Federal Court of Australia

Commissioner of Taxation v Apted [2021] FCAFC 45

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| Appeal from: | *Apted and Commissioner of Taxation* [2020] AATA 5139 |
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| File number: | QUD 11 of 2021 |
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| Judgment of: | **ALLSOP CJ, LOGAN AND THAWLEY JJ** |
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| Date of judgment: | 24 March 2021 |
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| Catchwords: | **TAXATION** – application for Coronavirus economic response payment (jobkeeper payment) – whether respondent eligible for jobkeeper payment – whether respondent “had an ABN on 12 March 2020” within the meaning of s 11(6) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**CERP Rules**) – where respondent was not registered for an ABN on 12 March 2020 – where respondent was later registered for an ABN with a “date of effect” covering 12 March 2020 – held respondent did not have an ABN within the meaning of s 11(6) of the CERP Rules – whether the Commissioner’s decision not to exercise the discretion in s 11(6) of the CERP Rules to allow a later time for the respondent to have an ABN forms part of the reviewable decision – held Commissioner’s decision not to exercise the later time discretion was part of the reviewable decision – whether Tribunal erred in exercising the discretion to allow a later time in the respondent’s favour – held Tribunal did not err in exercising discretion – appeal dismissed |
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| Legislation: | *A New Tax System (Australian Business Number) Act 1999* (Cth) ss 3, 8, 9, 10, 11, 13, 14, 15, 17, 18, 19, 21, 24, 25, 26, 27, 28, 35, 41  *Administrative Appeals Tribunal Act 1975* (Cth) ss 25, 43, 44  *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) ss 3, 7, 11, 11A, 13, 19, 20, 25  *Income Tax Assessment Act 1997* (Cth) s 995-1  *Taxation Administration Act 1953* (Cth) s 2  *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) ss 2, 4, 5, 11 |
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| Cases cited: | *Apted and Commissioner of Taxation* [2020] AATA 5139  *Australian Postal Corporation v Forgie* (2003) 130 FCR 279  *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353  *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378  *Collector of Customs v Agfa- Gevaert Ltd* (1996) 186 CLR 389  *Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503  *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 427  *Deputy Federal Commissioner of Taxation (S.A.) v Ellis & Clark Ltd* (1934) 52 CLR 85  *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409  *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342  *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250  *House v The King* (1936) 55 CLR 499  *Kelly v The Queen* (2004) 218 CLR 216  *Lacey**v Attorney-General (Qld)* (2011) 242 CLR 573  *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101  *Minister for Immigration and Border Protection v Stretton* (2016)237 FCR 1  *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332  *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611  *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286  *The* *Shell Company of Australia Limited v Federal Commissioner of Taxation* (1930) 44 CLR 530 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: | Taxation |
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| Number of paragraphs: | 113 |
|  |  |
| Date of hearing: | 19 March 2021 |
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| Counsel for the Applicant: | P Hanks QC with L Livingston and K Josifoski |
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| Solicitor for the Applicant: | Australian Government Solicitor |
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| Counsel for the Respondent: | E Wheelahan QC with C Horan |
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| Solicitor for the Respondent: | Holding Redlich |

ORDERS

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|  | | QUD 11 of 2021 |
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| BETWEEN: | COMMISSIONER OF TAXATION  Applicant | |
| AND: | JEREMY APTED  Respondent | |

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| order made by: | ALLSOP CJ, LOGAN AND THAWLEY JJ |
| DATE OF ORDER: | 24 MARCH 2021 |

THE COURT ORDERS THAT:

1. The application be dismissed.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

ALLSOP CJ:

1. I agree with the reasons of Thawley J and with the order proposed by his Honour.

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| I certify that the preceding one (1) numbered paragraph is a true copy of the Reasons for Judgment of the Honourable Chief Justice Allsop. |

Associate:

Dated: 24 March 2021

REASONS FOR JUDGMENT

LOGAN J:

1. I have had the privilege of reading in draft the reasons for judgment to be published by Thawley J. His Honour has summarised the background facts, the conclusions reached by the Tribunal, the issues for determination on the appeal, and the competing submissions of the parties, as well as extracting pertinent legislative and subordinate legislative provisions. All of this I gratefully adopt and repeat only to the extent necessary to explain my conclusions. I also adopt for consistency the abbreviations which have commended themselves to Thawley J.
2. The *Coronavirus Economic Response Package (Payments and Benefits) Act 2000* (Cth) (**CERP Act**) forms part of a suite of legislation enacted by the Parliament in 2020 which, as the titles of the various Acts indicate, constitute the “Coronavirus Economic Response Package”. Even more than the suite of legislation providing for the initial sales tax scheme, “the legislation depends to a remarkable degree upon the [legislative instruments] made under the power which it confers on the Executive”: *Deputy Federal Commissioner of Taxation (S.A.) v Ellis & Clark Ltd* (1934) 52 CLR 85, at 89 per Dixon J.
3. This dependence is very likely to have been occasioned by Parliament’s perception of a need for an urgent response to the sudden onset of a global pandemic carrying with it not just public health but also economic and related social consequences which were apprehended likely to be severe but uncertain in their nature, duration and extent. Hence the attraction of a scheme in which the broad objects and features were charted in legislation, leaving to the inherently more flexible and temporally reactive nature of subordinate legislative instruments, materially, the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**CERP Rules**), to flesh out the detail for eligibility and administration.
4. The general administration of the CERP Act and the CERP Rules is consigned to the Commissioner of Taxation (**Commissioner**). The Commissioner is also, *ex officio*, Registrar of the ABR. In that role, the Commissioner had accepted that Mr Apted was carrying on an enterprise before, on and after 12 March 2020. This acceptance does, with respect, give pause for thought as to why Mr Apted has been put to so much bother in relation to his eligibility to receive a payment the object of which “is to provide financial support directly or indirectly to entities that are directly or indirectly affected by the Coronavirus known as COVID-19” (s 3, CERP Act).

#### Issue 1

1. There is much to be said in favour of the construction of s 11(6) of the CERP Rules adopted by the Tribunal, for the reasons given by the Tribunal and adopted in the submissions made on Mr Apted’s behalf in the appeal. That construction does conform to the object of the CERP Act. However, it also depends on incorporating into the meaning to give to the text of s 11(6) of the CERP Rules the date of effect of registration under the *A New Tax System (Australian Business Number) Act 1999* (Cth) (**ABN Act**), mentioned in ss 11(1)(b)(iii), (2) and (3)(c); s 11A(c); and s 25(1)(c) and s 25(3)(c) of that Act.
2. The definitions section of the CERP Act, s 6, provides that a number of terms in that Act have the same meaning as that given for the corresponding term in the TAA or, as the case may be, the ITAA 1997 Act. However, there is no express incorporation by reference in the CERP Act of any definition or other provision from the ABN Act.
3. In the CERP Rules, s 4(2) provides:

Subject to subsection (1), an expression used in this instrument that is defined in the *Income Tax Assessment Act 1997* has the same meaning in this instrument as it has in that Act.

None of the definitions in s 4(1) of the CERP Rules is presently pertinent. The effect of s 4(2) is that “ABN”, where it appears in s 11(6) of the CERP Rules, has the same meaning as that given in the ITAA 1997 Act.

