



Australian Government
Inspector-General of Taxation
Taxation Ombudsman

An investigation into the ATO's administration of JobKeeper enrolment deferral decisions

PS LA 2011/15

By the Inspector-General of Taxation

September 2021

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Executive Summary

Executive Summary

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) has investigated, through our tax complaints investigation function, the Australian Taxation Office's (**ATO's**) administration of applicants' requests to defer the due date for lodgement of JobKeeper enrolment notices (**JobKeeper enrolment deferral**), in accordance with:

- Section 388-55 of Schedule 1 to the *Taxation Administration Act 1953 (TAA 1953)*; and
- The Commissioner of Taxation's instructions to ATO staff, practice statement *PS LA 2011/15 Lodgment obligations, due dates and deferrals (PS LA 2011/15)*.

JobKeeper enrolment deferrals allow JobKeeper applicants to enrol for JobKeeper retrospectively and receive JobKeeper payments for fortnights prior to the fortnight in which the notice of enrolment is given to the Commissioner.

The IGTO has investigated 20 taxation complaints, as at the date of this report, which raised issues concerning the ATO's administration of JobKeeper enrolment deferrals. A sample of examples to illustrate the circumstances investigated is set out below.

The community may not be aware of a clarification of the ATO's administration of JobKeeper enrolment deferrals, which surfaced during IGTO investigations. Importantly, the ATO has clarified that JobKeeper enrolment deferral requests may be granted where it is 'fair and reasonable' to do so in the circumstances, in accordance with PS LA 2011/5. Also, the ATO procedures and internal guidance, which list 4 ATO-specified circumstances in which requests would be granted, were intended to expedite decision-making by providing staff with circumstances that were clearly ascertainable by the ATO as being fair and reasonable. The ATO confirms that these procedures and guidance were not intended to restrict or narrow the granting of deferral requests to only those cases which matched the ATO-specified circumstances. Where requests for additional time did not correspond to one of these circumstances, the ATO expected the request to be escalated to more senior decision maker.

In the 20 taxation complaints that the IGTO investigated, however, this clarified ATO view was not shared by the original ATO decision makers and not shared by all ATO officers who conducted review of those decisions or assisted the IGTO with inquiries in the complaint investigations. On the contrary, these ATO staff understood that the ATO procedures and guidance did, in fact, restrict the granting of additional time to those ATO-specified circumstances. The IGTO has not verified if the clarified ATO view, as confirmed in this report, has been consistently applied to all entities who applied for JobKeeper enrolment deferral.

The ATO was provided opportunity to comment on this report and provide information, in addition to that provided during the relevant complaint investigations. The views and information provided have been carefully considered by the IGTO in finalising this report. The ATO's response to this report is reproduced in **Appendix M**.

A glossary of terms used throughout this report is set out in **Appendix A**.

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What were ATO decision-makers required to consider and what did the IGTO observe?

Essentially, ATO decisions on JobKeeper enrolment deferral requests should be made in a manner that is consistent with the Commissioner's instructions to ATO staff, which are set out in practice statement PS LA 2011/15. ATO staff have been required to follow this practice statement since 2011 and it includes the following instructions to ATO staff who may exercise discretion to defer the date for lodgement of approved forms, such as JobKeeper enrolment notices:

"Does the law allow us to defer lodgment?"

31. The law generally allows the Commissioner to defer the time for lodgment of an approved or a prescribed form.^[9]

32. The Commissioner has discretionary power to defer the time within which an approved form is to be given to the ATO or another entity. This power may be exercised individually, by way of concession for some electronic lodgments or through the lodgment program.

...

34. The purpose of deferring the due date for lodgment is to facilitate the lodgment of a document that is unable to be lodged by the due date, but has the potential to be lodged at a particular time in the future.

...

When can you defer a lodgment?

45. We can grant a lodgment deferral **where it is fair and reasonable to do so taking into account all relevant circumstances**. This approach seeks to balance our obligations to administer taxation and superannuation laws consistently and fairly but also consider an entity's individual circumstances.

46. Matters we consider when deciding whether it is fair and reasonable to grant a deferral include:

- **the reason why the entity or their representative is unable to lodge on time**
- the value of the information provided in the document
- the size and structure of the entity (large corporate entities are more likely to have the ability and resources to overcome circumstances that might affect their ability to not lodge by the due date)
- the risk to revenue

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- the entity's compliance history as a whole (that is, lodgment of taxation returns, activity statements and other documents, payments on time and previous dealings with us)
- the length of time needed to lodge the document (a deferral will usually be granted where an entity has a good compliance history and requests a short period of additional time to lodge)
- **any other relevant information that includes the individual circumstances.**

47. We generally consider it fair and reasonable to grant a deferral to entities where the inability to lodge by the due date is reasonably attributed to exceptional or unforeseen circumstances.

48. Exceptional or unforeseen circumstances may include:

- natural disasters or other disasters or events that may have, or have had, a significant impact on individuals, regions or particular industries
- impeded access to records (for example, records seized during a police search or retained as evidence in a court matter)
- the serious illness or death of a family member, tax professional or critical staff member
- considerable lack of knowledge and understanding of taxation obligations
- system issues, either with ATO online services or the entity's business system.

