client alert | explanatory memorandum

May 2022

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 22 April 2022.

Employees vs contractors: more clarity coming

For many businesses, the line between employees and contractors is becoming increasingly blurred, partly due to the rise of the gig economy. However, businesses should be careful as incorrectly classifying employees as contractors may be illegal and expose the business to various penalties and charges. Recently, the High Court handed down a significant decision in a case involving the distinction between employees and contractors. As a result, the ATO has noted it will review relevant rulings that may be impacted.

The High Court recently handed down a significant decision dealing with the distinction between employees and independent contractors. The case concerned an "independent contractor" and a labour hire company. Although the ATO was not a party to either case, it has since released a decision impact statement, as the High Court's decisions impact on the ordinary meaning of the term "employee".

In the case, a labourer had signed an Administrative Services Agreement (ASA) with a labour hire company to work as a "self-employed contractor" on various construction sites. The Full Federal Court had initially held that the labourer was an independent contractor after applying a "multifactorial" approach by reference to the terms of the ASA, among other things. The High Court, however, overturned the Full Federal Court's decision and held that the labourer was an employee of the labour hire company.

The majority of the High Court stated that where the parties have comprehensively committed to the terms of the relationship to a written contract, and no party is disputing the validity of that contract, the characterisation must proceed based on the legal rights and responsibilities established in that written contract. It thus concluded that a multifactorial approach examining the relationship between the parties over the entire history of their dealings was unnecessary and inappropriate. In certain circumstances, however, an examination of post-contractual conduct may be permissible, such as when the contract is not in writing, is oral/partly oral, being challenged or varied.

The minority view of two of the Judges considered the multifactorial test to be a well-established principle for characterising the totality of the legal relationship and that they were permitted to look at the whole employment relationship and not be restricted to the written contract. Even though there were different approaches taken in the judgement, the High Court agreed that the critical question in these circumstances was whether the supposed employee performed work while working in the business of the engaging entity. That is, whether the worker performed their work in the engaging entity's business (ie the labour hire firm) or in an enterprise or business of their own.

In its decision impact statement, the ATO notes that the High Court has not disturbed the well-established practice of examining the totality of the relationship. While the multifactorial test was rejected by a majority, there are still instances where it could be applied.

In addition, the ATO notes that the decision recognises that long-established employment indicators are still relevant, although they must now be viewed through the focusing question of whether the supposed employee is working in the business of the employer. This, according to the ATO, reflects its current understanding of the application of the business integration test that the High Court has now elevated as one of the primary aspects of contractual examination.

As a result of the decision, the ATO will review relevant rulings that may be impacted by the High Court's decision in the case, including super guarantee rulings on work arranged by intermediaries and who is an employee, as well as income tax rulings in the areas of PAYG withholding and the identification of employer for tax treaties.

Source: www.ato.gov.au/law/view/document?docid=LIT/ICD/P5/2021/00001
https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2022/hca-1-2022-02-09.pdf

Movement at the FBT station: COVID-19 tests, car parking

FBT is invariably seen as a relatively slow-moving and quiet area of tax law. But Budget day this year saw some movement at the FBT station, specifically regarding COVID-19 tests provided to staff, and also car parking benefits.

FBT and RATs for employees

There's always a catch with FBT, isn't there? With the introduction of a specific individual income tax deduction, employers can reduce their FBT liability, but there's a catch in the fine print.

The 2022–2023 Federal Budget included a measure previously announced regarding the Federal Government's intention to ensure that the costs of taking a COVID-19 test to attend a place of work are tax deductible for individuals from 1 July 2021.

The associated legislation containing this measure, the *Treasury Laws Amendment (Cost of Living Support and Other Measures) Bill 2022*, passed both houses of Parliament without amendment and received assent on 31 March 2022.

COVID-19 tests, including rapid antigen tests (RATs), provided by employers to employees (whether directly or through a third party under an arrangement, or as a reimbursement of the cost to employees) are considered benefits under the FBT regime.

However, by allowing for an individual tax deduction, the new measure also allows for the operation of the "otherwise deductible" rule to reduce the taxable value of the benefit to zero.

The result? By introducing a specific individual income tax deduction, employers would also not have to pay FBT.

