

client alert | explanatory memorandum

June 2020

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 22 May 2020.

Treasury revises down estimated JobKeeper cost by \$60 billion

The ATO and Treasury have released a joint statement advising that the previous estimate of the number of employers who would access the JobKeeper program was significantly overstated. Treasury now estimates the number of employees likely to be covered under the JobKeeper program to be around 3.5 million (down from a previous estimate of 6.5 million employees). As a result, Treasury has revised down the estimated cost of JobKeeper to around \$70 billion (down from the original \$130 billion estimate).

The overstatement has been attributed to errors that employers made when applying for the JobKeeper payment. For example, when estimating their eligibility over 500 businesses with only a single eligible employee actually reported the dollar amount that they expected to receive per fortnightly JobKeeper payment (ie 1,500) instead of the number of their eligible employees (ie 1). This reporting error has come to light as the ATO and Treasury have been analysing the amounts being paid out under the scheme, and reconciling them with the estimates provided by enrolled businesses of the likely number of eligible employees. It was not picked up by the ATO earlier as its primary focus in the first fortnight was on ensuring that JobKeeper payments were paid promptly to those eligible for them, and were not paid to those who were ineligible.

Importantly, this reporting error has no consequences for JobKeeper payments that have already been made to eligible businesses, as payments under the scheme depend on the subsequent declaration that an eligible business makes in relation to each and every eligible employee. This declaration does not involve estimates and requires an employer to provide the Tax File Number (TFN) for each eligible employee.

As of 20 May 2020, 910,055 businesses had enrolled in the JobKeeper program. Of these, 759,654 had made claims in relation to their eligible employees and had their applications processed. This resulted in \$8.7 billion of approved payments to those 759,654 businesses, covering around 2.9 million employees. Around 97% of claims have been paid to employers within three business days of employers making the employee declaration.

From the economic viewpoint, Treasury expects the unemployment rate would have been around 5% higher in the absence of the JobKeeper program than it currently is. Treasury continues to expect the unemployment rate to reach around 10%, although as indicated by the recent Labour Force survey, the measured level of the unemployment is highly uncertain given the impact of physical distancing restrictions on the participation rate.

Registration and declaration deadlines

The ATO has reminded all eligible employers that 31 May 2020 is the final date employers can enrol for JobKeeper if they intend to claim for wages paid for JobKeeper fortnights in April and May.

Further, all eligible employers who have enrolled but not yet made their employee declaration must ensure that they complete their April declaration by 31 May 2020. The ATO also reminds employers that on an on-going basis they must declare their eligible employees monthly. May declarations must be made by 14 June 2020.

Source: www.ato.gov.au/Media-centre/Media-releases/Joint-Treasury-and-ATO-statement---JobKeeper-update/.

Snapshot of Federal COVID-19 pandemic measures

The following is a snapshot of Australia's all-of-Government financial measures in response to the coronavirus (COVID-19) pandemic. It does not deal with the response measures specific to the various states and territories.

Tax-related business measures

- *Cash flow boost payments:* Tax-free payments of up to \$100,000 are available for eligible small and medium sized entities (SMEs) and not-for-profits (including charities) that employ people, with a minimum payment of \$20,000. The amounts will be delivered will be made in two stages. At 23 April 2020, the ATO had paid out \$3 billion in cash flow boost payments to 177,000 businesses ahead of the

originally anticipated start date of 28 April. Further cash flow boost payments will be made by October 2020.

NOTE: It is important to be aware that cash flow boosts are not upfront payments; rather, they are delivered as credits in the activity statement system. The amount an entity receives will be offset against the liabilities that appear on its business activity statement (BAS) and any debits in its running balance account (RBA). Any excess credit from the activity statement that received the cash flow boost amount will then generally be refunded to the entity within 14 days.

- *Instant asset write-off extended and increased to \$150,000:* The *Coronavirus Economic Response Package Omnibus Act 2020* has amended the *Income Tax Assessment Act 1997* (ITAA 1997) to increase the instant asset write-off threshold from \$30,000 to \$150,000 for business entities with aggregated annual turnover of less than \$50 million (up from a minimum of \$50 million) from 12 March 2020 to 30 June 2020.
- *Accelerated rates of depreciation:* Businesses with aggregated turnover of less than \$500 million in an income year can deduct capital allowances for depreciating assets at an accelerated rate. This measure extends over two income years; that is, 2019–2020 (albeit not the full year) and all of 2020–2021.
- *Research and development (R&D) tax incentive applications for 2019 extended:* The Government has deferred the lodgment dates for R&D tax incentive applications for the 2018–2019 income year until 30 September 2020.

