



Chat Legal Pty Ltd

Let's chat

WHAT'S A 'TAXABLE WAGE'?

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Overview

- ◆ What's calculated for payroll tax purposes?
- ◆ What's excluded?
- ◆ Importance of proper structuring.
- ◆ *Universal Supermodels Pty Ltd v Commissioner of State Revenue* [2018] QSC 257
- ◆ *Li v KC Dental Pty Ltd & Ors* [2019] FCCA 104
- ◆ *Brisbane Bears – Fitzroy Football Club Limited v Commissioner of State Revenue* [2017] QCA 223
- ◆ *The Commissioner of State Revenue v The Optical Superstore* [2018] VSC 524

*References to PTA is a reference to *Payroll Tax Act 1971 (QLD)*

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Positioning

Payroll tax – the basics

Crucial to payroll tax is the notion of 'taxable wages' or payments that are assessable for payroll tax purposes. This is relevant

- ◆ For businesses employing or contracting with large number of persons
- ◆ Where there could be more than \$1.1 million paid to 'workers'
- ◆ Where businesses may look to expand
- ◆ Where businesses are grouped

Reminder: Payroll tax rules are largely harmonized across the Country, but there can be some nuances, so always check the legislation

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Taxable wages

What is taxable wages?

Broadly, an employer is liable to pay payroll tax in a particular State/Territory in respect of:

- ◆ **Wages** paid or payable in that State, unless the wages are for services performed entirely in another State;
- ◆ **Wages** paid or payable outside the State if the wages are for services performed wholly within the State; and
- ◆ **Wages** paid outside Australia for services performed mainly in the State

Rules harmonized for interstate employees (i.e. airline industry employees) where payroll tax payable in the State the employee resides and that wages in Australia for services performed overseas for more than 6 months are exempt

What are 'wages' per the Schedule to Queensland's Payroll Tax Act?

"wages" —

1 means any wages, remuneration, salary, commission, bonuses or allowances paid or payable (whether at piecework rates or otherwise and whether paid or payable in cash or in kind) to an employee as an employee, and, without limiting the generality of the foregoing, includes—

- (a) any amount paid or payable by way of remuneration to a person holding office under the Crown in right of the State of Queensland or in the service of the Crown in right of the State of Queensland; and
- (b) any amount paid or payable under any prescribed classes of contracts to the extent to which that payment is attributable to labour; and
- (c) any amount paid or payable by a company by way of remuneration to a director of that company; and
- (d) any amount paid or payable by way of commission to an insurance or time payment canvasser or collector; and
- (e) the provision by the employer of meals or sustenance or the use of premises or quarters as consideration or part consideration for the employee's services; and
- (f) fringe benefits; and
- (g) a [superannuation contribution](#), other than a [superannuation contribution](#)—
 - (i) paid or payable by a company for a director of the company before 1 July 2008; or
 - (ii) for services performed or rendered by an employee before 1 January 2000; and
- (h) a termination payment; and
- (i) an amount taken to be wages under another provision of this Act; and

Example: See, for example, *sections 13E* (amounts paid or payable under a relevant contract), *13J* (amounts paid or payable under an employment agency contract) and *51* (amounts paid or payable by or to third parties).

- (j) a share or option granted by an employer to an employee in relation to services performed or rendered by the employee, if the share or option is—
 - (i) an ESS interest under the [Income Tax Assessment Act 1997 \(Cwlth\)](#), *section 83A-10*; and
 - (ii) granted to the employee under an employee share scheme within the meaning of that section; and

Example: See *part 2, division 1C* for provisions that apply for interpreting this paragraph.

- (k) a share or option granted by a company to a director of the company by way of remuneration for the appointment or services of the director.

Example: See *part 2, division 1C* for provisions that apply for interpreting this paragraph.

² However,

"wages" does not include a benefit that is an exempt benefit under the *Fringe Benefits Assessment Act*.

Things included as 'wages'

- ◆ Director remuneration
- ◆ Fringe benefits (excluding those exempt)
- ◆ Superannuation contributions (including deemed employees such as contractors and directors)
- ◆ Employee share schemes
- ◆ In Tasmania, trust distributions in lieu of wages

Who is receiving the 'wages'?

- ◆ Applies to 'employees' – taken from the 'common law'
- ◆ Consider the multi-factorial approach and see PTA038
- ◆ Can also apply to contractors and employment agents
- ◆ Draw a distinction between contractors and employment agents though as they are treated differently
- ◆ Note WA does not apply payroll tax to contractor payments
- ◆ Also consider 'charitable purposes' cases – *KinCare Community Services Limited v Chief Commissioner of State Revenue* [2019] NSWSC 182 being a recent one

Contractor payments

- ◆ Payments to contractors could be deemed as wages – section 13E PTA
- ◆ Does not include *some* payments though – section 13E(2) PTA
- ◆ Linked to concept of ‘relevant contract’ – section 13B PTA
- ◆ Relevant contract is where a person (contractor) supplies services or goods to another person (principal)
- ◆ Includes agreements, arrangements or undertakings whether formal, informal, express or implied
- ◆ There are, however, exemptions to what constitutes a relevant contract
- ◆ Where the relevant contract falls within the exemption, then payments made to those contractors are not considered as ‘wages’ – section 13B(2) PTA

