



## Tax Insights

### JobKeeper: important updates on 1 May 2020

#### Snapshot

A number of important developments occurred with respect to the JobKeeper scheme on or around 1 May 2020:

- Amendments were made to the JobKeeper Rules, pursuant to a [Legislative Instrument](#) registered as the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No 2) 2020, referred to in this document as the 1 May 2020 amendments. An accompanying [Explanatory Statement](#) was also released;
- The ATO issued [PCG 2020/4](#) dealing with “Schemes in relation to the JobKeeper payment”;
- The ATO issued a new employee nomination form ([here](#)); and
- The ATO updated its [website guidance](#) in respect of the alternative test. These updates are further to the release by the ATO of the Legislative Instrument registered as the Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020, under which the Commissioner determined a number of alternative tests, pursuant to section 8(6) of the Rules.

The 1 May 2020 amendments and PCG 2020/4 are both relevant to the treatment for JobKeeper purposes of **employees employed through a special purpose entity** within a group. In addition, the 1 May 2020 amendments also establish new requirements in respect of the “**one in all in**” principle and the eligibility of 16 and 17 year old children for the JobKeeper payment.

### JobKeeper: 1 May 2020 amendments

On 1 May 2020, the **Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020** was registered as a **Legislative Instrument**. This Legislative Instrument contains amendments to the JobKeeper Rules as initially determined by the Treasurer, and which were released on 9 April 2020.

The amendments to the Rules deal with the following matters:

- A **modified** decline in turnover test for certain group structures, referred to below as **group employers**;
- Pursuant to the “**one in all in**” principle, an **additional notification requirement** was included to confirm that all relevant employees of a participating entity must be given the opportunity to agree to be nominated;
- Additional requirements were imposed that must be met for **children** to be eligible employees.

In addition, the 1 May 2020 amendments also deal with certain matters relating to universities, charities and religious practitioners. These matters are not dealt with in this Tax Insight.

### Group employer

A key feature of the JobKeeper scheme is that it applies to employers, and the eligibility of that entity is determined by reference to, inter-alia, the decline in turnover. Where an entity is both an employer and derives revenue from customers, the decline in turnover tests are in many cases readily able to be applied. A particular issue identified at the outset related to entities within a group which employ staff and make those staff available to other entities in the group, where those other entities that are deriving revenue from customers external to the group. In that circumstance, the application of the decline in turnover test to the group employer entity is disconnected from the decline in customer revenue suffered by the market facing entities in the group.

On 24 April 2020, the Treasurer acknowledged this issue and indicated that changes would be made to the JobKeeper Rules to:

“address circumstances where business structures use a special purpose entity to employ staff, rather than staff being directly employed by an operating entity. The Government will provide an alternate decline in turnover test for the eligibility of special purpose service entities that provide employee labour to group members and that have not met the basic test for decline in turnover ... The alternate test will be by reference to the combined GST turnovers of the related entities using the services of the employer entity”.

The 1 May 2020 amendments made changes to the JobKeeper Rules to deal with this matter.

The amended Rules establish a “modified test for certain group structures”. The Rules define certain employer entities within a group as an employer entity. We refer to such an entity as a **group employer** in this document.

For the purposes of this document, we refer to the **three decline in turnover tests** as follows:

- The basic decline in turnover test, being the general test in section 8(1) of the JobKeeper rules (the **basic test**)
- The alternative decline in turnover test, being the alternative tests applicable to the specified classes of entities, pursuant to section 8(6) as set out in the Legislative Instrument dated 23 April 2020 (the **alternative test**)
- The modified decline in turnover test introduced by the 1 May 2020 amendments, being the test set out in section 8A applicable to group employers (the **group employer test**).

This Tax Insight provides an overview of the **group employer test** applicable to a **group employer**. These provisions also need to be considered in the context of **PCG 2020/4** where the ATO outlines its compliance approach in respect of the integrity provisions in section 19 of the Payments and Benefits Act (Contrived schemes). A number of the examples in PCG 2020/4 deal with group employers, and similar fact patterns.

**Q:** *What is the main change introduced by the 1 May 2020 amendments for group employers?*

**A:** The 1 May 2020 amendment introduces a modified or additional decline in turnover test specifically for an employer entity (group employer) within a group, referred to in this document as the group employer test.