JobKeeper Payment

NOTE: The JobKeeper Payment scheme is designed to provide a wage subsidy of \$1,500 per fortnight per employee. The payment will be paid to employers, for up to six months, for each eligible employee who was on their books on 1 March 2020 and is retained or continues to be engaged by that employer. Where a business has stood down employees since 1 March, the payment is designed to help the employer maintain connection with their employees.

- *JobKeeper legislation passed:* This contains the legislative framework to implement the Government's JobKeeper Payment program (with the mechanics to be contained in Statutory Rules). At 23 April 2020, more than 900,000 businesses had registered their interest in accessing JobKeeper payments, with 275,000 already completing applications.
- *JobKeeper Statutory Rules (as amended):* These contain the detailed rules and taxpayer requirements to qualify for the JobKeeper Payment program.
- *JobKeeper "decline in turnover" tests:* Details are now available regarding the alternative tests that can be used to determine if the "decline in turnover" requirement of the JobKeeper Payment program is satisfied. New rules set out a separate decline in turnover test where businesses use a special purpose entity to employ staff, and there have been changes to rules affecting charities, religious practitioners, the selection of all eligible employees (one-in, all-in), students aged 16 and 17, international aid organisations and universities.
- *Banks can confirm employer JobKeeper elections:* Authorised deposit-taking institutions (ADIs) are able to confirm that the ATO has provided a notice to an employer concerning their election to participate in the JobKeeper Payment program. This measure is designed to assist in the provision of bridging finance.
- *JobKeeper deadline(s) extension:* Employers had until 8 May 2020 to pay staff for the first two JobKeeper fortnights and must be registered by 31 May 2020 (the deadline was previously 30 April for both).
- *Fair Work advice:* The Fair Work Commission has released a "JobKeeper disputes benchbook" to assist employers and employees to resolve disputes relating to the JobKeeper Payment scheme.

Superannuation

- *Superannuation early release up to \$20,000:* Individuals affected by COVID-19 can apply via myGov to release (tax-free) up to \$10,000 of their superannuation in the 2019–2020 financial year. A second application up to \$10,000 can be made in the 2020–2021 year until 24 September 2020. To be eligible, a person must be unemployed or eligible to receive income support such as JobSeeker or Youth Allowance payments. Alternatively, on or after 1 January 2020, the person must have been made redundant or have had their working hours reduced by 20% or more (or, for a sole trader, have experienced a reduction in turnover of 20% or more).
- *Super pension drawdowns reduced by 50%:* The minimum annual payment amounts for pensions and annuities have been temporarily reduced by 50% for 2019–2020 and 2020–2021. The reduction in the minimum payment amounts applies to account-based, allocated and market-linked (term allocated) pensions.

- *Temporary residents early release for COVID-19:* Certain temporary residents impacted by COVID-19 may apply for an early release of up to \$10,000 of their superannuation by 30 June 2020.
- *Tax agents granted Australian financial services (AFS) licensing relief for early release:* A temporary AFS licensing exemption allows registered tax agents to provide certain financial product advice to their existing clients about the early release of superannuation under the coronavirus condition of release. The Australian Securities and Investments Commission (ASIC) has also provided some administrative relief.
- *Anti-money-laundering/counter-terrorism-financing (AML/CTF) exemption for early super release:* The Australian Transaction Reports and Analysis Centre (AUSTRAC) has registered legislative rules to provide a temporary exemption from the customer identification procedures for super funds making COVID-19-related early super release payments in respect of the anti-money-laundering and counter-terrorism rules.

Social security

- *Fortnightly \$550 Coronavirus Supplement:* This supplement is available for job seekers, sole traders, students and some others. It effectively doubles the current payment for new and existing social security recipients from 27 April 2020. It will be paid for six months to both existing and new recipients of the JobSeeker Payment, Sickness Allowance, Youth Allowance for jobseekers, Parenting Payment Partnered, Parenting Payment Single, Partner Allowance, Sickness Allowance and the Farm Household Allowance.
- *\$750 stimulus payments for income support recipients:* The first \$750 cash stimulus payment has now gone out to 6.8 million eligible pensioners, carers, disability support pensioners, those on family tax benefits and concession card holders. A second \$750 payment will be made from 13 July 2020 for eligible income recipients and concession card holders.
- *Pension deeming rates cut:* The social security deeming rate have been reduced (twice) to 0.25% for financial investments up to \$51,800 for single pensioners and \$86,200 for pensioner couples. The upper deeming rate is 2.25% for balances over these amounts.