Contractor exemptions



- ❖ The services provided by the worker are ancillary to the supply or use of goods by a contractor – PTA033.2
- ❖ The services are of a kind not ordinarily required by the designated person/client – PTA022.1
- ❖ The services are provided for a period that does not exceed 90 days in the financial year – PTA035.1 and PTA014.2
- ❖ The services are of a kind ordinarily required by the designated person/client for less than 180 days in the financial year – PTA020.2
- ❖ The Commissioner is satisfied the services are performed by a person who ordinarily performs services of that kind to the public generally in the relevant financial year – PTA021.1

Contractor exemptions

- ❖ The services are supplied by a contractor if that contractor engages labour to perform the actual services required under the contract – PTA-23.2
- ❖ The services are ancillary to the conveyance of goods by means of a vehicle provided by the person conveying them – PTA006
- ❖ The services solely relate to the procurement of persons desiring to be insured by the designated person
- ❖ The services relate to the door-to-door sale of goods solely for domestic purposes on behalf of the designated person PTA007.2

Employment agents?

- ❖ Section 13G-Section 13LA PTA
- ❖ Relates to a contract under which a person (Employer/Employment Agent) procures the services of another person (Employee) for a client of the Employer
- ❖ E.g. Cleaning business employs persons to clean an office building
- ❖ Therefore, wages paid by the employment agent under such a contract can be taxable wages
- ❖ Looks to impose the payroll tax law on payments made from an employer to an employee, even if the employee was providing services to a third party
- ❖ Please also not various Labour Hire Licensing Laws across the Country

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What's excluded?

Contractor exemptions

Services ancillary to the supply of goods



- ❖ Exemption available where services are ancillary to the supply of certain goods
- ❖ Examples include the lease of a photocopier, with incidental servicing included in the lease premiums or the supply of an excavator where a licensed operator is provided as part of the agreement
- ❖ PTA033 considers if:
 - ❖ the 'labour' proportion is less than 50%
 - ❖ There is evidence to substantiate the principal object of the contract is the provision of equipment and/or materials;
 - ❖ Amount attributable to non-labour components is reasonable having regard to current market prices for any materials and/or equipment

Contractor exemptions

Services not ordinarily required by a business



- ❖ This exemption will apply in instances where services are not ordinarily required by a taxpayer. For instance where an interior decorator is hired once a year to select artwork for a company's reception area
- ❖ It is intended that this exemption apply to services which are required so infrequently that it would be more practical for businesses to engage contractors instead of hiring permanent staff to perform those services when the need arises
- ❖ PTA022 requires services being provided not ordinarily required by the business **and** the contractor must be able to show that less than 40% of their trading income was derived from the principal

Contractor exemptions

Services provided for less than 90 days



- ❖ This exemption aims to replicate traditional scenarios where a worker may not perform services on a regular basis for a business
- ❖ Harmonised ruling PTA035 states that where a contractor provides the same, or similar services, to a principal for not more than 90 days in a financial year then payments made to that contractor will be exempt
- ❖ In calculating the total amount of days that a contractor provides services, regard must be had to:
 - ❖ any work carried out on a day, will be counted as a full day (as elaborated in PTA014);
 - and
 - ❖ the days do not need to be consecutive

Contractor exemptions

Services provided for less than 180 days



- ❖ This exemption is aimed at replicating traditional scenarios where businesses historically engaged contractors to undertake seasonal tasks such as shearing, cotton chipping or strawberry picking
- ❖ The 180 day exemption can be distinguished from the 90 day exemption on the basis that:
 - ❖ the 180 day test focuses on the number of days a particular type of service is required by the principal; whereas
 - ❖ the 90 day test focuses on the number of days on which the contractor provides services
- ❖ Payments to a particular contractor who may have worked for more than 90 days in that same financial year, would still be exempt under this exemption if the total amount of days such services (provided by the contractor and others) is less than 180 days
- ❖ Harmonised ruling PTA021 provides guidance on the exemption, indicating that for a Commissioner to be satisfied to exercise their discretion, it must be demonstrated the contractor:
 - ❖ provides the services as part of conducting a genuine independent business; and
 - ❖ ordinarily renders those services to the general public

Contractor exemptions

Services supplied by a contractor engaging others



- ❖ Payments to a contractor that engages labour to provide the services required under a relevant contract are exempt
- ❖ In determining whether the contractor engages labour to perform the services, two or more people must carry out the services required under the contract
- ❖ Harmonised ruling PTA023 notes the following conditions that the Commissioners regard must be met for the exemption to apply:
 - ❖ Contractor must be carrying on a business and have overall responsibility to fulfil the terms of the contract
 - ❖ Person conducting work must be engaged directly with the contractor
- ❖ Note anti-avoidance comments in ruling

