

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Coronavirus Economic Response Package (Payments and Benefits) Act 2020

*Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules
(No. 2) 2020*

Subsection 20(1) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act) provides that the Treasurer may make rules prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Subsection 7(1) of the Act provides that the rules may make provision for and in relation to one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period (the period between 1 March 2020 and 31 December 2020), and the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme. Any payments must relate to the prescribed period.

The object of the Act is to provide financial support to entities to assist with the impact of the Coronavirus known as COVID-19. In particular, the Act establishes a framework for the Treasurer to make rules about one or more kinds of payments to an entity in respect of a prescribed period.

On 30 March 2020, the Australian Government announced a wage subsidy called the JobKeeper payment for entities that have been significantly affected by the economic impacts of the Coronavirus. In support of the Act, the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) establish the JobKeeper scheme and specify details about the scheme, including when an employer or business is entitled to a payment and other matters relevant to the administration of the payment.

The purpose of the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (the Amending Rules No. 2) is to refine and clarify elements of the JobKeeper scheme to ensure that it most appropriately supports businesses and employees affected by the significant economic impact caused by the Coronavirus. In particular, the Amending Rules No. 2:

- provide a modified decline in turnover test for certain group structures;
- adjust the way in which Commonwealth payments are treated when calculating a university's turnover;
- extend the JobKeeper scheme to certain charities that undertake overseas aid and disaster relief;
- adjust the way in which payments made by the government and the United Nations are treated when calculating a charity's turnover;

- include a notification requirement to confirm that all employees of a participating entity must be given the opportunity to agree to be nominated;
- impose additional requirements that must be met for children to be eligible nominees;
- extend the JobKeeper scheme to include religious practitioners that are not employees; and
- make various consequential and minor technical amendments.

Details of the Amending Rules No. 2 are set out in [Attachment A](#).

Prior to making the instrument, consultation on draft legislation was conducted with a number of stakeholders, including the Australian Taxation Office, the Attorney-General's Department, the Department of Education, Skills and Employment, the Department of Social Services, the Australian Taxation Office's Charities Consultative Committee and National Tax Liaison Group and other industry representatives. These stakeholders provided expert advice regarding the operation of the draft legislation, and this advice was incorporated into the final design of the instrument.

An exemption from Regulation Impact Statement requirements was granted by the Prime Minister as there were urgent and unforeseen events.

The Amending Rules No. 2 do not materially change the estimated financial impact of the JobKeeper scheme that was included in the Explanatory Memorandum for the Act and Schedule 2 to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

The Amending Rules No. 2 are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amending Rules No. 2 commenced immediately after the time they were registered on the Federal Register of Legislation.

A Statement of Compatibility with Human Rights is at [Attachment B](#).

Details of the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020

Section 1 – Name of the Instrument

This section provides that the name of the Instrument is the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (the Amending Rules No. 2).

Section 2 – Commencement

The Amending Rules No. 2 commence immediately after the time they were registered on the Federal Register of Legislation.

Section 3 – Authority

The Amending Rules No. 2 are made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act).

Section 4 – Schedules

This section provides that each instrument that is specified in the Schedules to this instrument will be amended or repealed as set out in the applicable items in the Schedules, and any other item in the Schedules to this instrument has effect according to its terms.

Schedule 1 – Amendments

JobKeeper payment amendments

The Amending Rules No. 2 make a number of targeted refinements and clarifications to the Rules. The refinements relate to particular circumstances that have been identified and considered by Government since the Rules were made on 9 April 2020. The amendments are described below. The Amending Rules No. 2:

- provide a modified decline in turnover test for certain group structures;
- adjust the way in which Commonwealth payments are treated when calculating a university's turnover;
- extend the JobKeeper scheme to certain charities that undertake overseas aid and disaster relief;
- adjust the way in which payments made by the government and the United Nations are treated when calculating a charity's turnover;
- include a notification requirement to confirm that all employees of a participating entity must be given the opportunity to agree to be nominated;
- impose additional requirements that must be met for children to be eligible nominees;

- extend the JobKeeper scheme to include religious practitioners that are not employees; and
- make various consequential and minor technical amendments.

References to legislation in the Explanatory Statement are to Schedule 1 to the Amending Rules No. 2 unless otherwise stated.

Modified decline in turnover test for certain group structures

To properly target the JobKeeper payment to employers adversely affected by the economic conditions caused by the Coronavirus, the Rules establish a decline in turnover test that an employer must satisfy to qualify for the payment. The basic decline in turnover test in section 8 of the Rules does not expressly provide for circumstances where the entity is an employer entity that operates in a group structure.

In such group structures, most or all of the employees may be employed by one entity, the ‘employer entity’, whose principal activity is to provide the services of the employees and potentially other services to other members of the group. As such these employer entities do not typically have significant dealings outside the group and their turnover may not reflect the overall performance of the group. As a result, even where there has been a significant decline in the turnover of the entities in the group, the JobKeeper payment may not be available to the employer entity.

To address this, item 10 of the Amending Rules No. 2 provides a modified decline in turnover test for an employer entity (the modified test). The modified test applies in addition to the basic test in section 8 of the Rules. That is, an employer entity can satisfy the decline in turnover test either by satisfying the basic test in subsection 8(1) of the Rules, the modified test in section 8A of the Amending Rules No. 2 or one of the alternative tests determined by the Commissioner of Taxation (Commissioner) under subsection 8(6) of the Rules.

The modified test in subsection 8A(1) applies if all of the following are satisfied:

- the employer entity is a member of a consolidated group, consolidatable group or a GST group;
- the employer entity’s principal activity is supplying other members of the group with services (employee labour services) consisting of the performance of work by individuals the employer entity employs. The principal activity is the main or predominant activity that the employer entity carries out. The employer entity may provide other services to the group, but that employer entity must not be an operating entity of the group and must provide no more than incidental services to third parties;
- the Commissioner has not determined that the modified decline in turnover test does not apply to the employer entity.

