REPORT ON PROCEEDINGS BEFORE

PORTFOLIO COMMITTEE NO. 1 – PREMIER AND FINANCE

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

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At Jubilee Room, Parliament House, Sydney on Friday 21 March 2025

The Committee met at 9:30 am

PRESENT

The Hon. Jeremy Buckingham (Chair)

The Hon. Robert Borsak (Deputy Chair)
The Hon. Dr Sarah Kaine
The Hon. Stephen Lawrence
The Hon. Bob Nanva
The Hon. Chris Rath
The Hon. Damien Tudehope

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The CHAIR: Good morning, everyone. Welcome to the first hearing of the Portfolio Committee No. 1 – Premier and Finance inquiry into the application of the contractor and employment agent provisions in the Payroll Tax Act 2007. I acknowledge the Gadigal people of the Eora nation, the traditional custodians of the lands on which we are meeting today. I pay my respects to Elders past and present, and celebrate the diversity of Aboriginal peoples and their ongoing cultures and connections to the lands and waters of New South Wales. I also acknowledge and pay my respects to any Aboriginal and Torres Strait Islander people joining us today.

I ask everyone in the room to please turn their mobile phones to silent. Parliamentary privilege applies to witnesses in relation to the evidence they give today. However, it does not apply to what witnesses say outside of the hearing. I urge witnesses to be careful about making comments to the media or to others after completing their evidence. I note that the Committee has agreed to hold a further hearing for the inquiry to gather evidence from gig economy stakeholders. The date of the hearing will be determined after the court's determination on the appeal in the dispute between Uber and Revenue NSW.

Ms JULIE ABDALLA, Head of Tax and Legal, The Tax Institute, sworn and examined

Mr JACK AQUILINA, Managing Associate (Tax), Dentons Australia, sworn and examined

Ms AMANDA SPINKS, Managing Director, Employment Tax, Alvarez and Marsal Australia, affirmed and examined

The CHAIR: To all of the witnesses, thank you very much for making the time to give evidence. We very much appreciate it. Would any of you like to start by making a short statement? We'll start with you, Ms Spinks.

AMANDA SPINKS: Good morning. Thanks for having us today. I'm representing Alvarez and Marsal. We're a global tax company, and I've personally been advising on employment taxes for nearly 20 years. Any thoughts or recommendations I make today are obviously general in nature, but I'm very happy to help with any specifics at a later date if required. Our submission highlights concerns that the current provisions, and particularly the current administration of those provisions, are overly broad. It's leading to unintended tax burdens on genuine commercial arrangements. Our proposed reforms would realign the legislation with its original intent, as well as simplifying compliance and providing clarity for taxpayers, the commissioner, the Chief Commissioner of State Revenue, and the courts.

Our recommendations fall into three key areas for reform. First of all is clarifying and narrowing the types of business arrangements that fall within the contractor provisions. The current approach is that all contractors start within the rules, and they only fall out if an exemption applies. This creates an unnecessary burden for all businesses that use genuine, independent contractors. The second recommendation is around simplifying those contractor exemptions. So once someone is within those contract provisions, we can have a much easier way for them to fall out of those exemptions and apply them correctly. Again, the aim is to minimise the need for taxpayers to apply qualitative provisions and exemptions when they aren't necessarily privy to all the information that they need, and instead give businesses practical, realistic and actionable exemptions without any grey areas.

Finally, we suggest reverting to the original intention of the employment agent provisions by ensuring the employment agent provisions only cover those scenarios where workers are provided to be utilised by the client in the client's business. This could be readily amended by applying a clear and globally used industry classification. It's actually already in place and already used by Revenue NSW. In fact, Revenue NSW now pre-fills this information for employers in the annual payroll tax returns. Thank you.

JULIE ABDALLA: Good morning. On behalf of The Tax Institute, I thank the Committee for inviting me to give evidence in this hearing. The Tax Institute is an independent, not-for-profit education organisation with a diverse membership base of tax professionals, including lawyers and accountants, from sole practitioners to large firms; academics; and revenue officers across Australia. Our role is to educate members, government and the broader community on the tax system and to advocate for its improvement for the benefit of all Australians.

Payroll tax is a significant source of revenue for New South Wales, accounting for approximately 30 per cent of its total revenue, so it's important to get the settings right. The contractor and employment agent provisions were originally intended as anti-avoidance measures to bring to tax amounts paid in respect of in-substance employment relationships that are masked as contractor arrangements. The evolution of modern work models, including the on-demand and gig economy, has introduced new engagements that blur the line between traditional employment and contracting. These practices have brought about new challenges in the application of these rules. Likewise, changes over time in the interpretation of the law by the regulator adopting a more literal approach have brought into scope longstanding arrangements that were never intended to be caught by the policy.

The volume of litigation around these provisions in recent years, and much of the court's comments, clearly indicate the harshness and deficiencies of the current law. While amnesties and certain initiatives in New South Wales and other States have been beneficial for some businesses, they don't cover all affected arrangements, nor do they go to the heart of the issues that can only truly be resolved through legislative amendment. These provisions directly impact the viability of Australian businesses, and they've got broader public policy implications. They affect workers, consumers and patients, both in our metropolitan and rural communities, onto whom these costs are ultimately passed or who may lose access to fundamental services altogether.

We need a sustainable, fair system that can accommodate an evolving economic landscape. The contractor and employment agent provisions need to be appropriately targeted so they do not capture bona fide independent contractor arrangements. Any amendments need to be designed with the principles of good tax policy in mind, and with an aim of providing much needed certainty to taxpayers. Importantly, the input of stakeholders with expertise should be considered through consultation, starting as early in the process as possible. Early stakeholder engagement involvement facilitates the integration of expert knowledge and ensures that diverse perspectives are taken into account. This approach can foster a better understanding of the real-life issues and potential challenges,

and help to identify practical solutions while aligning with the community's needs and expectations. I'd be pleased to answer any questions to assist the Committee. Thank you.

JACK AQUILINA: Good morning, Chair, and good morning to all the Committee members. It's an honour to be here today. Thank you for the invitation and for asking us to contribute. Put simply, our payroll tax system is broken. It's not achieving its objectives of being a tax only on employment, and it needs to be updated. The problem with our payroll tax system at the moment is it was conceived in a period of time before modern arrangements, whether we like them or not, existed. In fact, the very provisions that we're focusing on today existed at a time where we couldn't even contemplate or imagine the types of arrangements that technology platforms and the gig economy have made possible. We have an opportunity to fix it.

I think one of the most egregious parts about the current operation of the system is that it's harming the most vulnerable of our small businesses. These are mums and dads, normal people that are trying to get ahead in the economy, who are pursuing opportunities that the gig economy is offering them to pursue their own employment in addition, probably, to other work that they're doing as well. We need to protect these people. We need to make sure that the system doesn't unfairly place economic burden on them, because let's face reality: If we tax the big end of town on these measures, they're going to pass the costs down and these people are going to pay the bill. It's just unacceptable.

It needs leadership and reform. I think the Committee has shown that today, and I want to congratulate the Parliament on doing that. New South Wales has a unique role to play now in leading the nation on this really important issue. We're proud, at Dentons Australia, to present not only the problem—because I'm sure you'll hear a lot about what the problems are—but also to make some suggestions about what the solution can be as well. We refer the Committee to our proposed draft legislation that we've proposed to rebalance the measures away from a services test towards an integration and control test, which is probably familiar to many of you, particularly those who have worked in employment law issues in the past. I think this is the opportunity now to consider what we can do to actually reform the system. We're looking forward to working with you and assisting the inquiry in any way and, most importantly, to answering your questions. Thank you again.

The CHAIR: Thank you, Mr Aquilina. We'll now turn to those questions, beginning with some from the Opposition and Mr Tudehope.

The Hon. DAMIEN TUDEHOPE: Good morning, and thank you for being there, and thank you very much for the quality of your submissions. I think they are of excellent quality. In view of the decisions which, Ms Abdalla, you have wonderfully summarised in your submission relating to the expansion of payroll tax, why isn't it the case that businesses which are now aware of those decisions should not be able to structure their businesses in ways that can now comply with the wording of the Act?

JULIE ABDALLA: Thank you for your question. There are a couple of different aspects to this. Number one, the policy underpinning those provisions hasn't changed, and the wording itself hasn't changed, but the interpretation has. So these businesses that may choose to then restructure to fit within the provisions, or to satisfy some of the exemptions—some of them can't actually do that. They can't actually fit within the exemptions, even where they are bona fide independent contractors. We've seen that in some of the court cases. Sometimes they may be at risk of other avoidance integrity provisions, where they choose to restructure to avoid something else. It can create more complications for them.

I suppose the overarching issue is that they shouldn't be within scope in the first place. They shouldn't need to restructure their arrangements where they are independent arrangements, where they are bona fide independent contractors. All of these sort of things create work for these businesses. There's time and money that goes into restructuring affairs or trying to understand whether they are within or not within the scope of the provisions. These disputes cost money. It's not just the advisers' costs, it's the resources of the business that are taken away from the business itself to try and manage these rules when it could be much simpler.

The Hon. DAMIEN TUDEHOPE: You act for a large number of people who are in the advice industry. Why isn't it the case that those advisers should not be providing advice to their clients about their potential exposure to payroll tax?

JULIE ABDALLA: They do. The difficulty is that, while they can provide advice, there is a challenge with providing enough certainty, given how things have evolved in recent times. But also, as much as they can give advice, some of the practical challenges that the businesses face in terms of the evidence that they need to collect and be able to demonstrate that they fall within an exemption are near impossible in some cases.

The Hon. DAMIEN TUDEHOPE: Perhaps you have some knowledge of this. There is the ability, of course, to obtain rulings from Revenue NSW in respect of certain arrangements. In what circumstances have your members or your organisations sought rulings in relation to potential liability for payroll tax?

JULIE ABDALLA: I would have to take on notice particular examples from members of rulings. How many, I couldn't tell you that off the top of my head. But the feedback that we do receive is that, while you can apply for a ruling, it can be a lengthy process; it's a costly process. But from our perspective as Tax Institute, looking at the system as a whole, rulings for individual businesses don't seem to be the preferred outcome, or the preferred solution to deal with these issues. I think it would be reasonably simple legislative amendments, coupled with some administrative guidance from Revenue, that's consistent with a purposive approach, but that would indicate to New South Wales, to all businesses, what the rules are and wouldn't be on a case-by-case basis. It's also, I would think, preferable for Revenue because it frees up resources in dealing with ruling applications to then have a consistent system across the board.

The Hon. DAMIEN TUDEHOPE: Mr Aquilina, have you got any observation in relation to that?

JACK AQUILINA: Yes, if I may. In terms of the situation around why they can't restructure, the cost of going through the system here is quite significant. It's a question of economics. If these businesses are operating on low margins—which a lot of them are—and if they absorb the costs, then the business doesn't exist. If they pass it on, then in a lot of cases these small businesses that are the recipients of contractors, per se, have a cut that's so significant they can't operate. It isn't a question about a willingness for people to comply with the law. People want to comply with the law and do the right thing. The duty of advisers—I mean, I see myself as a lawyer. My duty is not to be a puppet to my client, but to be an administrator of justice, and to ensure that the law applies the way it's intended. Obviously, that creates difficulties in structuring, because if the law is going to eliminate the business, then there's no business to restructure. So that's all I'd say on that point.

AMANDA SPINKS: I think what I'd add is we're often consulted when a business is being set up, or when a new arrangement is being entered into, and so we will provide advice at that point, and we'll say, "The law seems clear, this is how it should be done," and we'd give advice. But we've seen, certainly with the cases, as soon as a new case comes along and they change their interpretation, we're not necessarily being asked to reassert on a particular circumstance or to vary how an arrangement might change over time. All of my clients would always be trying to do the right thing. But as new cases come out, as working arrangements change, we could advise on a particular arrangement and that particular contractor may change their circumstances, unbeknownst to my client, over the next few years. So the payroll tax outcome should change, even though my client never received any information.

The Hon. DAMIEN TUDEHOPE: After the decision in Optical Superstore**,** did you provide advice to any of your clients or any of your members in relation to the potential ramifications of that decision?

AMANDA SPINKS: At the particular time of that case, I was not in professional services, so I'm probably not the correct person to answer.

The Hon. DAMIEN TUDEHOPE: The organisation for which you work?

AMANDA SPINKS: Certainly, there were people asking advice, and plenty of people in the industry were asking. It was always, I think, an area where different arguments could be presented, and I'd have to take on notice what particular clients were doing.

The Hon. DAMIEN TUDEHOPE: What about you, Ms Abdalla?

JULIE ABDALLA: The Tax Institute doesn't provide advice. I am a lawyer, but we don't give advice. We're an education body. We do put out materials that will assist our members and the broader public to understand these decisions and what the implications are for them.

The Hon. DAMIEN TUDEHOPE: Any of you can choose to answer these questions. Is it the case that what has occurred is, essentially, anti-avoidance provisions have been used now as a tool for, in fact, collection by Revenue, rather than being an anti-avoidance provision?

JACK AQUILINA: I agree with that.

AMANDA SPINKS: The anti-avoidance is not the reason that these cases have come to their conclusions. They've been using the contractor provisions, or they've been using the employment agent provisions. They're not saying that these are anti-avoidance. I think we have clear anti-avoidance rules in there to stop people doing the wrong thing. What these cases are actually finding is that people that are genuine, independent contractors, are still being pulled within the Payroll Tax Act—not because of anti-avoidance, though.

JULIE ABDALLA: I would say that it is important to have anti-avoidance provisions that deal with those relatively few cases that deliberately are doing the wrong thing, but these provisions are bringing in scope arrangements that were never meant to be within scope. So in a way, that could generate more revenue, but it's not appropriate within the policy intent. The question of "We need to generate more revenue" is probably outside

the scope of the terms of this inquiry, but there are other ways to look at that, and to do that in an equitable and fair way.

The Hon. DAMIEN TUDEHOPE: Have other jurisdictions addressed this issue?

JACK AQUILINA: My understanding is that other jurisdictions are waiting to see what happens in New South Wales, and that's been the feedback that we've received from other commissioners in other States. I think there's a bit of a vacuum of leadership in that respect. People are waiting and watching to see what happens. Whether it's fortunate or not that New South Wales is the first one out of the ring is a matter to be determined, but I think it's an exciting opportunity for New South Wales to show the rest of this country that this issue needs to be addressed, and to address it in an equitable and appropriate manner.

AMANDA SPINKS: I do think it's worth noting that Western Australia does not have contractor provisions. Western Australia does have anti-avoidance provisions, which we all agree are necessary and should be there, but in terms of harmonisation, this is one area that there is not harmonisation nationally, and Western Australia does not have the contractor provisions.

The Hon. DAMIEN TUDEHOPE: Can you take us through some of the recommendations which you've made? Can I start with you first, Ms Abdalla, and your recommendations?

JULIE ABDALLA: Yes, of course. The first of the recommendations I think is just a general recommendation to rewrite the Act. Is that a correct summary of it?

JULIE ABDALLA: Yes, I think there need to be some legislative amendments. It can be done in a few different ways. It doesn't need to be over-complicated. You can start with either dealing with the operative provisions on their own or dealing with the exemptions—if we're looking at just the contractor provisions for now—or a combination of both. Depending on which way you go, ultimately they're all directed to the same purpose: ensuring that the rules are applied in the right cases, they're targeted to the right kinds of arrangements and they don't capture the ones that are never meant to be captured.

The Hon. DAMIEN TUDEHOPE: In terms of the rewrite of the Act, you'd start from a premise, would you, about saying what is included? Or would you provide a system which in fact provides exemptions?

JULIE ABDALLA: I would suggest that a more targeted operative provision—a more targeted anti-avoidance provision that is limited and clearly brings within scope only those arrangements that are egregious for the purposes of what the provisions are directed to—would be the starting point. We have currently a sort of expansive "everything's in, but there are some exclusions".

The Hon. DAMIEN TUDEHOPE: And that's the problem, is it, that everything is in and if you don't fit within an exclusion—

JULIE ABDALLA: Yes, that's right. The courts have recognised that even some bona fide independent contractors are within scope but they don't fit one of the exemptions, for whatever reason.

JACK AQUILINA: I sympathise with the difficulty of writing legislation. I've worked for judges as an associate. I know how hard it is on the other side to interpret these things. As much as I'd love to scrap the tax system and start again, I don't think that's going to happen. We've made some very practical recommendations in our submission where there's minimalist change to the provisions to better target them towards excluding the types of arrangements we say shouldn't be in—that is, the genuine, independent bona fide relationships—simply by moving away from a services test and using an integration control test, which is aligning the law with basically 150 years of precedent around how we assess multifactorial relationships around employment relationships. Look, there might be better options in terms of how you might draft it—you might not use my drafting; I'm not a not a parliamentary draftsperson—but it's there. It's a solution. It's a mechanism that I think would be a quick and appropriate fix.

The Hon. DAMIEN TUDEHOPE: One of the tools that Revenue often uses, of course, is placing worked examples on their website to demonstrate who may or may not be caught. Do they in fact use that process in relation to payroll tax?

JACK AQUILINA: Of course they do. But the problem that we have with this is my experience at least suggests that—and I tell this to my students I lecture—be careful what the commissioner writes down because, as well intentioned as it is, it's only his opinion. The commissioner is first amongst equals when you get into the courtroom, but ultimately I find that the commissioner takes a very adaptive or flexible approach to the examples. Sometimes the examples are very hard to write. You have to remember, these are very broad provisions that capture potentially an innumerable number of arrangements. If you're trying to write a number of select examples, you're automatically setting yourself up to fail because it's difficult to capture the types of arrangements that might

be in or out. There's nuance. Every case turns on its own facts, and the facts are granular. It's the granular differences that make the difference. Yes, he writes examples. They're helpful, and I'm sure they've been very helpful to my colleagues as well. But, ultimately, they're never perfect and they're very hard to rely on, particularly in a disputes context, where it gets down to brass tacks. It's all about the interpretation of the raw provisions, which is what we're here to discuss as well.

The Hon. DAMIEN TUDEHOPE: One of the complaints that is replete through the submissions which have been made is taxpayers who have been subject to an audit and had their businesses given a so-called clean bill of health, and 12 months later or 18 months later then have a further visit and receive a bill for exactly the same structure which they were using at a previous opportunity. Do you have any reflections about that situation, given your observation, Ms Abdalla, that you don't think amnesties are necessarily the way to go?

JULIE ABDALLA: Just on the amnesties, they're obviously a step in the right direction. But they are not consistent across all the States in terms of who's within scope or who's not and the periods to which they apply, and they're also not long-term solutions. Coming back to the guidance from Revenue, I think New South Wales is the only State where the commissioner publishes commissioner's practice notes. They're very useful. Revenue NSW does consult with the Tax Institute and other stakeholders on their guidance and on new law, and that's a very positive process. But there are times where the guidance hasn't been updated since a case or a decision has been made, or there could be further guidance that might be useful. The consultation is great, but there could be more of that which would be helpful. The examples, no matter how great they are, are no replacement for the law. The commissioner's views, right or wrong, are no replacement for what the law says.

The Hon. DAMIEN TUDEHOPE: So what do you say about retrospective assessments?

JULIE ABDALLA: Retrospective assessments—and the Tax Institute has spoken about retrospective amendments to the law at a Federal level as well—should really be only limited to very exceptional circumstances. I would say that it takes away from certainty that taxpayers have. In cases like this, where we're going back many years, this can completely collapse a business in terms of the liabilities that were never accounted for—interest, penalties and things like that.

The Hon. DAMIEN TUDEHOPE: There was a recent case relating to penalties, though, wasn't there? Someone's submission made reference to the fact that a judge was very critical of penalties imposed where it was a retrospective assessment.

JULIE ABDALLA: XL Retail.

AMANDA SPINKS: XL Retail had penalties, and they were wound back as well, but that was a case where they were what would have been seen to be compliant. And then Integrated Trolley Management came down, and off the back of trolley management they were then captured within the employment agency rules from that point. That's an example where the examples on the Revenue NSW website still refer back to the UNSW Global findings, so they haven't been updated based on the trolley management case. So you can see how XL Retail, if they're reading all the information available to them on the Revenue website, they're making decisions based on what would have been the findings under UNSW Global as opposed to—

The Hon. DAMIEN TUDEHOPE: And then to impose a penalty on top.

AMANDA SPINKS: Correct.

The Hon. DAMIEN TUDEHOPE: It would appear to me to be something that a taxpayer who sought to be following the law found themselves—

AMANDA SPINKS: It would have been difficult to understand.

The Hon. DAMIEN TUDEHOPE: —in very difficult circumstances because what they thought was the correct interpretation of the law because of a decision, they then found themselves not acting in accordance with the law. What recommendation would you make in relation to that sort of circumstance?

AMANDA SPINKS: Our broad recommendations around the employment agency provisions—I mentioned earlier that there is actually a national standard the Australian Bureau of Statistics uses in conjunction with Australia and New Zealand. It's a standard industry classification. Revenue NSW already uses this information and pre-fills on a payroll tax return what business and what classification each business is in. There is a specific classification for labour hire services. If a business falls within that standard classification that the ABS uses, then they're in for the employment agency agreements for payroll tax purposes. If you're in a different industry, you're not captured. It would be very black and white, very easy to understand. It's a standard classification that would provide absolute certainty in this regard.

The Hon. DAMIEN TUDEHOPE: Part of your submission, Mr Aquilina, is that you can either have the Parliament give certainty or you can have the courts give certainty. Why haven't the courts given certainty?

JACK AQUILINA: I think the courts are doing the best they can with a difficult position. It all comes down to the original source of the law—that is, the provisions. In terms of this amnesty stuff, I agree that we should have relief and I think industry would support that. But the best way to draw the line in the sand is to change the law. We can clarify it. Parliament can do it, and we can do it in a way that will make the courts' job easier. The courts are dealing with—if you've read the provisions, even the Minister or the Treasurer in Victoria who passed the original version of this said they are awfully drafted provisions. They're difficult on purpose, and they're going to lead to ambiguities. If you're a judge trying to apply a very complex set of facts in a very complex arrangement to these very broad and poorly drafted provisions, you can only provide so much clarity. But remember, courts' jobs are to determine controversies, so particular cases based on particular facts. The problem is, when the policy misaligns, there's no amount of clarity a court can provide to fix the policy. The policy has to be fixed by Parliament.

The Hon. Dr SARAH KAINE: Thank you very much for your appearance and your submissions. I concur with Mr Tudehope: They were extremely helpful in covering off on the main cases et cetera. I've just got a few follow-up questions from this line of discussion. It seems like there are interpretive issues. I'm not being a lawyer, but I'm picking up that there are interpretive issues. These aren't new, are they? The Act is not new. These provisions aren't new. Indeed, the cases that you cite, from memory, started ramping up since about 2015. Is that correct? These are well known issues. I'm going to ask you to answer for Hansard.

JACK AQUILINA: They're well-known issues, yes.

The Hon. Dr SARAH KAINE: Across that period of time, has something changed, and what opportunities have there been across that time? Where else have you spoken about this? What's happened in that intervening time to the people that you represent or deal with? Why haven't we heard about this in other forums?

JACK AQUILINA: If I may, the law hasn't changed, as you said, but the administration has. I don't want to speculate. There are all sorts of economic and political conditions that lead to that, but that's clearly the fact.

The Hon. Dr SARAH KAINE: But that's over at least a decade.

JACK AQUILINA: Absolutely, but the law is a slow instrument. Unfortunately, the wheels of justice turn slowly, so sometimes we're dealing with cases—I think the Loan Market case was dealing with arrangements from about six years ago. It takes a bit of catch-up. The administration of the law has changed, and I think people have been talking about this issue for a long time. But, Dr Kaine, I think one of the big issues that we've seen—and you've written about this—is the advent of the gig economy and changes in technology. I think they're showing greater prevalence now economically than they ever have. Think about it: Uber has only been around for 15 years or something. It's a rapid change in a short amount of time. I think that the nature of the impact economically on these businesses and their contractors has really brought this to a crescendo, and I think people have been talking. I've been talking about it and I know my colleagues here have been talking about it. But you can talk into the wind sometimes. I think this is a great opportunity now for the Parliament to talk about it and not just talk about it but take action and make change.

The Hon. Dr SARAH KAINE: Perhaps there weren't formal opportunities to provide that?

