

# PAYROLL TAX REVIEW **CHECKLIST**



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# Payroll Tax Risk Review Checklist

The rate of non-compliance with payroll tax law is high.

There are a number of reasons why non-compliance may occur - the two most significant areas of audit risk are around the use of contractors and the grouping of entities. The contractor and grouping provisions are broad and often they apply in cases that both clients and advisors find surprising.

This checklist is intended to be used by an advisor to assess the compliance risks for their clients, and enable the advisor to engage in conversations with their clients to proactively address these risks. It sets out the matters that should be considered, at a preliminary level, in determining whether there are contractor or grouping risks for a client.

The checklist is not intended to be exhaustive or a substitute for obtaining considered legal or other professional advice on a client's payroll tax obligations. It is provided to help the advisor assess whether there is a risk. If risks are identified and professional advice is needed, please contact Matthew McKee.



**Matthew McKee**

Partner

[mpm@bwslawyers.com.au](mailto:mpm@bwslawyers.com.au)

02 9394 1032

# Section 1: Contractor risks

Payments made to contractors may be subject to payroll tax for a number of different reasons:

- the contractors may be considered to be employees under the ordinary meaning of that term, notwithstanding the parties' intention and understanding that the contractors are independent contractors;
- the contract with the contractor may be a 'relevant contract' for payroll tax purposes and any payments made under it deemed to be taxable wages; or
- the contract may be an employment agency contract and payments made under it deemed to be taxable wages.

Following is a series of questions to ask the client in relation to payments made to contractors:

No.	Question	Answer	Comment
1.	Does the client engage persons or entities to provide services?	<input type="checkbox"/> Yes (proceed to Question 2) <input type="checkbox"/> No (proceed to Section 2 of the checklist)	<p>If yes, the contract is a 'relevant contract' for payroll tax unless an exemption applies. The payments made under the contract may be taxable wages: see section 32(1) of the <i>Payroll Act 2007</i> (NSW) (<b>PTA</b>).</p>
2.	Are any of the service providers individuals?	<input type="checkbox"/> Yes <input type="checkbox"/> No	<p>Where individuals are engaged to provide services, there is a significant risk that Revenue NSW will regard those individuals as being employees, notwithstanding the parties have contracted on the basis that the individuals are not employees.</p> <p>If the service providers are employees, the contractor exemptions do not apply, and the payments made to them will be taxable wages.</p>

No.	Question	Answer	Comment
3.	Does the client have an on-boarding process for contractors to determine whether payroll tax will be payable?	<input type="checkbox"/> Yes - Good! <input type="checkbox"/> No - Get one.	<p>Clients should have an on-boarding process for any contractors, which includes obtaining certain information and documents from the contractors <b>before</b> engaging them as, where the client seeks to rely on the contractor exemptions, Revenue NSW will require evidence that an exemption applies. It can be difficult to obtain sufficient evidence after the fact.</p> <p>Brown Wright Stein can assist clients create an on-boarding process that is suitable to their circumstances.</p>
4.	<p><b>Services ancillary to goods</b></p> <p>Are the services ancillary to a supply of goods?  <i>(For example, where a person provides services of installing goods purchased by the service recipient)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	<p>If the answer to <b>either</b> question is yes, this exemption should apply and the contract will not be a 'relevant contract'.</p> <p>Revenue NSW considers that services will be ancillary to a supply of goods where the amount relating to the provision of materials and/or equipment under a contract is more than 50% of the total contract amount: see Revenue Ruling PTA 033.</p>
	<p>Are the services ancillary to a use of goods that are owned by the service provider?  <i>(For example, where a person hires construction machinery and an operator is supplied to operate the machinery)</i></p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	
5.	<p><b>Genuine contractor exemption</b></p> <p>Do any of the contractors provide services that are required regularly by the client?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	<p>If the answer to <b>either</b> question is yes, the genuine contractor exemption will not apply.</p> <p>If the services are not ordinarily required by the client <b>and</b> the contractor ordinarily provides those services to the public generally, the contract is not a 'relevant contract' and payments may not be subject to payroll tax.</p> <p><b>Note:</b> A person will not be providing services to the public generally where they provide services to the public through a labour hire intermediary: see <i>Drake Personnel Ltd v Commissioner of State Revenue (Vic)</i> [2000] VSCA 122</p>
	<p>Do any of the contractors only perform those services for the client and not for the public generally?</p>	<input type="checkbox"/> Yes <input type="checkbox"/> No	

