


TD 2021/9EC - Compendium

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Public advice and guidance compendium – TD 2021/9

1 Relying on this Compendium

This Compendium of comments provides responses to comments received on draft TD 2020/D1 *Income tax: notional deductions for research and development activities subsidised by JobKeeper payments*. It is not a publication that has been approved to allow you to rely on it for any purpose and is not intended to provide you with advice or guidance, nor does it set out the ATO’s general administrative practice. Therefore, this Compendium does not provide protection from primary tax, penalties or interest for any taxpayer that purports to rely on any views expressed in it.

Summary of issues raised and responses

Issue number	Issue raised	ATO response
Consideration		
1	<p>Disagree with the view that ‘consideration’ in section 355-405 of the <i>Income Tax Assessment Act 1997</i>¹ is broader than consideration in the contractual sense.</p> <p>If a term is undefined, it has its ordinary meaning, and where that ordinary meaning has a technical, legal meaning under the common law, that is what it must be given as that is why it was used by the legislators. There is no need for the word ‘for’ in the provision because it is implicitly contained within the legal meaning of ‘consideration’.</p> <p>As consideration includes the notion of ‘for’ (because it is a reciprocal exchange of something for something), the Commissioner cannot disregard the need for that legal nexus with a supply or an output when interpreting the word consideration.</p> <p>The Government is not procuring anything from the company. It is not giving the payments for something, such as the company’s research and development (R&D) whether that be</p>	<p>We acknowledge that the Australian Government is not providing the JobKeeper payment ‘for’ R&D entities to incur R&D expenditure or undertake R&D activities. However, we consider the term ‘consideration’ in section 355-405 has a broader meaning than consideration in a contractual sense. See paragraphs 12 to 13 of the final Determination.</p> <p>Construction of the term ‘consideration’ must be determined in accordance with the statutory context in which the term appears. Interpreting the word ‘consideration’ as implicitly containing ‘for’ disregards the requirement that the consideration only be ‘as a direct or indirect result of the expenditure being incurred’.</p> <p>Further, there is no requirement for an R&D entity to have an enforceable promise to incur R&D expenditure for the consideration to be ‘a direct or indirect result of the expenditure being incurred’.</p> <p>The comment was taken into account in the development of the Commissioner’s views in Draft Taxation Ruling TR 2021/D3: <i>Income tax: research and development tax offsets – the at risk rule</i>. Paragraphs 11 to 22 of Taxation Ruling TR 2021/5 <i>Income tax: research and development tax</i></p>

¹ All legislative references in this Compendium are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

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	<p>in the nature of expenditure, activities or results. There is no contractual bargain for the payments.</p> <p>If there was consideration of mutually enforceable promises, employers would be contractually bound by the arrangement to keep paying their employees, and the Government would also be bound to pay the JobKeeper subsidy once the wage condition was met by the employer, neither of which was the case nor the intention.</p>	<p><i>offsets – the ‘at risk’ rule</i> explain why ‘consideration’ has a broader meaning for the purposes of the ‘at risk’ rules than used in a contractual sense.</p>
2	<p>The argument that section 355-405 can be treated more widely than consideration in a contractual context is not supported by the Explanatory Memorandum to the Tax Laws Amendment (Research and Development) Bill 2010 (the EM). Paragraph 3.166 of the EM states that the Commissioner would administer this provision more narrowly than in a contractual context.</p> <p>This is consistent with ATO Interpretative Decision ATO ID 2006/68 <i>Research and Development: application of section 73CA of the ITAA 1936 to a reimbursement arrangement – expenditure ‘not at risk’</i>, which decided that the economic reality must be considered when assessing if a payment is direct or indirect consideration for incurring R&D expenditure. The economic reality of the contract meant that consideration was given a narrower meaning than the contractual form.</p> <p>The economic reality of the JobKeeper payment is that it is not direct or indirect consideration for incurring expenditure on R&D; it is a short-term crisis payment to help businesses keep employees during this pandemic.</p>	<p>We agree the ‘at risk’ rule would not apply in the example in paragraph 3.166 of the EM, but this is because the consideration is not received regardless of the results of the R&D activities on which the expenditure is incurred. That is, the tests contained in subparagraphs 355-405(1)(a)(ii) and 355-405(2)(a)(ii) are not satisfied.</p> <p>Paragraph 3.166 of the EM is not commenting on whether the consideration is ‘as a direct or indirect result of the expenditure being incurred’. It does not, therefore, support a view that the meaning of ‘consideration’ should be confined to a contractual legal definition, or a narrower interpretation.</p> <p>In ATO ID 2006/68, the concept of ‘economic reality’ is a reference to taking a ‘substance over form’ approach. It states:</p> <p style="padding-left: 20px;">At paragraph 19 of IT 2635 mention is made of the fact that whether or not certain matters ‘result in a recoupment should involve a substance approach with regard to the economic realities and not just contractual form: see <i>Dampier Mining Co. Ltd. v. FCT</i> 78 ATC 4237 at 4249; (1978) 8 ATR 835 at 848’.</p> <p>This approach looks beyond the legal terms of a transaction to the economic reality. It is consistent with the Commissioner’s view in paragraph 35 of TR 2021/5.</p>
3	<p>The ATO has not defined the ordinary meaning of ‘consideration’. Therefore, using the Macquarie Dictionary, we understand that by referencing consideration as ‘a wider</p>	<p>We disagree that the term ‘consideration’ should be interpreted as compensation ‘for’ services rendered. Interpreting ‘consideration’ in this way disregards the requirement that consideration only be ‘as a direct or indirect result of the expenditure being incurred’. See paragraphs 12 to 13 of the final Determination and paragraphs 19 to 22 of TR 2021/5.’</p>

