

# client alert | explanatory memorandum

May 2020

## CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 17 April 2020.

## Federal Budget night shifts to 6 October 2020

The Australian Government recently announced that this year's Federal Budget will not be handed down until 6 October 2020. In making the announcement, Treasurer Josh Frydenberg said that this postponement is intended to "provide more time for the economic and fiscal impacts of the coronavirus, both in Australia and around the world, to be better understood".

The Client Alert team will work to bring you a special Budget edition on the evening of 6 October, outlining key announcements of the 2020–2021 Federal Budget to assist you in dealing with your clients' queries.

### A little Budget history

Since 1994, with a few exceptions, Australia's Federal Budget has been handed down by the Treasurer on the second Tuesday in May. Exceptions were made in 1996, when an election and a change of government occurred in March and the Budget was handed down in August; in 2016, when the Budget was handed down on the first Tuesday in May because the government was considering calling a double dissolution election; and most recently in 2019, when a Federal election was called for 18 May and the Budget was presented on 2 April.

Between 1901 and 1993 the Budget was presented in August, on the first Tuesday night of Parliament's spring session.

*Source: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/2020-21-budget-announcement>.*

## Coronavirus cash flow boost payments explained

As a part of the second round of economic stimulus in response to the COVID-19 pandemic, the Australian Government has legislated a measure to boost cash flow for employers. Put simply, the cash flow boost payments are intended to support employment by providing Federal support for employers through the tax system. This is admirable yet is likely to prove complex to administer.

Small to medium employers who intend to claim the "cash flow boost payment" (a minimum of \$10,000 and a maximum of \$50,000) and hoping to receive an injection of cash should beware. The "payment" is not actually a payment; rather, it is a credit that will be offset against the liabilities that appear on the business activity statement (BAS) and any debits in a taxpayer's running balance account (RBA). While this is still likely to support employment by reducing the amount businesses have to pay to the ATO, anyone hoping to get a cash injection will be sorely disappointed.

The measure ensures that an eligible employer receives an amount equal to three times the amount of tax withheld from ordinary salary and wages as disclosed in the March monthly BAS, or equal to the amount of tax withheld from ordinary salary and wages for the quarter. Both are subject to a minimum of \$10,000 and a maximum of \$50,000. The payment is due on 28 April 2020 and other payments will follow later this year.

The cash flow boost payments are only available to entities that qualified as small or medium entities (ie with turnover less than \$50 million) for the income year when they were most recently assessed. There will be no cash flow boost payments for entities with turnover greater than \$50 million. There is also a withholding requirement – the payment will only be made to entities that first notified the ATO that they have a withholding obligation through the lodgment of a BAS or an instalment activity statement (IAS) for the period.

Therefore, the key to the system is the BAS that entities lodge for March (either monthly or quarterly). That BAS will determine how much is paid, and when it is paid.

A word of caution, however. The headline numbers (and dates) can be a tad misleading. This "boost" measure is not a minimum \$10,000 payment – instead, it is an entitlement to a minimum gross credit of \$10,000 in respect of the March BAS. This credit will be offset against the liabilities that appear on the BAS and any debits in a taxpayer's RBA. This may result in refund, but more likely for most taxpayers will result in a reduction in the amount they owe to the ATO.

Even assuming that the ATO owes the taxpayer money, that refund will not be paid on 28 April, but rather within 14 days of lodging the BAS. The ATO has already stated that lodging a BAS early will not give rise to an early payment of the first cash flow boost payment.

Another important feature to note is that eligibility is subject to a specific integrity rule to overcome artificial or contrived arrangements or schemes. The ATO has stated that a “scheme” for these purposes includes restructuring a business or the way an entity usually pays its workers to fall within the eligibility criteria, as well as increasing wages paid in a particular month to maximise the cash flow boost payment amount.

Source: [www.ato.gov.au/Business/Business-activity-statements-\(BAS\)/In-detail/Boosting-cash-flow-for-employers/](http://www.ato.gov.au/Business/Business-activity-statements-(BAS)/In-detail/Boosting-cash-flow-for-employers/).