1. Within the ITAA 1997 Act, s 995-1 provides that, “ABN”, “has the meaning given by the [ABN Act]”. The “Dictionary” in s 41 of the ABN Act provides that, “‘*ABN (Australian Business Number*)’ for an \*entity means the entity's ABN as shown in the\* Australian Business Register”.
2. Thus, commencing as one must with the text of s 11(6) of the CERP Rules, read in context and having regard to the purpose of those rules and their authorising CERP Act, the requirement of the “integrity rule” is that “the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner)”. The focus is temporal and past possessory. The temporal is 12 March 2020, subject to the parenthetical discretion vested in the Commissioner. And the past possessory is focussed solely on the temporal date, not on a date of effect. That precision of temporal focus is reinforced by the inter-relationship, apparent on the face of s 11(6), between that subsection and s 11(7) and s 11(8) of the CERP Rules. Each of s 11(7) and s 11(8) has a precise temporal focus, 12 March 2020. It is unlikely that, in making the CERP Rules pursuant to s 20 of the CERP Act, the Treasurer intended that s 11(6) have a different, “date of effect” temporal focus, as opposed to a harmonious focus on an identified past event.
3. Thus, I respectfully differ from the Tribunal and agree with Thawley J as to the construction of s 11(6) of the CERP Rules. The beneficial object of the CERP Act is served not by inserting into s 11(6) a reference to date of effect of registration but rather by recognising that the parenthetical discretion is intended to have an ameliorating effect.
4. Date of effect is a temporal touchstone which might have been employed to a like end, but that is not the text which commended itself to the Treasurer. That is not to say that date of effect of ABN registration is irrelevant to the administration of the CERP Rules. Once the object of the CERP Act is taken into account, one might have thought, with all due respect to the Commissioner, that the circumstances which had informed his assigning, in his capacity as Registrar, a date of effect of Mr Apted’s ABN registration prior to the date of his application for re-enlivening his ABN would have been regarded as offering a paradigm case for the exercise of the ameliorating discretion found in s 11(6) of the CERP Rules. It is, after all, a distinctly odd result to deny a jobkeeper payment to a man accepted to have been operating an enterprise prior to, on and after 12 March 2020.

#### Issue 2

1. In providing that, “[f]or the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision” s 43(1) of the AAT Act adopts a model the constitutional validity of which was upheld by the Judicial Committee of the Privy Council in *The* *Shell Company of Australia Limited v Federal Commissioner of Taxation* (1930) 44 CLR 530. The essence of that model, adopted and retained for decades for Taxation Boards of Review, was described in this way by the Judicial Committee, at 544 – 545:

The Board of Review appears to be in the nature of administrative machinery to which the taxpayer can resort at his option in order to have his contentions reconsidered. An administrative tribunal may act judicially, but still remain an administrative tribunal as distinguished from a Court, strictly so-called. … the Board of Review is not exercising judicial powers, but is merely *in the same position as the Commissioner himself*; namely, it is another administrative tribunal which is reviewing the determination of the Commissioner, who admittedly is not judicial, but executive.

[Emphasis added]

1. These conclusions were necessary and sufficient to demonstrate that the Board of Review did not impermissibly exercise the judicial power of the Commonwealth; so, too with the AAT by virtue of the adoption of that same model.
2. The origin and nature of the model enshrined in s 43 of the AAT Act was recognised by Bowen CJ and Deane J in the root authority concerning that section, *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409 (***Drake***), at 414. Flowing from the nature of the review model adopted by s 43 of the AAT Act, Bowen CJ and Deane J also observed in Drake, at 419:

The question for the determination of the Tribunal is not whether the decision which the decision maker made was the correct or preferable one on the material before him. The question for the determination of the Tribunal is whether that decision was the correct or preferable one on the material before the Tribunal.

1. While the AAT Act provides the model for administrate review, it is not the source of the Tribunal’s jurisdiction to conduct a review. Rather, as s 25 of the AAT Act contemplates, the source of the Tribunal’s jurisdiction comes from statutes which confer jurisdiction on the Tribunal to review particular administrative decisions. In relation to the present case, the source of the Tribunal’s jurisdiction was s 13 of the CERP Act with the particular reviewable decision being that specified in s 13(2)(a) of that Act, “a decision that the entity is not entitled to a Coronavirus economic response payment for a period”.
2. Identifying with precision the decision under review is, given the nature of the review model adopted, critical to the identification of the powers and any discretions exercisable by the Tribunal on the review: *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, at [43] per Kirby J (Crennan J, at [118] agreeing) and per Kiefel J, at [132] (not in dissent on this point), *Frugtniet v Australian Securities and Investments Commission* (2019) 266 CLR 250, at [14] – [15] per Kiefel CJ, Keane and Nettle JJ and, at [51] – [53] per Bell, Gageler, Gordon and Edelman JJ. As Davies J stated in *Freeman v Secretary, Department of Social Security* (1988) 19 FCR 342, at 345, “Regard must always be had to the nature of the decision which is under review.” To no different effect was the observation made by the Full Court in *Commonwealth Bank Officers Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 427, at [28], that the powers and discretions exercisable by the Tribunal are “necessarily interdependent” with the decision under review.
3. Issue 2 is resolved against the Commissioner by appreciating that, in deciding whether or not an entity is entitled to a Coronavirus economic response payment (jobkeeper) for a period, the Commissioner was obliged to determine whether or not the entitlement criteria specified in s 11 of the CERP Rules were met. One of those criteria was the “integrity rule” found in s 11(6). And that criterion permitted the Commissioner, in the ordinary course of determining payment eligibility, to exercise a discretion to allow a later time. The specification of the reviewable decision in s 13(2)(a) of the CERP Act is payment eligibility, not any one incident thereof. Were there any doubt about the identification of the decision under review carrying with it each of the incidents of eligibility, that doubt, given the beneficial object of the CERP Act, would be resolved in favour of regarding the decision under review as embracing the discretion found in s 11(6) of the CERP Rules: *Australian Postal Corporation v Forgie* (2003) 130 FCR 279, at [64]. It is an unlikely construction of s 13(1) and s 13(2)(a) of the CERP Act that the merits review jurisdiction of the Tribunal did not extend to exercise of the parenthetical discretion in s 11(6) of the CERP Rules when sitting in place of the Commissioner to review payment eligibility. Quite why that discretion could only, as the Commissioner contended, be amenable to judicial review is elusive.
4. The CERP Rules do not contemplate a bifurcated administrative decision-making process by the Commissioner, only the making of one decision namely, whether or not an entity is eligible or not for the payment. It is nothing to the point that the Commissioner, misguidedly but doubtless in good faith, apparently adopted a bifurcated process in the course of public administration.
5. For completeness, I should add that I have gained no assistance from the Explanatory Statement issued in respect of the CERP Rules. Indeed, that document contains views at variance with the text of the CERP Rules. It is neither necessary nor desirable to critique the Explanatory Statement, because the judicial function is to give primacy to the text adopted by the Treasurer in the CERP Rules.
6. The Tribunal was, therefore, able to exercise for itself, in the course of reviewing whether Mr Apted was entitled to a jobkeeper payment, the discretion to allow a time later than 12 March 2020 as to for the “having” of an ABN. That was the effect of s 43 of the AAT Act, once the decision under review was correctly identified. This the Tribunal did.