An employer entity will also satisfy the modified test under subsection 8A(2) if all of the following are satisfied at a particular time (test time):

- in a turnover test period in which the test time occurs, the employer entity:

- supplies employee labour services to one or more members of the group (each of which is a ‘test member’) for which their principal activity is making supplies to entities that are not members of the group; and
 - only supplies employee labour services to entities that are members of the group other than supplies that are merely incidental to the principal activity of the entity. Under subsection 8A(6), if the employer entity is a member of more than one of the following, a consolidatable group, a consolidated group, or a GST group, it may satisfy the modified test in relation to its membership of any of those groups; and
- the employer entity would satisfy the basic decline in turnover test in subsection 8(1) of the Rules at the test time if modifications were made.

The modifications to the basic test as set out in subsection 8A(3) are that, in applying the basic test:

- instead of using the employer entity’s projected GST turnover for the turnover test period, the sum of the projected GST turnovers for that period of each test member is to be used; and
- instead of using the employer entity’s current GST turnover for a relevant comparison period, the sum of the current GST turnovers for that period of each test member is to be used.

This ensures that the decline in turnover test is applied to group members that predominately undertake transactions with external entities on an arms-length basis rather than measuring the decline in intergroup transactions.

To avoid doubt, the Amending Rules No. 2 also provide that if an entity is a member of a consolidatable group, a consolidated group or a GST group, (or more than one of those groups) it satisfies the modified decline in turnover test if it satisfies that test in relation to its membership of any of those groups. This addresses situations in which an entity may have both formed a consolidated group or is part of a consolidatable group and is part of a GST group also.

Example 1: Satisfying the modified decline in turnover test

The Palette Group is a manufacturer of art supplies. It is structured as a GST group.

Red Employment is a member of the GST group comprising the Palette Group. Red Employment’s principal activity within the Palette Group is to supply employee labour services to other members of the Group. Red Employment does this by supplying the services of individuals it has engaged to the other group members. Red Employment has less than \$1 billion aggregated annual turnover.

The Palette Group’s sales suffer as a result of the economic effects of the Coronavirus. As a consequence, Red Employment seeks entitlement to the JobKeeper payment in respect of its employees.

In June 2020, Red Employment supplies employee labour services to three members of the Palette Group – Green Ltd, Yellow Ltd and Blue Ltd. Each of

those members have as their principal activity, the selling of art supplies to distributors outside of the Palette Group. In this period, Red Employment does not provide employee labour services for any entity outside of the Palette Group.

In the month of June 2020, the projected GST turnover for each of the test members is: Green Ltd – \$100,000; Yellow Ltd – \$65,000; and Blue Ltd – \$35,000. This gives a total projected GST turnover of \$200,000.

In the relevant comparison period (June 2019), the projected GST turnover for each of the test members is: Green Ltd – \$320,000; Yellow Ltd – \$60,000; and Blue Ltd – \$20,000. This gives a total projected GST turnover of \$400,000.

The June 2020 turnover falls short of the June 2019 turnover by \$200,000, which is 50 per cent of the June 2019 turnover and exceeds the specified percentage of 30 per cent. Red Employment satisfies the modified decline in turnover test.

The modified test also deals with circumstances in which an alternative decline in turnover test applies to another member of the group because there is not an appropriate relevant comparison period in 2019. This might be the case for a new business, (started for example in January 2020) or a business that made a major business acquisition in 2020. In both examples, the basic test may not accurately reflect the downturn in activity that the business has suffered. The modified test is adjusted to account for the fact that these tests are not applied by the entity in a group that provides employee labour services and accordingly the modified test for such entities is adjusted. Subsection 8A(4) provides that this is the case if:

- the Commissioner has determined (under subsection 8(6) of the Rules) that an alternative test applies to a member of the consolidatable group, a consolidated group or GST group (a test member); and
- the alternative test involves applying the basic test to the test member for the turnover test period, but using a different calculation instead of the test member's current GST turnover for a relevant comparison period.

Where this is the case, that different amount determined under the alternative test is to be used. That is, in these circumstances, the modifications to the basic test made by subsection 8A(3) are:

- instead of using the employer entity's projected GST turnover for the turnover test period, the sum of the projected GST turnovers for that period of each test member is to be used; and
- instead of using the different amount determined by the Commissioner for a relevant comparison period, the sum of the different amounts determined by the Commissioner for that period of each test member is to be used.

Example 2: Satisfying the modified decline in turnover test where an alternative test applies

The Mammalia Group provides office cleaning services. Based on its overall structure, it is a consolidatable group with Mammalia Ltd as the head company. Although the members of the group can consolidate for income tax purposes, it has not decided to form a consolidated group.

Tigress Employment is a subsidiary member of the consolidatable Mammalia Group. Tigress Employment's principal activity within the Mammalia Group is to supply employee labour services to other members of the consolidatable group. Tigress Employment does this by supplying the services of the individuals it has engaged to the other members. Tigress Employment has less than \$1 billion aggregated turnover.

In July 2020, Tigress Employment supplies employee labour services to three members of the Mammalia Group – Bonobo Ltd, Wombat Ltd and SugarGlider Ltd. Each of those members have as their principal activity, the provision of office cleaning services to clients outside of the Mammalia Group. In this period, Tigress Employment does not provide employee labour services for any entity outside of the Mammalia Group.

