



Jobkeeper

Session 4: Applying the tests to employment entities

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Quick recap

Jobkeeper payment

Key aspects of the Jobkeeper payment regime



Eligible Employers

Eligible employers has requisite decline in turnover during the relevant period

Receive \$1,500 for each eligible employee paid
\$1,500 (gross before tax) per fortnight



Eligible Owners

Eligible business has requisite decline in turnover during the relevant period

Receive \$1,500 for one eligible
business participant per fortnight

Jobkeeper payment

Decline in turnover test – the basic test

Projected GST turnover for the test period falls short of the
Current GST turnover for the comparison period and
Shortfall equals or exceeds the specified percentage for the entity



**Entity's aggregated
turnover \leq \$1b**

Threshold is 30%



**Entity's aggregated
turnover $>$ \$1b**

Threshold is 50%



**ACNC registered
charity***

Threshold is 15%

** This category does not include certain higher education providers or schools*

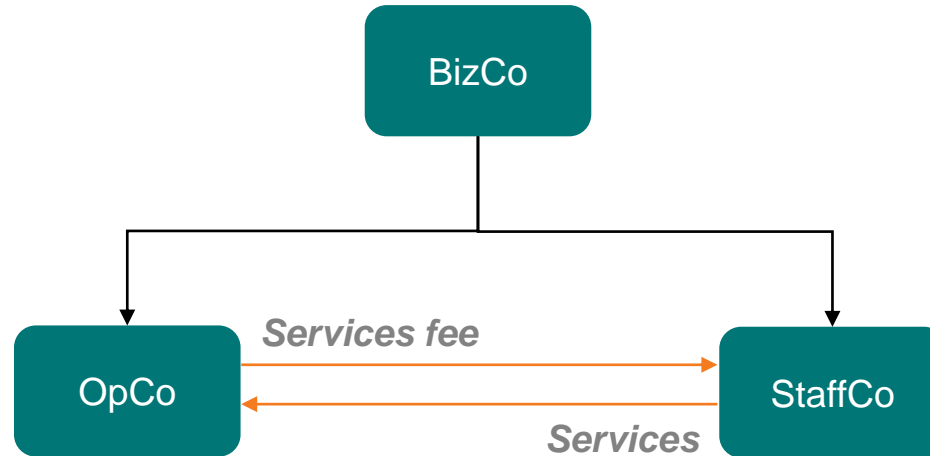
Jobkeeper payment

Decline in turnover test – the Commissioner's alternative tests

#	SCENARIO	DESCRIPTION
1	Commenced business	Entity commenced business before 1 March and after the comparison period in 2019
2	Acquisitions and disposals	Entity acquired or disposed of part of their business and the acquisition or disposal changed the entity's turnover
3	Restructure of business	Entity restructured part or all of its business and the restructure changed the entity's turnover
4	Substantial increase in turnover	Entity's turnover has increased substantially under the 50% / 25% / 12.5% rule
5	Irregular turnover	Non-cyclical business has irregular turnover during a quarter over the last 12 months
6	Sole trader or small partnership	Impact where sole trader or partner of small partnership is effected by sickness, injury or leave
7	Drought or natural disasters	Some or all of the business carried on in a declared drought or other natural disaster zone

Basic decline in turnover test

Application to service entities



OpCo business has been affected by COVID-19 and satisfies the basic decline in turnover test

However **OpCo does not employ anyone**

Service agreement provides for a cost-plus. **StaffCo has not reduced any staff or hours**

StaffCo's turnover has not declined



New modified test for employment entities



Issues to consider before you start

- Does the employment entity satisfy the basic conditions?
- Does the employment entity carry on a business in Australia on 1 March 2020?
- Has it ever made a profit or have a prospect of profit?
- Is there a legal agreement in place for the services?
- Is the arrangement commercial?



Modified employment entity test

Conditions for eligibility

#	Tests	Short description
1	Employment entity satisfies the grouping test	It is a member of a consolidated group, consolidatable group or a GST group
2	Employment entity satisfies the principal activity test	Principal activity is to supply group members with employee labour services
3	The Group satisfy the external supply test	One or more test members of the group that have the principal activity of making supplies to non-group members
4	Employment entity satisfies the merely incidental test	No employee labour services are supplied to members outside of the group (other than merely incidental)
5	Commissioner does not apply integrity rule	Must not have made a determination in writing that disallows the entity from using the test

Modified employment entity test

Modification to the basic test



Ordinary basic decline test

Compare the employer entity's **projected GST turnover** for the turnover test period

With the employer entity's **current GST turnover** for a relevant comparison period



Modified test

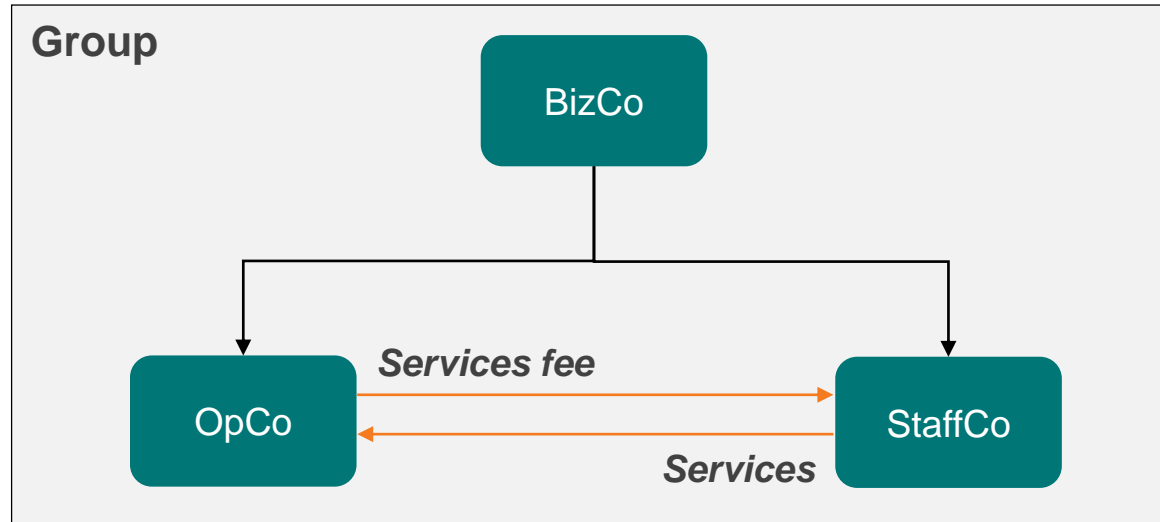
Instead use the sum of the **projected GST turnovers** for that period of each test member

