Raymond K H Ho & Associates Pty Ltd **Newsletter June 2020**

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# Have casual workers been granted annual leave?

**News headlines recently stated that casual workers have won the right to paid leave following a decision in the Federal Court. As usual, the devil is in the detail.**

At present, there is no global change granting Australian casual workers paid leave. The case however, highlights the long running problem of determining over time, who is a permanent staff member and entitled to paid leave and other benefits, and who is a casual worker entitled to a casual loading.

In the WorkPac v Rossato case, WorkPac, a specialist mining and engineering labour hire company, employed Mr Rossato as a casual worker across six consecutive employment contracts for a continuous period of approximately three and a half years. Over that time, Mr Rossato was paid a casual loading of 25% of the minimum rate of pay payable under the Enterprise Agreement, which was in part, paid in lieu of leave.

Mr Rossato worked every shift he was rostered for except where he was given approval to take rest and recreation, and when his partner was airlifted to hospital.

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In its decision, the Federal Court found that Mr Rossato was a permanent full-time employee across each of his contracts and entitled to his accrued leave entitlements and payment for the public holidays where he was rostered off work. WorkPac was unable to reduce the liability owing to Mr Rossato by the casual loading paid to him over the course of his contracts, with the court noting, “There is a superficial attraction to the notion that something given in substitution of an entitlement has an equivalent value to the entitlement itself and is therefore of the same character.”

Each of the contracts signed by Mr Rossato contained a declaration headed “Casual or Maximum Term Employee.” However, the court reiterated the observation that, “agreements by which people are engaged to work are typically partly written, partly oral and “partly left to evolve by conduct” as time goes on.” That is, what the employee signs up to does not necessarily define what the employment relationship becomes.

The WorkPac v Rossato case does not generally award casual employees paid leave entitlements but it does highlight the problem that can occur over time where the nature of the employment arrangement changes from casual to a more permanent arrangement.

Recognition of this pathway from casual to permanent employment is now a part of many Modern Awards. The Fair Work Commission’s updates to Modern Awards rolled out across this year include a *Right to request casual conversion* clause that enables a long-term casual worker to request permanent employment. The employer can refuse that request but only on “…reasonable grounds and after there has been consultation with the employee.”

The pathway also has political impetus with the Prime Minister’s recent ‘JobMaker’ speech at the National Press Club nominating the issue as one of the five working groups for negotiation.

## In brief: types of employment

- **Permanent employees** – full-time or part-time. Benefits include paid leave, notification on termination, redundancy where applicable, and on 12 months continuous service, parental leave, right to request flexibility, and access to unfair dismissal.
- **Casuals -** has no guaranteed hours of work or commitment of work in advance, does not have to accept work on offer, usually works irregular hours, doesn't get paid sick or annual leave, can end employment without notice (unless notice is required by a registered agreement, award or employment contract). Is entitled to a casual loading, and unpaid carer’s and family and domestic violence leave.
- **Long-term casuals** - a casual employee employed by the business on a regular and systematic basis. There is a commitment to ongoing work (the employer has not made it clear that they should not have an expectation of ongoing work). Long-term casuals have the same entitlements as casual workers except they are also entitled to take parental leave, request flexible working arrangements, and access to unfair dismissal.
- **Shiftworkers** - an employee who works shifts and gets an extra payment for working shift hours. Generally, Awards or agreements have a specific definition of what a shiftworker is and the conditions that apply. Refer to the relevant Award for the definition of full time, part time or casual employees.
- **Fixed term contract** – same entitlements as permanent employees but the employment relationship is for a fixed period. Where the contract is continually renewed, disputes may arise as to whether the employee is a permanent employee.
- **Independent contractor** – Generally, contracted to the business to produce a specific result for the business (as opposed to hours worked). Operates autonomously to the business, is generally financially self-reliant, and chases profit (that is a return on risk) rather than simply a payment for the time, skill and effort provided.

*Refer to the Fair Work Ombudsman for clarification of your specific scenario.*

### JobKeeper's impact on employee entitlements

To be eligible for JobKeeper payments as a casual employee, the individual had to be a long-term casual at 1 March 2020. Casual employees do not qualify unless they meet this condition. For some employers, JobKeeper has ensured that there is now a clear definition of some employees as a long-term casual where JobKeeper payments have been paid.

