



## Practice Update

Please read this update  
and contact this office  
if you have any queries

April 2021

### JobKeeper comes to an end

The ATO has advised that the final JobKeeper payment will be processed in April 2021.

Enrolled businesses do not have to do anything when the program closes, although they will need to complete their final March monthly business declaration by 14 April 2021.

Also, once a business is no longer claiming JobKeeper Payments, it may start to be eligible to receive the JobMaker Hiring Credit for any additional employees that started employment on or after 7 October 2020.

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### ATO loses case on JobKeeper and backdated ABNs

On 24 March 2021, the Full Federal Court handed down its decision in a case concerned with the requirement that an entity claiming JobKeeper must have had an ABN on 12 March 2020, or a later time allowed by the ATO.

The Registrar of the Australian Business Register had reactivated the relevant entity's previously cancelled ABN after 12 March 2020, but with a backdated effective date on or before 12 March 2020.

The Court held that backdating an ABN to have an effective date on or before 12 March 2020 did **not** satisfy the requirement for the entity to have had an ABN on 12 March 2020.

However, the Court also held that the ATO's decision not to allow the entity a "later time" to have an ABN was a "reviewable decision", and that the Commissioner's discretion **should** be exercised in these circumstances (i.e., the Court held that the entity should be entitled to JobKeeper).

The Court's decision does not change the need to satisfy all of the other eligibility requirements.

*Editor: Where the ATO has postponed finalising a decision regarding a taxpayer's eligibility for JobKeeper (and/or the cash flow boost) pending the Court's decision, the ATO will contact the affected taxpayer shortly to provide them with an update.*

### First criminal conviction for JobKeeper fraud

A person claiming to be a sole trader was convicted of three counts of making a false and misleading statement to the Commissioner of Taxation, in order to receive \$6,000 in JobKeeper payments to which he was not entitled, as he was not operating a genuine business and he had already agreed to be nominated by his full-time employer for the allowance.

The ATO has a dedicated integrity strategy that supports the administration of the Government's stimulus packages, with robust and efficient compliance systems that make it very easy to identify fraudulent behaviour and stop it.

ATO Deputy Commissioner Will Day said *"Since the first payments were made in April, the ATO has monitored every payment, every day, every month, and will continue to do so until the last payment is made."*

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### ATO's taxable payments reporting system update

The ATO has confirmed that more than 60,000 businesses have not yet complied with lodgment requirements under the taxable payments reporting system ('TPRS') for 2019/20.

The TPRS is a black economy measure designed to assist the ATO to identify contractors who don't report or under-report their income.

The ATO estimates that around 280,000 businesses need to lodge a *Taxable payments annual report* ('TPAR') for the 2020 financial year.

Importantly, 2020 was the first year that businesses that pay contractors to provide **road freight, information technology, security, investigation, or surveillance services** may need to lodge a TPAR with the ATO (in addition to those businesses providing **building and construction, cleaning, or courier services**).

Businesses who have not yet lodged need to lodge as soon as possible to avoid penalties.

ATO Assistant Commissioner Peter Holt added that some businesses **may not realise** they need to lodge a TPAR, but may be required to, depending on the percentage of payments received for deliveries or courier services.

*“Many restaurants, cafés, grocery stores, pharmacies and retailers have started paying contractors to deliver their goods to their customers. These businesses may not have previously needed to lodge a TPAR. However, if the total payments received for these deliveries or courier services are 10% or more of the total annual business income, you’ll need to lodge,”* Mr Holt said.

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### **FBT rates and thresholds for the 2021/22 FBT year**

The ATO has updated its webpage containing the fringe benefits tax ('FBT') rates and thresholds for the 2017/18 to 2021/22 FBT years.

Two amounts that were not previously announced for the 2021/22 FBT year are:

- ❑ the FBT record keeping exemption is \$8,923 (up from \$8,853 for the 2020/21 FBT year); and
- ❑ the statutory or benchmark interest rate is 4.52% (down from 4.80% for the 2020/21 FBT year).

The ATO also separately released two taxation determinations setting out further rates and thresholds for the FBT year commencing on 1 April 2021, being:

- Motor vehicle (other than a car) — cents per kilometre rate; and
- Reasonable food and drink amounts for employees living away from home.

*Editor: Please contact our office if you need more information about these rates or FBT in general.*

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### **Warning regarding new illegal retirement planning scheme**

The ATO has recently identified a new scheme where SMSF trustees were informed that they

could set up a new SMSF to roll-over the fund balance from the old SMSF and then liquidate their old SMSF, in an attempt to avoid paying potential tax liabilities.

The ATO warns that taking part in this arrangement and others like it can result in civil and criminal actions and could ultimately put the members' retirement savings at risk.