In the period, the relevant test members for the modified decline in turnover test are Bonobo Ltd, Wombat Ltd and SugarGlider Ltd, which are members of the consolidatable group. The projected GST turnover for each of the test members is: Bonobo Ltd – \$260,000; Wombat Ltd – \$100,000; and SugarGlider Ltd – \$90,000. This gives a total projected GST turnover of \$450,000 for the purposes of the modified test.

The current GST turnover for July 2019 for each of the test members was: Bonobo Ltd – \$290,000; Wombat Ltd – \$90,000; and SugarGlider Ltd – \$120,000. This gives a current GST turnover of \$500,000 for the purposes of the modified test.

However, between June 2019 and August 2019, Bonobo Ltd, Wombat Ltd and SugarGlider Ltd each underwent significant restructuring which meant that the current GST turnover for each of the entities in that period was significantly lower than what it would otherwise have been. Consistent with the alternative test determined by the Commissioner for restructures, in order to determine the decline in turnover of Tigress Employment, the alternative decline in turnover test is applied by reference to Bonobo Ltd, Wombat Ltd and SugarGlider Ltd, by using their current GST turnover for the first period immediately after the restructure occurred.

This means that Tigress Employment compares each of the test member's projected GST turnover for July 2020 with their current GST turnover for September 2019.

The current GST turnover for September 2019 for each of the test members was: Bonobo Ltd – \$530,000; Wombat Ltd – \$250,000; and SugarGlider Ltd

– \$220,000. This gives a total current GST turnover of \$1 million for the purposes of the modified test.

As a result, Tigress Employment has a decline in turnover of 55 per cent, which exceeds the specified percentage of 30 per cent. Tigress Employment therefore satisfies the modified decline in turnover test.

The terms ‘consolidatable group’, ‘consolidated group’, ‘GST group’ and ‘member’ (in relation to being a member of a consolidatable group, consolidated group or a GST group) are defined in the *Income Tax Assessment Act 1997* (the ITAA 1997), including by reference to the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act). In summary:

- a consolidated group consists of a head company and all the companies, trusts and partnerships that are resident in Australia and are wholly-owned subsidiaries of the head company (see Division 703 of the ITAA 1997);
- a consolidatable group consists of the wholly owned group which is able to consolidate for income tax purposes; and
- a GST group exists (broadly where there is 90 per cent or more common ownership), one member of the group deals with all the GST liabilities and entitlements of the group and, in most cases, transactions within the group are excluded from GST (see Division 48 of the GST Act).

The terms ‘projected GST turnover’ and ‘current GST turnover’ are defined in the GST Act (see sections 188-15, 188-20 and 195-1). In order for the decline in turnover test to operate as intended, the Rules apply those definitions with some modifications. The modifications to these terms are discussed in the Explanatory Statement to the Rules.

The modified test allows an employment entity that undertakes activities wholly as part of a group (other than making supplies outside the group that are only incidental to the principal activity of the group) that is or that can consolidate for income tax consolidation purposes or that is currently a part of a GST group to be eligible for the JobKeeper Payment. This eligibility is based on the turnover of the entities receiving employment services from the employment entity. This ensures that the JobKeeper scheme applies appropriately where a group is subject to a significant decline in turnover but its employment entity does not suffer a corresponding turnover decline.

However, in order to address the risks to the integrity of the JobKeeper scheme, the Amending Rules No. 2 provide that the Commissioner may determine in writing that the modified test does not apply to a particular entity. The Commissioner may make a determination under subsection 8A(5) if satisfied, having regard to the purpose of the JobKeeper scheme and any other matter the Commissioner considers to be relevant, of either or both of the following:

- that the modified test is unsuitable, in the circumstances of the group, for measuring the extent to which employees within the group are performing work in operations that have suffered a relevant decline in turnover. This might include, for example, where significant restructuring that affects turnover in 2020 results in

the modified test being inappropriate to determine entitlement to the JobKeeper payment;

- applying the modified test to the entity may, in the circumstances of the group (including the group's history of compliance with its obligations under taxation laws), risk the integrity of the Commissioner's administration of the JobKeeper scheme.

As provided by section 13 of the Act, if the Commissioner determines that the modified test does not apply to a particular employment entity and this affects its entitlement to a JobKeeper payment, the entity may object against the determination in the manner set out in Part IVC of the *Taxation Administration Act 1953* (TAA 1953). Part IVC deals with objections, reviews and appeals regarding particular actions of the Commissioner.

The modified decline in turnover test for certain group structures applies in relation to JobKeeper fortnights beginning on and after 30 March 2020.

While the application of the amendments is retrospective, the amendments operate to allow an entity to use the modified decline in turnover test instead to gain access to the JobKeeper payment from the first fortnight of the JobKeeper scheme's operation. In this way, the retrospectivity is not disadvantageous to affected entities.

Monthly reporting for employer entities

Under section 16, participation in the JobKeeper scheme requires monthly reporting. Generally, an entity that is entitled to a JobKeeper payment for a fortnight must notify the Commissioner of its current GST turnover for the reporting month and its projected GST turnover for the following month.

However, where an entity relies on the modified decline in turnover test for certain group structures, subsection 16(3) provides that the matters that must be reported are:

- the sum of the current GST turnovers for the reporting month of each test member of the relevant consolidated group, consolidatable group or GST group; and
- the sum of the projected GST turnovers for the following month of each of those members.

The information provided as part of this report does not affect an entity's eligibility. Rather, it is intended to ensure that there is good information on which to assess the economic impact of the Coronavirus on a monthly basis across Australia.

Decline in turnover test –universities

For the purposes of the decline in turnover test, section 8 of the Rules makes a number of modifications to the meaning of the terms 'projected GST turnover' and 'current GST turnover'. These modifications are intended to ensure that an appropriate test applies to determine whether an entity has suffered the required decline in its turnover to be entitled to the JobKeeper payment.

