

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Superannuation Guarantee (Administration) Act 1992

*Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment)
Regulations 2020*

The *Superannuation Guarantee (Administration) Act 1992* (the Act) establishes the Superannuation Guarantee Scheme, which requires employers to provide sufficient superannuation support for their employees, and provides rules for its administration.

Section 80 of the Act provides that the Governor-General may make regulations 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.

The purpose of the *Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 2020* (the Regulations) is to ensure employers are not subject to additional superannuation guarantee obligations as a result of their participation or anticipated participation in the JobKeeper scheme.

In particular, amounts of salary or wages that do not relate to the performance of work and are only paid to an employee to satisfy the wage condition for getting JobKeeper payment are prescribed by the Regulations as excluded salary or wages for the purposes of paragraph 27(1)(e) of the Act. The effect is that these amounts are excluded from the calculations of an employer's superannuation guarantee shortfall and the minimum superannuation contribution an employer is required to make in respect of an employee to avoid a superannuation guarantee charge liability.

The Regulations form part of the framework for the JobKeeper scheme, which was established by the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the JobKeeper Rules). The JobKeeper scheme assists businesses that have been significantly affected by the Coronavirus known as COVID-19 by subsidising the cost of wages of eligible employees from 30 March 2020 to 27 September 2020.

The JobKeeper Rules specify when an employer is entitled to a JobKeeper payment for their employees, the amount and timing of a payment, and other matters relating to the administration of the JobKeeper scheme.

An employer that is entitled to a JobKeeper payment will receive a fixed payment of \$1,500 per fortnight for each eligible employee. It is a condition of entitlement that an employer has satisfied the wage condition set out in the JobKeeper Rules by paying salary or wages (in combination with any superannuation contributions made under a salary sacrifice arrangement or other amounts dealt with as agreed with the employee under a salary sacrifice arrangement and any PAYG withholding) of at least that amount to each eligible employee in the fortnight. This reflects that the JobKeeper payment is a wage subsidy that is reimbursed by the Australian Government to entitled employers.

In some cases, an eligible employee will receive an amount greater than their usual salary or wages because of the JobKeeper payment. This will occur where the employee has been stood down or the amount that is required to be paid to the employee for the performance of work is less than \$1,500 per fortnight.

The Regulations recognise that an employer is only entitled to a JobKeeper payment for its employees if the business has suffered a substantial decline in turnover. In these circumstances, it is appropriate to require employers to only make minimum superannuation contributions in respect of amounts that are required to be paid to an employee for the performance of work. Employers would not be required to make contributions in relation to additional amounts paid to satisfy the wage condition (for example, the amount by which \$1,500 exceeds an employee's normal pay). Accordingly, the Regulations are designed to balance adequate superannuation support for employees with assistance for businesses in this period of downturn.

The Regulations commence on the day after it is registered on the Federal Register of Legislation.

The Regulations affect an employer's superannuation guarantee obligations from the commencement of the JobKeeper scheme on 30 March 2020. Therefore, the Regulations will have some retrospective application, particularly to the extent it affects superannuation contributions made in respect of the last two days of the first quarter of this year.

The Regulations are consistent with section 12 of the *Legislation Act 2003*, as they do not adversely affect a person's rights or impose liabilities retrospectively. Rather, the Regulations are beneficial for employers participating in the JobKeeper scheme as the Regulations reduce their potential superannuation guarantee charge liability in respect of the payment of minimum superannuation contributions for their employees.

The application of the Regulations to the commencement of the JobKeeper scheme on 30 March 2020 is also necessary and appropriate in these circumstances given the need to respond to urgent and unforeseen events.

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

Prior to making this instrument, consultation was conducted with the Australian Taxation Office.

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

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

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

Details of the *Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 2020*

Section 1 – Name

This section provides that the name of the instrument is the *Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 2020* (the Regulations).

Section 2 – Commencement

The Regulations commenced on the day after they are registered on the Federal Register of Legislation.

Section 3 – Authority

The Regulations are made under the *Superannuation Guarantee (Administration) Act 1992* (the Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Item 1 amends the *Superannuation Guarantee (Administration) Regulations 2018* by inserting new section 12A.

