

client alert | explanatory memorandum

November 2020

CURRENCY:

This issue of **Client Alert** takes into account developments up to and including 23 October 2020.

Budget personal tax cuts and business concessions now law

The *Treasury Laws Amendment (A Tax Plan for the COVID-19 Economic Recovery) Bill 2020* received Royal Assent on 14 October 2020 as Act No 92 of 2020. It implements several tax announcements from the 2020 Federal Budget.

Importantly, the Act brings the personal tax cuts (Stage 2) forward to 1 July 2020. From that date, the top threshold of the 19% personal income tax bracket is increased from \$37,000 to \$45,000. The top threshold of the 32.5% tax bracket is increased from \$90,000 to \$120,000. The Act also brings forward to 2020–2021 the increase in the low income tax offset (up to \$700). The low and middle income tax offset (up to \$1,080) is retained for 2020–2021.

It also expands a range of tax concessions currently available to small businesses (turnover under \$10 million) to be made available to medium sized businesses (turnover \$10 million to \$50 million). Businesses with turnover less than \$5 billion are also able to deduct the full cost of eligible depreciating assets that are installed ready for use between 6 October 2020 and 30 June 2022.

Implement new PAYG withholding rates by 16 November

The ATO issued updated tax withholding schedules on 13 October 2020 to reflect the 2020–2021 income year personal tax cuts. The ATO acknowledges that, as the changes to withholding were made partway through the income year, employers were unable to immediately implement them in their payroll. However, employers must make sure they are withholding the correct amount from salary or wages paid to employees for any pay runs processed in their systems from no later than 16 November onwards.

Employees and other payees will receive their entitlement to the reduced tax payable for the entire 2020–2021 income year when they lodge their income tax returns for that period (on the basis of their full-year taxable income).

Tables that continue to apply unchanged from 13 October 2020 include those relating to:

- study and training support loans;
- return to work payments;
- payments made under voluntary agreements; and
- an agreement to increase withholding.

There are also separate tables for the Seasonal Worker and Pacific Labour Scheme.

Source:

<https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=ld%3A%22legislation%2Fbillhome%2Fr6610%22;www.ato.gov.au/Rates/Tax-tables/;www.ato.gov.au/Media-centre/Media-releases/lt-s-time-for-employers-to-update-their-payroll-processes-to-apply-tax-cuts/>.

Working from home “shortcut” deduction extended

The ATO has updated Practical Compliance Guideline PCG 2020/3 to extend the availability of the “shortcut” 80 cents per hour rate for claiming work-from-home running expenses. This shortcut deduction rate will now be available until at least 31 December 2020 (it was previously extended to 30 September 2020).

As amended, PCG 2020/3 now allows eligible taxpayers to claim additional running expenses incurred between 1 March 2020 and 31 December 2020 at the rate of 80 cents per work hour, provided they keep a record of the number of hours worked from home. Taxpayers eligible to use the shortcut rate are employees and business owners who:

- work from home to fulfil their employment duties or to run their business during the period from 1 March 2020 to 31 December 2020; and
- incur additional running expenses that are deductible under s 8-1 or Div 40 of the *Income Tax Assessment Act 1997* (ITAA 1997).

Source: www.ato.gov.au/law/view/view.htm?docid=%22COG%2FFPCG20203%2FNAT%2FATO%2F00001%22.

JobKeeper decline in turnover tests

On 21 October 2020, the ATO issued an addendum to Law Companion Ruling LCR 2020/1 on the JobKeeper decline in turnover test. The ruling has been updated to make it clear that it covers the original test (introduced by the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*) and does not include guidance on applying the “actual decline in turnover” test (which is an additional requirement for JobKeeper fortnights from 28 September 2020). The ruling has also been amended to reflect legislative changes made to the original test by the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 8) 2020*.

The addendum confirms that if an entity satisfied the original decline in turnover test for JobKeeper fortnights before 28 September 2020, it does not need to satisfy the original test again for the JobKeeper extension (but does need to consider whether the actual decline in turnover test is satisfied).

Where an entity is seeking to enrol in the JobKeeper scheme for the first time for fortnights from 28 September 2020, it will need to satisfy both tests. However, for entities other than universities that are Table A providers, the ATO will treat the original decline in turnover test as satisfied if the actual decline in turnover test is satisfied for one turnover test period.

The addendum applies from 21 October 2020.

Temporary trading cessation rules

The ATO also registered the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020* (the latest alternative rules) on 9 October 2020, for the purposes of the revised JobKeeper payment system which commenced on 28 September 2020. These latest rules add an alternative “decline in turnover” test which is available for entities that temporarily ceased trading for some or all of the relevant comparative period.

