions as they apply to businesses generally:

- Determining whether a worker is an employee (Revenue Ruling PTA 038)
- Payroll tax contractors (Commissioner's practice note CPN 007)
- Payments to owner-drivers exemption (PTA 006)
- 180-day exemption (PTA 020)
- 90-day exemption (PTA 035 v2)
- Services performed to the public generally exemption (PTA 021 v2)
- Services not ordinarily required exemption (PTA 022)
- Services ancillary to the supply of goods exemption (PTA 033).

Occasionally, additional industry-specific guidance is required, such as where court decisions or new legislation necessitate further information being provided for an industry. Such guidance has been published in relation to medical centres and businesses providing financial services under an Australian Financial Services Licence and credit services under an Australian Credit Licence:

- Payroll Tax Act – Relevant Contracts – Medical Centres (PTA 041)
- Relief to Medical Centres (CPN 036v2)
- Payroll Tax Act – Relevant Contracts – Australian Financial Services Licences and Australian Credit Licences (CPN 016v2).

Revenue rulings and Commissioner's practice notes in relation to employment agency contracts have also been published, including:

- Employment Agency Contracts Guidelines (CPN 005 v2).
- Declaration by exempt clients (PTA 026 v2)
- Chain of on-hire (PTA 027)
- Workers on-hired to government (PTA 028).

The above support materials assist businesses to understand the potential payroll tax implications of different arrangements for procuring labour.

Flexible payment arrangements

Revenue NSW recognises that payroll tax is a cost borne by businesses, and that there needs to be some flexibility afforded to businesses, particularly those which may be experiencing financial difficulties.

Businesses are generally required to pay payroll tax monthly unless their annual payroll tax liability is less than $20,000 in which case they may pay annually or monthly.

If a business is unable to pay its payroll tax liabilities, Revenue NSW may extend the time for payment or accept payment by instalments. Interest may be remitted in certain instances.

Revenue NSW is always open to exploring tax payment options with businesses that are experiencing difficulty in meeting their obligations.

5. Case law related to contractor provisions and employment agent provisions

A number of court decisions have considered the application of the contractor provisions and employment agent provisions in different contexts. Briefly outlined below are some of the important cases.

In each of these cases, the courts applied the relevant provisions to the facts. Contrary to what has been suggested by certain parties, none of these cases resulted in new taxes or changed who is liable for tax. Consequently, it is also incorrect to suggest that Revenue NSW retrospectively imposed liabilities in relation to these matters: the liability arises at the time the taxable wages are paid or become payable, and Revenue NSW may issue an assessment requiring the payment of tax calculated from the date of liability.

Contractor provisions

The cases outlined below centre on the financial services sector and medical centres. Although the NSW Parliament has recently passed legislation providing payroll tax relief to general practitioner medical centres subject to meeting bulk billing requirements (*Revenue Legislation Amendment Act 2024*), the two medical centre related cases below continue to provide guidance on the application of the contractor provisions to businesses generally.

> *Bridges Financial Services Pty Ltd v Chief Commissioner of State Revenue* [2005] NSWSC 788 (***Bridges***)

The Bridges matter was determined under provisions (*Payroll Tax Act 1971*, section 3A) which were a precursor to the current contractor provisions.

In Bridges, representatives of Bridges Financial Services were providing financial planning services to their clients, exclusively for Bridges. Bridges was selling financial products and paid commissions to the financial planners who generated the business. The financial planners were tied to Bridges and were required to follow detailed procedures.

The Chief Commissioner contended that Bridges was liable for payroll tax on the commissions paid to the financial planners on the basis that the planners were employees of Bridges, and alternatively that they provided services under a relevant contract.

In relation to the contractor provisions at that time, the Supreme Court referred to comments made in the second reading speech for the equivalent Victorian legislation: “In essence, the legislation is intended to catch those relationships where the sub-contractor works exclusively or primarily for the one person and where the object of the contract between the parties is to obtain the labour of the sub-contractor.” It went on to note: “The structure of the *Payroll Tax Act 1971*, s3A 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 is to obtain the labour of that person, is achieved.”

The Supreme Court found that:

1. None of the financial planners were common law employees of Bridges, citing various factors which tended to suggest that the relationship was one of principal and independent agent (eg the planners bore all or most of the expenses of their activities, and were able to sell a business).
2. The planners were providing services to Bridges by recommending a financial plan to a client and, upon the client's instructions, lodging documentation to buy or sell securities in the name of Bridges. The services were work related and Bridges was supplied with them in the course of carrying on its business. While the arrangements between Bridges and the planners were notionally caught by the contractor provisions, most of them were exempt on the basis that the services provided to Bridges fell within the "two or more persons exemption" [9]; specifically, the services were provided by a planner and one or more persons employed by or providing services to the planner.

