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## Explanatory Statement

# Coronavirus Economic Response Package (Payments and Benefits) Alternative Reference Period 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 4A(2) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules).
2. This legislative instrument sets out an alternative reference period for specified classes of individuals in determining whether the higher or lower rate of a JobKeeper payment amount applies to an individual who is an eligible employee of an entity, an eligible business participant for an entity or an eligible religious practitioner for an entity. This alternative reference period applies if the Commissioner considers that a period set out in the table in subsection 4A(1) the Rules may not be a suitable reference period for the purpose of applying subsection 9A(1), subsection 12AA(1) or section 12BA of the Rules to individuals in the specified class.
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 determine an alternative reference period that applies to a specified class of individuals if the Commissioner considers that a period set out in the table in subsection 4A(1) of the Rules may not be a suitable reference period for the purpose of applying subsection 9A(1), subsection 12AA(1) or section 12BA of the Rules to individuals in the specified class. This will ensure that a suitable reference period applies to individuals in these specified classes for the purpose of determining whether the higher rate or the lower rate of the JobKeeper payment applies.

### 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).

## Background

9. For fortnights beginning on or after 28 September 2020, there are two rates for JobKeeper payments that entities can claim.

10. The higher rate applies to an individual who is an:

- (i) eligible employee, if the employee's total hours of work, paid leave and paid absence on public holidays in the individual's employment with that entity in the reference period was 80 hours or more;
- (ii) eligible business participant for an entity, if the total number of hours the eligible business participant was actively engaged in the business carried on by the entity was 80 hours or more and certain notice requirements are met;
- (iii) eligible religious practitioner for an entity, if the total number of hours the eligible religious practitioner spent doing an activity, or series of activities, in pursuit of their vocation and as a member of the entity in a reference period was 80 hours or more and certain notice requirements are met.

11. Otherwise, the lower rate applies.

### **The Commissioner has the power to determine an alternative reference period**

12. Under subsection 4A(2) of the Rules, the Commissioner has a power to determine, by legislative instrument, an alternative reference period to establish if the higher or lower JobKeeper rate applies in respect of eligible employees, eligible business participants and eligible religious practitioners.

13. Subsection 4A(2) provides that:

The Commissioner may, by legislative instrument, determine that an alternative reference period applies to a specified class of individuals if the Commissioner considers that a period set out in the table in subsection (1) may not be a suitable reference period for the purpose of applying subsection 9A(1), 12AA(1) or section 12BA to individuals in the specified class.

14. Hence, there are two conditions:

- (i) the Commissioner must identify a specified class of individuals; and
- (ii) the Commissioner must consider, and in doing so, conclude, that the standard reference period may not be a suitable reference period for the purposes of determining the hours of the specified class.

15. For these purposes, the standard reference period is:

- (i) for an eligible employee of an entity – the 28-day period ending at the end of the most recent pay cycle for the employee for the entity to end before 1 March 2020, or the 28-day period ending at the end of the most recent pay cycle for the employee for the entity to end before 1 July 2020;
- (ii) for an eligible business participant, or an eligible religious practitioner, for an entity - the month of February 2020.

16. The Commissioner cannot determine that an alternative reference period applies in all circumstances, only in circumstances where the standard reference period may not be suitable.

17. This legislative instrument sets out circumstances in which the Commissioner considers the standard reference period in subsection 4A(1) of the Rules may not be a suitable reference period for the purpose of applying subsection 9A(1), subsection 12AA(1) or section 12BA of the Rules to individuals in certain classes.

18. It also sets out alternative reference periods that apply in those circumstances.

19. Importantly, where the higher rate applies to an individual under any reference period in the Rules, an alternative reference period has no effect even where it could apply to the individual. It cannot be relied on to apply the lower rate.

