# client alert | explanatory memorandum

May 2021

**CURRENCY:**
This issue of **Client Alert** takes into account developments up to and including 23 April 2021.

## Keeping you informed about the Federal Budget and Tax Time 2021

The Australian Government will hand down its Federal Budget for 2021–2022 on the evening of Tuesday 11 May 2020.

The Client Alert team will, as usual, work to bring you a special **Budget Extra** edition that outlines the key announcements to assist you in dealing with your clients' queries.

You can expect to receive it on Wednesday 12 May, along with the latest **Tax Return Checklists** to assist your clients in compiling the necessary information before seeing you about their tax returns.

## Independent resolution process for small businesses now permanent

Small businesses now have another pathway to resolve tax disputes, with the ATO making its independent review service a permanent option for eligible small businesses (those with a turnover of less than $10 million). The service was initially conceived as an avenue for small businesses to obtain early and fair resolution in relation to audit positions.

The original pilot commenced in 2018 and centered around income tax audits in Victoria and South Australia. The trial was expanded in 2020 to include income tax audits in all other Australian states and territories, along with other areas of tax including GST, excise, luxury car tax, wine equalisation tax and fuel tax credits. After what the ATO considers a successful multi-year pilot, the service has now become a permanent feature.

"Small businesses who participated in our pilot told us they found the process to be fair and independent, irrespective of the independent review outcome, so this is a great result, and is a big part of why we are locking this service in permanently", ATO Deputy Commissioner Jeremy Geale has said.

An eligible small business can request an independent review if it disagrees with some or all of an audit position and an offer for an independent review has been made by the ATO. However, such a review will not be the first opportunity the business has to respond to ATO audit findings. Initial findings will be disclosed in an interim positions paper, and the small business can raise areas of disagreement before the final audit letter is sent out.

If a small business is eligible for a review, that business's ATO audit case officer will make contact and a written offer of independent review will be included in the audit finalisation letter. If the business wishes to proceed with the review, it will need to contact the ATO through the relevant email address within 14 days of the date of the audit finalisation letter. The ATO notes that such an email must clearly specify and outline each area of disagreement with the audit position.

As a part of the review process, the business will be asked to complete and return a consent form to extend the amendment period, which will allow the ATO to complete the review before the period of review for the relevant assessment ends. According to the ATO, the review cannot be commenced unless the consent form is completed and received.

Where a small business obtains approval to use the independent review service, an independent reviewer will be allocated to the case and contact the business to discuss the process. Although this process involves an in-house ATO officer, this officer will be from a different part of the ATO to the original case officer, and will not have been involved in the original audit.

It is important to note that the areas of superannuation, FBT, fraud and evasion finding, and interest are not covered under the independent review service. Where a small business dispute relates to those areas or the business does not want to pursue the independent review process, other options including lodging an objection or using an in-house facilitation service. Businesses can also raise matters with the Inspector-General of Taxation and Tax Ombudsman or the Australian Small Business and Family Enterprise Ombudsman.

*Source: www.ato.gov.au/Media-centre/Media-releases/ATO-affirms-importance-of-independent-review-service-for-small-businesses-to-help-resolve-disputes/.*

## ATO focus in relation to JobKeeper

The ATO has published a webpage entitled *Keeping JobKeeper payment fair*. In it, the ATO identifies what it sees as areas of concern in relation to JobKeeper, including what may constitute "fraudulent behaviour".

In relation to businesses, the ATO is examining those that have:

- made claims for employees without a nomination notice or have not paid their employees the correct JobKeeper amount (before tax);
- made claims for employees where there is no history of an employment relationship;
- amended their prior business activity statements to increase sales in order to meet the turnover test; and
- recorded an unexplained decline in turnover, followed by a significant increase.

It is also investigating individuals who have knowingly:

- made multiple claims for themselves as employees or as eligible business participants; or
- made claims both as an employee and an eligible business participant.

There is concern about behaviour in what the ATO calls the "JobKeeper extension period" (27 September 2020 to 28 March 2021). This refers to actions that:

- allowed JobKeeper access to entities that would otherwise not meet the actual decline in turnover test (eg deliberately manipulating the timing of billing or receipt of payments);
- deliberately assessed employees or eligible business participants to a higher payment tier than they were eligible to receive.

