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## Explanatory Statement

# Coronavirus Economic Response Package (Payments and Benefits) Higher Rate Determination 2020

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### General outline of instrument

1. This instrument is made under subsection 20(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* and subsection 9A(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules).
2. The legislative instrument relates to the amount of an entity's JobKeeper payment. It sets out when the higher rate applies to an individual who is an eligible employee of an entity, identifying specific circumstances in which the Commissioner is satisfied that the employee's total hours of the kind referred to in subsection 9A(1) of the Rules in the reference period<sup>1</sup> for the individual are not readily ascertainable.
3. The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

### Date of effect

5. This instrument commences on the day after it is registered on the Federal Register of Legislation.

### What is the effect of this instrument

6. The effect of this instrument is to specify circumstances in which the higher rate of an entity's JobKeeper payment applies to an individual who is an eligible employee of the entity. This will ensure that entities will still be eligible to receive the intended JobKeeper payments where particular circumstances apply to their employees.

### Compliance cost assessment

7. Compliance Cost Impact: Minor – There will be no or minimal impacts for both implementation and ongoing compliance costs. The legislative instrument is minor or machinery in nature.
8. No Regulation Impact Statement required. Prime Minister's Exemption applies – COVID-19 related measures (OBPR ref ID 42600).

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<sup>1</sup> In this Explanatory Statement, *reference period* has the meaning given by section 4A of the Rules and noting this can be an alternative reference period determined by the Commissioner under subsection 4A(2) of the Rules.

## Background

9. The JobKeeper scheme has been extended from 27 September 2020 to 28 March 2021. For fortnights beginning on or after 28 September 2020, the amount of an entity's JobKeeper payment will depend on whether the higher or lower rate applies to an individual for the entity.

10. Section 9A of the Rules states that the higher rate applies to eligible employees if the total hours of work, paid leave and paid absence on public holidays for their employer in any reference period was 80 hours or more. Otherwise, the lower rate applies.

11. Where the hours in a reference period for a class of individuals are not readily ascertainable, the Commissioner may determine specified circumstances in which the higher rate is taken to apply to individuals in that class.

12. In this instrument, the Commissioner has determined, in accordance with subsection 9A(4) of the Rules, specified circumstances in which the higher rate will be taken to apply.

## Explanation

### Whether the higher rate applies to an individual who is an eligible employee

13. Under subsection 9A(3) of the Rules, the higher rate applies to an eligible employee of an entity if:

- the Commissioner has determined specified circumstances under subsection 9A(4) of the Rules; and
- the circumstances apply to the employee.

14. Subsection 9A(4) provides that:

If the Commissioner is satisfied that hours of the kind referred to in subsection (1) in a period for a class of individuals are not readily ascertainable, the Commissioner may, by legislative instrument, determine specified circumstances in which the higher rate is taken to apply to individuals in the class.

15. There are two limbs to the Commissioner's determination power.

16. First, the Commissioner must be satisfied that the hours in a reference period for a class of individuals are not readily ascertainable.

17. Second, the Commissioner may determine specified circumstances in which the higher rate is taken to apply to individuals in that class.

### Class of individuals where hours are not readily ascertainable

18. The Commissioner has determined that he is satisfied that the hours of the kind referred to in subsection 9A(1) of the Rules in a reference period for a class of individual employees are not readily ascertainable. This instrument applies in determining whether the higher rate of JobKeeper payment applies to that class of employees, being individuals for whom their employer:

- does not have any record of the hours of the kind referred to in subsection 9A(1) of the Rules in a reference period; or
- has incomplete records of those hours in a reference period.

19. This class includes individuals paid salary, wages, commission, bonus or allowances that are not tied to an hourly rate or contracted rate, where there are no (or incomplete) records of the relevant hours. It is expected that employers would be less likely to have records of the hours

worked by these types of employees and as such the instrument may apply to determine if the higher rate applies.

### **Specified circumstances in which the higher rate is taken to apply**

20. The Commissioner has identified three circumstances (or tests) in which the higher rate of JobKeeper will apply to individuals in the class of employees.