### **What is a group employer?**

**Q:** *What is the definition of a group employer?*

**A:** A group employer is an entity which;

- Is a member of a consolidated group, consolidatable group, or a GST group; and
- Its principal activity is supplying other members of the group with services (**employee labour services**) consisting of the performance of work by individuals the group employer employs; and
- For which the Commissioner has not made a determination under subsection (5).

A key threshold issue will be whether it can be said that the principal activity of the relevant entity is the supply of employee labour services to other members of the group. Where the relevant entity also undertakes other activities or services, this may jeopardise the entity's status as a group employer for the purposes of the group employer test.

**Q:** *What if a potential group employer also undertakes additional activities?*

**A:** The Explanatory Statement says that a group employer meets the principal activity test if the main or predominant activity that the entity carries out is the provision of employee labour services to other members of the group. The entity may provide other services to the group but must not be an operating entity of the group and must provide no more than incidental services to third parties.

**Q:** *What is the relevant group concept?*

**A:** The relevant definition of group with respect to a group employer is based upon the employer entity being a member of either a tax consolidated group, a consolidatable group or a GST group.

### **Decline in turnover test options**

**Q:** *Can the basic test continue to be used by a group employer (i.e., on a stand-alone basis as per the original Rules)?*

**A:** Yes.

**Q:** *Can one or other of the alternative tests continue to be used by a group employer (i.e., on a stand-alone basis as per the original Rules)?*

**A:** Yes, if the group employer falls within one of the classes of entities dealt with by the alternative tests.

**Q:** *If a group employer doesn't satisfy the basic test or the alternative test, can a group employer use the group employer test?*

**A:** Yes, subject to the Commissioner not making an excluding determination under section 8A(5) of the group employer test

**Q:** *Under the group employer test, how do I determine the relevant decline in turnover percentage: whether 30% or 50%?*

**A:** This is determined in the usual way and requires calculating whether the aggregated turnover of the group employer, together with connected entities and affiliates, exceeds \$1 billion.

## Group employer test

**Q:** *How does a group employer satisfy the group employer test?*

**A:** If the relevant entity is a group employer, the group employer test is satisfied for a turnover test period if the group employer:

- Supplies employee labour services to one or more members of the group (a **test member**) that have as their principal activity the making of supplies to entities other than members of the group; and
- Does not supply employee labour services to entities that are not members of the group (disregarding supplies that are merely incidental to the principal activity of the entity); and
- Would satisfy the basic test in section 8(1) if certain group employer modifications were made to that test.

**Q:** *How does the group employer apply the relevant decline in turnover under the group employer test?*

**A:** The basic test is used as the architecture of the group employer test, subject to modifications. The modifications require that the GST turnover of test members be taken into account.

**Q:** *Is the group employer test a standalone test (like the basic test) or a group-concept test?*

**A:** The group employer test is based on the basic test, with some modifications. Instead of applying the decline in turnover testing to the GST turnover of the group employer, the group employer test requires:

- a) Adding together the projected GST turnover for each test member
- b) Adding together the current GST turnover for each test member
- c) Comparing the amount determined at (a) with the amount determined at (b) to determine whether there has been a greater than 30%/50% (as applicable) decline in turnover

In other words, the group employer test is effectively based upon the sum of the turnovers of the test members.

**Q:** *How is a test member's current GST turnover and projected GST turnover calculated?*

**A:** A test member calculates its current GST turnover and projected GST turnover as if that entity was applying the basic decline in turnover test to itself. That is, it would (subject to the following question) determine its projected GST turnover for a turnover test period and current GST turnover for a relevant comparison period, pursuant to the basic test in section 8(1) of the rules.

**Q:** *In calculating the test member's current GST turnover for a relevant comparison period, can a particular test member apply the alternative test?*

**A:** Yes. If a particular test member falls within a class of entities identified in the alternative test, and the alternative test identifies an alternative amount to the normal current GST turnover for a relevant comparison period, that different or alternative amount is to be used in determining the current GST turnover of that test member.