Regulation

- *Commercial property tenancies:* The Prime Minister has confirmed that the states and territories will legislate the *Mandatory Code of Conduct for SME commercial leasing principles during COVID-19*.
- *Creditor's statutory demand threshold:* The current minimum threshold for creditors issuing a statutory demand on a company under the *Corporations Act 2001* has been raised from \$2,000 to \$20,000. The statutory timeframe for a company to respond to a statutory demand has been extended from 21 days to six months.
- *Bankruptcy minimum debt of \$20,000:* The threshold for the minimum amount of debt required for a creditor to initiate bankruptcy proceedings against a debtor (ie personal insolvency) will increase from its current level of \$5,000 to \$20,000. The time debtors have to respond to a bankruptcy notice will be increased from 21 days to six months.
- *Duty to prevent insolvent trading:* Directors will be temporarily relieved of their duty to prevent insolvent trading with respect to any debts incurred in the ordinary course of the company's business.
- *Federal wage subsidy for apprentices:* Eligible employers can apply for a wage subsidy of 50% of an apprentice's or a trainee's wage paid during the nine months from 1 January 2020 to 30 September 2020.
- *SME loan guarantee scheme for bank lending:* The Coronavirus SME Guarantee scheme will provide a guarantee of 50% to SME lenders for new unsecured loans to be used for working capital.
- *Regional and sector support:* The Government has set aside an initial \$1 billion to support regions, communities and industries that have been disproportionately affected by the economic impacts of the pandemic, including those heavily reliant on industries such as tourism, agriculture and education.
- *Subsidy for child care providers:* The Government will pay 50% of the sector's fee revenue up to the existing hourly rate cap based on a point in time before parents started withdrawing their children in large numbers, but only so long as services remain open and do not charge families for care.

ATO concessions

- *Deferring tax payments:* Tax payment dates will be deferred by up to six months for tax amounts due through the BAS (this was initially announced as four months). This includes PAYG instalments, income tax assessments, FBT assessments and excise.
- *Varying PAYG instalments:* The ATO has allowed businesses to vary their PAYG instalment amounts to zero for the March 2020 quarter. That is, a quarterly PAYG instalments payer can vary its PAYG instalments on its activity statement for the March 2020 quarter. Businesses that vary their PAYG

instalment to zero can also claim a refund for any instalments made during the 2019–2020 financial year (ie for the September 2019 and December 2019 quarters).

- *ATO automatic lodgment deferrals:* The ATO has advised that lodgment and payment deferrals will be automatically applied to the following obligations due on 15 May 2020: company 2018–2019 income tax returns are now due by 5 June 2020, and self managed superannuation fund (SMSF) 2018–2019 annual returns are now due by 30 June 2020. For individuals, partnerships and trusts, the ATO says 2018–2019 income tax returns can be lodged by the 5 June 2020 concessional due date, provided that the taxpayer pays any liability by this date. Finally, the lodgment and payment due date for 2019–2020 FBT annual returns has been automatically deferred from 21 May to 25 June 2020.
- *Remitting interest and penalties:* This measure is applicable to certain interest and penalties incurred on or after 23 January 2020 that have been applied to tax liabilities.
- *Low-interest payment plans:* These are available to allow affected businesses to enter into low-interest payment plans for their existing and ongoing tax liabilities.
- *Cessation of business:* The ATO is taking a practical attitude to those who have to put their business “on hold”.
- *Working from home deductions:* The ATO will accept deduction claims using a flat rate of 80c per hour, provided a diary of working hours is kept. This is subject to rules in Practical Compliance Guideline PCG 2020/3.
- *Tax agents can enrol clients for JobKeeper:* The ATO has advised that agents can enrol on behalf of their clients for the JobKeeper Payment program.
- *Corporate residency and central management and control:* Where a foreign incorporated company that is not an Australian tax resident has had to make alternative arrangements for board meetings because of COVID-19 travel restrictions, concessions will be made when determining if the central management and control is in Australia.
- *Permanent establishment (PE):* The ATO says a foreign incorporated company that is not an Australian tax resident will not be deemed to have an Australian PE where it has an unplanned presence of my employees in Australia due to COVID-19.
- *Significant global entity (SGE) penalty:* The ATO will remit the significant global entity (SGE) penalty for a period of 30 days from the lodgment date of the approved form, including for the general purpose financial statement (GPFS) lodgment, under certain circumstances.
- *PAYG withholding and foreign employers:* The ATO does not expect foreign employers to register for PAYG withholding if the only reason that a foreign employee is now working in Australia (but not otherwise a resident of Australia) is the impacts of COVID-19 on travel, and it is anticipated that they will leave before 30 June 2020.
- *FBT:* If entities provide or pay for goods or services to assist employees who are sick, or are at risk of becoming sick, with COVID-19, this will generally be exempt from FBT if the benefit is provided for their immediate relief.
- *Switching to monthly GST reporting:* Businesses on a quarterly reporting cycle can elect to switch their GST reporting and payment to a monthly cycle to get a quicker GST refund.