Long term casuals have additional entitlements to casual employees providing for parental leave (and a guarantee of their job or an equivalent on their return from leave), and the right to request flexible arrangements.

# The ATO's JobKeeper audit targets

**The JobKeeper subsidy has progressed beyond the rush for eligibility and entered its second phase: compliance. Late last month, the Australian Taxation Office (ATO) released guidance highlighting where the regulator will focus its compliance resources.**

> **"…while it is all very well to talk of 'turning points', one can surely only recognise such moments in retrospect."**
>
> Kazuo Ishiguro, *The Remains of the Day*

### The JobKeeper estimates error

Hindsight is a dangerous lens as Treasury discovered last month announcing that the number of employees expected to be covered by the JobKeeper scheme was overstated in the original announcement by approximately 3 million. The overstatement reflects "the level and impact of health restrictions not having been as severe as expected and their imposition not having been maintained for as long as expected at the time," the Treasury statement says.

At the time of the Treasury estimates, not long after the country went into lockdown, we simply did not know what to expect. The first stimulus measures had been announced and long queues formed in front of Centrelink offices. Supermarket shelves were being stripped of essentials. Alarming daily global updates showed the virus spreading unimpeded in many parts of the world. China demonstrated the need for fast, severe and

extended lockdowns to remove the possibility of community transmission. For Australia, there was no appetite to wait and see what might happen as other countries with devastating death rates did. We acted swiftly and we have reaped the benefits of that action with a low death rate, albeit at an economic cost. For many businesses, estimating the potential impact of the pandemic, the expectations were the same - fast, severe and extended. Now, with the JobKeeper scheme entering a compliance phase, we need to go back and point to the facts that supported the estimates declared to the ATO.

## The ATO's JobKeeper targets

The ATO is looking carefully at businesses that appear to have made adjustments to their circumstances to meet the JobKeeper eligibility requirements where, if those adjustments had not been made, the entity would have been ineligible or had lower JobKeeper payments. Or, where adjustments have been made to enable another entity or subcontractor to meet the decline in turnover test.

Industries or businesses that have not experienced adverse trading conditions and those that appear to have increased staff numbers are likely to be looked at closely. In its guidance, the ATO sets out a series of examples that are likely to attract their attention:

**Increase in staff**
Where the number of staff the business reports have increased beyond levels that were previously required to run the business prior to 1 March 2020.

**Deferring supplies**
In industries unlikely to be adversely impacted by the pandemic, the business agrees with its customers to defer making supplies, resulting in the company's projected GST turnover declining to the level required to meet the turnover test.

**Bringing forward supplies**
In industries unlikely to be adversely impacted by the pandemic, the business brought forward supplies to be able to meet the decline in turnover test in a following month or quarter.

**Restructures**
The example given by the ATO is a company that leases assets to third parties. The leasing business is generally unaffected by the pandemic. However, the business restructures and transfers the assets of the business to a new company. It then withholds the payment of dividends from the new company to the business resulting in a decline in the turnover of the business.

**Management fee manipulation**
Where inter-entity management fees are charged, the timing of the fee is changed to meet the decline in turnover test.

**Reduction in payments to subcontractors**
Where a business has reduced or deferred payments to subcontractors to enable them to meet the decline in turnover test. The ATO has stated that they will review the business and the subcontractors.

**JobKeeper used to reduce cost of supplies to customers**
In this scenario, the business and its customers agree to reduce, waive or defer payments to enable the business to meet the decline in turnover test. JobKeeper is then used to fund the reduction in payments. In effect, JobKeeper is paying for the payment reduction.

## Low risk scenarios

If your industry or business has been adversely impacted by the pandemic, regardless of your structure or arrangements, it is unlikely the ATO will review your situation unless there has been an obvious attempt to increase JobKeeper payments.

To add certainty, the ATO notes that where a service entity that employs staff for a related entity has reduced management fees, either

because the service agreement has been changed to reduce the fee by an amount that is proportional to the reduction in the trading entity's external turnover, staff have been stood down, or where the related entities cannot afford to pay the fee, and the industry is adversely impacted by the pandemic, the ATO will not generally seek to apply compliance resources.