49. A lodgment deferral may be granted even where the circumstances leading to their inability to lodge on time continue to be beyond the entity's control so that they may not be able to meet future obligations on time. For example, if arm's length partners or beneficiaries cannot influence the preparation timeframe of the respective partnership or trust returns.

50. The fact that an entity may have a poor lodgment compliance history should not prevent granting a request for a deferral of time to lodge where the inability to lodge was caused by circumstances beyond their control or if it would be otherwise fair and reasonable to grant the deferral.

51. Each request is considered on its merits and the deferred due date will be determined considering the particular circumstances of the entity.”

It is important to note that, in PS LA 2011/15, the Commissioner has instructed ATO staff to consider a number of issues when deciding whether to grant a request to defer the date for lodging an approved or prescribed form. These include the following:

- officers “can grant a lodgment deferral where it is fair and reasonable to do so taking into account all relevant circumstances” (the **fair and reasonable threshold**) (paragraph 45);
- officers are to consider a range of factors in doing so (see paragraph 46); and
- it is “generally” considered fair and reasonable to grant a deferral “where the inability to lodge by the due date is reasonably attributed to exceptional or unforeseen circumstances” (paragraph 47), and such circumstances may include five specified examples, amongst others that may arise (paragraph 48).

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IGTO complaint investigations that were conducted up to around April 2021 did not observe the ATO applying the ‘fair and reasonable threshold’, as set out in PS LA 2011/15, in its decisions regarding JobKeeper enrolment deferral requests. Rather, the ATO sought to uphold its initial decisions, specifically on the basis that the facts did not meet an ‘exceptional circumstances threshold’ which was much narrower than the threshold set out in PS LA 2011/15. In these IGTO investigations, the ATO:

- only granted lodgement deferral of JobKeeper enrolments where there were exceptional circumstances which matched one of the circumstances on a list of ATO-specified circumstances;
- did not apply the fair and reasonable threshold, despite this threshold being set out in the Commissioner’s instructions to ATO staff (PS LA 2011/15);
- did not consider the particular facts and circumstances of each case to determine whether lodgement deferral was appropriate; and
- referred to disseminated guidance materials, including scripting for frontline staff, which confined JobKeeper enrolment deferral approvals to only those cases with circumstances that matched those on an ATO-specified list of circumstances and did not allow staff to refer requests to a more senior decision-maker unless the officer considered that the case may fall within that ATO-specified list.¹

From April 2021, the IGTO observed a marked improvement in the ATO’s decision making in the complaints the IGTO investigated, as ATO decision-making on JobKeeper enrolment deferrals in those cases started to more consistently apply a test of whether it would be ‘fair and reasonable’ to do so. For example, in these investigations, the ATO:

- overturned initial decisions in a number of JobKeeper enrolment deferral requests by applying a ‘fair and reasonable’ test; and
- advised the IGTO in writing and verbally that it is the ‘fair and reasonable threshold’ that should be applied and clarified that the list of ATO-specified circumstances only provide a basis for ATO officers to *automatically* grant JobKeeper enrolment deferrals.

Why is the IGTO reporting this?

Based on the IGTO complaint investigations, JobKeeper applicants who requested JobKeeper enrolment deferrals may have been adversely impacted by the ATO not applying the Commissioner’s instructions in PS LA 2011/15 consistently. This may also be the case with respect to IGTO complainants whose complaints were considered by the ATO prior to April 2021 as well as JobKeeper applicants who have not lodged complaints with the IGTO.

¹ Note, however, internal ATO communications on 13 August 2020 indicate that the senior ATO decision-makers, to whom such referrals would be made, had stated that no approval for deferral would be granted unless the case involved one of the ATO-specific circumstances.

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Taxpayers and their advisers who requested and have been denied JobKeeper enrolment deferrals should consider if the ATO applied the ‘fair and reasonable threshold’ to their circumstances — i.e. consistent with the Commissioner’s staff instructions in PS LA 2011/15. If not, please contact either ASBFEO or your professional organisation to follow this up, including:

| Organisation | Contact information | Phone Enquiries |
|--|--|-----------------|
| ASBFEO – Australian Small Business and Family Enterprise Ombudsman | www.asbfeo.gov.au/contact-us | 1300 650 460 |
| Certified Practising Accountants | www.cpaaustralia.com.au/contact-us | 1300 73 73 73 |
| Chartered Accountants in Australia and New Zealand | taxteamau@charteredaccountantsanz.com | 1300 137 322 |
| Institute of Public Accountants | www.publicaccountants.org.au/about/contact-us | (03) 8665 3100 |
| The Tax Institute | www.taxinstitute.com.au/footer/contact-us | 1300 829 338 |

In summary, the purpose of this report is to:

1. Inform the community (especially advisers who assist business taxpayers in the community) that the ATO has clarified its administration of requests to defer the date for lodgment of JobKeeper enrolment notices in response to IGTO complaint investigations;
2. more clearly communicate to the public that ATO decisions on such requests are expected to be made in accordance with the Commissioner’s instructions to ATO staff (PS LA 2011/15) – that is, considering the merits of each case and granting deferral where it is “fair and reasonable to do so taking into account all relevant circumstances” — and not limiting consideration to only whether the case falls within a list of 2 – 5 pre-defined exceptional circumstances; and
3. request feedback from the community to understand if there are more widespread issues in relation to the administration of:
 - a. requests to defer the lodgment date for JobKeeper enrolment notices; and/or
 - b. requests to defer the lodgment of other forms or notices, more generally, in accordance with PS LA 2011/15.

