

EXPLANATORY STATEMENT

Issued by authority of the Treasurer

Coronavirus Economic Response Package (Payments and Benefits) Act 2020

*Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules
(No. 5) 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), 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.

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

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

The purpose of the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020* (the Amending Rules No. 5) is to revise the rules in the JobKeeper scheme so that entities that are approved providers of child care services are not entitled to JobKeeper payments for certain employees or for a business participant. This follows the Government's decision to extend separate support to this sector by the reintroduction of the Child Care Subsidy and the introduction of an additional Transition Payment as part of the Early Childhood Education and Care transition arrangements. The changes take effect from the start of the JobKeeper fortnight commencing on 20 July 2020.

Details of the Amending Rules No. 5 are set out in [Attachment A](#).

Prior to making the instrument, consultation on the draft rules was conducted with a number of stakeholders, including the Australian Taxation Office and the Department of Education, Skills and Employment.

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

The financial impact of the Amending Rules No. 5 will be published in the July 2020 Economic and Fiscal Update.

The Amending Rules No. 5 are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amending Rules No. 5 commenced on the day after they were registered on the Federal Register of Legislation.

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

Details of the Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020

Section 1 – Name of the Instrument

This section provides that the name of the Instrument is the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020* (the Amending Rules No. 5).

Section 2 – Commencement

The Amending Rules No. 5 commence the day after they were registered on the Federal Register of Legislation.

Section 3 – Authority

The Amending Rules No. 5 are made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

JobKeeper payment amendments

The Amending Rules No. 5 revise the rules in the JobKeeper scheme so that entities that are approved providers of one or more approved child care services are not entitled to JobKeeper payments for:

- business participants; and
- their employees, if the sole business activity of the employer is to provide those child care services.

The changes take effect from the start of the JobKeeper fortnight commencing on 20 July 2020.

References to legislation in the Explanatory Statement are to the Amending Rules No. 5 unless otherwise stated.

Removal of application of the JobKeeper Scheme to child care services

Subsection 4(1) of item 1 to Schedule 1 includes definitions of ‘approved child care service’ and ‘approved provider’ in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. Both terms take the meaning they have in the *A New Tax System (Family Assistance) (Administration) Act 1999* to ensure the

amendments operate in conjunction with the Commonwealth's child care support framework.

JobKeeper payments in respect of employees

Paragraph 9(4)(d) in item 2 to Schedule 1 provides that an entity cannot qualify for a JobKeeper payment for an employee if:

- the entity solely carries on business as an approved provider of one or more approved child care services; and
- the ordinary duties of the individual's employment relate principally to the operation of one or more of those services.

The effect of this amendment is that an entity whose sole business activity is to carry on child care services as an approved provider under the family assistance law will no longer qualify for JobKeeper payments for any of their employees for the JobKeeper fortnight commencing on 20 July 2020 and later fortnights.

In contrast, an entity that is an approved provider of child care services, but also carries on other businesses (for example, aged care or vocational education), will only qualify for a JobKeeper payment for an employee for a JobKeeper fortnight if throughout that JobKeeper fortnight their ordinary duties of employment do not relate principally to the approved child care service operations of an approved provider. Accordingly, if during the JobKeeper fortnight the employee's ordinary duties of employment relate principally to the operations of an approved provider of approved child care services then eligibility for a JobKeeper payment in respect of that employee is not available to the employer for that JobKeeper fortnight.

The assessment of whether the ordinary duties of an individual relate principally to the operations of an approved provider considers the ordinary expected duties related to the individual's employment. In this respect, the assessment is not limited to the duties that were only performed during the relevant fortnight. They are not affected by once off duties that do not form part of the employee's ordinary expected ongoing duties. However, a pattern of such child care duties would suggest that they form part of the ordinary expected or established duties of the employee.

It does not matter whether a particular individual is on leave during a JobKeeper fortnight, as the taking of leave does not affect the nature of an employee's ordinary duties.

These amendments ensure that eligibility for JobKeeper payments applies appropriately to approved providers of approved child care services by only excluding eligibility in respect of their employees where the employee's ordinary duties of employment relate principally to the operation of the approved child care services. In contrast, an employee whose child care related activities (whether direct or indirect) are minor or secondary to their main ordinary employment responsibilities will continue to be an eligible employee for the purposes of the JobKeeper payment.

Duties of employment relating to the operation of a child care service include both direct provision of child care services and other duties that support the provision of such services. This would include, for example, any administrative support or payroll staff mainly involved in the child care services aspects of an entity's business and

ancillary support (for example, gardeners or cleaners who work only in relation to the child care service) that have no direct role in providing services to children.

However, the exclusion is not intended to apply to any employees of an approved provider whose ordinary duties of employment do not relate principally to the operation of one or more approved child care services. This will include staff whose duties relate to other elements of an entity's business other than concerning child care services (for example, aged care services) and employees with secondary or subordinate duties only that relate directly or indirectly to child care services.

Where the ordinary duties of an employee of an approved provider are not principally related to the operation of child care services for a JobKeeper fortnight, the nature of the employee's duties must continue to be tested for each later JobKeeper fortnight to confirm that this requirement continues to be satisfied for the JobKeeper payment to continue to be paid. A change in an employee's established ordinary duties may result in a change in their eligibility for the JobKeeper payment.