## What happens if you got it wrong?

If your structure or the way you have accessed JobKeeper is on the ATO target list, this does not mean that there is a problem.

Eligibility to JobKeeper is generally based on an estimate of the negative impact of the pandemic on an individual business's turnover. Some will experience a greater decline than estimated while others will fall short of the required 30%, 50% or 15%. There is no clawback if you got it wrong as long as you can prove the basis for your eligibility going into the scheme.

For those that, in hindsight, did not meet the decline in turnover test, you need to ensure you have your paperwork ready to prove your position if the ATO requests it. You will need to show how you calculated the decline in turnover test and how you came to your assessment of your expected decline, for example, a trend of cancelled orders or trade conditions at that time.

## Manage your JobKeeper compliance

Monthly declarations of your current and projected GST turnover are due within fourteen days of the end of each relevant month.

It's important to ensure that you have paid eligible JobKeeper staff at least $1,500 during each JobKeeper fortnight. If you pay employees less frequently than fortnightly, the payment can be allocated between fortnights in a reasonable manner. For example, if you pay your employees on a monthly pay cycle, your employees must have received the monthly equivalent of $1,500 per fortnight.

For the first two JobKeeper fortnights (30 March-12 April, 13 April-26 April), employers had an extension until 8 May to make the JobKeeper payments to eligible employees. For the remaining JobKeeper fortnights, employees will need to receive at least $1,500 by the end of each JobKeeper fortnight or the monthly equivalent of $1,500 per fortnight. Depending on your pay cycle, this may require some adjustments each month.

# What's changing on 1 July?

- Company tax rate reduces to 26% for base rate entities
- $150k instant asset write-off scheduled to reduce back to $1,000 for small business entities and will no longer be available for entities with aggregated annual turnover of $10m or more, although accelerated depreciation rules apply to certain entities until 30 June 2021
- Cents per km rate for work-related car expenses increase to 72 cents
- Expected reforms to allow 66 and 67 years olds to make voluntary superannuation contributions without satisfying the work test. This reform is not yet law.
- Age limit for making superannuation contributions to your spouse increases from 69-74. This reform is not yet law.
- For those 67 and under, reforms will enable you to use the 'bring forward rule' to make up to three years of non-concessional contributions. That is, you can make non-concessional contributions of up to $300,000 from the 2020-21 financial year.

# 1 July Company Tax Rate Reduction

**Despite the current economic environment, the company tax rate will reduce to 26% for small and medium businesses from 1 July 2020.**

| | 2018-19 and 2019-20 | 2020-21 | 2021-22 |
|---|---|---|---|
| **Base rate entities*** | 27.5% | 26% | 25% |
| **Other corporate tax entities** | 30% | 30% | 30% |

**aggregated turnover less than $50m and no more than 80% of the company's assessable income is base rate entity passive income.*

The 1 July change is part of a larger progressive plan to reduce the company tax rate to 25% from 1 July 2021 and applies to base rate entities (BRE) - companies, corporate unit trusts, and public trading trusts - with an aggregated turnover of less than $50 million where 80% or less of the entity's turnover for the year is classified as base rate entity passive income. Larger companies will continue to pay the 30% rate.

The reduction in the company tax rate will also change the maximum franking rate that applies to dividends paid by some base rate entities. The way the rules normally work is that if the company was classified as a base rate entity and was taxed at the lower corporate tax rate in the previous year then a lower maximum franking rate will apply to dividends paid in the current year. For example, a company that was classified as a BRE in the 2019 income year will generally be subject to a maximum franking rate of 27.5% on franked dividends paid in the 2020 income year. However, the maximum franking rate will normally be 26% for dividends paid in the 2021 income year if the company was a BRE in the 2020 income year.

Some companies may have franking account balances that have accumulated over time and will reflect prior company tax rates. It is important to consider how these credits can be utilised in an efficient manner. One strategy could be to bring forward the payment of dividends to utilise the current 27.5% franking rate before the company tax rate reduces to 26% if the cashflow of the company allows for it.