Your Knowledge – December 2018

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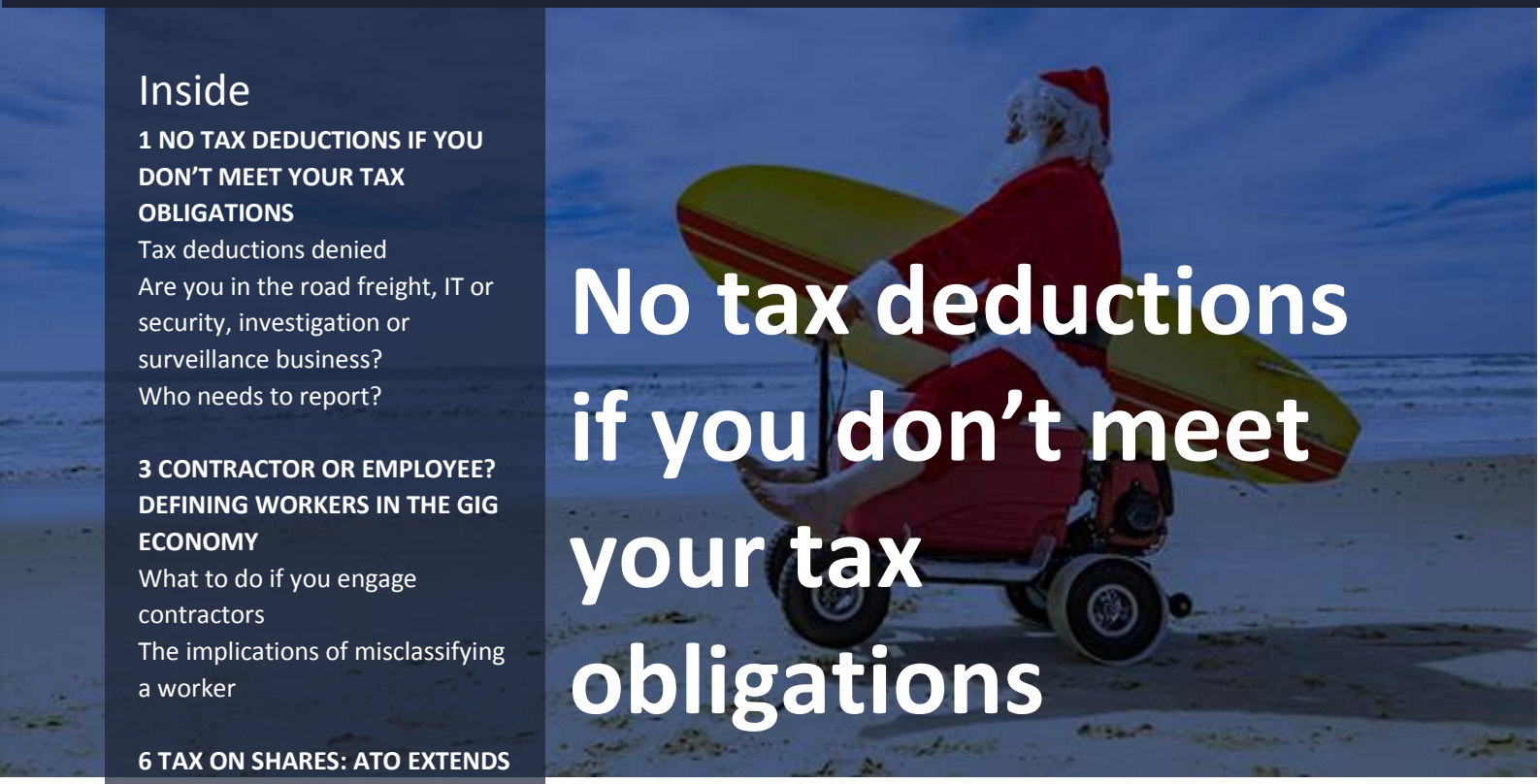

No tax deductions if you don't meet your tax obligations

New laws passed by parliament last month directly target the behaviour of taxpayers that don't meet their obligations.

