D'OMKARA ACCOUNTANTS
TAX AGENTS & BUSINESS ADVISORS

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Knowledge

March 2021

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Why are some businesses returning JobKeeper?

Super Retail Group - owner of the Supercheap Auto, Rebel, BCF and Macpac brands - handed back $1.7 million in JobKeeper payments in January after releasing a trading update showing sales growth of 23% to December 2020. Toyota announced that it will return $18 million in JobKeeper payments after a record fourth quarter. And, Domino's Pizza has also handed back $792,000 of JobKeeper payments.

Toyota, Super Retail Group, and Domino's were not obliged to hand back JobKeeper. Under the rules at the time, the companies qualified to access the payment. However, Toyota CEO Matthew Callachor said, "*Like most businesses, Toyota faced an extremely uncertain future when the COVID-19 health crisis developed into an economic crisis …We claimed JobKeeper payments to help support the job security of almost 1,400 Toyota employees around Australia ….In the end, we were very fortunate to weather the storm better than most, so our management and board decided that returning JobKeeper payments was the right thing to do as a responsible corporate citizen."*

Domino's Group CEO and Managing Director, Don Meij said, *"We appreciate the availability and support of JobKeeper during a period of significant uncertainty. That period has passed, the assistance package has served its purpose, and we return it to Australian taxpayers with our thanks."*

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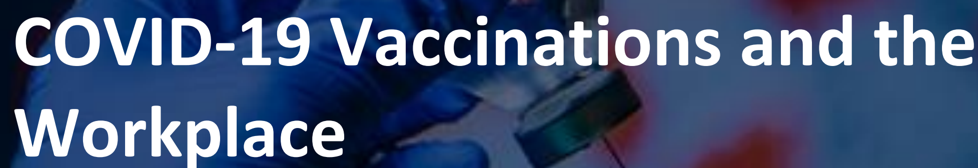


COVID-19 Vaccinations and the Workplace

The first COVID-19 vaccination in Australia rolled out on 21 February 2021 preceded by a wave of protests. With the rollout, comes a thorny question for employers about individual rights, workplace health and safety, and vaccination enforcement.

The rollout, managed in phases, is expected to complete by the end of 2021 (you can check your eligibility here). While the Australian Government's COVID-19 vaccination policy states that vaccination *"is not mandatory and individuals may choose not to vaccinate",* this does not mean that there will not be punitive initiatives for those failing to vaccinate including proof of vaccination to move across borders. Australia for example, already has a precedent with "No Jab, No Play" policies in place to access child care payments (the ability to object to vaccination on non-medical grounds was removed from 1 January 2016).

There are currently no laws or public health orders in Australia that specifically enable employers to require their employees to be vaccinated against coronavirus. However, it is likely that in some circumstances an employer may require an employee to be vaccinated.

Can an employer require an employee to be vaccinated?

For most employers, probably not. The Fair Work Ombudsman, however, states that there are *"limited circumstances where an employer may require their employees to be vaccinated."* These are:

- **The State or Territory Government enacts a public health order** requiring the vaccination of workers (for example, in identified high-risk workplaces or industries).
- **An agreement or contract requires it** - some employment agreements already require employees to be vaccinated and where these clauses exist, they will need to be reviewed to determine if they also apply to the COVID-19 vaccine.
- **A lawful and reasonable direction** – employers are able to issue a direction for employees to be vaccinated but whether that direction is lawful and reasonable will be assessed on a case by case basis. It's more likely a direction will be "reasonable" where, for example, there is an elevated risk such as border control and quarantine facilities, or where employees have contact with vulnerable people such as those working in health care or aged care.

If an employee refuses to be vaccinated on non-medical grounds in a workplace that requires it, standard protocols apply. That is, the employer will need to follow through with disciplinary action - there are no special provisions that enable suspensions or stand downs for employees who refuse to be vaccinated against COVID-19.

Continued over the page…

Quote of the month

"Knowledge is of no value unless you put it into practice."

Anton Chekhov

Can an employer require evidence of vaccination?

In general, an employer can only require evidence of vaccination if they have a lawful and reasonable reason to do so. Requesting access to medical records and storing data of an individual's medical information will also have privacy implications (see the Office of the Information Commissioner for more details).

Your immunisation history is already accessible through your myGov account when it is linked to Medicare. The Express Plus Medicare app enables you to access this information on your phone.

More details are expected shortly on Australia's "vaccine passport" that will enable the quick identification of an individual's vaccination status. Israel's "Green Pass" for example uses a simple QR code but there are already concerns that it is easily forged.