The test may not be met in one JobKeeper fortnight but the employee may satisfy the test in a later JobKeeper fortnight because their ordinary duties change and are no longer principally related to the operation of an approved provider of approved child care services. In these circumstances the entity that employs them can receive a JobKeeper payment in respect of the employee for the later qualifying JobKeeper fortnight in which the test is met.

Example 1: Diversified business including child care services

Aussie Care runs a number of child care services, aged care communities and training programs and employs 300 staff nationally. Aussie Care is an approved provider for these approved child care services.

Of its employees, 100 are permanently employed in its child care services and 120 are permanently employed in its aged care and training services. Aussie Care also employs 20 staff who work on a flexible basis between its child care and aged care services. Fifteen of these staff spend the majority of their time in the aged care and training services, and the remaining five staff spend the majority of their time in the child care services.

Aussie Care also has 60 staff who are permanently employed in the national office. Of these employees, 20 have duties that principally relate to the operation of the child care services. The duties undertaken by these staff include general management functions, as well as research and advocacy and roles in relation to Aussie Care's child care services. Ten employees in the national office are responsible for staffing and payroll across the organisation (including the child care services).

Aussie Care is not entitled to receive the JobKeeper payment in relation to the 100 employees permanently working in its child care services, the 5 employees working on a flexible basis who principally work in its child care services, and the 20 employees in the national office whose duties principally relate to the operation of those services.

Subject to other conditions, Aussie Care is entitled to receive the JobKeeper payment in relation to the 120 employees permanently working in its aged

care and training services, the 15 employees working on a flexible basis that principally work in the aged care and training services, and 40 of the employees in the national office. These include the 10 employees in the national office responsible for staffing and payroll, as their duties are not principally related to the child care services (the majority of staff of Aussie Care to which their staffing and payroll duties relate are not engaged in the provision or support of child care services).

Example 2: Working out if ordinary duties of an employee principally relate to the operation of child care services

Anne is employed by an entity that is an approved provider of approved child care services and which also operates aged care support. Her ordinary and longstanding duties of employment require her to work in the child care service for four days of a ten day fortnight and the other six days she is required to work at the aged care centre.

Accordingly, as the expected pattern of her employment duties continues to require 60 per cent of her time to be spent working in the aged care centre, her employer may continue to claim the JobKeeper payment in respect of Anne. This is subject to the mix of her ordinary duties continuing in the future and provided the other general conditions of eligibility continue to be met.

JobKeeper payments in respect of business participants

Paragraph 11(1)(ba) in item 3 to Schedule 1 provides that an entity cannot qualify for a JobKeeper payment for a business participant for a JobKeeper fortnight if the entity is an approved provider of an approved child care service.

If an entity is an approved provider of an approved child care service but is also carrying on other businesses, then it is no longer able to nominate a business participant to receive the JobKeeper payment from the affected JobKeeper fortnight and any future fortnights. If an entity that is carrying on business provides services to an approved provider of approved child care services but is not itself an approved provider then it can continue to qualify for the JobKeeper payment in respect of its employees and for an individual as a business participant under the JobKeeper scheme if the general eligibility requirements are otherwise met.

Application

Item 4 of Schedule 1 to the Amending Rules No. 5 includes an application provision that provides that the amendment to end support for the child care sector under the JobKeeper Payment Scheme applies from the start of the JobKeeper fortnight commencing on 20 July 2020. This ensures that the cessation of JobKeeper payments to the child care sector corresponds with the reintroduction of the Child Care Subsidy and Additional Child Care Subsidy, and the introduction of an additional Transition Payment as part of the Early Childhood Education and Care Transition Arrangements.

Statement of Compatibility with Human Rights

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

Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020

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

Overview of the Legislative Instrument

The purpose of the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 5) 2020* (the Amending Rules No. 5) is to revise the rules in the JobKeeper scheme so that it does not apply to employees of approved providers if the sole business activity of the employer is to provide child care services as an approved provider. This follows the Government's decision to extend separate support to this sector. The changes take effect from the start of the JobKeeper fortnight commencing on 20 July 2020.

Human rights implications

The Amendment Rules are consistent with Articles 3, 19 and 27 of the Convention on the Rights of the Child (CRC).

Article 3 of the CRC recognises that in all actions concerning children, the best interests of the child shall be a primary consideration.

Article 19 of the CRC requires that appropriate measures are taken to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation.

Article 27 of the CRC recognises the right of every child to a standard of living adequate for the child's physical, mental, spiritual, social and moral development. Article 27 also requires States Parties to take appropriate measures to assist parents and others responsible for the child to implement this right and shall, where required, provide material assistance and support.

Early childhood education and child care play a vital role in the development of Australian children and the rights of the child listed above are fundamentally engaged by the family assistance law generally in facilitating access to subsidised child care. Preparation for school and access to this care is also one of the most effective early intervention strategies to break the cycle of poverty for children.

The amendment ends support for the child care sector under the JobKeeper Payment Scheme so that it corresponds with the reintroduction of support under the Child Care Subsidy and Additional Child Care Subsidy, and the introduction of an additional Transition Payment as part of the Early Childhood Education and Care Transition

Arrangements (see the *Child Care Subsidy Amendment (Coronavirus Response Measures No. 4) Minister's Rules 2020*).

Conclusion

This Legislative Instrument is compatible with human rights.