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Let's chat

Collection of acronyms – BDBNs, PoAs, SFAs (and more) – November 2023

With:

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



Overview

- Theme is on acronyms
- Variety of issues considered
 - BDBNs – particularly regarding SMSFs
 - EPoAs – when trust isn't enough
 - SFAs – *sigh, again* but practical insights from the past year of advising since the Qld Revenue Ruling
 - PBRs – a collection of interesting picks
 - SGR – a (always) b (be) c (checking)...your ATO references are still in effect (i.e. they have not been withdrawn)



BDBN – To DIY or not to DIY

- Superannuation death benefits – not testamentary and do not form part of estate automatically
- Without anything further, terms of superannuation fund deed apply
- Terms may allow for trustee discretion to determine and interact with reversionary pensions
- Terms may also allow member to provide direction to trustee as to how they wish for such benefits to pass
- Discussing self-managed superannuation fund (SMSF) specific BDBNs



BDBN – Read the deed

- Section 59 SIS Act – provides for member to exercise discretion subject to other regulations
- Regulation 6.17A SIS Regulations – outlines rules on how payment can be made, which included the 3-year limit for BDBNs, need to have two adult witnesses and to serve the BDBN to the trustee
- Hill v Zuda Pty Ltd as Trustee for the Holly Superannuation Fund [2022] HCA 21
 - Related to BDBN signed more than 3 years ago and a dispute regarding partner from second relationship and child from first relationship
 - Reg 6.17A, properly construed, did not apply to an SMSF
 - Trust deed is king
 - Whether BDBN is valid depends on whether requirements of deed satisfied
 - Does the SMSF have restrictive wording (i.e. use the form in Annexure 1)



BDBN – Failure to deliver BDBN

- Subject to terms of the SMSF deed
- *Williams v Williams* [2023] QSC 90:
 - SMSF deed required trustee to be notified
 - One of the co-trustees denied receiving a copy of the BDBN
 - Was it enough that one of the trustees received a copy of the BDBN (the deceased person now)?
 - No – in order for trustee to give effect to a BDBN, the trustee must know which BDBN is current and therefore all trustees are required to be notified
- Are you preparing BDBNs without appropriate trustee resolutions?



BDBN – Words matter

- *Munro v Munro* [2015] QSC 61:
 - BDBN referred to 'Trustee of Deceased Estate'
 - Nomination challenged is 'legal personal representative' is not the same as 'trustee of deceased estate'
 - 'Legal personal representative' defined in section 10 SIS Act to include 'executor of the will or administrator of the estate of a deceased person'
 - Noted executor is nuanced from a trustee
 - Executor: holds the property of a deceased person for the purpose of carrying out the administration duties of the estate
 - Trustee: applies the assets to the trusts under the will
 - Timing a difference as well



BDBN – Attorney executing

- *Re Narumon Pty Ltd* [2018] QSC 185
 - BDBN paying 47.5% to second spouse, 47.5% to son of second spouse and 5% to sister signed
 - Debatable whether 5% to sister valid
 - Second spouse and sister signed a new BDBN as attorney of member 50% to each of second spouse and son
 - Question was whether BDBN valid
 - On basis form was valid, question turned to whether attorneys could sign on behalf of member
 - Noted nothing in trust deed prohibited attorney of member signing
 - Similarly no prohibition under superannuation law
 - Finally, no explicit prohibition from entering into BDBN under State law, but noted that any transactions are subject to obligations to avoid personal conflicts of interest unless they are expressly authorised



BDBN – Attorney executing

- Form over substance
- Letter stating: *'I hereby advise that it is my wish that the balance of any amounts standing in my name in the above named superannuation fund, on my demise, be paid to my Legal Personal Representative for inclusion in my estate assets'*
 - Was this a BDBN?
 - *Donovan v Donovan* [2009] QSC 26 – no. Letter did not show intention that it was to bind trustee



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'Death bed' withdrawals

- Pulling out superannuation before death (whether on 'death's bed' or with an unforeseen amount of time to go)
- Note ATO's comments in determining whether a death benefit or member benefit:
 - *The governing rules set out when benefits can be paid and who they can be paid to, including after a member's death. The governing rules of the fund must be read carefully to determine a member's benefit entitlements in the event of death.*
 - *At the time of payment, the trustee must assess whether it is a member or death benefit based on the facts known at the time, including:*
 - *terms of the request from the member*
 - *terms of the trust deed and any other governing rules*
 - *knowledge at the time the payment is made (including whether they are aware that the member has died)*
 - *the entity that the payment is being paid to*
 - *circumstances and timing of the payment*
 - *whether the payment is made because of and in line with the request made by the member.*



