October 2020

BUSINESS, TAXATION & INDUSTRY NEWS

JobKeeper rules, conditions and payment rates have changed

Legislation has been put in place to extend the JobKeeper scheme beyond its original sunset date, although the rates of payment and certain other details have been altered. The scheme is now to run until March next year, with one version lasting until 3 January and another version in place from then until 28 March.

Businesses that have been enrolled in JobKeeper do not need to re-enrol to participate in the extended scheme, but the decline in turnover test has now changed from projected GST turnover to actual GST turnover. The decline in turnover percentage remains unchanged at 30% (or 15% for not-for-profits and 50% for entities with more than $1 billion aggregated turnover).

Businesses will need to re-test their eligibility with reference to their actual turnover in the September quarter 2020 to be eligible for JobKeeper fortnights 14 to 20 (28 September 2020 to 3 January 2021). Businesses are generally expected to assess eligibility based on details reported in their BAS, with alternative arrangements put in place for businesses that are not required to lodge a BAS.

Worth noting however is that as the deadline to lodge a BAS for the September quarter or month is in late October, and the December quarter or month BAS deadline is in late January for monthly lodgers or late February for quarterly lodgers (or later under tax agent extensions), businesses will need to assess their eligibility for JobKeeper in advance of the BAS deadline. This may indeed put a great deal of pressure on businesses to complete their turnover results for the September 2020 quarter, but rest assured we are here to help.

Businesses will need to retest their eligibility with reference to their actual turnover in the December quarter 2020 to be eligible for JobKeeper fortnights 21 to 26 (4 January 2021 to 28 March 2021).

As with the first version of JobKeeper, the ATO will have discretion to set out alternative tests that would establish eligibility in specific circumstances where it is not appropriate to compare actual turnover in a quarter in 2020 with actual turnover in a quarter in 2019. The wage condition, based on the tier into which the eligible employee or business participant falls (see below), will continue to be required.

PARTNERS:

Peter Stockdale	FCA
Paul Lunn	FCPA, ICAA
Mark Mellor	CA
Brett Buntain	FCPA, ICAA
Brad Hope	FCA

LOVE & PARTNERS CHARTERED ACCOUNTANTS
Address: 66 Duporth Avenue (Cnr Wharf St), Maroochydore
Postal: P.O Box 299, Maroochydore, QLD 4558, Australia
T: (07) 5443 2600 E: reception@loveandpartners.com
W: www.loveandpartners.com

For JobKeeper fortnights 14 and 15, the ATO has extended until 31 October 2020 the time a business has to pay employees in order to meet the wage condition, so that they have time to first confirm their eligibility for the JobKeeper payment. And note that businesses that did not previously join the original JobKeeper scheme can join the new version of JobKeeper if they meet the eligibility criteria.

The new JobKeeper is a two-tiered payment arrangement based on average hours worked, on an employee-by-employee basis, in the four weeks of pay periods before either 1 March 2020 or 1 July 2020. The payment tiers will be:

	20 hours or more	**Less than 20 hours**
JobKeeper fortnights 14 to 20	$1,200	$750
JobKeeper fortnights 21 to 26	$1,000	$650

The period with the higher number of hours worked is to be used for employees with 1 March 2020 eligibility.

Payments for eligible business participants will be based on the same two-tiered payment arrangement, however the hours of active engagement to determine the payment rate will be based on the month of February 2020 only.

Businesses will be required to nominate which payment rate they are claiming for each of their eligible employees (or business participants). Employers must notify eligible employees of the payment to which they are eligible within seven days of notifying the ATO.

The ATO will have discretion to set out alternative tests where an employee or business participant's hours were not "usual" during the February and/or June 2020 reference periods. For example, this will include where the employee was on leave, volunteering during the bushfires, or not employed for all or part of February or June 2020.

Other eligibility criteria for employees and eligible business participants will be consistent with the first version of the JobKeeper rules, bearing in mind the "1 July 2020" amendments (about eligible employees).

New data matching programs initiated by Federal Government

Over the first quarter of this financial year, the government has initiated two new data matching programs, using data that the ATO holds.