JACK AQUILINA: We provide feedback to the Revenue all the time. He'll be surprised to hear this, or the Revenue would be—I sympathise with them because they've got a job to do and they're not law reform people. We write academic papers, as you know, and they get published. Do people read them? I think they do. I hope they do.

The Hon. Dr SARAH KAINE: We track whether they do; trust me.

JACK AQUILINA: We try. Ultimately everyone's been banging on this drum for a little while, but I think this has been the first real opportunity to actually talk about how we might fix it from a legislative point of view. New South Wales can lead the way.

The Hon. Dr SARAH KAINE: Were there any responses?

JULIE ABDALLA: I would say, from the Tax Institute's perspective, this is something that we have spoken about, but we look at all of the taxes across the States and at the Federal level. A few years ago we wrote a discussion paper called *The Case for Change*, and that looked at the whole of system and what needs to change. Payroll tax is one of the areas that we looked into as well. Around all of these cases we write articles, and we produce guidance for our members and the public about what they mean. As I mentioned earlier, we do consult with the Revenue, and they talk to us about different provisions, their guidance and things like that. There has

been a lot of work going on, at least in the background, on these measures, but it seems to be coming to a head more so, which is really positive to see.

AMANDA SPINKS: I think I'd add that the way the rules are drafted, as we've said, is that everything is in unless an exemption applies. And 15 to 20 years ago we knew what all the possibilities in that world were. We knew how contractor arrangements looked. We obviously had a significant change in the gig economy and how contracting arrangements worked, and then COVID happened. All of a sudden everyone are working differently, and all of the relationships and the arrangements are completely different. When we're in a world where everything is in unless it's out and when the rules were written before we knew what we wanted out—because they didn't exist—it now puts us in a position that we don't have the exemptions that we need to apply to the current environment as opposed to if we had a system that said these are the things that are in. Then, when new arrangements were found, there could be changes made to bring in new arrangements as they needed to be. But because we're in that default of you're in unless you're out, as soon as anything new is created, it's automatically going to be caught.

The Hon. Dr SARAH KAINE: You've mentioned the gig economy, which, as you know, Mr Aquilina, I am particularly interested in. Sometimes in the submissions it sounds as if it's the contractor or the gig worker who is liable for payroll tax. Clearly they're not; it's the platform et cetera. There are a couple of questions I want to ask about that. One is, have you got examples where there has been this retrospective liability and you have seen that flow through the contract chain? The other question—which we might go to after and might be directed to Mr Aquilina because he's been speaking directly about gig work—is that not all platforms are created equal. You talk about the multifactorial tests in other areas, and they're not exactly matching in other parts of the law either. But some of the platforms have been extremely creative about clever contracts and amending contracts et cetera. Isn't that going to be a continuing issue if we're not very careful in what we do to capture the right players? One question is do you have examples of where it has flowed down following a decision? And the other is, they're not all equal, are they?

JACK AQUILINA: On the first question, I've definitely seen this. When Loan Market was decided, the first thing that the aggregators did was look at their arrangements. This is public knowledge: They've released addendums to change the arrangements to push down the costs because, remember, they're intermediaries. They're operating themselves on a 5 or 6 per cent margin. The payroll tax is the margin plus something else. It's got to go somewhere. I agree. I have full sympathy with you around these big players playing an important role in determining what work looks like these days and how that can be exploited but, in specifically the tax context, what we're talking about here is an embedded cost in delivering services through a supply chain that gets pushed down to someone, and either consumers will pay or the businesses will pay in the supply chain.

It's usually the most vulnerable in the supply chain that get stuck with the bill, and that's what's happening here. The tax has an adverse impact on small enterprises, who are typically the types of people I think you suggested in your paper that you've published who are the former employees that were working for these types of businesses. They're the ones being punished here. Technically, yes, the assessment of the tax is on the big entity. But, economically, this flows through the system, and that's a huge problem.

The Hon. Dr SARAH KAINE: Have you got a suggestion? You're absolutely right, and I'm not quibbling with you about that and about the nature of business arrangements where we end up with the bottom of the supply chain bearing the brunt. I get you. Have you got any suggestions in this area of law as to what might assist with that?

JACK AQUILINA: Let's not tax them. These arrangements were never meant to be caught. Let's not tax these people. That's the problem. The problem is we're embedding a cost. It doesn't serve workers' rights or serve their ability to be protected or to have decent standards by having a system that encourages, economically, the costs to be pushed down the supply chain onto them. The problem is that none of these arrangements were intended to be captured in the first place. Unless we're starting from the proposition that these contractor arrangements where the contractors in the supply chain were always meant to be caught—I don't accept that, personally.

The problem we have is that they are bearing the economic cost. The cost is unjustified, principally, based on the objectives of the provision. The solution isn't going to be to create a system that puts that embedded cost down to them. It's going to happen. I'm not sure what Parliament could do to prevent that from happening, because it's the nature of business. You put a tax on a supply or a service and someone has to bear the cost. My concern is that the current system is incentivising directly the most vulnerable of those businesses to bear that cost. That's what's really concerning.

The Hon. Dr SARAH KAINE: The issue is actually with the business structure creating a particular employment relationship, isn't it? It's not about the tax; it's about the employment.

JACK AQUILINA: In the employment context, there are many things that Parliament could do to protect the rights of these people and ensure that they have good standards whilst at the same time not taxing them.

The Hon. Dr SARAH KAINE: Interesting. I'd love to chat with you at another time about that, Mr Aquilina. Any comments from other witnesses?

AMANDA SPINKS: I'd just give examples of a colleague of mine who was at a GP last week, paid the bill and then noticed that there was an extra $5 on the charge, and it wasn't even part of the invoice. They called them up and said, "Why did you hit my credit card with an extra $5?" The answer was, "That's the payroll tax we have to pay." I have other clients who are making assessments and, where they have a medical practice that doesn't meet the bulk billing, they're just charging it straight to the client. As mentioned, there's no sense that that margin will be absorbed; it will just be passed on to people attending those medical practices.

The Hon. DAMIEN TUDEHOPE: In summary, in answer to Dr Kaine's questions, this problem, albeit starting in 2015, probably is reflective of the fact that the nature of work has changed.

JACK AQUILINA: Correct.

The Hon. DAMIEN TUDEHOPE: Would you agree with this proposition that, whether you call it aggressive or not, because of the collection of this payroll tax, this represents, in one sense, windfall gains to revenue? Is that correct?

AMANDA SPINKS: Without using that phrasing, I'd suggest that it's broadening the base of which payroll tax is being applied. I think also I would say that there are a number of businesses that still aren't sure how payroll tax applies. If we were to take the GP scenario, that has been discussed widely; it's in the media and everyone is sort of across all of those cases. But, if we were to look at similar structures for a physio, a dentist, a mental health professional, any of those other industries, I suspect—

The Hon. DAMIEN TUDEHOPE: Lots of them have never paid tax before—will all of a sudden find themselves potentially liable to pay tax.

AMANDA SPINKS: I would put it that there is no revenue currently being collected from them. A change in that would not negatively impact any of the revenue that is going to be collected so it could be rectified without there being any impact to the—

The Hon. DAMIEN TUDEHOPE: Any impact on the existing revenue.

AMANDA SPINKS: Yes, exactly.

The CHAIR: Thank you very much. That concludes the questions. There were a couple of questions taken on notice. The secretariat will be in contact in due course.

The Hon. DAMIEN TUDEHOPE: Chair, can I ask one further question?

The CHAIR: Yes.

The Hon. DAMIEN TUDEHOPE: Have you all read the chief commissioner's submission?

JACK AQUILINA: Yes.

JULIE ABDALLA: Yes.

The Hon. DAMIEN TUDEHOPE: Have you got any observations in relation to anything that the chief commissioner has raised?

JACK AQUILINA: I think the chief commissioner was appropriate in his position in a sense that he educated taxpayers on what the current law is and how he is administering it and didn't go beyond that remit. I think that's probably the right approach.

JULIE ABDALLA: I would agree with that sentiment. He is not in a position to comment on the policy. He is focused on the administration. He has made comments about the approach that they've taken, which I think is fair from their perspective.

The Hon. DAMIEN TUDEHOPE: Is there something that we could do in terms of a parliamentary position to have an amnesty in relation to this until such time as this eminent Committee makes its findings and the Parliament will no doubt act on them? Should we be having an amnesty while this issue is resolved?

JACK AQUILINA: We would support an appropriately drafted amnesty, yes—or I would. I say "we"; I speak for Dentons Australia.

JULIE ABDALLA: I would agree with that approach. If I could just summarise, we need legislative amendments. We need consultation on those changes, updates to the guidance and a temporary approach in the meantime until we can achieve those.

The Hon. DAMIEN TUDEHOPE: I take it you're the same, Ms Spinks?

AMANDA SPINKS: Yes.

The CHAIR: Thank you very much for your excellent submissions and for your evidence today. We very much appreciate it. As I was in the process of saying, the secretariat will be in contact in due course with those questions and matters taken on notice.

(The witnesses withdrew.)

Dr SARAH RAPHAEL, Director of Policy and Education, Australian Dental Industry Association, sworn and examined

Mr JOHN BURNS, Chief Executive Officer, Abano Healthcare and Member, Dental Service Business Council, affirmed and examined

Ms DOMINIQUE EGAN, Director of Workplace Relations, Australian Medical Association, sworn and examined

Dr REBEKAH HOFFMAN, Chair, Royal Australian College of General Practitioners (NSW & ACT Faculty), affirmed and examined

The CHAIR: I welcome our next witnesses. The Committee affords you the opportunity to make some introductory remarks. We'll start with Dr Raphael.

SARAH RAPHAEL: Chair and members of the Committee, thank you for the opportunity to appear before you today. Mr John Burns and I represent the Australian Dental Industry Association and the Dental Service Business Council, which together represent a significant portion of Australia's dental service providers. These dental service organisations operate more than 400 dental clinics and support over 2½ thousand clinicians and additional employed auxiliary staff nationwide. We believe the application of the contractor provisions under division 7 of part 3 of the Payroll Tax Act 2007 poses a serious further threat to the affordability of dental services for New South Wales families.

The imposition of payroll tax on independent contractor arrangements, both retrospectively and moving forward, will place an overwhelming financial burden on operators, many of whom already pay payroll tax on their employees' wages. Without an amnesty from historical liabilities, we estimate that, for clinics with three or more dentists, these additional costs may drive up patient fees or even prompt clinic closures. We are particularly concerned about the potential for closures in regional and rural areas, where access to dental services is already limited.

Like general practitioners—our colleagues here—the largest costs for dental service organisations are the expenses of the health professionals, the talented dentists who provide essential dental care. Like general practitioners, imposing payroll tax on dentists most likely ends up with consumers meeting the costs through increased patient fees. We've just heard an example of that. The likely consequences are troubling. We know many Australians are already delaying dental care as they grapple with the rising cost of living. Preventable conditions will therefore escalate, leading to increased hospital admissions and a greater strain on our already overburdened GP services and the public health system. In New South Wales alone, there were over 24,000 preventable hospital admissions for dental conditions in the 2022-23 year.

We therefore urge the Government to amend the Act so that the genuine independent contractor arrangements, such as those between dental practitioners and clinic operators, are not subject to payroll tax. Most importantly, we seek a New South Wales Government amnesty on the imposition of retrospective payroll tax liabilities given the significant legal uncertainty to date. Without these changes, the viability of dental clinics and patient access to essential care will be severely compromised. In Queensland a bipartisan amnesty of retrospective payroll tax has provided certainty to dental clinic operators. We look forward to answering your questions later.

The CHAIR: Do you have anything further to add, Mr Burns?

JOHN BURNS: No.

The CHAIR: We'll now turn to the AMA. Ms Egan?

DOMINIQUE EGAN: Thank you. I'd like to begin by acknowledging the traditional owners and custodians of the lands on which we meet today, the Gadigal people, and pay my respects to Elders past and present. The AMA is an independent medical association that represents the medical profession from specialists to general practitioners, doctors in training and specialist practitioners in private practice. One of the AMA's principal objectives is to represent and advance the interests of medical professionals and patients through effective advocacy. Over the past five years, AMA New South Wales has worked closely with general practitioners in relation to the issue of payroll tax and its impact on private general practice following the Optical Superstore decision in Victoria in 2018. In 2020 the then AMA New South Wales president, Dr Danielle McMullen, wrote to the New South Wales Treasurer raising concerns regarding the potential exposure to payroll tax for medical practitioners.

AMA New South Wales' focus has been on the impact on general practitioners. They are less likely to be able to rely on the exemptions that exist under the payroll tax that may be available for non-GP specialists—

namely, the public service exemption and the 90-day exemption. And this is due to the differences in the way in which general practitioners and non-GP specialists work. Further, the margins in general practice are much tighter, and so there is less ability to absorb those costs. In 2024 the New South Wales Government announced and legislated two initiatives for general practitioners to supplement the existing exemptions under the Act, for those who were able to take advantage of those. The first was a legislated exemption for any unpaid payroll tax payable on wages paid or payable to GP contractors prior to 4 September 2024. The second was a legislated payroll tax rebate on wages paid or payable to GP contractors on or after 4 September 2024, provided the applicable bulk-billing threshold is met.

Since that time and since the time of our submission also, the Queensland Government has legislated an exemption for all wages paid to general practitioners, and that includes contractor payments. AMA New South Wales calls on the New South Wales Government to replicate this arrangement so that we don't have a situation where we lose general practitioners and practices across the border, particularly in northern New South Wales, and also to create a position of certainty, as, while we acknowledge the exemptions that have been legislated in New South Wales, there is still much angst and uncertainty amongst general practices about how that applies to them, particularly in relation to the application of the bulk-billing threshold. I am happy to answer the Committee's questions.

REBEKAH HOFFMAN: I'd like to thank the Committee for the opportunity to give evidence today. The RACGP, who I'm here representing, is Australia's largest professional general practice organisation. We represent more than 50,000 members and more than 15,000 in New South Wales. For over 60 years the RACGP supported Australia's healthcare systems and set the standards for education and practice and advocating for better health for the wellbeing of Australians. I'm also here, though, as a GP and as a practice owner as well.

In August 2023, as we've heard, the New South Wales State revenue office issued a ruling to broaden the application of payroll tax, and that was to include independent general practitioners. The applications of this ruling threatened the viability of the general practice system in New South Wales and definitely impacted patient care and patient access to care. In June 2024 the New South Wales Government announced limited exemptions for independent GPs meeting set bulk-billing thresholds and later announced exemptions for independent GPs from earnings derived from the Department of Veterans' Affairs rebates. There's still work to be done to ensure that GPs can continue to provide vital care to their communities now and into the future. The hearing today represents an opportunity to discuss the applications of the Payroll Tax Act within the framework of healthcare models and to support the viability of the general practice sector. I look forward to answering your questions.

The Hon. DAMIEN TUDEHOPE: Can I first, in case I'm going to be accused of a conflict of interest later on—my wife was a dentist. Can I just ask this to start with. What is the model that dentists use, which brings them within—describe just how that model works, so that Revenue can construe that they fall within the ambit of an employee for the purposes of the Payroll Tax Act?

JOHN BURNS: Absolutely. Also just to clarify—I've been working in, predominantly, general practice and then dental for the last 20 years. There's quite a lot of equivalencies across the two. In dental we have a facilities service agreement. Effectively, in the majority of cases, the dentist—we will, obviously, collect billings on behalf of the dentist. We'll remit 40 per cent of billings to the dentist. We share lab costs on a 40-60 split. We pay payroll tax on all of our employees, which includes practice managers, receptionists and dental assistants, and any other additional staff that we might have on site or in our support structure. The payment of payroll tax for us would represent approximately $5 to $10, per consultation, of additional fees and a loss of margin of around 2.5 per cent for us as a business. For the majority of non-corporate practices that are smaller, they will sit under the threshold. Obviously, it is not a massive issue for them.

But, once you get to three dentists or more, you are definitely within the payroll tax capture. So, for us, we have not traditionally paid payroll tax. Both in GP and in dentist, over the last 20 years and certainly the last 30 years, there's been a movement away from solo practice. It's better for patient journey and better for patient access. It matches our practitioner patterns. They want to work part-time. They want to work in a group environment so they can take leave et cetera. In the case of dental, they can share quite expensive scanning equipment et cetera. So the forming of group practice over the last 30 years, whether it be privately owned or corporate owned, has been a significant shift. Smaller practices under the threshold, those that are in group practice, under a payroll tax payable situation, would have that serious imposition, which we haven't had to date.

The Hon. DAMIEN TUDEHOPE: This applies across the board to general practitioners as well. Is it the fact that the primary problem is that the structure which has been organised is—it is a group practice, and the so-called employer collects all the fees which are payable and then distributes those fees to the practitioner who has, in fact, been involved. Is there a solution from your perspective, that the practitioner actually collects their own fees?

JOHN BURNS: The flow of funds is a very interesting concept, which, I think, certainly from our perspective, has been considered and remains a consideration. Up until this time, the collection of funds and the remitting of payments has been part of the service that we've provided. I very much see general practice and dental clinics as being individual independent contractors not wanting to run a solo practice, looking for group practice, but they're running a business within a business. They're running their business within our business, and that's very much the basis of the model and why payroll tax and employment-like definitions are problematic. But the collection of fees has always been a service that we provide. There's a machine at the desk. It's an EFTPOS machine. In the case of dental, there is an insurance payment that needs to be considered, as well. So pushing that flow of funds to a dentist receiving the funds and then remitting to us would be problematic but not impossible.

The Hon. DAMIEN TUDEHOPE: Is it the same position that applies in relation to GPs?

REBEKAH HOFFMAN: It's a very similar position. There's a few different models of general practice. There is a similar, where you're an independent contractor working at a group practice, and the practice does have, very similar, a machine at the front desk, where they take payments, and then the Medicare rebate goes back into the patient's account. Or, if they are bulk-billing, then they accept the Medicare payment instead of charging the patient. There are some newer models, where GPs are salaried employees, and they are entirely and appropriately paying payroll tax. But, very similarly, GPs already pay payroll tax for their registrars, for our nurses, for our admin, for all of our employed staff. It's the GPs, the independent doctors that, up until last year, weren't.

The Hon. DAMIEN TUDEHOPE: I had some personal experience of it. I went to see a skin cancer person. And, depending on who you saw, each of them had their own individual terminal. Would that have solved the problem?

REBEKAH HOFFMAN: It could've, but I've got 24 doctors. I have no interest in having 24 terminals at my reception. They're not going to have—all of my doctors are part time. They're mums with kids. They work a day, day and a half a week. The admin burden on that is phenomenal.

The Hon. DAMIEN TUDEHOPE: So the admin burden would almost equal the payroll tax impost which would be imposed.

REBEKAH HOFFMAN: Absolutely.

The Hon. DAMIEN TUDEHOPE: So it would, effectively, be passed on to the consumer at some stage. Is that the same with—

JOHN BURNS: Yes, very much.

The Hon. DAMIEN TUDEHOPE: Are there 24-dentist practices?

JOHN BURNS: No. GP group practice tends to be slightly more GPs on average. But, to Rebekah's point, you don't really want a dentist who is a mum, on a Sunday, sitting, looking at her billings for the last two weeks and trying to work out how much she's got to pay for Abano's service. For us, it's part of the service. We say, "We'll collect. We'll give you a full statement, and then we'll remit your funds every two weeks." And that's just a standard practice. Again, I see it as part of the service we provide to independent contractors.

The Hon. Dr SARAH KAINE: Just so that I understand—and this is probably to all of you—you're providing a service with regard to the admin, the collation and the flow of funds et cetera.

JOHN BURNS: Back office.

The Hon. Dr SARAH KAINE: Back office stuff. In the GP area, is that separate? When you say group practice, is that a separate service to say if you're—for want of a better term—part of a branded chain? Is that a different thing? Is this a service that's back of the office that we wouldn't know about, or is it, "We have a brand and that provides all of that service"? For me, there's also a difference in the branding of chains of things and what might be a service in house that no-one sees, because there's no goodwill attached to that.

JOHN BURNS: It's interesting. I always draw a triangle, which is the operator—ourselves—the dentist or GP, and the patient. For me, our primary relationship is between us and the dentist, and the other primary relationship in that triangle is between the dentist and the patient. The relationship between us, as the operator, and the patient is not a primary relationship, and brand comes into that, but that is simply what's over the door. People will come to see the dentist or the GP, and that's why I say they're operating a business within a business; they build their own brand. If they leave, then the patient will follow. For me, the link or the brand and the retailness of a brand doesn't translate on that axis between operator and patient. It's not a strong relationship as the other two, and I think that's very important. Our customer is the dentist, and their customer is the patient. That's very much how we structure our business.

REBEKAH HOFFMAN: It's exactly the same in general practice. Patients have their doctor. The practice is where their doctor is, but the patients have their doctor that they go and see. And, yes, they'll see somebody else if their doctor is not available that day, but they'll still want to go back to their doctor—to their GP. The service fee also doesn't just cover the funds; it also covers the admin fees, it covers the nursing fees, and it covers the mortgage and the electricity and all of the other costs that come with running a business as well. All of that is part of the branding and the service fee. But the patient who comes to see you, they absolutely are coming for that independent doctor.

The Hon. Dr SARAH KAINE: Why then do you need to have a brand? Why then isn't it just, "This is a doctor's surgery on Macquarie Street."? I don't need to name them. What is that about? Why do you need that?

JOHN BURNS: That's a fascinating question. I see the value, again, in the relationship between the practitioner and the patient. For me, brand or the retailness around a health environment is very secondary and, for me, actually holds very little value. I may get in trouble for saying that, because I run a branded business, but it is a pure service, GP/dentist-to-patient relationship.

The Hon. DAMIEN TUDEHOPE: In relation to that, isn't there a benefit being in a multidisciplinary practice in terms of all the technology, which is potentially available and made available to those dentists who operate in the practice?

JOHN BURNS: A CBCT costs about $150,000.

The Hon. DAMIEN TUDEHOPE: Correct.

JOHN BURNS: It is a live CT. It allows guided placement of an implant, for example, in the mouth. It is an expensive piece of machinery, and particularly young dentists are looking for that level of support—

The Hon. DAMIEN TUDEHOPE: But could not afford it.

JOHN BURNS: —and a lot of established dentists as well. A lot of the money that we do get, from a margin perspective, we're a very capital-intensive business and it's about reinvesting because it's—I'm dental phobic and, ironically, running a dental business.

The Hon. Dr SARAH KAINE: I love the dentist.

JOHN BURNS: My last experience was a dental implant. It was guided through a CBCT. It was an exceptionally good patient journey for me and patient experience. That's why, again, group practice allows access.

The Hon. Dr SARAH KAINE: I completely understand the economies of scale and all of that. That makes complete sense. It's more that I'm still struggling with the value—from what you're saying, the relationship that you're focused on is the patient-doctor, or dentist. I'm still struggling a bit with what—there's a lot of branding out there. Yes, the economies of scale and, yes, the service is in the same place, I understand. But I'm still figuring out then, well, there has got to be some value. There's a business model there, which is about branding, and I just can't—

SARAH RAPHAEL: I think you'll find that branding even in small solo practices. Practices with two or three dentists now, they will call their practice something, Happy Smiles—that's not a good one, because that is a—

The Hon. Dr SARAH KAINE: That captures the theme. I get what you're saying.

SARAH RAPHAEL: They'll call it "Bright Smile". It has just become a thing for identification, I think, with consumers. I think they want a name. That concept of having the brass plaque with Dr X on it now, even though when they get in there they want to see that particular dentist or doctor—I think it's just consumerism.

The Hon. Dr SARAH KAINE: But that goes to whether there is goodwill in a name. That's what I'm getting to. These are genuine questions.

SARAH RAPHAEL: Interesting.

JOHN BURNS: The thing with group practice is, again, that access between operator and patient. You want to be open with good opening hours. You want to have patient access. You want the site to be clean. You want it to have a good reputation. The minute you come away from that solo practice with the plaque on the door into group practice, then you have to call it something, and then you might call that something another one that's two suburbs away. But generally, for me, general practice and dentists are local businesses. Dentists will join a practice, as will GPs, not necessarily because of the name above the door but the person that's practising in the room next to them and the room next to them. It's about who is in that group practice. Is the medicine good? Does

it have a good sterilisation compliance? Do they have good nursing ratios? Do they have a great PM? They're much more important than what's above the door.

