

## Why are some Businesses Returning JobKeeper to the ATO?

**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 Dominos 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."*

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

The first phase of JobKeeper did not require businesses to prove that they had actually suffered a downturn in revenue. They just needed to have evidence that 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 becoming entrenched 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 Jeremy 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 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.

# 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 be completed 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 Covid-19. 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 (e.g. 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 is 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.

## 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 can easily be 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, they will be 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 on domestic and international travel in the middle-to-end of 2021.

For employers in high risk industries, it is 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.

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# FBT 2021: Tax and Employee Benefits

**Fringe benefits tax (FBT) is one of Australia's most disliked taxes because it is 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 is 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 below at the key issues and the 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 is generally classed as a minor benefit and exempt from FBT.

## Covid-19 and 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, FBT 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.

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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 rebateable 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 FBT, but not recognised in income tax return** – where employee contributions reduce the amount of FBT payable (e.g. 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.

## 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 other, stating *"Some have remained remarkably productive during the Covid-era, capitalising 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 was 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 average working day in the US is close to 7.2 hours.

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

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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.

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