Loan Market Group Pty Ltd v Chief Commissioner of State Revenue [2024] NSWSC 390 (***Loan Market***)

Loan Market Pty Ltd (**LML**) was a loan broker operating across Australia providing retail mortgage aggregation services and holds an Australian Credit Licence. LML entered into agreements with individual mortgage brokers (**Broker Agreements**). The brokers would find new borrowers and apply for loans on their behalf, and had access to LML's aggregation services for which they would pay a fee. When commissions were paid on the loans to LML by financial institutions, LML would deduct its fees and pay the balance to the brokers.

The key legal issue in Loan Market was whether the Broker Agreements constituted 'relevant contracts' and, if so, whether payments made under the Broker Agreements were liable to payroll tax.

The Court, citing **Thomas and Naaz** (see below) amongst other cases, held that the Broker Agreements constituted relevant contracts. Specifically, the Court found that "the performance by the Assessed Broker of the promises to undertake work in a particular way could be properly characterised as the performance of a service to LML and this is so notwithstanding that it is also the performance of a service to the client for whom the loan is arranged". In so doing, the Court reaffirmed the proposition that the provision of services to a person under a relevant contract can arise notwithstanding that this involves, at the same time, the provision of services to another party.

Similar to Bridges, LML argued that their Broker Agreements fell within some of the exempt categories of contract. The Court distinguished Loan Market from Bridges noting differences in the nature of the contractual relationships and specific terms of agreements.

Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd [2019] VSCA 197 (***Optical Superstores***)

This case concerned 'tenancy agreements' between Optical Superstore and optometrists under which the optometrists provided services to customers who would pay Medicare benefits and private consultation fees to the relevant store. At the end of the month, Optical Superstore would remit the amounts to the optometrists less a fee for 'rent' based on the time the optometrists provided their services at the relevant Optical Superstore stores.

[9] Payroll Tax Act 1971, section 3A(f). The current equivalent provision is section 32(2)(c).

The Tribunal found that the agreements between the Optical Superstore and optometrists were relevant contracts, but the amounts paid to them were not 'paid or payable for or in relation to the performance of work relating to a relevant contract' because those amounts were paid to the optometrists from an express trust.

While a Supreme Court appeal dismissed the Commissioner's appeal and upheld the Tribunal's decision, the Court of Appeal allowed the Commissioner's appeal and held that the ordinary meaning of 'payment' embraced a payment of money to a person beneficially entitled to that money. In a similar vein to *Loan Market*, the Court emphasised that a party to a relevant contract may be providing services to the other party to the contract even though it may be providing services to another party at the same time. The optometrists were providing services to the stores by servicing customers of those stores, and were receiving payments for or in relation to the work performed.

> *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259 (***Thomas and Naaz***)

In 2021, a NSW Tribunal case, *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259, found that the relevant contractor provisions applied to medical centre arrangements which were similar to the arrangements in Optical Superstores.

Thomas and Naaz Pty Ltd (Thomas and Naaz) operated three medical centres and entered into written agreements with general practitioners to use rooms, access shared administrative and medical support services and see patients at the medical centres. Patients did not pay the practitioners directly for the medical service; instead, the medical centre would submit Medicare claims and direct Medicare to pay Thomas and Naaz. Thomas and Naaz retained 30% of the amounts as a fee for the services provided to the practitioners and returned the remaining 70% to the practitioners.

In this case, the Tribunal considered the issue of whether payments of 70% of the Medicare benefit constituted wages and would therefore be subject to payroll tax. This required consideration of whether the agreements were relevant contracts, and whether the payments were taken to be wages paid or payable for or in relation to the performance of work relating to the agreements.

The Tribunal accepted the reasoning in Optical Superstores and found that the agreements satisfied the 'performance of work' requirement. Specifically, the agreement between the medical centre and the doctors secured the provision of the doctors' medical services to the patients of the medical centre. Where such services were a necessary part of the medical centre business, it follows that the doctors provided services not only to the patients but also to the medical centre.

The Tribunal also concluded that the payments made by Thomas and Naaz to the general practitioners were for or in relation to the performance of work under the agreements with the practitioners, and were therefore liable to payroll tax.

The Tribunal's decision was upheld on appeal to the NSW Court of Appeal: *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWCA 40

> *Uber Australia Pty Ltd v Chief Commissioner of State Revenue* [2024] NSWSC 1124 (***Uber***)

The Chief Commissioner assessed Uber for payroll tax on payments made to drivers, arguing that the contractor provisions applied to deem the payments as 'wages' for payroll tax purposes. The Supreme Court (Hammerschlag J) held that the contracts between Uber

and drivers were relevant contracts with the drivers providing three services to Uber under the contract, driving riders, rating riders and referring people to become Uber drivers. None of the exemptions applied outright, specifically:

- The ancillary to goods exemption (with the goods being the driver's vehicle)[10] only applied to the service of rating, and not driving or referring. Thus, driving or referring were additional services that were not exempt and the exemption was excluded entirely[11].
- The 90 day exemption[12] was not established.
- The services to the public exemption[13] (on the basis that some drivers' vehicles were registered taxis or hire cars) was not established due to a lack of evidence by Uber.
- The two or more employees exemption[14] was accepted in relation to at least some of the drivers.