20. The Commissioner has determined that an alternative reference period applies to the following specified classes of individuals (each discussed in further detail in the following sections):

(i) eligible employees:

(a) whose total number of hours of work, of paid leave and of paid absence on public holidays in the standard reference period:

- was less than 80 hours; and
- when compared to earlier 28-day periods ending at the end of a pay cycle for the employee, was not representative of the employee's total number of those hours in a typical such 28-day period;

(b) who were not employed during all or part of the reference period;

(c) whose employment started on or before 1 March 2020 or 1 July 2020, but their first pay cycle ended on or after 1 March 2020 or 1 July 2020, respectively;

(d) who, by operation of subsection 9(6) of the Rules, is treated as having also been employed by that entity at an earlier time but (disregarding subsection 9(6)) the employee was not employed by the entity for all or part of the reference period;

(ii) eligible business participants:

(a) whose total number of hours they were actively engaged in the business carried on by the entity in February 2020:

- was less than 80 hours; and
- when compared to earlier 29-day periods (each wholly within a calendar month), was not representative of the eligible business participant's total number of those hours in a typical such 29-day period;

(b) an individual who first satisfied the business participation requirement in subsection 12(2) of the Rules (such as a director of a company, beneficiary of a trust etc. actively engaged in the business) for the entity on or before 1 March 2020 but after 1 February 2020;

(c) where the entity conducted business or some of its business in a declared drought zone, or declared natural disaster zone, during February 2020;

(iii) eligible religious practitioners:

(a) whose total number of hours the eligible religious practitioner spent doing an activity, or series of activities, in pursuit of their vocation and as a member of the entity in February 2020:

- was less than 80 hours; and
- when compared to earlier 29-day periods (each wholly within a calendar month), was not representative of the eligible religious practitioner's total number of those hours in a typical such 29-day period;

(b) who first commenced doing activities covered by paragraph 12B(2)(b) of the Rules as a religious practitioner on or before 1 March 2020 but after 1 February 2020.

## Eligible Employees

### Total number of hours not representative of a typical 28-day period

21. Paragraph 6(1)(a) of this Instrument identifies as a class eligible employees for whom:

- (i) the total number of hours of work, of paid leave and of paid absence on public holidays, was less than 80 hours in the standard reference period; and
- (ii) that total number of hours, when compared to earlier 28-day periods ending at the end of a pay cycle for the employee, was not representative of the employee's total number of hours in a typical such 28-day period.

22. Paragraph 6(1)(a) requires that a comparison be made to earlier 28-day periods, being:

- (i) earlier 28-day periods ending at the end of a pay cycle for the employee; and
- (ii) dependent on the entity reasonably establishing the employee's usual hours over an established work pattern (that is, a typical such 28-day period).

23. Employers can look back to earlier 28-day periods in which any circumstances that affected the number of hours in the standard reference period did not exist to identify a typical 28-day period. For consistency with the standard reference period (and alternative reference period set out below), the earlier 28-day periods must end at the end of a pay cycle.

24. Common reasons the total number of hours in the standard reference period are not representative of typical hours include:

- (i) the employee took various types of unpaid leave during the standard reference period for any reason, for example, sick leave, parental leave and emergency services leave during bushfires;
- (ii) the employee's total number of hours during the standard reference period were affected due to the employer conducting business or some business in a declared drought zone or declared natural disaster zone;
- (iii) the total number of hours worked by an employee during the standard reference period varies due to rostering schedules, such as fly-in-fly-out employees; or
- (iv) the employee worked less hours in the standard reference period despite generally working on average 80 hours or more hours over earlier periods.

25. An assessment must be made that the total number of hours in the standard reference period was not representative of a typical 28-day period. If so, the employee is covered by the first specified class specified in paragraph 6(1)(a).

26. This assessment can be with regard to a single earlier 28-day period or multiple comparable 28-day periods (all of which end at the end of a pay cycle). For example, where the total number of hours worked by an employee varies due to rostering schedules there may be no single earlier 28-day period that is representative of the employee's usual hours. As such, an average of the hours worked over the employee's rostering schedule and proportionally adjusted over 28 days can be used to work out a typical 28-day period.