'Death bed' withdrawals

- *Example: SMSF paying a death benefit*
 - *Jack and Jill are spouses, and members and trustees of the Hill SMSF. Jack has a terminal medical condition. He makes a request to his SMSF for release of his super.*
 - *Before the benefit payment is made, Jack passes away. It is then paid to an account belonging to his legal personal representative, forming part of Jack's deceased estate.*
 - *At the time of payment Jill, as the surviving trustee, considered the above factors and determined that the payment is a death benefit. Notably:*
 - *the terms of the trust deed of the Hill SMSF allow for release where a member meets a condition of release, including both the terminal medical and death conditions*
 - *the trustee of the SMSF knew Jack had passed away before authorising the payment*
 - *Jack's super benefits are being paid to his legal personal representative's account*
 - *the payment is being made as soon as reasonably practicable to satisfy the compulsory cashing requirement that applies when a member dies, rather than in accordance with Jack's prior request.*



'Death bed' withdrawals

- But a member would have been notified (as under superannuation law, the member must be a trustee or director of a trustee company)
- Few circumstances where the trustee of the fund will not be aware of the member's death prior to pulling money out
- ATO has recently considered whether *'it cannot be said that the trustee made the payments with the exemption that the member would be alive to receive it'*
- Improved need to have proper documentation prepared if considering pre-death withdrawals
 - Liquidity issues



'Death bed' withdrawals

- Weighing tax free withdrawal but losing:
 - Superannuation tax free environment moving forward, particularly if wishing to live for a long time
 - Limited in recontributing
 - Loss of 'asset protection' of assets in superannuation
- War stories



EPoAs – protective provisions

- *Grant v Grant; Grant v Grant (No. 2)* [2020] NSWSC 1288
 - Daughter appointed as attorney for elderly father
 - Attorney revoked and Son appointed to replace Daughter
 - Son discovered various transactions made by Daughter to transfer a property to Daughter's daughter for nil consideration as well as various other unexplained withdrawals that all but depleted the wealth
 - Letter tendered by Daughter stating:
 - 'I want to give the Killcare house to [Granddaughter's name]*
 - I want you to live there for the rest of your life.*
 - I give you a life time tenancy.*
 - I will pay for the transfer.*
 - Please transfer the property to [Granddaughter's name]*
 - Thank you for all the care of me'*



EPoAs – protective provisions

- *Grant v Grant; Grant v Grant (No. 2)* [2020] NSWSC 1288
 - Letter held to be a fabrication
 - Handwriting expert obtained who claimed signature taken from an earlier document and transposed onto the handwritten letter and there was an incredibly slim possibility the Father had signed the letter
 - Court scathing in rejecting letter regarding the abuse of power made by Daughter
 - Daughter required to pay compensation in relation to monies withdrawn (including stamp duty and other costs)
 - Granddaughter was complicit and forced to transfer property back



EPoAs – protective provisions

- Sad day when can't trust family – but choosing the right people is the best thing possible
- If in doubt, appoint more than one; if still in doubt, consider independent persons
- Note the following protection provisions in QLD:
 - Section 73 *POA Act* - An attorney for a financial matter may enter into a conflict transaction only if the principal...has authorised the transaction, conflict transactions of that type or conflict transactions generally
 - Section 74 and 74A *POA Act* – Protected and prohibited use of confidential information
 - Sections 85 and 86 *POA Act* – Obligation to keep records and keep property separate (noting fines if property not kept separate)
 - Section 87 *POA Act* –Presumption principal is unduly influenced when entering into transaction with an attorney/related person of attorney



EPoAs – protective provisions

- Note the following protection provisions in QLD (cont):
 - Section 88 *POA Act* - *Unless otherwise authorised under this Act, an attorney for a principal may give away or donate the principal's property only if*
 - *the gift or donation is—*
 - *of the nature the principal made when the principal had capacity; or*
 - *of the nature the principal might reasonably be expected to make; and*
 - *the value of the gift or donation is not more than what is reasonable having regard to all the circumstances and, in particular, the principal's financial circumstances*
 - Section 89 *POA Act* - *An attorney for financial matters for an individual may provide from the principal's estate for the needs of a dependant of the principal.*
- Queensland enduring power of attorney documents enable requirement to notify other persons as well
- Whether to grant exemptions to protective provisions depend on who the attorney is – difficult balancing act sometimes



