



**Australian Government**  
**Inspector-General of Taxation**  
**Taxation Ombudsman**

# **Submission to the Treasury**

Independent Evaluation of the JobKeeper Payment

By the Inspector-General and Taxation Ombudsman

11 July 2023

## Submission

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) welcomes the opportunity to provide a submission in response to Treasury’s consultation paper on its “Independent Evaluation of the JobKeeper Payment”. The IGTO makes this submission with a view to assisting Treasury in achieving its objective of evaluating the “implementation and integrity” of the JobKeeper payment, with a particular focus on the “lived experience” of businesses and employees.<sup>1</sup>

The IGTO investigates actions, decisions and systems of the Australian Taxation Office (**ATO**) and the Tax Practitioners Board (**TPB**) to:

- provide advice and assurance to individual taxpayers, agencies and the community at large, that the Australian taxation laws<sup>2</sup> are being administered effectively and consistently with community expectations, and
- improve the administration of the Australian tax laws for the benefit of the community.

The implementation of the JobKeeper measures occurred at a critical and uncertain time for vulnerable Australians, heightening the need for the IGTO to fulfill its purpose in a manner that was agile and responsive to the evolving needs of the community. In the period April 2020 to December 2022, the Taxation Ombudsman received 327 complaints relating to JobKeeper from individuals and businesses from a broad cross-section of the Australian public. In response, the IGTO carried out 168 investigations into ATO actions and decisions made in administering the JobKeeper measures. The issues investigated by the IGTO included:

- whether the ATO was making JobKeeper eligibility decisions in accordance with the law as enacted and consistently across taxpayers, including by applying a purposive interpretation of the law given the purpose of the Jobkeeper measures;

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<sup>1</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, pg 3,

<sup>2</sup> The Australian taxation laws that fall within the purview of the IGTO include any Act of which the Commissioner has general administration, which includes the JobKeeper legislation.

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- whether the ATO was acting in accordance with the law as enacted and consistently and in accordance with the Commissioner’s instructions to consider “where it is fair and reasonable to do so taking into account all relevant circumstances” when deciding whether to grant taxpayer requests to defer the due date for enrolling in JobKeeper.

This includes:

- 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)*.
- administrative issues related to delays in decision making, correcting mistakes in JobKeeper enrolments and amending previous income tax and GST lodgements, and
- uncertainty in the community regarding eligibility and review rights.

The IGTO resolved the remaining 159 complaints without an investigation by:

- helping people understand and interpret the JobKeeper guidance published by the ATO and other government agencies, or by providing assistance to help them understand the eligibility and other decisions that had been made by the ATO, and
- directing people to the appropriate agency based on their circumstances (e.g. whether to apply for JobKeeper with the ATO or JobSeeker with Services Australia).

In recognition of the importance of the measures and of addressing community concerns, the IGTO rapidly restructured its internal operations to accommodate this unprecedented volume of complaints on a single issue.

The IGTO worked closely with complainants and the ATO to understand community concerns, identify issues of unfairness and/or ambiguity and resolve, to the extent possible, disputes between JobKeeper applicants and the ATO in regards to the ATO’s administrative actions and decisions. This places the IGTO in an ideal position to assist Treasury in better understanding the “lived experience of businesses and employees with JobKeeper”<sup>3</sup> with respect to the underlying issues generating taxpayer complaint.

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<sup>3</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, pg 3.

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Following its investigations of JobKeeper-related complaints, the IGTO published the following two reports, outlining its observations on the ATO's administration of the JobKeeper and Boosting Cash Flow payments:

1. A Report on Aspects of the Australian Taxation Office's Administration of JobKeeper and Boosting Cash Flow Payments for New Businesses, December 2020
  2. An investigation into the ATO's administration of JobKeeper enrolment deferral decisions, September 2021
- (collectively, the **IGTO JobKeeper Reports**).

These reports demonstrate that outcomes achieved in IGTO dispute investigations often go beyond addressing the concerns of an individual taxpayer and benefit the broader community. For example, one outcome in the IGTO JobKeeper Reports was that the ATO committed to review all JobKeeper eligibility disputes where the clarifications made in the IGTO report were a material factor in the ATO's previous decision. This meant that the concerns raised by 66 complainants resulted in outcomes for thousands of taxpayers. Further, as the IGTO JobKeeper Reports were public documents, they could be leveraged by the Professional bodies and associations to assist their members to resolve similar or like disputes or complaints directly with the ATO without the need for IGTO investigation.

The following was noted in the December 2020 report and is reflective of the IGTO's approach to the IGTO JobKeeper Reports:

*"This report provides some background to the IGTO complaint investigations and some insight into how independent investigation of these complaints improves the tax administration system for the benefit of all taxpayers, tax practitioners and other entities. This report may also help minimise issues arising in the design of future tax administrative measures, including those which deliver fiscal support measures to the wider Australian community.*

*The IGTO has also made observations on the underlying issues which were identified during the complaint investigations. The context of the extraordinary and unprecedented impact of the COVID-19 pandemic on Australian jobs and businesses, as well as the exceptional ATO response in providing economic support in the form of JK and BCF payments to many Australians, is an*



*important backdrop to these observations. However, the opportunity to learn from the crisis should not be missed.”*

Accordingly, the IGTO JobKeeper Reports share a number of Treasury’s objectives in conducting its evaluation, particularly with respect to “record[ing] lessons learned from the design and implementation of JobKeeper, with a view to informing future policy responses”.<sup>4</sup> The reports form the basis of this submission and are enclosed at **Annexure A** (December 2020) and **Annexure B** (September 2021).

## Terms of reference

The IGTO’s submission is intended to assist with Treasury’s examination of the following matters (per the Terms of Reference):<sup>5</sup>

- The effectiveness and appropriateness of the JobKeeper Payment’s key design features (payment to business, rate, eligibility criteria, delivery mechanism and duration) in achieving the policy objectives.
- How [the Australian Taxation Office] responded to payment delivery, program implementation and integrity challenges across the program.
- Lessons learned from the design and implementation of JobKeeper.

The information outlined in the IGTO’s JobKeeper Reports goes, specifically, to the discussion questions raised by Treasury in the context of “Implementation and integrity”, namely:<sup>6</sup>

*4. Did JobKeeper get the balance right between speed of implementation and ensuring integrity, given the risks and uncertainty at the time?*

*5. Were program implementation and integrity challenges faced throughout JobKeeper managed well? How could these challenges have been handled differently?*

*6. All things considered, what were the lessons learned from the implementation of JobKeeper?*

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<sup>4</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, pg 4.

<sup>5</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, pg 5

<sup>6</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, page 10.

## Submission to the Treasury – Independent Evaluation of the JobKeeper Payment - July 2023

The IGTO provides a different perspective to other stakeholders, such as that provided by the ANAO (as outlined in Treasury’s Consultation Paper)<sup>7</sup>. The IGTO independently investigates unresolved complaints and disputes as raised by taxpayers and their representatives. Accordingly, IGTO observations are drawn from direct interactions with members of the community, direct visibility of ATO systems and internal decision-making processes in relation to the individual taxpayer complainant and independent observations and findings drawn from investigations of ATO dealings with JobKeeper applicants individually. Every case means a great deal to the individual who has approached the IGTO.

### The importance of the inquiry

The IGTO is of the view that there are valuable lessons to be learned from the JobKeeper experience regarding how similar measures, and the tax system more broadly, are administered going forward. Treasury’s evaluation of the JobKeeper measures is an important step in making improvements to the design and administration of future tax administrative measures, including those that are leveraged to deliver fiscal support measures to the Australian community.

[SIGNED]

Karen Payne

**Inspector General of Taxation and Taxation Ombudsman**

11 July 2023

**Annexure A** – A Report on Aspects of the Australian Taxation Office’s Administration of JobKeeper and Boosting Cash Flow Payments for New Businesses, December 2020

**Annexure B** - An investigation into the ATO’s administration of JobKeeper enrolment deferral decisions, September 2021

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<sup>7</sup> The Treasury, *Independent Evaluation of the JobKeeper Payment Consultation Paper*, 16 June 2023, pages 10.



Australian Government  

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Inspector-General of Taxation  

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Taxation Ombudsman

# A REPORT ON ASPECTS OF THE AUSTRALIAN TAXATION OFFICE'S ADMINISTRATION OF JOBKEEPER AND BOOSTING CASH FLOW PAYMENTS FOR NEW BUSINESSES

By the Inspector-General of Taxation and Taxation Ombudsman

DECEMBER 2020

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# INTRODUCTION

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) conducted complaint investigations (commencing in June 2020) in response to concerns raised by or on behalf of new small businesses – individuals and entities. Most complainants were concerned that the Australian Taxation Office (**ATO**) had decided they were ineligible to receive the Boosting Cash Flow (**BCF**) and/or JobKeeper (**JK**) payments because either:

- a. sales had not been reported in their Business Activity Statement (**BAS**) as lodged (or to be lodged) before 12 March 2020; or
- b. they were not required to lodge a BAS at all.

Concerns were similarly raised by the accounting, tax and business professional bodies,<sup>1</sup> Members of Parliament and in the media.<sup>2</sup> Professional bodies referred their members to the IGTO's complaint investigation service.

## THE ROLE OF INDEPENDENT IGTO COMPLAINT INVESTIGATIONS

It is important for the community to understand the role of the IGTO in the tax administration system. The IGTO's role is to ensure that taxation laws as enacted by the Australian Parliament and which bring into effect the Australian Government's policies are being administered:

- correctly;
- fairly; and
- consistently.

When we investigate taxation complaints as the Taxation Ombudsman, we also assist taxpayers and tax practitioners (the community) with understanding their experience in the tax system. This can minimise disputes which are raised in the tribunals and the courts. Through these complaint investigations, we can also bring independent perspectives to those administering the taxation laws.

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<sup>1</sup> CPA Australia, CAANZ, The Tax Institute, The Institute of Certified Bookkeepers, Institute of Public Accountants, Tax & Super Australia, National Tax and Accountants Association Ltd, Australian Bookkeepers Association and Association of Accounting Technicians, letter to The Treasury, 19 June 2020 <<https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/covid-19/government-advice/joint-bodies-submission-covid-19-stimulus-and-new-business.pdf?la=en&rev=51e3b406bbd14b05ba1e1bbab042eeda>> ('Joint bodies submission').

<sup>2</sup> Jotham Lian, "'Triumph of bureaucratic, systems-based thinking': JobKeeper anomaly left unaddressed", *Accountants Daily* (Online), 23 July 2020 <[www.accountantsdaily.com.au](http://www.accountantsdaily.com.au)>; Elias Visontay, 'Tax office tells some businesses who received jobkeeper they were not entitled to payments', *The Guardian*, 2 July 2020.

This report provides some background to the IGTO complaint investigations and some insight into how independent investigation of these complaints improves the tax administration system for the benefit of all taxpayers, tax practitioners and other entities. This report may also help minimise issues arising in the design of future tax administrative measures, including those which deliver fiscal support measures to the wider Australian community.

The IGTO has also made observations on the underlying issues which were identified during the complaint investigations. The context of the extraordinary and unprecedented impact of the COVID-19 pandemic on Australian jobs and businesses, as well as the exceptional ATO response in providing economic support in the form of JK and BCF payments to many Australians, is an important backdrop to these observations. However, the opportunity to learn from the crisis should not be missed.



## EXECUTIVE SUMMARY

Overall, the IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the challenge of these unprecedented circumstances. The ATO needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF support measures. As with the implementation of every major new economic fiscal measure, matters arose that had an impact on the efficient and fair administration of the tax system.

### THE ATO HAS AGREED TO INFORMALLY REVIEW SOME OF ITS EARLIER DECISIONS

During the IGTO complaint investigations, the ATO undertook to informally review and reconsider its earlier decisions which were the subject of taxation complaints raised with the IGTO. The ATO also advised the IGTO (in September 2020) that it would review and reconsider earlier decisions, that were the subject of dispute in objections and appeal cases, regarding JK and BCF eligibility, where a material factor in the ATO's decision was the lack of a sale or supply reported by the new business on or before 12 March 2020. Overall, the IGTO's complaint investigations achieved positive outcomes for some new businesses, most of which had already been unsuccessful in challenging the ATO's decisions. Without the IGTO's intervention, it is unlikely that these businesses would have received the government support measures that they were intended to receive.

### THE ATO WILL NOT BE IDENTIFYING ALL POTENTIALLY AFFECTED TAXPAYERS

The IGTO notes that the ATO has been aware, as early as 11 August 2020, that it would need to review earlier decisions that it made in respect of certain taxpayer circumstances. The ATO first shared this information with the IGTO on 23 September 2020, when it was independently prompted by the IGTO as part of our complaint investigation.

The IGTO also learnt on 23 September 2020 that the ATO did not intend to identify all potentially affected taxpayers. The ATO explained that it considers it is infeasible to identify and approach all affected entities directly or to broadly communicate its changed view in a manner that would not cause disproportionate confusion for others.

## ACTIVELY TRADING NEW SMALL BUSINESS CAN DEMONSTRATE THEY MADE TAXABLE SUPPLIES AND WERE ACTIVELY TRADING (INCLUDING AS PART OF THE COMMENCEMENT OF AN ENTERPRISE) IN A TAX PERIOD ENDING BEFORE 12 MARCH 2020, OTHER THAN BY LODGING THEIR BAS

During the IGTO complaint investigations, the ATO confirmed that the meaning of "taxable supply", as modified by the JK and BCF support measures, was broader than the definition applied by the ATO in its earlier decisions.

The IGTO notes that this can mean, for the purposes of the JK and BCF support measures, a taxable supply can be made where an entity makes or acquires a financial interest, for example, by opening a bank account, as this constitutes the making of a financial supply. Such a supply might have been made during the commencement of the business, well before the business had made its first sale. Also, entities might have notified the ATO of these supplies within the requisite timeframe by means other than the lodgement of a BAS. For example, the ATO might have been notified of the making of a financial supply upon the opening of the business' bank account during the Goods and Services Tax (GST) registration process.

## TAXPAYERS SHOULD HAVE AN OPPORTUNITY TO DEMONSTRATE THAT THEY ARE ELIGIBLE FOR SUPPORT MEASURES BEFORE THEY ARE DEEMED INELIGIBLE

The IGTO concluded that the ATO did not provide a number of new businesses with an opportunity to provide evidence of having made taxable supplies (within the modified meaning) before it determined that they were ineligible for the JK and BCF support measures.

The ATO 'template' communications to these complainants (examples of which are attached at Appendix 3) deemed them to be ineligible based on BAS lodgements or GST reporting cycles. These template letters did not clearly outline or communicate to the complainants what evidence they had failed to provide nor provide any opportunity for them to demonstrate that they were indeed eligible, before they were deemed ineligible.

The ATO undertook to informally review all JK and BCF eligibility disputes where a material factor in the ATO's decision was the lack of a sale or supply reported by a new business on or before 12 March 2020.

## TAXPAYERS WHO MAY BE AFFECTED, SHOULD ENGAGE WITH THE ATO DIRECTLY TO DISCUSS THEIR CIRCUMSTANCES

Where a new small business has been deemed ineligible by the ATO but can show that they were carrying on an enterprise that made taxable supplies (as modified) in a GST reporting period ending before 12 March 2020, they can contact the ATO directly to confirm how they may obtain an ATO review of its earlier decision. They should also ask the ATO to accept late notification of their supplies, if they were not previously reported. The small business taxpayer will still be required to have been actively carrying on a business in the relevant tax periods and satisfy the remaining eligibility criteria as set out in the JK and BCF support measures.

# GUIDE TO THIS REPORT

An overview to the Parts in this report is summarised below:

## Part A — Background and Key Events

Part A provides an overview and chronology of the key surrounding events. It draws on a more detailed chronology of events that is set out in Appendix 1.

## Part B — IGTO Complaint Investigations

Part B provides an overview of the issues investigated (including some Case Studies to illustrate the circumstances surrounding the issues raised with the IGTO) and a description of certain outcomes following the IGTO's investigation activities in its specialised taxation complaint service to the Australian community. These outcomes include confirmation that:

- Taxable supplies for JK and BCF purposes can include input taxed supplies (e.g. financial supplies) and GST-free supplies;
- Financial supplies can be made by a taxpayer where the taxpayer acquires a financial interest and this can include a taxpayer opening a bank account, taking out a loan, entering a mortgage over real or personal property or acquiring an interest under a guarantee. Financial supplies which are acquisitions might not be reported to the ATO through a BAS;
- Although a taxable supply must be made for consideration, the consideration might not be received in the same tax period in which the taxable supply is made;
- The ATO will informally review all JK and BCF eligibility disputes which raised similar issues, including IGTO complaint cases, ATO objection decisions and appeals to the Administrative Appeals Tribunal (**AAT**), to determine whether the outcomes listed above were appropriately reflected in its decision making.

## Part C — IGTO Observations

Part C of the report provides high level observations on how the administration of taxation laws could be improved for the benefit of the community. Public reporting and transparency around these improvement observations provides assurance to the community on the outcomes of independent complaint investigations and demonstrates how these outcomes can support tax system improvements that are identified to benefit the community.

In summary these observations include:

1. Initial ATO compliance activities on new tax laws should afford taxpayers procedural fairness before making adverse decisions, and create opportunities for the ATO to identify needed clarification of its precedential view.
2. ATO advice and guidance should be easy to understand, but not risk oversimplification that leads taxpayers and ATO staff into error.
3. Prompt ATO remedial action is needed for affected taxpayers when the ATO materially changes how it applies its precedential view.
4. ATO compliance decisions should help taxpayers understand their options for review.
5. Options to expeditiously resolve disputes with the ATO's precedential view of the law should be explored.
6. A separation between drafting and interpretation of laws is important to minimise the risk of taxpayer disputes with ATO precedential views.
7. Opportunities exist to improve the design of new tax laws and their integration with existing laws by conducting broader consultation.
8. Improving IGTO access to ATO records and data systems can expedite IGTO complaint investigations.

The ATO's response to the IGTO's report and observations on these complaint investigations is set out in Appendix 5.

A handwritten signature in black ink, appearing to read 'K Payne', written in a cursive style.

Karen Payne  
Inspector-General of Taxation and Taxation Ombudsman  
21 December 2020

## ROLE AND FUNCTIONS OF THE IGTO

The Inspector-General of Taxation is an independent, Commonwealth statutory agency, established in 2003 to provide advice to the Australian Government on the resolution of systemic tax administration issues of concern to taxpayers that arise either from the operation of tax laws or as a result of ATO activities. That role was expanded twelve years later (with bipartisan support), in May 2015 to include the Tax Practitioners Board's (TPB) activities within jurisdiction as well as to transfer the Commonwealth Ombudsman's tax complaints function (as the Taxation Ombudsman).

The **IGTO** now effectively performs a dual role:

- as the **Taxation Ombudsman** – providing<sup>3</sup> independent assistance and assurance directly to taxpayers and tax professionals and investigating their complaints about the actions and decisions of tax officials — complaint assistance and complaint investigations, respectively; and
- as the **Inspector-General of Taxation**<sup>4</sup> – investigations of actions and tax administration systems established by the tax laws, the ATO and the TPB – review investigations.

The two roles and investigation modes of the IGTO complement each other. The dual roles provide a capability to quickly address taxpayer and tax practitioner concerns on a case-by-case basis but also to observe trends and collective community concerns that may indicate systemic issues requiring review investigation. The IGTO may also prepare an own-motion report in accordance with section 15 of the *Ombudsman Act 1976* and may publicly comment on its investigations in accordance with section 35A of that Act.

The investigation modes collectively assure the community (including the Government, Ministers, the Australian Parliament and its Committees) that taxation laws are being administered in accordance with community expectations. This builds confidence that the tax system is operating as intended and is being administered:

- correctly;
- fairly;
- consistently; and
- in a manner that helps taxpayers and tax practitioners (the community) to understand their experience with the tax system.

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<sup>3</sup> Taxation Ombudsman investigations are conducted, and recommendation are made, in private, which is consistent with taxpayers' rights to privacy in respect of their tax affairs and the tax secrecy requirements.

<sup>4</sup> Inspector-General of Taxation (IGT) review investigations are conducted, and recommendations are made, publicly, which is consistent with the public interest in systemic issues and assurance regarding their recommended treatment. These investigations may be own-initiated, directed by the Minister or requested by the Minister, Parliamentary Committees, the ATO or TPB.

This is summarised in Table 1 below.

**Table 1 - How does the IGTO assist to improve the taxation administration system?**

<b>IGTO helps...</b>	<b>How does this help?</b>
The community resolve their taxation disputes and complaints, fairly and transparently.	<p>Independent investigation and assurance:</p> <ul style="list-style-type: none"> <li>▪ improves the efficient resolution of disputes and complaints;</li> <li>▪ provides access to tax expertise and assistance for the most vulnerable and those with limited financial resources (especially small businesses);</li> <li>▪ reduces red tape and the cost of compliance;</li> <li>▪ minimises unnecessary disputes and related costs before the Tribunals and the Courts; and</li> <li>▪ improves community perceptions of the fairness of the tax system.</li> </ul>
To improve the taxation administration system for the benefit of all taxpayers, tax practitioners and other entities.	Independent complaint investigations and review investigations identify areas for improved tax administration and enhance community trust and engagement in the tax system.
Build confidence in the fairness of the tax system.	<p>Independent oversight, investigation and assurance improves:</p> <ul style="list-style-type: none"> <li>▪ the accountability in the system; and</li> <li>▪ administrative actions, decisions and systems relating to tax administration.</li> </ul>
With advice to the Minister, the Government and the Parliament and its Committees on tax administration issues and opportunities to improve the tax administration systems, laws and actions or decisions made by Tax Officials.	Independent perspectives enhance accountability, trust and impartiality in the tax system and brings new insights for Ministerial consideration and for Parliamentary committees with oversight responsibilities.

The IGTO's contribution to achieving these objectives is perhaps even more critical when the tax system is used to deliver financial assistance to the community – such as the recent economic support measures in the form of the JK and BCF payments. This is the subject of this report.

## BASIS FOR REPORT

Consistent with the IGTO's statutory purpose, the IGTO reports on its complaint investigations to inform the broader community of opportunities to improve the tax administration system.

The IGTO complaint investigations were limited to resolving the taxation complaints on hand and accordingly were not intended to be a comprehensive investigation of the ATO's administration of the JK and BCF support measures. This is in part due to time and resource constraints, given the nature of the IGTO's access to ATO records and information. It is also due to the desire to minimise the overlap of oversight agency activities, such as the Auditor-General's recent performance audit of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures* and, for 2021, the potential audit he has flagged for the *ATO's administration of the JobKeeper scheme*, including examination of the implementation of integrity rules designed to protect the scheme against fraud and other abuse.

This report is prepared in accordance with section 7(1)(f) of the *Inspector-General of Taxation Act 2003 (IGT Act 2003)* and follows complaint investigations conducted by the IGTO in accordance with section 7(1)(a) of that Act. This report is made public in accordance with section 35A of the *Ombudsman Act 1976* and the Commissioner of Taxation has been afforded an opportunity to comment before its public release.



## PART A. BACKGROUND AND KEY EVENTS

### A.1 INTRODUCTION

A.1.1 This Part provides some background on key events and introduces the relevant sections of the JK and BCF support measures that aim to ensure the integrity of these measures.

### A.2 THE JK AND BCF SUPPORT MEASURES AND LEGISLATION

A.2.1 On 12 March 2020, the Australian Government announced a \$17.6 billion economic stimulus package, which included a \$6.7 billion cash flow assistance scheme for employers to support Australian businesses during the COVID-19 pandemic (the **BCF support measure**).<sup>5</sup> On 30 March 2020, the Government also announced a \$130 billion JK payment scheme to keep Australians in jobs in response to the pandemic (the **JK support measure**).<sup>6</sup>

A.2.2 These support measures were enacted into law through the:

- *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF Act 2020)*; and
- *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* and *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the **JK legislative instrument**).

A.2.3 The ATO and, specifically the Commissioner of Taxation, is responsible for administering the JK and BCF support measures. This responsibility includes determining which entities are eligible to receive payments in accordance with the integrity rules provided in the JK and BCF support measures.

### A.3 THE JK AND BCF INTEGRITY RULES

A.3.1 The JK and BCF support measures include specific integrity rules. These rules aim to exclude new and inactive entities being established or revived for the sole purpose of benefiting from the COVID-19 economic support measures.<sup>7</sup>

A.3.2 The integrity rules have alternative tests which are based on income tax and GST concepts, respectively. Existing business entities that had reported assessable income for the 2018–19

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<sup>5</sup> Prime Minister and Treasurer, "Economic Stimulus Package" (media release, 12 March 2020) <[www.pm.gov.au](http://www.pm.gov.au)>.

<sup>6</sup> Prime Minister and Treasurer, "\$130 billion Jobkeeper payment to keep Australians in a job" (media release, 12 March 2020) <[www.pm.gov.au](http://www.pm.gov.au)>.

<sup>7</sup> Explanatory Memorandum, *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020*, [3.31]–[3.32] ('BCF explanatory memorandum'); Explanatory Statement, *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, pp 22–3 ('JK explanatory statement').

income year can satisfy either test, while ‘new’ business entities – those which did not report assessable income for the 2018–19 income year – must satisfy the test based on GST concepts.

## The JobKeeper integrity rule

A.3.3 The specific integrity rule in the JK legislative instrument is expressed in the following terms:

### *Integrity rule*

*11 (6) An entity is not entitled to a jobkeeper payment under this section unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.*

*(7) For the purposes of subsection (6), the requirement in this subsection is satisfied if:*

*(a) an amount was included in the entity’s assessable income for the 2018-19 income year in relation to it carrying on a business; and*

*(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.*

*(8) For the purposes of subsection (6), the requirement in this subsection is satisfied if:*

*(a) the entity made a taxable supply in a tax period that applied to it that:*

*(i) started on or after 1 July 2018; and*

*(ii) ended before 12 March 2020; and*

*(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.*

*(9) For the purposes of subsection (8), in determining whether the entity made a supply (within the meaning of the GST Act) that is a taxable supply:*

*(a) assume that the entity is registered (within the meaning of that Act); and*

*(b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act);... [emphasis added]<sup>8</sup>*

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<sup>8</sup> Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 s 11 ('JK legislative instrument').

## The Boosting Cash Flow integrity rules

A.3.4 The specific integrity rules in the BCF Act 2020 are expressed in the following terms:

*5(1) An entity is entitled to a payment (known as a cash flow boost) for a period covered by subsection (2) [i.e. the First Cash Flow Boost payment] if:*

*(f) either:*

*... (ii) the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (5) or (6) is satisfied; and*

*... (5) For the purposes of paragraph (1)(f), the requirement in this subsection is satisfied if:*

*(a) an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business; and*

*(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.*

*(6) For the purposes of paragraph (1)(f), the requirement in this subsection is satisfied if:*

*(a) the entity made a taxable supply in a tax period that applied to it that:*

*(i) started on or after 1 July 2018; and*

*(ii) ended before 12 March 2020; and*

*(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.*

*(7) For the purposes of subsection (6), in determining whether the entity made a supply (within the meaning of the A New Tax System (Goods and Services Tax) Act 1999) that is a taxable supply:*

*(a) assume that the entity is registered (within the meaning of that Act); and*

*(b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act). ... [emphasis added] <sup>9</sup>*

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<sup>9</sup> *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* s 5 ('BCF Act 2020'). Note: there is another rule in s 6 of this Act which applies to the second BCF payment and is expressed in the same terms.

## PART B. IGTO COMPLAINT INVESTIGATIONS

### B.1 INTRODUCTION

- B.1.1 This Part outlines the IGTO's complaint investigations undertaken. It includes a summary of the concerns raised by various stakeholders about the integrity rules contained in the JK and BCF support measures, a summary of the key issues investigated by the IGTO and case studies to illustrate them, and the outcomes achieved through those investigations.

### B.2 OVERVIEW OF THE IGTO COMPLAINT INVESTIGATION PROCESS

- B.2.1 From June 2020, the IGTO started to receive complaints from entities who expressed concern with adverse ATO decisions regarding their eligibility for the JK and BCF support measures. Shortly after, the IGTO commenced complaint investigations.
- B.2.2 Complaints with the same underlying issue were linked and investigated simultaneously to ensure an efficient and effective process for complainants, the IGTO and the ATO alike. As at 15 December 2020, we have received 66 such taxation complaints and commenced 38 complaint investigations (7 of which have been formally closed to date).
- B.2.3 To ensure the engagement of Senior Executive Service (**SES**) officers of the ATO for the purposes of these complaint investigations, the initial 13 investigations were re-categorised as Category 5 complaints. This category prompts early ATO SES officer awareness of emerging issues with potential broader impact, and facilitates the earlier resolution of such issues.
- B.2.4 The IGTO engaged extensively with the ATO during this period and met with the ATO on six occasions between June and September 2020.<sup>10</sup> Further information on these interactions is contained in the chronology in Appendix 1.

### B.3 CONCERNS RAISED WITH THE IGTO

- B.3.1 Overall, taxpayers and tax professionals agreed that the JK and BCF support measures were intended to support active business entities only. In addition, it was agreed that the JK and BCF integrity rules should exclude inactive entities established or revived solely to access the JK and BCF support measures.
- B.3.2 However, they expressed concern with the ATO's application of the JK and BCF integrity rules, which resulted in new, genuine businesses being deemed ineligible to benefit from the JK and

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<sup>10</sup> The Inspector-General of Taxation and Taxation Ombudsman (IGTO) held complaint investigation meetings with the ATO on the following dates: 25 June 2020; 14 July 2020; 7 August 2020; 11 September 2020; 18 September 2020; 23 September 2020.

BCF support measures (even though those businesses were actively trading prior to the Government's announcement of the support measures on 12 March 2020).

### Concerns raised by complainants

#### B.3.3 Complainants raised the following concerns with the IGTO:

- new businesses thought they were eligible to receive JK and BCF payments because they were actively trading prior to 12 March 2020, but were deemed ineligible by the ATO;
- new business owners thought they were eligible if they purchased an existing business that was actively trading prior to 12 March 2020, but were deemed ineligible by the ATO;
- businesses with the same underlying ownership that had recently changed their legal structure thought they would still be eligible, but were deemed to be ineligible by the ATO; and
- new businesses thought that the frequency of their BAS lodgements (i.e. monthly, quarterly or annually) (the **GST reporting cycle**) would not be a determinative factor as to whether they were eligible, however, the ATO deemed them ineligible and told them that they may have been eligible if the business had been required to lodge a BAS more frequently.