### ***Hours not representative: alternative reference period***

27. Once it is determined that the total number of hours in the standard reference period is not representative of a typical 28-day period, an alternative reference period applies.

28. The alternative reference period that applies to an eligible employee in paragraph 6(1)(a) is the 28-day period ending at the end of the most recent pay cycle for the employee before 1 March 2020 or 1 July 2020 in which the employee's total number of hours of work, of paid leave and of paid absence on public holidays was representative of a typical 28-day period.

29. Once the total number of hours in a typical 28-day period is determined, the alternative reference period will be the most recent 28-day period before 1 March 2020 or 1 July 2020 that is reflective of those hours. As the alternative reference period must be of the same duration as the standard reference period (subsection 4A(3)), where the employee's typical hours are worked out as an average due to varying rostering schedules, the alternative reference period is the most recent 28-day period that reflects the employee's average hours.

### **Eligible employees not employed during all of the standard reference period**

30. The second specified class of eligible employees in paragraph 6(1)(b) are those who were not employed by the employer during all or part of the standard reference period, such as an employee who started with that employer in mid-February 2020 and their first pay cycle ended before 1 March 2020.

#### ***Not employed: alternative reference period***

31. In these circumstances, the legislative instrument provides a forward looking alternative reference period.

32. For pay cycles less than 28 days (e.g. fortnightly, or weekly), the alternative reference period is the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during consecutive pay cycles.

33. For pay cycles of 28 days or more (e.g. monthly), the alternative reference period is the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during a pay cycle.

34. For employees stood down part way through the first 28-day period, paragraph 6(2)(b) provides that the alternative reference period is the first 28-day period starting on the first day of a pay cycle on or after 1 March 2020 or on or after 1 July 2020 in which they were not stood down. This primarily reflects the use of stand down directions since March 2020.

### **First pay cycle ended on or after 1 March 2020 or on or after 1 July 2020**

35. The third specified class in paragraph 6(1)(c) is employees who commenced employment on or on or before 1 March 2020 or before 1 July 2020 but their first pay cycle ended on or after those dates. As their first pay cycle did not end before 1 March 2020 or before 1 July 2020, as the case may be, there is no 28-day period that would satisfy the definition of the standard reference period.

#### ***No relevant pay cycle: alternative reference period***

36. The legislative instrument provides the same forward looking alternative reference period for paragraph 6(1)(c) as described above for employees not employed for the whole standard reference period.

### **Employee of a business changing hands or transferred in a wholly-owned group**

37. The fourth specified class in paragraph 6(1)(d) applies to employees for which subsection 9(6) of the Rules has application.

38. In these cases, an individual is an eligible employee of an employer despite not having been employed by them on 1 March 2020 or 1 July 2020. Such individuals are eligible employees of the employer by operation of subsection 9(6) of the Rules, which allows an employee of an entity to be treated as having been employed by that entity at an earlier time in certain circumstances. This is limited to circumstances in which the individual was employed by another entity in the same wholly-owned group as their current employer, or where they were employed by a business that has changed hands.

39. While subsection 9(6) treats an individual as an employee of their employer at an earlier time for the purposes of section 9 of the Rules, that does not extend to applying other provisions in the Rules (such as sections 4A and 9A). Where an individual is deemed to be an employee of an entity as at 1 March 2020 or 1 July 2020, that individual was not actually employed for all or part of the standard reference periods (ie, the 28-days of a pay period ending before the reference dates) and as such has neither pay periods nor relevant hours to undertake the necessary calculations.

40. The hours worked for the previous employer by employees who are covered by this rule cannot count towards the 80 hour threshold, as subsection 9(6) does not extend to hours worked in pay cycles for their former employer.

41. Accordingly, as there is no 28-day period that would satisfy the standard reference period, an alternative reference period applies.

***Change of employer: alternative reference period***

42. The legislative instrument provides the same forward looking alternative reference period for paragraph 6(1)(d) as described above for employees not employed for the whole standard reference period.