Tax deductions denied

If taxpayers do not meet their PAYG withholding tax obligations, from 1 July 2019 they will not be able to claim a tax deduction for payments:

- of salary, wages, commissions, bonuses or allowances to an employee;
- of directors' fees;
- to a religious practitioner;
- under a labour hire arrangement; or
- made for services where the supplier does not provide their ABN.

The main exception is where you realised there is a mistake and voluntarily corrected it. For example, if you made payments to a contractor but then later realised that they should have been paid as an employee and no PAYG was withheld.

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In these circumstances, a

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deduction may still be available if you voluntarily correct the problem but penalties may still apply for the failure to withhold the correct amount of tax.

Are you in the road freight, IT or security, investigation or surveillance business?

The Taxable Payments Reporting system was introduced to stem the flow of cash payments to contractors and rampant under reporting of income. Since the building and construction industry was first targeted in 2012, the reporting system has expanded to include cleaning and courier services. Now, a broader set of industries have been targeted.

If you have an ABN, and are in road freight, IT or security, investigation or surveillance, then any payments you make to contractors will need to be reported to the Australian Tax Office (ATO).

Be careful here as the definition of these industries is very broad. For example, 'investigation or surveillance' includes locksmiths. The definition covers services that provide "protection from, or measures taken against, injury, damage, espionage, theft, infiltration, sabotage or the like."
IT services are the provision of "expertise in relation to computer hardware or software to meet the needs of a client." This includes software installation, web design, computer facilities management, software simulation and testing. It does not include the sale of software or lease of hardware.

Road freight is typically goods transported in bulk using large vehicles. This includes services such as log haulage, road freight forwarding, taxi trucks, furniture removal, and road vehicle towing. The addition of road freight to the taxable payments reporting system completes the coverage of delivery and logistics services as businesses in courier services are already obliged to report payments to contractors to the ATO.

If your business is impacted by these changes, you need to document the ABN, name and address, and gross amount paid to contractors from 1 July 2019. Your first report to the ATO, the Taxable Payments Annual Report (TPAR), is due by 28 August 2020. This might seem like a long way away but it will come around quickly and you need to ensure that your systems are in place to manage the reporting required easily and accurately.

Who needs to report?

The obligation to report contractor payments to the ATO is already quite broad. The addition of road freight, IT or security, or investigation or surveillance services, adds another layer.

Service	Reporting of contractor payments
Building and construction services	From 1 July 2012
Cleaning services	From 1 July 2018
Courier services	From 1 July 2018
Road freight, IT or security, or investigation or surveillance services	From 1 July 2019

For businesses providing mixed services, if 10% or more of your GST turnover is made up of affected services, then you will need to report the contractor payments to the ATO.

Quote of the month

"If everything seems under control, you're just not going fast enough."

Mario Andretti
Racing driver

Contractor or employee? Defining workers in the gig economy

A former Foodora Australia delivery rider, Joshua Klooger, recently won an unfair dismissal claim despite a service agreement that classified him as an independent contractor.

Pivotal to the Fair Work Commission's decision was the classification by Foodora of Mr Klooger as an independent contractor. The "Corporate Rider" was employed under a service agreement titled "Independent contractor agreement". At the initial rate of $14 per hour and $5 per delivery, corporate riders would log into an app (the shifts app) which, at predetermined times each week, displayed available shifts. The shifts identified start and finish times and a specific geographical location where the delivery work would be undertaken. The riders could then decide what shifts they wanted. The riders undertaking shifts were provided with a Foodora branded insulated box, and other Foodora branded attire and equipment. Once the shift started, the riders would receive notifications through the app of an order to be picked up from a restaurant. Once the order had been collected, the rider would confirm the pick up, then the deliveries app would advise the delivery address.

In 2016, Mr Klooger's friend and fellow Foodora delivery rider had his visa cancelled. As a result, Foodora suspended the friend's access to the shifts and deliveries app. Instead, Mr Klooger gave his friend his access to the Foodora app allowing him to select and fulfil shifts. Over time, three other individuals did the same. Mr Klooger would reconcile his account, deduct tax and a further 1% for his involvement, then pay the substitutes. While the Foodora contract allowed for substituting, it required prior written consent. However, when Foodora became aware of the substitution scheme it took no steps to stop it and instead commended Mr Klooger for his "entrepreneurial initiative."