#### B.3.4 These businesses explained that they had commenced their business and related tax registration arrangements before 12 March 2020 and before the impact of the COVID-19 pandemic was apparent. Accordingly, they considered the ATO's decisions were unfair because they had not understood that there would be economic consequences as a result of nominating a particular GST reporting cycle as part of their GST registration, nor could they amend it retrospectively. Furthermore, some believed that the frequency with which a BAS was required to be lodged was an arbitrary basis upon which to decide whether economic relief should be provided in a time of need.

### Case studies – concerns raised by complainants

- B.3.5 Examples of the circumstances in which complainants were deemed ineligible are illustrated in the following case studies. The outcomes for these case studies is set out in section B.5.6 (for completeness):

Case study 1 – New small business set ups can involve long lead times as this example demonstrates – it was months after the enterprise ‘commenced’ before it was open for customers

A company was incorporated in July 2019 to fit out and run a café. From August 2019 to December 2019 the company applied for the required council approvals to operate as a café and spent considerable funds fitting out the café premises.

The café opened in January 2020 with 5 employees. It made approximately \$13,000 per week in sales until it was forced to shut in March 2020 due to a State Government lock-down that was implemented in response to the pandemic. At the time of the lock-down, the café employed 11 staff.

The company reported GST on a quarterly basis and therefore reported its first sales in the tax period that ended on 31 March 2020.

The ATO decided that the taxpayer was ineligible for the BCF payment on the following grounds:

*We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not lodge a GST return for the quarter ended 31 December 2019.*

### Case study 2 – Management buy-out of an existing business

For the last 10 years, a couple had been employed to manage a successful restaurant that made approximately \$150,000 per month in sales. In October 2019, the couple incorporated a company which registered for an Australian Business Number (ABN) and purchased the existing restaurant business. In December 2019, the company signed a new lease for the restaurant's existing commercial premises which would commence after the existing lease expired in February 2020. Restaurant operations were seamlessly transitioned.

The company continued to report the restaurant's GST quarterly, as the prior owners had done.

The ATO decided that the taxpayer was ineligible for the BCF on the following grounds:

*We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not have lodged a GST return for the quarter ended 31 December 2019.*

### Case study 3 – Employee transitions to a sole trader business which commences in January 2020

A taxpayer began transitioning from being a part-time employee of a company in November 2019 to a sole trader in January 2020. The taxpayer's business activities as a sole trader included the performance of services for their former employer, under contract.

The taxpayer was not registered for GST and did not lodge a BAS to report their taxable supplies to the ATO.

The taxpayer applied for JK payments but was determined to be ineligible by the ATO for the following reasons:

*As you are not registered for GST we assume you are registered, defaulting to a quarterly lodgement basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019.*

*You were an employee up till January 2020 and commenced business after 1 January 2020 and therefore cannot provide notice of a taxable supply for the quarter ended 31 December 2019.*

## Concerns raised by the tax profession and other stakeholders

B.3.6 Members of the tax profession, and the accounting, tax professional and business representative bodies, raised similar concerns to those of complainants. They also expressed concern that the GST reporting cycle was a determinative factor in the ATO's application of the integrity rules to new businesses, and believed it was a factor that would:

- favour large businesses and non-compliant businesses as they would be required to lodge their BAS monthly;<sup>11</sup>
- disadvantage smaller, compliant businesses who either lodge their BAS quarterly or annually or were not required to lodge a BAS at all; and
- potentially constitute a discriminatory application of the law.

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<sup>11</sup> See *A New Tax System (Goods and Services Tax) Act 1999* s 27-15 ('GST Act 1999').

- B.3.7 The IGTO was also made aware of a jointly signed letter, sent by 9 tax professional and accounting representative bodies to the Treasury on 19 June 2020.<sup>12</sup> The letter referred to feedback received from their members regarding the lack of new business access to the JK and BCF support measures as well as discussions they had with the ATO at its consultative forums concerning:
- the need for the ATO to have been made aware of business activity via income tax or GST reporting systems by 12 March 2020 and the restrictive nature of the 'notice' in relation to the integrity rules' 'tax period' requirement, when applied to certain new businesses;
  - inequitable JK and BCF outcomes for identical new businesses, simply due to different GST reporting cycles; and
  - the ATO's compliance program which included a focus on new businesses, particularly those that commenced after 1 July 2019 and were registered for GST on an annual cycle, as well as those that commenced after 1 January 2020 and either were registered for GST on a quarterly cycle or were not registered for GST.
- B.3.8 At the time, these concerns were echoed in media reports, which referred to the commentary of members of the tax profession and parliamentarians in relation to small businesses' eligibility for the JK and BCF support measures.<sup>13</sup>
- B.3.9 In other representations made to the IGTO, tax professionals observed that the ATO's public guidance concerning the JK and BCF integrity rules was inconsistent with Government-issued guidance.<sup>14</sup> The latter guidance was issued at the same time that the JK support measure became law, in the form of a fact sheet. The ATO's public guidance was released on its website<sup>15</sup> eleven days later. As these two sources of guidance were inconsistent with respect to the integrity rules, it caused some uncertainty as to whether an entity could demonstrate genuine business activity by:
- making taxable supplies after 1 July 2018 and prior to the first announcement of the COVID-19 economic support measures on 12 March 2020 (which aligned with the Government's guidance); or
  - having a tax period that started on or after 1 July 2018 and ended before 12 March 2020 in which the taxpayer made a taxable supply (which aligned with the later ATO guidance).

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<sup>12</sup> Joint bodies submission, above n 1.

<sup>13</sup> Lian, above n 2; Visontay, above n 2.

<sup>14</sup> Australian Government, *Economic Response to the Coronavirus: Job Keeper Payment – Frequently Asked Questions* (9 April 2020), publication on [www.treasury.gov.au](http://www.treasury.gov.au) from 9 April 2020 to 20 July 2020, accessed at <<https://archive.org/web/web.php>> ('JobKeeper FAQ').

<sup>15</sup> ATO, 'Sole traders and other entities' (Web Page, 20 April 2020) <[www.ato.gov.au](http://www.ato.gov.au)>, accessed at <<https://archive.org/web/web.php>>.



- B.3.10 Tax professionals also expressed concern that the ATO's eligibility decisions regarding new, active business entities appeared to be contrary to their understanding of the purpose of the JK and BCF integrity rules, which was drawn from the relevant extrinsic materials —i.e. the explanatory statement for the JK legislative instrument and the explanatory memorandum to the BCF Act 2020. Extracts and summaries of the relevant extrinsic materials which these tax professionals referred to are reproduced below.

#### Purpose of JobKeeper Integrity Rule

- B.3.11 The explanatory statement to the JK legislative instrument provides the following explanation:

*The JobKeeper payment for an entity in respect of business participants is intended to support active businesses only. Division 3 contains integrity rules to support this intention.*

*... In relation to an entity that has an ABN, it is additionally required that:*

- an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included; and*
- the entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.*

*For the purposes of determining whether the entity made a taxable supply, it should be assumed that the entity is registered, the supply is neither GST-free nor input taxed, and the external Territories are part of the indirect tax zone. These terms have the meaning that they are given in the GST Act.<sup>16</sup>*

- B.3.12 In summary, the JK explanatory statement expressly states that, in respect of business participants, the JK payment is intended to support active business entities only and the integrity rules apply to support this intention.<sup>17</sup>

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<sup>16</sup> JK explanatory statement, above n 7, pp 22–23.

<sup>17</sup> Ibid. p 22.

### Purpose of Boosting Cash Flow Integrity Rule

- B.3.13 The explanatory memorandum to the *Coronavirus Economic Response Package Omnibus Bill 2020* and associated Bills gives the following explanation:

#### *Active pre-existing entities*

3.30 *In addition to these other requirements the cash flow boost payments are only available to entities, if they held an ABN as at 12 March 2020 and were not inactive at that time. ...*

*[Paragraphs 5(1)(f) and subsections 5(5) and (6) of the Boosting Cash Flow Bill]*

3.31 *An entity is considered active if it had derived assessable income from carrying on a business in the 2018-19 income year or if it has made one or more supplies for consideration in carrying on an enterprise that is connected with the indirect tax zone (Australia) in the tax periods commencing on or after 1 July 2018 and ending before 12 March 2020. Further, notice of the income or supplies must have been held by the Commissioner on or before 12 March 2020, or within such further time as the Commissioner may allow. It is expected that the Commissioner would only rarely allow further time and only where exceptional circumstances provide good reason for a delay in lodgement of activity statements and the income tax return over the whole period.*

*[Paragraph 5(5)(c) and subsection 5(7) of the Boosting Cash Flow Bill]*

3.32 *This is an integrity rule that prevents new or inactive entities being established or revived solely to obtain the first cash flow boost. It sets a low threshold, only requiring a single supply or amount of business income to have been reported to the Commissioner on or before 12 March 2020. It can be satisfied if an entity has provided a single activity statement for any month or quarter since 1 July 2018 or an income tax return in relation to the 2018–19 income year.*<sup>18</sup>

- B.3.14 In summary, the explanatory memorandum indicates that the BCF Integrity Rule is intended to prevent new or inactive entities being established or revived solely to obtain the BCF payment.

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<sup>18</sup> BCF explanatory memorandum, above n 7, [3.30]-[3.32].

## B.4 KEY ISSUES INVESTIGATED

B.4.1 In the complaints investigated by, and representations made to, the IGTO, a common theme emerged — the ATO's administration of the JK and BCF integrity rules appeared to be premised on a view that “taxable supplies” were equivalent to sales or amounts of consideration reported on a BAS (e.g. amounts reported in the “Total Sales” Item G1 label).<sup>19</sup> For example, in many of the relevant complaints raised with the IGTO, the ATO had determined new entities were ineligible for the JK and BCF support measures where they ‘made [their first] supply or sale’<sup>20</sup> after:

- 1 July 2019, if they were registered for GST and reported GST on an annual basis;
- 1 January 2020, if they were registered for GST and reported GST on a quarterly basis; or
- 1 January 2020, if they were not required to be registered for GST.

B.4.2 The IGTO observed that the level of complainant disputation with the ATO's administration was underpinned by key issues arising from the following aspects of the JK and BCF integrity rules:

- the meaning of ‘taxable supply’ as modified for the purposes of the integrity rules;
- the meaning of ‘tax period’ in the context of the integrity rules; and
- how entities notify the ATO that they have made a ‘taxable supply’ in accordance with the integrity rules.

B.4.3 The IGTO also observed some parallels between the above complainant disputation and the uncertainty that was voiced by the tax profession in representations to the IGTO and elsewhere.<sup>21</sup>

### ATO administration of ‘Taxable Supply’

B.4.4 During the IGTO complaint investigations, the ATO confirmed that the meaning of ‘taxable supply’ for the purposes of the JK and BCF support measures’ is different to the meaning of that term for GST law purposes. While some key GST defined terms, such as ‘taxable supply’, are incorporated into the JK and BCF support measures, their meanings are either modified by those laws or those laws do not incorporate other associated GST mechanisms — effectively changing the operation of those terms from what is commonly understood in the GST context.

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<sup>19</sup> For example, the ATO's *Eligibility companion guide for cash flow boost* asks ‘Did your business derive income or make a sale for any tax period...’; See ATO, *Eligibility companion guide for cash flow boost*, (28 September 2020), <[www.ato.gov.au](http://www.ato.gov.au)>.

<sup>20</sup> See ATO template decision letters provided in Appendix 3.

<sup>21</sup> Joint bodies submission, above n 1.

## B.4.5 For example:

- The GST attribution rules<sup>22</sup> are not incorporated into the JK and BCF integrity rules. This means an entity does not need to have received consideration or issued a tax invoice for a taxable supply in the tax period to satisfy the JK and BCF integrity rules – it only needs to have made the taxable supply *for* consideration in the relevant tax period (notwithstanding that the consideration might be provided in a subsequent tax period).
- Additionally, the definition of taxable supplies for the purposes of the JK and BCF integrity rules modifies the GST law definitions.
  - Under the GST law, a supply cannot be a taxable supply if it is input taxed or GST-free.<sup>23</sup> However, under the JK and BCF support measures, it is assumed that supplies are not input taxed or GST-free.<sup>24</sup> It follows that supplies which would be input taxed or GST-free under the GST law might nevertheless be characterised as "taxable supplies" for the purposes of the JK and BCF support measures.
  - For example, a 'financial supply'<sup>25</sup> is treated as an input taxed supply under the GST law<sup>26</sup> and input taxed supplies are expressly excluded from the definition of taxable supplies in that law. Nevertheless, a financial supply can be a 'taxable supply' under the JK and BCF support measures, because for the purposes of the measures, it is assumed that supplies (including financial supplies) are not input taxed.

When the acquisition of a financial interest is the making of a financial supply

- B.4.6 The term 'supply' is defined broadly in *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act 1999) to mean 'any form of supply whatsoever'<sup>27</sup>. The meaning of 'supply' is further expanded in the context of financial supplies. Specifically, the term 'financial supplies' is defined in the GST Regulations 1999 to include the 'provision, acquisition or disposal' of a specified financial interest, provided certain additional requirements are satisfied (reg 40-5.09).

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<sup>22</sup> GST Act 1999 Div 29.

<sup>23</sup> GST Act 1999 s 9-5.

<sup>24</sup> BCF Act 2020 s 5(7) and 6(7); JK legislative instrument r 11(9).

<sup>25</sup> As defined in *A New Tax System (Goods and Services Tax) Regulations 1999* Div 40 ('GST Regulations 1999'). See Appendix 2 for the complete statutory definition.

<sup>26</sup> GST Act 1999 s 40-5.

<sup>27</sup> GST Act 1999 s 9-10.

- B.4.7 A complete extract of the definition of financial supply taken from the GST laws is included at Appendix 2. In summary, these additional requirements are broadly in line with the requirements for a taxable supply, namely, in order to be a financial supply, the provision, acquisition or disposal must be for consideration, in the course or furtherance of an enterprise and connected with the indirect tax zone. The entity making the supply must be a financial supply provider in relation to the supply of the interest.<sup>28</sup>
- B.4.8 Although the word 'supply' does not ordinarily contemplate the acquisition of something, the Commissioner confirms his view, in his published guidance, that, "For the purposes of the GST Regulations 1999 and the GST Act 1999, a supply includes a financial supply and a financial supply includes an acquisition of a financial interest"<sup>29</sup>.
- B.4.9 A list of the specified financial interests is set out in the regulations<sup>30</sup> — refer Appendix 2. In accordance with that list, acquisitions of financial interests (which constitute the making of financial supplies) can include:
- opening an account with a bank (an approved deposit taking institution (**ADI**));
  - borrowing money (from a financial supply provider);
  - entering a mortgage over real or personal property; and
  - buying or selling shares or other securities — including incorporation of a shelf company or acquiring an interest in a managed investment scheme (a type of trust).
- B.4.10 In describing financial supplies that are acquisitions of financial interests, the Commissioner uses the expression "acquisition-supplies"<sup>31</sup>. This expression is adopted for the purposes of this report.
- B.4.11 Acquisition-supplies, like other financial supplies, are usually input taxed.<sup>32</sup> It follows that acquisition-supplies are typically never taxable supplies, because the definition of taxable supplies in s 9-5 of the GST Act 1999 specifically excludes input taxed and GST-free supplies. However, in characterising supplies to determine eligibility under the BCF Act 2020 and the JK legislative instrument, it is assumed that the supplies are not input taxed<sup>33</sup>.

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<sup>28</sup> Whilst there is also a requirement for the entity to be registered or required to be registered for GST, this requirement is assumed for the purposes of the JK and BCF support measures: ss 5(7) and 6(7) of the BCF Act 2020 and r 11(9) of the JK legislative instrument. This is consistent with other modifications made to GST requirements under the JK and BCF support measures.

<sup>29</sup> ATO, *GSTRuling GSTR2002/2: Goods and Services Tax: GST treatment of financial supplies and related supplies and acquisitions* ('GSTR 2002/2'), 17 December 2014, para [22].

<sup>30</sup> GST Regulations 1999 reg 40-5.90(3).

<sup>31</sup> ATO, GSTR 2002/2, above n 29, para [26].

<sup>32</sup> GST Act 1999 s 40-5.

<sup>33</sup> BCF Act 2020 ss 5(7) and 6(7); JK legislative instrument r 11(9).

- B.4.12 It follows that acquisition-supplies are capable of being taxable supplies if the requirements in s 9-5 of the GST Act 1999 are otherwise satisfied, subject to any other modifications (such as the further assumption that the entity is registered<sup>34</sup>). As noted above, the requirements for a financial supply in reg 40-5.09 are materially the same as the requirements for a taxable supply in s 9-5 of the GST Act 1999.
- B.4.13 It follows that, if it is assumed that an acquisition-supply is not input taxed (because of the operation of the BCF Act 2020 and the JK legislative instrument), the acquisition-supply will typically satisfy the definition of taxable supply in s. 9-5 and will be a taxable supply for the purposes of the BCF Act 2020 and the JK legislative instrument.
- B.4.14 Where an entity makes an acquisition-supply because it acquires a financial interest, the consideration for making that supply is not always monetary (i.e. not always cash or an exchange of money). For example, when opening an account with a bank, the consideration provided can be the exchange of mutually agreed rights and the undertaking of obligations between the bank (the ADI) and the customer. An acquisition-supply of this kind is unlikely to be reported through a BAS or to be identifiable as such if it is.<sup>35</sup>
- B.4.15 Accordingly, a new entity may be eligible for JK and BCF support measures where they 'acquired' an interest in one or more financial supplies as part of the steps undertaken to commence their business, which is included as part of activities involved in carrying on an enterprise<sup>36</sup>, and did so in a tax period that ended on or before 12 March 2020 (where the other eligibility criteria are met).

### ATO administration of 'Tax Period'

- B.4.16 The ATO administers the JK and BCF integrity rules based on its interpretation that an entity is required to have made a 'taxable supply' in a 'tax period' that started on or after 1 July 2018 and ended before 12 March 2020.
- B.4.17 Early in the IGTO's complaint investigations, the ATO confirmed its view that, although it does have discretion to accept late notice of a taxable supply made by an entity for the purposes of the JK and BCF integrity rules (e.g. notice provided after 12 March 2020), it does not have any discretion regarding the tax period in which the taxable supply was made.

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<sup>34</sup> *ibid.*

<sup>35</sup> The value of financial supplies should factor into the calculation of supplies reported at Item G1 of the BAS form. As a practical matter, an acquisition-supply such as the opening of a bank account is unlikely to be disclosed on the BAS and, if it was, it would not be separately distinguishable from the value of other supplies.

<sup>36</sup> ATO, *Miscellaneous Taxation Ruling MT 2006/1: The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number* ('MT 2006/1'), 13 December 2006, para [120]-[131].

- B.4.18 The IGTO, through the course of its complaint investigations, considered whether the ATO's application of the 'tax period' requirement of the JK and BCF integrity rules was the only possible application of the measures as enacted. The IGTO tested several alternative applications which appeared open on the text of the law and which appeared to better promote the aim of those integrity rules, as informed by the extrinsic materials. Also, these alternative applications did not appear to result in new entities being treated differently depending on whether they were required or had elected to lodge their BAS monthly instead of the default quarterly lodgement cycle. The IGTO also tested whether other administrative solutions were available, including an exercise of the Commissioner's general powers of administration or his remedial powers.
- B.4.19 The ATO responded that it does not consider the alternative applications are open to it, based on its reading of the law and understanding of the policy intent for the relevant provisions. Similarly, the ATO considered that any solutions which seek to rely on the Commissioner's general powers of administration or remedial power are not open to it, as the exercise of those powers would require the ATO to form a view that it considers is not open, having regard to the words in the law as well as the extrinsic material for both measures.
- B.4.20 Notwithstanding the lack of available administrative solutions on this issue, the likely impact on the number of taxpayers affected by the ATO's administration of 'tax period' perhaps diminishes once it is understood that for the purposes of the JK and BCF integrity rules, an entity's taxable supplies can also include acquisitions of financial interests made during the commencement or establishment of a business. Some observations on this concern are nonetheless included in Part C below.

## ATO administration of 'Taxable Supply' notification and evidence

### Entities that are registered for GST

- B.4.21 The ATO's administration of the JK and BCF integrity rules appeared to require new entities to notify the ATO of sales made in a relevant tax period via a BAS that was lodged on or before 12 March 2020. For example, the ATO website states:

*Your entity is eligible if:...*

*> it satisfied certain conditions as at 12 March 2020, being*

*...it had lodged, on or before 12 March 2020...*

*– an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing that it made a taxable, GST-free or input-taxed sale.<sup>37</sup>*

- B.4.22 This website guidance is consistent with early ATO decisions on new entities' eligibility as the ATO's reasons for these decisions include that entities were ineligible for the JK and BCF

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<sup>37</sup> ATO, 'Sole traders and other entities' above n 15.

support measures if a sale was not (or could not be) reported on a BAS for the relevant tax period prior to 12 March 2020.

- B.4.23 These early decisions also show that the ATO did not consider evidence of other taxable supplies which may not appear on a BAS or alternative means of notifying the ATO of such supplies. For example, the following excerpt from an ATO BCF eligibility decision shows that acquisitions of financial interests made by an entity as part of its business commencement activities between July 2019 and January 2020 – which are not typically reported on a BAS – were not considered by the ATO in determining eligibility:

*You registered for an ABN on 17 July 2019 and had an ABN before 12 March 2020...*

*We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not lodge a GST return for the quarter ended 31 December 2019. **As a result, you did not lodge at least one of the documents for the eligible lodgement period reporting income or at least one sale from the eligible lodgement periods.** You also did not give the Commissioner notice of the entity's assessable business income or sale prior to 12 March 2020. As a result, you did not meet the [requirement to make a taxable supply in a tax period that applied that started on or after 1 July 2018 and ended before 12 March 2020] and the [requirement to give the Commissioner notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply].*  
[Emphasis added]<sup>38</sup>

- B.4.24 During the course of the IGTO's complaint investigations, the IGTO concluded that, for a number of adverse ATO decisions, the ATO did not provide an opportunity for new entities to provide evidence that they made taxable supplies (for the purposes of the JK and BCF support measures) in a relevant tax period before the ATO made that adverse decision.<sup>39</sup> Accordingly, the ATO did not consider whether the entity could provide additional evidence of supplies not typically shown on a BAS, which might have satisfied the JK and BCF eligibility requirements.
- B.4.25 If the entity had made taxable supplies in the relevant tax period but not previously notified the ATO of those taxable supplies, the Commissioner could exercise his discretion to accept late notification of those supplies. When considering whether to exercise this discretion, ATO staff must follow the instructions set out in Law Administration Practice Statement (PS LA) 2020/1.<sup>40</sup>
- B.4.26 PS LA 2020/1 states that in determining whether to grant further time to give notice, the Commissioner will have regard to the policy intent of the measures, including that the JK and

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<sup>38</sup> ATO, Communication to taxpayer, 23 July 2020.

<sup>39</sup> See Appendix 3 for template letters of these decisions.

<sup>40</sup> ATO, Law Administration Practice Statement PS LA 2020/1: Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies, 1 May 2020 ('PS LA 2020/1').



BCF support measures are designed to provide financial support to active businesses adversely affected by the economic impacts of the pandemic and to support the retention of employment of their staff.

- B.4.27 The PS LA states that ATO staff should take account of all relevant facts and circumstances and may need to contact the entity to obtain more information and supporting documents. The nature of the supporting documents will depend on the entity's circumstances, however, examples are provided which include tax invoices, bank statements and documentation of business financing arrangements.<sup>41</sup>
- B.4.28 Although it is not expressly stated in the PS LA, such supporting documentation could also be used to evidence that the entity has made taxable supplies in the relevant period (for the purposes of the JK and BCF support measures). However, as this staff instruction is limited to the exercise of the Commissioner's discretion to accept late notification (after 12 March 2020) of the entity's taxable supplies (or assessable income), it cannot be relied upon as an instruction to ATO staff regarding the type of documents to accept as evidence of those taxable supplies.

#### Entities that are not registered or required to be registered for GST

- B.4.29 Entities that commenced on or after 1 July 2019 and are not registered or required to be registered for GST did not have any obligation to lodge a BAS or income tax return before 12 March 2020. As such, the ATO could not refer to previous lodgements in order to satisfy the JK and BCF integrity rules. For these entities, the ATO:
- exercised the Commissioner's discretion to allow a later time for the entity to notify; and
  - requested evidence to consider whether the entity made sales on or before 31 December 2019.<sup>42</sup>
- B.4.30 Examples of the types of evidence sought by the ATO in these circumstances are contained in PS LA 2020/01 and include tax invoices, bank statements and documentation of business financing arrangements.<sup>43</sup>
- B.4.31 In essence, the ATO was accepting these alternative forms of evidence where an entity had no obligation to lodge a BAS before 12 March 2020 if it demonstrated that the entity would have shown sales on a BAS if it were registered for GST.

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<sup>41</sup> *ibid.* para [3].

<sup>42</sup> ATO, 'Exercise of the Commissioner's discretion' (Web Page, 16 September 2020) <[www.ato.gov.au](http://www.ato.gov.au)>, accessed at <<https://archive.org/web/web.php>>.

<sup>43</sup> ATO, PS LA 2020/1, above n 40, para [3].

## B.5 OUTCOME OF IGTO ASSISTANCE

### ATO confirmed that acquisition-supplies made during the commencement of an enterprise may satisfy the integrity rules

- B.5.1 The ATO has confirmed that, for JK and BCF eligibility purposes, a 'taxable supply' can be made in a tax period where the taxpayer acquires a financial interest that constitutes the making of an acquisition-supply.<sup>44</sup> This means that many new entities that were setting up their businesses in the 2019 calendar year, but only started making sales after December 2019, may satisfy the integrity rule and be eligible for relief under the JK and BCF support measures.<sup>45</sup> This will depend on whether the entities fulfill all of the other eligibility requirements. If notice of a taxable supply was not given to the Commissioner of Taxation before 12 March 2020, eligibility will also depend upon whether the Commissioner exercises his discretion to accept late notification of those taxable supplies.<sup>46</sup>

### ATO undertook to informally review some of its decisions – complaint cases, objections and appeals

- B.5.2 During the course of the IGTO's complaint investigations, the ATO advised that it would informally review all JK and BCF eligibility disputes where a material factor in the ATO's decision was the lack of a sale or supply reported by the new entity (by way of BAS lodgement) on or before 12 March 2020.<sup>47</sup> This would include informal review of all relevant objections, ATO objection decisions, appeals to the AAT and complaints which were investigated by the IGTO.
- B.5.3 The ATO's informal review would also consider whether all the eligibility requirements for the JK and BCF support measures were satisfied, including whether or not the entity made a taxable supply (including an acquisition-supply or other financial supply) in the relevant tax period. This may also require ATO officers to seek further information from the entity, in order to determine whether there is sufficient evidence to show it was carrying on an enterprise prior to 12 March 2020<sup>48</sup>, including evidence of activities undertaken while setting up the business.
- B.5.4 The ATO first communicated this informal review arrangement to the IGTO on 23 September 2020, when it was independently prompted by the IGTO as part of our complaint investigation.

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<sup>44</sup> See paragraphs B.4.6. to B.4.10 above for the meaning of "acquisition-supplies".

<sup>45</sup> See Appendix 1 – Chronology of events, 11 September 2020 and 18 September 2020.

<sup>46</sup> See ATO, PS LA 2020/1, above n 40.

<sup>47</sup> See Appendix 1 – Chronology of events, 23 September 2020.

<sup>48</sup> ATO, MT 2006/1, above n 36, para [120]–[131].

- B.5.5 The IGTO also learnt on 23 September 2020 that the ATO did not intend to identify all potentially affected taxpayers, as it advised that it would not informally review decisions unless they had been challenged by the entity. The ATO explained that it would not be feasible to identify all previous compliance decisions which were made on a basis which was inconsistent with the position outlined above. This is because the ATO considers that the process of specifically identifying these decisions, and distinguishing them from other decisions where an entity was ineligible for a different reason, would be too difficult and burdensome.

#### Case studies – outcomes achieved for complainants

- B.5.6 Outcomes for the case studies outlined in paragraph B.3.5 are set out below for completeness.

Case study 1 – New small business set ups can involve long lead times as this example demonstrates – it was months after the enterprise ‘commenced’ before it was open for customers

Following the ATO’s informal review, it reversed its decision and determined that the café was eligible to receive the BCF payments on the following grounds:

*You were registered for GST from 1 July 2019, reporting quarterly. [In] November 2019, you opened a bank account with an ADI. It is therefore considered that you were carrying on an enterprise and have made a taxable acquisition-supply in the December 2019 quarter. There is no requirement to report the supply in a BAS, as such Commissioner’s discretion may be considered.*

*...Therefore, you are eligible to receive the initial [BCF] credits and the additional [BCF] credits if you are granted Commissioners discretion in relation to the acquisition-supply of the relevant interest in a bank account.*

*...We have determined that discretion will be applied in your circumstances as, while you were registered for GST and reporting on a quarterly basis, you were not required to report the opening of your bank account [in] November 2019 in your BAS for the quarter as it was an input-taxed supply.*

### Case study 2 – Management buy-out of an existing business

Following the ATO's informal review, it reversed its decision and determined that the company was eligible to receive the BCF payments on the following grounds:

*In your circumstances, you opened a bank account with [an ADI in] November 2019 for the entity and contributed an amount... As you have opened a bank account with an ADI for the entity, the entity has made an acquisition-supply and the consideration element has been met.*

*We consider that when the bank account was opened a supply was made, it was a taxable supply for the purposes of [BCF], because it was being made for consideration.*

*... Therefore, you are eligible to receive the initial [BCF] credits and the additional [BCF] credits if you are granted Commissioners discretion in relation to the acquisition-supply of the relevant interest in a bank account.*

*... We have determined that discretion will be applied in your circumstances.*

### Case study 3 – Employee transitions to a sole trader business which commences in January 2020

As part of the ATO's informal review to determine whether the taxpayer had made any taxable supplies, including financial supplies during the carrying on of a business, the taxpayer provided evidence of the steps they undertook in commencing their sole trader business. The taxpayer provided evidence to show that they had opened a bank account for their sole trader operations in February 2020.

However, after reviewing this additional information, the ATO determined that the taxpayer was still ineligible for the JK support measure on the following grounds:

*Whilst you undertook steps in November/December 2019 to begin your transition to operating as a sole trader, you did not commence operating your business until ... January 2020.*

*Accordingly, we consider that you were still an employee with your former employer until January 2020. As you commenced business after 1 January 2020, you could not provide notice of a taxable supply for the quarter ended 31 December 2019.*

## The ATO clarified that ATO advice and guidance on 'Taxable Supply' would not be updated

- B.5.7 During the IGTO's complaint investigations, the IGTO considered that the ATO's public advice and guidance does not fully reflect the JK and BCF definitions of 'taxable supply' — i.e. that a taxable supply can be made where a taxpayer makes an acquisition of a financial interest — as confirmed to the IGTO in the course of our investigations.
- B.5.8 However, the ATO declined to amend the wording in its public guidance as it considered the existing materials struck an appropriate balance between simply explaining complex tax provisions to a wide audience and providing enough information for entities to understand the information needed to evidence their eligibility for the JK and BCF support measures.

