**Fair Work Amendment (Jobkeeper Payments) Regulations 2020**

# **EXPLANATORY STATEMENT**

Issued by authority of the Attorney-General and Minister for Industrial Relations

under paragraph 789GCB(1)(d), subsection 789GCB(2) and subparagraph 789GJA(1)(b)(ii) of the *Fair Work Act 2009*

**Purpose and operation of the Instrument**

The *Fair Work Amendment (Jobkeeper Payments) Regulations 2020* (JobKeeper Regulations) support the extension for ‘legacy employers’ of the temporary workplace flexibility measures in Part 6-4C of the *Fair Work Act 2009* (Fair Work Act) made by the *Coronavirus Economic Response (Jobkeeper Payment) Amendment Act 2020* (JobKeeper Amendment Act). Legacy employers are employers who received one or more JobKeeper payments for an employee prior to 28 September 2020, but who are not entitled to a payment for that employee after that date.

The JobKeeper Amendment Act relevantly inserted two new regulation-making powers into the Fair Work Act:

* Paragraph 789GCB(1)(d) provides a limited regulation-making power to modify the 10% decline in turnover test set out in section 789GCB(1) that legacy employers must satisfy in order to access the flexibilities under Part 6-4C. Subsection 789GCB(2) confines this regulation-making power to modifications of this test if the JobKeeper Payment Rules are amended after the commencement of section 789GCB and the modifications relate to those amendments. Section 789GCB commenced on 4 September 2020.
* Subparagraph 789GJA(1)(b)(ii) allows regulations to be made providing a way to work out the number of ordinary hours for a particular class of employees for the purpose of determining the 60% minimum threshold of ordinary hours, below which a legacy employer cannot direct an employee to work by way of a JobKeeper enabling stand down direction.

In reliance on paragraph 789GCB(1)(d) of the Fair Work Act, the JobKeeper Regulations amend the *Fair Work Regulations 2009* (Fair Work Regulations) by inserting new regulation 6.07B. This regulation ensures that any modifications that are made to the calculation of turnover for the purposes of the decline in turnover test in the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (JobKeeper Payment Rules) are picked up for the purposes of the 10% decline in turnover test in the Fair Work Act. This includes any existing modifications, and any future modifications that may be made, to the decline in turnover test under the JobKeeper Payment Rules, and will ensure alignment between the tests as far as possible.

In reliance on subparagraph 789GJA(1)(b)(ii) of the Fair Work Act, the JobKeeper Regulations also insert new regulation 6.07C. Section 789GJA allows a legacy employer, when certain conditions have been met, to give an employee a JobKeeper enabling stand down direction to no less than 60% of the employee’s ordinary hours as at 1 March 2020 (i.e. their ordinary hours before the impact of COVID-19). This regulation provides a method of determining an employee’s ordinary hours for the purposes of JobKeeper enabling stand down directions for certain classes of employees for whom it is not possible or appropriate to assess their ordinary hours as at 1 March 2020, for example because they don’t have ordinary hours as at 1 March 2020 as they were not yet employed.

Details of the JobKeeper Regulations are set out in Attachment A.

The JobKeeper Regulations are a legislative instrument for the purposes of the *Legislation Act 2003* and commence the day after they are registered on the Federal Register of Legislation.

**Consultation**

The Government consulted with state and territory government officials under the *Inter-governmental Agreement for a National Workplace Relations System for the Private Sector* and the Committee on Industrial Legislation on an exposure draft of the JobKeeper Regulations on 10 and 11 September 2020. The Government also consulted with the National Tax Liaison Group on an exposure draft of regulation 6.07B on 10 and 11 September 2020.

**Regulation Impact Statement**

An exemption from Regulation Impact Statement requirements has been granted by the Prime Minister for measures related to the Australian Government’s response to the COVID-19 pandemic.

**Statement of Compatibility with Human Rights**

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

The JobKeeper Regulations are 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*.

*Right to work and rights in work*

The JobKeeper Regulations engage the right to work in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the right to just and favourable conditions of work in Article 7 of ICESCR.

The new regulation to provide a method of determining ordinary hours for certain classes of employees employed by legacy employers is compatible with these rights because it ensures that employees’ 60% guaranteed threshold of hours is based on their most recent terms and conditions, disregarding any alteration to those terms and conditions made by a JobKeeper enabling stand down direction or changes to ordinary hours for COVID related reasons. This new regulation also positively engages with the right to work as it will result either in an increase minimum threshold of hours reflecting an employee’s increased ordinary hours, or facilitating the employer maintaining the employee’s position by aligning the capacity of the employer to give a JobKeeper enabling stand down direction with the employee’s relevant ordinary hours of work. For example, if an employee has increased from a part-time role to a full-time role after 1 March 2020 for reasons unrelated to COVID-19, the new regulation will ensure their 60% guaranteed threshold of hours is based on their new full-time ordinary hours, rather than their previous part-time ordinary hours.