## **Understanding the JobKeeper Payment scheme**

Federal Treasurer Josh Frydenberg registered the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 on 9 April 2020. These statutory rules set out the actual rules and taxpayer requirements for the JobKeeper Payment scheme, which will be administered by the ATO. The statutory rules complement the JobKeeper Payment legislation, the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, which was passed by Parliament on 8 April 2020.

The JobKeeper Payment scheme commenced on 30 March and will finish on 27 September 2020. It will operate on a fortnightly basis. The first fortnight commenced on 30 March and the last will end with the fortnight ending on 27 September. Employers and eligible recipients must qualify on a (rolling) fortnightly basis.

Businesses (including sole traders and charities) must have suffered a “substantial decline” in turnover due to the COVID-19 pandemic to be entitled to the payment of \$1,500 for each eligible employee. Critically, it is a condition of entitlement that the business has paid salary and wages of at least that amount to the employee in the fortnight.

The government will pay the JobKeeper Payment within 14 days of the end of the calendar month in which the fortnight(s) end(s). According to the fact sheets Treasury has released, employers will be paid “shortly after the end of each calendar month”, for fortnights ending in that month. This means that the first JobKeeper Payment will not be made until (at least) the first week of May.

An entity is not eligible for the JobKeeper Payment if another employer is claiming it for the same employee.

### **Definition of a JobKeeper fortnight**

An employer receives a JobKeeper Payment in respect of each “JobKeeper fortnight” in which they are entitled to the payment.

Each of the following is a JobKeeper fortnight:

- the fortnight beginning on 30 March 2020; and
- each subsequent fortnight, ending with the fortnight ending on 27 September 2020.

This means that the JobKeeper scheme commences on 30 March 2020 and ends on 27 September 2020 – a period of 26 weeks. This means the last fortnight in respect of which a JobKeeper Payment may be paid (under the current rules) is the fortnight commencing on 14 September 2020 and ending on 27 September 2020.

### **Entities that qualify**

For an entity to be eligible for the scheme, there are tests that must be met as at 1 March 2020 and other tests that must be satisfied on a rolling fortnightly basis.

Entities that carried on a business at 1 March 2020 or charities that “pursued [their] objectives” at that time will qualify, provided that they also satisfy the decline in turnover test.

However, the following are specifically excluded:

- entities that had a levy imposed under the *Major Bank Levy Act 2017* imposed for any quarter ending before 1 March 2020;
- an entity that is an Australian Government agency (or a wholly owned subsidiary of one);
- an entity that is a local governing body (or a wholly owned subsidiary of one);
- if the entity is a sovereign entity;
- if the entity is a company – a liquidator or provisional liquidator has been appointed in relation to the company; or
- if the entity is an individual – a trustee in bankruptcy has been appointed to the individual’s property.

The exclusion for local government bodies and government agencies means that councils will not be covered by the JobKeeper Payment scheme.

Qualifying employers must apply to the ATO in the approved form and become registered under the scheme prior to the end of a JobKeeper fortnight. Employers must then notify all employees in writing that they have elected to participate in the scheme and that their eligible employees will all be covered by the scheme.

### **Decline in turnover test**

The decline in turnover test is linked to the GST turnover test in Div 188 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act), in particular the projected GST turnover – which will take into account anticipated decline in revenue. There are a number of technical modifications to ensure that the test applies as intended.

The test requires an entity to measure its projected GST turnover and compare it to a “relevant comparison period”. Any shortfall is to be expressed as a percentage. If this equals or exceeds the following thresholds, the entity satisfied the decline in turnover test:

- for ACNC-registered charities: 15%;
- for entities with turnover less than \$1 billion: 30%;
- for entities with turnover greater than \$1 billion: 50%.

Note that universities, schools and local councils will not be covered by the 15% rate.

The \$1 billion threshold is determined by reference to “aggregated turnover” as defined in s 328-115 of the *Income Tax Assessment Act 1997* (ITAA 1997). This includes the annual turnover of any entity that is connected with or an affiliate of the business.