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	<p>notion' than its contractual definition, the ATO is referring to compensation for services rendered.²</p> <p>This interpretation would not be relevant to JobKeeper because the scheme is an economic survival package given to a business, not a payment for any specific activities or services rendered.</p>	
4	<p>The meaning of 'consideration' contained in <i>A New Tax System (Goods and Services Tax) Act 1999</i> (GST Act) should be adopted.</p> <p>Section 995-1 contains a definition of 'consideration', and that definition goes straight to the GST Act, defining consideration in the context of being 'for a taxable supply'.</p> <p>Section 9-15(1) of the GST Act defines consideration with reference to the thing that the payment is in connection with, in response to or for the inducement of. Consideration, being reciprocal, cannot be defined without referring to the other thing with which it has its legal nexus or relationship.</p>	<p>Paragraph 13 of TR 2021/5 explains why we consider 'consideration' does not take its meaning in subsection 995-1(1).</p> <p>That is, the definition of 'consideration' in section 995-1 is in the context of consideration for a taxable supply and has the same meaning as for goods and services tax (GST) purposes. This definition is not determinative of the meaning of 'consideration' for all income tax purposes.</p> <p>The 'at risk' rule does not require a 'supply' to exist. Therefore, the GST definition of 'consideration' has no bearing on the meaning of the term for the purposes of the 'at risk' rule.</p>
5	<p>The meaning of 'consideration' must be interpreted in the context of the entire section. The results test in section 355-405 requires the parties to have turned their minds as to whether the consideration will be paid regardless of the results of the R&D activities undertaken. The parties must have envisaged binding obligations between them relating to the payment. Therefore, the text dictates that 'consideration' must be interpreted in this context.</p> <p>The JobKeeper payments do not meet this requirement as they are merely a reimbursement of salaries paid to eligible employees. The government does not make the payment having turned its mind as to whether R&D activities will be conducted and whether the payment will be made regardless of the results of those activities.</p>	<p>We agree that all the requirements contained in section 355-405 must be satisfied for the 'at risk' rule to apply, including the regardless of 'results test'. However, it is an objective question of fact whether an entity has received, or could reasonably be expected to receive, consideration regardless of the results of the R&D activities on which they incurred R&D expenditure. This does not require a subjective assessment of the party's intention to create binding obligations as this would disregard the requirement that consideration is as a direct or indirect result of the expenditure being incurred.</p>

² Refer definition 4 of 'consideration'; Macmillan Publishers Australia, *The Macquarie Dictionary* online, www.macquariedictionary.com.au, accessed 9 December 2021.

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6	<p>JobKeeper is not a reimbursement, but a subsidy based on a range of criteria, one of which relates to employment conditions. The entitlement to be paid JobKeeper is only created after the salary payment is made and the employer effectively claims the subsidy on the ATO portal.</p> <p>The broader context of the JobKeeper payment demonstrates it is an employer subsidy or grant of financial assistance to be passed on to employees. Satisfying the 'wage condition' is a condition for eligibility to JobKeeper. Performing a 'condition' for a grant of financial assistance is not consideration at law. JobKeeper payments are a 'subsidy' and not 'consideration'.</p> <p>Applying an integrity rule designed ostensibly to cover reimbursement arrangements to the receipt of a government employer subsidy established to deal with the current extraordinary economic circumstances is something we believe was not intended by the government when implementing JobKeeper.</p>	<p>We are of the opinion that the term 'consideration' in section 355-405 has a broader meaning than consideration in a contractual sense and can extend to JobKeeper payments. We do not think this position changes because the JobKeeper payments may be described as a subsidy or grant of financial assistance.</p> <p>The 'at risk' rule applies where an R&D entity received, or could reasonably be expected to receive, consideration when it incurs the expenditure. Although the JobKeeper payments are received after the wage expenditure is incurred, an entitlement to JobKeeper exists when the conditions are satisfied. Therefore, when it incurs expenditure to satisfy the wage condition an R&D entity can reasonably be expected to receive JobKeeper (assuming the other criteria for JobKeeper eligibility are satisfied).</p> <p>We have considered the alternative arguments submitted to the ATO but consider that the view expressed in the final Determination is the appropriate interpretation of section 355-405.</p>
7	<p>JobKeeper payments are considered 'government grants' and accounted for under International Accounting Standard (IAS) 20 <i>Accounting for Government Grants and Disclosure of Government Assistance</i> because they are being provided by the government in return for compliance with conditions relating to the operating activities of the entity.</p> <p>Australian Accounting Standards Board (AASB) 1058 <i>Income of Not-for-Profit Entities</i>, relating to the accounting treatment of grants, does not provide an option to offset a government grant against an expense. JobKeeper payments must be presented in financial statements as 'other income'.</p>	<p>The accounting treatment of JobKeeper payments for financial reporting purposes does not determine whether they are 'consideration' for the purposes of applying section 355-405.</p>
8	<p>The purpose of the JobKeeper payment is not to fund R&D activities. Its purpose is to generate employment and support businesses whose turnover has declined. Although the revenue replaced by the JobKeeper payment may have been</p>	<p>The subjective intention of the party providing 'consideration' is not an element of section 355-405. It does not need to be established whether a payer intended to provide consideration in relation to R&D activities, as illustrated by the fact the consideration only needs to be 'a direct or indirect result of the expenditure being incurred'.</p>