Data matching involves bringing together data from different sources and comparing it. For example, records from different agencies or businesses are compared, with the results possibly identifying people who are being paid benefits to which they may not be entitled, or people who may not be paying the right amount of tax.

For the ATO's part, it can collect data from financial institutions or other agencies and match this with its own information, which is sourced from income tax returns, activity statements and other tax records. In the past, data matching activities have focused on, for example:

- the total credit and debit card payments received by businesses
- information on sellers using online selling platforms
- details of payments made to ride-sourcing drivers from accounts held by the ride-sourcing facilitator.

The ATO then matches this data with information held in its databases to identify any discrepancies.

This time however, the focus is to be on data held by Services Australia (the government body that became the executive agency in February this year in the Social Services portfolio responsible for health, social and welfare payments and services — known by most as Centrelink).

Of the two new programs, one will be looking specifically at comparing information held by the ATO in relation to the JobKeeper payment and information reported to Services Australia's "customers" in relation to social security payments.

The aim, as described in the notice announcing the program, is to uncover people who may be registered for both the JobKeeper program and social security payments, and "identify social security customers who may need extra support to correctly declare their income, to help prevent them getting an overpayment".

A "protocol document" describing the program was developed in consultation with the Office of the Australian Information Commissioner, where it is stated: "This program involves the agency receiving a data file from the ATO which will contain a list of all employees who have been nominated for JobKeeper payment by an eligible employer. The agency will then undertake a matching process of this data against the agency's social security payment customers and claimants."

It says the matching process compares the following fields of data of each payee:

- tax file number
- family name
- given name
- additional name (other name)
- date of birth.

The other exchange of data involves comparing information held by the ATO in relation to Single Touch Payroll (STP) and Services Australia's databases. The aim this time is to enable:

- comparison of pre-filling employer details (as reported through STP) onto Services Australia online services for review by customers,
- the supporting of timely confirmation of employment and establishment of child support employer withholdings (where appropriate),
- the identifying where there is a significant difference between STP income and the estimate the customer has provided to Services Australia, and nudging the customer to suggest that they revisit their income estimate,
- the supporting of existing debt recovery processes, including the contacting of customers with whom contact has been lost,
- analysis of the data with a view to improving Service Australia's processes.

Again a protocol document describing the program was provided, which states that the data matching program "will exchange personal information and employer/employee relationship and payroll data between Services Australia and the ATO where there is a mutual relationship for the individual".

It says part of the objectives of the exercise is to:

- support customers by prompting them to update their income estimates to assist them to receive the right rate of payment at the right time
- reduce employer burden by minimising the contact that employers must have with Services Australia to provide payroll information for activities like:
    - establishing child support employer withholding and
    - existing debt recovery processes

- assist Service Australia with discussion with non-current customers to determine their capacity to repay a debt.

ATO advice, if anyone thinks they've made a mistake or left something out, is to contact either the ATO or their registered tax adviser to correct the mistake or to amend any previously supplied data. "You can also make a voluntary disclosure – we may reduce or even waive penalties if you make a disclosure before we contact you," it says.

SMEs: ATO confirms JobKeeper payments do not contribute to aggregated turnover

From the outset, it has been emphasised that JobKeeper payments are assessable income. However some concerns had been raised as to JobKeeper payment status in regard to being statutory income or ordinary income. And if the latter, whether it is ordinary income derived in the ordinary course of carrying on a business.

If so, JobKeeper payments would be included in aggregated turnover, which determines whether an entity qualifies for a range of concessions and other certain measures, which can include accessing the small business income tax concessions, small business CGT concessions, the instant asset write-off, the refundable R&D tax offset, and the base rate entity tax rate.

But now the ATO has confirmed that although JobKeeper payments are ordinary income, they are not derived in the ordinary course of business, and therefore not included in aggregated turnover.

Electronic execution of documents during COVID-19

The COVID-19 pandemic has prompted state and territory governments to temporarily ease the manner in which documents are executed.