No.	Question	Answer	Comment
6.	<p><b>180-day exemption</b></p> <p>Do any of the contractors provide services that the client requires for 180 days or more in the financial year?</p>	<p><input type="checkbox"/> Yes - contract is not covered by the 180-day exemption.</p> <p><input type="checkbox"/> No - contract is covered by the 180-day exemption.</p>	<p>This exemption focuses on whether the services of the kind were required by the client for 180 days or more, irrespective of who provided them.</p> <p>For example, if Bob engaged Jane to provide cleaning services for 120 days and engaged Jim to provide cleaning services for 61 days, the exemption would not be satisfied and the contracts with Jane and Jim are potentially 'relevant contracts', unless another exemption applies.</p> <p>The client must prove the number of days those services were provided to the client in the year. Accordingly, consider how the client would prove this.</p> <p>Note that if a person works for any part of a day, that part day counts as a whole day for the 180-day test: Revenue Ruling No PTA 020 (<b>PTA 020</b>).</p>
7.	<p><b>90-day exemption</b></p> <p>Do any of the contractors provide services for 90 days or more in the financial year?</p>	<p><input type="checkbox"/> Yes - the contract is not covered by the 90-day exemption.</p> <p><input type="checkbox"/> No - the contract is covered by the 90-day exemption.</p>	<p>This exemption focuses on the number of days that the particular contractor provided the services in the financial year.</p> <p>Using the example from Question 5, the contract with Jane would not be exempted from being a relevant contract under this exemption, but the contract with Jim would be exempted.</p> <p>The client must prove the number of days the contractor provided the services. Accordingly, consider how the client would be able to prove this.</p> <p>If a person works for any part of a day, that part day counts as a whole day for the 90-day test: PTA 020.</p>

No.	Question	Answer	Comment
8.	<p><b>Two or more persons test</b></p> <p>Do two or more persons perform the services for the contractor under the contract in a business carried on by the contractor?</p>	<p><input type="checkbox"/> Yes - the contract is not a relevant contract.</p> <p><input type="checkbox"/> No - the contract is a relevant contract.</p>	<p>To utilise this exemption, the client will need to prove both elements:</p> <ol style="list-style-type: none"> <li>1. First, the services must be performed by two or more persons. The client will need evidence of who performed the services. Revenue NSW commonly relies on the contractor's employer obligations reporting to the ATO to conclude that other persons did not perform the services.</li> <li>2. Second, the client will need evidence that the contractor is carrying on a business. This can be difficult to prove during an audit, particularly if the contracting relationship has come to an end and the contractor does not have a significant presence on the Internet.</li> </ol>
9.	<p>Does the client sub-contract work for its own clients?</p> <p>For example, the client is a security company and is engaged to provide security personnel for various venues and then sub-contracts to other security companies to meet its obligations.</p>	<p><input type="checkbox"/> Yes - employment agency provisions may apply.</p> <p><input type="checkbox"/> No - contractor exemptions apply.</p>	<p>If yes, consider whether the employment agency provisions apply. If the employment agency provisions apply, the contractor exemptions do not apply, and the payments made to the sub-contractor(s) may be taxable wages.</p>
10.	<p>If the client sub-contracts work, has it obtained a written contractor statement(s) from the contractor for each financial year?</p>	<p><input type="checkbox"/> Yes</p> <p><input type="checkbox"/> No</p>	<p>If no, potentially the client can be liable for any payroll tax that the contractor does not pay: see Part 5 of Schedule 2 of the PTA.</p>

## Section 2: Grouping

Payroll tax grouping is a key risk area for all businesses. It is not only a problem for closely related entities that carry on a common or similar business - seemingly unrelated entities can also be grouped.

Where entities are grouped, the members of the group will, effectively, have a single payroll tax threshold (currently \$850,000 in New South Wales) and be jointly and severally liable for the payroll tax debts of each member of the group.

Where a primary taxpayer is unable to pay its payroll tax liabilities, the State revenue authorities will look to identify other entities to group with the primary taxpayer in order to recover the payroll tax from those other entities. Accordingly, the payroll tax grouping provisions represent a significant asset protection risk.

Grouping assessment is a two-step process. First, you must consider whether the entities form a group under the grouping provisions. Second, you must consider whether entities should be excluded from the group on the basis that the business of an entity is genuinely independent and unconnected with the businesses of the other entities in the group. Importantly, the second step cannot be self-assessed and requires an application to be made to the Chief Commissioner.