Under the revised tests for JobKeeper eligibility, the entity must have had an actual decline in its turnover for the applicable quarter relative to the same quarter in 2019. This will generally involve a one-to-one comparison of the 2020 numbers to those in the corresponding period in 2019, to see if it exceeds the 15%, 30% or 50% threshold(s) (depending the type of entity).

Alternative tests can be used (and in fact can *only* be used) if there is not an “appropriate relevant comparison period” in 2019. The ATO registered the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No 2) 2020* on 23 September 2020 (the No 2 alternative rules), which set out the alternative tests that can be used to determine if the decline in turnover test is satisfied.

Note that if an entity qualifies under what may be termed the “standard” turnover tests, it does not need to consider the application of alternative tests. Similarly, if more than one “alternative” decline in turnover test applies to an entity, it only has to satisfy one of them.

Requirements

As already stated, the latest alternative rules add an additional alternative decline in turnover category. There were seven categories in the No 2 alternative rules, so there are now eight categories available to employers.

Four requirements must be satisfied before an entity can use the “temporary cessation of business” alternative tests:

- the entity’s business had temporarily ceased trading due to an event or circumstance outside the ordinary course of the entity’s business;
- trading temporarily ceased for a week or more;
- some or all of the relevant comparison period occurred during the time in which the entity’s business had temporarily ceased trading; and
- the entity’s business resumed trading before 28 September 2020.

If these four requirements are satisfied, the entity can apply either of the alternative tests.

The explanatory statement (ES) states that “temporarily ceasing to trade” includes where a business ceases to make supplies or cannot otherwise offer its goods and services to customers. It does not require that the entity stopped carrying on business, but does require “a suspension of the ordinary activities of the business while it is still carrying on business due to some event or circumstance outside the ordinary course of business”.

The ES says that an example of a circumstances being outside the ordinary course of business would be where an entity that runs from a purpose-built premises ceased trading for an extended period of time to move into new premises.

The rules impose a minimum of one week; that is, the entity must have temporarily ceased trading for a period of not less than a week. The week's minimum is necessary, according to the ES, as "short events" such as blackouts and taking several days to move premises are not outside the "ordinary business setting". This highlights the potential "greyness" of this alternative test – for example, that a move into purpose-built premises taking more than a week would enable an entity to qualify, but a move into premises taking *close* to a week would not.

The ES lists a number of other events that would not qualify an entity to use the alternative tests:

- blackouts;
- moves taking several days;
- ceasing trade at the end of a business day, on weekends and public holidays;
- ceasing trade during the off-season of a seasonal business; or
- ceasing trade because a sole trader (or partner in a small partnership) goes on planned leave for all or part of the relevant comparison period.

It is important to remember that other categories may be available if the requirements for temporary cessation are not met. For example, businesses with seasonal turnover may qualify under the alternative category that applies to businesses with irregular turnover. Similarly, there is an alternative category available for sole traders or small partnerships that covers annual leave (and sickness, injury, etc).

Alternative tests

If an entity satisfies the temporary cessation requirements, it may apply either of the following tests:

- *First alternative test:* compare its current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover for the same period in the year immediately before the business temporarily ceased trading. The earlier period will be a more appropriate period to use than the relevant comparison period in 2019 due to the temporary cessation of trade. For example, this could involve going back to 2018 instead.
- *Second alternative test:* compare its current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover of the three whole months immediately before the month that the business temporarily ceased trading (or the whole month where the relevant comparison period is a month rather than a quarter). So, assuming the cessation was in September 2019, the entity could look at turnover in June, July and August 2019 for that quarter.

An eligible entity can use either test, entirely at its own discretion.

Special provision is made for entities that qualified for the ATO's bushfires 2019–2020 lodgment and payment deferrals, or who received Drought Help concessions. Entities may use the nearest month before or after the relevant period(s), as appropriate.

Source: www.ato.gov.au/law/view/document?docid=COG/LCR20201A3/NAT/ATO/00001;
www.legislation.gov.au/Details/F2020L01295; www.legislation.gov.au/Details/F2020L01200.

Data-matching program: apprentices and trainees

The Department of Education, Skills and Employment (DESE) has commenced a new ongoing data-matching program with the ATO in relation to the Supporting Apprentices and Trainees (SAT) measure. The program seeks to confirm the eligibility of employers receiving the subsidy, as well as stamp out any potential double-dipping of government assistance. It is estimated that around 117,000 apprentices and trainees and more than 70,000 employers could be affected.

Under SAT, employers can apply for a wage subsidy of 50% of the apprentice's or trainee's wage paid until 31 March 2021. To be eligible, an apprentice must have been in an Australian apprenticeship with a small business as at 1 March 2020. The SAT program has since been expanded to include medium sized businesses that had an apprentice in place on 1 July 2020. Employers of any size who re-engage an eligible out-of-trade apprentice are also eligible to claim the SAT wage subsidy. However, there are restrictions on when an employer can claim SAT for an eligible apprentice.