The turnover test period must be a calendar month that ends after 30 March and before 1 October 2020, or a quarter that starts on 1 April or 1 July 2020. The relevant comparison period must be the period in 2019 that corresponds to this turnover test period. For example, an entity can make the comparison by comparing the whole of the month of March 2020 with March 2019, or by comparing the quarter beginning on 1 April 2020 with the quarter beginning on 1 April 2019.

Once the decline in turnover test is satisfied, the entity does not need to retest its turnover in later months. However, if an entity does not qualify for one month (or quarter), it can test in a later month (or quarter) to determine if the test is met and can become eligible from that time.

Despite the fact that an entity does not need to retest its turnover once the decline in turnover test is satisfied, an entity that has qualified for the JobKeeper Payment must, within seven days of the end of that month, notify the ATO of its current GST turnover for that month and its projected GST turnover for the following month.

Deductible gift recipients (DGRs) are required to include gifts received or likely to be received that are tax deductible to the donor under s 30-15 ITAA 1997. Charities that are registered with the Australian Charities and Not-for-profits Commission (ACNC) but are not DGRs must instead include gifts received or likely to be received that are made by way of monetary donations, property with a value of more than \$5,000 and listed Australian shares. For either type of entity, gifts received from an associate are not included in their turnover.

There will undoubtedly be ATO guidance on this.

The turnover numbers must be reported to the ATO before any payments will start, although there is a transitional rule for the first two JobKeeper fortnights.

There is scope for the ATO to apply an alternative test to different classes of entities, by way of legislative instrument. For example, where a business or non-profit organisation was not in operation a year earlier, or where the turnover a year earlier was not representative of the usual or average turnover (eg because the entity was newly established or its turnover is typically highly variable). Although no legislative instrument had been made as at the time of writing, the following example (adapted from an example in the explanatory statement to the statutory rules) shows how the alternative test would apply.

### **Example**

Milly’s Farms carries on a farming and retail flower sales business in Australia. It was subject to a severe drought from 2018 until September 2019 that reduced the amount of flowers it could grow. It returned to normal crop output in January 2020. Its retail flower sales became significantly affected in March 2020.

It assesses its eligibility for JobKeeper Payments on 3 July 2020 based on a projected GST turnover from its farming activities for the quarter beginning on 1 July 2020 of \$2 million. The corresponding period is the quarter beginning on 1 July 2019 – a period in which Milly’s Farms was severely affected by drought. Because of the effects of the drought, Milly’s Farms had a much lower than usual 2019 GST turnover of \$2.5 million. The July 2020 quarter turnover falls short of the July 2019 quarter turnover by \$500,000, which is 25% of the July 2019 quarter turnover. This does not exceed the specified percentage of 30%, so the basic decline in turnover test is not satisfied.

However, because of the effects of the drought on farming businesses, the ATO is satisfied that there is not an appropriate relevant comparison period for an entity that carried on a farming business. Instead, for these

entities, the ATO determines an alternative test for which the relevant comparison period is the corresponding quarter in 2017. The ATO determines that the alternative test will be satisfied in these circumstances where the entity can show a 30% shortfall in turnover (for entities with less than \$1 billion aggregated annual turnover) when compared to one of these alternative periods.

In the quarter beginning on 1 July 2017, Milly's Farms had a current GST turnover of \$4 million. This represents a shortfall of 50% when compared to its projected GST turnover for the quarter beginning on 1 July 2020. This exceeds the specified percentage of 30%, so the alternative decline in turnover test is satisfied.

### **Eligible employees**

An individual must be employed for a JobKeeper fortnight to be eligible for that fortnight. In addition, as at 1 March 2020 the employee must:

- be aged 16 or over;
- be an employee or a long-term casual employee of the entity (12 months of regular and systematic employment); and
- be an Australia resident, as determined by reference to the *Social Security Act 1991*, or the *Income Tax Assessment Act 1936* (ITAA 1936) where the person holds a Subclass 444 (Special Category) visa.