Neat solution. Well, apart from the catch. In paragraph 2.25 of the Explanatory Memorandum to the passed Bill, we see:

> *The existing FBT record keeping requirements apply. Where the "otherwise deductible" rule is applied, the employer would need to ensure they have the relevant documentation and employee declarations to substantiate the extent to which the benefit provided would have been "otherwise deductible" to the employee.*

Specifically, employee-level declarations could be required when the provision of the RAT is a property fringe benefit (that is, legal ownership of the item passes from the employer to the employee).

Where the RAT is provided by way of an expense reimbursement or residual benefit, an employer-level declaration is available (that is, one declaration signed by the public officer on behalf of each employing entity lodging an FBT return to declare that there is no private use).

Now, in case you've just decided in about 30 seconds that collecting hundreds or thousands of employee-level paper declarations is not how you'd like to spend the coming weeks, we see three options at this stage:

- assess the potential application of the minor benefit rule to your fact pattern;
- explore your policy and processes to determine whether the benefit provided could meet an exemption or documentation exception; and
- use an automated, electronic declaration tool to at least take out some of the pain from the process (if doing so, consider a recurring declaration which would last for five years).

We know there will be a number of developing fact patterns and in lieu of this less-than-perfect practical outcome, likely some further consideration by practitioners of the limits of the interpretation of other exemptions within the FBT Act (that do not require employee level declarations).

"Commercial parking station" definition under review

The Federal Government will undertake consultation with the intent of amending the definition of "commercial parking station" to restore the previously understood application of FBT to car parking benefits.

Amid the build-up to the Federal Budget on 29 March 2022, the Assistant Treasurer announced by media release that the Federal Government will be undertaking consultation with the intent of restoring the previously understood application of FBT to car parking fringe benefits.

By way of a reminder:

- a car parking fringe benefit can only arise where the employee parks their car for at least four hours during a daylight period in an employer-provided space in the vicinity of the principal workplace;
- a further requirement is that there is a commercial parking station that charges more than a threshold amount (currently $9.25) for all-day parking within one kilometre of the entrance to the employer's car park; and

- "all-day parking" means parking for a continuous period of at least six hours between 7 am and 7 pm.

The scope of the term "commercial parking station" is therefore fundamental to the determination of whether an employer has taxable car parking benefits.

Broadly, a commercial parking station is a commercial car parking facility where car parking spaces are, for payment of a fee, available in the ordinary course of business to members of the public for all-day parking.

The ATO issued TR 2021/2 on 16 June 2021, in which the Commissioner no longer applied the interpretation that car parking facilities with a primary purpose other than providing all-day parking, usually charging significantly higher rates, were not commercial parking stations.

This revised position of the Commissioner, stemming from the decision of the full bench of the Federal Court in *Federal Commissioner of Taxation v Qantas Airways Limited* [2014] FCAFC 168, was to apply in respect of car parking benefits provided on or after 1 April 2022.

The effect of this would be to bring into the definition of a "commercial parking station" facilities such as shopping centre car parks and hospital car parks.

For employers having only such car parking within a one-kilometre radius, the consequences were significant, potentially bringing previously non-taxable employer-provided car parking within the scope of FBT.

The consultation to be undertaken by the Federal Government is intended to identify the appropriate modifications to the definition of "commercial parking station", with a view to restoring the previously understood interpretation (as expressed by the Commissioner in TR 96/26), which is more closely aligned with the original policy intent of the car parking FBT provisions.

The revised definition of a commercial parking station would apply to car parking fringe benefits provided from 1 April 2022, which is good news for those employers that were to be adversely impacted by the new ruling. We eagerly anticipate the outcomes of the consultation process.

Source: www.ato.gov.au/General/COVID-19/Support-for-businesses-and-employers/FBT,-COVID-19-tests-and-the-otherwise-deductible-rule/
https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/consultation-car-parking-fringe-benefits
www.ato.gov.au/General/Fringe-benefits-tax-(FBT)/Types-of-fringe-benefits/Car-parking-fringe-benefits/

ATO urges vigilance: new TFN and ABN scams

The ATO is urging taxpayers to be vigilant following an increase in reports of fake websites offering to provide tax file numbers (TFN) and Australian business numbers (ABN) for a fee, but failing to provide those services.

The fake TFN and ABN services are often advertised on social media platforms like Facebook, Twitter and Instagram.