SFAs – Importance of words

- Been over a year and law firms have sought to either:
 - Tweak the wording of template agreements
 - Advise on a change in how money flows
- Distinction:
 - Flow of money to Practitioner and then fee paid to Clinic (Good agreement)
 - Flow of money to Practitioner and then fee paid to Clinic (No agreement)
 - Flow of money to Clinic in separate bank account and reconciled (Good agreement)
 - Flow of money to Clinic in general bank account and reconciled (Good agreement)
 - Flow of money to Practitioner and then fee paid to Clinic (Bad agreement)
 - Flow of money to Clinic in separate bank account and reconciled (Bad agreement)
 - Flow of money to Clinic in general bank account and reconciled (Bad agreement)



SFAs – Importance of words

When is a contract a relevant contract?

18. A contract is a relevant contract under s.13B(1) if it provides for the supply of services 'in relation to the performance of work' by one party for or on behalf of the other party unless one of the exemptions in s.13B(2) applies. The reference to services 'in relation to the performance of work' is satisfied if the services performed under the contract are work-related.
19. The requirement that a practitioner supplies services to a medical centre is satisfied if the practitioner serves patients for or on behalf of the medical centre. This principle has been endorsed by the High Court in *Accident Compensation Commission v Odco Pty Ltd* [1990] HCA 43; (1990) 95 ALR 641 at 652 (paragraph 30) concerning similar Victorian legislation regulating workers' compensation.
20. This principle has also been applied by courts and tribunals in a range of industries⁴ including cases involving medical centres.⁵
21. Some factors or terms indicating that a contract between a medical centre and a practitioner would more likely be a relevant contract are provided in Attachment 3. However, each contract must be considered individually on a case-by-case basis taking into account all the relevant facts and circumstances to determine whether it is a relevant contract. If the contract provides, either expressly or by implication, that a practitioner is engaged to supply work-related services to the medical centre by serving patients for or on behalf of the medical centre, the contract is a relevant contract under s.13B(1).



SFAs – Importance of words

Example 1—Supply of services for or in relation to work by practitioners

ABC Pty Ltd (ABC) operates a medical centre that provides patients with access to a range of medical services performed by qualified practitioners who are engaged by ABC to service patients of ABC.⁶

Practitioners are engaged by ABC to provide their services to the medical centre by serving patients of the medical centre in accordance with the terms of individual contracts. The contracts also require ABC to provide practitioners a consultation room for patients, manage appointments, maintain patient contact information and medical records, collect fees from patients and pay practitioners a share of revenue.

Each contract between ABC and a practitioner satisfies the requirement to supply services 'in relation to the performance of work' under s.13B(1) because practitioners are required to serve patients for or on behalf of ABC.

The elements of a relevant contract under s.13B(1) are satisfied because the services are supplied by each practitioner 'in the course of a business' and are supplied 'in relation to the performance of work' by the practitioner.



SFAs – Importance of words

Deemed wages—common payment arrangements

47. The following common payment arrangements between a medical centre and a practitioner under a relevant contract have been identified and are discussed further below. Whether certain payments to the practitioner are considered deemed wages is summarised below.

Payment arrangement	Deemed wages	Paragraph and example
Medicare benefit assigned by the patient to the practitioner, and any additional out-of-pocket patient fees ('patient revenue') paid to the medical centre on behalf of or directed by the practitioner, then payment from the medical centre to the practitioner (net of any administration fee)	Yes	Paragraphs 48–50 Example 10
Patient revenue paid to the medical centre on behalf of or directed by the practitioner, then payment from the medical centre to the practitioner's entity (net of any administration fee)	Yes	Paragraphs 51, 52 and 62 Examples 11 and 14
Medicare benefit assigned by the patient to the practitioner and paid directly to the practitioner from Medicare	No	Paragraph 57–60 Example 12

Payment arrangement	Deemed wages	Paragraph and example
Out-of-pocket patient fees paid directly to the practitioner from the patient	No	Paragraph 61 Example 13
Patient revenue paid to a third-party entity, then paid from the third-party entity to the practitioner	Yes	Paragraphs 62–65 Examples 15–18



