client alert | explanatory memorandum

February 2021

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 22 January 2021.

ATO warning: watch out for tax avoidance schemes

To many individuals, the difference between tax planning and tax avoidance is not immediately obvious, while the ATO considers the former to be a legal way of arranging your affairs to minimise the tax you pay, the latter could land you in legal hot water. So, how can your clients tell the difference? The ATO has outlined some common features of tax avoidance schemes in order to warn individuals to steer clear of them. While it is not always easy to identify these schemes, the old adage of “if it seems too good to be true, it probably is” usually applies.

The ATO warns individuals to steer clear of tax avoidance schemes involving deliberate exploitation of the tax and super systems which may put them at risk of paying back tax, with interest and penalties. According to the ATO, most people get suckered into these schemes by promoters making promises of tax benefits that aren’t legally available.

These tax avoidance schemes range from mass-marketed arrangements advertised to the public, to individualised arrangements offered directly to experienced investors. Other schemes exploit the social/environmental conscience of people or their generosity. As different as these schemes are, the common thread often involves promises of reducing taxable income, increasing deductions, increasing rebates or entire avoidance of tax and other obligations.

The ATO notes that tax avoidance schemes may include complex transactions or distort the way funds are used in order to avoid tax or other obligations. Schemes may also incorrectly classify revenue as capital, exploit concessional tax rates, or inappropriately move funds through several entities including trusts to avoid or minimise tax that would otherwise be payable.

Currently, the ATO has its eyes on retirement planning schemes, private company profit extraction and certain financial products. In relation to retirement planning, it has outlined areas of concern including non-concessional cap manipulation, life interests over commercial property, dividend stripping, some types of limited recourse borrowing arrangements, and personal services income.

For private companies, the ATO is concerned with privately owned and wealthy groups with tax or economic performance not comparable to similar business and those with low transparency tax affairs, or unusual/large transactions with could be an indicator for shifting of wealth.

While the majority of financial products offered to retail investors do not raise concerns with the ATO, it has flagged a small number of products that promise to provide investors with tax benefits where those benefits may not be available to some or all investors who invest in the product. Additionally, there may be issues concerning whether interest and borrowing costs can be claimed as a tax deduction, transactions involving deferred purchase agreements, and various CGT issues.

Source: www.ato.gov.au/Tax-professionals/Your-practice/Tax-and-BAS-agents/Recognising,-rejecting-and-reporting-tax-avoidance.

COVID-19 Supplement extension to 31 March 2021

The Federal Minister for Families and Social Services has registered the *Social Security (Coronavirus Economic Response – 2020 Measures No 16) Determination 2020* to ensure the continued payment of the COVID-19 Supplement to 31 March 2021.

The COVID-19 Supplement will be paid to recipients of the following:

- JobSeeker Payment;
- Parenting Payment;
- Youth Allowance;
- Austudy Payment;
- Special Benefit;

- Partner Allowance; and
- Widow Allowance.

It will be paid at the rate of $150 a fortnight (down from the previous $250 a fortnight) for social security instalment periods for the period 1 January 2021 to 31 March 2021. This is courtesy of the *Social Services and Other Legislation Amendment (Extension of Coronavirus Support) Act 2020*.

The new determination also extends (until 16 April 2021) the period for which a person is taken to receive a social security pension or benefit at nil rate, resulting in their continued access to benefits such as concession cards.

In addition, the determination extends the following temporary social security measures to 31 March 2021:

- waivers of the ordinary waiting period for JobSeeker Payment, Parenting Payment and Youth Allowance (Other), and the seasonal work preclusion period and the newly arrived resident's waiting period for JobSeeker Payment, Parenting Payment, Youth Allowance, Austudy Payment and Special Benefit;
- the exemption from the qualifying residence requirement for Parenting Payment;
- the modifications of the social security law regarding the process to determine when a person is a "member of a couple" for the purposes of JobSeeker Payment;
- income-free areas and taper rates for JobSeeker Payment and Youth Allowance (other) recipients to $300 with a 60 cent taper (except single principal carer parents, who have an income-free area of $106 and a taper of 40 cents) and the current 27 cent taper rate associated with the partner income test for JobSeeker Payment;
- access to certain payment portability arrangements currently in place for Age Pension recipients (and certain recipients of the Disability Support Pension);
- the power of the Secretary of the Department of Social Services to extend the Mobility Allowance two-week and 12-week qualification grace periods to 18 weeks in recognition of the continued difficulty for some people, in particular people with disability, to access the workplace and other activities.