Can we require customers to be vaccinated?

Some high risk industries are likely to require customers to be vaccinated or where they cannot be vaccinated, subject to heightened measures such as quarantine and/or testing. Qantas CEO Alan Joyce recently told *A Current Affair*, *"We are looking at changing our terms and conditions to say, for international travellers, that we will ask people to have a vaccination before they can get on the aircraft."* Qantas is expected to release its position middle-to-end 2021 on domestic and international travel.

For employers in high risk industries, it's important to maintain a conversation with employees and consult an industrial relations specialist if your workplace intends to require vaccinations for employees and/or customers. **-End-**

Why are some businesses returning JobKeeper? *Continued from page 1…*

Companies that received JobKeeper and subsequently paid dividends to shareholders and executive bonuses have come under particular scrutiny, not just by the regulators but by public opinion.

The first phase of JobKeeper did not require business to prove that they had actually suffered a downturn in revenue, just have evidence turnover was likely to drop in a particular month or quarter. For many businesses, early trends indicated that the pandemic would have a devastating impact on revenue. Many also took action and prevented the trend entrenching by actioning plans to protect their workforce and revenue. The fact that business improved, does not impact on initial JobKeeper eligibility. In the first phase of JobKeeper, employers were not obliged to stop JobKeeper payments if trends improved.

Speaking at the Senate Select Committee on COVID-19, ATO Deputy Commissioner Jeremey Hirschhorn stated that the ATO rejected some $180 million in JobKeeper claims pre-issuance. Approximately, $340 million in overpayments have been identified. Of these, $50 million were honest mistakes and will not be clawed back where the payment had been passed on to the employee.

Where the ATO determines that JobKeeper overpayments need to be repaid, they will contact you and let you know the amount and how the repayment should be made. Administrative penalties generally will not apply unless there is evidence of a deliberate attempt to manipulate the circumstances to gain the payment.

Taxpayers can object to the ATO's JobKeeper overpayment assessment. If you are contacted by the ATO, please contact us immediately for assistance and we will work with the ATO on your behalf. **-End-**

FBT 2021: Tax & Employee Benefits

Fringe benefits tax (FBT) is one of Australia's most disliked taxes because it's cumbersome and generates a lot of paperwork. The COVID-19 lockdowns have added another layer of complexity as many work patterns and behaviours changed.

A fringe benefit is a 'payment' to an employee or an associate (an associate is someone related to you such as a spouse, child or even a friend), but in a different form to salary or wages. A benefit might be as simple as hosting a work Christmas party, providing car parking, using a work vehicle, or providing the goods or services of the business at a reduced rate to what the public pay.

If your business is not already registered for FBT, it's important to understand if fringe benefits have been provided. Generally, the ATO will look closely at unregistered employers and where there are mismatches in data.

With the FBT year ending on 31 March, we look at the key issues and the Australian Taxation Office's (ATO) hotspots.

What is exempt from FBT?

Certain benefits are excluded from the FBT rules if they are provided primarily for use in the employee's employment. These include:

- Portable electronic devices (e.g., laptop, ipad, printers, GPS, etc.,). Larger businesses are limited to the purchase or reimbursement of one portable electronic device for each employee per FBT year;
- A handbag, briefcase or satchel to carry items you are required to use and carry for work, such as laptops, tablets, work papers or diaries. Be warned that if you are using these bags for a mix of personal and work use, then the use needs to be apportioned and will not be fully exempt from FBT. The ATO is not going to pay for your Gucci bag even if you do throw your ipad into it on occasion.
- Tools of trade.

Also, if the item or service provided to the employee is less than $300 and is a one-off, it's generally classed as a minor benefit and exempt from fringe benefits tax.

COVID-19 & FBT

The ATO has changed how it will approach FBT compliance this year because of the impact of COVID-19 on work patterns and conditions.

Emergency assistance such as flights and accommodation – emergency assistance to provide immediate relief to employees because the employee is at risk of being adversely affected by COVID-19 will generally not be subject to FBT. This might include:

- Expenses incurred relocating an employee, including paying for flights home to Australia.
- Expenses incurred for food and temporary accommodation if an employee cannot travel due to restrictions (domestic, interstate or intrastate).
- Benefits provided that allow an employee to self-isolate or quarantine.
- Transporting or paying for an employee's transport expenses including car hire and transport to temporary accommodation.

