

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Coronavirus Economic Response Package (Payments and Benefits) Act 2020

Coronavirus Economic Response Package (Payments and Benefits) Rules 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 period from 1 March 2020 to 31 December 2020. However, payments under the JobKeeper scheme can only be made after the commencement of both the Act and the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) that provide for payments – earlier events within the period may affect entitlement to a payment but all payments must be made prospectively.

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.

The purpose of the Rules is to establish the JobKeeper payment scheme and specify details about the scheme, including:

- the start and end date of the scheme;
- when an employer or business is entitled to a payment;
- the amount and timing of a payment; and
- other matters relevant to the administration of the payment.

The Rules specify that the JobKeeper payment is available in fortnightly periods between 30 March 2020 and 27 September 2020 – a period of 26 weeks.

A business that is entitled to the JobKeeper payment will receive a fixed payment of \$1,500 per fortnight per eligible employee. The payment must have already been passed on to the eligible employee in full. The payment provides the equivalent of approximately 70 per cent of the national median wage. In addition a business may be entitled to the JobKeeper payment for the business owner or a nominated owner regardless of whether the business has eligible employees.

By temporarily offsetting wage costs, the JobKeeper scheme supports businesses to retain staff – and continue paying them – despite suffering decreased turnover during this period of downturn. The payment also supports these businesses to recommence their operations or scale up operations quickly without needing to rehire when the downturn is over.

Goods and services tax does not apply in relation to JobKeeper payments made to employers because the payments are not consideration for supplies made by employers to the Government.

Details of the Rules are set out in [Attachment A](#).

Prior to making this instrument, consultation was conducted with a number of stakeholders, including the Australian Taxation Office, the Attorney-General's Department and the Department of Social Services.

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

The Rules are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Rules 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](#).

ATTACHMENT A

Details of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*

Part 1 – Preliminary

Section 1 – Name

Section 1 provides that the name of the instrument is the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

Section 2 – Commencement

Section 2 provides that the Rules commenced immediately after the time of registration on the Federal Register of Legislation.

Section 3 – Authority

Section 3 provides that the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* is the enabling legislation under which the Rules are made.

Section 4 – Definitions

Section 4 provides definitions of expressions used in the Rules. Expressions used in the Rules that are not defined in subsection 4(1) and that are defined in the *Income Tax Assessment Act 1997* have the same meaning as in that Act. This reflects that the JobKeeper scheme is administered by the Commissioner of Taxation (the Commissioner) and that in some instances the Rules governing the operation of the scheme rely on established taxation principles.

Part 2 - JobKeeper scheme

Part 2 of the Rules provides for the JobKeeper scheme.

Division 1 (section 5) contains a simplified outline of the JobKeeper payment that provides a broad description of the operation of the scheme.

Division 2 sets out the rules for when an employer with eligible employees is entitled to the JobKeeper payment. The aim of the JobKeeper payment is to assist employers to retain staff during the Coronavirus outbreak, so that these entities can recommence or scale up operations once conditions allow.

Division 3 sets out the rules for when a business owner is entitled to a JobKeeper payment. A business can be entitled to a JobKeeper payment for one business participant who is actively engaged in operating the business.

JobKeeper payments are in respect of fortnightly periods, commencing on 30 March 2020 for a maximum of 13 fortnights (provided the employer was entitled to the payment for the fortnight commencing on 30 March 2020). This means the last fortnight in respect of which a JobKeeper payment may be paid is the fortnight commencing on 14 September 2020 and ending on 27 September 2020.

Division 4 and Division 5 set out the rules regarding the amount of the JobKeeper payment and administration of the JobKeeper scheme.

Division 2 - When is an employer entitled to a JobKeeper payment?

In general terms, an employer is entitled to a JobKeeper payment for a fortnight if:

- the fortnight is a JobKeeper fortnight;
- the employer qualifies for the scheme on or before the end of the fortnight;
- the payment is for a person who is an eligible employee of the employer;
- the employer has satisfied the wage condition by making payments to the eligible employee equal to or greater than the amount of JobKeeper payment (less PAYG withholding and salary packaging) that the employer will receive for the employee for the fortnight; and
- the employer has notified the Commissioner of a range of matters, including notification of its election to participate in the scheme.

Each of these requirements is described in greater detail below.

There are tests within the Rules that must have been satisfied on 1 March 2020, and other tests that must be satisfied during the fortnight in respect of which a JobKeeper payment is to be made. The date 1 March 2020 is used as the relevant date in relation to elements of the JobKeeper scheme because it was in March 2020 that Australian employers began to most acutely experience the effects of the downturn caused by the Coronavirus. This reflects the intention that the JobKeeper scheme covers entities that have been significantly affected by the economic impacts of the Coronavirus.

What is a JobKeeper fortnight?

An employer receives a JobKeeper payment in respect of each JobKeeper fortnight in which they are entitled to the payment.

Entitlement to a JobKeeper payment is assessed in relation to a fortnightly period known as a JobKeeper fortnight. Each of the following is a JobKeeper fortnight:

- the fortnight beginning on 30 March 2020; and
- each subsequent fortnight, ending with the fortnight ending on 27 September 2020.

This means that the JobKeeper scheme commences on 30 March 2020 and ends on 27 September 2020 – a period of 26 weeks. This reflects that the JobKeeper payment is a temporary measure for a limited period only to support entities that have been significantly affected by the economic impacts of the Coronavirus.

How does an employer qualify for the JobKeeper scheme?

The JobKeeper payment is only available to an employer who qualifies for the scheme. An employer will qualify for the scheme for a particular fortnight if:

- it satisfies the following requirements:
 - on 1 March 2020, it carried on a business in Australia or was a non-profit body pursuing its objectives principally in Australia;
 - before the end of the fortnight, it met the decline in turnover test; and
- none of the following applies:
 - on 1 March 2020, it had been subject to the levy imposed by the *Major Bank Levy Act 2017* for any quarter ending before this date, or it was a member of a consolidated group and another member of the group had been subject to the levy;
 - it is a government body of a particular kind, or a wholly-owned entity of such a body; or
 - at any time in the fortnight, a provisional liquidator or liquidator has been appointed to the business or a trustee in bankruptcy had been appointed to the individual's property.

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

The JobKeeper scheme operates on a prospective basis only. Entitlement only arises for those JobKeeper fortnights and later fortnights in which eligible employers are registered under the scheme prior to the end of a JobKeeper fortnight. The only exception to this is for the month of April 2020. In April 2020 employers may register prior to the end of April and if they meet the eligibility rules receive JobKeeper payments for eligible employees for JobKeeper fortnights in the two JobKeeper fortnights commencing from 30 March 2020.

Another key element of the scheme is that qualifying employers that decide to participate in the JobKeeper scheme must, as a condition of entitlement, notify all employees in writing that they have elected to participate in the scheme and that their eligible employees will all be covered by the scheme.

Carrying on a business or pursuing objectives as a non-profit body

To be a qualifying employer, on 1 March 2020, the employer must have either been carrying on a business in Australia or been a non-profit body pursuing its objectives principally in Australia.

The term ‘business’ is defined in section 995-1 of the *Income Tax Assessment Act 1997*. As noted in the dictionary for the Rules, the term ‘non-profit body’ takes the same meaning as given to the term in section 23-15 of the *A New Tax System (Goods and Services Tax) Act 1999* (the GST Act).

