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JOBKEEPER SCHEMES – WHAT IS THE ATO TARGETING AND HOW TO PREPARE FOR AN AUDIT

The following is a summary of an article originally prepared and published by Fletch Heinemann of Cooper Grace Ward Lawyers on 7th May 2020. It outlines what ‘schemes’ the ATO are likely to audit for those businesses that have enrolled in JobKeeper. If you have enrolled or are thinking of enrolling for JobKeeper we strongly suggest you read this summary.

This summary outlines the following areas:

- What is a JobKeeper ‘Scheme’
- What JobKeeper schemes are caught by the anti-avoidance provisions?
- What does ‘sole or dominant purpose’ mean?
- What is the ATO looking at?
- What are the consequences of the ATO concluding there was a JobKeeper scheme?
- What evidence should businesses keep?
- Example Schemes outlined by the ATO

The ATO has released guidance that shows the JobKeeper ‘schemes’ that will be audited. Businesses that are receiving JobKeeper payments should check that their payments are not at risk of being clawed back by the ATO.

Businesses that have a decline in turnover for a particular test period, but whose turnover is otherwise relatively stable, should be prepared for ATO review activity.

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WHAT IS A JOBKEEPER ‘SCHEME’?

The term ‘scheme’ is broadly defined. A scheme does not need to be elaborate, artificial, or contrived. It can include a simple arrangement or merely making a decision. For example, a scheme will include deciding to:

1. Not invoice customers in a particular period
2. Extend payment terms for customers
3. Reduce prices

While each of these examples will be ‘schemes’, only some will be caught by anti-avoidance provisions.

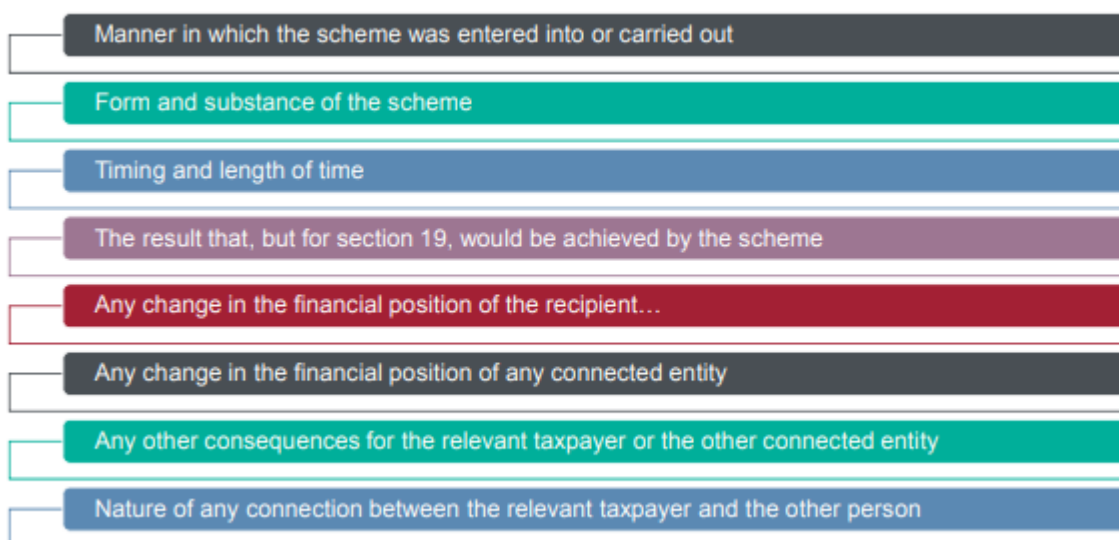
WHAT JOBKEEPER SCHEMES ARE CAUGHT BY THE ANTI-AVOIDANCE PROVISIONS?

For a JobKeeper scheme to be caught by the anti-avoidance provision, the scheme must have been entered into for the sole or dominant purpose of either:

- Receiving a JobKeeper payment
- Receiving a greater JobKeeper payment than would otherwise have been the case.

The test for 'sole or dominant purpose' is not subjective. The legislation sets out eight factors that must be considered when determining whether, objectively, the business entered the scheme for the sole or dominant purpose of obtaining the JobKeeper payments.

These 8 factors are:



WHAT DOES 'SOLE OR DOMINANT PURPOSE' MEAN?

