

Australian JobKeeper wage subsidy - developments and action plan to accelerate payment

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Executive summary

The Australian Government enacted on 9 April 2020, the unprecedented AU\$130 billion¹ JobKeeper Payments wage subsidy (JKP) to support businesses significantly affected by COVID-19. The Treasurer subsequently signed the legislative instrument *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Rules)* to regulate the JKP.

Under the JKP, eligible entities can claim a fortnightly payment of \$1,500 per eligible employee/participant from 30 March 2020, for up to 13 fortnights ending 27 September 2020 (Jobkeeper fortnights). The first payment is to be received by eligible businesses from the first week of May, if they register promptly.

Employers (and certain business participants in a non-employee arrangement such as sole traders, partnerships, trusts or companies) should now work through the requirements and if eligible, notify the Australian Taxation Office (ATO) that they wish to participate in the initial round or be ready to elect in if they become eligible later.

To receive payments in respect of the first two fortnights, all the requirements including payment to employees must be met by 30 April 2020. The only exception is enrollment which must be completed by 31 May 2020. However, enrollment by 30 April 2020 is recommended for businesses seeking speedy JKP receipts.

Significant procedural work is needed by each entity which is an employer that has employees eligible for the JKP; various steps and actions are confirmed in ATO guidance and reflected in the detailed EY JKP work programs.

Employers must:

- ▶ Establish eligibility, identify and notify potentially eligible employees
- ▶ Pay employees the minimum \$1,500 per fortnight for every JKP fortnight in accordance with the wage condition rules
- ▶ Obtain and retain "Jobkeeper employee nomination notices" from eligible employees
- ▶ Enroll for the Jobkeeper payment (from 20 April 2020 onwards)
- ▶ Provide ongoing information on bank details, business participation and fortnightly numbers of employees through online ATO forms

Detailed analysis of the Rules and preparation of documentation of eligibility are required for each potentially eligible entity: there are no group consolidation rules. Proof of satisfying the rules requires a significant amount of information which may be hard to find. Eligibility will be subject to ATO scrutiny and overpayments will need to be repaid with interest. Furthermore, overpayments create exposure to potential significant administrative and criminal penalties.

EY has a detailed work plan to assist businesses with the various procedures including with:

- ▶ Documentation for the ATO eligibility and compliance reviews
- ▶ Significant employment law issues which must be carefully managed

Businesses need to monitor ATO and government developments as further JKP guidance and changes are emerging, including further eligibility, procedural and reporting obligations.

Detailed discussion

Overview of the JKP system

The JKP subsidy is a material issue for businesses - \$1,500 per eligible employee over the six-month period amounts to almost \$1m for a business with 52 eligible employees eligible for the full JKP entitlement, \$10m for a medium sized business with 500 employees, \$20m for a business employing 1,000 and so on.

Entitlement to such high levels of Government assistance, within a relatively complex framework, demands a high level of attention, due diligence and evidence to ensure eligibility and that one's position can be supported.

The JKP is material to the Government as the \$130 billion JKP cost equals broadly 25% of total Australian Federal Government payments forecasted in the 2019-20 budget, or 130% of anticipated company tax receipts for 2019-20.

The ATO will be reviewing business documentation and any rearrangements of business and employee activity. The JKP law contains integrity measures, and the ATO is aware of schemes being proposed to businesses to maximize JKP. Businesses should anticipate detailed ATO scrutiny of business actions, restructures and documentation.

The urgent implementation timeframe means that to date we have only seen the framework legislation passed into law and the first tranche of guidance from the ATO, with more to come. There are many unknowns, and EY is in discussions with Treasury and the ATO.

It will be vital to correctly and promptly address notification requirements between employers and employees and to notify the ATO initially in a timely way and complete on-going ATO reporting within specified times. Delays will slow down JKP payments.

There will be a range of circumstances where the base rules will not apply. Some businesses will need to rely on the Commissioner of Taxation's (Commissioner) discretion to access the JKP.

Businesses must also consider how the JKP scheme interacts with other business issues including their employment law obligations.

There are three issues requiring immediate attention:

- ▶ Employer eligibility
- ▶ Employee eligibility
- ▶ Practical steps to enroll in the JKP program

Employer entity eligibility

An employer entity is eligible for the JKP if the following all apply:

- ▶ On 1 March 2020, the employer carried on a business in Australia or was a not-for-profit organization
- ▶ It employed at least one eligible employee on 1 March 2020

- ▶ The eligible employees are currently employed by the business for the Jobkeeper fortnights claimed (including employees stood down or re-hired)
- ▶ There is a decline in turnover (gross revenue) of at least:
 - 50% for entities with either turnover more than \$1 billion, or are part of a group of connected and affiliated entities with turnover of more than \$1 billion
 - 15% for entities that are an ACNC registered charity (excluding private schools and higher education providers)
 - 30% for all other businesses

Aggregated turnover for 30%/50% threshold test

An entity other than charities will determine if it applies a 30% or 50% test based on its aggregated turnover as defined in the income tax law.

