

# CROCODILE OR ALLIGATOR

Also known as employee or contractor



# 1. CASE STUDY



## CASE STUDY

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- Kate was engaged to conduct a shopfront for a gaming agency selling wagering and betting products to the public
- Kate entered into an agreement to be engaged as an independent contractor, not an employee
- When told by her friend that she should be entitled to superannuation, Kate confronted the gaming agency and the agreement was subsequently terminated
- Kate has since brought an action against the gaming agency

## TERMS OF ENGAGEMENT

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- Kate would operate a shopfront in the middle of the city with set hours as set out by the gaming agency
- Whilst she was not required to pay for any rent or equipment leasing, she paid a fee to the gaming agency to use the equipment
- As the shopfront lacked certain beverages, Kate brought in her own equipment at her own expense (fridge, tea and coffee)

## TERMS OF ENGAGEMENT

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- Kate had little flexibility on the operations of the shopfront and she was required to report to a regional manager.
- That said, Kate had the flexibility to delegate the operation of the shopfront provided she provided sufficient details in writing.
- In delegating the operation, Kate had the ability to directly engage other individuals and she took on the employer responsibilities (e.g. PAYG/SGC etc)

## TERMS OF ENGAGEMENT

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- As a result, the gaming agency reimbursed Kate for some of the payroll tax paid
- The payroll tax that Kate had to pay related to a grouping of various other operators on similar terms as Kate (although such grouping claims were dropped given the businesses were identifiably separate)
- Kate was also paid based on the profit of the shopfront itself, however, she was offered income should the shopfront need to close for refurbishment.

## TERMS OF ENGAGEMENT

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- Kate also did not have any interest in the 'goodwill' or any assets of the business and she was required to provide three months notice before terminating the arrangement.

# 2. EMPLOYMENT TAXES





# EMPLOYEE V CONTRACTOR FOR EMPLOYMENT TAXES

## Income tax

Are you required to withhold payments made to the person engaged with?

## Payroll tax

Are the payments made included in determining whether payroll tax is payable?

## Fringe benefits tax

Will fringe benefits tax apply in giving a non-cash benefit to the individual?

## Superannuation

Are you required to pay superannuation on top of the payments made to the person engaged with?

## Goods and services tax

No enterprise if there is an employment relationship. So think about how this operates from an input tax credit perspective or payments made to and from.

## Other

Including whether employee share schemes arrangements apply and similarities with the personal services income provisions

## SO WHO'S AN EMPLOYEE?

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### Income tax

Take the ordinary meaning – TR 2005/16

Summary of additional payments included in section 12-35, Taxation Administration Act 1953 (Cth)

### Payroll tax

Take the ordinary meaning – see various State rulings on factors to consider

Contractor payments also included, but not the exemptions to pull them out  
Western Australia

## SO WHO'S AN EMPLOYEE?

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### Superannuation

Take the ordinary meaning –  
section 12 Superannuation  
Guarantee (Administration) Act  
1992 and SGR 2005/2 and 2009/2

Also expanded to include other  
people in the entertainment  
industry and people in contracts of  
labour (see SGR 2005/1 v results)

### Work cover

Works under a contract and an  
employee for PAYG purposes

Schedule 2 in the legislation  
elaborates who is and isn't a  
worker

(director/trustee/professional  
sportsman and more)

Not getting work cover right can  
trigger audits from tax authorities

# 3. THE 'ORDINARY' MEANING



# CONSTANT CHANGE

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# CONTROL TEST

## Palais de Danse [1924] 1 KB 762

Breach of copyright by employer of band of musicians?

No musicians were employees as they were subjected to direction of hirer

## Barrett [1973] HCA 49

Payroll tax in relation to a land salesman remunerated based on commission?

Yes and control is a relevant factor in considering this

## Foster [1952] HCA 10

Is an insurance salesman covered by a Federal Award?

You need to look at the substance of the relationship, not just the superficial agreement

## Mary Kay Cosmetics [1982] VR 871

Not employee based on wording in the contract

\*a bit contradictory

## Zuij [1955] HCA 73

Workers compensation for circus acrobats, despite their specialist knowledge?

Depends, look at the lawful authority to command.

## Narich [1983] 2 NSWLR 597

Lecturers appointed to “Weight Watchers’ program were employees based on control placed on them.

# MULTIFACTORIAL TEST

## Stevens v Brodribb (1986) 160 CLR 16

Truck driver injured by a snigger, could the 'employer' be liable?

Introduction of the multifactorial approach and not employees

## On Call [2011] FCA 366

Are interpreters employees?

Yes given the fact that the interpreters represented the employer notwithstanding being paid on a results basis

## Vabu v FCT (1996) 33 ATR 537

Are bicycle, motorcycle and car couriers employees?

Not in this case as although wearing a uniform, they operated in their own accord

## Trifunovski [2011] FCA 1204

Insurance agents employees?

Contractors in this case given ability to delegate and bear the risks of operating the business

## Roy Morgan [2009] AATA 702

Interviewers working for market research company employee?

Yes given control and payment, despite them able to provide own vehicles and incorporate

# THE TESTS

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# 4. BACK TO THE CASE STUDY



**Any takers?**

## CASE STUDY

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- Tattsbet Ltd v Morrow [2015] FCAFC 62
- Primary judge held employer-employee relationship
- It was noted as being a ‘finely balanced case’
- Full Federal Court held contractor relationship

# THE VERDICT

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## Acknowledgement of contractor relationship

Note distinction from scenarios where acknowledge has no substance behind it, rather steps were taken to enforce relationship

## Income linked to profit of the business

Not exactly working on commission, but rather reaping the rewards of the business profits

## Ability to delegate

Respondent had the flexibility to delegate the work required. Determined her role would be to operate the agency, not just for her own work

## Parties interaction with tax laws

Absence of PAYG for the appellant and the GST collections by the respondent suggested a contractor relationship

## Adoption of employer obligations

Respondent took upon standard employer obligations including paying workers' compensation, the only exception from the pattern being the payroll tax obligations

# 4. MOVING FORWARD



## THOUGHTS IN CURRENT INDUSTRY

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- It's a spider web to navigate through
- Uber – remains an interesting case study (more slides next)
- Ultimately, read the employment agreement and consider the actual substance of the arrangement
- Shams are shams

# UBER

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## The US

Various shades of grey

January 2017 – Miami-Dade’s Third District Court of Appeal – Not employee

Mid 2015 – Californian Labour Commission – Employee

June 2017 – New Year Department of Labour - Employee

## The UK

Clearer

November 2017 – Employment Appeal Tribunal of London - Employee

# UBER

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## THE UK POSITION

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### Contractor

Drivers supply own vehicle (subject to Uber's requirements)

Drivers responsible maintaining their own vehicle and licence

Drivers get to choose when to work

## THE UK POSITION

### Employee

Drivers go through interview, induction and training process

Drivers cannot negotiate rates or expand their business with clients

Drivers cannot delegate

Once working, drivers must accept or decline a job within 10 seconds without knowing the client/destination

Uber controls key information

Drivers cannot reject three trips consecutively and should accept at least of 80% of trip requests

Drivers face consequence for not following Uber routes

Uber can unilaterally make deductions from drivers' accounts to compensate

Uber may contribute to costs of cleaning

## CREDITS

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- Presentation template by [SlidesCarnival](#)
- Photographs by [Unsplash](#)

# THANKS!

ANY QUESTIONS?

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