



Explanatory Statement

Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Amendment Rules 2020

General outline of instrument

1. This instrument is made under subsection 20(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (the Act) and subsection 8(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (the Rules).
2. The legislative instrument sets out an additional alternative decline in turnover test where there is not an appropriate relevant comparison period in 2019 for the purpose of an entity in the class of entities satisfying both the actual decline in turnover test in section 8B of the Rules and the decline in turnover test in section 8 of the Rules (including as modified by section 8A of the Rules).
3. This 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 and applies to jobkeeper fortnights beginning on, or after, 28 September 2020.
6. The amendments made by Schedule 1 to this instrument apply in relation to jobkeeper fortnights beginning on, or after, 28 September 2020.
7. Under subsection 12(2) of the *Legislation Act 2003*, this instrument does not adversely affect the rights or liabilities of any person other than the Commonwealth.

The effect of this instrument

8. The effect of this instrument is to give certain entities or classes of entities an alternative basis on which they may satisfy the actual decline in turnover test or the decline in turnover test to be eligible for jobkeeper payments. This will ensure that entities in certain classes will still be eligible to receive assistance through jobkeeper payments where their particular circumstances are not specifically accounted for in the Rules.

Compliance cost assessment

9. Minor or Machinery – The legislative instrument is machinery in nature and any regulatory impacts from this instrument are likely to be minor. No RIS required. Prime Minister's Exemption applies – COVID-19 related measures (OBPR ref ID 42600).

Amending the alternative turnover test legislative instrument

10. This instrument amends the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules (No. 2) 2020* (primary instrument).

11. The primary instrument sets out alternative decline in turnover tests for the purposes of the Rules. The tests apply for both the decline in turnover test in sections 8 and 8A of the Rules (often called the 'original' or 'projected' decline in turnover test) **and** the actual turnover test in section 8B of the Rules for jobkeeper fortnights beginning on or after 28 September 2020.

12. This instrument amends the primary instrument to add an additional alternative decline in turnover test for the purposes of the Rules.

13. While the application of the amendments in this instrument is retrospective, the amendments operate to allow a class of entities to use the alternative decline in turnover test to gain access to the jobkeeper payment in the fortnights beginning on, or after, 28 September 2020. In this way, the retrospectivity is not disadvantageous to affected entities.

Additional alternative turnover test: Business temporarily ceased trading during the relevant comparison period

14. The legislative instrument applies to give two alternative tests to entities that temporarily ceased trading and were not trading for some or all of the relevant comparison period. Trading must cease due to events or circumstances outside of the ordinary course of business. For example, where a business that is run from a purpose-built premises ceased trading for an extended period of time to move into a new premises.

15. As temporarily ceasing trading for more than a short period is outside the ordinary business setting, the relevant comparison period in 2019 is not appropriate.

16. Entities can expect to cease trading temporarily for short periods, such as several days to move premises, or such as due to events or circumstances outside their control, like blackouts. Even where particular events and their timing may not be known in advance, such short events can be expected and are therefore not outside the ordinary business setting. Therefore, the legislative instrument requires that the entity temporarily cease trading for a period of not less than a week.

17. Ceasing trade at the end of a business day, on weekends and public holidays or ceasing trade during the off-season of a seasonal business would not satisfy the requirement that ceasing trading is because of an event or circumstance outside the ordinary course of the entity's business. These all form part of the ordinary course of the entity's business.

18. This alternative test will not generally apply where a business ceases trade because its sole trader or partner (in a small partnership) goes on planned leave for all or part of the relevant comparison period. These circumstances would not be outside the ordinary course of the entity's business, but may be covered by the alternative test in section 13 of the primary instrument.

19. The test is only available for entities that resumed trading before 28 September 2020, as it is only for those businesses that had resumed prior to the jobkeeper extension period (28 September 2020 to 28 March 2021).

20. For the purpose of this alternative test, temporarily ceasing to trade includes where a business ceases to make supplies or cannot otherwise offer its goods and services to customers. It does not require that the entity stopped carrying on business, but requires a suspension of the ordinary activities of the business while it is still carrying on business due to some event or circumstance outside the ordinary course of business.

Alternative tests

21. The first alternative test compares the entity's current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover for the same period in the year immediately before the business temporarily ceased trading. The earlier period will be a

more appropriate period to use than the relevant comparison period in 2019 due to the temporary cessation of trade.

22. The second alternative test compares the entity's current GST turnover (or projected GST turnover) for the applicable turnover test period with the current GST turnover of the 3 whole months immediately before the month that the business temporarily ceased trading (or the whole month where the relevant comparison period is a month rather than a quarter).