**If more than one alternative reference period applies to an eligible employee**

43. Where more than one alternative reference period under the legislative instrument can apply to an eligible employee, each of those alternative reference periods can apply to determine whether the total number of hours is 80 or more in that period.

**Eligible Business Participants**

**Total number of hours not representative of a typical 29-day period**

44. Paragraph 7(1)(a) applies to an eligible business participant if the total number of hours the eligible business participant was actively engaged in the business carried on by the entity in February 2020:

- (i) was less than 80 hours; and
- (ii) when compared to earlier 29-day periods (each wholly within a calendar month), was not representative of the eligible business participant's total number of those hours in a typical such 29-day period.

45. Paragraph 7(1)(a) operates similarly to paragraph 6(1)(a), with some exceptions:

- (i) consistent with the test in subsection 12AA(1) of the Rules, it considers hours of active engagement in the business;
- (ii) it requires consideration of earlier 29-day periods (not 28-day periods) as subsection 4A(3) of the Rules requires alternative reference periods to be the same duration as the standard reference period; and
- (iii) the 29-day period must be wholly within a calendar month, for consistency with the standard reference period (and alternative reference period, below).

46. Much of the above commentary relating to paragraph 6(1)(a) applies equally to eligible business participants, keeping in mind the above exceptions.

***Hours not representative: alternative reference period***

47. The alternative reference period that applies to an eligible business participant covered by paragraph 7(1)(a) is the most recent 29-day period, wholly within a calendar month, ending before 1 March 2020 in which any circumstances that caused the eligible business participant's total number of hours of active engagement not to be representative of the eligible business participant's total number of those hours in a typical 29-day period did not exist (paragraph 7(2)(a)).

48. To determine the alternative reference period, the following must be identified:

- (i) any circumstances that caused their total number of hours of active engagement in the standard reference period not to be representative of their total number of those hours in a typical 29-day period;
- (ii) the most recent 29-day period wholly within a calendar month before 1 March 2020 in which any of those circumstances did not exist.

49. That most recent period will be the alternative reference period.
50. For example, if the eligible business participant was absent through sickness in February 2020, causing that month not to be representative of a typical month, the alternative reference period would be the most recent 29-day period (wholly within a calendar month) in which they were not sick. If there were also circumstances in the earlier month that cause it not to be representative of a typical month, the alternative reference period would be the most recent month in which no such circumstances existed.

### **Eligible business participants commenced participation in February 2020**

51. In paragraph 7(1)(b) the class is individuals who first satisfied the business participation requirement in subsection 12(2) of the Rules (such as a director of a company, beneficiary of a trust etc. actively engaged in the business) for the entity on or before 1 March 2020 but after 1 February 2020.
52. For example, this could occur where an individual first becomes a director or shareholder of a company, a partner in a partnership or a beneficiary of a trust part way through February 2020.
53. The entity still needs to meet eligibility requirements to be entitled to a JobKeeper payment, such as subsections 11(6) to 11(9) of the Rules, and this instrument does not override those requirements.
54. When an individual first becomes an eligible business participant in mid-February 2020, the standard reference period is not suitable because the individual could not have been actively engaged in that capacity before their start time and their hours of engagement cannot reflect the entire duration of the period. A forward looking reference period is more suitable.

### ***Commenced participation in February 2020: alternative reference period***

55. The alternative reference period that applies to an eligible business participant under paragraph 7(1)(b) is the 29-day period starting on the day the individual first began to satisfy the business participation requirement for the entity.

### **Eligible business participants in businesses affected by drought or other natural disaster**

56. Paragraph 7(1)(c) applies to eligible business participants where the entity, for which they are an eligible business participant, conducted business or some of its business in a declared drought zone, or declared natural disaster zone, during February 2020.
57. The standard reference period of February 2020 would not be suitable.

### ***Drought or natural disaster: alternative reference period***

58. The reference period would be the most recent 29-day period ending before 1 March 2020, during which the entity did not conduct business or some of its business in a declared drought zone or declared natural disaster zone.