Contractor exemptions

Services relating to procurement of persons desirous to be insured

- ❖ Payments made for services performed by a contractor who sells insurance on the business' behalf are exempt in all jurisdictions with specific contractor provisions other than the Australian Capital Territory. This is provided that the contractor:
 - ❖ Is not a business' employee;
 - ❖ Is a genuine independent contractor with an agency business; and
 - ❖ Holds an Australian Financial Services licence, or be an authorised representative of an insurance business that holds an Australian Financial Services licence

Contractor exemptions



Services relating to door-to-door sale of goods solely for domestic purposes – have a look at PTA007

Contractor deductions

- ❖ Where an exemption is unable to be claimed regarding a relevant contract then a concession may still be available so as to exclude any amount attributable to non-labour components. The Commissioner must decide the quantum of any amount not attributable to labour under a relevant contract; however harmonised rulings PTA019 and PTA018 confirm set deductions that the Commissioners will accept as reasonable for certain categories of workers
- ❖ If a taxpayer is dissatisfied with the percentage deduction as outlined in the rulings, then they can make submissions to the relevant Commissioner as to what it regards as an appropriate percentage deduction having regard to the circumstances of its particular contractor arrangements

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Importance of structuring

Structuring matters

Employee-Contractor relationship

- ❖ Distinction between employer-employee and principal-contractor relationship important
- ❖ Different exemptions/concessions available
- ❖ Genuine business

Is it a wage?

- ❖ Consider if certain payments are 'taxable wages'
- ❖ Look at contracts to determine if they are 'relevant contracts' as well as how the business is structured

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*Universal Supermodels Pty Ltd v
Commissioner of State Revenue*
[2018] QSC 257

Background

- ❖ Taxpayer is the holder of a Liquor Licence and an adult entertainment licence and operated 3 clubs
- ❖ Following an audit, the Commissioner issued reassessments for the tax years 2009 to 2014 requiring the taxpayer to pay a total of \$810,389.15 in payroll tax, together with \$164,510.32 in penalty tax and \$237,001.74 in unpaid tax interest
- ❖ Assessment based on the fact that payments made to dancers were included in the 'taxable wages'. Specifically, the dancers were employees
- ❖ Question – where the dancers carrying on their own independent business, and therefore contractors?

Arrangement

- ❖ Taxpayer imposes a cover charge for customers with such charge collected by door-girls and given to the receptionist at the front door of the club
- ❖ Once in, customers may book a private dance and pay a fee to the receptionist. The fee was based on the duration of the dance
- ❖ The private dance was conducted in a separate room and an 'adult entertainment controller' observed all dances to monitor compliance with the club's adult entertainment license

Arrangement

- ❖ Taxpayer contends dancers were engaged on a contractor basis and each contract was paid on a cash basis with settlement of each contract being made at the end of the next working day
- ❖ Taxpayer evidenced this by omitting payments made to contractors on the employee records and by having all dancers sign a 'dancer's protocol'
- ❖ The OSR determined to the contrary citing the 'dancer's protocol' as being consistent with the taxpayer exercising authority to control the dancers, what they wore, when they worked, how they performed their job, who they reported to each night and when they could take leave

Arrangement

- ❖ OSR noted dancers did not supply their own material, equipment and tools needed
- ❖ Dancers were initially provided with a uniform and payment of the uniform was deducted from their pay with the uniform being handed back each night until it was paid off
- ❖ Shoes could be hired on a fee per night and the taxpayer was responsible for all other materials and tools including dancer's poles, stage, music and lap-dance rooms

Arrangement

- ❖ OSR noted that the dancers had their own ABN, operated on a cash only basis, were not entitled to superannuation, sick leave or recreational leave and provided their own invoice to manage their own tax liability (including with no PAYG Withholding)
- ❖ However, the OSR argued the fact that the dancers' hours of work included requirements to work set shifts and set days. Dancers were also restricted from exchanging phone numbers or private details and in leaving the club with customers. These factors were suggestive of control consistent with dancers being an employee
- ❖ Dancers also did not have any commercial risk or responsibility with their work

Arrangement

- ❖ Taxpayer disagreed on the basis the arrangements they put in place were consistent with commentary provided by the Australian Taxation Office Adult Industry Project Team following an industry wide audit during 2004 to 2006
- ❖ Interestingly enough, a similar review by OSR bodies in December 2008 concluded that dancers were not employees
- ❖ Taxpayer argued dancers were free to choose and select the client and nights worked and free to dance at the establishment of competitors to the appellant

Statutory declaration (managers)

- ❖ Distinction as employees (such as door girls, receptionists, team leaders, duty managers and liquor approved managers etc) were advertised on certain job sites, whilst dancers were not [21]
- ❖ Three type of contractors were engaged – security, cleaners and dancers [22]
- ❖ Employees provided with a staff pack including a protocol, information about uniforms, PAYG withholding form and superannuation nomination forms etc. Dancers were provided with a different pack [23]
- ❖ Dancers were mentored by other dancers and no feedback was provided from the taxpayer. Agreements were terminatable on demand from the taxpayer or with one week's notice from a dancer [24]

Statutory declaration (managers)