DOMINIQUE EGAN: If I could just add one thing to that. The group practice model as well has very much become a feature because that is what regulators expect. They don't want people to be practising on their own because that's not good necessarily for that practitioner, because they're isolated. For the patient, when that practitioner tries to take leave, then they don't have continuity of care. So while I think, as Rebecca's point was, people very much associate with a person as their general practitioner, what they actually also want is to also know that there's somebody else to care for them if their practitioner is not available for one reason or another. That is also the advantage of the brand to know that they're going to a practice where they have a good reputation in that regard.

The CHAIR: I'm sure there are a multitude of different circumstances. With the group practice, is it that the practitioners come together and then move in collectively under an umbrella of a brand, or are they recruited in individually? How does it usually work? Is it that the overarching business just brings in individuals, or is it that the practitioners get together as a collective and then move in underneath a brand?

DOMINIQUE EGAN: I think a lot of people now are joining established practices. They establish those connections when they're training, and then they're invited to come into the practice once they've gained fellowship. Probably some of the bigger corporate practices do have a recruitment model, but I think most people now are joining established practices. But there may be two or three practitioners who get together to decide to establish a new practice together to share the overhead.

JOHN BURNS: It's also a really well-established registrar model as well. If you're a training practice—we have the same in dental—then you get really good talent coming in as a registrar, and you provide them with an environment which is conducive to chronic disease management et cetera, and they will then graduate. In both sectors, as well as other sectors like veterinary, the traditional model of the senior owner bringing in a junior, and there were two people in the practice who retired and handed the practice over—that ceased to function about 30 years ago, and in its place is collectives. I call them collectives of doctors wanting to work together. That's how I explain to a lot of GPs coming out of solo practice to join a group practice, "Your business within our business is a collective. You have a shared voice on how you wish us to help you run your practice individually and collectively."

The Hon. Dr SARAH KAINE: This is really fascinating, and I'm sorry if these seem to be obvious questions. If we were to look at the sector overall, how many of the businesses would be at the bigger end, and then how many would be that more traditional, which you say is not really the thing anymore and regulations push to a different model? You can take it on notice, but I'd be interested in the breakdown of the number of businesses that are at that bigger end, multiple operators—that collective model—and how many are that more traditional breakdown. I guess a related question would be how many dentists or doctors would you need in a practice to get over the 1.2 million threshold.

JOHN BURNS: There are really three categories. We can come back with some detail.

The Hon. DAMIEN TUDEHOPE: Three, did you say?

JOHN BURNS: Yes, three categories, the first being one or two dentists that will be under the threshold regardless of who's in scope for payroll tax. Those that are currently out of scope based on non-contractor costs would be in scope if you add in the independent contractor revenue. And then there are those that are already in scope if we apply the rule, because they're already paying payroll tax and they're above the threshold for non-contracted employees, like nurses, dental assistants and PMs. They would be the three categories.

SARAH RAPHAEL: Practice managers are PMs.

JOHN BURNS: Sorry, practice managers are PMs. They're very important people.

SARAH RAPHAEL: We have a little bit of an answer to that question. In Australia, the dental service organisations that we're representing today run 403 clinics across Australia, with 2,502 clinicians. Six is kind of that average number where that's sitting—just over six per practice. That is much more common, for example, than GP practices, which perhaps have the larger numbers that Dr Hoffman was talking about.

REBEKAH HOFFMAN: With general practice, it's closer to four FTE until they are meeting the threshold.

JOHN BURNS: For us, it would be three FTE.

The Hon. DAMIEN TUDEHOPE: General practitioners effectively now have a new regime they operate on. Since that has come into place, have there been any further audits in relation to medical practices?

REBEKAH HOFFMAN: There has. There are now practices that are paying payroll tax. There are now practices that will be eligible for the rebate if they've met the bulk-billing thresholds for payroll tax. As we've heard before, there are practices that are now passing on that payroll tax to their patients.

The Hon. DAMIEN TUDEHOPE: In relation to that, do you have the number of practices that are now paying payroll tax that weren't previously?

REBEKAH HOFFMAN: I'm happy to take that on notice.

The Hon. DAMIEN TUDEHOPE: Could I ask the dentists the same thing? How many dentists are currently the subject of audits? Are you aware?

JOHN BURNS: Are you across that?

SARAH RAPHAEL: No. We'd need to take that on notice.

The Hon. DAMIEN TUDEHOPE: Are you aware of any court cases involving dentists—

SARAH RAPHAEL: We're not aware of any at the current time.

JOHN BURNS: Not in New South Wales.

The Hon. DAMIEN TUDEHOPE: —where there has been a challenge to the payroll tax assessment?

SARAH RAPHAEL: We're not aware of that at this time.

The Hon. DAMIEN TUDEHOPE: Are you aware of any circumstances where dentists have been audited and have been the subject of retrospective tax?

SARAH RAPHAEL: Yes, we are.

The Hon. DAMIEN TUDEHOPE: Do you have any data relating to how many have been audited and who would be the subject of retrospective tax?

SARAH RAPHAEL: We would have to take that on notice as well.

The Hon. DAMIEN TUDEHOPE: Similarly, general practitioners, are there any current challenges to payroll tax assessments that you're aware of?

DOMINIQUE EGAN: Not that I'm aware of.

REBEKAH HOFFMAN: No, not that I'm aware of.

The Hon. DAMIEN TUDEHOPE: In terms of the actual audit process, are you aware of practitioners that have been audited and been found to be potentially liable for retrospective tax?

REBEKAH HOFFMAN: Only previous to the new legislation.

DOMINIQUE EGAN: Same.

The Hon. DAMIEN TUDEHOPE: And there are cases involving that, where retrospective assessments have been levied?

DOMINIQUE EGAN: Prior to the amendments, yes.

The Hon. DAMIEN TUDEHOPE: Was that challenged?

REBEKAH HOFFMAN: No. The GPs that I'm aware of have had to pay that.

The Hon. DAMIEN TUDEHOPE: Pay the retrospective tax?

REBEKAH HOFFMAN: Yes.

The Hon. DAMIEN TUDEHOPE: Is it the circumstance that Revenue, in fact, had previously given a clean bill of health to a practice and subsequently assessed that practice for the purposes of payroll tax given the impact of Supreme Court decisions, whether in Victoria or New South Wales?

REBEKAH HOFFMAN: Not to my knowledge, but I can take that on notice as well.

DOMINIQUE EGAN: I know that there were some that were being looked at. I'm not sure whether they went through a formal audit process yet, but there was some concern about that. I can make further inquiries.

JOHN BURNS: I think there is a sense of resolution across both sectors that anybody who has been through the process and has come out pleased with the outcome—

The Hon. DAMIEN TUDEHOPE: They've generally been pleased with the outcome?

JOHN BURNS: No, have not been. No-one has come out and said, "That was fine. We came out unscathed." For us, collectively, it's the uncertainty.

The Hon. Dr SARAH KAINE: I want to pick up on a couple of things. Ms Egan, in your opening statement, you spoke about 2020 being quite a catalyst for concern and writing to the Treasurer about payroll tax liabilities and exposure to that. Then you jumped ahead to 2024. I wondered if you could speak a bit about what happened in that time. Others on the panel, I suspect, probably had some concerns that were triggered around the same time. If you could speak about what happened in that period of time, that would assist my understanding of the context.

DOMINIQUE EGAN: Certainly. We met with Revenue NSW about the Optical Superstore decision in early 2020. That then prompted the initial correspondence to the then Treasurer. In that period of time, we made repeated representations to government about our concerns around payroll tax. We engaged about what an exemption might look like or how that might be dealt with. Similarly, and in cooperation with the RACGP, we also participated in discussions that looked at the statistics around general practice—how many general practitioners there were, what their fees were and all of those arrangements.

The Hon. Dr SARAH KAINE: Sorry, discussions with whom?

DOMINIQUE EGAN: That was with Revenue NSW. Throughout that period, we were making representations and participating in consultation, and then the legislative amendment resulted in 2024.

The Hon. Dr SARAH KAINE: So in that intervening period, with the previous Government there, it was simply continued representation? What was the response? Was there a definitive response?

DOMINIQUE EGAN: There wasn't interest at that time, as I understand it, in legislating an exemption for general practice.

The Hon. Dr SARAH KAINE: Was that a similar experience for dentists? Did you have any—

JOHN BURNS: During that period, I was predominantly in general practice, not dental. I've only been in dental for a year and a half.

SARAH RAPHAEL: I think this is where there aren't similarities. Obviously, that legislation was directed at Medicare-billed and government-billed services. Because dentistry is 85 per cent in private, that hasn't been as applicable for us. The whole time has been a period of uncertainty as far as past payroll tax liability. I think everybody has been slowly monitoring what's happened in other jurisdictions to try to get a gauge on what we would believe would happen for dentistry in New South Wales.

The Hon. Dr SARAH KAINE: Were there any meetings with relevant Ministers or was it all with Revenue?

DOMINIQUE EGAN: No, there were meetings with Ministers as well.

The Hon. Dr SARAH KAINE: Across different portfolios?

DOMINIQUE EGAN: Yes, health and finance.

The Hon. Dr SARAH KAINE: Not Treasury?

DOMINIQUE EGAN: I can't recall, sorry.

The Hon. Dr SARAH KAINE: Would you take that on notice and let us know?

DOMINIQUE EGAN: Yes.

REBEKAH HOFFMAN: We've only met with the health and finance Ministers regularly. With the State revenue office, we had a working party at one point where we were meeting almost fortnightly to talk mostly about the impact of the retrospective payroll tax liabilities, but also then what the legislated options would be.

The Hon. DAMIEN TUDEHOPE: One of the issues that was raised was the requirement for harmonisation and, with a change in New South Wales, what would occur in relation to other jurisdictions, because I think New South Wales has obligations in relation to the harmonisation of its tax arrangements. I take it that the dentists would advocate for exactly the same provisions to be applied as applies to general practitioners in Queensland.

REBEKAH HOFFMAN: Absolutely.

JOHN BURNS: Absolutely. We're talking about doctors, and doctors just happen to be working with parts of the patient. I know that then there is an argument around the widening to allied health providers. I don't see the same equivalency.

The Hon. DAMIEN TUDEHOPE: I take it you would encourage the New South Wales Government to adopt the same across-the-board provision that has been adopted in Queensland? I suppose there is an administrative burden which attaches to assessing whether you fall within or without the 80 per cent rule or the 70 per cent rule.

DOMINIQUE EGAN: Yes, and it varies from quarter to quarter.

The Hon. DAMIEN TUDEHOPE: That's right. And that of itself has an administrative burden attached to it. For simplicity, you would be saying that this is something which just ought to apply across the board.

DOMINIQUE EGAN: Yes.

REBEKAH HOFFMAN: Absolutely, not just in New South Wales but nationally as well. There needs to be a nationally consistent model for payroll tax that is not based on different jurisdictions. The administrative burden is enormous. It's not just based on Medicare; there are WorkCover payments, there are insurance payments and there are DVA payments. Clarity around which payments contribute to the bulk-billing threshold and which don't are still unclear.

The CHAIR: Thank you for your submissions and for your attendance here today to inform our inquiry and this hearing. We very much appreciate it. There were a couple of things taken on notice. The secretariat will be in contact with you in due course for those. Again, thank you. It's very much appreciated. It is now time for morning tea. We'll have a break and reconvene at 11.15 a.m.

(The witnesses withdrew.)

(Short adjournment)

Mrs KIM PUXTY, Chief Executive Officer, Building Service Contractors Association of Australia Ltd (BSCAA), affirmed and examined

Mr MARK DIAMOND, Primary Legal Counsel, Quad Services Pty Ltd, affirmed and examined

Mr PAUL McCANN, Chief Executive Officer, ARA Property Services, affirmed and examined

Mr COLIN WALKER, Managing Director, Mastercare Australasia Pty Ltd, affirmed and examined

The CHAIR: Good morning, everyone. We will recommence the hearing. To our witnesses, welcome and thank you for taking the time today to give evidence. I would like to inform everyone that the Legislative Council has adopted rules to provide procedural fairness for inquiry participants. I note that, in accordance with these rules and with the prior agreement of the Committee, the witness appearing for Mastercare, Mr Colin Walker, today will have reasonable opportunity to consult his legal adviser during the hearing, if needed. Do any witnesses have an opening statement you would like to give to the Committee? I will start with you, Mrs Puxty.

KIM PUXTY: Good morning, honoured members of the Committee. Thank you for the opportunity to address this inquiry into the Payroll Tax Act 2007. My name is Kim Puxty. I'm the Chief Executive Officer of the Building Service Contractors Association of Australia, also referred to as BSCAA. Our association represents a diverse range of businesses within the cleaning and building services industry, which are integral to maintaining the health and safety of our community and workplace. The Payroll Tax Act, particularly its employment agency provisions, has had significant implications for our members. Initially, our members were confident in their compliance with the Act. However, through recent audits carried out by Revenue NSW, it has left them confused and seeking clarification on the employment agent provision. For example, members who were previously deemed compliant by Revenue NSW after previous audits have now been classified as employment agencies, despite no changes in their business structure or practices.

Guidance from accountants and Revenue NSW has not provided clear answers, causing significant operational and financial strain. Our industry relies heavily on contractor arrangements to meet client demands. However, the current legislative framework lacks clarity in its interpretation, leading to uncertainty and potential noncompliance. The BSC has made a formal submission to this inquiry outlining the challenges faced by our members and proposing recommendations for more equitable tax policies.

I will outline our key recommendations. There are complex and confusing rules. We are seeking that the current payroll tax rules that are considered difficult to understand, and create compliant challenges for small- and medium-sized businesses, be addressed. And then there is retrospective taxation. The retrospective application of payroll tax means businesses have to pay taxes on past transactions that weren't previously taxed, leading to unexpected and often huge liabilities. We strongly recommend ceasing this practice immediately to give businesses time to realign their budgets, speak with their clients and align their businesses to meet their legislative requirements.

Lastly is education and communication. BSCAA is committed to working with the Government and other stakeholders in improving and providing understanding and compliance. We would like to see educational resources and clear guidelines to help businesses navigate the complexities of the Payroll Tax Act. In conclusion, the BSCAA is dedicated to advocating for our members and ensuring their voices are heard. By participating in this inquiry, we aim to promote a fairer, more transparent and supportive regulatory environment. We believe in ceasing retrospective taxation, clarifying the employment agency provision and enhancing education through collaboration with industry bodies to better support businesses.

The CHAIR: Mr Diamond?

MARK DIAMOND: I've got a short opening submission to make. I'm here today on behalf of Quad Services. They're a significant business. We're seeking three things only: fairness, transparency and predictability in the application of the payroll tax legislation. That's why we're here. I think you would all be aware, members of the Committee, that there is a significant amount of angst, certainly within the cleaning industry, about the way in which Revenue NSW is interpreting the employment agency provisions. Based on everything that we know to date, pretty much every cleaning contractor would be caught by the employment agency provisions. That just cannot be right. Cleaning contractors, by and large, provide a comprehensive service. They bring equipment. Yes, they bring labour, and they bring a number of things. They bring materials; they bring gear. That's not an employment agency; it can't be.

What we hope from this Committee is that we get some clarity, some fairness and some reasonableness in the application of these provisions. Quad doesn't come here asking for the law to be changed. That's not why we're here, but what we are here for is for the interpretation and administration of that law to be changed. It needs to be.

This is an extinction-level event for a lot of small- to medium-sized businesses. I'm not exaggerating when I say that. You have medium businesses getting bills for $7 million, $8 million because of the retrospectivity provisions. It can't be right. I thank every member of this inquiry for giving us a chance to be heard on this, because it's that important.

The CHAIR: Mr McCann?

PAUL McCANN: Good morning, honourable members. Thank you for the opportunity to present today. We believe the problem is this: Payroll tax laws were designed to prevent avoidance. Today, they risk punishing compliance. I want to highlight a few themes from our submission, which I note were shared by many others. Firstly, harsh unintended consequences—the application of payroll tax, particularly the relevant contractor provisions, are outdated and harsh. Originally introduced in 1985 to prevent employment relationships disguised as independent contracting, they have failed to evolve with modern business practices. Genuinely independent contractors, like regional specialists, part-time contractors and microbusiness owners, are now treated as payroll tax liabilities, not partners in enterprise. New South Wales is taxing genuine business models as though they are loopholes, which is both unfair and economically unsound.

Secondly, uncertainty and contradiction—the employment agent provisions are increasingly unclear due to shifting interpretations and contradictory guidance from Revenue NSW. What used to be a fact-sensitive analysis has now become, in the wake of recent legal decisions like the Integrated Trolley Management case, a mechanical contractual review disregarding the practical realities of how services are delivered. Parliament did not agree to change the payroll tax, or regulations or their interpretation; yet Revenue has changed its interpretation, contradicting years of legal precedent and leaving taxpayers like us in a sea of uncertainty.

Picture this: You're running a business. Yesterday's audit gave you a clean bill of health, but today's audit, based on the same facts, flags a liability worth hundreds of thousands of dollars. This isn't a hypothetical. This happened to us and is happening to us. In 2017 and 2019, ARA Property Services was given a clean audit; yet in 2022 it was audited again and the state revenue office of New South Wales changed its interpretation and decided to go back four years to 2018. We were forced to pay fines, interest and tax totalling $2.7 million.

The third point is under retrospective liability. This is arguably the most dangerous issue. ARA, like many others, has experienced the fallout of retrospective audits where past interpretations of the law are overturned and liabilities are imposed years later. One court decision issued long after a tax year has passed suddenly becomes the new lens through which historical arrangements are viewed. What does that mean for a business? It means reassessments, penalties and interest all calculated on decisions that weren't even made at the time of doing business. It's akin to being issued a speeding fine today if the speed limits changed tomorrow only because the rules were changed overnight. Retrospective enforcement doesn't just create financial strain, it breeds fear, confusion and mistrust in the system.

Fourthly, clear, consistent and practical guidance—clarity and consistency are the cornerstone of a well-functioning tax system. We need consistent administrative guidance. Revenue NSW's public rulings often conflict with its enforcement actions. While Revenue's rulings suggest payroll tax liabilities lie with the employment agent closest to the client, audits have then been conducted against parties further down the chain—a complete contradiction. When tax authorities shift interpretations without consultation, or contradict their own published positions, it places businesses in an impossible bind. Compliance becomes a gamble rather than a guarantee.

In closing, I ask this inquiry to recommend the following changes: modernize the payroll tax to recognise modern business practices and ensure only genuine examples of avoidance are targeted for compliance; amend the Act to require the commissioner to report to Parliament on their changes to interpretation; prohibit retrospective application of interpretations; and ensure any future interpretation changes are clearly communicated so that businesses have time to plan and adapt. When taxpayers know the rules, compliance follows naturally. We need this inquiry to recommend changes to modernise payroll tax, restore clarity and consistency, and ensure fairness and economic resilience for New South Wales businesses.

The CHAIR: Mr Walker?

COLIN WALKER: Thank you, Chair and honourable members. I would like to tell my story, and I'm afraid it's going to be very similar to what I've already heard. I've been in business for 40-plus years and during this time, after previous audits, I have never owed one additional cent in tax—full stop. Indeed, the last audit for the period of 2017 to 2020 identified an overpayment by my companies of $6,000. Then at the last minute, during this audit and before it was finalised, Revenue NSW unexpectedly issued a demand for $1 million plus penalties and interest to be paid in 21 days based upon its now interpretation of the employment agency legislation.

This is the nub of the problem: The legislation is totally unfit for purpose. From my colleagues on the right here, you've heard it. Government needs to rewrite the employment agency legislation to ensure it is relevant to the 2025 business environment. The legislation was introduced in 1985, 40 years ago, and amended in 1998, 27 years ago. How different is the world today, well before Google was even known? I am not alone in this belief. Justice White has similar views. Justice White observed in respect of the employment agency provisions that "it is not a case in which a literal construction of these provisions fails to address the mischief that Parliament was concerned to address, but rather a case in which the literal words used to address that mischief go far beyond the mischief intended to be addressed". Hear, hear, Justice White. I have a silk who has made a written comment. He is a little more succinct. I'll quote what he wrote. He says:

> A taxation law—

and this is what we're all saying—

> is unjust if it is so uncertain that taxpayers are unable to confidently interpret and apply it. The volume of litigation over the Employment Agent Rules in the last 10-15 years demonstrates that not even judges and highly paid tax lawyers are able to consistently agree on how the legislation should be interpreted. These circumstances are crying out for legislative intervention.

Further, in 1985, the concluding remarks of Mr Ernie Page, who was a Labor MP at the time, put the Government's position beyond any doubt when he said:

> The whole aim of tightening up on contractors and agents is to pick those who are avoiders. The Minister has made it quite clear that there is no suggestion that anyone who is a legitimate contract worker, or a firm, should face an undue imposition of payroll tax.

It is therefore clear that the original intent of Parliament when this legislation was introduced is no longer being applied. I have some further comments to make on retrospectivity. The retrospective period, I'm told, is about five years. In my case, Revenue NSW is seeking to go back nine years. Obviously what we're saying here is that each business should be responsible for its own tax and no-one else's. This is a very simple principle of fairness, common sense and, I would imagine, desirable public policy. The current legislation does not provide this certainty.

The commissioner must communicate widely all practice notes—for example, email it to industry associations, lawyers and accountants et al—months before new rules are applied so appropriate consideration can be given to them. The Committee should recommend a moratorium of six months to 12 months while all the above matters are being resolved. All court cases should be halted during this period. Finally, if requested, we will offer draft legislation. The legislation that we will propose will not reduce the percentage rate of payroll tax. It will not increase the threshold. Therefore the Government will not lose one cent in tax revenue beyond the original intent of the employment agency provisions. Instead, it will simply result in each business being solely responsible for their tax and no one else's. It will not lose revenue. Thank you, Chair.

The CHAIR: Thank you, Mr Walker. We will now turn to questions from Mr Tudehope for the Opposition.

The Hon. DAMIEN TUDEHOPE: Thank you all for the submissions which you have made. They all outline the various issues which your corporations or, alternatively, those for whom you act have been facing. Mr Walker, in your concluding statement you say you are happy to pay the tax that you are liable for but not pay the tax for others.

COLIN WALKER: Correct.

The Hon. DAMIEN TUDEHOPE: Explain to me what you mean by that.

COLIN WALKER: The legislation that I paid and the audits that I've had—we met what we thought then were the rules of taxation of employing people, and we paid payroll tax as required for the employees. Revenue NSW has decided to interpret the current legislation differently. The fees that we pay subcontractors—bona fide incorporated contractors—they claim are basically deemed wages, and they apply the tax to that fee. The department has, in my case, not audited any of these subcontractors—not one of them. They don't know if they are above the threshold or under the threshold. We know in one of our cases that they are under the threshold, but I'm supposed to pay tax on it. Suddenly I'm responsible for other people's tax.

The Hon. DAMIEN TUDEHOPE: Can you give me a description of your business and what these subcontractors do for your business?

COLIN WALKER: They provide services to what our clients want. They might provide specialist services or specialist cleaning services. We outsource this, and clients outsource to engage us. With respect, we have a court case coming up, so I have to be a little circumspect.

The Hon. DAMIEN TUDEHOPE: Just describe to me what your business is.

COLIN WALKER: Basically a cleaning company.

The Hon. DAMIEN TUDEHOPE: And you subcontract with—

COLIN WALKER: With other providers who might provide equipment, labour, chemicals and whatever specialist expertise.

The Hon. DAMIEN TUDEHOPE: Do those people only work for you?

COLIN WALKER: No.

The Hon. DAMIEN TUDEHOPE: They work for other people as well?

COLIN WALKER: Absolutely.

The Hon. DAMIEN TUDEHOPE: The subcontractors that you engage to do work, where you have the head contract, may in fact be also contracted to other organisations.

COLIN WALKER: With the greatest respect sir, they might even work for our client.

The Hon. DAMIEN TUDEHOPE: Yes.

COLIN WALKER: Exactly. It's not like the old story where, if they work for more than 80 per cent of you, they are deemed an employee. That's not the case. These are incorporated entities who have their own—most probably pay their own payroll tax, workers compensation and public liability. There is no association between me and the other parties. There is no cross-shareholding. They are independent contractors as viewed by the ATO. There's no relationship, none whatsoever.

The Hon. DAMIEN TUDEHOPE: When you got your assessment for $1 million, did you challenge that assessment?

COLIN WALKER: We are at the moment, yes.

The Hon. DAMIEN TUDEHOPE: And that is in the Supreme Court?

COLIN WALKER: Yes.

The Hon. DAMIEN TUDEHOPE: When is that due to go to hearing?