Source: www.legislation.gov.au/Details/F2020L01671.

Working from home deductions: "shortcut" rate until 30 June 2021

The ATO has again extended – this time from 31 December 2020 to 30 June 2021 – the application of the "shortcut" rate outlined in Practical Compliance Guideline PCG 2020/3 for claiming work-from-home running expenses.

As amended on 17 December 2020, PCG 2020/3 allows eligible taxpayers to claim additional running expenses incurred between 1 March 2020 and 30 June 2021 at the rate of $0.80 per work hour, provided they keep a record of the number of hours worked from home. Taxpayers eligible to use the shortcut rate are employees and business owners who:

- work from home to fulfil their employment duties or to run their business during the period from 1 March 2020 to 30 June 2021; and
- incur additional running expenses that are deductible under s 8-1 or Div 40 of the *Income Tax Assessment Act 1997* (ITAA 1997).

The additional running expenses covered by the shortcut rate are listed at para 26 of PCG 2020/3 and comprise lighting, heating, cooling and cleaning costs, electricity for electronic items used for work, the decline in value and repair of home office items such as furniture and furnishings in the area used for work, phone and internet expenses, computer consumables, stationery and the decline in value of a computer, laptop or similar device. Crucially, taxpayers who decide to use the shortcut rate to claim a deduction for their additional running expenses cannot claim any further deductions for the listed expenses.

Taxpayers who choose not to use the shortcut rate can:

- claim $0.52 per work hour for heating, cooling, lighting, cleaning and the decline in value of office furniture (in accordance with Law Administration Practice Statement PS LA 2001/6), plus the work-related portion of phone and internet expenses, computer consumables and stationery and the work-related portion of the decline in value of a computer, laptop or similar device; or
- claim the actual work-related portion of all running expenses, which need to be calculated on a reasonable basis.

Source: www.ato.gov.au/law/view/document?DocID=COG/PCG20203/NAT/ATO/00001&PiT=99991231235958.

JobMaker Hiring Credit rules and reporting

The Government registered the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 9) 2020* on 4 December 2020. These set out details of the JobMaker Hiring Credit rules.

The JobMaker Hiring Credit was announced in the Federal Budget and legislation to implement the rules – the *Economic Recovery Package (JobMaker Hiring Credit) Amendment Act 2020* – received assent on 13 November 2020. This Act contains what may be termed the "machinery" provisions, while the Statutory Rules contain the "nuts and bolts" of the system.

The Statutory Rules specify:

- the start and end date of the scheme;
- when an employer or business is entitled to a payment;
- the amount and timing of a payment; and
- other matters relevant to the administration of the payment.

Broadly, the JobMaker Hiring Credit will be available to employers for each new job they create over the next 12 months for which they hire an eligible young person aged 16 to 35 years old.

Generally, the amount of the JobMaker Hiring Credit payment depends on the age of the eligible additional employee when they commence employment with the entity. An entity may receive up to $200 per week for each eligible additional employee aged 16 to 29 years and up to $100 per week for each eligible additional employee aged 30 to 35 years.

The JobMaker scheme commences on 7 October 2020 and ends on 6 October 2022, but only applies to eligible individuals who commence employment between 7 October 2020 and 6 October 2021.

An employer will be eligible for a JobMaker payment if:

- the period is a JobMaker period;
- the employer qualifies for the JobMaker scheme for the period;
- the employer has one or more eligible additional employees for the period;
- the employer has a headcount increase for the period;
- the employer has a payroll increase for the period;
- the employer has notified the ATO of its election to participate in the scheme;
- the employer has given information about the entitlement for the period to the Commissioner in accordance with the requisite reporting requirements (to be determined by the ATO); and
- the employer is not entitled to a JobKeeper payment for an individual for a fortnight that begins during the period.