**Q:** *What if some test members in the group have satisfied the basic test and others have not?*

**A:** The group employer test effectively operates by aggregating the current GST turnovers and the projected GST turnovers of all test members and applying the group employer test at that aggregated level. It is not necessary that each test member satisfy the basic test on a stand-alone basis.

**Q:** *What if some test members in the group, mainly or wholly make input-taxed supplies?*

**A:** These entities apply the basic test in the normal way: it is necessary to calculate the current GST turnovers and the projected GST turnovers of all test members, applying the existing JobKeeper definitions of current GST turnover and the projected GST turnover. A test member making input-taxed supplies would need to determine its current GST turnover and projected GST turnover with reference to its non-input taxed supplies.

**Q:** *What happens if a group employer supplies employee labour services to other members of the group which do not make supplies to entities outside the group?*

**A:** In order for an entity to meet the definition of group employer, its principal activity must be the supply of employee labour services to other members of the group. There is no concept of test entity in the first step of identifying whether an entity is a group employer. If an entity meets the definitional requirement of being a group employer, that then opens the pathway to the group employer test. As a next step, the group employer test is available if the entity supplies employee labour services to one or more test members: being a group member that has as its principal activity the making of supplies to entities outside of the group. The group employer may also provide employee labour services to other members of the group which do not make supplies to entities outside of the group. This of itself should not prevent access to the group employer test. However, when applying the group employer test, it is only the relevant GST turnover amounts of test entities which are taken into account.

**Q:** *In what circumstances may the Commissioner determine that the group employer test does not apply to a particular group employer?*

**A:** There are 2 circumstances in which the Commissioner may determine that a particular group employer cannot use the group employer test, being:

- That the group employer test is unsuitable for measuring the extent to which employees within the group are performing work in operations that have suffered a relevant decline in turnover. The Explanatory Statement provides an example of where significant restructuring that affects turnover in 2020 results in the group employer test being inappropriate to determine entitlement to the JobKeeper payment; or
- That the application of the group employer test to the particular group risks the integrity of the Commissioner's administration of the JobKeeper scheme

**Q:** *In identifying the relevant test members, which group concept is applied?*

**A:** If a group employer is a member of more than one of a consolidated group, consolidatable group or a GST group, it can satisfy the group employer test in relation to its membership of any of those groups. It will be important to ensure that the relevant group and group members are identified, for the purpose of applying the definition of group employer, and for applying the group employer test.

**Q:** *Can JobKeeper be available for some employees in the group employer but not other employees?*

**A:** No. Given that the group employer test is effectively applied at an aggregated level as a result of adding up the turnovers of all test members, the group employer will either satisfy or not satisfy the group employer test on "all or nothing" basis.

**Q:** *Do I allocate the turnover of a particular operating entity or business to particular employees of the group employer?*

**A:** No. The group employer test does not operate on that basis.

**Q:** *Do I allocate the employees of the group employer to a particular operating entity or business?*

**A:** No. The group employer test does not operate on that basis.

**Q:** *Is there any difference between employees of the group employer who work in a shared services role (providing services to a number of group entities or businesses) versus those who are involved in the provision of services to a particular group entity?*

**A:** No. If the group employer provides employee labour services to any extent to a particular group entity, that entity becomes a test member for the group employer test.

**Q:** *From which JobKeeper fortnight is the group employer test applicable?*

**A:** The group employer test is applicable from the first JobKeeper fortnight which commenced on 30 March 2020.

## PCG 2020/4: contrived schemes

Under section 19 (Contrived Schemes) of the Payments and Benefits Act, the Commissioner may determine that an entity is not entitled to a JobKeeper payment. In broad terms, section 19 can be activated where a person enters into a scheme for the sole or dominant purpose of achieving either of the following:

- Making an entity entitled to a JobKeeper payment in respect of a period;
- Increasing the amount of a JobKeeper payment to which an entity is entitled for the period.

This is referred to below as obtaining a relevant JobKeeper benefit. Section 19 has many of the features which are found in Part IVA.

The ATO has outlined in PCG 2020/4 how it will apply compliance resources in circumstances where a relevant JobKeeper benefit may have been obtained. Key principles in the PCG are found in the following paragraphs:

“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.”