COLIN WALKER: I can't answer that, and I'm not being evasive here. Later this year, I would imagine.

The Hon. DAMIEN TUDEHOPE: You received an assessment, I think you said, in 2017 and then 2019. Is that correct?

COLIN WALKER: The audited period was from 2017-20. It was four years. I said that they went back nine years retrospectively, because the financial year ending in 2017 started in July 2016. That's what they're starting to say, "You owe tax on."

The Hon. DAMIEN TUDEHOPE: When was the first time that you became aware that the subcontractors you've identified were deemed employees for the purposes of payroll tax?

COLIN WALKER: When my chief financial officer said, because they alerted us, that we'd overpaid this $6,000. The person we were dealing with apparently said, "I have to get approval to credit you the $6,000." The answer came back, "No, we're not going to pay the $6,000. We're going to view you under the employment agency conditions," right at the end of the audit.

The Hon. DAMIEN TUDEHOPE: So before that—

COLIN WALKER: We had no idea.

The Hon. DAMIEN TUDEHOPE: Had you ever been made aware of court cases which had been in the process of being decided, or had been decided, which potentially may have exposed you to liability?

COLIN WALKER: Not at all. My lawyers, accountants and other people we used had never come to me and said, "Look, you really should consider this. This is something which is potentially financially damaging to the company." We had no idea. It was first drawn to our attention formally in the written word. They came back and said, "We're now viewing your structure as under the employment agency provision," and I did not have a clue what that meant. I'd heard of employment agencies, but we're no more an employment agency than we fly in the air. It then became a legal matter.

The Hon. DAMIEN TUDEHOPE: Mr Diamond, you have said you don't want the legislation changed. Do you say this legislation is fit for purpose?

MARK DIAMOND: Can I answer you in this way. We understand what a task it is to change legislation—we do understand that. What we're seeking here are practical outcomes. If it is possible to change the legislation, then absolutely we would support that, but we don't make that a main task here, if I can say that, honourable member.

The Hon. DAMIEN TUDEHOPE: To give the clarity which you are seeking, isn't the best tool to change the legislation so that it does give you that clarity which you're seeking?

MARK DIAMOND: That is the best tool if it's achievable. If it can't be achieved, though, it is still open under the legislation as it's written for Revenue NSW to adopt an interpretation of it or to have a policy in place, which it says it does.

The Hon. DAMIEN TUDEHOPE: Currently the problem is, isn't it, that the courts interpret strictly the provisions of this legislation? That's why companies like yours, on a strict interpretation of the current legislation, are being assessed as liable for payroll tax. If you're going to convince a court that you are not liable for payroll tax, this legislation needs changing, doesn't it?

MARK DIAMOND: You will get no opposition from my client or myself to that, sir. Absolutely. But as I said, we do appreciate how difficult it is to change legislation.

The Hon. DAMIEN TUDEHOPE: Isn't it the case—and others may have a view on this—that Revenue say, "We are just applying the law"? If this is the law, doesn't the legislation need to be changed?

MARK DIAMOND: Yes, it does, in that context.

The Hon. DAMIEN TUDEHOPE: In each of the decided cases—in fact, if you go to the Loan Market decision, it states:

> 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.

Isn't that exactly the problem?

MARK DIAMOND: Indeed. There have been a number of Supreme Court decisions and it would appear that the judges don't agree amongst themselves, so it's doubly problematic for a business. If the legislation can be changed to bring absolute clarity so that this problem goes away, then hell yes we would support it, sir.

The Hon. DAMIEN TUDEHOPE: What I'm putting to you is that it must be changed if in fact you're going to get rid of the ambiguity which currently exists in relation to the interpretation of this Act.

MARK DIAMOND: I'm not pushing back against that one iota, sir—not at all.

The Hon. DAMIEN TUDEHOPE: What's the model of the employment contracts which you entered? Are they the same as Mr Walker's?

MARK DIAMOND: Yes.

The Hon. DAMIEN TUDEHOPE: There's a head contractor and you have subcontractors, potentially, who carry out that work on behalf of the subcontractor?

MARK DIAMOND: That's quite right. That's what happens through the industry. Quad has that model, the same as Mastercare.

The Hon. DAMIEN TUDEHOPE: Have you received retrospective tax assessments?

MARK DIAMOND: Yes.

The Hon. DAMIEN TUDEHOPE: What's the quantum of those retrospective tax assessments?

MARK DIAMOND: It's in the millions of dollars.

The Hon. DAMIEN TUDEHOPE: Have they been challenged?

MARK DIAMOND: Very much so.

The Hon. DAMIEN TUDEHOPE: By way of proceedings against the commissioner?

MARK DIAMOND: We are not at the litigation point yet. We have filed a formal objection. We've had one brief meeting with Revenue NSW about that and we are awaiting the results of the objection.

The Hon. DAMIEN TUDEHOPE: The assessment which your client received was in respect of a period of tax, then a retrospective period of tax and penalties in addition?

MARK DIAMOND: That is correct, yes.

The Hon. DAMIEN TUDEHOPE: What was the quantum of the penalties? Do you recall?

MARK DIAMOND: It effectively doubled.

The Hon. DAMIEN TUDEHOPE: The penalties doubled the amount of tax which was payable?

MARK DIAMOND: Yes. Penalties and interest effectively doubled what was owed.

The Hon. DAMIEN TUDEHOPE: If in fact the law wasn't to be changed, what is the impact in terms of the cost of the provision of services provided by your company under the contracts which you've entered into—if you were going to pass those costs on to the consumer, so to speak?

MARK DIAMOND: I would prefer to be able to give the honourable member a completely accurate answer to that.

The Hon. DAMIEN TUDEHOPE: You can take it on notice.

MARK DIAMOND: I'll take it under advisement. Can we correspond with the Committee on that?

The Hon. DAMIEN TUDEHOPE: You can correspond with the Committee.

MARK DIAMOND: It'll be significant—that I can tell you.

COLIN WALKER: At a broad brush stroke, you're talking about at least the quantum of the tax, which in New South Wales I think is about 5.5 or 5.45, and then you've got other administrative things. You're talking about possibly a quantum of up to 10 per cent, if not more. And that's just a broad idea of what the additional cost—

The Hon. DAMIEN TUDEHOPE: That's the payroll tax plus the administration, which you would pass on.

COLIN WALKER: Exactly, which would cost industry and the clients, which would put up their prices in very tough—that's one of the reasons you have to have a moratorium. As I've said, we are prepared to give draft legislation so it's totally changed—the law—so everybody has clarity and confidence in the way they're running the business. Everybody sitting here, including the association, is basically telling me the same story. We're all honest taxpayers—I've been around for 40-plus years in business, paying my tax—and suddenly you feel like you're a bloody enemy of the state because they come along with this interpretation, which is unfit for purpose, and say, "Thanks very much. You've paid all your tax. You've overpaid by $6,000, but you now owe a million-plus because of the way we interpret the legislation," which is 40 years old—totally unfit for purpose.

The Hon. Dr SARAH KAINE: I'm interested in exploring a bit more about the contracting down your subcontractors chain. Mr Tudehope asked you about that. Mr Diamond, you said that the arrangements were similar to those explained by Mr Walker. Mr Walker, I think you said that the businesses that you engage with are incorporated.

COLIN WALKER: Correct.

The Hon. Dr SARAH KAINE: Mr Diamond, you note in your submission that you have I think 2,000 or 3,000 cleaners in New South Wales that you engage with. Are they incorporated businesses or are they people with ABNs? I'd like to know a bit more about the people doing the work.

MARK DIAMOND: The individuals who clean don't hold ABNs; they're employed. They're either direct employees of Quad or they're employees of a subcontractor. The reason subcontractors get used by principal cleaning contractors is that they have expertise that the cleaning contractor broadly doesn't have, they're able to source labour in areas that are difficult—where the principal cleaning contractor doesn't have a good reach—and similar other differences that arise when you compare with the direct workforce.

The Hon. Dr SARAH KAINE: So Quad employs some cleaners directly?

MARK DIAMOND: Yes.

The Hon. DAMIEN TUDEHOPE: And you'd pay payroll tax in relation to those.

MARK DIAMOND: Absolutely.

The Hon. Dr SARAH KAINE: So you employ some cleaners directly and you have some that are outsourced further down the subcontracting chain. How many have you got directly employed? And then—we asked the same of the dentists—what is the nature of the companies that you engage with, the subcontractors?

How big are they? How many cleaners do they engage? Could we get, even on notice, a list of those so we understand the nature of that subcontracting chain?

MARK DIAMOND: I don't think there's any problem with providing you with a relative break-up, because that's what you want to know, isn't it?

The Hon. Dr SARAH KAINE: Yes.

MARK DIAMOND: How much is direct employment and how much is subcontract engagement? That's what you're seeking to get to.

The Hon. Dr SARAH KAINE: Yes, and then the next thing is not only how much is subcontract engagement but also how much of that subcontract engagement is done by bigger organisations, by smaller organisations or, indeed, by individuals?

MARK DIAMOND: Speaking for Quad, most of the subcontractors are of substance and size.

The Hon. Dr SARAH KAINE: Could you provide more detail of that on notice?

MARK DIAMOND: Yes, and I'd be happy to correspond at the same time that I do the other. Can I say this to all of you, please? In 2016, that was the first time, as an adviser to Quad, that I was aware that Revenue NSW was looking at the employment agency provisions. Following correspondence, senior management from Quad and I went to meet with Revenue NSW senior officials at Parramatta. We discussed it with them. There was quite a debate about what "employment agency" meant. Subsequently, they wrote to us and said that they were not going to determine the issue but regarded it as, essentially, a matter of self-assessment.

Quad went away and took advice. The audits were then completed. Based on the correspondence, no problem. Then another audit was conducted in 2022, and it took quite a while. There were significant gaps. Months went by when we didn't hear from Revenue NSW but, almost as soon as the Integrated Trolley Management decision was handed down, suddenly Revenue NSW was issuing assessments not just to Quad but to plenty of other companies on the basis of employment agency, retrospective five years, even though the decision was only made in December 2023.

The Hon. Dr SARAH KAINE: Thank you, Mr Diamond. I appreciate that and I appreciate the context that you've given. I might ask you a bit more about that in a second, but I'm still interested also in the relationships down that subcontracting chain. I understand, but please bear with me for a little while longer. You've said that Quad employs some cleaners directly and then it further outsources others because there are speciality areas. Of the 2,000 or so cleaners engaged in New South Wales—and you said you can find proportion—can you give me a ballpark figure of how many are engaged directly by Quad and how many specialist services in cleaning you then have to go out and engage?

MARK DIAMOND: As I said, I can provide that level of detail in correspondence.

The Hon. Dr SARAH KAINE: Do you have a ballpark figure on that for us now?

MARK DIAMOND: I only want to tell you something that's completely accurate because we are on record here and I am under oath.

The Hon. Dr SARAH KAINE: Sure. I appreciate that very much.

MARK DIAMOND: Having a broad swing at it, honourable member, would not be right.

The Hon. Dr SARAH KAINE: No, I appreciate your diligence in that respect. In your submission you talk about control and the types of control that are cited as being necessary to prove different types of relationships. Could you maybe give an example of the differences between a cleaner who you send out as a direct employee to a client and someone who is under some other contracting arrangement? What would be the differences in the instruction given to them or the levels of control that you refer to in your submission?

MARK DIAMOND: In broad scope, if a cleaner is employed to do a task at a client's site, there will be a set of specifications, there will be some directions given to the cleaner by the management as to what to do, and that will be checked for satisfaction, quality and performance standard.

The Hon. Dr SARAH KAINE: That's regardless of whether they're employed by you or whether they're—

MARK DIAMOND: No, I'm talking about an employment relationship. If a subcontractor is engaged, generally, that model changes somewhat. The subcontractor is told what the client wants, but the subcontractor then makes a determination about what labour it will engage, and it takes up the task of managing that labour. That's what happens.

The Hon. Dr SARAH KAINE: Could I ask a question that I expect will be taken on notice? Have you got any sense of the demographics of the cleaning workforce both within Quad's directly employed workers and within the subcontracting workforce?

MARK DIAMOND: In terms of country of origin, gender?

The Hon. Dr SARAH KAINE: Age—demographics generally.

MARK DIAMOND: We can certainly provide the information to the extent that it's collected. That can be done.

The Hon. Dr SARAH KAINE: That would be very helpful. I wonder if I could go to everyone, as well—Mr Walker, I might, on notice, ask you similar questions that I've asked Mr Diamond, given the similarities in your stories and your businesses. But I want to go back to what you were talking about, Mr Diamond, in terms of the cases that—that's what I'm hearing from you—might have changed in interpretation. I think there were some key dates. I think 2017—

PAUL McCANN: No, that was my submission. I think it's 2017 and 2019.

The Hon. Dr SARAH KAINE: If I could just maybe take that as a point in time for us and if I could get from each of you, maybe taking 2017 as a point, your interactions not with State Revenue—we've heard about the differences there—but with the Government and Ministers around the situation. About 2017, at the time when key cases were heard or you saw you had activity, did you engage with government rather than or as well as Revenue?

COLIN WALKER: I don't understand that, sorry.

PAUL McCANN: I could start with our example. Obviously, we didn't have any engagement with any government officials but, in 2017 and 2019, we had separate entities—but cleaning. Both passed an audit around exemptions under being a contractor. Fast-forward to 2022 and we had a similar audit. Currently, in 2024, we've had an audit and we've issued, in one example, the same contract—they often ask for a sample of a contract, and it's the same contract that we had in 2017. Currently it's been deemed, "No, it's all employment agency." We went back and said, "What's changed since 2017? Here's the same contract." And it was very much "No, we don't really want to talk about it. All of your contractors are deemed to be employment agents."

The Hon. Dr SARAH KAINE: Thank you. That's very helpful.

PAUL McCANN: To the point of—in a current audit letter there was a commentary saying, "It was probably an oversight in 2017." That means there have been two oversights, and we're currently in the process of having to pay $750,000 in the next week because we've been—we obviously are going to fight it, but we're a business that, whether its banking covenants or whatever, has to pay it, in dispute.

The CHAIR: Mr McCann, did you provide that audit letter in your submission?

PAUL McCANN: No, but we've got all the documentation around the audit so, if we need to submit that, absolutely we could do that.

The CHAIR: That would be welcome.

The Hon. Dr SARAH KAINE: Perhaps I could go to Ms Puxty, as the peak body, and I might restate the question: Between 2017 and now, did your organisation, as a peak body, have correspondence or have meetings with any Government Ministers during that time around this issue?

KIM PUXTY: We were unaware of the issue.

COLIN WALKER: I think that's the point.

The Hon. Dr SARAH KAINE: Sorry, but I want to give Ms Puxty a chance.

KIM PUXTY: We were unaware of the issue. The issue was not brought to our attention until close to the end of 2023 by several members who had gone through an audit and received their notice. I then, on 18 October 2023, reached out to Revenue NSW, introducing myself and the association and seeking assistance in any education that they could provide around employment agency. Unfortunately, after many other emails that were sent to Revenue NSW, I received no response for over five months. I did make contact with Revenue NSW and spoke to their representative answering the phone. Their direction was, "We don't know how to assist you with this. We generally tell people to go to the website."

It turned out to be quite fortunate that I had a meeting with the Service NSW Business Bureau on 21 February. We discussed other topics. I brought this issue to their attention. They advised me that they would speak to Revenue NSW. That afternoon I received an email from Revenue NSW reaching out to address the

concerns that I had. From that time in February, I was not able to coordinate a meeting with them until May and then, from that meeting in May, we were able to coordinate a presentation to members in New South Wales on 19 June approximately.

The Hon. DAMIEN TUDEHOPE: Mrs Puxty, in terms of the members of your organisation which may have been subject to these audits, how many would you anticipate have been the subject of an audit?

KIM PUXTY: I could give an approximate if that would help. I would say six that I would feel confident in saying, but I would be happy to provide actual information on notice if you would like.

The Hon. DAMIEN TUDEHOPE: You say you have now had a seminar with Revenue NSW, who have explained potentially how the law is currently being administered.

KIM PUXTY: We did. The invitation went out to all our members. At that time—it was in June 2024 and I believe the response to attend was quite limited. I think that was around the hesitation and a lot of companies were actually going through audits at the time.

The Hon. DAMIEN TUDEHOPE: When you say "a lot of companies"—

KIM PUXTY: Sorry, there were companies going through audits at the time.

The Hon. DAMIEN TUDEHOPE: This is potentially across the board. Have any of you changed your work arrangements or contracting arrangements since 2017?

COLIN WALKER: No.

PAUL McCANN: No, and this is the problem. We're doing business how we've—ARA Property is doing business and we get a tick and we haven't changed it. As I said, we put a contract in that's still nine years old. It's like doing business with your hands tied behind your back. We haven't changed our practices. If we were told to or we had some guidance, then that's what we'd do. We would change our practices.

The Hon. DAMIEN TUDEHOPE: Given that you probably now are made aware of the provisions of recent decisions, how would you change it?

PAUL McCANN: We would have to look at our business model, so whether we engage more direct cleaners or whether or not we in essence pay tax on our contractors. That's the balance. As Mr Walker said, there's a potential cost to that to whatever our clients are. But it's a modelling thing.

The Hon. Dr SARAH KAINE: Why can't you employ more? What stops you now employing, apart from this specialist idea that—

PAUL McCANN: The example that—there were a few examples. I was thinking in my head a perfect example is if we win a small little contract in Dubbo—and it might only be an hour a night, so you've got award conditions with minimum engagement. We would generally reach out to a large contractor in Dubbo and we would engage them and sometimes we might even put a small tender out and say, "Look, guys, who wants to do this work?" It's an independent—they've got their own business, they've got their own website. They're probably working for Quad and Mastercare for all we know.

COLIN WALKER: And they'll have work nearby.

PAUL McCANN: But we can't employ someone in Dubbo for an hour. We'd have to charge potentially two-hour minimum and then the client won't want to pay that. That's a bit of the modelling—or it could be speciality services, so steam cleaning or high-level glass cleaning, or strip and sealing. There is a mix there of regional and speciality.

COLIN WALKER: If I may say and if I can quote again what the silk said and why I believe the law has to be changed—and we're prepared to offer a draft. I think he sums it up in this one paragraph. He says:

> A taxation law is unjust if it is so uncertain that taxpayers are unable to confidently interpret and apply it.

That's it. Then he goes on to say:

> … not even judges and highly paid tax lawyers are able to consistently agree on how the legislation should be interpreted.

It just shouldn't be like that. It should be clear-cut so we know that we're observing the law. No-one sitting at this table is an avoider, as Ernie Page would say. We all pay our tax. We mightn't like it, but that's got nothing to do with it. We pay our tax to the guidelines. Revenue NSW has come along and is interpreting differently a tax which is 40 years old. If you had a house, you'd give it a lick of paint in 40 years. You'd most probably renovate the bathroom. For a modern day business to try and comply with this tax is impossible.

The Hon. DAMIEN TUDEHOPE: Have you read the submission or have your legal advisers read the submission of the commissioner?

COLIN WALKER: I have not. I've heard it's a little bland.

MARK DIAMOND: I have read it.

The Hon. DAMIEN TUDEHOPE: Do you have any observations to make in relation to that submission?

MARK DIAMOND: I'm always mindful of ongoing relationships. Can I seek an indulgence and respond to that in writing, please?

The Hon. DAMIEN TUDEHOPE: Yes, that's fine.

COLIN WALKER: I think nothing overly productive—what the commissioner has said. I think it's an attitude. It could be—and I obviously don't know. It may be an attitudinal thing. It'd be interesting to know why the commissioner has suddenly become very active in issuing demands on this interpretation. What is the motive of doing it? If the majority of people are honest taxpayers—we're talking about the 98 per cent of us who pay the tax according to the law as we understand it and we don't want to go to lawyers and tax barristers to make sure that we're observing the law. Surely, as you've suggested, the legislation just has to be changed so it's clear-cut and then we all get on with our business.

I disagree slightly with Mr McCann here. I don't want to modify anything. I just want to know what the law is and then I'll go about my business. I don't want to have this law remain as it is because it's an incredible impediment of doing business and it's an incredible impediment on the economic structure of New South Wales. They're putting companies out of business. They're creating unemployment. The biggest tax revenue in this State is now payroll tax. It makes no sense. To me—and I'm obviously not a politician—it's a relatively easy fix. If Government says, "This is the new legislation and we will have this moratorium for six or 12 months while we get all this sorted, we put a halt on the current court cases and we've got resolution"—because it is unfit for purpose, it does not work, full stop.

The Hon. Dr SARAH KAINE: Forgive me, I am just trying to make sure that I've got it clear in my head how it all works between the different tiers of the chain. In terms of the requirement to declare subcontractors and for the subcontractor's statement, your organisations would be collecting those from—

COLIN WALKER: Say that again, sorry.

The Hon. Dr SARAH KAINE: The subcontractor's statement that's required.

COLIN WALKER: Yes, correct, every month.

The Hon. Dr SARAH KAINE: So your organisation every month gets that from all of your—

COLIN WALKER: Yes.

The Hon. Dr SARAH KAINE: So that is what you do? That is not others doing that down the chain? You're the ultimate holders of those subcontractors' statements?

COLIN WALKER: That's not relevant to this problem because the problem is—to answer your question, yes, we always get subcontractors' statements and they don't get paid. We're dealing with incorporated entities and we will pay some of these millions of dollars in fees to do work. As Mr Diamond said, one of the reasons you do it is because Australians aren't all that willing to work and these subcontractors are of different nationalities and they've got a deep reach into their communities and these people work.

The Hon. Dr SARAH KAINE: Sorry, I'm not clear what you mean by Australians. So you're saying that these are people—

COLIN WALKER: Australians in general don't wish to do menial jobs, in my experience.

The Hon. Dr SARAH KAINE: So you've got a lot of visa holders or students and those kinds of things.

COLIN WALKER: I don't know what it is, but they're either Australian citizens—but they're legitimate citizens in Australia. They're quite legal, because we check that because the taxation department makes sure that that's the case.

The CHAIR: Thank you very much. In the absence of any questions, that concludes this section. We very much appreciate your submissions and your testimony here today, your answers to the questions. We very much appreciate it. The Committee is hearing loud and clear your concerns. We will be in contact through the secretariat in due course with any matters that were taken on notice. Thank you.

(The witnesses withdrew.)

Mr SAM WHITE, Executive Chairman, Loan Market Group Pty Ltd, affirmed and examined

Ms ANJA PANNEK, Chief Executive Officer, Mortgage and Finance Association of Australia, sworn and examined

Mr DAVID BUSHBY, Chief Executive Officer, Commercial and Asset Finance Brokers Association of Australia (CAFBA), sworn and examined

The CHAIR: Good afternoon to our witnesses. Thank you very much for your attendance at today's hearing. Do you have some introductory remarks to make, Mr White?

SAM WHITE: I do, if I may. Thank you for the opportunity to appear before this Committee. The recent decision in our case against Revenue NSW has left the mortgage broking industry grappling with some serious consequences. Whilst we lost our case, the judge called the outcome harsh and highlighted the law's complexity that makes it difficult to apply fairly. His Honour illustrates that the exemptions, while available, are hard to evidence, particularly for aggregators like us, who are required to source detailed evidence from hundreds of independent brokers operating as small businesses. This complexity has been our experience through nearly a decade-long process, compounded by limited guidance from the regulator and a burdensome, inconsistent approach to audits.

Though the court ultimately reduced our payroll tax liability by 65 per cent of the original assessment, the broader uncertainty remains unresolved and is now landing squarely on small business owners and brokers across Australia. There are approximately 22,000 mortgage brokers in Australia, a quarter of whom choose Loan Market Group to be their aggregator. Most are sole traders or family-run businesses. They are now facing a new tax on their revenue, not their profit, which for many is unsustainable.

Can I just explain how the numbers work. If a broker, say, earns $300,000, they might pay Loan Market Group, say, $15,000 in aggregation fees. The outcome of this case means that we would now be required to pay $16,800 in tax, based on the broker's earnings. We make $15,000, but we have to pay $16,800 to the payroll tax office. Across the board, if we did not have exemptions, which were granted by his Honour, the payroll tax would be more than 60 per cent of our total revenue every year as an aggregator. We can't sustain that. Obviously, no business can sustain that type of cost, so we have to pass it on. And we've been having discussions with brokers about this, and we will absorb the previous amounts that have been for the back tax. But we've been saying we can't absorb this moving forwards and we will need to pass on that 5.6 per cent to them and to the smallest of small businesses, who cannot establish an exemption. It's these brokers that will feel the impact.