Changes from the draft Rules

The Statutory Rules were released in draft form on 2 November 2020. During the consultation, "some concerns" were raised around complexity for small businesses. Changes were subsequently made to to clarify certain provisions and to reduce complexity "where possible". However, the explanatory statement (ES) to the registered Rules says that some complexity in the provisions "is unavoidable" (particularly regarding the "additionality" requirements). The ES goes on to state, however, that "much of the practical implications" will be resolved through the ATO's "proposed administration of the scheme".

There is no doubt that the logistics of the JobMaker Hiring Credit are very technical (unfortunately necessitating the following long discussion). Indeed, the provisions dealing with calculating the entitlement amount are almost baffling.

JobMaker periods

Entitlement to a JobMaker Hiring Credit payment is assessed in relation to three-month periods known as "JobMaker periods". Accordingly, each of the following is a JobMaker period (inclusive):

- 7 October 2020 to 6 January 2021;
- 7 January 2021 to 6 April 2021;
- 7 April 2021 to 6 July 2021;
- 7 July 2021 to 6 October 2021;
- 7 October 2021 to 6 January 2022;
- 7 January 2022 to 6 April 2022;

- 7 April 2022 to 6 July 2022; and
- 7 July 2022 to 6 October 2022.

It be seen that there are eight JobMaker periods. Note that the distinction between periods 1 to 4 and periods 5 to 8 becomes relevant later in the following discussion.

Qualifying employers

The JobMaker Hiring Credit payment is only available to "qualifying entities". An entity is a qualifying entity in respect of a JobMaker period if, from the time it elected to participate in the scheme, it:

- carries on a business in Australia;
- has an Australian Business Number (ABN); and
- is registered for pay-as-you-go (PAYG) withholding.

The payment is also available to certain non-profit bodies or deductible gift recipients. Note that Australian universities may also participate in the scheme.

The term "business" is as it is used in the *Income Tax Assessment Act 1997* (ITAA 1997). GST pundits will notice that this is narrower than the "carrying on an enterprise" test used in that legislation.

Entities must be up to date with lodgments – at the time an entity gives information to the Commissioner of Taxation about its entitlement for a JobMaker period, the entity cannot have any outstanding income tax or GST returns that have become due in the past two years.

The ATO will require that information be provided through single touch payroll (STP). Entities that are not enrolled in STP will not qualify for JobMaker payments.

Certain entities are specifically excluded from eligibility:

- those who have been subject to the levy imposed by the *Major Bank Levy Act 2017* for any quarter ending before 1 October 2020 (or where a consolidated group member had been subject to the levy);
- any Australian government agency or local governing body (or wholly-owned entity of those);
- sovereign entities; and
- those where a provisional liquidator or liquidator has been appointed to the business or a trustee in bankruptcy had been appointed to the individual's property at any time in the fortnight.

Those who have clients who may be getting close the financial cliff will be most interested in this last category.

Disqualified employers

An entity may be separately disqualified for the JobMaker scheme for a period if:

- at or before the end of the period, the entity terminates the employment; or
- at or before the end of the period, the entity reduces the ordinary hours of work of an employee; and
- the termination or reduction is part of a scheme for the sole or dominant purpose of the entity obtaining, or increasing the amount of, the JobMaker payment.

This denies access to JobMaker for an employer who enters into an arrangement to artificially inflate their employee headcount and/or payroll for a JobMaker period. Terminating or reducing the hours of an existing employee could be considered part of a scheme to facilitate greater access to JobMaker by hiring other employees.

Generally, this rule would not apply to an arrangement voluntarily entered into by the employee whose employment was terminated or whose ordinary hours of work were reduced.

An employer who is disqualified under this specific rule loses all entitlements to JobMaker for any JobMaker period that ends after the termination or reduction in hours occurred. This includes the period in which the termination or reduction occurred, as well as any subsequent periods.

In addition to losing access to the hiring credit under the general anti-avoidance provisions, employers who take adverse action against an older employee in order to benefit from the scheme may also be acting unlawfully under the *Age Discrimination Act 2004* and the *Fair Work Act 2009*.

One or more additional employees for the period

To be eligible, an employer must have one or more eligible additional employees for a JobMaker period. An "eligible additional employee" is an individual who:

- was employed by the qualifying entity at any time during the JobMaker period;
- commenced employment between 7 October 2020 and 6 October 2021;

- was aged between 16 and 35 years at the time they commenced employment (note that there are split rates depending on the age of the individual at the commencement of their employment);
- has worked or has been paid for an average of 20 hours a week for each whole week the individual was employed by the qualifying entity during the JobMaker period;
- meets the pre-employment conditions;
- meets the notice requirement; and
- is not excluded as an eligible additional employee.

