



Australian Government
Inspector-General of Taxation
Taxation Ombudsman

A REPORT ON ASPECTS OF THE AUSTRALIAN TAXATION OFFICE'S ADMINISTRATION OF JOBKEEPER AND BOOSTING CASH FLOW PAYMENTS FOR NEW BUSINESSES

By the Inspector-General of Taxation and Taxation Ombudsman

DECEMBER 2020

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CONTENTS

| | |
|---|-----------|
| Contents | ii |
| Introduction | 1 |
| The role of independent IGTO complaint investigations..... | 1 |
| Executive Summary | 3 |
| The ATO has agreed to informally review some of its earlier decisions..... | 3 |
| The ATO will not be identifying all potentially affected taxpayers | 3 |
| Actively trading new small business can demonstrate they made Taxable Supplies and were actively trading (including as part of the commencement of an enterprise) in a tax period ending before 12 March 2020, other than by lodging their BAS..... | 4 |
| Taxpayers should have an opportunity to demonstrate that they are eligible for support measures before they are deemed ineligible..... | 4 |
| Taxpayers who may be affected, should engage with the ATO directly to discuss their circumstances | 5 |
| Guide to this Report | 6 |
| Role and functions of the IGTO | 8 |
| Basis for report..... | 10 |
| Part A. Background and Key Events | 11 |
| A.1 Introduction | 11 |
| A.2 The JK and BCF support measures and legislation..... | 11 |
| A.3 The JK and BCF integrity rules | 11 |
| Part B. IGTO Complaint Investigations | 14 |
| B.1 Introduction | 14 |
| B.2 Overview of the IGTO complaint investigation process | 14 |
| B.3 Concerns raised with the IGTO..... | 14 |
| B.4 Key issues investigated..... | 21 |
| B.5 Outcome of IGTO assistance..... | 28 |
| Part C. IGTO Observations | 32 |
| C.1 Introduction | 32 |
| C.2 Context of IGTO observations..... | 33 |
| C.3 Initial ATO compliance decisions on new tax laws should afford taxpayers procedural fairness before making adverse decisions, and create opportunities for the ATO to identify needed clarification of its precedential view..... | 34 |
| C.4 ATO advice and guidance should be easy to understand, but not risk oversimplification that leads taxpayers and ATO staff into error | 39 |
| C.5 Prompt ATO remedial action is needed for affected taxpayers when the ATO materially changes how it applies its precedential view | 41 |
| C.6 ATO compliance decisions should help taxpayers understand their options for review..... | 44 |

| | | |
|-------------------|---|-----------|
| C.7 | Options to expeditiously resolve disputes with the ATO’s precedential view of the Law should be explored..... | 46 |
| C.8 | A Separation between drafting and interpretation of laws is important to minimise the risk of taxpayer disputes with ATO precedential views | 49 |
| C.9 | Opportunities exist to improve the design of new tax laws and their integration with existing laws by conducting broader consultation | 53 |
| C.10 | Improving IGTO access to ATO records and data systems can expedite IGTO complaint investigations..... | 54 |
| C.11 | Concluding comments..... | 56 |
| Appendix 1 | — Chronology of events..... | 58 |
| Appendix 2 | — Definition of Financial Supply..... | 70 |
| Appendix 3 | — ATO template decision letters..... | 73 |
| Appendix 4 | — Summary of ATO-provided samples of JK/BCF compliance letters | 75 |
| Appendix 5 | — ATO response to the IGTO report | 78 |
| Appendix 6 | — Glossary and Shortened terms | 80 |

INTRODUCTION

The Inspector-General of Taxation and Taxation Ombudsman (**IGTO**) conducted complaint investigations (commencing in June 2020) in response to concerns raised by or on behalf of new small businesses – individuals and entities. Most complainants were concerned that the Australian Taxation Office (**ATO**) had decided they were ineligible to receive the Boosting Cash Flow (**BCF**) and/or JobKeeper (**JK**) payments because either:

- a. sales had not been reported in their Business Activity Statement (**BAS**) as lodged (or to be lodged) before 12 March 2020; or
- b. they were not required to lodge a BAS at all.

Concerns were similarly raised by the accounting, tax and business professional bodies,¹ Members of Parliament and in the media.² Professional bodies referred their members to the IGTO's complaint investigation service.

THE ROLE OF INDEPENDENT IGTO COMPLAINT INVESTIGATIONS

It is important for the community to understand the role of the IGTO in the tax administration system. The IGTO's role is to ensure that taxation laws as enacted by the Australian Parliament and which bring into effect the Australian Government's policies are being administered:

- correctly;
- fairly; and
- consistently.

When we investigate taxation complaints as the Taxation Ombudsman, we also assist taxpayers and tax practitioners (the community) with understanding their experience in the tax system. This can minimise disputes which are raised in the tribunals and the courts. Through these complaint investigations, we can also bring independent perspectives to those administering the taxation laws.

¹ CPA Australia, CAANZ, The Tax Institute, The Institute of Certified Bookkeepers, Institute of Public Accountants, Tax & Super Australia, National Tax and Accountants Association Ltd, Australian Bookkeepers Association and Association of Accounting Technicians, letter to The Treasury, 19 June 2020 <<https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/covid-19/government-advice/joint-bodies-submission-covid-19-stimulus-and-new-business.pdf?la=en&rev=51e3b406bbd14b05ba1e1bbab042eeda>> ('Joint bodies submission').

² Jotham Lian, "'Triumph of bureaucratic, systems-based thinking': JobKeeper anomaly left unaddressed", *Accountants Daily* (Online), 23 July 2020 <www.accountantsdaily.com.au>; Elias Visontay, 'Tax office tells some businesses who received jobkeeper they were not entitled to payments', *The Guardian*, 2 July 2020.

This report provides some background to the IGTO complaint investigations and some insight into how independent investigation of these complaints improves the tax administration system for the benefit of all taxpayers, tax practitioners and other entities. This report may also help minimise issues arising in the design of future tax administrative measures, including those which deliver fiscal support measures to the wider Australian community.

The IGTO has also made observations on the underlying issues which were identified during the complaint investigations. The context of the extraordinary and unprecedented impact of the COVID-19 pandemic on Australian jobs and businesses, as well as the exceptional ATO response in providing economic support in the form of JK and BCF payments to many Australians, is an important backdrop to these observations. However, the opportunity to learn from the crisis should not be missed.

EXECUTIVE SUMMARY

Overall, the IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the challenge of these unprecedented circumstances. The ATO needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF support measures. As with the implementation of every major new economic fiscal measure, matters arose that had an impact on the efficient and fair administration of the tax system.

THE ATO HAS AGREED TO INFORMALLY REVIEW SOME OF ITS EARLIER DECISIONS

During the IGTO complaint investigations, the ATO undertook to informally review and reconsider its earlier decisions which were the subject of taxation complaints raised with the IGTO. The ATO also advised the IGTO (in September 2020) that it would review and reconsider earlier decisions, that were the subject of dispute in objections and appeal cases, regarding JK and BCF eligibility, where a material factor in the ATO's decision was the lack of a sale or supply reported by the new business on or before 12 March 2020. Overall, the IGTO's complaint investigations achieved positive outcomes for some new businesses, most of which had already been unsuccessful in challenging the ATO's decisions. Without the IGTO's intervention, it is unlikely that these businesses would have received the government support measures that they were intended to receive.

THE ATO WILL NOT BE IDENTIFYING ALL POTENTIALLY AFFECTED TAXPAYERS

The IGTO notes that the ATO has been aware, as early as 11 August 2020, that it would need to review earlier decisions that it made in respect of certain taxpayer circumstances. The ATO first shared this information with the IGTO on 23 September 2020, when it was independently prompted by the IGTO as part of our complaint investigation.

The IGTO also learnt on 23 September 2020 that the ATO did not intend to identify all potentially affected taxpayers. The ATO explained that it considers it is infeasible to identify and approach all affected entities directly or to broadly communicate its changed view in a manner that would not cause disproportionate confusion for others.

ACTIVELY TRADING NEW SMALL BUSINESS CAN DEMONSTRATE THEY MADE TAXABLE SUPPLIES AND WERE ACTIVELY TRADING (INCLUDING AS PART OF THE COMMENCEMENT OF AN ENTERPRISE) IN A TAX PERIOD ENDING BEFORE 12 MARCH 2020, OTHER THAN BY LODGING THEIR BAS

During the IGTO complaint investigations, the ATO confirmed that the meaning of "taxable supply", as modified by the JK and BCF support measures, was broader than the definition applied by the ATO in its earlier decisions.

The IGTO notes that this can mean, for the purposes of the JK and BCF support measures, a taxable supply can be made where an entity makes or acquires a financial interest, for example, by opening a bank account, as this constitutes the making of a financial supply. Such a supply might have been made during the commencement of the business, well before the business had made its first sale. Also, entities might have notified the ATO of these supplies within the requisite timeframe by means other than the lodgement of a BAS. For example, the ATO might have been notified of the making of a financial supply upon the opening of the business' bank account during the Goods and Services Tax (GST) registration process.

TAXPAYERS SHOULD HAVE AN OPPORTUNITY TO DEMONSTRATE THAT THEY ARE ELIGIBLE FOR SUPPORT MEASURES BEFORE THEY ARE DEEMED INELIGIBLE

The IGTO concluded that the ATO did not provide a number of new businesses with an opportunity to provide evidence of having made taxable supplies (within the modified meaning) before it determined that they were ineligible for the JK and BCF support measures.

The ATO 'template' communications to these complainants (examples of which are attached at Appendix 3) deemed them to be ineligible based on BAS lodgements or GST reporting cycles. These template letters did not clearly outline or communicate to the complainants what evidence they had failed to provide nor provide any opportunity for them to demonstrate that they were indeed eligible, before they were deemed ineligible.

The ATO undertook to informally review all JK and BCF eligibility disputes where a material factor in the ATO's decision was the lack of a sale or supply reported by a new business on or before 12 March 2020.

TAXPAYERS WHO MAY BE AFFECTED, SHOULD ENGAGE WITH THE ATO DIRECTLY TO DISCUSS THEIR CIRCUMSTANCES

Where a new small business has been deemed ineligible by the ATO but can show that they were carrying on an enterprise that made taxable supplies (as modified) in a GST reporting period ending before 12 March 2020, they can contact the ATO directly to confirm how they may obtain an ATO review of its earlier decision. They should also ask the ATO to accept late notification of their supplies, if they were not previously reported. The small business taxpayer will still be required to have been actively carrying on a business in the relevant tax periods and satisfy the remaining eligibility criteria as set out in the JK and BCF support measures.

GUIDE TO THIS REPORT

An overview to the Parts in this report is summarised below:

Part A — Background and Key Events

Part A provides an overview and chronology of the key surrounding events. It draws on a more detailed chronology of events that is set out in Appendix 1.

Part B — IGTO Complaint Investigations

Part B provides an overview of the issues investigated (including some Case Studies to illustrate the circumstances surrounding the issues raised with the IGTO) and a description of certain outcomes following the IGTO's investigation activities in its specialised taxation complaint service to the Australian community. These outcomes include confirmation that:

- Taxable supplies for JK and BCF purposes can include input taxed supplies (e.g. financial supplies) and GST-free supplies;
- Financial supplies can be made by a taxpayer where the taxpayer acquires a financial interest and this can include a taxpayer opening a bank account, taking out a loan, entering a mortgage over real or personal property or acquiring an interest under a guarantee. Financial supplies which are acquisitions might not be reported to the ATO through a BAS;
- Although a taxable supply must be made for consideration, the consideration might not be received in the same tax period in which the taxable supply is made;
- The ATO will informally review all JK and BCF eligibility disputes which raised similar issues, including IGTO complaint cases, ATO objection decisions and appeals to the Administrative Appeals Tribunal (**AAT**), to determine whether the outcomes listed above were appropriately reflected in its decision making.

Part C — IGTO Observations

Part C of the report provides high level observations on how the administration of taxation laws could be improved for the benefit of the community. Public reporting and transparency around these improvement observations provides assurance to the community on the outcomes of independent complaint investigations and demonstrates how these outcomes can support tax system improvements that are identified to benefit the community.

In summary these observations include:

1. Initial ATO compliance activities on new tax laws should afford taxpayers procedural fairness before making adverse decisions, and create opportunities for the ATO to identify needed clarification of its precedential view.
2. ATO advice and guidance should be easy to understand, but not risk oversimplification that leads taxpayers and ATO staff into error.
3. Prompt ATO remedial action is needed for affected taxpayers when the ATO materially changes how it applies its precedential view.
4. ATO compliance decisions should help taxpayers understand their options for review.
5. Options to expeditiously resolve disputes with the ATO's precedential view of the law should be explored.
6. A separation between drafting and interpretation of laws is important to minimise the risk of taxpayer disputes with ATO precedential views.
7. Opportunities exist to improve the design of new tax laws and their integration with existing laws by conducting broader consultation.
8. Improving IGTO access to ATO records and data systems can expedite IGTO complaint investigations.

The ATO's response to the IGTO's report and observations on these complaint investigations is set out in Appendix 5.

A handwritten signature in black ink, appearing to read 'K Payne', written in a cursive style.

Karen Payne
Inspector-General of Taxation and Taxation Ombudsman
21 December 2020

ROLE AND FUNCTIONS OF THE IGTO

The Inspector-General of Taxation is an independent, Commonwealth statutory agency, established in 2003 to provide advice to the Australian Government on the resolution of systemic tax administration issues of concern to taxpayers that arise either from the operation of tax laws or as a result of ATO activities. That role was expanded twelve years later (with bipartisan support), in May 2015 to include the Tax Practitioners Board's (TPB) activities within jurisdiction as well as to transfer the Commonwealth Ombudsman's tax complaints function (as the Taxation Ombudsman).

The **IGTO** now effectively performs a dual role:

- as the **Taxation Ombudsman** – providing³ independent assistance and assurance directly to taxpayers and tax professionals and investigating their complaints about the actions and decisions of tax officials — complaint assistance and complaint investigations, respectively; and
- as the **Inspector-General of Taxation**⁴ – investigations of actions and tax administration systems established by the tax laws, the ATO and the TPB – review investigations.

The two roles and investigation modes of the IGTO complement each other. The dual roles provide a capability to quickly address taxpayer and tax practitioner concerns on a case-by-case basis but also to observe trends and collective community concerns that may indicate systemic issues requiring review investigation. The IGTO may also prepare an own-motion report in accordance with section 15 of the *Ombudsman Act 1976* and may publicly comment on its investigations in accordance with section 35A of that Act.

The investigation modes collectively assure the community (including the Government, Ministers, the Australian Parliament and its Committees) that taxation laws are being administered in accordance with community expectations. This builds confidence that the tax system is operating as intended and is being administered:

- correctly;
- fairly;
- consistently; and
- in a manner that helps taxpayers and tax practitioners (the community) to understand their experience with the tax system.

³ Taxation Ombudsman investigations are conducted, and recommendations are made, in private, which is consistent with taxpayers' rights to privacy in respect of their tax affairs and the tax secrecy requirements.

⁴ Inspector-General of Taxation (IGT) review investigations are conducted, and recommendations are made, publicly, which is consistent with the public interest in systemic issues and assurance regarding their recommended treatment. These investigations may be own-initiated, directed by the Minister or requested by the Minister, Parliamentary Committees, the ATO or TPB.

This is summarised in Table 1 below.

Table 1 - How does the IGTO assist to improve the taxation administration system?

| IGTO helps... | How does this help? |
|--|--|
| The community resolve their taxation disputes and complaints, fairly and transparently. | <p>Independent investigation and assurance:</p> <ul style="list-style-type: none"> ▪ improves the efficient resolution of disputes and complaints; ▪ provides access to tax expertise and assistance for the most vulnerable and those with limited financial resources (especially small businesses); ▪ reduces red tape and the cost of compliance; ▪ minimises unnecessary disputes and related costs before the Tribunals and the Courts; and ▪ improves community perceptions of the fairness of the tax system. |
| To improve the taxation administration system for the benefit of all taxpayers, tax practitioners and other entities. | Independent complaint investigations and review investigations identify areas for improved tax administration and enhance community trust and engagement in the tax system. |
| Build confidence in the fairness of the tax system. | <p>Independent oversight, investigation and assurance improves:</p> <ul style="list-style-type: none"> ▪ the accountability in the system; and ▪ administrative actions, decisions and systems relating to tax administration. |
| With advice to the Minister, the Government and the Parliament and its Committees on tax administration issues and opportunities to improve the tax administration systems, laws and actions or decisions made by Tax Officials. | Independent perspectives enhance accountability, trust and impartiality in the tax system and brings new insights for Ministerial consideration and for Parliamentary committees with oversight responsibilities. |

The IGTO's contribution to achieving these objectives is perhaps even more critical when the tax system is used to deliver financial assistance to the community – such as the recent economic support measures in the form of the JK and BCF payments. This is the subject of this report.

BASIS FOR REPORT

Consistent with the IGTO's statutory purpose, the IGTO reports on its complaint investigations to inform the broader community of opportunities to improve the tax administration system.

The IGTO complaint investigations were limited to resolving the taxation complaints on hand and accordingly were not intended to be a comprehensive investigation of the ATO's administration of the JK and BCF support measures. This is in part due to time and resource constraints, given the nature of the IGTO's access to ATO records and information. It is also due to the desire to minimise the overlap of oversight agency activities, such as the Auditor-General's recent performance audit of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures* and, for 2021, the potential audit he has flagged for the *ATO's administration of the JobKeeper scheme*, including examination of the implementation of integrity rules designed to protect the scheme against fraud and other abuse.

This report is prepared in accordance with section 7(1)(f) of the *Inspector-General of Taxation Act 2003 (IGT Act 2003)* and follows complaint investigations conducted by the IGTO in accordance with section 7(1)(a) of that Act. This report is made public in accordance with section 35A of the *Ombudsman Act 1976* and the Commissioner of Taxation has been afforded an opportunity to comment before its public release.

PART A. BACKGROUND AND KEY EVENTS

A.1 INTRODUCTION

A.1.1 This Part provides some background on key events and introduces the relevant sections of the JK and BCF support measures that aim to ensure the integrity of these measures.

A.2 THE JK AND BCF SUPPORT MEASURES AND LEGISLATION

A.2.1 On 12 March 2020, the Australian Government announced a \$17.6 billion economic stimulus package, which included a \$6.7 billion cash flow assistance scheme for employers to support Australian businesses during the COVID-19 pandemic (the **BCF support measure**).⁵ On 30 March 2020, the Government also announced a \$130 billion JK payment scheme to keep Australians in jobs in response to the pandemic (the **JK support measure**).⁶

A.2.2 These support measures were enacted into law through the:

- *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF Act 2020)*; and
- *Coronavirus Economic Response Package (Payments and Benefits) Act 2020 and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (the JK legislative instrument)*.

A.2.3 The ATO and, specifically the Commissioner of Taxation, is responsible for administering the JK and BCF support measures. This responsibility includes determining which entities are eligible to receive payments in accordance with the integrity rules provided in the JK and BCF support measures.

A.3 THE JK AND BCF INTEGRITY RULES

A.3.1 The JK and BCF support measures include specific integrity rules. These rules aim to exclude new and inactive entities being established or revived for the sole purpose of benefiting from the COVID-19 economic support measures.⁷

A.3.2 The integrity rules have alternative tests which are based on income tax and GST concepts, respectively. Existing business entities that had reported assessable income for the 2018–19

⁵ Prime Minister and Treasurer, "Economic Stimulus Package" (media release, 12 March 2020) <www.pm.gov.au>.

⁶ Prime Minister and Treasurer, "\$130 billion Jobkeeper payment to keep Australians in a job" (media release, 12 March 2020) <www.pm.gov.au>.

⁷ Explanatory Memorandum, *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020*, [3.31]–[3.32] ('BCF explanatory memorandum'); Explanatory Statement, *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, pp 22-3 ('JK explanatory statement').

income year can satisfy either test, while 'new' business entities – those which did not report assessable income for the 2018–19 income year – must satisfy the test based on GST concepts.

The JobKeeper integrity rule

A.3.3 The specific integrity rule in the JK legislative instrument is expressed in the following terms:

Integrity rule

11 (6) An entity is not entitled to a jobkeeper payment under this section unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.

(7) For the purposes of subsection (6), the requirement in this subsection is satisfied if:

(a) an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.

(8) For the purposes of subsection (6), the requirement in this subsection is satisfied if:

(a) the entity made a taxable supply in a tax period that applied to it that:

(i) started on or after 1 July 2018; and

(ii) ended before 12 March 2020; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

(9) For the purposes of subsection (8), in determining whether the entity made a supply (within the meaning of the GST Act) that is a taxable supply:

(a) assume that the entity is registered (within the meaning of that Act); and

(b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act);... [emphasis added]⁸

⁸ *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 s 11 ('JK legislative instrument').*

The Boosting Cash Flow integrity rules

A.3.4 The specific integrity rules in the BCF Act 2020 are expressed in the following terms:

5(1) An entity is entitled to a payment (known as a cash flow boost) for a period covered by subsection (2) [i.e. the First Cash Flow Boost payment] if:

(f) either:

... (ii) the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (5) or (6) is satisfied; and

... (5) For the purposes of paragraph (1)(f), the requirement in this subsection is satisfied if:

(a) an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.