- ❖ Dancers can have good will [25]
- ❖ Dancers were not paid to try and win 'dances' [26] (They had a rough three minute rule to win prospective clients over)
- ❖ Taxpayer could not force dancers to perform. Dancers would advise the taxpayer of their availability at the commencement of a week and dancers would report in at the start of a night (for fire and liquor licensing record purposes) [29 and 30]
- ❖ Dancers received 50% of money made during lap-dances and tips. Dancers signed a tax invoice to the taxpayer on a daily basis for their services. Dancers were not paid if they did not perform private lap-dances [32]

Statutory declaration (managers)

- ❖ Dancers protocol was introduced due to taxpayer receiving fines and warning letters from failing to comply with their obligations [34]
- ❖ Dancers provided with details of taxpayer accountant if they needed assistance with their own tax obligations [35]

Statutory declaration (dancer)

- ❖ Understood need to obtain own ABN and be responsible for own tax and superannuation obligations. As such, bought clothes from taxpayer [36]
- ❖ Agreed with the payment details of the taxpayer, but noted other clubs offered 85% of the fees paid, provided the dancer paid \$30 and bought (or had other people buy) three drinks [38]
- ❖ Agreed nobody instructed dancer how to obtain dancers and she identified over time the best way [41]
- ❖ Agreed dancer was paid the next night on an invoice system and the invoice was on carbon paper [43]

Cross-examination (managers)

- ❖ You can have an adult entertainment license without dancers, but you would have no service [48]
- ❖ Proposed taxpayer offered the space to dancers, and noted that the dancer could only provide such service in licensed premises [49]
- ❖ Accepted that by signing the dancer protocol, that the dancer may be fined or have her contract terminated if she failed to follow that agreement. Protocol also agreed that the dancer would be given agreed hours ever week [49]
- ❖ Notice was required to take leave, a minimum of two weeks [50]
- ❖ Protocol suggested dancers not 'cut other dancer's grass' [51]

Cross-examination (managers)

- ❖ Various protocols were inserted to ensure compliance with the strict laws that apply to adult entertainment venues [57]
- ❖ A fine system was introduced to discourage dancers from failing to comply with the law (i.e. no touching) [58]
- ❖ Argued dancers advertising their own service with the lap-dance, rather than advertising for the taxpayer [60]
- ❖ Invoicing system done by receptionist and was between the taxpayer and dancer (i.e. no client details on the invoice) [61]

Cross-examination (accountant)

- ❖ Although dealt with ATO in relation to whether dancers were employees or independent contractors, accountant accepted a taxpayer can only rely upon statements made by the ATO or other tax authorities through a private ruling. No private ruling was made to the accountant when the ATO audited to determine that the dancers were employees [76]

Court findings

- ❖ Employee not defined in PTA and requires an analysis at common law – i.e. per the multifactorial test [130]
- ❖ Critical issue is the difference between ‘a person who services his employer in his, the employer’s business, and a person who carries on a trade or business of his own’ [131]
- ❖ Multifactorial test is to be undertaken without ‘the particular labels adopted in the arrangement being determinative’ [138]
- ❖ Whether a person is an employee or an independent contractor involves an assessment of the totality of the relationship...and...whether in reality, the dancers were employees rather than operating their own business [139]

Court findings

- ❖ 'Having their own clients with whom they have an individual rapport, does not prevent a conclusion the dancers were employees of the appellant, if the transaction entered into between the dancers and the client is in truth a transaction on behalf of the appellant.' [taxpayer] [139]
- ❖ Contractor features include the fact a dancer may make no or little money in a particular shift and were free to work at other clubs and privately [140]
- ❖ Employee features include dancers undertaking their duties pursuant to a protocol and acknowledging their obligations under that protocol with the imposition of fines and forfeiture of income in the event of non-compliance [141]

Court findings

- ❖ Other employee features include the strict limitations on not merely the nature and method of the performance of lap-dancers, so as to ensure compliance with the taxpayer's business and statutory obligations. These restrictions go beyond what is necessary to ensure compliance with the statutory obligations and therefore reflects a contract "of service", not "for services [142]
- ❖ There were also restrictions on the rostered shifts, when a break can be taken as well as the clothes that can be worn [143]
- ❖ Significantly, the amount a dancer may receive from a lap-dance was not able to be varied at the dancer's discretion and such fee being paid by the client directly to the appellant's receptionist (in addition to tips) [144]

Court findings

- ❖ Words in the dancers' protocol such as 'pay', 'your pay' and 'your final pay' suggests an employee relationship. Whilst the creation of a tax invoice is permissible, there is no evidence that there was any between the dancer and the client. *"That is odd, if the dancer was in truth, carrying on her own business"* [145]
- ❖ Despite the dancer having an ABN the details provided in the tax invoice from the dancers were more reflective of details required for the pay slip of an employee [146]
- ❖ The ATO commentary relied on did not consider the entire circumstances of dancers [147]

Court findings

- ❖ “The inability of a lap-dancer to alter the remuneration to be received at the appellant’s club, is more consistent with the relationship being that of employee.” [149]
- ❖ Other employee factors include the appellant paying a dancer the amount of \$50 should they complete a rostered shift without having performed any lap-dances [150]
- ❖ Dancers were also unable to unilaterally decide to have another dancer perform the rostered shift [151]