### **If more than one alternative reference period applies to an eligible business participant**

59. Where more than one alternative reference period under the legislative instrument can apply to an eligible business participant, each of those alternative reference periods can apply to determine that the total number of hours of active engagement is 80 or more in that period.
60. For example, where the eligible business participant's total number of hours of active engagement in February 2020 was not representative of a typical 29-day period, and during that same month, the entity conducted some or all of its business in a declared natural disaster zone, multiple alternative reference periods could apply. Any alternative reference period in which the eligible business participant was actively engaged in the business for 80 hours or more can be used to determine that the higher rate applies.

## Eligible religious practitioners

### Total number of hours not representative of a typical 29-day period

61. Paragraph 8(1)(a) applies to eligible religious practitioners whose:

- (i) total number of hours they spent doing activities covered by paragraph 12B(2)(b) of the Rules in February 2020:
  - (a) was less than 80 hours; and
  - (b) when compared to earlier 29-day periods (each wholly within a calendar month), was not representative of the eligible religious practitioner's total number of those hours in a typical such 29-day period.

62. Activities covered by paragraph 12B(2)(b) of the Rules are an activity, or a series of activities:

- (i) in pursuit of the individual's vocation as a religious practitioner; and
- (ii) as a member of the registered religious institution.

63. Paragraph 8(1)(a) operates similarly to paragraph 6(1)(a), with some exceptions:

- (i) consistent with the test in section 12BA of the Rules, it considers hours spent doing these activities;
- (ii) it requires consideration of earlier 29-day periods (not 28-day periods), consistent with the requirement in subsection 4A(3) of the Rules that the alternative reference period must be of the same duration as the standard reference period; and
- (iii) the 29-day period must be wholly within a calendar month, for consistency with the standard reference period (and alternative reference period, below).

64. Much of the above commentary relating to paragraph 6(1)(a) applies equally to eligible religious practitioners, keeping in mind the above exceptions.

#### ***Hours not representative: alternative reference period***

65. The alternative reference period that applies to an eligible religious practitioner in paragraph 8(1)(a) is the most recent 29-day period wholly within a calendar month ending before 1 March 2020 during which the eligible religious practitioner's total number of hours spent doing activities covered by paragraph 12B(2)(b) of the Rules was representative of the eligible religious practitioner's total number of those hours in a typical 29-day period.

### Eligible religious practitioners who commenced activities in February 2020

66. Paragraph 8(1)(b) applies to eligible religious practitioners who first commenced doing activities covered by paragraph 12B(2)(b) of the Rules as a religious practitioner on or before 1 March 2020 but after 1 February 2020 (paragraph 8(1)(b)).

67. The standard reference period is not suitable because the individual's hours do not reflect a full month of pursuing their vocation as a member of the religious institution. A forward looking reference period is more suitable.

#### ***Commenced in February: alternative reference period***

68. The alternative reference period that applies to an eligible religious practitioner in paragraph 8(1)(b) is the 29-day period starting on the day the eligible religious practitioner first commenced doing those activities.

## Consultation

69. 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.

70. 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. Feedback from consultees included additional circumstances where the standard reference period may not be suitable, such as employers affected by subsection 9(6) of the Rules. 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) Alternative Reference Period Determination 2020

1. 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

2. The legislative instrument to determine an alternative reference period that applies to a specified class of individuals if the Commissioner considers that a period set out in the table in subsection 4A(1) of the Rules may not be a suitable reference period for the purpose of applying subsection 9A(1), subsection 12AA(1) or section 12BA of the Rules to individuals in the specified class. This will ensure that a suitable reference period applies to individuals in these specified classes in certain classes for the purpose of determining whether the higher rate or the lower rate of the JobKeeper payment applies.

#### Human rights implications

3. 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)

4. 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.

5. Use of the alternative reference periods may require the provision of information to the Commissioner including personal information such as the hours an individual has worked in 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.](#)

6. 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 \(CRPD\).](#)

7. 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 employees, business participants or religious practitioners of the business have worked atypical hours in the standard reference period.

### **Conclusion**

8. 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.