Today 76 per cent of Australians rely on mortgage brokers to secure a home loan. These small businesses play a crucial role in helping everyday Australians get a fair go with their finances, and I urge this Committee to ensure that this landscape, this law is clarified and changed if possible, the drafting made clearer and its administration applied fairly to protect small businesses and the Australians they serve.

ANJA PANNEK: Chair, Committee members, thank you for the opportunity to speak today and represent the approximately 6,000 MFAA members in New South Wales: mortgage and finance brokers, aggregators and lenders. Mortgage brokers, as mentioned by Mr White, play a critical role in Australia's lending market, providing choice and competition, and helping more than 75 per cent of Australians secure a home loan. Brokers are overwhelmingly independent micro- and small businesses. The broking industry has actually been in existence since the early 1990s, with brokers running their own businesses, sourcing their own clients and, working on behalf of these clients, sourcing loan options. Aggregators emerged in the mid to late 1990s, offering services to brokers so they could operate their businesses and secure and support their clients more efficiently.

Despite all of these facts, drafting of the relevant contractor provisions and the recent Loan Market court ruling now treat these broking businesses as employees of aggregators. They are not. Aggregators provide services to brokers. Brokers are independent small businesses. When first introduced into the Payroll Tax Act in the mid-1980s, the relevant contractor provisions were intended to address anti-avoidance. They are now capturing businesses such as broking businesses in a way never intended. This threatens not only the viability of small broking businesses but also the ability of New South Wales borrowers to access a competitive home loan, as less brokers means more expensive mortgages. Our submission highlights the opportunity for this inquiry to recommend changes to the law so that it reflects its original intent and, in doing so, provides clarity not only to the broking industry but to the many other small business industries who have provided submissions to this inquiry. Thank you, and I welcome questions from the Committee.

DAVID BUSHBY: Thank you, and thank you also to the Committee for giving us for the opportunity to present today. CAFBA is a not-for-profit association representing finance brokers whose primary focus is assisting business clients source the finances that they need to grow their businesses, create wealth for communities and

employ Australians. Small businesses tend to be experts in the field in which they operate but not in how to get the finance they need, in the structure and timelines that best suits their particular businesses' needs. The finance needs of small and medium business varies widely, from new office equipment though to heavy factory machinery, commercial property finance, yellow goods, working capital—the list goes on.

Assisting businesses with these needs requires a high degree of knowledge and expertise. We have around 1,000 individual members, associated with around 500 broking business members across Australia. CAFBA welcomes and endorses the opening comments made by the CEO of the MFAA and also of Loan Market Group. The aggregation model in finance broking developed in response to a market opportunity and need to provide services to finance brokers that better enable them to service their clients efficiently. Commercial and asset finance brokers are generally paid by lenders and pay a fee to aggregators for the services that they supply, such as customer record management systems and other IT systems. The legislation being considered by this inquiry contains provisions intended to address arrangements put in place to avoid and evade tax properly paid by an employer in relation to their employees. The relationship between aggregators and brokers is not such an arrangement and should not be caught under such provisions.

The CHAIR: Thank you very much. We will now go to questions from the Opposition.

The Hon. DAMIEN TUDEHOPE: Mr White, thank you for being here, and thank you for your submissions. You've sat through and heard the evidence previously given by various contractors, and I take it that it is a similar story which you're telling. Can I ask you about your relationship with Revenue NSW? You've obviously now been through the whole hoop. You got the assessment, challenged the assessment—I assume by way of objection, in the first instance, to the assessment—and then lodged an application with the Supreme Court challenging the assessment, which ultimately was varied but you still were subject to payroll tax. In summary, I think that's where—

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: When was the very first time that you were the subject of an audit?

SAM WHITE: I believe it's 2015.

The Hon. DAMIEN TUDEHOPE: And when you were the subject of that audit, had you ever been audited previously?

SAM WHITE: No—well, for payroll tax, we would have been previously, but not for payroll tax for brokers, no.

The Hon. DAMIEN TUDEHOPE: So you had been audited for payroll tax in your own right, for your own employees?

SAM WHITE: I believe so, yes.

The Hon. DAMIEN TUDEHOPE: But for the purposes of that audit, brokers were not included as part of the audit. Is that the case?

SAM WHITE: That's my understanding, although I don't have direct knowledge of—we would have been audited. We've been in business for 30 years, so we would have had some sort of payroll tax audit in the past.

The Hon. DAMIEN TUDEHOPE: In 2015, is it the case that you were asked to provide the records of all the brokers for whom you provided services?

SAM WHITE: That's right.

The Hon. DAMIEN TUDEHOPE: Did you query that at the time?

SAM WHITE: Yes, we did, and we worked through a process with Revenue NSW. We thought it may be a misunderstanding and that we could explain how things worked. We did that for—I believe we got the final actual assessment in 2018, so I believe it was three years. During that time we thought that—we had a short number of meetings with Revenue NSW. We obviously gave them a lot of information, and obviously their decision was a different position to what we thought it was going to be.

The Hon. DAMIEN TUDEHOPE: In 2015 when they came to see you, they asked you for the brokers' records?

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: And you queried that. What explanation did they give as to why they had formed the view that they wanted to see the brokers' records?

SAM WHITE: I can't recall. I can find out and come back to you.

The Hon. DAMIEN TUDEHOPE: Was there correspondence relating to that?

SAM WHITE: There was correspondence, yes, between us and Revenue NSW.

The Hon. DAMIEN TUDEHOPE: Had there been a decision that you were aware of which may have given rise to a circumstance?

SAM WHITE: My recollection, and through the discussions we had with Revenue NSW, was that they referenced the Bridges case, which I think was a 2002 case.

The Hon. DAMIEN TUDEHOPE: Which case?

SAM WHITE: Bridges, B-r-i-d-g-e-s. In their correspondence with us, Bridges was a significant part of their—and there wasn't a lot of detail in the letters that we received, but we were required to give them all the information. We had all our records on brokers that were choosing to use us for five years prior to 2015.

The Hon. DAMIEN TUDEHOPE: Was that material which you had readily at hand, or did you have to engage in a process where you had to collect that information?

SAM WHITE: A lot of this was new. A lot of the information we had at hand were—we had all the information at hand that we had. What we didn't have was some of the requests that they asked us for subsequently—for example, how many people did that particular business employ or engage? We didn't have that information readily to hand, and we had to end up surveying and talking to all of our the brokers who had left our group and brokers who were also with our group. We had to go and find out from them and survey them and say, "How many staff do you have?" So there was that information we needed to collect, and some of the information we had.

The Hon. DAMIEN TUDEHOPE: So in 2018 you actually got the assessment from Revenue and then lodged an objection.

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: What process did that objection follow?

SAM WHITE: I believe we followed the internal process, which was to appeal to the manager of the person who was conducting our audit. My recollection is that that process came back with a slight variation in the amount but reaffirming the liability. That was then required to be paid within a certain period of time. If we wanted to go further, we needed to challenge that legally, which we did.

The Hon. DAMIEN TUDEHOPE: Do you recall the amount of that assessment?

SAM WHITE: Not precisely, no.

The Hon. DAMIEN TUDEHOPE: Did it include retrospective tax?

SAM WHITE: Yes, it went back to the period of 2012 to 2018. That was the period.

The Hon. DAMIEN TUDEHOPE: Did it include penalties?

SAM WHITE: Yes, it did.

The Hon. DAMIEN TUDEHOPE: When you went to court, were those penalties removed?

SAM WHITE: Some of the penalties were removed; some were not, as I understand. I'd need to go to the lawyers to clarify exactly which parts were and which parts weren't. But I remember the judge—the conclusion was that just because the law was confusing, it doesn't mean there's any reason why the penalties shouldn't be applying. So there was some relief given, but obviously there were still some penalties that were involved.

The Hon. DAMIEN TUDEHOPE: So even after the court decision, you were faced with an assessment for payroll tax on the amounts which you paid to brokers?

SAM WHITE: Amounts which were distributed through lenders to brokers through us.

The Hon. DAMIEN TUDEHOPE: Sorry, let me just clarify that. So the position was that the actual fee payable to the broker was not paid by you; it was paid by the actual lender to the broker?

SAM WHITE: The bank, yes. We have 130 lenders on our panel, and a broker is licensed, or they needed to be accredited with each lender, to be able to operate. The broker sees a customer, and they submit a loan to a lender through our technology platform. The lender then remits payment for that. If the deal settles through our system, we remit that through to the broker. The flow of funds goes through Loan Market Group to the broker.

The Hon. DAMIEN TUDEHOPE: But if there is a fee payable to the broker, it's not payable by you.

SAM WHITE: No.

The Hon. DAMIEN TUDEHOPE: It is a fee payable by the lender.

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: Does that include tailing fees?

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: Say, for example, a loan was organised with the Commonwealth Bank. Any fee payable by the broker is not payable by you.

SAM WHITE: No.

The Hon. DAMIEN TUDEHOPE: It is only payable by the bank. The arrangement between you and the broker and the amount which they pay you in relation to the service you provide, is that based on the opportunity and technology which you make available?

SAM WHITE: There are about 15 or 20 other aggregation groups, I believe, in Australia. We compete for brokers to say, "Please choose us as your aggregator." The broker then pays a fee to the aggregator, and that fee varies, depending upon what services they would like, but they always include things like access to lenders for which you can't actually—to be a broker, you need to be licensed, and you need to have an access to lenders. The only way to do that is through aggregation panels, because lenders don't deal directly with brokers. They need to deal through these intermediaries, which is what we've become.

The Hon. DAMIEN TUDEHOPE: The assessment for payroll tax, though, was based on the fee which the broker paid to you?

SAM WHITE: Yes—no, the assessment for payroll tax was based on the fact that the bank paid the broker through us, and the amount of money that went from our account into the broker's account was the amount assessable for payroll tax. In some cases, we actually pay 100 per cent of that fee that the lender pays to the broker. We have a number of different models that brokers can choose from. So 100 per cent of that fee will go to the broker. State Revenue will say we need 5.6 per cent of that fee because that's payroll tax, even though there is—

The Hon. DAMIEN TUDEHOPE: No benefit to you.

SAM WHITE: —no benefit. The broker pays us a fixed monthly fee in those circumstances.

The CHAIR: That fee isn't revenue for you.

SAM WHITE: The fee that the broker pays is revenue to us. The fee that the bank pays to the broker—

The CHAIR: The fee that the bank is paying to the broker is not revenue to you.

SAM WHITE: No.

The CHAIR: In some cases.

SAM WHITE: It passes through. The accounting standards require us to put our revenue as that fee in our accounting standards. That was part of our case and part of the complexity of that. The entitlement to that revenue is the broker's. If a broker leaves us, we continue to pay that money to them. We're contractually obliged to make that payment. It is not our money. I've never looked at it as our money. We don't take that money. Our revenue is the money that the broker pays us.

The Hon. Dr SARAH KAINE: What's the turnaround time? You're holding that money to give to the broker from the bank. How long do you keep that money?

SAM WHITE: We pay three times a month. Banks will pay intermittently. Some banks will pay in the first and some in the second. Some will do two-payment runs and some will do up-fronts in some months. In some, it's the first week of the month, and then they'll do another payment on the third week. We pay three times. Some brokers ask us to pay them monthly, but we pay three times. We're actually trying to increase that number, but three times a month is our payment cycle.

The Hon. Dr SARAH KAINE: So it's not the case that with some banks, you'll have particular amounts of money sitting in your bank account and you'll be acquitting that, whatever it is. It'll be sitting in your bank account for a week and a bit.

SAM WHITE: There is a particular case where some loans are unmatched, where, for example, we might need to work out who actually has done this loan if there's some complexity. That's a very minor part. Maybe 1 per cent of our total volume that goes through might be that. That might be the case until we actually clarify which broker has written that loan, if there's some ambiguity about it. The vast majority passes through very quickly. Three times a month is our payment cycle.

The Hon. Dr SARAH KAINE: Sorry, you did say the amount of brokers that you have?

SAM WHITE: It's about one-quarter of the brokers in Australia. We have nearly 6,000 brokers throughout Australia.

The Hon. DAMIEN TUDEHOPE: Do they all have separate ABNs?

SAM WHITE: The vast majority would, but not all of them. In the spirit of trying to give an estimate, I would say 95 per cent would have their own. They all need to have their own accreditations. They need their own insurance and professional indemnity insurance policies. They all have their own client base.

The Hon. Dr SARAH KAINE: Can I ask a bit more about the relationship? You might call yourself an aggregator, but can you explain a bit more the relationship between the broker—

SAM WHITE: It's confusing.

The Hon. Dr SARAH KAINE: I don't think the technical parts of it are confusing, but I think how it appears is, because of different branding. If you could explain—

SAM WHITE: The industry has evolved. I was a broker 30 years ago. When we first started, we had to get our own accreditation with lenders. We had to get our own agreements. So I had to get five agreements, but I was only seeing 20 clients, so I could only support 20 lenders. You'd support five lenders because lenders would only accredit you if you could give them volume. Over time, we started to share accreditations between brokers and said, "Can I use your relationship with CBA and I'll give you mine with the Bank of Melbourne? I'll pay you 5 per cent or 10 per cent of the commission."

That's how our industry started, and aggregation. That's how our industry evolved. Now we have 130 lenders, and we don't have accreditations to write loans. We're now an aggregator. We have a number of different models that we offer our customers to choose from. Some are branded, where we say, "We can give you the Loan Market brand. We'll give you a marketing system. We'll help you generate leads and clients." Others say, "I don't really want that. I'd like to have my own brand. I don't need to pay for your brand, Sam; I'll use my own." So they have a different model.

The Hon. Dr SARAH KAINE: What's the breakdown in terms of your 6,000 between those who do the branded thing and those who—

SAM WHITE: It would be about 600 individuals that would trade under the brand and about 5,000 would have their own.

The Hon. Dr SARAH KAINE: So you wouldn't google "Loan Market", for example, and get those people on your website or your external-facing things?

SAM WHITE: For the ones who don't share the brand?

The Hon. Dr SARAH KAINE: Yes.

SAM WHITE: No. They have their own lead acquisition models. They pay us for technology and access to the panel of commission of payment systems. A lot of our reporting and some other things help them run their business. The people who trade under the brand pay a slightly different fee structure to us.

The Hon. Dr SARAH KAINE: Do you think that they're the same relationship?

SAM WHITE: His Honour considered this in the case. Our case went over two periods—one before we were a franchisor, and part of the case was after we became a franchisor, which was in 2016. We had people who were trading under their own brand prior to 2016 and people who were trading under their brand after 2016. In that case, he said there is no difference between those two periods. The brand did not make a difference to his Honour in his judgement. He had the opportunity to distinguish the facts, because we do have people as part of that payroll tax case that weren't being paid, that weren't part of the Loan Market brand.

The Hon. Dr SARAH KAINE: I'm intrigued because when you google and have a look, there's a lot of talk—which I presume are those 600—about "our team" and saying, "We do this. We provide this. We'll direct you to our team." It seems a much closer relationship.

SAM WHITE: We're a franchise group. We share the brand. We have a culture that we're proud of. We are a team.

The Hon. Dr SARAH KAINE: It's an interesting differentiation, that's all.

The Hon. DAMIEN TUDEHOPE: We're not trying to relitigate your case.

The Hon. Dr SARAH KAINE: No, I'm genuinely sorry. I'm not pretending to be an expert.

SAM WHITE: I am proud of what we've built, and I look at our people as family. I don't think that makes us bad or wrong. I don't see how that means we're in some way exerting more control over our people than anything else. We care for our people. They're our customers. They can leave us at any time. They can give us 14 days notice and walk out the door. When that happens, it's a kick in the guts, but they are our customers and we've got to do everything we can to earn the right to keep them as our customers. Part of that is providing an environment that they want to be a part of.

The Hon. Dr SARAH KAINE: To Mr Tudehope's point, I would never try to relitigate that case here. In saying that, a lot of what we're presented with are differences in decisions and circumstances, so I am trying to understand what it is about different cases and different industries. That's the other aspect of this. I just wanted to give you that context. I am interested in that.

SAM WHITE: His Honour did distinguish and said that there were bona fide independent contractors, that that's what brokers were, that they were an extension of an aggregator and that an aggregator and a broker were very different. Even in the banking royal commission, Commissioner Hayne was talking about the structure of our industry. Commissioner Hayne spoke a lot about the services that an aggregator provides brokers. His Honour looked at it and said that because it is so broad, money does flow from a bank account into ours and to the broker.

The broker therefore provides services to us, because effectively our business is to generate revenue. His comment was about how broad that definition was. Even though it was very clear that we were providing services to the broker and that they were our customers, his conclusion was that it was so broad. I think he used language that it didn't catch the bona fide contractors. Because it didn't exclude that, we were caught up in that mix. I understand that you need to have legislation that protects the tax base, but I think this was a case where he acknowledged that he wasn't open to make that finding, given the breadth of the language in the statute.

The Hon. DAMIEN TUDEHOPE: Are you appealing this to the Court of Appeal?

SAM WHITE: No, sir. We are not. We made a decision that our people need some clarity. We've gone out and said, "Unless you can fit into an exemption"—our brokers—"we are going to need to pass this on from FY 2025. We'll absorb everything prior to that"—

The Hon. DAMIEN TUDEHOPE: What's the impact of doing that?

SAM WHITE: If you can establish an exemption, it generally means that you have—there are a number of ways you can do that. The main one is to engage someone in your business. There is some confusion as to what it actually means to engage someone in your business. If you can't establish that, we will need to reduce the commissions by 5.6 per cent, which is the amount of the payroll tax, for those people that can't establish that and engage someone. The problem is we're not sure exactly if our definition of what engaging someone is matches the revenue departments in all the States. We're engaging with Victoria, we're engaging with Queensland and we're engaging with South Australia. Their evidentiary burdens are different even though the legislation is the same.

The Hon. DAMIEN TUDEHOPE: Your model exists right across Australia, does it not?

SAM WHITE: Yes.

The Hon. DAMIEN TUDEHOPE: Whatever happens in New South Wales, you would like to see a harmonised outcome?

SAM WHITE: Harmonisation has been great, except when—it has been interpreted very differently in New South Wales first and then other States are now following New South Wales. We would like it to be consistent, if possible. But it's not just the statute; it's the interpretation of the facts and how evidence is collected and managed. We need to go to individual brokers and determine if they have engaged someone in their business for more than 90 days in the last 12 months. If we can't establish that, then we need to pay payroll tax on that figure.

The Hon. DAMIEN TUDEHOPE: Can I ask you about having engaged someone in your business for 90 days? In terms of the way the market operates at the moment, is that a proper test for the purpose of an exemption?

SAM WHITE: No.

The CHAIR: Can I just ask a question before we move on, Mr Tudehope? You're doing that prospectively, but how are you dealing with the liability that you've incurred?

SAM WHITE: We're going to pay that ourselves.

The CHAIR: What's the quantum of that?

SAM WHITE: It's a few million in the case we've had. It will be about, I think, $15 million across the country.

The Hon. DAMIEN TUDEHOPE: Ms Pannek, you have heard Mr White's evidence. Is there anything in that that you want to add to or disagree with?

ANJA PANNEK: In the case of Loan Market, it highlights what the entire mortgage and finance broking industry has been grappling with, which is legislation that is inadvertently court arrangements that mortgage brokers have with their aggregators. As I said in my opening statement, mortgage brokers run their own businesses; they're independent. More than 40 per cent of brokers across the country run their own businesses. They do not work for their aggregator. Yet we find ourselves in a situation—because the final ruling in the Loan Market case really came down late last year where brokers in New South Wales and aggregators in New South Wales are now trying to figure out how to apply a law which the view across industry was that it never did apply because of the construct of industry.

The Hon. DAMIEN TUDEHOPE: I accept that. Is it your position that the current Payroll Tax Act is not fit for purpose in terms of giving clear identification about what is a contractor for the purpose of payroll tax?

ANJA PANNEK: Yes, it is. We see the opportunity for the law to be amended, to identify what is truly an independent contractor. As the Committee would have heard from other witnesses this morning, the intention of the law was to capture avoidance. These are not businesses seeking to avoid the tax. We see the opportunity for the law to be amended and really to look at whether services is an appropriate test for employment. This morning Mr Aquilina mentioned, for example, the concept of control and is that more of an appropriate test to apply to bring the law back to its original intention. We would be very supportive of and would welcome the opportunity to work with NSW Treasury in consultation to have the law amended back to its original intent.

The Hon. Dr SARAH KAINE: Sorry, Mr Tudehope, I have one question in regards to the—

The Hon. DAMIEN TUDEHOPE: Control.

The Hon. Dr SARAH KAINE: Yes. The Loan Market case, obviously, is a clear marker for this sector. Prior to the case and the decision, was it that there were no audits? We heard different interpretations in other industries. Was it that there were different interpretations applied and then this was a shock because it's a new interpretation, which we have had in other cases, or is it that nothing came up and then this came up?

ANJA PANNEK: Loan Market approached the association—and this was before my time—flagging this as an issue back in, I think, 2016-17. In 2020 we approached Revenue NSW and sought engagement with them to actually clarify that this is the construct of industry and that the relationship between an aggregator and a broker should not be captured under relevant contracts and that these were independent businesses. What we found post that—we spent considerable time working with Revenue NSW. They did not agree with industry's view and issued a CPN—a practice note—saying that mortgage brokers were captured with their relationship with aggregators under relevant contracts. During this time, what we saw was an escalation of audit activity. I speak on behalf of our aggregator members. Audits started being conducted across a number of aggregators in industry. We saw this very much as a targeted industry approach, which we did not feel was appropriate because we do not feel that the tax should apply. We continue to work closely with government and Revenue NSW.

The Hon. Dr SARAH KAINE: Sorry, could I just stop you there? I've asked this of all of our witnesses today. Working closely with government, you've met with Revenue and you've had those interactions. Did you meet with Ministers or Ministers' offices about this during that time?

ANJA PANNEK: Yes, with the finance Minister and Revenue NSW.

The Hon. DAMIEN TUDEHOPE: Which finance Minister?

ANJA PANNEK: Minister Houssos over the course of this. In 2022 Revenue NSW wrote to the association and notified us that they would hold off conducting any new audits, given the significant ambiguity as it related to our industry, because there was no precedent and the Loan Market matter was proceeding through objection and through litigation. The Loan Market case is the first to apply the facts between an aggregator and a broker. But I do need to bring to the Committee's attention that there is another case proceeding through court and

that is Finsure, where they're objecting to their assessment. The reason I highlight that is there's still not clarity for this industry. There's still not clarity for how aggregators should interpret and how Revenue NSW is seeking to apply the law to these arrangements.

The Hon. Dr SARAH KAINE: Just to be clear, these concerns pre-dated Loan Market and from 2017 or 2016 you had concerns that you were working through either amongst yourselves or with Revenue NSW but you didn't approach government until later?

ANJA PANNEK: There was an initial engagement from government—and, again, I can confirm the exact dates because this was prior to my time around 2017-18—and then, once I commenced in my role, there was subsequent engagement with government.

The Hon. Dr SARAH KAINE: Yes, if you wouldn't mind. It's helpful for me.

ANJA PANNEK: Also in our submission we have a timeline from 2023 onwards around the various engagement that we've had with Revenue NSW and the Minister's office as well.

The CHAIR: Just to be clear, Dr Kaine, you're asking if the witness could table some of the engagement that they had?

The Hon. Dr SARAH KAINE: Yes, please.

ANJA PANNEK: We can table all of that.

The CHAIR: That would be good.

The Hon. DAMIEN TUDEHOPE: Mr Bushby, you have been very quiet. Have you got anything you would like to add in relation to this?

DAVID BUSHBY: Yes. I think it's fair to say that the CAF has been maintaining a bit of a watching brief over the proceedings with LMG since that first started. The specific circumstances around that case relate to consumer lending, and our members are mostly focused on business lending. There are differences in the models and how the interrelation between commercial and asset brokers and aggregators works. There are some similarities as well, but there are lots of different models and different ways of doing it. I mentioned, I think, in my opening statement that, in some cases, lenders directly pay brokers in the commercial and asset space. It depends to a significant degree on the style of transaction, what assets or what business needs are being financed and how that works.