Karen Payne
 Inspector General of Taxation and Taxation Ombudsman
 September 2021

Detailed Explanation

Detailed Explanation

The IGTO has investigated, through our tax complaints investigation function, the ATO's administration of applicants' requests to defer the date of lodgement of JobKeeper enrolment notices (**JobKeeper enrolment deferrals**) in accordance with:

- Section 388-55 of Schedule 1 to the TAA 1953; and
- The Commissioner of Taxation's instructions to ATO staff, practice statement PS LA 2011/15.

Overview of Legislative provisions - Lodgment and Payment Deferral

The Commissioner has the power to defer both the time for payment and the time for lodgment of a relevant tax form under sections 255-10² and 388-55 (respectively) of Schedule 1 to the TAA 1953.

Section 388-55 is in the following terms:

388-55 Commissioner may defer time for lodgment

- (1) The Commissioner may defer the time within which an *approved form is required to be given to the Commissioner or to another entity.
- (2) A deferral under subsection (1) does not defer the time for payment of any amount to the Commissioner.

Note: Section 255-10 allows the Commissioner to defer the time for payment of an amount of a tax-related liability.

Section 388-55 commenced from 1 July 2000 and was introduced by the *A New Tax System (Tax Administration Act (No. 2) 2000*. The following explanation appears at paragraph 1.166 of the Revised Explanatory Memorandum to that Act (**EM**):

1.166 The Commissioner will have a discretion to allow taxpayers further time for lodging any approved form. This deferral power is the same as the discretion to defer the time for lodgment of an income tax return, an FBT return or a GST return.

The EM goes on to explain (at paragraph 1.167) that a deferral of the due date for lodgment does not defer the due date for the payment of tax-related liabilities notified in the relevant approved form. The Commissioner can defer the due date for payment under s. 255-10 of Schedule 1 to the TAA 1953³ which was introduced by the *A New Tax System (Tax Administration) Act 1999* and commenced from 1 July 2000.

² Set out in Appendix B

³ Refer Appendix B

Detailed Explanation

Commissioner's published guidance on the application of s. 388-55 of Schedule 1 to the *Taxation Administration Act 1953*

The ATO's practice statement, PS LA 2011/15, is the Commissioner's existing and binding instructions to ATO staff on the application of s.388-55. It relevantly provides that the date to lodge a form can be deferred where it is "fair and reasonable to do so taking into account all relevant circumstances" (paragraph 45).

PS LA 2011/5 sets out the matters the ATO will consider when deciding whether it is fair and reasonable to grant a deferral, including the following (see paragraph 46):

- the reason why the entity or their representative is unable to lodge on time,
- the value of the information provided in the document,
- the size and structure of the entity (large corporate entities are more likely to have the ability and resources to overcome circumstances that might affect their ability to not lodge by the due date),
- the risk to revenue,
- the entity's compliance history as a whole (that is, lodgment of taxation returns, activity statements and other documents as well as payments on time and previous dealings with the ATO),
- the length of time needed to lodge the document (a deferral will usually be granted where an entity has a good compliance history and requests a short period of additional time to lodge), and
- any other relevant information that includes the individual circumstances.

The practice statement goes on to explain that, where the inability to lodge the relevant form by the due date is reasonably attributed to exceptional or unforeseen circumstances, the ATO generally considers it fair and reasonable to grant the deferral (paragraph 47).

The practice statement gives a number of non-exhaustive examples of what may constitute exceptional or unforeseen circumstances, including the following (at paragraph 48):

- natural disasters or other disasters or events that may have, or have had, a significant impact on individuals, regions or particular industries,
- impeded access to records (for example, records seized during a police search or retained as evidence in a court matter),
- the serious illness or death of a family member, tax professional or critical staff member,
- considerable lack of knowledge and understanding of taxation obligations, and
- system issues, either with ATO online services or the entity's business system.

The practice statement states that "**each request is considered on its merits** and the deferred due date will be determined considering the particular circumstances of the entity" (paragraph 48, bolding added).

Detailed Explanation

The relevant paragraphs of PS LA 2011/15 are extracted at [Appendix C](#).

Overview of Legislative provisions - Retrospective Enrolment for JobKeeper payments

To qualify for JobKeeper payments, the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (**the Rules**) require an employer or an eligible business recipient to notify the Commissioner of their election to participate in the JobKeeper scheme. For both employers and eligible business participants, the deadline for notifying the Commissioner of this election is either (ss. 6(2) and 11(2) of the Rules):

- (a) for an entitlement arising in the first or second JobKeeper fortnight – the end of the second JobKeeper fortnight; or
- (b) for an entitlement arising in any other fortnight – the end of the fortnight.

The relevant sections are extracted at [Appendix D](#).

For both employers and business recipients, a note to the relevant sections of the Rules (under ss. 6(2) and 11(2)) indicates that the time for giving the Commissioner the approved form may be deferred by the Commissioner under s. 388-55 of Schedule 1 to the TAA 1953.