SFAs – Importance of words

Tenancy contract that is not a relevant contract

- 66. Under a tenancy contract, a landlord (who may be a sub-lessor) by lease or licence provides a practitioner with use of a suite or space in, for example, a building from which the practitioner conducts their own independent medical practice. The tenancy contract will reference the specific space being leased or licensed and generally includes provisions for fit-out and alterations to accommodate the practitioner's requirements and services such as building maintenance and signage for the practitioner's operating hours.
- 67. A tenancy contract is not a relevant contract if the practitioner does not supply work-related services to patients for or on behalf of the landlord. In these circumstances, the practitioner must operate their own independent medical practice responsible for such matters as advertising and attracting patients, providing medical services to their own patients (i.e. not for or on behalf of anyone else), managing patient appointments and records and directly submitting claims for medical benefits to Medicare; with Medicare paying those benefits to the practitioner (or the practitioner's entity).
- 68. If a tenancy contract refers to a medical centre as a 'landlord' and the practitioner as a 'tenant', but in substance the practitioner is providing medical services for or on behalf of the medical centre to its patients, the tenancy contract is more likely to be a relevant contract.



SFAs – Importance of words

Example 19—Tenancy contract not a relevant contract

A practitioner enters into a tenancy contract with DEF Pty Ltd (DEF Co) for the lease of specific premises comprising a consultation room, waiting room and administration office (suite). DEF Co's only business activity is leasing the suite and does not conduct a medical centre business (refer to Attachment 1). Further, under the tenancy contract, DEF Co does not have any operational or administrative control over the practitioner. That is, the practitioner determines their own operating hours, leave requirements and all other matters in relation to conducting their medical practice (refer to Attachment 2), not DEF Co. The practitioner conducts a medical practice from the suite by hiring administration staff to manage patient and Medicare matters, and providing medical services to patients who make appointments to see the practitioner. The 'tenancy contract' is not a relevant contract.

Example 20—Tenancy contract is a relevant contract

A practitioner enters into a 'tenancy contract' with ABC Pty Ltd (ABC), which operates multiple medical centres. Under the tenancy contract, the practitioner is referred to and described as the 'tenant' and the medical centre the 'landlord'. The tenancy contract does not refer to the lease, being the grant of exclusive possession, of any specific location or physical space, but provides that the practitioner as 'tenant' is to work at the various medical centres operated by ABC as required. Despite how the parties are referred to and described, the terms of the 'tenancy contract' mean that ABC has operational and administrative control over the practitioner being able to influence all matters in conducting the medical centre (refer Attachment 2). This secures the provision of medical services by the practitioner to ABC's patients in a manner required by ABC. The tenancy contract is a relevant contract because ABC, in the course of operating its medical centres, has supplied to it the services of the practitioner in relation to the performance of work.

A contract with an administration entity may be a relevant contract

69. Multiple medical practices conducted by individual practitioners may operate from the same premises and use the same entity that provides administration and support services (administration entity) to practitioners. A contract with the administration entity may be a relevant contract depending on the terms and conditions of each contract. In some cases a contract may be a relevant contract under s.13B(1), but an exemption may apply under s.13B(2). The terms and conditions of each contract must be considered on a case-by-case basis having regard to 'When is a contract a relevant contract?' above.



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SFAs – Importance of words

Determining whether a medical centre business is being conducted

Outlined below are factors to consider in determining whether an entity is conducting a medical centre business, for the purpose of this ruling. These factors are not exhaustive and the absence of one or more will not necessarily mean a medical centre business is not being conducted.

	Medical centre business	Administrative service business
(a)	The business holds out, promotes and advertises to the public as a place where medical services are available and provided to the public.	The business is held out, promoted and advertised to the public as an administrative services business, unrelated to the provision of medical services.
(b)	The business operator enters into a contract or arrangement with practitioners, pursuant to which the practitioner promises to provide medical services to the patients of the medical centre.	The practitioner does not promise to provide medical services to the business operator.
(c)	The business operator determines bulk billing practices, patient fees and concessional arrangements for medical services offered to patients.	The business operator does not determine and has no involvement in patient billing practices.
(d)	When a member of the public (patient) enters the reception area at the medical centre, the person does so at the invitation of the medical centre.	A member of the public being a patient would not ordinarily enter the business for the purpose of receiving medical services.
(e)	The business operator has concern for patient dissatisfaction with the availability and quality of medical services provided at the medical centre.	The business operator would have no concern regarding patient dissatisfaction, having no connection to the provision of administrative services.
(f)	The business is conducted in a manner to attract patients to the medical centre.	The business is conducted in a manner to secure practitioners that pay fees for administration services provided to the practitioners.