### JobKeeper payments traded off for employee entitlements

The ATO is paying special attention to situations involving employee rights. It states that, in general, employers were entitled to claim JobKeeper until 28 March 2021 even if the employee is likely to be made redundant after that date. However, it would be concerned if a scheme was entered into where:

- the employee would not receive certain entitlements (such as a redundancy payment) when the employment ends, or they would receive reduced entitlements; and
- wages received by the employee are paid in substitution for payment of entitlements.

The ATO provides the following example.

**Employee made redundant after 28 March 2021**

Malith is an employee of Wicket's Sports Emporium. Wicket's Sports Emporium advises Malith in January that they will make him redundant. Malith's role has effectively come to an end and there are no further duties for him to carry out.

However, Wicket's Sports Emporium gives Malith the option of continuing to receive salary that meets the minimum wage conditions for JobKeeper until the end of March. This option is only provided if he forgoes his entitlement to an eight-week redundancy payment. The salary can be seen as in substitution for the eight-week redundancy payment Malith would normally expect to receive.

In this situation Wicket's Sports Emporium's eligibility to those JobKeeper payments may be denied, based on there being a contrived scheme.

*Source: www.ato.gov.au/General/JobKeeper-Payment/Keeping-JobKeeper-payment-fair/.*

## ATO targets contractors who under-report income

The ATO has advised that it is using its Taxable Payments Reporting System (TPRS) to make sure more than $172 billion of payments to contractors have been properly declared.

According to ATO Assistant Commissioner Peter Holt, more than 158,000 businesses have now reported all payments made to contractors in the 2019–2020 year. The TPRS captures data about contractors who have performed services including couriering (including food delivery), cleaning, building and construction, road freight, information technology, security, investigation and surveillance services.

The ATO is now using this data to contact contractors or their tax agents to ensure that they have declared all of their income, including any from part-time work. The ATO is also checking the GST registration status and Australian Business Numbers (ABNs) of contractors that are businesses to ensure their relevant obligations are met.

In relation to individuals, the ATO is using sophisticated analytics to match the information provided by businesses in the taxable payments annual report (TPAR) to the figures provided on the tax returns of the individual contractors. The taxable payments annual report (TPAR) includes information such as the

contractor's ABN, name, address, and gross amount paid for the financial year. Where discrepancies between business reports and contractor returns are identified, the ATO will send the contractor a letter in the first instance.

For individuals who have inadvertently forgotten to include their income from contracting, an amendment can be lodged for the relevant tax return to correct the mistake. If you lodged your initial return through a tax agent, they are able to complete an amendment to the return on your behalf. If you lodged the return yourself, the easiest and quickest way to lodge an amendment is through myGov. Paper amendment forms can also be lodged, although that process will take longer – according to the ATO, it may take up to 50 business days for paper processing.

While it appears that the ATO will not initially apply any penalties in relation to the under-reporting of contracting income, and taxpayers will only need to pay any additional tax owed, it is likely that those taxpayers that do not respond to the initial ATO letter or lodge the required amendment may face penalties at a future date.

As a reminder, for false and misleading statements made on tax returns that are not reasonably arguable and result in a shortfall amount, the base penalty is 25% of the shortfall amount (for failure to take reasonable care) and penalties can go all the way up to 75% of the shortfall amount (for intentional disregard).

In addition to these penalties, the ATO has the option to apply a shortfall interest charge (SIC) in instances where a tax return is amended and the tax liability increases. The interest charge is updated every quarter, and is 3.01% for the current quarter (April to June 2021). This percentage is applied to the shortfall amount for the period between when the tax would have been due and when the assessment is corrected.

*Source: www.ato.gov.au/Media-centre/Media-releases/Contractors-reminded-to-declare-$172-billion-of-income/.*

## Can your business claim a tax deduction for bad debts?

April 2021 has been a closely observed month financially, with many government COVID-19 economic supports coming away. As with the wind-down of any stimulus measures, many economists have predicted inevitable business casualties in the coming months.

There is also no doubt that some businesses will find themselves owed debts that cannot be recovered from customers or other debtors. Businesses facing this type of unrecoverable debt, commonly known as "bad debt", may be able to claim a tax deduction for the unrecoverable amount, depending on the accounting method used.