The PCG identifies 4 examples where there is a **high risk** of the Commissioner applying compliance resources to consider the integrity provisions. The features of these examples are as follows:

- There is a relevant scheme entered into; and
- There is no anticipation of any material impact on the relevant entity as a result of external factors beyond the entity’s control; and
- A particular step or transaction is undertaken such as:
  - Deferring the making of supplies to obtain the JobKeeper payment;
  - Bringing forward the making of supplies solely to obtain the JobKeeper payment;
  - Transfer of assets and associated income stream to a subsidiary; or
  - Manipulating the timing of management fees.

The PCG provides 4 examples each involving an employer entity where there is a **low risk** of the Commissioner applying compliance resources to consider the integrity provisions. The features of these examples are as follows:

- The external revenue of the operating entity has been significantly reduced;
- The basic test is applied to the employer entity (rather than the group employer test in section 8A); and
- There is a relevant scheme entered into; and
- There is a reduction in the GST turnover of the employer entity in the relevant GST turnover test period for various reasons such as:
  - The service fee payable under the agreement between the employer entity and an operating entity is renegotiated and reduced by an amount that is proportional to the reduction in the external turnover of the operating entity; or
  - The employer entity stands down staff due to the reduced activity of the operating entity resulting in a reduction of the service fee; or
  - The related party is unable to pay and the employer entity reasonably projects a fall in turnover; or
  - A parent company of a corporate group reduces management fees.

As a result, where there is an employer entity in a group, there are a number of ways that the entity may be eligible for the JobKeeper payment including:

- Applying the **basic test** in section 8(1) to the employer entity, and in doing so, being cognisant of the ATO's likely compliance approach to the integrity provisions; or
- Determining whether the employer entity is a group employer as defined, and if so, applying the **group employer test** in section 8A.

### One in, all in principle: new notification requirement

In the Explanatory Statement which accompanied the original JobKeeper rules issued on 9 April 2020, reference was made to the "one in all in" principle. The Explanatory Statement was as follows:

"Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. This "one in, all in" rule is a key feature of the scheme."

The Treasurer's media release on 24 April 2020 stated that the "one in, all in" principle will be made clearer in the Rules. This has been done by way of **new section 10A** of the Rules imposing an **additional notification requirement** upon an employer, following the employer enrolling in the JobKeeper scheme.

**Q:** *What is the new notification requirement imposed upon an eligible employer under section 10A?*

**A:** An employer who enrolls in the JobKeeper scheme under section 6(1)(e) is required to provide a notice in writing of such enrolment to each **relevant employee** of the entity, and to do so within 7 days of enrolment (or such later time as the Commissioner allows).

**Q:** *What must be contained in the notice?*

**A:** The notice must notify the employee of the JobKeeper enrolment of the employer, state that the individual must give the employer an employee nomination notice if the individual agrees to be nominated as an eligible employee of the entity of the employer, and include information about the steps the individual can take to provide the nomination notice to the employer.

**Q:** *Is there an approved form for the section 10A notification?*

**A:** Section 10A does not refer to an approved form, however, the ATO has released a new employee nomination form ([here](#)) and the ATO instructions state that the form will be used to both:

- Notify eligible employees (pursuant to section 10A) that an employer intends to participate in the JobKeeper scheme; and
- Ask eligible employees if they agree to be nominated by the employer and permit the employee to agree to be nominated (pursuant to section 9(3)).

**Q:** *Must an employer provide this notice to all employees?*

**A:** The must give this notification to all **relevant employees**. An individual is a relevant employee (subject to some exceptions) of an entity if the individual is an employee of the entity on the day that the entity enrolls in the JobKeeper scheme. However, an individual is not a relevant employee of an entity if the entity reasonably believes that individual does not satisfy the "1 March 2020 requirements" in section 9(2), which deal with the following matters: age of the individual, employee or long-term casual employee status of the individual, and residency and visa status.

**Q:** *How does this concept of a relevant employee apply to a person who was an employee at 1 March 2020 but has been stood down or made redundant since 1 March 2020?*

**A:** A relevant employee is a person who is an employee of the relevant employer on the day that the employer enrolls in the JobKeeper scheme. If the employment status of an individual has changed since 1 March 2020, but the person remains an employee of the employer at the time of enrolment, the person would be regarded as a relevant employee, and accordingly must be notified under section 10A. For example, a person who has been stood down but is still an employee at the time of enrolment would continue to be a relevant employee. On the other hand, a person who has been made redundant and has ceased to be an employee of the employer as at the date that the employer enrolls in the JobKeeper scheme would not be a relevant employee. It may be necessary to obtain employment law advice with respect to certain fact patterns in this regard to confirm the employment (or otherwise) status of an individual at the time of enrolment and other relevant times.