An employer that was not carrying on a business in Australia or was not a non-profit body pursuing its objectives principally in Australia on 1 March 2020 – for example, because it ceased before that date or because it commenced after that date – is not a qualifying employer for the purposes of the JobKeeper scheme.

Subject to any other exclusions, a business may be an Australian resident entity or a foreign resident entity carrying on business in Australia.

Decline in turnover test

The decline in turnover test needs to be satisfied before an entity becomes eligible for the JobKeeper payment. Once this occurs there is no requirement to retest in later months. If an entity does not qualify for the month of April 2020 because its turnover has not been sufficiently affected, it can test in later months to determine if the test is met. This allows entities that only become affected part way through the six month period of operation of the JobKeeper scheme to continue to monitor for any decline in turnover until they qualify for the scheme in a later period.

The JobKeeper scheme aims to assist entities that have a significant decline in turnover due to the economic impacts of the Coronavirus. Accordingly, to properly target the JobKeeper payment to affected employers, section 8 of the Rules establishes a decline in turnover test that must be satisfied at the end of a fortnight for an employer to qualify. Once an entity satisfies this test it does not need to retest its turnover in later months.

The Rules specify two ways in which a business can satisfy the decline in turnover test: the basic test and the alternative test.

The basic decline in turnover test works by comparing the projected GST turnover of the entity for a period (the turnover test period) with its current GST turnover as calculated for a relevant comparison period (the comparison turnover). In effect this compares a month or quarter in the period the JobKeeper scheme applies with the corresponding period in 2019. For most businesses this will be an appropriate comparison to identify if turnover has declined significantly. An alternative test applies in certain circumstances (see below).

A business will generally satisfy the test where the GST turnover in the turnover test period falls short of the comparison turnover and the shortfall is 30 per cent or more.

However, larger businesses need to have a greater decline in turnover than smaller businesses to satisfy the basic decline in turnover test. This recognises the greater capacity of larger businesses to withstand the economic impacts of the Coronavirus. For a large business to satisfy the decline in turnover test, the GST turnover in the turnover test period must fall short of the comparison turnover and the shortfall must be 50 per cent or more.

For the purposes of the decline in turnover test, a large business is a business that:

- in the income year in which the test time occurs—is likely to have an aggregated turnover of \$1 billion or more; or
- in the income year previous to the income year in which the test time occurs—has an aggregated turnover of \$1 billion or more.

In this context, aggregated turnover has the same meaning as in section 328-115 of the *Income Tax Assessment Act 1997* and includes the annual turnover of an entity that is connected with or an affiliate of the business. In this way, a small business that forms part of a group that is a large business must have a 50 per cent decline in turnover to satisfy the test.

In order to reflect the important role of charities, an entity that is an ACNC-registered charity only needs to demonstrate a shortfall of 15 per cent. However, this lower shortfall percentage does not apply to ACNC-registered charities that are public or private universities (Table A or Table B providers within the meaning of the *Higher Education Support Act 2003*) or are schools within the meaning of the GST Act (that is pre-schools, primary schools, secondary schools and education for children with disabilities). These particular ACNC-registered charities must apply the basic turnover test that applies depending on the amount of their aggregated turnover. Although the rules use the broad definition of ‘schools’, other criteria for employers mean that government schools cannot be eligible employers (this is because they are covered by the exclusion, explained below, for Australian government agencies and their wholly-owned entities).

The periods for the turnover test period being compared by can be periods of one month or three months, where:

- if a one month turnover test period is being used, it must be one of the following months:
 - March 2020;
 - April 2020;
 - May 2020;
 - June 2020;
 - July 2020;
 - August 2020;
 - September 2020; or
- if a three month period is being used it must be one of the following periods:
 - the quarter that starts on 1 April 2020;
 - the quarter that starts on 1 July 2020.

Accordingly, for example, a business can make the comparison by comparing the whole of the month of March 2020 with March 2019, or by comparing the quarter beginning on 1 April 2020 with the quarter beginning on 1 April 2019. These periods align with the reporting periods for which GST registered businesses submit GST returns on their business activity statement and allow the Commissioner to examine changes in GST turnover that is reported.

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.

Projected GST turnover includes the value of all the supplies that an entity has made or is likely to make in the period. A supply is likely to be made where, on the balance of probabilities, it can be predicted that the supply is more likely than not to be made. The likelihood of a supply being made must be based on a reasonable expectation and considered in the context of the facts and circumstances of a particular business, such as by reference to the terms of a particular contract which requires supplies to be made in a certain period.

In general terms, for current GST turnover and projected GST turnover, the definitions in sections 188-15 and 188-20 of the GST Act apply as if subsection (1) of those sections refers to the period, rather than the month. The operation of subsections 188-15(2) and 188-20(2) (about members of GST groups) are disregarded. Also each external territory is treated as forming part of the indirect tax zone when working out both current GST turnover and projected GST turnover.

In addition, certain donations that ACNC-registered charities and gift deductible recipients receive or are likely to receive (including the non-monetary value of gifts) are also included in the calculation to work out the current GST turnover and projected GST turnover of these entities. This ensures that the decline in turnover test can apply appropriately to ACNC-registered charities and gift deductible recipients which may not make supplies for GST purposes or only limited supplies. This means that when such ACNC-registered charities or gift deductible recipients have a significant decline in donations they may qualify for the Scheme.

In particular, deductible gift recipients are required to include gifts received or likely to be received that are tax deductible to the donor under section 30-15 of the *Income Tax Assessment Act 1997*. ACNC-registered charities that are not deductible gift recipients must instead include gifts received or likely to be received that are made by way of monetary donations, property with a value of more than \$5,000 and listed Australian shares. For either type of entity, gifts that they receive from an associate are not included in their turnover. This ensures that an increase to an entity’s turnover from gifts they receive, or are likely to receive, are only taken into account where the gifts make a substantive change to the overall economic position of the entity and its related parties.

Businesses, individuals and entities that deliberately enter into contrived arrangements with the sole or dominant purpose of reducing their turnover in order to gain access to JobKeeper payments or increase the amount of JobKeeper payments they receive will not be entitled to the payment or the increased payment and the general interest charge will apply on the overpayment under section 19 of the Act. In addition, significant administrative as well as criminal penalties are also likely to apply to the parties involved in such schemes.

Example 1: Satisfying the basic decline in turnover test

Burke Industries assesses its eligibility for JobKeeper payments on 11 May 2020 based on a projected GST turnover for May 2020 of \$10 million from its business activities. The corresponding period is the month of May 2019 for which it had a current GST turnover of \$20 million. The alternative turnover test does not apply as the month of May 2019 is an appropriate relevant comparison period. The May 2020 turnover falls short of the May 2019 turnover by \$10 million, which is 50% of the April 2019 turnover. This exceeds the specified percentage of 30% that applies to business entities with less than \$1 billion aggregated annual turnover, so the decline in turnover test is satisfied.

The alternative decline in turnover test applies if 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.

Where the Commissioner is satisfied that there is no such period in 2019 or it is not an appropriate relevant comparison period, the Commissioner may, by legislative instrument, determine an alternative decline in turnover test applies to a class of entities.

Where such an alternative test applies to a business or non-profit body, the entity can meet the decline in turnover test by satisfying the alternative test determined by the Commissioner. It will be necessary for the affected entity to provide appropriate evidence to the Commissioner that it satisfies the alternative test.