Whether the aggregated turnover exceeds \$1 billion is determined by reference to either the current income year (on a “likely to exceed” basis) or the prior income year.

The aggregated turnover definition includes the worldwide turnover of the entity and its connected entities and affiliates. Turnover encompasses the sum of an entity’s ordinary income. Amounts derived from its affiliated or connected entities are excluded to avoid double counting.

For organizations on the cusp of \$1 billion aggregated turnover, significant work needs to be done to support the assessment of which percentage applies.

Decline in turnover test: individual entity

The decline in turnover test is a **once only** requirement. Once this test has been met before the end of a fortnight there is no requirement to retest in later months. So, an entity meeting the test at the time of the 30 March 2020 fortnight will be entitled to JKP for eligible employees for all 13 fortnights.

The decline in turnover test uses the Goods and Services Tax (GST) concepts of “current” and “projected” turnover, which includes taxable supplies and GST-free supplies but not input taxed supplies, with special JKP modifications. Under the GST law, only Australian-based turnover is relevant.

Subject to our comments further below, the decline in turnover test is calculated on an entity by entity basis, so disaggregation will be required for entities that are members of a GST group. Within a group of related entities some

entities may qualify for the JKP and others may not. The test is on a whole of entity basis and there is no mechanism to subdivide one entity into separate businesses for this purpose.

– Basic decline in turnover test periods

The periods for which the turnover test can be compared from 2020 to 2019 (base case) can be either one month (March, April, May, June, July, August or September 2020) or a three-month period (either 1 April to 30 June or 1 July 2020 to 30 September 2020). This is intended to align with an entity’s GST reporting period.

However, a monthly Business Activity Statement (BAS) lodger could potentially use a three-month period and a quarterly BAS lodger could potentially use a one-month period provided they complete the necessary additional work to determine current and projected GST turnover for those periods. For an employer entity to be eligible for the JKP from the first fortnight starting 30 March 2020 – under the base case rules there are three comparison options:

1. Compare actual GST turnover for the month of March 2020 with the month of March 2019
2. Compare projected GST turnover for the month of April 2020 with the month of April 2019
3. Compare projected GST turnover for the April to June 2020 quarter with the corresponding April to June Quarter for 2019

Calculating GST turnover will not be as simple as using the “sales” amount reported on the BAS (though it is a good starting point). Some amounts that are generally reported on the BAS are excluded from the JKP decline in turnover test. Given the challenges around using the BAS, a recommended approach is that the turnover calculation is based on sales data for the relevant period.

Projected turnover is based on supplies that businesses have made in the period or are likely to make. To quantify the value of supplies that are likely to be made in the period, it is necessary to make a projection. The Commissioner has issued a ruling on GST turnover which states that he will accept a calculation based on a bona fide business plan, accounting budget or some other reasonable estimate.

Most entities report transactions on the BAS that are “attributed” to the month based on when an invoice is issued, or consideration is received (if earlier). This can produce quite

a different result to the statutory calculation. The ATO is looking into whether it can accept testing based on BAS type attribution of turnover.

The way in which projections are determined will differ between entities based on commercial practices.

Forecasting the impact of COVID-19 will be challenging. In accordance with the Commissioner's ruling, the projection must be reasonable and robust. Accordingly, the basis of the projection must be clearly documented, and specifically includes key assumptions regarding what is included in turnover from a GST perspective.

Businesses must maintain adequate records to evidence the decline in turnover calculation.

There are special rules for charities, not set out here.

- Alternative decline in turnover test periods

The Commissioner can by legislative instrument specify an alternative decline in turnover comparative testing period for a class of entities.

The explanatory statement (ES) to the Rules indicates that the discretion may be applied where the basic test comparison periods do not accurately reflect the downturn in activity the business has suffered, e.g.:

- ▶ A new business which started for example in January 2020
- ▶ A business that made a major business acquisition in 2020

The limited discretion in the Rules appears to be somewhat at odds with statements in the initial fact sheets published by Treasury after the JKP was announced which implied that the Commissioner would have a broader discretion that could be applied considering an entity's individual facts and circumstances.