21. An eligible employee may satisfy any of the three tests. That is, each test applies independently and in addition to the test in subsection 9A(1) of the Rules. If an employer determines that an employee satisfies any of the three tests, the higher rate will apply.

#### ***First specified circumstance – \$1,500 or more in salary, wages, commission***

22. The higher rates applies to employees pursuant to paragraph 7(1)(a) if, in a reference period, the sum of the amounts covered by subsection 10(2) of the Rules totalled \$1,500 or more in respect of a particular employee, if all references to 'fortnight' in that subsection were instead to 'reference period'.

23. Section 10 of the Rules is the wage condition. Subsection 10(2) of the Rules sets out amounts that are included in determining whether the wage condition is satisfied. It includes gross salary, wages, commission, bonus payments and allowances, inclusive of pay as you go (PAYG) withholding, and any fringe benefits or superannuation contributions provided under an effective salary sacrifice agreement.

24. Subsection 7(2) excludes certain amounts from the calculation required under paragraph 7(1)(a). Similar to prescribed salary and wages under section 12A of the *Superannuation Guarantee (Administration) Regulations 2018*, this excludes the 'top-up' amount that an employer would need to make to satisfy the wage condition for an employee in a JobKeeper fortnight. This must be excluded for any reference period that also consists of any part of one or more JobKeeper fortnights (for example, relating to 1 July 2020 for eligible employees) – otherwise, any eligible employee of an employer in the JobKeeper scheme would qualify under this test if the employer did not keep records (or kept incomplete records). This would be inconsistent with the intent of the Rules and this Instrument.

#### ***Example 1 – Piece rate workers and no records kept***

25. Jenda Pty Ltd (Jenda) employed ten individuals (seven full-time, three part-time) to work in its small factory to produce widgets. Jenda pays its employees at a piece rate based on each widget produced (rather than an hourly rate), and did not maintain records of the number of hours its employees had worked in a reference period.

26. Jenda's employees fall within the class of individuals where the Commissioner is satisfied that the hours of employees within that class are not readily ascertainable in a reference period.

27. Applying paragraph 7(1)(a), Jenda's payroll records for its full-time employees show that the seven full-time employees each earned approximately \$3,500 in the reference period (being more than \$1,500). The higher rate will apply to those seven individuals in determining the amount of the JobKeeper payment for those individuals.

*Example 2 – Piece rate workers and no records kept for employer on JobKeeper*

28. Continuing on from Example 1, Jenda's records showed that Char, one of Jenda's eligible employees who works part-time, was paid \$3,000 in the reference period that is the 28-day period ending at the end of the most recent pay cycle for Char before 1 July 2020. However, some of that amount represented top-up payments made by Jenda in order to satisfy the wage condition. Therefore, subsection 7(2) applies to modify the operation of paragraph 7(1)(a).

29. Jenda made two top-up payments to Char in the reference period totaling \$900, which is excluded from paragraph 7(1)(a). This means that Char was paid \$2,100 for the purposes of paragraph 7(1)(a) in the reference period, and the higher rate still applies.

**Second specified circumstance – employment conditions**

30. The higher rate applies to employees pursuant to paragraph 7(1)(b) if a written industrial award, employment contract or similar instrument governs their employment relationship and under that agreement an employee was required to work 80 hours or more in a reference period (including paid leave and paid absence on public holidays).

31. In order to satisfy evidentiary requirements for the purposes of meeting this circumstance, such instruments governing employment relationships must be in written form, rather than being only verbal agreements or understandings.

*Example 3 – Piece rate workers and no records kept (continued)*

32. Continuing on from Examples 1 and 2, Jenda's payroll records for the reference period are corrupted and payroll records for the other two of its part-time employees' payroll records are lost. Jenda cannot determine whether those employees have been paid \$1,500 or more in the reference period.