The instrument making power is necessary to maximise flexibility and responsiveness to ensure that all entities that are intended to be assisted by the JobKeeper payment do in fact obtain the benefit of the payment. Paragraph 20(4)(a) of the Act provides that the Rules may confer on the Commissioner the power to make an instrument of a legislative or administrative character. However, any instrument made by the Commissioner would be a legislative instrument for the purposes of the *Legislation Act 2003* and would be subject to disallowance and parliamentary scrutiny.

Example 2: Failing to satisfy the basic decline in turnover test

Nguyen Industries assesses its eligibility for JobKeeper payments on 3 July 2020 based on a projected GST turnover for the quarter beginning on 1 July 2020 of \$80 million from its business activities. The corresponding period is the quarter beginning on 1 July 2019 for which it had a current GST

turnover of \$100 million. The alternative turnover test does not apply as the quarter beginning on 1 July 2019 is an appropriate relevant comparison period. The July 2020 quarter turnover falls short of the July 2019 quarter turnover by \$20 million, which is 20% of the July 2019 quarter turnover. This does not exceed the specified percentage for such entities of 30%, so the decline in turnover test is not satisfied.

Example 3: Satisfying the alternative decline in turnover test

Camille's Farms carries on a farming business and retail flower sales in Australia. It was subject to a severe drought from 2018 until September 2019 that reduced the amount of flowers it could grow. It returned to normal crop output in January 2020. Its retail flower sales became significantly affected in March 2020.

It assesses its eligibility for JobKeeper payments on 3 July 2020 based on a projected GST turnover from its farming activities for the quarter beginning on 1 July 2020 of \$2,000,000. The corresponding period is the quarter beginning on 1 July 2019 – a period in which Camille's Farms was severely affected by drought. Because of the effects of the drought, Camille's Farms had a much lower than usual current (2019) GST turnover of \$2,500,000. The July 2020 quarter turnover falls short of the July 2019 quarter turnover by \$500,000, which is 25% of the July 2019 quarter turnover. This does not exceed the specified percentage of 30%, so the decline in turnover test is not satisfied.

However, because of the effects of the drought on farming businesses, the Commissioner is satisfied that there is not an appropriate relevant comparison period for an entity that carried on a farming business. Instead, for these entities, the Commissioner determines an alternative test for which the relevant comparison period is the corresponding quarter in 2017. The Commissioner determines that the alternative test will be satisfied in these circumstances where the entity can show a 30% shortfall in turnover (for entities with less than \$1 billion aggregated annual turnover) when compared to one of these alternative periods.

In the quarter beginning on 1 July 2017, Camille's Farms had a current GST turnover of \$4,000,000. This represents a shortfall of 50% when compared to its projected GST turnover for the quarter beginning on 1 July 2020. This exceeds the specified percentage of 30%, so the alternative decline in turnover test is satisfied.

Example 4: Satisfying the alternative decline in turnover test

Seb Tech is a start-up technology company that began carrying on a business on 1 October 2019 selling its product to a range of businesses including cafes and restaurants. Despite strong initial sales, its sales declined substantially from March 2020. It assesses its eligibility for JobKeeper payments on 15 April 2020 based on a projected GST turnover for April 2020 of \$15,000 from its technology business. However, because Seb Tech did not begin to

carry on a business until 1 October 2019, there is no corresponding period in 2019 that applies.

As there is no corresponding comparison period in 2019, the Commissioner determines an alternative test under which the relevant comparison period is the average of the actual GST turnover in all of the months in which the business was being carried on prior to the turnover test period.

In October 2019 to March 2020, Seb Tech had an average monthly current GST turnover of \$30,000. This represents a shortfall of 50% when compared to its projected GST turnover for April 2020 of \$15,000. This exceeds the specified percentage of 30%, so the alternative decline in turnover test is satisfied.

Major bank levy

A qualifying employer cannot be an employer that was subject to the major bank levy in a quarter ending prior to 1 March 2020. The major bank levy is imposed by the *Major Bank Levy Act 2017* and is payable by authorised deposit-taking institutions with total liabilities of more than \$100 billion on a quarterly basis.

The Rules further provide that an employer is not a qualifying employer if the major bank levy was imposed on another member of a consolidated group that it is a member of for any quarter ending before 1 March 2020. For example, if an employer is a small bank that is part of a consolidated group that includes an authorised deposit-taking institution that is subject to the major bank levy, then the small bank cannot be a qualifying employer.

Government entities

An Australian government agency is not a qualifying employer for the purposes of the JobKeeper payment. ‘Australian government agency’ is defined in section 995-1 of the *Income Tax Assessment Act 1997* as the Commonwealth, a State or a Territory or an authority of the Commonwealth, of a State or of a Territory. A ‘local governing body’, which is also defined in that Act, is also excluded from being a qualifying employer for the purposes of JobKeeper payment.

An entity that is wholly-owned by an Australian government agency or a local governing body is not a qualifying employer for the purposes of JobKeeper payment.

A sovereign entity is also not a qualifying employer for the purposes of JobKeeper payment. The term ‘sovereign entity’ takes its meaning from the *Income Tax Assessment Act 1997* and, generally, includes a body politic of a foreign country, a foreign government agency, and an entity wholly-owned by a body politic of a foreign country or foreign government agency.

Liquidators and bankruptcy

For the purposes of JobKeeper payment, an employer is not a qualifying employer if a liquidator or trustee in bankruptcy had been appointed. This reflects the intention that the JobKeeper Payment is intended to support entities that are continuing their

operations through the Coronavirus period or wishing to recommence their operations following the period.

Who is an eligible employee?

An employer is only entitled to a JobKeeper payment for a person for a fortnight if the person is an eligible employee. This reflects that the payment is a wage subsidy – it is intended to help employers to continue paying their employees during this period of downturn.

Section 9 of the Rules provides that an eligible employee of an employer for a JobKeeper fortnight is a person who satisfies the following requirements:

- On 1 March 2020:
 - the person was aged 16 years or over;
 - the person was an employee other than a casual employee of the employer, or was a long term casual employee of the employer; and
 - the person was an Australian resident (within the meaning of section 7 of the *Social Security Act 1991*), or was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a Subclass 444 (Special Category) visa.
- At any time during the fortnight:
 - the person is an employee of the employer;
 - the person is not excluded from being an eligible employee. The exclusions relate to recipients of parental leave pay and dad and partner pay under the *Paid Parental Leave Act 2010*, and specified recipients of workers' compensation.

There is also a requirement that eligible employees have provided a notice to their employer agreeing:

- to be nominated by the employer as an eligible employee under the JobKeeper scheme as the employer with which the employee will participate in the JobKeeper scheme;
- that they confirm they have not agreed to be nominated by another employer; and
- that they do not have permanent employment with another employer if they are employed as a casual employee with this employer.

The requirement that casual employees cannot nominate with an employer if they were permanently employed by another employer at the time of nomination, ensures that an individual who is employed on a permanent basis (either full time or part time with an employer) must nominate their full time or part time employer under the scheme. This reflects that such employers are likely to be the individual's 'primary' employer, and prevents an individual from nominating a secondary, casual employment position if their primary employment is unaffected.

Individuals with one or more full time or part time jobs are free to nominate any one of those full time or part time jobs. Similarly, individuals with multiple long term casual jobs can nominate any one of those casual jobs.

The residency rules ensure that Australian residents who are working overseas for an Australian based business can be an eligible employee under the JobKeeper scheme if their employer elects to participate in the scheme and the overseas based Australian resident agrees to be nominated by the employer for the purposes of the scheme.