## 'Tax Period' construction is a question of law

- B.5.9 The IGTO obtained confirmation of the ATO's authoritative interpretation of 'tax period' in the context of the JK and BCF integrity rules and its link to the 12 March 2020 end date specified in those rules — i.e. the 12 March 2020 date is the date by which the relevant 'tax period' must have ended, not the date by which the relevant taxable supply was made. The IGTO communicated this to several complainants as part of our complaint investigations. This did not result in a changed ATO decision for complainants where the ATO's interpretation of 'tax period' was the determinative issue.
- B.5.10 The ATO also considered the alternative applications of the term 'tax period', that were raised through the IGTO's complaint investigations, and reaffirmed its view that its application of the 'tax period' requirement was correct and in accordance with the JK and BCF support measures.
- B.5.11 The resolution of competing constructions of the 'tax period' requirements in the integrity rules is a question of law. There are limited avenues for the IGTO to resolve questions of law, and such matters are more appropriately dealt with through the judicial system — including through relevant 'test cases'. The IGTO has made observations in Part C regarding the interaction between the drafting and the administration of the measures, and the ATO's role in resolving interpretative issues, including by way of 'test cases'.

## PART C. IGTO OBSERVATIONS

### C.1 INTRODUCTION

- C.1.1 Overall, the IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the unprecedented challenges caused by the COVID-19 pandemic. The ATO needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF payments. As with the implementation of new major economic fiscal measures, matters arose that had an impact on the efficient and fair administration of the tax system.
- C.1.2 Consistent with our statutory purpose of improving the tax administration system, and in the interests of capturing the opportunity to learn from the response to the crisis, we have made observations on the underlying issues which were identified during the IGTO's complaint investigations (outlined in Part B). These observations inform the broader community of opportunities to improve tax administration and help to build trust and confidence in the administration of the tax system, which in turn promotes voluntary compliance.<sup>49</sup> They may be the subject of a broader review in future.
- C.1.3 Accordingly, the IGTO makes the following observations on issues arising from the complaint investigations undertaken:
- Initial ATO compliance activities on new law should afford taxpayers procedural fairness before making adverse decisions, and create opportunities for the ATO to identify any need to clarify its precedential view.
  - ATO advice and guidance should be easy to understand, but not risk oversimplification that leads taxpayers and ATO staff into error.
  - Prompt ATO remedial action is needed for affected taxpayers when the ATO materially changes how it applies its precedential view.
  - ATO compliance decisions should help taxpayers understand their options for review.
  - Options to expeditiously resolve disputes about the ATO's precedential view should be explored.
  - Opportunities exist to improve the care and maintenance processes for new tax laws and their integration with existing tax laws.
  - Improving IGTO access to ATO records and data systems can expedite IGTO complaint investigations.

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<sup>49</sup> As noted in Table 1 on page 8.

- C.1.4 These observations also incorporate material which was provided by the ATO on 8 December 2020 to give broader context for those issues which are the subject of the IGTO observations below. They are included for the sake of completeness and to assist with scoping potential future reviews of the issues.

## C.2 CONTEXT OF IGTO OBSERVATIONS

- C.2.1 The observations below should be appreciated in their broader context. The JK and BCF support measures were enacted in response to the extraordinary and unprecedented impact of the COVID-19 pandemic on Australian jobs and businesses and to provide economic support measures in the form of JK and BCF payments to many Australians.
- C.2.2 The ATO was chosen to deliver these payments as the ATO's existing tax payment and reporting infrastructure could be adapted to that purpose within a relatively short timeframe. However, significant ATO effort was required to refocus its resources towards the design and implementation of these new support measures. This involved significant changes to the ATO's operations, such as redeploying its workforce, pausing debt collection, updating its internal and external communications as well as tailoring its information, communication and technology systems to administer the payments.
- C.2.3 Accompanying communications, including public advice and guidance, needed to be developed and distributed quickly in response to the crisis conditions. This included the publication of guidance in the form of Facts Sheets by Treasury and website material by the ATO. Multiple subsequent legislative amendments also meant that the guidance frequently required updates. The rapid pace of this change prompted the ATO to publish a [timeline of content updates for the JK support measure](#).<sup>50</sup>
- C.2.4 In developing the relevant guidance for the public and its own staff, the ATO needed to quickly and carefully consider the range of taxpayers that may be affected by the JK and BCF support measures and their differing circumstances, to ensure that the new measures were understood and applied by staff fairly and consistently.

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<sup>50</sup> ATO, 'JobKeeper – timeline of content updates' (Web page, 27 Oct 2020) <[www.ato.gov.au](http://www.ato.gov.au)>.

### C.3 INITIAL ATO COMPLIANCE DECISIONS ON NEW TAX LAWS SHOULD AFFORD TAXPAYERS PROCEDURAL FAIRNESS BEFORE MAKING ADVERSE DECISIONS, AND CREATE OPPORTUNITIES FOR THE ATO TO IDENTIFY NEEDED CLARIFICATION OF ITS PRECEDENTIAL VIEW

- C.3.1 The ATO was quick to commence its initial active compliance campaign on JK eligibility, in June 2020, which was approximately two (2) months after the commencement of the JK legislative instrument. By acting quickly, the ATO minimised the risk of ongoing errors and helped assure the community of the integrity of the JK support measures at an early stage. However, the ATO's process for determining and communicating its adverse decisions for particular new entities in this active compliance campaign was one of the main sources of concern raised with the IGTO and a source of substantial disputation.
- C.3.2 In the ATO's initial compliance campaign, the ATO identified over 27,000 business participant applicants that may not have met the eligibility criteria for a number of different reasons. The ATO sent correspondence to these applicants, the content of which differed depending on the applicant's circumstances and the particular eligibility criteria that may not have been met (see Appendix 4) — for example, whether the entity had registered for GST, whether it had started business before or on/after 1 January 2020, and whether it had notified the ATO of business income or taxable supplies before 12 March 2020.
- C.3.3 In relation to the BCF payments, the ATO determined which entities would receive the payments based on information it already held. The ATO advises that it had initiated contact with a number of entities to confirm their eligibility for BCF. Generally, this was where those entities had not reported the relevant income or supplies by the 12 March 2020 date, however, the ATO has not advised what other particular factors would have generated this type of contact. The ATO also advises that where contact was made with the ATO to determine why a BCF payment was not received, the ATO would afford the entity opportunity to provide further information before reconsidering its non-payment decision. Based on the sample letters provided, one of the material factors for new businesses was whether, by 12 March 2020 or any agreed lodgement deferral date, the entity had:
- (for earlier ATO letters) declared business income or reported "sales" to the ATO;<sup>51</sup> or
  - (for later ATO letters), given notice that the entity had derived business income or made a "taxable, GST-free or input taxed supply (or a sale that would have been such a supply if [they] were registered for GST)".<sup>52</sup>

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<sup>51</sup> See appendix 4, BCF letter - Sample July.

<sup>52</sup> See appendix 4, BCF letter - Sample December.



- C.3.4 The ATO advises that over 80,000 entities received the BCF payment after providing further evidence to the ATO.<sup>53</sup>
- C.3.5 In relation to the JK payments, and based on the sample letters the ATO provided, the start date for the entity's business and their GST reporting cycle were material factors in determining whether the ATO afforded entities opportunity to provide information before the ATO made an adverse decision — i.e. where the ATO considered the entity had started their business:
- between 1 July 2019 and 31 December 2019 and did not register for GST on an annual lodgement cycle, the ATO afforded the entity opportunity to provide information to the ATO before it made an adverse decision;<sup>54</sup>
  - between 1 July 2019 and 31 December 2019 and registered for GST on an annual lodgement cycle, the ATO did not afford the entity opportunity to provide information to the ATO before it made an adverse decision;<sup>55</sup>
  - on or after 1 January 2020, the ATO made an adverse decision and did not afford opportunity to provide information before it did so.<sup>56</sup>
- C.3.6 There were approximately 2,200 new businesses in the latter two categories — i.e. those whose first communication from the ATO was a letter advising that they were considered ineligible for JobKeeper payments because they commenced business too late to satisfy the integrity rules,<sup>57</sup> **(ATO template decision letters)**— refer Appendix 3. In the complaints that the IGTO received regarding the ATO's compliance activities for the BCF and JK measures, a substantial number involved receipt of these ATO template decision letters.

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<sup>53</sup> ATO, Communication to the IGTO, 8 December 2020, p 20.

<sup>54</sup> See Appendix 4, Sample letters 1, 2 and 3.

<sup>55</sup> See Appendix 4, ATO template decision letters, Option 3; see also Appendix 3 for a copy of that template letter.

<sup>56</sup> See Appendix 4, ATO template decision letters, Options 1, 2 and 3; see also Appendix 3 for a copy of that template letter.

<sup>57</sup> ATO, Communication to the IGTO, 19 August 2020, p 7.

- C.3.7 The ATO's template decision letters were based on pro forma wording, that advised the entity that the ATO had decided the entity was ineligible to claim the JK payments without affording procedural fairness to these taxpayers:

*To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of...*

- *supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that report and pay GST quarterly).*

*Our records indicate the entity started business on or after 1 January 2020.*

*On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.*

*We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.<sup>58</sup>*

- C.3.8 Although the ATO template decision letters provided the ATO's reasons for decision, they did not afford complainants an opportunity to present evidence of relevant considerations before adverse decisions were made. Also, the ATO template in its design did not afford an opportunity for the ATO itself to identify circumstances which would require it to clarify its precedential view.
- C.3.9 For example, the wording in the ATO template decision letters regarding the term 'supplies or sales' does not take into account the fact that the making of the supplies and the attribution of the supplies (for GST purposes) may occur in different tax periods. Therefore what is reported in the BAS may not be indicative of whether a supply was in fact made. However, through the IGTO's complaint investigations, the ATO has confirmed that the making of a taxable supply does not depend on consideration having been received (provided the taxable supply is made for consideration, which might be provided in a future tax period).
- C.3.10 Taxable supplies may also include other types of supplies such as acquisition-supplies, e.g. opening a bank account. Such supplies may be made during the commencement of a business.<sup>59</sup> For some entities, these activities occurred in a tax period before that in which they made their first sale.
- C.3.11 Further, the ATO template decision letters did not contemplate that complainants could notify the ATO of the making of taxable supplies (as modified by the JK and BCF support measures) via means other than lodging a BAS, such as the entity notifying the Commissioner of the opening of a bank account for a new business as part of their GST registration.

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<sup>58</sup> See Appendix 2 for a copy of that template letter.

<sup>59</sup> See ATO, MT 2006/1, above n 36, para [120]–[131].

- C.3.12 Although complainants may dispute the ATO's decisions via the statutory objection process, had the ATO afforded procedural fairness in these cases — for example, by offering to consider further taxpayer views and evidence before finalising its decisions — the ATO would have decreased the risk of flawed decision-making and the resulting impacts for both the taxpayer and the ATO. It may be that the number of flawed decisions in this compliance campaign is a small fraction of the total number who claimed the JK payment. Even so, they are likely to significantly impact the ATO's management of disputes and there may be significant consequences for entities adversely impacted by those decisions, including financial and emotional consequences for the businesses, their employees and their families. This is especially the case if there are delays in resolving the matter with the ATO, given the fact that entitlement to the JobSeeker payment cannot be backdated.
- C.3.13 In past ATO compliance activities on newly enacted law, the ATO has afforded procedural fairness opportunities in its initial communications with taxpayers. For example:
- by confirming the information the ATO had on hand;
  - by confirming that the information indicated to the ATO that the taxpayer may be ineligible; and
  - then by affording the taxpayer an opportunity to provide further information and views before it made a decision which had an adverse financial impact on the taxpayer.
- C.3.14 It may be said that the ATO would have incurred significant additional administrative costs if it had afforded all entities with an opportunity to provide further information before making decisions in its compliance activities on newly enacted law. However, the ATO has routinely afforded such opportunities in other compliance campaigns which have involved significant numbers of taxpayers, for example, in its income matching system (that is, compliance activities which match interest data received from financial institutions with the interest reported by taxpayers in their income tax returns).
- C.3.15 The ATO's design of its initial compliance activities on newly enacted law, including its template decision letters, may be a potential topic for broader IGTO review in the future.

### Ongoing monitoring of compliance issues in new laws to better inform the need for care and maintenance

- C.3.16 In a previous review, the *Review into improving the self assessment system*, the IGTO observed that after substantial new tax law is enacted, greater post-implementation monitoring should take place, as the need for refinements and advice is a necessary and healthy part of maintaining a complex system.<sup>60</sup> For example, there may be limited ATO awareness of the specific taxpayer factual arrangements to which the new law applies, at the time it is enacted. As the ATO conducts compliance activities on that law, it becomes increasingly aware of the broader range of factual circumstances and how the law applies to them. In this sense, the full

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<sup>60</sup> See IGTO, *Review into improving the self assessment system* (2012), pp 130–131 ('Self assessment review').

application of the law is better understood through undertaking compliance activities.<sup>61</sup> That is, a better understanding of the law can be obtained with the benefit of hindsight.

- C.3.17 Consistent with previous observations on this issue, there is ongoing need for the ATO to continue to refine its guidance and communications as it develops a more fulsome appreciation of the application of newly enacted law to the myriad of factual circumstances. This acknowledges the fact that unknown issues may arise in the reporting and lodgement cycle<sup>62</sup> and reflects a causal link between:
- the law design and implementation process, in which the ATO plays a significant consultative role; and
  - the ATO's subsequent administration of that law, including the content of its public guidance and conduct of its compliance activities.
- C.3.18 As there are likely to be issues arising from the design of law that will be identified after the legislation is enacted and during subsequent compliance activities, appropriate safeguards or mechanisms need to be in place to address those issues before considerable taxpayer and ATO administrative costs are incurred in resolving consequent disputes. By affording taxpayers an opportunity to present evidence of relevant considerations before the ATO makes adverse decisions on newly enacted law, the ATO maximises the opportunity to quickly identify previously unforeseen issues and to take prompt action in response, for example alerting the Government of unintended consequences.
- C.3.19 The involvement of the community in the ongoing monitoring of newly enacted legislation also helps to ensure it is operating as intended. The ATO's consultation forums, such as the National Tax Liaison Group (**NTLG**) and Tax Practitioners Stewardship Group (**TPSG**), provide a platform for external stakeholders to raise issues for consideration<sup>63</sup> and alert the ATO to the need to take prompt administrative action, for example, by clarifying application of its precedential view of the law.
- C.3.20 The IGTO notes that concerns about the JK and BCF integrity rules were raised with the ATO through these forums. However, it appears that not all material issues raised, and associated responses, have been made publicly available—for example, the ATO's informal review process for certain new businesses. Given the targeted nature of these complaint investigations, the IGTO has not explored in further detail the ATO consultation processes that took place beyond the publicly available records of the relevant NTLG and TPSG meetings.
- C.3.21 This issue may warrant IGTO review in future and would be better informed by the Auditor-General's recent performance audit report of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures*.

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<sup>61</sup> *ibid.* p 37.

<sup>62</sup> *ibid.* pp 130–131.

<sup>63</sup> *ibid.*

## C.4 ATO ADVICE AND GUIDANCE SHOULD BE EASY TO UNDERSTAND, BUT NOT RISK OVERSIMPLIFICATION THAT LEADS TAXPAYERS AND ATO STAFF INTO ERROR

- C.4.1 The ATO plays a fundamental role in assisting a broad range of taxpayers to understand how the tax laws apply to their affairs — for example, by giving simple explanations of complex tax concepts — whilst at the same time ensuring that this guidance accurately reflects the legislation as enacted. Over-emphasis on one of these two objectives can compromise the other.

### Oversimplification of the application of the JK and BCF integrity rules

- C.4.2 Following the enactment of the JK and BCF support measures, both the Treasury and the ATO publicly released a substantial volume of guidance materials in the form of Facts Sheets and information posted to the Treasury and ATO websites.
- C.4.3 In IGTO complaint investigations, it was observed that the wording in these guidance materials may have led some taxpayers to conclude that the JK and BCF integrity rules required notification of the same business activities that they were required to report under the income tax and GST regimes. This was mainly due to the use of income tax concepts (i.e. the requirement to have an amount included as assessable income for the income year) and GST concepts (i.e. the making of a taxable supply in a tax period that applied to it) in the drafting of the JK and BCF integrity rules.
- C.4.4 In this respect, the ATO oversimplified its guidance as it did not assist taxpayers to fully appreciate the meaning of key terms in the JK and BCF integrity rules. Often, these terms were not used in the JK and BCF support measures in the same way that they are used in the GST law. In relation to new businesses, this had the effect of propagating the misconception that a new business would be unable to prove its eligibility for the JK and BCF support measures unless it had made its first sale in a GST reporting period that ended before 12 March 2020 (for example, before 1 July 2019 for an annual GST reporter with a tax period ending 30 June).
- C.4.5 During the IGTO's complaint investigations, the ATO confirmed that the JK and BCF integrity rules allowed businesses to establish their eligibility with a wider range of business activities than those which are typically reported to the ATO in a BAS. Also, these rules do not limit the way that entities may notify the ATO of these activities. This broader scope was due to the JK and BCF support measures modifying certain GST terms, such as "taxable supply", and not incorporating other GST rules, such as those that attribute the GST payable to particular reporting periods which can be different to the tax period in which the taxable supply is made (the GST attribution rules). The IGTO considered that, in this regard, the ATO's public guidance on the application of the integrity rules to new businesses could have been more fulsomely explained.

- C.4.6 The IGTO observed that affected taxpayers, their advisers and ATO officers had made decisions on the basis of this incomplete public guidance, resulting in adverse financial consequences for some affected taxpayers. With the benefit of hindsight, had the ATO's guidance been more fulsome in its explanation of the modified GST concepts included in the JK and BCF support measures, the practical impact on new businesses may have been apparent to advisers and taxpayers and ATO staff may not have been led into error when determining the eligibility for certain new businesses.

### Inconsistencies in public guidance that led to uncertainty

- C.4.7 In relation to the application of the JK and BCF integrity rules to new businesses, the Treasury publicly released a Facts Sheet that gave guidance on the JK support measure at the same time that the JK legislative instrument was registered. As previously observed by the IGTO, synchronising public advice and guidance with the implementation of significant new tax law minimises some of the uncertainty caused by the administration of that new law.<sup>64</sup>
- C.4.8 This Facts Sheet indicated that eligibility depended on whether the entity had made a supply before 12 March 2020 (amongst other requirements)<sup>65</sup>. However, the ATO guidance that was published on its website 11 days later indicated that eligibility for the JK payment depended on, amongst other requirements, whether the entity had made a sale or supply in a particular GST reporting period which ended before 12 March 2020 (discussed in paragraph B.3.9)<sup>66</sup>. Also, the ATO website material gave the impression that only sales or supplies reported on a BAS would be accepted by the ATO.<sup>67</sup>
- C.4.9 This inconsistency has been a key cause for uncertainty amongst taxpayers and tax professionals, based on the concerns raised with the IGTO and expressed more publicly (see, for example, concerns about the application of the integrity rules raised in a joint letter from the Professional Bodies to Treasury and in the media<sup>68</sup>). A more fulsome explanation of the JK and BCF integrity rules in the ATO's guidance would have likely minimised the confusion regarding the correct application of those rules and addressed misapprehensions.
- C.4.10 These IGTO observations are made with the benefit of hindsight and must be balanced against the unprecedented circumstances at the time, which required the ATO to quickly develop, implement and deliver a major economic stimulus package of measures in a moment of potential crisis. On this basis, it is understandable that uncertainty arose as to how the JK and BCF support measures operated in practice. Further, little time was available to more fully consider whether public guidance had oversimplified matters or caused uncertainty.

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<sup>64</sup> *ibid.* pp 37–40.

<sup>65</sup> Australian Government, JobKeeper FAQ, above n 14, p 12.

<sup>66</sup> ATO, 'Sole traders and other entities', above n 15.

<sup>67</sup> *ibid.*

<sup>68</sup> Lian, above n 2; Visontay, above n 2; Joint bodies submission, above n 1.

- C.4.11 The lesson to be learnt on this issue draws from an observation that the IGTO previously made in its *Review into improving the self assessment system* regarding greater post-implementation monitoring of the implementation of new tax law — the need for refinements to ATO advice and guidance is a necessary and healthy part of maintaining a complex system.<sup>69</sup> This includes a need to closely monitor ATO public advice and guidance, and review it as necessary, to ensure that it responds quickly to the unanticipated scenarios which emerge in practice and correctly reflects the ATO's evolving views of the law.
- C.4.12 The IGTO may consider the ATO's approach to implementing and monitoring significant new tax law as a potential topic for broader review in future.

## C.5 PROMPT ATO REMEDIAL ACTION IS NEEDED FOR AFFECTED TAXPAYERS WHEN THE ATO MATERIALLY CHANGES HOW IT APPLIES ITS PRECEDENTIAL VIEW

- C.5.1 The need for clear advice and guidance on new tax law is not only limited to taxpayers but is also needed to appropriately guide ATO officers (by way of internal scripting and guidance) in their application of that law. The ATO requires its officers to apply the ATO precedential view of the law, which is reflected in the relevant internal advice and guidance. As the ATO changes how it applies its precedential view of the law, it may materially impact a class of taxpayers. In these cases, it will be important for the ATO to demonstrate fair treatment of taxpayers by taking prompt remedial action for taxpayers who were affected by adverse decisions based on a different application of that view.
- C.5.2 During the course of the IGTO's complaint investigations, as set out in Part B, the ATO clarified its view with the IGTO that, for the purposes of the JK and BCF integrity rules, a 'taxable supply' can be made when an entity makes an acquisition-supply, that is, when it acquires a financial interest and thereby makes a financial supply. This can occur when an entity opens a bank account, and entities that have registered for GST would have notified the ATO of their bank account details on the relevant registration forms.
- C.5.3 This means that new entities undertaking business commencement activities on or before 31 December 2019 may have fulfilled the 'taxable supply' requirement in the JK and BCF integrity rules and, therefore, may be eligible for relief (if all other eligibility requirements are met).
- C.5.4 This was not a situation contemplated by ATO officers at the time they made their initial decisions regarding new businesses' JK and BCF eligibility, as they did not consider whether new entities had made acquisition-supplies and were not prompted to do so by internal ATO guidance. However, the ATO has recently clarified that such supplies may satisfy the JK and BCF integrity rules, so long as all other requirements are met.

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<sup>69</sup> See IGTO, *Self assessment review*, above n 60, pp 130–131.

- C.5.5 As such, this ATO clarification may materially affect new businesses' eligibility for the JK and BCF support measures where the ATO had previously decided they were ineligible on the basis that they did not (or could not) report a sale for the relevant tax period. The ATO's clarification warrants communication to these affected entities.

### Identification of individually affected taxpayers

- C.5.6 During the complaint investigations, the ATO advised the IGTO that it would informally review its decisions where entities had lodged an objection with the ATO, lodged a complaint with the IGTO or lodged an appeal in the AAT.<sup>70</sup> This remedial action is welcomed and goes part way to fulfil the ATO's agreement to recommendations the IGTO had made in a previous review — that is, that the ATO communicates such changes to known affected taxpayers and that it takes appropriate rectification action:

*If there is a change to (the ATO's) existing precedential view in a given compliance approach, the Tax Office will ensure:*

*it fully informs those known impacted taxpayers at the earliest possible time; and*

*it undertakes quick, complete and transparent rectification action with those known taxpayers where appropriate.<sup>71</sup>*

- C.5.7 The IGTO also notes that the ATO has been aware, as early as 11 August 2020, that it would need to review earlier decisions that it made in respect of certain taxpayer circumstances<sup>72</sup>, however, it has not, as yet, communicated this process more broadly to encourage affected members of the public to make contact with the ATO.
- C.5.8 During the IGTO complaint investigations, the IGTO asked the ATO to identify and reconsider adverse decisions for affected entities that did not lodge an objection, complaint or appeal. This proactive action would help to avoid further delays and costs, especially for those businesses that do not have the financial means to obtain independent tax advice or those that may not be aware of the IGTO's tax ombudsman service. These affected taxpayers could be identified by cross-referencing those who received an adverse decision in the ATO's JK and BCF compliance campaign (as identified by an internal project code used on the ATO's decision letters) with the date of the entities' applications for ABN and GST registration. The IGTO also notes that the ATO provided information that indicates, within 3 days of the ATO initially identifying an issue with a particular application of its view (entities carrying on businesses without an ABN), the ATO had identified 282 entities potentially affected by adverse decisions

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<sup>70</sup> The ATO placed cases on hold on 11 August 2020 and advised the IGTO of its informal reviews on 23 September 2020 — further detail in Appendix 1 Chronology.

<sup>71</sup> IGTO, *Review into aspects of the Tax Office's settlement of active compliance activities* (2009), rec 22.

<sup>72</sup> See, Appendix 1 – Chronology of events, 16 September 2020.



out of those that had applied for the JK payment, noting that only 15 of these 282 had lodged objections.<sup>73</sup>

- C.5.9 The ATO, however, considers it may be infeasible to directly communicate its clarification with affected entities who have not disputed an ATO decision. This is because it believes it would be unable to identify which entities were determined to be ineligible on the basis of views that have now been clarified without conducting a manual review of the ATO's adverse decision letters that were issued in the JK and BCF compliance campaign.
- C.5.10 Effectively, this means that affected entities will either need to lodge an objection with the ATO or lodge a complaint with the IGTO or ATO in order to be identified by the ATO as requiring review. As some complainants would not have had their eligibility reconsidered if it were not for the IGTO's complaint investigation, the IGTO will continue to alert the ATO to affected entities that may benefit from the ATO's informal review, where they are identified in the complaints lodged with the IGTO. However, it is likely that there are many other affected taxpayers that will not be made aware of what evidence they could provide to fulfil the taxable supply eligibility requirement —i.e. they may in fact have made a taxable supply in the relevant period (despite an earlier adverse decision by the ATO in relation to their case) and could be eligible if the ATO exercised its discretion to allow the entity to provide late notice of that supply (together with information that satisfies the other eligibility requirements).

### Public clarification where the ATO is unable to identify all affected taxpayers

- C.5.11 In principle, the ATO's clarification should be communicated in a timely manner that empowers affected entities to obtain the advantage of any remedial action undertaken by the ATO. Such communication provides assurance that ATO decisions are made consistently and in accordance with its best view of the law. It would also promote transparency of ATO decisions, which in turn engenders public confidence in its administration of the tax laws. Conversely, where this does not occur, the ATO bears the risk of not being consistent or transparent in its administration of the tax system.
- C.5.12 If affected taxpayers are unable to be feasibly identified and contacted, a targeted public announcement of the clarification would promote fair and transparent tax administration. This would alert those who may be eligible to receive the intended support measures to the fact that they are expected to identify themselves to the ATO so that prompt reconsideration of their circumstances can be undertaken.
- C.5.13 During the IGTO complaint investigations, the ATO updated its public guidance (PS LA 2020/1) to clarify that, for the purposes of the JK and BCF integrity rules, taxable supplies can include input taxed supplies.<sup>74</sup> Notwithstanding this update, it remains unclear (based on this public guidance) that the JK and BCF support measures modified definition of 'taxable supply' may

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<sup>73</sup> ATO, internal communication, 6 August 2020.

<sup>74</sup> ATO, PS LA 2020/1, above n 40, para [7] n 12. See Appendix 1 – Chronology of events, 16 September 2020.

include business activities which are not taxable sales or reported on a BAS, such as the opening of a bank account.<sup>75</sup> As a result, affected taxpayers would remain unaware of their potential eligibility if they read this updated guidance. The ATO, however, has questioned the utility of further public clarification of the 'taxable supply' issue, as it considers it would not affect entities in the future as the number of entities affected will not increase. Further, it believes it cannot broadly communicate its changed view without causing disproportionate confusion for others.

- C.5.14 As a result, affected entities may only become aware that they have an opportunity for the ATO to reconsider their eligibility if they have already objected to the ATO's original eligibility decision or lodged a complaint with the IGTO. Affected entities that did not take these actions may remain unaware of this opportunity. They may continue to labour under an erroneous belief that they were not entitled to access government support measures which were intended to provide them with financial support during this very difficult economic period.
- C.5.15 In the IGTO's view, if the ATO does not take action to identify affected taxpayers (and initiate appropriate remedial action) or does not alert the potential class of affected taxpayers to its change in precedential view, it will risk the erosion of public confidence in the fair and transparent administration of Australia's tax system.
- C.5.16 The ATO's ability to identify taxpayers affected by its adverse decisions is a broader issue that may warrant review in future and may be better informed by the Auditor-General's recent report of his performance audit of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures* as well as the outcome of the Auditor-General's announced potential audit into the *ATO's administration of the Jobkeeper support measure*, should that audit be commenced in the coming year.

## C.6 ATO COMPLIANCE DECISIONS SHOULD HELP TAXPAYERS UNDERSTAND THEIR OPTIONS FOR REVIEW

- C.6.1 The objection process is a legislatively enshrined right to a formal internal review of ATO decisions.<sup>76</sup> It also provides access to external merits review by the AAT or judicial review by the Federal Court.<sup>77</sup> The objection process and external review avenues can involve significant financial and opportunity costs for taxpayers, which can effectively operate as barriers to

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<sup>75</sup> Example 4 in PS LA 2020/1 does not bring attention to the fact that the taxpayer (Jack) may have been eligible if he was able to provide evidence of the making of a financial supply prior to 1 January 2020 which had a sufficient connection to the commencement and carrying on of his business. Rather, the insertion of the wording 'however did not undertake any further activities' eliminates any possibility that a financial supply was made during this period.

<sup>76</sup> *Taxation Administration Act 1953* Pt IVC ('TAA 1953').

<sup>77</sup> TAA 1953 s 14ZZ.

independent review of ATO decisions.<sup>78</sup> As such, the costs of these dispute resolution options and decisions would normally be material for most individuals and small businesses, and may be prohibitive for those significantly impacted by the COVID-19 pandemic.

C.6.2 The ATO has advised the IGTO that it has received in excess of 9,000 objections as a result of its JK and BCF compliance activities.<sup>79</sup> The IGTO considers this is a significant amount of disputation which may result in substantial costs and/or resource commitments for the entities concerned and impose significant costs on the ATO in dealing with these disputes. It is also likely to have compounded delays.