The rates Foodora paid to riders and the way in which shifts were allocated changed over time. In July 2016, the hourly rate for new riders/ drivers was reduced to $13 plus $3 per delivery, and a $1 per delivery payment for Friday, Saturday and Sunday night work. *Continued over…*

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Towards the end of 2016, Foodora removed the hourly rate for new riders completely, fixing a flat $10 per delivery payment. The flat rate was progressively reduced further and by February 2018, the rate for new delivery riders had dropped to $7 per delivery. In addition, a new "batching system" was put in place which established a fortnightly assessment process that ranked individual delivery riders and offered shifts according to rank. The highest ranked riders were offered shifts well before lower ranked riders.

When determining whether a worker is a contractor or an employee, the courts say "… the distinction between an employee and an independent contractor is rooted fundamentally in the difference between a person who serves his employer in his, the employer's business, and a person who carries on a trade or business of his own."

The factors identified by the commission in this case are helpful indicators:

How work is fulfilled. The commission determined that while the riders had the choice to accept the shifts, the shift start and finish times and geographical locations were fixed by Foodora. Despite the ability to self-select shifts, the commission saw that the "process for engagement is similar to a variety of electronic and web-based systems that are frequently used to advise, in particular, casual employees of available shifts that are offered." While the system is not as prescriptive as naming particular employees, the commission saw the results as essentially similar.

What the contract said. While the Foodora service agreement attempts to establish a relationship of principal and contractor, the commission found that, "The service contract contains many provisions which are similar in form and substance to those that would ordinarily be found in an employment contract document." These included clauses dealing with rostering and acceptance of jobs, the attire to be worn when on shift, the specific nature of the engagements to be undertaken including requirements that the contractor is to comply with all policies and practices of the principal.

Who had control? Foodora had "… considerable capacity to control the manner in which the applicant performed work." The commission also noted that the batching system meant that to maintain a high ranking, riders had to perform a certain number of deliveries during a shift, work a minimum number of shifts in a week and work a number of Friday, Saturday and Sunday shifts.

Generating business. In Foodora's favour was the fact that it did not prevent its riders from working for other companies or delivery platforms. However, in this case the commission compared this ability to casual restaurant staff working for more than one restaurant.

Is the contractor operating separate to the principal? One of the aspects of many contractor versus employee cases is whether the individual holds themselves out to the public as a separate business in their own right – do they have their own place of business. In this case, Mr Klooger worked exclusively for Foodora.

Supply of tools of trade. Mr Klooger's only investment as a contractor was his bicycle which he also used privately. An asset which the commission points out does not require a high degree of skill or training.

Delegation of work. One of the factors that determines whether someone is a contractor or employee is their capacity to delegate work to others. The substitution scheme operated by Mr Klooger was a significant factor in this case as he was delegating work.
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However, in this instance, the commission saw that the substitution scheme was a breach of Foodora's own service agreement not evidence of delegation despite their eventual acceptance of the scheme.

Identifying as Foodora. Riders had to identify as being from Foodora. Clause 4 of the service contract established an expectation riders dress in Foodora branded attire, and utilise equipment displaying the livery of the Foodora brand.

Tax, leave, and remuneration. As Foodora classified the riders as independent contractors no tax was deducted from payments made. Riders were not entitled to holiday or sick leave. When Foodora paid Mr Klooger, they would generate a recipient created invoice. Once Mr Klooger had reviewed the invoice and made any corrections, the invoice would be paid.

Reputational damage. If the riders did not perform to the standard expected by customers, it was Foodora that faced reputational damage not the riders.

While Mr Klooger won his case and was awarded $15,559, Foodora appointed voluntary administrators on 17 August 2018, well before this case came before the commission. The commission pursued the case on public importance grounds.

Foodora is by no means the first company to fall foul of the definition between contractor and employee; there are a litany of companies that have stepped over the definitional boundary but it is one of the first to test platform based work relationships in the gig economy.

