

Decision impact statement

Airport Handling Services Australia Pty Ltd v Commissioner of Taxation

Court citation:	[2021] FCA 1405
Venue:	Federal Court of Australia
Venue reference no.:	VID 48 of 2021, VID 49 of 2021, VID 50 of 2021, VID 51 of 2021, VID 52 of 2021, VID 53 of 2021, VID 54 of 2021, VID 56 of 2021
Judge:	O'Callaghan J
Judgment date:	15 November 2021
Appeals on foot:	No
Decision outcome:	Partly favourable to the Commissioner

Impacted advice



This decision has no impact on any related advice or guidance.

Précis

This Decision impact statement outlines the ATO's response to this case, which concerns amendments made to the 'sovereign entity' exclusion in subsection 7(2) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (JobKeeper Rules).

All legislative references in this Decision impact statement are to the JobKeeper Rules, unless otherwise indicated.

Brief summary of facts

The applicants operated businesses in Australia in the aviation and hospitality industries. Each was wholly owned by the Dubai Government and employed an Australian workforce.

Between 30 March and 1 May 2020, the applicants made wage payments of at least \$1,500 to their employees in anticipation that the payments would be subsidised under the JobKeeper scheme.

To be entitled to JobKeeper payments, the applicants must have satisfied the conditions for entitlement in section 6. One requirement was that the applicants not be excluded by subsection 7(2).¹ Until 30 April 2020, paragraph 7(2)(e) excluded an entity that was a 'sovereign entity' within the meaning of section 880-15 of the *Income Tax Assessment Act 1997*. None of the applicants came within this definition.

¹ Paragraph 6(1)(b).

On 1 May 2020, an instrument amending the JobKeeper Rules (Amending Instrument) was registered, extending the sovereign entity exclusion to Australian subsidiaries of sovereign entities.² The applicants fell within this extended definition. The commencement section of the Amending Instrument provided that it commenced immediately after registration.³ However, the application provision specified that the amendment would apply to JobKeeper fortnights beginning on or after 30 March 2020.⁴

By the time of the Amending Instrument's registration, the applicants⁵ had satisfied the requirements for entitlement in section 6, apart from the requirement to provide information about the entitlement to the Commissioner in the approved form.⁶

The applicants contended that they were entitled to JobKeeper payments for the first 2 JobKeeper fortnights, notwithstanding the amendment to the JobKeeper Rules. This was because the Amending Instrument purported to have retrospective effect and the applicants had accrued rights to JobKeeper payments, which were preserved by subsection 12(2) of the *Legislation Act 2003* (LA 2003). Alternatively, the applicants contended that section 20 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (CERP Act) did not authorise the Treasurer of Australia to make retrospective rules.

The Commissioner decided that the applicants were not entitled to the JobKeeper payments they sought. That decision was affirmed by the Commissioner on objection. The applicants appealed to the Federal Court.

Issues decided by the Court

The 3 issues considered by the Court were:

- whether the Amending Instrument commenced before it was registered, within the meaning of subsection 12(2) of the LA 2003 (**retrospectivity issue**)
- if the Amending Instrument had retrospective operation, whether the applicants had any 'rights' that were adversely affected within the meaning of paragraph 12(2)(a) of the LA 2003 under either of sections 6 or 7 (of the JobKeeper Rules) at the time that the Amending Instrument was registered (**rights issue**)
- to the extent that the Amending Instrument had retrospective operation, whether it was *ultra vires* the rule-making power in section 20 of the CERP Act (***ultra vires* issue**).

His Honour found that the applicants were not entitled to the JobKeeper payments sought. His Honour's decision on each of the issues is summarised as follows:

Retrospectivity issue

The term 'commences' in subsection 12(2) of the LA 2003 is not limited to when an instrument formally commences but is synonymous with 'takes effect' and 'comes

² *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020*.

³ Table item 1 of section 2(1) of the Amending Instrument.

⁴ Section 101.

⁵ Certain applicants had not yet notified the Commissioner of their election to participate in the scheme per paragraph 6(1)(e). However, the distinction is not relevant for present purposes.

⁶ Pursuant to paragraph 6(1)(f).

into operation'.⁷ Accordingly, the Amending Instrument commenced on 30 March 2020, which was prior to its registration.⁸

Rights issue

The authorities⁹ establish that the existence of a 'right' depends on the terms of the enactment giving rise to its creation.¹⁰ Under section 6, no entitlement to a JobKeeper payment arises until all the requirements in that section are satisfied. Further, nothing in the text of the CERP Act or the JobKeeper Rules suggest that some criteria were of greater significance than others.¹¹

It followed that, for the purposes of subsection 12(2) of the LA 2003, the applicants had no rights of any relevant kind at the time the Amending Instrument commenced.

Ultra vires issue

Because of the way that the retrospectivity issue was decided, it was not necessary for the Court to decide on the *ultra vires* issue.¹²

However, had it been necessary to decide, his Honour would have held that section 20 of the CERP Act authorised the making of rules with retrospective effect.¹³ This intention could be inferred from the breadth of the subject matters that section 7 of the CERP Act permitted the JobKeeper Rules to deal with, the broad language of the rule-making power in section 20 and the need for the Treasurer of Australia to be able to adjust the JobKeeper scheme promptly in response to the COVID-19 pandemic.¹⁴

ATO view of decision

Retrospectivity issue

We accept the Court's interpretation of the term 'commences' in subsection 12(2) of the LA 2003 and consider it to be consistent with the purpose of the section. The Commissioner will, in future, apply this view of the law in analogous circumstances. The Attorney-General's Department, which has responsibility for the LA 2003, also accepts this position.

Rights and ultra vires issues

The decision of the Federal Court on these issues is consistent with the way the Commissioner has interpreted and applied the JobKeeper Rules and the CERP Act.

Implications for impacted advice or guidance

Not applicable.

⁷ *Airport Handling Services Australia Pty Ltd v Commissioner of Taxation* [2021] FCA 1405 (*Airport Handling*) at [85].

⁸ *Airport Handling* at [100–101].

⁹ See, for example, *Chief Adjudication Officer v Maguire* [1999] 1 WLR 1778.

¹⁰ *Airport Handling* at [131].

¹¹ *Airport Handling* at [120].

¹² *Airport Handling* at [137].

¹³ *Airport Handling* at [138] and [143].

¹⁴ *Airport Handling* at [141–142].

Comments

We invite you to advise us if you feel this decision has consequences we have not identified. Please forward your comments to the contact officer.

Date issued: 15 September 2022

Contact officer details have been removed as the comments period has expired.

Legislative references

Coronavirus Economic Response Package (Payments and Benefits) Act 2020
20

Coronavirus Economic Response Package (Payments and Benefits) Amendment
Rules (No. 2) 2020
2

Coronavirus Economic Response Package (Payments and Benefits) Rules 2020
6

6(1)(b)

6(1)(f)

7

7(2)

7(2)(e)

101

Income Tax Assessment Act 1997
880-15

Legislation Act 2003
12(2)
12(2)(a)

Case references

Chief Adjudication Officer v Maguire [1999] 1 WLR 1778

ATO reference

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