The 1 March date is important, as it allows employees who were retrenched after that date but then subsequently rehired (possibly on the basis of the announcement of the scheme) to be eligible for the JobKeeper Payment. However, if an employee was only engaged after 1 March, that employee would not be eligible for the scheme, because they were not an employee of the eligible employer as at 1 March 2020.

There are some specific exclusions. A person is excluded from being an eligible employee if:

- parental leave pay is payable to the individual and the individual's paid parental leave period overlaps with, or includes, the fortnight;
- at any time during the fortnight, the individual is paid dad and partner pay; or
- all of the following apply:
  - the individual is totally incapacitated for work throughout the fortnight;
  - an amount is payable to the individual under, or in accordance with, an Australian workers' compensation law in respect of the individual's total incapacity for work; and
  - the amount is payable in respect of a period that overlaps with, or includes, the fortnight.

The test is specifically that a person must be employed by an eligible employer "at any time" in the fortnight. The person does not need to be employed for the full fortnight.

There is also a requirement that eligible employees have provided a notice to their employer agreeing:

- to be nominated by the employer as an eligible employee of that employer under the JobKeeper scheme;
- that they have not agreed to be nominated by another employer; and
- that (if they are employed as a casual employee with this employer) they do not have permanent employment with another employer.

An eligible employee who is employed by one or more qualifying employers will need to choose one employer that will receive the JobKeeper Payments for their employment.

Once an employee has nominated an employer and the employer has received JobKeeper Payments in respect of the employee and has paid the employee, the employee cannot nominate a different employer. If for any reason, the employment relationship between an eligible employee and their nominated employer ends, the employee will not be able to have another employer qualify for the JobKeeper Payments in respect of their new employment. The advice then would be to look at eligibility for the JobSeeker Payment.

### **Wage condition**

Employers must satisfy what is termed the "wage condition" to be entitled for a JobKeeper Payment. This is satisfied in respect of an individual for a fortnight if the sum of the following amounts equals or exceeds \$1,500:

- amounts paid by the employer to the individual in the fortnight by way of salary, wages, commissions, bonuses or allowances;
- amounts withheld by the employer from payments made to the individual in the fortnight under the PAYG provisions (specifically, s 12-35 in Sch 1 to the *Taxation Administration Act 1953*);

- contributions made by the employer in the fortnight to a superannuation fund or a retirement savings account (an RSA) for the benefit of the individual, if the contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*);
- other amounts that, in the fortnight, are applied or dealt with in any way if the individual agreed:
  - for the amount to be so applied or dealt with; and
  - in return, for amounts covered by salary and wages etc for the individual for the fortnight to be reduced (including to nil).

If the regular payment period is longer than a fortnight, these payments are allocated to each fortnight on a reasonable basis. For example, if an employee is paid monthly, it would presumably be reasonable to multiply the monthly amount by 12 and then divide that amount by 26.

The effect of these rules is as follows:

- If the employer pays the employee \$1,500 or more in income per fortnight before tax, the JobKeeper Payment will assist the employer to continue operating by subsidising all or part of the employee's income.
- If the employer would otherwise pay the employee less than \$1,500 in income per fortnight before tax, the employer must pay the employee, at a minimum, \$1,500 per fortnight before tax using the JobKeeper Payment.
- If the employee has been stood down, the employer must pay the employee, at a minimum, \$1,500 per fortnight before tax using the JobKeeper Payment.

### **Sole traders, partners, etc**

There are special rules that enable sole traders (entities that do not have employees as such) to obtain the JobKeeper Payment. The statutory rules refer to such entities as "business participants".

The ATO states that sole traders and some other entities (such as partnerships, trusts or companies) may be entitled to the JobKeeper Payment scheme under what is termed the "business participation entitlement". However, not-for-profit organisations are not included.

The entity may be eligible for the JobKeeper Payment scheme if it has a non-employee individual – an "eligible business participant" – who is actively engaged in the operation of the business. The entity must meet all other relevant requirements.

The ATO makes the important point that officially under the scheme it is the entity – not the eligible business participant – which receives the JobKeeper Payment. However, this distinction is moot for a sole trader, who is both the business entity and an eligible business participant, and does receive the JobKeeper Payment themselves.