Section 12A provides that an excess amount is prescribed as salary or wages for the purposes of paragraph 27(1)(e) of the Act to the extent:

- the salary or wages paid to an employee for the fortnight exceeds the amount that is required to be paid to the employee for the performance of work in the fortnight (including in relation to any leave entitlements); and
- the excess amount is reasonably attributable to amounts paid by the employer to the employee to satisfy the wage condition for getting a JobKeeper payment for the employee for the fortnight.

Section 12A of the Regulations is necessary to achieve the intended policy outcome as payments that are made to an employee to satisfy the wage condition for getting JobKeeper payment would otherwise be considered salary or wages and ordinary time earnings under the Act.

An employee's salary or wages are relevant to the calculation of the employer's individual superannuation guarantee shortfall in respect of the employee and the employer's superannuation guarantee charge. These calculations are relevant where the employer has failed to make the minimum superannuation contribution by the due date.

If the superannuation contribution is to be made to a retirement savings account or to a fund other than a defined benefit scheme, then an employee's ordinary time earnings are relevant to calculating the minimum superannuation contribution that is required to be made by the employer for the benefit of the employee to avoid a superannuation guarantee charge liability.

While an employee's salary or wages and ordinary time earnings are distinct concepts with different functions under the Act, the effect of excluding salary or wages under section 27 or 28 of the Act, including through regulations made for the purposes of paragraph 27(1)(e), flows through to the employee's ordinary time earnings base. In particular, subsection 23(12) of the Act provides that an employee's ordinary time earnings base is reduced by the amount of excluded salary or wages for the purposes of calculating the minimum superannuation contribution that an employer is required to make in respect of the employee.

Therefore, the effect of prescribing the excess amount for the purposes of paragraph 27(1)(e) of the Act is that it is excluded from the calculations of the individual superannuation guarantee shortfall in respect of the employee and the minimum superannuation contribution the employer is required to make in respect of the employee to avoid a superannuation guarantee charge liability.

The key components of section 12A of the Regulations are described in greater detail below.

Application to JobKeeper fortnights

Subsection 12A(1) provides that the Regulations apply in relation to JobKeeper fortnights, which are fortnightly periods in which an employer may be entitled to a JobKeeper payment for an employee. A JobKeeper fortnight includes each of the following:

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

This provision makes clear that the Regulations support the JobKeeper scheme framework by applying in relation to the duration of the scheme.

Subsection 12A(1) does not require an employer to be entitled to a JobKeeper payment for the Regulations to apply. This is intended to allow the Regulations to apply where an employer has a reasonable belief that it is entitled to a JobKeeper payment and has subsequently satisfied the wage condition in respect of its employees, but is ultimately not entitled to a JobKeeper payment.

For example, this may occur where an employer has relied on false statements provided by an employee about the employee's eligibility to participate in the JobKeeper scheme. In this case, an employer may rely on the Regulations even though it is not entitled to a JobKeeper payment in respect of the employee.

Subsection 12A(1) also establishes the retrospective application of the Regulations to the start of the JobKeeper scheme on 30 March 2020. This retrospective application does not adversely affect a person's rights or impose liabilities retrospectively, and is necessary in these circumstances given the need to respond to urgent and unforeseen events.

Salary or wages paid to an employee exceeds the amount required to be paid for the performance of work

Salary or wages that are required to be paid to an employee for the performance of work covers a broad range of payments. It includes paid salary or wages that are based on an employee's base rate of pay for work that is actually done by the employee. It also includes amounts that are required to be paid to an employee in relation to the taking of leave. For example, this includes personal leave, long service leave or leave loading that is required to be paid to an employee. This is made clear in paragraph 12A(2)(a) of the Regulations.

Additionally, the following salary or wages are also generally considered to be payments in relation to the performance of work, provided they form part of the agreed remuneration under the relevant employment agreement or contract: incentive-based payments and bonuses; loadings; monetary allowances; overtime and penalty rates.

The Regulations do not apply if the salary or wages paid to an employee does not exceed the sum of the amount required to be paid for the performance of work. This reflects that superannuation guarantee obligations should generally apply in respect of salary or wages that are required to be paid for the performance of work.