(6) For the purposes of paragraph (1)(f), the requirement in this subsection is satisfied if:

(a) the entity made a taxable supply in a tax period that applied to it that:

(i) started on or after 1 July 2018; and

(ii) ended before 12 March 2020; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

(7) For the purposes of subsection (6), in determining whether the entity made a supply (within the meaning of the A New Tax System (Goods and Services Tax) Act 1999) that is a taxable supply:

(a) assume that the entity is registered (within the meaning of that Act); and

(b) assume that the supply is neither GST-free (within the meaning of that Act) nor input taxed (within the meaning of that Act). ... [emphasis added]⁹

⁹ *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* s 5 ('BCF Act 2020'). Note: there is another rule in s 6 of this Act which applies to the second BCF payment and is expressed in the same terms.

PART B. IGTO COMPLAINT INVESTIGATIONS

B.1 INTRODUCTION

B.1.1 This Part outlines the IGTO's complaint investigations undertaken. It includes a summary of the concerns raised by various stakeholders about the integrity rules contained in the JK and BCF support measures, a summary of the key issues investigated by the IGTO and case studies to illustrate them, and the outcomes achieved through those investigations.

B.2 OVERVIEW OF THE IGTO COMPLAINT INVESTIGATION PROCESS

B.2.1 From June 2020, the IGTO started to receive complaints from entities who expressed concern with adverse ATO decisions regarding their eligibility for the JK and BCF support measures. Shortly after, the IGTO commenced complaint investigations.

B.2.2 Complaints with the same underlying issue were linked and investigated simultaneously to ensure an efficient and effective process for complainants, the IGTO and the ATO alike. As at 15 December 2020, we have received 66 such taxation complaints and commenced 38 complaint investigations (7 of which have been formally closed to date).

B.2.3 To ensure the engagement of Senior Executive Service (**SES**) officers of the ATO for the purposes of these complaint investigations, the initial 13 investigations were re-categorised as Category 5 complaints. This category prompts early ATO SES officer awareness of emerging issues with potential broader impact, and facilitates the earlier resolution of such issues.

B.2.4 The IGTO engaged extensively with the ATO during this period and met with the ATO on six occasions between June and September 2020.¹⁰ Further information on these interactions is contained in the chronology in Appendix 1.

B.3 CONCERNS RAISED WITH THE IGTO

B.3.1 Overall, taxpayers and tax professionals agreed that the JK and BCF support measures were intended to support active business entities only. In addition, it was agreed that the JK and BCF integrity rules should exclude inactive entities established or revived solely to access the JK and BCF support measures.

B.3.2 However, they expressed concern with the ATO's application of the JK and BCF integrity rules, which resulted in new, genuine businesses being deemed ineligible to benefit from the JK and

¹⁰ The Inspector-General of Taxation and Taxation Ombudsman (IGTO) held complaint investigation meetings with the ATO on the following dates: 25 June 2020; 14 July 2020; 7 August 2020; 11 September 2020; 18 September 2020; 23 September 2020.

BCF support measures (even though those businesses were actively trading prior to the Government's announcement of the support measures on 12 March 2020).

Concerns raised by complainants

B.3.3 Complainants raised the following concerns with the IGTO:

- new businesses thought they were eligible to receive JK and BCF payments because they were actively trading prior to 12 March 2020, but were deemed ineligible by the ATO;
- new business owners thought they were eligible if they purchased an existing business that was actively trading prior to 12 March 2020, but were deemed ineligible by the ATO;
- businesses with the same underlying ownership that had recently changed their legal structure thought they would still be eligible, but were deemed to be ineligible by the ATO; and
- new businesses thought that the frequency of their BAS lodgements (i.e. monthly, quarterly or annually) (the **GST reporting cycle**) would not be a determinative factor as to whether they were eligible, however, the ATO deemed them ineligible and told them that they may have been eligible if the business had been required to lodge a BAS more frequently.

B.3.4 These businesses explained that they had commenced their business and related tax registration arrangements before 12 March 2020 and before the impact of the COVID-19 pandemic was apparent. Accordingly, they considered the ATO's decisions were unfair because they had not understood that there would be economic consequences as a result of nominating a particular GST reporting cycle as part of their GST registration, nor could they amend it retrospectively. Furthermore, some believed that the frequency with which a BAS was required to be lodged was an arbitrary basis upon which to decide whether economic relief should be provided in a time of need.

Case studies – concerns raised by complainants

- B.3.5 Examples of the circumstances in which complainants were deemed ineligible are illustrated in the following case studies. The outcomes for these case studies is set out in section B.5.6 (for completeness):

Case study 1 – New small business set ups can involve long lead times as this example demonstrates – it was months after the enterprise ‘commenced’ before it was open for customers

A company was incorporated in July 2019 to fit out and run a café. From August 2019 to December 2019 the company applied for the required council approvals to operate as a café and spent considerable funds fitting out the café premises.

The café opened in January 2020 with 5 employees. It made approximately \$13,000 per week in sales until it was forced to shut in March 2020 due to a State Government lock-down that was implemented in response to the pandemic. At the time of the lock-down, the café employed 11 staff.

The company reported GST on a quarterly basis and therefore reported its first sales in the tax period that ended on 31 March 2020.

The ATO decided that the taxpayer was ineligible for the BCF payment on the following grounds:

We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not lodge a GST return for the quarter ended 31 December 2019.

Case study 2 – Management buy-out of an existing business

For the last 10 years, a couple had been employed to manage a successful restaurant that made approximately \$150,000 per month in sales. In October 2019, the couple incorporated a company which registered for an Australian Business Number (ABN) and purchased the existing restaurant business. In December 2019, the company signed a new lease for the restaurant's existing commercial premises which would commence after the existing lease expired in February 2020. Restaurant operations were seamlessly transitioned.

The company continued to report the restaurant's GST quarterly, as the prior owners had done.

The ATO decided that the taxpayer was ineligible for the BCF on the following grounds:

We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not have lodged a GST return for the quarter ended 31 December 2019.

Case study 3 – Employee transitions to a sole trader business which commences in January 2020

A taxpayer began transitioning from being a part-time employee of a company in November 2019 to a sole trader in January 2020. The taxpayer's business activities as a sole trader included the performance of services for their former employer, under contract.

The taxpayer was not registered for GST and did not lodge a BAS to report their taxable supplies to the ATO.

The taxpayer applied for JK payments but was determined to be ineligible by the ATO for the following reasons:

As you are not registered for GST we assume you are registered, defaulting to a quarterly lodgement basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019.

You were an employee up till January 2020 and commenced business after 1 January 2020 and therefore cannot provide notice of a taxable supply for the quarter ended 31 December 2019.

Concerns raised by the tax profession and other stakeholders

B.3.6 Members of the tax profession, and the accounting, tax professional and business representative bodies, raised similar concerns to those of complainants. They also expressed concern that the GST reporting cycle was a determinative factor in the ATO's application of the integrity rules to new businesses, and believed it was a factor that would:

- favour large businesses and non-compliant businesses as they would be required to lodge their BAS monthly;¹¹
- disadvantage smaller, compliant businesses who either lodge their BAS quarterly or annually or were not required to lodge a BAS at all; and
- potentially constitute a discriminatory application of the law.

¹¹ See *A New Tax System (Goods and Services Tax) Act 1999* s 27-15 ('GST Act 1999').

B.3.7 The IGTO was also made aware of a jointly signed letter, sent by 9 tax professional and accounting representative bodies to the Treasury on 19 June 2020.¹² The letter referred to feedback received from their members regarding the lack of new business access to the JK and BCF support measures as well as discussions they had with the ATO at its consultative forums concerning:

- the need for the ATO to have been made aware of business activity via income tax or GST reporting systems by 12 March 2020 and the restrictive nature of the 'notice' in relation to the integrity rules' 'tax period' requirement, when applied to certain new businesses;
- inequitable JK and BCF outcomes for identical new businesses, simply due to different GST reporting cycles; and
- the ATO's compliance program which included a focus on new businesses, particularly those that commenced after 1 July 2019 and were registered for GST on an annual cycle, as well as those that commenced after 1 January 2020 and either were registered for GST on a quarterly cycle or were not registered for GST.

B.3.8 At the time, these concerns were echoed in media reports, which referred to the commentary of members of the tax profession and parliamentarians in relation to small businesses' eligibility for the JK and BCF support measures.¹³

B.3.9 In other representations made to the IGTO, tax professionals observed that the ATO's public guidance concerning the JK and BCF integrity rules was inconsistent with Government-issued guidance.¹⁴ The latter guidance was issued at the same time that the JK support measure became law, in the form of a fact sheet. The ATO's public guidance was released on its website¹⁵ eleven days later. As these two sources of guidance were inconsistent with respect to the integrity rules, it caused some uncertainty as to whether an entity could demonstrate genuine business activity by:

- making taxable supplies after 1 July 2018 and prior to the first announcement of the COVID-19 economic support measures on 12 March 2020 (which aligned with the Government's guidance); or
- having a tax period that started on or after 1 July 2018 and ended before 12 March 2020 in which the taxpayer made a taxable supply (which aligned with the later ATO guidance).

¹² Joint bodies submission, above n 1.

¹³ Lian, above n 2; Visontay, above n 2.

¹⁴ Australian Government, *Economic Response to the Coronavirus: Job Keeper Payment – Frequently Asked Questions* (9 April 2020), publication on www.treasury.gov.au from 9 April 2020 to 20 July 2020, accessed at <<https://archive.org/web/web.php>> ('JobKeeper FAQ').

¹⁵ ATO, 'Sole traders and other entities' (Web Page, 20 April 2020) <www.ato.gov.au>, accessed at <<https://archive.org/web/web.php>>.

B.3.10 Tax professionals also expressed concern that the ATO's eligibility decisions regarding new, active business entities appeared to be contrary to their understanding of the purpose of the JK and BCF integrity rules, which was drawn from the relevant extrinsic materials —i.e. the explanatory statement for the JK legislative instrument and the explanatory memorandum to the BCF Act 2020. Extracts and summaries of the relevant extrinsic materials which these tax professionals referred to are reproduced below.

Purpose of JobKeeper Integrity Rule

B.3.11 The explanatory statement to the JK legislative instrument provides the following explanation:

The JobKeeper payment for an entity in respect of business participants is intended to support active businesses only. Division 3 contains integrity rules to support this intention.

... In relation to an entity that has an ABN, it is additionally required that:

- an amount was included in the entity's assessable income for the 2018-19 income year in relation to it carrying on a business and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included; and*
- the entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.*

For the purposes of determining whether the entity made a taxable supply, it should be assumed that the entity is registered, the supply is neither GST-free nor input taxed, and the external Territories are part of the indirect tax zone. These terms have the meaning that they are given in the GST Act.¹⁶

B.3.12 In summary, the JK explanatory statement expressly states that, in respect of business participants, the JK payment is intended to support active business entities only and the integrity rules apply to support this intention.¹⁷

¹⁶ JK explanatory statement, above n 7, pp 22–23.

¹⁷ Ibid. p 22.

Purpose of Boosting Cash Flow Integrity Rule

- B.3.13 The explanatory memorandum to the *Coronavirus Economic Response Package Omnibus Bill 2020* and associated Bills gives the following explanation:

Active pre-existing entities

3.30 *In addition to these other requirements the cash flow boost payments are only available to entities, if they held an ABN as at 12 March 2020 and were not inactive at that time. ...*

[Paragraphs 5(1)(f) and subsections 5(5) and (6) of the Boosting Cash Flow Bill]

3.31 *An entity is considered active if it had derived assessable income from carrying on a business in the 2018-19 income year or if it has made one or more supplies for consideration in carrying on an enterprise that is connected with the indirect tax zone (Australia) in the tax periods commencing on or after 1 July 2018 and ending before 12 March 2020. Further, notice of the income or supplies must have been held by the Commissioner on or before 12 March 2020, or within such further time as the Commissioner may allow. It is expected that the Commissioner would only rarely allow further time and only where exceptional circumstances provide good reason for a delay in lodgement of activity statements and the income tax return over the whole period.*

[Paragraph 5(5)(c) and subsection 5(7) of the Boosting Cash Flow Bill]

3.32 *This is an integrity rule that prevents new or inactive entities being established or revived solely to obtain the first cash flow boost. It sets a low threshold, only requiring a single supply or amount of business income to have been reported to the Commissioner on or before 12 March 2020. It can be satisfied if an entity has provided a single activity statement for any month or quarter since 1 July 2018 or an income tax return in relation to the 2018–19 income year.*¹⁸

- B.3.14 In summary, the explanatory memorandum indicates that the BCF Integrity Rule is intended to prevent new or inactive entities being established or revived solely to obtain the BCF payment.

¹⁸ BCF explanatory memorandum, above n 7, [3.30]-[3.32].

B.4 KEY ISSUES INVESTIGATED

B.4.1 In the complaints investigated by, and representations made to, the IGTO, a common theme emerged — the ATO's administration of the JK and BCF integrity rules appeared to be premised on a view that “taxable supplies” were equivalent to sales or amounts of consideration reported on a BAS (e.g. amounts reported in the "Total Sales" Item G1 label).¹⁹ For example, in many of the relevant complaints raised with the IGTO, the ATO had determined new entities were ineligible for the JK and BCF support measures where they 'made [their first] supply or sale'²⁰ after:

- 1 July 2019, if they were registered for GST and reported GST on an annual basis;
- 1 January 2020, if they were registered for GST and reported GST on a quarterly basis; or
- 1 January 2020, if they were not required to be registered for GST.

B.4.2 The IGTO observed that the level of complainant disputation with the ATO's administration was underpinned by key issues arising from the following aspects of the JK and BCF integrity rules:

- the meaning of 'taxable supply' as modified for the purposes of the integrity rules;
- the meaning of 'tax period' in the context of the integrity rules; and
- how entities notify the ATO that they have made a 'taxable supply' in accordance with the integrity rules.

B.4.3 The IGTO also observed some parallels between the above complainant disputation and the uncertainty that was voiced by the tax profession in representations to the IGTO and elsewhere.²¹

ATO administration of 'Taxable Supply'

B.4.4 During the IGTO complaint investigations, the ATO confirmed that the meaning of 'taxable supply' for the purposes of the JK and BCF support measures' is different to the meaning of that term for GST law purposes. While some key GST defined terms, such as 'taxable supply', are incorporated into the JK and BCF support measures, their meanings are either modified by those laws or those laws do not incorporate other associated GST mechanisms — effectively changing the operation of those terms from what is commonly understood in the GST context.

¹⁹ For example, the ATO's *Eligibility companion guide for cash flow boost* asks 'Did your business derive income or make a sale for any tax period...'; See ATO, *Eligibility companion guide for cash flow boost*, (28 September 2020), <www.ato.gov.au>.

²⁰ See ATO template decision letters provided in Appendix 3.

²¹ Joint bodies submission, above n 1.

B.4.5 For example:

- The GST attribution rules²² are not incorporated into the JK and BCF integrity rules. This means an entity does not need to have received consideration or issued a tax invoice for a taxable supply in the tax period to satisfy the JK and BCF integrity rules – it only needs to have made the taxable supply *for* consideration in the relevant tax period (notwithstanding that the consideration might be provided in a subsequent tax period).
- Additionally, the definition of taxable supplies for the purposes of the JK and BCF integrity rules modifies the GST law definitions.
 - Under the GST law, a supply cannot be a taxable supply if it is input taxed or GST-free.²³ However, under the JK and BCF support measures, it is assumed that supplies are not input taxed or GST-free.²⁴ It follows that supplies which would be input taxed or GST-free under the GST law might nevertheless be characterised as "taxable supplies" for the purposes of the JK and BCF support measures.
 - For example, a 'financial supply'²⁵ is treated as an input taxed supply under the GST law²⁶ and input taxed supplies are expressly excluded from the definition of taxable supplies in that law. Nevertheless, a financial supply can be a 'taxable supply' under the JK and BCF support measures, because for the purposes of the measures, it is assumed that supplies (including financial supplies) are not input taxed.

When the acquisition of a financial interest is the making of a financial supply

- B.4.6 The term 'supply' is defined broadly in *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act 1999) to mean 'any form of supply whatsoever'²⁷. The meaning of 'supply' is further expanded in the context of financial supplies. Specifically, the term 'financial supplies' is defined in the GST Regulations 1999 to include the 'provision, acquisition or disposal' of a specified financial interest, provided certain additional requirements are satisfied (reg 40-5.09).

²² GST Act 1999 Div 29.

²³ GST Act 1999 s 9-5.

²⁴ BCF Act 2020 s 5(7) and 6(7); JK legislative instrument r 11(9).

²⁵ As defined in *A New Tax System (Goods and Services Tax) Regulations 1999* Div 40 ('GST Regulations 1999'). See Appendix 2 for the complete statutory definition.

²⁶ GST Act 1999 s 40-5.

²⁷ GST Act 1999 s 9-10.

- B.4.7 A complete extract of the definition of financial supply taken from the GST laws is included at Appendix 2. In summary, these additional requirements are broadly in line with the requirements for a taxable supply, namely, in order to be a financial supply, the provision, acquisition or disposal must be for consideration, in the course or furtherance of an enterprise and connected with the indirect tax zone. The entity making the supply must be a financial supply provider in relation to the supply of the interest.²⁸
- B.4.8 Although the word 'supply' does not ordinarily contemplate the acquisition of something, the Commissioner confirms his view, in his published guidance, that, “For the purposes of the GST Regulations 1999 and the GST Act 1999, a supply includes a financial supply and a financial supply includes an acquisition of a financial interest”²⁹.
- B.4.9 A list of the specified financial interests is set out in the regulations³⁰ — refer Appendix 2. In accordance with that list, acquisitions of financial interests (which constitute the making of financial supplies) can include:
- opening an account with a bank (an approved deposit taking institution (**ADI**));
 - borrowing money (from a financial supply provider);
 - entering a mortgage over real or personal property; and
 - buying or selling shares or other securities – including incorporation of a shelf company or acquiring an interest in a managed investment scheme (a type of trust).
- B.4.10 In describing financial supplies that are acquisitions of financial interests, the Commissioner uses the expression “acquisition-supplies”³¹. This expression is adopted for the purposes of this report.
- B.4.11 Acquisition-supplies, like other financial supplies, are usually input taxed.³² It follows that acquisition-supplies are typically never taxable supplies, because the definition of taxable supplies in s 9-5 of the GST Act 1999 specifically excludes input taxed and GST-free supplies. However, in characterising supplies to determine eligibility under the BCF Act 2020 and the JK legislative instrument, it is assumed that the supplies are not input taxed³³.

²⁸ Whilst there is also a requirement for the entity to be registered or required to be registered for GST, this requirement is assumed for the purposes of the JK and BCF support measures: ss 5(7) and 6(7) of the BCF Act 2020 and r 11(9) of the JK legislative instrument. This is consistent with other modifications made to GST requirements under the JK and BCF support measures.

²⁹ ATO, *GST Ruling GSTR2002/2: Goods and Services Tax: GST treatment of financial supplies and related supplies and acquisitions* ('GSTR 2002/2'), 17 December 2014, para [22].

³⁰ GST Regulations 1999 reg 40-5.90(3).

³¹ ATO, GSTR 2002/2, above n 29, para [26].

³² GST Act 1999 s 40-5.

³³ BCF Act 2020 ss 5(7) and 6(7); JK legislative instrument r 11(9).

- B.4.12 It follows that acquisition-supplies are capable of being taxable supplies if the requirements in s 9-5 of the GST Act 1999 are otherwise satisfied, subject to any other modifications (such as the further assumption that the entity is registered³⁴). As noted above, the requirements for a financial supply in reg 40-5.09 are materially the same as the requirements for a taxable supply in s 9-5 of the GST Act 1999.
- B.4.13 It follows that, if it is assumed that an acquisition-supply is not input taxed (because of the operation of the BCF Act 2020 and the JK legislative instrument), the acquisition-supply will typically satisfy the definition of taxable supply in s. 9-5 and will be a taxable supply for the purposes of the BCF Act 2020 and the JK legislative instrument.
- B.4.14 Where an entity makes an acquisition-supply because it acquires a financial interest, the consideration for making that supply is not always monetary (i.e. not always cash or an exchange of money). For example, when opening an account with a bank, the consideration provided can be the exchange of mutually agreed rights and the undertaking of obligations between the bank (the ADI) and the customer. An acquisition-supply of this kind is unlikely to be reported through a BAS or to be identifiable as such if it is.³⁵
- B.4.15 Accordingly, a new entity may be eligible for JK and BCF support measures where they 'acquired' an interest in one or more financial supplies as part of the steps undertaken to commence their business, which is included as part of activities involved in carrying on an enterprise³⁶, and did so in a tax period that ended on or before 12 March 2020 (where the other eligibility criteria are met).

ATO administration of 'Tax Period'

- B.4.16 The ATO administers the JK and BCF integrity rules based on its interpretation that an entity is required to have made a 'taxable supply' in a 'tax period' that started on or after 1 July 2018 and ended before 12 March 2020.
- B.4.17 Early in the IGTO's complaint investigations, the ATO confirmed its view that, although it does have discretion to accept late notice of a taxable supply made by an entity for the purposes of the JK and BCF integrity rules (e.g. notice provided after 12 March 2020), it does not have any discretion regarding the tax period in which the taxable supply was made.

