

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

Organisation: Australian Security Industry Association Ltd (ASIAL)
Date Received: 11 February 2025



The peak body for security professionals

Industry Submission

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

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About the Australian Security Industry Association Limited (ASIAL)

ASIAL is the peak national body representing security professionals in Australia. The Association is comprised of over 2,700 members ranging from large corporate entities to small and medium sized operations.

ASIAL is:

- a Registered Organisation of Employers under the *Fair Work (Registered Organisations) Act 2009*
- an accredited Registrar under the Australian Communications & Media Authority (ACMA) *Cabling Provider Rules*

Australian Security Industry Association Limited (ASIAL)

Submissions re Inquiry into the application of the contractor and employment agent provisions in the Payroll Tax Act 2007

Date: 11 February 2025

Submitted to: Portfolio Committee No.1 Premier and Finance

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

Parliament of New South Wales

1. Purpose of Submission:

The purpose of this submission on behalf of the security industry is to inform the Committee of the specialised services provided by protective security to their clients and the training and licensing required by regulators of security guards. ASIAL has formed the view that RevNSW does not have a full understanding of the specialist services provided by the security industry which are separate and distinct from the client's business and do not operate in or as part of that business.

Our concern arises from the conduct of Revenue New South Wales (RevNSW) in applying an over-reaching interpretation of the employment agency provisions in the *Payroll Tax Act 2007* (NSW) (the Act). The employment agency provisions under the Act are intended to impose payroll tax on payments to contractors if the contractors' workers are working essentially as employees of a client's business. The purpose is to stop payroll tax avoidance where providers use contractors instead of direct labour to avoid having to pay payroll tax on employee wages.

However, RevNSW has recently been applying a broad interpretation of those provisions to impose payroll tax liability in circumstances where contractor workers could not be considered as working in the position of an employee in relation to the client. We would assert that the provisions are not operating as they were intended. We understand that RevNSW has been targeting various industries including cleaning, building and construction, medical centres and more recently, the security industry to raise payroll tax assessments on subcontractor payments.

ASIAL submits that RevNSW's interpretation of the application of the employment agency provisions to the provision of security guards is flawed. Security guards do not function merely as a pool of labour that is made available to security industry clients, they are distinct professionals, whose roles and responsibilities are regulated by the *Security Industry Act 1997* (NSW).

The operation of the strict regulatory requirements that operate in the security industry prohibit organisations providing security services from relinquishing to others the control of the security guards performing those services. By reason of that regulatory regime, organisations providing security services are expressly prohibited from allowing their security guards to perform services in a manner that would 'help the client to conduct its business in the same way, or in much the same way, as the client would conduct its business through an employee' (*CCSR V Integrated Trolley Management Pty Ltd* [2023] NSW CA 302). As such, the legislative framework within which security businesses operate, is at odds with RevNSW's view that Security providers are employment agencies.

ASIAL has seen a significant change in the understanding of the employment agency provisions under the *Payroll Tax Act* with RevNSW applying a novel interpretation of the application of those provisions to make assessments on subcontractor payments that precede that interpretation. The security industry is concerned that this 'retrospective' application of fines and interest violates the principle of legal certainty. Retrospective assessments and fines violate this principle because they impose penalties for conduct that was not clearly illegal at the time it occurred.

Security businesses have acted in good faith, relying on the principle of legal certainty. They have made financial and/or operational decisions based on the laws that were in place when they acted and arguably remain so. To shift the approach now and penalise businesses retrospectively for relying on what was, and is, good law without legislative clarity, violates the legal certainty principle and undermines confidence in the state tax system. We would request that Revenue NSW should be exercising discretion and leniency for taxpayers in the industry as the scope of the law has been in a state of fluctuation.

If found to be an employment agency, the amounts assessed (which may include penalties and interest) become legally binding debts payable even if the objection process is initiated. In addition, a reverse onus of proof applies so that RevNSW's assessment stands unless successfully challenged the assessment which will take several years at enormous legal expense.

Background:

- Security services are not integral to the clients' business in the same way that trolley management was to the supermarkets.
- Whilst security services are provided on a regular and consistent basis to many of our member's clients, in many cases the security services are not essential; for the client's business to operate (i.e. a supermarket could operate without a security guard for a day or longer and many do).