For fly-in fly-out workers, this includes temporary accommodation and meals where

they were unable to return home because of border or travel restrictions.

Health care - Providing flu vaccinations to employees is generally exempt from FBT because it is work-related preventative health care. However, health care treatment is only exempt from FBT if it is provided to your employees at your workplace or adjacent to your worksite. The cost of ongoing medical costs are generally not exempt.

Company cars - a company car garaged at an employee's home will generally attract FBT. However, this FBT year, many company carparks and places of business were closed. As a result, the ATO has stated that for employers using the operating cost method, if the "car has not been driven at all during the period it has been garaged at home, or has only been driven briefly for the purpose of maintaining the car, we will accept that you don't hold the car for the purpose of providing fringe benefits to your employee." But, you will need to maintain odometer readings that show the car has not been used.

If the car was used, fringe benefits generally applies. However, if the car was used for business purposes then this use reduces the taxable value. If the car was only used for business, the taxable value may be reduced to zero.

Logbooks – COVID-19 is likely to have impacted on driving patterns and the ATO have made some concessions where the 12 week log book period was interrupted.

If you are already using the logbook method and have an existing logbook in place, you can still rely on this logbook. However, you must keep odometer records for the year to show how much the car has been driven during the year including during any lockdown period.

If this is the first year you have used a logbook, you still need to keep an accurate 12 week logbook. However, if COVID-19 impacted driving patterns during that 12 weeks, then the ATO will allow you to adjust the use indicated in the logbook to account for the change in driving patterns.

Not-for-profit salary packaging – Not-for-profit employers often provide salary-packaged meal entertainment to employees to take advantage of the exempt or rebatable cap. For the FBT year ending 31 March 2021, the ATO has stated that they will not look into these arrangements where meals are provided by a supplier that was authorised as a meal entertainment provider as at 1 March 2020.

Cancellation fees – non-refundable costs for cancelled events are exempt from FBT unless the employee paid for the event themselves and was reimbursed by you. That is, if the employer paid for the event then the cancellation fee is the employer's obligation as no benefit was provided. If the employee paid for the event, the cancellation fee is the employee's obligation that has been reimbursed. It really depends on who the arrangement was between.

ATO 'red flags'

One of the easiest ways for the ATO to pick up on problem areas is where there are mismatches in the information provided to the ATO. Common problem areas include:

Entertainment deductions with no corresponding fringe benefit - A simple way for the ATO to pick up on a problem is when an employer claims a deduction for expensive entertainment expenses – meals out, tickets to cricket matches, etc., – but there is not a corresponding recognition of the fringe benefit. Entertainment expenses are generally not deductible and no GST credits can be claimed unless the expenses are subject to FBT.

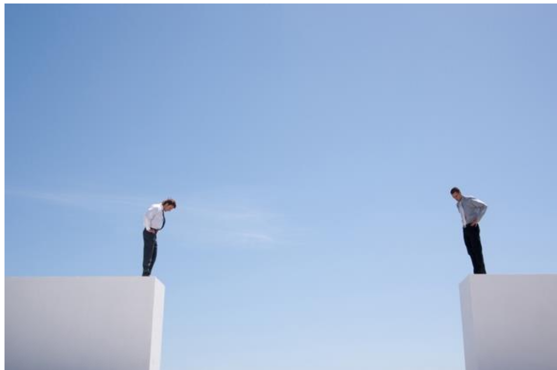
If your business uses the 'actual' method for FBT purposes and the value of the benefits provided is less than $300 then there might not be any FBT implications. This is because benefits provided to a client are not subject to FBT and minor benefits provided to employees (i.e.,

value of less than $300) on an infrequent and irregular basis are generally exempt from FBT. However, no deductions should be claimed for the entertainment and no GST credits would normally be available either.

If the business uses the 50/50 method, then 50% of the meal entertainment expenses would be subject to FBT (the minor benefits exemption would not apply). As a result, 50% of the expenses would be deductible and the company would be able to claim 50% of the GST credits.