Example 1: Employee's salary or wages do not exceed the amount required to be paid for the performance of work

Liz is a full-time employee who usually earns \$3,000 per fortnight. As a result of the Coronavirus, her employer issues a JobKeeper enabling stand down direction and reduces her hours of work. She now earns \$2,000 per fortnight for the performance of work. Her employer is entitled to JobKeeper payments for her.

During the JobKeeper fortnight beginning on 25 May 2020, Liz takes 5 days of personal leave at full-pay. Her employer pays her \$2,000 for that fortnight: \$1,000 for the days she worked, and \$1,000 in relation to the taking of personal leave.

Liz's salary or wages and ordinary time earnings for the fortnight are \$2,000. The Regulations do not apply as the salary or wages paid to Liz do not exceed the amount required to be paid to her for the performance of work.

The minimum superannuation contribution her employer must make to avoid a superannuation guarantee charge liability for the relevant quarter is

9.5 per cent of Liz's ordinary time earnings. Her ordinary time earnings will include the \$2,000 she was paid in respect of the fortnight.

Excess is reasonably attributable to amounts paid to satisfy the wage condition

This requirement provides that the excess must be reasonably attributable to amounts paid by the employer to the employee for the purpose of satisfying the wage condition in respect of the employee for the fortnight.

Paragraph 12A(2)(a) of the Regulations makes clear that the excess amount cannot include salary or wages that are paid for the performance of work, even if those salary or wages are also paid to the employee for the purpose of satisfying the wage condition.

While in most cases, the salary or wages paid to an employee in this context will either be for the performance of work or for the purpose of satisfying the wage condition (or both), there may be circumstances where it is not appropriate to characterise part of an employee's salary or wages in this way.

For example, directors' fees that are paid to a director who is also an employee of the company will generally not be considered an amount for the performance of work or an amount that is paid for the purpose of satisfying the wage condition. This is because directors' fees would be better characterised as a payment for the performance of duties as a member of the executive body of a body corporate.

To deal with this issue, subsection 12A(2) only applies to the extent the excess amount is reasonably attributable to amounts paid by the employer for the purpose of satisfying the wage condition. In other words, if only part of the excess amount is reasonably attributable to amounts paid to satisfy the wage condition (and is not for the performance of work), then only that part of the excess is prescribed under subsection 12A(2). In the example above regarding directors' fees, this means that any such fees are not included in the excess amount worked out under paragraph 12A(2)(b) of the Regulations.

The following examples show how section 12A of the Regulations may apply in practice.

Example 2: Employee's earnings for the performance of work are less than \$1,500 per fortnight

Rachel is a part-time employee who continues to earn her usual wages of \$1,000 per fortnight. To satisfy the wage condition for JobKeeper payment for Rachel, her employer pays her an additional \$500 per fortnight so that she is paid a total of \$1,500 per fortnight. Her employer is entitled to JobKeeper payments for her.

The additional payment of \$500 is excluded from being salary or wages because it is paid by Rachel's employer for the purpose of satisfying the wage condition and is not paid to Rachel for the performance of work. Therefore, Rachel's salary or wages and ordinary time earnings for the fortnight are \$1,000.

The minimum superannuation contribution her employer must make in order to avoid a superannuation guarantee charge liability for the relevant quarter is 9.5 per cent of Rachel's ordinary time earnings. Her ordinary time earnings will include the \$1,000 she was paid in respect of the fortnight.

Example 3: Employee stood down and employer not entitled to JobKeeper

Erin is a long term casual employee who was earning approximately \$1,750 per fortnight. As a result of the Coronavirus, she has been stood down by her employer. Her employer has a reasonable expectation of participating in the JobKeeper scheme and satisfies the wage condition in respect of Erin by paying her \$1,500 for the first JobKeeper fortnight.

After making the payment to Erin, her employer discovers that they are not entitled to JobKeeper payment for Erin under the JobKeeper Rules.

However, the Regulations still apply as the payment of \$1,500 is considered salary or wages paid to Erin in respect of a JobKeeper fortnight.

