

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

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THE LAW SOCIETY
OF NEW SOUTH WALES

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The Hon Jeremy Buckingham MLC

Chair

Legislative Council Portfolio Committee No. 1 – Premier and Finance

Parliament House

Macquarie Street

SYDNEY NSW 2000

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

Dear Chair,

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

The Law Society appreciates the opportunity to comment on the application of the contractor and employment agent provisions in the *Payroll Tax Act 2007* (NSW) (**2007 Act**) and select terms of reference of the Inquiry. The Law Society members of the Law Society's Revenue NSW/Law Society Liaison and Business Law Committees contributed to this submission.

Our comments focus on the 'Contractor provisions' in Part 3, Division 7 of the 2007 Act. In our view, these provisions give rise to significant inequities in their operation, particularly for small business operators who work under the sole contractor model. The background to this issue and the inequities that are present are outlined below.

1. Current Provisions

Under the 2007 Act, an 'employer by whom taxable wages are paid or payable is liable to pay payroll tax on the wages'.¹ Amongst others, an employer is defined as:

(1) ...a person—

...

(b) to whom during a financial year, under a relevant contract, the services of persons are supplied for or in relation to the performance of work, or...²

¹ Section 7, 2007 Act.

² Section 33(1)(b), 2007 Act.

Where a 'relevant contract' is in place, the 'Contractor provisions' will apply. A 'relevant contract' is defined as:

- (1) ...a contract under which a person (the **designated person**) during that financial year, in the course of a business carried on by the designated person —
 - (a) supplies to another person services for or in relation to the performance of work; or
 - (b) has supplied to the designated person the services of persons for or in relation to the performance of work, or
 - (c) gives out goods to natural persons for work to be performed by those persons in respect of those goods and for re-supply of the goods to the designated person or, where the designated person is a member of a group, to another member of that group.³

For the purposes of the 2007 Act, 'amounts paid or payable by an employer during a financial year for or in relation to the performance of work relating to a relevant contract' are taken by section 35(1) to be wages paid or payable during that financial year. The person who performs the work is taken by section 34(a) to be an employee.

The 'Contractor provisions' are very widely drafted and have the potential to apply to a wide range of business structures. They are anti-avoidance provisions, and to avoid inequity, various exemptions have been provided. However as outlined below, because the exemptions are narrow and unclear in their application, there are many businesses that are now arguably unintentionally caught, meaning that legislative change is needed to ensure inequity does not arise.

2. History of 'Contractor provisions' and exemptions

The background to the 'Contractor provisions' is that ordinarily payments to persons who were not characterised as employees, including independent contractors, were not subject to payroll tax.⁴

The 'Contractor provisions' are anti-avoidance provisions that are directed at contractors who are, in substance, employees. However, it was always intended that genuine small businesses who used the contractor model would not be caught. In his second reading speech to the Legislative Assembly of New South Wales, in relation to the Pay-roll Tax (Amendment) Bill 1985 (NSW), the Minister for Employment and Finance said of the original New South Wales provisions that '(b)ona fide independent contractors will not be caught by the legislation.'⁵

The Explanatory Note to the legislation,⁶ also confirmed that the terms of the definition of 'relevant contract' were:

³ Section 32(1), 2007 Act.

⁴ Victoria first enacted 'Contractor provisions' in 1983, with New South Wales following in 1985 with the *Pay-roll Tax (Amendment) Act 1985* (NSW). Those 'Contractor provisions' formed part of the payroll tax legislation enacted in each State and have carried through into the 2007 Act.

⁵ New South Wales, *Parliamentary Debates, Second Reading Speech*, Legislative Assembly, 13 November 1985, 9558 (Robert Debus, Minister for Employment and Minister for Finance).

⁶ Explanatory Note, Pay-roll Tax (Amendment) Bill 1985, 1, in relation to the definition of 'relevant contract', <https://www.parliament.nsw.gov.au/historicbills/files/16291/Various%20Versions%201.pdf>.

directed to capture several means of disguising the employer-employee relationship by contractual arrangements which have been increasingly resorted to in recent years by persons seeking to defeat the objects of the Principal Act. The definition contains appropriate exclusions, so the parties to genuine service contracts will not be prejudiced.

Despite various exclusions, some contractors by reason of their regulatory model or business structure were recognised as potentially still caught. For instance, financial planners who work under an Australian Financial Services Licence (**AFSL**) were recognised as being potentially caught due to their regulatory structure. Historically, the policy of the NSW Government was not to impose payroll tax on financial planning businesses as the tax was considered to be an unintended result of the financial services licensing regime under Chapter 7 of the *Corporations Act 2001* (Cth) (**Corporations Act**) and associated regulations.

As such, despite the financial planner operating as an independent sole trader (with their own business name, accounts, clientele etc) the deeming provisions of the Corporations Act mean that Revenue NSW considers that a service is being provided by the financial planner to the AFSL holder as a contractor. The arrangements were originally dealt with by a specific exemption in the prior *Pay-roll Tax Act 1971* (NSW) (**1971 Act**), in section 3A(5A), as inserted by the *State Revenue Legislation Amendment Act 2005*. That exemption was in the following terms:

The wages that are liable to taxation under this section do not include amounts paid or payable by an AFS licence holder in respect of services provided by a financial planner if the exemption conditions are satisfied.