Employee contributions reduce fringe benefits tax but not recognised in income tax return – Where employee contributions reduce the amount of fringe benefits tax payable (for example where an employee makes a contribution relating to a car fringe benefit), a corresponding amount needs to be recognised in the income tax return of the employer.
-End-

The Pandemic Productivity Gap



A recent article published in the Harvard Business Review by Bain & Co suggests that the pandemic has widened the productivity gap between top performing companies and others stating, *"Some have remained remarkably productive during the Covid-era, capitalizing on the latest technology to collaborate effectively and efficiently. Most, however, are less productive now than they were 12 months ago. The key difference between the best and the rest is how successful they were at managing the scarce time, talent, and energy of their workforces before Covid-19."*

Atlassian data scientists also crunched the numbers on the intensity and length of work days of software users during the pandemic. The results found that workdays were longer with a general inability to separate work and home life, and workers were working longer hours (predominantly because during lockdowns, there is no set start and end of the workday routine). Interestingly, the average length of a day for Australian workers is shorter than our international peers by up to an hour pre pandemic. Australia's average working day is around 6.8 active hours whereas the US is close to 7.2.

However, working longer does not mean working more productively. Atlassian's research shows that while the length of the working day increased and the intensity of work increased earlier and later in the day, intensity during "normal" hours generally decreased.

So, how do we measure productivity? Bain & Co suggests:

- The best companies have minimised wasted time and kept employees focused; the rest have not. Those that were able to collaborate effectively with team members and customers pre pandemic fared the best. Poor collaboration and inefficient work practices reduce productivity.
- The best have capitalised on changing work patterns to access difference-making talent (they acquire, develop, team, and lead scarce, difference-making talent).
- The best have found ways to engage and inspire their employees. Research shows an engaged employee is 45% more productive than one that is merely a satisfied worker.

The productivity gap was always there. The pandemic merely brought the gap into stark contrast.
-End-

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The 1 July 2021 superannuation changes

Changes from 1 July 2021 will impact on how much money you can contribute to superannuation and how much you can have in your retirement phase superannuation account.

In general, your superannuation is either in an accumulation account (when you are building your super), a retirement account (when you meet preservation age and certain conditions of release and can withdraw your super), or in between when you are transitioning to retirement (when you reach perseveration age, are working reduced hours and take some of your superannuation as a pension).

The amount of money you can transfer from your accumulation account into your tax-free retirement account is limited by a transfer balance cap (TBC). From 1 July 2021, the current $1.6m general TBC will be indexed to $1.7m and once indexed, no single cap will apply to all individuals (each person will have an individual TBC between $1.6m and $1.7m).

Indexation will also change other superannuation caps and limits including:

- Non-concessional contributions (contributions from after tax income)
- Concessional contributions (contributions from before tax income such as super guarantee, salary sacrificed super amounts, or contributions you make and claim a tax deduction for etc.)
- Co-contributions (personal contributions made by low and middle income earners matched by the Government up to $500), and
- Contributions you make on behalf of your spouse that are eligible for a tax-offset.

How will the transfer balance cap impact me?

You are accumulating super

If you are building your superannuation (accumulation phase) and not withdrawing it*, indexation of the TBC is a good thing because from 1 July 2021 you will be able to access more of your superannuation tax-free. If you start taking your superannuation after 1 July 2021, for example if you meet a condition of release and retire, your transfer balance cap will be $1.7m. Essentially, if you have never had a transfer balance account credit, then the full indexation is available to you.

For low and middle income earners claiming the government co-contribution, the limit will increase in line with indexation to $1.7m.

Similarly, if you are contributing superannuation to your spouse and claiming the tax offset, the limit will increase in line with indexation to $1.7m. That is, you can contribute to your spouse's superannuation and claim the tax offset as long as their TBC is not more than $1.7m.

You have started taking your super

If you started taking your superannuation before 1 July 2021 and have already had a credit added to your transfer balance account, then your TBC will be between $1.6m and $1.7m depending on the balance of your transfer balance account between 1 July 2017 and 30 June 2021. If your account reached $1.6m or more at any point during this time, your TBC after 1 July 2017 will remain at $1.6m. If the highest credit ever in your account was between $1 and $1.6m, then your TBC will be proportionally indexed based on the highest ever credit balance your transfer balance account reached. That is, the ATO will look at the highest amount your transfer balance account has ever been, then apply indexation to the unused cap amount. For example, if you started a retirement phase income stream valued at $1.2m on 1 October 2018 and this was the highest point of your account before 1 July 2021, then your unused cap is $400,000. This unused cap amount is used to work out your unused cap percentage (400k/1.6m=25%). The unused cap percentage is then applied to $100,000 ($100k*25%=$25k) to create your new TBC of $1,625,000.

Note that indexation only applies to the difference between the $1.6m TBC and the **highest point of your account at any point between 1 July 2017 and 30 June 2021**, not the value of your account at 30 June 2021. That is, if you made additional contributions after 1 October 2018 that increased your account to say $1,440,000, then indexation would apply to your unused cap of $160,000 (instead of $400,000), creating a TBC on 1 July 2021 of $1,610,000.