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	<p>used to fund R&D activities, this does not make the JobKeeper payment directly related to R&D activities.</p> <p>The 'at risk' rule is only intended to apply for JobKeeper payments where the business applies retrospectively and knowing that the R&D staff have been conducting R&D activities. In that instance, it is fair to say that the JobKeeper payment is applied to R&D activities retrospectively and it could be deemed as being not at risk.</p>	<p>It does not need to be established that the consideration has 'been used to fund R&D activities' to satisfy the requirements in section 355-405. The test focuses on the nexus between the consideration and the R&D expenditure, not between consideration for R&D activities.</p> <p>The requisite question is not whether expenditure has been incurred because an entity received, or reasonably expected to receive, consideration. The tests in section 355-405 require determining whether consideration is received, or reasonably expected, as a direct or indirect result of the expenditure being incurred.</p>
9	<p>The term 'consideration' should be interpreted as a reference to a guaranteed or recoverable sum.</p> <p>The 'at risk' rule was introduced in response to tax effective syndicate arrangements devised in connection with R&D. The EM makes it clear that the 'expenditure not at risk' provision in section 355-405 is one of four integrity rules.</p> <p>The only examples of the operation of this provision in both the EM and on the ATO website are about scenarios involving contractual arrangements to provide a guaranteed return; that is, where there is an agreement involving mutual promises bound together by the glue that is 'consideration' at law.</p> <p>Paragraph 3.164 of the EM explains the policy intent and rationale of the provision as follows:</p> <p style="padding-left: 40px;">Expenditure that is not at risk (for example, if there is guaranteed return under a financing arrangement or an indemnity) is not eligible for a notional R&D deduction but the ordinary deduction rules may apply. [Schedule 1, item 1, section 355-405].</p> <p>To interpret the 'at risk' integrity rule as being triggered by the JobKeeper payments defies good sense, logic and the policy intent.</p> <p>In the case of the JobKeeper program, the only entity who receives a guarantee of performance is the Australian Government; that is, they obtain assurance that the wage</p>	<p>A notional deduction is reduced or denied by virtue of the satisfaction of the provisions contained in section 355-405, regardless of the nature of the program or scheme through which the consideration arises.</p> <p>We agree that one of the examples provided in the EM is where there is a 'guaranteed return under a financing arrangement or an indemnity'. However, while the examples provided in the EM are useful interpretative material, they are not an exhaustive compendium of all situations in which the 'at risk' rule will apply.</p> <p>We note that the 'at risk' rule contained in section 355-405 results in an R&D entity's notional deduction for R&D expenditure being reduced or denied where the criteria contained in the provision are satisfied. The section is not explicitly limited to, nor does it mention, syndicate arrangements devised in connection with R&D.</p> <p>Whether a reasonable expectation of receiving consideration exists needs to be determined at the time the relevant R&D expenditure is incurred. The requirement for the consideration to 'reasonably be expected' means there is no requirement that receipt of the consideration is absolutely certain or guaranteed. Whether there is a 'reasonable' expectation is a question of fact and it to be determined objectively on a case-by-case situation.</p>

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	<p>condition is met before a claimant business can be eligible. However, there is no guaranteed return for the business in any way, and certainly not of the kind contemplated by the 'at risk' provision.</p> <p>The interpretation is inconsistent with the original policy of the R&D scheme and the previous ATO view in ATO Interpretative Decision ATO ID 2009/107 <i>R&D tax concession: is a company 'not at risk' if it can expect to recover its R&D expenditure because of the good technical prospects of its activities (rather than merely because of the terms of the relevant arrangement)?</i> In that ATO ID, it was stated that the Commissioner would consider the features of the relationship between the parties involved in the arrangements under which the expenditure is incurred, which can extend to any combination of formal contracts, side-arrangements, informal understandings, options and the like.</p> <p>The correct interpretation of the 'expenditure not at risk' rule is that there be a demonstrable link between the incurring of expenditure and a guaranteed or recoverable return or consideration. There is no contract or enforceable promise and hence no consideration in relation to JobKeeper.</p>	
Reasonably expected to receive consideration		
10	<p>An R&D entity does not have a reasonable expectation to receive JobKeeper at the time it incurs the R&D expenditure.</p> <ul style="list-style-type: none"> • It can only have a reasonable expectation when it satisfies all the conditions of the JobKeeper program and lodges its monthly declaration. • An entity may be entitled to JobKeeper and choose not to receive the payment. • JobKeeper payments are too uncertain – they can be withdrawn or extended at any time (for example, situation for childcare workers) and taxpayers may 	<p>Whether a reasonable expectation of receiving consideration exists needs to be determined at the time the relevant R&D expenditure is incurred.</p> <p>The requirement is for the consideration to 'reasonably be expected', not certain or guaranteed. Whether there is a 'reasonable' expectation is a question of fact and is determined objectively on a case-by-case situation having regard to:</p> <ul style="list-style-type: none"> • anything that happened or existed before or at the time the expenditure is incurred, and • anything that is likely to happen or exist after that time.