Section 388-55 as noted above, is an existing provision that applies in a number of different contexts (i.e. it is not exclusive to the JobKeeper scheme); commonly, with respect to deferral requests relating to the lodgment of income tax returns.

Explanatory Statement

The Explanatory Statement to the Rules⁴ contains a brief description about the timing for giving a JobKeeper enrolment election to the Commissioner. Relevantly, it states that, “Employers that have difficulty meeting the timing requirements may seek [a s.388-55] deferral from the Commissioner.”

The relevant paragraphs of the Explanatory Statement are extracted at [Appendix E](#).

Relevant JobKeeper Guidance

The IGTO is not aware of any public guidance issued by the Commissioner that specifically relates to retrospective enrolment for the JobKeeper scheme. The Commissioner has produced internal guidance for ATO staff, ‘JobKeeper Practice Note 2020/002’ and ‘Enterprise Work Management – JobKeeper Deferral Guidelines’. As these guidelines have not been made available publicly, they are discussed further below under ‘**Further ATO Response to IGTO Investigations**’.

⁴ Explanatory Statement to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

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Commissioner's administration of s. 388-55 of Schedule 1 to the TAA in relation to JobKeeper enrolment deferrals

Background to IGTO Investigations

a. Complainants' experience

A number of complainants have advised the IGTO that, on requesting a JobKeeper enrolment deferral, the response from the ATO call centre and ATO complaints team was that such a deferral would only be allowed in a specific set of exceptional or unforeseen circumstances (**ATO-specified circumstances**). The list of ATO-specified circumstances, which has been revised over time, was limited to some or all of the examples of exceptional or unforeseen circumstances that are listed at para 48 of the PS LA 2011/15.

From early August 2020, the list of ATO-specified circumstances included the following:

- natural disasters or other disasters or events that may have, or have had, a significant impact on individuals, regions or particular industries,
- impeded access to records (for example, records seized during a police search or retained as evidence in a court matter),
- the serious illness or death of a family member, tax professional or critical staff member, and
- system issues, either with ATO online services or the entity's business system.

The ATO-specified list of circumstances has been narrowed over time and, as at 3 August 2021, only includes "natural disasters or other disasters or events..." and "the serious illness or death of a family member...".

According to complainants, the ATO did not give any consideration to whether it would be 'fair and reasonable' to grant a JobKeeper enrolment deferral (as contemplated by paras 45 and 46 of PS LA 2011/15) unless one of the ATO-specified circumstances applied.

The IGTO investigations confirmed that, initially in fact, this was the manner in which JobKeeper enrolment deferral requests were generally dealt with by the ATO and by the ATO complaints team when complaints were made.

Example 1

In the course of an IGTO complaint investigation, we reviewed an email that was sent from the ATO's 'Tax Advice Individuals and Small Business' unit, which gave advice to the ATO Complaints Unit that retrospective enrolment for JobKeeper payments "will not be allowed" unless one of the four

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exceptional circumstances (the ATO-specified circumstances listed above) applies.⁵ This advice was said to restate statements made by senior ATO staff who were authorised by the Commissioner to exercise the discretion to grant requests for deferral of JobKeeper enrolment lodgement dates.

Example 2

In the course of another IGTO complaint investigation, we listened to a call in which an ATO officer relayed to a complainant's tax agent the same information that was relayed in Example 1. In this call, the ATO officer indicated that they were reading from a script and that they had to do so as they "have to follow procedures" and that they had to tell callers that "a complaint would not change the outcome and their review rights can be found on [the ATO's] website."⁶

Sample of cases that IGTO has assisted

The following is a sample of cases that the IGTO has assisted through our complaint investigations:

Table 1 – Summary of issues raised through complaint investigations

| Outline of the case | ATO Initial Response | ATO response to IGTO Investigation |
|---|---|--|
| Case 1 The complainant, who is legally blind, mistakenly applied for JobSeeker payments through Centrelink | The ATO did not grant lodgment deferral of the enrolment notice because his circumstances did not fall within one of the ATO-specified circumstances. | The ATO upheld its initial decision and did not allow lodgment deferral because it considered that there were no exceptional or unforeseen circumstances (pre April 2021). |
| Case 2 The tax agent advised that the JobKeeper enrolment notification had been delayed due to the serious illness of a family member and staff shortages. | The ATO did not grant lodgment deferral of the enrolment notice because the tax agent's circumstances did not fall within one of the ATO-specified circumstances. | The ATO upheld its initial decision and did not allow lodgment deferral because it considered that there were no exceptional or unforeseen circumstances (pre April 2021). |
| Case 3 The complainant was a small business with no employees and an 81-year old eligible business participant, who operated a travel agency with his elderly wife. He was not aware that JobKeeper payments were available to businesses without employees until advised by | The ATO did not grant lodgment deferral of the enrolment notice because the business' circumstances did not fall within one of the ATO-specified circumstances. | The ATO reversed its initial decision and granted lodgment deferral because it considered it was fair and reasonable to do so, in accordance with PS LA 2011/15. |

⁵ ATO internal communication, 13 August 2020.

⁶ ATO, call recording, 28 September 2020.