Two important limitations flow from these conditions.

First, the requirement that an employee must commence employment between 7 October 2020 and 6 October 2021 means that JobMaker is only available for additional employment that occurs within this 12-month period.

Second, the requirement that an employee commenced employment no more than 12 months before the start of a particular JobMaker period means that employers can only claim JobMaker for a given employee for up to 12 months (ie from the time they commence employment). After 12 months, the employer can no longer receive payments in relation to that employee. However, employers can continue to qualify for payments in relation to another eligible additional employee who commenced their employment at a later time. This is the reason that, while scheme only applies for employment commenced up to 6 October 2021, payments can continue to operate until 6 October 2022 (ie JobMaker Period 8).

Pre-employment condition: recipients of social security

The pre-employment condition is that for at least 28 of the 84 days (ie for four out of 12 weeks) immediately before the commencement of employment of the individual, the individual was receiving the following payments under the Social Security Act 1991:

- Parenting Payment;
- Youth Allowance (except if the individual was receiving this payment on the basis that they were undertaking full time study or was a new apprentice); or
- JobSeeker Payment.

Notice requirement

The notice requirement for an eligible additional employee is that the individual must give written notice to the employer in the approved form that the individual:

- met one of the applicable age requirements at the time they commenced employment (ie they were either aged between 16 and 29, or between 30 and 35);
- meets the pre-employment condition; and
- has not provided a similar notice to another entity of which they are currently an employee.

This notice requirement allows qualifying entities to rely on declarations made by the employee regarding their satisfaction of the pre-employment condition and that they are not nominated by another entity to receive the JobMaker Hiring Credit payment. Under no circumstances are employees permitted to have valid notices with multiple employers at the same time.

This does provide some relief for employers – the onus very much rests with the employee to make full and true disclosures.

Excluded persons

There are two broad categories of individuals who are excluded from qualifying as an eligible additional employee.

The first category, not unexpectedly, is relatives of the employer, namely:

- if the entity is a sole trader – the sole trader themselves;
- if the entity is a partnership – a partner of the partnership;
- if the entity is a trust – the trustee or beneficiary of that trust; or
- if the entity is a company (other than a widely-held company) – a shareholder in the company or a director of the company.

The term “relative” has the same meaning as in s 995-1 of the ITAA 1997. The exclusion of relatives applies on a look-through basis, where interposed entities are disregarded for the purposes of the test.

The second exclusion applies to contractors. Specifically, an individual is also excluded from being an eligible additional employee if, at any time between 6 April 2020 and 6 October 2020, the individual was

engaged by the entity as a contractor or a subcontractor where they worked in a substantially similar role or performed substantially similar functions or duties.

This is designed to prevent parties converting an existing consultancy relationship into an employment relationship, as this would not result in additional aggregate employment (which is what JobMaker is designed to stimulate).

Headcount increase amount for a JobMaker period

An entity has a "headcount increase" for a period if the number of employees employed by the entity at the end of the last day of the JobMaker period is greater than the entity's "baseline headcount" for the period. This excess or increase in employees in comparison to baseline headcount is the "headcount increase amount".

Note, though, that to be entitled to the JobMaker Hiring Credit payment for a period, an entity must have at least one employee for whom the entity is not entitled to the JobMaker Hiring Credit payment. As a result, an entity cannot be a sole trader and employ themselves to receive the JobMaker Hiring Credit payment – there must be additional employees.

For the first four JobMaker periods (7 October 2020 to 6 January 2021, 7 January 2021 to 6 April 2021, 7 April 2021 to 6 July 2021 and 7 July 2021 to 6 October 2021), the entity's baseline headcount will be the greater of one and the number of employees employed by the entity at the end of 30 September 2020.

In other words, additional employment for the first four JobMaker periods is measured by reference to the number of employees on the books as at 30 September 2020.