Instead use the sum of the **current GST turnovers** for that period of each test member

Test member can use 'alternative test' for the purpose of determining the current GST turnover where the alternative test applies to that test member

Basic decline in turnover test

Basic application to service entities



OpCo business has been affected by COVID-19 and satisfies the basic decline in turnover test

However **OpCo does not employ anyone**

StaffCo can now use the GST turnover of OpCo and can therefore pass the basic decline in turnover test

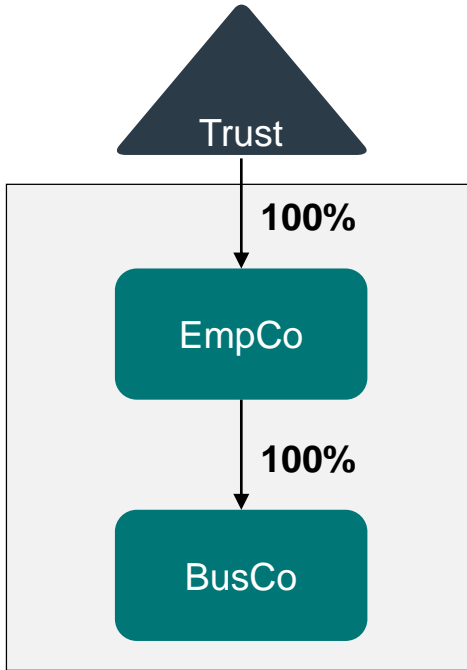


Test 1

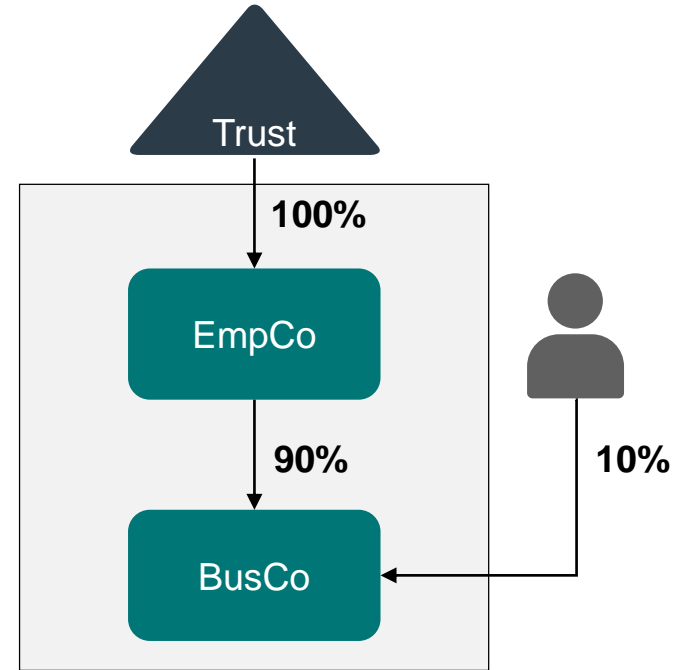
The group test

The group test

Condition



Satisfies consolidated or consolidatable group test

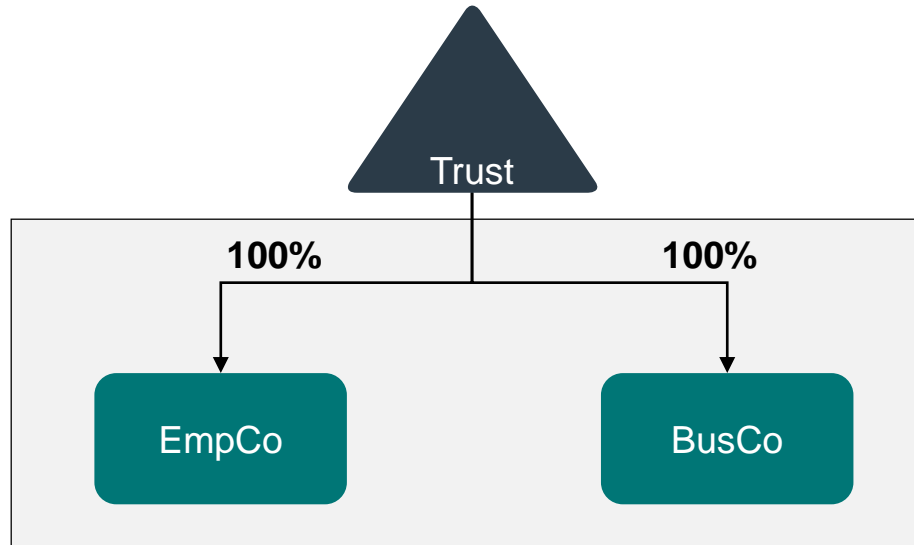


Satisfies GST group test



The group test

What is an acceptable group?