33. Jenda applies paragraph 7(1)(b) by reviewing the individual contracts in place with those two employees for the reference period. It required them to work for 20 hours per week (80 hours over the reference period). The higher rate will also apply to those two individuals in determining the amount of the JobKeeper payment for those individuals.

**Third specified circumstance – reasonable assumptions**

34. The higher rate applies to employees pursuant to paragraph 7(1)(c) if it can be determined, based on reasonable assumptions, that an employee's hours in a reference period were 80 hours or more (including paid leave and paid absence on public holidays).

35. This test also requires that the hours are not readily ascertainable. While this is satisfied where the hours are not readily ascertainable, it is also satisfied where, while the hours could be readily ascertainable (albeit in the absence of complete records of the hours worked per subsection 6(1)), the steps necessary to determine the hours are not reasonable having regard to the burden it would place on the employer.

36. In either circumstance, employers must make reasonable assumptions to estimate whether the employee's hours in a reference period were 80 hours or more (including paid leave and paid absence on public holidays).

37. For assumptions to be reasonable, they must be based on verifiable information. This could include information on how an employer's business usually operates, such as the ordinary business hours, average staffing level in any given week, common shift lengths for certain types of employees and the average number of shifts of employees.

#### *Example 4 – Records destroyed*

38. Elron Company (Elron) suffered flooding to its premises during July 2020 and, as a result, a number of employment records for its only long-term casual employees were destroyed, including those relating to hours worked and amounts paid in the reference period. Elron's long-term casual employees fall within the class of individuals under subsection 6(1).

39. As no wage records were available and no employment agreements were in place specifying the number of hours to be worked, Elron considered its business practices.

40. The long-term casual employees work at Elron producing laptop computers assembled from individual parts it has purchased. In general, an average worker assembles eight laptops in a five-hour shift. One employee assembled 161 laptops (as identified in the warehouse records): approximately 100 hours of work.

41. This is a reasonable assumption, based on information Elron has available, on which to apply the higher rate to this employee.

#### **Class of individuals to whom this instrument does not apply**

42. Subsection 9A(4) of the Rules cannot apply if an employer can readily ascertain under subsection 9A(1) of the Rules an employee's total hours of work, paid leave and paid absence on public holidays in a reference period. As such, this instrument does not apply in respect of such employees (that is, they are not in the class of individuals).

#### *Example 5 – Piece rate workers and records kept*

43. Jomily Company employed individuals to work in its small factory to produce gizmos. Jomily paid their employees at a piece rate based on each gizmo produced, and kept records of the employees' total hours or work in the reference period.

44. The hours of the employees of the kind referred to in subsection 9A(1) of the Rules are readily ascertainable and this instrument does not apply.

#### **Availability of independent merits review**

45. A decision made by the Commissioner under section 7 of the legislative instrument is subject to independent merits review.

#### **Objecting to decisions under the Coronavirus Economic Response Package (Payments and Benefits) Act**

46. Subsection 13(1) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (CERP Act) states that an entity that is dissatisfied with a decision covered by subsection 13(2) of the CERP Act may object to the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953* (TAA).

47. For a decision to be covered by subsection 13(2) of the CERP Act, it must be a decision of the kind referred to in paragraphs 13(2)(a) to (f). Relevantly, paragraph (b) covers 'a decision that the entity is entitled to a Coronavirus economic response payment for a period of a particular amount'.

48. Subsection 20(1) of the CERP Act allows the Treasurer to make rules prescribing matters required or permitted by the Act to be prescribed by the rules, or matters that are necessary or convenient to be prescribed for carrying out or giving effect to the Act.

49. Further, subsection 20(4) of the CERP Act allows the rules to make provision in

relation to a matter by conferring a power on the Commissioner to make ‘an instrument of a legislative or administrative character,’ or ‘a decision of an administrative character’. For this legislative instrument, the Rules are the relevant rules.

50. Included in the Rules is subsection 9A(4) which states that:

‘If the Commissioner is satisfied that hours of the kind referred to in paragraph (1)(a) in a period for a class of individuals are not readily ascertainable, the Commissioner may, by legislative instrument, determine specified circumstances in which the higher rate is taken to apply to individuals in the class.’