The objective of the new data-matching program, as stated by the DESE, is to confirm that an employer is eligible to receive the SAT subsidy and to validate information provided by the employer. It also seeks to confirm that employers are not claiming both SAT and JobKeeper support at the same time for the same employee.

It is estimated that data relating to around 117,000 apprentices and trainees and more than 70,000 employers will be transferred between DESE and the ATO. While the first data-matching activity is intended to be conducted as soon as possible, it is expected the program will be ongoing, with data transfer to occur at regular intervals as required over the life of the SAT measure.

The data-matching will occur in several steps. The DESE will first provide the ATO with information relating to employers and apprentices that has been extracted from DESE systems, including the Training and Youth Internet Management System (TYIMS) and SmartForms completed by employers. The ATO will match that information against its own data holdings and identify employers that claimed eligibility for SAT as a small business or claimed the SAT wage subsidy and the JobKeeper at the same time for the same individual.

To avoid mistakes, the ATO will be using sophisticated matching techniques which use multiple details to obtain an identity match (eg name, address, date of birth). Additional manual processes may also be undertaken where a high-confidence identity match does not occur. This involves an ATO officer reviewing and comparing third-party data identity elements against ATO information on a one-on-one basis, seeking sufficient common indicators to allow confirmation (or not) of an individual's or business's identity.

The DESE will then use the information sourced from the ATO to verify its own data holding, and a manual process will be undertaken by a DESE officer to compare the information. All discrepancies and anomalies will be dealt with on a case-by-case basis.

In instances where the DESE detects a discrepancy or an anomaly that requires verification, it will contact the business and provide them with an opportunity to verify the accuracy of the information on which the eligibility was based. According to the DESE, businesses will be given at least 28 days to respond and any relevant individual circumstances will be taken into consideration.

Small business tax options during COVID-19: ATO reminder

The ATO has reminded businesses impacted by COVID-19 that they have a range of tax options to consider, including claiming a deduction for any losses.

ATO Assistant Commissioner Andrew Watson said small business owners feeling overwhelmed or getting behind with their tax should contact the ATO as early as possible to find a solution. "No matter what your situation is, it's never too late to ask for help", Mr Watson said.

Tax losses

Sole traders and individual partners in a partnership who meet certain conditions can offset current year losses against other assessable income (such as salary or investment income) in the same income year. Otherwise, the loss can be deferred or carried forward and offset in a future year when the business next makes a profit. The ATO also notes that businesses set up under a company structure that have made a tax loss in a current year can generally carry forward that loss for as long as they want.

Of course, it is crucial that businesses keep proper records when claiming a deduction for losses. While records must be kept for five years for most transactions, if a tax loss is fully deducted in a single income year, records only need to be kept for four years from that income year. However, there are some deductions that can't be used to create or increase a tax loss, such as donations or gifts and personal super contributions.

For businesses finding it difficult to estimate income for the purposes of PAYG instalments, the ATO will not apply penalties or interest for excessive variations for businesses that make a "best attempt" to estimate their end-of-year tax.

Closing a small business

The ATO has acknowledged that some businesses may need to close their doors – either temporarily or permanently – due to COVID-19, particularly in Victoria. It calls on such businesses that are closing temporarily to "do their best to keep up with tax and super obligations".

If a business is forced to close permanently as a result of COVID-19, or for any other reason, it must still lodge any outstanding activity statements and instalment notices, make GST adjustments on the final activity statement and lodge final tax returns. This will enable the ATO to finalise the taxpayer's account and issue any refunds that might be owed.

Once the entity's tax affairs are finalised, the ABN and GST registration should also be cancelled. Business records must be kept for at least five years after the end of the financial year in which a business is sold or closed.

Source: www.ato.gov.au/Media-centre/Media-releases/Businesses-doing-it-tough-through-COVID-19-reminded-of-tax-options/.

Insolvency reforms announced for small businesses

The Government has announced that it will introduce insolvency reforms to help small businesses restructure in response to COVID-19. Key elements of the reforms include:

- the introduction of a new debt restructuring process for incorporated businesses with liabilities of less than \$1 million, drawing on key features from Chapter 11 of the US Bankruptcy Code;
- moving from a one-size-fits-all “creditor in possession” model to a more flexible “debtor in possession” model which will allow eligible small businesses to restructure their existing debts while remaining in control of their business;
- providing a rapid 20-business day period for the development of a restructuring plan by a small business restructuring practitioner, followed by 15 business days for creditors to vote on the plan; and
- creating a new, simplified liquidation pathway for small businesses to allow faster and lower cost liquidation.