C.6.3 In some respects, this number may not be surprising and can be explained by the guidance that the ATO gave entities as part of its template decision letters. The ATO advised entities of their ineligibility for the JK payment and that a review of the ATO decision was available by way of the objection process:

*If you don't agree with our decision you may lodge an objection within 60 days. For more information on lodging an objection please seek advice from your tax professional or visit [ato.gov.au/objection](https://ato.gov.au/objection)<sup>80</sup>*

C.6.4 The objection process may not be well-suited to address every particular concern or issue which generates a dispute. For example, the IGTO has previously observed that many disputes on the pathway to external merits review can be quickly resolved via informal facilitated discussions which ensure both parties fully appreciate each other's respective concerns, arguments and views on the facts and evidence.<sup>81</sup>

C.6.5 There are other avenues for dispute resolution that may be more appropriate to provide the assistance needed by some taxpayers. Examples of these other avenues include the right to:

- make a formal complaint to the ATO Complaints Unit on such issues as the lack of explanation of its decision or the failure to provide a basis for the ATO views expressed; or
- request an independent investigation of the decision-making process by lodging a complaint with the Taxation Ombudsman.

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<sup>78</sup> See IGTO, *Review into the management of tax disputes*, (2015), pp 56–58 ('Management of tax disputes'). For example, a 2012 study estimated that personal costs incurred by represented taxpayers in the Taxation Appeals Division of the AAT were between \$5,634 and \$6,684: Binh Tran-Nam and Michael Walpole, 'Access to tax justice: How costs influence dispute resolution choices' (2012) 22 *Journal of Judicial Administration* 3, p 3.

<sup>79</sup> ATO, Communication to the IGTO, 8 December 2020, p 17.

<sup>80</sup> See Appendix 3 for a reproduction of the ATO template decision letters, as viewed by the IGTO.

<sup>81</sup> For example, IGTO, *Review into the Australian Taxation Offices use of early and Alternative Dispute Resolution* (2012), pp 42–47, rec 3.6; ATO, *Annual Report 2016–17* (2017) p 65.

- C.6.6 The ATO template decision letters in these complaint cases did not advise taxpayers of these other avenues or rights of review — they only advised entities of the objection process. Of the 9,000-odd objections that the ATO has received, it is likely that a substantial portion are due to a genuine disconnect between the community's understanding of the JK and BCF integrity rules and the ATO's administration of them, which could be addressed by one of the informal complaints processes outlined above.
- C.6.7 In the IGT0's view, many of these disputes may have been dealt with more efficiently through other less formal complaint and dispute resolution processes, had the ATO advised taxpayers of these options in its template decision letters. The lesson to be learnt here is that, in adverse decision letters, taxpayers should be alerted to the different options for review, together with sufficient explanation that enables them to make an informed decision as to which option would be most appropriate for their circumstances. This includes where the ATO requires further information from the taxpayer for the purposes of making its decision.
- C.6.8 The IGT0 is currently conducting a separate review investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal the decisions made and actions taken by the ATO.<sup>82</sup> The findings of the review investigation will be released once the investigation has been completed, which is expected to occur in 2021.

## C.7 OPTIONS TO EXPEDITIOUSLY RESOLVE DISPUTES WITH THE ATO'S PRECEDENTIAL VIEW OF THE LAW SHOULD BE EXPLORED

- C.7.1 The observations in sections C7 and C8 relate mainly to the ATO's administration of the 'Tax Period' requirement in the JK and BCF integrity rules.
- C.7.2 All ATO officers are required to apply the ATO precedential view of the law.<sup>83</sup> For example, those ATO officers who make objection decisions must apply the same ATO precedential view of the law that was applied by officers who made the initial decision. Accordingly, taxpayers who dispute the ATO precedential view of the law may not obtain a fully independent review of these issues until the matters are considered by the AAT or Federal Court.<sup>84</sup>

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<sup>82</sup> IGT0, 'Review Announcement — An investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal' (Media Release, 30 June 2020) <[www.igt.gov.au](http://www.igt.gov.au)>.

<sup>83</sup> The IGT0 notes, however, that there are internal ATO processes for an ATO Officer to challenge an established precedential view.

<sup>84</sup> IGT0, *Management of tax disputes*, above n 78, pp 50–52.

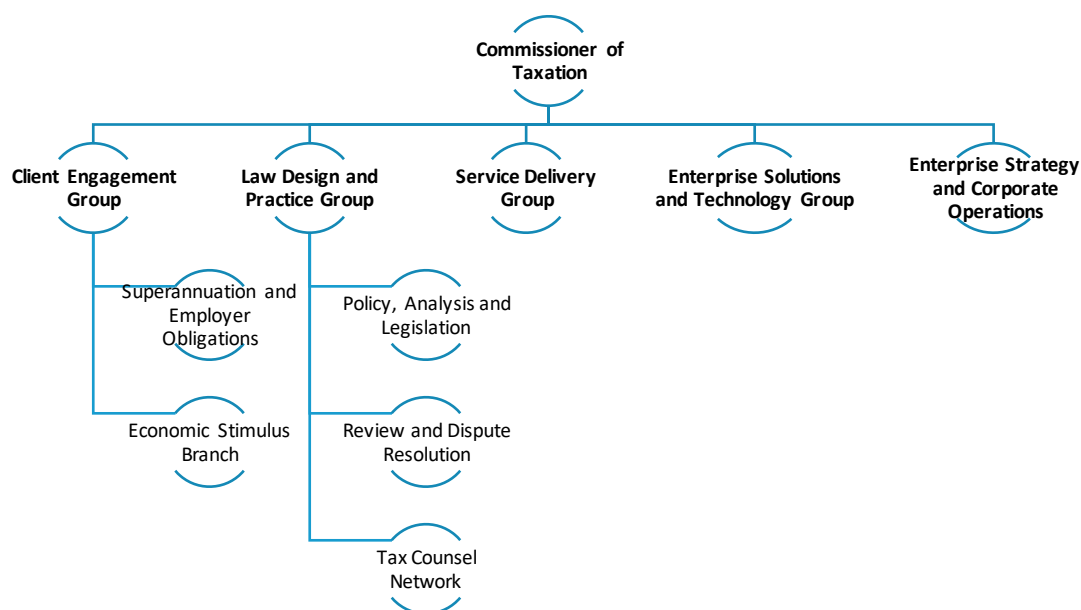
C.7.3 Generally, the ATO Law Design and Practice Group (**LD&P**) is responsible for:

- providing analysis and assistance to Treasury in the latter's design of taxation laws (Policy, Analysis and Legislation (**PAL**) business line);
- managing and reviewing disputes, such as objections — the Review and Dispute Resolution (**RDR**) business line; and
- overseeing the ATO's precedential view of the law as well as providing technical advice to both the RDR business line and the ATO's Client Engagement Group (which is responsible for the ATO's compliance activities) (Tax Counsel Network or **TCN**).<sup>85</sup>

C.7.4 In the IGTO's complaint investigations, the ATO initially advised the IGTO that its PAL business line was responsible for the ATO precedential view of the JK and BCF support measures. The ATO later clarified that TCN was responsible for overseeing that precedential view, however, the IGTO was unclear as to who had final responsibility on the issues which were the subject of the complaint investigations. The IGTO has not conducted a review on this issue and observes that, generally, clarification of responsibilities and accountabilities would assist to expeditiously resolve issues that are raised with the ATO's precedential view of the law. This is discussed in further detail in section C8 below.

C.7.5 The relevant business lines of the ATO involved in its administration of the JK and BCF support measures can be identified in the ATO Organisational Chart as shown below.

### ATO Organisational Chart



Source: ATO<sup>86</sup>

<sup>85</sup> *ibid.* pp 13–16 and 50–51; see also ATO, *Precedential ATO view*, PS LA 2003/3, 19 February 2015.

<sup>86</sup> ATO, 'ATO organisational structure - October 2020' (Web Page, 16 November 2020) <[www.ato.gov.au](http://www.ato.gov.au)>.

- C.7.6 One consequence of requiring all ATO officers to follow the same precedential view of the law is that taxpayers who dispute that precedential view are required to use the objection process even where an ATO objection decision would merely confirm the original ATO decision in dispute. This is because, generally, taxpayers who dispute ATO tax liability decisions cannot appeal to the AAT or Federal Court until they have first lodged an application for and received an ATO objection decision via the process set out in Part IVC of the *Taxation Administration Act 1953 (TAA 1953)*.<sup>87</sup>
- C.7.7 The IGTO has previously observed<sup>88</sup> that the objection process may add unnecessary delay in resolving disputes with the ATO's precedential view of the law, if the decision is based on a precedential view and the material facts in the case are agreed. Such cases would benefit from the use of declaratory proceedings to quickly obtain judicial clarification, without the associated delays of the objection process. This was recommended by the IGTO in previous reviews, including the *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution*.<sup>89</sup>
- C.7.8 During the IGTO's complaint investigations, the IGTO observed that some of the disputes concerning the ATO's decisions on new entities' eligibility for JK and BCF support measures may have benefited from independent review of the ATO's interpretation of the relevant provisions, such as declaratory proceedings in the Federal Court. This is because the material facts that the ATO relied upon in many of the ATO decisions that the IGTO saw were undisputed and the sole issue in dispute was an interpretative one. However, a fast-tracked process to by-pass the delays inherent in the objections process would be needed. Such a process could be effected via legislative amendment or ATO agreement (for example, agreement to obtain a Federal Court declaration on a matter of contention before the statutory rights under Part IVC of the TAA 1953 are triggered).
- C.7.9 Furthermore, such a fast-tracked process in this case may also have reduced the ATO's administrative costs in dealing with a portion of the disputation that resulted from the ATO's JK and BCF eligibility compliance activities. It can also be costly for a taxpayer to obtain judicial clarification of an ATO precedential view. However, there may be a public benefit in promptly obtaining this clarification.
- C.7.10 The ATO-funded Test Case Litigation Program helps to alleviate litigation costs for taxpayers where the ATO agrees that there is uncertainty or contention on how the law operates and the issue is in the public interest to be litigated due to its broader impact.<sup>90</sup> In relation to the interpretation of the JK and BCF integrity provisions, however, it may be that the ATO is certain that its view is the better view of the law (as the IGTO was advised in these complaint cases)

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<sup>87</sup> TAA 1953, Pt IVC.

<sup>88</sup> IGTO, *Management of tax disputes*, above n 78, pp. 47–48 and 50–52.

<sup>89</sup> IGTO, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution (2012)* pp 61–63 (rec 4.3).

<sup>90</sup> ATO, 'Test Case Litigation Program' (webpage, August 2020) <[www.ato.gov.au](http://www.ato.gov.au)>.

and is consistent with the policy intent. In these circumstances, taxpayer-applicants would face an insurmountable task in seeking to persuade the ATO that the operation of the law was of sufficient contention or uncertainty to warrant Test Case Funding for their dispute.

- C.7.11 Notwithstanding this, unrepresented small businesses who dispute the ATO's precedential view in the Small Business Taxation Division of the AAT may have their reasonable litigation costs paid by the ATO if the ATO decides to engage external counsel to represent it in the matter. This type of litigation assistance aims to maintain a level playing field in small business AAT disputes.<sup>91</sup> This funding might enable taxpayers to seek clarification of interpretative issues in the AAT, in circumstances where the costs might otherwise be prohibitive.
- C.7.12 The IGTO understands the number of cases before the Small Business Taxation Division within the AAT was 374 as at 30 November 2020, made up as follows:
- 30 Cash Flow Boost for employers
  - 35 JobKeeper payments
  - 309 Other.<sup>92</sup>
- C.7.13 Considering the observations made above about the efficiency and independence of the ATO's dispute resolution process as well as the recommendations made by the IGTO in previous reviews, it may be opportune for the IGTO to conduct a broader review on this area in future and the ATO to confirm and clarify its approach to testing its precedential views.

## C.8 A SEPARATION BETWEEN DRAFTING AND INTERPRETATION OF LAWS IS IMPORTANT TO MINIMISE THE RISK OF TAXPAYER DISPUTES WITH ATO PRECEDENTIAL VIEWS

- C.8.1 Taxpayers, advisors<sup>93</sup> and the ATO, as well as the courts and tribunals, are similarly bound by the laws as passed by the Australian Parliament. Accordingly, a separation between those responsible for drafting the law (which reflects the Government's intended policy) and those responsible for administering the laws ensures that taxpayers and the ATO start with an 'even' understanding of the laws – based on the words as enacted. This creates a level playing field and can minimise the risk of unnecessary disputes.

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<sup>91</sup> ATO, 'Small Business Litigation Funding' (webpage, 4 July 2019) <[www.ato.gov.au](http://www.ato.gov.au)>; ATO, 'Dispute Resolution Instruction Bulletin DR IB 2019/1: Small Business Taxation Division, AAT' (Internal ATO document, March 2019).

<sup>92</sup> AAT, Communication to IGTO, 7 December 2020. Note that the ATO has similarly advised that 65 of its AAT cases involve relevant BCF and JK issues and that 23 of those 65 cases have been resolved (ATO, Communication to the IGTO, 8 December 2020).

<sup>93</sup> Including tax agents, accountants, solicitors and barristers.

- C.8.2 During the course of the IGTO complaint investigations, the IGTO was advised that the ATO's administration of the JK and BCF integrity rules was consistent with the policy intent for the JK and BCF support measures. For example, it was strongly suggested that:
- an alignment of the integrity rules' operation with the income tax and GST reporting regimes was consistent with this policy intent; and
  - this alignment would assist the ATO to deliver payments quickly as it could rely on information already reported to it prior to 12 March 2020 to determine an entity's eligibility and would not need to await any further information provided by that entity.
- C.8.3 Whilst the 'guiding' intentions may have been clear to the ATO, there were other factors which suggest that the position was less clear to the rest of the community. Those factors include the following:
- there are no GST reporting requirements as part of the integrity rules for new small business as enacted (as there is no GST attribution requirement and the rule allows entities which are not registered and not required to be registered, and therefore not reporting at all, to be eligible for the support measures);
  - there is no requirement for amounts to be reported through a BAS (unlike the income tax integrity rule);
  - the distinction between lodging a BAS annually, quarterly, monthly or not at all appears arbitrary and its application to different types of entities may appear discriminatory, without some further means to determine eligibility;
  - the ongoing nature of JK payments and entity reporting requirements runs counter to an intention that the ATO need only rely on existing information; and
  - the suggestion in the wording in the explanatory statement to the JK legislative instrument regarding the intended purpose for the integrity rule.
- C.8.4 Also, there was no explanation in the extrinsic material for supporting an approach that would exclude new businesses who had registered for GST and were trading, but had not reported a sale before 12 March 2020 simply because, for example, their BAS lodgement would not be due before 12 March 2020. The IGTO was not provided with evidence that supported this intention having informed the JK and BCF support measures. Further, if such a trade-off was intended, it was not referred to in the list of policy issues and trade-offs that Treasury had published in the Facts Sheet it maintained from April – June 2020.<sup>94</sup>
- C.8.5 If there was an intention to limit access and eligibility to improve the administrative ease and simplicity for making payments, then the level of community disputation and the reliance on technically complex provisions which omitted a reporting requirement tended against this simplicity being achieved.

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<sup>94</sup> Australian Government, JobKeeper FAQ, above n 14.



- C.8.6 If the above policy intent was an overt consideration, it would indicate that there is room to improve the legislative design and drafting processes to ensure Government's intended policy is expressed in the text of the Bills presented to Parliament.
- C.8.7 The IGTO notes that consistent with the Australian Taxation Office and Treasury Protocol, *ATO – Treasury Protocol* (dated 10 September 2012), that the ATO and Treasury share joint stewardship for the tax system:<sup>95</sup>

*...The ATO's responsibilities include unique challenges in relation to revenue collection, law interpretation, administration, compliance and enforcement.*

*... Ensuring that legislation accurately reflects the Government's policy intent is a critical element of the Treasury's policy advising and legislation implementation role. In developing new legislation, it is imperative that agreement is reached with the tax administrator (the ATO) that the legislation will achieve the Government's policy intent and a commitment that it can and will be administered in that way. Where such agreement cannot be reached, it will be critical to identify the reasons for the impasse and potential remedies and to advise the Government if any change in policy is required.*

- C.8.8 As mentioned in section C.7 above, the ATO's PAL and TCN business lines have different responsibilities regarding the administration of the JK and BCF support measures. During the IGTO's complaint investigations, the PAL business line initially provided the ATO's authoritative view in response to the IGTO's questions regarding interpretative issues. Although the TCN did not provide a formal sign off for those initial views, the ATO subsequently provided the IGTO with some emails to evidence TCN's role in overseeing the technical clearance of wording in a number of the ATO's public guidance documents (see, for example, 24 March 2020 entry in Appendix 1). These emails also evidence substantial involvement in the drafting of a key ATO guidance document, PSLA 2020/1, by the PAL business line (refer – 24-25 April 2020 entry in Appendix 1), which was the ATO business line that had provided advice and assistance in the design and legislative drafting of the JK and BCF support measures.
- C.8.9 The IGTO has not investigated the ATO's involvement in the design and drafting of the JK and BCF support measures and considers that any future review of this issue could explore whether there is opportunity to improve the ATO's role in the joint stewardship of the legislative design and drafting process. The IGTO notes that any broader review of this issue would be better informed by the Auditor-General's recent performance audit of the *Australian Taxation Office's Management of Risks Related to the Rapid Implementation of Covid-19 Economic Response Measures* as well as the outcome of the Auditor-General's announced potential audit into the *ATO's administration of the Jobkeeper support measure*, should that audit be commenced in the coming year.

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<sup>95</sup> ATO, *ATO-Treasury Protocol* (2012) <[www.ato.gov.au](http://www.ato.gov.au)>.

- C.8.10 Given the apparent inconsistency between the ATO and Treasury-published guidance on the integrity rules, the IGTO considers it is worth commenting on the importance of maintaining sufficient separation between legislative drafting and administration thereafter (i.e. post-enactment), whilst ensuring that legislative design draws on the administrator's experience as well as the experience of those who will be impacted by the administration of the new tax law.
- C.8.11 A key reason for this separation is to avoid unnecessary disputation. That is, disputes arising because there is a different understanding of the 'words as enacted' and different expectations of the intentions of those words by those who are subject to the law as compared with those responsible for administering the law. This is why it is important that the same people involved in drafting the law (including those who assist or advise the drafters) should not also be responsible for determining how the law should be interpreted or administered (for example, in settling key ATO guidance documents) and hence the importance of the role performed by the ATO's TCN<sup>96</sup>. Without separation, there can be unnecessary disputes and confusion, which is not in the interests of efficient tax administration.
- C.8.12 Prior to 2003, the ATO and Treasury each held partial responsibility for designing legislation. Concerns were raised about the appropriateness of the administrator holding such responsibility,<sup>97</sup> and the Government subsequently implemented the Board of Taxation's recommendations to unify the tax policy advising and legislation development functions within Treasury. The ATO would thereafter be consulted to provide its administrative, compliance and interpretive experience.<sup>98</sup> This integrated approach to tax law and policy design is set out in the *ATO - Treasury Protocol*.<sup>99</sup>

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<sup>96</sup> The IGTO understands that Treasury is responsible for instructing and approving the final form of tax legislation to be tabled in the Australian Parliament. Treasury personnel are also responsible for preparing the Explanatory Memorandum that accompanies the Bill that is tabled in Parliament. However, the ATO's role is to advise Treasury on the relevant drafting - that is, to ensure the law reflects the Government's policy intention, consistent with the Protocol entered between Treasury and the ATO on 10 September 2012. The Office of Parliamentary Counsel prepares the drafting as instructed by Treasury.

<sup>97</sup> Board of Taxation, *Government Consultation with the Community on the Development of Taxation Legislation: A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer* (2002) <[www.taxboard.gov.au](http://www.taxboard.gov.au)> ('Tax legislation consultation').

<sup>98</sup> Peter Costello, 'Reforms to Community Consultation Processes and Agency Accountabilities in Tax Design' (Media Release, 2 May 2002) <[www.ministers.treasury.gov.au](http://www.ministers.treasury.gov.au)>.

<sup>99</sup> ATO, *ATO - Treasury Protocol* (2012) <[www.ato.gov.au](http://www.ato.gov.au)>.

- C.8.13 Separation in the drafting and administration of legislation should not be viewed as competing against consultation, which is widely acknowledged as an important ingredient of good tax law design. This is acknowledged in the *ATO-Treasury Protocol*:

*Enacted law – The law in administration*

*Whilst acknowledging that the Courts are the final arbiters of the laws made by Parliament, the ATO interprets and enforces enacted law that it is responsible for administering.*

*In forming its view on the interpretation of law, the ATO will routinely consult senior members of Treasury's Law Design Practice and the professions, and undertake community consultation and release draft views for public comment in accordance with its long standing practices.*

- C.8.14 Rather, the scope of ATO input during consultation should be clear and aimed at ensuring tax legislation and administration faithfully reflects Government's policy intent.<sup>100</sup>

## C.9 OPPORTUNITIES EXIST TO IMPROVE THE DESIGN OF NEW TAX LAWS AND THEIR INTEGRATION WITH EXISTING LAWS BY CONDUCTING BROADER CONSULTATION

- C.9.1 There is merit in ensuring the taxpayer and tax practitioner perspective is considered during consultation for new laws. The IGTO has previously observed that private sector experts are well placed to inform the policy and legislation design process by bringing practical knowledge of the tax law, industry structures and commercial practices.<sup>101</sup> The early involvement of private sector experts during this process was also agreed with in principle by Government.<sup>102</sup>
- C.9.2 However, the involvement of private sector experts may be constrained due to competing objectives arising from limited timeframes in which to design the tax law integrity provisions. In this respect, there is opportunity to draw on the experience and perspective of a select few independent parties.

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<sup>100</sup> Board of Taxation, *Tax legislation consultation*, above n 97.

<sup>101</sup> IGTO, *Self assessment review*, above n 60, para [5.18].

<sup>102</sup> David Bradbury, 'Inspector-General of Taxation review into improving the self assessment system' (Media Release, 13 February 2013) <[www.ministers.treasury.gov.au](http://www.ministers.treasury.gov.au)>.

- C.9.3 This could include the IGTO, in a consultative role, especially where the laws will impact on unrepresented taxpayers. If the IGTO were to perform such a role, it would neatly align with the IGTO's statutory objects of providing independent advice to Government on tax administration issues, whether they be a result of systems established by the administrator or systems established by the tax laws themselves.<sup>103</sup> Formalising such a role for the IGTO has also been recently recommended by the Government-chaired Senate Economics Legislation Committee in its *Report into the performance of the Inspector-General of Taxation*.<sup>104</sup> Recommendation 4 is in the following terms:

*Recommendation 4*

*The committee recommends the Australian Government consider whether the IGTO should have a formal role to independently advise the minister on the administrative aspects of new tax laws and amendments to existing tax laws.*<sup>105</sup>

- C.9.4 Consideration of this recommendation is a matter for Government.

## C.10 IMPROVING IGTO ACCESS TO ATO RECORDS AND DATA SYSTEMS CAN EXPEDITE IGTO COMPLAINT INVESTIGATIONS

- C.10.1 The IGTO provides an important and unique dispute resolution service for vulnerable taxpayers. It is a free and accessible Ombudsman service that may form independent views based on access to records which may be unavailable to taxpayers due to the operation of the tax law secrecy provisions.
- C.10.2 The scope of these IGTO complaint investigations was simple — to help complainants understand why the ATO had deemed them ineligible and to explore with the ATO whether the explanation in their decision letters correctly reflected complainants' circumstances and appropriately applied the ATO's view.
- C.10.3 The ability of the IGTO to perform this independent function is largely dependent on the extent to which the IGTO can access relevant ATO records. However, access to these records requires the authorisation of the Commissioner, due a legislative provision in the *Ombudsman Act 1976*.<sup>106</sup> Contrary to popular belief, the IGTO does not have unrestricted access to relevant ATO records and data systems for the purposes of providing assurance to complainants and the community that the administration of the tax system is consistent with community expectations — whether through a taxation complaint investigation or a review investigation.

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<sup>103</sup> *Inspector-General of Taxation Act 2003* s 3(b) ('IGT Act 2003').

<sup>104</sup> Senate Standing Legislation Committee on Economics, *Inquiry into the Performance of the Inspector-General of Taxation* (report tabled 17 June 2020).

<sup>105</sup> *ibid.* rec 4.

<sup>106</sup> *Ombudsman Act 1976* ss 8(1A) and (2)(b)(iii), which operate by virtue of the *IGT Act 2003* s 15.

- C.10.4 During the IGTO complaint investigations regarding JK and BCF complaints, the ATO was responsive to the IGTO's information requests. For example:
- the ATO regularly engaged with the IGTO;
  - the ATO was responsive to the information requests made of ATO senior officers with responsibility for the support measures;
  - senior ATO executives attended meetings to discuss the concerns raised by taxpayers and the tax profession; and
  - the ATO also provided detailed responses to the information requests made by the IGTO as part of the complaint investigations.
- C.10.5 Notwithstanding this extensive level of ATO engagement, the complaint investigation process exceeded six months for many of the complaints investigated by the IGTO. This is particularly concerning given the nature and time-sensitivity of the concerns raised as many entities were experiencing significant financial hardship and unable to access the JK and BCF support measures in their time of need.
- C.10.6 The IGTO also notes that a period of approximately 6 weeks elapsed between the time that the ATO internally acknowledged a need to review its earlier decisions and the IGTO complaint investigation meetings and discussions resulting in similar issues being identified.<sup>107</sup> The ATO also did not update its public advice and guidance during this period to identify these review opportunities for the public and the community.
- C.10.7 Early and self-initiated access to ATO documents such as internal minutes of advice, correspondence with external agencies and stakeholders, and internal technical advice on the substantive issues at hand may have accelerated the IGTO's investigation of these complaints. Specifically, the IGTO observes that access to communications between the ATO and Treasury pertaining to the administration of the JK and BCF support measures and TCN advice regarding the formation and evolution of the ATO's precedential views on the issues may have assisted the IGTO in concluding its investigations of the concerns raised by complainants in a more timely manner.
- C.10.8 As the IGTO may only access ATO data systems and obtain information to the extent the Commissioner of Taxation authorises<sup>108</sup>, there is a degree of reliance on the ATO to provide the IGTO with the information required to effectively conduct its complaint investigations. In addition to the impact this has on the efficiency of IGTO complaint investigations, such reliance could potentially compromise the perceived independence of the IGTO in the eyes of the community.

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<sup>107</sup> See Appendix 1 – Chronology of events, 11 August 2020 and 23 September 2020.

<sup>108</sup> See *Ombudsman Act 1976* ss 8(1A) and (2)(b)(iii), which operate by virtue of s 15 of the IGT Act 2003.

- C.10.9 These issues were previously identified in the recent Senate Economics Legislation Committee report, *Performance of the Inspector General of Taxation*, and particular recommendations were made:

*Recommendation 3*

*The committee recommends the Australian Government review the IGTO's current access to the ATO and Tax Practitioners Board's systems, data, and records and considers improving access, where necessary, to further enable it to perform its legislative functions.*

*Recommendation 6*

*The committee recommends the Australian Government consider strengthening protections available to individuals who disclose information to the IGTO, regardless of whether the disclosure is in relation to a complaint investigation or systemic review.*

*Recommendation 7*

*The committee recommends the rights of tax officials who are interviewed during investigations undertaken by the IGTO be clarified, and that protections afforded to them be strengthened. This includes providing officials the legal right to choose whether or not they have other persons present when providing information.<sup>109</sup>*

- C.10.10 Consideration of these recommendations is a matter for Government.

## C.11 CONCLUDING COMMENTS

- C.11.1 The IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the challenge of the exceptional and unprecedented circumstances caused by the COVID-19 pandemic. It needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF payments. As with the implementation of every major new economic fiscal measure, however, matters arose that had impacted the efficient and fair administration of the tax system.
- C.11.2 Consistent with the IGTO's statutory purpose to improve the tax administration system, and taking the opportunity to learn from the crisis, the observations flowing from the IGTO complaint investigations will inform the broader community of opportunities to improve the tax administration system and help to build taxpayer's trust and confidence, which in turn promotes voluntary compliance. The IGTO has not formed opinions under section 15 of the *Ombudsman Act 1976* and makes these observations public to provide insight on the issues which are of broader concern to the tax profession and new small businesses.

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<sup>109</sup> Senate Standing Legislation Committee on Economics, *Inquiry into the Performance of the Inspector-General of Taxation* (report tabled 17 June 2020).

C.11.3 Importantly, there are valuable lessons to be learnt from these insights regarding how the tax system is administered moving forward. These observations highlight improvements that *would* help to mitigate issues that may arise from the design of future tax administrative measures, including those that are leveraged to deliver fiscal support measures to the wider Australian community.

C.11.4 In conclusion, the IGTO considers that there is scope for these observations to be:

- understood by the community — especially tax, accounting, legal and business professionals;
- assessed by the ATO against its internal performance measures and with *appropriate* action *undertaken* in response;
- further investigated by the IGTO as part of a targeted investigation or broader review into the administration of the tax system, as indicated;
- considered by the Auditor-General in determining his forward audit work program; and/or
- noted by Government.

# APPENDIX 1 — CHRONOLOGY OF EVENTS

Date	Summary of event or action taken
12 March 2020	Government announces a \$17.6 billion economic stimulus package to support Australian businesses during the Coronavirus pandemic. This stimulus package includes a Boosting Cash Flow (BCF) support measure to help small and medium sized business to stay in business. <sup>1</sup>
24 March 2020	<p><i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF 2020 Act)</i> is passed by Parliament and comes into effect after receiving Royal Assent. The legislation provides that:</p> <ul style="list-style-type: none"> <li>▪ The Commissioner of Taxation is responsible for the general administration of this Act.</li> <li>▪ The ATO is to administer the BCF support measure by making payments to entities it determines to be eligible based on the integrity rules, for the periods from March 2020 to June 2020.</li> </ul> <p>Payments will be automatically made by the ATO to eligible entities through their Business Activity Statement (BAS).<sup>2</sup></p>
24 March 2020	<p>ATO's TCN is asked to provide technical clearance for BCF webpage wording. TCN changes wording from:</p> <ul style="list-style-type: none"> <li>▪ "made GST taxable, GST-free or input-taxed sales <i>between 1 July 2018 and 11 March 2020</i> and lodged the relevant activity statement on or before 12 March 2020"; to</li> <li>▪ "made GST taxable, GST-free or input-taxed sales <i>in a previous tax period (since 1 July 2018)</i> and lodged the relevant activity statement on or before 12 March 2020".</li> </ul> <p>TCN opines that "for quarterly taxpayers they must have made the supplies in 2019 since there [sic] last tax period before 12 March ended on 31 December 2019."<sup>3</sup> [italics added]</p>
30 March 2020	Government announces the \$130 billion JobKeeper (JK) support measure to keep Australians in jobs in response to the Coronavirus pandemic. <sup>4</sup>
9 April 2020	<i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i> <sup>5</sup> is registered under the <i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (JK legislative instrument)</i> <sup>6</sup> and comes into effect. The JK support measure is to be administered by the Commissioner of Taxation who is responsible for issuing JK payments to eligible entities.
9 April 2020	<p>Treasury publishes a Fact Sheet titled "JobKeeper - Frequently asked questions" on its website. The Fact Sheet provides further information and guidance on how the JK support measure will operate for employers, employees, the self-employed and other eligible businesses.</p> <p>The Treasury Fact Sheet identifies that one of the JK eligibility requirements for 'business participants' is to have:</p>

<sup>1</sup> Prime Minister, 'Economic stimulus package' (Media Release, 12 March 2020) <www.pm.gov.au>.