However, the Supreme Court held that the amounts paid or payable by Uber were not 'for or in relation to' work done by the drivers under the relevant contract. The Court found that, although there was some form of relationship between Uber's payment to the driver and the work performed by the driver, there was no element of reciprocity or calibration between the driver and Uber, or the Uber and the rider. In the Court's view, Uber was a merely a payment collection agent: it was the rider, not Uber, that paid the driver for the work performed. Accordingly, the amounts could not be deemed wages for the purposes of payroll tax.

The decision is subject to an appeal by the Chief Commissioner.

The above cases underscore the importance of businesses carefully assessing their contractual arrangements with workers' and not relying on contractual labels, as such arrangements may be deemed relevant contracts, with the payments made under those contracts being potentially liable for payroll tax.

Employment agent provisions

UNSW Global Pty Ltd v Chief Commissioner of State Revenue [2016] NSWSC 1852.

In this case, UNSW Global Pty Ltd (**UNSW Global**) provided expert services to clients (such as law firms) by engaging contractors who were experts in their relevant field. The expert would provide a quote to UNSW Global who would then charge the client a fee including a mark-up.

In interpreting the provisions, the Supreme Court determined that the definition of an employment agency contract (i.e. a contract under which a person (the employment agent) *"… procures the services of another … for a client of the employment agent*") can be read as meaning a contract under which a person procures the services of another person in and for the conduct of the business of the employment agent. Whether the worker is to be characterised as an employee or a contractor, the employment agent contract provisions were intended to apply to cases where the employment agent provided individuals who would comprise, or who would be added to, the workforce of the client for the conduct of the client's business.

[10] Section 32(2)(a)
[11] See section 32 (2B)
[12] Section 32(2)(b)(iii)
[13] Section 32(2)(b)(iv)
[14] Section 32(2)(c)

The Court determined that the contractors working for UNSW Global did not work 'in and for' the conduct of the clients' businesses and so the employment agency provisions did not apply.

> *Chief Commissioner of State Revenue v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302

Integrated Trolley Management Pty Ltd (**ITM**) provided trolley collection services to supermarkets by engaging subcontractors. The Supreme Court determined that the facts did not meet the 'in and for' test from *UNSW Global Pty Ltd* and so the employment agency provisions did not apply. However, the Court of Appeal overturned the Supreme Court's decision. The Court of Appeal considered the following key issues:

1. *Whether there was an employment agency contract*. The Court of Appeal rejected the Supreme Court's view that an employment agency contract can only exist between the agent and the service providers, and found that the contracts between ITM and the supermarkets were employment agency contracts as they involved ITM providing the subcontractors to the supermarkets. The statutory purpose of the employment agent provisions is to create a payroll tax liability where the party which might have been the employer (and thus liable for tax on wages to its employees) is the client and its liability is transferred to the employment agent. It is the absence of a contract of employment between the service provider and the client which engages the provisions. The purposive approach to statutory construction would also support the employment agency contract as being the contract between the "client" and the "employment agent".

2. *Whether the services provided by the subcontractors were 'in and for' the conduct of the supermarkets' businesses*. This is a specific test (used in UNSW Global) to determine if the services fall under the employment agent provisions. The Court of Appeal accepted the Chief Commissioner's submission that, in addressing the statutory test, the individuals who work for the client should do so in much the same way as would an employee of the client. That meant the work would involve a degree of regularity and continuity, and where the nature of the work was to a significant degree under the control and direction of the client. The degree of control reflected in the employment agent contract supported a view that the trolley collection services were 'in and for' the conduct of the supermarkets' businesses.

This decision provides further guidance on the interpretation of the employment agent provisions and highlights that businesses that engage contractors to provide services that are integral to their client's operations may be considered 'employment agents' for payroll tax purposes even if they do not consider themselves to be traditional employment agents.

6. Payroll tax issues posed by on-demand and gig economy

As businesses in the on-demand or gig economies do not typically engage common law employees, the contractor provisions or employment agent provisions may come into play for those businesses.

Some of the excluded classes of contract may apply to gig industries depending on the facts of individual cases. For instance:

- where the workers provided services to the employer for less than 90 days in a financial year
- where the workers provided their services to at least another employer in that financial year, or
- where the workers' services are ancillary to the conveyance of goods by a vehicle provided by the person conveying them.

However, as with any business model, whether a business in the on-demand or gig economy will be liable for payroll tax under the contractor or employment agent provisions will depend on the particular arrangements and agreements that business has with its workers and other parties. The Uber decision (outlined above) illustrates some of the issues which may arise in applying the contractor provisions to a gig business, noting that the matter dealt with one particular business model and is subject to appeal by the Chief Commissioner of State Revenue.