An initial instrument has been issued and may apply to situations involving:

- ▶ Startups or businesses ramping up with major increases in turnover
- ▶ M&A or restructure of business
- ▶ Drought or natural disaster
- ▶ Irregular turnover
- ▶ A sole trader or small partnership with sickness, injury or leave

Alternative decline in turnover test: special purpose employing entity

Where the basic decline in turnover test is not met, there is an alternative decline in turnover test where employees are employed by a special purpose entity rather than directly by an operating entity. This alternative test applies where the employing entity provides the services of its employees to one or more related entities and those related entities carry on a business of deriving revenues from unrelated third parties. This alternative test will apply by reference to the combined GST turnovers of the related entities using those services.

Employer eligibility - unresolved issues

Issues have been identified with the eligibility rules, including measuring declines in turnover for businesses providing services which are not subject to GST (notably input taxed services including financial services sector).

EY has proposed responses to address these issues and recommended extending some of the deadlines.

Employee eligibility

The employer must have an employment relationship with eligible employees as at 1 March 2020. JKP payments are then made after the employer qualifies for each fortnight in which the employer has eligible employees.

Eligible employees need to be paid ("the wage condition") before an employer can include them in the JKP claim. For the two fortnights falling in April, employees must be paid JKP amounts no later than 30 April 2020. For those who continue to earn more than \$1,500 per fortnight there is no change in payroll processes. For an employee who earns less than \$1,500, including anyone stood down without pay, the employer will need to have enough information to determine whether the employees are eligible and then must pay them by 30 April, to receive the JKP.

Employees are eligible if they satisfy two tests at different times:

- ▶ The 1 March 2020 test
- ▶ The Jobkeeper fortnight test, each Jobkeeper fortnight

The 1 March 2020 test

This test requires that on 1 March 2020 an employee was:

- ▶ 16 years or older

- ▶ An employee (other than a casual employee) of the employer, or a long-term casual employee
- ▶ An Australian resident within the meaning of section 7 of the *Social Security Act 1991* or both a tax resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and the holder of a Subclass 444 (Special Category) visa.

Jobkeeper fortnight tests - continuing

For each of the 13 Jobkeeper fortnights starting from 30 March 2020 and ending 27 September 2020, employees must satisfy further conditions:

- ▶ They are an employee of a qualifying employer (including stood down or re-hired employees) at any time during the fortnight.
- ▶ They are not excluded by receiving Government parental leave pay, Dad and partner pay, or a payment in accordance with Australian workers compensation law for an individual's total incapacity for work.

As well, for each Jobkeeper fortnight, the employer is only entitled to a JKP if the employer has satisfied the wage condition by paying the eligible employee a minimum of \$1,500 in respect of that fortnight.

It follows that employees ordinarily receiving \$1,500 or more per fortnight before tax will continue to receive their regular income according to prevailing workplace arrangements. Employees ordinarily receiving <\$1,500 income per fortnight before tax will be paid a top-up so they receive a minimum of \$1,500 per fortnight, before tax.

Employee eligibility - One in, all in - risks

All eligible employees either working for the employer or who have been stood down must be included by the employer in the scheme. This "one in, all in" rule is supported in the ES and by amendments to the *Fair Work Act*.

Despite the short time frame involved, employers must navigate the employee eligibility rules with care. Otherwise they risk litigation from disaffected employees and exposures under the *Fair Work Act*.

The EY-JET (JobKeeper Eligibility Tool) has been developed to efficiently allow employers to process eligibility and documentation for multiple employees up to several thousand employees.

Employee notifications

For an employer to have a JKP entitlement, each employee must provide a notice to their employer declaring they meet the 1 March 2020 requirements and are not excluded as above, agree to be nominated by the employer, they have not agreed to be nominated by another employer or (if they are employed as a casual employee with this employer) stating that they do not have permanent employment with another employer. The ATO has provided a pro-forma form.

Employers can develop their own forms and EY can assist employers to use portals and electronic means to obtain the forms - techniques important for larger employers.

Once an employee has nominated an employer and the employer has received JKP in respect of the employee and has paid the employee, they cannot nominate a different employer.

If an employer normally pays employees less frequently than fortnightly, the JKP can be allocated between fortnights in a reasonable manner.

An announcement stated employers would not be required to pay superannuation guarantee on any "top-up" portion of the JKP above the employee's usual wage. These amendments have not yet been made: the ES notes that they will be progressed separately through regulations to be made under the relevant Act.

Long-term casual employee

A "long-term casual employee" is a person who has been employed by the employer on a regular and systematic basis during the period of 12 months that ended on 1 March 2020. The definition is based on that in the *Fair Work Act 2009*, with adjustments to ensure it can be applied to all employees (not just "national system employees"). The ES states that a casual employee is likely to be employed on a regular and systematic basis where the employee has a recurring work schedule or a reasonable expectation of ongoing work.