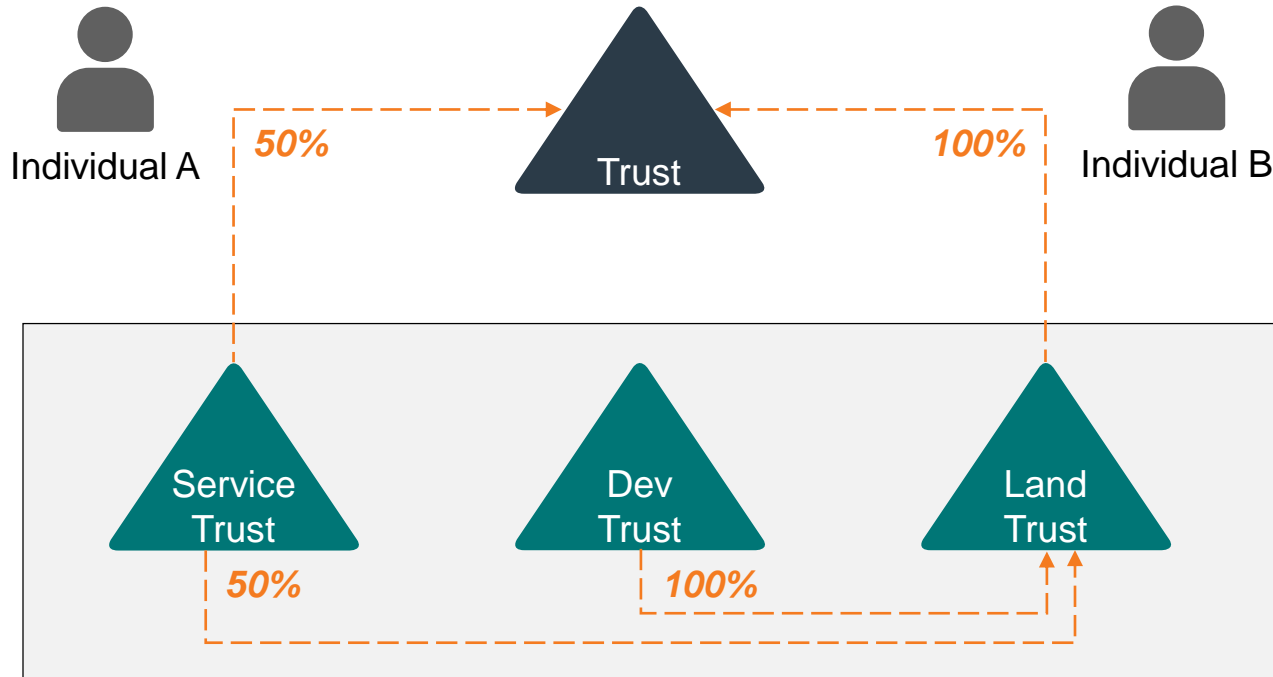


**This group would not qualify as
a tax consolidated group nor a GST group**



The group test

What is an acceptable group?

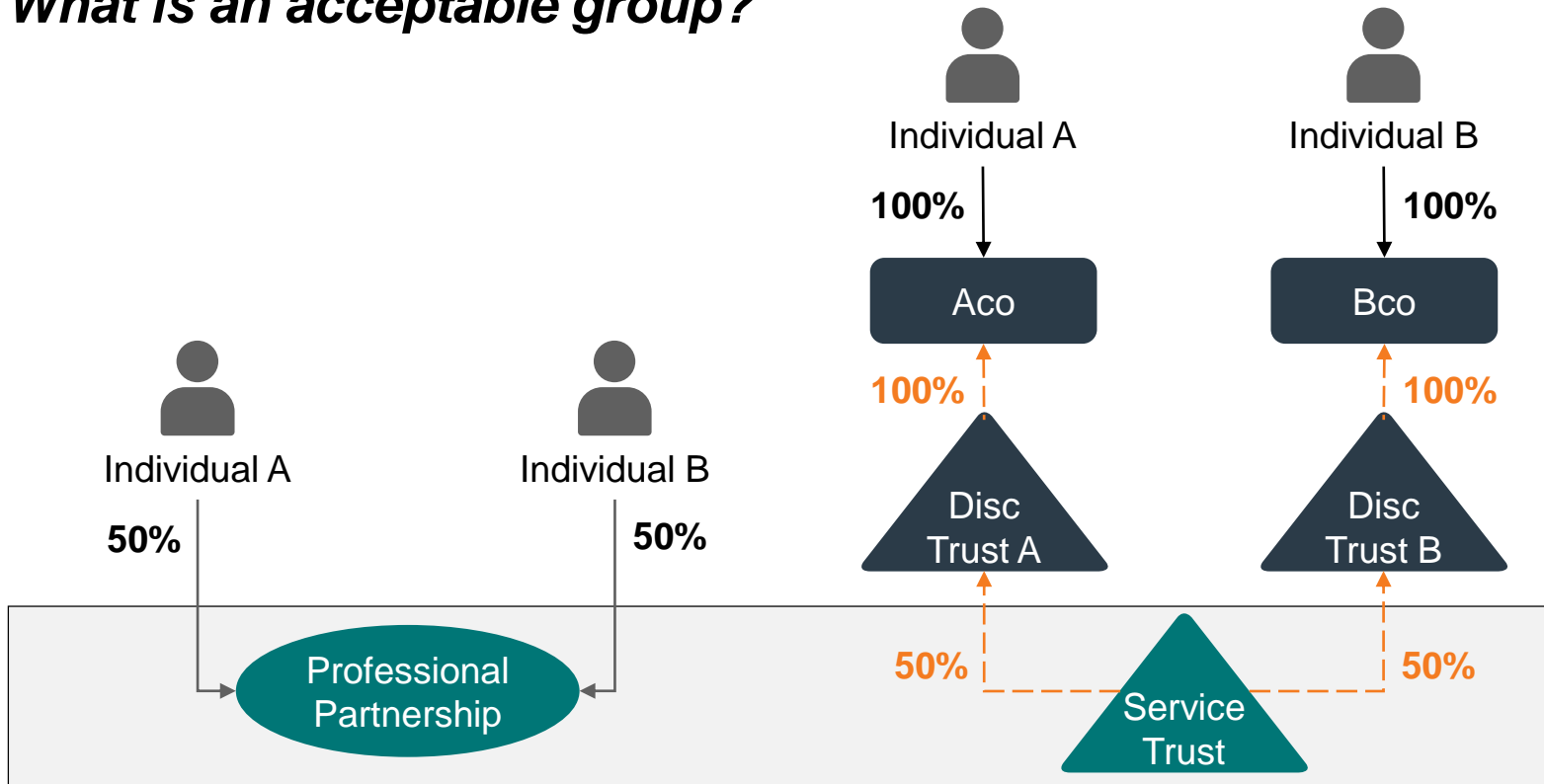


**This group may or may not
qualify as a GST group**



The group test

What is an acceptable group?