³⁴ *ibid.*

³⁵ The value of financial supplies should factor into the calculation of supplies reported at Item G1 of the BAS form. As a practical matter, an acquisition-supply such as the opening of a bank account is unlikely to be disclosed on the BAS and, if it was, it would not be separately distinguishable from the value of other supplies.

³⁶ ATO, *Miscellaneous Taxation Ruling MT 2006/1: The New Tax System: the meaning of entity carrying on an enterprise for the purposes of entitlement to an Australian Business Number ('MT 2006/1')*, 13 December 2006, para [120]-[131].

- B.4.18 The IGTO, through the course of its complaint investigations, considered whether the ATO's application of the 'tax period' requirement of the JK and BCF integrity rules was the only possible application of the measures as enacted. The IGTO tested several alternative applications which appeared open on the text of the law and which appeared to better promote the aim of those integrity rules, as informed by the extrinsic materials. Also, these alternative applications did not appear to result in new entities being treated differently depending on whether they were required or had elected to lodge their BAS monthly instead of the default quarterly lodgement cycle. The IGTO also tested whether other administrative solutions were available, including an exercise of the Commissioner's general powers of administration or his remedial powers.
- B.4.19 The ATO responded that it does not consider the alternative applications are open to it, based on its reading of the law and understanding of the policy intent for the relevant provisions. Similarly, the ATO considered that any solutions which seek to rely on the Commissioner's general powers of administration or remedial power are not open to it, as the exercise of those powers would require the ATO to form a view that it considers is not open, having regard to the words in the law as well as the extrinsic material for both measures.
- B.4.20 Notwithstanding the lack of available administrative solutions on this issue, the likely impact on the number of taxpayers affected by the ATO's administration of 'tax period' perhaps diminishes once it is understood that for the purposes of the JK and BCF integrity rules, an entity's taxable supplies can also include acquisitions of financial interests made during the commencement or establishment of a business. Some observations on this concern are nonetheless included in Part C below.

ATO administration of 'Taxable Supply' notification and evidence

Entities that are registered for GST

- B.4.21 The ATO's administration of the JK and BCF integrity rules appeared to require new entities to notify the ATO of sales made in a relevant tax period via a BAS that was lodged on or before 12 March 2020. For example, the ATO website states:

Your entity is eligible if:...

> it satisfied certain conditions as at 12 March 2020, being

...it had lodged, on or before 12 March 2020...

– an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing that it made a taxable, GST-free or input-taxed sale.³⁷

- B.4.22 This website guidance is consistent with early ATO decisions on new entities' eligibility as the ATO's reasons for these decisions include that entities were ineligible for the JK and BCF

³⁷ ATO, 'Sole traders and other entities' above n 15.

support measures if a sale was not (or could not be) reported on a BAS for the relevant tax period prior to 12 March 2020.

- B.4.23 These early decisions also show that the ATO did not consider evidence of other taxable supplies which may not appear on a BAS or alternative means of notifying the ATO of such supplies. For example, the following excerpt from an ATO BCF eligibility decision shows that acquisitions of financial interests made by an entity as part of its business commencement activities between July 2019 and January 2020 – which are not typically reported on a BAS – were not considered by the ATO in determining eligibility:

You registered for an ABN on 17 July 2019 and had an ABN before 12 March 2020...

*We have reviewed your GST registration and you report GST on a quarterly basis. The last quarter that ended prior to 12 March 2020 was the quarter ended 31 December 2019. You commenced business after 1 January 2020 and could not lodge a GST return for the quarter ended 31 December 2019. **As a result, you did not lodge at least one of the documents for the eligible lodgement period reporting income or at least one sale from the eligible lodgement periods.** You also did not give the Commissioner notice of the entity's assessable business income or sale prior to 12 March 2020. As a result, you did not meet the [requirement to make a taxable supply in a tax period that applied that started on or after 1 July 2018 and ended before 12 March 2020] and the [requirement to give the Commissioner notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply]. [Emphasis added]³⁸*

- B.4.24 During the course of the IGTO's complaint investigations, the IGTO concluded that, for a number of adverse ATO decisions, the ATO did not provide an opportunity for new entities to provide evidence that they made taxable supplies (for the purposes of the JK and BCF support measures) in a relevant tax period before the ATO made that adverse decision.³⁹ Accordingly, the ATO did not consider whether the entity could provide additional evidence of supplies not typically shown on a BAS, which might have satisfied the JK and BCF eligibility requirements.
- B.4.25 If the entity had made taxable supplies in the relevant tax period but not previously notified the ATO of those taxable supplies, the Commissioner could exercise his discretion to accept late notification of those supplies. When considering whether to exercise this discretion, ATO staff must follow the instructions set out in Law Administration Practice Statement (PS LA) 2020/1.⁴⁰
- B.4.26 PS LA 2020/1 states that in determining whether to grant further time to give notice, the Commissioner will have regard to the policy intent of the measures, including that the JK and

³⁸ ATO, Communication to taxpayer, 23 July 2020.

³⁹ See Appendix 3 for template letters of these decisions.

⁴⁰ ATO, Law Administration Practice Statement PS LA 2020/1: Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies, 1 May 2020 ('PS LA 2020/1').

BCF support measures are designed to provide financial support to active businesses adversely affected by the economic impacts of the pandemic and to support the retention of employment of their staff.

- B.4.27 The PS LA states that ATO staff should take account of all relevant facts and circumstances and may need to contact the entity to obtain more information and supporting documents. The nature of the supporting documents will depend on the entity's circumstances, however, examples are provided which include tax invoices, bank statements and documentation of business financing arrangements.⁴¹
- B.4.28 Although it is not expressly stated in the PS LA, such supporting documentation could also be used to evidence that the entity has made taxable supplies in the relevant period (for the purposes of the JK and BCF support measures). However, as this staff instruction is limited to the exercise of the Commissioner's discretion to accept late notification (after 12 March 2020) of the entity's taxable supplies (or assessable income), it cannot be relied upon as an instruction to ATO staff regarding the type of documents to accept as evidence of those taxable supplies.

Entities that are not registered or required to be registered for GST

- B.4.29 Entities that commenced on or after 1 July 2019 and are not registered or required to be registered for GST did not have any obligation to lodge a BAS or income tax return before 12 March 2020. As such, the ATO could not refer to previous lodgements in order to satisfy the JK and BCF integrity rules. For these entities, the ATO:
- exercised the Commissioner's discretion to allow a later time for the entity to notify; and
 - requested evidence to consider whether the entity made sales on or before 31 December 2019.⁴²
- B.4.30 Examples of the types of evidence sought by the ATO in these circumstances are contained in PS LA 2020/01 and include tax invoices, bank statements and documentation of business financing arrangements.⁴³
- B.4.31 In essence, the ATO was accepting these alternative forms of evidence where an entity had no obligation to lodge a BAS before 12 March 2020 if it demonstrated that the entity would have shown sales on a BAS if it were registered for GST.

⁴¹ *ibid.* para [3].

⁴² ATO, 'Exercise of the Commissioner's discretion' (Web Page, 16 September 2020) <www.ato.gov.au>, accessed at <<https://archive.org/web/web.php>>.

⁴³ ATO, PS LA 2020/1, above n 40, para [3].

B.5 OUTCOME OF IGTO ASSISTANCE

ATO confirmed that acquisition-supplies made during the commencement of an enterprise may satisfy the integrity rules

- B.5.1 The ATO has confirmed that, for JK and BCF eligibility purposes, a 'taxable supply' can be made in a tax period where the taxpayer acquires a financial interest that constitutes the making of an acquisition-supply.⁴⁴ This means that many new entities that were setting up their businesses in the 2019 calendar year, but only started making sales after December 2019, may satisfy the integrity rule and be eligible for relief under the JK and BCF support measures.⁴⁵ This will depend on whether the entities fulfill all of the other eligibility requirements. If notice of a taxable supply was not given to the Commissioner of Taxation before 12 March 2020, eligibility will also depend upon whether the Commissioner exercises his discretion to accept late notification of those taxable supplies.⁴⁶

ATO undertook to informally review some of its decisions – complaint cases, objections and appeals

- B.5.2 During the course of the IGTO's complaint investigations, the ATO advised that it would informally review all JK and BCF eligibility disputes where a material factor in the ATO's decision was the lack of a sale or supply reported by the new entity (by way of BAS lodgement) on or before 12 March 2020.⁴⁷ This would include informal review of all relevant objections, ATO objection decisions, appeals to the AAT and complaints which were investigated by the IGTO.
- B.5.3 The ATO's informal review would also consider whether all the eligibility requirements for the JK and BCF support measures were satisfied, including whether or not the entity made a taxable supply (including an acquisition-supply or other financial supply) in the relevant tax period. This may also require ATO officers to seek further information from the entity, in order to determine whether there is sufficient evidence to show it was carrying on an enterprise prior to 12 March 2020⁴⁸, including evidence of activities undertaken while setting up the business.
- B.5.4 The ATO first communicated this informal review arrangement to the IGTO on 23 September 2020, when it was independently prompted by the IGTO as part of our complaint investigation.

⁴⁴ See paragraphs B.4.6. to B.4.10 above for the meaning of "acquisition-supplies".

⁴⁵ See Appendix 1 – Chronology of events, 11 September 2020 and 18 September 2020.

⁴⁶ See ATO, PS LA 2020/1, above n 40.

⁴⁷ See Appendix 1 – Chronology of events, 23 September 2020.

⁴⁸ ATO, MT 2006/1, above n 36, para [120]–[131].

- B.5.5 The IGTO also learnt on 23 September 2020 that the ATO did not intend to identify all potentially affected taxpayers, as it advised that it would not informally review decisions unless they had been challenged by the entity. The ATO explained that it would not be feasible to identify all previous compliance decisions which were made on a basis which was inconsistent with the position outlined above. This is because the ATO considers that the process of specifically identifying these decisions, and distinguishing them from other decisions where an entity was ineligible for a different reason, would be too difficult and burdensome.

Case studies – outcomes achieved for complainants

- B.5.6 Outcomes for the case studies outlined in paragraph B.3.5 are set out below for completeness.

Case study 1 – New small business set ups can involve long lead times as this example demonstrates – it was months after the enterprise ‘commenced’ before it was open for customers

Following the ATO’s informal review, it reversed its decision and determined that the café was eligible to receive the BCF payments on the following grounds:

You were registered for GST from 1 July 2019, reporting quarterly. [In] November 2019, you opened a bank account with an ADI. It is therefore considered that you were carrying on an enterprise and have made a taxable acquisition-supply in the December 2019 quarter. There is no requirement to report the supply in a BAS, as such Commissioner’s discretion may be considered.

...Therefore, you are eligible to receive the initial [BCF] credits and the additional [BCF] credits if you are granted Commissioner’s discretion in relation to the acquisition-supply of the relevant interest in a bank account.

...We have determined that discretion will be applied in your circumstances as, while you were registered for GST and reporting on a quarterly basis, you were not required to report the opening of your bank account [in] November 2019 in your BAS for the quarter as it was an input-taxed supply.

Case study 2 – Management buy-out of an existing business

Following the ATO's informal review, it reversed its decision and determined that the company was eligible to receive the BCF payments on the following grounds:

In your circumstances, you opened a bank account with [an ADI in] November 2019 for the entity and contributed an amount... As you have opened a bank account with an ADI for the entity, the entity has made an acquisition-supply and the consideration element has been met.

We consider that when the bank account was opened a supply was made, it was a taxable supply for the purposes of [BCF], because it was being made for consideration.

... Therefore, you are eligible to receive the initial [BCF] credits and the additional [BCF] credits if you are granted Commissioners discretion in relation to the acquisition-supply of the relevant interest in a bank account.

... We have determined that discretion will be applied in your circumstances.

Case study 3 – Employee transitions to a sole trader business which commences in January 2020

As part of the ATO's informal review to determine whether the taxpayer had made any taxable supplies, including financial supplies during the carrying on of a business, the taxpayer provided evidence of the steps they undertook in commencing their sole trader business. The taxpayer provided evidence to show that they had opened a bank account for their sole trader operations in February 2020.

However, after reviewing this additional information, the ATO determined that the taxpayer was still ineligible for the JK support measure on the following grounds:

Whilst you undertook steps in November/December 2019 to begin your transition to operating as a sole trader, you did not commence operating your business until ... January 2020.

Accordingly, we consider that you were still an employee with your former employer until January 2020. As you commenced business after 1 January 2020, you could not provide notice of a taxable supply for the quarter ended 31 December 2019.

The ATO clarified that ATO advice and guidance on 'Taxable Supply' would not be updated

- B.5.7 During the IGTO's complaint investigations, the IGTO considered that the ATO's public advice and guidance does not fully reflect the JK and BCF definitions of 'taxable supply' — i.e. that a taxable supply can be made where a taxpayer makes an acquisition of a financial interest — as confirmed to the IGTO in the course of our investigations.
- B.5.8 However, the ATO declined to amend the wording in its public guidance as it considered the existing materials struck an appropriate balance between simply explaining complex tax provisions to a wide audience and providing enough information for entities to understand the information needed to evidence their eligibility for the JK and BCF support measures.

'Tax Period' construction is a question of law

- B.5.9 The IGTO obtained confirmation of the ATO's authoritative interpretation of 'tax period' in the context of the JK and BCF integrity rules and its link to the 12 March 2020 end date specified in those rules — i.e. the 12 March 2020 date is the date by which the relevant 'tax period' must have ended, not the date by which the relevant taxable supply was made. The IGTO communicated this to several complainants as part of our complaint investigations. This did not result in a changed ATO decision for complainants where the ATO's interpretation of 'tax period' was the determinative issue.
- B.5.10 The ATO also considered the alternative applications of the term 'tax period', that were raised through the IGTO's complaint investigations, and reaffirmed its view that its application of the 'tax period' requirement was correct and in accordance with the JK and BCF support measures.
- B.5.11 The resolution of competing constructions of the 'tax period' requirements in the integrity rules is a question of law. There are limited avenues for the IGTO to resolve questions of law, and such matters are more appropriately dealt with through the judicial system — including through relevant 'test cases'. The IGTO has made observations in Part C regarding the interaction between the drafting and the administration of the measures, and the ATO's role in resolving interpretative issues, including by way of 'test cases'.

PART C. IGTO OBSERVATIONS

C.1 INTRODUCTION

- C.1.1 Overall, the IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the unprecedented challenges caused by the COVID-19 pandemic. The ATO needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF payments. As with the implementation of new major economic fiscal measures, matters arose that had an impact on the efficient and fair administration of the tax system.
- C.1.2 Consistent with our statutory purpose of improving the tax administration system, and in the interests of capturing the opportunity to learn from the response to the crisis, we have made observations on the underlying issues which were identified during the IGTO's complaint investigations (outlined in Part B). These observations inform the broader community of opportunities to improve tax administration and help to build trust and confidence in the administration of the tax system, which in turn promotes voluntary compliance.⁴⁹ They may be the subject of a broader review in future.
- C.1.3 Accordingly, the IGTO makes the following observations on issues arising from the complaint investigations undertaken:
- Initial ATO compliance activities on new law should afford taxpayers procedural fairness before making adverse decisions, and create opportunities for the ATO to identify any need to clarify its precedential view.
 - ATO advice and guidance should be easy to understand, but not risk oversimplification that leads taxpayers and ATO staff into error.
 - Prompt ATO remedial action is needed for affected taxpayers when the ATO materially changes how it applies its precedential view.
 - ATO compliance decisions should help taxpayers understand their options for review.
 - Options to expeditiously resolve disputes about the ATO's precedential view should be explored.
 - Opportunities exist to improve the care and maintenance processes for new tax laws and their integration with existing tax laws.
 - Improving IGTO access to ATO records and data systems can expedite IGTO complaint investigations.

⁴⁹ As noted in Table 1 on page 8.

- C.1.4 These observations also incorporate material which was provided by the ATO on 8 December 2020 to give broader context for those issues which are the subject of the IGTO observations below. They are included for the sake of completeness and to assist with scoping potential future reviews of the issues.

C.2 CONTEXT OF IGTO OBSERVATIONS

- C.2.1 The observations below should be appreciated in their broader context. The JK and BCF support measures were enacted in response to the extraordinary and unprecedented impact of the COVID-19 pandemic on Australian jobs and businesses and to provide economic support measures in the form of JK and BCF payments to many Australians.
- C.2.2 The ATO was chosen to deliver these payments as the ATO's existing tax payment and reporting infrastructure could be adapted to that purpose within a relatively short timeframe. However, significant ATO effort was required to refocus its resources towards the design and implementation of these new support measures. This involved significant changes to the ATO's operations, such as redeploying its workforce, pausing debt collection, updating its internal and external communications as well as tailoring its information, communication and technology systems to administer the payments.
- C.2.3 Accompanying communications, including public advice and guidance, needed to be developed and distributed quickly in response to the crisis conditions. This included the publication of guidance in the form of Facts Sheets by Treasury and website material by the ATO. Multiple subsequent legislative amendments also meant that the guidance frequently required updates. The rapid pace of this change prompted the ATO to publish a [timeline of content updates for the JK support measure](#).⁵⁰
- C.2.4 In developing the relevant guidance for the public and its own staff, the ATO needed to quickly and carefully consider the range of taxpayers that may be affected by the JK and BCF support measures and their differing circumstances, to ensure that the new measures were understood and applied by staff fairly and consistently.

⁵⁰ ATO, 'JobKeeper – timeline of content updates' (Web page, 27 Oct 2020) <www.ato.gov.au>.

C.3 INITIAL ATO COMPLIANCE DECISIONS ON NEW TAX LAWS SHOULD AFFORD TAXPAYERS PROCEDURAL FAIRNESS BEFORE MAKING ADVERSE DECISIONS, AND CREATE OPPORTUNITIES FOR THE ATO TO IDENTIFY NEEDED CLARIFICATION OF ITS PRECEDENTIAL VIEW

- C.3.1 The ATO was quick to commence its initial active compliance campaign on JK eligibility, in June 2020, which was approximately two (2) months after the commencement of the JK legislative instrument. By acting quickly, the ATO minimised the risk of ongoing errors and helped assure the community of the integrity of the JK support measures at an early stage. However, the ATO's process for determining and communicating its adverse decisions for particular new entities in this active compliance campaign was one of the main sources of concern raised with the IGTO and a source of substantial disputation.
- C.3.2 In the ATO's initial compliance campaign, the ATO identified over 27,000 business participant applicants that may not have met the eligibility criteria for a number of different reasons. The ATO sent correspondence to these applicants, the content of which differed depending on the applicant's circumstances and the particular eligibility criteria that may not have been met (see Appendix 4) — for example, whether the entity had registered for GST, whether it had started business before or on/after 1 January 2020, and whether it had notified the ATO of business income or taxable supplies before 12 March 2020.
- C.3.3 In relation to the BCF payments, the ATO determined which entities would receive the payments based on information it already held. The ATO advises that it had initiated contact with a number of entities to confirm their eligibility for BCF. Generally, this was where those entities had not reported the relevant income or supplies by the 12 March 2020 date, however, the ATO has not advised what other particular factors would have generated this type of contact. The ATO also advises that where contact was made with the ATO to determine why a BCF payment was not received, the ATO would afford the entity opportunity to provide further information before reconsidering its non-payment decision. Based on the sample letters provided, one of the material factors for new businesses was whether, by 12 March 2020 or any agreed lodgement deferral date, the entity had:
- (for earlier ATO letters) declared business income or reported "sales" to the ATO;⁵¹ or
 - (for later ATO letters), given notice that the entity had derived business income or made a "taxable, GST-free or input taxed supply (or a sale that would have been such a supply if [they] were registered for GST)".⁵²

⁵¹ See appendix 4, BCF letter - Sample July.

⁵² See appendix 4, BCF letter - Sample December.

- C.3.4 The ATO advises that over 80,000 entities received the BCF payment after providing further evidence to the ATO.⁵³
- C.3.5 In relation to the JK payments, and based on the sample letters the ATO provided, the start date for the entity's business and their GST reporting cycle were material factors in determining whether the ATO afforded entities opportunity to provide information before the ATO made an adverse decision — i.e. where the ATO considered the entity had started their business:
- between 1 July 2019 and 31 December 2019 and did not register for GST on an annual lodgement cycle, the ATO afforded the entity opportunity to provide information to the ATO before it made an adverse decision;⁵⁴
 - between 1 July 2019 and 31 December 2019 and registered for GST on an annual lodgement cycle, the ATO did not afford the entity opportunity to provide information to the ATO before it made an adverse decision;⁵⁵
 - on or after 1 January 2020, the ATO made an adverse decision and did not afford opportunity to provide information before it did so.⁵⁶
- C.3.6 There were approximately 2,200 new businesses in the latter two categories — i.e. those whose first communication from the ATO was a letter advising that they were considered ineligible for JobKeeper payments because they commenced business too late to satisfy the integrity rules,⁵⁷ (**ATO template decision letters**)— refer Appendix 3. In the complaints that the IGTO received regarding the ATO's compliance activities for the BCF and JK measures, a substantial number involved receipt of these ATO template decision letters.