As with various tests relating to qualifying employers, the test for whether a person is an eligible employee involves applying two sets of criteria to the person at two discrete times: on 1 March 2020 and at a time during the relevant JobKeeper fortnight. This means there is no requirement for a person to satisfy all of the criteria on an ongoing basis (between 1 March 2020 and the end of a JobKeeper fortnight) in order to be considered an eligible employee for that fortnight.

Practically, this accommodates situations where a person's employment was terminated after 1 March 2020 and the person is subsequently rehired by their employer. This may occur for example, if prior to the announcement of the JobKeeper payment an employer did not expect to be able to pay its employees but with the support of the payment is able to rehire its employees.

A person who has been stood down or is on leave is considered to be an employee of their employer under the *Fair Work Act 2009* and for the purposes of the JobKeeper payment.

The two sets of criteria for when a person is an eligible employee are discussed in further detail below.

Eligible employee test – 1 March 2020 requirements

Subsection 9(2) of the Rules provides the requirements that must be met on 1 March 2020 for a person to be an eligible employee of an employer for a fortnight.

An employee who was younger than 16 years of age on 1 March 2020 is excluded from the JobKeeper payment scheme.

The requirement that an employee was employed on 1 March 2020 limits the JobKeeper payment to employees who were employed by the entity before it experienced significant downturn as a result of the Coronavirus. It also sets a limit on the employer's maximum number of employees (and therefore payment) under the JobKeeper scheme.

The requirement that a person was an employee (other than a casual employee) is intended to ensure there is a minimum level of connection between the employer and the employee. In an ordinary sense, an employee other than a casual employee is a full time or part time employee.

Subsection 9(5) of the Rules provides the meaning of 'long term casual employee' as a person who has been employed by the employer on a regular and systematic basis during the period of 12 months that ended on 1 March 2020. This definition is based on the same term in the *Fair Work Act 2009*, with adjustments to ensure it can be

applied to all employees (not just ‘national system employees’). A casual employee is likely to be employed on a regular and systematic basis where the employee has a recurring work schedule or a reasonable expectation of ongoing work.

Casual employees who have not been employed on this basis between 1 March 2019 and 1 March 2020 therefore cannot be an eligible employee for the purposes of the JobKeeper scheme.

Subsection 9(6) of the Rules provides some flexibility for any changes in ownership of a business and movement of employees within the same wholly-owned group. It means that employees are not disadvantaged if these events, which are ordinarily beyond their control, occur.

A person can therefore be treated as an eligible employee of the same employer even if the business or non-profit body in which the person is employed changes hands after 1 March 2020. It also means that in working out if a person is a long term casual employee of an employer, employment in a business or non-profit body in the 12 month period ending on 1 March 2020 can be counted even if the business or non-profit body changed hands during that period.

Example 5: Long term casual employees

On 1 March 2019, Sam commences employment as a casual employee at Annie’s Bakery. Sam has a regular work schedule – working between 3 and 4 days each week. On 1 July 2019, ownership of Annie’s Bakery changes hands. Sam continues to be employed as a casual employee of Annie’s Bakery and continues to work according to their regular work schedule from that date until 10 March 2020, when Sam is stood down.

For the purposes of determining whether Sam is a long term casual employee and an eligible employee, the fact that the business has changed hands will not disadvantage Sam. Sam is able to demonstrate regular and systematic employment at Annie’s Bakery for over 12 months. He is therefore a long term casual employee for the purposes of the JobKeeper scheme.

Finally, a person will satisfy the residence requirements to be an eligible employee if, on 1 March 2020:

- the person was an Australian resident within the meaning of the *Social Security Act 1991*, that is, the person’s usual place of residence was in Australia and the person was either an Australian citizen, the holder of a permanent visa, or the holder of a protected special category visa; or
- the person was a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* and was the holder of a Subclass 444 (Special Category) visa.

The first part of the residence requirements broadly mirrors the residence rules for JobSeeker payment under the social security system. It is intended to generally limit eligibility for the new JobKeeper payment to persons who would otherwise be eligible to receive the JobSeeker payment if they were unemployed and satisfied the assets test.

In working out whether a person is an Australian resident within the meaning of the *Social Security Act 1991*, the ordinary meaning of the term ‘reside’ is relevant. The ordinary meaning of ‘reside’ is to ‘dwell permanently, or for considerable time, to have a settled or usual abode, and to live in a particular place’. Some of the factors that can be used to determine residency status include physical presence, intention and purpose, family and employment ties, maintenance and location of assets, social and living arrangements.

A person who was a resident of Australia for tax purposes and was the holder of a Subclass 444 (Special Category) visa will also satisfy the residence requirements for JobKeeper payment. This is intended to apply to New Zealand citizens who have an established long term employment relationship with an Australian employer on 1 March 2020.

The definition of ‘resident of Australia’ in the *Income Tax Assessment Act 1936* is located in section 6 of that Act. The definition uses the ordinary concept of ‘resident’ (which is broadly equivalent to the ‘resides’ test in the *Social Security Act 1991*) as well as a number of extensions. These extensions include provisions that cause a person to be a resident of Australia for tax purposes in an income year if they physically present in Australia of 183 days or more of that year or if they have a domicile in Australia.

Eligible employee test – JobKeeper fortnight requirements

The requirement in paragraph 9(1)(a) of the Rules that a person was an employee of the employer during a fortnight is satisfied if the person was employed at any time during that fortnight. In other words, the person does not need to be employed for the full fortnight.

This ensures that an employer is eligible to receive a JobKeeper payment for a fortnight in respect of an employee who has been rehired or terminated at a point during the fortnight, provided the other eligibility and entitlement requirements are satisfied.

The nomination requirements in subsection 9(3) of the Rules require an employee to provide a notice in the approved form to their employer agreeing to be nominated by the employer for the purposes of the JobKeeper scheme. The employee must also specify in the notice that they have not agreed to be so nominated by any other employer or business. The purpose of this nomination is to assist employers to determine whether they may be entitled to JobKeeper payment in respect of the employee for a particular fortnight.

A person who is employed by one or more qualifying employers will need to choose one employer that will receive the JobKeeper payments for their employment.

Once an employee has nominated an employer and the employer has received JobKeeper payments in respect of the employee and has paid the employee, they cannot nominate a different employer. If for any reason, the employment relationship between an eligible employee and their nominated employer ends, the employee will not be able to have another employer qualify for the JobKeeper payments in respect of

their new employment. Such a person may become entitled to receive other Government support, including the JobSeeker payment.

If an employee has nominated more than one employer to receive the JobKeeper payment, the employee does not satisfy the nomination requirements required to be an eligible employee. This means that no employers 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 employer, 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.

This approach prioritises maintaining an ongoing employment relationship over providing flexibility in the labour market during this crisis. It also minimises complexity for participants in the scheme and ensures that the integrity of the scheme is maintained. The Commissioner will also check compliance and ensure that employees have not nominated to participate with more than one employer.

Eligible employee test – exclusions

Even if a person satisfies the other components of the eligible employee test, they will not be an eligible employee if an exclusion under subsection 9(4) applies.

If, under the *Paid Parental Leave Act 2010*, parental leave pay is payable to a person, and the person's paid parental leave (PPL) period overlaps with or includes a fortnight in respect of which a JobKeeper payment may be paid, the person cannot be an eligible employee for JobKeeper 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 employee of a qualifying employer, their employer may be able to receive JobKeeper payments for their employee.