Income tax cases deal with the phrase 'sole or dominant purpose' in the context of the general anti-avoidance provisions in Part IVA of the Income Tax Assessment Act 1936. The High Court has held that 'dominant' means the 'most influential and prevailing or ruling purpose'.

There will be cases where the sole or dominant purpose is obvious, for example:

- Consider a business that ordinarily invoices at the end of the calendar month, but then defers its invoicing for April 2020 to the first week of May 2020. If that decision results in a decline of turnover of 30% comparing April 2020 to April 2019, this would indicate, in the absence of other reasons, a sole or dominant purpose of obtaining JobKeeper payments.
- By contrast, consider a business that ordinarily invoices before providing services, and defers invoicing until May 2020 because it is unsure, as a result of government restrictions, whether it will provide its services in April or May 2020. If the decision to defer its invoicing results in a decline in turnover of 30% comparing April 2020 to April 2019, this would not indicate, in the absence of other reasons, a sole or dominant purpose of obtaining JobKeeper payments.

In most cases, the analysis will not be black and white. A business will make commercial decisions based on:

- The supplies it anticipates it will make;
- Its customers
- Whether to continue to pay wages; and
- Whether it is entitled to JobKeeper payments.

These considerations and others will all be part of the factual matrix. Out of that context, the business needs to ensure that obtaining JobKeeper payments is not the sole or dominant purpose of any decision.

WHAT IS THE ATO LOOKING AT?

The ATO have release a Practical Compliance Guide (PCG 2020/4) that indicates they will audit businesses:

1. That defer making supplies, invoicing, or receiving payments to achieve a decline in turnover for a particular period.
2. That bring forward making supplies, invoicing or receiving payments to achieve a decline in turnover for a particular period.
3. Transferring income-producing assets to achieve a decline in turnover for a particular period.

The ATO are particularly interested in businesses what access JobKeeper payments who have not been significantly affected by external environmental factors.

In its PCG 2024/4, that ATO correctly points out that the examples set out the types of arrangements where they will 'apply compliance resources' which otherwise, means 'audit'. Those examples are not designed to show how the ATO will apply the legislation.

Please refer to the appendix for a list of examples of schemes to obtain access to a JobKeeper payment taken from PCG 2020/4 and whether or not an audit would be sought.

WHAT ARE THE CONSEQUENCES OF THE ATO CONCLUDING THERE WAS A JOBKEEPER SCHEME?

If the ATO determines that there was a scheme, then:

- The business was never entitled to the JobKeeper payments
- The business will have to pay back the JobKeeper payments – which may be problematic if the business has paid the same amounts to its eligible employees as wages
- The business will have to pay interest at the general interest charge rate – currently 7.89%
- The ATO may impose penalties for the business making false or misleading statements (as the business will have declared it was an eligible employer when it was not).

WHAT EVIDENCE SHOULD BUSINESSES KEEP?

The critical evidence in these types of cases tend to be documents showing the commercial purpose of the scheme. Consider the following examples:

- A business with a monthly service agreement decided not to invoice customers in April 2020 as it provided no services in April 2020 because of the government restrictions. The objective evidence might include documents showing that no services were provided, because of the government restrictions.
- A commercial landlord decided to extend payment terms for its retail tenants because their cashflow was affected by COVID-19. The objective evidence might be documents showing:
 - (a) The agreements reached with the tenants
 - (b) The landlord's obligation to comply with leasing principles
 - (c) The effect that government restrictions had on the tenants' turnover.
- A business decided to reduce fees charged to its long-term customers on the basis that it preferred reduced revenue in the short timer to potential loss of a customer in the long term. The objective evidence might include documents showing the financial analysis between the short-term reduction in revenue compared with losing a customer and documents showing the risk that the business would lose the customer if it did not reduce fees.

Evidence occurring at the same period of time is generally more compelling than evidence obtained at a later date when responding to an ATO review. Businesses at risk of being reviewed should keep evidence about their decisions now, so they are ready to respond to any ATO reviews.

CONTACT US

Our Office remains open for business however, we have closed the doors to the public and our Accountants are now working remotely from home until the Government allows us to return to work in the Office. Please phone the office on 07 4038 8888 and Angela will arrange for the Accountant to call you back, or alternatively email us at: -

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Return phone calls from the Accountant will display as unknown number.