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	<p>need to repay amounts if they were ineligible to receive it.</p> <ul style="list-style-type: none"> Entitlement to JobKeeper is based on turnover figures that need to be calculated retrospectively and are unlikely to be fully known when the expenditure is incurred. <p>Reasonable certainty can only be implied once the company receives JobKeeper and is not required to repay it.</p>	<p>If, at the time the expenditure is incurred, the employer is unlikely to apply for JobKeeper, then a reasonable expectation will not exist.</p> <p>If subsequent changes to JobKeeper eligibility or entitlement are not likely to happen or exist at the time the R&D expenditure is incurred, then JobKeeper payments are still reasonably expected to be received. Therefore, we disagree that a reasonable expectation will only exist where JobKeeper payments have been received and there is no requirement to repay them.</p>
11	<p>The ATO has acknowledged there were extraordinary circumstances and, by implication, uncertainty in compliance and eligibility for JobKeeper payments³:</p> <p>Due to the extraordinary circumstances in the early stages of the JobKeeper program, overpayments may have been made in error as businesses moved quickly to access JobKeeper payments.</p> <p>This contradicts the view in the draft Determination that there could be a reasonable expectation of receiving JobKeeper payments.</p>	<p>We do not consider that the positions are contradictory. Whether a company 'could reasonably expect to receive' an amount of JobKeeper is a question of fact and is to be determined objectively. If a company makes a mistake in their self-assessment as to their entitlement and is required to make a repayment then, viewed objectively, at the time the company incurred its R&D expenditure the company's expectation to receive therefore may not be reasonable.</p> <p>If a company receives JobKeeper payments to which it is not entitled and is obliged to repay them, the JobKeeper payments received have not sheltered the company's wage expenditure from being at risk. So, this will not impact the company's entitlement to an R&D tax incentive. However, a company that voluntarily gifts to the Australian Government an amount equivalent to all or part of the JobKeeper payments to which it was entitled is not in the same position.</p>
Nexus to expenditure		
12	<p>The JobKeeper payment is not received 'as a direct or indirect result' of salary or wage expenditure incurred because the wage condition is not the primary test for eligibility to receive JobKeeper payments. The payments are conditional on the company meeting a range of other requirements.</p> <ul style="list-style-type: none"> The primary test is the decline in turnover test. The wage conditions are in effect a means to calculate the 	<p>We disagree that the 'at risk' rule requires an entity to determine the dominant, prevailing or primary cause of the consideration received or reasonably expected to be received.</p> <p>For section 355-405 to apply, it must be established that the consideration is received, or reasonably expected to be received, as a direct or indirect result of incurring the expenditure. The degree of connection between the consideration and expenditure is less demanding than would be required by the phrase 'caused by'.</p>

³ [JobKeeper overpayments](https://ato.gov.au) page on ato.gov.au, accessed 9 December 2021.

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	<p>amount of JobKeeper payment paid to the employer per employee.</p> <ul style="list-style-type: none"> • The employee must also accept the nomination for the employer to receive the payment. • The employer must log onto the ATO portal, after the salary is paid, and lodge a declaration of the number of eligible employees already paid. If the declaration is not lodged, the JobKeeper is not payable. This declaration is the entitlement to JobKeeper. <p>JobKeeper is therefore consideration received as a direct or indirect result of meeting the decline in turnover test and having employees, not the direct or indirect result of salary and wage expenditure incurred.</p> <p>Consider the following scenarios:</p> <ul style="list-style-type: none"> • Salary is paid to an ineligible employee. Despite salary paid, there is no entitlement to JobKeeper and the payment is at risk. • Salary is paid by an ineligible employer not having met the decline in turnover test. Again, despite salary paid there is no entitlement to JobKeeper and the payment is at risk. • Salary is paid by an eligible employer for an eligible employee but either or both decline registration. Despite salary paid, there is no entitlement to JobKeeper and the payment is at risk. • Salary is paid by an eligible employer for an eligible employee. Despite salary paid, there is no entitlement to JobKeeper and the payment is at risk. 	<p>Having regard to the eligibility criteria for entitlement to JobKeeper, the wage condition is a key condition and consequently JobKeeper is received as a result of the employer incurring wage expenditure. That the employer must also satisfy other eligibility criteria (for example, the decline in turnover test) does not alter this conclusion.</p> <p>The JobKeeper payment has the requisite nexus to the wage expenditure incurred regardless of whether the wage condition is considered the 'primary test' or not.</p> <p>Satisfying the wage condition is a requirement for entitlement to receive JobKeeper. Therefore, receipt of JobKeeper is a direct or indirect result of satisfying the wage condition by incurring the requisite expenditure. It does not need to be the direct result of satisfying the wage condition, in terms of identifying the primary cause of the consideration where multiple causes may exist.</p> <p>In each of the scenarios provided in Issue 12 of this Compendium, there is no entitlement to JobKeeper. Therefore, the employer has not received, or is reasonably expected to receive, consideration. The 'at risk' rule would not apply.</p>
13	<p>The amount of each JobKeeper payment must be greater or equal to the sum of amounts paid to employees per fortnight, plus the payment of pay as you go, plus superannuation and salary sacrificed amounts under section 10 of the <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i> (the CERP Rules). The CERP Rules</p>	<p>Whether the receipt of the JobKeeper payment is a direct or indirect result of more than one thing does not determine whether or not it is 'a direct or indirect result' of R&D expenditure incurred in satisfaction of the wage condition.</p>