	Medical centre business	Administrative service business
(g)	The business operator determines the physical configuration and layout of the medical centre premises for the provision of medical services.	The business operator does not determine and has no involvement in the physical configuration and layout of the medical centre premises and merely provides a room or space.
(h)	The business operator determines the composition of practitioners who provide services at the medical centre.	The business operator has no involvement in the composition of practitioners who provide services at the medical centre, having no connection to the provision of administrative services.
(i)	The business operator determines the nature of the medical services available at the medical centre.	The business operator has no involvement in the nature of the medical services provided at the medical centre, having no connection to the provision of administrative services.
(j)	The business operator determines the specific location within the medical centre where each practitioner provides medical services to patients.	The business operator has no involvement in the specific location from which each practitioner provides medical services to patients, and merely provides a room or space.
(k)	The business operator determines the roster to be worked by practitioner(s).	The business operator complies with the roster determined by the practitioner(s) and provides administrative services as required.
(l)	The business operator determines the hours when the medical centre will be open to receive patients.	The business operator complies with the operating hours determined by the medical centre and provides administrative services as required.
(m)	The business operator retains control and ownership over patient records at all times.	The business operator has no control or ownership over patient records, except to the extent required for the provision of administration services.
(n)	Restrictive covenants placed on practitioners include an exclusivity restraint and a restraint of trade following completion or termination of the agreement.	Restrictive covenants placed on practitioners include restrictions on acquiring administrative services from other third-party providers.

	Medical centre business	Administrative service business
(o)	Termination of a practitioner as a result of committing an act that adversely affects the reputation of the medical centre.	Termination of a practitioner as a result of failing to comply with contractual obligations (e.g. not paying fees for administration services or becoming insolvent).
(p)	Commercial success and profit of the business is a function of the degree to which patients are attracted to the medical centre	Commercial success and profit of the business is a function of the degree of utilisation by the practitioners of administration services, not the medical services provided by practitioners.



SFAs – Importance of words

Factors which may be influenced indicating 'operational or administrative control'

The medical centre is considered to have 'operational or administrative' control over a practitioner if it is able to influence matters in the relationship between the medical centre and practitioner. For example, the practitioner is subject to the following:

- (a) specified period of work including, for example, attendance and availability, prescribed days and hours to be worked, set start and finish times and public holiday requirements
- (b) leave policy including, for example, specified leave entitlements, the requirement to provide advanced notice of planned leave, certain limitations on leave (e.g. timing and duration) and leave approval
- (c) directed to provide medical services to patients from a physical location (e.g. specific medical centre) and space within the medical centre as required
- (d) compliance with operating protocols including, for example, meeting roster commitments, being physically present during rostered sessions, sign-in and sign-out procedures, and completion of necessary documentation
- (e) promotion of the business and interest of the medical centre including, for example, expanding the turnover and patient base of the practice, upholding the quality and image of the services provided and not channelling patients away from the medical centre
- (f) property in business records remains with the medical centre at all times including, for example, an obligation that the practitioner must promptly provide the medical centre with all information and documents as required at any time during and following completion or termination of the agreement
- (g) control and property in patient records remains with the medical centre at all times including, for example, an obligation that practitioners must not copy patient records or remove them from the medical centre during the agreement and practitioners are prevented from or limited to accessing patient records following completion or termination of the agreement
- (h) patient fee and payment protocols including, for example, an obligation that the practitioner is required to bulk bill patients for services, charge patients based on rates set by the medical centre and adopt concessional arrangements as directed (e.g. reduced fees for infants, veterans)
- (i) types of restrictive covenants including, for example, an exclusivity restraint during the agreement and a restraint of trade following completion or termination of the agreement.

The above factors are indicative only and are not exhaustive. The extent of 'operational or administrative' control between a medical centre and practitioner must be considered on a case-by-case basis, taking into account all the relevant facts and circumstances.



SFAs – Importance of words

Factors and terms indicating a contract is more likely to be a relevant contract

Whether an arrangement between a medical centre and a practitioner is a relevant contract depends on if:

- (a) the medical centre conducts a business of providing medical services to patients
- (b) there is an arrangement between the medical centre and the practitioners whereby the practitioners will provide medical services to patients of a medical centre
- (c) payment or remuneration of some kind will be provided in return for the services supplied by the practitioner to patients of the medical centre.