It is now possible under multiple jurisdictions to sign and witness certain documents electronically or via audio visual links. The changes address difficulties in executing documents amid social distancing and stay-at-home restrictions. However the requirements for signing and witnessing documents are highly prescriptive and specific to each state and territory, and you may need to seek legal advice as required depending on your individual situation.

Contracts

Federal legislation and similar legislation in each state and territory provides that electronic signatures are able to be used to validly sign most contracts. While specific requirements in each state and territory vary, a valid electronic signature must usually satisfy three broad requirements:

- Identification: a recipient must be able to identify the person signing the contract and confirm their intention to be bound by it.
- Reliability: the method used to sign the document must be reliable. This is determined by considering all relevant circumstances and the purpose for which the electronic signature is required.
- Consent: the recipient must consent to the document being signed electronically.

Note that there are state and territory-specific exemptions (such as in relation to certain property transactions) and you may need to seek legal advice depending on your particular situation.

Deeds, statutory declarations and affidavits

<u>*Victoria*</u>

The Victorian Government introduced special regulations specific to the COVID-19 pandemic. The Victorian regulations are highly prescriptive in relation to witnessing, signing and the use of video links for certain documents.

These regulations are due to expire on 24 October 2020, and at the time of writing the state government was yet to announce whether they will be extended.

Key changes regarding the remote execution of deeds, powers of attorney, wills, affidavits and statutory declarations include:

- deeds can now be signed electronically in accordance with the requirements of the *Electronic Transactions (Victoria) Act 2000*, subject to other legislative requirements
- in relation to transactions that are governed by the *Electronic Transactions (Victoria) Act 2000:*
  - witnessing signatures by audio visual link is now permitted, subject to the witness writing a statement that they observed the signing by audio visual link
  - signatures are now valid across separate copies of documents
- declaring a statutory declaration is now permitted by audio visual link for the purposes of the *Oaths and Affirmations Act 2018.*

<u>New South Wales and the ACT</u>

The NSW Government introduced regulations this year that permit the witnessing and signing of documents via audio visual links. Relevant documents include deeds, statutory declarations, wills, powers of attorney and affidavits.

Similarly in the ACT, amended regulations also allows the witnessing of documents by audio visual link – namely affidavits, wills and general or enduring powers of attorney.

These laws state that the relevant documents can be witnessed via audio visual link if the witness, in summary:

- observes the person signing in real time
- confirms the signature was witnessed by signing the document or a copy of the document
- is reasonably satisfied the document that the witness signs is the same document (or a copy of the document), signed by the signatory, and
- endorses the document (or a copy of that document) by writing a statement specifying the method used to witness the signing in accordance with the particular legislation.

Queensland

The Queensland Government introduced new legislation and amended existing regulations to broadly allow deeds to be converted into electronic documents and electronically signed. Subject to complying with the requirements of the Queensland regulations, certain deeds no longer need to be witnessed.

Further, the new rules provide for the ability for affidavits, declarations and powers of attorney to be witnessed by audio visual link.

Tasmania

Limited witnessing of documents (including statutory declarations) is now permitted via audio visual link pursuant to new legislation introduced this year. The witness must, in summary:

- observe the person signing in real time
- confirm the signature was witnessed by signing the document (or a copy)
- be reasonably satisfied the document the witness signs is the same document (or a copy of that document), signed by the signatory, and
- endorse the document (or a copy) by stating the signing was in accordance with the legislation.

Western Australia, South Australia and the Northern Territory

The Western and South Australian governments (save as noted below) and the Northern Territory have enacted little or no legislation prescribing remote witnessing and electronic signing of documents in response to COVID-19. This may change in the future as the pandemic situation evolves.

The South Australian Government has however extended the classes of persons who may witness statutory declarations.

Further information

The Australian Government Solicitor's fact sheet provides a comprehensive summary of the requirements that corporations and company officers must satisfy when executing documents remotely. This can be downloaded from www.ags.gov.au/publications/fact-sheets/Fact_sheet_No_38.pdf

Fears of Div 7A danger from COVID-relaxed loan repayments unfounded

The ATO has clarified its position regarding loans, and the repayments of loans that may have been put on hold for the period that COVID-19 has a grip on the economy and our lives.