<sup>2</sup> *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*.

<sup>3</sup> Australian Taxation Office (ATO), internal communications, 24 March 2020.

<sup>4</sup> Prime Minister, '\$130 billion Jobkeeper payment to keep Australians in a job', (Media Release, 30 March 2020) <www.pm.gov.au>.

<sup>5</sup> *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

<sup>6</sup> *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.



Date	Summary of event or action taken
	<p><i>"made a supply during the period 1 July 2018 to 12 March 2020 and provided this information to the Commissioner on or before 12 March 2020 (or such later time as allowed by the Commissioner)"<sup>7</sup></i></p> <p>The Fact Sheet does not define what is considered as a 'supply'. However, in relation to determining an entity's decline in turnover, the Fact Sheet notes that:</p> <p><i>"Turnover (for purpose of determining how much turnover has declined by) will be defined according to the current calculation for GST purposes and is reported on Business Activity Statements. It includes all taxable supplies and all GST free supplies but not input taxed supplies".<sup>8</sup></i></p>
12 April 2020	TCN clears ATO wording for the "Tier 2" content for eligible business participant requirements. <sup>9</sup>
19 April 2020	The ATO starts paying the first BCF payment.
20 April 2020	ATO publishes information on its website under "Sole traders & other entities" as part of the "we've updated our information to reflect the next stage of enrolment" section. It notes that the following is required for an entity to be eligible for JK: <p><i>...it had lodged, on or before 12 March 2020, at least one of: ... an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing that it made a taxable supply, GST-free or input-taxed sale<sup>10</sup></i></p>
Fr. 22 April 2020	Posts from taxpayers on the ATO-moderated 'ATO Community' website ask for guidance on a sole trader's eligibility for JK payments where they have not lodged their 2019-20 income tax return and not registered for Goods and Services Tax (GST). <sup>11</sup>
24 and 25 April 2020	ATO's PAL business line circulates to other areas of the ATO the final version of <i>Law Administration Practice Statement 2020/1: Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies</i> (PS LA 2020/1) which it has "approved". TCN provides affirmative comments on the PSLA and an editorial suggestion. <sup>12</sup>
1 May 2020	ATO publishes PS LA 2020/1. Amongst other things, PS LA 2020/1 instructs ATO staff on the exercise of the Commissioner's discretion to allow an entity further time after 12 March 2020 to provide notice to the Commissioner that an amount of business income should be included in the entity's assessable income for the relevant period or that the entity made a taxable supply during the relevant period for the purposes of satisfying the eligibility criteria for the BCF payment or the JK payment in respect of an eligible business participant.

<sup>7</sup> Australian Government, *Economic Response to the Coronavirus: Job Keeper Payment – Frequently Asked Questions* (9 April 2020), publication on [www.treasury.gov.au](http://www.treasury.gov.au) from 9 April 2020 to 20 July 2020, accessed at <<https://archive.org/web/web.php>> ('JobKeeper FAQ').

<sup>8</sup> *ibid.* p 3.

<sup>9</sup> ATO, Internal communications, 24–25 April 2020.

<sup>10</sup> ATO, 'Sole traders and other entities' (Web Page, 20 April 2020) <[www.ato.gov.au](http://www.ato.gov.au)>, accessed at <<https://archive.org/web/web.php>>.

<sup>11</sup> ATO, 'Sole trader eligible for Job Keeper payments' (thread on Webpage, 22 April 2020 – 4 May 2020) <<http://community.ato.gov.au>>.

<sup>12</sup> ATO, Internal communications 19 April 2020.

Date	Summary of event or action taken
	<p>According to PS LA 2020/1, further time will likely be granted to an entity that:</p> <ul style="list-style-type: none"> <li>▪ has a pre-existing lodgement deferral in place;</li> <li>▪ is a new business established from 1 July 2019 that is not registered or required to be registered for GST, but has made supplies during a period ending between the 1 July 2019 to 12 March 2020 period; or</li> <li>▪ had exceptional and unforeseen circumstances such as the loss of a significant amount of records due to the recent bushfires.<sup>13</sup></li> </ul>
5 May 2020	<p>TCN clearance sought for wording of proposed ATO publication that sets out which classes of entities would not need to apply for the exercise of the discretion under s11 of the JK legislative instrument and includes entities who:</p> <ul style="list-style-type: none"> <li>▪ are carrying on active business but not holding an ABN on 12 March 2020, to allow them to obtain an ABN by 23 June 2020,</li> <li>▪ did not notify the ATO of assessable business income for the 2018-19 financial year, and</li> <li>▪ did not notify of "sales for a tax period" ending before 12 March 2020.<sup>14</sup></li> </ul>
6 May 2020	<p>The Tax Practitioner Stewardship Group (<b>TPSG</b>) (an ATO consultative group with members from the ATO and the tax profession) held a special briefing with the following key messages provided in relation to the BCF support measure:</p> <p><i>Clients that have not lodged or have a deferral of time to lodge the 2018–19 income tax return will not be disadvantaged or excluded from accessing the cash flow boost credits provided that an activity statement has been lodged within the period of 1 July 2018 and 12 March 2020, showing taxable supplies. Credits will be automatically applied.</i></p> <p><i>In circumstances where clients have not lodged income tax returns or activity statements for these periods and consider they would otherwise be eligible for the cash flow boost, they should contact the ATO to provide evidence of their business activities to confirm eligibility.<sup>15</sup></i></p>
7 May 2020	ATO commences paying JK to entities. <sup>16</sup>
8 May 2020	Tax and accounting professional bodies raise concerns with the ATO's application of the JK integrity rule at a meeting held by the National Tax Liaison Group ( <b>NTLG</b> ) (an ATO consultative group with members from the ATO, Treasury and the tax profession). <sup>17</sup>
11 May 2020	PSLA 2020/1 is updated by the ATO to clarify that the discretion to grant further time after 12 March 2020 to provide notice of a taxable supply to the Commissioner will likely be exercised for a new entity established from 1 July 2019 that is not registered nor required to be registered for GST. <sup>18</sup>

<sup>13</sup> ATO, *Law Administration Practice Statement 2020/1: Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies* (1 May 2020) ('PS LA 2020/1').

<sup>14</sup> ATO, internal communication (attachment to email), 9 June 2020.

<sup>15</sup> ATO, 'Tax Practitioner Stewardship Group special briefing 6 May 2020' (Web Page, 19 May 2020) <www.ato.gov.au>.

<sup>16</sup> ATO, 'Tax Practitioner Stewardship Group special briefing 13 May 2020' (Web Page, 22 May 2020) <www.ato.gov.au> ('TPSG briefing 13 May 2020').

<sup>17</sup> Meeting referred to in Joint bodies submission, below n 25.

<sup>18</sup> ATO, PS LA 2020/1, above n 13.

Date	Summary of event or action taken
13 May 2020	<p>The 'key messages' of the 13 May 2020 TPSG special briefing provide answers to frequently asked questions about the BCF support measure, which was an action item from the 6 May 2020 TPSG special briefing, including:</p> <p><i>Is a new annual lodger who commenced in 2019–20, or a quarterly lodger who commenced post 1 January 2020 entitled to the cash flow boost?</i></p> <p><i>No they are not entitled to the cash flow boost.<sup>19</sup></i></p>
20 May 2020	<p>TPSG special briefing given. The 'key messages' record that the ATO gave an update on the JK support measure, including:</p> <p><i>In addition to focusing on processing payments as quickly as possible we have started verification work to confirm information provided on applications. Entities who have had no signs of business activity are given 14 days to confirm and demonstrate that they are still in business.<sup>20</sup></i></p>
Fr. 5 June 2020 to 15 December 2020	IGTO receives 66 complaints about ATO decisions regarding the eligibility criteria and JK and BCF integrity rules as applied to new business entities.
9 June 2020	TCN approves wording for the communication of the Commissioner's discretion relating to ABN and lodgement requirements for JK purposes. <sup>21</sup>
Fr. 10 June 2020	IGTO commences complaint investigations in response to complaints about ATO decisions regarding new business entities eligibility for the JK and BCF support measures. These complaint investigations involved meetings with the relevant ATO business areas to discuss the JK and BCF integrity rules and explore what discretions or alternative administrative solutions may be available to the ATO with respect to new entities.
10 June 2020	<p>TPSG special briefing given. The 'key messages' record that amongst other things, the ATO advised the following in relation to the BCF support measure:</p> <p><i>We have issued notifications to taxpayers where we have determined that they are not eligible based on the information that we have. This could be due to having a backdated pay as you go role that was established after 12 March 2020, or where they have not lodged their income tax return by the due date and did not have a deferral in place.</i></p> <p><i>We are contacting clients in cases where we are seeking further information to confirm eligibility. There are several cases outstanding where we have not been able to contact the client by email, however they will be contacted through postal mail this week.<sup>22</sup></i></p>
11 June 2020	NTLG meeting held, during which the consultation process of the JK support measure was discussed. At this meeting, Treasury noted that:

<sup>19</sup> ATO, TPSG briefing 13 May 2020, above n 16.

<sup>20</sup> ATO, 'Tax Practitioner Stewardship Group special briefing 20 May 2020' (Web Page, 26 May 2020) <www.ato.gov.au>.

<sup>21</sup> ATO, internal communications (attachment to email), 9 June 2020.

<sup>22</sup> ATO, 'Tax Practitioner Stewardship Group special briefing 10 June 2020' (Web Page, 30 June 2020) <www.ato.gov.au>.

Date	Summary of event or action taken
	<i>"it was a very limited consultation in relation to the initial rules due to time constraints. The consultation process was successful in that feedback was provided quickly and had identified the key issues."</i> <sup>23</sup>
17 June 2020	ATO asks tax and accounting professional bodies to give feedback on its draft JK compliance letters. <sup>24</sup>
19 June 2020	<p>Joint letter from 9 tax and accounting professional bodies to Treasury on the accessibility and administration of JK and BCF support measures for new businesses and start-ups. A copy of the correspondence is also sent to the ATO.</p> <p>The letter notes that external members of the NTLG have identified a lack of access to stimulus measures for new businesses and the restrictive nature of the 'notice' in relation to a 'tax period' requirement on certain new businesses.</p> <p>Concerns are also raised about the ATO commencing the sending of JK cessation letters to new businesses that have failed to meet the tax period notice requirement. The Professional Bodies recommend that the 'notice' requirement should be amended by importing an assumption that either a monthly or quarterly tax period applies, and to allow the Commissioner to use other evidence of 'making a taxable supply'.<sup>25</sup></p>
25 June 2020	Accountant's Daily publishes an article that identifies the 19 June 2020 joint professional bodies letter and provides details of the contents. <sup>26</sup>
29 June 2020	As part of its complaint investigations, the IGTO asks the ATO to explain whether it has any discretion to consider as eligible for the BCF payments those entities that were actively trading prior to 12 March 2020 but did not have a tax period ending before 12 March 2020.
30 June 2020	IGTO announces the commencement of a Review Investigation into the effectiveness of ATO communications to complain, review and appeal decisions made or actions taken by Tax Officials.
1 July 2020	ATO provides response to the IGTO's information request on 29 June 2020 and advises that it does not have any discretion to consider entities as eligible for BCF payments where they were actively trading prior to 12 March 2020 but did not have a tax period ending before 12 March 2020.
2 July 2020	The Guardian publishes an article regarding the ATO's compliance activities that determined some businesses were ineligible for the JK payment because they "started business on or after 1 January 2020". <sup>27</sup>
14 July 2020	IGTO meets with the ATO as part of the complaint investigations to seek the ATO's views on what alternative solutions have or can be considered in circumstances where an entity is determined to be

<sup>23</sup> ATO, 'National Tax Liaison Group key messages 11 June 2020' (Web Page, 15 October 2020) <[www.ato.gov.au](http://www.ato.gov.au)>.

<sup>24</sup> Correspondence referred to in Joint bodies submission, below n 25.

<sup>25</sup> CPA Australia, CAANZ, The Tax Institute, The Institute of Certified Bookkeepers, Institute of Public Accountants, Tax & Super Australia, National Tax and Accountants Association Ltd, Australian Bookkeepers Association and Association of Accounting Technicians, letter to The Treasury, 19 June 2020 <<https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/covid-19/government-advice/joint-bodies-submission-covid-19-stimulus-and-new-business.pdf?la=en&rev=51e3b406bbd14b05ba1e1bbab042eeda>> ('Joint bodies submission').

<sup>26</sup> Jotham Lian, 'ATO JobKeeper termination letters set to debut as professional bodies push back' *Accountants Daily* (Online), 25 June 2020 <[www.accountantsdaily.com.au](http://www.accountantsdaily.com.au)>.

<sup>27</sup> Elias Visontay, 'Tax office tells some businesses who received jobkeeper they were not entitled to payments', *The Guardian*, 2 July 2020.

Date	Summary of event or action taken
	ineligible for BCF payments despite actively trading prior to 12 March 2020. The IGTO also asks the ATO to clarify what information it has put forward to Treasury about the issue.
15 July 2020	IGTO obtains copies of ATO template decision letters for consideration as part of the Review Investigation into the effectiveness of ATO communications to complain, review and appeal decisions made or actions taken by Tax Officials.
21 July 2020	Treasury publishes a report of its review into the JK support measure, <i>The Job-keeper payment: Three month Review</i> . <sup>28</sup>
23 July 2020	In response to the IGTO's questions at the 14 July 2020 meeting, the ATO advises that it is required to administer the law the way it is written and that any equity issues are a matter of policy. The ATO also notes that it has provided Treasury with information on its administration of the BCF support measure, including its interpretation of the legislation in respect of the eligibility of new businesses.
24 July 2020	ATO settles internal documentation that sets out an informal review post-objection decision informal review process for JK eligibility disputes. <sup>29</sup> In this process, post-objection decision disputes that are received via ATO case officers, IGTO or Australian Small Business and Family Enterprise Ombudsman (ASBFEO), are assigned to technical officers for review. These officers may obtain further information and consult with other technical officers including TCN, before notifying the taxpayer of the outcome of their review of the JK objection decision. The ATO advises that the first such reviews were finalised in August 2020. <sup>30</sup>
30 July 2020	IGTO informs the ATO that it requires the involvement of its Senior Executive Service (SES) as part of the ongoing complaint investigations into new business entities' eligibility for the JK and BCF support measures. The areas of focus specified in the IGTO's notice of investigations included: <ul style="list-style-type: none"> <li>▪ clarifying the ATO's precedential view of the BCF and JK integrity rules</li> <li>▪ whether the ATO's administrative application of that view would cause unfairness to or discriminate against some new businesses, and</li> <li>▪ options for resolution that would minimise the risk of unfairness.<sup>31</sup></li> </ul>
31 July 2020	House of Representatives Standing Committee on Tax and Revenue (SCTR) Chair Mr Jason Falinski MP raises concerns and asks questions of the ATO and the IGTO about the fairness of certain ATO BCF compliance activities, during a SCTR's hearing that is part of its Inquiry into the Commissioner of Taxation Annual Report 2018-19. <sup>32</sup>
2 August 2020	In relation to a case under appeal in the AAT, the ATO is alerted to example number 5 in PSLA 2020/1 and that it should not be applied inflexibly or in isolation from the range of relevant considerations identified elsewhere in that PSLA. <sup>33</sup> Example number 5 concluded a sole trader, who did not register for GST, was not eligible for JK payments because she did not have an ABN on 12 March 2020, notwithstanding the fact that she had operated a business for a number of years.

<sup>28</sup> Treasury, *The Job—keeper payment: Three month Review*, 21 July 2020.

<sup>29</sup> ATO "JobKeeper Review and Objections Process: Post-objection informal review", (internal document provided to IGTO) 24 July 2020,

<sup>30</sup> ATO, communication to IGTO, 6 November 2020.

<sup>31</sup> IGTO, Communication to the ATO, 30 July 2020.

<sup>32</sup> Commonwealth, *Commissioner of Taxation annual report 2018—19*, House of Representatives Standing Committee on Tax and Revenue, 31 July 2020, p 16 (Jason Falinski).

<sup>33</sup> ATO, communication to IGTO, 6 November 2020.

Date	Summary of event or action taken
3 August 2020	ATO's RDR business line starts work to identify specific adverse ATO decisions in JK eligibility cases where the entity was carrying on a business without an ABN and that may be impacted by the 2 August 2020 alert. <sup>34</sup>
6 August 2020	ATO identified 282 entities that had their JK payments denied on the same basis illustrated by example number 5 in PSLA 2020/1 (i.e. the entity conducted a business but did not have an ABN on 12 March 2020). Only 15 of these 282 entities had applied for a backdated ABN and objected to the ATO's adverse decision. The ATO identified that 148 of these entities may need the ATO to exercise a discretion to qualify. <sup>35</sup>
7 August 2020	<p>IGTO meets with senior ATO SES as part of the complaint investigations and discusses:</p> <ul style="list-style-type: none"> <li>whether the JK and BCF integrity rules require a 'tax period' to have ended before 12 March 2020;</li> <li>the administrative and interpretative options that may be open for genuine businesses that started trade after 1 January 2020 to access the JK and BCF support measures; and</li> <li>the ATO's understanding of the policy intent and administrative design for the JK and BCF support measures.</li> </ul> <p>The IGTO asks the ATO for written confirmation of its authoritative view on the application of the JK and BCF integrity rules, the potential scale of impact of this view and the scope of administrative/interpretative options to include active businesses that made supplies before 12 March 2020.</p>
11 August 2020	ATO receives a submission from a taxpayer's representative that asks the ATO to reconsider its approach in determining new businesses' eligibility to the BCF payment to avoid different outcomes due to entities using different entity accounting treatments (eg. cash or accruals) of supplies made before 1 January 2020 and payments received after 31 December 2019. The submission argued that the ATO's approach is technically incorrect as it confuses making of the supply and the application of the GST attribution rules, as well as being an approach that is neither supported by the wording nor intent of the legislation. The representative stated that the affected entities "have been left with no option for further review apart from applying to the Federal Court or the Federal Circuit Court of Australia under the Administrative Decisions (Judicial Review) Act 1977" and that "given that small business which have commenced business in recent times do not have the resources available to take such a path for review." <sup>36</sup>
11 August 2020	<p>ATO's RDR business line places two types of BCF/JK objection cases on hold, pending TCN advice. In these cases, the ATO decided that the integrity rule was not met due to:</p> <ul style="list-style-type: none"> <li>the entity making a supply prior to 1 January 2020, but not receiving payment until after 1 January 2020; or</li> <li>the entity not reporting a pre 1 January 2020 taxable supply but may have made a pre-January 2020 input taxed supply, such as "taking out a loan, opening a bank account, lending money."<sup>37</sup></li> </ul> <p>RDR considered seeking evidence of the supplies while awaiting TCN's advice and identifying relevant objection cases on hand as well as those already decided.</p>

<sup>34</sup> *ibid.*

<sup>35</sup> ATO, internal communication, 6 August 2020.

<sup>36</sup> Taxpayer representative [identity redacted by ATO], "Review of Cash Flow Boost position" (document attached to ATO internal communications), 11 August 2020.

<sup>37</sup> ATO, internal communication, 11 August 2020.

Date	Summary of event or action taken
13 August 2020	ATO updates PSLA 2020/1 to remove Section 7 'Who is authorised to exercise the discretion on behalf of the Commissioner'. Information on who is authorised to exercise discretion is made internal and only available to ATO staff via the 'Taxation Authorisation Guidelines'. <sup>38</sup>
17 August 2020	ATO meets with ASBFEO to discuss BCF and JK objections, acknowledges a number of categories of cases which could be reviewed and agrees to set up a dedicated email address for ASBFEO to refer cases directly to the ATO objections team for review. <sup>39</sup>
19 August 2020	<p>ATO provides response to information requested by IGTO during 7 August 2020 meeting. The response confirmed the ATO's view as follows:</p> <ul style="list-style-type: none"> <li>▪ The JK and BCF support measures does not provide it with any discretion in respect of the tax periods to which business income or supplies needed to be attributed.</li> <li>▪ The term 'tax period' is specifically defined as having the same meaning as in the GST Act 1999. As such, there is no scope to read the provision as being satisfied with taxable supplies being made in 'a period' ending before 12 March 2020 rather than in 'a tax period' ending before 12 March 2020.</li> <li>▪ Under both JK and BCF support measures, the Commissioner must assume that the entity is registered under the GST Act 1999 for present purposes. Section 27-5 of the GST Act 1999 requires a GST-registered entity to account for GST on a quarterly basis. This is unless the entity elects otherwise or the Commissioner determines otherwise, which could never occur for an entity that is not registered for GST.</li> <li>▪ The ATO sees no administrative solutions that address the issues raised in IGTO complaint investigations.</li> <li>▪ It is not open for the Commissioner to use his remedial power to modify the law because a modification would be inconsistent with the ATO's understanding of the policy intent for the JK and BCF support measures.</li> </ul>
31 August 2020	By this date, ATO had finalised 21 post-objection informal reviews of adverse JK decisions. <sup>40</sup>
1 September 2020	<p>IGTO provides a Draft Preliminary View document to the ATO on the application of the JK and BCF integrity rules, requesting ATO comments and confirmation including in respect of the following:</p> <ul style="list-style-type: none"> <li>▪ JK and BCF support measures modify the GST definition of taxable supply</li> <li>▪ Tax period is as defined by GST law but the associated attribution rules are not incorporated into that law.</li> <li>▪ The taxable supply must be made for consideration but there is no requirement for that consideration to be received in the same tax period in which the taxable supply made.</li> <li>▪ Whether the tax period requirement can operate differently (potential alternative constructions of the JK and BCF integrity rules) - e.g. The word 'that' in the integrity rule can be read as applying to Taxable Supply rather than Tax Period so that the requirement is that a taxable supply is made between 1 July 2018 and 12 March 2020.</li> </ul>
10 September 2020	<p>ATO provide Draft Response to IGTO Draft Preliminary View 1 September 2020. The ATO confirm its views that:</p> <ul style="list-style-type: none"> <li>▪ The Commissioner agrees that a taxable supply made in a tax period does not require the entity that made the supply to be the entity that receives the consideration and does not require it to be received in the tax period that the supply is made.</li> <li>▪ The requirement is to have made the taxable supply in a tax period that started on or after 1 July 2018 and ended before 12 March 2020.</li> </ul>

<sup>38</sup> ATO, PS LA 2020/1, above n 13.

<sup>39</sup> ATO, communication to IGTO, 6 November 2020.

<sup>40</sup> *ibid.*

Date	Summary of event or action taken
	<ul style="list-style-type: none"> <li>▪ The potential alternative constructions are not open to the ATO as they go beyond fixing a simple, grammatical, drafting error which, if uncorrected, would defeat the object of the provision.</li> </ul>
11 September 2020	<p>IGTO meets the ATO to discuss the ATO's response to its Preliminary Draft view document and to test its view of the operation of the JK and BCF integrity rules with senior ATO technical officers. This IGTO view is:</p> <ul style="list-style-type: none"> <li>▪ The definition of Tax period in the JK and BCF support measures is the same definition in the GST Act 1999, however, the JK and BCF support measures do not incorporate other GST concepts, such as the GST attribution rules.</li> <li>▪ Therefore, for JK and BCF integrity purposes, an entity may have made a taxable supply in an earlier tax period than the tax period in which they received consideration</li> <li>▪ The definition of Taxable supply in the JK and BCF support measures is based on the definition of that term in GST Act 1999. And, for GST purposes, although a taxable supply must be made for consideration, there is no requirement for that consideration to be received in the same tax period in which the taxable supply made.</li> <li>▪ Also, the JK and BCF support measures modifies the GST law definition of taxable supplies so that Taxable Supplies may include input taxed supplies.</li> <li>▪ Financial supplies are input taxed supplies and (and somewhat counter-intuitively) include the acquisition of particular interests which are identified in Division 40 of the <i>A New Tax System (Goods and Services Tax) Regulations 1999</i> (the <b>GST regulations 1999</b>)), such as: <ul style="list-style-type: none"> <li>- opening an account with a bank (Approved deposit taking institution);</li> <li>- borrowing money (from a financial supply provider);</li> <li>- entering a mortgage over real property; and</li> <li>- buying or selling shares or other securities – including incorporation of a shelf company or acquiring an interest in a managed investment scheme (a type of trust).</li> </ul> </li> <li>▪ Therefore, these financial supplies can amount to taxable supplies for JK and BCF integrity rule purposes.</li> <li>▪ However, consideration of these types of financial supplies is not always financial and not usually reported through a BAS.</li> <li>▪ But, lodging a BAS is not an explicit requirement in the JK and BCF support measures and not the only way to provide notice to the Commissioner of the taxable supplies an entity has made.</li> </ul> <p>The IGTO and ATO agree to reconvene discussion regarding this IGTO view in the following week.</p>
16 September 2020	<p>PS LA 2020/1 is updated by the ATO:</p> <ul style="list-style-type: none"> <li>▪ Additions and amendments are made to the policy intent in Section 2. The following addition was made to explain the requirement to provide notice of a taxable supply made in a tax period that applied to it starting on or after 1 July 2018 and ending before 12 March 2020: <p><i>This requirement ensures that only active businesses which are visible in the tax system with a lodgement period that ends prior to the date the Government commenced announcing measures that would comprise the Coronavirus Economic Response Package would be eligible for the cash flow boost or JobKeeper payment (as it applies to qualifying businesses based on an eligible business participant).<sup>41</sup></i></p> </li> <li>▪ The discretion to grant further time section was expanded to clarify that an entity is not entitled to further time to provide notice and such a grant will only be given where it is warranted.</li> <li>▪ The lodgement history of an entity is added as a relevant consideration in determining whether further time to give notice is warranted.</li> </ul>

<sup>41</sup> ATO, PS LA 2020/1, above n 13.



Date	Summary of event or action taken
	<p>■ Six examples were added and two pre-existing examples were amended. The amendment made to one of these pre-existing examples, example 4 in Section 7 of the PSLA, adjusts the facts to made it clear that the entity in the example undertook no further activities in carrying on a business between the start of December 2019 and January 2020, as shown below (changes marked in red):</p> <p><i>Jack commenced a new business selling toys at the start of December 2019.</i></p> <p><i>Jack completed all the necessary registration requirements for his new business, including obtaining an ABN and registering for quarterly GST reporting <del>Jack</del> <del>also</del> however did not undertake any further activities. In January 2020, Jack incurred numerous costs in establishing his business.</i></p> <p><i>However due to delays in setting up the business, Jack did not manage to make any sales during the month of December. Rather the businesses' first sales eventuated in late January 2020.</i></p> <p><i>Because Jack's business did not make any taxable supplies [Footnote 12: Taxable supply for this purpose includes any supply including those that may be GST—free or input taxed. See footnote 6 of this practice statement for more details.] in the December quarter reporting period, the business will not be eligible for either the cash flow boost or JobKeeper payment because it did not make a taxable supply in a tax period that ended prior to 12 March 2020.</i></p> <p><i>As the business did not commence until after 30 June 2019, it is not able to include an amount in its assessable income in the 2018–19 income year.</i></p> <p><i>On behalf of his business, Jack asks the Commissioner to exercise the discretion to allow further time for Jack to notify the Commissioner <del>of the that</del> he made a taxable <del>supplies</del> supply during the relevant period for the purposes of being eligible for both the cash flow boost and JobKeeper payment.</i></p> <p><i>The Commissioner does not exercise the discretion under either measure because Jack's business is ineligible as it did not make a taxable supply in a tax period ending prior to 12 March 2020 [Footnote 13: New businesses that do not have a tax period that ends before 12 March 2020 are similarly not eligible for any cash flow boosts, this includes both the first and second cash flow boosts]. The Commissioner does not have the discretion to extend the date by which an entity can make a taxable supply. The Commissioner can only extend the date by which notice of the made supply is provided. The Commissioner can only extend the date by which notice of the made supply is provided.<sup>42</sup></i></p>
16 September 2020	<p>The Commissioner makes a determination regarding the decline in turnover test and the timing of supplies. The determination allows entities not registered or required to be registered for GST to choose their accounting method for the purposes of the JK and BCF support measure.<sup>43</sup></p>

<sup>42</sup> *ibid.*

<sup>43</sup> Legislative Instrument, *Coronavirus Economic Response Package (Payments and Benefits) (Timing of Supplies Made and Decline in Turnover Test) Rules 2020 (No. 1)*, 16 September 2020.