ATO concessions: SMSFs

- *SMSF annual returns:* The ATO has automatically deferred until 30 June 2020 the lodgment due date for the 2018–2019 SMSF annual return for all funds.
- *SMSF temporary rent reductions:* The ATO has confirmed that it will not take compliance action for the 2019–2020 and 2020–2021 financial years where an SMSF landlord gives a tenant (who is also a related party) a temporary rent reduction during this period.
- *Related-party limited recourse borrowing arrangements (LRBAs) and temporary rent reductions:* If an SMSF with an otherwise compliant LRBA grants COVID-19 rent repayment relief, reflecting similar terms to what commercial banks are offering, the ATO will accept that the parties are dealing at arm’s length and the non-arm’s length income (NALI) provisions in s 295-550 of ITAA 1997 do not apply. The ATO still expects to see evidence that interest continues to accrue on the loan and that the SMSF trustee will catch up any outstanding principal and interest repayments as soon as possible.
- *In-house assets:* If an SMSF exceeds the 5% in-house asset threshold as at 30 June 2020, a plan must be prepared and implemented on or before 30 June 2021. However, the ATO will not undertake compliance activity if the rectification plan could not be executed because the market has not recovered or it was unnecessary to implement the plan as the market had recovered.
- *SMSF residency test:* If a trustee or director is stranded overseas due to COVID-19, the ATO will not apply compliance resources to that aspect of the SMSF residency condition in s 295-25 of ITAA 1997.

ASIC

- *AFS licensees and financial advisers:* ASIC has granted temporary financial services relief to enable the provision of timely COVID-19 advice (including the early release of super). ASIC has also adopted a temporary no-action position for intra-fund advice by super trustees. Professional bodies have released Record of Advice (RoA) templates to assist members providing clients with COVID-19 advice about the early release of super.
- *ASIC's regulatory priorities:* Until 30 September 2020, ASIC will afford priority to COVID-19 issues and delay less time-critical activities, such as consultations, regulatory reports and reviews (eg executive remuneration, internal dispute resolution and managed discretionary accounts). ASIC will also revise its work on implementing recommendations of the Banking Royal Commission in light of changes to the Parliamentary timetable.
- *Annual general meetings (AGMs) and financial reporting:* ASIC has adopted a "take no action" stance in relation to the timing of AGMs and the conduct of AGMs by electronic means.
- *Reporting by unlisted entities:* Lodgment deadlines have been extended for unlisted entities, including unlisted public companies, proprietary companies, registered schemes, disclosing entities and AFS licensees.
- *Directors' duties:* Despite the temporary COVID-19 relief for financially distressed businesses, ASIC has reminded directors that they must still comply with their other statutory and common law duties, including the duties to act with due care, skill and diligence; to act in the best interests of the company as a whole; and to not use their position to gain an advantage.
- *Unlicensed advice by real estate agents:* ASIC has warned estate agents not to advise tenants who are unable to pay their rent to apply for the early release of their super.

APRA

- *APRA's regulatory priorities:* until 30 September 2020, the Australian Prudential Regulation Authority (APRA) has suspended the majority of its planned policy and supervision initiatives. It will focus on monitoring entities for key financial settings, such as capital and liquidity. APRA has also suspended all substantive public consultations and actions to finalise revisions to the prudential framework that are currently underway or upcoming. However, APRA may still progress certain data reporting initiatives that are related to the impacts of COVID-19.
- *APRA prudential and reporting standards:* APRA has deferred the start dates for six prudential and reporting standards that have been finalised but are yet to fully come into effect.
- *APRA data collection:* APRA has suspended for six months its project to replace the Direct to APRA (D2A) data collection tool with its APRA Connect data collection solution.

Financial institutions

- *Bank loan deferrals:* Banks will defer loan repayments for six months for small businesses with total business loan facilities up to \$10 million who need assistance because of COVID-19.
- *Commercial property landlords:* The banks have agreed not to enforce business loans for non-financial breaches of the loan contract (such as changes in valuations). This concession is subject to the landlord complying with the mandatory *National Code of Conduct for commercial leasing principles during COVID-19*.
- *Bank assistance for JobKeeper:* The major banks have agreed to set up a dedicated hotline for customers needing to access bridging finance to pay their staff ahead of receiving money under the JobKeeper program. The banks have also agreed to expedite the processing of those JobKeeper applications.

JobKeeper: common questions to the ATO

The ATO has updated its webpages – one for employers and one for employees – that provide answers to some common JobKeeper questions. These pages are being regularly updated, so it is worth keeping an eye on them. The following highlights some of the more noteworthy items.