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	make it clear each of these is a separate payment. As such, the minimum \$1,500 a fortnight is (as a minimum) paid partly by reference to amounts paid to employees, but partly as a result of payments of pay as you go and other things.	
14	<p>An entity may legitimately qualify for JobKeeper payments in circumstances where such payments have no effect on its ability to pay the eligible employees; that is, it would have paid its employees regardless of whether it received JobKeeper.</p> <p>In this case, the nexus that must ordinarily exist between consideration for a corresponding supply is clearly not present.</p> <p>This argument is supported by Goods and Services Tax Ruling GSTR 2012/2 <i>Goods and services tax: financial assistance payments</i>, which deals with the question of when a financial assistance payment (for example, by the government) is consideration for a supply.</p> <p>Furthermore, in distinguishing a gift from consideration, GSTR 2012/2 identifies the determining factor as being whether the payer received a material benefit or advantage in return for the payment. Since the government does not receive any material benefit or advantage in response to issuing JobKeeper payments, such payments do not appear to meet the required threshold for consideration. This is supported by a number of examples in GSTR 2012/2, including Examples 6 and 12.</p>	<p>It must be objectively determined whether a taxpayer can reasonably expect to receive JobKeeper at the time they incur the salary expenditure, having regard to anything that happened or existed before or at the time the expenditure is incurred and anything that is likely to happen or exist after that time. The subjective motivation of an employer as to the use of the funds is not determinative as to whether something constitutes 'consideration' for the purposes of 355-405 (see paragraph 13 of the final Determination).</p> <p>Further, JobKeeper payments are not consideration for a taxable supply as no 'supply' is being made. It is not relevant whether JobKeeper payments constitute 'consideration' for the purpose of the GST Act (see paragraph 23 of the final Determination and paragraph 13 of TR 2021/5). Therefore, GSTR 2012/2 does not provide the ATO view regarding the application of section 355-405 to entities in receipt of JobKeeper.</p> <p>We note that Examples 6 and 12 of GSTR 2012/2 both involve determining whether there is a supply for consideration. Section 355-405 does not require a 'supply' to exist for the 'at risk' rule to have application.</p>
15	<p>JobKeeper is, in effect, a payment to the employer as a direct or indirect result of the number of employees, not a payment as a result of 'expenditure'.</p> <p>For example, where an employee receives more than \$1,500 per fortnight, there is no requirement to pass on the JobKeeper payment to the employee.</p> <p>The JobKeeper payment is \$1,500 for each eligible employee, irrespective of the salary previously paid,</p>	<p>Although the number of eligible employees is one component that determines the total quantum of JobKeeper payments an employer is entitled to receive, the 'wage condition' must nonetheless be satisfied in respect of each eligible employee. The 'wage condition' requires the employer to pay each eligible employee at least the JobKeeper payment rate per fortnight.</p> <p>Further, a payment does not need to be a reimbursement of salary or wage expenditure for it to constitute consideration received as a direct or indirect result of the expenditure incurred. The degree of connection between the</p>

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	conditional on them now receiving at least \$1,500. While it provides sufficient funding to retain employees it does not provide a reimbursement of the salaries paid or payable, merely a method of calculating the grant payable.	consideration and expenditure is less demanding than would be required by the phrase 'caused by'.
16	JobKeeper payments are a direct or indirect result of meeting the decline in turnover test and eligible employees, not a direct or indirect result of expenditure on salary and wages. Employers can receive JobKeeper when no salary expenditure is incurred. Paying someone who is stood down the amount equivalent to the minimum JobKeeper amount is not the payment of wage expenditure as it is not linked to work.	An R&D entity's notional deduction for expenditure under either sections 355-205 or 355-480 is limited to expenditure incurred on R&D activities, and the consideration captured by section 355-405 is that which is received as a result of having incurred that expenditure. If payments are made to an employee who is not engaged in R&D activities, the expenditure would not be incurred on eligible R&D activities. The 'at risk' rule in section 355-405 would have no application in this situation as there is no eligible R&D expenditure incurred.
17	The view that the JobKeeper payment is consideration received as a result of salary or wage expenditure incurred is an error in respect of wages paid in March before the announcement of JobKeeper on 30 March 2020. There could be no expectation of receiving consideration in respect of these wages.	The final Determination does not capture wage expenditure incurred in March before the announcement of JobKeeper on 30 March 2020. This is because JobKeeper payments are received after an employer has incurred its wage expenditure for each fortnight and the first JobKeeper fortnight only began on 30 March 2020.
18	The test in paragraphs 355-405(1)(a)(i) and (2)(a)(i) is intended to be a straightforward causal nexus test – a factual relationship. The consideration must relate directly or indirectly to the input; that is, there is a relationship between the expenditure incurred and the consideration in a causative sense. For example, when the company receives a payment against wages expenditure or contract expenditure or overhead costs relating to R&D activities undertaken for that consideration, or the consideration relates to a product rather than the expenditure or the activities – in that case, the R&D expenditure could have the required nexus with the consideration received directly or indirectly as a result of that expenditure being incurred. Similarly, the nexus could be established where the consideration is received under the same contract, or under a	We disagree that the 'at risk' rule requires a nexus between consideration and expenditure that is akin to 'when the company receives a payment against wages expenditure or contract expenditure or overhead costs relating to R&D activities undertaken for that consideration'. Interpreting the 'at risk' rule in a manner that implies the consideration must be received for incurring the expenditure disregards the requirement that the consideration only be 'as a direct or indirect result of the expenditure being incurred'. Both the word 'a' (instead of 'the') and the word 'indirect' provide the appropriate scope of the nexus that must be established between the consideration and the expenditure. See also paragraphs 23 to 30 of TR 2021/5.