Date	Summary of event or action taken
17 September 2020	<p>Senator Jacqui Lambie raises concerns regarding new businesses' access to the JK and BCF support measures during the Senate Committee's Inquiry the Australian Government's response to the COVID-19 pandemic. Senator Lambie asks questions to Treasury about:</p> <ul style="list-style-type: none"> <li>▪ whether the issue of small businesses that were set up at the beginning of the year not being eligible for JK and BCF payments, but would have been if they had lodged their BAS monthly instead of quarterly, has been rectified;</li> <li>▪ why this issue was not addressed in Treasury's report, <i>The Job-keeper payment: Three month Review</i>; and</li> <li>▪ whether it can provide a formal response to the accounting bodies who had raised concerns about this issue in April and June.<sup>44</sup></li> </ul>
18 September 2020	<p>IGTO holds further meeting with the ATO to confirm its view that financial supplies, which are not reported on a BAS, are considered taxable supplies for the purposes of the JK and BCF support measures. At this meeting, the ATO also clarifies what supporting information is required for an entity to show evidence of financial supplies made in a prior tax period where such supplies are not able to be reported on a BAS. IGTO asks ATO arrange a meeting with its Review and Disputes Resolution (RDR) business line to discuss options to settle outcomes for IGTO complaint investigation cases.</p>
22 September 2020	<p>ATO provides a written response to the IGTO confirming its views on taxable supplies discussed during the meetings held on 11 September 2020 and 18 September 2020. The ATO confirms that:</p> <ul style="list-style-type: none"> <li>▪ An entity that makes a financial supply will be regarded as having made a taxable supply under paragraph 11(8)(a) of the JK legislative instrument and paragraph 5(6)(a) of the BCF Act 2020. In order to satisfy the requirements of an entity making a financial supply under section 40-5.09 of the GST Regulations 1999, the entity must have relevantly acquired the interest for consideration and in the course or furtherance of an enterprise.</li> <li>▪ The Commissioner's views as to when an entity will be carrying on an enterprise are set out in Miscellaneous Taxation Ruling MT 2006/1. Activities that an entity undertakes in carrying on enterprise include activities undertaken in the commencement of the enterprise. An activity will be undertaken in the commencement of an enterprise where it forms part of a series of activities that are planned, organised and carried out in a businesslike manner over a period of time.</li> <li>▪ An acquisition of an interest mentioned in section 40-5.09 of the GST Regulations 1999 will not be a financial supply, and therefore not be taken to be a taxable supply for the purposes of paragraph 11(8)(a) of the JK legislative instrument and paragraph 5(6)(a) of the BCF Act 2020 where the entity is not carrying on an enterprise.</li> <li>▪ The Commissioner will consider whether to exercise the discretions in accordance with PS LA 2020/1 which requires consideration of a range of factors. Generally, the fact that an entity had no obligation to notify the Commissioner of the taxable supply, for example where the entity was not registered for GST, will point in favour of exercising the discretion.</li> <li>▪ The Commissioner acknowledges that entities that may only make infrequent input taxed supplies (for example opening a bank account) may not record those supplies on their BAS. Those circumstances may point in favour of exercising the discretion. This would need to be balanced against other relevant factors and the entity's particular facts and circumstances in determining whether it would be appropriate for the discretion to be exercised. The ATO also notes that the discretion will not be exercised if the entity does not meet other eligibility criteria.</li> <li>▪ The Commissioner has routinely accepted notification of taxable supplies other than in a BAS. A list of other evidence that the ATO may seek has been on the ATO's BCF website since April 2020. It will often accept other forms of notification that objectively evidence that the entity made a</li> </ul>

<sup>44</sup> Commonwealth, Senate Select Committee on COVID-19, *Inquiry into Australian Government's response to the COVID-19 pandemic*, 17 September 2020, pp. 10-11 (Senator Jacqui Lambie). Referred to in Accountants Daily: <<https://www.accountantsdaily.com.au/tax—compliance/14860-treasury-passes-the-buck-on-cash-flow-boost-anomaly>>

Date	Summary of event or action taken
	taxable supply (e.g. invoices, bank statements showing receipt of payments, contracts) in cases where an entity had no lodgement obligation or there was a deferred lodgement due date.
23 September 2020	<p>IGTO meets with ATO's Review and Disputes Resolution (<b>RDR</b>) business line to obtain an ATO commitment to reconsider adverse JK and BCF eligibility decisions and settle outcomes for IGTO complaint investigation cases. RDR confirms that:</p> <ul style="list-style-type: none"> <li>▪ The ATO has self-identified a number of objections decisions that may require informal review .</li> <li>▪ The ATO will informally review every relevant case that progressed to litigation.</li> <li>▪ The ATO will identify objections to relevant ATO JK and BCF eligibility decisions for informal review.</li> </ul> <p>The ATO agrees to informally review ALL cases the IGTO raises with the ATO for reconsideration, consistent with its informal review of all objections and litigation cases. Importantly, these cases will be reviewed without the need for a formal objection to be lodged.</p>
Fr. 23 September 2020	<p>IGTO communicates to all relevant complainants that the ATO has agreed to informally review their eligibility for the JK and/or BCF payments and that an ATO case officer will contact them to discuss further. IGTO is monitoring these complaint cases and will determine the next course of action after the ATO has completed these informal reviews.</p>
30 September 2020	<p>By this date, ATO had finalised 71 post-objection informal reviews of adverse JK decisions. <sup>45</sup></p>
Fr. 28 October 2020	<p>ATO notifies the IGTO of the outcome of its informal review for each complaint. For some complaints, the ATO reverses its original decision as a result of the IGTO's complaint investigation. This leads to the JK and/or BCF payment being made to some entities, resulting in a favourable outcome for these complainants.</p>
31 October 2020	<p>By this date, ATO had finalised 139 post-objection informal reviews of adverse JK decisions. <sup>46</sup></p>

<sup>45</sup> ATO, communication to IGTO, 6 November 2020.

<sup>46</sup> *ibid.*

## APPENDIX 2 — DEFINITION OF FINANCIAL SUPPLY

- A financial supply is defined in section 40-5 of the GST Act 1999. This definition references regulation 40-5.90 of the *A New Tax System (Goods and Services Tax) Regulations 1999* (**GST Regulations 1999**)

### *40-5 Financial supplies*

*(1) A \*financial supply is input taxed.*

*(2) Financial supply has the meaning given by the regulations.*

- Financial supplies are listed in Regulation 40-5.09 of the GST Regulations 1999. Financial supplies include the provision, acquisition or disposal of an interest in one of the Items listed in subsection (3) as follows:

*The provision, acquisition or disposal of an interest mentioned in subsection (3) is a financial supply if:*

*(a) the provision, acquisition or disposal is:*

*(i) for consideration; and*

*(ii) in the course or furtherance of an enterprise; and*

*(iii) connected with the indirect tax zone; and*

*(b) the supplier is:*

*(i) registered or required to be registered; and*

*(ii) a financial supply provider in relation to supply of the interest.*

*(2) However, if Division 84 (offshore supplies) of the Act applies to the provision, acquisition or disposal of an interest mentioned in subsection (3), the provision, acquisition or disposal is a financial supply to the extent that it would, apart from subparagraphs (1)(a)(iii) and (b)(i), be a financial supply.*

*(3) For the purposes of subsections (1) and (2), the interest is an interest in or under a matter mentioned in an item in the following table.*

Financial supplies	
Item	An interest in or under ...
1	An account made available by an Australian ADI in the course of: (a) its banking business within the meaning of the <i>Banking Act 1959</i> ; or (b) its State banking business
2	A debt, credit arrangement or right to credit, including a letter of credit
3	A charge or mortgage over real or personal property
4	A regulated superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme within the meaning of the <i>Superannuation Industry (Supervision) Act 1993</i> , or a retirement savings account within the meaning of the <i>Retirement Savings Accounts Act 1997</i>
5	An annuity or allocated pension
6	A life insurance business (within the meaning of the <i>Life Insurance Act 1995</i> ): (a) which consists of the issuing of life policies (within the meaning of that Act); or (b) to which a declaration under subsection 12(2) or section 12A of that Act applies; or related reinsurance business
7	A guarantee
7A	An indemnity that holds a person harmless from any loss as a result of a transaction the person enters with a third party
8	Credit under a hire purchase agreement entered into before 1 July 2012 in relation to goods, if: (a) the credit for the goods is provided for a separate charge; and (b) the charge is disclosed to the recipient of the goods
9	Australian currency, the currency of a foreign country, digital currency or an agreement to buy or sell any of these 3 things
10	Securities, including: (a) a debenture described in paragraph (a), (b), (c), (e) or (f) of the definition of debenture in section 9 of the <i>Corporations Act 2001</i> ; and

Financial supplies	
Item	An interest in or under ...
	(b) a document issued by an individual that would be a debenture if it were issued by a body corporate; and
	(c) a scheme described in paragraph (e), (i) or (m) of the definition of managed investment scheme in section 9 of the <i>Corporations Act 2001</i> ; and
	(d) the capital of a partnership or trust
11	A derivative
12	An account made available by a non-resident in the course of carrying on banking business (within the meaning of the <i>Banking Act 1959</i> ) in a foreign country in which the entity is authorised under the law of that country to carry on banking business
13	A foreign superannuation fund (within the meaning of the <i>Income Tax Assessment Act 1997</i> )

## APPENDIX 3 — ATO TEMPLATE DECISION LETTERS

The following template contains three alternative text options to be used depending on whether the entity receiving the letter is registered or required to be registered for GST, and if so, whether it is registered on a quarterly or annual lodgement cycle.



### Your entitlement for JobKeeper payments

Hello,

Contact Name: [Contact Name]  
ABN: [XX XXX] #### ##

Thank you for the recent application for the JobKeeper Payment under the business participation entitlement for the entity with the above ABN.

Option 1 – No GST

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that are not registered nor required to be registered for GST).

Our records indicate the entity started business on or after <1 January 2020>.

On this basis the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

#### Option 2 – Quarterly

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that report and pay GST quarterly)

Our records indicate the entity started business on or after [1 January 2020](#).

On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

#### Option 3 – Annual GST

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 30 June 2019 (this period applies for entities that report and pay GST annually).

Our records indicate the entity started business on or after [1 July 2019](#).

On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

#### Your right to a review

If you don't agree with our decision you may lodge an objection within 60 days. For more information on lodging an objection please seek advice from your tax professional of visit [ato.gov.au/objection](https://ato.gov.au/objection)

The entity will not have to repay amounts already paid if it has made an honest mistake.



## APPENDIX 4 — SUMMARY OF ATO-PROVIDED SAMPLES OF JK/BCF COMPLIANCE LETTERS

Support Measure	ABN?	Registered for GST?	When did entity start business (according to ATO)?	Lodged 2019 ITR?	Reported business income (if ITR lodged)?	Notified ATO of supplies/sales by 12/3/20 or deferral date?	ATO advice in communication to entity	Source document*
JK	Yes	No	On/after 1/1/20	n/a	n/a	No	Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days	ATO template decision letter – Option 1
JK	Yes	Yes (Qtr)	On/after 1/1/20	n/a	n/a	No	Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days	ATO template decision letter – Option 2
JK	Yes	Yes (Annual)	On/after 1/1/20	n/a	n/a	No	Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days	ATO template decision letter – Option 3
JK	Yes	No	1 Jul – 31 Dec 2019	No	n/a		Wait [unspecified] days for t/p contact before making adverse decision	Sample 1 Letter
JK	Yes	No	1 Jul – 31 Dec 2019	No	n/a	No	Wait 14 days for t/p contact before making adverse decision	Sample 2 letter
JK	Yes	No	1 Jul – 31 Dec 2019	Yes	No	No	Wait 14 days for t/p contact before making adverse decision	Sample 3 letter
JK	Yes	Unspecified	Unspecified	Unspecified	Unspecified	Unspecified	Advised that payment was pending review. ATO may contact if need further information.	JK Review SMS/email

Appendix 4 —ATO-provided samples of JK/BCF compliance letters

Support Measure	ABN?	Registered for GST?	When did entity start business (according to ATO)?	Lodged 2019 ITR?	Reported business income (if ITR lodged)?	Notified ATO of supplies/sales by 12/3/20 or deferral date?	ATO advice in communication to entity	Source document*
BCF	Unspecified	Unspecified	Unspecified	Unspecified	Unspecified	No	(NB: ATO had previously determined entity was not eligible to receive BCF payment). Advised t/p of limited circumstances where ATO would give more time to notify of assessable income or taxable supply. Invited t/p contact by 30/6/20	BCF letter – Sample June 2020
BCF	Unspecified	Unspecified	Unspecified	Unspecified	Unspecified	No	(NB: ATO had previously determined entity was not eligible to receive BCF payment.) ATO was responding to t/p contact about their eligibility). Advised t/p did not meet criteria, gave website address for more information, would reconsider decision not to pay BCF if information provided within 3 weeks.	BCF letter – Sample July 2020
BCF	Unspecified	Unspecified	Unspecified	Unspecified	Unspecified	No	(NB: ATO had previously determined entity was not eligible to receive BCF payment.) T/p had contacted ATO and then given further information to ATO). ATO determined entity did not meet eligibility criteria as the required notice not received. Notified entity of right to lodge objection within 60 days	BCF letter – Sample Dec - Response to t/p provided information
BCF	Unspecified	Unspecified	Unspecified	Unspecified	Unspecified	No	(NB: ATO had previously determined entity was not eligible to receive BCF payment.) T/p had contacted ATO, but had NOT given further information to ATO). ATO determined entity was ineligible. It did not declare business income or sales before 12/3/20, and PAYG withholding registration was not active on	BCF letter – Sample Sept – no further information given by t/p

Appendix 4 —ATO-provided samples of JK/BCF compliance letters

Support Measure	ABN?	Registered for GST?	When did entity start business (according to ATO)?	Lodged 2019 ITR?	Reported business income (if ITR lodged)?	Notified ATO of supplies/sales by 12/3/20 or deferral date?	ATO advice in communication to entity	Source document*
							12/3/20. Advised to contact specific ATO number, tax agent or lodge an objection.	
BCF	Unspecified	Unspecified	On/after 1 Jul 2019	Unspecified	Unspecified	No, but a lodgement deferral previously agreed with ATO	ATO asks for t/p to call the ATO before 30/6/20 to notify of any assessable income or taxable supplies made in the relevant periods.	BCF letter – Sample June – Lodgement deferral in place

Note: Shaded rows denote the ATO template decision letters which were the subject of complaints raised with the IGTO and are contained in Appendix 3.

\* Source: ATO communication to IGTO 8 December 2020, including pro-forma copies of letters

# APPENDIX 5 — ATO RESPONSE TO THE IGTO REPORT

GPO BOX 9990 SYDNEY NSW 2001



**Australian Government**  
**Australian Taxation Office**

Karen Payne  
Inspector-General of Taxation and Taxation  
Ombudsman  
Office of the Inspector-General of Taxation and  
Taxation Ombudsman Level  
6, 321 Kent Street SYDNEY  
NSW 2000

17 December 2020

Dear Karen,

Thank you for providing an opportunity to consider your report *Aspects of the ATO's Administration of JobKeeper and Boosting Cash Flow Payments for New Entities*, which we note applies to a very small number of cases on a specific technical issue.

We also thank the IGTO for your commendation of our responsiveness to meet the economic challenges brought about by COVID-19. We are particularly pleased that this view has also recently been supported by the ANAO which has acknowledged the suitability of our risk management approaches for these programs in such a dynamic environment and made no recommendations to change the ATO's approaches.

Both the JobKeeper and Cash Flow Boost measures were of an unprecedented scale. We are proud of the ATO's contribution in rapidly delivering these stimulus measures resulting in \$100 billion in financial support payments being made to over 1 million businesses, which support over 6 million Australian workers.

Independent scrutiny of the ATO is an important part of sustaining confidence in the administration of Australia's tax and superannuation systems. We therefore welcome observations that assist in this endeavour.

However, we note that there are observations, conclusions and inferences in the report that the ATO does not agree with, which do not fully reflect the ATO's view or the information provided about our approach.

Our usual business practice in the development and implementation of new programs is to design client-centred administrative and communication strategies, whilst continually refining approaches. We did this in relation to these large-scale programs as they matured.

The ATO's commitment to procedural fairness is always a central feature in the design of our processes, procedures and practices and of our administrative approaches. To that end, the JobKeeper and Cash Flow Boost measures were implemented to provide multiple opportunities for clients to demonstrate their eligibility, including by bringing additional information forward. Our approach also encompassed accessible and cost-effective formal and informal review options for clients to seek reconsideration of decisions should they wish to do so.

Our approach to our public advice and guidance was to provide timely and clear information that could be readily understood by broad audiences. This was supported by active engagement with the community and the tax profession to identify areas of uncertainty. This allowed us to refine our guidance.

The implementation of the stimulus measures has seen the ATO connect with the community more than ever before, delivering tens of millions of payments and credits to businesses and supporting the community when they need it most. We are honoured to have delivered such an extraordinary program on behalf of the Government.

Sincerely,

A handwritten signature in black ink, appearing to be 'K. Fish', written over a large, faint, stylized letter 'C'.

Kirsten Fish, Acting Second Commissioner, Law Design and Practice

## APPENDIX 6 — GLOSSARY AND SHORTENED TERMS

Defined terms and Acronyms	Full/Defined term
<b>AAT</b>	Administrative Appeals Tribunal
<b>ABN</b>	Australian Business Number
<b>ADI</b>	Approved Deposit Taking Institution
<b>ATO</b>	Australian Taxation Office
<b>ATO template decision letters</b>	ATO letters, based on pro forma wording, that advised entities of an ATO decision to consider them as ineligible to receive JK payments
<b>BAS</b>	Business Activity Statement
<b>BCF</b>	Boosting Cash Flow
<b>BCF Act 2020</b>	<i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i>
<b>BCF support measure</b>	A \$6.7 billion cash flow assistance scheme for employers to support Australian businesses during the COVID-19 pandemic, announced by the Australian Government on 12 March 2020 and enacted into law by the <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i>
<b>Commissioner</b>	Commissioner of Taxation
<b>Complaint</b>	<p>A complaint is defined in <i>AS/NZS 10002:2014 Guidelines for complaint management in organizations</i> as:</p> <p>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</p> <p><i>[Compare this with the Guideline's following definitions:</i></p> <p><i>Disputes – Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback – Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.]</i></p>
<b>Complaint investigation</b>	An investigation conducted by the Taxation Ombudsman into complaints and concerns raised about the actions and decisions of tax officials (pursuant to s 7(1)(a) of the IGT Act 2003)
<b>COVID-19 economic support measures</b>	A range of measures that were announced by the Australian Government from 12 March 2020 that are part of an economic plan to keep Australians in jobs, keep businesses in business and support households and the Australian

	economy as the world deals with the significant challenges posed by the spread of the coronavirus.
<b>Entity</b>	<p>An entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is:</p> <ul style="list-style-type: none"> <li>an individual</li> <li>a body corporate</li> <li>a body politic</li> <li>a partnership</li> <li>any other unincorporated association or body of persons</li> <li>a trust</li> <li>a superannuation fund</li> </ul>
<b>Financial supply</b>	See the definition provided in Appendix 2
<b>GST</b>	Goods and Services Tax
<b>GST Act 1999</b>	<i>A New Tax System (Goods and Services Tax) Act 1999</i>
<b>GST-free supply</b>	<p>A GST-free supply is defined in s. 9-30(a) and Division 38 of <i>A New Tax System (Goods and Services Tax) Act 1999</i>:</p> <p>If a supply is GST-free, then:</p> <ul style="list-style-type: none"> <li>• no GST is payable on the supply;</li> <li>• an entitlement to an input tax credit for anything acquired or imported to make the supply is not affected.</li> </ul>
<b>GST Regulations 1999</b>	<i>A New Tax System (Goods and Services Tax) Regulations 1999</i>
<b>GST reporting cycle</b>	How often a Business Activity Statement (BAS) needs to be lodged by an entity
<b>IGT Act 2003</b>	<i>Inspector-General of Taxation Act 2003</i>
<b>IGTO</b>	<p>Inspector-General of Taxation and Taxation Ombudsman.</p> <p>The acronym “IGTO” is used throughout the report to denote both the “Inspector-General of Taxation”, as named in the enabling legislation, and “Inspector-General of Taxation and Taxation Ombudsman” as recently adopted due to recent calls for greater understanding and awareness of our taxation complaint service function.</p>
<b>ITR</b>	Income tax return
<b>JK</b>	JobKeeper
<b>JK and BCF support measures</b>	<i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF Act 2020), Coronavirus Economic Response Package (Payments and Benefits) Act 2020 and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.</i>
<b>JK and BCF integrity rules</b>	<i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 s 11 and Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 ss 5–6</i>

<b>JK explanatory statement</b>	Explanatory Statement to the <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i>
<b>JK legislative instrument</b>	<i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i>
<b>JK support measure</b>	a \$130 billion JK payment scheme to keep Australians in jobs in response to the pandemic, announced by the Australian Government on 30 March 2020 and enacted into law by the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020
<b>LD&amp;P</b>	Law Design and Practice Group
<b>NTLG</b>	National Tax Liaison Group, an ATO consultative group with members from the ATO, Treasury and the tax profession
<b>PAL business line</b>	The ATO's Policy, Analysis and Legislation business line
<b>PAYG</b>	Pay As You Go, which are particular types of taxation payment and reporting obligations
<b>PS LA 2020/1</b>	ATO Law Administration Practice Statement, <i>PSLA 2020/1 Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies</i>
<b>RDR</b>	Review and Dispute Resolution
<b>SCTR</b>	House of Representatives Standing Committee on Tax and Revenue
<b>SES</b>	Senior Executive Service
<b>TAA 1953</b>	<i>Taxation Administration Act 1953</i>
<b>TCN</b>	Tax Counsel Network
<b>Tax Official</b>	<p>The term 'tax official' is defined in section 4 of the IGT Act 2003 to mean:</p> <ul style="list-style-type: none"> <li>a. an ATO official; or</li> <li>b. a Board member of the Tax Practitioners Board; or</li> <li>c. an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the <i>Tax Agent Services Act 2009</i>; or</li> <li>d. a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or</li> <li>e. a person who:</li> <li>f. is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and</li> <li>g. receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body.</li> </ul> <p>The term 'tax official' is also used to refer to a 'taxation officer' to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.</p>



<b>Tax period</b>	<p>A tax period is defined in Division 27 of <i>A New Tax System (Goods and Services Tax) Act 1999</i>.</p> <p>For GST purposes a tax period may be a month, a quarter or a year and refers to how frequently a taxpayer or entity is required to lodge their activity statements.</p>
<b>Taxable supply</b>	<p>A taxable supply is defined in section 9-5 of <i>A New Tax System (Goods and Services Tax) Act 1999</i>:</p> <p>You make a taxable supply if:</p> <ul style="list-style-type: none"> <li>(a) you make the supply for consideration; and</li> <li>(b) the supply is made in the course or furtherance of an enterprise that you carry on; and</li> <li>(c) the supply is connected with the indirect tax zone; and</li> <li>(d) you are registered, or required to be registered.</li> </ul> <p>However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.</p>
<b>TPSG</b>	<p>Tax Practitioners Stewardship Group, an ATO consultative group with members from the ATO and the tax profession</p>



**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

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**.

## 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.<sup>[9]</sup>

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

## Executive Summary

- 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).

## Executive Summary

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.<sup>1</sup>

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.

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<sup>1</sup> 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.

## Executive Summary

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	<a href="http://www.asbfeo.gov.au/contact-us">www.asbfeo.gov.au/contact-us</a>	1300 650 460
Certified Practising Accountants	<a href="http://www.cpaaustralia.com.au/contact-us">www.cpaaustralia.com.au/contact-us</a>	1300 73 73 73
Chartered Accountants in Australia and New Zealand	<a href="mailto:taxteamau@charteredaccountantsanz.com">taxteamau@charteredaccountantsanz.com</a>	1300 137 322
Institute of Public Accountants	<a href="http://www.publicaccountants.org.au/about/contact-us">www.publicaccountants.org.au/about/contact-us</a>	(03) 8665 3100
The Tax Institute	<a href="http://www.taxinstitute.com.au/footer/contact-us">www.taxinstitute.com.au/footer/contact-us</a>	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

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 255-10<sup>2</sup> 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 1953<sup>3</sup> which was introduced by the *A New Tax System (Tax Administration) Act 1999* and commenced from 1 July 2000.

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<sup>2</sup> Set out in Appendix B

<sup>3</sup> Refer Appendix B

## 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 Rules<sup>4</sup> 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**’.

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

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

# 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

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

exceptional circumstances (the ATO-specified circumstances listed above) applies.<sup>5</sup> 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."<sup>6</sup>

## 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
<b>Case 1</b> <b>The complainant, who is legally blind, mistakenly applied for JobSeeker payments through Centrelink</b>	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).
<b>Case 2</b> <b>The tax agent advised that the JobKeeper enrolment notification had been delayed due to the serious illness of a family member and staff shortages.</b>	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).
<b>Case 3</b> <b>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</b>	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.

<sup>5</sup> ATO internal communication, 13 August 2020.

<sup>6</sup> 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.		
<b>Case 4</b>		
<b>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.</b>	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.
<b>Case 5</b>		
<b>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 being cancelled due to the pandemic. He was not aware of his eligibility for JobKeeper until his return to Australia.</b>	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.
<b>Case 6</b>		
<b>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.</b>	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

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

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).<sup>7</sup>

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 PS LA 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."<sup>8</sup>

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.<sup>9</sup> 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.

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

<sup>8</sup> ATO communication to IGTO, 3 March 2021.

<sup>9</sup> 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 2021<sup>10</sup> 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 –

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<sup>10</sup> 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 2020/002 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,
  - o add a note to the inbound phone activity including eligibility has been met for JobKeeper or JobKeeper extension (or both)
  - o update the activity with the following classifications
    - Capability: Operations
    - Category: Processing
    - Type: JobKeeper deferral
  - o 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.

  - o 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]

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

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:<sup>11</sup>

**"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]**

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<sup>11</sup> ATO internal communication, 13 August 2020.

## 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 unclear<sup>12</sup> - see **Appendix L: JobKeeper Discussion on a Bookkeeper's Facebook Group dated 12 August 2020**.

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<sup>12</sup> 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.



## Appendix A — Glossary and Defined terms

Abbreviation	Defined term
ATO	Australian Taxation Office
Commissioner	Commissioner of Taxation
Complaint	<p>A complaint is defined AS/NZS 10002:2014 Guidelines for complaint management in organizations</p> <p><i>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</i></p> <p><i>Disputes - Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback - Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.</i></p>
EM	Explanatory Memorandum to the A New Tax System (Tax Administration Act (No. 2) 2000
IGT Act 2003	<i>Inspector-General of Taxation Act 2003</i>
IGTO	Inspector-General of Taxation and Taxation Ombudsman.
PS LA 2011/15	Practice Statement Law Administration PS LA 2011/15 <i>Lodgment obligations, due dates and deferrals</i>
Rules	<i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i>
TAA 1953	<i>Taxation Administration Act 1953</i>

## Appendix B — Section 255-10 of the TAA Act 1953

### 255-10 To defer the payment time

#### Deferrals for particular taxpayers

- (1) The Commissioner may, having regard to the circumstances of your particular case, defer the time at which an amount of a \*tax-related liability is, or would become, due and payable by you (whether or not the liability has already arisen). If the Commissioner does so, that time is varied accordingly.

Note: General interest charge or any other relevant penalty, if applicable for any unpaid amount of the liability, will begin to accrue from the time as varied. See, for example, paragraph 5-15(a) of the Income Tax Assessment Act 1997.

- (2) The Commissioner must do so by written notice given to you.

#### Deferrals for classes of taxpayers

- (2A) The Commissioner, having regard to the circumstances of the case, may, by notice published on the Australian Taxation Office website, defer the time at which amounts of \*tax-related liabilities are, or would become, due and payable by a class of taxpayers (whether or not the liabilities have already arisen).

- (2B) If the Commissioner does so, that time is varied accordingly.

Note: General interest charge and any other relevant penalties, if applicable for any unpaid amounts of the liabilities, will begin to accrue from the time as varied. See, for example, paragraph 5-15(a) of the Income Tax Assessment Act 1997.

- (2C) A notice published under subsection (2A) is not a legislative instrument.

#### Deferral does not affect time for giving form

- (3) A deferral under this section does not defer the time for giving an \*approved form to the Commissioner.

Note: Section 388-55 allows the Commissioner to defer the time for giving an approved form.

## ***PS LA 2011/15 - Lodgment obligations, due dates and deferrals***

! This cover sheet is provided for information only. It does not form part of *PS LA 2011/15 - Lodgment obligations, due dates and deferrals*

! This document has changed over time. This version was published on *20 May 2011*

*Other obligations*

131. With one exception, where a person<sup>90</sup> gives a TFN declaration to a payer, this must be lodged with the Commissioner within 14 days of the declaration being made.<sup>91</sup> The exception is where the payer is a labour hire firm and the payee has not commenced work.
132. For each financial year, investment bodies must give the Commissioner a written report in relation to all investments in the investment body (Annual Investment Income Report). The report must be lodged within four months after the end of the financial year; that is, 31 October following a financial year ending 30 June.<sup>92</sup>
133. An obligation to lodge a Petroleum Resource Rent Tax annual return arises where a person derives assessable receipts in relation to a petroleum project.<sup>93</sup> The due date for lodgment of an annual return is 60 days after the end of the year of tax in which a person derives the assessable receipts for financial years commencing on or after 1 July 2006<sup>94</sup> and 42 days after the end of the year of tax for previous years.

*Elections*

134. Eligible entities may elect to pay PAYG instalments annually. Entities must make an election to report annually by the date on which the first quarterly instalment would otherwise be due<sup>95</sup> – generally 28 October.
135. Eligible entities will be able to elect to pay GST by instalments. This election generally must be made on or before 28 October of the financial year to which it relates.<sup>96</sup> The election is usually made on the first quarterly activity statement in the income year (or the first quarterly activity statement issued after eligibility criteria are met).
136. Those entities that are eligible to report and pay, or claim a refund of, GST annually (that is, elect annual tax periods) must make an election by the due date. Annual GST tax period elections are generally due:<sup>97</sup>
  - for quarterly reporters, on or before 28 October in the financial year to which it relates, or
  - for monthly reporters, on or before 21 August in the financial year.
137. New GST registrants will be allowed up to six months from the date of effect of their GST registration to elect the annual GST option if this is later than the dates above.
138. The Commissioner may accept elections after the due date in certain circumstances.

**Deferring lodgment obligations**

139. At times, entities may experience circumstances that prevent them from lodging by the due date. The law generally allows the Commissioner to defer the time for lodgment of an approved form and a prescribed form.

<sup>90</sup> Section 202A of the ITAA 1936.

<sup>91</sup> Section 202CD of the ITAA 1936.

<sup>92</sup> Sub-regulation 56(3) of the *Income Tax Regulations 1936*.

<sup>93</sup> Section 59 of the *Petroleum Resource Rent Tax Assessment Act 1987* (PRRTAA).

<sup>94</sup> Section 82 of the PRRTAA.

<sup>95</sup> Subsection 45-140(2).

<sup>96</sup> Section 162-25 of the GST Act.

<sup>97</sup> Section 151-20 of the GST Act.