⁵³ ATO, Communication to the IGTO, 8 December 2020, p 20.

⁵⁴ See Appendix 4, Sample letters 1, 2 and 3.

⁵⁵ See Appendix 4, ATO template decision letters, Option 3; see also Appendix 3 for a copy of that template letter.

⁵⁶ See Appendix 4, ATO template decision letters, Options 1, 2 and 3; see also Appendix 3 for a copy of that template letter.

⁵⁷ ATO, Communication to the IGTO, 19 August 2020, p 7.

- C.3.7 The ATO's template decision letters were based on pro forma wording, that advised the entity that the ATO had decided the entity was ineligible to claim the JK payments without affording procedural fairness to these taxpayers:

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of...

- *supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that report and pay GST quarterly).*

Our records indicate the entity started business on or after 1 January 2020.

On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.⁵⁸

- C.3.8 Although the ATO template decision letters provided the ATO's reasons for decision, they did not afford complainants an opportunity to present evidence of relevant considerations before adverse decisions were made. Also, the ATO template in its design did not afford an opportunity for the ATO itself to identify circumstances which would require it to clarify its precedential view.
- C.3.9 For example, the wording in the ATO template decision letters regarding the term 'supplies or sales' does not take into account the fact that the making of the supplies and the attribution of the supplies (for GST purposes) may occur in different tax periods. Therefore what is reported in the BAS may not be indicative of whether a supply was in fact made. However, through the IGTO's complaint investigations, the ATO has confirmed that the making of a taxable supply does not depend on consideration having been received (provided the taxable supply is made for consideration, which might be provided in a future tax period).
- C.3.10 Taxable supplies may also include other types of supplies such as acquisition-supplies, e.g. opening a bank account. Such supplies may be made during the commencement of a business.⁵⁹ For some entities, these activities occurred in a tax period before that in which they made their first sale.
- C.3.11 Further, the ATO template decision letters did not contemplate that complainants could notify the ATO of the making of taxable supplies (as modified by the JK and BCF support measures) via means other than lodging a BAS, such as the entity notifying the Commissioner of the opening of a bank account for a new business as part of their GST registration.

⁵⁸ See Appendix 2 for a copy of that template letter.

⁵⁹ See ATO, MT 2006/1, above n 36, para [120]–[131].

- C.3.12 Although complainants may dispute the ATO's decisions via the statutory objection process, had the ATO afforded procedural fairness in these cases — for example, by offering to consider further taxpayer views and evidence before finalising its decisions — the ATO would have decreased the risk of flawed decision-making and the resulting impacts for both the taxpayer and the ATO. It may be that the number of flawed decisions in this compliance campaign is a small fraction of the total number who claimed the JK payment. Even so, they are likely to significantly impact the ATO's management of disputes and there may be significant consequences for entities adversely impacted by those decisions, including financial and emotional consequences for the businesses, their employees and their families. This is especially the case if there are delays in resolving the matter with the ATO, given the fact that entitlement to the JobSeeker payment cannot be backdated.
- C.3.13 In past ATO compliance activities on newly enacted law, the ATO has afforded procedural fairness opportunities in its initial communications with taxpayers. For example:
- by confirming the information the ATO had on hand;
 - by confirming that the information indicated to the ATO that the taxpayer may be ineligible; and
 - then by affording the taxpayer an opportunity to provide further information and views before it made a decision which had an adverse financial impact on the taxpayer.
- C.3.14 It may be said that the ATO would have incurred significant additional administrative costs if it had afforded all entities with an opportunity to provide further information before making decisions in its compliance activities on newly enacted law. However, the ATO has routinely afforded such opportunities in other compliance campaigns which have involved significant numbers of taxpayers, for example, in its income matching system (that is, compliance activities which match interest data received from financial institutions with the interest reported by taxpayers in their income tax returns).
- C.3.15 The ATO's design of its initial compliance activities on newly enacted law, including its template decision letters, may be a potential topic for broader IGTO review in the future.

Ongoing monitoring of compliance issues in new laws to better inform the need for care and maintenance

- C.3.16 In a previous review, the *Review into improving the self assessment system*, the IGTO observed that after substantial new tax law is enacted, greater post-implementation monitoring should take place, as the need for refinements and advice is a necessary and healthy part of maintaining a complex system.⁶⁰ For example, there may be limited ATO awareness of the specific taxpayer factual arrangements to which the new law applies, at the time it is enacted. As the ATO conducts compliance activities on that law, it becomes increasingly aware of the broader range of factual circumstances and how the law applies to them. In this sense, the full

⁶⁰ See IGTO, *Review into improving the self assessment system* (2012), pp 130–131 ('Self assessment review').

application of the law is better understood through undertaking compliance activities.⁶¹ That is, a better understanding of the law can be obtained with the benefit of hindsight.

- C.3.17 Consistent with previous observations on this issue, there is ongoing need for the ATO to continue to refine its guidance and communications as it develops a more fulsome appreciation of the application of newly enacted law to the myriad of factual circumstances. This acknowledges the fact that unknown issues may arise in the reporting and lodgement cycle⁶² and reflects a causal link between:
- the law design and implementation process, in which the ATO plays a significant consultative role; and
 - the ATO's subsequent administration of that law, including the content of its public guidance and conduct of its compliance activities.
- C.3.18 As there are likely to be issues arising from the design of law that will be identified after the legislation is enacted and during subsequent compliance activities, appropriate safeguards or mechanisms need to be in place to address those issues before considerable taxpayer and ATO administrative costs are incurred in resolving consequent disputes. By affording taxpayers an opportunity to present evidence of relevant considerations before the ATO makes adverse decisions on newly enacted law, the ATO maximises the opportunity to quickly identify previously unforeseen issues and to take prompt action in response, for example alerting the Government of unintended consequences.
- C.3.19 The involvement of the community in the ongoing monitoring of newly enacted legislation also helps to ensure it is operating as intended. The ATO's consultation forums, such as the National Tax Liaison Group (**NLTG**) and Tax Practitioners Stewardship Group (**TPSG**), provide a platform for external stakeholders to raise issues for consideration⁶³ and alert the ATO to the need to take prompt administrative action, for example, by clarifying application of its precedential view of the law.
- C.3.20 The IGTO notes that concerns about the JK and BCF integrity rules were raised with the ATO through these forums. However, it appears that not all material issues raised, and associated responses, have been made publicly available—for example, the ATO's informal review process for certain new businesses. Given the targeted nature of these complaint investigations, the IGTO has not explored in further detail the ATO consultation processes that took place beyond the publicly available records of the relevant NLTG and TPSG meetings.
- C.3.21 This issue may warrant IGTO review in future and would be better informed by the Auditor-General's recent performance audit report of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures*.

⁶¹ *ibid.* p 37.

⁶² *ibid.* pp 130–131.

⁶³ *ibid.*

C.4 ATO ADVICE AND GUIDANCE SHOULD BE EASY TO UNDERSTAND, BUT NOT RISK OVERSIMPLIFICATION THAT LEADS TAXPAYERS AND ATO STAFF INTO ERROR

- C.4.1 The ATO plays a fundamental role in assisting a broad range of taxpayers to understand how the tax laws apply to their affairs — for example, by giving simple explanations of complex tax concepts — whilst at the same time ensuring that this guidance accurately reflects the legislation as enacted. Over-emphasis on one of these two objectives can compromise the other.

Oversimplification of the application of the JK and BCF integrity rules

- C.4.2 Following the enactment of the JK and BCF support measures, both the Treasury and the ATO publicly released a substantial volume of guidance materials in the form of Facts Sheets and information posted to the Treasury and ATO websites.
- C.4.3 In IGTO complaint investigations, it was observed that the wording in these guidance materials may have led some taxpayers to conclude that the JK and BCF integrity rules required notification of the same business activities that they were required to report under the income tax and GST regimes. This was mainly due to the use of income tax concepts (i.e. the requirement to have an amount included as assessable income for the income year) and GST concepts (i.e. the making of a taxable supply in a tax period that applied to it) in the drafting of the JK and BCF integrity rules.
- C.4.4 In this respect, the ATO oversimplified its guidance as it did not assist taxpayers to fully appreciate the meaning of key terms in the JK and BCF integrity rules. Often, these terms were not used in the JK and BCF support measures in the same way that they are used in the GST law. In relation to new businesses, this had the effect of propagating the misconception that a new business would be unable to prove its eligibility for the JK and BCF support measures unless it had made its first sale in a GST reporting period that ended before 12 March 2020 (for example, before 1 July 2019 for an annual GST reporter with a tax period ending 30 June).
- C.4.5 During the IGTO's complaint investigations, the ATO confirmed that the JK and BCF integrity rules allowed businesses to establish their eligibility with a wider range of business activities than those which are typically reported to the ATO in a BAS. Also, these rules do not limit the way that entities may notify the ATO of these activities. This broader scope was due to the JK and BCF support measures modifying certain GST terms, such as "taxable supply", and not incorporating other GST rules, such as those that attribute the GST payable to particular reporting periods which can be different to the tax period in which the taxable supply is made (the GST attribution rules). The IGTO considered that, in this regard, the ATO's public guidance on the application of the integrity rules to new businesses could have been more fulsomely explained.

C.4.6 The IGTO observed that affected taxpayers, their advisers and ATO officers had made decisions on the basis of this incomplete public guidance, resulting in adverse financial consequences for some affected taxpayers. With the benefit of hindsight, had the ATO's guidance been more fulsome in its explanation of the modified GST concepts included in the JK and BCF support measures, the practical impact on new businesses may have been apparent to advisers and taxpayers and ATO staff may not have been led into error when determining the eligibility for certain new businesses.

Inconsistencies in public guidance that led to uncertainty

C.4.7 In relation to the application of the JK and BCF integrity rules to new businesses, the Treasury publicly released a Facts Sheet that gave guidance on the JK support measure at the same time that the JK legislative instrument was registered. As previously observed by the IGTO, synchronising public advice and guidance with the implementation of significant new tax law minimises some of the uncertainty caused by the administration of that new law.⁶⁴

C.4.8 This Facts Sheet indicated that eligibility depended on whether the entity had made a supply before 12 March 2020 (amongst other requirements)⁶⁵. However, the ATO guidance that was published on its website 11 days later indicated that eligibility for the JK payment depended on, amongst other requirements, whether the entity had made a sale or supply in a particular GST reporting period which ended before 12 March 2020 (discussed in paragraph B.3.9)⁶⁶. Also, the ATO website material gave the impression that only sales or supplies reported on a BAS would be accepted by the ATO.⁶⁷

C.4.9 This inconsistency has been a key cause for uncertainty amongst taxpayers and tax professionals, based on the concerns raised with the IGTO and expressed more publicly (see, for example, concerns about the application of the integrity rules raised in a joint letter from the Professional Bodies to Treasury and in the media⁶⁸). A more fulsome explanation of the JK and BCF integrity rules in the ATO's guidance would have likely minimised the confusion regarding the correct application of those rules and addressed misapprehensions.

C.4.10 These IGTO observations are made with the benefit of hindsight and must be balanced against the unprecedented circumstances at the time, which required the ATO to quickly develop, implement and deliver a major economic stimulus package of measures in a moment of potential crisis. On this basis, it is understandable that uncertainty arose as to how the JK and BCF support measures operated in practice. Further, little time was available to more fulsomely consider whether public guidance had oversimplified matters or caused uncertainty.

⁶⁴ *ibid.* pp 37–40.

⁶⁵ Australian Government, JobKeeper FAQ, above n 14, p 12.

⁶⁶ ATO, 'Sole traders and other entities', above n 15.

⁶⁷ *ibid.*

⁶⁸ Lian, above n 2; Visontay, above n 2; Joint bodies submission, above n 1.

- C.4.11 The lesson to be learnt on this issue draws from an observation that the IGTO previously made in its *Review into improving the self assessment system* regarding greater post-implementation monitoring of the implementation of new tax law — the need for refinements to ATO advice and guidance is a necessary and healthy part of maintaining a complex system.⁶⁹ This includes a need to closely monitor ATO public advice and guidance, and review it as necessary, to ensure that it responds quickly to the unanticipated scenarios which emerge in practice and correctly reflects the ATO's evolving views of the law.
- C.4.12 The IGTO may consider the ATO's approach to implementing and monitoring significant new tax law as a potential topic for broader review in future.

C.5 PROMPT ATO REMEDIAL ACTION IS NEEDED FOR AFFECTED TAXPAYERS WHEN THE ATO MATERIALLY CHANGES HOW IT APPLIES ITS PRECEDENTIAL VIEW

- C.5.1 The need for clear advice and guidance on new tax law is not only limited to taxpayers but is also needed to appropriately guide ATO officers (by way of internal scripting and guidance) in their application of that law. The ATO requires its officers to apply the ATO precedential view of the law, which is reflected in the relevant internal advice and guidance. As the ATO changes how it applies its precedential view of the law, it may materially impact a class of taxpayers. In these cases, it will be important for the ATO to demonstrate fair treatment of taxpayers by taking prompt remedial action for taxpayers who were affected by adverse decisions based on a different application of that view.
- C.5.2 During the course of the IGTO's complaint investigations, as set out in Part B, the ATO clarified its view with the IGTO that, for the purposes of the JK and BCF integrity rules, a 'taxable supply' can be made when an entity makes an acquisition-supply, that is, when it acquires a financial interest and thereby makes a financial supply. This can occur when an entity opens a bank account, and entities that have registered for GST would have notified the ATO of their bank account details on the relevant registration forms.
- C.5.3 This means that new entities undertaking business commencement activities on or before 31 December 2019 may have fulfilled the 'taxable supply' requirement in the JK and BCF integrity rules and, therefore, may be eligible for relief (if all other eligibility requirements are met).
- C.5.4 This was not a situation contemplated by ATO officers at the time they made their initial decisions regarding new businesses' JK and BCF eligibility, as they did not consider whether new entities had made acquisition-supplies and were not prompted to do so by internal ATO guidance. However, the ATO has recently clarified that such supplies may satisfy the JK and BCF integrity rules, so long as all other requirements are met.

⁶⁹ See IGTO, *Self assessment review*, above n 60, pp 130–131.

- C.5.5 As such, this ATO clarification may materially affect new businesses' eligibility for the JK and BCF support measures where the ATO had previously decided they were ineligible on the basis that they did not (or could not) report a sale for the relevant tax period. The ATO's clarification warrants communication to these affected entities.

Identification of individually affected taxpayers

- C.5.6 During the complaint investigations, the ATO advised the IGTO that it would informally review its decisions where entities had lodged an objection with the ATO, lodged a complaint with the IGTO or lodged an appeal in the AAT.⁷⁰ This remedial action is welcomed and goes part way to fulfil the ATO's agreement to recommendations the IGTO had made in a previous review — that is, that the ATO communicates such changes to known affected taxpayers and that it takes appropriate rectification action:

If there is a change to (the ATO's) existing precedential view in a given compliance approach, the Tax Office will ensure:

it fully informs those known impacted taxpayers at the earliest possible time; and

it undertakes quick, complete and transparent rectification action with those known taxpayers where appropriate.⁷¹

- C.5.7 The IGTO also notes that the ATO has been aware, as early as 11 August 2020, that it would need to review earlier decisions that it made in respect of certain taxpayer circumstances⁷², however, it has not, as yet, communicated this process more broadly to encourage affected members of the public to make contact with the ATO.
- C.5.8 During the IGTO complaint investigations, the IGTO asked the ATO to identify and reconsider adverse decisions for affected entities that did not lodge an objection, complaint or appeal. This proactive action would help to avoid further delays and costs, especially for those businesses that do not have the financial means to obtain independent tax advice or those that may not be aware of the IGTO's tax ombudsman service. These affected taxpayers could be identified by cross-referencing those who received an adverse decision in the ATO's JK and BCF compliance campaign (as identified by an internal project code used on the ATO's decision letters) with the date of the entities' applications for ABN and GST registration. The IGTO also notes that the ATO provided information that indicates, within 3 days of the ATO initially identifying an issue with a particular application of its view (entities carrying on businesses without an ABN), the ATO had identified 282 entities potentially affected by adverse decisions

⁷⁰ The ATO placed cases on hold on 11 August 2020 and advised the IGTO of its informal reviews on 23 September 2020 — further detail in Appendix 1 Chronology.

⁷¹ IGTO, *Review into aspects of the Tax Office's settlement of active compliance activities* (2009), rec 22.

⁷² See, Appendix 1 – Chronology of events, 16 September 2020.

out of those that had applied for the JK payment, noting that only 15 of these 282 had lodged objections.⁷³

- C.5.9 The ATO, however, considers it may be infeasible to directly communicate its clarification with affected entities who have not disputed an ATO decision. This is because it believes it would be unable to identify which entities were determined to be ineligible on the basis of views that have now been clarified without conducting a manual review of the ATO's adverse decision letters that were issued in the JK and BCF compliance campaign.
- C.5.10 Effectively, this means that affected entities will either need to lodge an objection with the ATO or lodge a complaint with the IGTO or ATO in order to be identified by the ATO as requiring review. As some complainants would not have had their eligibility reconsidered if it were not for the IGTO's complaint investigation, the IGTO will continue to alert the ATO to affected entities that may benefit from the ATO's informal review, where they are identified in the complaints lodged with the IGTO. However, it is likely that there are many other affected taxpayers that will not be made aware of what evidence they could provide to fulfil the taxable supply eligibility requirement —i.e. they may in fact have made a taxable supply in the relevant period (despite an earlier adverse decision by the ATO in relation to their case) and could be eligible if the ATO exercised its discretion to allow the entity to provide late notice of that supply (together with information that satisfies the other eligibility requirements).

Public clarification where the ATO is unable to identify all affected taxpayers

- C.5.11 In principle, the ATO's clarification should be communicated in a timely manner that empowers affected entities to obtain the advantage of any remedial action undertaken by the ATO. Such communication provides assurance that ATO decisions are made consistently and in accordance with its best view of the law. It would also promote transparency of ATO decisions, which in turn engenders public confidence in its administration of the tax laws. Conversely, where this does not occur, the ATO bears the risk of not being consistent or transparent in its administration of the tax system.
- C.5.12 If affected taxpayers are unable to be feasibly identified and contacted, a targeted public announcement of the clarification would promote fair and transparent tax administration. This would alert those who may be eligible to receive the intended support measures to the fact that they are expected to identify themselves to the ATO so that prompt reconsideration of their circumstances can be undertaken.
- C.5.13 During the IGTO complaint investigations, the ATO updated its public guidance (PS LA 2020/1) to clarify that, for the purposes of the JK and BCF integrity rules, taxable supplies can include input taxed supplies.⁷⁴ Notwithstanding this update, it remains unclear (based on this public guidance) that the JK and BCF support measures modified definition of 'taxable supply' may

⁷³ ATO, internal communication, 6 August 2020.

⁷⁴ ATO, PS LA 2020/1, above n 40, para [7] n 12. See Appendix 1 – Chronology of events, 16 September 2020.

include business activities which are not taxable sales or reported on a BAS, such as the opening of a bank account.⁷⁵ As a result, affected taxpayers would remain unaware of their potential eligibility if they read this updated guidance. The ATO, however, has questioned the utility of further public clarification of the 'taxable supply' issue, as it considers it would not affect entities in the future as the number of entities affected will not increase. Further, it believes it cannot broadly communicate its changed view without causing disproportionate confusion for others.

- C.5.14 As a result, affected entities may only become aware that they have an opportunity for the ATO to reconsider their eligibility if they have already objected to the ATO's original eligibility decision or lodged a complaint with the IGTO. Affected entities that did not take these actions may remain unaware of this opportunity. They may continue to labour under an erroneous belief that they were not entitled to access government support measures which were intended to provide them with financial support during this very difficult economic period.
- C.5.15 In the IGTO's view, if the ATO does not take action to identify affected taxpayers (and initiate appropriate remedial action) or does not alert the potential class of affected taxpayers to its change in precedential view, it will risk the erosion of public confidence in the fair and transparent administration of Australia's tax system.
- C.5.16 The ATO's ability to identify taxpayers affected by its adverse decisions is a broader issue that may warrant review in future and may be better informed by the Auditor-General's recent report of his performance audit of the *ATO's Management of Risks Related to the Rapid Implementation of COVID-19 Economic Response Measures* as well as the outcome of the Auditor-General's announced potential audit into the *ATO's administration of the Jobkeeper support measure*, should that audit be commenced in the coming year.

C.6 ATO COMPLIANCE DECISIONS SHOULD HELP TAXPAYERS UNDERSTAND THEIR OPTIONS FOR REVIEW

- C.6.1 The objection process is a legislatively enshrined right to a formal internal review of ATO decisions.⁷⁶ It also provides access to external merits review by the AAT or judicial review by the Federal Court.⁷⁷ The objection process and external review avenues can involve significant financial and opportunity costs for taxpayers, which can effectively operate as barriers to

⁷⁵ Example 4 in PS LA 2020/1 does not bring attention to the fact that the taxpayer (Jack) may have been eligible if he was able to provide evidence of the making of a financial supply prior to 1 January 2020 which had a sufficient connection to the commencement and carrying on of his business. Rather, the insertion of the wording 'however did not undertake any further activities' eliminates any possibility that a financial supply was made during this period.