As Erin remains stood down, the entire amount is excluded from being salary or wages as it is paid by her employer for the purpose of satisfying the wage condition and is not paid to Erin for the performance of work.

Therefore, Erin's salary or wages and ordinary time earnings for the fortnight are nil. This means her employer is not required to make a superannuation contribution in respect of Erin for the fortnight in order to avoid a superannuation guarantee charge liability.

Treatment of sacrificed amounts

To satisfy the wage condition under section 10 of the JobKeeper Rules in respect of an employee, an employer may make superannuation contributions for the benefit of the employee under a salary sacrifice arrangement within the meaning of the Act.

Section 15A of the Act provides that a salary sacrifice arrangement involves an employee agreeing to superannuation contributions to be made in return for the employee's salary or wages or ordinary time earnings being reduced. This means that these contributions by their nature, are not part of an employee's salary or wages or ordinary time earnings under the Act.

However, the calculations in sections 19 and 23 of the Act regarding the superannuation guarantee shortfall and the minimum superannuation contribution incorporates sacrificed amounts back into the quarterly salary or wages base and the ordinary time earnings base respectively.

This means that sacrificed amounts do not reduce the salary or wages base or ordinary time earnings base on which the relevant calculations are made. This reflects that contributions made under salary sacrificed arrangements are generally an extra contribution on top of an employer's minimum superannuation contribution obligations.

In most cases, the sacrificed amount for superannuation guarantee purposes is equivalent to the superannuation contribution that is made under the salary sacrifice arrangement. However, under subsection 15A(3) of the Act, this is not the case where the contribution amount, had it been paid to the employee (instead of being reduced from the employee's salary or wages under the salary sacrifice arrangement) would have been excluded salary or wages.

The effect of subsection 15A(3) is that if an employer makes a contribution under a salary sacrifice arrangement to satisfy the wage condition, and that contribution (or part thereof) would have been an excess amount under subsection 12A(2) of the Regulations if it was paid to the employee, then that contribution (or part thereof) is not considered a sacrificed amount. The contribution therefore does not form part of the employee's quarterly salary or wages base or ordinary time earnings base, and no additional superannuation contribution is required to be paid in respect of the salary sacrificed contribution for the benefit of the employee to avoid a superannuation guarantee charge liability.

This result is consistent with the purpose of the Regulations, that is, to ensure employers receiving JobKeeper payments for their employees are not subject to additional superannuation guarantee obligations in respect of those employees because of their participation in the JobKeeper scheme.

Example 4: Contribution under salary sacrifice arrangement would have been an excess amount under the Regulations

Rob is a part-time employee who continues to receive his usual wages of \$1,000 per fortnight for the performance of work. To satisfy the wage condition for JobKeeper payment, his employer makes a contribution of \$500 to Rob's superannuation fund under an agreed salary sacrifice arrangement. His employer is entitled to JobKeeper payments for him.

If the salary sacrificed contribution of \$500 had been paid to Rob, it would have been excluded salary or wages under subsection 12A(2) of the Regulations. This is because it would have been an excess amount that is paid by Rob's employer to satisfy the wage condition in respect of Rob and would not be an amount that is required to be paid to Rob for the performance of work.

Therefore, under subsection 15A(3) of the Act, the \$500 salary sacrificed contribution is not a sacrificed amount and is not included in either the quarterly salary or wages base or ordinary time earnings base.

The minimum superannuation contribution his employer must make in order to avoid a superannuation guarantee charge liability for the relevant quarter is 9.5 per cent of Rob's ordinary time earnings base. His ordinary time earnings base will include the \$1,000 he was paid in respect of the fortnight.

However, if the contribution under the salary sacrifice arrangement would not have been excluded salary or wages if it had been paid to the employee, then the contribution would be considered a sacrificed amount. This means the contribution would be taken into account in calculating the employer's minimum superannuation

contribution for the benefit for the employee and any superannuation guarantee shortfall.

Example 5: Contribution under salary sacrifice arrangement would not have been an excess amount under the Regulations

Lee is a part-time employee who works 40 hours per fortnight. She has an arrangement in place with her employer whereby each fortnight the employer pays Lee a salary of \$800 and makes a salary sacrificed superannuation contribution of \$200 in respect of Lee. Her employer is entitled to JobKeeper payments for her.