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Li v KC Dental Pty Ltd & Ors [2019]

FCCA 104

Background and issues

- ❖ Dentist (Dr Li) dismissed from dental arrangements with a dental clinic (KC Dental)
- ❖ KC Dental was managed by Dr Shi (male), and Dr Cao (female and Dr Shi's wife) was the principal dentist
- ❖ Was the dentist an employee or independent contractor?
- ❖ If the dentist was an employee, was she entitled to various employee entitlements on termination
- ❖ If the dentist was an independent contractor, was she entitled to compensation for termination of independent contract without proper notice

Background

- ❖ The dentist commenced working for the dental practice in about November 2012 before moving into a full time role from January 2013
- ❖ There was no formal written agreement, and the particulars of the agreement were found by way of verbal agreement (and subsequently disputed)
- ❖ The disparity can be seen with the dentist alleging a conversation on 22 December 2012 (held at the dental practice at the end of a work day) with the dental practice offering her a full time position would be full time (5 days a week from 9:30 to 5:30, including a Sunday) with the dentist receiving 40% commission minus laboratory fees. The dental practice contended it was the dentist requesting an increase in 'employment'

Background

- ❖ The dentist alleges she was an employee because:
 - ❖ She would receive 40% of all patient fees
 - ❖ She wasn't permitted to book in patients
 - ❖ She worked regular and systematic hours
 - ❖ She was unable to access the surgery with access controlled by the dental practice
 - ❖ She had no ability to sub-contract her duties to another dentist
 - ❖ She was not permitted to work for another dental practice while engaged with the dental practice
 - ❖ She was not permitted to promote her own business as a dentist during her engagement with the dental practice
 - ❖ All equipment, materials and staff were provided by the dental practice
 - ❖ She was issued with a business with the dental practice details and listed on their website.
 - ❖ She was under the direction and control of the dental practice

Background

- ❖ The dental practice pleads the dentist
 - ❖ Provided an ABN and charged GST and did her own tax affairs
 - ❖ Worked as a professional, registered and qualified dentist
 - ❖ Received 40% commission of income generated less laboratory fees
 - ❖ Paid the laboratory fees to the dental practice
 - ❖ Invoiced the dental practice with respect to the commissions and paid the dental practice for the rental of facilities, equipment and use of staff
 - ❖ Was responsible for managing her patient appointments and directed the staff to undertake bookings
 - ❖ Was able to choose her hours and change her roster according to her personal requirements
 - ❖ Could delegate duties to other practitioners (i.e. arranging another contracted dentist to take x-rays for one of the dentist's own patients)
 - ❖ Was able to work at other dental practices and promote her services if she chose to do so

Background

- ❖ The dental practice pleads the dentist (cont)
 - ❖ Was able to use large items and dental equipment and dental laboratory of which the cost was covered by the laboratory fee
 - ❖ Had the assistance of staff from the dental practice that she could choose to work with
 - ❖ Made her own arrangements in the purchase of smaller items of dental equipment as and when required for her patients
 - ❖ Managed and controlled her own dental practice
 - ❖ Had her own business cards which confirmed she worked at the dental practice and was listed on its website

Background

- ❖ The dentist disputes such claims stating that:
 - ❖ She never provided an invoice to the dental practice and that the dental practice generated documents such documents, detailing them 'invoices'
 - ❖ Between 2.12.12 and 15.9.13, the dental practice would pay the dentist a contribution marked 'GST' in addition to her salary
 - ❖ From 15.12.13 to 3.10.16, the dental practice began to deduct the GST contribution from her salary
 - ❖ She never signed or authorise such a deduction to approve such a change in the treatment
 - ❖ Any delegation was done at the direction of the dental practice
 - ❖ The dental practice would deduct money from the dentist to pay the other assisting dentist (*that had been engaged without the applicant's permission*)
 - ❖ The dentist could not subcontract any of her duties without it prior approval
- ❖ The dental practice disputes all claims by the dentist that she was an employee

Background

- ❖ The dentist then please:
 - ❖ In about May 2016, she received an email from manager of the dental practice about advice indicating that the dentist was an employee
 - ❖ The dentist phoned the manager flagging her understanding she was an employee
 - ❖ On about 23 June 2016, the manager of the dental practice emailed her an 'independent contract agreement'
 - ❖ It was proposed to alter the relationship from one of employee to independent contractor
 - ❖ The agreement sought to backdate the arrangement to 4 January 2013 and allow the dentist to subcontract her work to other dentists if she chose so, and for the dentist to make 'rental payments' to the practice for the use of the surgery and for her equipment
- ❖ The dental practice admitted the proposed agreement but that it was intended to reflect and confirm the existing engagement as an independent contractor