If the business accounts for its income on an accruals basis – that is, it includes all income earned for work done during the income year even if the business hasn't yet received the payment by the end of the income year – a tax deduction for a bad debt may be claimable.

In order to claim a deduction for a bad debt, the business must have included the amount in its assessable income either in the current year tax return or an earlier income year. The business will also need to determine that the debt is genuinely bad, rather than merely doubtful, at the time the business writes it off. Whether or not the debt is genuinely bad depends on the circumstances of each case, with the guiding principle being how unlikely it is that the debt can be recovered through reasonable and/or commercial attempts.

According to the ATO, making such attempts does not always mean you need to have commenced formal proceedings to recover the debt. Evidence of communications seeking to obtain payment of debt, including reminder notices and attempts to contact the debtor by phone, mail and email, may be sufficient in certain circumstances.

The next step in claiming a bad debt deduction is to write off the debt as bad. This usually means that the business has to record (in writing) the decision to write off the debt before the end of the income year in which the business intends to claim a deduction. However, the ATO notes that the removal of debt from a customer's account along with a note indicating that it was a bad debt expense may be sufficient.

Companies that want to deduct bad debts have the additional hurdle of satisfying the continuity of ownership test (COT). Those that do not satisfy the COT may still deduct a bad debt if they satisfy the same business test or the similar business test. Other special rules also exist for trusts, including trusts that have made a family trust election.

There may also be GST consequences for businesses when writing off bad debts. For example, where the business accounts for GST on a non-cash basis, a decreasing adjustment can be claimed where the business has made the taxable sale and paid the GST to the ATO, but subsequently has not received the payment. However, the debt will need to have been written off as bad and have been overdue for 12 months or more.

Businesses that account for income on cash basis will not be able to claim a deduction for bad debts. This is because these businesses only include an amount in their assessable income when it is received; therefore, bad debts will have no income tax consequences.

## ATO data-matching: residency for tax purposes

The ATO has announced a new data-matching program that will use information collected from the Department of Home Affairs. It is designed to determine whether business entities and individuals are Australian residents for tax purposes, and whether they have met their lodgment and registration obligations. This is in addition to the existing visa data-matching program, which has been operating for more than 10 years. The new program will include data about passenger movements during the income years 2016–2017 to 2022–2023.

While there are four statutory tests to determine residency (the resides test, domicile test, 183-day test and Commonwealth superannuation test), the ATO will generally consider someone to be an Australian resident for tax purposes if they satisfy any of the following:

- they have always lived in Australia or have come to Australia and live here permanently;
- they have been in Australia continuously for six months or more, and for most of that time worked in one job and lived at the same place;
- they have been in Australia for more than six months of the year, unless their usual home is overseas and they do not intend to live in Australia;
- they go overseas temporarily and do not set up a permanent home in another country; and
- they are an overseas student who has come to Australia to study and are enrolled in a course that is more than six months long.

**Note:** Separate rules exist for working holiday makers and individuals who are tax residents of more than one country.

For business entities, the residency criteria differ depending on the structure (sole trader, ordinary partnership, company, corporate limited partnership or trust). Businesses with the sole trader or ordinary partnership structures are considered to be Australian residents with resident tax obligations if the individuals behind them are residents.

A company is considered to be a resident if it is incorporated in Australia; also, a company that isn't incorporated in Australia may be an Australian resident if its central management and control is in Australia or its voting power is controlled by shareholders who are residents of Australia. The tests for corporate limited partnerships are similar to companies, while the tests for trusts differ based on the type of trust.

The data collected by ATO will include full names, personal identifiers, dates of birth, genders, arrival dates, departure dates, passport information (including travel document IDs and country codes), and status types (eg visa status, residency, lawful, Australian citizen). It is expected that the personal information of approximately 670,000 individuals will be collected and matched each financial year.

According to the ATO, the compliance activities from data obtained will largely be confined to verification of identity and residency status for registration purposes, as well as identifying ineligible claims for tax and superannuation entitlement. In addition to compliance activities, the data will be used to refine existing ATO risk detection models, improve knowledge of overall level of identity and residency compliance risks, and identify potentially new or emerging non-compliance and entities controlling or exploiting ATO methodologies.