#### Issue 3

1. The allowance of a time later than 12 March 2020 by the Tribunal in the course of determining for itself that Mr Apted was eligible for a jobkeeper payment was, in the circumstances of the present case, entirely unremarkable.
2. I agree with Thawley J that the parenthetical qualification found in s 11(6) of the CERP Rules is better characterised as the source of an incidental discretion, rather than an administrative satisfaction based criterion: as to the distinction: see *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, at [127] – [136] per Gummow J. For that reason, and contrary to the submission made for Mr Apted, I would not, with respect, regard *Avon Downs Pty Ltd v Commissioner of Taxation* (1949) 74 CLR 353 (***Avon Downs***) as applicable to any judicial review of a payment eligibility decision. However, in light of the authorities cited by Thawley J, that may well be a distinction without a practical difference in terms of result in light of the jurisdictional error grounds upon which such a decision might be judicially reviewed. However approached, there is no jurisdictional error evident nor, even if it were applicable, is there any error of the kind described by Dixon J in *Avon Downs*. Indeed, in Mr Apted’s circumstances, it is strongly arguable that any outcome other than that reached by the Tribunal would have been so subversive of the object of the CERP Act as to fall within that rare class of case in which one might find the jurisdictional error ground of unreasonableness made out.
3. For these reasons, and like Thawley J, I would dismiss the appeal.

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| I certify that the preceding twenty-three (23) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Logan. |

Associate:

Dated: 24 March 2021

REASONS FOR JUDGMENT

THAWLEY J:

# OVERVIEW

1. The **Commissioner** of Taxation, as applicant, appeals under s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) (**AAT Act**) from a decision of the Administrative Appeals **Tribunal**: *Apted and Commissioner of Taxation* [2020] AATA 5139 (hereafter “**T**”). The appeal relates to an application made by the respondent for a jobkeeper payment, being a “Coronavirus economic response payment” authorised under the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (**CERP Rules**) made by the Treasurer under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) (**CERP Act**). The Commissioneradministers the CERP Rules.
2. There was and is no dispute that Mr Apted satisfied all but one of the eligibility criteria set out in s 11 of the CERPRules. The one criterion which the Commissioner contends Mr Apted did not satisfy is that required by s 11(6), giving rise to the first issue in the appeal. Section 11(6) provides that an “entity is *not* entitled to a jobkeeper payment … unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner)” (emphasis in original).
3. If one had examined the Australian Business Register (**ABR**) on 12 March 2020, it would not have recorded Mr Apted as having an ABN. There was no dispute that Mr Apted was actively engaged in business on 12 March 2020 and entitled to have an ABN on that day: T[53]. There was also no dispute that, after 12 March 2020 – namely on 10 June 2020 and at the time of the Tribunal’s decision – Mr Apted had an ABN with a “date of effect” for his ABN registration of 1 July 2019. The Tribunal concluded that Mr Apted had an ABN on 12 March 2020 within the meaning of s 11(6) of the CERP Rules: T[6]; T[33]–[53].
4. The parties’ respective positions on the first issue may be summarised as follows:
5. Mr Apted contends that the concept of “having” an ABN is governed by the provisions of the *A New Tax System (Australian Business Number) Act 1999* (Cth) (**ABN Act**). The ABN Act provides for an entity’s ABN registration on the ABR to have a “date of effect”. In Mr Apted’s submission, an entity has an ABN on 12 March 2020 if the entity has an ABN on the ABR with a “date of effect” which covers 12 March 2020.
6. The Commissioner contends that s 11(6) directs attention to what the ABR showed on 12 March 2020. If one had examined the ABR on that day, it would have shown that Mr Apted did not have an ABN.
7. The second and third issues in the appeal only arise if the first issue is resolved against Mr Apted. The second issue is whether the Commissioner’s decision not to exercise the discretion in s 11(6) to allow a later time than 12 March 2020 to have an ABN forms part of the reviewable decision (**the “later time” discretion**). The third issue is whether, if the decision not to allow a later time did form part of the reviewable decision, the Tribunal erred in law in exercising the discretion in Mr Apted’s favour.
8. For the reasons which follow:
9. As to the first issue: the Commissioner’s construction is to be preferred. Mr Apted did not have an ABN on 12 March 2020 within the meaning of s 11(6) of the CERP Rules.
10. As to the second issue: the “later time” discretion in s 11(6) formed part of the reviewable decision. Accordingly, the Tribunal had jurisdiction to exercise the discretion. Further, even if the discretion did not form part of the reviewable decision, the Tribunal had jurisdiction to exercise the discretion by reason of s 43(1) of the AAT Act.
11. As to the third issue: the Commissioner has not established that the Tribunal relevantly erred in exercising the discretion in s 11(6) to allow a “later time”.
12. It follows that, although the Tribunal erred on the first issue, the application must be dismissed.

# BACKGROUND FACTS

1. The background facts may be stated briefly.
2. On 28 August 2018, Mr Apted cancelled his GST registration, advising the Registrar of the ABR that he had ceased his business and wished to cancel his ABN registration with effect from 4 June 2018: T[14]. Mr Apted had then planned to retire.
3. Mr Apted changed his mind and recommenced business activities around the second half of 2019: T[15]. He did not then apply to have his ABN reinstated or reactivated: T[16].
4. On 31 March 2020, Mr Apted applied online to have his ABN reinstated. He recalled confirming to the Registrar that he had resumed his business as a sole trader. His ABN was reinstated on the ABR with a date of effect of 31 March 2020: T[17].
5. Mr Apted lodged an application for a jobkeeper payment on 20 April 2020. On 6 May 2020, the Commissioner responded informing the applicant he was not eligible for the jobkeeper payment because he did not have an ABN on 12 March 2020.
6. On 8 May 2020, Mr Apted completed a form titled “Jobkeeper application for Commissioner’s discretion in respect of an eligible business participant”. The Commissioner responded with a decision contained in a letter dated 22 May 2020: T[25]. It included:

**You aren’t eligible for JobKeeper**

…

On 8 May 2020, you applied for the Commissioner to exercise his discretion to allow an entity further time to meet certain eligibility requirements for the JobKeeper payment.

**Our decision**

You aren’t eligible for JobKeeper because you had no ABN on 12 March 2020.

**Reasons for our decision**

You requested further time to meet the requirement to have had an ABN on 12 March 2020.

We haven’t granted your request for further time because your ABN was not active as at 12 March 2020. Your ABN was cancelled as you advised you had ceased sole trader activities.

More recently you have conducted business activities without an active ABN although you were entitled to hold one. Operating a business without an ABN has adverse tax consequences such as no-ABN withholding, which may result in tax being withheld from certain payments to you at a rate as high as 47%.

One of the requirements of JobKeeper eligibility is that you hold an active ABN, as you had not satisfied this requirement and the re-activation occurred after this date, you have not met the eligibility criteria.