Background

- ❖ The dentist did not sign the proposed agreement and it was alleged on 15 October 2016, that the dental practice would cease paying the dentist if she did not sign the proposed agreement
- ❖ The dental practice stated:
 - ❖ They asked the dentist to sign the agreement between June and October 2016
 - ❖ The dentist did not sign and failed to explain why she wouldn't sign
 - ❖ In requesting the dentist to sign the agreement, it was to ensure the 'oral agreements' were formalized in accordance with what was understood to be legal and industry requirements
- ❖ The agreement wasn't signed and over the course of the next month, the relationship deteriorated

Background

- ❖ The disputed unpaid amounts were as follows:
 - ❖ \$13,501.90 for the period 3 October to 16 October 2016
 - ❖ \$6,755.88 for the period 17 October to 27 October 2016
 - ❖ \$4,343.78 for the period 31 October to 10 November 2016
 - ❖ \$2,000 being an amount due by way of reimbursement for equipment the dentist purchased for the dental practice

Evidentiary comments

- ❖ Evidence was provided by the dentist and the manager of the dental practice
- ❖ The dentist was unrepresented, with her son (who was studying law) assisting her with developing her arguments
- ❖ Court noted the dentist as an 'impressive witness' notwithstanding her imperfect command of spoken English. It is noted the dentist is a widow
- ❖ The manager of the dental practice was 'demonstrably less so' [an impressive witness]

Evidentiary comments

- ❖ Although the manager stated all dentists were engaged as independent contractors (see [71] for his explanation), he was seen as providing contradictory evidence where he stated that there were some employee dentists
- ❖ As seen in previous slides, there was no true agreement between the parties on what the terms and conditions of engagement were
- ❖ Even the time and place were in contention with some discussion purportedly made at a cafe

Court comments – part-time

- ❖ *It also seemed inherently improbable that Dr Li had significant choice as to her days and hours of work. It is clear that the patients who chose to seek dental treatment at KC Dental did so by contacting that dental practice. [83]*
- ❖ *Nor does it seem probable that Dr Li had significant choice in the type of dental services that she provided. In the nature of the professional encounter, the patient would make an appointment and seek whatever type of dental consultation they required... In the end result, I find that Dr Li offered to provide particular dental services to patients who booked an appointment at KC Dental but that the choice whether to obtain such treatment was largely a matter for the individual patient [84]*

Court comments – part-time

❖ *I accept that Dr Li bore professional responsibility for the manner in which she performed her work including any repairs which may have been required except on occasions that the patient may have requested the services of another dentist. Dr Li accepted that she had the professional duty to render her services with due care. Insofar as KC Dental suggested that it had no control over the provision of those service, the guidelines which it promulgated suggested otherwise. In particular, KC Dental proscribed the provision of certain dental services until the patient had prepaid the quoted cost of that service. Until that had been done, Dr Li was unable to provide the dental service which she may have recommended. [85]*

Court comments – part-time

- ❖ Court acknowledge the dental practice's evidence that the dentist could choose the equipment and staff used. [86] to [87]

Court comments - invoicing

- ❖ Dental practice stated that the dentist was paid *'100% of the gross income for the previous two week period and that in turn Dr Li paid KC Dental 60% from her gross (minus lab fees) plus GST for rental equipment, dental supplies and administrative costs'*
- ❖ Evidence was provided to the contrary (with the dental practice agreeing the changes were made without consultation to the dentist) showing the following:
 - ❖ The first 13 payments to the dentist was made as an employee
 - ❖ Tax invoices were then prepared with referred to the dentist as a contractor with a 40% commission
 - ❖ Tax invoices were prepared for the dental practice offering services to the dentist with 60% as the service fee

Court comments - roster

- ❖ The dental practice brought forward evidence asking the dentist to change their roster
- ❖ The dentist put forward emails suggesting that although the dentist was allowed to make preliminary decisions in respect of holidays, the dental practice assumed responsibility for preparing the rosters

Court comments – practice policy

- ❖ Evidence was brought forward that the dentist was required to follow various guidelines, policies and management protocols of the dental practice
- ❖ *My impression of Dr Shi was that he enforced his view as to what was expected of dentists and that he did so irrespective of whether or not the dentist had been consulted or agreed to the manner in which KC Dental would deal with an issue.*
[124]
- ❖ There was little evidence showing the dentist could sub-contract
- ❖ There was also evidence the dentist was reimbursement for certain tools/supplies
- ❖ There was evidence put forward showing the general practice was done by the dental practice

Court comments – practice policy



❖ *KC Dental dealt with complaints from patients and decided whether or not to give a patient a refund. On the occasions that it did so, KC Dental would later deduct the full amount of that refund from a dentist's pay. Dr Li complained that the effect of this practice meant that KC Dental, which had retained 66% of the original fee then reclaimed 100% of the fee when it had unilaterally decided to make a refund to the patient. Dr Shi stated this was an 'adjustment' made because otherwise KC Dental had lost its 66% share of the fee. This evidence, given in cross-examination, was said to be inconsistent with the statement in Dr Shi's affidavit that Dr Li was solely responsible for any failed treatment. In truth the position adopted by Dr Shi reflected that he had complete control of the parties' financial arrangements and applied a practice of making a refund to KC Dental of the full amount of the refund which had been given to a patient in the cases where Dr Shi himself had agreed to the refund [136]*