This exclusion does not extend to any employer-funded paid parental leave that is outside the scope of the *Paid Parental Leave Act 2010*. This is because employer-funded paid parental leave schemes vary significantly in terms of the support that is provided by the employer. Accordingly, there could be unintended consequences if these recipients were excluded from being eligible employees for the purposes of the JobKeeper scheme.

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

- the person is totally incapacitated for work throughout the fortnight;

- an amount is payable to the person under or in accordance with an Australian workers compensation law in respect of the individual's total incapacity for work; and
- the amount is payable in respect of a period that overlaps with or includes the fortnight.

This is intended to capture a person whose entire wage is being paid under a workers' compensation scheme. Where this is the case, the person is not an eligible employee because the economic impact of the Coronavirus is unlikely to affect the financial support they receive under the workers' compensation scheme.

Where a person has some capacity to work in a particular fortnight, the person is not excluded from being an eligible employee for that fortnight. This is because the person's employer likely pays part of their wages in addition to any payments made under the workers' compensation scheme, or would be paying part of their wages if they were not stood down as a result of the Coronavirus. Accordingly, the JobKeeper payment should be available to the employer in these circumstances to support the employee, provided the other eligibility and entitlement criteria are satisfied.

What other entitlement criteria apply?

The rules about a JobKeeper fortnight, when an employer qualifies for the JobKeeper payment and when a person is an eligible employee are described above. In addition to these rules, section 6 contains further rules for when an employer is entitled to a JobKeeper payment in relation to their employees. These further entitlement rules are described below.

The employer must satisfy the wage condition

For each JobKeeper fortnight, the employer is only entitled to a JobKeeper payment if the employer has satisfied the wage condition. The wage condition is set out in section 10 of the Rules.

Generally, the wage condition requires that an employer pay each participating employee at least \$1,500 for each JobKeeper fortnight. This reflects the practical operation of the JobKeeper scheme in which the JobKeeper payment is essentially a reimbursement to an employer of \$1,500 where the employer has paid a participating employee at least that amount.

The component amounts that together must equal or exceed \$1,500 are:

- amounts paid by the employer to the employee in the fortnight by way of salary, wages, commission, bonus or allowances (less PAYG withholding) – generally, this means the employee's income before tax;
- amounts withheld from payments made to the employee in the fortnight under section 12-35 in Schedule 1 to the *Taxation Administration Act 1953* – generally, this means amounts withheld by the employer for income tax or a HECS-HELP loan;
- contributions made in the fortnight to a superannuation fund or an RSA (retirement savings account) for the benefit of the employee, if the

contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*); and

- amounts that, in the fortnight, are applied or dealt with in any way where the employee has agreed for the amount to be so dealt with in return for salary and wages to be reduced – generally, this means amounts forming part of salary sacrifice arrangements.

The requirement that the component amounts be at least \$1,500 applies regardless of whether the employee ordinarily receives more or less than that amount. For example if an employee:

- ordinarily receives \$1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;
- ordinarily receives less than \$1,500 in income per fortnight before PAYG withholding and other salary sacrificed amounts, the employer must pay the employee at least \$1,500 per fortnight, subject to PAYG withholding and other salary sacrificed amounts to the value of \$1,500;
- has been stood down, the employer must pay the employee at least \$1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of \$1,500; or
- was employed on 1 March 2020, subsequently ceased employment with the employer, and then has been rehired by the same eligible employer, the employer must pay the employee at least \$1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of \$1,500.

If an employer's ordinary arrangement is to pay its employees less frequently than fortnightly, then the payment can be allocated between fortnights in a reasonable manner. For example, if an employer's ordinary arrangement is to pay an employee every four weeks, it may be reasonable for the purposes of satisfying the wage condition if the employee is paid at least \$3,000 for every four week period.

The Rules provide that the Commissioner may treat a particular event that happened in a fortnight as having happened in a different fortnight or fortnights if the Commissioner's opinion is that it is reasonable to do so. For example, an employee may be accidentally underpaid in a fortnight with the result that the employee is paid less than \$1,500 in that fortnight, and then receives back pay in the next fortnight in recognition of the underpayment. If this occurs the Commissioner may decide that it is reasonable to treat the employee as having received at least \$1,500 in the earlier fortnight. The Commissioner could make similar arrangements where an employer pays an employee monthly and an accidental underpayment has occurred, for example on a one off basis, and the Commissioner considered that it is reasonable to do so.

Changes to superannuation guarantee obligations

Further amendments will be made in respect of the superannuation guarantee rules. These changes are not provided for in these Rules as the Rules cannot modify the operation of the *Superannuation Guarantee (Administration) Act 1992*. The changes will instead be progressed separately through regulations to be made under that Act.

The regulations will ensure that an employer will only need to make superannuation contributions for any amount payable to an employee in respect of their actual employment, disregarding any extra payments made by the employer to satisfy the wage condition for getting the JobKeeper payment.

For example, if the work actually done by an employee over a period entitled them to be paid \$1,000, but the employer instead paid them \$1,500 to satisfy the wage condition for a JobKeeper fortnight, then the employer will only be required to make superannuation contributions in relation to \$1,000. Similarly, any liability to superannuation guarantee charge that the employer would have for not making sufficient superannuation contributions would be calculated by reference to that \$1,000 base.

An employer will still be required to make the same superannuation contributions for an employee whose pay exceeds the JobKeeper payment. For example, if an employee is entitled to be paid \$2,000 for their work, the employer will continue to be required to make contributions in relation to that amount, irrespective of whether they were eligible to receive the JobKeeper payment in relation to the employee.

An employer will not be required to make superannuation contributions for an employee who is stood down. This is because employers have no obligation to pay stood down employees. If an employer pays a stood down employee \$1,500 to satisfy the wage condition for receiving the JobKeeper payment, then the entire amount will be disregarded for superannuation guarantee purposes.

The employer must elect to participate

The JobKeeper scheme requires an employer to actively seek to participate in the scheme. An employer must therefore notify the Commissioner in the approved form of the employer's election to participate in the scheme before the employer can be entitled to a payment for a fortnight.

This election generally needs to be provided to the Commissioner before the end of a JobKeeper fortnight for the employer to be entitled to a payment for that fortnight.

However, there is a different timing rule where the employer wishes to participate in the scheme and receive the first or second JobKeeper payment (relating to the JobKeeper fortnights commencing on 30 March 2020 and 13 April 2020 respectively). Where this is the case, the employer has until the end of the second JobKeeper fortnight, that is, 26 April 2020, to provide the Commissioner with its election to participate. This gives employers more time to comply with the election requirement and means that fewer employers will miss out on receiving the first JobKeeper payment where it may be otherwise entitled to the payment as generally the scheme only applies prospectively to elections to participate.

For all subsequent JobKeeper fortnights, the employer will need to notify the Commissioner of the employer's election to participate in the scheme before the end of the particular fortnight.

Under section 388-55 in Schedule 1 to the *Taxation Administration Act 1953*, the Commissioner may also defer the timing for giving information in an approved form. Employers that have difficulty meeting the timing requirements may seek such a deferral from the Commissioner.