⁷⁶ *Taxation Administration Act 1953* Pt IVC ('TAA 1953').

⁷⁷ TAA 1953 s 14ZZ.

independent review of ATO decisions.⁷⁸ As such, the costs of these dispute resolution options and decisions would normally be material for most individuals and small businesses, and may be prohibitive for those significantly impacted by the COVID-19 pandemic.

C.6.2 The ATO has advised the IGTO that it has received in excess of 9,000 objections as a result of its JK and BCF compliance activities.⁷⁹ The IGTO considers this is a significant amount of disputation which may result in substantial costs and/or resource commitments for the entities concerned and impose significant costs on the ATO in dealing with these disputes. It is also likely to have compounded delays.

C.6.3 In some respects, this number may not be surprising and can be explained by the guidance that the ATO gave entities as part of its template decision letters. The ATO advised entities of their ineligibility for the JK payment and that a review of the ATO decision was available by way of the objection process:

If you don't agree with our decision you may lodge an objection within 60 days. For more information on lodging an objection please seek advice from your tax professional or visit ato.gov.au/objection⁸⁰

C.6.4 The objection process may not be well-suited to address every particular concern or issue which generates a dispute. For example, the IGTO has previously observed that many disputes on the pathway to external merits review can be quickly resolved via informal facilitated discussions which ensure both parties fully appreciate each other's respective concerns, arguments and views on the facts and evidence.⁸¹

C.6.5 There are other avenues for dispute resolution that may be more appropriate to provide the assistance needed by some taxpayers. Examples of these other avenues include the right to:

- make a formal complaint to the ATO Complaints Unit on such issues as the lack of explanation of its decision or the failure to provide a basis for the ATO views expressed; or
- request an independent investigation of the decision-making process by lodging a complaint with the Taxation Ombudsman.

⁷⁸ See IGTO, *Review into the management of tax disputes*, (2015), pp 56–58 ('Management of tax disputes'). For example, a 2012 study estimated that personal costs incurred by represented taxpayers in the Taxation Appeals Division of the AAT were between \$5,634 and \$6,684: Binh Tran-Nam and Michael Walpole, 'Access to tax justice: How costs influence dispute resolution choices' (2012) 22 *Journal of Judicial Administration* 3, p 3.

⁷⁹ ATO, Communication to the IGTO, 8 December 2020, p 17.

⁸⁰ See Appendix 3 for a reproduction of the ATO template decision letters, as viewed by the IGTO.

⁸¹ For example, IGTO, *Review into the Australian Taxation Offices use of early and Alternative Dispute Resolution* (2012), pp 42–47, rec 3.6; ATO, *Annual Report 2016–17* (2017) p 65.

- C.6.6 The ATO template decision letters in these complaint cases did not advise taxpayers of these other avenues or rights of review — they only advised entities of the objection process. Of the 9,000-odd objections that the ATO has received, it is likely that a substantial portion are due to a genuine disconnect between the community's understanding of the JK and BCF integrity rules and the ATO's administration of them, which could be addressed by one of the informal complaints processes outlined above.
- C.6.7 In the IGTO's view, many of these disputes may have been dealt with more efficiently through other less formal complaint and dispute resolution processes, had the ATO advised taxpayers of these options in its template decision letters. The lesson to be learnt here is that, in adverse decision letters, taxpayers should be alerted to the different options for review, together with sufficient explanation that enables them to make an informed decision as to which option would be most appropriate for their circumstances. This includes where the ATO requires further information from the taxpayer for the purposes of making its decision.
- C.6.8 The IGTO is currently conducting a separate review investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal the decisions made and actions taken by the ATO.⁸² The findings of the review investigation will be released once the investigation has been completed, which is expected to occur in 2021.

C.7 OPTIONS TO EXPEDITIOUSLY RESOLVE DISPUTES WITH THE ATO'S PRECEDENTIAL VIEW OF THE LAW SHOULD BE EXPLORED

- C.7.1 The observations in sections C7 and C8 relate mainly to the ATO's administration of the 'Tax Period' requirement in the JK and BCF integrity rules.
- C.7.2 All ATO officers are required to apply the ATO precedential view of the law.⁸³ For example, those ATO officers who make objection decisions must apply the same ATO precedential view of the law that was applied by officers who made the initial decision. Accordingly, taxpayers who dispute the ATO precedential view of the law may not obtain a fully independent review of these issues until the matters are considered by the AAT or Federal Court.⁸⁴

⁸² IGTO, 'Review Announcement — An investigation into the effectiveness of ATO communications of taxpayers' rights to complain, review and appeal' (Media Release, 30 June 2020) <www.igt.gov.au>.

⁸³ The IGTO notes, however, that there are internal ATO processes for an ATO Officer to challenge an established precedential view.

⁸⁴ IGTO, *Management of tax disputes*, above n 78, pp 50–52.

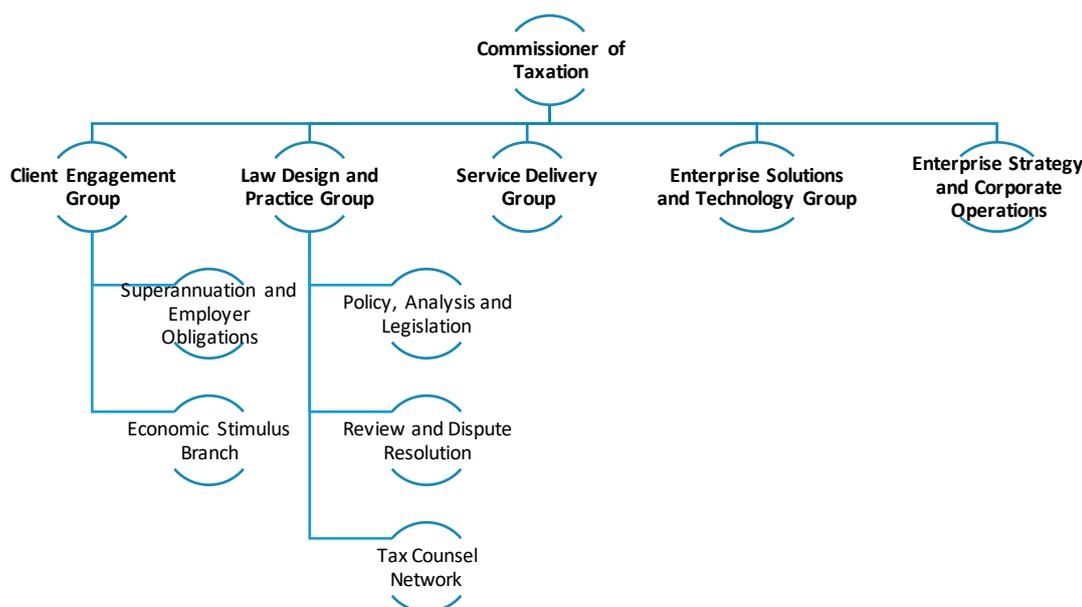
C.7.3 Generally, the ATO Law Design and Practice Group (**LD&P**) is responsible for:

- providing analysis and assistance to Treasury in the latter's design of taxation laws (Policy, Analysis and Legislation (**PAL**) business line);
- managing and reviewing disputes, such as objections — the Review and Dispute Resolution (**RDR**) business line; and
- overseeing the ATO's precedential view of the law as well as providing technical advice to both the RDR business line and the ATO's Client Engagement Group (which is responsible for the ATO's compliance activities) (Tax Counsel Network or **TCN**).⁸⁵

C.7.4 In the IGTO's complaint investigations, the ATO initially advised the IGTO that its PAL business line was responsible for the ATO precedential view of the JK and BCF support measures. The ATO later clarified that TCN was responsible for overseeing that precedential view, however, the IGTO was unclear as to who had final responsibility on the issues which were the subject of the complaint investigations. The IGTO has not conducted a review on this issue and observes that, generally, clarification of responsibilities and accountabilities would assist to expeditiously resolve issues that are raised with the ATO's precedential view of the law. This is discussed in further detail in section C8 below.

C.7.5 The relevant business lines of the ATO involved in its administration of the JK and BCF support measures can be identified in the ATO Organisational Chart as shown below.

ATO Organisational Chart



Source: ATO⁸⁶

⁸⁵ *ibid.* pp 13–16 and 50–51; see also ATO, *Precedential ATO view*, PS LA 2003/3, 19 February 2015.

⁸⁶ ATO, 'ATO organisational structure - October 2020' (Web Page, 16 November 2020) <www.ato.gov.au>.

- C.7.6 One consequence of requiring all ATO officers to follow the same precedential view of the law is that taxpayers who dispute that precedential view are required to use the objection process even where an ATO objection decision would merely confirm the original ATO decision in dispute. This is because, generally, taxpayers who dispute ATO tax liability decisions cannot appeal to the AAT or Federal Court until they have first lodged an application for and received an ATO objection decision via the process set out in Part IVC of the *Taxation Administration Act 1953 (TAA 1953)*.⁸⁷
- C.7.7 The IGTO has previously observed⁸⁸ that the objection process may add unnecessary delay in resolving disputes with the ATO's precedential view of the law, if the decision is based on a precedential view and the material facts in the case are agreed. Such cases would benefit from the use of declaratory proceedings to quickly obtain judicial clarification, without the associated delays of the objection process. This was recommended by the IGTO in previous reviews, including the *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution*.⁸⁹
- C.7.8 During the IGTO's complaint investigations, the IGTO observed that some of the disputes concerning the ATO's decisions on new entities' eligibility for JK and BCF support measures may have benefited from independent review of the ATO's interpretation of the relevant provisions, such as declaratory proceedings in the Federal Court. This is because the material facts that the ATO relied upon in many of the ATO decisions that the IGTO saw were undisputed and the sole issue in dispute was an interpretative one. However, a fast-tracked process to by-pass the delays inherent in the objections process would be needed. Such a process could be effected via legislative amendment or ATO agreement (for example, agreement to obtain a Federal Court declaration on a matter of contention before the statutory rights under Part IVC of the TAA 1953 are triggered).
- C.7.9 Furthermore, such a fast-tracked process in this case may also have reduced the ATO's administrative costs in dealing with a portion of the disputation that resulted from the ATO's JK and BCF eligibility compliance activities. It can also be costly for a taxpayer to obtain judicial clarification of an ATO precedential view. However, there may be a public benefit in promptly obtaining this clarification.
- C.7.10 The ATO-funded Test Case Litigation Program helps to alleviate litigation costs for taxpayers where the ATO agrees that there is uncertainty or contention on how the law operates and the issue is in the public interest to be litigated due to its broader impact.⁹⁰ In relation to the interpretation of the JK and BCF integrity provisions, however, it may be that the ATO is certain that its view is the better view of the law (as the IGTO was advised in these complaint cases)

⁸⁷ TAA 1953, Pt IVC.

⁸⁸ IGTO, *Management of tax disputes*, above n 78, pp. 47–48 and 50–52.

⁸⁹ IGTO, *Review into the Australian Taxation Office's use of early and Alternative Dispute Resolution (2012)* pp 61–63 (rec 4.3).

⁹⁰ ATO, 'Test Case Litigation Program' (webpage, August 2020) <www.ato.gov.au>.

and is consistent with the policy intent. In these circumstances, taxpayer-applicants would face an insurmountable task in seeking to persuade the ATO that the operation of the law was of sufficient contention or uncertainty to warrant Test Case Funding for their dispute.

- C.7.11 Notwithstanding this, unrepresented small businesses who dispute the ATO's precedential view in the Small Business Taxation Division of the AAT may have their reasonable litigation costs paid by the ATO if the ATO decides to engage external counsel to represent it in the matter. This type of litigation assistance aims to maintain a level playing field in small business AAT disputes.⁹¹ This funding might enable taxpayers to seek clarification of interpretative issues in the AAT, in circumstances where the costs might otherwise be prohibitive.
- C.7.12 The IGTO understands the number of cases before the Small Business Taxation Division within the AAT was 374 as at 30 November 2020, made up as follows:
- 30 Cash Flow Boost for employers
 - 35 JobKeeper payments
 - 309 Other.⁹²
- C.7.13 Considering the observations made above about the efficiency and independence of the ATO's dispute resolution process as well as the recommendations made by the IGTO in previous reviews, it may be opportune for the IGTO to conduct a broader review on this area in future and the ATO to confirm and clarify its approach to testing its precedential views.

C.8 A SEPARATION BETWEEN DRAFTING AND INTERPRETATION OF LAWS IS IMPORTANT TO MINIMISE THE RISK OF TAXPAYER DISPUTES WITH ATO PRECEDENTIAL VIEWS

- C.8.1 Taxpayers, advisors⁹³ and the ATO, as well as the courts and tribunals, are similarly bound by the laws as passed by the Australian Parliament. Accordingly, a separation between those responsible for drafting the law (which reflects the Government's intended policy) and those responsible for administering the laws ensures that taxpayers and the ATO start with an 'even' understanding of the laws – based on the words as enacted. This creates a level playing field and can minimise the risk of unnecessary disputes.

⁹¹ ATO, 'Small Business Litigation Funding' (webpage, 4 July 2019) <www.ato.gov.au>; ATO, 'Dispute Resolution Instruction Bulletin DR IB 2019/1: Small Business Taxation Division, AAT' (Internal ATO document, March 2019).

⁹² AAT, Communication to IGTO, 7 December 2020. Note that the ATO has similarly advised that 65 of its AAT cases involve relevant BCF and JK issues and that 23 of those 65 cases have been resolved (ATO, Communication to the IGTO, 8 December 2020).

⁹³ Including tax agents, accountants, solicitors and barristers.

C.8.2 During the course of the IGTO complaint investigations, the IGTO was advised that the ATO's administration of the JK and BCF integrity rules was consistent with the policy intent for the JK and BCF support measures. For example, it was strongly suggested that:

- an alignment of the integrity rules' operation with the income tax and GST reporting regimes was consistent with this policy intent; and
- this alignment would assist the ATO to deliver payments quickly as it could rely on information already reported to it prior to 12 March 2020 to determine an entity's eligibility and would not need to await any further information provided by that entity.

C.8.3 Whilst the 'guiding' intentions may have been clear to the ATO, there were other factors which suggest that the position was less clear to the rest of the community. Those factors include the following:

- there are no GST reporting requirements as part of the integrity rules for new small business as enacted (as there is no GST attribution requirement and the rule allows entities which are not registered and not required to be registered, and therefore not reporting at all, to be eligible for the support measures);
- there is no requirement for amounts to be reported through a BAS (unlike the income tax integrity rule);
- the distinction between lodging a BAS annually, quarterly, monthly or not at all appears arbitrary and its application to different types of entities may appear discriminatory, without some further means to determine eligibility;
- the ongoing nature of JK payments and entity reporting requirements runs counter to an intention that the ATO need only rely on existing information; and
- the suggestion in the wording in the explanatory statement to the JK legislative instrument regarding the intended purpose for the integrity rule.

C.8.4 Also, there was no explanation in the extrinsic material for supporting an approach that would exclude new businesses who had registered for GST and were trading, but had not reported a sale before 12 March 2020 simply because, for example, their BAS lodgement would not be due before 12 March 2020. The IGTO was not provided with evidence that supported this intention having informed the JK and BCF support measures. Further, if such a trade-off was intended, it was not referred to in the list of policy issues and trade-offs that Treasury had published in the Facts Sheet it maintained from April – June 2020.⁹⁴

C.8.5 If there was an intention to limit access and eligibility to improve the administrative ease and simplicity for making payments, then the level of community disputation and the reliance on technically complex provisions which omitted a reporting requirement tended against this simplicity being achieved.

⁹⁴ Australian Government, JobKeeper FAQ, above n 14.

- C.8.6 If the above policy intent was an overt consideration, it would indicate that there is room to improve the legislative design and drafting processes to ensure Government's intended policy is expressed in the text of the Bills presented to Parliament.
- C.8.7 The IGTO notes that consistent with the Australian Taxation Office and Treasury Protocol, *ATO – Treasury Protocol* (dated 10 September 2012), that the ATO and Treasury share joint stewardship for the tax system:⁹⁵

...The ATO's responsibilities include unique challenges in relation to revenue collection, law interpretation, administration, compliance and enforcement.

... Ensuring that legislation accurately reflects the Government's policy intent is a critical element of the Treasury's policy advising and legislation implementation role. In developing new legislation, it is imperative that agreement is reached with the tax administrator (the ATO) that the legislation will achieve the Government's policy intent and a commitment that it can and will be administered in that way. Where such agreement cannot be reached, it will be critical to identify the reasons for the impasse and potential remedies and to advise the Government if any change in policy is required.

- C.8.8 As mentioned in section C.7 above, the ATO's PAL and TCN business lines have different responsibilities regarding the administration of the JK and BCF support measures. During the IGTO's complaint investigations, the PAL business line initially provided the ATO's authoritative view in response to the IGTO's questions regarding interpretative issues. Although the TCN did not provide a formal sign off for those initial views, the ATO subsequently provided the IGTO with some emails to evidence TCN's role in overseeing the technical clearance of wording in a number of the ATO's public guidance documents (see, for example, 24 March 2020 entry in Appendix 1). These emails also evidence substantial involvement in the drafting of a key ATO guidance document, PSLA 2020/1, by the PAL business line (refer – 24-25 April 2020 entry in Appendix 1), which was the ATO business line that had provided advice and assistance in the design and legislative drafting of the JK and BCF support measures.
- C.8.9 The IGTO has not investigated the ATO's involvement in the design and drafting of the JK and BCF support measures and considers that any future review of this issue could explore whether there is opportunity to improve the ATO's role in the joint stewardship of the legislative design and drafting process. The IGTO notes that any broader review of this issue would be better informed by the Auditor-General's recent performance audit of the *Australian Taxation Office's Management of Risks Related to the Rapid Implementation of Covid-19 Economic Response Measures* as well as the outcome of the Auditor-General's announced potential audit into the *ATO's administration of the Jobkeeper support measure*, should that audit be commenced in the coming year.

⁹⁵ ATO, *ATO-Treasury Protocol* (2012) <www.ato.gov.au>.

- C.8.10 Given the apparent inconsistency between the ATO and Treasury-published guidance on the integrity rules, the IGTO considers it is worth commenting on the importance of maintaining sufficient separation between legislative drafting and administration thereafter (i.e. post-enactment), whilst ensuring that legislative design draws on the administrator's experience as well as the experience of those who will be impacted by the administration of the new tax law.
- C.8.11 A key reason for this separation is to avoid unnecessary disputation. That is, disputes arising because there is a different understanding of the 'words as enacted' and different expectations of the intentions of those words by those who are subject to the law as compared with those responsible for administering the law. This is why it is important that the same people involved in drafting the law (including those who assist or advise the drafters) should not also be responsible for determining how the law should be interpreted or administered (for example, in settling key ATO guidance documents) and hence the importance of the role performed by the ATO's TCN⁹⁶. Without separation, there can be unnecessary disputes and confusion, which is not in the interests of efficient tax administration.
- C.8.12 Prior to 2003, the ATO and Treasury each held partial responsibility for designing legislation. Concerns were raised about the appropriateness of the administrator holding such responsibility,⁹⁷ and the Government subsequently implemented the Board of Taxation's recommendations to unify the tax policy advising and legislation development functions within Treasury. The ATO would thereafter be consulted to provide its administrative, compliance and interpretive experience.⁹⁸ This integrated approach to tax law and policy design is set out in the *ATO - Treasury Protocol*.⁹⁹

⁹⁶ The IGTO understands that Treasury is responsible for instructing and approving the final form of tax legislation to be tabled in the Australian Parliament. Treasury personnel are also responsible for preparing the Explanatory Memorandum that accompanies the Bill that is tabled in Parliament. However, the ATO's role is to advise Treasury on the relevant drafting - that is, to ensure the law reflects the Government's policy intention, consistent with the Protocol entered between Treasury and the ATO on 10 September 2012. The Office of Parliamentary Counsel prepares the drafting as instructed by Treasury.

⁹⁷ Board of Taxation, *Government Consultation with the Community on the Development of Taxation Legislation: A Report to the Treasurer and the Minister for Revenue and Assistant Treasurer* (2002) <www.taxboard.gov.au> ('Tax legislation consultation').

⁹⁸ Peter Costello, 'Reforms to Community Consultation Processes and Agency Accountabilities in Tax Design' (Media Release, 2 May 2002) <www.ministers.treasury.gov.au>.

⁹⁹ ATO, *ATO - Treasury Protocol* (2012) <www.ato.gov.au>.

- C.8.13 Separation in the drafting and administration of legislation should not be viewed as competing against consultation, which is widely acknowledged as an important ingredient of good tax law design. This is acknowledged in the *ATO-Treasury Protocol*:

Enacted law – The law in administration

Whilst acknowledging that the Courts are the final arbiters of the laws made by Parliament, the ATO interprets and enforces enacted law that it is responsible for administering.

In forming its view on the interpretation of law, the ATO will routinely consult senior members of Treasury's Law Design Practice and the professions, and undertake community consultation and release draft views for public comment in accordance with its long standing practices.