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	separate contract, or potentially a chain of contracts and third parties involved, therefore may be indirectly related to the R&D expenditure.	
19	<p>R&D wages expenditure has its nexus with R&D activities only. The nexus is with the company's pre-existing program of R&D activities which it had committed to under its R&D plan and was conducting on its own behalf.</p> <p>The JobKeeper grant/subsidy is predicated on the exact opposite of it being consideration received in exchange for or as a result of 'expenditure being incurred'. Rather, the JobKeeper payments were only available to companies in respect of employees they already had on the books and were already paying as at 1 March 2020.</p> <p>Therefore, a company's R&D salary expenditure was already committed to and incurred independent of the JobKeeper program.</p>	<p>The analysis incorrectly places emphasis on whether the consideration is received for an R&D entity to conduct R&D activities.</p> <p>Regardless of whether the R&D entity has already planned to undertake R&D activities, it must be determined if the consideration satisfies the nexus of being 'as a direct or indirect result of the expenditure being incurred'. The test does not require determining whether the expenditure is incurred as a result of receiving the consideration. Therefore, it is irrelevant whether the R&D entity chose to incur the R&D expenditure because it received the JobKeeper payment.</p> <p>We agree that the JobKeeper entitlement was limited to eligible employees of an employer. However, in our view, it is incorrect to state that the JobKeeper payment is not consideration received, or reasonably expected, as a direct or indirect result of incurring the salary and wage expenditure. The 'wage condition' is evidence of this nexus between the consideration and expenditure incurred; that is, a criterion of the JobKeeper scheme that requires employers to pay an eligible employee at least \$1,500 per JobKeeper fortnight, regardless of what they were previously paid.</p>
20	<p>The view in the draft Determination is that JobKeeper payments subsidise R&D activities and therefore the R&D integrity rule denies or reduces notional deductions for the JobKeeper payment amount.</p> <p>The title of the draft Determination uses the term 'subsidy', which is not a defined term, in a misleading way. Definitions of 'subsidy' in legal dictionaries typically have a government payment and a desired activity component. There is no activity component with JobKeeper payments, neither for the employer nor the eligible employee. An employer can receive JobKeeper payments for eligible employees they pay whilst the employee performs no work during the JobKeeper periods.</p>	<p>The title of the final Determination has been amended. Other than being included in the title of the draft Determination, the term 'subsidies' or similar did not appear anywhere in the remainder of the draft Determination, nor did it influence the interpretation.</p>

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21	<p>There is an implicit requirement that the consideration be received in relation to R&D activities, not merely expenditure incurred. Subparagraph 355-405(1)(a)(ii) directly references the activities on which the expenditure is incurred.</p> <p>The Commissioner's view in <i>BAE Systems Australia (NSW) Pty Limited v Commissioner of Taxation for the Commonwealth of Australia</i> [2008] FCA 48 suggests that a causal link must exist between the activities undertaken, the expenditure incurred and the consideration received. This view is affirmed in ATO ID 2006/68, where the Commissioner '... concludes that the substance of the arrangement was that company Y is fully reimbursing or recouping company X in respect of company X's expenditure on the relevant R&D activities'.</p> <p>The JobKeeper payment is designed specifically to protect Australian jobs and businesses impacted by COVID-19. There is no intrinsic or specific relationship between the receipt of JobKeeper payments and the undertaking of R&D activities. The payment is directly linked to keeping the business operational and staff members employed. Whether R&D activities are undertaken is not a relevant factor for the JobKeeper scheme.</p>	<p>It is incorrect to meld the requirements in subparagraphs 355-405(1)(a)(i) and (2)(a)(i) with the requirements contained in subparagraphs 355-405(1)(a)(ii) and (2)(a)(ii). The former subparagraphs require that the consideration is a direct or indirect result of the expenditure incurred, whereas the latter subparagraphs require that the consideration is received regardless of the results of the activities on which the expenditure is incurred.</p> <p>The requirements in subparagraphs 355-405(1)(a)(i) and (2)(a)(i) are that the consideration is receive 'as a direct or indirect result of the expenditure being incurred'. The specified nexus is that between 'consideration' received or reasonably expected, and the 'expenditure being incurred'. If that nexus exists, then it must be ascertained whether the consideration is also received 'regardless of the results of the activities on which the expenditure is incurred'.</p>
Regardless of results		
22	<p>The 'expenditure not at risk' provisions are integrity measures, designed to ensure that the business seeking to claim the R&D expenditure bears the risk that the activities may fail to produce results that can be commercialised. No contract should directly or indirectly provide consideration in return for the R&D entity conducting the R&D activities if the R&D activities fail to produce results that can be commercialised.</p> <p>The integrity rules are intended to apply when the entity is merely conducting the R&D activities in return for direct or indirect consideration under a contract. For example, they are</p>	<p>We agree that one of the requirements for the 'at risk' rule to apply is that the consideration is received, or reasonably expected, regardless of the results of the activities on which the R&D expenditure is incurred.</p> <p>However, we disagree that the integrity provisions can only operate where a contract specifies that one entity will receive consideration for conducting R&D activities on behalf of another entity. Although the 'at risk' rule may apply in this scenario, its application is not limited to this.</p> <p>To restrict the application of the 'at risk' rule in this way would disregard the wording of the legislation, specifically the requirement that the consideration</p>

