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Let's chat

Service Facility Agreements for Dental Practices – February 2022

With:

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Information provided is general in nature; precise application depends on specific circumstances



Overview

- Why use? The problem with contractors.
- How is it structured?
- Is it a 'sham' – and is it really an employee in sheet clothes?
- Typical and problematic clauses.



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Let's have a chat

Why use?

- PAYG
- Superannuation
- Payroll tax
- PSI
- Workcover
- Employment law



Why use?

Employer-employee	Principal-contractor	Business-service provider
<ul style="list-style-type: none">• Employment rights• PAYG• Superannuation• Payroll tax• Workcover	<ul style="list-style-type: none">• Superannuation (probably)• Payroll tax (most likely)• Workcover• PSI issues• NB GST considerations	<ul style="list-style-type: none">• Payroll tax (less likely if legitimate)• NB GST considerations



How is it structured?

- Employer (Dental Clinic) → Employee (Dentist):
 - Employer engages employee
 - Employer pays wage to employee
- Principal (Dental Clinic) → Contractor (Dentist):
 - Principal engages independent contractor to provide services to Principal for a fee
 - Principal pays fee to independent contractor
- Business (Dentist) → Service Provider (Dental Clinic):
 - Business owner engages service provider to utilise premise and other services for a fee
 - Business owner pays fee to service provider for provision of services



How is it structured?

- Principal → Contractor ≠ Business → Service Entity
- Crucial different is where the “invoice” raised:
 - Contractor v Service entity
- Both require dentist to operate own business:
 - NB: Distinction between employment law relationship and independent business
 - NB: PSI rules required to be met before business expenses incurred by business can be deducted for both approaches



Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - The case related to a dentist (Dr Li) who was engaged by a dental clinic (KC Dental) in late 2012 to provide dental services pursuant to an oral agreement.
 - Many years later (in 2016), the dental clinic attempted to formalise the arrangement under a written agreement backdated to the original commencement date.
 - Dr Li refused to sign the agreement on the basis that she did not believe it reflected the agreed oral terms of engagement. Dr Li entered the relationship believing she would be engaged as an employee; whilst the agreement was drafted to reflect an independent contractor arrangement.
 - Due to a breakdown between the parties, KC Dental terminated Dr Li's engagement and Dr Li sought to claim various workplace rights offered to employees pursuant to the Fair Work Act 2009 (Cth).
 - KC Dental argued that Dr Li was in fact an independent contractor, and therefore, was not entitled to any workplace rights.



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Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - The case for Dr Li
 - she was not personally permitted to book in patients for dental work and that such bookings were undertaken by KC Dental;
 - she worked regular and systematic hours for KC Dental (being full time work, five days per week, 9:30am to 5:30pm, including Sundays and receiving a 40% commission minus laboratory fees);
 - she was unable to access the surgery of KC Dental with all such access being controlled by the nurses employed by KC Dental;
 - she had no ability to sub-contract her duties to another dentist;
 - she was not permitted to work for another dental practice whilst engaged by KC Dental;
 - she was not permitted to promote her own business as a dentist during her engagement with KC Dental;
 - all equipment, materials, dental assistants and office staff were provided by KC Dental;
 - she was issued with business cards containing the details of KC Dental's dental practice;
 - she was listed as a dentist on the website of KC Dental;
 - she was otherwise under the direction and control of KC Dental in the conduct of her practice.



Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - Having considered the evidence on hand, the Court analysed the relationship based on the 'multi-factorial' approach and came to the following conclusion:
 - In relation to the level of control a contractor is able to exercise:
 - Counsel for KC Dental accepted that on the whole of the evidence, there was evidence that KC Dental exercised a degree of control of Dr Li particularly reflecting on a teeth whitening example where the amount of substance used was carefully administered, as well as the fact that Dr Li was bound to follow strict guidelines requiring her to delay dental treatment until payment was received by the practice.
 - To the contrary, it was submitted that Dr Li had near complete autonomy to perform general dental treatment.
 - It was further found that Dr Li had limited control in her choice of hours or days of work and that KC Dental controlled the rosters of both all staff (including dental practitioners).



Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - In relation to the level of integration of the contractor in the business:
 - Although Dr Li was not required to wear any formal work uniform, KC Dental had a high level of oversight in relation to her hours as well as managing of the recoupment of fees generated by Dr Li.
 - Such oversight was considered to reflect the level of integration seen in an employee relationship.
 - In relation to whether the contractor provides their own tools and equipment:
 - It ultimately agreed that Dr Li supplied her own tools and equipment through the payment of a service fee to KC Dental for use of the equipment and administration.
 - It was also noted that Dr Li paid for her own insurance, education and work seminar expenses, which were reflective of a contractor arrangement.



Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - In relation to how the contractor is remunerated:
 - It was found that Dr Li was paid to produce a result. Such an arrangement reflects the trait of an independent contractor.
 - The Court did, however, accept the fact that KC Dental
 - In relation to the level of risk a contractor takes on and any insurance arrangements:
 - It was agreed that Dr Li would rectify any defective work.
 - Further, the practical arrangements between KC Dental and Dr Li was such that KC Dental exercised a level of control in determining when to refund any defective work performed by Dr Li to patients
 - In relation to the tax arrangements of the contractor:
 - Dr Li agreed that she held her own ABN and remitted quarterly instalments in GST.
 - She also confirmed that KC Dental made no superannuation contributions on her behalf, nor did she accrue any sick, annual or long services leave.



Employee v contractor

- Li v KC Dental Pty Ltd & Ors [2019] FCCA 104
 - Ultimately, on the balance of the above analysis, the Court found the relationship between KC Dental and Dr Li to be one of principal and independent contractor.
 - Also to note:
 - The breakdown in the relationship between Dr Li and KC Dental ultimately began when KC Dental handed a written agreement to Dr Li and attempted to force her to sign it barring a termination of her engagement.
 - The case is also a reminder of the importance to ensure complex tax and legal concepts are properly explained to clients.
 - Much of the driving reasons to require Dr Li to sign the agreement was due to a misunderstanding of the interaction between the application of the personal services income provisions under tax law and the common law employer/employee relationship.
 - The Court also noted various inconsistencies with the evidence of KC Dental and discrepancies in KC Dental's accounting of payments to Dr Li.
 - Specifically, it was found that the first 13 payment advices issued to Dr Li referred to her as an employee before KC Dental unanimously amended the invoicing arrangement to generate an invoice on behalf of Dr Li issued to KC Dental. Further steps were taken to unanimously amend the invoicing arrangements again such that KC Dental charged a service fee to Dr Li.
 - The Court was critical of this unanimous changing of the arrangements and accordingly referred the practice to the AHPRA.



Service facility agreements

- Different relationship from Employer/Employee or Principal/Contractor
- Rather, services and facilities are offered by a practice owner to other health professionals
- Such services can include administrative support, marketing and patient invoicing
- Facilities include a treatment room and a level of equipment required to run a standard dental practice
- The relationship is one where an offer is made from the practice to other practitioners to use; and a fee is paid
- Practitioners conduct their business with patients and the practice would assist the business owner with collecting patient fees
- A fee would then be paid by the practitioner to the practice
- Common for the practice fee to be paid from the patient billings collected by the practice, with the practice returning the balance to the practitioner



Service facility agreements

- Thought to have reduced the risk of payroll tax applying as it was the practice invoicing the dental practitioner – therefore no ‘wages’ being paid
- Important to appreciate that payroll tax legislation has provisions that can capture payments made to independent contractors and treat them like ‘wages’ in aggregating the payroll tax threshold – called ‘relevant contracts’
- Various cases over the past 3 years have tested whether payments made under service facility agreements are linked to ‘relevant contracts’



The Optical Superstore

- *Commissioner of State Revenue (Vic) v The Optical Superstore Pty Ltd* [2019] VSCA 197
- Tenancy and agency arrangement implemented by Optical Superstores to 'pay' optometrists to look after patients
- Arrangement structures so that:
 - Optical Superstores would collect optometrist fees (both Medicare payments and patient fees) and hold 'on trust'
 - A fee was paid by Optometrist to Optical Superstore comprising of:
 - An occupancy fee for using the store
 - Another amount factoring into an hourly rate and hours worked by the optometrist
 - Balance was returned to Optometrist
- Originally not considered a 'relevant contract' but was overturned and considered applicable for payroll tax on appeal



Homefront Nursing

- *Homefront Nursing Pty Ltd v Chief Commissioner of State Revenue* [2019] NSWCATAD 145
- Distinction between payments:
 - Medicare and Department of Veterans Affairs benefits – Homefront Nursing treated as being a collection house on behalf of practitioner and such benefits paid by Homefront Nursing to GPs were not considered a relevant contract
 - Non-bulk billed payments – Considered patients paid amounts to Homefront Nursing for services performed by the GP contemplated in agreement between Homefront Nursing and the GP and therefore a relevant contract for payroll tax