The advertisements offer to obtain a TFN or ABN on behalf of a person or business, for a fee. But instead of delivering this service, the scammer uses the fraudulent websites to steal both money and personal information.

TIP: It's important to note that the ATO and Australian Business Register (ABR) **do not** charge fees for providing a TFN or an ABN. It's free, quick and easy to use government services online to apply for a TFN through the ATO, or apply for an ABN through the ABR.

In 2021, more than 50,000 people reported various ATO impersonation scams, with victims losing a total of more than $800,000.

In addition to the ATO being concerned about the recent increase in numbers of victims reporting scams around TFN and ABN applications, it says it is still seeing scammers impersonating the ATO, making threats, demanding the payment of fake tax debts or claiming a TFN has been "suspended" due to fraud.

The ATO notes that those who apply for a TFN or ABN through a tax agent should also always check that the tax agent is registered with the Tax Practitioners Board.

Tips to protect your clients from scammers

- *Know your tax affairs* – You will be notified about your tax debt before it is due. Check if you have a legitimate debt owed by logging into your myGov account or by calling your tax agent if you have one. Find the contact details for the ATO or your tax agent independently by searching online or using your own paper records – don't trust details provided by possible scammers.

- *Guard your personal and financial information* – Be careful when clicking on links, downloading files or opening attachments. Only give your personal information to people you trust and don't share it on social media.
- *If you're not sure, don't engage* – If a call, SMS or email leaves you wondering if it's genuine, don't reply. Instead, you should phone the ATO's dedicated scam line on 1800 008 540 to check if it is legitimate. You can also verify or report a scam online at www.ato.gov.au/scams and visit ScamWatch at www.scamwatch.gov.au to get information about scams (not just tax scams).
- *Know legitimate ways to make payments* – Scammers may use threatening tactics to trick people into paying fake debts via unusual methods. For example, they might demand pre-paid gift cards or transfers to non-ATO bank accounts. To check that a payment method is legitimate, visit www.ato.gov.au/howtopay.
- *Talk to your family and friends about scams to help them stay informed* – And if you or someone you know has fallen victim to a tax-related scam, call the ATO as soon as you can.

Source: www.ato.gov.au/General/Online-services/Identity-security-and-scams/Scam-alerts/?anchor=April2022faketfnabnapplicationscam#April2022faketfnabnapplicationscam

Federal Budget fuel excise reduction: will all businesses benefit?

The uncertainty around availability of fuel has seen fuel prices soar across Australia. The 2022–2023 Federal Budget proposed an answer for this by way of a temporary (six-month) reduction to fuel excise.

The six-month reduction will end at midnight on 28 September 2022 (that is, it won't apply to fuel and similar petroleum-based products on or after 29 September 2022). These changes have already been legislated through the *Excise Tariff Amendment (Cost of Living Support) Bill 2022* and the *Customs Tariff Amendment (Cost of Living Support) Bill 2022*, which both received Royal Assent on 31 March 2022 and are now law.

For petrol and diesel, this means an excise reduction from 44.2 to 22.1 cents per litre, which is already being felt by users at the pump. But who will actually benefit from this Budget promise and what does it mean for those businesses claiming fuel tax credits (FTCs)?

Snapshot: who will benefit?

Individuals:

- all fuel uses of individuals – benefit of 22.1 cents per litre.

Businesses:

- businesses operating light vehicles on public roads – benefit of 22.1 cents per litre;
- businesses operating heavy vehicles on public roads – benefit of 4.3 cents per litre;
- businesses operating vehicles on private roads – no benefit; and
- businesses using fuel for non-vehicle use (auxiliary, machinery, plant and equipment) – no benefit.

Businesses operating vehicles on public roads

Businesses operating vehicles on public roads will see a financial benefit from this measure.

Immediately prior to the Budget announcement, businesses operating light vehicles (4.5 tonnes or less) were not entitled to a FTC and heavy vehicles (over 4.5 tonnes) were entitled to a FTC of 17.8 cents per litre for petrol and diesel. While businesses will not be entitled to claim a FTC in respect of their heavy vehicle fuel usage for the duration of this measure, the minimum benefit available is the 22.1 cents per litre fuel excise reduction. This translates to 22.1 cents per litre more for light vehicles and 4.3 cents per litre more for heavy vehicles.