**Q:** *Does the provision of a notification under section 10A make the individual an eligible employee?*

**A:** No. All of the eligible employee requirements in respect of that individual need to be met including the 1 March 2020 requirements, returning the nomination notice to the employer (as required by section 9(3)) and the satisfaction of the wage condition in respect of the individual.

**Q:** *Can an employer provide a nomination notice to a person who is not a relevant employee of the entity?*

**A:** Section 10A imposes a positive obligation on an employer to provide the relevant notification to all relevant employees. It appears that it is possible for an employer to nominate a person other than a relevant employee, if the employer so chooses. For example, a person may have been an employee as at 1 March 2020 and an employee during one or more JobKeeper fortnights prior to the employer enrolling in the JobKeeper scheme, but the person has ceased to be an employee prior to enrolment. Whilst the section 10A obligation is not applicable to that individual, the individual may nonetheless be an eligible employee if all of the eligibility conditions are met, including the nomination notice requirements under section 9(3) and the wage condition requirements under section 10.

**Q:** *What if an employer has **already enrolled** in the JobKeeper scheme?*

**A:** If an employer has already enrolled in the JobKeeper scheme, the notification requirement under section 10A notification requirement must still be satisfied, and the employer is required to notify its relevant employees no later than **8 May 2020**.

**Q:** *What happens if an employer fails to meet the section 10A notification requirement?*

**A:** The refusal or failure to give such a notice to an individual is an **offence** under the Taxation Administration Act.

**Q:** *From which JobKeeper fortnight is the section 10A notification requirement applicable?*

**A:** The section 10A notification requirement in the 1 May 2020 amendments is applicable from the first JobKeeper fortnight which commenced on 30 March 2020.



## Children as eligible employees

The Treasurer's media release on 24 April 2020 stated that amendments would be made to the JobKeeper Rules in respect of children (16 and 17 year olds). The media release stated that:

"The rules will provide that full-time students who are 17 years old and younger, and who are not financially independent, are not eligible for the JobKeeper payment. This clarification will apply prospectively, which would mean an eligible employer that has already met the wage condition of paying such an employee \$1500 for a fortnight could be entitled to a JobKeeper payment in arrears for that fortnight."

**Q:** *What were the original age based rules, when the JobKeeper Rules were first released on 9 April 2020?*

**A:** The requirement was that an individual must be 16 years or over as at 1 March 2020.

**Q:** *What are the amended requirements?*

**A:** It is still a requirement that an individual must be 16 years or over as at 1 March 2020. In addition, if the individual was aged 16 or 17 years (i.e., had not yet turned 18) as at 1 March 2020, in order to be an eligible employee, the individual must be:

- Independent, within the meaning of section 1067A of the Social Security Act 1991. The Explanatory Statement sets out 10 factors to be taken into account to determine if a child is considered independent; or
- Not undertaking full-time study.

**Q:** *From which JobKeeper fortnight are the new age based requirements applicable?*

**A:** The age based requirements in the 1 May 2020 amendments are applicable in relation to JobKeeper fortnights commencing after the introduction of the amended rules. That is, the new age based requirements are first applicable for the fourth JobKeeper fortnight commencing on 11 May 2020. This ensures that no entitlement is removed retrospectively for affected 16 and 17-year-olds.

	Fortnight commencing Monday	Fortnight ending Sunday	JobKeeper payments made in	No of fortnights
1	30 March	12 April	May	2
2	13 April	26 April		
3	27 April	10 May	June	2
4	11 May	24 May		
5	25 May	7 June	July	2
6	8 June	21 June		
7	22 June	5 July	August	2
8	6 July	19 July		
9	20 July	2 August	September	3
10	3 August	16 August		
11	17 August	30 August		
12	31 August	13 September	October	2
13	14 September	27 September		

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