For the last four JobMaker periods (ie 7 October 2021 to 6 January 2022, 7 January 2022 to 6 April 2022, 7 April 2022 to 6 July 2022 and 7 July 2022 to 6 October 2022), reference is made to the corresponding period 12 months earlier or the increase of the previous period, whichever is higher. There are special rules that apply to working out headcount increase amount for JobMaker Period 5 to Period 8 (but, at this point, this can be next year's problem).

Payroll increase for a JobMaker period

An entity's "total payroll amount" must be greater than its "baseline payroll" for a JobMaker period to qualify for a JobMaker payment.

The amount for each category is referable to:

- salary, wages, commission, bonuses and allowances;
- amounts withheld under the PAYG withholding regime;
- salary sacrifice superannuation contributions; and
- amounts applied or dealt with in any way where the employee has agreed for the amount to be so dealt with in return for salary and wages to be reduced (eg amounts forming part of salary sacrifice arrangements).

An entity's total payroll amount for a JobMaker period is the sum of these payroll amounts for each of the entity's employees for each pay cycle that ended during the JobMaker period.

An entity's baseline payroll amount is the sum of those amounts for a reference period that ended on or immediately before 6 October 2020 (by reference to an equivalent number of pay cycles as the number of pay cycles in the JobMaker period).

The ES to the Statutory Rules states that "the payroll amount is worked out as the excess of the entity's total payroll amount for a JobMaker period from the baseline payroll amount". This is used in the formula to work out the amount of payment.

Where the payroll amount for a JobMaker period is less than or equal to the reference period payroll amount, the entity may not claim a JobMaker Hiring Credit for that JobMaker period. This reflects that in such cases the entity has not had a substantive increase in its overall employment levels, irrespective of whether it has nominally increased the number of its employees.

In other words, the design is presumably to prevent employers cutting the wages of existing employees to take on new employees and therefore access JobMaker payments.

Amount of JobMaker payment

This is where the draft Statutory Rules start to get quite complex. The amount of payment that a qualifying entity may receive in relation to a JobMaker period is the lesser of:

- the headcount amount; and
- the payroll amount.

It is expected that the ATO will establish systems to automate the calculation of the payroll amount "for most employers". This is, to quote the ES to the Rules, "because the calculations only rely on inputs relating to start and cessation times, the age of eligible employees at the time they commenced employment, the entity's baseline headcount and payroll on 30 September 2020 and the entity's headcount and payroll at the end of the period".

The payroll amount is the excess of the entity's total payroll amount for a JobMaker period from the baseline payroll amount, as already discussed.

The headcount amount is worked out as follows. This information is taken largely verbatim from the ES.

It is worked out on a daily basis in the relevant JobMaker period. In working out the headcount amount, different calculations apply based on whether an eligible additional employee is aged from 16 to 29, and from 30 to 35. For these two groups, the higher rate of payment is $200 per week, and the lower rate of payment is $100 per week. The headcount amount based on the total counted days in a period is capped by the maximum payable days as worked out below.

To calculate the headcount amount for a period under the formula, the entity should:

- *Step 1*: count the number of higher rate days for the JobMaker period by adding together the number of days each higher rate eligible additional employee was employed in the period – these individuals are those who were aged 16 to 29 years (inclusive) at the commencement of their employment;
- *Step 2*: count the number of lower rate days for the JobMaker period by adding together the number of days each lower rate eligible additional employee was employed in the period – these individuals are those who were aged 30 to 35 years (inclusive) at the commencement of their employment;
- *Step 3*: count the number of maximum payable days for the JobMaker period by subtracting the entity's baseline headcount from the number of employees employed by the entity at the end of the last day of the period, and multiply this by the number of days in the period. For example, for the JobMaker period of 7 October 2020 to 6 January 2021 (dates inclusive), there are 92 days.

Where the sum of steps 1 and 2 (total counted days) is equal to or less than the maximum payable days for the period, the headcount amount in a JobMaker period is the sum of:

- the amount derived by multiplying the higher rate days for the period by $200, dividing the result by seven (for the number of days in a week) and rounded up to the nearest cent; and
- the amount derived by multiplying the lower rate days for the period by $100, dividing the result by seven (for the number of days in a week) and rounded up to the nearest cent.