Item 7 of the Amending Rules No. 2 makes further modifications to the meaning of the terms ‘projected GST turnover’ and ‘current GST turnover’ for the purposes of the decline in turnover test (as well as the modified decline in turnover test as inserted by the Amending Rules No. 2). The modification applies to calculating the decline in turnover of Australian universities.

The Amending Rules No. 2 provide that for the purposes of a university calculating its projected GST turnover or current GST turnover, that subsection 9-17(3) of the GST Act is disregarded.

Subsection 9-17(3) of the GST Act has the effect of excluding particular payments from the Commonwealth, under an appropriation, to a university when determining whether the payment is the provision of consideration for a supply or acquisition.

The effect of disregarding subsection 9-17(3) of the GST Act for the purposes of calculating projected GST turnover or current GST turnover is that payments by the Commonwealth under the *Higher Education Support Act 2003* or the *Australian Research Council Act 2001* (of the sort that would not amount to consideration under subsection 9-17(3) of the GST Act) are included in a university’s calculation of its projected GST turnover and current GST turnover.

This amendment applies to an entity that is a Table A provider or a Table B provider within the meaning of sections 16-15 and 16-17 of the *Higher Education Support Act 2003*. Generally, Table A providers are approved for Australian Government grants under the *Higher Education Support Act 2003* and their students can receive all forms of assistance. Table B providers are eligible for some grants for particular purposes. The terms Table A and Table B provider are defined in subsection 4(1) to take their meaning under the above Act.

Paragraph 8(7)(aa) requires that universities use the six month period commencing on 1 January 2020 as the turnover test period to determine if they have had a sufficient decline in their turnover which potentially qualifies them for the JobKeeper scheme. This ensures that a significant period of the year is tested to confirm any decline in turnover.

The modifications to the meaning of the terms ‘projected GST turnover’ and ‘current GST turnover’ as they apply to the decline in turnover test for universities apply in relation to JobKeeper fortnights beginning on and after 30 March 2020. It is necessary for the amendment to apply retrospectively to ensure that the JobKeeper scheme applies as intended to universities and that Commonwealth payments are used in the calculation to determine the decline in turnover.

Expanding the scheme to more charities and modifying the treatment of certain payments

Items 3, 8 and 9 of Schedule 1 to the Amending Rules No. 2 make amendments to the JobKeeper scheme with respect to charities. The amendments expand the JobKeeper scheme to more charities and also modify the treatment of certain payments for the purposes of the decline in turnover test. A grant payment will, broadly, only be included in a charity’s turnover for GST purposes if the grant is conditional on the charity undertaking a particular action.

The amendments expand on the types of entities that can qualify for the JobKeeper scheme under subsection 7(1) of the Rules. In addition to entities carrying on business in Australia and non-profit bodies pursuing their objectives principally in Australia, paragraph 7(1)(a) includes entities that on 1 March 2020 were, or operated, public funds covered by items 9.1.1 or 9.1.2 of the table in subsection 30-80(1) of the ITAA 1997 and were a deductible gift recipient.

Items 9.1.1 and 9.1.2 of the table in subsection 30-80(1) of the ITAA 1997 broadly apply to public funds that are declared to be developing country relief funds and developing country disaster relief funds.

The decline in turnover test is also modified to ensure that ACNC-registered charities that made supplies to Australian government agencies, local governing bodies or the United Nations are not prevented from accessing the JobKeeper program.

Paragraph 8(8)(h) ensures that the decline in turnover test applies appropriately to these types of entities. Under this modified GST turnover rule, a supply made by the entity is disregarded if:

- the consideration for the supply is provided by certain government entities (i.e. an Australian government agency, or a local governing body – entities covered by paragraphs 7(2)(b) and (c) of the Rules), or the United Nations (including an agency of the United Nations); and
- the charity elects for this modified GST turnover rule to apply.

However, the election to disregard government supplies is not available to universities (Table A providers and Table B providers) or schools. This is because the modified decline in turnover test for charities is only intended to be available to registered charities that can access the lower 15 per cent decline in turnover test under subsection 8(3) of the Rules (i.e. ACNC registered charities other than universities and schools).

This ensures that charities can treat government grants made to them as excluded from their turnover if they elect for this treatment to apply.

Under subsection 8(9), the election is not revokable to ensure that the same treatment applies throughout the operation of the JobKeeper scheme. This is relevant to the monthly requirement to report current and projected turnover to the Commissioner under section 16 of the Rules. This election to use the modified rule must be made in the approved form and given to the Commissioner within seven days of the charity's election to participate in the JobKeeper scheme. However, the Commissioner may allow a later time for a charity to make this election to apply the modified rule.

Where charities have notified the Commissioner of their election to participate in the JobKeeper scheme before the commencement of these amendments, the charity can elect to apply the modified GST turnover rule by notifying the Commissioner within seven days of the commencement of these amendments or within such further time as the Commissioner allows. This transitional provision in item 104 ensures that affected charities are not disadvantaged and have sufficient time to notify the Commissioner after these amendments commence.

Item 101 of the Amending Rules No. 2 provides that the amendments regarding charities that are developing country relief funds and developing country disaster relief funds apply to fortnights beginning on or after 30 March 2020. While the

amendments apply retrospectively, they are wholly beneficial and ensure the affected charities can benefit for the whole of the period of the JobKeeper scheme.

Requirement to notify employees

A critical feature of the JobKeeper scheme is that an employer that elects to participate in the scheme under Division 2 of the Rules (relating to entitlement in relation to paid employees) must ensure that all employees are provided with the opportunity to advise the employer that they agree to be nominated by the employer as an eligible employee for the purposes of the JobKeeper scheme. Employers then notify the Commissioner of all eligible employees that have nominated. This is consistent with the 'one in, all in' operation of the scheme.