51. As the relevant legislative instrument referred to in subsection 9A(4) of the Rules is this legislative instrument, a decision that the Commissioner makes under section 7 of this legislative instrument will be a decision made under the CERP Act.

52. Further, as that decision affects the amount of the Jobkeeper payment that an employer may receive in respect of certain employees, it is a decision regarding whether the entity is entitled to a Coronavirus economic response payment for a period of a particular amount.

53. Therefore, a decision made by the Commissioner under section 7 of the legislative instrument will fall under subsection 13(2) of the CERP Act and an entity can object to the decision in the manner set out in Part IVC of the TAA.

#### **Part IVC of the Taxation Administration Act 1953**

54. Part IVC of the TAA relates to taxation objections, reviews and appeals.

55. If an entity is dissatisfied with a decision in relation to whether the entity was entitled to a Coronavirus economic response payment for a period for a particular amount, the entity can lodge an objection within 60 days after the notice of the decision has been served on the person: paragraph 14ZW(1)(c) of the TAA.

56. Subsections 14ZY(1) and (2) of the TAA provide that if the objection has been lodged with the Commissioner within the required period, the Commissioner must decide whether to allow it, wholly or in part, or disallow it, and that such a decision will be an objection decision.

57. If the entity is dissatisfied with the objection decision, then the entity can apply to the Administrative Appeals Tribunal (AAT) for a review of that decision if it is a ‘reviewable objection decision’: subparagraph 14ZZ(1)(a)(i) of the TAA. Alternatively, though less common, the person may appeal directly to the Federal Court under subparagraph 14ZZ(1)(a)(ii) of the TAA.

58. A decision that the Commissioner makes under section 7 of the legislative instrument will be a reviewable objection decision.

#### **Consultation**

59. The Commissioner routinely publishes draft legislative instruments seeking public feedback for a minimum period of 4 weeks. To avoid the detrimental effects for employers and employees that delays in making the legislative instrument would cause, the Commissioner undertook targeted consultation to ensure it could be made as quickly as possible. In these circumstances, the Commissioner has undertaken reasonable and appropriate consultation over a shorter period than would otherwise have been used.

60. Consultation was undertaken with various representatives of professional and industry

associations, business representatives and officials from the Treasury, Attorney-General's Department, Fair Work Commission and Fair Work Ombudsman. In consultation scenarios were identified that needed to be addressed expressly, such as the operation of wage condition to the 1 July 2020 reference date. Most, but not all, suggestions have been adopted in the instrument or addressed in this Explanatory Statement.

## 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) Higher Rate Determination 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 legislative instrument is to specify circumstances in which the higher rate of an entity's JobKeeper payment applies to an individual who is an eligible employee of the entity. This will ensure that entities will still be eligible to receive the intended JobKeeper payments where particular circumstances apply to their employees.

#### Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms listed in the following covenants:

- [the International Covenant on Civil and Political Rights](#) (ICCPR)

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

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

The application of the higher rate of JobKeeper payments by reference to the specified circumstances in the determination may require the provision of information to the Commissioner including personal information such as records of sales and manufacturing 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 higher rate of payment under 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.

- [the International Covenant on Economic, Social and Cultural Rights](#) (ICESCR)
- [the International Convention on the Elimination of All Forms of Racial Discrimination](#) (CERD)
- [the Convention on the Elimination of All Forms of Discrimination against Women](#) (CEDAW)



- [the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment](#) (CAT)
- [the Convention on the Rights of the Child](#) (CRC), and
- [the Convention on the Rights of Persons with Disabilities](#) (CRPD).

This disallowable legislative instrument does not engage with any human rights because it merely provides additional opportunities for business entities to obtain higher levels of Government assistance due to the consequences of the COVID-19 pandemic, where the employee's hours of work, paid leave and paid absence for public holidays are not readily ascertainable.

## **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues. Importantly, this instrument positively engages the right to work as it is aimed at assisting employers and keeping people in jobs.