- *Super is not included:* The ATO confirms that the minimum \$1,500 payment does not include the amount contributed as super to meet super guarantee obligations. However, it does include super contributions made under a salary sacrifice arrangement. For example, assume an employer pays an employee \$1,400 per fortnight before tax, plus contributes \$133 super per fortnight (ie 9.5%) to meet super guarantee obligations. This would not meet the requirements for the minimum payment to the employee.
- *Out-of-sync pay cycles:* Employers are not required to change pay cycles to correspond with JobKeeper fortnights. What is important is that employees are paid at some time during the JobKeeper fortnight. However, if the employer usually pays their employees less frequently, the payment can be allocated

between fortnights in “a reasonable manner”. For example, if employees are paid monthly, the employer will still be entitled to receive a JobKeeper Payment, provided that the employees received the monthly equivalent of \$1,500 per fortnight.

- *Proof of participation:* The ATO cannot provide a letter (eg to a bank) confirming that an employer has enrolled in the JobKeeper Payment scheme. However, the employer themselves can provide the bank with the information used as part of the JobKeeper enrolment process, including the JobKeeper receipt number and the number of eligible employees.
- *Eligibility cut-off:* If an employer does not satisfy the “decline in turnover” test for the current month or quarter, it can still assess its eligibility at a later date. To qualify later, the turnover month can be May, June, July, August or September 2020, provided the relevant JobKeeper fortnight has ended that month or an earlier month. If the turnover for a quarter is being used, it can be the quarter:
 - from 1 April 2020 to 30 June 2020; or
 - from 1 July 2020 to 30 September 2020 – but only if first seeking to qualify for fortnights ending in July 2020 or later.
- *Turnover recovery:* Employers only need to satisfy the “decline in turnover” test once to be entitled to JobKeeper payments (and remain entitled). For example, having satisfied it for March 2020 (compared in March 2019) is sufficient – even if the business recovers to previous levels after this (eg if things pick up in May).
- *Reporting current turnover:* Employers needed to report their April current GST turnover and May projected GST turnover to the ATO by 31 May 2020 (not 7 May as originally announced). Note, though, that the approved form that entities use to report their monthly GST turnover for April is also used to identify eligible employees, religious practitioners and/or a business participant each month. This confirmation will need to be made for the ATO to be satisfied that the entity is entitled to a JobKeeper Payment. This means that if an employer reported its April GST turnover amounts later than 7 May 2020, its JobKeeper Payment will also be delayed.
- *Evidence of turnover decline:* In terms of proving projected GST turnover for a test period, “relevant evidence that would support a prediction of sales likely to be made” may include:
 - a decline in sales during the turnover test period or since 1 March 2020 as a result of government COVID-19 restrictions;
 - customers cancelling or modifying existing contracts for sales on or from 1 March 2020;
 - being required to close or pausing the business due to government COVID-19 restrictions;
 - delays in being able to get access to trading stock sourced from overseas on or from 1 March 2020;
 - evidence of a business’s reliance on tourism;
 - any consequential effect on the price of supplies, eg the effect on the market value of new property being sold by a developer;
 - information known to the business, whether or not publicly available;
 - economic forecasts undertaken by a reputable organisation that are relevant to the type of business; and
 - the likely timing of government COVID-19 restrictions being lifted for employer’s type of business, based on government announcements.
- *Incorrect assessments of turnover:* If, at a later stage, it eventuates that actual turnover for a test period is greater than the projected turnover, the employer will not lose access to JobKeeper. The ATO will accept the assessment of these turnovers, unless it has reason to believe that the calculation of projected GST turnover was not reasonable. If there is a significant difference, the ATO may need to assess whether the assessment was reasonable, so there is a need to keep good records of calculations and the assumptions behind them.
- *Job change:* If an employee changes jobs after 1 March 2020, the new employer will not be eligible to claim JobKeeper Payments for that employee. However, there are some limited exceptions that may apply when a person is re-employed within the same corporate group.
- *Other income of employees stood down:* An employee who has been stood down can earn income from another job while the original employer is receiving JobKeeper Payments for the employee, provided the employee maintains employment (including while being stood down) with the JobKeeper-eligible employer.

Source: www.ato.gov.au/General/JobKeeper-Payment/In-detail/Employers--frequently-asked-JobKeeper-questions/;
www.ato.gov.au/General/JobKeeper-Payment/In-detail/Employees--frequently-asked-JobKeeper-questions/.

JobKeeper: measuring decline in turnover

Law Companion Ruling LCR 2020/1, issued on 4 May 2020 and effective from 9 April 2020, explains various aspects of the JobKeeper “decline in turnover” test and also sets out practical compliance approaches that an entity can apply to calculate its turnover. The Ruling is intended to supplement guidance already available on the ATO website. The ATO says it decided to issue a (non-binding) ruling as it continues to receive questions about some aspects of the test.