Court comments

- ❖ Largely agreed that the dentist did her own tax and business compliance
- ❖ Interesting reading on the correspondence leading up to the draft independent contractor agreement – [144] to [168]
- ❖ It includes the dental practice flagging with the dentist about the PSI rules
- ❖ It specifically mentions that *‘the advice seemed to indicate that Dr Li should be characterized as standing in the relationship of an employee of KC Dental’*.
- ❖ The manager stated he misunderstood the application of the PSI rules in the context of what an employee is at common law (see [146])
- ❖ A lack of proper discussions led to a further breakdown in the parties’ understanding of the circumstances

Court findings

- ❖ This case provides a good overview of the history of what it means to be an 'employee'
- ❖ Question in this case was *'whether or not Dr Li and KC Dental stood in the relationship of employee/employer or under a contract for services'* [216]
- ❖ *Mr Tracey (acting for the dental practice) quite properly conceded that, on the whole of Dr Li's evidence including as to emails, policies and guidelines (such as for example teeth whitening and incidental matters), there was arguably a measure of control exercised by KC Dental* [217]
- ❖ It was further agreed the inability to undertake dental services until the quoted cost had been paid also shows clear evidence of control exercised by the practice

Court findings

❖ *It was submitted that, in the manner of execution of her roles, Dr Li had near complete autonomy with some limited aspects of control in other areas. Dr Li submitted correctly that, within their particular areas of expertise, dental practitioners exercise autonomous decision-making and that in this sense were independent practitioners. Dr Li submitted that a unique aspect of the nature of her profession required that in the provision of dental care, dentists treated their patients independently and that when doing so they were not subject to control by the clinic in which they worked...I accept that submission. As Dr Li emphasized, hospitals would otherwise be full of medical practitioners, all of whom were to be regarded as independent contractors. [219]*

Court findings

- ❖ *Mr Tracey sought a finding that at best for Dr Li's case there was only a limited degree of control insofar as her manner of performing or executing her work was concerned. Reference was made to Dr Li's choice of hours, the manner of diagnosis and treatment, and the use of treatment plans. [220]*
- ❖ *I do not accept that Dr Li had the degree of latitude suggested by the respondents in relation to her choice of hours or days of work...Dr Shi had responsibility for, and controlled the rosters of, both administrative and nursing staff and dental practitioners alike. [221]*

Court findings

- ❖ The Court accepted the commissioner based remuneration.
- ❖ The Court noted the description in the payment documents to an employee or contractor are not determinative of the legal character of the relationship [223]
- ❖ The Court also noted the significant level of control demonstrated by the dental practice in preparing those documents [224]
- ❖ The dentist agreed in her managing her ABN, GST and PAYG affairs and the fact that she did not accrue sick, annual or long service leave

Court findings

- ❖ Factors suggesting the dentist as an independent contractor in addition to the ABN and recording keeping – the payment of insurance, education and work seminar expenses (which would have been deductible for the dentist)
- ❖ There was very little evidence showing the dentist could delegate, however, little weight is given to this factor
- ❖ *The provision of equipment was a factor which militated in favour of an employment relationship...[however it was] noted that the renting of equipment for which Dr Li was charged a fee was also a fact which pointed in favour of an independent contract [232]*
- ❖ Including the dentist on the website suggested an employment relationship

Court findings

- ❖ Thought was also given as to uniform, however, no great weight was given on the basis she did not seek to claim an expense on purchasing any uniform
- ❖ *In closing submission, Dr Li said that she didn't care whether she was an employee or independent contractor but that she was entitled to be treated like a human being and fairly*

Court findings

- ❖ Decided as an independent contractor
- ❖ Heavily relied on the case of *Tattsbet* where a critical factor in determining an independent contractor relationship was on foot, was the use of an ABN and the contractor undertaking their own tax affairs (i.e. GST, PAYG Withholding and Superannuation Contributions)

Court findings

❖ *I have reflected on whether I should direct the Registrar to provide a copy of these reasons for judgment to the AHPRA. I remain concerned at the manner in which KC Dental had accounted to Dr Li for her commission including by unilaterally changing the basis on which she would be paid from 40% to 34% and the manner in which refunds made to patients would be recouped from Dr Li in subsequent pay cycles. Dr She agreed that Medicare has cancelled the accreditation of KC Dental. In those circumstances, I conclude that the appropriate regulatory authorities will monitor and investigate the conduct of persons in the dental industry as and when is required [277]*

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*Brisbane Bears – Fitzroy Football Club
Limited v Commissioner of State
Revenue [2017] QCA 223*

Background

- ❖ Are payments made to employees in relation to the use of their image, 'taxable wages'?
- ❖ Very technical case distinguishing between:
 - ❖ Payments **for** services rendered by an employee as an employee v payments made to an employee for something else
 - ❖ Payments **for** services v payments **in respect of** services
- ❖ Came down to how the Court interpreted the agreements in place

Issue

“... [they] were intended to be agreements in which players would contract to derive payments as a direct result of bona fide promotions/marketing by that player in accordance with the Guidelines for Additional Services Agreements. Those Guidelines also emphasised that what was authorised was the deriving of payments ‘as a direct result of bona fide marketing’ by the player. The context makes clear that the whole point of the agreements which players were authorised to enter into with their club or its sponsors was for the provision of promotion or marketing services by the players.”