An important sidebar to the ATO's announcement is the implications regarding Division 7A — just in case you have had some stress about possible Div 7A outcomes because a creditor has not insisted on payment.

In normal circumstances, if a private company forgives a debt, it is considered a deemed dividend under Division 7A — "a debt is forgiven if a reasonable person would conclude a creditor will not insist on payment or rely on the borrower's obligation to pay".

But the ATO states that "allowing more time to repay a debt due to COVID-19 will not result in the debt being treated as forgiven".

Further, it says: "If a creditor only postpones an amount payable and the debtor acknowledges the debt, a debt is not considered forgiven. This is unless there is evidence that the creditor will no longer rely on the obligation for repayment."

Note also that just before the new financial year, the ATO issued an announcement entitled *Request to extend time to make minimum yearly repayments for COVID-19 affected borrowers*. It said, in part: "As a result of the COVID-19 situation, we understand that some borrowers are facing circumstances beyond their control. To offer more support, we'll allow an extension of the repayment period for those borrowers who are unable to make their MYR" (minimum yearly repayment).

Relating as it does to a possible inability of borrowers under Division 7A loan agreements to make the minimum yearly repayment required due to the COVID-19 economic situation, the announcement provided a procedure whereby a borrower who is unable to make repayments on a Division 7A loan can request an extension of time to make the minimum yearly repayment.

The benchmark interest rate for Div 7A purposes, by the way, is 4.52% for the income year ending 30 June 2021, the ATO has announced, and is relevant to private company loans made or deemed to have been made after 3 December 1997 and before 1 July 2020 and to trustee loans made after 11 December 2002 and before 1 July 2020.

SMSF regulations to allow six members under new legislation

A bill has been introduced into Parliament that partially implements a measure to allow an increase in the maximum number of allowable members in self-managed superannuation funds and small APRA funds from four to six.

First floated in the 2018-19 Federal Budget, the remainder of the measure is to be implemented through regulations. The bill also amends provisions that relate to SMSFs and small APRA funds to ensure continued alignment with the increased maximum number of members for SMSFs.

The reasoning behind the move is that SMSFs are often used by families as a vehicle for controlling their own superannuation savings and investment strategies. For families with more than four members, the only real options in the incumbent arrangements are to create two SMSFs (which incur extra costs) or place their superannuation in a large fund. The government says the change will help large families to include all their family members in their SMSF.

In some instances, the number of individual trustees that a trust can have may be limited to less than five or six trustees by state legislation. Such rules could prevent some or all members of a fund with five or six members from being individual trustees. In such cases, the members of a fund can use a corporate trustee in order for the superannuation fund to meet, or continue to meet, the amended definition of an SMSF.

Currently, if an SMSF has more than one director member, its accounts and statements for a year of income must be signed by at least two members in their capacity as individual trustees or as a director of a corporate trustee. As there cannot be more than four members of an SMSF under the current rules, these requirements ensure that all members sign the accounts and statements of SMSFs with one or two members. For SMSFs with three or four members, at least half of the members must sign its accounts and statements for an income year.

Under the updated requirements, an SMSF with one or two directors or individual trustees must have its accounts and statements signed by all of those directors or trustees. For all other SMSFs (that is, those with between three and six directors or trustees), the accounts and statements of the SMSF must be signed by at least half of the directors or individual trustees.

This approach maintains the standard under the previous provisions for funds that have between one and four directors or trustees, and extends the requirement that at least half of the directors or trustees sign the accounts and statements of an SMSF with either five or six directors or trustees.

COVID-19 payments and some issues for companies and trusts

With many having received cash flow boost and JobKeeper payments, there can arise some unique issues where these amounts are received within a trust or company.

The cash flow boost and JobKeeper payment have been flowing to eligible businesses for some time now. These stimulus payments have differing tax treatments, which are:

- the cash flow boost is paid as a credit and is non-assessable non-exempt income, and also free from GST (because it does not represent consideration for a supply)
- the JobKeeper payment is paid directly into a recipient's nominated bank account on completion of monthly reporting obligations. JobKeeper is assessable income, not subject to GST, and not included in activity statements.