The employer has not withdrawn their election to participate

An employer is not entitled to the JobKeeper payment if they notify the Commissioner that they no longer wish to participate in the JobKeeper scheme. This notification must be made in the form approved by the Commissioner. An employer does not need to consult with or obtain the consent of its eligible employees if it no longer wishes to participate in the JobKeeper scheme.

The employer must provide information about eligible employees and the wage condition

To be entitled to a JobKeeper payment for a fortnight, the employer must have provided the following information to the Commissioner in the approved form:

- the details of each eligible employee; and
- other information about their entitlement to the JobKeeper payment.

It is anticipated that the Commissioner may require the following details for each eligible employee in the approved form:

- the name of the employee;
- the type of the employee's employment; and
- the employee's citizenship or residency status.

Once an employer has provided details of its eligible employees to the Commissioner, the employer must also notify each eligible employee within 7 days. This requirement is intended to keep eligible employees informed about the process.

If the information provided to the Commissioner does not subsequently change in the following JobKeeper fortnights, an employer is not required to provide the same information to the Commissioner again. However, where there is a change of circumstances – for example, a person who was an eligible employee for the previous JobKeeper fortnight is no longer an eligible employee for the relevant JobKeeper fortnight – the employer must notify the Commissioner of this in the approved form before the end of the relevant JobKeeper fortnight to satisfy the notification requirements for entitlement to a payment for that fortnight.

Only one employer is entitled to JobKeeper payment for a person

An entity is not entitled to the JobKeeper payment for an individual who is an employee (or business owner) if another employer is entitled (either as an employer or as a business owner) to a JobKeeper payment for the individual.

In circumstances where an individual has more than one employer, only one employer is entitled to a JobKeeper payment in relation to that individual. In circumstances where an employer seeks the agreement of an employee to participate in the JobKeeper scheme and that employee has already agreed to participate in the scheme in relation to his or her other employer, the employee should not accept the later nomination.

If an employee has agreed to be nominated to participate in the JobKeeper scheme as an eligible employee of their first employer and not their second employer, but the second employer receives payments for that employee, then the second employer will not have been entitled to those payments. If this occurs, the employer will be required to repay these payments as this is an overpayment under the Act. This will not affect entitlement to JobKeeper payments in relation to the employee for the employee's nominated (first) employer.

The taxation law contains administrative penalties that apply to a person who makes false or misleading statements to the Commissioner and other entities that are required or permitted by the taxation law. These penalties could apply to the notice provided by the employer to the Commissioner, and any statements made by an employee to the employer about whether they have agreed to be nominated by any other employer or other eligibility requirements such as residency or visa status.

Division 3 - When is a business owner entitled to the JobKeeper payment?

The JobKeeper payment established in Division 2 of the Rules entitles an employer to the JobKeeper payment with respect to its eligible employees. This could include a business owner who is an employee, including a sole trader, adult beneficiary of a trust, or a director or shareholder of a company. However, it will not include owners who are not employees such as sole traders, partners, adult beneficiary of trusts, or a director or shareholder of a company.

However, the JobKeeper scheme recognises that certain participants in a business, such as a sole trader, are also affected by the economic downturn caused by the Coronavirus. Accordingly, in order to provide a benefit to such business participants, the Rules in Division 3 extend the availability of the JobKeeper payment to certain participants in a qualifying business. The entitlement to the JobKeeper payment applies to businesses and is not available to non-profit entities.

Entitlement to a JobKeeper payment as a business participant (under section 11 of the Rules) operates similarly to entitlement to the payment as an employer (under section 6) with some additional integrity rules. Particularly:

- the fortnight must be a JobKeeper fortnight (subsection 6(5)); and
- the business must qualify for the JobKeeper scheme on or before the end of the fortnight (section 7).

These rules are described above in relation to the JobKeeper payment for employers.

In other respects, entitlement to a JobKeeper payment as a business participant differs from the rules for employers to take into account of differences in the relationship

between a business and a business participant (for example as sole traders and partners cannot be employees). These rules are described below.

The entity must not be a non-profit body

For the purposes of entitlement to a JobKeeper payment under Division 3 of the Rules, the entity must not be a non-profit body. This differs from the rules for entitlement to a JobKeeper payment based on paid employees where a qualifying employer may be a non-profit body.

Notification

An entity must notify the Commissioner of its election to participate in the JobKeeper scheme and the details of the nominated individual. Also, the entity must not have notified the Commissioner that the entity no longer wishes to participate in the JobKeeper scheme. Notification of this information must be made in the approved form.

No more than one individual and one entity

A business is not entitled to a JobKeeper payment under Division 3 of the Rules for more than one individual. If a business has more than one eligible participant, the business can only be entitled to receive the JobKeeper payment in relation to one of the individuals. It is up to the business to determine which individual is nominated as the eligible business participant.

Similarly, an individual can only create an entitlement for one entity. A business is not entitled to a JobKeeper payment for an individual if another business is also entitled under either Division 3 or Division 2 for the same individual. For example, where an individual is an eligible participant of two businesses – only one of those businesses is entitled to the JobKeeper payment in respect of that individual. Also, for example, where an individual is an eligible participant of a business and is entitled to a JobKeeper payment as an employee of another business—the business is not entitled to a JobKeeper payment in respect of the individual.

Integrity rule

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

The only entities that are entitled to a JobKeeper payment for business participants are those that had an ABN on 12 March 2020, or such later time that the Commissioner allows.

This discretion is only able to be exercised by the Commissioner for unintended situations where the entity was running an active business prior to 12 March 2020 but was not required to have an ABN to operate it. This will occur only in limited circumstances, such as in relation to businesses that are conducted in the external Territories. Businesses that only operate in the external Territories are not required to have an ABN as the no-ABN rules and GST does not apply within the external Territories. In order to be eligible for the JobKeeper payment they will need to obtain

an ABN. However as they cannot hold it on 12 March 2020, this provision provides the Commissioner with a limited discretion after the commencement of the Rules to allow these entities to hold an ABN later, and still be entitled to the JobKeeper payment. This discretion accordingly benefits affected businesses. It is envisaged that the Commissioner will release guidance outlining the limited circumstances in which this discretion is able to be used.

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

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

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

Eligible business participant

The individual for whom a business is entitled to the JobKeeper payment must be an individual that is an eligible business participant. Under section 12, an individual is an eligible business participant where the individual:

- is not employed by the business at any time in the fortnight (that is, because the individual is the owner of the business ie a nominated business participant not an employee of the business);
- satisfies the business participation requirements at any time in the fortnight;
- satisfies the 1 March 2020 requirements; and
- satisfies the nomination the requirements.

The business participation requirements are that, at any time in the fortnight, the individual is actively engaged in the business carried on by the entity. The individual must be actively engaged in the operations and activities of the body. Further, depending on the type of entity the business is, the individual must have a particular role within the business. In the case of an entity that is a:

- sole trader—the individual must be the entity;
- partnership—the individual must be a partner in the partnership;
- trust—the individual must be an adult beneficiary of the trust; and
- company—either a director or shareholder in the company.

The 1 March 2020 requirements are that, on that date, the individual:

- was aged 16 years or over;

- satisfied the business participation requirements (described above); and
- satisfied the Australian residency requirement.

The Australian residency requirement for the purposes of an eligible business participant is the same as the requirements that apply to an eligible employee (for entitlement to the JobKeeper payment as an employer). The residency requirement is described above in relation to Division 2 of the Rules.