However, if the total counted days (sum of the higher rate days and the lower rate days) exceeds the cap imposed by the maximum payable days, the counted days are reduced to the number of maximum payable days by:

- reducing the lower rate days; then
- reducing the higher rate days.

Accordingly, it is possible for the maximum payable days to cap the total counted days for a JobMaker period to the effect that there are only higher rate days used for the calculation and no lower rate days. After applying the cap imposed by the maximum payable days, the headcount amount is worked out according to the formula.

Participation and notification requirements

To be entitled to the JobMaker Hiring Credit payment in relation to a JobMaker period, the entity must have notified the Commissioner in the approved form of its election to participate in the scheme by the end of the period that the entity first elects to participate. The notification requirements are set out in the *JobMaker Hiring Credit Reporting Obligations Instrument 2020*.

Interaction with JobKeeper

An entity cannot participate in the JobMaker scheme if it is entitled to receive a JobKeeper payment in respect of an individual for a JobKeeper fortnight that begins during the JobMaker period. This ensures that an entity cannot participate in both the JobKeeper scheme and the JobMaker scheme simultaneously.

The prohibition on JobKeeper fortnights that begin during a JobMaker period allows an entity to have a single JobKeeper fortnight end at the start of a JobMaker period.

Permitting this overlap allows an entity to cease its participation in the JobKeeper scheme and begin its participation in the JobMaker scheme without requiring a "gap" between the two schemes. Preventing a JobKeeper fortnight from starting in a JobMaker period ensures that any such overlap is always limited to a part of a single JobKeeper fortnight. According to the ES, this reflects that any transition between the two schemes must be limited and temporary in nature.

Reporting obligations

The Government also registered the *JobMaker Hiring Credit Reporting Obligations Instrument 2020* on 4 December 2020. This sets out the information that employers who seek to participate in the JobMaker Hiring Credit scheme must provide the ATO.

Specifically, it describes information that must be reported under JobMaker, including the information that must be reported each time a claim for a payment is made under the scheme. The instrument also explains how reporting must be undertaken and when reports are due.

Employee reporting

Certain information must be reported before an employer can claim JobMaker. This includes the following details for each employee an employer intends to claim for as an eligible additional employee using STP:

- TFN;
- date of birth;
- full name;
- date employment commenced (if occurring in the JobMaker period);
- date employment ceased (if occurring in the JobMaker period); and
- whether the employee met the average hours of work requirement for the JobMaker period.

The ATO is developing specifications setting out the JobMaker Hiring Credit functionality for STP enabled payroll software. Information will be located on the ATO website.

The Rules set out reporting deadlines on this, starting in April 2021 and progressing forward on a monthly basis. Given that the information must be provided before a claim can be paid, it is in the employer's interest to provide the information as soon as possible.

Payment claim information

Information that must be provided when a claim is made includes:

- the total payroll expenses for the JobMaker period;
- the baseline payroll amount for the period;
- the total headcount at the end of the JobMaker period;
- the baseline headcount for the JobMaker period;
- confirmation that each employee included in the claim calculation is an eligible additional employee (including that the minimum hours test has been satisfied);
- a declaration which meets specific requirements;
- a signature which meets specific requirements; and
- financial institution account details.

This information is to be reported via ATO Online services for Individuals, ATO Online Services for Business, Business Portal or Online Services for Agents or the Business Portal as part of the claims process.

Source: www.legislation.gov.au/Details/F2020L01534/Download;
https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr6609%22;
www.legislation.gov.au/Details/F2020L01535/Download.

Small businesses: don't forget your FBT concessions

If your clients own a small business still recovering from the COVID-19 induced downturn, remember that they can take advantage of FBT concessions to lower the amount of FBT they will need to pay. The concessions include exemptions for car parking in some instances, and work-related portable electronic devices. All this could mean more cash to invest in the revitalisation and ultimate success of small businesses. Even if a business was not considered to be a small business entity a few years ago, the turnover threshold has changed, and it may be worth a reassessment.

For small business employers, the car parking benefits provided to employees could be exempt if the parking is not provided in a commercial car park and the business satisfies the total income or the turnover test. This is the case if the business is not a government body, listed public company or a subsidiary of a listed public company.