**This group may or may not
qualify as a GST group**



The group test **Questions**

When do you need to satisfy the grouping test?

What happens if you form a GST group now?

Can you retrospectively form a GST group?

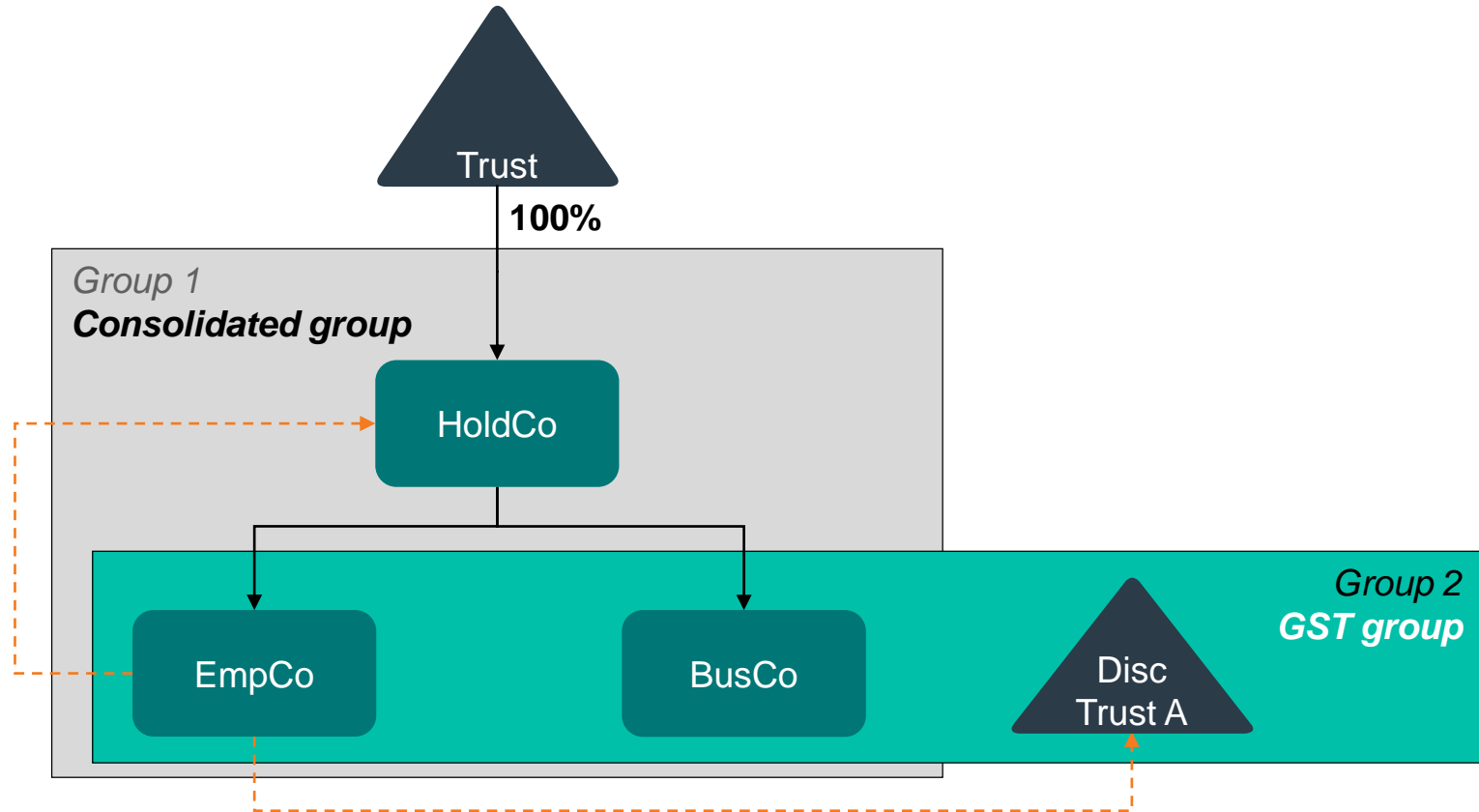
Will the integrity provisions apply if you form a group?

What if you are a member of two groups?



The group test

Member of two groups





Test 2

The principal activity test

Condition

The principal activity test

The employer entity's principal activity must be to supply other members of the group with services (**employee labour services**) consisting of the performance of work by individuals the employer entity employs.

Consider

What is a principal activity?

What if you provide other services (e.g. use of equipment)?

What if you supply contractors that are not individuals or employees?

When do you test the principal activity?



Test 3

The external supply test

Condition

The external supply test

In a turnover test period in which the test time occurs,

- the employer entity supplies **employee labour services** to one or more members of the group (each of which is a **test member**)
- that have as their principal activity the making of supplies to entities other than members of the group

Consider

What is a principal activity?

Does each group entity need to satisfy this rule (or only one or more)?