- Revenue NSW appears to focus on security providers to the retail industry, when in fact private security is provided to every type of business including but not limited to:
 - Government at all levels.
 - Hospitals.
 - Office Buildings.
 - Places of worship.
 - Stadiums/event facilities.
 - Educational Institutions, schools and Universities.
 - Construction sites.
 - Manufacturing facilities.
 - Financial Institutions and
 - Defence facilities.
- Where possible members operate a direct employee model (as opposed to contractors being the first point of call when staffing a particular job).
- The degree of control and supervision is substantially different. The security entity is responsible for the supervision and direction of the individuals, and carries the liability if something goes wrong, not the client
- In most arrangements, the services provided by the Security business could not have been undertaken by employees of the client (due to licensing requirements) in contrast to trolley management.
- Security guards undergo significant training, are fingerprinted and must qualify to hold a security licence. The comparison with trolley collectors is entirely inaccurate.

2. Terms of Reference

That Portfolio Committee 1 - Premier and Finance inquire into and report on the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007*, and in particular:

- (a) the provisions in Division 7 of Part 3 of the *Payroll Tax Act 2007* on contractors
- (b) the provisions in Division 8 of Part 3 of the *Payroll Tax Act 2007* on employment agents
- (c) revenue rulings and Commissioner's practice notes issued by Revenue NSW addressing the contractor and employment agencies provisions in the *Payroll Tax Act 2007*
- (d) decisions of courts in cases involving the application of the contractor and employment agencies provisions in the *Payroll Tax Act 2007*
- (e) the applicability of the contractor and employment agent provisions in the *Payroll Tax Act 2007* on particular industries including the on-demand and gig economy, and
- (f) any other related matter.

The terms of reference were self-referred by the committee on 26 November 2024.

Relevance to Terms of Reference:

The Security Industry provides specialist security services to every facet of economic activity both public and private.

Each of the Terms of Reference, (a) to (e) inclusive have direct relevance for Security Industry Protective Service Providers

Response to Terms of Reference:

On behalf of its members and the Security Industry in New South Wales ASIAL is most concerned that the Inquiry provide clarity and certainty particularly in relation to Revenue NSW interpretation and application of revenue rulings and Commissioner's practice Notes and Court Rulings including but not limited to the following Cases:

- *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852
- *Securecorp (NSW) Pty Ltd v Chief Commissioner of State Revenue* [2019] NSW 744
- *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190
- *Integrated Trolley Management Pty Ltd v Chief Commissioner of State Revenue* [2023] NSWSC 557

3. Main Submission

3.1 Definition of Employment Agency

The classification of security protective services arrangements as employment agency contracts under the *Payroll Tax Act 2007* (NSW) (PTA) requires satisfying the criteria outlined in Section 37. Central to this determination is whether the security personnel are *working "in and for the conduct of the client's business,"* as clarified in *UNSW Global Pty Ltd v Chief Commissioner of State Revenue* [2016] NSWSC 1852 (*UNSW Global*).

The decisions in *E Group Security Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWSC 1190 (*E Group*) and *Chief Commissioner of State Revenue (NSW) v Integrated Trolley Management Pty Ltd* [2023] NSWCA 302 (*ITM*) emphasise that determining whether personnel work "in and for the conduct of the client's business" requires a fact sensitive analysis of the specific contractual and other arrangements.

Drawing on these authorities, ASIAL submits that the standard security industry business model does not fall within the scope of the employment agency provisions.

KEY GROUNDS

Working ‘in and for’ the Client’s Business

For an arrangement to create an employment agency contract, personnel must work ‘in and for’ the conduct of the client’s business. The *UNSW Global* decision clarified that this requires integration into the client’s workforce in a manner akin to employment. We make the following contentions to support our perspective:

- **Independence:** Personnel that deliver services to security industry clients (including direct employees and subcontractor employees) are not integrated into the business operations of clients. They operate independently under the direction and operational control of the security provider, following standard operating procedures (SOPs) typically prepared by the security provider. In the case of most security providers, all direct employees and subcontractor personnel are also required to comply with company-developed operational protocols or “Employee Standing Instructions” set out in a handbook that is provided to all personnel.