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	providing contract services for another business whether or not the R&D is successful, such that the other business bears the risks of a negative R&D result.	is received, or reasonably expected 'as a direct or indirect result of the expenditure'.
Apportionment issues		
23	Applying the 'expenditure not at risk' to JobKeeper payments becomes overly complicated when determining a percentage of R&D activity that relates to each staff member for each month and excluding this amount.	The nature of the 'at risk' rule requires apportionment and maintenance of appropriate records to aid in calculating the reduction in the notional deduction. See paragraph 6 of the final Determination, which addresses apportionment.
24	<p>The question arises as to whether the JobKeeper payment should apply proportionally to the R&D and non-R&D expenditure, or initially to one of the amounts, with any excess applied to the other.</p> <p>In the absence of other guidance, and since JobKeeper payments can relate as easily to expenditure incurred only on R&D activities as to expenditure incurred on no activities at all, it appears reasonable to assume that the recoupment applies to both amounts proportionally.</p>	Where an eligible employee is only partly engaged in R&D activities, our view is that a fair and reasonable basis for determining the portion of JobKeeper received as a result of incurring R&D expenditure is the amount of time the eligible employee spends on R&D activities. Paragraphs 6, 36 and 37 of the final Determination address apportionment.
Date of effect		
25	<p>The final Determination should only have application from 1 July 2020 and not be retrospective.</p> <ul style="list-style-type: none"> • Taxpayers can only reasonably expect to receive JobKeeper once they have not been required to repay it. • Retrospective application disadvantages taxpayers who lodged their tax returns in good faith, based on information available at that time, prior to the draft Determination being published. <p>Taxpayers may have lodged their 2019–20 income tax return and received a refund from their R&D tax incentive claim before the draft Determination was released. Taxpayers should not be subject to the additional cost and administrative burden of preparing and lodging amended</p>	<p>See our response to Issue 10 of this Compendium on the reasonable expectation test and repayment of JobKeeper payments.</p> <p>The 'at risk' rule existed in the R&D legislation prior to the implementation of the JobKeeper program, so any payments made under the JobKeeper program were always going to attract the application of the 'at risk' rule from the commencement of the JobKeeper program. The public expression of the Commissioner's interpretation of the operation of the 'at risk' rule by way of a taxation determination does not alter this; the final Determination instead provides further guidance on the interaction together with practical examples to assist taxpayers in their compliance.</p> <p>Prior to any company having to (or even being able to) lodge their income tax return for the 2019–20 income year (being the first income year impacted), the ATO publicly advised the community that it was preparing COVID-19-related guidance on the interaction of the R&D provisions</p>

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	returns because later guidance indicates a contrary interpretation from the one they adopted when submitting their returns. The need for a taxation determination demonstrates that the situation is unclear to taxpayers.	(including the 'at risk' rule) with the government's economic stimulus measures. Companies entitled to JobKeeper who nevertheless lodged their 2019–20 income tax return prior to publication of the draft Determination, and in that return claimed a notional deduction for their salary and wage expenditure, are requested to provide a voluntary disclosure that their notional deduction, to the extent that it is not at risk, be removed.
Other comments		
26	The draft Determination does not account for subsection 355-405(4), which excludes R&D activities conducted for foreign residents from the 'at risk' rule. Accordingly, it is our understanding that JobKeeper payments for employees of businesses that conduct R&D for foreign residents will not trigger the 'at risk' rule, creating inconsistency by at risk favouring foreign-owned R&D over Australian-owned R&D activity.	The exclusion in subsection 355-405(4) is a policy decision. It does not affect the interpretation of the preceding tests in section 355-405.
27	The economic objectives of the JobKeeper payment could be compromised by the view in the draft Determination. There will be differing tax outcomes for R&D entities and non-R&D entities depending on whether they conduct R&D.	While noting the submission, we consider that the view expressed in the final Determination is the appropriate interpretation of section 355-405.
28	The R&D integrity provisions were never intended to apply to payments made to a broad array of taxpayers regardless of the activity of the employees or the employer, simply for keeping all eligible employees on their payroll. They are a means of stimulating the economy.	We consider that the 'at risk' rule only will apply where consideration is received, or reasonably expected to be received, as a direct or indirect result of incurring R&D expenditure. Any salary or wage expenditure incurred for an employee who is not engaged in R&D activities would not constitute 'R&D expenditure'. See paragraph 6 of the final Determination, which addresses apportionment where employees are partially engaged in R&D activities.
29	This draft Determination would have benefited from external stakeholder consultation prior to being issued for comment, even limited consultation with key stakeholders.	We note the submission. We considered that in the context of providing advice on the interaction between the R&D rules and JobKeeper payments, there was an urgent need to issue the draft Determination to address taxpayer uncertainty.

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Division 3 JobKeeper payments (eligible business participants)		
30	We agree with the ATO's views and conclusions reached on the business participant entitlement aspect of the draft Determination.	Noted.
31	There is nothing preventing a business from spending JobKeeper payments received under Division 3 on its R&D activities. No practical distinction can be drawn between the incurring of R&D expenditure through Division 2 or Division 3 JobKeeper payments, so the application of the 'at risk' rule should not be differentiated.	<p>We recognise an R&D entity in receipt of Division 3 JobKeeper payment could choose to spend the funds conducting R&D activities. However, whether the R&D expenditure was incurred because consideration has been received is not the relevant test for determining the application of the 'at risk' rule.</p> <p>Paragraph 46 of the final Determination explains the differences between Division 2 and Division 3 JobKeeper payments that, in our view, result in different outcomes when applying the 'at risk' rule. Relevantly, Division 3 does not require an employer to incur salary and wage expenditure in satisfaction of a 'wage condition'.</p>
Interaction with other stimulus payments		
32	<p>The ATO has guidance on its website that the cash flow boost paid under the <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i> does not impact R&D claims where a payment (such as salary and wages) is made. This is particularly important as the cash flow boost is non-assessable and non-exempt, whereas JobKeeper payments are assessable to the employer.</p> <p>This would indicate the integrity issue is in principle larger for the cash flow boost than JobKeeper, as employers receive the R&D offset as well as not being assessed on the cash flow boost. An explanation for the differing treatment is warranted to help understand the integrity concern with JobKeeper.</p>	Among other requirements, to satisfy the 'at risk' rule, cash flow boost must be consideration received or reasonably expected to be received as a direct or indirect result of the R&D expenditure being incurred. As distinct from JobKeeper, cash flow boost is not considered to be consideration having the requisite nexus to any R&D expenditure being incurred; it is considered too remote for the 'at risk' rule to apply.