If you don’t agree with our decision you may object to it within 60 days. You need to include a detailed explanation of why you think our decision is wrong in your objection. For more information on lodging an objection visit **ato.gov.au/howtoobject**

1. The letter recorded the right on the part of Mr Apted to lodge an objection to the decision. The reference to appeal rights did not distinguish between the element of the decision about whether Mr Apted had an ABN on 12 March 2020 and the “later time” discretion.
2. On 10 June 2020, Mr Apted telephoned a representative of the Registrar of the ABR (namely the Commissioner) to request that the reactivation of his ABN be amended so that the reactivation was effective from 1 July 2019. The ABR was then adjusted to show that Mr Apted’s ABN was reactivated with a “date of effect” of 1 July 2019: T[18].
3. Also on 10 June 2020, Mr Apted lodged an objection to the decision of 22 May 2020. He noted in his objection that the ABN had already been amended to show his ABN was registered with a date of effect of 1 July 2019: T[27].
4. On 15 June 2020, Mr Apted wrote to the Commissioner and explained:

With the benefit of hindsight and a better understanding of the Australian Business Register, on 31 March 2020, the date when I updated my ABN details, I should have nominated 1 July 2019 as being the date when the ABN was active. Reactivation is from 1 July 2019 not 31 March 2020. My application for the Commissioner’s discretion (dated 8 May 2020) was not necessary as I was not registering for an ABN.

I would like to reiterate that my business was active prior to 12 March 2020 and the ABN records have been corrected to show the status as being active from 1 July 2019. My business is also registered with ASIC with a renewal date of 8 August 2020.

1. On 14 July 2020, the Commissioner disallowed in full Mr Apted’s objection to the Commissioner’s decision of 22 May 2020. Under the heading “Conclusion”, the reasons for decision state:

We have determined that you do not meet the eligibility requirements to receive a JobKeeper payment for a business participant.

Therefore, you are not eligible to claim JobKeeper for a business participant.

1. The document then discusses the exercise of the Commissioner’s discretion to allow extra time under the heading “Commissioner’s Discretion”. The discussion begins with the following:

This section does not form part of your objection decision as the application of the Commissioner’s discretion in relation to JobKeeper does not carry objection rights nor does it form part of your objection decision.

1. As the Tribunal observed at T[32], the principal reason for not exercising the discretion was that the applicant did not hold an ABN as at the relevant date.
2. Mr Apted applied to the Tribunal for review of the objection decision on 22 July 2020. The Tribunal delivered its reasons for setting aside the objection decision on 21 December 2020.

# THE ABN ACT

1. The objects of the ABN Act are set out in s 3 and include making it easier for businesses to conduct their dealings with the Australian Government and allowing businesses to identify themselves readily for the purposes of “taxation laws”. The CERP Act and CERP Rules are “taxation laws” – see: definition of “taxation laws” in s 41 of the ABN Act; s 2 of the *Taxation Administration Act 1953* (Cth) (**TAA 1953**); s 995-1(1) of the *Income Tax Assessment Act 1997* (Cth) (**ITAA 1997**).
2. The “main object” of the ABN Act is described in s 3(1) and (2) as follows:

**3 Objects**

*Main object*

(1) The main object of this Act is to make it easier for businesses to conduct their dealings with the Australian Government. This is done by establishing a system for registering businesses and issuing them with unique identifying numbers so that they can identify themselves reliably:

(a) in all their dealings with the Australian Government; and

(b) for all other Commonwealth purposes.

(2) Without limiting paragraph (1)(b), the main object of this Act includes allowing businesses to identify themselves reliably for the purposes of \*taxation laws.

1. Part 2 of the ABN Act (comprising ss 8 to 23) is entitled “Registering for ABN purposes”. Section 8 addresses entitlement to an ABN. It includes:

**8 Are you entitled to an ABN?**

(1) \*You are entitled to have an Australian Business Number (\*ABN) if:

(a) you are \*carrying on an \*enterprise in \*Australia; or

(b) in the course or furtherance of carrying on an enterprise, you make \*supplies that are \*connected with the indirect tax zone.

*Corporations Act companies*

(2) A \*Corporations Act company is entitled to have an Australian Business Number (\*ABN).

1. Section 9 deals with applying for an ABN. Section 9(1) provides:

To get an \*ABN, \*you must apply to the \*Registrar to be registered in the \*Australian Business Register.

1. Section 10 requires the Registrar to register an entity if certain conditions are met. It provides:

**10 Registrar must register you if conditions met**

(1) The \*Registrar must register \*you in the \*Australian Business Register if:

(a) you have applied under section 9; and

(b) the Registrar is satisfied that you:

(i) are entitled to have an \*ABN; or

(ii) are likely to be entitled to have an ABN by the date specified in your application; and

(c) the Registrar is satisfied that your identity has been established; and

(ca) if details about an \*associate of yours were requested in the \*approved form for registration—the Registrar is satisfied that the identity of the associate has been established; and

(d) you are not already registered in the Register.

(2) The \*Registrar may request \*you to give the Registrar specified information or a specified document the Registrar needs to be satisfied that:

(a) you are entitled to have an \*ABN; or

(b) your identity, or that of an \*associate referred to in paragraph (1)(ca), is established.

1. Section 11 addressed the steps which the Registrar takes to register an entity. It provides:

**11 Steps taken by Registrar to register you**

(1) The \*Registrar registers \*you (for an application under section 9) by:

(a) allocating you an \*ABN; and

(b) entering in the \*Australian Business Register:

(i) your name; and

(ii) your ABN; and

(iii) the date of effect of the registration.

Note: A decision setting the date of effect of your registration is a reviewable ABN decision.

(2) The date specified as the date of effect of \*your registration may be any date (including a date before your application for registration was made).

(3) The \*Registrar must give \*you a written notice of:

(a) the fact that you have been registered; and

(b) your \*ABN; and

(c) the date of effect of your registration; and

(d) the other details entered in relation to you in the \*Australian Business Register (see section 25).

Note: Section 12 deals with giving notice to an entity registered under this section.

1. The Registrar can refuse to register an entity under s 13 of the ABN Act, such refusal being a “reviewable ABN decision”.
2. Section 14(1) of the ABN Act provides:

**14 You must notify Registrar of changes to matters set out in the Register**

(1) If:

(a) \*you give information to the \*Registrar; and

(b) the information is recorded in relation to you in the \*Australian Business Register under section 25; and

(c) circumstances change so that the information you gave the Registrar is no longer correct;

you must notify the Registrar of the change within 28 days after you become aware of the change.

Note 1: The information may have been given to the Registrar as part of applying for registration or it may have been given in a previous notice under this subsection or section 15.

Note 2: This Act is a taxation law for the purposes of the *Taxation Administration Act 1953*. If you fail to comply with this subsection, you commit an offence against section 8C of that Act.

1. Section 15 requires information to be given to the Registrar if requested.
2. The Registrar can vary, cancel or reinstate registration under ss 17, 18 and 19 respectively. Sections 17(1), 18(1) and 19(1) and (3) provide:

**17 Registrar may change your ABN**

(1) The \*Registrar may, at any time, change \*your \*ABN by:

(a) making an appropriate change to the \*Australian Business Register (including the date from which the new ABN has effect); and

(b) giving you written notice of the new ABN.

Note: Section 12 deals with giving notice to an entity registered under section 11.