The Government's intention is that all employees of an entity are given the opportunity to agree to be nominated for the purposes of the entity's participation in the JobKeeper scheme. In order to clarify this intention, item 13 of Schedule 1 to the Amending Rules No. 2 inserts section 10A to provide that an entity that elects to participate in the scheme must give written notice to each individual who is an employee of the entity, thereby allowing each employee to agree to be nominated.

The notice must be given to all relevant employees of the entity. Under subsection 10A(3), a relevant employee is an individual who is an employee of the entity on the day the entity notifies the Commissioner of the entity's election to participate.

However, an individual is not a relevant employee (and written notice does not need to be given to the individual) if the entity reasonably believes that the individual does not satisfy the requirements to be an eligible employee (subsection 9(2) of the Rules). This will be the case where the entity reasonably believes that the individual on 1 March 2020:

- was not an employee of the entity;
- did not meet the minimum age, study and independence test requirements;
- did not meet the relevant residency requirements; or
- was a casual employee other than a long term casual employee.

The notification obligation applies to an entity that is an employer that has notified the Commissioner (under section 6 of the Rules) that it elects to participate in the JobKeeper scheme. The notification requirement only applies to employees and does not apply to business participants or religious practitioners (see below) because only employees are likely to need additional protections where entities fail to advise them that they have elected to participate in the JobKeeper scheme. The amendments include a note in subsection 10A(1) to confirm that the notification requirement applies to employees only.

The written notice given to the relevant employee must:

- state that the individual must give the entity a nomination notice referred to in paragraph 9(3)(a) of the Rules (i.e. confirming the individual satisfies the relevant age, residency and employment status requirements) if the individual agrees to be nominated by the entity as an eligible employee of the entity; and
- include information about the steps the individual can take to give the entity the nomination notice.

The obligation to provide the notice applies to any entity that notifies the Commissioner that it elects to participate in the JobKeeper scheme under section 6 of the Rules, regardless of whether it notifies the Commissioner before or after the commencement of the Amending Rules No. 2.

For an entity that notifies the Commissioner after the commencement of the Amending Rules No. 2 that it elects to participate in the JobKeeper scheme (for the purposes of section 6 of the Rules), the written notice to be given to relevant employees must be given within seven days of the entity notifying the Commissioner of its election (or within such later time permitted by the Commissioner).

Item 105 of Schedule 1 to the Amending Rules No. 2 provides a transitional rule regarding notifications to employees. For an entity that notified the Commissioner of its election to participate before the commencement of the Amending Rules No. 2, the entity must notify its relevant employees no later than seven days after the commencement of the Amending Rules No. 2.

However, the entity does need to notify an individual if the entity reasonably believes that, on 1 March 2020, the individual was aged 16 or 17 years, was undertaking full-time study, and was not independent. This relates to the limitation of the JobKeeper payment in respect of those individuals (see below).

The requirement to notify employees will already be satisfied if an employer has already provided information that satisfies this requirement to an employee before the commencement of the Amending Rules No. 2.

If an entity nominates employees but refuses or fails to comply with the requirement to provide the information to all of its relevant employees, the entity contravenes paragraph 8C(1)(a) of the TAA 1953. This provision makes it an offence under the taxation law to fail to give a document to another person that is required under the taxation law.

Children who can qualify to be nominated by an entity

Items 11, 12, 14 and 15 of the Amending Rules No. 2 amend the Rules by inserting paragraphs 9(2)(aa), 9(3)(aa), 12(3)(aa) and 12(4)(aa) to limit the circumstances in which children that are 16 or 17 years of age on 1 March 2020 can qualify as eligible employees and business participants under the JobKeeper scheme. These amendments limit the scope of the scheme as well as impose relevant requirements in the nomination process.

Under the amendments, children aged 16 or 17 years are only eligible if, in addition to the general requirements under the Rules, on 1 March 2020 they:

- met the definition of being independent within the meaning of section 1067A of the *Social Security Act 1991*. This includes circumstances in which the child had been in long term full or part-time employment broadly for a two year period and a number of other situations; or
- were not studying full-time as defined in the *Social Security Act 1999*. Full-time study is defined in broad terms to mean enrolled in and undertaking study in a course of study at an educational institution of at least 75 per cent of the normal full-time study requirements. Where a school leaver is enrolled to commence university or other further education, they continue to be considered to be a full-time student despite classes having not necessarily commenced as at 1 March 2020.

In broad terms, a child is considered independent if they can demonstrate that they:

- have supported themselves through work with long term full or part-time employment broadly for a two year period;
- are, or have been, married or are in a registered relationship;
- have lived in a de facto relationship as a member of a couple for at least 12 months;
- have, or have had, a dependent child;
- are a job seeker assessed as unable to work over 30 hours a week;
- are unable to live at home due to extreme circumstances;
- have parents that are unable to support them;
- are a refugee and their parents do not live in Australia;
- are an orphan that has not been legally adopted; or
- are in state care, including foster care.

This generally ensures that 16 and 17 years olds undertaking full-time study on 1 March 2020 cannot be eligible employees or business participants and are encouraged to continue to engage in full-time education.

Item 102 of Schedule 1 to the Amending Rules No. 2 provides that the amendments in relation to children who can qualify apply to fortnights beginning at or after commencement of the Amending Rules No. 2. Although the amendments restrict the application of the JobKeeper scheme to entities in respect of certain 16 and 17 year olds, this amendment is prospective. This ensures that no entitlement is removed retrospectively for affected 16 and 17 year olds but rather that the limitations apply after commencement of the Amending Rules No. 2.