Trust distributions

What constitutes trust income is determined by the trust deed or by the trustee where permitted under the trust deed.

It is a common misconception that the trust income available for distribution is equal to the taxable income of the trust. However, this will only be the case where the trust deed defines trust income to equal taxable income, or the trustee, where discretion permits, determines that to be the case.

Cashflow Boost

When considering payments received under the Cashflow Boost, if the trust deed or the trustee determine that non-assessable non-exempt income does not form part of trust income, the Cashflow Boost will not be distributable.

However, where such overt restrictions are not present, or where the trust deed or the trustee determine that non-assessable non-exempt income can be distributed, the Cashflow Boost may be available for distribution to the beneficiaries.

Where the Cashflow Boost is distributed to beneficiaries it will hold its character as non-assessable non-exempt income in the hands of the beneficiary.

JobKeeper

JobKeeper payments will form part of the taxable income of the trust and would be expected to also be trust income as may be defined by the trust deed or the trustee.

Where JobKeeper is received for eligible employees, the amount paid to the employees, and therefore the associated expense/deduction must be equal to or more than the amount JobKeeper payment. Therefore, no net trust or taxable income would arise.

However, JobKeeper amounts received for eligible business participants do not need to be paid to the eligible business participant, as the wage condition does not apply. Therefore, the amounts could be retained within the trust and form part of the trust income distributed at year end.

Franking credits

As the Cashflow Boost amounts are non-assessable non-exempt income, no tax arises on these amounts and it follows that no franking credits will be generated by these amounts. Whether the boost amounts can be paid out as a franked dividend by the recipient company will depend on the balance in the franking account of the company involved and the amount of its accumulated profits.

Company beneficiaries

A key plank of the JobKeeper payment is that a minimum of $1,500 per fortnight amount must be paid to employees (which is then reimbursed to the employer at month-end).

However, where the recipient of an amount is an eligible business participant, there is no requirement for the amount to be paid to that individual. Instead, it can be retained in the company or trust as the case may be. Where a trust does retain the amount, it will then form part of the trust law income to be distributed by the trust to any beneficiary at year-end (see earlier).

Where a trust receives JobKeeper payments and distributes these amounts to a company beneficiary, this can have consequences as to whether that beneficiary then qualifies as a base rate entity for the purposes of qualifying for the lower company tax rate. To recap, to qualify as a base rate entity, a company must not only have an aggregated turnover of less than $50 million, but no more than 80% of its assessable income can be base rate entity passive income. This income consists of the following:

a) corporate distributions and franking credits on these distributions
b) royalties and rent
c) interest income (though some exceptions apply)
d) gains on qualifying shares
e) net capital gains, and
f) an amount included in the assessable income of a partner in a partnership or beneficiary of a trust, to the extent that it is traceable (directly or indirectly) to an amount that is base rate entity income under categories (a) to (e).

Trust distributions received by corporate beneficiaries need to be dissected into their base rate entity component, and their non-base rate entity component. In this case of cash flow boost, it would not count as assessable income in any case and therefore would be disregarded for the purposes of the 80% test. On the other hand, JobKeeper is assessable income, but not passive income for the purposes of the 80% test.

Therefore, the JobKeeper component of trust distributions to a company will improve the chances of the company meeting the 80% test (because it will be assessable income, and not base rate entity passive income). It will therefore qualify the company as a base rate entity for the purposes of accessing the lower 27.5% corporate tax rate (decreasing to 26% from 2020-21).

JobKeeper amendments

There have been some changes made to JobKeeper since our last newsletter. Businesses will need to meet one of the decline in turnover tests for the September 2020 quarter alone (rather than for both the June and September quarters as announced in July) to be eligible for JobKeeper for the period 28 September 2020 to 3 January 2021. Beyond that, businesses will have to meet the decline in turnover tests for the December 2020 quarter to be eligible for JobKeeper for the period 4 January to 28 March 2021.

