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## Schemes in relation to the JobKeeper payment

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### **!** Relying on this Guideline

*This Practical Compliance Guideline sets out a practical administration approach to assist taxpayers in complying with relevant tax laws. Provided you follow this Guideline in good faith, the Commissioner will administer the law in accordance with this approach.*

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### **What this Guideline is about**

1. This Guideline provides guidance on how we will apply our compliance resources to schemes to obtain access to the Coronavirus economic response payment (the **JobKeeper payment**), or an increased amount of a JobKeeper payment.
2. An entity's entitlement to an amount of a JobKeeper payment that results or would result from schemes mentioned in paragraph 1 of this Guideline may be denied in whole or in part under section 19 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.<sup>1</sup>

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<sup>1</sup> All legislative references in this Guideline are to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* unless otherwise indicated.

3. In deciding whether to apply compliance resources, the Commissioner's predominant considerations will be the occasion for and result of the scheme in the context of the entity and its external operating environment. In particular, the Commissioner will be concerned with an entity that accesses or increases JobKeeper payment entitlements:

- where the entity's business is not significantly affected by external environmental factors beyond its control, and/or
- in excess of those that would maintain pre-existing employment relationships.

4. However, if:

- the external operating environment is affected by factors beyond the control of the entity (and its related parties), and
- that affected external operating environment significantly impacts the business of the entity or another entity the entity's employees serve in, and
- the entity enters into the scheme in response to that impact and satisfies the decline in turnover test, and
- the JobKeeper payment the entity receives is for individuals who were employed by the entity and serving in the significantly impacted business prior to that time and who remain employed as a result of that JobKeeper payment,

the Commissioner generally will not apply his compliance resources to consider the application of section 19.

5. The Commissioner's application of compliance resources will be driven by the substance of the outcome achieved, more than the type of arrangement entered into.

6. For the avoidance of doubt, for this Guideline to apply to your circumstances you do not need to show that COVID-19 was the factor beyond the control of the entity (and its related parties) that affected the entity's external operating environment.

7. The application of these general principles to particular scenarios is outlined in paragraphs 13 to 46 of this Guideline.

#### **Date of effect**

8. This Guideline applies before and after the date of issue.

#### **Background**

9. Section 19 provides that if one or more entities enter into or carry out a scheme for the sole or dominant purpose of obtaining a JobKeeper payment, or an increased amount of a JobKeeper payment, the Commissioner may determine:

- that the entity was never entitled to the JobKeeper payment, or
- the amount to which the entity was entitled was always the amount specified by the Commissioner in the determination.

10. The Commissioner will be able to recover any overpayments and will have the power to impose significant penalties and interest. This specific integrity provision is aimed at contrived and artificial arrangements that technically satisfy the eligibility requirements, but have been implemented for the sole or dominant purpose of accessing a JobKeeper payment.

11. The Commissioner's determination may be made by having regard to a range of factors, including:

- the manner in which the scheme was entered into or carried out
- the form and substance of the scheme
- the time at which the scheme was entered into and the length of the period during which the scheme was carried out
- the result that, but for section 19, would be achieved by the scheme
- any change in the financial position of the entity that is the JobKeeper payment recipient that has resulted, will result, or may reasonably be expected to result, from the scheme
- any change in the financial position of any entity that has, or has had, any connection (whether of a business, family or other nature) with the entity that is the JobKeeper payment recipient (a **connected person**), being a change that has resulted, will result or may reasonably be expected to result, from the scheme
- any other consequence for the entity that is the JobKeeper payment recipient, or for any connected person, of the scheme having been entered into or carried out, and
- the nature of any connection (whether of a business, family or other nature) between the entity that is the JobKeeper payment recipient and any connected person.

12. Section 19 protects the integrity of the JobKeeper payment framework. It ensures that entities that enter into contrived schemes do not obtain a payment (including an increased amount of payment) they would otherwise not be entitled to.