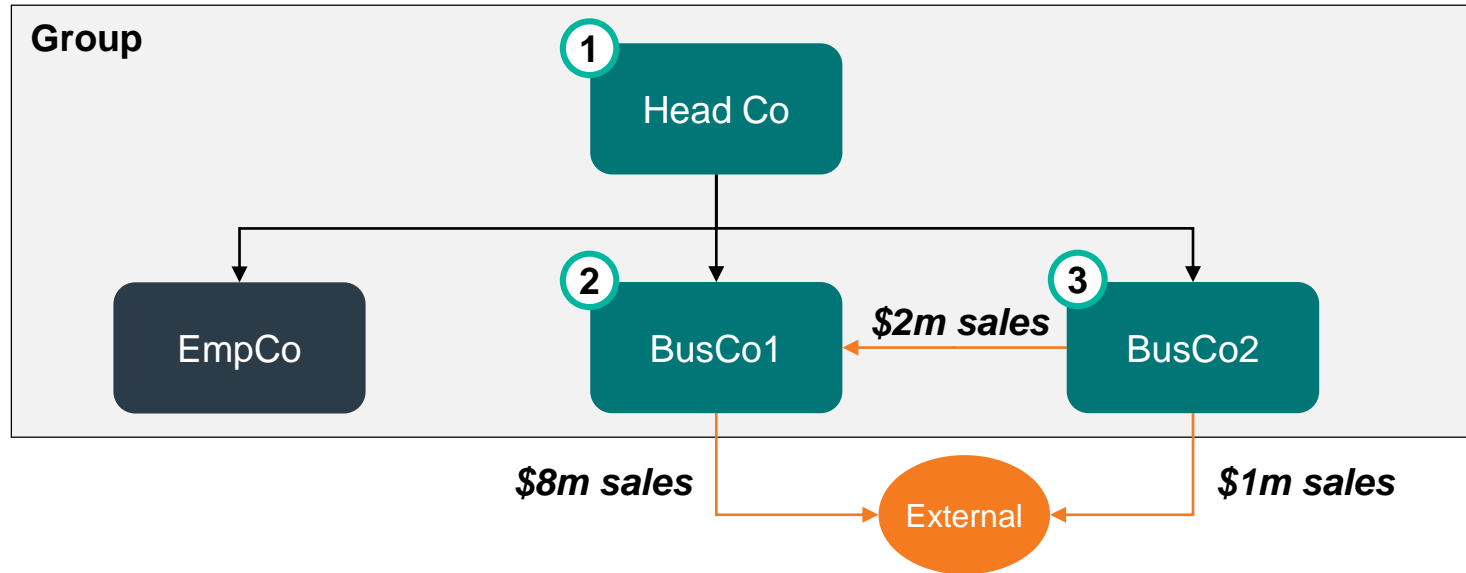
Who is a test member –one that receives services or one that satisfies this rule?

Does the test member need to carry on business?

The external supply test

How to test the condition

(X) Potential test members



In a turnover test period in which the test time occurs, the employer entity supplies **employee labour services** to one or more members of the group (each of which is a **test member**) that have as their principal activity the making of supplies to entities other than members of the group

The external supply test **Questions**

When do you test the principal activities of test members?

What happens if the test member has stopped trading during COVID19?





Test 4

The merely incidental test

Condition

The merely incidental test

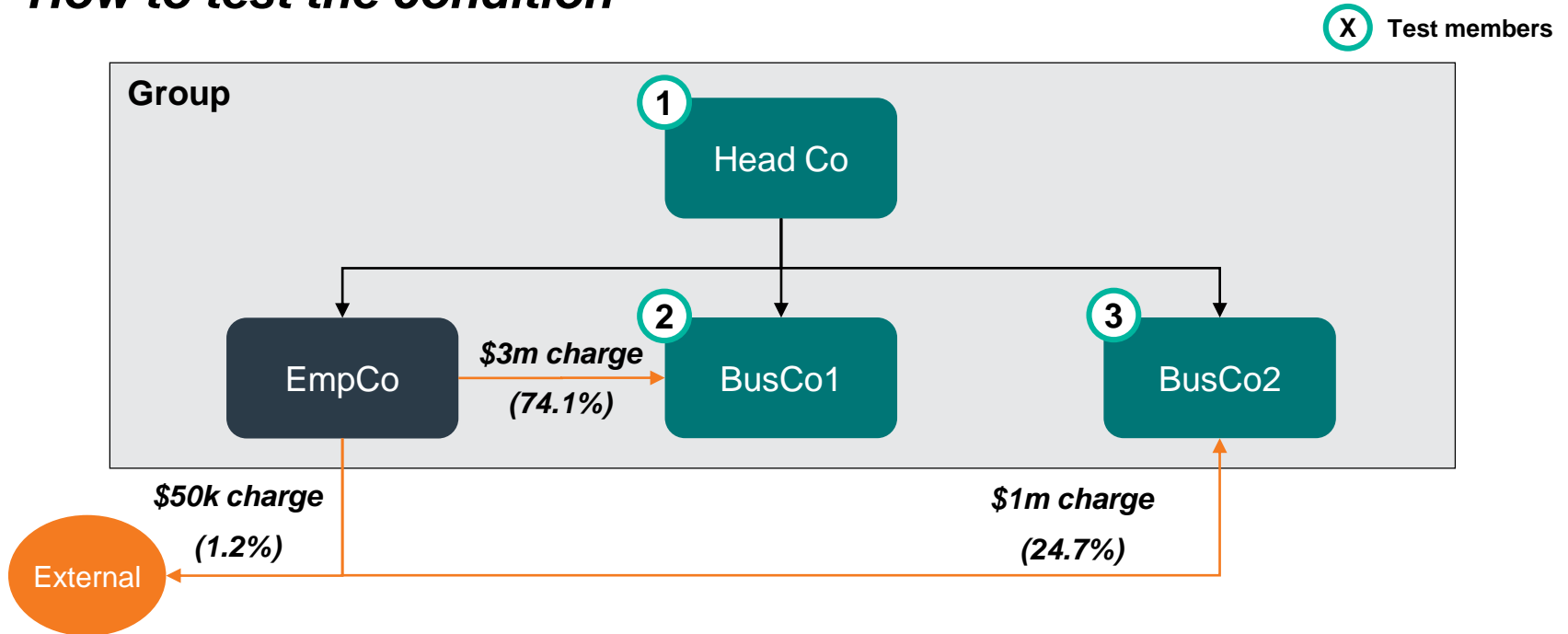
In the turnover test period in which the test time occurs, the employer entity **must not supply** employee labour services **to entities that are not members** of the group **disregarding supplies** that are merely incidental to the principal activity of the employer entity

Consider

When is a supply merely incidental?

The merely incidental test

How to test the condition



Are the supplies made to the external party “merely incidental” to the principal activity of the EmpCo?



Test 5

The integrity rule

Condition

The integrity rule

The **Commissioner** has the ability to **determine in writing** that the modified test **does not apply to an entity** when considering the purpose of the Jobkeeper scheme.