Treasurer Josh Frydenberg said the reforms will cover around 76% of businesses subject to insolvencies today, 98% of whom who have less than 20 employees. Further details are set out in a Government fact sheet.

The Government said safeguards will be included to prevent companies from using the new processes to undertake corporate misconduct, including firms seeking to carry out illegal phoenix activity. This will include allowing creditors to convert the liquidation back to a “full” process, and preventing directors from using the process more than once within a prescribed period (proposed at seven years). Company directors seeking to use the process would also be required to declare that they believe the company is eligible and has not engaged in illegal phoenixing.

Complementary measures will also seek to ensure the insolvency sector can respond effectively both in the short and long term to increased demand and to meet the needs of small business.

The new insolvency processes are proposed to be available from 1 January 2021.

Source: <https://ministers.treasury.gov.au/ministers/josh-frydenberg-2018/media-releases/insolvency>.

JobKeeper payments satisfy “work test” for super contributions

The Australian Prudential Regulation Authority (APRA) has published a new frequently asked question (FAQ) on the interaction between JobKeeper payments and satisfying the “work test” for the purpose of voluntary superannuation contributions.

Where an individual is aged 67–74 and is stood down from their employment due to the impacts of COVID-19 but is in receipt of the JobKeeper payment, APRA says a super fund trustee can accept a personal contribution from that individual under the “work test” rules in reg 7.04 of the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations).

APRA’s view is that where an employer is receiving the JobKeeper wage subsidy for an individual, registrable superannuation entity (RSE) licensees should consider the individual to be “gainfully employed” for the purposes of the “work test”, even if that individual has been fully stood down and is not actually performing work. In APRA’s view, it is appropriate for an RSE licensee to take this approach because the individual is still employed and is obtaining a valuable benefit from their employer.

APRA has also said that RSE licensees do not need to distinguish between individual members on JobKeeper who are working reduced hours and those who have been stood down, but can assume that all members in receipt of the JobKeeper subsidy satisfy the “work test”.

Source: www.apra.gov.au/frequently-asked-questions-superannuation-trustees-response-to-covid-19.

SMSF asset valuations: concession during COVID-19

The ATO has advised that it will not apply a penalty for self managed super fund (SMSF) trustees that have difficulty in obtaining evidence to support market valuations of assets due to COVID-19.

SMSF trustees are required to provide objective and supportable evidence to their auditor each year to establish that assets of the fund are valued at market value in compliance with the *Superannuation Industry (Supervision) Regulations 1994* (SIS Regulations). To satisfy this requirement, the valuation evidence should be provided in accordance with the ATO’s *Valuation guidelines for self-managed super funds*.

During the 2020 and 2021 financial years, the ATO will not apply a penalty if it is satisfied that the difficulty in obtaining valuation evidence is due to COVID-19. Instead, the ATO will send the SMSF trustee a letter advising them to ensure they comply with the ATO’s valuation guidelines and have supporting valuation evidence by the time of their next audit if possible. The ATO warns that repeated contraventions of the valuation evidence requirements could lead to penalties.

If a trustee has difficulty obtaining valuation evidence due to COVID-19, the SMSF auditor should still consider modifying Part B of the audit report and lodge an auditor/actuary contravention report (ACR) if necessary. The auditor should also provide reasons on the ACR as to why the trustee was unable to obtain the appropriate evidence.

Source: www.ato.gov.au/Super/Sup/Regulation-8-02B-and-evidence-required-to-support-real-property-valuations/;
www.ato.gov.au/Super/Self-managed-super-funds/In-detail/SMSF-resources/Valuation-guidelines-for-self-managed-super-funds/.

Digital AGMs and signatures: legislative determination

The Government has registered the *Corporations (Coronavirus Economic Response) Determination (No 3) 2020*, which extends until March 2021 the ability for companies to convene annual general meetings (AGMs) and other *Corporations Act 2001* prescribed meetings entirely online.

This determination has the same substantive provisions as first implemented. It allows company boards to:

- provide notice of AGMs to shareholders using email;
- achieve a quorum with shareholders attending online; and
- hold AGMs meetings online – shareholders will be able to put questions to board members online and vote online.

The determination also extends the use of electronic signature by company officers to meet the requirements for a signature.

The determination is effective from 23 September 2020, and is currently set to be repealed in six months, on 22 March 2021.

Source: www.legislation.gov.au/Details/F2020L01194.

Thomson Reuters would like to hear from you

Subscribers are invited to submit topics for articles for future publication. Information should be sent to:

Publisher – **Client Alert**

Thomson Reuters (Professional) Australia Limited ABN 64 058 914 668
PO Box 3502, Rozelle NSW 2039

Tel: 1800 074 333

Email: SupportANZ@thomsonreuters.com

Website: www.thomsonreuters.com.au