…

**18 When your registration can be cancelled**

*On Registrar’s initiative*

(1) The \*Registrar may cancel \*your registration in the \*Australian Business Register if satisfied that:

(a) you are registered under an identity that is not your true identity; or

(b) at the time you were registered, you were not entitled to have an \*ABN; or

(c) you are no longer entitled to have an ABN.

Note 1: If your registration is cancelled, you cease to have an ABN (see the definition of ***ABN*** in section 41).

Note 2: A decision to cancel your registration is a reviewable ABN decision.

…

**19 Reinstating your registration**

(1) The \*Registrar must reinstate \*your registration, or the registration of your representative, in the \*Australian Business Register if the Registrar is satisfied that the registration should not have been cancelled.

…

(3) The reinstatement has effect on and from the day on which the registration was cancelled.

1. Some decisions under these provisions are “reviewable ABN decisions” – see: s 21(2). A taxpayer can object to “reviewable ABN decisions” in accordance with Pt IVC of the TAA 1953: s 21(1).
2. Part 3 of the ABN Act is entitled “Administration”. Division 10 in Pt 3 is entitled “The Australian Business Register”. Sections 24 and 25(1) provide:

**24 The Australian Business Register**

(1) The \*Registrar must establish and maintain an \*Australian Business Register.

(2) The \*Australian Business Register may be kept in any form that the \*Registrar considers appropriate.

**25 Entries in the Australian Business Register**

(1) Under paragraph 11(1)(b), the \*Registrar enters in the \*Australian Business Register in relation to each \*entity registered in the Register:

(a) the entity’s name; and

(b) the entity’s \*ABN; and

(c) the date of effect of the registration.

1. Access to the register is governed by s 26. The Registrar may give a person a copy of the entry in the ABR relating to an entity: s 26(1). The details which might be on an entry are dealt with in s 26(3) and include the entity’s name, the entity’s ABN and the date of effect of registration. Section 27 is entitled “Evidentiary value of the Australian Business Register”. Subsections 27(1) to (3) provide:

**27 Evidentiary value of the Australian Business Register**

(1) The \*Australian Business Register is admissible in proceedings as prima facie evidence of the matters registered in it.

(2) If the \*Australian Business Register is kept by the use of a computer, the \*Registrar may issue a document containing the details of a matter taken from the Register.

(3) The document issued under subsection (2) is admissible in proceedings as prima facie evidence of the matter.

1. The Registrar of the ABR is the Commissioner of Taxation: s 28(2). The Commissioner has the powers and functions conferred on the Registrar by the ABN Act and the general administration of the Act: s 28(3) and (4).
2. Section 35(1) provides that, amongst other things, notes form a part of the ABN Act. It provides:

**35 What forms part of this Act**

(1) These all form part of this Act:

* the headings to the Parts, Divisions and Subdivisions of this Act;
* the headings to the sections and subsections of this Act;
* the notes and examples (however described) that follow provisions of this Act.

1. Part 4 is entitled “Rules for interpreting this Act”. Division 15 in Pt 4 is entitled “The Dictionary”. Section 41 includes the following definitions:

***ABN (Australian Business Number)*** for an \*entity means the entity’s ABN as shown in the \*Australian Business Register.

# THE CERP ACT AND RULES

1. In early 2020, the Commonwealth Government announced various economic stimulus measures to combat a downturn in the Australian economy and continued economic disruption anticipated as a result of the Coronavirus pandemic. 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. It was “designed to leverage [Australia’s] existing tax and transfer systems to ensure that [the Government] can get the support to the millions of Australians that need it in the most efficient and effective way possible” – see: Australia, House of Representatives, *Debates*, 8 April 2020, p 2918.

## The CERP Act

1. The CERP Act commenced on 9 April 2020. The object of the Act is stated in s 3 as follows:

3 **Object of this Act**

The object of this Act is to provide financial support directly or indirectly to entities that are directly or indirectly affected by the Coronavirus known as COVID‑19.

1. The Commissioner of Taxation has the general administration of the Act: s 5.
2. Section 7 provides for the making of rules for the making of various payments by the Commonwealth. It provides:

**7 Coronavirus economic response payments**

(1) The rules may make provision for and in relation to:

(a) one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period; and

(b) the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme.

Paragraphs (a) and (b) do not limit each other.

(1A) The rules may also make provision for and in relation to:

(a) one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the relevant period, being payments that are primarily for the purpose of:

(i) improving the prospects of individuals getting employment in Australia; or

(ii) increasing workforce participation in Australia; and

(b) the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme.

Paragraphs (a) and (b) do not limit each other.

(2) Without limiting subsections (1) and (1A), the rules may make provision for and in relation to the following matters:

(a) the eligibility criteria for a payment;

(b) if or how an application for a payment may or must be made;

(c) whether a payment is to be paid in instalments or as a lump sum;

(d) entitlement to a payment or an instalment of a payment;

(e) the amount of a payment or an instalment of a payment;

(f) when a payment or an instalment of a payment is payable;

(g) conditions applying to a payment or an instalment of a payment;

(h) providing information or notices;

(i) rights, obligations or liabilities of:

(i) an entity that is paid a payment; or

(ii) an entity that directly benefits from another entity being paid a payment; or

(iii) if the entitlement of an entity to a payment relates to a relationship existing between the entity and another entity—the other entity.

Paragraphs (a) to (i) do not limit each other.

1. Section 13(1) of the CERP Act provides:

13 **Review of the Commissioner’s decision**

(1) An entity who is dissatisfied with a decision covered by subsection (2) may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953.*

(2) This subsection covers the following decisions of the Commissioner under this Act:

(a) a decision that the entity is not entitled to a Coronavirus economic response payment for a period;

…

1. Section 19 is headed “contrived schemes” and permits the Commissioner to determine that the CERP Act is taken to have effect as if a person never became entitled to a payment if, objectively assessed, it would be concluded that participants entered into or carried out a scheme for the sole or dominant purpose of making an entity entitled to the payment or an increased amount of payment.
2. Section 20 furnishes power to the Treasurer to make rules, by legislative instrument, prescribing matters required or permitted by the CERP Act. The rules may make provision in relation to a matter by conferring a power on the Commissioner to make a decision of an administrative character: s 20(4)(b).

## The CERP Rules

1. The CERP Rules also commenced on 9 April 2020: s 2 of the CERP Rules.
2. Section 4 is entitled “Definitions”. Subsection 4(1) define particular words and phrases. Subsection 4(2) provides:

Subject to subsection (1), an expression used in this instrument that is defined in the *Income Tax Assessment Act 1997* has the same meaning in this instrument as it has in that Act.