- C.8.14 Rather, the scope of ATO input during consultation should be clear and aimed at ensuring tax legislation and administration faithfully reflects Government's policy intent.¹⁰⁰

C.9 OPPORTUNITIES EXIST TO IMPROVE THE DESIGN OF NEW TAX LAWS AND THEIR INTEGRATION WITH EXISTING LAWS BY CONDUCTING BROADER CONSULTATION

- C.9.1 There is merit in ensuring the taxpayer and tax practitioner perspective is considered during consultation for new laws. The IGTO has previously observed that private sector experts are well placed to inform the policy and legislation design process by bringing practical knowledge of the tax law, industry structures and commercial practices.¹⁰¹ The early involvement of private sector experts during this process was also agreed with in principle by Government.¹⁰²
- C.9.2 However, the involvement of private sector experts may be constrained due to competing objectives arising from limited timeframes in which to design the tax law integrity provisions. In this respect, there is opportunity to draw on the experience and perspective of a select few independent parties.

¹⁰⁰ Board of Taxation, *Tax legislation consultation*, above n 97.

¹⁰¹ IGTO, *Self assessment review*, above n 60, para [5.18].

¹⁰² David Bradbury, 'Inspector-General of Taxation review into improving the self assessment system' (Media Release, 13 February 2013) <www.ministers.treasury.gov.au>.

- C.9.3 This could include the IGTO, in a consultative role, especially where the laws will impact on unrepresented taxpayers. If the IGTO were to perform such a role, it would neatly align with the IGTO's statutory objects of providing independent advice to Government on tax administration issues, whether they be a result of systems established by the administrator or systems established by the tax laws themselves.¹⁰³ Formalising such a role for the IGTO has also been recently recommended by the Government-chaired Senate Economics Legislation Committee in its *Report into the performance of the Inspector-General of Taxation*.¹⁰⁴ Recommendation 4 is in the following terms:

Recommendation 4

*The committee recommends the Australian Government consider whether the IGTO should have a formal role to independently advise the minister on the administrative aspects of new tax laws and amendments to existing tax laws.*¹⁰⁵

- C.9.4 Consideration of this recommendation is a matter for Government.

C.10 IMPROVING IGTO ACCESS TO ATO RECORDS AND DATA SYSTEMS CAN EXPEDITE IGTO COMPLAINT INVESTIGATIONS

- C.10.1 The IGTO provides an important and unique dispute resolution service for vulnerable taxpayers. It is a free and accessible Ombudsman service that may form independent views based on access to records which may be unavailable to taxpayers due to the operation of the tax law secrecy provisions.
- C.10.2 The scope of these IGTO complaint investigations was simple — to help complainants understand why the ATO had deemed them ineligible and to explore with the ATO whether the explanation in their decision letters correctly reflected complainants' circumstances and appropriately applied the ATO's view.
- C.10.3 The ability of the IGTO to perform this independent function is largely dependent on the extent to which the IGTO can access relevant ATO records. However, access to these records requires the authorisation of the Commissioner, due a legislative provision in the *Ombudsman Act 1976*.¹⁰⁶ Contrary to popular belief, the IGTO does not have unrestricted access to relevant ATO records and data systems for the purposes of providing assurance to complainants and the community that the administration of the tax system is consistent with community expectations – whether through a taxation complaint investigation or a review investigation.

¹⁰³ *Inspector-General of Taxation Act 2003* s 3(b) ('IGT Act 2003').

¹⁰⁴ Senate Standing Legislation Committee on Economics, *Inquiry into the Performance of the Inspector-General of Taxation* (report tabled 17 June 2020).

¹⁰⁵ *ibid.* rec 4.

¹⁰⁶ *Ombudsman Act 1976* ss 8(1A) and (2)(b)(iii), which operate by virtue of the *IGT Act 2003* s 15.

- C.10.4 During the IGTO complaint investigations regarding JK and BCF complaints, the ATO was responsive to the IGTO's information requests. For example:
- the ATO regularly engaged with the IGTO;
 - the ATO was responsive to the information requests made of ATO senior officers with responsibility for the support measures;
 - senior ATO executives attended meetings to discuss the concerns raised by taxpayers and the tax profession; and
 - the ATO also provided detailed responses to the information requests made by the IGTO as part of the complaint investigations.
- C.10.5 Notwithstanding this extensive level of ATO engagement, the complaint investigation process exceeded six months for many of the complaints investigated by the IGTO. This is particularly concerning given the nature and time-sensitivity of the concerns raised as many entities were experiencing significant financial hardship and unable to access the JK and BCF support measures in their time of need.
- C.10.6 The IGTO also notes that a period of approximately 6 weeks elapsed between the time that the ATO internally acknowledged a need to review its earlier decisions and the IGTO complaint investigation meetings and discussions resulting in similar issues being identified.¹⁰⁷ The ATO also did not update its public advice and guidance during this period to identify these review opportunities for the public and the community.
- C.10.7 Early and self-initiated access to ATO documents such as internal minutes of advice, correspondence with external agencies and stakeholders, and internal technical advice on the substantive issues at hand may have accelerated the IGTO's investigation of these complaints. Specifically, the IGTO observes that access to communications between the ATO and Treasury pertaining to the administration of the JK and BCF support measures and TCN advice regarding the formation and evolution of the ATO's precedential views on the issues may have assisted the IGTO in concluding its investigations of the concerns raised by complainants in a more timely manner.
- C.10.8 As the IGTO may only access ATO data systems and obtain information to the extent the Commissioner of Taxation authorises¹⁰⁸, there is a degree of reliance on the ATO to provide the IGTO with the information required to effectively conduct its complaint investigations. In addition to the impact this has on the efficiency of IGTO complaint investigations, such reliance could potentially compromise the perceived independence of the IGTO in the eyes of the community.

¹⁰⁷ See Appendix 1 – Chronology of events, 11 August 2020 and 23 September 2020.

¹⁰⁸ See *Ombudsman Act 1976* ss 8(1A) and (2)(b)(iii), which operate by virtue of s 15 of the IGT Act 2003.

- C.10.9 These issues were previously identified in the recent Senate Economics Legislation Committee report, *Performance of the Inspector General of Taxation*, and particular recommendations were made:

Recommendation 3

The committee recommends the Australian Government review the IGTO's current access to the ATO and Tax Practitioners Board's systems, data, and records and considers improving access, where necessary, to further enable it to perform its legislative functions.

Recommendation 6

The committee recommends the Australian Government consider strengthening protections available to individuals who disclose information to the IGTO, regardless of whether the disclosure is in relation to a complaint investigation or systemic review.

Recommendation 7

The committee recommends the rights of tax officials who are interviewed during investigations undertaken by the IGTO be clarified, and that protections afforded to them be strengthened. This includes providing officials the legal right to choose whether or not they have other persons present when providing information.¹⁰⁹

- C.10.10 Consideration of these recommendations is a matter for Government.

C.11 CONCLUDING COMMENTS

- C.11.1 The IGTO commends the ATO on its responsiveness in assisting the Australian community to meet the challenge of the exceptional and unprecedented circumstances caused by the COVID-19 pandemic. It needed to act quickly to implement administrative systems and associated guidance to facilitate the JK and BCF payments. As with the implementation of every major new economic fiscal measure, however, matters arose that had impacted the efficient and fair administration of the tax system.
- C.11.2 Consistent with the IGTO's statutory purpose to improve the tax administration system, and taking the opportunity to learn from the crisis, the observations flowing from the IGTO complaint investigations will inform the broader community of opportunities to improve the tax administration system and help to build taxpayer's trust and confidence, which in turn promotes voluntary compliance. The IGTO has not formed opinions under section 15 of the *Ombudsman Act 1976* and makes these observations public to provide insight on the issues which are of broader concern to the tax profession and new small businesses.

¹⁰⁹ Senate Standing Legislation Committee on Economics, *Inquiry into the Performance of the Inspector-General of Taxation* (report tabled 17 June 2020).

C.11.3 Importantly, there are valuable lessons to be learnt from these insights regarding how the tax system is administered moving forward. These observations highlight improvements that *would* help to mitigate issues that may arise from the design of future tax administrative measures, including those that are leveraged to deliver fiscal support measures to the wider Australian community.

C.11.4 In conclusion, the IGTO considers that there is scope for these observations to be:

- understood by the community — especially tax, accounting, legal and business professionals;
- assessed by the ATO against its internal performance measures and with *appropriate* action *undertaken* in response;
- further investigated by the IGTO as part of a targeted investigation or broader review into the administration of the tax system, as indicated;
- considered by the Auditor-General in determining his forward audit work program; and/or
- noted by Government.

APPENDIX 1 — CHRONOLOGY OF EVENTS

| Date | Summary of event or action taken |
|---------------|---|
| 12 March 2020 | Government announces a \$17.6 billion economic stimulus package to support Australian businesses during the Coronavirus pandemic. This stimulus package includes a Boosting Cash Flow (BCF) support measure to help small and medium sized business to stay in business. ¹ |
| 24 March 2020 | <p><i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF 2020 Act)</i> is passed by Parliament and comes into effect after receiving Royal Assent. The legislation provides that:</p> <ul style="list-style-type: none"> ▪ The Commissioner of Taxation is responsible for the general administration of this Act. ▪ The ATO is to administer the BCF support measure by making payments to entities it determines to be eligible based on the integrity rules, for the periods from March 2020 to June 2020. <p>Payments will be automatically made by the ATO to eligible entities through their Business Activity Statement (BAS).²</p> |
| 24 March 2020 | <p>ATO's TCN is asked to provide technical clearance for BCF webpage wording. TCN changes wording from:</p> <ul style="list-style-type: none"> ▪ "made GST taxable, GST-free or input-taxed sales <i>between 1 July 2018 and 11 March 2020</i> and lodged the relevant activity statement on or before 12 March 2020"; to ▪ "made GST taxable, GST-free or input-taxed sales <i>in a previous tax period (since 1 July 2018)</i> and lodged the relevant activity statement on or before 12 March 2020". <p>TCN opines that "for quarterly taxpayers they must have made the supplies in 2019 since there [sic] last tax period before 12 March ended on 31 December 2019."³ [italics added]</p> |
| 30 March 2020 | Government announces the \$130 billion JobKeeper (JK) support measure to keep Australians in jobs in response to the Coronavirus pandemic. ⁴ |
| 9 April 2020 | <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i> ⁵ is registered under the <i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (JK legislative instrument)</i> ⁶ and comes into effect. The JK support measure is to be administered by the Commissioner of Taxation who is responsible for issuing JK payments to eligible entities. |
| 9 April 2020 | <p>Treasury publishes a Fact Sheet titled "JobKeeper - Frequently asked questions" on its website. The Fact Sheet provides further information and guidance on how the JK support measure will operate for employers, employees, the self-employed and other eligible businesses.</p> <p>The Treasury Fact Sheet identifies that one of the JK eligibility requirements for 'business participants' is to have:</p> |

¹ Prime Minister, 'Economic stimulus package' (Media Release, 12 March 2020) <www.pm.gov.au>.

² *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020*.

³ Australian Taxation Office (ATO), internal communications, 24 March 2020.

⁴ Prime Minister, '\$130 billion Jobkeeper payment to keep Australians in a job', (Media Release, 30 March 2020) <www.pm.gov.au>.

⁵ *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

⁶ *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

| Date | Summary of event or action taken |
|----------------------|---|
| | <p><i>“made a supply during the period 1 July 2018 to 12 March 2020 and provided this information to the Commissioner on or before 12 March 2020 (or such later time as allowed by the Commissioner)”⁷</i></p> <p>The Fact Sheet does not define what is considered as a ‘supply’. However, in relation to determining an entity’s decline in turnover, the Fact Sheet notes that:</p> <p><i>“Turnover (for purpose of determining how much turnover has declined by) will be defined according to the current calculation for GST purposes and is reported on Business Activity Statements. It includes all taxable supplies and all GST free supplies but not input taxed supplies”.⁸</i></p> |
| 12 April 2020 | TCN clears ATO wording for the "Tier 2" content for eligible business participant requirements. ⁹ |
| 19 April 2020 | The ATO starts paying the first BCF payment. |
| 20 April 2020 | <p>ATO publishes information on its website under “Sole traders & other entities” as part of the “we’ve updated our information to reflect the next stage of enrolment” section. It notes that the following is required for an entity to be eligible for JK:</p> <p><i>...it had lodged, on or before 12 March 2020, at least one of: ... an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing that it made a taxable supply, GST-free or input-taxed sale¹⁰</i></p> |
| Fr. 22 April 2020 | Posts from taxpayers on the ATO-moderated ‘ATO Community’ website ask for guidance on a sole trader’s eligibility for JK payments where they have not lodged their 2019-20 income tax return and not registered for Goods and Services Tax (GST). ¹¹ |
| 24 and 25 April 2020 | ATO’s PAL business line circulates to other areas of the ATO the final version of <i>Law Administration Practice Statement 2020/1: Commissioner’s discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies</i> (PS LA 2020/1) which it has "approved". TCN provides affirmative comments on the PSLA and an editorial suggestion. ¹² |
| 1 May 2020 | ATO publishes PS LA 2020/1. Amongst other things, PS LA 2020/1 instructs ATO staff on the exercise of the Commissioner’s discretion to allow an entity further time after 12 March 2020 to provide notice to the Commissioner that an amount of business income should be included in the entity’s assessable income for the relevant period or that the entity made a taxable supply during the relevant period for the purposes of satisfying the eligibility criteria for the BCF payment or the JK payment in respect of an eligible business participant. |

⁷ Australian Government, *Economic Response to the Coronavirus: Job Keeper Payment – Frequently Asked Questions* (9 April 2020), publication on www.treasury.gov.au from 9 April 2020 to 20 July 2020, accessed at <<https://archive.org/web/web.php>> ('JobKeeper FAQ').

⁸ *ibid.* p 3.

⁹ ATO, Internal communications, 24–25 April 2020.

¹⁰ ATO, ‘Sole traders and other entities’ (Web Page, 20 April 2020) <www.ato.gov.au>, accessed at <<https://archive.org/web/web.php>>.

¹¹ ATO, ‘Sole trader eligible for Job Keeper payments’ (thread on Webpage, 22 April 2020 – 4 May 2020) <<http://community.ato.gov.au>>.

¹² ATO, Internal communications 19 April 2020.

| Date | Summary of event or action taken |
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| | <p>According to PS LA 2020/1, further time will likely be granted to an entity that:</p> <ul style="list-style-type: none"> ▪ has a pre-existing lodgement deferral in place; ▪ is a new business established from 1 July 2019 that is not registered or required to be registered for GST, but has made supplies during a period ending between the 1 July 2019 to 12 March 2020 period; or ▪ had exceptional and unforeseen circumstances such as the loss of a significant amount of records due to the recent bushfires.¹³ |
| 5 May 2020 | <p>TCN clearance sought for wording of proposed ATO publication that sets out which classes of entities would not need to apply for the exercise of the discretion under s11 of the JK legislative instrument and includes entities who:</p> <ul style="list-style-type: none"> ▪ are carrying on active business but not holding an ABN on 12 March 2020, to allow them to obtain an ABN by 23 June 2020, ▪ did not notify the ATO of assessable business income for the 2018-19 financial year, and ▪ did not notify of "sales for a tax period" ending before 12 March 2020.¹⁴ |
| 6 May 2020 | <p>The Tax Practitioner Stewardship Group (TPSG) (an ATO consultative group with members from the ATO and the tax profession) held a special briefing with the following key messages provided in relation to the BCF support measure:</p> <p style="color: #0070C0;"><i>Clients that have not lodged or have a deferral of time to lodge the 2018–19 income tax return will not be disadvantaged or excluded from accessing the cash flow boost credits provided that an activity statement has been lodged within the period of 1 July 2018 and 12 March 2020, showing taxable supplies. Credits will be automatically applied.</i></p> <p style="color: #0070C0;"><i>In circumstances where clients have not lodged income tax returns or activity statements for these periods and consider they would otherwise be eligible for the cash flow boost, they should contact the ATO to provide evidence of their business activities to confirm eligibility.¹⁵</i></p> |
| 7 May 2020 | ATO commences paying JK to entities. ¹⁶ |
| 8 May 2020 | Tax and accounting professional bodies raise concerns with the ATO's application of the JK integrity rule at a meeting held by the National Tax Liaison Group (NTLG) (an ATO consultative group with members from the ATO, Treasury and the tax profession). ¹⁷ |
| 11 May 2020 | PSLA 2020/1 is updated by the ATO to clarify that the discretion to grant further time after 12 March 2020 to provide notice of a taxable supply to the Commissioner will likely be exercised for a new entity established from 1 July 2019 that is not registered nor required to be registered for GST. ¹⁸ |

¹³ ATO, *Law Administration Practice Statement 2020/1: Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies* (1 May 2020) ('PS LA 2020/1').

¹⁴ ATO, internal communication (attachment to email), 9 June 2020.

¹⁵ ATO, 'Tax Practitioner Stewardship Group special briefing 6 May 2020' (Web Page, 19 May 2020) <www.ato.gov.au>.

¹⁶ ATO, 'Tax Practitioner Stewardship Group special briefing 13 May 2020' (Web Page, 22 May 2020) <www.ato.gov.au> ('TPSG briefing 13 May 2020').

¹⁷ Meeting referred to in Joint bodies submission, below n 25.

¹⁸ ATO, PS LA 2020/1, above n 13.

| Date | Summary of event or action taken |
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| 13 May 2020 | <p>The ‘key messages’ of the 13 May 2020 TPSG special briefing provide answers to frequently asked questions about the BCF support measure, which was an action item from the 6 May 2020 TPSG special briefing, including:</p> <p><i>Is a new annual lodger who commenced in 2019–20, or a quarterly lodger who commenced post 1 January 2020 entitled to the cash flow boost?</i></p> <p><i>No they are not entitled to the cash flow boost.¹⁹</i></p> |
| 20 May 2020 | <p>TPSG special briefing given. The ‘key messages’ record that the ATO gave an update on the JK support measure, including:</p> <p><i>In addition to focusing on processing payments as quickly as possible we have started verification work to confirm information provided on applications. Entities who have had no signs of business activity are given 14 days to confirm and demonstrate that they are still in business.²⁰</i></p> |
| Fr. 5 June 2020 to 15 December 2020 | <p>IGTO receives 66 complaints about ATO decisions regarding the eligibility criteria and JK and BCF integrity rules as applied to new business entities.</p> |
| 9 June 2020 | <p>TCN approves wording for the communication of the Commissioner's discretion relating to ABN and lodgement requirements for JK purposes.²¹</p> |
| Fr. 10 June 2020 | <p>IGTO commences complaint investigations in response to complaints about ATO decisions regarding new business entities eligibility for the JK and BCF support measures. These complaint investigations involved meetings with the relevant ATO business areas to discuss the JK and BCF integrity rules and explore what discretions or alternative administrative solutions may be available to the ATO with respect to new entities.</p> |
| 10 June 2020 | <p>TPSG special briefing given. The ‘key messages’ record that amongst other things, the ATO advised the following in relation to the BCF support measure:</p> <p><i>We have issued notifications to taxpayers where we have determined that they are not eligible based on the information that we have. This could be due to having a backdated pay as you go role that was established after 12 March 2020, or where they have not lodged their income tax return by the due date and did not have a deferral in place.</i></p> <p><i>We are contacting clients in cases where we are seeking further information to confirm eligibility. There are several cases outstanding where we have not been able to contact the client by email, however they will be contacted through postal mail this week.²²</i></p> |
| 11 June 2020 | <p>NTLG meeting held, during which the consultation process of the JK support measure was discussed. At this meeting, Treasury noted that:</p> |

¹⁹ ATO, TPSG briefing 13 May 2020, above n 16.

²⁰ ATO, ‘Tax Practitioner Stewardship Group special briefing 20 May 2020’ (Web Page, 26 May 2020) <www.ato.gov.au>.

²¹ ATO, internal communications (attachment to email), 9 June 2020.