The nomination requirements are that the individual has agreed to be nominated by the entity as an eligible business participant and has not agreed to be nominated by another entity. This reflects the intention that an individual can only entitle one business to receive the JobKeeper payment as a business participant. This individual must make this notification in the approved form. Further, the individual must not have given a nomination notice to any other entity – including in the individual’s capacity as an employee of an employer seeking to obtain the JobKeeper payment for employers under Division 2 of the Rules. Also at the time of nomination as an eligible business participant the individual must not also be a permanent employee of an employer. This ensures that individuals do not qualify in relation to a business as an eligible business recipient if they have a separate permanent source of employment income. Individuals who have a permanent source of employment can nominate to receive the JobKeeper payment through their permanent employer.

A person is not an eligible business participant for a fortnight if parental leave pay is payable to the person, the person is paid dad and partner pay, or the person is incapacitated for work and an amount is payable to the person in accordance Australian workers’ compensation law. These exclusions mirror those that apply in relation to determining whether a person is an eligible employee for purposes of Division 2, and are described in detail above.

Division 4 and Division 5 - Payment and administration

Divisions 4 and 5 of the Rules set out the conditions for payment of the JobKeeper payment and other rules relating to the administration of the JobKeeper scheme. Divisions 4 and 5 apply to a JobKeeper payment where entitlement has been established under Division 2 (entitlement based on employees) or Division 3 (entitlement based on business participation).

Payment

Under section 14, if the Commissioner is satisfied that an employer or business is entitled to a JobKeeper payment for a fortnight, the Commissioner must pay the employer or business the JobKeeper payment.

In being satisfied that an entity is entitled to a JobKeeper payment, the Rules provide that the Commissioner may accept, either in whole or in part, a statement in an approved form lodged with the Commissioner by the entity. This allows the Commissioner to have regard to statements made by the entity in relation to its entitlement. Where a statement made by an entity in support of its claims to entitlement leads to, for example, overpayment of a JobKeeper payment – then provision is made in sections 9, 10 and 11 of the Act to deal with the consequences of overpayment.

Under section 13, if the Commissioner is satisfied of an entitlement to a JobKeeper payment, the Commissioner must pay \$1,500 to the employer for each eligible employee or to the business for its participating individual. Under section 15, the Commissioner must make the payment for a fortnight no later than the later of:

- 14 days after the end of the calendar month in which the fortnight ends; and
- 14 days after the Commissioner is satisfied that the employer or business is entitled to the payment for the fortnight.

This means that, while entitlement to a payment is assessed in relation to a JobKeeper fortnight and the amount is a fortnightly amount, an entitled employer or business will receive the JobKeeper payment monthly. For example, a participating employer with one eligible employee who qualifies for both fortnights in June 2020 will generally receive \$3,000 by 14 July 2020.

The method of payment is dealt with in section 8 of the Act.

The Rules also make it clear that the payment of an amount by the Commissioner to an entity does not affect whether the entity is actually entitled to the amount. This ensures there is no doubt that the rules about overpayments in sections 9, 10 and 11 of the Act apply where an entity was not eligible to receive a particular amount paid to it.

Transitional rule for first JobKeeper payment

Subsection 14(3) of the Rules provides a transitional rule that allows the Commissioner to make an advance payment for the JobKeeper fortnights ending in the month of April without being satisfied that the entity is entitled to that payment under either section 6 or section 11 of the Rules.

This is necessary to ensure that payments in respect of the first and second JobKeeper fortnights (being the fortnights starting on 30 March 2020 and 13 April 2020 respectively) can be made quickly to assist entities affected by the Coronavirus.

However, before the Commissioner can make such an advance payment:

- the entity must have notified the Commissioner in the approved form of its election to participate in the scheme; and
- the Commissioner is satisfied, on the basis of the information provided by the entity in the approved form, that it is reasonable in the circumstances make the payment.

If the Commissioner subsequently determines that the entity was entitled to a lesser amount or a nil amount in respect of the relevant JobKeeper fortnights, then the overpayment rules in the Act would apply and the entity would be required to repay the overpaid amount.

Conversely, if the Commissioner subsequently determines that the entity was entitled to a greater amount, the Commissioner must make an additional payment to account for the difference.

Decisions and notification

Subsection 20(4) of the Act provides that the Rules may confer on the Commissioner the power to make a decision of an administrative character. Similarly, section 5 of the Act provides that the Commissioner has general administration of the Act. Accordingly, under the Rules, the Commissioner is the relevant decision maker with respect to an entity's entitlement to a JobKeeper payment. Section 13 of the Act provides for the review of certain decisions of the Commissioner through Part IVC of the *Taxation Administration Act 1953*.

Sections 17 and 18 of the Rules deal with notice being given to an entity regarding certain decisions of the Commissioner. Section 17 provides for when the making of a JobKeeper payment constitutes notice, and section 18 deals with a notice of decision of entitlement that the Commissioner is required to give to an entity.

Section 17 of the Rules provides that, in some circumstances, the Commissioner is taken to have given notice of a decision by making a payment. Payment constitutes notice if:

- an entity has notified the Commissioner that the entity elects to participate in the JobKeeper scheme (as required by paragraph 6(1)(e) or 11(1)(e)); and
- the entity has notified the Commissioner of details of one or more individuals (that is, eligible employees or an eligible business participant) for whom the entity is entitled to a JobKeeper payment for a fortnight (as required by subparagraph 6(1)(e)(ii) or 11(1)(e)(ii)); and
- the Commissioner has paid JobKeeper payments to the entity for those fortnights; and
- the sum of the amounts paid by the Commissioner is consistent with the Commissioner being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified for each relevant fortnight.

In these circumstances, the Commissioner is taken (for the purposes of subsection 12(2) of the Act) to have given the entity notice that the Commissioner is satisfied that the entity is entitled to a JobKeeper payment for each individual for each of the fortnights.

However, section 17 does not apply to payments made in respect of the first two JobKeeper fortnights. This reflects that payments can be made to an entity under the usual payment rules or under the transitional rule. It will not be possible for an entity that has provided the necessary information to the Commissioner to know on what basis the Commissioner has paid an amount to it. However, section 18 continues to apply.

Where the Commissioner pays an amount that is *not* consistent with being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified (including a nil amount), section 18 of the Rules requires the Commissioner to give an entity notice of a decision about that entity's entitlement. The Commissioner may need to give an entity notice of a decision that the entity:

- is entitled to a JobKeeper payment for an individual for a fortnight; or
- is not entitled to a JobKeeper payment for an individual for a fortnight.

The Commissioner is not required to give this notification in all instances. Rather, the Commissioner is only required to give this notification if:

- an entity has notified the Commissioner that the entity elects to participate in the JobKeeper scheme (as required by paragraph 6(1)(e) or 11(1)(e));
- the entity has notified the Commissioner of details of one or more individuals (that is, eligible employees or an eligible business participant) for whom the entity is entitled to a JobKeeper payment (as required by subparagraph 6(1)(f)(i) or paragraph 11(1)(f)); and
- the Commissioner pays an amount that is not consistent with being satisfied that the entity is entitled to a JobKeeper payment for each individual about whom the Commissioner was notified (including a nil amount).

The requirement that an entity has made the necessary notifications means that section 18 only applies to payments made under the transitional rule where the employer has provided all of the required information to the Commissioner.