Generally, the Commissioner can look to make a determination **where he believes** the test **is unsuitable** or if he believes there is **a risk to the integrity** of the administration of the Jobkeeper scheme (e.g. due to a poor compliance history of the relevant entity).

The integrity rule **Questions**

When would the Commissioner apply this test?

What is a potential example?

Does this create a retrospective risk for some groups?

Can you object to a decision?

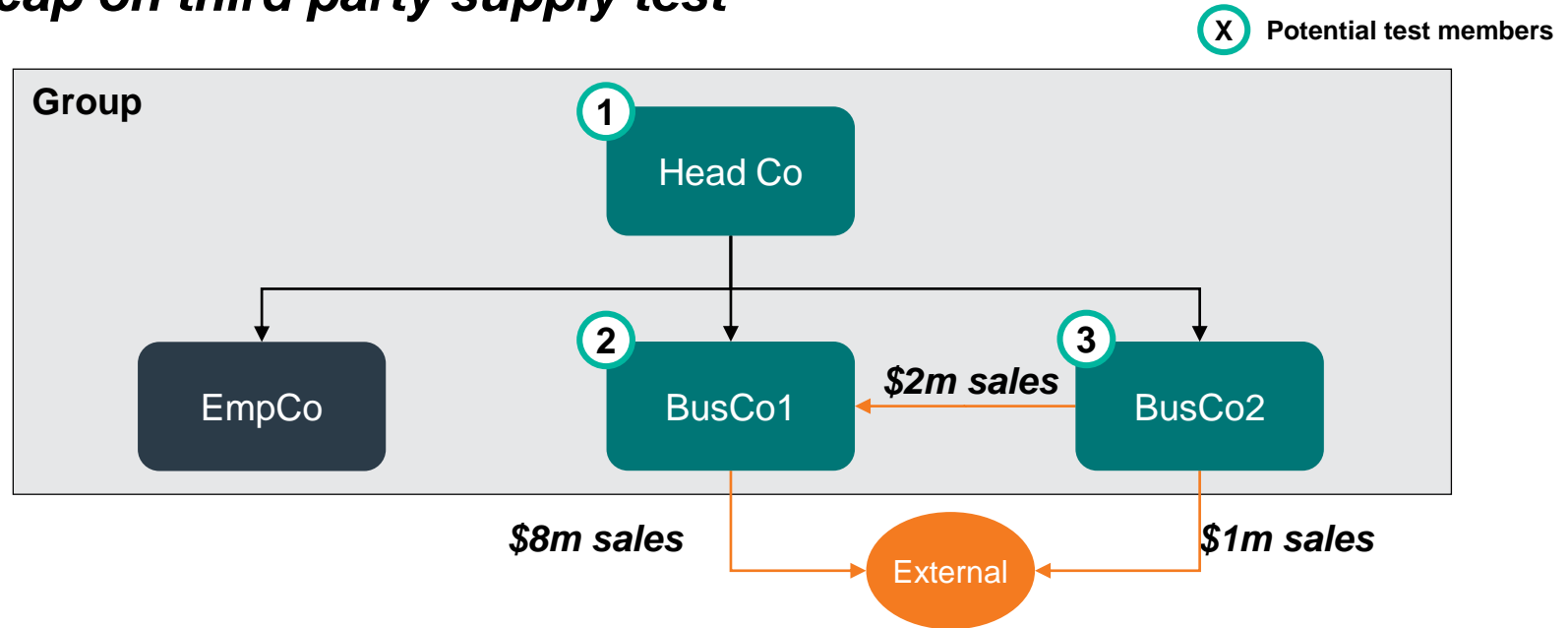




Case study

Case study

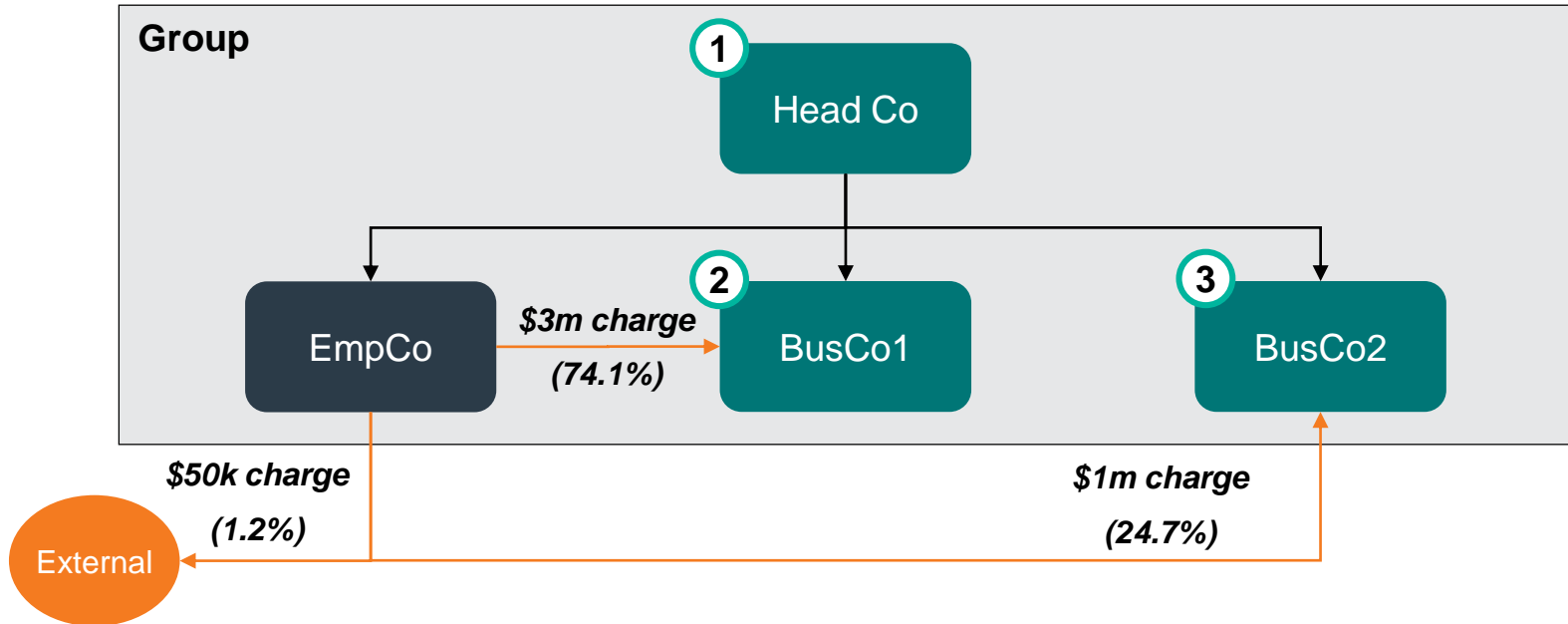
Recap on third party supply test



Case study

Recap on merely incidental test

X Potential test members



Case study

Modified turnover test

Projected turnover <i>Jun-20 quarter</i>	EmpCo	HeadCo	BusCo1	BusCo2
Sales (taxable supplies)	\$4.05M	-	\$7.0M	\$2.5M
Commercial rent (taxable supplies)	-	\$0.1M		-
Exports (tax free supplies)	-	-	\$1.0M	\$0.5M
Total	\$4.05M	\$0.5M	\$8.0M	\$3.0M

Current turnover <i>Jun-19 quarter</i>	EmpCo	HeadCo	BusCo1	BusCo2
Sales (taxable supplies)	\$3.90M	-	\$10.8M	\$5.5M
Commercial rent (taxable supplies)	-	\$0.5M	-	-
Exports (tax free supplies)	-	-	\$0.2M	\$0.0M
Total	\$3.90M	\$0.1M	\$11.0M	\$5.5M

Case study

Modified turnover test

Entity	EmpCo	HeadCo	BusCo1	BusCo2	Total
Test member	No	?	Yes	?	
Projected GST turnover	-	\$0.1M	\$8.0M	\$3.0M	\$11.1M
Current GST turnover	-	\$0.5M	\$11.0M	\$5.5M	\$17.0M
Decline in turnover	-	80.0%	27.2%	45.5%	34.7%
Pass?	N/A		No		Yes

Key question is whether the modified test requires grouping of HeadCo and / or BusCo2 where HeadCo is not charged for services and BusCo2 does not principally supply third parties

Final thoughts



Significant outstanding issues
on application
of the rule