1. Section 995-1(1) of the ITAA 1997 defines “ABN” to have the meaning given by the ABN Act.
2. Part 2 of the CERP Rules is entitled “Jobkeeper payment”. It contains a “simplified outline” in Division 1, s 5, which provided (when introduced):

5 **Simplified outline**

|  |
| --- |
| The jobkeeper payment is intended to assist businesses affected by the Coronavirus to cover the costs of wages of their employees.  The jobkeeper scheme starts on 30 March 2020 and ends on 27 September 2020.  A business that has suffered a substantial decline in turnover can be entitled to a jobkeeper payment of $1,500 per fortnight for each eligible employee. It is a condition of entitlement that the business has paid salary and wages of at least that amount to the employee in the fortnight.  A business that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment of $1,500 per fortnight for one business participant who is actively engaged in operating the business.  A registered religious institution that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment of $1,500 per fortnight for each eligible religious practitioner who is active as a member of the institution.  The jobkeeper scheme is administered by the Commissioner of Taxation.  The Commissioner pays the jobkeeper payment to entities shortly after the end of each calendar month, for fortnights ending in that month.  Some of the administrative arrangements for the scheme are set out in the Act. |

1. Division 2 of Pt 2 addresses entitlement to the jobkeeper payment “based on paid employees”. Division 3 of Pt 2 addresses entitlement to the jobkeeper payment “based on business participation”. It is this Division which is of present relevance. The criteria which must be satisfied for an entity to be entitled to the jobkeeper payment are set out in s 11. It is not necessary to set out all of the criteria because only one is in issue, namely that in s 11(6).
2. Section 11(6) is described in its heading as an “integrity rule”. To be fully understood, reference must also be made to subsections (7) to (9). Subsections (7) to (9) are not central to the appeal because it is accepted that Mr Apted satisfies the various requirements thrown up by those subsections. Nevertheless, they are part of the statutory context; the references in them to 12 March 2020 are relevant to the correct construction of s 11(6); and the provisions are necessary in order to understand how the integrity rule as a whole was intended to operate. Subsections 11(6) to (9) provide:

11 **Entity’s entitlement to jobkeeper payment for a business participant**

…

*Integrity rule*

(6) An entity is *not* entitled to a jobkeeper payment under this section unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.

(7) For the purposes of subsection (6), the requirement in this subsection is satisfied if:

(a) an amount was included in the entity’s assessable income for the 2018‑19 income year in relation to it carrying on a business; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included.

(8) For the purposes of subsection (6), the requirement in this subsection is satisfied if:

(a) the entity made a taxable supply in a tax period that applied to it that:

(i) started on or after 1 July 2018; and

(ii) ended before 12 March 2020; and

(b) the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

(9) For the purposes of subsection (8), in determining whether the entity made a supply (within the meaning of the GST Act) that is a taxable supply:

(a) assume that the entity is registered (within the meaning of that Act); and

(b) assume that the supply is neither GST‑free (within the meaning of that Act) nor input taxed (within the meaning of that Act); and

(c) for an entity carrying on business solely in the external Territories—assume that the external Territories are part of the indirect tax zone (within the meaning of that Act).

## Extrinsic material

1. An Explanatory Statement to the CERP Act and CERP Rules was issued by authority of the Treasurer. It includes at page 22:

*Integrity rule*

The JobKeeper payment for an entity in respect of business participants is intended to support active businesses only. Division 3 contains integrity rules to support this intention.

The only entities that are entitled to a JobKeeper payment for business participants are those that had an ABN on 12 March 2020, or such later time that the Commissioner allows.

This discretion is only able to be exercised by the Commissioner for unintended situations where the entity was running an active business prior to 12 March 2020 but was not required to have an ABN to operate it. This will occur only in limited circumstances, such as in relation to businesses that are conducted in the external Territories. Businesses that only operate in the external Territories are not required to have an ABN as the no-ABN rules and GST does not apply within the external Territories. In order to be eligible for the JobKeeper payment they will need to obtain an ABN. However as they cannot hold it on 12 March 2020, this provision provides the Commissioner with a limited discretion after the commencement of the Rules to allow these entities to hold an ABN later, and still be entitled to the JobKeeper payment. This discretion accordingly benefits affected businesses. It is envisaged that the Commissioner will release guidance outlining the limited circumstances in which this discretion is able to be used.

In relation to an entity that has an ABN, it is additionally required that:

* an amount was included in the entity’s assessable income for the 2018-19 income year in relation to it carrying on a business and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the amount should be so included; and
* the entity made a taxable supply in a tax period that applied to it that started on or after 1 July 2018 and ended before 12 March 2020 and the Commissioner had notice on or before 12 March 2020 (or a later time allowed by the Commissioner) that the entity had made the taxable supply.

For the purposes of determining whether the entity made a taxable supply, it should be assumed that the entity is registered, the supply is neither GST-free nor input taxed, and the external Territories are part of the indirect tax zone. These terms have the meaning that they are given in the GST Act.

# THE FIRST ISSUE

1. As noted earlier, the Commissioner’s position is that s 11(6) is concerned with what the position was on 12 March 2020. According to the Commissioner, the provision sets up a “point-in-time test”. The question whether a person “had an ABN on 12 March 2020” within the meaning of s 11(6) is resolved by reference to whether or not, if the ABR had been examined on that day, it would have shown that the relevant entity had an ABN.
2. As also noted earlier, Mr Apted submitted that an entity has an ABN on 12 March 2020 if the entity has an ABN with a date of effect which includes 12 March 2020.
3. Mr Apted’s position is that the Commissioner’s construction amounts to one of identifying what the ABR “showed” on 12 March 2020 rather than whether a person had an ABN on the relevant day in accordance with the ABN Act.
4. The Commissioner relies principally on the text of s 11(6), read in context. The Commissioner noted that, by reason of s 4(2) of the CERP Rules and s 995-1(1) of the ITAA 1997, the meaning of “ABN” in s 11(6) of the CERP Rules was supplied by the definition of “ABN” in s 41 of the ABN Act, namely: “an entity’s ABN as shown in the Australian Business Register”. The Commissioner submits that s 11(6) should have been read by the Tribunal as follows (italics in original; underlining represents words from the definition of “ABN”):

An entity is *not* entitled to a jobkeeper payment under this section unless the entity had an ABN as shown in the Australian Business Register on 12 March 2020 (or a later time allowed by the Commissioner), and the requirement in subsection (7) or (8) is satisfied.