If a trustee of an SMSF believes they have been approached by a promoter of a retirement planning scheme, the ATO recommends they seek a second opinion from a registered tax agent or appropriately qualified financial adviser, and also report the promoter to the ATO.

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### **New succession planning guide for family businesses**

The Australian Small Business and Family Enterprise Ombudsman, in conjunction with Family Business Australia, has released a new online guide to succession planning — the *“Introductory Guide to Family Business Succession Planning”* — which provides a step-by-step guide to passing the family business on to the next generation.

A recent report revealing that 54% of family businesses have no documented succession plan in place and no retirement plan for the current CEO.

The easy-to-read guide offers tips on how to handle tense conversations that can arise between family members throughout the transition phase.

The guide is free and available on both the Family Business Australia and the ASBFEO's websites.

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### **Parliament passes casual employee definition and addresses casual employment uncertainty**

#### **Employment Contracts Legislation Update**

There has been significant press around the government's agenda to reform large parts of the Fair Work regime, most of which failed in the Senate. There has been less press around one significant set of changes that did survive the political process: an introduction, for the first time, of a substantive definition of 'casual employment' into the *Fair Work Act 2009* (Cth) (**Act**), and a scheme for managing casuals.

The change, which was passed on 22 March 2021, seeks to provide greater certainty around casual employment relationships in the wake of last year's decision of the Full Federal Court in *WorkPac v Rossato* [2020] FCAFC 84.

### Definition of casual employee

The Act now defines a 'casual employee' as someone who accepts an offer of employment made on the basis of no firm advance commitment to continuing and indefinite work according to an agreed pattern of work. In determining whether there is no such firm advance commitment, the Act permits a consideration of only:

- whether the employer can elect to offer work and whether the person can elect to accept or reject work;
- whether the employee will work only as required;
- whether the employment is described as casual employment; and
- whether the employee will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

Just as importantly, the Act makes clear that these criteria can be considered only at the time of the offer and acceptance – ie when the contract is made. Subsequent conduct may not be taken into account.

If an employee is a casual at the time the contract is made, the Act provides that the employee remains a casual employee until their employment is converted to full-time or part-time (see below) or the employee accepts an alternative offer of non-casual employment by the employer and commences work on that basis.

### Casual conversion

The Act also now requires an employer to offer casual employees the opportunity to convert to full-time or part-time employment if they have been employed for 12 months and working a regular pattern of hours on an ongoing basis. An employer is not required to make an offer of casual conversion if there are reasonable grounds not to make the offer, including if:

- the employee's role will cease to exist in the next 12 months;

- the employee's hours will be significantly reduced in the next 12 months;
- there will be a significant change to the employee's work days or work hours in the next 12 months, which cannot be accommodated within the employee's available days or hours; or
- the offer would not comply with a Commonwealth, State or Territory recruitment or selection process.

While employees will also have the right to request casual conversion after 12 months of employment in certain circumstances (as many already did under Modern Awards), the Act now shifts the impetus for the move, away from requiring an employee to ask for permanent employment, to requiring an employer to offer permanent employment or show good reason why that should not take place.

### Casual loading set-off

If an employee thought to be a casual employee successfully makes a claim for entitlements on the basis that the employee is, in fact, a full-time or part-time employee, the Act now requires a court to reduce the amount of the employee's claim by an amount equal to any casual loading paid to the employee.

The amount by which the claim is to be reduced must be determined by reference to any contract, Award or enterprise agreement terms that specify what the loading compensates for (eg the entitlement to annual leave) and the proportion of the loading attributable to each entitlement. If the contract (etc) term does not specify the proportion attributable to each entitlement, then the court determines the attributable proportion in all the circumstances. Clarity about what benefits of ongoing employment the casual loading incorporates will be an essential condition to assist in managing the risk of disputes about casual employment.

### Casual information statement

The Act also now requires an employer to give a Casual Information Statement (to be developed by the Fair Work Ombudsman) to an employee it intends to engage as a casual employee.

#### Actions for employers

Following these amendments to the Act, it will be particularly important for employers to have written employment contracts in place for their casual employees which make clear:

- that there is no firm advance commitment to continuing and indefinite work (including addressing the criteria that the Act says are determinative of this); and
- the basis upon which any casual loading is paid to the employee.

Employers should review their casual employment templates to ensure they achieve these things.

Employers should also:

- ensure they have processes in place to assist them to identify when an offer to convert to ongoing employment should be made to a casual employee; and
- update their induction and on-boarding procedures to incorporate the Casual
- Information Statement, once available.

Please Note: Many of the comments in this publication are general in nature and anyone intending to apply the information to practical circumstances should seek professional advice to independently verify their interpretation and the information's applicability to their particular circumstances.