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JOBKEEPER SCHEMES EXAMPLES – ATO PRACTICAL COMPLIANCE GUIDELINE

The following examples have been taken from the ATO's 'PCG 2020/4 – Schemes in relation to the JobKeeper payment'. They refer to Section 19 which provides that if one or more entities enter into or carry out a scheme for the dominant purpose of obtaining a JobKeeper payment, or an increased amount of a JobKeeper payment, the Commissioner may determine that:

- The entity was never entitled to the JobKeeper payment, or
- The amount to which the entity was entitled was always the amount specified by the Commissioner in the determination.

EXAMPLE 1 – DEFERRING THE MAKING OF SUPPLIES TO OBTAIN THE JOBKEEPER PAYMENT

Company A nominates the quarter ending 30 June 2020 to its projected GST turnover. Its projected GST turnover for that quarter is \$1 million, and its GST turnover for the quarter ending 30 June 2019 was \$900,000.

Due to the industry in which Company A is operating, there is no anticipation of any material impact on its revenue for the period ending 30 June 2020.

Despite this, Company A agrees with third-party customers to defer the making of supplies until after 30 June 2020. This results in Company A's projected GST turnover for that quarter being \$500,000. The decline in GST turnover from \$900,000 to \$500,000 meets Company A's relevant decline in turnover threshold.

Because Company A's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of Section 19.

EXAMPLE 2 – BRINGING FORWARD THE MAKING OF SUPPLIES SOLELY TO OBTAIN THE JOBKEEPER PAYMENT

Company B is considering enrolling in the JobKeeper scheme from July. It nominates the quarter ending 30 September 2020 to test its projected GST turnover. Its projected GST turnover for that quarter is \$1 million, and its GST turnover for the quarter ending 30 September 2019 was \$900,000.

Due to the industry in which Company B is operating, there is no anticipation of any material impact on its revenue for the period ending 30 September 2020.

Despite this, Company B agrees with third-party customers to bring forward the making of supplies to the quarter ending 30 June 2020. This results in Company B's projected GST turnover for the quarter ending 30 September 2020 declining to \$500,000. The decline in GST turnover from \$900,000 to \$500,000 meets Company B's relevant decline in turnover threshold.

Because Company B's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response of any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of Section 19.

For the avoidance of doubt, the Commissions will apply his compliance resources to schemes of this type regardless of the method by which Company B purports to defer its turnover for a period, such as for example by not bringing forward when supplies are made, but bringing forward the payment of cash, or the issuing of invoices.

EXAMPLE 3 – TRANSFER WITHOUT ANY DECLINE IN EXTERNAL REVENUE

Company D leases assets to third parties. There is no reduction in the company's projected GST turnover.

In order to satisfy the decline in turnover test, Company D transfers all of its assets to a recently incorporated subsidiary. That subsidiary will not pay dividends to Company D until after 30 September 2020.

Because Company D's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of Section 19.

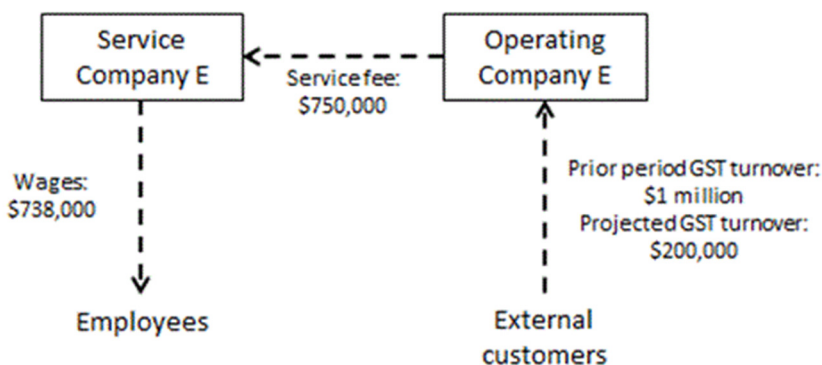
EXAMPLE 4 – EMPLOYER ENTITY THAT REDUCES A SERVICE FEE

Service Company E employs 100 individuals. These employees perform activities on behalf of Operating Company E.

For a typical period, Operating Company E will pay a service fee of \$750,000 to Service Company E. Service Company E in turn will pay wages of \$738,000 to the 100 employees.

Operating Company E's GST turnover for the quarter ended 30 June 2019 was \$1 million. This turnover is from external parties. Operating Company E's projected GST turnover for the quarter ended 30 June 2020 is \$200,000.