²² ATO, ‘Tax Practitioner Stewardship Group special briefing 10 June 2020’ (Web Page, 30 June 2020) <www.ato.gov.au>.

| Date | Summary of event or action taken |
|--------------|--|
| | <i>"it was a very limited consultation in relation to the initial rules due to time constraints. The consultation process was successful in that feedback was provided quickly and had identified the key issues."</i> ²³ |
| 17 June 2020 | ATO asks tax and accounting professional bodies to give feedback on its draft JK compliance letters. ²⁴ |
| 19 June 2020 | <p data-bbox="411 533 1417 622">Joint letter from 9 tax and accounting professional bodies to Treasury on the accessibility and administration of JK and BCF support measures for new businesses and start-ups. A copy of the correspondence is also sent to the ATO.</p> <p data-bbox="411 640 1417 730">The letter notes that external members of the NTLG have identified a lack of access to stimulus measures for new businesses and the restrictive nature of the 'notice' in relation to a 'tax period' requirement on certain new businesses.</p> <p data-bbox="411 748 1417 913">Concerns are also raised about the ATO commencing the sending of JK cessation letters to new businesses that have failed to meet the tax period notice requirement. The Professional Bodies recommend that the 'notice' requirement should be amended by importing an assumption that either a monthly or quarterly tax period applies, and to allow the Commissioner to use other evidence of 'making a taxable supply'.²⁵</p> |
| 25 June 2020 | Accountant's Daily publishes an article that identifies the 19 June 2020 joint professional bodies letter and provides details of the contents. ²⁶ |
| 29 June 2020 | As part of its complaint investigations, the IGTO asks the ATO to explain whether it has any discretion to consider as eligible for the BCF payments those entities that were actively trading prior to 12 March 2020 but did not have a tax period ending before 12 March 2020. |
| 30 June 2020 | IGTO announces the commencement of a Review Investigation into the effectiveness of ATO communications to complain, review and appeal decisions made or actions taken by Tax Officials. |
| 1 July 2020 | ATO provides response to the IGTO's information request on 29 June 2020 and advises that it does not have any discretion to consider entities as eligible for BCF payments where they were actively trading prior to 12 March 2020 but did not have a tax period ending before 12 March 2020. |
| 2 July 2020 | The Guardian publishes an article regarding the ATO's compliance activities that determined some businesses were ineligible for the JK payment because they "started business on or after 1 January 2020". ²⁷ |
| 14 July 2020 | IGTO meets with the ATO as part of the complaint investigations to seek the ATO's views on what alternative solutions have or can be considered in circumstances where an entity is determined to be |

²³ ATO, 'National Tax Liaison Group key messages 11 June 2020' (Web Page, 15 October 2020) <www.ato.gov.au>.

²⁴ Correspondence referred to in Joint bodies submission, below n 25.

²⁵ CPA Australia, CAANZ, The Tax Institute, The Institute of Certified Bookkeepers, Institute of Public Accountants, Tax & Super Australia, National Tax and Accountants Association Ltd, Australian Bookkeepers Association and Association of Accounting Technicians, letter to The Treasury, 19 June 2020 <<https://www.cpaaustralia.com.au/-/media/corporate/allfiles/document/covid-19/government-advice/joint-bodies-submission-covid-19-stimulus-and-new-business.pdf?la=en&rev=51e3b406bbd14b05ba1e1bbab042eeda>> ('Joint bodies submission').

²⁶ Jotham Lian, 'ATO JobKeeper termination letters set to debut as professional bodies push back' *Accountants Daily* (Online), 25 June 2020 <www.accountantsdaily.com.au>.

²⁷ Elias Visontay, 'Tax office tells some businesses who received jobkeeper they were not entitled to payments', *The Guardian*, 2 July 2020.

| Date | Summary of event or action taken |
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| | ineligible for BCF payments despite actively trading prior to 12 March 2020. The IGTO also asks the ATO to clarify what information it has put forward to Treasury about the issue. |
| 15 July 2020 | IGTO obtains copies of ATO template decision letters for consideration as part of the Review Investigation into the effectiveness of ATO communications to complain, review and appeal decisions made or actions taken by Tax Officials. |
| 21 July 2020 | Treasury publishes a report of its review into the JK support measure, <i>The Job-keeper payment: Three month Review</i> . ²⁸ |
| 23 July 2020 | In response to the IGTO's questions at the 14 July 2020 meeting, the ATO advises that it is required to administer the law the way it is written and that any equity issues are a matter of policy. The ATO also notes that it has provided Treasury with information on its administration of the BCF support measure, including its interpretation of the legislation in respect of the eligibility of new businesses. |
| 24 July 2020 | ATO settles internal documentation that sets out an informal review post-objection decision informal review process for JK eligibility disputes. ²⁹ In this process, post-objection decision disputes that are received via ATO case officers, IGTO or Australian Small Business and Family Enterprise Ombudsman (ASBFEO), are assigned to technical officers for review. These officers may obtain further information and consult with other technical officers including TCN, before notifying the taxpayer of the outcome of their review of the JK objection decision. The ATO advises that the first such reviews were finalised in August 2020. ³⁰ |
| 30 July 2020 | <p>IGTO informs the ATO that it requires the involvement of its Senior Executive Service (SES) as part of the ongoing complaint investigations into new business entities' eligibility for the JK and BCF support measures. The areas of focus specified in the IGTO's notice of investigations included:</p> <ul style="list-style-type: none"> ▪ clarifying the ATO's precedential view of the BCF and JK integrity rules ▪ whether the ATO's administrative application of that view would cause unfairness to or discriminate against some new businesses, and ▪ options for resolution that would minimise the risk of unfairness.³¹ |
| 31 July 2020 | House of Representatives Standing Committee on Tax and Revenue (SCTR) Chair Mr Jason Falinski MP raises concerns and asks questions of the ATO and the IGTO about the fairness of certain ATO BCF compliance activities, during a SCTR's hearing that is part of its Inquiry into the Commissioner of Taxation Annual Report 2018-19. ³² |
| 2 August 2020 | In relation to a case under appeal in the AAT, the ATO is alerted to example number 5 in PSLA 2020/1 and that it should not be applied inflexibly or in isolation from the range of relevant considerations identified elsewhere in that PSLA. ³³ Example number 5 concluded a sole trader, who did not register for GST, was not eligible for JK payments because she did not have an ABN on 12 March 2020, notwithstanding the fact that she had operated a business for a number of years. |

²⁸ Treasury, *The Job—keeper payment: Three month Review*, 21 July 2020.

²⁹ ATO "JobKeeper Review and Objections Process: Post-objection informal review", (internal document provided to IGTO) 24 July 2020,

³⁰ ATO, communication to IGTO, 6 November 2020.

³¹ IGTO, Communication to the ATO, 30 July 2020.

³² Commonwealth, *Commissioner of Taxation annual report 2018—19*, House of Representatives Standing Committee on Tax and Revenue, 31 July 2020, p 16 (Jason Falinski).

³³ ATO, communication to IGTO, 6 November 2020.

| Date | Summary of event or action taken |
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| 3 August 2020 | ATO's RDR business line starts work to identify specific adverse ATO decisions in JK eligibility cases where the entity was carrying on a business without an ABN and that may be impacted by the 2 August 2020 alert. ³⁴ |
| 6 August 2020 | ATO identified 282 entities that had their JK payments denied on the same basis illustrated by example number 5 in PSLA 2020/1 (i.e. the entity conducted a business but did not have an ABN on 12 March 2020). Only 15 of these 282 entities had applied for a backdated ABN and objected to the ATO's adverse decision. The ATO identified that 148 of these entities may need the ATO to exercise a discretion to qualify. ³⁵ |
| 7 August 2020 | <p>IGTO meets with senior ATO SES as part of the complaint investigations and discusses:</p> <ul style="list-style-type: none"> ▪ whether the JK and BCF integrity rules require a 'tax period' to have ended before 12 March 2020; ▪ the administrative and interpretative options that may be open for genuine businesses that started trade after 1 January 2020 to access the JK and BCF support measures; and ▪ the ATO's understanding of the policy intent and administrative design for the JK and BCF support measures. <p>The IGTO asks the ATO for written confirmation of its authoritative view on the application of the JK and BCF integrity rules, the potential scale of impact of this view and the scope of administrative/interpretative options to include active businesses that made supplies before 12 March 2020.</p> |
| 11 August 2020 | ATO receives a submission from a taxpayer's representative that asks the ATO to reconsider its approach in determining new businesses' eligibility to the BCF payment to avoid different outcomes due to entities using different entity accounting treatments (eg. cash or accruals) of supplies made before 1 January 2020 and payments received after 31 December 2019. The submission argued that the ATO's approach is technically incorrect as it confuses making of the supply and the application of the GST attribution rules, as well as being an approach that is neither supported by the wording nor intent of the legislation. The representative stated that the affected entities "have been left with no option for further review apart from applying to the Federal Court or the Federal Circuit Court of Australia under the Administrative Decisions (Judicial Review) Act 1977" and that "given that small business which have commenced business in recent times do not have the resources available to take such a path for review." ³⁶ |
| 11 August 2020 | <p>ATO's RDR business line places two types of BCF/JK objection cases on hold, pending TCN advice. In these cases, the ATO decided that the integrity rule was not met due to:</p> <ul style="list-style-type: none"> ▪ the entity making a supply prior to 1 January 2020, but not receiving payment until after 1 January 2020; or ▪ the entity not reporting a pre 1 January 2020 taxable supply but may have made a pre-January 2020 input taxed supply, such as "taking out a loan, opening a bank account, lending money."³⁷ <p>RDR considered seeking evidence of the supplies while awaiting TCN's advice and identifying relevant objection cases on hand as well as those already decided.</p> |

³⁴ *ibid.*

³⁵ ATO, internal communication, 6 August 2020.

³⁶ Taxpayer representative [identity redacted by ATO], "Review of Cash Flow Boost position" (document attached to ATO internal communications), 11 August 2020.

³⁷ ATO, internal communication, 11 August 2020.

| Date | Summary of event or action taken |
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| 13 August 2020 | ATO updates PSLA 2020/1 to remove Section 7 'Who is authorised to exercise the discretion on behalf of the Commissioner'. Information on who is authorised to exercise discretion is made internal and only available to ATO staff via the 'Taxation Authorisation Guidelines'. ³⁸ |
| 17 August 2020 | ATO meets with ASBFEO to discuss BCF and JK objections, acknowledges a number of categories of cases which could be reviewed and agrees to set up a dedicated email address for ASBFEO to refer cases directly to the ATO objections team for review. ³⁹ |
| 19 August 2020 | <p>ATO provides response to information requested by IGTO during 7 August 2020 meeting. The response confirmed the ATO's view as follows:</p> <ul style="list-style-type: none"> ▪ The JK and BCF support measures does not provide it with any discretion in respect of the tax periods to which business income or supplies needed to be attributed. ▪ The term 'tax period' is specifically defined as having the same meaning as in the GST Act 1999. As such, there is no scope to read the provision as being satisfied with taxable supplies being made in 'a period' ending before 12 March 2020 rather than in 'a tax period' ending before 12 March 2020. ▪ Under both JK and BCF support measures, the Commissioner must assume that the entity is registered under the GST Act 1999 for present purposes. Section 27-5 of the GST Act 1999 requires a GST-registered entity to account for GST on a quarterly basis. This is unless the entity elects otherwise or the Commissioner determines otherwise, which could never occur for an entity that is not registered for GST. ▪ The ATO sees no administrative solutions that address the issues raised in IGTO complaint investigations. ▪ It is not open for the Commissioner to use his remedial power to modify the law because a modification would be inconsistent with the ATO's understanding of the policy intent for the JK and BCF support measures. |
| 31 August 2020 | By this date, ATO had finalised 21 post-objection informal reviews of adverse JK decisions. ⁴⁰ |
| 1 September 2020 | <p>IGTO provides a Draft Preliminary View document to the ATO on the application of the JK and BCF integrity rules, requesting ATO comments and confirmation including in respect of the following:</p> <ul style="list-style-type: none"> ▪ JK and BCF support measures modify the GST definition of taxable supply ▪ Tax period is as defined by GST law but the associated attribution rules are not incorporated into that law. ▪ The taxable supply must be made for consideration but there is no requirement for that consideration to be received in the same tax period in which the taxable supply made. ▪ Whether the tax period requirement can operate differently (potential alternative constructions of the JK and BCF integrity rules) - e.g. The word 'that' in the integrity rule can be read as applying to Taxable Supply rather than Tax Period so that the requirement is that a taxable supply is made between 1 July 2018 and 12 March 2020. |
| 10 September 2020 | <p>ATO provide Draft Response to IGTO Draft Preliminary View 1 September 2020. The ATO confirm its views that:</p> <ul style="list-style-type: none"> ▪ The Commissioner agrees that a taxable supply made in a tax period does not require the entity that made the supply to be the entity that receives the consideration and does not require it to be received in the tax period that the supply is made. ▪ The requirement is to have made the taxable supply in a tax period that started on or after 1 July 2018 and ended before 12 March 2020. |

³⁸ ATO, PS LA 2020/1, above n 13.

³⁹ ATO, communication to IGTO, 6 November 2020.

⁴⁰ *ibid.*

| Date | Summary of event or action taken |
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| | <ul style="list-style-type: none"> ▪ The potential alternative constructions are not open to the ATO as they go beyond fixing a simple, grammatical, drafting error which, if uncorrected, would defeat the object of the provision. |
| 11 September 2020 | <p>IGTO meets the ATO to discuss the ATO's response to its Preliminary Draft view document and to test its view of the operation of the JK and BCF integrity rules with senior ATO technical officers. This IGTO view is:</p> <ul style="list-style-type: none"> ▪ The definition of Tax period in the JK and BCF support measures is the same definition in the GST Act 1999, however, the JK and BCF support measures do not incorporate other GST concepts, such as the GST attribution rules. ▪ Therefore, for JK and BCF integrity purposes, an entity may have made a taxable supply in an earlier tax period than the tax period in which they received consideration ▪ The definition of Taxable supply in the JK and BCF support measures is based on the definition of that term in GST Act 1999. And, for GST purposes, although a taxable supply must be made for consideration, there is no requirement for that consideration to be received in the same tax period in which the taxable supply made. ▪ Also, the JK and BCF support measures modifies the GST law definition of taxable supplies so that Taxable Supplies may include input taxed supplies. ▪ Financial supplies are input taxed supplies and (and somewhat counter-intuitively) include the acquisition of particular interests which are identified in Division 40 of the <i>A New Tax System (Goods and Services Tax) Regulations 1999</i> (the GST regulations 1999)), such as: <ul style="list-style-type: none"> - opening an account with a bank (Approved deposit taking institution); - borrowing money (from a financial supply provider); - entering a mortgage over real property; and - buying or selling shares or other securities – including incorporation of a shelf company or acquiring an interest in a managed investment scheme (a type of trust). ▪ Therefore, these financial supplies can amount to taxable supplies for JK and BCF integrity rule purposes. ▪ However, consideration of these types of financial supplies is not always financial and not usually reported through a BAS. ▪ But, lodging a BAS is not an explicit requirement in the JK and BCF support measures and not the only way to provide notice to the Commissioner of the taxable supplies an entity has made. <p>The IGTO and ATO agree to reconvene discussion regarding this IGTO view in the following week.</p> |
| 16 September 2020 | <p>PS LA 2020/1 is updated by the ATO:</p> <ul style="list-style-type: none"> ▪ Additions and amendments are made to the policy intent in Section 2. The following addition was made to explain the requirement to provide notice of a taxable supply made in a tax period that applied to it starting on or after 1 July 2018 and ending before 12 March 2020: <p style="margin-left: 40px;"><i>This requirement ensures that only active businesses which are visible in the tax system with a lodgement period that ends prior to the date the Government commenced announcing measures that would comprise the Coronavirus Economic Response Package would be eligible for the cash flow boost or JobKeeper payment (as it applies to qualifying businesses based on an eligible business participant).⁴¹</i></p> ▪ The discretion to grant further time section was expanded to clarify that an entity is not entitled to further time to provide notice and such a grant will only be given where it is warranted. ▪ The lodgement history of an entity is added as a relevant consideration in determining whether further time to give notice is warranted. |

⁴¹ ATO, PS LA 2020/1, above n 13.

| Date | Summary of event or action taken |
|-------------------|---|
| | <ul style="list-style-type: none"> <li data-bbox="411 309 1417 450"> <p>Six examples were added and two pre-existing examples were amended. The amendment made to one of these pre-existing examples, example 4 in Section 7 of the PSLA, adjusts the facts to make it clear that the entity in the example undertook no further activities in carrying on a business between the start of December 2019 and January 2020, as shown below (changes marked in red):</p> <p><i>Jack commenced a new business selling toys at the start of December 2019.</i></p> <p><i>Jack completed all the necessary registration requirements for his new business, including obtaining an ABN and registering for quarterly GST reporting Jack also however did not undertake any further activities. In January 2020, Jack incurred numerous costs in establishing his business.</i></p> <p><i>However due to delays in setting up the business, Jack did not manage to make any sales during the month of December. Rather the businesses' first sales eventuated in late January 2020.</i></p> <p><i>Because Jack's business did not make any taxable supplies [Footnote 12: Taxable supply for this purpose includes any supply including those that may be GST—free or input taxed. See footnote 6 of this practice statement for more details.] in the December quarter reporting period, the business will not be eligible for either the cash flow boost or JobKeeper payment because it did not make a taxable supply in a tax period that ended prior to 12 March 2020.</i></p> <p><i>As the business did not commence until after 30 June 2019, it is not able to include an amount in its assessable income in the 2018–19 income year.</i></p> <p><i>On behalf of his business, Jack asks the Commissioner to exercise the discretion to allow further time for Jack to notify the Commissioner of the that he made a taxable supplies supply during the relevant period for the purposes of being eligible for both the cash flow boost and JobKeeper payment.</i></p> <p><i>The Commissioner does not exercise the discretion under either measure because Jack's business is ineligible as it did not make a taxable supply in a tax period ending prior to 12 March 2020 [Footnote 13: New businesses that do not have a tax period that ends before 12 March 2020 are similarly not eligible for any cash flow boosts, this includes both the first and second cash flow boosts]. The Commissioner does not have the discretion to extend the date by which an entity can make a taxable supply. The Commissioner can only extend the date by which notice of the made supply is provided. The Commissioner can only extend the date by which notice of the made supply is provided.⁴²</i></p> |
| 16 September 2020 | <p>The Commissioner makes a determination regarding the decline in turnover test and the timing of supplies. The determination allows entities not registered or required to be registered for GST to choose their accounting method for the purposes of the JK and BCF support measure.⁴³</p> |

⁴² *ibid.*

⁴³ Legislative Instrument, *Coronavirus Economic Response Package (Payments and Benefits) (Timing of Supplies Made and Decline in Turnover Test) Rules 2020 (No. 1)*, 16 September 2020.

| Date | Summary of event or action taken |
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| 17 September 2020 | <p>Senator Jacqui Lambie raises concerns regarding new businesses' access to the JK and BCF support measures during the Senate Committee's Inquiry the Australian Government's response to the COVID-19 pandemic. Senator Lambie asks questions to Treasury about:</p> <ul style="list-style-type: none"> ▪ whether the issue of small businesses that were set up at the beginning of the year not being eligible for JK and BCF payments, but would have been if they had lodged their BAS monthly instead of quarterly, has been rectified; ▪ why this issue was not addressed in Treasury's report, <i>The Job-keeper payment: Three month Review</i>; and ▪ whether it can provide a formal response to the accounting bodies who had raised concerns about this issue in April and June.⁴⁴ |
| 18 September 2020 | <p>IGTO holds further meeting with the ATO to confirm its view that financial supplies, which are not reported on a BAS, are considered taxable supplies for the purposes of the JK and BCF support measures. At this meeting, the ATO also clarifies what supporting information is required for an entity to show evidence of financial supplies made in a prior tax period where such supplies are not able to be reported on a BAS. IGTO asks ATO arrange a meeting with its Review and Disputes Resolution (RDR) business line to discuss options to settle outcomes for IGTO complaint investigation cases.</p> |
| 22 September 2020 | <p>ATO provides a written response to the IGTO confirming its views on taxable supplies discussed during the meetings held on 11 September 2020 and 18 September 2020. The ATO confirms that:</p> <ul style="list-style-type: none"> ▪ An entity that makes a financial supply will be regarded as having made a taxable supply under paragraph 11(8)(a) of the JK legislative instrument and paragraph 5(6)(a) of the BCF Act 2020. In order to satisfy the requirements of an entity making a financial supply under section 40-5.09 of the GST Regulations 1999, the entity must have relevantly acquired the interest for consideration and in the course or furtherance of an enterprise. ▪ The Commissioner's views as to when an entity will be carrying on an enterprise are set out in Miscellaneous Taxation Ruling MT 2006/1. Activities that an entity undertakes in carrying on enterprise include activities undertaken in the commencement of the enterprise. An activity will be undertaken in the commencement of an enterprise where it forms part of a series of activities that are planned, organised and carried out in a businesslike manner over a period of time. ▪ An acquisition of an interest mentioned in section 40-5.09 of the GST Regulations 1999 will not be a financial supply, and therefore not be taken to be a taxable supply for the purposes of paragraph 11(8)(a) of the JK legislative instrument and paragraph 5(6)(a) of the BCF Act 2020 where the entity is not carrying on an enterprise. ▪ The Commissioner will consider whether to exercise the discretions in accordance with PS LA 2020/1 which requires consideration of a range of factors. Generally, the fact that an entity had no obligation to notify the Commissioner of the taxable supply, for example where the entity was not registered for GST, will point in favour of exercising the discretion. ▪ The Commissioner acknowledges that entities that may only make infrequent input taxed supplies (for example opening a bank account) may not record those supplies on their BAS. Those circumstances may point in favour of exercising the discretion. This would need to be balanced against other relevant factors and the entity's particular facts and circumstances in determining whether it would be appropriate for the discretion to be exercised. The ATO also notes that the discretion will not be exercised if the entity does not meet other eligibility criteria. ▪ The Commissioner has routinely accepted notification of taxable supplies other than in a BAS. A list of other evidence that the ATO may seek has been on the ATO's BCF website since April 2020. It will often accept other forms of notification that objectively evidence that the entity made a |

⁴⁴ Commonwealth, Senate Select Committee on COVID-19, *Inquiry into Australian Government's response to the COVID-19 pandemic*, 17 September 2020, pp. 10-11 (Senator Jacqui Lambie). Referred to in Accountants Daily: <<https://www.accountantsdaily.com.au/tax—compliance/14860-treasury-passes-the-buck-on-cash-flow-boost-anomaly>>

| Date | Summary of event or action taken |
|-----------------------|--|
| | taxable supply (e.g. invoices, bank statements showing receipt of payments, contracts) in cases where an entity had no lodgement obligation or there was a deferred lodgement due date. |
| 23 September 2020 | <p>IGTO meets with ATO's Review and Disputes Resolution (RDR) business line to obtain an ATO commitment to reconsider adverse JK and BCF eligibility decisions and settle outcomes for IGTO complaint investigation cases. RDR confirms that:</p> <ul style="list-style-type: none"> ▪ The ATO has self-identified a number of objections decisions that may require informal review . ▪ The ATO will informally review every relevant case that progressed to litigation. ▪ The ATO will identify objections to relevant ATO JK and BCF eligibility decisions for informal review. <p>The ATO agrees to informally review ALL cases the IGTO raises with the ATO for reconsideration, consistent with its informal review of all objections and litigation cases. Importantly, these cases will be reviewed without the need for a formal objection to be lodged.</p> |
| Fr. 23 September 2020 | <p>IGTO communicates to all relevant complainants that the ATO has agreed to informally review their eligibility for the JK and/or BCF payments and that an ATO case officer will contact them to discuss further. IGTO is monitoring these complaint cases and will determine the next course of action after the ATO has completed these informal reviews.</p> |
| 30 September 2020 | <p>By this date, ATO had finalised 71 post-objection informal reviews of adverse JK decisions. ⁴⁵</p> |
| Fr. 28 October 2020 | <p>ATO notifies the IGTO of the outcome of its informal review for each complaint. For some complaints, the ATO reverses its original decision as a result of the IGTO's complaint investigation. This leads to the JK and/or BCF payment being made to some entities, resulting in a favourable outcome for these complainants.</p> |
| 31 October 2020 | <p>By this date, ATO had finalised 139 post-objection informal reviews of adverse JK decisions. ⁴⁶</p> |

⁴⁵ ATO, communication to IGTO, 6 November 2020.