Indexation does not impact existing child death benefit beneficiaries. Child death benefit income streams commencing after 1 July 2021 will be entitled to the increment if the parent never had a transfer balance account or a proportion if the parent had a transfer balance account.

If you receive income from a capped defined benefit income stream and you are 60 years of age or more, or the income stream is from a death benefit where the member was over 60 at the time of death, then the defined benefit income cap will increase to $106,250 for most individuals. This will mean that the money your fund withholds from your income stream may change.

-End-

The amount you can contribute to super will increase

Indexation will increase the concessional and non-concessional contribution caps from 1 July 2021. These caps are indexed by average weekly ordinary time earnings (AWOTE).

Cap	Current cap	Cap from 1 July 2021
Concessional contributions cap	$25,000	$27,500
Non-concessional contributions cap	$100,000	$110,000

The bring forward rule

The bring forward rule enables you to contribute up to three years' worth of non-concessional contributions in the one year. That is, from 1 July 2021, you could contribute up to $330,000 to your superannuation in one year. You can use the bring forward rule if you are 64 or younger on 1 July of the relevant financial year of the contribution and the contribution will not increase your total super balance by more than your transfer balance account cap.

If you utilised the bring forward rule in previous years, your non-concessional cap will not change. You will need to wait until your three years has expired before utilising the new cap limit.

1 July 2017 – 30 June 2021		After 1 July 2021	
Total Super Balance (TSB)	**Contribution and bring forward available**	**Total Super Balance (TSB)**	**Contribution and bring forward available**
< $1.4m	$300,000	<$1.48m	$330,000
$1.4m - $1.5m	$200,000	$1.48m - $1.59m	$220,000
$1.5m - $1.6m	$100,000	$1.59m - $1.7m	$110,000
$1.6m+	Nil	$1.7m+	Nil

** excludes withdrawals made under the COVID 19 relief measures.*

-End-

Tax treatment of JobKeeper payments handed back to ATO

The ATO has clarified the tax treatment of JobKeeper payments handed back to the Government. The clarification comes after the Super Retail Group, Dominos Pizza and Toyota collectively returned more than $20 million in JobKeeper payments after reporting exceptional trading results.

Where a business has handed back JobKeeper despite qualifying for the payments, the ATO states that:

- JobKeeper payments returned to the Government are still included in assessable income, and
- The returned payments may be deductible in limited circumstances if the repayment is to a achieve the business's objectives. For example, if the media exposure from the returned payment generates goodwill for the business or publicises the business, or the repayment prevents a downturn in business activity.

The message is, if you are returning JobKeeper payments voluntarily, make the decision public. If no one knows about the repayment then it is unlikely to be deductible. If your business decides to hand back JobKeeper despite being entitled to the payments, special arrangements will need to be put in place with the ATO as the repayments are treated differently and require a special payment reference number.

We note that if your business and your employees qualified for the first tranche of JobKeeper payments, you are under no obligation to return the money if trading conditions were better than the estimate you provided to the ATO.

-End-

Professional services firm profits under fire

The Australian Taxation Office (ATO) has been concerned for some time about how many professional services firms are structured – specifically, professional practices such as lawyers, architects, medical practices, engineers, architects etc., operating through trusts, companies and partnerships of discretionary trusts and how the profits from these practices are being taxed.

New draft guidance (PCG 2021/D2) released last month from the ATO takes a strong stance on structures designed to divert income so the professional ends up receiving very little income directly for their work, reducing their taxable income. Where these structures appear to be in place to divert income to create a tax benefit for the professional, Part IVA may apply. Part IVA is an integrity rule which allows the Commissioner to remove any tax benefit received by a taxpayer where they entered into an arrangement in a contrived manner in order to obtain a tax benefit. Part IVA may apply to schemes designed to ensure that the professional is not appropriately rewarded for the services they provide to the business, or that they receive a reward which is substantially less than the value of those services.

The draft guidance for professional services

Set to apply from 1 July 2021, the draft guidance sets out a series of tests to create a risk score. This risk score is then used to classify the practitioner as falling within a Green, Amber or Red risk zone and determines if the ATO should take a closer look at you and your firm. Those in the green zone are at low risk of the ATO directing its compliance efforts to you. Those in the red zone, however, can expect a review to be initiated as a matter of priority with cases likely to proceed directly to audit.