But we've been concerned about potentially regulatory or judicial creep through further cases and further reach of Revenue NSW that they would actually start looking at our relationship as well and decide that that also is caught by the legislation. Indeed, just this week I was talking to one of our members who is associated with an aggregation firm but does probably less than 50 per cent of his loans through the aggregator. The rest of the work he does on different asset and different business finance needs he does directly with lenders. His aggregator and the work that he has done for that aggregator has been assessed by Revenue NSW, even though it's only part of what he does. From the aggregators perspective, the money that has gone to them has been assessed by Revenue NSW and so there's an objection that has gone in with that. We can see that that creep is happening already, even though the models under which asset and commercial finance broking occurs is quite different.

The Hon. DAMIEN TUDEHOPE: How many of your members would be subject at the moment, potentially, to an audit? Not potentially—actually.

DAVID BUSHBY: We have a number of larger firms that are broking firms that would actually be directly impacted because they—

The Hon. DAMIEN TUDEHOPE: They're impacted. Are they actually the subject of an audit at the moment to the best of your knowledge?

DAVID BUSHBY: To the best of my knowledge, I'm not aware of anybody.

The Hon. DAMIEN TUDEHOPE: Ms Pannek, are you aware of how many of your members?

DAVID BUSHBY: The only parallel arrangement that I'm aware of, where one of our members has actually been caught up by payroll tax vis-a-vis the aggregation—the money that's paid to them by aggregators—is the one that I mentioned.

The Hon. DAMIEN TUDEHOPE: I understand.

ANJA PANNEK: That same question to me—we looked at this, I think, a couple of years ago. There are 11 major aggregator groups across Australia, and there was probably 70 per cent of them that were either in litigation—to go to litigation—or in audit.

The Hon. DAMIEN TUDEHOPE: Eight of the 11.

ANJA PANNEK: This is an industry-wide issue.

The CHAIR: I'm assuming that the others are preparing for it as well.

ANJA PANNEK: For litigation?

The CHAIR: Yes.

ANJA PANNEK: Yes, and I think that highlights as well just a lack of clarity in the law and that taxpayers, as with LMG and Mr White and also in the Finsure case, need to pursue litigation, which is very costly for themselves and also for the New South Wales taxpayer, who funds Revenue NSW litigation.

The Hon. CHRIS RATH: I'm struggling to understand. What was the exact turning point or change? At what point did you notice a change? Was it the change when there was a new practice note issued? Did the change happen based on a court ruling or did it happen when Revenue came knocking on the door, saying, "We're going to do an audit," in regards to payroll tax that you thought you never had to pay payroll tax in the past, and it's essentially just a matter of enforcement rather than a change in any regulation or practice note or anything?

ANJA PANNEK: I might start with some overarching industry comments. Mr White referenced the Bridges case, which was in the stockbroking industry where there is a requirement to hold an AFS licence. It is our understanding that Revenue NSW opined on that and saw similarities between the Australian credit licence framework, and saw the opportunity—

The CHAIR: Sorry, just on that, was the Bridges case 2002?

ANJA PANNEK: I don't know the exact date, but it was many, many years ago.

The CHAIR: Decades ago.

ANJA PANNEK: Decades ago.

SAM WHITE: I believe it was 2002, Chair.

The Hon. CHRIS RATH: Wow.

ANJA PANNEK: Then we found ourselves in a position in 2015 where Loan Market was approached, and then it was brought to the association's attention probably around 2020 that the commissioner was looking to issue a practice note, and hence that engagement that I referred to earlier. The practice note, despite our endeavours to consult, was issued really not taking into account any of our observations. If you read the original practice note, it really looked at the fact that in some instances the aggregator holds a licence and a broker needs to be licensed to provide credit assistance. In some instances, the broker will obtain credit representative status and avail themselves of compliance services that the aggregator offers. I think the thing that's important to note here is that this is a Federal law. NCCP came into place in 2009, and it would appear that for some reason a Federal law is giving rise to some sort of employee relationship, which makes absolutely no sense.

The CHAIR: What's the acronym?

ANJA PANNEK: It's the NCCP, the National Consumer Credit Protection Act.

The Hon. Dr SARAH KAINE: We've had this discussion in previous panels. It's not the broker that's directly being levied, obviously, for payroll tax. They're not meeting those thresholds. It's the aggregator. So it's then a business choice of the aggregator, if they're liable for payroll tax, to pass the costs of that payroll tax down to there. At the bottom of it, whether you agree with it or not, it's a business choice that all aggregators will make based on their business models, based on their margins, based on—

SAM WHITE: It's not really a choice, with respect. It's 70 per cent of our revenue. So not 70 per cent of our profit; it's of our revenue. If our profit margin is 20 per cent, the payroll tax is somewhere north of 60 per cent of our total revenue. You just can't be in business and pay 60 per cent of your revenue to the government before you even pay your staff. It is not a choice. It has to change. The only question is how do you change? Do you levy everybody the same or do you say, "We're not going to engage anyone in our business anymore who doesn't employ someone"? Do you say, "Sole traders, sorry, you're out of business"? Do you levy the sole trader for the cost that they're forcing the aggregator to incur by not engaging somebody? But I would submit that it is not a choice that we have. We've chosen to not levy the back tax because I think that's un-Australian, but we can't absorb

that going forwards. It's just physically impossible. Anyone who says otherwise, I think they're kidding themselves.

The Hon. DAMIEN TUDEHOPE: The un-Australian part, of course, is a good comment levied at Revenue, of course, because it has levied back tax.

SAM WHITE: We're not going to be part of that cycle of unfairness.

DAVID BUSHBY: Can I just add to that? This is in consumer, which is not really my area, but it has the same impact in terms of business lending as well. The net effect of that will be that those sole traders, a lot of them will not continue in business, and that will actually have an impact on the ability of Australians to access broking services and the competition that that puts on lenders to actually keep interest rates down. The equivalent would also apply if this bleeds into business lending, where it makes it harder for small businesses to get the finance that they need at the price that actually works for them, and the anti-competitive effects on cost of money there as well. It has the potential to impact more broadly at a less clear and more opaque way but quite real.

The Hon. CHRIS RATH: Just going back, not to labour this point too much, the Bridges case happens in 2002. If you were to ask any mortgage broker in, say, 2014 about payroll tax, they'd say, "We don't have to pay it"—the aggregator, the mortgage broker. Even if you ask Revenue in 2014, they'd probably say, "Yes, they don't have to pay payroll tax." But then, at some point, Revenue started enforcing or auditing your industry. Did they give any reason why they started doing that, why they issued that practice note? Did they have new legal advice that led to that? It's all very confusing.

ANJA PANNEK: That is unclear to us, and that might be a question best addressed to Revenue NSW for why there was a change in tack many decades after the law was in place.

SAM WHITE: There was no CPN issued until 2020.

ANJA PANNEK: It was in 2020, and then it was reissued in '21 with no update. We weren't aware that it was being reissued, actually.

SAM WHITE: But prior to us being assessed, there was no case that we were aware of. There was no position on that and there was no practice note. At least for us, it was out of the blue completely.

The Hon. CHRIS RATH: From their perspective, when we asked about it in budget estimates, it was "Nothing has changed; we're just enforcing the law as it is." But the way you're describing it is that there has been a big change from what was previously enforced in the past, and this is what we're going to have to try to get a better understanding of when Revenue NSW appears this afternoon.

ANJA PANNEK: Yes. In our submission and, no doubt, across many of the submissions that you've seen, on a principle basis, this goes back to the law itself and, in our view, the way that it is drafted very broadly and in the way that it captures broker-aggregator arrangements. If the intention of the law is not to capture independent businesses, it really needs to be redrafted.

The Hon. CHRIS RATH: They may not have changed the law; they've just changed their interpretation of it, it seems to be.

The Hon. DAMIEN TUDEHOPE: I'm sure Mr Smythe is watching this session. When he comes this afternoon, he will be well versed and prepared for an answer because he listens, doesn't he, Chair?

The CHAIR: Yes. Cullen, we're waiting for you. Any other questions, colleagues? No? We very much hear your concerns. The Committee is alive to them, and we very much appreciate the submissions you've made and the evidence you've given today. There were a few matters taken on notice. The secretariat will be in contact with you in due course to get some answers from you on those matters. That concludes the session. Thank you very much.

(The witnesses withdrew.)

(Luncheon adjournment)

Mr MUSTAFA AGHA, Head of Policy, Business NSW, affirmed and examined

Ms ELIZABETH GREENWOOD, Senior Policy Manager, Workers Compensation, WHS and Regulation, Business NSW, sworn and examined

Mr MARK FROST, Acting NSW Small Business Commissioner, affirmed and examined

Mr LUKE ACHTERSTRAAT, Chief Executive Officer, The Council of Small Business Organisations Australia, sworn and examined

Ms ADELE SUTTON, Head of Policy, The Council of Small Business Organisations Australia, affirmed and examined

The CHAIR: Good afternoon everyone. Welcome to the Portfolio Committee No. 1 – Premier and Finance inquiry into the Payroll Tax Act 2007. We will now turn to some opening statements. Would Business NSW like to commence?

MUSTAFA AGHA: Good afternoon, Chair. I begin by acknowledging the traditional owners of the land on which we meet, the Gadigal people of the Eora nation. Thank you for having Business NSW here today to talk about an issue that is as equally important as it is frustrating for our members. Business NSW represents almost 50,000 businesses of all sizes throughout New South Wales. Every quarter, as our members complete our business condition survey, payroll tax and red tape are a constant and evolving theme, with running a business becoming an increasingly complex situation.

For years we have called for the overhaul, decrease and eventual removal of payroll tax. As a tax on employment, it impacts a business's ability to grow and thrive in New South Wales. Our economy has experienced significant inflation over the last three to four years, resulting in bracket creep within the payroll tax regime. This means more businesses are participating in a scheme, which, as we outline in our submission, is complex and uncertain and is a fair way away from its original intended purpose in 1927, and later in 1941. To the direct terms of reference of this inquiry, Business NSW opposes the application of payroll tax on truly independent contracting arrangements.

The provisions that are currently contained in the Payroll Tax Act exceed the original anti-avoidance intent, unfairly capturing genuine independent contractors and intermediaries who explicitly do not choose an employment relationship for commercial reasons. Further, retrospective tax application and inconsistent interpretations by Revenue NSW have created significant uncertainty and administrative burdens, inhibiting investment and growth. Business NSW recommends urgent reform, and we look forward to responding to questions throughout today's session.

The CHAIR: Thank you very much. Mr Frost?

MARK FROST: I thank the Committee for the opportunity to make a submission and provide evidence today. A key objective of the commission is to promote a fair operating environment in which small businesses can flourish. With this in mind, the commission has been closely following industry concerns regarding the application of the Payroll Tax Act to arrangements commonly used by small businesses across various sectors. As the Committee has heard today, many small business stakeholders are concerned that payments made to them may be subject to payroll tax despite operating as independent businesses under genuine commercial arrangements.

While most small businesses are not directly liable for payroll tax, some are under the contractor provisions of the Payroll Tax Act. Small businesses can find themselves indirectly bearing the cost of payroll tax. While it is important for there to be appropriate safeguards to protect against tax avoidance schemes, the commission would welcome a legislative review of the contractor and employment agent provisions to ensure that they are fit for purpose for our modern economy. This includes ensuring that non-employing businesses and microbusinesses are not systemically disadvantaged and making sure that our tax system does not impact arrangements which exist to improve efficiency rather than to avoid a tax liability. Thank you again for the opportunity to contribute.

The CHAIR: Thank you so much. Mr Achterstraat, fire away.

LUKE ACHTERSTRAAT: If you want less of something, tax it more. The New South Wales Government will bring in almost $55 billion in payroll tax over the next four years. Remarkably, this State will raise more in payroll tax than gambling tax. This inquiry is timely. An alarming symptom of the New South Wales payroll tax addiction has been the reckless mission creep of its application beyond the employment relationship. Payroll tax was never intended to be payable in a B2B relationship, and yet small businesses have been highly

anxious since a court ruling harshly found a business providing services to mortgage brokers somehow owed payroll tax.

Even the judge in that decision acknowledged the harshness of that case. COSBOA stands firmly with MFAA, CAFBA and Australian brokers who are critical enablers of enterprise and small business success in New South Wales. Without change, the average self-employed broker is set to lose $68,000, or one-third of their gross income. This will reduce competition and push up borrowing costs for New South Wales residents. Of course, COSBOA represents an array of small businesses, not only brokers, and there are huge concerns of contagion beyond the broking sector. In fact, various sectors, from direct selling, logistics, cleaning—as you've heard earlier—and agriculture, are all highly anxious.

Small business confidence in New South Wales is already low. It is currently sitting at 25 per cent—the worst result in over a year. At a COSBOA summit last year, Premier Chris Minns told small businesses, "If poorly designed taxes are weighing down small businesses, we want to cut these wherever we can." Let me just read that to you again: "If poorly designed taxes are weighing down small business, we want to cut these wherever we can." It is clear the Government knows we have a problem here, evidenced by its decision to exempt general practitioners trading as small businesses. However, the law needs to be changed and clarified to ensure that it is fit for purpose for all and that bona fide contractor relationships are not wrongly captured by payroll tax.

The CHAIR: Thank you very much. We will now turn to questions from the Committee, starting with Mr Tudehope for the Opposition.

The Hon. DAMIEN TUDEHOPE: Thank you very much for the very good quality submissions which you have made. I will start with you, Mr Frost. You are the acting Small Business Commissioner. Have you made representations to the commissioner for Revenue NSW in relation to this issue?

MARK FROST: I'm aware there may have been some discussions under the previous Small Business Commissioner. I'm not specifically across the nature of what those might have been. However, I am also conscious that during the last several years some of this has been contingent on court decisions. Some of these remain unresolved.

The Hon. DAMIEN TUDEHOPE: A lot of the evidence that we have heard relates to a number of issues that have arisen: The first is the lack of clarity which is contained within the Payroll Tax Act relating to what an independent contractor is for the purposes of payroll tax; secondly, the issue of retrospectivity in respect of assessments by the commissioner; and thirdly, potential penalties. The first is relating to the actual framework and the way the Act is structured. Is the Small Business Commissioner's position that the Payroll Tax Act needs rewriting?

MARK FROST: I think what I would say that is that it would be a good opportunity to have a look and to get the best tax policy experts together to have a look at what arrangements under the Act would address some of the issues that have been raised both in the submissions received by this inquiry and in terms of the small businesses that may find themselves liable for payroll tax—perhaps not directly, but certainly indirectly—and to examine if that indeed matches the intent of the current contractor provisions of the Act.

The Hon. DAMIEN TUDEHOPE: You would have read, and I think one of you made reference to, the Loan Market case and the observations made by the judge in that case. Is there not a case for rewriting this Act?

MARK FROST: I think that should certainly form part of a consideration under a review. That's certainly what we've called for in our submission. If that allows an opportunity for all the different potential opportunities to consider alternative approaches, I think that would be worth doing and there's a merit in doing so.

The Hon. DAMIEN TUDEHOPE: Mr Agha, is it your position that this needs rewriting?

MUSTAFA AGHA: I'll defer to my colleague Ms Greenwood.

ELIZABETH GREENWOOD: I think our preferred position is that it not exist at all.

The Hon. DAMIEN TUDEHOPE: Well, you and I can agree on that.

ELIZABETH GREENWOOD: And everyone goes back to the drawing board. I would agree it seems to be a problem, especially when you read the most recent cases, that a lot of them didn't reach appeal because there was no error of law. The reason why there was no error of law was because the decision, based on statutory interpretation, was correct. To the extent that payroll tax needs to avoid having "unintended consequences", yes, it would need a rewrite. However, I think the bigger picture question is what is the payroll tax for? It originally was to subsidise a child endowment scheme. It was supposed to be regarded by businesses as being the depreciation on labour, similarly to depreciation on plant and equipment. That is no longer the reason for the

payroll tax to exist. There's very much a fundamental question: Why do we have it? Obviously it's an incredibly important source of revenue, but why does the revenue have to flow in that way given it's so harmful?

The Hon. DAMIEN TUDEHOPE: I think child endowment was one part of it, but it was holiday pay and other things. The specific issue of this inquiry relates to independent contractors. I'm sure you had the opportunity to review the provisions contained in the Act. Every piece of evidence we have heard so far is that there is a lack of clarity around those provisions and people who have been given clear audits are now being in fact assessed. Would that indicate to you that these provisions are no longer fit for purpose?

ELIZABETH GREENWOOD: They're not fit for purpose if they're still trying to adhere to the original object of being anti-avoidance provisions from back in the mid-80s, when a contractual arrangement with an individual went from being an employment arrangement to a contracting arrangement. If that is still the purpose, then it clearly needs a rewrite. However, I think it needs more than a rewrite; it needs a review.

The Hon. DAMIEN TUDEHOPE: Perhaps that's a discussion for another day, and you and I can be on the same page in relation to that. But for the specific purposes of this inquiry, you've heard the evidence and seen the submissions which have been made in relation to the manner in which companies and aggregators are now being assessed for payroll tax in circumstances where they've never been assessed before. Is that a circumstance which would give rise in your mind to a necessity to rewrite these provisions?

ELIZABETH GREENWOOD: To the extent that there is uncertainty in the business world, it's very much a very poorly drafted piece of legislation. It still gets back to the question: Why is it there?

The Hon. DAMIEN TUDEHOPE: You can rewrite anti-avoidance provisions if in fact you want to capture anti-avoidance. But if this is creating circumstances where businesses—small businesses, large businesses—are now receiving very large payroll tax bills, is not that an indication that this legislation is not carrying out the purpose for which it was intended?

ELIZABETH GREENWOOD: Maybe you can help me understand your question. What do you say the purpose of this tax is? Originally it was a tax on wages. I recall reading somewhere that there was an amendment made where a particular entity, their wages were exempt. I'm a bit unclear as to what the purpose is supposed to be.

The Hon. DAMIEN TUDEHOPE: Is it not your understanding that why you're here today is to in fact give evidence in respect of the manner in which payroll tax is being assessed on independent contractors?

ELIZABETH GREENWOOD: It is the effect of the provisions. That is why we're here.

The Hon. DAMIEN TUDEHOPE: Yes.

ELIZABETH GREENWOOD: I believe I've answered your question.

The Hon. DAMIEN TUDEHOPE: That it's not fit for purpose?

ELIZABETH GREENWOOD: Yes.

The Hon. DAMIEN TUDEHOPE: What's your view, Mr Achterstraat?

LUKE ACHTERSTRAAT: It's not fit for purpose. It needs a rewrite. Next question.

The Hon. DAMIEN TUDEHOPE: To the extent that there are small businesses which are in fact now caught which have never been caught before—in circumstances where they have received audits in the past which have given them clean bills of health—that are now being assessed and are being subject of retrospective tax together with penalties, does that give rise in your mind to a circumstance where the provisions relating to independent contractors are no longer serving their purpose?

LUKE ACHTERSTRAAT: One hundred per cent.

The Hon. DAMIEN TUDEHOPE: Have you ever had any contact with the Commissioner of State Revenue in relation to this?

LUKE ACHTERSTRAAT: Yes, we have.

The Hon. DAMIEN TUDEHOPE: Enlighten us as to how those conversations have gone in respect of his view in respect of these provisions.

LUKE ACHTERSTRAAT: I think the provisions are broad. They're very ambiguous. That's partly why we are calling on legislative certainty and legislative change to enact, what I called in my opening, making sure that the provisions are fit for purpose. We've engaged with the Minister for Finance and the Minister for Small Business. We've engaged with Revenue NSW. I think I'll describe that interaction as Revenue NSW taking the

view that they're not policymakers, they are policy implementers—so effectively being told this is the law of the land. I know they are witnesses later on today so I'm sure they can speak for themselves. But we have had ongoing contact with the New South Wales Government and all sides of Parliament to really put forward how this is having a terrible impact on small business. This is having a huge impact on competition—a direct financial cost to small businesses who are legitimate, bona fide independent contractors.

The examples we have go beyond what you heard earlier in terms of broking. We have an example—my colleague Ms Sutton might elaborate on this—where a businessperson who bought a direct selling entity and, in the process of doing the due diligence and when that transaction went through, discovered that there was actually a hidden liability of payroll tax which had not been forthcoming due to the uncertainty and the ambiguity of what we're talking about here. This is affecting confidence. It's already had a big impact, the anxiety that I talked about, amongst small businesses.

The Hon. DAMIEN TUDEHOPE: So the value of that business was then correspondingly diminished?

LUKE ACHTERSTRAAT: Correct.

The Hon. DAMIEN TUDEHOPE: Tell us a bit more about that, Ms Sutton.

ADELE SUTTON: In my previous role I was the head of legal and policy at Direct Selling Australia. There are particular nuances in that industry.

The Hon. DAMIEN TUDEHOPE: For which industry?

ADELE SUTTON: The direct selling industry—think of Tupperware or Avon back in the day. There was a lot of anxiety—and there continues to be—within the industry when an exemption was removed, a door to door sales exemption. My understanding is there had been, outside of the industry, an instance of sham contracting, which was the policy lever in removing it. But as an inadvertent consequence, then, in New South Wales—not in other States—that exemption that the industry relied on was removed. Subsequent to that, there's been a lot of uncertainty. There was a direct selling company that made a submission which outlined just the sheer quantities in terms of liability and penalties, and $400,000 in legal fees in addressing the liability that until that point they didn't realise that they had.

The Hon. DAMIEN TUDEHOPE: Do you recall the name of that case?

ADELE SUTTON: That's USANA. A lot of these companies—sometimes they're international and they have independent contractors. There are something like 350,000 independent contractors across Australia; I don't have the specific figures for New South Wales. But 78 per cent of them are women, usually looking to make a couple of hundred extra dollars a month in supplementary income. Then this extra 5.6 per cent, for the companies that are liable to pay it, they just take that out of their commission. It's literally like putting their hand in their pocket.

The Hon. DAMIEN TUDEHOPE: When did you first become aware that this was an issue?

ADELE SUTTON: I started in that role in 2018. At that point, the exemption had already been removed, but there were some interactions then with Revenue NSW. Because the commission is really on the product sold, and there's no way of telling what time is spent—in that they are very flexible, they're very independent, they don't put in timesheets and there's no invoices. There's no way of understanding how much time they spend in their business. It is very much just commission paid on product, so there were lots of conversations about how on earth each company could work out their liability, in terms of the replacement method. I'd not been involved in payroll tax before I started that role, and it was completely baffling trying to understand the provisions and then explain them to the industry.

The Hon. DAMIEN TUDEHOPE: Mr Achterstraat, obviously, you haven't been in the role for a long period of time but, on your examination of the records of COSBOA, not only in relation to the direct selling industry, when did it first come to the notice of COSBOA members that they were being impacted by this?

LUKE ACHTERSTRAAT: It probably actually originally came through direct selling and Ms Sutton, when she was in that role, talking to COSBOA in relation to that matter. Obviously, the Loan Market case had a big impact too, and COSBOA, as I mentioned in my opening, proudly work and represent MFAA and CAFBA. We've had quite a few of our different member organisations—noting that, as a peak of peaks, COSBOA comprises almost 50-odd small business organisations. Probably also, Mr Tudehope, not just particular member organisations but, as Ms Sutton alludes to, tax practitioners and organisations like CPA and the Institute of Certified Bookkeepers. People who are expected to give advice about this stuff find it pretty difficult to do so, and that comes at additional cost to them, being small businesses themselves, but it also inserts a lot of operating uncertainty onto people who are trying to run their business.

The example Ms Sutton gives about independent contractors, who might largely be women, looking to, during a cost-of-living crisis, sell some product or create some social events, and they're having their take-home pay potentially undermined by the imposition of payroll tax. For me, that is a huge issue where you can actually see the human impact of what we're talking about here—but certainly the professional services side of things as well, where people are trying to interpret these legal cases. How do you interpret and explain a legal case to a small business where the judge has themself admitted it's extremely harsh? It beggars belief how the average punter out there can understand how that is, in any way, shape or form, fit for purpose.

The Hon. DAMIEN TUDEHOPE: In relation to Business NSW, when did it first become an issue with your member organisations or when were you put on notice that Revenue was pursuing potential payroll tax audits in respect of your members in circumstances where they were never potentially liable for payroll tax before but are now liable for payroll tax?