Businesses that change hands

A person can be treated as an eligible employee of the same employer even if the business or non-profit body in which the person is employed changes hands after 1 March 2020, including for working out if a person is a long-term casual employee of an employer.

Integrity rules

Entities should be mindful of integrity rules included in the Rules and the Act. The JKP measures will be subject to ATO compliance and audit activities.

The integrity rules include:

- ▶ Denial of JKP entitlement where businesses, individuals and entities deliberately enter into contrived arrangements with the sole or dominant purpose of reducing their turnover to gain access to JKPs or increase the amount of JKPs they receive
- ▶ If an employee has nominated more than one employer to receive the JKP, the employee does not satisfy the nomination requirements required to be an eligible employee of any employer
- ▶ The general interest charge will apply on the overpayment of payments as well as potential significant administrative and criminal penalties
- ▶ If an overpayment results from an individual fraudulently nominating more than one employer, the individual will be jointly and severally liable to pay the overpayment and general interest charge on the overpayment

How to enroll in the JKP program

The ATO process for an employer to participate is:

- ▶ Step 1: Initial enrollment form, to be completed from 20 April, which notifies the ATO that a business is claiming the JKP and estimates of employees.
- ▶ Step 2: Identify eligible employees, with a second form where JKP enabled Single Touch Payroll (STP) software is not installed, to be submitted during the 7 days from 4 May 2020.

The enrollment form must be completed by 31 May for JKPs covering the first two fortnights. However, enrollment by 30 April is recommended for businesses seeking speedy JKP receipts.

Once an employer provides details of the eligible employees to the ATO, within seven days they need to notify the eligible employees of the provision.

Also, seven days after the end of each month the employer needs to report to the ATO their GST turnover for the reporting month and the projected turnover for the following month.

The ATO has published enrolment guides for sole traders, employers using STP and employers not using STP.

Summary of actions for employers

It will be essential for businesses planning to claim JKP for April to streamline their actions. Employer actions include:

- ▶ Step 1 - Ensure that all eligibility requirements are met by the business entity and employees
- ▶ Step 2 - Continue to pay at least \$1,500 to each eligible employee per Jobkeeper fortnight (the first Jobkeeper fortnight was from 30 March - 12 April 2020, the second was 13-26 April 2020)
- ▶ Step 3 - Notify eligible employees that Jobkeeper payments are being claimed on their behalf and confirm they have not been nominated through another employer
- ▶ Step 4 - Ensure nominated employees complete and return the Jobkeeper employee nomination notice by the end of April if JKP is being claimed for April. Retain records, anticipating ATO review
- ▶ Step 5 - Enroll for the JKP payment using the Business Portal and authenticate with myGovID from 20 April 2020. Ensure enrollment by 31 May 2020 to claim JKP for the two fortnights in April.
- ▶ Step 6 - In the ATO online form, provide bank details and indicate if an entitlement based on business participation is being claimed
- ▶ Step 7 - Specify the estimated number of employees who will be eligible for the first Jobkeeper fortnight and the second Jobkeeper fortnight
- ▶ Step 8 - Identify eligible employees either:
 - Directly in payroll software by 30 April 2020, if software has been updated with JKP functionality or
 - Through the ATO business portal from 4 May 2020.

Summary of actions for employees

The actions necessary by employees are in summary:

- ▶ Step 1 - Ensure the eligibility requirements are met.
- ▶ Step 2 - Notify the relevant employer through which the JKP are to be claimed.
- ▶ Step 3 - Employees with multiple jobs can choose one employer to claim the JKP and notify the nominated employer. The other employer(s) should be informed that a different employer has been nominated for JKP.
- ▶ Step 4 - Complete the Jobkeeper employee nomination notice provided by the chosen and agreed employer and return it as soon as possible. This includes a confirmation of nomination by the employer.

- ▶ Step 5 - Employees who are receiving or in the process of applying for a Services Australia income support payment, like JobSeeker payment, must notify Services Australia regarding the JKP claim.

Next steps

EY's detailed JKP work program is available to support businesses in managing this tight timeframe.

Our multidisciplinary approach addresses tax and legal requirements while also addressing the intricacies of employee communications and the interaction with ATO reporting.

Processes where we can assist include:

- ▶ Assessing entity eligibility - including with our **EY JobKeeper GST Turnover Calculator**
- ▶ Assessing employee eligibility - including using the **EY-JET (JobKeeper Eligibility Tool)**
- ▶ Employee onboarding and communications
- ▶ Payroll and ATO reporting
- ▶ Reconciling JKP payments received to initial claim
- ▶ Addressing *Fair Work Act* requirements
- ▶ Critically assessing workforce planning and the interaction with JKP

Endnote

1. Currency references in this Alert are to the AU\$.

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