For the eligible employee test, the reference date for assessing which employees are eligible for JobKeeper is now 1 July 2020 (previously 1 March) with effect from fortnight 10 (3 August 2020). The reference period for employees regarding their hours worked to determine their tier of payment will be the two fortnightly pay periods prior to 1 March 2020 or 1 July 2020. The period with the higher number of hours is to be used for employees who were eligible at 1 March 2020.

The ATO had already extended the wage condition deadline to 31 August for fortnights 10 and 11.

Businesses can claim previous year tax losses

If your business has made tax losses in years to the current one, but you haven't yet offset all those losses, you can still carry these forward and claim a deduction for them in a later year — as long as you meet all the requirements of the tax law.

Your business structure will affect how you can claim business tax losses from the current year or previous years. If you are:

- a sole trader or an individual partner in a partnership, you can generally offset your current or prior year business losses against other income in the same income year (subject to the non-commercial business loss rules that may prevent you from doing so);
- operating your business through a trust, losses must be carried forward by the trust indefinitely until they are offset against future trust income (they cannot be distributed to beneficiaries) – and, furthermore, there are strict requirements that must be met for the trust to be able to use the losses itself;
- operating through a company, you must meet fairly onerous “continuity of ownership” tests or the “same business” test in order to be able to claim current and/or prior year losses.

It is important to be aware that the ATO expects taxpayers to consider each tax loss separately if you are looking at more than one tax loss across multiple years.

If you carry forward a prior year business loss to the current year or a future year, make sure you have correctly applied your past business losses before lodging a tax return. Check that:

- you have accurately reconciled carried forward losses from a prior year to a later year (errors can occur when poor record keeping of losses accumulate)
- you haven't mis-characterised expenses such as capital expenditure and CGT losses as normal business expenses (because, for example, CGT losses can only be offset against CGT gains)
- if your business is a specific entity, such as a private company, that you have considered the relevant tests linked to same or similar business tests when applying prior year losses to a current year, where the business ownership or the nature of the business activity has sufficiently changed (as indicated above).

Remember, we are here to help if you have any questions or need clarification about claiming business losses.

COVID-19 and trust liquidity issues

The ATO has highlighted the fact that due to COVID-19, a trustee may experience liquidity issues that may affect a trust's ability to satisfy a beneficiary's entitlement. This may happen where financial institutions impose restrictions that affect the way a trustee can deal with its assets.

The ATO states that where a present entitlement arose before any effect of COVID-19, in circumstances that were not a reimbursement agreement, trustees may need to make subsequent arrangements to meet the requirements of the financial institution. If that occurs, these arrangements will not invalidate that entitlement nor trigger other taxation impediments.

"For present entitlements conferred at the end of the last tax year, the law will apply based on the facts presented," it says. "We won't undertake compliance action to consider the validity of an entitlement … in circumstances where a trustee is affected by liquidity issues due to COVID-19 and unable to satisfy the entitlement."

The ATO also reminds trustees of the importance of complying with the terms of their trust deeds. It says that for cases under review, it will continue to apply the law. Further, the ATO says that its compliance approach is intended to provide relief and certainty to trustees and associated private groups who experience genuine liquidity difficulties as a result of COVID-19, and assures affected parties that it will monitor behaviour to ensure this approach works as intended.

COVID-19 and SMSF rental relief

The Federal Government announced a six-month moratorium on evictions of commercial and residential tenants during the COVID-19 health pandemic. This moratorium (and its accompanying code of conduct leasing principles) will inevitably affect SMSFs, which are reasonably heavily invested in real property, according to statistics.

LEASING PRINCIPLES

A moratorium on evictions means that SMSF landlords face the real prospect of tenants falling behind on their rent. However, this does not mean that the tenant is not required to pay rent during the moratorium period. Rather, broadly speaking, parties are encouraged and indeed required to negotiate a rental reduction, deferrals, or rent-free periods if the tenant needs. In terms of commercial rents, a mandatory code has been developed and applies if a tenant or landlord is eligible for JobKeeper payments and has a turnover of less than $50 million. The code includes a common set of principles that must be adhered to, including:

- landlords must not terminate leases for non-payment of rent during the COVID-19 pandemic (or reasonable recovery period)
- tenants must stay committed to their lease terms (subject to amendments)
- landlords must offer reductions in rent (as waivers or deferrals) based on the tenant's reduction in trade during COVID-19
- benefits that owners receive for their properties (eg reduced charges, land tax, deferred loan payments from banks) should be passed on to the tenant proportionately.