Background

Businesses (including sole traders and charities) must have suffered a “substantial decline” in turnover to qualify for the JobKeeper Payment of \$1,500 per eligible employee. The basic decline in turnover test is linked to the GST turnover test (in Div 188 of the GST Act) and requires an entity to measure its projected GST turnover for a turnover test period in 2020 and compare this to the current GST turnover for a relevant comparison period in 2019. In particular, an entity needs to allocate supplies made, or likely to be made, to a turnover test period or relevant comparison period based on when the supply is made or is likely to be made, and to then determine the value of those supplies. Any shortfall is to be expressed as a percentage. If this equals or exceeds specified thresholds, the entity satisfies the decline in turnover test.

An alternative turnover test may be available if an entity’s circumstances do not fit the basic test rules. The alternative tests are not addressed in LCR 2020/1.

Issues covered by LCR 2020/1

Ruling LCR 2020/1 discusses in some detail the following aspects of the basic decline in turnover test:

- *Step A*: the supplies that are included in projected GST turnover and current GST turnover;
- *Step B*: allocating supplies to the right period; and
- *Step C*: determining the value of each supply allocated to a relevant period.

The Ruling then sets out practical compliance approaches that effectively allow entities to work out Steps B and C simultaneously.

Practical compliance approaches: alternative methods

The ATO accepts that there may be practical compliance difficulties in linking amounts received or invoiced based strictly on the time a supply is made or likely to be made. Ruling LCR 2020/1 outlines the following alternative methods which, if applied in good faith, can be used as a proxy to determine the value of supplies (Steps B and C):

- *Accrual accounting*: Entities can use the GST-exclusive revenue from making supplies that would be recognised in financial accounts prepared in accordance with accounting principles as a proxy for the value of supplies made or likely to be made in a turnover test period. This method extends to entities that account for GST on a cash basis.
- *GST attribution basis*: The total GST-exclusive value of supplies that would be allocated to a relevant period under the GST attribution rules (assuming the relevant period was also a GST reporting period) can be used as a proxy for the value of supplies made or likely to be made in a relevant period. For non-taxable supplies, entities should use the GST attribution rules as if they applied in the same way as they do for taxable supplies and as if the relevant period was a reporting period for GST purposes. If the amounts used for GST reporting purposes do not reflect the value of the supplies for the decline in turnover test, entities should ensure they include the value of the supply when the GST may have been calculated on a different basis (eg the full value of a supply of real property and not just the margin).

Entities that are not registered for GST may use the same accounting method that they use for income tax purposes. This involves treating the income or gains that are, or are likely to be, derived in a relevant period for income tax purposes as being the value of the supplies made, or likely to be made, in that relevant period.

An entity that chooses to use one of these alternative methods must use the same method, and apply it consistently, for both relevant periods. The entity also needs to keep reasonable records to show which method was used.

The ATO emphasises that an entity will not lose access to JobKeeper payments if its actual turnover for the turnover test period turns out to be greater than the prediction of projected turnover. The ATO will accept an entity’s assessment of these turnovers unless there is reason to believe that the calculation of projected GST turnover was not reasonable.

Source: www.ato.gov.au/law/view/view.htm?docid=%22COG%2FLCR20201%2FNAT%2FATO%2F0001%22.

STP exemption for small employers extended to July 2021

The ATO has announced that it has extended the Single Touch Payroll (STP) exemption for small employers in relation to closely held payees from 1 July 2020 to 1 July 2021 in response to COVID-19.

NOTE: A “small employer” is one that has 19 or fewer employees, and a “closely held payee” (or “related payee”) is someone who is directly related to the business, company or trust that pays them, such as family members of a family business, directors or shareholders of a company or beneficiaries of a trust.

This STP exemption for closely held payees applies automatically and small employers do not need to apply to the ATO to access it. However, employers should keep records to support their decision to apply the concession. Alternatively, an employer can notify the ATO and apply for the exemption through the online Business Portal – select “Manage employees”, then “STP deferrals and exemptions”, and then “Exemption”. A registered tax agent can also apply for an exemption on behalf of a client.

If a small employer has any other employees (also known as arm’s length employees), the ATO says they must be reported through STP on or before each payday, unless the employer is eligible for the reporting concession available to micro employers (those with one to four employees). Micro employers who need more time to move to STP reporting can ask their registered tax or BAS agent to report on their behalf on a quarterly basis. This can continue until 30 June 2021.

Source: www.ato.gov.au/Business/Single-Touch-Payroll/Concessional-reporting/Closely-held-payees/.