Alternative tests
can be applied to
each test member



Calculations are
more extensive
and complex

**This Friday 8 May is the cut-off day
for 'excess' payments**



ATO compliance guide

Coronavirus Economic Response Package Omnibus Act 2020





If the Commissioner is satisfied ... it would be concluded (having regard to certain matters) that any of the participants entered into or carried out the scheme, or any part of the scheme, for the **sole or dominant purpose** of achieving either:

- (i) an entity **being entitled** to a Coronavirus economic response payment ...;
- (ii) **increasing the amount** of such a payment to which an entity is entitled; then the **Commissioner may determine** that ...
the entity never became entitled to the payment; or
the amount of the payment was always the amount specified in the determination.

Section 19, Coronavirus Economic Response Package (Payments and Benefits) Act 2020


Integrity measures

Significant number of integrity measures

Integrity provision	Provisions contained in Coronavirus Economic Response Package (Payments and Benefits) Bill 2020
Overpayment debts	 If not entitled to the JobKeeper payment then need to repay the amount not entitled to [s.9] and general interest charge [s.10]
Joint and several liability where overpayment debts	 If another entity made a statement that is false or misleading or due to fraud of another entity [s.11] – e.g. employee provides false statement of eligibility in notice
Record keeping requirement	 No entitlement unless entity complies with pre and post payment record keeping (i.e. retain records for 5 years) [s.14]
Contrived schemes	 Scheme entered into for sole or dominant purpose of being entitled to payment or increasing entitlement to payment [s.19]