During the fortnight beginning 4 May 2020, Lee takes 5 hours' worth of paid leave. She also performs overtime and as such receives additional salary of \$100. To satisfy the wage condition for JobKeeper payment, her employer pays her an additional amount of \$400 so that she receives salary of \$1,300 and has a salary sacrificed superannuation contribution of \$200 made in respect of her, being a total of \$1,500 for that fortnight before tax.

The additional amount of \$400 is excluded from being salary or wages because it is paid by Lee's employer for the purpose of satisfying the wage condition and is not an amount that is paid to Lee for the performance of work.

Lee's salary or wages for the fortnight are therefore \$900. The salary sacrificed superannuation contribution is not included as it does not form part of an employee's salary or wages under the Act.

Lee's ordinary time earnings for the fortnight are \$800 as they do not include the salary sacrificed superannuation contribution or the additional salary for overtime work.

If the salary sacrificed contribution of \$200 had been paid to Lee, it would not have been excluded salary or wages under subsection 12A(2) of the Regulations as it would have been an amount that is required to be paid to Lee for the performance of work. The salary sacrificed contribution will therefore form part of Lee's quarterly salary or wages base and ordinary time earnings base.

The minimum superannuation contribution her employer must make in order to avoid a superannuation guarantee charge liability for the relevant quarter is 9.5 per cent of Lee's ordinary time earnings base. Her ordinary time earnings base will include the \$1,000 for this fortnight.

Remaining amounts less than \$450

Subsection 12A(3) of the Regulations makes clear that if the amount that remains after reducing the salary or wages an employer pays to an employee by the excess amount under subsection 12A(2) is less than \$450 for a calendar month, then the remaining amount is also excluded salary or wages.

This provision clarifies that the operation of subsection 27(2) of the Act is preserved in this context. Subsection 27(2) broadly provides that salary or wages of less than \$450 for a calendar month for the purposes of the Act.

This provision balances the administrative cost of making small superannuation contributions against providing adequate superannuation support to employees.

Example 6: Employee's earnings for the performance of work are less than \$450 for a calendar month

Nelson is a long term casual employee who earns \$400 in April 2020 for the performance of work. To satisfy the wage condition for JobKeeper payment for Nelson, his employer pays him \$400 for the month, plus an additional \$2,600, totalling \$3,000 before tax for that month.

His employer is entitled to JobKeeper payment for him.

The additional payment of \$2,600 is excluded from being salary or wages because it is not an amount that is required to be paid to Nelson for the performance of work.

The remaining \$400 is also excluded from being salary or wages under subsection 12A(3) of the Regulations because his earnings in relation to the performance of work during the calendar month is less than \$450.

Therefore, Nelson's salary or wages and ordinary time earnings for the month of April are nil. This means his employer is not required to make a superannuation contribution in respect of Nelson for that month in order to avoid a superannuation guarantee charge liability.

Statement of Compatibility with Human Rights

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

Superannuation Guarantee (Administration) Amendment (Jobkeeper Payment) Regulations 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

This Legislative Instrument forms part of the JobKeeper scheme framework and ensures that employers receiving JobKeeper payments for their employees are not required to comply with additional superannuation guarantee obligations in respect of those employees as a result of their participation in the JobKeeper scheme.

Any excess amounts that are only paid to an employee to satisfy the wage condition, which is a condition of entitlement for the JobKeeper payment, are therefore excluded salary or wages for superannuation guarantee purposes.

Instead, these employees are only required to make minimum superannuation contributions in respect of amounts that are required to be paid to those employees for the performance of work.

This recognises that an employer is only entitled to a JobKeeper payment if the business has suffered a substantial decline in turnover. In these circumstances, it is appropriate to require employers to only make minimum superannuation contributions in respect of amounts that are required to be paid to an employee for the performance of work. However, employers would not be required to make contributions in relation to additional amounts paid to satisfy the wage condition (for example, the amount by which \$1,500 exceeds an employee's normal pay). Accordingly, this Legislative Instrument is designed to balance adequate superannuation support for employees with assistance for businesses in this period of downturn.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.