140. Subsection 388-55(1) provides the Commissioner with the discretionary power to defer the time within which an approved form is to be given to the Commissioner or another entity.
141. The existence of this discretion does not mean that the entity has an entitlement to it being exercised, but it does enable the time for lodgment to be deferred where warranted.
142. The Commissioner will generally grant a deferral where it is fair and reasonable to do so having taken into account all of the material facts. This approach seeks to achieve a balance between the Commissioner's obligation to administer tax law consistently and to do so fairly having regard to the relevant circumstances.
143. The purpose of deferring the due date for lodgment is to facilitate the lodgment of forms by entities (or their representatives) that are unable to be lodged by the due date but have the ability or potential to lodge at a particular time in the future. Deferring the due date for lodgment provides a further period of time in which to lodge without incurring an FTL penalty or other administrative penalties and provides the Commissioner with an alternative to undertaking further compliance action.
144. A deferral of time to lodge does not defer the time for payment.<sup>98</sup> However, the Commissioner does have power under a separate provision to defer the time for payment of a tax-related debt.<sup>99</sup> Refer to PS LA 2011/14 General debt collection powers and principles.
145. Where possible, a lodgment deferral request should be made before the lodgment due date. A request may be made by telephone, but in some cases it may be necessary to apply in writing to assist the Commissioner to make a more informed decision. Requests by registered agents will generally need to be in writing. The preferred method for receiving deferral requests made by registered agents is through the Tax Agent Portal or the BAS Agent Portal.
146. In any request for a deferral of the due date to lodge a form, an entity or the entity's representative will need to:
- provide details of the particular circumstances that make them unable to lodge on time
  - propose a deferred date for lodgment, and
  - give an assurance that future obligations will be met on time once the stated circumstances are resolved.
147. In determining whether it is fair and reasonable to grant a deferral the Commissioner will consider:
- the reason why the entity or their representative is unable to lodge on time
  - the value of the information contained in the form
  - the size and structure of the entity (large corporate entities are more likely to have the ability to overcome circumstances that might otherwise adversely affect their ability to lodge by the due date)
  - the risk to revenue

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<sup>98</sup> Subsection 388-55(2).

<sup>99</sup> Section 255-10.

- the entity's compliance history as a whole (that is lodgment of taxation returns, activity statements and other forms, payment of amounts on time and previous dealings with the Commissioner, to gain a view of the entity's level of compliance)
  - the length of time needed to lodge the form (a deferral will usually be granted where an entity has good compliance history and requests a short period of additional time to lodge a form), and
  - any other relevant information.
148. Each request will be considered on its merits and the deferred due date will be determined having regard to the particular circumstances of the entity.
149. If a lodgment deferral is granted it is done so on a short term basis to allow time to overcome problems preventing the lodgement of the relevant form. Lodgment deferrals will not be extended on a permanent basis.

***Exceptional or unforeseen circumstances***

150. The Commissioner will generally consider it fair and reasonable to grant a deferral where the inability to lodge by the due date is reasonably attributed to exceptional or unforeseen circumstances, such as:
- natural disasters (flood, fire, drought, cyclones, earthquake and similar events) or other disasters or events that may have, or have had, a significant impact on an entity, region or particular industry or grouping of entities
  - the serious illness or death of the individual or their representative
  - impeded access to records (for example, records seized during a police search or retained as evidence in a court matter)
  - the advanced age or the youth of an individual, the serious illness or death of a family member or a problem due to language difficulties.
151. A deferral can 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, where an individual's length partners or beneficiaries of a partnership or trust cannot influence the preparation timeframe of the main return.
152. 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.

***Other circumstances***

153. In circumstances such as an individual being overseas or away from home the individual should, where possible, make arrangements to deal with their taxation affairs either before or during their absence. Where an individual is absent at the time of normal bulk activity statement generation, it may be possible to generate an activity statement in advance so that the individual can meet lodgment and payment obligations on time.
154. If an entity presents a lodgment deferral proposal that is either unacceptable or has some aspects that are unacceptable to the Commissioner, a more suitable arrangement may be negotiated.

155. Where fraudulent alterations made by an entity's representative without the authority of the entity are detected in a form already lodged, the Commissioner will generally advise the entity of the requirement to lodge a fresh form. The due date for lodgment of this form will be deferred for 30 days from the date of the advice from the Commissioner. A longer deferral period may be granted, if requested, depending on the entity's circumstances.

### ***Collective deferrals***

156. Deferrals may be granted to a class of entities affected by a common event such as bushfire or delayed legislation. Where the Commissioner can reasonably assume that a common event has sufficiently impacted on all of a defined population, a deferral may be granted without individual applications being made by the entities involved. For example, where industrial instruments prevent employees of schools and associated bodies from working over the Christmas holiday shutdown period, deferrals may be granted to all entities affected in this way.

### ***New legislative measures***

157. On occasions, the Australian Government may announce new legislative measures that will have retrospective application once enabling legislation is enacted. The general approach of the Commissioner to administering retrospective changes is to apply the existing law until the proposed changes are enacted. The Commissioner cannot insist on the application of a proposed law that has the effect of increasing entities' liabilities or of paying money to entities where there is no legal basis. However, the tax law allows the Commissioner to accept returns as lodged. PS LA 2004/6 Tax Office role in providing information or advice on the potential application of announced changes to the tax law, or where legislative change is contemplated but not announced, discusses the limited situations in which the Commissioner may advise entities that they can satisfy their obligations by anticipating the effects of a proposed legislative change. These decisions are not taken lightly and must be defensible having regard to the *Financial Management and Accountability Act 1997*.
158. In limited circumstances, it may be appropriate to grant a general deferral of the due date for lodgment. Generally, however, the fact that a new legislative measure will have retrospective application but has not been enacted will not be sufficient for a deferral of the due date for lodgment.

### ***Labour hire firms***

159. Labour hire firms and recruitment agencies acting in the capacity of a labour hire firm, are given a deferral for lodgment of TFN declarations. These firms are required to forward TFN declarations to the Commissioner within 14 days from the commencement of the relationship, that is, from when the payee actually commences working for the payer (the labour hire firm), and not from the date the payee has made the declaration. This is because the labour hire firm will usually have the payee complete a TFN declaration at the time of registering with the labour hire firm (for convenience only), but the payee may not commence a working relationship until a substantial time later, if at all.



# **Coronavirus Economic Response Package (Payments and Benefits) Rules 2020**

made under subsection 20(1) of the

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

## **Compilation No. 9**

**Compilation date:** 25 March 2021

**Includes amendments up to:** F2021L00305

**Registered:** 30 March 2021

Prepared by the Office of Parliamentary Counsel, Canberra



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**Division 2—Entitlement based on paid employees****6 Employer's entitlement to jobkeeper payment for an employee**

- (1) An entity (the **employer**) is entitled to a jobkeeper payment for an individual for a fortnight if:
- (a) the fortnight is a jobkeeper fortnight (see subsection (5)); and
  - (b) the employer qualifies for the jobkeeper scheme for the fortnight (see section 7); and
  - (c) the individual is an eligible employee of the employer for the fortnight (see section 9); and
  - (d) the employer has satisfied the wage condition in section 10 in respect of the individual for the fortnight; and
  - (e) the employer has notified the Commissioner in the approved form at or before the time referred to in subsection (2) that the employer elects to participate in the jobkeeper scheme; and
  - (f) the employer has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form; and
  - (fa) for a jobkeeper fortnight beginning on or after 28 September 2020—the employer has notified the Commissioner in the approved form as to whether the higher rate or the lower rate applies to the individual (see section 9A); and
  - (g) the employer has not notified the Commissioner in the approved form that the employer no longer wishes to participate in the jobkeeper scheme.

Note 1: Some provisions of the Act also affect whether an entity is entitled to a jobkeeper payment: see section 14 of the Act (about record keeping) and section 19 of the Act (about contrived schemes).

Note 2: The approved form may require further information: see paragraph 388-50(1)(c) in Schedule 1 to the *Taxation Administration Act 1953*.

- (2) For the purposes of paragraph (1)(e), the time at or before which the employer must notify the Commissioner that the employer elects to participate in the jobkeeper scheme is:
- (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.

Note 1: The Commissioner may defer the time for giving an approved form: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

Note 2: See section 10A of this instrument for requirements that apply if an employer notifies the Commissioner that the employer elects to participate in the jobkeeper scheme.

**Part 2** Jobkeeper payment**Division 2** Entitlement based on paid employees**Section 7**

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*No other entity to be entitled for the same individual for a fortnight*

- (3) An entity cannot be entitled under this section to a jobkeeper payment for an individual for a fortnight if another entity is entitled under this section or section 11 or 12A to a jobkeeper payment for the individual for the fortnight.

*Employer must notify individual*

- (4) An employer must notify an individual in writing within 7 days of giving the Commissioner details of the individual under paragraph (1)(f).
- (4A) An employer must notify an individual in writing within 7 days of giving the Commissioner a notice under paragraph 6(1)(fa) in respect of the individual. The notice must state whether the rate notified to the Commissioner under that paragraph was the higher rate or the lower rate.

*Meaning of **jobkeeper fortnight***

- (5) Each of the following is a **jobkeeper fortnight**:
- (a) the fortnight beginning on 30 March 2020;
  - (b) each subsequent fortnight, ending with the fortnight ending on 28 March 2021.

**7 When an entity qualifies for the jobkeeper scheme**

- (1) For the purposes of paragraphs 6(1)(b), 11(1)(c) and 12A(1)(c), an entity qualifies for the jobkeeper scheme for a jobkeeper fortnight if:
- (a) on 1 March 2020, the entity:
    - (i) carried on a business in Australia; or
    - (ii) was a non-profit body that pursued its objectives principally in Australia; or
    - (iii) was a deductible gift recipient that was, or operated, a public fund covered by item 9.1.1 or 9.1.2 of the table in subsection 30-80(1) of the *Income Tax Assessment Act 1997* (international affairs deductible gift recipients); and
  - (b) the entity has satisfied the decline in turnover test at or before the end of the fortnight (see sections 8 and 8A); and
  - (c) for a fortnight beginning on or after 28 September 2020—the entity also satisfies the actual decline in turnover test (see section 8B) for the fortnight.

Note: Qualifying entities must report monthly turnover information to the Commissioner for the duration of the scheme: see section 16.

*Exceptions*

- (2) However, an entity does *not* qualify for the jobkeeper scheme for a jobkeeper fortnight if:
- (a) an amount of levy under the *Major Bank Levy Act 2017* was imposed for any quarter ending before 1 March 2020 on:

**Division 3—Entitlement based on business participation****11 Entity's entitlement to jobkeeper payment for a business participant**

- (1) An entity is entitled to a jobkeeper payment for an individual for a fortnight if:
- (a) the fortnight is a jobkeeper fortnight (see subsection 6(5)); and
  - (b) the entity is not a non-profit body; and
  - (ba) the entity is not the approved provider of an approved child care service; and
  - (c) the entity qualifies for the jobkeeper scheme for the fortnight (see section 7); and
  - (d) the individual is the eligible business participant for the entity for the fortnight (see section 12); and
  - (e) the entity has notified the Commissioner in the approved form at or before the time referred to in subsection (2) that the entity elects to participate in the jobkeeper scheme; and
  - (f) the entity has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form; and
  - (fa) for a jobkeeper fortnight beginning on or after 28 September 2020—the entity has notified the Commissioner in the approved form as to whether the higher rate or the lower rate applies to the individual (see section 12AA); and
  - (g) the entity has not notified the Commissioner in the approved form that the entity no longer wishes to participate in the jobkeeper scheme.

Note 1: Some provisions of the Act also affect whether an entity is entitled to a jobkeeper payment: see section 14 of the Act (about record keeping) and section 19 of the Act (about contrived schemes).

Note 2: The approved form may require further information: see paragraph 388-50(1)(c) in Schedule 1 to the *Taxation Administration Act 1953*.

- (2) For the purposes of paragraph (1)(e), the time at or before which the entity must notify the Commissioner that the entity elects to participate in the jobkeeper scheme is:
- (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 another fortnight—the end of the fortnight.

Note: The Commissioner may defer the time for giving an approved form: see section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*.

*Only one eligible business participant per entity*

- (3) An entity cannot be entitled under this section to a jobkeeper payment for more than one individual (whether for the same fortnight or a different fortnight).

**Part 2** Jobkeeper payment**Division 3** Entitlement based on business participation**Section 12**

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*No other entity to be entitled for the same individual for a fortnight*

- (4) An entity cannot be entitled under this section to a jobkeeper payment for an individual for a fortnight if another entity is entitled under this section or section 6 or 12A to a jobkeeper payment for the individual for the fortnight.

*Entity must notify individual*

- (5) Unless the entity is a sole trader, the entity must notify an individual in writing within 7 days of giving the Commissioner details of the individual under paragraph (1)(f).

Note: In the case of a sole trader, the entity and the individual are the same: see item 1 of the table in subsection 12(2).

- (5A) Unless the entity is a sole trader, the entity must notify an individual in writing within 7 days of giving the Commissioner a notice under paragraph 11(1)(fa) in respect of the individual. The notice must state whether the rate notified to the Commissioner under that paragraph was the higher rate or the lower rate.

*Integrity rule*

- (6) An entity is *not* entitled to a jobkeeper payment under this section unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.
- (7) For the purposes of subsection (6), the requirement in this subsection is satisfied if:
- (a) an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business; and
  - (b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.
- (8) For the purposes of subsection (6), the requirement in this subsection is satisfied if:
- (a) the entity made a taxable supply in a tax period that applied to it that:
    - (i) started on or after 1 July 2018; and
    - (ii) ended before 12 March 2020; and
  - (b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.
- (9) For the purposes of subsection (8), in determining whether the entity made a supply (within the meaning of the GST Act) that is a taxable supply:
- (a) assume that the entity is registered (within the meaning of that Act); and
  - (b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act); and
  - (c) for an entity carrying on business solely in the external Territories—assume that the external Territories are part of the indirect tax zone (within the meaning of that Act).

**EXPLANATORY STATEMENT****Issued by authority of the Treasurer**

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

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

Subsection 20(1) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act) provides that the Treasurer may make rules prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 7(1) of the Act provides that the rules may make provision for and in relation to one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period (the period between 1 March 2020 and 31 December 2020), and the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme. Any payments must relate to the prescribed period – the period from 1 March 2020 to 31 December 2020. However, payments under the JobKeeper scheme can only be made after the commencement of both the Act and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) that provide for payments – earlier events within the period may affect entitlement to a payment but all payments must be made prospectively.

The object of the Act is to provide financial support to entities to assist with the impact of the Coronavirus known as COVID-19. In particular, the Act establishes a framework for the Treasurer to make rules about one or more kinds of payments to an entity in respect of a prescribed period.

On 30 March 2020, the Australian Government announced a wage subsidy called the JobKeeper payment for entities that have been significantly affected by the economic impacts of the Coronavirus.

The purpose of the Rules is to establish the JobKeeper payment scheme and specify details about the scheme, including:

- the start and end date of the scheme;
- when an employer or business is entitled to a payment;
- the amount and timing of a payment; and
- other matters relevant to the administration of the payment.

The Rules specify that the JobKeeper payment is available in fortnightly periods between 30 March 2020 and 27 September 2020 – a period of 26 weeks.

A business that is entitled to the JobKeeper payment will receive a fixed payment of \$1,500 per fortnight per eligible employee. The payment must have already been passed on to the eligible employee in full. The payment provides the equivalent of approximately 70 per cent of the national median wage. In addition a business may be entitled to the JobKeeper payment for the business owner or a nominated owner regardless of whether the business has eligible employees.

For all subsequent JobKeeper fortnights, the employer will need to notify the Commissioner of the employer's election to participate in the scheme before the end of the particular fortnight.

Under section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*, the Commissioner may also defer the timing for giving information in an approved form. Employers that have difficulty meeting the timing requirements may seek such a deferral from the Commissioner.

*The employer has not withdrawn their election to participate*

An employer is not entitled to the JobKeeper payment if they notify the Commissioner that they no longer wish to participate in the JobKeeper scheme. This notification must be made in the form approved by the Commissioner. An employer does not need to consult with or obtain the consent of its eligible employees if it no longer wishes to participate in the JobKeeper scheme.

*The employer must provide information about eligible employees and the wage condition*

To be entitled to a JobKeeper payment for a fortnight, the employer must have provided the following information to the Commissioner in the approved form:

- the details of each eligible employee; and
- other information about their entitlement to the JobKeeper payment.

It is anticipated that the Commissioner may require the following details for each eligible employee in the approved form:

- the name of the employee;
- the type of the employee's employment; and
- the employee's citizenship or residency status.

Once an employer has provided details of its eligible employees to the Commissioner, the employer must also notify each eligible employee within 7 days. This requirement is intended to keep eligible employees informed about the process.

If the information provided to the Commissioner does not subsequently change in the following JobKeeper fortnights, an employer is not required to provide the same information to the Commissioner again. However, where there is a change of circumstances – for example, a person who was an eligible employee for the previous JobKeeper fortnight is no longer an eligible employee for the relevant JobKeeper fortnight – the employer must notify the Commissioner of this in the approved form before the end of the relevant JobKeeper fortnight to satisfy the notification requirements for entitlement to a payment for that fortnight.

*Only one employer is entitled to JobKeeper payment for a person*

An entity is not entitled to the JobKeeper payment for an individual who is an employee (or business owner) if another employer is entitled (either as an employer or as a business owner) to a JobKeeper payment for the individual.





Australian Government  
Australian Taxation Office

IGT reference number: [REDACTED]

ATO reference number: [REDACTED]

05 February 2021

Dear Robyn,

With reference to your referral of IGT0 complaint reference number: [REDACTED] please consider the following information.

1. Provide written reasons for the decision that was made, including the criteria for the exercise of the discretion and what considerations were taken into account

Based on the circumstances the BAS agent provided to explain why the client did not register for JobKeeper in an earlier month, the client did not meet the exceptional circumstances for the deferral request to be granted. The exceptional circumstances for deferral requests are:

- natural disasters – how was the client prevented from enrolling on time or contacting the ATO earlier
- impeded access to records – how was access impeded and/or what about the impeded access prevented the client from enrolling on time or contacting the ATO earlier
- serious illness or death – when did the illness happen and/or what prevented the client or their representative from contacting the ATO for assistance
- system issues – specifying the nature and duration of the problem, what had been done to resolve the issue and/or when they first contacted the ATO to seek assistance

Initial contact from the BAS agent [REDACTED] was made on 7 August 2020, refer to activity ID: [REDACTED]. The Call Centre representative applied the exceptional circumstances to the reasons the BAS agent provided why the client did not register for JobKeeper at an earlier date. This resulted in the deferral request not being granted. The BAS agent subsequently lodged a complaint.

During the complaint, the exceptional circumstances applied to the client's situation were provided to the BAS agent on 12 August 2020. Refer to complaint activity ID [REDACTED] created on 10 August 2020, see Note ID: [REDACTED]

2. Provide an explanation of what (if any) review rights are available to the complainant's client.

If the client does not agree with the decision to not grant the deferral request, the client can apply to the Federal Court of the Federal Circuit Court of Australia for a review under the Administrative Decisions (Judicial Review) Act 1977. The application must be lodged within 28 days. Clients can be directed to our website [www.ato.gov.au](http://www.ato.gov.au) and advised to search for "Federal Court". Or you can input into the search field webpage reference "QC 33829".

3. Did a change to deferral request policy occur?

At the start of August, the deferral request policy for JobKeeper had changed. We ceasing providing extended dates for clients to lodge their deferral requests. The exceptional circumstances that were considered were tightened. The exceptional circumstances stated above are the ones that have been applied since August.

If you have any questions or would like to discuss this matter further, please do not hesitate to contact [REDACTED].

Regards

[REDACTED]

ATO Complaints and External Review

[REDACTED]



**JobKeeper Practice Note 2020/002**

ATO practice statements should be the primary reference and basis for decisions. However, in some cases practice notes may be the only source of information. For example, where a practice note outlines policy which has not yet been included in a practice statement, or where the guidance is of a non-tax technical nature.

The practice note system has been adopted across the ATO to deliver business line-specific policies and practices. They have become an important component of the ATO governance framework, as outlined in the [ATO Policy Framework and Requirements](#).

*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.<sup>1</sup>*

This practice note is intended as a guide for ATO staff only and may not be relied upon by taxpayers if released publicly.

**Extension of time request to lodge approved forms****1. Background**

The Government's JobKeeper payment scheme supports businesses and their employees who have been significantly affected by the coronavirus to help keep more Australians in jobs.

Under the JobKeeper payment scheme, businesses impacted by the coronavirus outbreak are able to access a subsidy from the government to assist with the cost of wages paid to their employees. Affected employers, businesses and registered religious institutions, are able to claim a fortnightly JobKeeper payment per eligible employee, per eligible religious practitioner, or for one eligible business participant. These payments can be claimed for fortnights from 30 March 2020 to the end of the JobKeeper scheme.

To be eligible for the JobKeeper payment, an employer must provide the Commissioner with certain required information in the approved form by a due date. Sections 6(1)(e) and 11(1)(e) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) require employers or business participants to provide to the Commissioner an election to participate. Sections 6(2) and 11(2) provide the deadline for that election to be given. Generally, this is at or before the end of the first fortnight for which the employer is electing to claim, however the Commissioner has extended the due dates for enrolment for the JobKeeper fortnights. See Attachment A for a list of the approved deferred due dates for enrolment in order to claim for the JobKeeper fortnights and any further deferral will be from these due dates.

This practice note is limited in scope to deferral of the approved form for JobKeeper enrolment and does not cover the deferment of other JobKeeper dates (such as the date by which the wage condition in section 6(1)(d) of the Rules must be satisfied).

**2. Issue**

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<sup>1</sup> Service Delivery Practice Note 2003-001.

This practice note provides guidance to staff on how to respond to enquiries from businesses requesting that the Commissioner allow an extension of time to lodge an approved form for the purposes of JobKeeper participation.

### 3. Policy

The coronavirus outbreak is a special circumstance which impacts businesses. In certain limited circumstances, it may be reasonable for the Commissioner to exercise discretions to allow approved forms to be lodged after the due date to facilitate claiming of the JobKeeper payments.

### 4. Practice

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<sup>2</sup>.

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;
- the scheme is only of a short duration.

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

- 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<sup>3</sup>.

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

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. If an employer has met the payment conditions for the relevant JobKeeper fortnights for which they are seeking a payment under the JobKeeper scheme, the request for deferral can be considered.

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<sup>2</sup> Paragraph 45 of *PSLA 2011/15: Lodgment obligations, due dates and deferrals*

<sup>3</sup> Paragraph 48

Any deferral of the enrolment date for an employer is so that they are able to claim for JobKeeper fortnights that have occurred in the previous month. Employers who request a deferral will need to confirm that they have met the minimum payment conditions<sup>4</sup> for all their eligible employees for the relevant JobKeeper fortnights before a deferral is granted, otherwise it may facilitate claims for JobKeeper payments which they will not be entitled to claim<sup>5</sup>.

## 5. Time for making the application

Applications for deferment should ordinarily be made before the due date. However, we accept that the coronavirus outbreak is a special circumstance and many applications will not be made by that deadline. Therefore, it is permissible for applications to be made after the due date. Regardless of when the deferral application is made, the agreed deferral period begins from the first business day after the due date.

## 6. Staff authorised to grant the lodgment deferral

There are limits which apply to the authorisation of ATO officers making deferral decisions. Additionally, 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. The limits for deferral of JobKeeper approved forms are:

Level	APS 1	APS 2	APS 3	APS 4	APS 5	APS 6	EL 1	EL 2	SES
Maximum Adjustment Period:	14 business days	14 business days	14 business days	14 business days	14 business days	14 business days	14 business days	14 business days	No Lt

## Related documents

[\*PSLA 2011/15: Lodgment obligations, due dates and deferrals\*](#)

## Need help?

If you are unsure about the application of this practice note, you should seek advice from your team leader or technical adviser in the first instance. If they are unable to provide resolution themselves, they can seek technical support from Economic Stimulus Branch – Advice & Guidance

([REDACTED] [@ato.gov.au](mailto:[REDACTED]@ato.gov.au)).

<b>Contact officer:</b>	<span style="background-color: black; color: black;">[REDACTED]</span>
<b>Phone:</b>	(02) <span style="background-color: black; color: black;">[REDACTED]</span>
<b>Date first issued:</b>	11 June 2020

<sup>4</sup> Employers must pay all their eligible employees at least the JobKeeper amount (gross salary inclusive of PAYG withholding) per JobKeeper fortnight.

<sup>5</sup> Employers can only claim for eligible employees where they have met the minimum payment requirements under the wage conditions.

<b>Date of effect:</b>	11 June 2020
<b>Date of next review:</b>	N/A
<b>Issued under the authority of:</b>	<span style="background-color: black; color: black;">[REDACTED]</span> Assistant Commissioner

**Version control**

Version	Date	Description of Change		
1.0	11 June 2020	New Practice Note		
1.1	3 September 2020	Minor amendments and extension to maximum adjustment period for staff making deferral decisions.		
1.2	1 October 2020	Update to enrolment due date for FN 20.		
1.3	16 October 2020	Update internal mailbox.		

Modified Date: 16 October 2020

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## ATTACHMENT A

## Key Dates for Job Keeper Enrolments &amp; declarations

JobKeeper Fortnight	Period relating to each JobKeeper Fortnight	Claim Month	Enrolment (Step 1)
1	30 March – 12 April	April	11 June
2	13 April – 26 April		
3	27 April – 10 May	May	11 June
4	11 May – 24 May		
5	25 May – 7 June	June	30 June
6	8 June – 21 June		
7	22 June – 5 July	July	31 July
8	6 July – 19 July		
9	20 July – 2 August	August	31 August
10	3 August – 16 August		
11	17 August – 30 August		
12	31 August – 13 September	September	30 September
13	14 September – 27 September		
14	28 September – 11 October	October	31 October
15	12 October – 25 October		
16	26 October – 8 November	November	30 November
17	9 November – 22 November		
18	23 November – 6 December	December	31 December (3 January for FN 20)
19	7 December – 20 December		
20	21 December – 3 January		
21	4 January – 17 January	January	31 January
22	18 January – 31 January		
23	1 February – 14 February	February	28 February
24	15 February – 28 February		
25	1 March – 14 March	March	31 March
26	15 March – 28 March		

This document is to be used in conjunction with the PSLA 2011/15 and the associated practice note 2020/002

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

- 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.

## Impeded access to records due to COVID lockdown in VIC

July and August - impeded access to records – COVID lockdown VIC

Prior months – case by case if they met one of the Four exceptional circumstances outlined in SMART at an earlier date

- **Service Delivery will consider COVID as an acceptable reason to grant a lodgment deferral for July and August, for clients living in Victoria under lockdown where the client advises that for only these months they were unable to see their agent or to gather required information to make the declaration.**
- **This is only exceptional if they needed to see their agent in order to provide physical records relating to JK eligibility/enrolment. Where calling or emailing the agent would be reasonable alternative discretion would not be granted.**
- If reason given is COVID alone, deferral for prior months will not be considered. There must be a circumstance that impacted the client being able to enrol on time. For example, because of the lockdown I am unable to access my financial data stored on my business computer, my business premises is outside the 5km radius I am allowed to travel and I don't have remote access from my home.

**Where an ATO staff member has taken incorrect action on an account or provided incorrect information, in the below scenarios we would accept a lodgment deferral.**

- If an ATO staff member incorrectly keyed a monthly form and the client has received any JobKeeper funds this is considered an ATO error. Where a prior month has been incorrectly keyed, the client remains enrolled for all later months - no lodgment deferral is required however, the client is still required to satisfy all the eligibility criteria each month to be entitled to receive JobKeeper payment.
- Where an ATO staff member has incorrectly advised a client they were not eligible for Job Keeper and the client has subsequently been found eligible and wants to backdate their JobKeeper application this an appropriate reason to allow late enrolment back to the date of the incorrect advice. Evidence of the previous advice would need to be confirmed. For example, client calls ATO in April and is told they are not eligible (case note recorded) and do not enrol. Later the client visits a TAG who helps them determine they are eligible; the client enrolls and wishes to backdate. The case note provides evidence of the previous advice and ECP tool should be used to confirm eligibility (unless confirmed by subsequent ATO advice).

## Advice provided where a deferral should not be granted.

- Client/Agent advises they were waiting for turnover to dip before applying
- Client/Agent was waiting until they worked out actual turnover to apply.
- **The JobKeeper rules allow clients to make a projection of turnover for the purpose of the decline in turnover test and as such clients are not obliged to wait for actual turnover figures to enrol – our public facing online reference material, and the portals, reflect this.**
- **From September 28<sup>th</sup>, actual turnover is required.**

## Tax Agent related reasons for not lodging on time that should not be considered for a deferral:

- Changing from one agent to another – unless the client has evidence of being unable to obtain records for the new agent evidenced by change in TAN associated to client record (in which case would be impeded access to records)
- Agent provided incorrect advice that client was not eligible
- New agent or bookkeeper has determined client was eligible however no previous contact with the ATO
- Client did not know they were eligible until they saw their agent – current month only
- Agent has just finished tidying up client books and found client was eligible – current month only
- Client's agent passed away **but** client did not attempt to contact ATO/significant time passed until client found another agent. For example, TAG passed away in March and client contacted ATO in September wanting late enrolment back to April.
- Agent advised client was stuck overseas and backdate until April – if overseas and an EBP they would not be actively engaged in business and not eligible.
- Agents with new clients due to issues with previous agent – current month only

## Reasonable basis to exercise discretion outside of the 4 limited exception 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. 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).

## Additional Guidance

### Serious Illness

How far is the scope? Does it need to be a direct family member?

Deferral to be assessed on all of the circumstances.

#### Under the exceptional circumstance Serious Illness:

Where a client advises death of a family member OR a person at a tax agent office, we will accept these on face value for all of the months being requested. This is so we are ensuring our clients are being looked after and also supporting our commitment to the staff experience .

Mental Illness and affected by Cancer – these requests also fall into the above criteria.

### Natural Disaster

Siebel indicator is enough to evidence impacted by natural disaster but there needs to be information around how the natural disaster caused them not to enrol in earlier months – ie why did they not apply earlier. COVID alone is not sufficient.

### System Issues

Not sufficient if the client/agent had ongoing issues (eg patchy nbn) from April with no contact to the ATO until months later (asking in September for enrolment back to April). The system issue needs to be proximate to the enrolment due date and should also be proximate to the client contacting the ATO.

Where the client/agent advises system issues and there is evidence of prior contact to the ATO then it can be considered.

### Impeded access to records

Going through a divorce and ex-partner denied access to records – not acceptable unless the client can provide evidence.

Overseas and could not access records – to be assessed on a case by case basis however an ABP needs to be actively engaged in the business each fortnight. If they are overseas, they would not be.

Content current at 26/10/20



# JobKeeper form deferral requests

## Background

This page provides:

- instructions when assisting clients who have not enrolled for JobKeeper by the legislated or extended due date
- the conditions a deferral may be granted, and
- the process to follow based on Authorisations to grant the deferral.

**!** If you receive an escalation as part of the **Plus one** team, establish PORO if not already completed and proceed to **Eligibility for deferral**.

**!** Deferral consideration is only required if the client has **not** lodged the enrolment form by the due date for the fortnights being claimed.

There is no requirement to consider a deferral for lodgment of the monthly declaration. However, clients should be encouraged to lodge their monthly declaration by the due date so there are no delays to payment of JobKeeper amounts.