The following factors and contractual terms between a medical centre and a practitioner, or the practitioner's entity, indicate the contract is more likely to be a relevant contract:

- (a) The medical centre and the practitioner agree that the practitioner will provide competent, professional medical services to patients of the medical centre.
- (b) The medical centre controls the manner in which services are provided, specifically the extent to which the medical centre can influence those factors in the relationship between the medical centre and practitioner outlined in Attachment 2.
- (c) The medical centre determines patient fee arrangements, including decisions as to which patients may be only bulk billed to Medicare, the extent of out-of-pocket patient fees charged, payments by the Department of Veterans' Affairs (DVA) and other specified fees and amounts paid or payable.
- (d) The medical centre determines how patients' fees (including assigned Medicare benefits) are shared between the medical centre and the practitioner or the practitioner's entity. The mechanism by which the medical centre calculates the payment to the practitioner or practitioner's entity (e.g. as an hourly rate, a percentage of billing or a variable management fee) will not in itself change whether the payments are wages.
- (e) The medical centre directs the assignment and administers the payment of an assigned Medicare benefit or DVA benefit from the patient to the medical centre.
- (f) Provision is made for the practitioner to periodically invoice the medical centre for services provided to the medical centre; for example, by serving patients for or on behalf of the medical centre.
- (g) Hours or days of attendance by the practitioner are specified.
- (h) The practitioner's entitlement to take a leave of absence is specified, including any requirement to seek approval from the medical centre or to ensure a minimum number of practitioners are available to serve patients.
- (i) The practitioner is required to provide the medical centre with specified information and documents.

- (j) Ownership of, and access to records, including patient information is controlled and retained by the medical centre and not the practitioner.
- (k) There are restrictions on copying or removing records from the medical centre.
- (l) The practitioner is required to promote the interests and welfare of the medical centre.
- (m) The practitioner is required to commit to provide a share of duties relating to after-hours calls, home visits and nursing home visits.
- (n) The medical centre agrees to provide the practitioner with administration services, clerical and professional staff and facilities, plant and equipment necessary for the practitioner to provide medical services to patients of the medical centre.
- (o) Any other factors and contractual terms indicate a medical centre business is being conducted (refer Attachment 1), which requires a practitioner to be engaged to provide medical services in the manner required by the medical centre (i.e. the medical centre has operational and administrative control over the practitioner) (refer Attachment 2).

These factors are not exhaustive and the absence of one or more will not necessarily mean a relevant contract does not exist.



SFAs – Importance of words

- D. The Service Provider agrees to provide the Facilities to the Practitioner at the Dental Facility for the purpose of enabling the Practitioner to operate and provide Dental Services.
- Dental Services means those professional dental services performed by the Practitioner at the Dental Facility and outlined at Annexure A to this Agreement.
- Dental Facility means a dental clinic operated by the Service Provider situated at the Location.
- Patient means any person to whom the Service Provider provides Dental Services at the Dental Facility.
- Referred Patient means any person referred by the Service Provider to the Practitioner and for whom the Service Provider provided Dental Services at the Dental Facility.



SFAs – Importance of words

- 2.4 The Practitioner shall perform the Dental Services at the Location from the Commencement Date upon the days outlined in Annexure A to this Agreement. Nothing in this Agreement shall require the Practitioner to provide the Dental Services at the Location on an exclusive basis.
- 2.5 Upon the commencement of this Agreement the parties will agree upon the Professional Fees which the Practitioner shall charge in relation to the provision of Dental Services. The agreed Professional Fees shall only be varied upon the prior written approval of the parties.
- (j) shall, so far as is reasonably practicable, co-operate with any activity or conduct by the Service Provider to enhance the business of the Dental Facility
- (k) may not discount or waive any Professional Fees in respect of any Patient without notifying and accounting to the Service Provider;



SFAs – Importance of words

- (m) [OPTION – DELETE AS APPROPRIATE] agrees that any Referred Patient is a patient of the Service Provider and not of the Practitioner;
- (n) will comply as soon as practicable, although within 2 working days 24 hour period, with any request by the Service Provider to provide information concerning the provision of the Dental Services;
- (b) the Practitioner does not provide services to any Competitor to the Service Provider, or to any Referred Patient at any place other than the Location, or Group Company, without the prior written consent of the Service Provider.
- 11.1 All Intellectual Property in the Materials, other than dental records, generated in connection with the Dental Services will be and remain the property of the Practitioner.