However, that exemption was removed following the NSW Government's agreement to the state harmonisation of payroll taxes, implemented by the 2007 Act.

3. Why the current exemptions are inadequate

3.1. Overview

Section 32(2) of the 2007 Act outlines various exceptions to the definition of a relevant contract. There are carve outs based on whether the services are ancillary to the supply of goods, where they are provided to the public generally, or meet various time thresholds.

However, as noted below, many small business structures which work under a contractor arrangement will often not be able to use these narrow exemptions, because of the regulatory structure involved, or because they supply services to one major client. Recent media examples of where issues arise include medical practitioners, financial planners and mortgage brokers.

One of the further main exemptions is the 'other persons exemption', in section 32(2)(c) of the 2007 Act:

- (2) However, a **relevant contract** does not include a contract of service or a contract under which a person (the **designated person**) during a financial year in the course of a business carried on by the designated person—

...



- (c) is supplied by a person (the **contractor**) with services for or in relation to the performance of work under a contract to which paragraphs (a) and (b) do not apply where the work to which the services relate is performed—
- (i) by two or more persons employed by, or who provide services for, the contractor in the course of a business carried on by the contractor, or
 - (ii) where the contractor is a partnership of two or more natural persons, by one or more of the members of the partnership and one or more persons employed by, or who provide services for, the contractor in the course of a business carried on by the contractor, or
 - (iii) where the contractor is a natural person, by the contractor and one or more persons employed by, or who provide services for, the contractor in the course of a business carried on by the contractor, or

The 'other persons exemption' is problematic for the reasons outlined below.

3.2. Specific Issues

(a) Business structures

The way business structures have evolved has meant contractors are more in demand by large businesses which use their services. This is not for tax purposes but to allow flexibility in terms of their use, such as where they are only required for a specific project or a specific time period.

The exemptions are narrow and problematic in their application. For instance, the 'other persons exemption' in section 32(2)(c):

- Only applies where the contractor uses another person, meaning that a sole operator cannot avail themselves of the exemption, while two persons operating a business as a partnership could rely on the exemption.⁷
- The extent of use of other persons is 'grey' – for instance many small businesses might involve a husband and wife where one party does the 'service' and the other does administration. It is unclear whether these cases would be exempt as demonstrated by case law.⁸
- It ignores regulatory structures that might require a one-on-one relationship (such as licensing under an AFSL).

It would seem inequitable that a sole operator would be caught by the provisions while a partnership (of two persons) would be excluded even though the services being provided are identical.

⁷ For a discussion of various examples and the application of the 'other persons' exemption see Revenue Ruling PTA 023 *Contractors engaging others*, issued 30 June 2008 by Revenue NSW, <https://www.revenue.nsw.gov.au/help-centre/resources-library/rulings/payroll/pta023>.

⁸ For example, *Bridges Financial Services Pty Ltd v. Chief Commissioner of State Revenue* [2005] NSWSC 788. <https://www.caselaw.nsw.gov.au/decision/549fc26d3004262463bad346>.

In our view, consideration should be given to expanding the exemptions to recognise the growing use of the contractor model, and to ensure that genuine sole trader contractors are covered, and that it is only the most artificial schemes that are excluded.

(b) Regulatory requirements

Some industries require specific regulatory structures that would prima facie cause a breach of the 'Contractor provisions'. The prior exemption for financial planners in the 1971 Act is an example of the recognition of such an issue.

Where the regulatory framework for an industry effectively requires a business structure that appears to breach the 'Contractor provisions', this should be addressed, in our view, through appropriate exemptions.

(c) Case law

Case law on the application of the 'Contractor provisions' demonstrates the complexity of the provisions.

For example, in *Novus Capital Ltd v Chief Commissioner of State Revenue [2018] NSWCATAD 72*, some contractors were exempted, while others were caught, essentially depending on whether they could show the 'other persons exemption' applied. The outcome is therefore fact specific, uncertain and not based on any merit of the circumstances.

The legal cost of disputing how the exemptions apply is beyond most small businesses and involves significant time frames.

(d) The provisions are arbitrary in their application

As noted above, the provisions are arbitrary – a sole operator can be caught in situations where a two-person partnership would not. Similarly, a contractor that even marginally goes over the time thresholds (eg a day over) cannot rely on the time-based exemptions under section 32(2).

We also suggest the provisions should operate more equitably across different industries. For example, while some bulk billing general practitioners have been provided a small carve out,⁹ there are no carve outs for similar allied health professionals or other industries that use similar business models. While we understand the policy objective of encouraging bulk billing, it is concerning that certain industries are given exemptions from payroll tax while others are not, when essentially the same business structures are being used.

⁹ Schedule 2, Part 3, Division 2A, 2007 Act.

(e) Compliance Cost for business

The nature of the exemptions means that there are significant factual records that must be retained – for instance if a contractor uses another person – the days used must be recorded during the year. Such records are more complicated where different persons are used during that same period.

Compliance costs are compounded by the fact that in any dispute with the Revenue NSW, the onus of proof is on the taxpayer to bring evidence to prove their case.

In our view, a review of the 'Contractor provisions' is overdue in terms of meeting modern business structures and needs. The Law Society welcomes the Committee's review and looks forward to the opportunity to contribute to potential reforms of the 2007 Act.

Any questions in relation to this letter should be directed to Gabrielle Lea, Senior Policy Lawyer, at
or on .

Yours sincerely,

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President