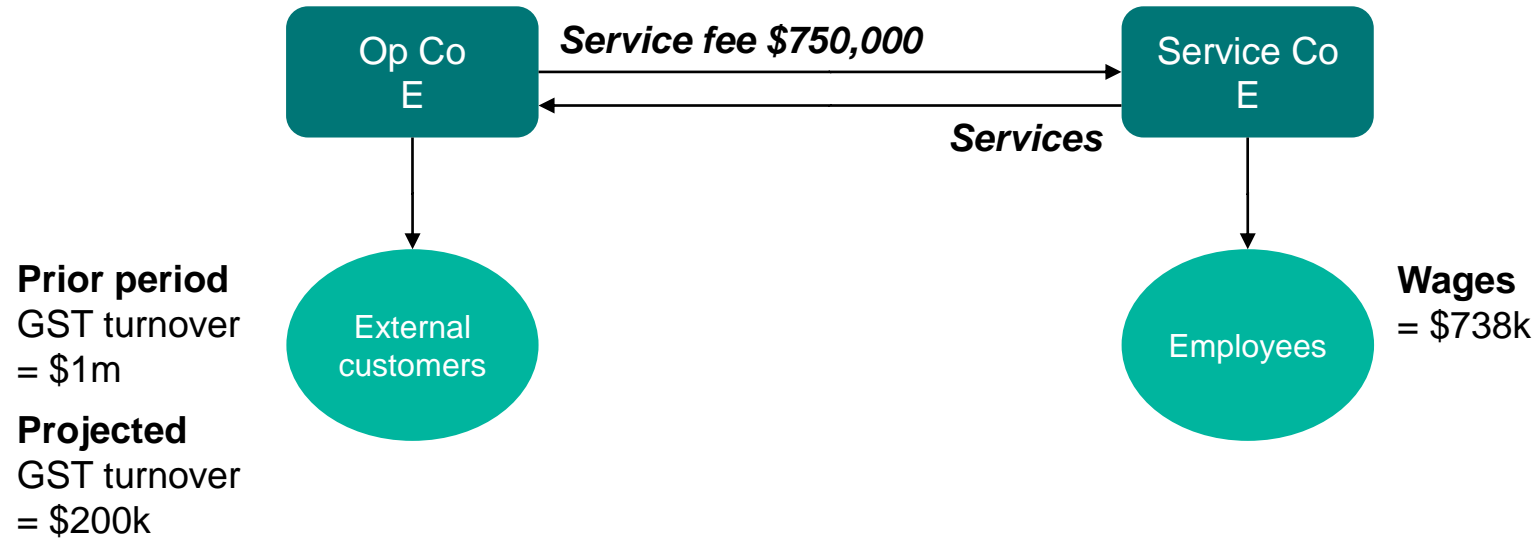
Integrity measures

Additional measures that can apply to fraudulent activities

Integrity provision	Other potential consequences
False or misleading statements	 Financial penalty of 75 percent of the amount of overpayment, potential imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Failure to comply with taxation law	 Potential imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Obtaining financial advantage by deception	 Imprisonment for up to 10 years under the Criminal Code
Conspiracy to defraud	 Imprisonment for up to 10 years under the Criminal Code
Obtaining financial advantage	 Imprisonment for up to 12 months

ATO compliance guide

Example 4 on service entities



Service fee is reduced to \$150,000. This is 20% and is in line with the commercial reduction in the sales income of Op Co.

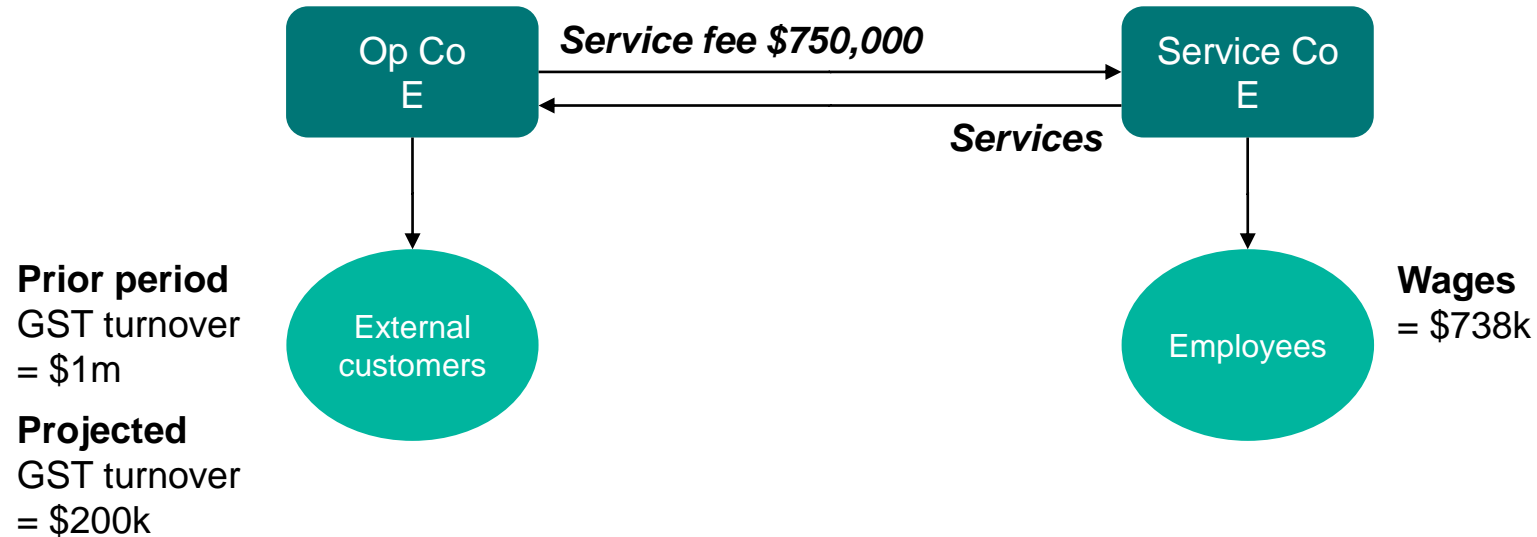
ATO compliance guide

Example 4 on service entities

Because this scheme is entered into **in response to the significant impact the external operating environment** has had on the business of Operating Company E where the employees of Service Company E serve (and those external factors are beyond the group's control), **there is a low risk** the Commissioner would apply his compliance resources to consider the application of section 19.

ATO compliance guide

Example 5 on service entities



Service Co E reduces hours by half reducing the cost of employment to \$500K. This reduces the fee to Op Co E to \$508K. To the extent that this is a direct response to COVID, ATO says “low risk of applying compliance resources”.

ATO compliance guide for service entities

PCG 2020/4

#	Example	Tests	Risk level
4	Employer entity reduces service fee	An employment service entity reduces its fee to other business entities in line with their reduction in revenue due to COVID.	Low
5	Employer entity stands down employees	An employment service entity reduces staff hours which causes an indirect reduction in fees (in a cost plus agreement). The reduction of employment is due to COVID.	Low
6	Operating entity unable to pay service fee	The employment service entity can include the 'expected reduction' in the service fee (e.g. through future credit notes) when estimating projected GST turnover. <i>Note</i> – bad debts may not reduce projected GST turnover.	Low
7	Parent company reduces management fees	Similar to example 1, the parent entity reduces its fee to the subsidiary entities affected by COVID.	Low
8	Parent company changes timing of management fee	Business of the group is not adversely affected by COVID but timing of fee altered so the decline in turnover test can be satisfied.	High

ATO compliance guide

Additional issues to consider

- PCG is not a signoff by the ATO. Just risk of ATO compliance.
- Should you approach the ATO on any reductions?
- Does the employment entity satisfy the basic conditions for Jobkeeper?
- Did employment entity carry on a business on 1 March 2020 in Australia?
- Has it ever made a profit or have a prospect of profit?
- Is there a legal agreement in place for the services?
- Is the arrangement commercial?
- Can you alter the fees?
- Will the Service Entity make losses and will they be deductible?

Final thoughts and comments

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