Receiving notice in these situations ensures that an entity is able to ascertain which of their employees the Commissioner considered to be eligible or ineligible. This is particularly important for employers to know which employees they must continue to satisfy the wage condition for in respect of later JobKeeper fortnights. It also allow an entity to know which employees were determined to be ineligible by the Commissioner so that they can decide whether to seek a review of the Commissioner's decision.

Where the Commissioner is required to give this notification, the Commissioner must give the notice in writing as soon as practicable after making the relevant decision. Where a decision relates to more than one employee of an employer, the Commissioner may give notice to the employer of those decisions in one notice.

Compliance

There are a number of obligations imposed on participating employers and businesses under the JobKeeper scheme. For example, as described above, it must have paid at least \$1,500 to each qualifying employee (subject to PAYG withholding and salary packaging) for each JobKeeper fortnight and must notify the Commissioner of changes in circumstances that would affect its entitlement to a JobKeeper payment.

Further, the Act sets out additional measures to ensure compliance with and administration of the scheme, including:

- an entity that receives an overpayment of the JobKeeper payment is required to repay the overpaid amount and a general interest charge to the Commonwealth, applying from the date of the overpayment;
- pre-application record keeping requirements and post-application record keeping requirements which participating entities must comply with; and

- a prohibition on contrived schemes aimed at falsely making an entity entitled to a JobKeeper payment or to an amount of payment to which it would not otherwise be entitled.

Monthly reporting

Under section 16, participation in the JobKeeper scheme requires monthly reporting. An entity that is entitled to a JobKeeper payment (within the meaning of section 7 of the Rules) 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.

All ACNC-registered charities and gift deductible recipients that are eligible for the JobKeeper payment must also report to the Commissioner the amount of certain donations that they have received in the past month and certain donations that they have received or expect to receive in the month in which the reporting time occurs. The particular donations that must be included are those that are included in working out their decline in turnover (see above).

The reporting month is a month in which there is a fortnight for which the entity is entitled to a JobKeeper payment. The report must be made to the Commissioner in the approved form, and must be made within 7 days of the end of the reporting month.

The information provided as part of this report does not affect an entity's eligibility, including in respect of the decline in turnover test (which only needs to be satisfied once). It is also not intended to verify whether the projection given as part of the decline in turnover test was accurate. 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.

Time limits for JobKeeper payments

JobKeeper payments are intended to only be available in respect of fortnights up to the fortnight ending on 27 September 2020, although payments may still be made in respect of those fortnights beyond this time.

While it is expected that most JobKeeper payments will be paid by October 2020, it may be appropriate for a payment to be paid to an entity beyond this time. For example, if an entity has satisfied all the entitlement requirements but has been underpaid by the Commissioner, a payment may be made after October 2020.

However, section 19 of the Rules provides that despite any entitlement to a payment that has not been made, the Commissioner must not make any JobKeeper payments after 30 September 2021. The Rules further provide that for any unpaid amount to which an entity would otherwise be entitled to, the entity is not entitled to that amount after 30 September 2021. These rules provide a cessation date for the JobKeeper scheme consistent with the intention that the scheme only applies on a time limited basis.

Later legislation

The operation of the JobKeeper scheme will be closely monitored to ensure that it provides an effective subsidy to the entities that it is intended to assist in the period of economic downturn caused by the Coronavirus. Compliance with the rules of the JobKeeper scheme will also be monitored. Where it is determined that changes to the JobKeeper scheme are necessary, relevant amendments will be made. Such changes may be necessary, for example, to remove an entitlement from an entity where it is determined that the entity has acted in a way which means that it should not receive or should not continue to receive the JobKeeper payment.

Accordingly, section 20 of the Rules make clear that any entitlement to JobKeeper payment may be cancelled, revoked, terminated, varied or made subject to conditions by or under later legislation.

Application

The Rules apply from their commencement immediately after the time they are registered. The JobKeeper scheme effectively ceases after the last JobKeeper fortnight – after 27 September 2020.

The Rules provides a wage subsidy to eligible businesses calculated by reference to the period from 30 March 2020 in relation to workers employed by the business on 1 March 2020. However, payments under the scheme and all obligations apply on a prospective basis after the commencement of the Rules and accordingly, there is no retrospective application.

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) Rules 2020

The *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules) are 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 Rules

The JobKeeper payment is a subsidy to businesses that is intended to keep more Australian workers in jobs through the course of the Coronavirus outbreak. The JobKeeper payment is aimed at maintaining the connection between employers and employees where the business goes into hibernation or closes down for six months. As the economy recovers from the challenges posed by the Coronavirus, it is intended that the connection maintained between employer and employee will enable business to recommence their operations quickly and productively.

Under the JobKeeper payment, qualifying employers will receive \$1,500 per fortnight for each eligible employee. This amount, subject to PAYG withholding and salary packaging arrangements with the employee must have been paid in full to the eligible employee. The payment is made for up to 13 fortnights. A JobKeeper payment is also available to an owner of an entity that qualifies for the JobKeeper scheme.

The Rules establish the operation of the JobKeeper payment, including by specifying the eligibility requirements for employers and employees, the amount payable and the timing of payments, and other matters relevant to the administration of the payment.

Human rights implications

The Rules 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.

Participation in the JobKeeper scheme requires the provision of information to the Commissioner that may include 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 affected person giving consent to the disclosure of information by nominating to participate in the JobKeeper scheme, or in the case of an employee, 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 Rules 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 entitlement to a JobKeeper payment, an employee 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 employee. Consequently, the employee does not entitle their employer to a JobKeeper payment and no amount needs to be passed on to the employee.

To the extent to which these employees 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 employers to pay their employees during the period of economic downturn and to maintain the employment relationship throughout the period of the downturn. Where an employee receives parental leave pay or dad and partner pay, there is no cost to the employer to subsidise. The maintenance of the employment relationship is also guaranteed by those schemes.

For these reasons, the Rules 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 employee who, in a JobKeeper fortnight, is incapacitated for work and receives a payment under an Australian worker's compensation law is not an eligible employee. Consequently, the employee does not entitle their employer to a JobKeeper payment and no amount needs to be passed on to the employee.

To the extent to which these employees 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 employers to pay their employees during the period of economic downturn and to maintain the employment relationship throughout the period of the downturn. Where an employee receives a payment under an Australian worker's compensation law, there is no cost to the employer to subsidise. The maintenance of the employment relationship is also guaranteed by those schemes.

For these reasons, the Rules do not unnecessarily limit the protections afforded to the enjoyment of health.

National origin

The Rules 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 employees 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 social security system.

The differentiation of treatment is considered legitimate as it supports the unique arrangements between Australia and New Zealand under the Trans-Tasman Travel Arrangement. To the extent that differentiation of treatment on the basis of national origin is applied to this cohort, it is considered reasonable and proportionate as it reaffirms the important role of the bilateral relationship between Australia and New Zealand.

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

Age

The Rules 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 Rules limit entitlement to a JobKeeper payment in relation to an employee where the employee was aged at least 16 years on 1 March 2020. Accordingly, some in the working population—those aged under 16—cannot obtain the benefit of the JobKeeper payment.

Applying the benefit of the JobKeeper payment to workers over the age of 16 only is justified and rationally connected and proportionate to the objective as it is workers over the age of 16 who are financially independent and 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 Rules do not unnecessarily restrict the rights of equality and non-discrimination based on age.

Conclusion

The Rules are compatible with human rights. Importantly, the Rules positively engage the right to work as the JobKeeper scheme is aimed at assisting employers and keeping people in jobs.

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