MUSTAFA AGHA: We might take that one on notice, come back to you with a supplementary on that and look through our records. The issue has popped up here and there over the years in different ways. It's one of those ones where our members keep complaining to us about the complexity of the regulatory environment. We keep seeing comments come through about being pursued for payroll tax and other issues. But we can take that on notice and come back with a supplementary submission on that. What we're also seeing is that our member businesses, especially small businesses, are finding the regulatory environment more complex. This is one of those areas impacting that as well. It's harder to navigate. The clarity isn't there and, where advice is given, they're often told, "This is a likely outcome, but we can't guarantee anything." When businesses are operating in that environment, it's really difficult to grow and to invest, and often businesses are finding themselves capping themselves at a certain size to avoid these issues as well.

The Hon. DAMIEN TUDEHOPE: Have you had any meetings or correspondence with the New South Wales revenue commissioner in relation to this issue?

MUSTAFA AGHA: Not to my knowledge, but if there are any meetings that I can look into, we'll come back with that as well.

The Hon. DAMIEN TUDEHOPE: Have you had any meetings with members of the Government in relation to this issue?

MUSTAFA AGHA: Not specifically around this contract arrangement but, around payroll tax more generally, we've continued to advocate on that.

The Hon. DAMIEN TUDEHOPE: To abolish it?

MUSTAFA AGHA: Abolish, reduce regional payroll tax—there's a whole bunch of provisions that we think will create a more effective tax system that encourages investment in New South Wales.

The Hon. DAMIEN TUDEHOPE: In fact, I think one of your submissions is that you suggest that the payroll tax threshold ought to be increased.

MUSTAFA AGHA: Increased—inflation has had a significant impact on businesses. That threshold needs to continue to match that, either through CPI, WPI or other arrangements that will allow our businesses to continue to grow. I think there was an article this week looking at the cost of trade going up. Some wages are going up 20 per cent a year and 15 per cent a year. There's bracket creep taking place there. That needs to keep up with the times.

The CHAIR: Did you say regional payroll tax?

MUSTAFA AGHA: Regional payroll tax, yes.

The CHAIR: What's regional payroll tax?

MUSTAFA AGHA: Victoria has a regional payroll tax. We have border communities like Albury where investment decisions come down to Albury or Wodonga. The regional payroll tax, I believe, is 1.21 per cent in Victoria. We think that should be matched. People shouldn't choose to invest based on payroll tax in New South Wales. That's a real perverse outcome that's taking place in our regions.

The Hon. Dr SARAH KAINE: Did you say that, in some places, wages have gone up 20 per cent?

MUSTAFA AGHA: Yes, there are some key industries—I think construction is one of them—where things are going up significantly.

The Hon. Dr SARAH KAINE: But the wages component by 20 per cent.

MUSTAFA AGHA: Don't quote. There is a significant—it's double digits. I'll have to come back to you on that, but it's significant growth, year on year, especially when it comes—I think there was an article this week about $250,000-a-year tradies. There are some key areas. We have a housing crisis. There's significant demand on key industries.

The Hon. Dr SARAH KAINE: Tradies are independent contractors.

MUSTAFA AGHA: Depending on how they're arranged, yes.

The Hon. CHRIS RATH: On the threshold—this is probably to all of you—is there enough clarity when businesses hit the threshold mark? They may have been under the threshold for years; their labour costs have increased, and their payroll has increased. How have you found the guidance from Revenue NSW in terms of the communication from them to small businesses once they hit the $1.2 million or whatever the threshold is? How's that?

MUSTAFA AGHA: I can't comment on how the communication is done. I think we can have some conversations.

The Hon. DAMIEN TUDEHOPE: Isn't it self-assessment for the individual businesses?

MUSTAFA AGHA: But I'm not sure if there's any communication that's triggered once there's anything put into single payroll, touch or other systems.

The Hon. CHRIS RATH: They don't get a notice saying, "You're at $1.1 million payroll."

MUSTAFA AGHA: Watch out.

The Hon. CHRIS RATH: "Are you aware that next year you might have to be liable" There's no forewarning, potentially, because that's something I've heard.

The Hon. ROBERT BORSAK: No, you don't get that. I pay payroll tax, and you don't get that. I'm answering your question for you. The only time you get that is when either the threshold is going to go up or the rate of tax is going to go up. There's no regular communication.

LUKE ACHTERSTRAAT: That level of customer service, unfortunately, does not exist in the current operation of Revenue NSW.

The Hon. CHRIS RATH: They just come when they want money.

LUKE ACHTERSTRAAT: Well, it's kind of their job, to be fair.

The Hon. CHRIS RATH: Exactly.

The Hon. ROBERT BORSAK: Send you an email.

The Hon. Dr SARAH KAINE: Mr Agha, I think Mr Tudehope asked you about engagement with the Government, just to be clear, across the years. This is an issue that, we've heard today, is long term. It's been an issue for a while. You've obviously engaged with Revenue NSW, have you?

MUSTAFA AGHA: No, not specifically on independent contracting arrangements, that I'm aware of.

The Hon. Dr SARAH KAINE: Just on payroll tax generally.

MUSTAFA AGHA: More generally. Our advocacy has been around payroll tax as a general principle.

The Hon. Dr SARAH KAINE: But you have or you haven't engaged across a range of years with Government Ministers or Ministers' offices? You have or you haven't?

MUSTAFA AGHA: On payroll tax generally?

The Hon. Dr SARAH KAINE: Yes.

MUSTAFA AGHA: Yes, I believe so.

The Hon. Dr SARAH KAINE: Would you mind providing us with information about when that might have been?

MUSTAFA AGHA: Yes, we can look and see what we can provide you.

The Hon. Dr SARAH KAINE: Recently with this Minister or with the previous Minister—that would be great.

MUSTAFA AGHA: Sure. We can see what we can provide from our records.

The Hon. DAMIEN TUDEHOPE: Have you turned your mind, if you were going to make changes to this Act, besides abolishing the Act—if you were just going to make changes—to what the changes would look like?

ELIZABETH GREENWOOD: If I could get back to clarity around the purpose and your question, Dr Kaine, about engaging with Revenue NSW, in a former role I had with Housing Industry Association, I used to have quarterly meetings with the then commissioner and his three—each one was in charge of payroll tax, land tax, and there was a third one. Duties.

The Hon. DAMIEN TUDEHOPE: Yes, stamp duty.

ELIZABETH GREENWOOD: Yes, and I recall, at the time—this was just prior to the harmonisation. They were trying to harmonise, and I remember Commissioner Smythe saying to me, "Liz, what we really need to do is have a test for who dependent contractors are." That's what he said back prior to 2007. It's unclear whether that is still the purpose, given that now wages paid to employees—I can't recall what the entity is, but wages paid to employees are now specifically excluded. I think the question is what is the purpose? Then examine the provisions and then you have a better idea of how it should be changed if that is, indeed, the appropriate way to go.

The Hon. DAMIEN TUDEHOPE: Is that your view about how you would change the Act other than abolish it, Mr Achterstraat?

LUKE ACHTERSTRAAT: I might defer that to Ms Sutton, given her strong legal background.

ADELE SUTTON: Not in tax. I think probably the interesting part about it is the fact that it is a self-assessment regime. So anything—especially for small businesses, you've got to assess your liability. It needs to be much, much easier to understand. There are so many parts and exemptions to it. It's far too complicated and far too broad. It needs to be a lot simpler. In that respect, we think it would be an opportune time to have a consultation to work out how to simplify it and also create specific and workable exemptions so that the contract provisions are fit for purpose and that they don't capture bona fide contractor arrangements. Particularly as they currently stand, this reference to deemed wages—it doesn't really align with how the ATO views contracting arrangements and also the use of ABNs. Taking the direct selling example or, again, the page that Revenue NSW have implemented, which they didn't consult industry with, the examples just don't reflect the reality of the industry. I think also there needs to be more consultation with the industries affected as to how that simplification process could be could be reached.

The Hon. Dr SARAH KAINE: You might have said this at the beginning, but we're getting a lot of—I just want to clarify. Mr Achterstraat, of your membership, what is the proportion that this impacts?

LUKE ACHTERSTRAAT: This would impact a significant proportion. Taking a loan, direct selling, who—as Ms Sutton has mentioned, there are about 250,000 independent contractors operating in direct selling.

ADELE SUTTON: More.

LUKE ACHTERSTRAAT: More?

ADELE SUTTON: About 350,000, yes.

LUKE ACHTERSTRAAT: Of the 50-odd member organisations we represent, I would suggest we have had conversations with respect to this issue with between five to 10 of those member organisations, so it's not insignificant.

The Hon. Dr SARAH KAINE: But it's the member organisations that are the ones liable for the tax, not the independent contractors.

LUKE ACHTERSTRAAT: Sorry, for clarity, a member organisation for us could be Direct Selling Australia; it could be Master Builders Australia; it could be the Australian Retailers Association. We're a peak of peak organisations.

The Hon. Dr SARAH KAINE: Okay, thank you. That's helpful.

LUKE ACHTERSTRAAT: Helpful to clarify.

The Hon. Dr SARAH KAINE: Yes. You've got your own supply chain of membership there, yes.

LUKE ACHTERSTRAAT: You might be hitting on in terms of who actually pays the damn thing. It is obviously the head entity in that respect. But we've heard the evidence about that payroll tax being passed on to small businesses—and, as such, why we're here and have such a keen interest in the work of the inquiry.

The Hon. Dr SARAH KAINE: Mr Frost, again, forgive me if you've covered this already, but in terms of all of your work, what's this in terms of the priority of the conversations you have with small businesses—payroll tax generally and then these particular issues?

MARK FROST: We would not be the natural place within government for a small business with an issue with their tax affairs to contact. It's not our bread and butter; however, we do engage with small businesses proactively to understand the nature of their concerns. Through our insights, initiatives and programs that we have, we do seek intelligence from the small business sector to better understand the nature of this. We find that, of those who are involved in payroll tax and administering payroll tax, about a quarter of those respondents to that survey question that we put out and that is referenced in our submission indicated they did have challenges with applying and determining the contractor provisions of the Payroll Tax Act. You can extrapolate that across the broader economy and it's a fairly significant issue.

The CHAIR: Thank you very much, everyone, for coming and giving evidence. We very much appreciate it and also your excellent submissions. The Committee hears the concerns of you and the other stakeholders loud and clear. We, through the secretariat, will be in contact in due course on those few matters that were taken on notice. Thank you very much for the work you do.

(The witnesses withdrew.)

Mr SCOTT JOHNSTON, Deputy Secretary, Revenue NSW and Chief Commissioner of State Revenue, NSW, sworn and examined

Mr CULLEN SMYTHE, Commissioner of State Revenue, NSW, sworn and examined

The CHAIR: Thank you for joining us here for this inquiry into the Payroll Tax Act and for your submission. Does Revenue NSW want to make an introductory statement?

SCOTT JOHNSTON: Yes, I do.

The CHAIR: Okay, fire away.

SCOTT JOHNSTON: Thank you to the select committee for the invitation to make a submission to the inquiry and to attend this hearing to give evidence. Let me begin by saying that Revenue NSW is responsible for administering the State's taxation laws. We administer those laws as written, fairly and impartially. While we assist the Government in reviewing those laws and developing any changes, we are ultimately not responsible for tax policy. Tax policy is led by the Treasurer and the Treasury and is shaped by a broad range of economic, social and political considerations, which is beyond our remit to comment on. Therefore, to the extent that the select committee is investigating possible legislative changes, we are constrained in what we can say.

I will now make a few observations or key points drawing on the submission that we provided. Firstly, it is worthwhile putting the discussion around the application of contractor and employment agent provisions in some context. In the last financial year 19 per cent of payroll tax customers reported contractor payments, and 2.7 per cent reported having an employment agency arrangement. Of the 19 per cent of customers that reported contractor payments, 40 per cent claimed exemption. The total taxable contractor payments average $5.2 billion per year, and represent only 2.1 per cent of the total gross New South Wales wages paid.

In the last financial year, Revenue NSW conducted a total of 3,452 payroll tax audits. Of these, 1,477 resulted in no further action, which is 42.8 per cent, and 62 resulted in refunds. Of the payroll tax audits conducted, 14.6 per cent found underpaid payroll tax relating to contractor payments that did not qualify for an exemption, and 2 per cent found underpaid payroll tax relating to employment agent arrangements. Based on these figures and our experience, businesses are generally aware of the contractor and employment agent provisions and how to apply them correctly.

Secondly, I would like to say something about the Payroll Tax Act 2007 and the provisions relating to contractors and employment agents. Payroll tax was first introduced in 1941 by the Commonwealth Government and then transferred to States and Territories in 1971. Since that time, the policy underpinning the tax has remained largely intact—that is it's a tax on remuneration paid to workers who are employees or who, for all intents and purposes, are in an employment-like relationship with a business. By "employment-like" I mean an arrangement which has a resemblance to an employer-employee relationship, where workers are procured to work for a business and obtain income from that work.

The contractor and employment agent provisions were introduced in 1986 and 1985, respectively, to the Payroll Tax Act 1971, which preceded the current Act, in an environment where contractors were increasingly being used in place of common-law employees, and employment agents in place of directly engaging workers. These changes in how businesses procure labour have occurred and continue to occur within a broad context of commercial influences, including but not limited to tax considerations, and is something that we continue to see evolve today. In relation to contractors, the broad policy intent of the payroll tax legislation is given effect by making wages paid to contractors liable to payroll tax unless one or more exemptions apply.

In general, these exemptions cover circumstances which suggest that the contractor is in a non-employment-like relationship with the employer—for example, where the contractor's services for the employer are of a limited or transient nature or incidental to the activities of the business. In relation to employment agents, the provisions apply when there is an employment agent contract, where the workers procured by the agent work in and for the client's business, in much the same way as if the worker was the client's employee. In these circumstances, the Act deems the agent liable for payroll tax on wages paid to the workers. For both contractor and employment agent provisions, what is paramount is a consideration of all the relevant facts and circumstances of the relationships between the parties and whether they fall within those provisions as written, as I have just outlined.

Contrary to the assertions made in some submissions to this inquiry, there has been no major change to the contractor and employment agent provisions, nor the introduction of any new tax. Some submissions to this inquiry also suggest that the provisions were intended to tackle tax avoidance schemes set up to disguise an employer-employee relationship. However, while addressing tax avoidance may well have been one motivating

factor for their introduction, it is not correct to construe the purpose and application of the provisions in such a narrow way. There is nothing in the provisions themselves that requires that a particular labour arrangement be intended to avoid tax in order to trigger their application.

Thirdly, having outlined the provisions, let me say something briefly about our approach in administering those provisions and payroll tax generally. Liability for payroll tax is imposed by the legislation. Payroll tax is a self-assessed tax, and our focus is very much on the voluntary compliance from the outset. We encourage and assist taxpayers to comply with the law by providing a significant amount of information, education and tools to help them to understand their obligations. Revenue NSW issues revenue rulings and commissioner's practice notes, which provide detailed guidance on the interpretation of the provisions within the Act, including practical examples. We often develop these in consultation with our key stakeholder committees, which include representatives from the Tax Institute, the Law Society and other bodies. This ensures that the guidance we provide is clear and useful for the taxpayers and professionals that we are working with. Our submission listed the various publications that we have issued specifically in respect of the contractor and employment agent provisions.

As with all taxes, Revenue NSW undertakes compliance activity. We take a risk-based approach that concentrates on high areas of risk, using data analytics and risk assessment processes. Audits ensure that taxpayers are self-assessing correctly in accordance with the law and that there is a level playing field for all. If an audit identifies that tax has not been correctly assessed and that there has been an underpayment of tax, Revenue NSW may issue a reassessment. This may be for multiple tax years, if the underpayment has occurred for such time, and may be issued up to five years after the initial assessment was made. It may also be longer in certain circumstances. It is in this context that I must respectfully reject the assertion, made in some of the submissions to this inquiry, that Revenue NSW has retrospectively imposed liabilities on taxpayers. This is simply incorrect. As I stated earlier, a liability is imposed by the Act. Where we have issued a reassessment for multiple years, this is because the taxpayer has, for some years, incorrectly assessed their liabilities and underpaid their payroll tax and this is only identified by us at that later time.

During the audit process, we work with the taxpayer to understand why and how the underpayment occurred. This does not derogate from the existence of the liability that is payable under the law. As with any government administrator, our decisions are subject to review by the courts. There have been a number of court decisions that have considered the application of the contractor and employment agent provisions in different contexts. This is to be expected, given the breadth of industries that employ and the various and emerging models of employment as the market evolves. However, consistently over time, the courts have affirmed Revenue NSW's interpretation and application of the law to the facts of the case. None of these cases resulted in new taxes or changed who is liable for tax under the law, which, as I stated earlier, has remained largely unchanged for decades.

Regardless, Revenue NSW recognises that the issuing of reassessments of payroll tax liabilities for multiple years can place a significant and unexpected burden on a taxpayer. As with other taxes, we support and work with taxpayers who may have difficulty in meeting their obligations. We encourage them to contact our office to discuss options, which can include an extended time to pay or payment by instalment. Lastly, as we point out in our submission, New South Wales operates within a harmonised payroll tax regime that was one of a number of initiatives sponsored by the Council of Australian Governments to reduce red tape and drive productivity. If any legislative amendments to address issues arising out of this inquiry are to be pursued, consultation with other participant jurisdictions will need to be undertaken and their agreement obtained in order to maintain harmonisation. Any significant shift away from the harmonised regime may increase costs for businesses operating across jurisdictions. Mr Buckingham, that concludes my opening statement.

The CHAIR: Thank you very much, Chief Commissioner. We will now turn to some questions.

The Hon. CHRIS RATH: Thank you both for attending today and for your submission and also for your appearance at budget estimates as well. I don't know if you had a chance to listen to the evidence given today from the mortgage broker panel.

SCOTT JOHNSTON: No. I think we were travelling.

The Hon. CHRIS RATH: So I'll go into a little bit of detail. They basically say that there was the Bridges case in 2002—I assume you're both aware of that—but that the first time that they've been, essentially, assessed or hit with a payroll tax bill was around 2016. The Bridges case was in about 2002. Is the payroll tax liability that they've been assessed as having to pay—does that stem from the Bridges case in 2002? Is that the interpretation that Revenue NSW is using?

SCOTT JOHNSTON: I'll make a broad comment, and perhaps Commissioner Smythe might build further. Importantly, as I've outlined, payroll tax is based on self-assessment. Our audit program is based on assessment of risk factors, where we undertake audits, where through data analysis we have a sense that it's worthy

of auditing in a certain space. Without speaking to specifics—and I've said the law has remained fairly consistent over this time—when a particular business comes to our attention, that would be based on our audit and compliance program, which we can't audit and don't audit every business in existence. It would make no reflection on what happened between 2002 and up to the point of time where we might have engaged with them, but the law would have been consistently held. The expectation is every business that is subject to payroll tax does it in accordance with the law.

The Hon. CHRIS RATH: Mr Smythe, did you want to add to that?

CULLEN SMYTHE: No.

The Hon. CHRIS RATH: Okay. It looked like you wanted to.

CULLEN SMYTHE: I was just thinking.

The Hon. CHRIS RATH: Basically, you're saying, then, that it's not—and you said in your opening statement that the law hasn't changed, the provisions haven't changed and the tax hasn't changed. But a lot of the submissions and the witnesses we've heard from have felt like it has changed, at least, or that they feel like they're needing to pay payroll tax now where they previously haven't. You're saying that, in essence, that's because they were self-assessing in the past and self-assessing that they didn't have to pay payroll tax, but now your audit process of recent years has determined that they haven't been, essentially, self-assessing it correctly. So there's a discrepancy between their self-assessment and your audit, and that's really what the what the essence of it is.

SCOTT JOHNSTON: That might be one of many factors why they've come to attention, including business models changing and other contexts. But, potentially, the point to the first question could be the case for many businesses.

The Hon. Dr SARAH KAINE: Could I ask a follow-up question? We're just puzzling with, I think, the evidence that we've received today. Has there been something that has changed? You mentioned data analytics as informing the decisions you're making. Was there a point in time, or several points in time, when your audit processes have changed or your audit identification has changed or you're using a different data analytics tool? I'm just wondering if there's something else that might have precipitated this change.

SCOTT JOHNSTON: Probably a general response would be that our analytic capability, our access to information, would have improved significantly over time.

The Hon. Dr SARAH KAINE: That has increased, yes.

SCOTT JOHNSTON: So our ability to be effective in our compliance effort has increased. But, as I mentioned in my statement, nearly half the audits that we undertake don't result in a reassessment. Reflecting on coming here today, the other changes that we've seen in the last five years at least is there was a long period during COVID when we paused our audit program. So many other things were happening at that time, and auditing businesses wouldn't have been appropriate. We haven't tried to catch up following that, but there was a period of lower effort and lower compliance that we did for a couple of years there. That is now back to normal levels.

The Hon. Dr SARAH KAINE: You must, though, have a way of triaging or determining priority sectors. Is there something that might be there that might trigger—

SCOTT JOHNSTON: What we have evolved over recent years is this risk-based approach to auditing rather than a random approach. We do have access to other information that speaks potentially to industries, where there might be compliance issues or areas to explore, that then focuses our compliance officers in that space, because, ultimately, our objective is to administer the law fairly and equally. The motivation to that is where we understand most businesses are meeting their payroll tax obligations as the law is, but having the integrity in the system requires us to assess that. That is an area of focus for us, but it's not driving particular targets at any industries for any other reason other than data and information we might have suggest there might be reasons to explore the compliance audits.

The Hon. Dr SARAH KAINE: In terms of that risk-based assessment, I don't know if you are, but are you able to share what the attributes are of risk that you prioritise? I don't know if you're able to share that.

SCOTT JOHNSTON: I'll take that on notice, just to think about how we can best help you, because I think that's a useful point. Maybe the factors that we consider in developing that to a point are fairly broad, but I'm happy to work in the way that we could help.

The Hon. Dr SARAH KAINE: It might be helpful. Thank you.

The Hon. CHRIS RATH: The practice notes that you issue, are they informed by legal advice? Have you received new legal advice in the practice notes that you've issued to the mortgage brokers, for instance?

CULLEN SMYTHE: There are a number of lawyers who work at Revenue NSW. I'm one of them, and I sign off the bottom of the commissioner's practice notes. They're not meant to be a determination like, say, a revenue ruling or a specific legal advice. It would be helpful, I think, if you have a moment, just to go through the three major parts of communication or advice material that we provide to taxpayers across the State. The first is the more general information that we make available on the website. We try to provide both guidance to specific provisions and cases. There are case summaries and case notes, all of those sorts of things that try to take what can be—I think I mentioned in estimates that the tax law itself is generally not overly complicated. It's trying to match that to what is a very rapidly changing set of business circumstances. So that's one.

The second item in the hierarchy is revenue rulings. Revenue rulings are generally issued under this harmonised regime we have with the other jurisdictions, and they touch on specific points in the legislation—try to clarify them, make references to specific cases when that's appropriate, and deal with more complex issues. Practice notes are something different. They had their genesis really in New South Wales as part of a response to queries on a number of our taxes around how do you actually administer them. I can read the cases; I can read the legislation. What does that mean for particular industries? That's why you will see practice notes being issued in industries where we've had particular questions—financial services, mortgage aggregators or medical centres. They're not meant to be a pronouncement of new law or new policy. It's basically saying—

The Hon. CHRIS RATH: Nor a new interpretation of the existing law.

CULLEN SMYTHE: That's correct. They're replete with examples. So we try to make points and then show how we would apply those in various scenarios. I think it was Mr Aquilina in this morning's testimony—I did manage to see some of the hearing through the day—who pointed out one of the difficulties with practice notes, which is we can only provide a certain number of examples, but the possibilities of different business models and transactions is large. I acknowledge that their utility for some business models may well be limited, but that's where—they are meant and the examples are chosen to try to give a flavour of how we administer, and then of course there is the option for particular operators to seek a private ruling on their individual circumstances.

The Hon. CHRIS RATH: Just going back to the mortgage brokers, the evidence that we heard was that at some point after 2002, with the Bridges case—probably 2016 or at some point thereafter; I think maybe it was 2020—there was a new practice note that specifically came out that impacted them. What information led you to come up with that practice note, specifically for mortgage brokers? Was it that there was a lack of clarity in that industry that required it?

CULLEN SMYTHE: I'm not sure that I'd say there was a lack of clarity, particularly, for that industry. We had received a number of questions from the financial services industry, and we were engaging with the mortgage aggregation bodies that had raised a number of questions. There was also the process of commenting on the administration of payroll tax. Under the former Government, there was a focus on trying to ensure that there was sufficient general information available to taxpayers who might be liable to the different taxes we administer.