However, any previous nominations made regarding 16 or 17 year olds (that are no longer eligible) for JobKeeper fortnights that start at or after the commencement of the Amending Rules No. 2 are no longer valid.

Religious practitioners

The Rules allow eligible employers to participate in the JobKeeper scheme for the benefit of their eligible employees. However, religious practitioners may not be considered to be employees.

Item 1 of Schedule 1 to the Amending Rules No. 2 inserts the following definitions relating to religious practitioners for the purposes of the JobKeeper scheme in the definitions part of the Rules in section 4:

- an ‘eligible religious practitioner’ is defined by section 12B (see below);
- a ‘registered religious institution’ means an institution that is a registered charity and registered as a charity that is advancing religion under the *Australian Charities and Not-for-profits Commission Act 2012*;
- a ‘religious practitioner’ means a minister of religion or a full-time member of a religious order.

As a consequence of including the eligibility of religious institutions as a participant of the JobKeeper scheme, item 2 of Schedule 1 to the Amending Rules No. 2 amends

the outline of the JobKeeper scheme to include references to religious institutions and religious practitioners.

Item 16 of Schedule 1 to the Amending Rules No. 2 inserts Division 3A in the Rules to ensure that eligible entities may receive JobKeeper payments in respect of such eligible religious practitioners.

Eligible religious institution

Subsection 12A(1) provides that registered religious institutions can qualify for a JobKeeper payment for an eligible religious practitioner for a fortnight if:

- the entity qualifies for the JobKeeper scheme at or before the end of the fortnight;
- the entity satisfies the payment condition in section 12C (see below);
- the entity has notified the Commissioner in the approved form at or before the required time that the entity elects to participate in the JobKeeper scheme;
- the entity has given information to the Commissioner in the approved form about the entitlement for the fortnight, including details of the eligible religious practitioner; and
- the entity has not withdrawn from the JobKeeper scheme by advising the Commissioner in the approved form that they no longer wish to participate.

Subsection 12A(2) provides that consistent with the general operation of the JobKeeper scheme, to participate in the JobKeeper scheme, a registered religious institution must notify the Commissioner at the end of the third fortnight in which the JobKeeper payment applies, or by the end of the fortnight for later fortnights.

Subsection 12A(3) ensures that an entity cannot qualify for a JobKeeper payment for a religious practitioner if:

- another religious institution is entitled to payment in relation to that individual; or
- another entity is entitled to payment for the individual in their capacity as either an employee or business participant.

These rules are consistent with the general operation of the JobKeeper scheme and ensure that no double claiming can occur.

Similar to the general operation of the JobKeeper scheme, subsection 12A(4) requires that a registered religious institution must notify a religious practitioner within seven days of giving the Commissioner information about the eligible religious practitioner.

Subsection 12A(5) requires that, in addition, to the other requirements, to qualify, an entity must be a registered religious institution on 12 March 2020. Registered religious institutions are required to hold an Australian Business Number. This requirement is consistent with the integrity rule for the business participation payment in Division 3 of the Rules but adapted to reflect that religious institutions do not carry on the same activities as businesses.

Eligible religious practitioners

Subsections 12B(1) and (2) provide that individuals are eligible religious practitioners in a fortnight if they meet all of the following in that fortnight:

- they are not employed by the religious institution;

- they are a religious practitioner and they do activities or a series of activities in pursuit of their vocation as a religious practitioner, and as a member of the registered religious institution;
- they meet the 1 March 2020 requirements; and
- they meet the nomination requirements.

Subsection 12B(3) provides for the 1 March 2020 requirements, which are largely consistent with the overall JobKeeper scheme. These are that on 1 March 2020, the individual satisfied all of the following:

- they were aged 16 years or over;
- if they were aged 16 or 17 years, they were independent or not undertaking full-time study (see above);
- they met the fortnightly requirement of being a religious practitioner and they do activities or a series of activities in pursuit of their vocation as a religious practitioner, and as a member of the registered religious institution; and
- they were either an Australian resident (under section 7 of the *Social Security Act 1991*), or a resident for Australian tax purposes (see the *Income Tax Assessment Act 1936*) that was the holder of a Subclass 444 (Special Category) visa (for New Zealand nationals).

Subsection 12A(4) provides for the nomination requirements, which are largely consistent with the overall JobKeeper scheme. The amendments require a religious practitioner to provide a notice in the approved form to the religious institution agreeing to be nominated for the purposes of the JobKeeper scheme.

In the notice, the religious practitioner must also specify that they meet the 1 March 2020 requirements and they have not agreed to be nominated by another entity entitled to receive the JobKeeper payment. The purpose of this nomination is to assist an entity to determine whether they may be entitled to JobKeeper payment in respect of the individual for a particular fortnight.

Similar to the general framework, a religious practitioner who is employed by one or more qualifying employers, or a member of one or more religious institutions will need to choose one employer or institution that will receive the JobKeeper payments for their employment or membership.

A religious practitioner who is also an employee of another entity is not eligible to be nominated, unless they are a casual employee of that entity.

If an eligible individual has nominated more than one entity to receive the JobKeeper payment, the individual does not satisfy the nomination requirements required to be eligible. This means that no entity will be able to nominate the person under the JobKeeper scheme in the future. If an overpayment results from an individual fraudulently nominating more than one entity, the individual will be jointly and severally liable to pay the overpayment and general interest charge on the overpayment under section 11 of the Act.

Payment condition for religious institutions

A payment condition applies to an eligible religious institution concerning payments or benefits provided to a religious practitioner to qualify for the JobKeeper payment in respect of the religious practitioner.