Service Company E's GST turnover for both quarters remains at \$750,000 – because the agreement between Service Company E and Operating Company E provides for that result.



Without any change to the agreement between Service Company E and Operating Company E, Service Company E would not have satisfied the decline in turnover test in subsection 8(1) of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 as there had been no reduction in its projected GST turnover.

The group of entities then enter into a scheme the result of which is a reduction in the service fee by an amount that is proportional to the reduction in Operating Company E's external turnover. This scheme results in a reduction of the service fee from \$750,000 to \$150,000.

This means Service Company E does satisfy the decline in turnover test in Subsection 8(1) of the Payments and Benefits Rules.

Because this scheme is entered into in response to the significant impact the external operating environment has had on the business of Operating Company E where the employees of Service Company E (and those external factor are beyond the group's control), there is a low risk the Commissioner would apply his compliance resources to consider the application of Section 19.

EXAMPLE 5 – EMPLOYER ENTITY STANDS DOWN EMPLOYEES

This example involves the same facts as Example 4 except that, due to the changed operations of Operating Company E, Service Company E reduces the amount of labour it provides to Operation Company E under the service agreement and stands down employees or reduces their work hours. This in turn results in a reduction in service fees not by way of a renegotiation between the companies, but simply by virtue of the service agreement itself.

Even if the reduction in services fees was a scheme within the meaning of paragraph 1 of the guideline, because the scheme was entered into in response to the significant impact the external environment has had on the business of Operating Company E where the employees of Service Company E service (and those external factors are beyond the group's control), there is a low risk that the Commissioner would apply his compliance resources to consider the application of section 19.

EXAMPLE 6 – EMPLOYER ENTITY UNABLE TO PAY

This example involves the same facts as Example 4, except Service Company E and Operating Company E are unable or unwilling to enter into a scheme that results in a reduction in the amount of the service fee Operating Company E is obliged to pay.

Despite this, it remains possible, depending on the and circumstances, that Service Company E will satisfy the decline in turnover test. This will be the case if it is reasonable for Service Company E to project that it is unlikely to receive payment for the service fee from Operating Company E. Ascertaining a reasonable estimate can include:

- Evidence of any decline in Service Company E's turnover leading up to restrictions
- Records of Operating Company E cancelling or modifying existing contracts for supplies
- Closing or pausing either company's business at appoint in time due to the governments COVID-19 restrictions
- Downturn in expenditure and other amounts claimed for the relevant period
- Downturn in the market value of assets; and
- Information known to Service Company E, whether or not publicly available.

Therefore, provided Service Company E can satisfy the requirement that there be a reasonable projection of a decline in projected GST turnover, the Commissioner will be unlikely to apply compliance resources to consider the application of Section 19.

EXAMPLE 7 – PARENT COMPANY OF A CORPORATE GROUP THAT REDUCES MANAGEMENT FEES

Company F is the parent company of a corporate group and is also the main employer of that group. Subsidiary F1, F2 & F3 are subsidiaries of Company F, and carry on external market-facing businesses.

In the past, Company F has charged Subsidiaries F1, F2 & F3 management fees on an annual basis, these fees are substantially all of Company F's current and projected GST turnover.

The business of each subsidiary F1, F2 & F3 is severely impacted by COVID-19, such that the operations of most of the subsidiaries are closed. Individually, all subsidiaries would satisfy the decline in turnover test.

Subsidiary F1, F2 & F3 do not pay the management fees or pay a significantly smaller management fee before 30 June such that the decline in turnover test is satisfied.

However, if the management fees had been reduced on a pro rata basis throughout the year, the decline in turnover test would not be satisfied. This is because the group had had no decline in revenue for the first nine months of the year.

Even if the reduction in management fees was a scheme, because that scheme was entered into in response to the significant impact the external operating environment has had on Subsidiary F1, F2 & F3 (and those external factors are beyond the group's control), there is a low risk the Commissioner would apply his compliance resources to consider the application of Section 19.

EXAMPLE 8 - PARENT COMPANY OF A CORPORATE GROUP THAT MANIPULATES THE TIMING OF MANAGEMENT FEES

This example involves the same facts as Example 7, except the business of the group has not been adversely affected by COVID-19. Instead, the group alters the timing of the payment of management fees merely so that Company F would satisfy the decline in turnover test.

Because Company F's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of Section 19.