SFAs – Importance of words

- All Intellectual Property in the Materials, other than dental records, generated in connection with the Dental Services will be and remain the property of the Practitioner.
- The Practitioner will not, within the Restraint Period and Restraint Area, without the Service Provider's express prior written consent:
 - (a) directly or indirectly approach, solicit, endeavour to entice away, contract with or employ, any employee or contractor of the Service Provider who is engaged by the Service Provider at the date of termination of this Agreement;
 - (b) [OPTION – DELETE AS APPROPRIATE] directly or indirectly approach, solicit, canvass or try to entice away any Referred Patient from the Service Provider; or
 - (c) provide Dental Services at, for or with a Competitor;
 - (d) counsel, procure or otherwise assist any person, firm or corporation to do any of the acts referred to in (a), (b) or (c) above.
- Each sub-clause of 15.1 above will have effect as if it were a number of separate sub-clauses. If any of such separate sub-clause is deemed to be invalid or unenforceable for any reason, such invalidity or unenforceability will not prejudice or in any way affect the validity or enforceability of any other sub-clause.
- The Practitioner agrees that the restraints in this clause are reasonable and necessary to protect the legitimate business interests of the Service Provider and further acknowledges that damages may not be an adequate remedy for breach of the restraints and that the Service Provider is entitled to seek injunctive relief in addition to any damages.



PBR – home to work travel

- Taxpayer lives in Location A
- Taxpayer accepted job with the role located in Location B
- Employer does not have an office or worksite location in Location A
- When home in Location A, the taxpayer is able to work from a dedicated home office that is used exclusively for work purposes
- Officer signed stating taxpayer had to attend workplace in Location B but noted employer may ask taxpayer to travel elsewhere and work in different locations
- Weekly office hours of work set out in contract as 8:30AM to 5:00PM Monday to Friday at Location B
- Taxpayer not paid a travel allowance and is not reimbursed
- Travel from Location A to Location B (and vice versa) deductible?
- Private Binding Ruling Authorisation No. 1052106110372:
<https://www.ato.gov.au/law/view/document?docid=EV/1052106110372>



PBR – legal v beneficial

- Taxpayers' parents purchased property
- Property required major repairs and renovations but parents did not have finances
- Property transferred to taxpayers by parents as a gift to renovate dilapidated dwelling and so that on parents death, proceeds would be shared in accordance with parents' wishes
- Taxpayers resided in property prior to the change in title
- Taxpayers took out a loan to carry out renovations
- Parents assumed responsibility for repayment of loan under taxpayers' name and all other expenses related to the property
- Property has always been considered the parents' main residence and was intended to be until their death
- Neither taxpayers or parents have declared rental income or expenses from the property



PBR – legal v beneficial

- Parent A passed away and then soon after parent B passed away (neither having a Will).
- Taxpayers paid the mortgage and other costs for the property after both parents passed away until the property was sold in a later year.
- Property was in the taxpayers' name and was split 37.5/37.5/25 between taxpayers and their children.
- Will the taxpayers be required to declare CGT in relation to the sale of the property in their income tax return?
- Private Binding Ruling Authorisation No. 1052115910479:
<https://www.ato.gov.au/law/view/document?docid=EV/1052115910479>
- War stories:
 - Son held property for Mum (not on good terms)
 - Son held property for Mum (on good terms)



PBR – cryptocurrency trading

- Taxpayer made significant number of buy and sell transactions in 2021-2022 financial year.
- Transactions were regular and repetitive throughout the year with a trading strategy developed to make short-term income and profit (with electronic records of the trades and analysis kept using crypto-currency software).
- Taxpayer invested a substantial sum of capital to be able to trade and used a personal account in their name to deposit and withdraw funds.
- Taxpayer provided the ATO with details of their income and losses, as well as the number of hours per week that the taxpayer spent on research and analysis on a daily basis.
- Taxpayer used various internet sources to analyse potential trading set-ups and entry/exit methods (including a subscription to obtain professional assistance from other traders to improve their knowledge).
- Taxpayer had a home office set up for the purpose of trading.
- Is the taxpayer carrying on a business for income tax purposes?
- Private Binding Ruling Authorisation No 1052126535535:
<https://www.ato.gov.au/law/view/document?docid=EV/1052126535535>

SGR – A (always) B (be) C (checking)



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- There was a PBR to discuss: Private Binding Ruling Authorisation No 1052111810272
- Query came through instead recently:

Is the practitioner entitled to superannuation under the SFA?