Foreign employment income and the impact of COVID-19

The ATO has issued a fact sheet for taxpayers who have returned to Australia as a result of the COVID-19 pandemic, particularly to address their status in regards of the income tax exemption for foreign earnings. Foreign earnings include salary, wages, commissions, bonuses and allowances earned from engagement in foreign service.

An Australian resident deriving foreign earnings from service in a foreign country may be entitled to an income tax exemption on those foreign earnings under s 23AG of the *Income Tax Assessment Act 1936* (ITAA 1936). This exemption can only apply where the foreign earnings are from a continuous period of service in the foreign country that lasts for at least 91 days.

The fact sheet applies where a taxpayer has returned to Australia from foreign service as a result of the pandemic and had:

- undertaken 91 days of continuous foreign service that qualifies for the income tax exemption, but had expected to complete further foreign service prior to returning to Australia; or
- commenced foreign service that otherwise would have qualified for the income tax exemption, however the taxpayer had not yet completed 91 days of continuous foreign service at the time of return.

If the taxpayer had already completed 91 days of continuous foreign service and met all the other requirements in s 23AG, the foreign earnings earned while undertaking the foreign service will remain exempt income. This includes income earned after return which is related to that period of foreign service, even if it is paid after the return (eg wages paid in arrears and paid recreation leave that accrued during the period of foreign service). However, if they had not yet completed 91 days of continuous foreign service, any foreign earnings from that period of foreign service are not exempt and therefore will be assessable.

While temporary absences from foreign service (such as time spent in Australia) still count as a period of foreign service, the ATO says that an absence from foreign service because a person returns to Australia as a result of COVID-19 and commences working in Australia is not a temporary absence from foreign service that falls into the s 23AG exceptions, because the person is returning without knowing when they can recommence their service in the foreign country. In the ATO’s view, this time in Australia cannot be characterised as a short work-related trip.

Source: www.ato.gov.au/law/view/view.htm?docid=%22AFS%2F23AG-COVID-19%2F00001%22.

Rental properties and the impact of COVID-19

The ATO has updated its webpage that addresses questions about residential rental properties and the financial impact of COVID-19. Some of the more interesting issues are outlined here.

- *Reduced or temporary cessation of rent:* If tenants are not meeting their payment obligations under the lease agreement due to COVID-19 and a landlord continues to incur normal expenses on the property, the landlord will still be able to claim those expenses.
- *Reduced rent to assist tenants affected by COVID-19:* If landlords reduce rent to enable tenants to remain in the property (thereby maximising rental return in a changed rental market), there will be no corresponding reduction for rental property expenses.

- *Back payments/insurance:* Receipts of back payment of rent or an amount of insurance for lost rent should be declared as income in the tax year in which the amounts are received.
- *Interest on deferred bank loans:* If a bank defers loan repayments for a period of time as a result of COVID-19, any interest accrued will be deductible.
- *Instant asset write-off:* The new instant asset write-off deduction is not available for property investors.

Private use of short-term accommodation

The ATO has also addressed a number of questions related to short-term accommodation being used for private purposes.

One question asks whether, in relation to a property that has suffered rental downturn due to COVID-19, the owner will be able to continue to deduct expenses associated with this property in the same proportion as before COVID-19 for the period when demand is adversely affected. The ATO says that the amount to be claimed will depend on how the property had been used before COVID-19 and how the owner planned to use it during the period that is now affected by the pandemic. If the reason for the adverse effect on demand for the property is COVID-19 (or the bushfires immediately beforehand), the owner can continue to deduct expenses associated with the property in the same proportion as they were entitled to deduct before the pandemic (or the bushfires). However, if they had started to use the property in a different way beforehand, the proportion of expenses to be claimed as a deduction may change. The ATO provides the following examples of changed use:

- increased private use of the property by the owner, their family or their friends; and
- a decision to permanently stop renting out the property once the COVID-19 restrictions end.

A flow-on question involves a taxpayer using a holiday home to self-isolate and whether deductions can continue to be claimed, given that the taxpayer was unable to rent the property commercially. Perhaps unsurprisingly, the ATO says that the increased private usage will reduce the amount that the taxpayer can claim.

The last question addresses rental advertising and is interesting. If a taxpayer stops paying for advertising during the COVID-19 lockdown period, can deductions associated with holding the property still be claimed? It is worth quoting the ATO's answer in full:

"It depends on a wider range of factors, not just one. Whether active and bona fide efforts are made to ensure a property is available for rent is only one factor to consider when determining the appropriate method to apportion deductions for a short term rental property. You would need to consider how the property had been used before COVID-19 and how you plan to use it during the period now adversely affected by COVID-19.