The second exemption relates to work-related devices. Small businesses can to provide their employees with multiple work-related portable electronic devices that have substantially identical functions in the same FBT year, with all devices being exempt from FBT. Note, however, that this only applies to devices that are primarily used for work, such as laptops, tablets, calculators, GPS navigations receivers and mobile phones.

What is a "small business entity"?

To be a small business entity, the business must satisfy the turnover threshold, which for the 2020–2021 FBT year (1 April 2020 to 31 March 2021) is $10 million. From 1 April 2021 (that is, the 2021–2022 FBT year onwards), the turnover threshold will increase to $50 million.

Therefore, to be a small business entity, the business in question must have had an aggregated turnover in the previous year of less than $10 million for the 2020–2021 FBT year, or $50 million for the 2021–2022 FBT year and onwards. There may also be other tests that the business can satisfy in place of the aggregate turnover test, depending on its circumstances.

When concessions are not available

Businesses that do not satisfy the small business entity tests will not be eligible for the car parking or work-related devices exemption. This means that, generally, the business/employer can only provide one work-related item in each category (ie if the items' functions are substantially identical) to each employee, each FBT year (unless an additional item is a replacement).

Whether the items have substantially identical functions depends on the facts of each case. For example, the ATO considers that where a tablet can perform the functions of a laptop computer, even in reduced capacity, it has substantially identical functions to a laptop. Thus, either a laptop or a tablet may be provided to each employee for each FBT year, but not both.

As for car parking fringe benefits, where a business is not considered to be a small business or where it provides car parking to employees in a commercial car park, the business will not be exempt and will bear the extra administrative burden of having to work out whether it is liable for car parking fringe benefits, and if so, the amount of FBT it is liable for.

Where a business does not satisfy the definition of a small business entity in the current FBT year, this may be worth a revisit in the 2021–2022 FBT year when the threshold will have increased – the business may then be eligible to receive these FBT exemptions as well as other tax concessions.

New insolvency rules commence

Important changes to Australia's insolvency laws commenced operation on 1 January 2021. The Government has called these the most important changes to Australia's insolvency framework in 30 years.

The measures apply to incorporated businesses with liabilities less than $1 million. The intention is that the rules change from a rigid "one size fits all" model to a more flexible "debtor in possession" model, which will allow eligible small businesses to restructure their existing debts while remaining in control of their business. For those businesses that are "unable to survive", a new simplified "liquidation pathway" will apply for small businesses to allow faster and lower-cost liquidation.

The changes were enacted by the *Corporations Amendment (Corporate Insolvency Reforms) Act 2020*.

The measures are expected to cover around 76% of businesses currently subject to insolvency, 98% of which have fewer than 20 employees. The new rules do not apply to partnerships or sole traders.

Treasury factsheet

On 24 December 2020, Treasury released a factsheet entitled *Simplified Debt Restructuring: a factsheet for small business*. It states that to be eligible to access this new process a company must:

- be incorporated under the *Corporations Act 2001*;
- have total liabilities which do not exceed $1 million on the day the company enters the process – this excludes employee entitlements;
- resolve that it is insolvent or likely to become insolvent at some future time and that a small business restructuring practitioner should be appointed; and
- appoint a small business restructuring practitioner to oversee the restructuring process, including working with the business to develop a debt restructuring plan and restructuring proposal statement.

A list of restructuring practitioners that can undertake this work is available on the Australian Securities and Investments Commission (ASIC) website.

The temporary insolvency and bankruptcy protections were extended until 31 December 2020 (having otherwise been due to expire in September 2020). To access the relief, companies were required to declare their intention to access the restructuring provisions by publishing the declaration on the published notices website from 1 January 2021. Companies must also notify ASIC within five business days that they have made this declaration.

From the date a declaration is published, temporary relief from insolvent trading liability and responding to statutory demands from creditors applies to the business for up to three months. The ability to declare such an intention will be available until 31 March 2021.

ASIC declaration

ASIC confirms that for a debt restructuring, a company is required to make a declaration that it is eligible to access the new process, which must be published on the ASIC site (and a copy given to ASIC).

Source: https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/insolvency-reforms-support-small-businesses-start; https://treasury.gov.au/publication/simplified-debt-restructuring; https://newshub.asic.gov.au/insolvency-laws-for-small-business-are-changing/; https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-directors/temporary-restructuring-relief/.

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