### **Eligible business participant**

A non-employee individual is an eligible business participant of an entity for a JobKeeper fortnight if all of the following conditions are met; namely, that the individual:

- is not employed by the entity;
- is actively engaged in the business carried on by the entity (at 1 March 2020 and for the relevant JobKeeper fortnight);
- is one of the following (again as at 1 March 2020 and for the individual fortnight):
  - a sole trader;
  - a partner in the partnership;
  - an adult beneficiary of the trust;
  - a shareholder or director in the company; and
- as at 1 March 2020, was aged at least 16 and was an Australian resident (within the meaning of s 7 of the *Social Security Act 1991*), or a resident for income tax purposes and the holder of a special category (Subclass 444) visa;
- is not receiving government parental leave pay or dad and partner pay; and
- is not currently totally incapacitated for work and receiving payments under an Australian workers' compensation law in respect of a total incapacity to work.

The ATO states that an eligible business participant cannot also be an employee (other than a casual employee) of another entity. If a sole trader is both a long-term casual employee of another business and an eligible sole trader, they can choose to either let their employer claim the JobKeeper Payments on their behalf or they can claim as a sole trader, but not both.

Importantly, only one eligible business participant can be nominated by an entity. This means that a business entity must choose which eligible business participant to nominate, and that entity is only entitled to one JobKeeper Payment per fortnight. This requirement does seem stringent when it comes to entities other than sole traders (eg partnerships or trusts).

The ATO has issued a JobKeeper Nomination Notice on its website. However, this should not be used if an entity is intending to claim JobKeeper payments for an eligible business participant. Rather, a different nomination process will be required.

### **Eligible entities**

An entity is eligible if it carried on a business in Australia as at 1 March 2020 and it satisfies the decline in turnover test for the relevant period.

In addition, it must have had an ABN as at 12 March 2020 and have lodged, on or before 12 March 2020:

- a 2018–2019 income tax return showing that it had an amount included in its assessable income in relation to it 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 that the entity made a taxable, GST-free or input-taxed sale.

The ATO has the discretion to allow an entity to obtain an ABN after 12 March 2020 where it was running an active business before 12 March 2020 but was not required to have an ABN to operate it.

An entity cannot claim JobKeeper Payments for an individual if there is already a JobKeeper claim being made by another business or employer for that individual.

### **Payment**

The amount of an entity's JobKeeper Payment for an individual for a fortnight is \$1,500.

The statutory rules note that, for the avoidance of doubt, the fact that the ATO pays an entity a payment does not mean the entity is actually entitled to it, therefore ensuring the door to recovery is kept well open.

No payment will be made after 30 September 2021. Entitlement to a payment may be cancelled, revoked or varied by later legislation.

### **Superannuation**

There are no changes to superannuation in the JobKeeper statutory rules, but the explanatory statement to the rules does flag that amendments will need to be made (through regulations made under the *Superannuation Guarantee (Administration) Act 1992*).

The regulations will ensure that an employer will only need to make superannuation contributions for any amount payable to an employee in respect of their actual employment, disregarding any extra payments made by the employer to satisfy the wage condition for getting the JobKeeper Payment.

For example, if the work actually done by an employee over a period entitled them to be paid \$1,000 but the employer instead paid them \$1,500 to satisfy the wage condition for a JobKeeper fortnight, then the employer will only be required to make superannuation contributions in relation to \$1,000. Similarly, any liability to superannuation guarantee charge that the employer would have for not making sufficient superannuation contributions would be calculated by reference to that \$1,000 base.

An employer will still be required to make the same superannuation contributions for an employee whose pay exceeds the JobKeeper Payment. For example, if an employee is entitled to be paid \$2,000 for their work, the employer will continue to be required to make contributions in relation to that amount, irrespective of whether they were eligible to receive the JobKeeper Payment in relation to the employee.