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33	<p>Are other grants, rebates or subsidies also captured by the 'at risk' rule? The ATO's interpretation suggests that other government subsidies for employment would be. For example:</p> <ul style="list-style-type: none"> • the Australian Apprenticeships Incentive Program • the Employer Support Payment Scheme • tax rebates • wage subsidies • the Manufacturing Modernisation Fund. 	<p>The final Determination considers the eligibility criteria for the JobKeeper payment only. The application of the at risk or clawback recoupment provisions to other government payments for employment are out of scope of the final Determination and need to be assessed against their eligibility criteria.</p> <p>Taxpayers seeking certainty on the application of the provisions to their circumstances are encouraged to engage with us for advice.</p>
Clawback and recoupment		
34	We agree that the JobKeeper payments would not meet the criteria for the clawback recoupment provision contained in section 355-445.	Noted.
35	<p>Even though an R&D entity may have to satisfy certain conditions or requirements to receive a grant or reimbursement, the view in the draft Determination is that they will still have a reasonable expectation to receive the consideration. This is contrary to the legislative intention of the R&D recoupment provisions in Subdivision 355-G (see example 3.11 of the EM).</p> <p>The R&D recoupment provisions were intended to remove the additional R&D benefit where a company also receives a grant or reimbursement from the government.</p> <p>If the legislator intended that R&D entities not receive any notional R&D benefit when they receive a government recoupment, then Subdivision 355-G would not have been required. Section 355-405 would have been sufficient to stop access to the notional R&D deductions where a company was in receipt of a government grant.</p>	<p>An R&D entity that incurs expenditure as a condition of a grant or reimbursement may have a reasonable expectation to receive consideration as a direct or indirect result of incurring that expenditure (depending on the terms and conditions of the grant or reimbursement).</p> <p>We agree that the clawback recoupment provisions contained in Subdivision 355-G have no application where a notional deduction has been denied in full, including where this result occurs by virtue of the 'at risk' rule applying.</p> <p>However, we do not agree that the interpretation of section 355-405 in the draft Determination renders Subdivision 355-G redundant, with no work for the provision to do. The clawback recoupment provisions could still apply where the elements of section 355-405 are not satisfied, such as where:</p> <ul style="list-style-type: none"> • an R&D entity incurs R&D expenditure for which no consideration is received or could reasonably be expected to be received at the time they incur the expenditure, or • an R&D entity receives a grant that was conditional on the successful outcome of the R&D activities.

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		<p>Example 3.11 of the EM states that the R&D entity receives a \$500,000 reimbursement under a government vine-pull scheme for specified costs that it incurred in removing vines. We agree that, to the extent the reimbursement would have been captured by the 'at risk' rule, the clawback recoupment provisions in Subdivision 355-G would not apply. However, the facts do not indicate whether the entity can reasonably expect to receive the reimbursement at the time it incurs the R&D expenditure or whether the announcement of the scheme occurred subsequently. Further, the reimbursement is dependent upon the successful results of the activities (that is, removal of the vines). Therefore, the requirements of the 'at risk' rule are not satisfied.</p>
36	<p>The statements on the ATO website indicate that the JobKeeper payment is a recoupment or reimbursement of wages paid to employees. Therefore, the JobKeeper payment falls squarely into the application of Subdivision 355-G. To the extent that the employees undertake R&D activities, recoupment tax should apply to that component of the JobKeeper payment, not the 'at risk' rule.</p> <p>The interpretation of section 355-405 should be based on the context of Division 355 as a whole. Section 355-405 is a broadly-drafted integrity provision that reduces the R&D tax offset in some circumstances, whereas Subdivision 355-G is an integrity provision that reduces the R&D benefit in specific situations. The specific provisions in Subdivision 355-G should have priority over the general integrity provision in section 355-405.</p>	<p>JobKeeper payments do not satisfy the requirements in Subdivision 355-G in the context of an entity that is eligible under Division 3 of the CERP Rules. The JobKeeper payment would not be a 'recoupment' because it is not made as a reimbursement, refund or grant in respect of a loss or outgoing.</p> <p>In contrast, JobKeeper payments received by entities under Division 2 of the CERP Rules would not be subject to the clawback provisions if the 'at risk' rule applies. The clawback provisions only apply if eligible R&D expenditure has not already been denied or reduced through operation of the 'at risk' rule. See also our response to Issue 35 of this Compendium, which explains why the interpretation in both the draft and final Determination, which can result in grants being consideration, does not render Subdivision 355-G redundant.</p>
37	<p>The draft Determination states the respective subject matter of the nexus enquiry is expenditure with regard to anything that happened or existed before or at the time the expenditure is incurred, and anything that is likely to happen or exist after that time. Such a broad interpretation can have a potential negative impact to other arrangements with R&D entities.</p>	<p>The requirement to have regard to anything that happened or existed before or at the time the expenditure is incurred, and anything likely to happen or exist after that time is prescribed by subsection 355-405(3).</p>

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	<p>For example, many companies outsource their R&D activity to associated entities or third-party contractors. In some scenarios, there may be a license fee that the third party or associate would negotiate in order to use the technology under development by the R&D entity. In such scenarios, the licensor would reasonably expect to receive this as consideration. If no relevance is granted to the specifics of the activities to which the consideration relates, such consideration could arguably be interpreted as an indirect result of expenditure being incurred on R&D activities, particularly when there is ongoing development of the technology. Similar to JobKeeper, even though there may be no causal link between R&D activities and the consideration received, it would prevent the licensor from claiming the component of that consideration used as expenditure incurred on conducting R&D activities.</p>	