During this time we acknowledge it may be a reasonable commercial decision to temporarily reduce the level of paid advertising for your property, depending on the restrictions in your property's locality. However, this factor alone doesn't necessarily determine the allowable proportion of your deductions."

Source: www.ato.gov.au/general/covid-19/covid-19-frequently-asked-questions/individuals-frequently-asked-questions/?anchor=Residentialrentalproperties#Residentialrentalproperties.

Processing of super early releases resumes with extra risk filters

Processing of COVID-19 early release of superannuation applications resumed 11 May 2020 after the ATO added extra risk filters for all files that are delivered to super funds.

This followed the "pausing" of early release requests on 8 May 2020 so that the ATO could consider further enhancements to its systems to help protect individuals' personal data. Out of an abundance of caution, the ATO "paused" the early release of super requests being sent to super funds until 11 May. This was to enable the ATO to make sure there was nothing more that could be done to help individuals protect personal data to ensure they don't become victims of identity theft, said Assistant Treasurer Michael Sukkar.

In an update on 11 May, Mr Sukkar said the ATO had identified a small number of third parties who could be susceptible to new techniques criminals are using to try to steal personal data. The ATO is working with these third parties to help them make security enhancements, Mr Sukkar said. The additional risk filters will now be applied by the ATO on all files before they are delivered to super funds. Further information will be provided to funds to assist them in discharging their own obligations to apply fraud prevention processes.

The ATO has also reminded people to be vigilant about how they store and share their personal information. An individual's myGov log-in should never be shared with anyone, including their tax agent, Mr Sukkar said. Also be wary of emails or text messages that request personal information. The ATO will never send taxpayers a direct link to log on to ATO online services.

Appearing before the Senate Select Committee on COVID-19 on 7 May 2020, Australian Federal Police (AFP) Commissioner Reece Kershaw said the AFP was in the early stages of an investigation into fraud attempts against the super early release scheme, with five search warrants executed. So far, there are up to 150 victims. The AFP said it has identified some bank accounts and had them frozen, with \$120,000 all up.

The Assistant Treasurer added that the AFP is investigating one incident that might involve around 150 individuals. Tax Commissioner Chris Jordan has also confirmed that the ATO's systems have not been compromised. Mr Jordan has called on all taxpayers to be extraordinarily careful about keeping their personal information, such as their date of birth and Tax File Number (TFN) private and secure.

Source: <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/transcripts/interview-laura-jayes-first-edition-sky-news-0>; <https://ministers.treasury.gov.au/ministers/michael-sukkar-2019/media-releases/processing-early-release-superannuation-applications>; <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommsen%2F0c5c7e36-6300-484b-b9c3-ed5847b7ce91%2F0000%22>

Directors' duties still apply despite COVID-19 relief

The Australian Securities and Investments Commission (ASIC) has reminded companies, directors and officers faced with COVID-19 challenges to reflect on their fundamental duties to act with due care, skill and diligence, and to act in the best interests of the company.

ASIC Commissioner John Price has said the impacts of COVID-19 will require many companies to focus on and, most likely, recalibrate aspects of their corporate strategy, risk-management framework, and funding and capital management, among other things. This will require directors to reflect on which stakeholders' interests need to be factored into decisions – including employees, investors and creditors. This continues to be the case in areas where temporary relief has been provided from specific obligations under the law, Mr Price said. For example, the *Coronavirus Economic Response Package Omnibus Act 2020* has granted temporary relief for financially distressed businesses (s 588GAAA of the *Corporations Act 2001*). The temporary safe harbour provides relief for directors from potential personal liability for insolvent trading.

ASIC notes that a director wishing to rely on the temporary safe harbour measure “bears an evidential burden” to prove that the requirements of the temporary safe harbour provisions are met. According to ASIC, it may need to be shown that the debt was not effectively incurred before 25 March 2020. Even though temporary relief is provided from the insolvent trading provisions, ASIC said the relief does not extend to relief from statutory and common law directors' duties. These include the duty to act in the best interests of the company as a whole (which can involve directors taking into account the interests of stakeholders beyond shareholders, including creditors, when the company is in financial distress). These duties also involve the duty to act with care, diligence and good faith and not to use a director's position or information they have obtained as a director to gain an advantage or cause detriment to the company.

Finally, ASIC will maintain enforcement activities and continue to investigate and take action where the public interest warrants it. Whether action is taken depends on the assessment of all relevant circumstances, including what a director or officer could reasonably have foreseen at the time of taking relevant decisions or incurring debts, Mr Price said.

Source: <https://asic.gov.au/about-asic/news-centre/articles/directors-duties-in-the-context-of-covid-19/>

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