### **Transitional rules**

There is a transitional rule that allows the ATO to make an "advance payment" for the JobKeeper fortnights ending in the month of April without being satisfied that the entity is entitled to that payment. This was necessary to ensure that payments in respect of the first and second JobKeeper fortnights (starting on 30 March 2020 and 13 April 2020 respectively) could be made quickly to assist entities affected by the pandemic. Otherwise, entitlement only arises for those JobKeeper fortnights and later fortnights in which eligible employers are registered under the scheme before the end of a JobKeeper fortnight.

However, before the ATO can make an advance payment under the transitional rule:

- the entity must have notified the ATO in the approved form of its election to participate in the scheme; and
- the ATO must be satisfied, on the basis of the information the entity provides, that it is reasonable in the circumstances to make the payment.

Generally, an employer must notify the ATO in the approved form of its election to participate in the scheme before the employer can be entitled to a payment for a fortnight. This election generally needs to be provided

to the ATO before the end of a JobKeeper fortnight for the employer to be entitled to a payment for that fortnight.

However, there is a different timing rule where the employer wishes to participate in the scheme and receive the first or second JobKeeper Payments. Where this is the case, the employer has until the end of the second JobKeeper fortnight, that is, 26 April 2020, to provide the ATO with its election to participate. This gives employers more time to comply with the election requirement and means that fewer employers will miss out on receiving the first JobKeeper payment (given that generally the scheme only applies prospectively to elections to participate).

The ATO points out that to qualify for the first JobKeeper Payment (to be received in May), eligible entities can make one combined payment of \$3,000 for the first two fortnights, paid by end of April 2020. It is worth remembering that salary and wages operates on a cash basis; that is, the amount has to be received by the employee. The employer cannot accrue the liability and then pay it to the employee after receiving the JobKeeper Payment.

## **Integrity issues**

Businesses, individuals and entities that deliberately enter into contrived arrangements with the sole or dominant purpose of reducing their turnover in order to gain access to or increase their JobKeeper Payments will not be entitled to the payment or the increased payment. The general interest charge (GIC) will apply on any overpayment under s 19 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*. In addition, significant administrative and criminal penalties may apply.

## **Records**

An entity is not entitled to a JobKeeper Payment (or any other coronavirus economic response payment) unless it satisfies various pre-payment and post-payment record-keeping requirements. Relevant records must be in English, or readily accessible and easily convertible into English, and must be kept for five years after the payment is made.

## **Review of decisions**

Various decisions of the ATO in relation to the JobKeeper Payment (and any other coronavirus economic response payments) – for example, that an entity is not entitled to a payment for a period or in relation to the amount of a payment – are subject to the objection and appeal provisions in Pt IV of the *Taxation Administration Act 1953*.

## **Tax consequences**

The statutory rules do not state that a JobKeeper Payment is exempt income or non-assessable non-exempt (NANE) income. The payment will therefore be assessable as a subsidy. However, as a payment forms part of wages paid to the employee, a deduction for the payment is available under s 8-1 of ITAA 1997.

GST does not apply in relation to JobKeeper Payments made to employers, because the payments are not consideration for supplies made by employers to the government.

Source: <https://www.legislation.gov.au/Details/F2020L00419>; [www.ato.gov.au/Business/Business-bulletins-newsroom/Employer-information/JobKeeper-Payment-is-here/..](http://www.ato.gov.au/Business/Business-bulletins-newsroom/Employer-information/JobKeeper-Payment-is-here/)

## **ATO opens applications for early release of super**

The ATO has released its application form for the early release of superannuation by individuals impacted by COVID-19. From 20 April, an individual can make one application to access up to \$10,000 (tax-free) in the 2019–2020 financial year (ie they must make the application by 30 June 2020). A second application for up to \$10,000 can be made in the 2020–2021 year (ie from 1 July 2020) until 24 September 2020.

An application can be made by:

- the member authenticating themselves through the myGov website and completing the application form in ATO Online; or
- for those who are unable to access online services, the individual calling the ATO, confirming their identity and completing the application over the phone.