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| Outline of the case | ATO Initial Response | ATO response to IGTO Investigation |
|--|---|--|
| his bookkeeper in July 2020 and the deferral request was made in the following days. | | |
| Case 4 | | |
| The complainant was overseas, caring for a sick relative, when the JobKeeper scheme was introduced. Due to border restrictions he was unable to return until October 2020 and then had to complete hotel quarantine. The lodgment deferral request was made once he completed hotel quarantine. | The ATO did not grant lodgment deferral of the enrolment notice because his circumstances did not fall within one the ATO-specified circumstances. | The ATO reversed its initial decision and granted lodgment deferral because it considered it was fair and reasonable to do so, in accordance with PS LA 2011/15. |
| Case 5 | | |
| The complainant was overseas when the JobKeeper scheme was introduced and only returned to Australia after trying 4 times to do so, with 3 of his flights having been cancelled due to the pandemic. He was not aware of his eligibility for JobKeeper until his return to Australia. | The ATO did not allow lodgment deferral of the enrolment notice because his circumstances did not fall within one of the ATO-specified circumstances. | The ATO reversed its initial decision and granted lodgment deferral because it considered it was fair and reasonable to do so, in accordance with PS LA 2011/15. |
| Case 6 | | |
| The complainant (a company) engaged a tax agent to enrol the company for JobKeeper and was advised by the tax agent that they had been enrolled within time - but this was false. The enrolment was not processed by the tax agent until August 2020. | The ATO did not allow lodgment deferral of the enrolment notice because the business' circumstances did not fall within one of the ATO-specified circumstances. | The ATO reversed its initial decision and granted lodgment deferral because it was fair and reasonable to do so, in accordance with PS LA 2011/15. |

Please note that the IGTO will contact taxpayers who had raised complaints before April 2021 and who may benefit from the ATO reconsidering whether the fair and reasonable threshold had been correctly applied in their case (for example – Cases 1 and 2).

b. ATO's initial responses to IGTO complaint investigations

Initially, the IGTO received responses from the ATO in our complaint investigations that were consistent with the responses the ATO had given to complainants when they lodged complaints with the ATO

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directly — namely, that JobKeeper enrolment deferrals will only be granted if the complainant's circumstances matched one of the ATO-specified circumstances (which are set out above).⁷

In early August 2020, the ATO provided the IGTO with its list of ATO-specified circumstances. The IGTO observed that this list was consistent with the examples in paragraph 48 of PS LA 2011/15, other than the fact that the list of examples in PSLA 2011/15 was stated to be a non-exhaustive list of such circumstances and the ATO's list omitted the PL SA 2011/15 example of "considerable lack of knowledge and understanding of taxation obligations". When the IGTO queried why this particular example of an exceptional circumstance was omitted from the ATO's response to the IGTO and why applicants would not be granted JobKeeper enrolment deferrals on this basis, the IGTO was provided with the following explanation:

"For JobKeeper purposes, we do not consider that considerable lack of knowledge and understanding of taxation obligations is an exceptional circumstance where we would automatically grant deferral though it is not our position that it would never be relevant. However, the JobKeeper Rules are not part of Australia's taxation system; it is a temporary measure and understanding your JobKeeper obligations is not considered to be equivalent to navigating the taxation system which is considerably more complex.⁸

The ATO maintained this view up until 6 April 2021 in cases the IGTO investigated. The ATO did reverse its initial decision in one case, however, in that case the ATO determined the request did fall within one of the ATO-specified categories and should not have been disallowed at first instance.⁹ The ATO also did not agree that confining the grounds for JobKeeper enrolment deferrals to the handful of ATO-specified circumstances was an approach that was inconsistent with the approach in PS LA 2011/15 which ATO staff were required to follow.

As a result, a number of IGTO complaints investigations did not result in the ATO agreeing to reverse its decision to refuse to grant a JobKeeper enrolment deferral. This included a complaint where the small business owner, hindered by the fact that he is legally blind, mistakenly applied for JobSeeker payments through Centrelink and a complaint where the tax agent advised that he had been delayed in lodging the JobKeeper enrolment notice due to the serious illness of a family member and staff shortages.

c. April 2021 ATO response to IGTO complaint investigations

The IGTO queried how the ATO's initial responses which outlined its approach to administering s. 388-55 of Schedule 1 to the TAA were consistent with the approach set out in PS LA 2011/15. This was because the threshold for granting a deferral in PS LA 2011/15 was "fair and reasonable ... taking into account all relevant circumstances" and was not confined to a specific set of exceptional circumstances.

⁷ ATO communication to IGTO, 5 February 2021 (redacted copy reproduced in **Appendix F**).

⁸ ATO communication to IGTO, 3 March 2021.

⁹ In this case, the ATO reversed its decision to refuse JobKeeper enrolment deferral during the IGTO complaint investigation. This ATO reversal was made on the basis that the case fell within one of the ATO-specified circumstances as two of the complainant's family members had died from COVID-19.

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On 6 April 2021, the ATO reversed a lodgement deferral decision and granted the applicants deferral on the basis that it was 'fair and reasonable' to do so, consistent with the guidance with the Commissioner's instructions to ATO staff in PS LA 2011/15. This was the first in a series of such decisions.