However, not all gig economy businesses engaging with workers using a platform are at risk. In December 2017, an unfair dismissal claim against Uber was dismissed. Many of the factors evident in the Foodora case were not evident in Uber's model. Interestingly, the commission noted that current laws that determine work for wages and the nature of employment relationships "… developed and evolved at a time before the new "gig" or "sharing" economy. It may be that these notions are outmoded in some senses and are no longer reflective of our current economic circumstances. These notions take little or no account of revenue generation and revenue sharing as between participants, relative bargaining power, or the extent to which parties are captive of each other, in the sense of possessing realistic alternative pursuits or engaging in competition. Perhaps the law of employment will evolve to catch pace with the evolving nature of the digital economy."

Pre-empting the commission's warning on the gig economy was the 2017 Senate report that asked whether the gig economy is "hyper flexibility or sham contracting." In addition to exploring the model of organisations like Deliveroo, the Senate committee demonstrated how apps like AirTasker are being used by businesses for ongoing roles without the burden of employment. The fee Airtasker takes is charged only to the worker. Posters deposit payment into an account managed by the company, and Airtasker then releases 85% of that money to the worker, once the job poster declares the work to be complete.

What to do if you engage contractors

If you engage contractors, it is essential to get the facts of the relationship right. Business owners need to take a proactive approach to reviewing arrangements to ensure that the business is not exposed to material liabilities. Key factors include:

- Whether the work involves a particular profession or skill set.
- The level of control the contractor has over how the contract is executed.
- The ability of the contractor to delegate work to another person.
- Whether the contractor supplies his own tools or equipment.

- Whether the contractor has his own place of business.
- The contractor's ability to generate goodwill or saleable assets during the course of the contract.
- How the contractor is paid (for hours worked or a result).
- The level of risk the contractor bears.
- Whether the contractor is independent or in reality, simply 'part and parcel' of the organisation they contract to.

No single factor is determinative; it is the weight of evidence, on balance, across all of the factors.

The implications of misclassifying a worker

The implications of misclassifying a worker go well beyond industrial relations. If a business misclassifies an employee, it impacts on superannuation guarantee (SG), PAYG withholding, workers compensation, and payroll tax. These entitlements will often need to be met even if the misclassification was a genuine mistake.

For SG obligations, there is no real time limit on the recovery of outstanding obligations. However, the ATO will generally only go back 5 years unless the individual employee can prove an entitlement beyond this point. Remember that employers that fail to make their superannuation guarantee payments on time don't just pay the outstanding superannuation but are subject to the SG charge (SGC) and lodge a Superannuation Guarantee Statement. SGC is made up of:

- The employee's superannuation guarantee shortfall amount;
- Interest of 10% per annum; and
- An administration fee of $20 for each employee with a shortfall per quarter.

Unlike normal superannuation guarantee contributions, SGC amounts are not deductible to the employer, even when the liability has been satisfied.

Getting it wrong can be a very costly exercise particularly if the error is evident over a number of years.

Tax on shares: ATO extends data matching program

The Australian Tax Office (ATO) is utilising data provided by the Australian Investments and Security Commission (ASIC) to data match share trades.

The ATO is accessing more than 500 million records detailing price, quantity and time of individual trades dating back to 2014. The information complements information that the ATO already holds from brokers, share registries and exchanges.

Utilising this wealth of information, the ATO will explore what has been reported on tax returns, specifically, capital gains on the sale or transfer of shares and the losses claimed.

Given that more than 5 million Australians now own shares, the ATO is keen to ensure that errors are minimised.

"… there is evidence that some taxpayers are getting it wrong when it comes to reporting their capital gains or losses from the sale of shares. In particular, we tend to see higher rates of error among those who don't regularly trade in shares and who are not aware of the tax implications," Assistant Commissioner Kath Anderson said.

With penalties as high as 75% of the tax shortfall, it is important to ensure that you have your documentation in place for share trades and transfers including records of share purchase and sale prices, as well as costs like brokerage fees. If you sold part of your share holdings, you need to keep records of the parcel you sold and the parcel you are still holding.