Even though the practitioner is likely to be considered as an independent contractor under the SFA, this does not automatically mean that they are not entitled to superannuation contributions under the *Superannuation Guarantee (Administration) Act 1992 (Act)*.

Section 12 of the Act outlines the meaning of 'employee' for the purposes of superannuation payment and further provides that superannuation is payable to an individual contractor where:

- the contract for services is wholly or principally for the provisions of labour;
- the individual is not paid to achieve a result; and
- the work is to be performed personally (that is, there is no ability to delegate or subcontract the work).

However, under the SFA, as it is considered that the practitioner is performing services for their clients and paying the dental practice for the services and facilities that it provides, then it cannot be said that the individual is working under a contract that is wholly or principally for the provision of labour.

A payment for labour is usually an hourly rate taking the form of salary or wages. The dental practice is not paying either one to the practitioner in this case. Instead, the practitioner is receiving a set percentage of their clients' billings, and the distributions received are in respect of, and conditional to, the completion of each of their client consultations, making the agreement results based. It is therefore the ATO view that the practitioner is neither a common law employee of the dental practice, nor an employee of the dental practice under any expanded meanings within section 12 of the Act.¹

Practitioners should not get confused with the ATO's interpretation on the matter with the Federal Court decision of *Moffet v Dental Corporation Pty Ltd [2019] FCA 344*. While Dr Moffet was found to be an independent contractor, and therefore not entitled to employee leave benefits, the Court found that he was an employee for the purposes of the Act and was owed superannuation payment. However, the agreement in the *Moffet* case was different to an SFA agreement because the clinic did not provide Dr Moffet services and facilities in exchange for him paying a fee. Had this been the case, then it is highly likely Dr Moffett would not have been entitled to any superannuation payment.

How does the practitioner get paid?

A dental practice will pay the Net Patient Billings (the amount of patient fees it holds on behalf of the practitioner less the service and facility fee) to the practitioner.

¹ ATO ID 2011/87

SGR – expanded meaning of employee



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- ATO ID 2011/87:
 - *Is the medical practitioner an employee of the medical clinic according to section 12 of the Superannuation Guarantee (Administration) Act 1992 (SGAA)?*
 - *No. The medical practitioner is not an 'employee' of the medical clinic under either the ordinary meaning of the term, or any expanded meanings within section 12 of the SGAA.*
- ATO ID 2011/878 now withdrawn (as of 23 August 2021)
 - *because the position stated in this ATO ID is no longer current. It is inconsistent with the view expressed by the Full Federal Court in Dental Corporation Pty Ltd v Moffet [2020] FCAFC 118; (2020) 297 IR 183; (2020) 278 FCR 502 about the application of the extended definition of employee in subsection 12(3) of the Superannuation Guarantee (Administration) Act 1992 to a similar factual situation. The current ATO view can be found in Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?*

SGR – expanded meaning of employee



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- Superannuation Guarantee Ruling SGR 2005/1 Superannuation guarantee: who is an employee?
 - *The Ruling clarifies which persons are employees under the extended definition and also considers the circumstances in which an individual who may otherwise be an employee is specifically exempted from the scope of the SGAA – paragraph 3*
 - *a person who works under a contract that is wholly or principally for the labour of the person (subsection 12(3)) (see paragraph 11) – paragraph 10*
 - *For the purposes of subsection 12(3), where the terms of the contract in light of the subsequent conduct of the parties indicate that:*
 - *the individual is remunerated (either wholly or principally) for their personal labour and skills;*
 - *the individual must perform the contractual work personally (there is no right of delegation); and*
 - *the individual is not paid to achieve a result,*
 - the contract is considered to be wholly or principally for the labour of the individual engaged and he or she will be an employee under that subsection.*
– paragraph 11

SGR – A (always) B (be) C (checking)



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- Same outcome ultimately, but important that the prepared document aligns with the ATO guidelines
- What is practically seen:
 - Junior practitioners engaged as an employee
 - Once more experienced, they are placed as independent contractors (where clinic wants more control) or left to operate their own business under a service facility agreement (where clinic does not want to control the practitioner)
 - Should not be afraid to have various offerings dependent on experience and skills

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