Section 12C provides that an eligible religious institution meets the payment condition (for the purposes of paragraph 12A(1)(e)) in respect of an individual for a fortnight if it:

- makes one or more payments to the individual from which an amount must be withheld under section 12-47 in Schedule 1 to the TAA 1953; or
- provides a benefit to the individual whether that is a fringe benefit or an exempt benefit under the *Fringe Benefits Tax Assessment Act 1986*.

Under subsections 12C(2) and (3) where an institution usually pays religious practitioners for a regular period of more than a fortnight such as monthly, then those payments are to be allocated to a fortnight or fortnights in a reasonable manner. Also the Commissioner may treat an event occurring in a fortnight as having occurred in a different fortnight or fortnights, if, or to the extent that, in the Commissioner's opinion it is reasonable to do so.

Exclusions – religious practitioners

Similar to the general framework, subsection 12B(5) provides that despite an individual meeting the general requirements to be an eligible religious practitioner, the individual may nevertheless be excluded.

If, under the *Paid Parental Leave Act 2010*, parental leave pay is payable to a person, and the person's paid parental leave period overlaps with or includes a fortnight in respect of which a JobKeeper payment may be paid, the person cannot be an eligible religious practitioner for a JobKeeper payment for that fortnight. The same applies for a person who is paid dad and partner pay under the *Paid Parental Leave Act 2010* at any time during the fortnight.

These payments are provided to eligible parents by the Australian Government. As a statutory entitlement for eligible recipients, these payments will not be affected by the economic impact of the Coronavirus. Accordingly, recipients of parental leave pay or dad and partner pay in a fortnight cannot be an eligible employee for the JobKeeper payment in that fortnight.

If a person ceases to receive parental leave pay or dad and partner pay – for example, because they have received the full amount of the pay – and the person is otherwise an eligible individual of a qualifying entity, their qualifying entity may be able to receive JobKeeper payments.

This exclusion does not extend to any paid parental leave that is outside the scope of the *Paid Parental Leave Act 2010*.

Similarly, where applicable, recipients of workers' compensation are excluded from being eligible for a particular fortnight. This applies if:

- the person is totally incapacitated for work throughout the fortnight;
- an amount is payable to the person in accordance with Australian workers' compensation law; and
- the amount is for a period that overlaps with or includes the fortnight.

Items 23, 24, 33 to 36, 38, and 42 to 45 of Schedule 1 to the Amending Rules No. 2 make consequential amendments to the Rules regarding religious practitioners. In general, they ensure appropriate consistency of treatment in the Rules between entities and institutions with their eligible employees and eligible religious practitioners.

The amendments in relation to religious practitioners apply to JobKeeper fortnights beginning on or after 30 March 2020. While these amendments apply retrospectively, they extend the types of entities that are eligible to participate in the JobKeeper scheme to religious institutions. The retrospective application of these amendments is beneficial to the affected entities.

Employees of charities paid under government grants

Subsection 10A(5) provides an exception to the ‘one-in all-in’ principle that applies to nominating employees as eligible employees under the JobKeeper Scheme. Under this exception, ACNC-registered charities that have elected to disregard certain government grants when calculating their decline in turnover that have employees whose salary and wages are fully funded by those government grants may choose not to ask these employees to nominate as eligible employees for the purposes of the JobKeeper scheme. This choice is available only where the employer reasonably believes that the full amount of the employee’s salary and wages is funded for the relevant fortnight by a grant that has been disregarded in calculating GST turnover as a result of subparagraph 8(8)(h)(i).

Minor and consequential amendments

Item 4 of Schedule 1 to the Amending Rules No. 2 makes a technical amendment to clarify that the exclusion of sovereign entities from qualifying for the JobKeeper scheme applies as if subparagraphs 880-15(c)(ii) and (iii) of the ITAA 1997 were disregarded. Although the changes apply retrospectively from the time of commencement of the Rules when they were registered on 9 April 2020, they are consistent with the intended policy outcome as explained in the Explanatory Statement to the Rules.

The amendment addresses a technical issue in the Rules to ensure that they apply as intended. The definition of ‘sovereign entity’ in the ITAA 1997 does not include Australian entities of foreign governments. The amendment corrects this unintended outcome in the drafting of the Rules.

Item 37 of Schedule 1 to the Amending Rules No. 2 makes technical amendments to eligible business participants under subsection 12(4). These amendments ensure that the operation of the provision is consistent with the existing operation of paragraph 9(3)(b), and also ensures that individuals are eligible business participants at the time of the giving of the nomination notice. Item 103 of Schedule 1 to the Amending Rules No. 2 provides that this amendment applies in relation to nomination notices given at or after commencement.

Part 2 of Schedule 1 to the Amending Rules No. 2 also makes a number of other minor and consequential amendments to the Rules, including the insertion of definitions in section 4 of the Rules (which are described throughout this Explanatory Statement) and the inclusion of new and amended cross-references.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The purpose of the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (the Amending Rules No. 2) is to refine elements of the JobKeeper scheme to ensure that it most appropriately supports businesses and employees affected by the significant economic impact caused by the Coronavirus. In particular, the Amending Rules No. 2:

- provide a modified decline in turnover test for certain group structures;
- adjust the way in which Commonwealth payments are treated when calculating a university's turnover;
- extend the JobKeeper scheme to certain charities that undertake overseas aid and disaster relief;
- adjust the way in which payments made by the government and the United Nations are treated when calculating a charity's turnover;
- include a notification requirement to confirm that all employees of a participating entity must be given the opportunity to agree to be nominated;
- impose additional requirements that must be met for children to be eligible nominees;
- extend the JobKeeper scheme to include religious practitioners that are not employees; and
- make various consequential and minor technical amendments.