The application form requires the person to certify that they are eligible and includes information about the consequences of making false applications. The individual will then proceed to:

- review a list of open accounts they have and the last account balance reported for each account (in most cases at 30 June 2019);
- input the amount they would like to release from each account – the total amount cannot exceed \$10,000, but there are otherwise no limitations on what the individual can input;
- input the details of the bank account (account name, BSB and number) they would like the money paid into; and

- authorise the ATO to provide the information to the super fund and the super fund to release the money into that account.

The ATO has run a social media campaign asking people to observe the intention of the legislation and only apply to release their super to deal with the adverse economic effects of COVID-19. For example, the ATO says taxpayers should not withdraw their super early and re-contribute it to gain a personal tax deduction.

Individuals have been able to login into myGov and register interest in the coronavirus early release of super measure with the ATO. The ATO has been contacting these individuals via SMS or email now that the application form is available to complete. As at 2 April 2020, 361,000 individuals had registered an interest in the measure.

Eligible individuals should carefully check their super account balances to ensure there are sufficient funds available to claim. If a member makes an application and the fund has insufficient money to fulfil the application, the ATO says the member will not be able to make a second application for the balance from another fund/account in that financial year. They will also not be able to seek the balance in the 2020–2021 financial year above the \$10,000 cap.

If an application is rejected by the ATO, the member will be notified via their MyGov account in two to three days.

### **Notification process for super funds**

It will take one to two business days for super funds to receive notifications directly from the ATO about their members, with funds expecting to start receiving notifications from 21 April 2020. The ATO will be providing the details to funds in an electronic data file that funds will need to download via the Bulk Data Exchange (BDE) channel and process. The government expects funds to process the payments and release the amounts to individuals “as soon as possible”. The current process for existing categories of compassionate release of super will continue as is.

The ATO and the Australian Transaction Reports and Analysis Centre (AUSTRAC) have confirmed that super funds will be able to rely on the ATO’s customer verification under a proposed anti-money laundering and counter-terrorism financing (AML/CTF) regime rule.

Separate arrangements will apply for applications by members of self managed super funds (SMSFs). The ATO will issue a determination to the member (instead of the super fund) advising of their eligibility to release an amount. When the SMSF receives the determination from the member, the SMSF trustee is then authorised to make the payment.

### **Unclaimed super payment deferral**

The ATO will grant super funds a deferral of the scheduled statement day and payment day for 31 December unclaimed money day accounts. The 30 April 2020 due date will be deferred to 31 October 2020.

The ATO is providing this deferral to allow funds to focus on assisting members who may be looking to release amounts from their super under the coronavirus condition for early release. The deferral extends the period within which unclaimed superannuation money (USM) accounts can be reported and paid. Any fund wanting to continue with their USM reporting as planned can do so. Funds may want to consider continuing reporting and paying USM for certain categories (such as where a member is 65 years or older) where it would be in the member’s interests. The ATO said it will not proceed with hyper-care arrangements for this USM period (including proactive consolidation).

### **Electronic release authority statements**

During the COVID-19 period, the ATO says it will allow super funds to submit electronically release authority statements (RASs) and end benefit notices (EBNs) in relation to the First Home Super Saver (FHSS) scheme and excess contributions, and for Div 293 purposes.

### **Super accounts available for release**

A member can request amounts up to a total of \$10,000 from multiple funds at the application stage, as follows:

- The available fund accounts (excluding those in retirement phase) will be displayed via myGov and the member can choose multiple accounts and the amount to be approved for release from each account.
- There are no restrictions on the amount a person can request for release from any account, except the \$10,000 overall yearly limit.
- A member can request more than the account balance displayed to them in the application.
- There is a limit of \$10,000 in the one application per financial year.

A member cannot add a new fund to myGov when applying; only matched accounts reported to the ATO through the Member Account Attribute Service (MAAS) will be displayed.



The application form will display all open accounts except those in retirement phase. A member can only apply for one determination per financial year. For example, a member can request \$1,000 from one fund and another \$9,000 from another fund as long as they do so in the same application. Members will not be able to make a subsequent application if they do not request or receive the full amount approved in their first application for that financial year.