The risk assessment framework will only apply if the firm first meets two gateway tests.

- **Gateway 1** - considers whether there is commercial rationale for the business structure and the way in which profits are distributed, especially in the form of remuneration paid. Red flags would include arrangements that are more complex than necessary to achieve the relevant commercial objective, and where the tax result is at odds with the commercial venture, for example, where a tax loss is claimed for a profitable commercial venture.
- **Gateway 2** - requires an assessment of whether there are any high-risk features. Potentially high-risk features include financing arrangements relating to non-arm's length transactions, where income of a partnership is assigned in a way that is not consistent with existing guidelines, and where there are multiple classes of shares or units held by non-equity holders.

If the gateway tests are passed, then you can self-assess your risk level against the ATO's risk assessment factors. There are 3 factors to be considered:

- the professional's share of profit from the firm (and service entities etc) compared with the share of firm profit derived by the professional and their related parties;
- the total effective tax rate for income received from the firm by the professional and their related parties; and
- the professional's remuneration as a percentage of the commercial benchmark for the services provided to the firm.

The resulting 'score' from these factors determines your risk zone. Some arrangements that were previously considered low risk may now fall into a higher risk zone.

For professional services firms, it will be important to assess the risk level and this needs to be done for each principal practitioner separately. Those in the amber or red zone who want to be classified as low risk need to start thinking about what needs to change to move into the lower risk zone.

Where other compliance issues are present - such as failure to recognise capital gains, misuse of the superannuation systems, failure to lodge returns or late lodgement, etc., - a green zone risk assessment will not apply.

-End-

Quote of the month

"You can't ask customers what they want and then try to give that to them. By the time you get it built, they'll want something new."

Steve Jobs

National licence recognition for tradies

Builders, electricians, plumbers, architects, real estate agents, security guards and other workers who hold an occupational licence in their home state or territory and who want to do the same work in another state or territory will soon be automatically deemed to have the necessary licence.

The Federal, State and Territory Governments have agreed to a mutual recognition regime that will be implemented by the Federal Government. Exposure draft legislation enabling the seamless mutual recognition scheme was released last month with the scheme expected to start from 1 July 2021.

Workers will not need to pay additional licence fees or apply for additional licences.

Workers working in another state or territory will need to comply with local laws and regulations (including vulnerable people character test) and in some cases will need to notify the regulator they intend to work in their State. The States have the capacity to refuse a registration or type of license from mutual recognition.

Those subject to disciplinary action or who have conditions on their registration as a result of disciplinary, civil or criminal action will be excluded from automatic mutual recognition. Information on cancelled or suspended registrations and disciplinary proceedings and to record cancellations and suspensions on registers, will be shared.

JobMaker fails to boost employment

The Government's JobMaker scheme has created 609 new jobs since registrations opened on 1 February 2021, despite around 15,000 businesses registering their interest in the scheme.

The hiring credit is available for jobs created from 7 October 2020 until 6 October 2021 and provides $200 per week for new employees between 16 to 29 years of age, and $100 a week for new employees between 30 to 35 years of age. Payment is from the start date of the employee for 12 months. To date, around 70% of employers taking advantage of the credit are micro-employers with another 20% from the SME sector.

Unlike JobKeeper, the employer keeps the JobMaker payment and does not pass it onto their employee.

One of the reasons for the low take up rate, beyond a general lack of awareness in the business community, is likely to be the complexity of the scheme versus the reward. There are a number of tests and compliance requirements at both the employer and employee level including an 'additionality test' that requires the total headcount of the business to remain above a baseline number of employees. That is, if you employ an eligible employee and an existing employee resigns, the benefit cancels out because there is no longer an increase in total headcount.

In addition, JobMaker only applies where an employer takes an employee from the unemployment queue. That is, the employee had to be receiving the JobSeeker Payment, Youth Allowance or Parenting Payment for at least one month within the three months before they were hired.

It is possible that more businesses will start to take advantage of the scheme now that the JobKeeper scheme has finished. Businesses that were still eligible for JobKeeper could not generally access JobMaker at the same time.

The Treasurer has stated that the Government will review the design of the JobMaker program in the upcoming Federal Budget with only $800,000 of the $4 billion scheme's budget distributed.

Unemployment rate at pre COVID-19 levels

Australia's unemployment rate decreased to 5.8% in February 2021 (0.6% higher than 12 months ago) with just under 70,000 jobs created in the month. Employment in March 2021 was 4,000 jobs higher than March 2020.