Following is a series of questions to ask the client in relation to grouping:

No.	Question	Answer	Comment
1.	Does a single person hold more than 50% of the shares in the business entity?	<input type="checkbox"/> Yes - entity will be grouped. <input type="checkbox"/> No - entity will not be grouped.	If a person holds more than 50% of the shares in the business entity, they control the entity and the entity will be grouped with any other entity that the person controls.
2.	Is there only one director of the business entity?	<input type="checkbox"/> Yes - entity will be grouped. <input type="checkbox"/> No - entity will not be grouped.	If there is only one director, the director controls the business entity and the entity will be grouped with any other entity that the director controls.
3.	Does the business entity have common directors or shareholders with other entities?	<input type="checkbox"/> Yes - entity will be grouped. <input type="checkbox"/> No - entity will not be grouped.	If a person controls (or set of persons control) an entity (whether because they are directors or shareholders of the entity), the entity will be grouped with any other entity that is controlled by the same person or persons.
4.	Do any of the persons who control the business entity have a discretionary trust, or is the shareholder of the business entity a discretionary trust?	<input type="checkbox"/> Yes - entity can be grouped. <input type="checkbox"/> No - entity will not be grouped.	<p>All beneficiaries of a discretionary trust, whether named in the trust deed or not, are deemed to control the business of the discretionary trust (whether or not the trust carried on a business): see section 72(6) of the PTA.</p> <p>This can result in an entity being grouped with any entities controlled by beneficiaries of a related discretionary trust: see <i>Chief Commissioner of State Revenue v Smeaton Grange Holdings Pty Ltd</i> [2017] NSWCA 184</p>
5.	Does the business have common employees with other entities?	<input type="checkbox"/> Yes - entity will be grouped. <input type="checkbox"/> No - entity will not be grouped.	A director is deemed to be an employee, so that if a director of an entity is an actual employee or a deemed employee of another entity, the two entities will be grouped.
6.	Do persons who are employed by the business entity undertake work in the business of another entity?	<input type="checkbox"/> Yes - entity will be grouped. <input type="checkbox"/> No - entity will not be grouped.	In these circumstances, the person or persons may be deemed to be common employees of both entities and the entities would be grouped, notwithstanding that the person or persons are only formally employed by one of the entities: see section 71 of the PTA.

If your client answers yes to any of the above questions, they are at risk of having other related or unrelated entities being grouped for payroll purposes.



# Don't Risk Payroll Tax

If you have identified that your client has payroll tax risks, or you are not sure whether your client is compliant, please contact the Brown Wright Stein Tax Team.

Our impressive team of tax specialists includes a number of New South Wales Law Society Accredited Specialists in taxation law. Members of our taxation team are also Fellows of the Tax Institute and hold Master's degrees in taxation law.

We act for a wide variety of clients, ranging from listed public companies, to small and medium-sized enterprises and entrepreneurs. Our tax lawyers work closely with leading accounting firms to provide expert advice on Federal and State taxation law. In addition to advisory work, we have substantial experience with preparing private ruling applications and assisting clients to resolve audit activity and taxation disputes with revenue authorities.

## Contact us



**Geoff Stein**

Partner

+61 2 9394 1021

[gds@bwslawyers.com.au](mailto:gds@bwslawyers.com.au)



**Andrew Noolan**

Partner

+61 2 9394 1087

[ajn@bwslawyers.com.au](mailto:ajn@bwslawyers.com.au)



**Matthew McKee**

Partner

+61 2 9394 1032

[mpm@bwslawyers.com.au](mailto:mpm@bwslawyers.com.au)



**Rachel Vijayaraj**

Senior Associate

+61 2 9394 1067

[rlv@bwslawyers.com.au](mailto:rlv@bwslawyers.com.au)

## About Brown Wright Stein

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Our firm is built upon our deep and long-term commitment to our clients, their businesses and personal interests. We are proud of these long-term commitments. Our clients include public companies, small and medium sized enterprises, owner managers, high net worth individuals and investors.

We offer a strategic, practical and very personal approach, striving to ensure our advice fits within your wider business and personal needs. We see the whole picture. We speak your language.

Our team's broad expertise and understanding of business and tax issues enables us to provide the right solution for you every time.

Level 6, 179 Elizabeth Street Sydney NSW 2000  
PO Box A2625, Sydney South NSW 1235  
Tel: 02 9394 1010 Fax: 02 9394 1011  
info@bwslawyers.com.au  
**www.bwslawyers.com.au**

**BROWN  
WRIGHT  
STEIN**

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