There is also a timing advantage for businesses, given the benefit will be received in real time at the pump rather than waiting to receive a FTC refund through their BAS.

Businesses operating vehicles on private roads; fuel for non-vehicle use

Businesses operating vehicles on private roads or using fuel for non-vehicle use will not see a financial benefit from this measure.

Immediately prior to the Budget announcement, businesses operating vehicles on private roads or using fuel for non-vehicle use (eg auxiliary, machinery, plant and equipment) were entitled to a FTC of 44.2 cents per litre for petrol and diesel. Under this new measure, the FTC available will reduce in line with the reduction in fuel excise. As such, businesses will be entitled to a 22.1 cents per litre fuel excise reduction at the pump and a 22.1 cents per litre FTC.

While this means that there is no reduction in the overall cost of fuel for these businesses, there will be a timing advantage, given they will now receive half of the benefit in real time at the pump rather than waiting to receive a FTC refund through their BAS.

What should businesses do?

For businesses that currently claim FTCs, it is important they understand the impact of these changes on their FTC entitlement and adjust their FTC process accordingly.

We expect there will be increased complexity for businesses claiming FTCs in the first few weeks of the temporary measure and the weeks following its conclusion. This is because the changes in fuel excise are expected to trickle through from fuel suppliers depending on where businesses are located and how they purchase their fuel. Businesses will be required to determine which rate of fuel excise has been applied to fuel purchases to determine the rate of fuel tax credit available.

Source: www.ato.gov.au/Newsroom/smallbusiness/GST-and-excise/Fuel-tax-credit-rates-have-changed/ www.ato.gov.au/Business/Fuel-schemes/Fuel-tax-credits---business/

ATO's COVID-related support for SMSFs

Because of the financial impacts of COVID-19, trustees of a self managed superannuation fund (SMSF), or a related party of the fund, may provide or accept certain types of relief, which may give rise to contraventions of the super laws. Some trustees may also have been stranded overseas because of travel bans, which can affect their fund's residency status.

In recognition of these issues, the ATO is offering support and relief to SMSF trustees for the 2019–2020, 2020–2021 and 2021–2022 income years. Trustees must properly document the relief and provide their approved SMSF auditor with evidence to support it for the purposes of the annual SMSF audit.

Rental relief

An SMSF trustee, or a related party of the SMSF, may have offered rental relief to a tenant due to the financial impacts of COVID-19. The ATO offers the following related support:

- If rent was reduced or waived, the ATO will not take any compliance action against the fund and/or ask its approved SMSF auditor to report any contraventions, as long as the relief is provided on comparable terms to relief offered by other landlords to unrelated tenants in similar circumstances.
- If rent was deferred, relief granted by the ATO will ensure that the deferral does not cause a loan or investment to be an in-house asset of the fund in 2019–2020, 2020–2021 or 2021–2022, and future financial years, provided certain conditions are met.

Temporary changes to a lease agreement to provide for rental relief need to be properly documented, together with the reasons for those changes. It's important to note that a formal variation of the lease may need to be executed.

In-house asset relief

If the value of the fund's in-house assets exceeds 5% of the fund's total assets as at 30 June of an income year, the fund trustees are required to prepare and execute a written plan to get those holdings below 5% by the end of the following income year.

However, if trustees have not been able to execute this type of plan because of the financial impacts of COVID-19:

- the ATO will not take any compliance action against the fund; and
- the fund's approved SMSF auditor will not need to report any contravention of the in-house asset rules to the ATO.

Loan repayment relief

If a fund has offered loan repayment relief because the borrower was experiencing difficulty repaying the loan due to the financial impacts of COVID-19, the ATO will not take any compliance action and the approved SMSF auditor need not report any contravention of the super laws, provided:

- the relief is offered on commercial terms; and
- the changes to the loan agreement are properly documented.

Other relief

- *SMSF residency relief* – This may be available where a fund no longer satisfies the residency rules because the trustee/s were stranded overseas for an extended period.

- *LRBA relief* – This may be available if an SMSF has a limited recourse borrowing arrangement (LRBA) in place with a related party lender, and the lender has offered loan repayment relief to the fund due to the financial impacts of COVID-19.

Source: www.ato.gov.au/General/COVID-19/Support-for-self-managed-super-funds/

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