Thomas and Naaz Pty Ltd

- *Thomas and Naaz Pty Ltd v Chief Commissioner of State Revenue* [2021] NSWCATAD 259
- Prior cases considered whether a 'relevant contract' existed
- If so, such payments made would be included for payroll tax purposes
- Although case is in NSW, QLD has similar payroll tax provisions
- Relevant contract defined (section 32 NSW Payroll tax legislation) to include a 'contract under which a person (the **“designated person”**...in the course of a business carried on by the designated person: (a) supplies to another person services for or in relation to the performance of work'



Thomas and Naaz Pty Ltd

- Case involved the applicant operating three medical centres with various doctors operating from the medical centres.
- Written agreements were entered into where:
 - The medical centres provided rooms to the doctors as well as shared administrative and medical support services (including charging and collection of fees on behalf of doctors);
 - Doctors saw patients at the medical centres and patients did not pay directly to the doctors;
 - Doctors provided with option to receive bulk billing directly, however, all but three agreed for the medical centre to do so on behalf of them;
 - Other fees paid to medical centre
 - Once service fee reconciled, doctors paid an amount equal to 70% of claims received
- Question whether such amounts paid under a relevant contract



Thomas and Naaz Pty Ltd

- Agreement contained particular wording:
 - “**The Services**” are defined as “medical services normally provided in most general practices and shall not include services of a special nature provided by some GP’s, such as, acupuncture, cosmetic services etc...”
 - Clause 2 of the Agreement stated that the applicant was authorised to use “part of Thomas & Naaz Pty Ltd @ The Ponds Family Medical Practice to operate the Clinic” and that “The Doctor has requested to use The Clinic(s) to provide The Services in these facilities as a private Doctor, subject to the terms of this Agreement” and further that “The Doctor agrees to provide the services on a five day per week basis, including weekend rotation.”
 - Clause 3 of the Agreement set out a number of general obligations upon the Doctors, including:
 - “The Doctor shall at all times act to promote the interest of The Clinic” (cl 3.4);
 - “The records of all services are the sole property of The Venture, the Doctor shall have access to records for a period of six months after completion of contract on request” (cl 3.6);
 - “The Doctor shall abide by operating protocols issued by The Venture from time to time” (cl 3.7);



Thomas and Naaz Pty Ltd

- Agreement contained other provisions:
 - Clause 6 of the Agreement, which dealt with leave policy, included:
 - an obligation on the Doctor to inform The Venture of any unplanned absence in advance (cl 6.1);
 - an obligation on the Doctor to provide The Venture at least 6 weeks' notice prior to a planned vacation (cl 6.3);
 - that a maximum of four weeks' vacation leave per 12-month period was allowed (cl 6.5); and
 - that all applications for leave were to be made in writing to The Venture for approval (cl 6.7).
 - Clause 7 of the Agreement dealt with the event of the departure of the Doctor and provided, inter alia, that an exclusion zone of five kilometres from The Clinic would be expected by The Venture for a period of two years after the Doctor left the Clinic.



Thomas and Naaz Pty Ltd

- Important to appreciate that Agreement on its own did not bluntly state 'services were provided to the medical centres' (rather, services were provided to patients)
- However, on consideration of the surrounding provisions imposing obligations on the Doctors to the medical clinics (i.e. rostered days/commitments, promotion of medical clinic interests and restraint provisions) – it was constructed that the Doctors were in fact providing a service to the medical centre
- Such provisions indicate the 'Services' provided by the Doctors were a necessary part of the medical centre business and a relevant contract exists
- Exclusions in the relevant contract provision could apply, but no evidence was present during the case



What do the cases say?

- The contents of an agreement is crucial?
- The phrasing of who provides the services is a common mistake.
- Additional provisions imposing obligations on a health practitioner can further construe the agreement to one similar of 'Employer/Employee'.
- As a result, not all businesses are suitable for a service facility agreement method.
- Clinics that are comfortable with relinquishing the ability to micro-manage will be more suited in undertaking actions that are consistent with the arrangement.
- Actions of parties will be considered to confirm what is in writing aligns with practice



Our experience – common issues

- Document called 'service facility agreement' but services to define health practitioner providing medical/dental services to the clinic
- Document called 'service facility agreement' where services are defined to mean room and admin support, but the doctor provides the invoice to the clinic
- Service facility agreements which include heavy handed provisions:
 - Not allowing a practitioner to take any leave in December
 - Requiring practitioners to provide at least 1 week notice if they are absent from the clinic for more than 1 hour in a day



Bespoke and tailored advice

- Agreements should not be 'off-the-shelf'
- Agreements should be tailored to suit the clinic's circumstances
- Tailoring more controlling agreements requires appreciation of the payroll tax risk
- Clinic owners should be explained the advantages and disadvantages prior to determining whether a service facility agreement arrangement is suitable for their affairs

Contact details

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