23. The entity can use either test.

24. Each alternative test can apply in regard to a relevant comparison period that is a calendar month or a quarter. A relevant comparison period that is a month is only applicable to the decline in turnover test under section 8 (including as modified by section 8A) of the Rules. For the actual decline in turnover test under section 8B of the Rules, entities must use a relevant comparison period that is a quarter ending on 30 September 2019 or 31 December 2019.

Adjustments to the alternative test

25. Allowances can be made within the alternative test in situations where:

- (a) Entities qualified for the ATO's Bushfires 2019–20 lodgment and payment deferrals. The months which were affected by the bushfires can be excluded from the calculation of turnover on the assumption the entities had a decline in turnover from the bushfires, and inclusion of those months would unfairly reduce the turnover with which the projected or current GST turnover for the applicable turnover test period is compared¹, unless there are no other appropriate months, or
- (b) Entities that received Drought Help concessions provided by the ATO. The months which were affected by the drought can be excluded from the calculation of turnover on the assumption they had a decline in turnover from the drought already, and inclusion of those months would unfairly reduce the turnover with which the projected or current GST turnover for the applicable turnover test period is compared, unless there are no other appropriate months.²

Example

Example - Business ceasing trading during the relevant comparison period

During the months of July and August 2019, AUS Co ceased trading temporarily because its business premises had been severely damaged in a storm and needed repairing. It resumed trading in September 2019.

AUS Co assesses its eligibility for jobkeeper payments based on a current GST turnover for the quarter ending 30 September 2020 of \$3 million.

As AUS Co had ceased trading for part of the relevant comparison period in 2019 and resumed trading before 28 September 2020, AUS Co satisfies the conditions for the alternative tests in section 14 to apply.

Applying the first alternative test, AUS Co had the following current GST turnovers for the quarter ending 30 September 2018:

Month	Turnover
-------	----------

¹ Australian Taxation Office, Bushfires 2019–20 lodgment and payment deferrals <https://www.ato.gov.au/General/Dealing-with-disasters/In-detail/Specific-disasters/Bushfires-2019-20>.

² Australian Taxation Office, Drought Help <https://www.ato.gov.au/General/Financial-difficulties-and-serious-hardship/In-detail/Help-for-drought-affected-taxpayers/?page=1#Helpforindividualsandbusinesses>.

July 2018	\$3,000,000
August 2018	\$3,000,000
September 2018	\$2,000,000

AUS Co's current GST turnover for the quarter ending 30 September 2018 is \$8 million and compares it with the current GST turnover for the quarter ending 30 September 2020 of \$3 million.

AUS Co finds that its current GST turnover for the quarter ending 30 September 2020 falls short of the current GST turnover for the quarter ending 30 September 2018 by \$5 million, which is greater than 30%. The alternative decline in turnover test is satisfied.

Consultation

26. The Commissioner routinely publishes draft legislative instruments seeking public feedback for a minimum period of 4 weeks. This legislative instrument was prepared in response to the COVID-19 coronavirus disease pandemic. To avoid the detrimental effects for employers and employees that delays in making the legislative instrument would cause, the Commissioner undertook targeted consultation with representatives of professional associations to ensure it could be made as quickly as possible. Consultees suggested modifications to the draft alternative decline in turnover tests and explanatory materials. Most, but not all, of these suggestions have been adopted or otherwise addressed.

27. In these circumstances the Commissioner has undertaken reasonable and appropriate consultation over a shorter period than would otherwise have been used.

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 Decline in Turnover Test Amendment Rules 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 applies to provide an alternative basis for an entity in a class of entities to satisfy the decline in turnover tests for the purposes of receiving jobkeeper payments, when the Commissioner is satisfied that there is not a relevant comparison period for the purposes of an entity in a class of entities satisfying the decline in turnover test under subsection 8(1) and the actual decline in turnover test in section 8B of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*. This instrument is intended to keep more Australian workers in jobs through the course of the COVID-19 coronavirus disease pandemic by creating alternative decline in turnover tests for classes of entities where the relevant comparison period is not appropriate.

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.

Participation in the alternative test requires the provision of information to the Commissioner that may include personal information such as the turnover of a business. To any extent to which the provision of this information constitutes a limitation of a person's right to be protected from interference with his or her privacy, the limitation is justified because the provision of information is:

- contingent on the affected person giving consent to the disclosure of information by nominating to participate in the jobkeeper scheme, or in the case of an employee, agreeing to be nominated
- in pursuit of the legitimate objective identified - which is to respond to the economic downturn caused by the Coronavirus by providing a wage subsidy to affected businesses, and
- rationally connected and proportionate to the objective sought as the information is required to determine eligibility for the jobkeeper scheme and to ensure that it is administered according to the policy objective.

For these reasons, the Rules do not unnecessarily restrict a person's right to privacy.

- [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 Government assistance where the entities have experienced a decline in business turnover as a consequence of the COVID-19 pandemic.

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.