## Recent updates

04/05/2021	Added link in Scenarios to Apted FFC decision page content. Removed 'impeded access to records' from eligibility for deferral.	Case Id: [REDACTED]
01/05/2021	Updates: <ul style="list-style-type: none"> <li>• Removed 'system issues' as a circumstance at step 1 under 'Eligibility for deferral' heading</li> <li>• Changed 'Assigned To:' to ENTERPRISE_Q, under 'Actioning deferral requests (Plus One team only)' heading, step 8 and step 10.</li> </ul>	Case Id: [REDACTED]
21/04/2021	Added: <ul style="list-style-type: none"> <li>• Warning Alert under 'Eligibility for deferral' heading, to advise Plus One team only</li> <li>• (Plus One team only) as a part of 'Actioning deferral requests' heading.</li> </ul>	Case Id: [REDACTED]

# Checks

## PORO

Establish [PORO](#).

### Confirm client ineligible to enrol

Step	Action
1	Open <a href="#">ECP</a> .
2	Type the client's <ul style="list-style-type: none"> <li>• TFN</li> <li>• ABN, or</li> <li>• Name.</li> </ul>
3	<a href="#">Set up the JobKeeper enrolment exclusion tool</a> .
4	Determine if the client meets any of the exclusion checks. If there are no exclusions, ECP will display 'There are no details for this entity'.

To claim JobKeeper payments, an entity must satisfy certain eligibility requirements. As a sole trader, you are an eligible entity if:

- on 1 March 2020, you carried on a business in Australia
- you satisfy the relevant decline in turnover tests
- you satisfied certain conditions at 12 March 2020, being
  - you had an ABN on 12 March 2020, and
  - you had lodged, on or before 12 March 2020, at least one of
    - a 2018–19 income tax return showing an amount included in your assessable income for carrying on a business, or
    - an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing you made a taxable, GST-free or input-taxed sale.

For additional eligibility information, refer to the **Employers** section of the [JobKeeper Payment](#) page for information about eligibility.

## Enrolment status

Determine if the client has lodged an enrolment form (JobKeeper FID form), by the due date, for the month they are attempting to claim. Refer to [JobKeeper dates and Authorisations](#).

If **yes**, no deferral is required. Assist the client by encouraging them to self serve or complete the relevant forms for them, if they are unable to. Refer to [JobKeeper payment](#) page.

## Wage condition has been met

Ensure the client is eligible for JobKeeper before considering a deferral. Determine if the client is claiming as an employer or an eligible business participant. If the client is an:

- employer, confirm the client has paid their eligible employees a minimum of:

- \$1500 per fortnight, for fortnights **prior** to 28 September 2020
- the relevant [payment tier](#) amount for JobKeeper extension periods
- If:
  - **yes**, proceed to **Active compliance case**
  - **no**, the business is not eligible for the deferral. Discuss eligibility requirements for submitting for future months. Refer to [COVID-19 – JobKeeper Payment](#) for the relevant information to assist the client
- eligible business participant (including a sole trader), proceed to **Active compliance case**

## Active compliance case

Before making any changes to JobKeeper forms, go to [Further validation on JobKeeper forms](#) to check if an active Compliance Activity exists. No deferral should be granted if there is an open compliance activity on the account or where the client has been deemed ineligible for JobKeeper.

## Scenarios

### Apted - Full Federal Court decision

Refer to [Apted decision - Jobkeeper payment](#) for any client enquiries regarding this matter and their eligibility for JobKeeper.

# Procedure Steps

## Before you begin

If the client...	Then...
wants to enrol for JobKeeper	<p>advise the client</p> <ul style="list-style-type: none"> <li>they can lodge the <a href="#">enrolment form</a> online</li> <li>any enrolment lodged today will allow them to claim the JobKeeper subsidy for future periods if they have confirmed their actual decline in turnover and are eligible for the JobKeeper extension</li> <li><b>no</b> deferral is required.</li> </ul>
<p>has already attempted to</p> <ul style="list-style-type: none"> <li>enrol for JobKeeper, and</li> <li>claim for prior months</li> </ul>	<ul style="list-style-type: none"> <li>check any Siebel activities with the classification: <ul style="list-style-type: none"> <li><b>Capability:</b> Operations</li> <li><b>Category:</b> Processing</li> <li><b>Type:</b> JobKeeper deferral</li> </ul> </li> <li>review the notes on the activity to determine if more information has been requested, or if the client has already been advised they are <b>not</b> eligible.</li> </ul>
<p>wants to enrol for JobKeeper to claim for a prior month where the enrolment due date has passed</p> <p><b>!</b> Refer to <a href="#">JobKeeper dates and Authorisations</a>.</p>	<ul style="list-style-type: none"> <li>warm transfer the client to the <b>Plus one</b> team on <b>x92211</b> who will continue with the client's eligibility for deferral</li> <li>if unable to transfer within 2 minutes, refer to <b>Plus one team</b> on <a href="#">JobKeeper Payment</a> to escalate via NPE.</li> </ul>
<p>wants to enrol for a prior month, where there is an existing deferral request</p>	<p><b>!</b> Do <b>not</b> cold transfer the client to the Plus one team.</p>

**!** A deferral does not need to be considered if the client is amending a form that has already been processed.

## Eligibility for deferral

**!** Eligibility should **only** be confirmed by the Plus One team.

Step	Action
1	<p>Determine if any of the following exceptional circumstances apply to the client:</p> <ul style="list-style-type: none"> <li><b>natural disasters:</b> <b>how</b> was the client prevented from enrolling on time or contacting the ATO earlier</li> </ul> <p><b>!</b> COVID-19 is <b>not</b> a natural disaster on its own. It is a circumstance that led to the implementation of JobKeeper.</p>

	<ul style="list-style-type: none"> <li>• <b>serious illness or death:</b> <b>when</b> did the illness happen and/or <b>what</b> prevented the client or their representative from contacting the ATO for assistance.</li> </ul> <p>! Determine if the information provided by the client clearly meets the exceptional circumstance to consider a deferral request.</p> <p>Clients <b>must</b> advise of <b>how</b> the circumstance impeded them from enrolling on time.</p> <p>If one of the reasons above is <b>not</b> provided, with sufficient information to support the request, the deferral may not meet the exceptional circumstances and cannot be considered for approval.</p> <p>If:</p> <ul style="list-style-type: none"> <li>• <b>yes,</b> <ul style="list-style-type: none"> <li>○ add a <b>note</b> to the inbound phone activity including eligibility has been met for JobKeeper or JobKeeper extension (or both)</li> <li>○ update the activity with the following classifications <ul style="list-style-type: none"> <li>▪ <b>Capability:</b> Operations</li> <li>▪ <b>Category:</b> Processing</li> <li>▪ <b>Type:</b> Jobkeeper deferral</li> </ul> </li> <li>○ complete template <b>JobKeeper deferral</b>, stating the period/s that require a deferral, and detailing how the client has met the deferral criteria</li> </ul> <p>! The note <b>must</b> state one of the reasons for deferral listed above. Specifically, your note <b>must</b> primarily state the circumstance and the reason supported by how the client was prevented from enrolling.</p> <ul style="list-style-type: none"> <li>○ proceed to step 2</li> </ul> <li>• <b>no</b>, go to <b>step 3</b> in this table.</li> </li></ul>
2	<p>Refer to <b>JobKeeper dates and Authorisations</b> on this page, to determine your authorisation to approve the deferral based on your APS level. When considering your authorisation, the deferral period starts from the next business day after the <b>due date</b>, <b>not</b> from the call date.</p> <p>Are you authorised to approve the deferral? If:</p> <ul style="list-style-type: none"> <li>• <b>yes</b>, a deferral can be provided; <ul style="list-style-type: none"> <li>○ <b>assist the client to enrol</b> and complete the relevant forms</li> <li>○ <b>create a JobKeeper application form in ICP</b> (for periods prior to 28 September 2020)</li> <li>○ create an Employer eligibility form in ICP</li> <li>○ create an Employee eligibility form in ICP to identify their employees</li> <li>○ create a JobKeeper declaration form in ICP</li> </ul> </li> </ul> <p>There is no separate deferral form.</p> <ul style="list-style-type: none"> <li>• <b>no</b>, go to <b>step 4</b> in this table.</li> </ul>
3	<p>Advise the client <b>no</b> deferral is available.</p>

	<p>Assist the client to enrol but do <b>not</b> create a JobKeeper application form in ICP.</p> <p>Discuss eligibility requirements for submitting for future months. Refer to <a href="#">COVID-19 – JobKeeper Payment</a> for the relevant information to assist the client.</p> <p><b>This is the end of the procedure.</b></p> <p><b>!</b> If the client advises they received incorrect advice from the ATO, which led to the late enrolment, check the client account for evidence of the previous interactions. Where client notes indicate incorrect advice was provided, seek advice from your support officer. If the client disagrees with the decision to reject the deferral, initiate the following discussion with the client.</p> <p>"Today we have determined that you don't have exceptional circumstances that would allow us to accept your late enrolment form.</p> <p>This is not a decision about your eligibility for JobKeeper payment and/or if you have assessed that you are eligible for JobKeeper payment in a fortnight going forward.</p> <p>If you don't agree with our decision today not to accept your late enrolment form for prior fortnights, you can apply to the Federal Court of the Federal Circuit Court of Australia for a review under the Administrative Decisions (Judicial Review) Act 1977."</p> <p>This application must be lodged within 28 days. You can find out more about this by searching <a href="#">Federal Court</a> on ato.gov.au.</p>
4	<p>Advise the client:</p> <ul style="list-style-type: none"> <li>• you can assist them with submitting the required forms</li> <li>• approval will be required before the form can be finalised</li> <li>• if the deferral is <ul style="list-style-type: none"> <li>◦ <b>not approved</b>, they will be notified</li> <li>◦ <b>approved</b>, the client will not hear from us, and no further action is required.</li> </ul> </li> </ul> <p>Assist the client to enrol:</p> <ul style="list-style-type: none"> <li>• <a href="#">create a JobKeeper application form in ICP</a> (for periods prior to 28 September 2020)</li> <li>• create an Employer eligibility form in ICP</li> <li>• create an Employee eligibility form in ICP to identify their employees</li> <li>• create a JobKeeper declaration form in ICP</li> </ul> <p>For periods prior to 28 September 2020, do <b>not</b> submit the Application form, but <b>save</b> and <b>suspend</b> it.</p> <p>For JobKeeper extension periods, submit the Employer eligibility form and the Employee form, but <b>save</b> and <b>suspend</b> the Declaration.</p> <p>Do <b>not</b> close the Inbound activity.</p> <p>Make sure to follow the steps on that page, as different actions are required for forms that need deferral approval.</p>

## JobKeeper dates and Authorisations

## OFFICIAL

Refer to the table below for the relevant lodgment dates, and the Authorisations that apply, when considering deferral for clients lodging after the due date.

If any of the below dates fall on a public holiday, the next business day will be the due date.

### Definitions

Step 1: JobKeeper enrolment form (JobKeeper FID form)

Claim month	Enrolment due date	Enrolment deferral authorisations
<b>April 2020</b> Fortnight 1 period: 30 March - 12 April Fortnight 2 period: 13 April - 26 April	31 May (extended to 11 June)	APS 1-6 (including Outsource): Up to 25 June
<b>May 2020</b> Fortnight 3 period: 27 April - 10 May Fortnight 4 period: 11 May - 24 May	31 May (extended to 11 June)	APS 1-6 (including Outsource): Up to 25 June
<b>June 2020</b> Fortnight 5 period: 25 May - 7 June Fortnight 6 period: 8 June - 21 June	30 June	APS 1-6 (including Outsource): Up to 7 July
<b>July 2020</b> Fortnight 7 period: 22 June - 5 July Fortnight 8 period: 6 July - 19 July	31 July	APS 1-6 (including Outsource): Up to 7 August
<b>August 2020</b> Fortnight 9 period: 20 July - 2 August Fortnight 10 period: 3 August - 16 August Fortnight 11 period: 17 August - 30 August	31 August	APS 1-6 (including Outsource): Up to 18 September
<b>September 2020</b> Fortnight 12 period: 31 August - 13 September Fortnight 13 period: 14 September - 27 September	30 September	APS 1-6 (including Outsource): Up to 20 October
<b>October 2020</b> Fortnight 14 period: 28 September – 11 October Fortnight 15 period: 12 October – 25 October	31 October	APS 1-6 (including Outsource): Up to 19 November
<b>November 2020</b> Fortnight 16 period: 26 October – 8 November Fortnight 17 period: 9 November – 22 November	30 November	APS 1-6 (including Outsource): Up to 18 December

<b>December 2020</b> Fortnight <b>18</b> period: 23 November – 6 December Fortnight <b>19</b> period: 7 December – 20 December Fortnight <b>20</b> period: 21 December – 3 January	Fortnights <b>18</b> and <b>19</b> , have a due date of 31 December. Fortnight <b>20</b> , has a due date of the 3 January.	APS 1-6 (including Outsource): Up to 21 January
<b>January 2021</b> Fortnight <b>21</b> period: 4 January – 17 January Fortnight <b>22</b> period: 18 January – 31 January	31 January	APS 1-6 (including Outsource): Up to 18 February
<b>February 2021</b> Fortnight <b>23</b> period: 1 February – 14 February Fortnight <b>24</b> period: 15 February – 28 February	28 February	APS 1-6 (including Outsource): Up to 18 March
<b>March 2021</b> Fortnight <b>25</b> period: 1 March – 14 March Fortnight <b>26</b> period: 15 March – 28 March	31 March	APS 1-6 (including Outsource): Up to 20 April

## Actioning deferral requests (Plus One team only)

Step	Action
1	Review the Siebel activity <b>Status</b> , If: <ul style="list-style-type: none"> <li>• <b>Approved</b> – proceed to step 2 to action the request</li> <li>• <b>Request for Approval Denied</b> – go to step 8.</li> </ul>
2	From the client's Siebel CCV, perform a null query (query, go) and open the activity with the below classifications: <ul style="list-style-type: none"> <li>• <b>Capability:</b> ICP Suspense item</li> <li>• <b>Category:</b> Exception generalist</li> <li>• <b>Type:</b> Approval Required</li> </ul>
3	Select the link in the <b>Attachments</b> tab to access the suspended form.
4	Select: <ul style="list-style-type: none"> <li>• <b>Correct suspended form</b>, and</li> <li>• <b>Input reason:</b> FDF validation - 1.</li> </ul>
5	Navigate to the <b>Form Confirmation</b> tab and select <b>Submit</b> .
6	Add a note to the suspense activity, and link it to the Inbound phone deferral request via service request if this has not been done previously.



7	<p>Update the status of both activities to <b>Done</b>.</p> <p><b>This is the end of the procedure.</b></p>
8	<p>Check the activity notes to determine action required. If the activity note has:</p> <ul style="list-style-type: none"> <li>• <b>Request for deferral declined</b> - then the circumstances provided by the client do not meet the exceptional circumstances outlined under 'Eligibility for deferral' on this page. Contact the client and advise their deferred enrolment has not been granted, however they may claim for current and future months if eligible. Ensure you cancel any suspended JobKeeper forms in ICP, and resolve associated Siebel activities after contact. To contact the client, proceed to Step 9</li> <li>• <b>Additional information required</b> – then this deferral request cannot be approved based on limited information provided in the initial escalation. Contact the client and determine if they meet exceptional circumstances outlined under 'Eligibility for deferral' on this page. If the client does not meet these exceptional circumstances, advise their deferral has been declined. Ensure you cancel any suspended JobKeeper forms in ICP which were lodged prior to the enrolment date, and resolve associated Siebel activities. If the client <b>does</b> meet the acceptable circumstances, assign the activity using the following values: <ul style="list-style-type: none"> <li>○ <b>Capability:</b> Operations</li> <li>○ <b>Category:</b> PROCESSING</li> <li>○ <b>Type:</b> JobKeeper Deferral</li> <li>○ <b>Template:</b> Attach and complete template <b>JobKeeper deferral</b></li> <li>○ <b>Assigned To:</b> ENTERPRISE_Q</li> <li>○ <b>Description:</b> Deferral Discretion</li> <li>○ <b>Status:</b> For Approval</li> <li>○ Tick the <b>Escalation Flag</b></li> </ul> </li> </ul> <p>To contact the client, proceed to Step 9.</p> <p><b>!</b> If the additional information required has already been provided, an outbound call is required. Advise the client, their request for deferral has been denied after careful consideration, as they do not meet the exceptional circumstances to grant a deferral.</p>
9	<p>Three contact attempts are required. If client contact is:</p> <ul style="list-style-type: none"> <li>• <b>Unsuccessful</b> - Update <b>Call Back Attempts</b> field and place a review date of 1 business day before assigning the activity as 'Information Pending' in the Enterprise-Q. If after three unsuccessful attempts <ul style="list-style-type: none"> <li>○ cancel any suspended ICP forms and close their associated Siebel Activities</li> <li>○ place a detailed note in the original activity detailing the information you were seeking</li> <li>○ set the <b>Status</b> of any Service Request linked activities to <b>Done</b>.</li> </ul> </li> <li>• <b>Successful</b> – proceed to step 10.</li> </ul>
10	<p>Ensure appropriate call recording warnings and privacy statements are provided, refer to <a href="#">Outbound protocols</a>.</p>

Advise the client their deferral request has been reviewed, and based on the information provided their request to have a deferral granted for late enrolment has been denied. If the client then offers additional information, and **does** meet the exceptional circumstances, assign the activity using the following values:

- **Capability:** Operations
- **Category:** PROCESSING
- **Type:** JobKeeper Deferral
- **Template:** Attach and complete template **JobKeeper deferral**
- **Assigned To:** ENTERPRISE\_Q
- **Description:** Deferral Discretion
- **Status:** For Approval
- Tick the **Escalation Flag**.

Discuss their eligibility requirements for submitting for future months, and that they are not already enrolled. The client will need to:

- enrol for the JobKeeper payment
- identify their eligible employees/eligible business participant, and
- make a business monthly declaration.

Refer to [JobKeeper Payment](#) on ato.gov.au for further information.

If client enrolled prior to 28 September 2020, inform the client that they:

- will need to apply an additional actual decline in turnover test, and
- the change in rate of payments.

Refer to [JobKeeper Extension](#) and [JobKeeper Payment](#) on ato.gov.au for further information.

**!** If the client disagrees with the decision to reject the deferral, initiate the following discussion with the client.

"Today we have determined that you don't have exceptional circumstances that would allow us to accept your late enrolment form.

This is not a decision about your eligibility for JobKeeper payment and if you have assessed that you are eligible for JobKeeper payment in a fortnight going forward.

If you don't agree with our decision today, not to accept your late enrolment form for prior fortnights, you can apply to the Federal Court or Federal Circuit Court of Australia for a review under the Administrative Decisions (Judicial Review) Act 1977.

The application must be lodged within 28 days. For more information go to [Federal Court](#) on ato.gov.au."










To correct any form error codes or suspense errors, refer to [Correct a suspended JobKeeper application form in ICP](#).

Finalise your activity:

- Add a detailed note of action taken
- Set the Siebel activity to **Done**

- Close all associated activities.

## Appendix J - Change log for instructions and scripting for front line staff (change long for SMART instructions)

Content	Change Log
 V.1.0 - 12 Jun 2020.docx	Introduce scripting including guidelines for eligibility for JobKeeper deferral
 V.5.0 - 22 Jun 2020.docx	Further clarify JobKeeper deferral eligibility criteria. Includes support for clients of tax practitioners due to tax practitioner workloads and support for clients with limited understanding of JK enrolment process and dates
 V.9.0 - 1 Jul 2020.docx	Clarified JobKeeper deferral documentation and escalation process. Eligibility criteria not changed
 V.10.0 - 23 Jul 2020.docx	Clarified that sole traders are included as Eligible Business Participants. JK Deferral eligibility criteria updated - additional support removed for tax practitioners due to work load and clients with limited understanding of JK enrolment process and dates
 V.11.0 - 1 Oct 2020.docx	Additional information requested from clients regarding how client circumstances prevented them from enrolling on time or contacting the ATO earlier, including: “If one of the reasons above is <b>not</b> provided with sufficient information to support the request, the deferral may not meet the exceptional circumstances and cannot be considered for approval”
 V.12.0 - 16 Oct 2020.docx	Clarified JobKeeper deferral documentation and escalation process. Eligibility criteria not changed
 V.13.0 - 4 Dec 2020.docx	Scripting structure changed. JK Deferral eligibility scripting published separately from other JobKeeper content. Eligibility criteria not changed
 V.15.0 - 1 May 2021.docx	System issues removed as eligibility for JK Deferral
 V.16.0 - 4 May 2021.docx	Impeded access to records removed as eligibility for JK Deferral

# Deferrals

Internal/ Outsource  
AUDIENCEV1  
VERSIONUnclassified  
CLASSIFICATION2020  
DATE

Businesses eligible to claim JobKeeper must enrol by the due date for the month they wish to lodge and claim.

Businesses not enrolled by the due date cannot lodge and claim for an earlier period unless they meet the strict deferral criteria and all other eligibility criteria.

Businesses must be able to show they have:

- **paid** their eligible employees the minimum wage requirement;
- no current **compliance** activity;
- **not** been deemed ineligible for JobKeeper; and
- extenuating circumstances preventing them from **enrolling** by the monthly due date.

Hi, I checked my eligibility for JobKeeper and I think I was eligible to receive it back in April



In order to qualify for JobKeeper you must meet the eligibility criteria and enrol by the due date for the first month you want to claim.



# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
DATE

Businesses eligible to claim JobKeeper must enrol by the due date for the month they wish to lodge and claim.

Businesses not enrolled by the due date cannot lodge and claim for an earlier period unless they meet the strict deferral criteria and all other eligibility criteria.

Businesses must be able to show they have:

- **paid** their eligible employees the minimum wage requirement;
- no current **compliance** activity;
- **not** been deemed ineligible for JobKeeper; and
- extenuating circumstances preventing them from **enrolling** by the monthly due date.

Oh. So if I'm too late I can't claim it?



If you are eligible you can still claim but only for the months where you have met the enrolment due date.



# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
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Businesses eligible to claim JobKeeper must enrol by the due date for the month they wish to lodge and claim.

Businesses not enrolled by the due date cannot lodge and claim for an earlier period unless they meet the strict deferral criteria and all other eligibility criteria.

Businesses must be able to show they have:

- **paid** their eligible employees the minimum wage requirement;
- no current **compliance** activity;
- **not** been deemed ineligible for JobKeeper; and
- extenuating circumstances preventing them from **enrolling** by the monthly due date.

Is there anyway I can enrol and claim from the start. I'm really struggling and need the money. My agent didn't tell me about it.



Firstly, to be eligible for deferred enrolment you must have actually paid your staff the minimum to meet the wage requirement.



# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
DATE

Businesses eligible to claim JobKeeper must enrol by the due date for the month they wish to lodge and claim.

Businesses not enrolled by the due date cannot lodge and claim for an earlier period unless they meet the strict deferral criteria and all other eligibility criteria.

Businesses must be able to show they have:

- **paid** their eligible employees the minimum wage requirement;
- no current **compliance** activity;
- **not** been deemed ineligible for JobKeeper; and
- extenuating circumstances preventing them from **enrolling** by the monthly due date.

Yeah I paid them. I checked and it meets the minimum wage requirement



Ok. So why didn't you enrol for JobKeeper earlier?





# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
DATE

## Extenuating circumstances 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
- System issues, either with ATO online services or the entity's business system.

## When discussing the client's circumstances you need to consider and ask:

- Are the circumstances beyond the clients' control that prevented them from lodging their enrolment form on time?
- What actions did the client take to mitigate those circumstances?
- Did the client previously contact the ATO to seek help? If so there should be recorded evidence of this.
- Did the client engage a Tax Agent early on in the JobKeeper scheme when they realised they could not manage the process themselves?
- Was the client given incorrect advice by the ATO in a prior interaction? This should be evidenced from client records.

Ahh. I have just been really overwhelmed with you know, everything. Its been really hard. You guys would not understand.



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.

I can still help you enrol now and claim for the remaining fortnights in JobKeeper, but not for the earlier periods.



# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
DATE

## JobKeeper deferred enrolment review rights

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.

That's not fair. I really need the money. Can I get this reviewed?



You can apply to the Federal Court or the Federal Circuit Court of Australia for a review of the ATO decision under the Administrative Decisions (Judicial Review) Act 1977. This application must be lodged within 28 days.

This does not stop you from enrolling for JobKeeper now and claiming for the months where you have met the due date.



# Deferrals

Internal/ Outsource  
AUDIENCE

V1  
VERSION

Unclassified  
CLASSIFICATION

2020  
DATE

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.

Make sure to always  
refer to  
**SMARTonline**  
for updated  
reference material  
to assist you in  
supporting clients.



OFFICIAL

August 12 at 8:16 PM · 🌐

Hi All,

Jobkeeper Australia.

Question, if we call ato tomorrow, will they still give chance for late enrolment for July Jobkeeper? The business meets all criteria including wage payment requirement.

Much appreciated your advice if you have experience this.

Thank you.



5

32 Comments

Like

Comment

Looks is like the earliest you can enrol is the August fortnights

Like · Reply · 1w

Do the initial set up on the ATO portal first then call and ask

Like · Reply · 1w



3

Like · Reply · 1w



2

Only if you have unusual circumstances.

Like · Reply · 1w

Like · Reply · 1w

They have changed the criteria to allow for this, so I expect not.

Like · Reply · 1w

[redacted] st  
[redacted] !

Like · Reply · 1w



[redacted] yes! That's been my experience too.

Like · Reply · 1w

Write a reply...



Like · Reply · 1w

It's always worth a try

Like · Reply · 1w

Like · Reply · 1w

Author  
Thank you so much everyone! yes we'll give a try 😊

Like · Reply · 1w

One of my clients enrolled in for July but only a couple of days ago, and can only claim August payments not July. You're meant to enrol before the eom!

Like · Reply · 1w

[redacted] h  
m [redacted] ut  
c [redacted] t.

Like · Reply · 1w

🙄🙄 don't you hate that! The person I got wasn't obliging 😞

You have to have extreme circumstances and I've not been able to claim for clients due to the strict criteria

OFFICIAL

Like · Reply · 1w

Yeah I've done it a few times but today had someone who refused to discuss it. We had to call back to talk to someone else to get them to put it through. Its seriously ridiculous...that one person will put it through then someone else won't. Makes no ... See More

Like · Reply · 1w



can't hurt to try.

Like · Reply · 1w

it for one of mine, money was in the bank this morning.

Like · Reply · 1w

goes to show it really depends on who you get on the phone because I got refused

Like · Reply · 1w

Like · Reply · 1w

Write a reply...



depend on the person you get. Had one the other day who refused to discuss it. I had to call back to talk to someone else to get them to put it through. Its seriously ridiculous...that one person will put it through then someone else won't. Makes no ... See More

Like · Reply · 1w

I tried this today. They read the notes of the previous person I dealt with and refused to grant it.

is OFFICIAL

I d [redacted]  
p [redacted]. They said in order to apply for  
a deferral after that, you have to have exceptional  
circumstances (or death, serious illness, impeded access  
to files or data etc).

Like · Reply · 1w

I did one on Monday [redacted] - the  
healthy estimate we had assessed for July evaporated &  
Aug/Sep are not looking good. There was no argument  
from the ATO

Like · Reply · 1w

Yes they may. Give them a call, they're very helpful. 😊

Like · Reply · 1w · Edited

Y [redacted]  
Like · Reply · 1w

[redacted] T  
c [redacted] .....  
They were great!!!!

Like · Reply · 1w

[redacted] how did you put in your request? Phone call?

Thanks 😊

Like · Reply · 1w

Write a reply...



I [redacted] luck.  
A [redacted] er,  
[redacted] es  
y [redacted] e

Like · Reply · 1w





Australian Government  
Australian Taxation Office

Karen Payne  
Inspector-General of Taxation and Taxation  
Ombudsman  
Office of the Inspector-General of Taxation and  
Taxation Ombudsman  
Level 6, 321 Kent Street  
SYDNEY NSW 2000

8 September 2021

Dear Karen,

Thank you for the opportunity to consider your report *Investigation into the ATO's administration of JobKeeper enrolment deferral decisions*.

We are proud of the ATO's delivery of the Government's COVID-19 stimulus measures, including the delivery of \$89 billion in payments to eligible businesses and supporting 3.8 million individuals through the JobKeeper program. The program is the largest economic support program in Australia's history, keeping individuals employed and businesses operating.

The ATO understands the importance of granting applicants more time to apply for JobKeeper, and more broadly the significant impact the Government stimulus measures brought to financially support businesses and participants. The ATO's approach to administering the various aspect of JobKeeper was guided by timeliness, transparency, simplicity, and critically – efficiency.

Independent scrutiny of the ATO is an important part of sustaining confidence in the administration of Australia's tax and superannuation systems and we welcome observations that assist in this endeavour.

As you are aware, granting additional time is a discretion to be considered in light of individual facts and circumstances, and exercised where it is fair and reasonable to do so in those circumstances. This principle has underpinned the ATO's approach throughout the duration of the JobKeeper program.

Recognising the environmental settings and context facing the community in 2020, the ATO put in place various procedures to rationalise and expedite decisions for applicants impacted by exceptional and unforeseen circumstances. This involved setting out those cases where the circumstances were clearly ascertainable by the ATO as being fair and reasonable to grant additional time for enrolment, enabling decisions to be made quickly and consistently by ATO officers at first instance.

However, the ATO did not restrict or narrow the granting of additional time to those in limited exceptional or unforeseen circumstances. Where requests for additional time did not correspond to a clear circumstance allowing the ATO to streamline decision making, escalation and review pathways were available for applicants to have their situations reconsidered. In addition, blanket discretions were granted at the start of the JobKeeper program, in recognition that applicants and advisers needed time to familiarise themselves with new rules, and eligibility criteria – in times of uncertainty.

As with all ATO decisions, the ATO takes the review and complaints process very seriously – including complaints referred to us by the Office of the Inspector-General of Taxation and Taxation Ombudsman – always with a view of improving everything we do. As extension of time decisions are made on a case by case basis, decisions might be upheld, or overturned based on a review of the facts and evidence, or with the benefit of new information. We do not consider that granting



requests for applicants on review as being reflective of an overall change in the ATO's administration of these decisions, and the ATO is not aware of this approach causing widespread inconsistent outcomes for applicants.

Sincerely,

A handwritten signature in brown ink, appearing to read 'ERosenzweig', with a stylized, cursive script.

Emma Rosenzweig  
Deputy Commissioner, Superannuation and Employer Obligations  
Australian Taxation Office