Following these reversal decisions, the IGTO took steps to understand why it took a number of IGTO complaint investigations for the ATO to reverse its decisions and why such decisions could not have been made earlier, for example, during the ATO's handling of the initial complaints. The IGTO also sought to explore whether this was symptomatic of a systemic failure in the way section 388-55 of Schedule 1 to the TAA had been administered by the ATO in the context of enrolment for the JobKeeper scheme, generally. These steps included discussion between IGTO and ATO officers on 20 May 2021. Following this meeting, the ATO provided the IGTO with a number of written responses and documents on 7 June 2021, including the following:

- JobKeeper Practice Note 2020/002 (PN 2020/002), which is an internal guide for ATO staff setting out the relevant policy and practices, enclosed at **Appendix G**;
- Enterprise Work Management – JobKeeper Deferral Guidelines, which are internal guidelines for ATO staff and which states that it should be used in conjunction with PS LA 2011/15 and PN 2020/002, enclosed at **Appendix H**;
- instructions and scripting for frontline staff assisting applicants who are seeking to register retrospectively for JobKeeper, titled 'JobKeeper form deferral requests' (**the SMART Instructions**), enclosed at **Appendix I**;
- change log for the 'JobKeeper form deferral requests' instructions, enclosed at **Appendix J**; and
- a JobKeeper power point presentation, entitled 'Deferrals', which was developed to train ATO staff and contractors, relevant extracts enclosed at **Appendix K**.

d. ATO's 7 June 2021 explanation

The ATO's cover email to the material received on 7 June 2021¹⁰ sets out the following explanation regarding the ATO's approach to JobKeeper enrolment deferral requests over time:

"If an entity hasn't enrolled by the deferred due date, the Commissioner can exercise this discretion to further defer lodgment of the enrolment form where it is fair and reasonable to do so. For such JobKeeper enrolment deferral requests our approach aligns with PSLA 2011/15: Lodgment obligations, due dates and deferrals, and we will generally consider it fair and reasonable where there are exceptional or unforeseen circumstances that directly impacted the clients ability to enrol by the due date.

We will automatically grant deferral where the client demonstrates one of the following circumstances occurred proximate to the relevant due date –

¹⁰ ATO communication to the IGTO, 7 June 2021.

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- natural disasters or other disasters or events that may have, or have had, a significant impact on individuals, regions or particular industries
- impeded access to records (for example, records seized during a police search or retained as evidence in a court matter)
- the serious illness or death of a family member, tax professional or critical staff member
- system issues, either with ATO online services or the entity's business system.

Where there are circumstances outside the 4 listed above that caused the client to miss the relevant enrolment date, our approach is to only grant deferral **where it is fair and reasonable taking into account all the relevant facts and circumstances.”**

(Bolding added.)

Both the written response quoted above, and the feedback provided to us at the meeting on 20 May 2021, indicate that the purpose for the list of ATO-specified circumstances was to clarify when JobKeeper enrolment deferral would be *automatically* granted. They also suggest that, if these ATO-specified circumstances did not apply, there was a process for determining whether it would otherwise be fair and reasonable to grant the deferral.

Unfortunately, however, this ATO approach was not supported by the documents that the ATO provided. Our reasons follow.

ATO's internal staff guidance PN2020/002

The ATO's internal staff guide, PN 2020/002, is an ATO business line-specific policy and/or practice which ATO staff are generally required to follow:

ATO personnel, including non-ongoing personnel and relevant contractors, must comply with this practice note unless doing so creates unintended consequences or is considered incorrect. Where this occurs, ATO personnel must follow their business line's escalation process.

PN 2002/002 states:

“Section 388-55 of Schedule 1 to the Taxation Administration Act 1953 provides the Commissioner with the power to defer the time for the giving of an approved form. The Commissioner can defer lodgment where it is fair and reasonable to do so, taking into account all the relevant circumstances.

Deferment will only be available in exceptional circumstances for the following reasons:

- the Commissioner has already put in place broad deferrals, giving taxpayers more time to submit JobKeeper approved forms;
- the purposes of the JobKeeper approved forms are elections to participate and the satisfying of monthly reporting obligations;

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- the scheme is only of a short duration.

Consistent with PSLA 2011/15: Lodgment obligations, due dates and deferrals, exceptional circumstances will arise where:"

[PN 2020/002 lists the four ATO-specified circumstances set out above and then states:]

Such circumstances do not commonly occur and there would be few others that would give rise to a business qualifying for a deferral."

The PN 2002/002 goes on to state that:

"If an entity has missed lodging the approved form for enrolment for specific JobKeeper fortnights for reasons not outlined in this practice note, the Commissioner will not generally exercise his discretion to defer enrolment. If there are additional facts and circumstances that resulted in the entity missing the relevant enrolment due date and warrant further consideration, the request for deferral will need to be escalated and considered in a decision of whether it is appropriate for the Commissioner to grant a deferral of the due date to lodge the approved form outside the reasons outlined above."

There is no explanation in the PN of how limiting the granting of deferrals to "exceptional circumstances" aligns with the 'fair and reasonable threshold' in PS LA 2011/15.