The data collected for the 2016–2017 to 2022–2023 income years will be retained for five years from the receipt of the final instalment of verified data files from the Department of Home Affairs. The ATO notes that this will allow it to use the data for multiple risk models, including models that establish retrospective profiles of travellers over multiple years.

*Source: www.legislation.gov.au/Details/C2021G00256.*

## NSW announces tougher penalties for payroll tax avoidance

The NSW Government has announced that it will introduce new legislation to increase penalties for payroll tax avoidance, as well as providing it with the ability to name taxpayers who have underpaid payroll tax on wages.

The changes are directed at those employers who underpay wages, which of course reduces the employers' payroll tax liabilities, but also deprives workers of their due wages. Modelling suggests that this amounts to $1.35 billion in wages per year Australia-wide, and affects some 13% of workers.

Revenue NSW will be able to reassess payroll tax more than five years after the initial tax assessment when wages have been underpaid.

The penalties will be increased five-fold in some instances (as set out in the following table). For example, penalties for making records known to contain false or misleading information and for knowingly give false or misleading information are both up from $11,000 to $55,000.

| Offence | Current penalty | New penalty |
|---|---|---|
| Fail to keep records needed to determine tax liability or to be produced to Revenue NSW as requested, including failure to keep records in English and for the minimum five years | 100 penalty units ($11,000) | 250 penalty units ($27,500) |
| Make or include records known to contain false or misleading information | 100 penalty units ($11,000) | 500 penalty units ($55,000) or, if the offender has previously committed the same offence, 1,000 penalty units ($110,000) |
| Wilfully damage or destroy records | 100 penalty units ($11,000) | 500 penalty units ($55,000) |
| Knowingly give false or misleading information | 100 penalty units ($11,000) | 500 penalty units ($55,000) or, if the offender has previously committed the same offence, 1,000 penalty units ($110,000) or imprisonment of up to two years (or both) |
| Fail or refuse to lodge a document, statement or return as required | 100 penalty units ($11,000) | 250 penalty units ($27,500) |
| Falsify or conceal the identity or location of a taxpayer or another person | 100 penalty units ($11,000) | 500 penalty units ($55,000) |

*Source: www.treasury.nsw.gov.au/sites/default/files/2021-04/Damien%20Tudehope%20med%20rel%20-%20Crackdown%20on%20payroll%20tax%20avoidance%20on%20wage%20theft.pdf.*

## ASIC extends deadlines for financial reports and AGMs

The Australian Securities and Investments Commission (ASIC) has announced that it will extend the deadline to lodge financial reports for listed and unlisted entities by one month for balance dates from 23 June to 7 July 2021 (inclusive). ASIC said the extension will help alleviate pressure on resources for the audits of smaller entities and provide adequate time for the completion of the audit process, taking into account the challenges presented by COVID-19 conditions. This relief will not apply to registered foreign companies.

ASIC will also extend its “no-action” position for public companies to hold their annual general meetings (AGMs) from within five months to within seven months after the end of financial years that end up to 7 July 2021.

The announcement includes the following relief (where applicable) for entities that make use of the extended deadlines:

- similar extended deadlines will be available for sending reports to members (but note that some of those deadlines also operate by reference to the date of the next AGM);
- issuers of continuously quoted securities that use the extended reporting deadlines will not lose the ability to use reduced fundraising disclosures;
- the deadlines for compliance plan audits for registered schemes will be extended by one month;
- where a grandfathered proprietary company uses the extended deadline relief, it will continue to retain its grandfathered status – the directors’ report must disclose that the company has applied ASIC relief to report to members no later than one month after the normal reporting deadline; and

- the reporting deadlines in *ASIC Corporations (Wholly-owned Companies) Instrument 2016/785* will be extended by one month for balance dates from 23 June to 7 July 2021.

The extensions do not apply for reporting for balance dates from 8 January 2021 to 22 June 2021, as ASIC does not consider there to be a general lack of resources to meet financial reporting and audit obligations. However, the regulator will consider relief on a case-by-case basis.

*Source: https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-082mr-asic-to-extend-deadlines-for-30-june-2021-financial-reports-and-amends-no-action-position-for-agms/*


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