The new regulation to align the 10% decline in turnover test in the Fair Work Act with the JobKeeper Payment Rules makes a technical change to the test to ensure it operates effectively and does not engage human rights.

**Attachment A**

**NOTES ON SECTIONS**

**Section 1 – Name**

This section provides that the title of the instrument is the *Fair Work Amendment (Jobkeeper Payments) Regulations 2020*.

**Section 2 – Commencement**

This section provides that the whole of the instrument will commence the day after it is registered.

**Section 3 – Authority**

This section provides that the instrument is made under the *Fair Work Act 2009* (Fair Work Act).

**Section 4 – Schedules**

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

**SCHEDULE 1 – Amendments**

***Fair Work Regulations 2009***

**Item 1 – After Part 6-4B**

This item inserts new Part 6-4C–Coronavirus economic response.

*Division 1–Introduction*

*6.07B 10% decline in turnover test—modification*

New regulation 6.07B provides for modifications to the 10% decline in turnover test in section 789GCB of the Fair Work Act as authorised by paragraph 789GCB(1)(d), and as limited by subsection 789GCB(2).

Subregulation 6.07B(1) provides that the regulation is made for the purposes of paragraph 789GCB(1)(d) of the Fair Work Act.

Subregulation 6.07B(2) provides that the decline in turnover test, as applied under paragraph 789GCB(1)(b) of the Fair Work Act, is modified by providing that current GST turnover is to be calculated in the same way as current GST turnover is calculated for the purposes of the actual decline in turnover test within the meaning of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (JobKeeper Payment Rules).

The effect of this subregulation is that modifications that have been made, and modifications that may be made in future, to the decline in turnover test for the purposes of the JobKeeper Payment Rules will be incorporated into the 10% decline in turnover test in section 789GCB of the Fair Work Act to ensure alignment between the tests as far as possible.

*Division 5A—Flexibility provisions relating to employers previously entitled to JobKeeper payment*

*6.07C JobKeeper enabling stand down—employer previously entitled to JobKeeper payment for employee*

Under subparagraph 789GJA(1)(b)(ii) of the Fair Work Act, if an employee belongs to a class of employees specified in the regulations, an employer cannot reduce the employee’s hours under section 789GJA to below 60% of the employee’s ordinary hours of work ascertained in accordance with the regulations for this class. This provision applies to ‘legacy employers’ who received a JobKeeper payment for an employee prior to 28 September 2020 but who is not entitled to a payment for that employee after that date.

New regulation 6.07C provides a method of determining an employee’s ordinary hours for the purposes of JobKeeper enabling stand down directions for certain classes of employees for whom it is not possible or appropriate to assess their ordinary hours as at 1 March 2020.

The new regulation provides that, for each employee of an employer in a class of employees specified in column 1 of the table at regulation 6.07C, the number of ordinary hours of work for the purposes of subparagraph 789GJA(1)(b)(ii) are ascertained as specified in column 2 of the table.

The first class of employee specified in column 1 at item 1 of the table is employees whose ordinary hours of work for the employer have changed on or after 1 March 2020 for reasons that are attributable to neither the COVID-19 pandemic, nor government initiatives to slow the transmission of COVID-19 (non-COVID reasons). Employees in this category could include:

* employees on long term unpaid leave on 1 March 2020, such as employees on unpaid parental leave under Division 5 of Part 2-2 of the Fair Work Act; and
* employees whose ordinary hours of work have otherwise changed since 1 March 2020 for non-COVID reasons, such as employees who increase from a part-time role to a full-time role, for example, because they no longer need days off work for caring responsibilities.

For this class of employees, their ordinary hours for the purposes of ascertaining the 60% minimum threshold of hours are the ordinary hours of work of the employee as most recently changed for non-COVID reasons, disregarding the effect of any JobKeeper enabling stand down direction applying to the employee (table item 1, column 2).

The second class of employee specified in column 1 at item 2 of the table in regulation 6.07C is employees who were not employed by the employer on 1 March 2020. When the JobKeeper Payment Rules were first made in April 2020, the JobKeeper payment could only be received in respect of employees who were employed on 1 March 2020. However, in August 2020, the JobKeeper Payment Rules were amended so that the JobKeeper payment could be paid in respect of employees who were employed on 1 July 2020. As a result of this amendment to the JobKeeper Payment Rules, legacy employers may be able to give JobKeeper enabling stand down directions to an employee who was employed on 1 July 2020, but who was not employed on 1 March 2020, so long as the legacy employer has previously received a JobKeeper payment for that employee.

For this class of employees, their ordinary hours for the purposes of ascertaining the 60% minimum threshold of hours are either:

* the ordinary hours of work of the employee when the employee started employment with the employer; or
* if those hours of work have changed for non-COVID reasons—those hours of work as most recently changed for those non-COVID reasons;

disregarding the effect of any jobkeeper enabling stand down direction applying to the employee (table item 2, column 2).