In addition, PN 2020/002 states that there are limits placed on the authorisation of ATO officers making JobKeeper enrolment deferral decisions, particularly the maximum adjustment that may be made to the lodgement date. For all levels of ATO staff this limit is 14 business days, with the exception of Senior Executive Staff where the maximum adjustment period is unlimited. Effectively, this means that even if a case met one of the ATO-specified circumstances, non-SES ATO staff could only effectively backdate the JobKeeper enrolment 14 business days at most. PN 2020/002 suggests that the rationale for such limitations are:

the JobKeeper Payment Program is a short-term wage subsidy scheme that requires participants to provide information on a monthly basis to the Commissioner. Any deferral should only be for a short amount of time unless there are exceptional circumstances.

This rationale for the limited timeframe for JobKeeper enrolment deferrals is confusing, as the exception to these limitations is the existence of exceptional circumstances. However, the ATO's basis for granting a deferral at all is that it considers there are exceptional circumstances.

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JobKeeper Deferral Guidelines

The guidance in the JobKeeper Deferral Guidelines is similarly confined, as follows:

Reasonable basis to exercise discretion outside of the 4 limited exceptional circumstances

Assessed case by case as there is scope in the PSLA to approve outside of the 4 reasons listed in SMART/the practice note where the Commissioner considers it reasonable to do so. There are *very few circumstances* that would warrant exercise of the discretion outside of the 4 in the practice note. [Emphasis Added] These include –

- Domestic violence – case by case.
- Evidence of ATO error/incorrect advice
- Client was waiting for ATO to make a section 11 discretion decision (for certain EBPs who require section 11 discretion to be eligible, they are not able to enrol until we make a decision. When we do exercise s11 discretion, they should be allowed to enrol back to the fortnight they first requested the s11 discretion).

ATO frontline officer scripting - the SMART Instructions

The scripting that was provided to ATO frontline officers (SMART Instructions) also confirms that applicants would be told that no JobKeeper enrolment deferral request would be granted if they did not fall within one of the ATO-specified circumstances (step 3). This is demonstrated in the extract below:

Determine if any of the following exceptional circumstances apply to the client:

- natural disasters: how was the client prevented from enrolling on time or contacting the ATO earlier

COVID-19 is not a natural disaster on its own. It is a circumstance that led to the implementation of JobKeeper.

- serious illness or death: when did the illness happen and/or what prevented the client or their representative from contacting the ATO for assistance.

Determine if the information provided by the client clearly *meets the exceptional circumstance to consider a deferral request*. [emphasis added]

Clients must advise of how the circumstance impeded them from enrolling on time.

If one of the reasons above is not provided, with sufficient information to support the request, the deferral may not meet the exceptional circumstances and cannot be considered for approval.

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If:

- yes,
 - add a note to the inbound phone activity including eligibility has been met for JobKeeper or JobKeeper extension (or both)
 - update the activity with the following classifications
 - Capability: Operations
 - Category: Processing
 - Type: JobKeeper deferral
 - complete template JobKeeper deferral, stating the period/s that require a deferral, and detailing how the client has met the deferral criteria

The note must state one of the reasons for deferral listed above. Specifically, your note must primarily state the circumstance and the reason supported by how the client was prevented from enrolling.

- proceed to step 2
- no, go to step 3 in this table.

Step 3 states, “Advise the client no deferral is available ... This is the end of the procedure.” However, if the client advises that they received incorrect advice from the ATO which led to the late lodgement and there is a confirming record on the ATO system which indicates that incorrect advice was given, then the ATO officer may seek further advice from a support officer.

These instructions, which are primarily relied on by the ATO staff who receive telephone calls from the public (ATO front line staff), do not apply the fair and reasonable threshold. They also do not outline any process for escalating or transferring the matter to another decision maker to consider in situations where the client is not automatically granted deferral because of ATO-specified circumstances. This is inconsistent with the ATO’s 7 June 2021 advice to the IGTO.

ATO JobKeeper Training PowerPoint - ‘Deferrals’

The approach in the training PowerPoint is arguably somewhat broader, in that it explains to ATO officers that businesses can claim for an earlier period where there are “extenuating circumstances preventing them from enrolling by the monthly due date”. It states that “extenuating circumstances **include**” and goes on to list the four ATO-specified circumstances outlined above as examples. However, it then suggests the following wording for ATO frontline officers:

“Unfortunately, to be eligible for deferred enrolment you need to have specific extenuating circumstances that prevented you from enrolling. The circumstances you have described don’t meet the criteria”.

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The training goes on to state:

"If they do not accept your decision you should explain that they can apply to the Federal Court or the Federal Circuit Court of Australia for a review under the Administrative Decisions (Judicial Review) Act 1977. This application must be lodged within 28 days from the day they called.

Escalating deferral requests for clients who don't meet the criteria will not produce a different result and will instead delay their ability to go through the correct appeal process. This is not a good client experience."

This does not align with the explanation in the 7 June 2021 email that circumstances that fell outside the specified categories might still be considered 'fair and reasonable' albeit that they did not automatically qualify for lodgement deferral.

The training PowerPoint also indicates an ATO expectation that cases falling outside of the specified categories will be considered by more senior decision makers:

If a client meets all the eligibility criteria for a deferral you must ensure you check your authorisation and take action accordingly. Requests that are within your authorisation do not need to be escalated.

Requests that are outside your authorisation but meet all other eligibility criteria require the following actions.