However, granting rental relief – where not carefully justified and documented – can present considerable compliance risks for SMSF landlords. This includes fines of up to $12,600 per trustee and/or in serious instances the SMSF being deemed non-complying, in which case the value of its assets as at the commencement of the income year could be taxed at 45%.

NON ARM'S LENGTH TENANTS

Where the property is held by the SMSF and the tenant is a "related party" of the SMSF trustee, unless care is taken, evidence gathered, and the arrangement is properly documented, there is a real risk that, in granting rental relief, breaches of the following provisions of the SIS Act may result.

- The sole purpose test. In granting rental relief, the SMSF trustee may not be deemed to be acting with the sole purpose of maximising the retirement benefits of members of the fund, but rather acting to assist the related party with their rental expenses.
- The arm's length test. In granting rental relief to a related party, it may be considered that the fund is not maintaining all investments and transactions at arm's length, in the same way as they would deal with an unrelated party.
- In-house asset test. In providing rent relief, is the SMSF providing a loan to the related party tenant? In the unlikely event that this loan exceeds 5% of the value of the fund's assets, the fund can be deemed to be non-complying.
- Prohibition against lending or providing financial assistance to a member or relative. In granting relief to the tenant member or relative, could it still be said that the arrangement is still on commercial or arm's length terms so as to avoid being deemed "financial assistance"?

It is, however, important to note that the ATO updated its auditor/actuary contravention report (ACR) instructions for the 2019-20 income year to state SMSF auditors will not be required to report in the ACR breaches of the sole purpose test and in-house provisions that may occur as a result of COVID-19 rent relief measures.

ARM'S LENGTH TENANTS

Although the risk is less acute, with potentially only the sole purpose test in play, the same careful evidence gathering and documentation is recommended where rental relief is granted to a party who is not related to the SMSF trustee. Unless it can be demonstrated that the relief granted was actually still in the broader interests of the SMSF, then a breach of the rules is a possibility.

JUSTIFICATION

To establish a strong case for granting rental relief, SMSF trustees should obtain sufficient evidence including the following where applicable:

- the financial circumstance of the tenant. In terms of evidencing this, it may take the form of:
  - their eligibility for JobKeeper (which itself requires evidence of a downturn in turnover)
  - year-to-date financial statements
  - cashflow forecasts
  - a report from the tenant's registered tax agent that the tenant is experiencing COVID-19-related financial difficulties that may impact their ability to pay the agreed rate of rent
- government restrictions that may impact the tenant long-term, such as those imposed on large restaurants where, even when they are permitted to open, social distancing requirements in the venue may still nonetheless impact capacity and profitability
- any comparable rental relief that is being offered by arm's length landlords to their tenants
- the difficulty in leasing out the property to a new tenant, should the current tenant default on the lease. The location of the property, or the type of property may mean that retaining the current tenant – even with rental relief – is in the long-term best interests of the SMSF, particularly where the current tenant has an otherwise good history in terms of paying on time and looking after the property
- to the above point, if the property was untenanted, it may be more difficult to obtain insurance cover. Additionally, untenanted properties are arguably more vulnerable to break-ins and natural deterioration/rundown.

It is important that any rental relief that is granted is proportionate to the above, and that the new arrangement is properly documented by amending the lease agreement between the parties, including the reasons for any reductions.

In summary, where the related-party lender provides any relief to the SMSF that is not comparable to an arm's-length arrangement (that it may offer unrelated parties in these fraught economic times), then the ATO may then apply the non-arm's length rules to tax any net income or future capital gain from the property (for the entire future period of ownership) at the top individual marginal tax rate. Whether these provisions are applied may ultimately depend on whether the SMSF can justify with documented evidence that the decision to alter repayment terms is done on a commercial basis as if the parties were unrelated.