### **Proportioning rule**

While a released amount is non-assessable non-exempt income (NANE) for the individual, the ATO notes that the payment is subject to the proportioning rule in s 307-125 of the *Income Tax Assessment Act 1997* (ITAA 1997). Therefore, individuals with multiple super accounts still need to consider the underlying tax components of their different super interests when choosing which accounts to release from.

Generally, a taxpayer with multiple super interests should consider nominating the release amount to be paid from the interest with the largest taxable component. However, take care if looking to maintain an unrestricted non-preserved component, as any benefit payment from a particular super interest will be cashed out first from the unrestricted non-preserved component.

For accounts where a member's tax-free component is actually higher than the entire accumulation balance itself (as a result of negative returns), it may be helpful to maintain some of that interest in the accumulation phase so that it can be used to absorb any future investment earnings (which would otherwise be effectively added to the taxable component). However, there is no one-size-fits-all approach, so it is necessary to consider the operation of the proportioning rule on the future payment of benefits for a member's particular circumstances.

### **Pension accounts**

The ATO notes that super amounts cannot be released from a pension account under the coronavirus early access condition of release.

The recent amendments to allow early access to super under the coronavirus condition of release do not vary the circumstances in which pension payments may be made from a transition to retirement income stream (TRIS), or the circumstances in which an amount commuted from a TRIS can be cashed out of the superannuation fund. Hence, the ATO says no amounts in excess of what is already allowed to be cashed from a TRIS can be released under the coronavirus condition.

However, a member whose TRIS comprises preserved or restricted non-preserved benefits may be able to commute the TRIS back to the accumulation phase within the superannuation fund (in accordance with the rules of the fund and the pension). In this case, the ATO says the preserved and restricted non-preserved amounts may then be eligible to be released under the coronavirus condition for early release. As an individual can only apply once in each financial year, it is important to first commute a pension amount back to accumulation before applying to the ATO.

### **Payment by fund**

Funds are required to make the payment tax-free "as soon as practicable". The ATO acknowledges that there may be occasions when a fund will need to contact the member to meet that obligation. In those scenarios, a fund can use the ATO's provision of details (POD) service to obtain current contact details for a member.

Funds are not required to issue PAYG statements showing a proportion of the payment to be taxable component – untaxed element. The payment is not a "withholding payment" and an amount is not required to be withheld from the payment as it is NANE (s 12-1(1A) of Sch 1 to the *Taxation Administration Act 1953*). There is no requirement to report back to the ATO where a fund is unable to pay part or all of the money requested under the early release provisions.

The ATO will make determinations based on self-assessment, but if a fund identifies a case suspected to be at high risk of fraud, it should be reported to the ATO for confirmation of the best approach to manage it. Any compliance activity will be followed up by the ATO directly with the individual.

### **Non-regulated funds and defined benefit funds**

Members of non-regulated funds will need to apply directly to their own scheme/fund for early release of super. If an individual applies to the ATO for the release of an amount from an exempt public sector superannuation scheme (EPSSS), the ATO will process the application, make a determination and send a notification to the EPSSS. It will be up to the EPSSS to decide how to respond to the notification and what action to take.

When an individual applies, they will be presented with all open accounts that are not in retirement phase. This will include defined benefit accounts. The ATO will process the application and notify the defined benefit fund. It is up to the defined benefit fund to decide whether or not to release the amount. As an individual can only apply once in each financial year, it is important to first check whether a defined benefit fund can or will release amounts before applying to the ATO.

## **ATO-held super**

An individual cannot apply for a determination to release super amount held by the ATO. If the individual is not eligible for a direct payment of ATO-held super, they will need to request a transfer of the ATO-held super into an account held by a super provider on their behalf before requesting its release.

*Source: [www.ato.gov.au/Super/APRA-regulated-funds/In-detail/News/CRT-Alerts/2020/CRT-Alert-004/2020---COVID-19-economic-response-package---early-release-of-super/](http://www.ato.gov.au/Super/APRA-regulated-funds/In-detail/News/CRT-Alerts/2020/CRT-Alert-004/2020---COVID-19-economic-response-package---early-release-of-super/).*

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