Human rights implications

The Amending Rules No. 2 may engage the following human rights or freedoms:

Privacy

Article 17 of the *International Covenant on Civil and Political Rights* (the ICCPR) provides:

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.

The Amending Rules No. 2 provide for entitlement to the JobKeeper payment for an entity that is a registered religious institution with respect to an individual who is an eligible religious practitioner for the institution. Participation in the JobKeeper scheme requires the provision of information by the entity to the Commissioner that may include the individual's personal information, including names, employment status, Australian residency status, and information relating to the turnover of a business. To any extent to which the provision of this information constitutes a limitation of a person's right to be protected from interference with his or her privacy, the limitation is justified because the provision of information is:

- contingent on the individual agreeing to be nominated;
- in pursuit of the legitimate objective identified—which is to respond to the economic downturn caused by the Coronavirus by providing a wage subsidy to affected businesses; and
- rationally connected and proportionate to the objective sought as the information is required to determine eligibility for the JobKeeper scheme and to ensure that it is administered according to the policy objective.

For these reasons, the Amending Rules No. 2 do not unnecessarily restrict a person's right to privacy.

Family

Articles 17 and 23 of the ICCPR and Article 10 of the *International Covenant on Economic, Social and Cultural Rights* (the ICESCR) provide protections to the family as the natural and fundamental group unit of society. These protections require measures to protect the family, including parental leave.

For the purposes of an entity that is a religious institution being entitled to a JobKeeper payment, an individual who, in a JobKeeper fortnight, receives parental leave pay or dad and partner pay (within the meaning of the *Paid Parental Leave Act 2010*) is not an eligible religious practitioner for the entity. Consequently, the entity is not entitled to a JobKeeper payment in respect of the individual.

To the extent to which these individuals are excluded from the benefit of the JobKeeper payment, the limitation is justified and rationally connected and proportionate to the objective. The objective is to assist an entity that is a religious institution to pay its religious practitioners during the period of economic downturn and to maintain the relationship throughout the period of the downturn. Where an individual receives parental leave pay or dad and partner pay, there is no cost to the entity to subsidise. The maintenance of the relationship is also guaranteed by those schemes.

For these reasons, the Amending Rules No. 2 do not unnecessarily limit the protections afforded to the family.

Health

Article 12 of the ICESCR provides for the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

For the purposes of entitlement to a JobKeeper payment, an individual who, in a JobKeeper fortnight, is incapacitated for work and receives a payment under an Australian worker's compensation law is not an eligible religious practitioner. Consequently, the religious institution is not entitled to a JobKeeper payment in respect of the individual.

To the extent to which these individuals are excluded from the benefit of the JobKeeper payment, the limitation is justified and rationally connected and proportionate to the objective. The objective is to assist entities to maintain relationships with their religious practitioners throughout the period of the downturn. Where an individual receives a payment under an Australian worker's compensation law, there is no cost to the entity to subsidise. The maintenance of the relationship is also guaranteed by those schemes.

For these reasons, the Amending Rules No. 2 do not unnecessarily limit the protections afforded to the enjoyment of health.

National origin

The Amending Rules No. 2 may also engage the rights of equality and non-discrimination contained in Articles 2 and 26 of the ICCPR as the Rules broadly limit participation in the JobKeeper scheme to individuals who are either Australian citizens, permanent residents or specified New Zealand citizens living in Australia. This includes New Zealand citizens living in Australia who may not be eligible for assistance under the Australian social security system.

The beneficial treatment of New Zealand citizens is appropriate as it supports the longstanding and unique arrangements between Australia and New Zealand under the Trans-Tasman Travel Arrangement for travel and work in each country. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

Other visa holders, however, are unable to obtain the benefit of the JobKeeper payment – including international students and holders of other temporary visas. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is reasonable and proportionate as it reflects the temporary nature of their connection to Australia. It also reflects the expectation that to obtain a visa these students and workers are able to demonstrate that they can support themselves financially while in Australia. Further, it is consistent with the general operation of the social security system, under which most migrants do not have access to the majority of payments for up to four years after their arrival.

Other measures intended to respond to the economic hardship caused by the Coronavirus may be available to visa holders who are excluded from obtaining the benefit of the JobKeeper payment. For example, the person may seek early access to up to \$10,000 of their superannuation in both the 2019-20 and 2020-21 financial years.

For these reasons, the Rules do not unnecessarily restrict the rights of equality and non-discrimination based on national origin.

Age

The Amending Rules No. 2 may also engage the rights of equality and non-discrimination contained in Articles 2 and 26 of the ICCPR in relation to age. This may occur because the Amending Rules No. 2 exclude entitlement to a JobKeeper payment in relation to an employee where, on 1 March 2020, the employee was aged 16 or 17, was engaged in full-time study and was not independent. Accordingly, some in the working population cannot obtain the benefit of the JobKeeper payment.

Applying the benefit of the JobKeeper payment to workers who are not full-time students and financially independent is justified and rationally connected and proportionate to the objective as it is predominantly workers who are not studying or are financially independent who require the security provided by participation in the JobKeeper scheme and the maintenance of the working relationship that it affords.

For these reasons, the Amending Rules No. 2 do not unnecessarily restrict the rights of equality and non-discrimination based on age.

Conclusion

The Amending Rules No. 2 are compatible with human rights.

Unless otherwise indicated in this document, it is Copyright of the Commonwealth of Australia and the following applies:

Copyright Commonwealth of Australia.

This material does not purport to be the official or authorised version. Reproduction and use of this material is subject to a [Creative Commons Attribution-NonCommercial-ShareAlike 3.0 Australia License](#).

You should make independent inquiries and obtain appropriate advice before relying on the information in any important matter.

This document has been distributed by LexisNexis Australia. All queries regarding the content should be directed to the author of this document.