Extracts

“... [they] were intended to be agreements in which players would contract to derive payments as a direct result of bona fide promotions/marketing by that player in accordance with the Guidelines for Additional Services Agreements. Those Guidelines also emphasised that what was authorised was the deriving of payments ‘as a direct result of bona fide marketing’ by the player. The context makes clear that the whole point of the agreements which players were authorised to enter into with their club or its sponsors was for the provision of promotion or marketing services by the players.”

Extracts

Clause 3 3.1 Duties

The Player must for the Term:

(a) perform the Additional Services in a diligent, faithful and efficient manner;

(b) comply with all lawful orders and directions given by the Club, or any person authorised by the Club, in relation to the performance of the Additional Services;

...

3.2 Use of Player's Image

The Player agrees that the payment of the Fee entitles the Club to use the Player's Image for purposes related or connected to the Additional Services as specified on [sic] Schedule 1 of this Agreement.

Schedule 1 Additional Services

1 Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed.

Where a Player is also being paid for use of image, provide details of how image is to be used and the Fee associated with image use.

The Club must also separately detail the Player's performance requirements under Clause 21 of the CBA.

[The template then set out blank space for completion in respect of each individual contract.]

3.1 Duties

The Company shall and shall procure that the Player:

(a) performs the Additional Services in a diligent, faithful and efficient manner;

(b) complies with all lawful orders and directions given by the Club, or any person authorised by the Club, in relation to the performance of the Additional Services;

...

3.2 Use of Player's Image

The Company agrees that the payment of the Fee entitles the Club to use the Player's Image. In addition, the Club may also use the Player's Image in connection to and in relation to the Additional Services as specified in Schedule 1 of this Agreement, provided the prior written consent of the Player is obtained which consent shall not be unreasonably withheld.

Additional Services

Provide full details below of all services to be performed by the Player and the associated Fee to be paid for each service performed.

Where a Player is also being paid for use of image, provide details of how image is to be used and the Fee associated with image use.

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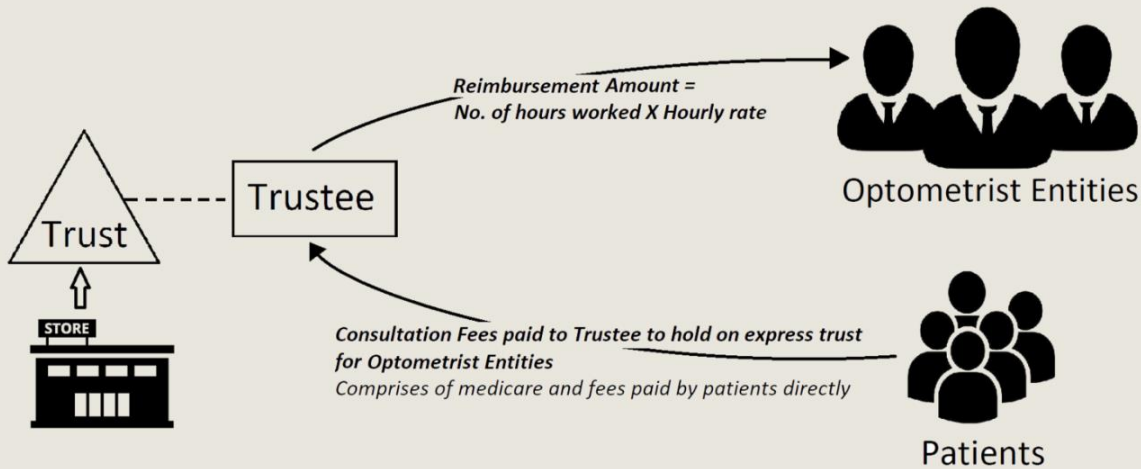
Key points



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*The Commissioner of State Revenue v
The Optical Superstore [2018] VSC*

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Occupancy Fee = Consultation Fee - Reimbursement Amount

The Occupancy Fee is payable to the Trustee, however in reality, often no Occupancy Fee was payable to the Trustee as the Reimbursement Amount often exceeded the Consultation Fee.

In this case, the Optom Agreements provided that a Location Attendance Premium was payable to the Optometrist Entities instead. In practice, this was treated as loans from the Trustee to the Optometrist Entities which would only be recharacterised as payments to the Optometrist Entities at the end of the financial year where it still remained outstanding.



Chat Legal Pty Ltd

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Conclusion

Conclusion

- ❖ Understanding what constitutes taxable wages is important
- ❖ Even more important is properly structure arrangements
- ❖ A properly structured arrangements may mean that there are no taxable wages paid in certain circumstances whilst one not properly thought could unwind any structuring arrangements taken place
- ❖ Consider the commerciality of the arrangements though otherwise they just won't work

Contact details



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