Given that the legislation is self-assessment legislation, the primary responsibility is on the individual taxpayers to consider their business model and the way that the law applies to that. The vast majority, as the chief commissioner mentioned, do that successfully. Most businesses have both financial and legal advisers who are able to provide them with advice. Our efforts in that area were focused on making sure people were aware of not just the law but how we administer that practically, and also what sort of evidence we would expect to see if someone was making a lodgement or was subject to an audit.

The Hon. CHRIS RATH: If we went back, say, 10 years ago, the amount of revenue from payroll tax that you would have received from the broking, aggregator-type businesses compared to how much payroll tax revenue from that same industry you're receiving today, or expecting to receive once they pay their liability, would be vastly different. It would be close to zero, I would assume, 10 years ago, and it would be quite substantial today.

SCOTT JOHNSTON: It's hard to answer that question with any confidence in terms of the numbers because I haven't got what we were doing 10 years ago in front of me. That may well be true, but it doesn't mean a liability did not exist.

The Hon. CHRIS RATH: It was just unpaid.

SCOTT JOHNSTON: Potentially.

The Hon. CHRIS RATH: But they didn't assume they had to pay it. They were under the assumption back then that they weren't liable for that payroll tax that they now are. That's the point of contention, right? You're saying they have always been liable, but it wasn't enforced through an audit—

SCOTT JOHNSTON: We've said that the law has remained consistent. There are a lot of factors that come into a payroll tax assessment outside of the law, such as the models that they're employing. If everything else has stayed the same, it's conceivable that there was a liability 10 years ago that wasn't pursued. On the point that Mr Smythe was just making about the engagement, there was not a trigger for us to do a practice note and then initiate a large number of audits. In fact, there are not many mortgage aggregators in the country in terms of number, noting the structure of that industry. We have regular liaison committee meetings where we ask for information on what would be helpful and what other areas would be useful to develop—commissioner's practice notes—because we can't do everything. The practice note is a guide and is meant to be of assistance, not a messaging of an intent around a compliance program.

The Hon. CHRIS RATH: I know you said it was paused under COVID. Maybe you can take on notice the number of audits per year pre-COVID, during COVID and now.

SCOTT JOHNSTON: Yes. I'll take that on notice.

The Hon. CHRIS RATH: I assume it was a bit higher, then low during COVID and now it's up high again. If there's any information you can provide to us on the estimated gap between the self-assessment done versus the audit that has determined how much they're able to pay—I know that's hard because you don't want to say business by business. For some businesses, I assume, when you do the audit, the self-assessment versus the audit would be very similar or identical. In other instances, it would be minor. In some cases—and this might be where the brokers come in—there would be quite a large gap between what they thought they had to pay and the advice that they've been given.

SCOTT JOHNSTON: What the assessment is, yes.

CULLEN SMYTHE: I might just point out that there is another category that slips under the radar, which are people who are subject to an audit that find out they're actually owed a refund.

The Hon. CHRIS RATH: That's very good news for them.

The Hon. DAMIEN TUDEHOPE: Do you agree with the proposition that the original provisions relating to independent contractors were primarily introduced as an anti-avoidance provision?

CULLEN SMYTHE: That's a difficult question to answer. In saying that, I have a copy of the second reading speech that accompanied the introduction of the provisions under the—

The Hon. DAMIEN TUDEHOPE: From Mr Page?

CULLEN SMYTHE: What was that, sorry?

The Hon. DAMIEN TUDEHOPE: I think it was quoted this morning. It was Ernie Page.

CULLEN SMYTHE: The commentary I have is dealing with the 1971 legislation and the Pay-roll Tax (Amendment) Bill. It's a motion by Mr Debus. While acknowledging that the provisions are designed to deal with certain arrangements that were aimed at avoiding the payment of tax, it can be a little simplistic to say that a body of provisions were brought in only for that purpose. What often happens is that, through whatever means—it could be a court case or it could be an audit—the government becomes aware that there has been a shrinking or a limitation of the revenue base, keeping in mind that originally—

The Hon. DAMIEN TUDEHOPE: Or an expansion of the revenue base, in this case.

CULLEN SMYTHE: Or an expansion, yes. That's a different conversation, I believe. They become aware that the revenue base is shrinking. Sometimes the thing that brings that to attention is an attempted avoidance, but the reason for the shrinking isn't always because there's some nefarious purpose on the part of individuals or businesses that are engaged in these activities. Sometimes it's just changing business models. It may be that in order to redress that particular weakening or contraction of the revenue base, a specific anti-avoidance provision is brought in.

Sometimes it's more in the nature of a clarificatory provision. This then goes to the discussion that was had earlier. There are two general ways of dealing with this under revenue law traditionally. One is to cast a very broad net and then to provide exemptions. The other way of doing it is to target the collection of revenue from particular activities and try to put a net underneath that with a general anti-avoidance provision. The way that the contractor provisions were brought in was the earlier type, which is to cast a wide net and then set up a number of exemptions that allow various contracting arrangements to fall outside of that net.

The Hon. DAMIEN TUDEHOPE: We've heard from doctors, dentists, cleaners and mortgage brokers. All of those industries say that there is no clarity in relation to what constitutes an independent contractor. We've heard from the New South Wales business council and the council of small business. All of them say there needs

to be more clarity around what needs to be included for the purposes of giving surety to people that they are potentially liable to pay payroll tax. Do you agree with that?

SCOTT JOHNSTON: Is the inference more clarity in the legislation?

The Hon. DAMIEN TUDEHOPE: Yes.

SCOTT JOHNSTON: Do I agree that they're making that argument?

The Hon. DAMIEN TUDEHOPE: You can agree that they're making the argument—

SCOTT JOHNSTON: They very much appear to be making the argument. This is a difficult question for us to answer. I would say from the range of submissions—while I haven't listened to the full day today, I appreciate the sentiment that has come from them. Our strong view is that we have been administering the law fairly and consistently and it hasn't—

The Hon. DAMIEN TUDEHOPE: That can't be right. What happened between 2002 and 2016? Where is the consistency?

The Hon. Dr SARAH KAINE: What happened between 2016 and when you were the Minister?

The Hon. DAMIEN TUDEHOPE: Between 2002 and 2016, I wasn't, by the way. What was happening? There was no consistency. There were no assessments of mortgage aggregators in that period of time.

CULLEN SMYTHE: What inconsistency are you pointing to, Mr Tudehope?

The Hon. DAMIEN TUDEHOPE: There was an absence of assessment or audit in relation to that. This body of people, absolutely, their evidence is they were working under the assumption that, because of their business model, they were not liable to payroll tax. What was happening in that period of time?

SCOTT JOHNSTON: We couldn't comment to what happened between those years.

The Hon. DAMIEN TUDEHOPE: But the evidence you've given is that there is a changing nature of work and a changing nature of contractors and every individual case is now throwing up its own circumstances, which may or may not give rise to some sort of query. Don't you think that there is some necessity to give more clarity around when people will be liable to pay payroll tax?

CULLEN SMYTHE: The question you've asked could be applied equally well to every provision of every revenue Act around the world.

The Hon. DAMIEN TUDEHOPE: That's probably right.

CULLEN SMYTHE: Whether there's a lack of understanding or a lack of clarity around the definition of contractor under the Payroll Tax Act, I don't accept that for a moment. The definition is quite simple. It's very clear. The difficulty that is faced by various industry groups, which I do concede, is that, as business models change, there is a level of complexity in having those business models meet existing legislation. The underlying principle of the Act itself remains unchanged from 1941, which is that it's meant to be a tax on labour and the provision of labour. Back then they make the point in the second reading speech for the Pay-Roll Tax Assessment Bill 1941—Mr Curtin actually made that—that it would fall largely on large employer businesses.

As business models change, yes, there is a challenge in meeting revenue laws, not only revenue laws but changes in the Corporations Act, changes in the workplace health and safety legislation, and pretty much everything. I don't disbelieve anyone who has provided testimony in the hearing today at all. There was nothing that struck me, from the speakers that I heard, that seemed false or disingenuous. But revenue law, while in itself simple, has always had challenges because it doesn't always fit neatly with business models that are in existence. Where those issues are solved is in the courts. If we jump back to the Bridges Financial decision, that is a fantastic example of my point. When you print the case out, it's thick. Very few of those pages are focused on general principles of law and of the way that the legislation operates.

What probably 70 per cent or 80 per cent of that case involves is looking at individual contractors and trying to apply the principles of the legislation to each of them. The other big challenge with payroll tax is that it's a very data heavy, numbers heavy type of tax as opposed to, say, land tax or stamp duty—the other two major State revenue sources. When you look at those cases, unless they're challenging or questioning a central principle—for example, what is land right or how does the provision operate in this particular circumstance?—in most of those cases, they're quite short and the payroll tax decisions are large, not because the law is any more difficult but just because the quantity of datasets that need to be considered are much longer.

The Hon. Dr SARAH KAINE: From what I'm hearing, nothing has substantively changed from your point of view since the last change in the Act; it's businesses' response to whatever other circumstances that means

they change their business models. Have you been required to, say, over the past five years, provide briefings to Ministers because of a concern that there's a perception of a change out there?

SCOTT JOHNSTON: I'll take that on notice. What I would say is that this has been an issue for a number of years in different industries. Our view has been very consistent, in that we feel that we're applying the law fairly and consistently. Obviously, a lot of attention comes to certain court cases, which, in the main, have fallen in our favour, confirming our approach. From a briefing perspective, I think it's very much about having that position that we've held fairly strongly to. I think what we do attempt to do is to provide the support that we can to inform others about how we think about the law so that they can best navigate the challenges that Commissioner Smythe spoke to. But it hasn't changed.

I know the highlights for some of those court matters that have happened in the past few years bring a lot of attention, but we're very reasonable. We will meet with people or industry groups if they want to discuss their circumstances so that we consider whether there's either more that we could do to inform or consider our practices, even. I think it's an ongoing relationship with business. Payroll tax is not defined by industry. It's about business models. That's an important feature of it, particularly from a harmonised perspective, which we try to navigate through with our colleagues from other jurisdictions as well.

The CHAIR: Mr Johnston, just on that, we heard evidence today from witnesses who said that their contracts and their business model had stayed the same and they had been audited and not subject to these provisions and they hadn't changed anything and now they are being caught. How can that be?

SCOTT JOHNSTON: I can't speak specifically to those matters but, in general, these audits can take time as well. I spoke of the risk-based approach we have to compliance, if further information is maintained—and I'm not making inference to any of the people or the cases, just in general this is how we might approach it. Very few businesses are audited within five years, firstly; I should say that. If there's information to suggest that there's a reason to, we'll explore that. What's also important is that, while the business might have stayed the same over a period of time, or notionally stayed the same over a period of time, it may have grown and it may have engaged with others in different ways. While it might, on one hand, feel like they're doing the same thing in the same way, potentially, there will be cases where each year that assessment has to be made and thought through again and that could be quite different to the year previous. That's why we work with businesses who we audit to provide information to understand their circumstances and take the time that we need to.

The Hon. Dr SARAH KAINE: Can I ask a question about harmonisation? I'm not entirely clear. You talked about harmonisation, I think, in your opening statement. What exactly does it mean? I think we've heard evidence today of different provisions, say, in Western Australia about some things and I think we heard something about regional Victoria as well. What does harmonisation mean, given that we're also saying there are these differences?

SCOTT JOHNSTON: Western Australia doesn't have contractor provisions. That is certainly a difference to harmonisation. But, in general—and Mr Smythe will give a more detailed response, I'm sure—harmonisation is about ensuring businesses, where possible, can operate across jurisdictions and understand the legislation and the law that they're engaging in in primarily the same way. That might mean that the rates are different or there can be other aspects of the legislation that are applied differently in different States, but the working together and understanding how we all consider the legislation is quite consistent. Court cases across the country are considered in the application. There's a lot of continued collaboration with the revenue organisations across the country to ensure that we're engaging in a way that's largely consistent. That's the operational and administrative aspect to that. But the point and the intent of it is really to try to minimise complexity and burden to businesses working across the States.

The Hon. Dr SARAH KAINE: I'm thinking about WHS as a comparison and the harmonised legislation. It's not a direct replica. It's working where you can to come up with shared understandings?

CULLEN SMYTHE: It's probably between those two. New South Wales and Victoria really pushed the harmonisation. We work under a 2007 Act at the moment. New South Wales and Victoria are very close together, apart from one of the examples that you just pointed out. But back then the idea was to drive the reforms that the chief commissioner just mentioned, trying to make it a little bit easier, especially for businesses that operated across a number of borders. A large number of the provisions are identical right across the country. Remember those old lectures on the tyranny of distance when you were in high school? That's a real thing.

The economies in the different States are completely different, and for various reasons. WA did not pick up a contractor regime. However, I have a bunch of provisions that are effectively uniform—nexus, for example. Where do you tax? How do we make sure someone's wages are not being taxed in two States, especially if, say, they're at a place like the Gold Coast or Albury-Wodonga? I won't take you through them all, but that's the essence

of it. They're never going to be 100 per cent unique because there are some unique provisions in each jurisdiction, but the legislation is actually set up to allow for that—to have an area for State-specific provisions.

The Hon. Dr SARAH KAINE: Aside from WA, which was doing its thing, the contractor provisions are similar across the rest of the States?

CULLEN SMYTHE: Yes.

The Hon. DAMIEN TUDEHOPE: I think the evidence was that they were waiting for us. Mr Smythe, you quoted from the second reading speech in relation to this, I think in 1971.

CULLEN SMYTHE: Yes, sir.

The Hon. DAMIEN TUDEHOPE: Do you recall that part of that second reading speech said, "This bill includes a number of measures which will catch schemes designed to avoid liability for payroll tax by severing the employer-employee relationship. Such arrangements have included the use of so-called contractors to replace wages staff"?

CULLEN SMYTHE: I do. I used a green highlighter to underline that.

The Hon. DAMIEN TUDEHOPE: And then if you come to the very last sentence of that paragraph, it says—and probably you have this highlighted as well—"Bona fide independent contracts will not be caught by the legislation."

CULLEN SMYTHE: I do.

The Hon. DAMIEN TUDEHOPE: And you'll also recall, I assume, that it was noted by Justice Richmond in the Loan Market case that:

> The conclusion that the Broker Agreements constitute a relevant contract under s 32 may be seen as a harsh outcome for LML because the contractor provisions now found in s 32 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—

and this is your point—

> of 'relevant contract' very widely and then to give exclusions which were intended to catch the bona fide independent contractor relationships.

That is the point that you have been making.

CULLEN SMYTHE: Yes.

The Hon. DAMIEN TUDEHOPE: Do you accept that that throws up, in many respects, potentially unfair results? That's the position, I think, taken by His Honour.

CULLEN SMYTHE: I accept that Justice Richmond made those comments, but that's an opinion. I'd question whether it even reaches the classification of obiter because there's no real legal view from that. I'd probably also refer to some comments made by Justice Basten in *Bonner v Chief Commissioner of State Revenue* only a couple of years ago where, in considering a similar sort of issue, he pointed out that regardless of how you feel about things, the provisions contain no requirement of tax avoidance, notwithstanding what was referred to in the second reading speech, and even if you do consider that they're an anti-avoidance provision, it's then difficult to work out what the limits are.

The way I try and reconcile those two views—and they're not really different views; they're slightly different perspectives on the same issue, which is, as you said, the provisions are cast very broadly. The legislature at the time was very keen that bona fide independent contractors were not caught. So then we need to think, what did they mean by using that term "bona fide independent contractors"? We don't have to go very far to get the answer, and the answer is contained in the exceptions.

If you are seeking services or someone is providing services to someone that are not in the ordinary course of their business, for example, bringing a plumber in to fix the sink in your law firm, they are an independent contractor, bona fide, whether they're operating by themselves or if they have a small business under them. That takes me to another of the exceptions, which is if there are two or more people engaged in performing the work, then they're going to be excluded. They're treated as an independent contractor. It can be a little bit difficult for us a good—what's this now—50-odd years later to try to retrofit our understanding of what an independent contractor is now and superimpose it over the views of parliamentarians half a century ago.

The Hon. DAMIEN TUDEHOPE: But isn't that the point? Isn't the point that what was legislated in 1971 may not be fit for purpose today?

CULLEN SMYTHE: That's a different question.

The Hon. Dr SARAH KAINE: That's a question for us, isn't it?

The Hon. DAMIEN TUDEHOPE: But it is the point. What you're saying is this model, which was in fact delivered then, might deliver a different outcome.

SCOTT JOHNSTON: This is, I guess, the point and the question for the inquiry. We would hold the view that, notwithstanding your question of those early years in this century, we've consistently applied the law. Court cases have validated our approach.

The Hon. DAMIEN TUDEHOPE: You didn't apply it between 2002 and 2016.

The Hon. Dr SARAH KAINE: That's not what we've heard.

The Hon. DAMIEN TUDEHOPE: Isn't there this huge gap?

SCOTT JOHNSTON: I think that's an unfair comment. During that period, we would have had a compliance program that would have been, I'm sure, viewed as being fit for purpose for the time. Things have improved in terms of, as I mentioned, smarts around analytics and data sharing that have improved our practice. But I don't think we could assert that nothing was happening during that time in relation to contractor provisions.

The Hon. DAMIEN TUDEHOPE: Can you point to any decided decision in that gap which dealt with this issue?

CULLEN SMYTHE: A contractor issue or a particular industry group?

The Hon. DAMIEN TUDEHOPE: Both.

CULLEN SMYTHE: I think the principle underlying your question—I can't speak for the chief commissioner—I definitely can't agree with it. To say that we were doing absolutely nothing in that space, especially if we're talking about contractor issues—

The Hon. DAMIEN TUDEHOPE: Did you issue any practice notes?

The CHAIR: Order! Mr Tudehope, let Mr Smythe answer.

CULLEN SMYTHE: Practice notes were first issued after I became commissioner, and I became commissioner in 2016.

The Hon. DAMIEN TUDEHOPE: I accept that.

CULLEN SMYTHE: So for practice notes, no. For revenue rulings, yes. The body of case law that deals with contractors leading up to that period has continued to apply. There have been no major overturnings of the principles. When it goes back to industry groups, however, that goes back to the comments of the chief commissioner earlier, which was we can't and we would never want to go out and audit every single business every single year. The size of the compliance task would be immense. What we need to do is do our best to make sure people understand their obligations. To assist that, we undertake our compliance program. But at various times it may be looking at operators in this industry; it may be random audits of this industry. They may be spread across a number of industries. For whatever reason, if the word obviously—or according to a number of the witnesses today—did not reach the ears of people involved in the aggregation industry or, if it did, it did not influence a change in their behaviour.

The Hon. DAMIEN TUDEHOPE: Are you telling me that the aggregators gave evidence that they've been in business now for over 20 years, but it never came to your attention that the arrangement relating to aggregators might in fact be incurring payroll tax until 2016?

CULLEN SMYTHE: Of the thousands of businesses in New South Wales that would potentially be subject for review or investigation, the six aggregators, I believe it is, that operate in New South Wales—

The Hon. DAMIEN TUDEHOPE: I think there are 11 across Australia.

SCOTT JOHNSTON: It is a small number.

CULLEN SMYTHE: I think it was 15 around the country. Even if it was the full 15, that is a very small portion.

The Hon. DAMIEN TUDEHOPE: What about the model of doctors' practices—none of those?

CULLEN SMYTHE: I couldn't comment on that.

SCOTT JOHNSTON: We couldn't comment on the specifics because we wouldn't have that in front of us. We've not maintained a campaign of compliance efforts against medical practices either, which we've always

maintained. I think our challenge in what we tried to say, which is possibly not answering the question or where you want us to be, is that a liability may have existed for these businesses back in these years. We couldn't comment on it. We are assessing the payroll tax each year effectively and efficiently and are arguably getting better at our efforts. If the question is what the trigger was to engage these businesses, I've already answered that several times. It was about our risk-based approach.

We generated some audits, which then, in the case of Loan Market, went to court, which validated our approach to the law. We haven't started anything particularly different or focused. What we could have communicated 20 years ago or 15 years ago—it's impossible for us to give good value to those questions other than how we've evolved that practice and improved. As you're aware with the commissioner's practice notes, we are the only jurisdiction in the country that does that. They're shared and used nationally. We put a lot of effort and significant focus on trying to educate, but businesses are the ones that have to be across their obligations notwithstanding its complexity. We can't be an advisory service to every business in the State.

The Hon. DAMIEN TUDEHOPE: The Tax Institute are also calling for—I think they sit on your panel, don't they?

CULLEN SMYTHE: We meet with them. I think it's every two months or three months.

The Hon. DAMIEN TUDEHOPE: They're also calling for more clarity in relation to this, but you say it doesn't need more clarity.

SCOTT JOHNSTON: No. If the law was to change, we would administer the law, and we would change with it. I think the challenge is what clarity is required for people to understand their obligations more specifically?

The Hon. DAMIEN TUDEHOPE: All the evidence we've heard today is from people who say there was no clarity around this. To Dr Kaine's earlier questions, there were people who are saying that they were audited at a particular time and given a clean bill of health in relation to their audit. Two years later, they are audited again. Your response to this was something may have changed in the volume of the business or some other aspect of the business may have changed, but two years later they are given an assessment. Against your submission, that assessment was for a period five years earlier. When you get a clean bill of health in 2017 and you're audited again in 2019, how is it that the assessment in 2017 did not pick up this issue?

SCOTT JOHNSTON: I can't answer that question without speaking to a specific business, and I won't.

The CHAIR: It was a specific—

The Hon. DAMIEN TUDEHOPE: Mastercare.

The CHAIR: It was one of the cases that was put to us.

SCOTT JOHNSTON: I'm aware of the submission. Often we are asked about specific cases, and—

The Hon. DAMIEN TUDEHOPE: If that is true, wouldn't that give rise to a suggestion that you have changed your position in relation to the nature of the independent contractors which they say that they were engaging to do work on—

SCOTT JOHNSTON: I would say, generally, that if we were to audit a business again and if we were to start another audit within two years, our practice would have been that there would have been a trigger to do that by some other information that was provided.

The Hon. DAMIEN TUDEHOPE: It might have been the trolley maker case.

SCOTT JOHNSTON: No—related to a business. Not a court case triggering us to retrospectively—that's a very important point, actually. Payroll tax, often in court and in matters being considered—we're very mindful and aware of these because we're part of those proceedings. Audits continue over these periods. Not speaking to specifics of any of these people who've come here today, but you would think logically that if we knew an outcome of a court case was going to happen in a near period that may consider the law differently, we should wait before issuing an assessment. From a fairness perspective, we should wait to do that. I'm speaking very generally. I'm a bit cautious on how specifically I can talk to certain matters, but the courts have continued to consider our approach as being appropriate and fair to the law.

The Hon. Dr SARAH KAINE: I have one question, and it is it is a bit repetitive. For example, let's take 2022 to now. There's been no substantive change in anything. It's a hypothetical, and so I'm guessing you're probably not going to answer, but if you thought that the law was not fit for purpose now—nothing has changed since, perhaps, there was another government in 2022. Nothing has substantively changed. If you were to subscribe that it's not fit for purpose, then it hasn't been fit for purpose for some time because it hasn't changed for some time.

The Hon. DAMIEN TUDEHOPE: I would agree with that.

The Hon. Dr SARAH KAINE: So you think that is the case from when you were the Minister?

The CHAIR: Order! We nearly got there.

The Hon. DAMIEN TUDEHOPE: This is not political, Sarah.

SCOTT JOHNSTON: I would say that's right. The chief commissioner has independence from ministerial direction as well.

The Hon. DAMIEN TUDEHOPE: Correct.

SCOTT JOHNSTON: That's important in this function which enables consistency over years. I would agree.

The Hon. Dr SARAH KAINE: Nothing has changed.

SCOTT JOHNSTON: Nothing has substantively changed in that time.

The CHAIR: Thank you very much, Mr Johnston and Chief Commissioner. Thank you very much for your evidence. We started early, so we're going to finish now.

The Hon. DAMIEN TUDEHOPE: I'm happy to continue.

The CHAIR: I'm sure you are! You could go on for days. Unfortunately for you, Mr Tudehope, we have got other things to do and other committees to get to. Thank you very much for your evidence, for your submission and for your work on behalf of the people of New South Wales. There were a few matters taken on notice, and the secretariat will be in contact in due course. You are free to leave.

(The witnesses withdrew.)

The Committee adjourned at 15:55.