1. Mr Apted submits that it is not appropriate to read into s 11(6) the terms of (part of) the definition of ABN. Mr Apted accepts that, as a general rule, one reads a definition into a primary provision in order to construe the primary provision, but notes that, in this case, that would be grammatically difficult: *Kelly v The Queen* (2004) 218 CLR 216 at [103]. The reason for that, Mr Apted submits, is that the definition of ABN does more than simply define the word “ABN”; it also gives meaning to the concept of possession of an ABN by an entity. The grammatical difficulty of reading a definition into a primary provision arises in many cases. It does not follow from the existence of such a difficulty that one does not construe the principal provision by reference to the definition. It is clear from the definition of “ABN”, that an “ABN” is that which is shown on the ABR. In any event, for the reasons which follow, s 11(6) has the meaning for which the Commissioner contends irrespective of whether the words from the definition of “ABN” are notionally read into s 11(6).
2. On matters of text, the Commissioner also points to the terms of s 11(7) and (8) of the CERP Rules, set out at [74] above. The Commissioner noted that there were three requirements in s 11(6): (1) that an entity have an ABN on 12 March 2020; (2) that s 11(7) be satisfied; and (3) that s 11(8) be satisfied. Subsections 11(7) and (8) by their references to events occurring before 12 March 2020 and the requirement of notice on or before 12 March 2020 were further textual indicators that the concept in s 11(6) of having an ABN on 12 March 2020 was intended to reflect a point-in-time test.
3. As to context, the Commissioner notes that the CERP Act and CERP Rules were introduced in recognition of the potentially catastrophic economic consequences seen as likely to flow from the global COVID-19 pandemic.
4. The task of construction may be simply stated: it is to apply common law and statutory rules of construction in order to identify from an examination of the text, in context, what the legislature should be taken to have intended by the words enacted: *Lacey**v Attorney-General (Qld)* (2011) 242 CLR 573 at [43]-[44]; *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AAQS v Cross* (2012) 248 CLR 378 at [25]-[26]. The general principles relating to the interpretation of Acts of Parliament are equally applicable to the interpretation of subordinate legislation: *Collector of Customs v Agfa- Gevaert Ltd* (1996) 186 CLR 389 at 398; *Master Education Services Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19].
5. Acknowledging that there is much to be said in favour of both parties’ constructions, the preferable construction of s 11(6) is that it requires that the person had an ABN on the ABR on 12 March 2020 in the sense that, if the ABR had been inspected on 12 March 2020 it would have shown the entity as having an effective ABN; any person who did not in fact have an ABN on 12 March 2020 could ask for the “later time” discretion in s 11(6) to be exercised. The text does not suggest that the Treasurer intended that an entity could satisfy s 11(6) by later getting, under the provisions of the ABN Act, an ABN with a “date of effect” of 12 March 2020 or by altering the “date of effect” of an ABN so that it was effective on 12 March 2020. Whilst the discretion in s 11(6) would still have a role to play if one could satisfy the requirement of having an ABN on 12 March 2020 by later securing a “date of effect” on or before 12 March 2020, the text and context suggests that that the Treasurer should be taken to have intended that those seeking a jobkeeper payment who did not have an ABN shown on the ABR on 12 March 2020 should apply for the Commissioner to exercise the broadly expressed discretion. The Treasurer should be taken to have intended that the reference to having an ABN on 12 March 2020 was a reference to the particular state of affairs as revealed by the ABR on that day. That is a logical and simple thing to have intended; it is consistent with the language of s 11(7) and 11(8); and the alternative is less compelling. If the Treasurer had intended that the issue in s 11(6) turn on the “date of effect” of ABN registration he could have said so. In the context of a provision described as an “integrity rule”, it is unlikely that the Treasurer intended that the rule could be satisfied by later altering the “date of effect” of an ABN registration in order to satisfy the condition of having an ABN on 12 March 2020. That is particularly so when account is taken of the circumstances in which the provision was introduced. It is clear enough that the CERP Rules were intended to provide a quick and easy mechanism to determine as efficiently as possible who was, and who was not, entitled to an economic stimulus payment.
6. Mr Apted’s submissions that the concept of “having” an ABN, used in s 11(6), should be taken as having been intended to cover the situation of an entity which did not have an ABN on the ABR on 12 March 2020 but which later got an ABN with a “date of effect” covering 12 March 2020 should be rejected. The concept of having an ABN on 12 March 2020 within the meaning of s 11(6) of the CERP Rules is different to the concept of having an ABN which has a date of effect such that it covered 12 March 2020 in accordance with the provisions of the ABN Act. The CERP Rules and the ABN Act – although connected by their operative provisions and the provisions of the ITAA 1997 and by both being taxation laws administered by the Commissioner – have quite different objects.
7. It follows that the Tribunal erred on the first issue.

# THE SECOND ISSUE

1. As noted above, s 13 of the CERP Act provides:

13 **Review of the Commissioner’s decision**

(1) An entity who is dissatisfied with a decision covered by subsection (2) may object against the decision in the manner set out in Part IVC of the *Taxation Administration Act 1953.*

(2) This subsection covers the following decisions of the Commissioner under this Act:

(a) a decision that the entity is not entitled to a Coronavirus economic response payment for a period;

…

1. The critical question is whether a decision under s 11(6) of the CERP Rules not to exercise the “later time” discretion, made in the context of a decision that a person is not entitled to a jobkeeper payment because they did not have an ABN on 12 March 2020, falls within s 13(2)(a) of the CERP Act as “a decision that the entity is not entitled to a Coronavirus economic response payment for a period”.
2. The debate is in many ways arid. Even if the decision not to exercise the “later time” discretion is not “a decision that the entity is not entitled to a Coronavirus economic response payment for a period” within the meaning of s 13(2)(a), the Tribunal could exercise the discretion in any event by reason of s 43(1) of the AAT Act.
3. Section 43(1) provides:

*Tribunal’s decision on review*

(1) For the purpose of reviewing a decision, the Tribunal may exercise all the powers and discretions that are conferred by any relevant enactment on the person who made the decision and shall make a decision in writing:

(a) affirming the decision under review;

(b) varying the decision under review; or

(c) setting aside the decision under review and:

(i) making a decision in substitution for the decision so set aside; or

(ii) remitting the matter for reconsideration in accordance with any directions or recommendations of the Tribunal.

1. The exercise by the Tribunal of the “later time” discretion would be “for the purpose of reviewing a decision”, namely the Commissioner’s decision that Mr Apted was not entitled to a jobkeeper payment. Even if there are in fact two distinct decisions as the Commissioner submits, s 43(1) still gives the Tribunal jurisdiction to exercise the “later time” discretion. As the Full Court stated in ***Commonwealth Bank Officers*** *Superannuation Corporation Pty Ltd v Commissioner of Taxation* (2005) 148 FCR 427 at [29]:

… It is neither necessary nor permissible to put a gloss upon s 43 that would permit the Tribunal to exercise the decision-maker’s powers and discretions only when those powers or discretions are necessarily interdependent with the decision under review, or where the power or discretion to be exercised by the Tribunal is necessarily involved in the making of the decision under review — see *Department of Social Security v Hodgson* (1992) 37 FCR 32 at 39-40.