It is usual for clients to review and approve of SOPS and may provide broad performance expectations, but clients do not have authority to manage the providers’ personnel.

- **Ancillary Services:** The services provided by security personnel are not part of the clients’ core business but instead are supportive and ancillary in nature. In the vast majority of cases, they are not an addition to the businesses of the relevant clients. They operate as distinct licensed professionals under the direction and control of the security provider and deliver distinct services. For example:
 - A security guard at a retail shopping centre or large retail outlet deters theft, manages access control, monitors CCTV and alarms and responds to incidents but does not contribute to retailing activities which form the core business of the client.
 - Similarly at universities, hospitals, office buildings security services support and are ancillary to the businesses of the client but are not intrinsic to the core functions of teaching, research, administrative work or healthcare delivery.

In cases where the security officers supplement client security teams, they typically perform distinct services separate from the client’s internal operations. In addition, in such cases, these security officers are usually direct employees of the private security provider and rarely employees of subcontractors.

- **Case Law Support:** The E Group decision emphasised that ancillary services do not meet the threshold for *“in and for the conduct of the client’s business.”*

Control and Direction under the Security Industry Act 1997 (NSW)

The *Security Industry Act 1997* (NSW) establishes a regulatory framework that inherently prevents security personnel from being integrated into a client’s workforce:

- section 38(1) prohibits a licence holder from delegating the carrying on of a security activity to an unlicensed party; and
- the provision reinforces that the master licence holder must retain operational and directional authority over the personnel performing the security services. The statutory requirement ensures that unlicensed clients cannot legally assume control over security personnel or dictate their activities beyond the scope of agreed contractual performance standards. Clients cannot legally exercise the degree of control necessary to classify security personnel as working *“in and for”* the conduct of the clients’ businesses.
- The security entity is responsible for the supervision and direction of the individuals, and carries the liability if something goes wrong, not the client.

While in some cases, clients may, themselves hold a security licence, these instances are rare. Even in such cases the contractual and operational arrangements typically ensure that the security providers’ business retains overall authority and responsibility for the services provided. This is consistent with the requirements of the *Security Industry Act 1997* (NSW), which safeguards the operational independence of licenced security providers and holds them entirely responsible for observance of the *Security Industry Act 1997* (NSW).

The statutory framework effectively prevents clients from exercising day to day operational control or integrating security personnel into their workforce

In the *E Group* case, the court relied on the licensing requirements to find that operational control remained with the security company, not the client. As noted by Ward J:

“There is some level of direction or instruction reserved to the client under the contractual documentation that was in evidence though, as noted above, I do not accept that it would extend to the control over or giving of binding instructions as to security decisions of a kind required under the legislation to be made by the security licence holder”.

The above demonstrates the inherent incompatibility between the licensing regime and the requirements for an employment agency contract.

Contractual Arrangements

Client Contracts: Contractual terms with clients and security firms demonstrate that security personnel provided are not working in and for the conduct of the business. Relevant aspects of these contracts include:

- The agreements define the relationship as service agreements, not ones resembling employment or integration. Personnel are engaged to provide specific security services under the security providers' direction and control, and do not become part of the client's workforce. They obtain instructions from the security provider and report into the providers' site managers or to state operational managers and disciplinary matters are dealt with by the security providers' management. There are some rare cases where security personnel may work alongside a client's security team, (most often performing separate and distinct activities).
- Client contracts typically require the security provider to deliver an agreed scope of services. Any client requests that fall outside contractual terms need to be referred to the security provider for approval and action
- Client contracts typically allocate responsibility for employment related issues of the security personnel to the security provider, including responsibility for:
 - recruitment, hiring, training and licensing
 - payment of wages, superannuation and other entitlements
 - compliance with industrial relations and workplace laws
 - disciplinary processes and performance management

These provisions reinforce the operational independence of security personnel and the clear distinction between the security provider's workforce and the client's business.

Subcontracts: In terms of the obligations concerning the payment of payroll tax, most contractual arrangements with subcontractors clearly delineate payroll tax responsibilities:

- where relevant, subcontractors are responsible for registering as employers and paying all payroll tax due in respect of the personnel performing work under the subcontract.
- there may be instances where both the security entity and the subcontractors are both paying payroll tax on the wages (this may lead to double taxation in some circumstances).
- most subcontracts explicitly require subcontractors to provide statutory declarations confirming their compliance with payroll tax obligations.