⁴⁶ *ibid.*

APPENDIX 2 — DEFINITION OF FINANCIAL SUPPLY

- A financial supply is defined in section 40-5 of the GST Act 1999. This definition references regulation 40-5.90 of the *A New Tax System (Goods and Services Tax) Regulations 1999 (GST Regulations 1999)*

40-5 Financial supplies

*(1) A *financial supply is input taxed.*

(2) Financial supply has the meaning given by the regulations.

- Financial supplies are listed in Regulation 40-5.09 of the GST Regulations 1999. Financial supplies include the provision, acquisition or disposal of an interest in one of the Items listed in subsection (3) as follows:

The provision, acquisition or disposal of an interest mentioned in subsection (3) is a financial supply if:

(a) the provision, acquisition or disposal is:

(i) for consideration; and

(ii) in the course or furtherance of an enterprise; and

(iii) connected with the indirect tax zone; and

(b) the supplier is:

(i) registered or required to be registered; and

(ii) a financial supply provider in relation to supply of the interest.

(2) However, if Division 84 (offshore supplies) of the Act applies to the provision, acquisition or disposal of an interest mentioned in subsection (3), the provision, acquisition or disposal is a financial supply to the extent that it would, apart from subparagraphs (1)(a)(iii) and (b)(i), be a financial supply.

(3) For the purposes of subsections (1) and (2), the interest is an interest in or under a matter mentioned in an item in the following table.

| Financial supplies | |
|--------------------|---|
| Item | An interest in or under ... |
| 1 | An account made available by an Australian ADI in the course of: (a) its banking business within the meaning of the <i>Banking Act 1959</i> ; or (b) its State banking business |
| 2 | A debt, credit arrangement or right to credit, including a letter of credit |
| 3 | A charge or mortgage over real or personal property |
| 4 | A regulated superannuation fund, an approved deposit fund, a pooled superannuation trust or a public sector superannuation scheme within the meaning of the <i>Superannuation Industry (Supervision) Act 1993</i> , or a retirement savings account within the meaning of the <i>Retirement Savings Accounts Act 1997</i> |
| 5 | An annuity or allocated pension |
| 6 | A life insurance business (within the meaning of the <i>Life Insurance Act 1995</i>): (a) which consists of the issuing of life policies (within the meaning of that Act); or (b) to which a declaration under subsection 12(2) or section 12A of that Act applies; or related reinsurance business |
| 7 | A guarantee |
| 7A | An indemnity that holds a person harmless from any loss as a result of a transaction the person enters with a third party |
| 8 | Credit under a hire purchase agreement entered into before 1 July 2012 in relation to goods, if: (a) the credit for the goods is provided for a separate charge; and (b) the charge is disclosed to the recipient of the goods |
| 9 | Australian currency, the currency of a foreign country, digital currency or an agreement to buy or sell any of these 3 things |
| 10 | Securities, including: (a) a debenture described in paragraph (a), (b), (c), (e) or (f) of the definition of debenture in section 9 of the <i>Corporations Act 2001</i> ; and |

| Financial supplies | |
|--------------------|--|
| Item | An interest in or under ... |
| | (b) a document issued by an individual that would be a debenture if it were issued by a body corporate; and |
| | (c) a scheme described in paragraph (e), (i) or (m) of the definition of managed investment scheme in section 9 of the <i>Corporations Act 2001</i> ; and |
| | (d) the capital of a partnership or trust |
| 11 | A derivative |
| 12 | An account made available by a non-resident in the course of carrying on banking business (within the meaning of the <i>Banking Act 1959</i>) in a foreign country in which the entity is authorised under the law of that country to carry on banking business |
| 13 | A foreign superannuation fund (within the meaning of the <i>Income Tax Assessment Act 1997</i>) |

APPENDIX 3 — ATO TEMPLATE DECISION LETTERS

The following template contains three alternative text options to be used depending on whether the entity receiving the letter is registered or required to be registered for GST, and if so, whether it is registered on a quarterly or annual lodgement cycle.



Australian Government
Australian Taxation Office

Your entitlement for JobKeeper payments

Hello,

Contact Name: [Contact Name]
ABN: [XX XXX] #### ##

Thank you for the recent application for the JobKeeper Payment under the business participation entitlement for the entity with the above ABN.

Option 1 – No GST

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that are not registered nor required to be registered for GST).

Our records indicate the entity started business on or after <1 January 2020>.

On this basis the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

Option 2 – Quarterly

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 31 December 2019 (this period applies for entities that report and pay GST quarterly)

Our records indicate the entity started business on or after <1 January 2020>.

On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

Option 3 – Annual GST

To be entitled the entity must, on or before 12 March 2020, have notified the Commissioner of either:

- an amount of assessable income for the 2018-19 income year in relation to carrying on a business, or
- supplies or sales it made between 1 July 2018 and 30 June 2019 (this period applies for entities that report and pay GST annually).

Our records indicate the entity started business on or after <1 July 2019>.

On this basis, the entity would not have assessable business income in the 2018-19 income year, nor would it have made a supply or sale in the period outlined above, as that period ended before the business commenced.

We have therefore determined that the entity does not meet the necessary requirements and is not entitled to receive JobKeeper payments for the periods it applied for under the business participation entitlement.

Your right to a review

If you don't agree with our decision you may lodge an objection within 60 days. For more information on lodging an objection please seek advice from your tax professional of visit ato.gov.au/objection

The entity will not have to repay amounts already paid if it has made an honest mistake.

APPENDIX 4 — SUMMARY OF ATO-PROVIDED SAMPLES OF JK/BCF COMPLIANCE LETTERS

| Support Measure | ABN? | Registered for GST? | When did entity start business (according to ATO)? | Lodged 2019 ITR? | Reported business income (if ITR lodged)? | Notified ATO of supplies/sales by 12/3/20 or deferral date? | ATO advice in communication to entity | Source document* |
|-----------------|------|---------------------|--|------------------|---|---|---|---|
| JK | Yes | No | On/after 1/1/20 | n/a | n/a | No | Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days | ATO template decision letter – Option 1 |
| JK | Yes | Yes (Qtr) | On/after 1/1/20 | n/a | n/a | No | Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days | ATO template decision letter – Option 2 |
| JK | Yes | Yes (Annual) | On/after 1/1/20 | n/a | n/a | No | Decided entity was not entitled. ATO concludes entity did not make sale or supply in tax period ending before 12/3/20. Notified entity of right to lodge objection within 60 days | ATO template decision letter – Option 3 |
| JK | Yes | No | 1 Jul – 31 Dec 2019 | No | n/a | | Wait [unspecified] days for t/p contact before making adverse decision | Sample 1 Letter |
| JK | Yes | No | 1 Jul – 31 Dec 2019 | No | n/a | No | Wait 14 days for t/p contact before making adverse decision | Sample 2 letter |
| JK | Yes | No | 1 Jul – 31 Dec 2019 | Yes | No | No | Wait 14 days for t/p contact before making adverse decision | Sample 3 letter |
| JK | Yes | Unspecified | Unspecified | Unspecified | Unspecified | Unspecified | Advised that payment was pending review. ATO may contact if need further information. | JK Review SMS/email |

Appendix 4 —ATO-provided samples of JK/BCF compliance letters

| Support Measure | ABN? | Registered for GST? | When did entity start business (according to ATO)? | Lodged 2019 ITR? | Reported business income (if ITR lodged)? | Notified ATO of supplies/sales by 12/3/20 or deferral date? | ATO advice in communication to entity | Source document* |
|-----------------|-------------|---------------------|--|------------------|---|---|---|--|
| BCF | Unspecified | Unspecified | Unspecified | Unspecified | Unspecified | No | (NB: ATO had previously determined entity was not eligible to receive BCF payment). Advised t/p of limited circumstances where ATO would give more time to notify of assessable income or taxable supply. Invited t/p contact by 30/6/20 | BCF letter – Sample June 2020 |
| BCF | Unspecified | Unspecified | Unspecified | Unspecified | Unspecified | No | (NB: ATO had previously determined entity was not eligible to receive BCF payment.) ATO was responding to t/p contact about their eligibility). Advised t/p did not meet criteria, gave website address for more information, would reconsider decision not to pay BCF if information provided within 3 weeks. | BCF letter – Sample July 2020 |
| BCF | Unspecified | Unspecified | Unspecified | Unspecified | Unspecified | No | (NB: ATO had previously determined entity was not eligible to receive BCF payment.) T/p had contacted ATO and then given further information to ATO). ATO determined entity did not meet eligibility criteria as the required notice not received. Notified entity of right to lodge objection within 60 days | BCF letter – Sample Dec - Response to t/p provided information |
| BCF | Unspecified | Unspecified | Unspecified | Unspecified | Unspecified | No | (NB: ATO had previously determined entity was not eligible to receive BCF payment.) T/p had contacted ATO, but had NOT given further information to ATO). ATO determined entity was ineligible. It did not declare business income or sales before 12/3/20, and PAYG withholding registration was not active on | BCF letter – Sample Sept – no further information given by t/p |

| Support Measure | ABN? | Registered for GST? | When did entity start business (according to ATO)? | Lodged 2019 ITR? | Reported business income (if ITR lodged)? | Notified ATO of supplies/sales by 12/3/20 or deferral date? | ATO advice in communication to entity | Source document* |
|-----------------|-------------|---------------------|--|------------------|---|---|--|--|
| | | | | | | | 12/3/20. Advised to contact specific ATO number, tax agent or lodge an objection. | |
| BCF | Unspecified | Unspecified | On/after 1 Jul 2019 | Unspecified | Unspecified | No, but a lodgement deferral previously agreed with ATO | ATO asks for t/p to call the ATO before 30/6/20 to notify of any assessable income or taxable supplies made in the relevant periods. | BCF letter – Sample June – Lodgement deferral in place |

Note: Shaded rows denote the ATO template decision letters which were the subject of complaints raised with the IGTO and are contained in Appendix 3.

* Source: ATO communication to IGTO 8 December 2020, including pro-forma copies of letters

APPENDIX 5 — ATO RESPONSE TO THE IGTO REPORT

GPO BOX 9990 SYDNEY NSW 2001



Australian Government
Australian Taxation Office

Karen Payne
Inspector-General of Taxation and Taxation
Ombudsman
Office of the Inspector-General of Taxation and
Taxation Ombudsman Level
6, 321 Kent Street SYDNEY
NSW 2000

17 December 2020

Dear Karen,

Thank you for providing an opportunity to consider your report *Aspects of the ATO's Administration of JobKeeper and Boosting Cash Flow Payments for New Entities*, which we note applies to a very small number of cases on a specific technical issue.

We also thank the IGTO for your commendation of our responsiveness to meet the economic challenges brought about by COVID-19. We are particularly pleased that this view has also recently been supported by the ANAO which has acknowledged the suitability of our risk management approaches for these programs in such a dynamic environment and made no recommendations to change the ATO's approaches.

Both the JobKeeper and Cash Flow Boost measures were of an unprecedented scale. We are proud of the ATO's contribution in rapidly delivering these stimulus measures resulting in \$100 billion in financial support payments being made to over 1 million businesses, which support over 6 million Australian workers.

Independent scrutiny of the ATO is an important part of sustaining confidence in the administration of Australia's tax and superannuation systems. We therefore welcome observations that assist in this endeavour.

However, we note that there are observations, conclusions and inferences in the report that the ATO does not agree with, which do not fully reflect the ATO's view or the information provided about our approach.

Our usual business practice in the development and implementation of new programs is to design client-centred administrative and communication strategies, whilst continually refining approaches. We did this in relation to these large-scale programs as they matured.

The ATO's commitment to procedural fairness is always a central feature in the design of our processes, procedures and practices and of our administrative approaches. To that end, the JobKeeper and Cash Flow Boost measures were implemented to provide multiple opportunities for clients to demonstrate their eligibility, including by bringing additional information forward. Our approach also encompassed accessible and cost-effective formal and informal review options for clients to seek reconsideration of decisions should they wish to do so.

Our approach to our public advice and guidance was to provide timely and clear information that could be readily understood by broad audiences. This was supported by active engagement with the community and the tax profession to identify areas of uncertainty. This allowed us to refine our guidance.

The implementation of the stimulus measures has seen the ATO connect with the community more than ever before, delivering tens of millions of payments and credits to businesses and supporting the community when they need it most. We are honoured to have delivered such an extraordinary program on behalf of the Government.

Sincerely,

A handwritten signature in black ink, appearing to be 'K. Fish', written over a faint circular stamp or watermark.

Kirsten Fish, Acting Second Commissioner, Law Design and Practice

APPENDIX 6 — GLOSSARY AND SHORTENED TERMS

| Defined terms and Acronyms | Full/Defined term |
|---|---|
| AAT | Administrative Appeals Tribunal |
| ABN | Australian Business Number |
| ADI | Approved Deposit Taking Institution |
| ATO | Australian Taxation Office |
| ATO template decision letters | ATO letters, based on pro forma wording, that advised entities of an ATO decision to consider them as ineligible to receive JK payments |
| BAS | Business Activity Statement |
| BCF | Boosting Cash Flow |
| BCF Act 2020 | <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i> |
| BCF support measure | A \$6.7 billion cash flow assistance scheme for employers to support Australian businesses during the COVID-19 pandemic, announced by the Australian Government on 12 March 2020 and enacted into law by the <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020</i> |
| Commissioner | Commissioner of Taxation |
| Complaint | <p>A complaint is defined in <i>AS/NZS 10002:2014 Guidelines for complaint management in organizations</i> as:</p> <p>Expression of dissatisfaction made to or about an organization, related to its products, services, staff or the handling of a complaint, where a response or resolution is explicitly or implicitly expected or legally required.</p> <p><i>[Compare this with the Guideline's following definitions:</i></p> <p><i>Disputes – Unresolved complaints escalated internally or externally, or both.</i></p> <p><i>Feedback – Opinions, comments and expressions of interest or concern, made directly or indirectly, explicitly or implicitly to or about the organization, its products, services, staff or its handling of a complaint. Organizations may choose to manage such feedback as a complaint.]</i></p> |
| Complaint investigation | An investigation conducted by the Taxation Ombudsman into complaints and concerns raised about the actions and decisions of tax officials (pursuant to s 7(1)(a) of the IGT Act 2003) |
| COVID-19 economic support measures | A range of measures that were announced by the Australian Government from 12 March 2020 that are part of an economic plan to keep Australians in jobs, keep businesses in business and support households and the Australian |

| | |
|------------------------------------|--|
| | economy as the world deals with the significant challenges posed by the spread of the coronavirus. |
| Entity | An entity is defined in section 960-100 of the <i>Income Tax Assessment Act 1997</i> that is: an individual a body corporate a body politic a partnership any other unincorporated association or body of persons a trust a superannuation fund |
| Financial supply | See the definition provided in Appendix 2 |
| GST | Goods and Services Tax |
| GST Act 1999 | <i>A New Tax System (Goods and Services Tax) Act 1999</i> |
| GST-free supply | <i>A GST-free supply is defined in s. 9-30(a) and Division 38 of A New Tax System (Goods and Services Tax) Act 1999:</i> If a supply is GST-free, then: <ul style="list-style-type: none"> • no GST is payable on the supply; • an entitlement to an input tax credit for anything acquired or imported to make the supply is not affected. |
| GST Regulations 1999 | <i>A New Tax System (Goods and Services Tax) Regulations 1999</i> |
| GST reporting cycle | How often a Business Activity Statement (BAS) needs to be lodged by an entity |
| IGT Act 2003 | <i>Inspector-General of Taxation Act 2003</i> |
| IGTO | Inspector-General of Taxation and Taxation Ombudsman. The acronym “IGTO” is used throughout the report to denote both the “Inspector-General of Taxation”, as named in the enabling legislation, and “Inspector-General of Taxation and Taxation Ombudsman” as recently adopted due to recent calls for greater understanding and awareness of our taxation complaint service function. |
| ITR | Income tax return |
| JK | JobKeeper |
| JK and BCF support measures | <i>Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (BCF Act 2020), Coronavirus Economic Response Package (Payments and Benefits) Act 2020 and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020.</i> |
| JK and BCF integrity rules | <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 s 11 and Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 ss 5–6</i> |

| | |
|----------------------------------|---|
| JK explanatory statement | Explanatory Statement to the <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i> |
| JK legislative instrument | <i>Coronavirus Economic Response Package (Payments and Benefits) Rules 2020</i> |
| JK support measure | a \$130 billion JK payment scheme to keep Australians in jobs in response to the pandemic, announced by the Australian Government on 30 March 2020 and enacted into law by the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 and Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 |
| LD&P | Law Design and Practice Group |
| NTLG | National Tax Liaison Group, an ATO consultative group with members from the ATO, Treasury and the tax profession |
| PAL business line | The ATO's Policy, Analysis and Legislation business line |
| PAYG | Pay As You Go, which are particular types of taxation payment and reporting obligations |
| PS LA 2020/1 | ATO Law Administration Practice Statement, <i>PS LA 2020/1 Commissioner's discretion to allow further time for an entity to register for an ABN or provide notice to the Commissioner of assessable income or supplies</i> |
| RDR | Review and Dispute Resolution |
| SCTR | House of Representatives Standing Committee on Tax and Revenue |
| SES | Senior Executive Service |
| TAA 1953 | <i>Taxation Administration Act 1953</i> |
| TCN | Tax Counsel Network |
| Tax Official | <p>The term 'tax official' is defined in section 4 of the IGT Act 2003 to mean:</p> <ol style="list-style-type: none"> a. an ATO official; or b. a Board member of the Tax Practitioners Board; or c. an APS employee assisting the Tax Practitioners Board as described in section 60-80 of the <i>Tax Agent Services Act 2009</i>; or d. a person engaged on behalf of the Commonwealth by another tax official (other than an ATO official) to provide services related to the administration of taxation laws; or e. a person who: f. is a member of a body established for the sole purpose of assisting the Tax Practitioners Board in the administration of an aspect of taxation laws; and g. receives, or is entitled to receive, remuneration (but not merely allowances) from the Commonwealth in respect of his or her membership of the body. <p>The term 'tax official' is also used to refer to a 'taxation officer' to whom subdivision 355-B of Schedule 1 to the TAA 1953 applies.</p> |

| | |
|-----------------------|---|
| Tax period | <p>A tax period is defined in Division 27 of <i>A New Tax System (Goods and Services Tax) Act 1999</i>.</p> <p>For GST purposes a tax period may be a month, a quarter or a year and refers to how frequently a taxpayer or entity is required to lodge their activity statements.</p> |
| Taxable supply | <p>A taxable supply is defined in section 9-5 of <i>A New Tax System (Goods and Services Tax) Act 1999</i>:</p> <p>You make a taxable supply if:</p> <ul style="list-style-type: none"> (a) you make the supply for consideration; and (b) the supply is made in the course or furtherance of an enterprise that you carry on; and (c) the supply is connected with the indirect tax zone; and (d) you are registered, or required to be registered. <p>However, the supply is not a taxable supply to the extent that it is GST-free or input taxed.</p> |
| TPSG | <p>Tax Practitioners Stewardship Group, an ATO consultative group with members from the ATO and the tax profession</p> |