### **Examples of schemes to obtain access to a JobKeeper payment**

13. This section sets out the ATO's approach to how it will apply its compliance resources to certain schemes that result in an entity obtaining access to the JobKeeper payment, or an increased amount of a JobKeeper payment. The examples are concerned only with the allocation of compliance resources and should not be taken to express a conclusion as to whether the Commissioner should make a determination in any case. The application of the integrity provision would necessarily require careful consideration of all the circumstances.<sup>2</sup>

#### **Example 1 – deferring the making of supplies to obtain the JobKeeper payment**

14. *Company A nominates the quarter ending 30 June 2020 to test its projected GST turnover. Its projected GST turnover for that quarter is \$1 million, and its GST turnover for the quarter ending 30 June 2019 is \$900,000.*

15. *Due to the industry in which Company A is operating, there is no anticipation of any material impact on its revenue for the period ending 30 June 2020.*

16. *Despite this, Company A agrees with third-party customers to defer the making of supplies until after 30 June 2020. This results in Company A's projected GST turnover for*

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<sup>2</sup> The examples set out in this Guideline all involve the use of companies. For the avoidance of doubt, the risk framework this Guideline sets out would, in general, apply equally to different types of entities that were in analogous situations, such as trusts or partnerships. That said, the use of trusts, partnerships, or other types of entities may give rise to implications under other areas of the tax law that are not the subject of this Guideline.

that quarter being \$500,000. The decline in GST turnover from \$900,000 to \$500,000 meets Company A's relevant decline in turnover threshold.

17. Because Company A's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of section 19.

18. For the avoidance of doubt, the Commissioner will apply his compliance resources to schemes of this type regardless of the method by which Company A purports to defer its turnover for a period, for example by not deferring when supplies are made, but deferring the payment of cash, or the issuing of invoices.

#### **Example 2 – bringing forward the making of supplies solely to obtain the JobKeeper payment**

19. Company B is considering enrolling in the JobKeeper scheme from July. It nominates the quarter ending 30 September 2020 to test its projected GST turnover. Its projected GST turnover for that quarter is \$1 million, and its GST turnover for the quarter ending 30 September 2019 is \$900,000.

20. Due to the industry in which Company B is operating, there is no anticipation of any material impact on its revenue for the period ending 30 September 2020.

21. Despite this, Company B agrees with third-party customers to bring forward the making of supplies to the quarter ending 30 June 2020. This results in Company B's projected GST turnover for the quarter ending 30 September 2020 declining to \$500,000. The decline in GST turnover from \$900,000 to \$500,000 meets Company B's relevant decline in turnover threshold.

22. Because Company B's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of section 19.

23. For the avoidance of doubt, the Commissioner will apply his compliance resources to schemes of this type regardless of the method by which Company B purports to defer its turnover for a period, such as for example by not bringing forward when supplies are made, but bringing forward the payment of cash, or the issuing of invoices.

#### **Example 3 – transfer without any decline in external revenue**

24. Company D leases assets to third parties. There is no reduction in the company's projected GST turnover.

25. In order to satisfy the decline in turnover test, Company D transfers all of its assets to a recently incorporated subsidiary. That subsidiary will not pay dividends to Company D until after 30 September 2020.

26. Because Company D's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of section 19.

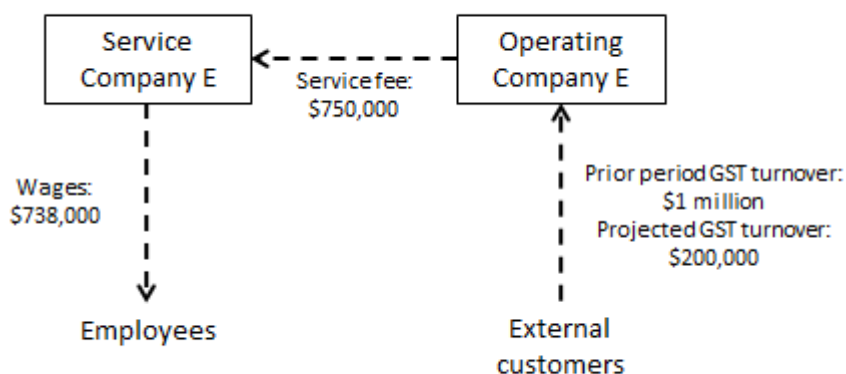
#### **Example 4 – employer entity that reduces a service fee**

27. Service Company E employs 100 individuals. These employees perform activities on behalf of Operating Company E.

28. For a typical period, Operating Company E will pay a service fee of \$750,000 to Service Company E. Service Company E in turn will pay wages of \$738,000 to the 100 employees.

29. Operating Company E's GST turnover for the quarter ended 30 June 2019 is \$1 million. This turnover is from external parties. Operating Company E's projected GST turnover for the quarter ended 30 June 2020 is \$200,000.

30. Service Company E's GST turnover for both quarters remains at \$750,000 – because the agreement between Service Company E and Operating Company E provides for that result.



31. Without any change to the agreement between Service Company E and Operating Company E, Service Company E would not have satisfied the decline in turnover test in subsection 8(1) of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (the Payment and Benefit Rules) as there had been no reduction in its projected GST turnover.