Amounts taken to be wages - Payroll Tax Act 2007 - Sect 40

S40 (1) (a) states “Any amounts paid or payable by the employment agent under the contract, including amounts attributable to non-labour costs or commissions payable to another employment agent, are taken to be wages (s.40(1) of the Act)”.

ASIAL submits that this section of the Act should be reviewed to eliminate the inconsistency of classifying non-labour costs (including, but not limited to, such things as administrative overheads, GST and profit) as payroll or wages.

While we agree that wages, commissions, and other employee benefits should be assessable in appropriate cases, non-labour costs should not be included in this category. If a cost is not related to labour, it should not be treated as such.

4. Conclusion

In summary:

1. Security providers' employees and their subcontractors' employees do not work *"in and for the conduct of the client's business"*.
2. The Client has no legal control over the Licensed Security Providers' employees because the *Security Industry Act 1997* (NSW), section 38(1) prohibits a licence holder from delegating the carrying on of a security activity to an unlicensed party (the Client).
3. Review and remove from Payroll Tax Act 2007 - Sect (1) (a), *the inclusion of non-labour costs* from the calculation of payroll tax.
4. Security employees operate independently under the direction and operational control of the security provider, following standard operating procedures (SOPs) typically prepared by the security provider.
5. The factors outlined by the Commissioner in the Integrated Trolley Management Case are not relevant to the activities provided by the private Security Industry and should not be compared in any way for the following reasons:
 - Security services are not integral to the clients' business in the same way that trolley management is to the supermarkets.
 - Whilst security services are provided on a regular and consistent basis to many clients, in many cases the security services are not required for the clients' business to operate (i.e. a supermarket could operate without a security guard for a day).

- Where possible security providers operate a direct employee model (as opposed to contractors being the first point of call when staffing a particular job).
- The degree of control and supervision is substantially different.
- The services provided by private security providers could not have been undertaken by employees of the client (due to licensing requirements) in stark contrast to trolley management.

We would encourage caution when referring to hypothetical contracts as they may not be reflective of all entities in the security industry, Contracts need to be considered on a case-by-case basis.

Recommendations:

1. Clarify the definition of Employment Agent to expressly exclude the provision of licensed security officers to clients whose core business is not in the security industry.
2. Adopt the position taken in *E Group Security Pty Ltd v Chief Commissioner of State Revenue [2021] NSWSC 1190*, acknowledging that Security Officers do not work in or as part of a client's business. While Security Officers may interact with client representatives as part of their duties and perform their duties in accordance with the client's specifications, they remain under the management, supervision and operational control of the security service provider.
3. The Act be amended to provide RevNSW with the discretion to provide leniency for taxpayers in the industry as the scope of the law has been in a state of flux for some time.
4. Review and remove from *Payroll Tax Act 2007 - Sect (1) (a)*, the inclusion of non-labour costs from the calculation of payroll tax.

About ASIAL

Established in 1969, the Australian Security Industry Association Ltd (ASIAL) is the national peak body for security organisations and professionals in Australia. ASIAL Members account for approximately 85% of the security industry across Australia.

ASIAL plays a key role in driving Australian Standards, developing codes of conduct and raising the level of professionalism within the industry. As the voice of the industry, ASIAL performs a key role in representing the interests of the industry at a Federal and State/Territory government level.

ASIAL IS:

- A Registered Organisation of Employers under the *Fair Work (Registered Organisations) Act 2009*
- An Accredited Cabling Registrar under the Australian Communications and Media Authority's *Cabling Provider Rules*
- An Approved Security Industry Association under the *Security Industry Act 2003* in the ACT
- An Approved Security Industry Organisation under the *Private Security Act 2004* in Victoria
- An Approved Security Industry Association under the *Security Providers Act 1993* in Queensland

ASIAL provides advice, assistance, and representation to members in the security sector, reflecting its membership of owners and operators of security businesses providing all forms of protective security, cash in transit, electronic and associated security services.