- Assist the client to enrol
- Create a JobKeeper application form in ICP but do not submit the form. This will be saved and suspended.
- Ensure there are sufficient notes in your escalation for the person making the decision to assess the clients' relevant circumstances fully.
- Escalate your activity.

However, the training materials also state:

"Sometimes clients will insist they are eligible even when the circumstances they describe don't meet the strict criteria for a deferral. You should do everything to help them claim for the periods where they have met the deadline.

If they do not accept your decision you should explain that they can apply to the Federal Court or the Federal Circuit Court of Australia for a review under the Administrative Decisions (Judicial Review) Act 1977. This application must be lodged within 28 days from the day they called.

Escalating deferral requests for clients who don't meet the criteria will not produce a different result and will instead delay their ability to go through the correct appeal process. This is not a good client experience." [Emphasis added]

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The IGTO notes that there is no mention in the training material that the taxpayer has an opportunity to lodge a complaint with the IGTO, as the Taxation Ombudsman.

The ATO advised that this training was conducted with staff in September and October 2020.

However, it appears that the ATO expectation of escalation, as set out in some parts of the training, was not followed in the complaint cases which the IGTO investigated as original requests were not 'escalated' to another decision maker. On this basis, it appears that this aspect of the training was either forgotten by staff or overridden by other instructions. For example, the IGTO was advised that from 1 August 2020 JobKeeper enrolment deferral requests were required to be escalated to ATO Executive Level 2 and Senior Executive Staff officers for approval. However, those EL2 and SES staff had instructed other staff that:¹¹

"Procedure for requests from 1 August 2020

Late enrolment by an EBP will generally not be allowed unless there are exceptional circumstances as set out in Practice Note 2020/002.

Can the EBP demonstrate any of the following four (4) exceptional circumstances which resulted in them failing to enrol by the due date? ..." [emphasis in original]

¹¹ ATO internal communication, 13 August 2020.

Conclusions

Conclusions

The IGTO is unable to explain why the ATO internal instructions would seek to restrict the application of s. 388-55 of Schedule 1 to the TAA in the context of JobKeeper enrolment, when the JobKeeper measures were introduced to mitigate a period of profound economic pressure and difficulty for many in the community who were impacted by COVID-19. There is nothing in the Explanatory Statement to suggest that it was Parliament's intention to restrict the economic relief provided by JobKeeper in this way. In fact, the statement in the Explanatory Statement, that "Employers that have difficulty meeting the timing requirements may seek such a deferral from the Commissioner," suggests a far more liberal application of the lodgement deferral discretion. Moreover, the rationale provided in PN 2020/002 (e.g. that the scheme is of short duration) does not provide a meaningful justification for the restricted approach as it does not explain why the *grounds* for exceptional circumstances have been narrowed to a small number of ATO-specified circumstances.

Notwithstanding the above, the IGTO has observed in its investigations that after April 2021 the ATO's decision-making on JobKeeper enrolment deferral requests, in response to IGTO complaints investigations, has become substantially more consistent with the Commissioner's instructions in PS LA 2011/15. In several of the IGTO complaint investigations mentioned in this report, the ATO arrived at a fair and transparent outcome and demonstrated a willingness to overturn their initial decisions. However, there is a concern that taxpayers who did not have the benefit of lodging a complaint with the IGTO would have been disadvantaged by the ATO's pre-April 2021 approach.

Finally, given the assistance that JobKeeper provided to, or had the potential to provide, vulnerable members of the community, the IGTO considers the ATO should have considered:

- notifying potential applicants personally of their possible eligibility to encourage enrolment within the specified time frame, particularly eligible business participants, as the IGTO experience shows many intuitively believed that "JobKeeper" was only available to employees;
- publishing guidance on when retrospective enrolment would be permitted, to:
 - ensure that potential applicants were aware of the requirements; and
 - improve the confidence of applicants that decisions were made fairly and consistently, and not arbitrarily.

The lack of transparency was a cause of concern for a number of IGTO complainants, including where their colleagues and associates were able to obtain different outcomes for reasons that were unclear¹² - see **Appendix L: JobKeeper Discussion on a Bookkeeper's Facebook Group dated 12 August 2020.**

¹² Information provided to the IGTO, screenshots of JobKeeper Discussion on a Bookkeeper's Facebook Group, 12 August 2020 (a redacted copy is reproduced in **Appendix L**.

Conclusions

It is unclear why the criteria for not granting JobKeeper enrolment deferrals was not more clearly communicated to the public. The IGTO report is published to:

1. provide assurance to the community that taxation investigations can assist in resolving their disputes with the ATO;
2. ensure the community is informed (especially advisers assisting business taxpayers in the community) that the ATO has clarified its administration of lodgment deferral for JobKeeper enrolments in response to IGTO investigations;
3. provide clear communication to the public that JobKeeper enrolment deferral decisions are to be made in accordance with the Commissioner's instructions to ATO staff in PS LA 2011/15 – that is after considering the merits of each case and granting deferral where this is fair and reasonable in the circumstances – and not to be limited to the limited ATO-specified circumstances;
4. request feedback from the community to confirm if there are more widespread issues in relation to the administration of:
 - a. requests to defer the lodgment date for JobKeeper enrolment notices; and/or
 - b. requests to defer the lodgment of other forms or notices, more generally, in accordance with PS LA 2011/15.