32. The group of entities then enter into a scheme the result of which is a reduction in the service fee by an amount that is proportional to the reduction in Operating Company E's external turnover. This scheme results in a reduction of the service fee from \$750,000 to \$150,000.

33. This means Service Company E does satisfy the decline in turnover test in subsection 8(1) of the Payments and Benefits Rules.

34. Because this scheme is entered into in response to the significant impact the external operating environment has had on the business of Operating Company E where the employees of Service Company E serve (and those external factors are beyond the group's control), there is a low risk the Commissioner would apply his compliance resources to consider the application of section 19.

#### **Example 5 – employer entity stands down employees**

35. This example involves the same facts as Example 4 except that, due to the changed operations of Operating Company E, Service Company E reduces the amount of labour it provides to Operating Company E under the service agreement and stands down employees or reduces their work hours. This in turn results in a reduction in service fees not by way of a renegotiation between the companies, but simply by virtue of the service agreement itself.

36. Even if the reduction in services fees was a scheme within the meaning of paragraph 1 of this Guideline, because that scheme was entered into in response to the significant impact the external operating environment has had on the business of Operating Company E where the employees of Service Company E serve (and those external factors are beyond the group's control), there is a low risk the Commissioner would apply his compliance resources to consider the application of section 19.

#### **Example 6 – employer entity unable to pay**

37. This example involves the same facts as Example 4, except Service Company E and Operating Company E are unable or unwilling to enter into a scheme that results in a reduction in the amount of the service fee Operating Company E is obliged to pay.

38. Despite this, it remains possible, depending on the facts and circumstances, that Service Company E will satisfy the decline in turnover test in subsection 8(1) of the Payments and Benefits Rules. This is will be the case if it is reasonable for Service Company E to project that it is unlikely to receive payment for the service fee from Operating Company E. Ascertaining a reasonable estimate can include:

- evidence of any decline in Service Company E's turnover leading up to Service Company E leading up to restrictions
- records of Operating Company E cancelling or modifying existing contracts for supplies
- closing or pausing either company's business at a point in time due to the government's COVID-19 restrictions
- downturn in expenditure and other amounts claimed for the relevant period
- downturn in the market value of assets, and
- information known to Service Company E, whether or not publicly available.

39. Therefore, provided Service Company E can satisfy the requirement that there be a reasonable projection of a decline in projected GST turnover, the Commissioner will be unlikely to apply compliance resources to consider the application of section 19.

#### **Example 7 – parent company of a corporate group that reduces management fees**

40. Company F is the parent company of a corporate group, and is also the main employer of that group.

41. Subsidiary F1, Subsidiary F2 and Subsidiary F3 are subsidiaries of Company F, and carry on external market-facing businesses.

42. In the past, Company F has charged Subsidiary F1, Subsidiary F2 and Subsidiary F3 management fees on an annual basis. These fees are substantially all of Company F's current and projected GST turnover.

43. The business of each of Subsidiary F1, Subsidiary F2 and Subsidiary F3 is severely impacted by COVID-19, such that the operations of most of the subsidiaries are closed. Individually, all subsidiaries would satisfy the decline in turnover test.

44. Subsidiary F1, Subsidiary F2 and Subsidiary F3 do not pay the management fees or pay a significantly smaller management fee before 30 June such that the decline in turnover test is satisfied.

45. However, if the management fees had been reduced on a pro rata basis throughout the year, the decline in turnover test would not be satisfied. This is because the group had had no decline in revenue for the first nine months of the year.

46. *Even if the reduction in management fees was a scheme within the meaning of paragraph 1 of this Guideline, because that scheme was entered into in response to the significant impact the external operating environment has had on Subsidiary F1, Subsidiary F2 and Subsidiary F3 (and those external factors are beyond the group's control), there is a low risk the Commissioner would apply his compliance resources to consider the application of section 19.*

**Example 8 – parent company of corporate group manipulates timing of management fee**

47. *This example involves the same facts as Example 7, except the business of the group has not been adversely impacted by COVID-19. Instead, the group alters the timing of the payment of management fees merely so that Company F would satisfy the decline in turnover test.*

48. *Because Company F's business and operating environment is not significantly affected by external factors beyond its control and the scheme is not entered into in response to any such factors, there is a high risk the Commissioner would apply his compliance resources to consider the application of section 19.*

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**Commissioner of Taxation**

1 May 2020

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## References

*Previous draft:*

Not previously issued as a draft

ATOlaw topics	Income tax~~COVID-19 Income tax~~JobKeeper payment
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