1. Nor does it matter that the decision not to exercise the discretion might be reviewable separately in judicial review proceedings – see: *Commonwealth Bank Officers*.
2. Is a decision under s 11(6) of the CERP Rules not to exercise the “later time” discretion a decision within s 13(2)(a) of the CERP Act? The Commissioner submits that it is not. The Commissioner submits that the question whether to exercise the “later time” discretion can only logically arise after it has been decided that an entity did not have an ABN on 12 March 2020 and that, once that first question is answered, there is “a decision that the entity is not entitled to a Coronavirus economic response payment for a period”. The Commissioner submits that then answering the question whether to exercise the “later time” discretion involves a separate decision and not one that falls within s 13(2)(a) as “a decision that the entity is not entitled to a Coronavirus economic response payment for a period”.
3. Whilst as a matter of analytical logic this argument has some attraction, it should be rejected. Reading the CERP Act and the CERP Rules as a whole, it is tolerably clear that the legislature intended to permit objection and review under Pt IVC of the TAA 1953 in respect of a decision that an entity was not entitled to a Coronavirus economic response payment in circumstances such as present themselves here. The determination of entitlement to the jobkeeper payment was intended to comprise one decision, involving various elements. So far as concerns s 11(6), the preferable construction is that the decision that a person is not entitled to the jobkeeper payment is only reached once the decision is made both that the entity did not have an ABN on 12 March 2020 and that the “later time” discretion should not be exercised. This conclusion is reached largely because of the text and structure of s 11(6) itself, read in context, in particular the inclusion of the “later time” discretion immediately after the stated requirement that the person hold an ABN on 12 March 2020.
4. The very argument about the surrounding context of emergency and the provision of quick economic relief, correctly employed by the Commissioner in relation to the first issue, applies equally in relation to the second issue. The legislature should be taken as having intended one decision to be made about an entity’s entitlement to the jobkeeper payment. So far as s 11(6) is concerned that decision involved determining whether the entity had an ABN on 12 March 2020 and, if not, whether to exercise the “later time” discretion. An entity is not entitled to the jobkeeper payment if the entity did not have an ABN on 12 March 2020 and the discretion has not been or should not be exercised.
5. The Commissioner’s argument might be correct in other statutory contexts. However, this is not a case, such as *Commonwealth Bank Officers*, where the discretion is contained in a separate provision and expressed in terms which indicate an intention that there be two quite distinct decisions. The Commissioner’s argument involves an assumption that the decision that a person is not entitled to the payment must necessarily be reached as soon as it is concluded that the entity did not have an ABN on 12 March 2020. This conclusion pays insufficient regard to the language of s 11(6) which states: “unless the entity had an ABN on 12 March 2020 (or a later time allowed by the Commissioner)”. The word “unless” relates to both of the subsequent possibilities, namely either having an ABN on 12 March 2020 or having an ABN at such later time as the Commissioner might allow. At least in a case where an entity has asked that the discretion be exercised, it is only once both of the possibilities have been answered that “a decision [has been made] that the entity is not entitled to a Coronavirus economic response payment for a period” within the meaning of s 13(2)(a) of the CERP Act.
6. As explained next, this conclusion accords with the way the Commissioner initially dealt with the matter in his decision of 22 May 2020.
7. On any view of the answer to the first issue in the appeal, Mr Apted did not have an ABN either when he applied for the exercise of the “later time” discretion (8 May 2020) or at the time of the Commissioner’s decision refusing to exercise the discretion and concluding that Mr Apted was not eligible for the jobkeeper payment (22 May 2020). The Commissioner’s decision of 22 May 2020 included:

… On 8 May 2020, you applied for the Commissioner to exercise his discretion to allow an entity further time to meet certain eligibility requirements for the JobKeeper payment.

**Our decision**

You aren’t eligible for JobKeeper because you had no ABN on 12 March 2020.

**Reasons for our decision**

You requested further time to meet the requirement to have had an ABN on 12 March 2020.

We haven’t granted your request for further time because your ABN was not active as at 12 March 2020 …

1. In his decision of 22 May 2020, the Commissioner characterised his decision as being one that Mr Apted was not eligible for jobkeeper because Mr Apted had no ABN on 12 March 2020. This decision was made in response to a request to exercise the “later time” discretion. The Commissioner’s decision is properly seen as one about entitlement to a jobkeeper payment involving a determination of two subsidiary issues: whether Mr Apted had an ABN on 12 March 2020 and whether the “later time” discretion should be exercised. The decision, responding to a request to exercise the “later time” discretion, was made on the basis that Mr Apted did not have an ABN on 12 March 2020 and that the “later time” discretion should not be exercised. Mr Apted’s entitlement to the jobkeeper payment depended, as the Commissioner’s reasons indicate, upon the question whether Mr Apted had an ABN on 12 March 2020 and, if not, whether the Commissioner should exercise the “later time” discretion. The decision of 22 May 2020, that Mr Apted was not entitled to the jobkeeper payment, involved two components.
2. As noted earlier, on 10 June 2020, Mr Apted secured a “date of effect” of ABN registration of 1 July 2019. Mr Apted also objected on 10 June 2020 to the 22 May 2020 decision. On 15 June 2020, Mr Apted wrote to the Commissioner asserting his view that he had an ABN on 12 March 2020 by reason of his later having obtained a date of effect of 1 July 2019.
3. The Commissioner disallowed the objection in full. This was because the Commissioner formed the view that Mr Apted did not have an ABN on 12 March 2020. By this time, but inconsistently with the position adopted by the Commissioner in his decision of 22 May 2020, the Commissioner took the position that the discretion did not form part of the objection.
4. In circumstances where Mr Apted did not have an ABN on 12 March 2020 and Mr Apted had asked for the “later time” discretion to be exercised, the Commissioner could not have made the decision that, because of s 11(6), Mr Apted was not entitled to the jobkeeper payment, unless the Commissioner also answered the question whether his “later time” discretion had been or should be exercised.
5. The Commissioner might unilaterally exercise the “later time” discretion, without being asked, if the circumstances suggested that it was in the interests of the better administration of the taxation laws or he might consider whether to exercise the discretion because an entity made a request for the Commissioner to do so. If s 11(6) operates to disentitle an entity to the jobkeeper payment that is because two circumstances exist: the entity did not have an ABN on 12 March 2020 and the “later time” discretion has not been exercised.
6. Although there are many decisions which one can divide up into several questions giving rise, as a matter of logic, to distinct decisions, it does not follow that each of the answers to the several questions should be regarded as decisions giving rise to different avenues of potential challenge. It depends on the proper construction of the particular provisions.
7. Here, there is one decision, namely that Mr Apted was not entitled to the jobkeeper payment. The decision about whether Mr Apted was entitled to the payment involved a variety of components, including – so far as s 11(6) was concerned – whether Mr Apted had an ABN on 12 March 2020 and, if not, whether further time should be allowed. The structure of s 11(6), and the legislative context in which it is found, is not such as leads to the conclusion that it was intended that the “later time” discretion not form a part of the decision that a person is not entitled to the payment.
8. It is unlikely that the Treasurer intended that the “later time” discretion in s 11(6) only be challengeable in judicial review proceedings. Indeed, it is difficult to see why, as a matter of administration, the Commissioner is advocating such an approach. It has a number of negative consequences:
9. First, it means the Tribunal does not have a merits review jurisdiction in this respect and forces taxpayers, presumably in difficult financial circumstances, to have to embark on inevitably expensive litigation in this Court.
10. Secondly, this has the consequence that the Commissioner would be subject to costs orders in cases where his discretion was relevantly affected by error or would have to pursue costs from taxpayers, many of whom might be presumed to be in financial difficulties, in cases where the Commissioner won.
11. Thirdly, it might result in parallel proceedings in the Tribunal and in this Court: the Tribunal being concerned with the decision that a person was not entitled for any one of a number of reasons; and this Court reviewing a decision not to exercise the “later time” discretion.

If this is what the Treasurer truly intended, there would be a good argument for legislative change.

# THE THIRD ISSUE

1. The Commissioner’s position on the third issue is that the Tribunal exercised the “later time” discretion in Mr Apted’s favour, without proper regard to the limited circumstances in which the discretion fell to be exercised. The Commissioner submits that the discretion can only be exercised in “limited circumstances” such as the specific circumstance described in the explanatory statement, set out at [75] above. The Commissioner also notes, however, that the explanatory statement records that “[i]t is envisaged that the Commissioner will release guidance outlining the limited circumstances in which this discretion is able to be used” and that the Commissioner has now issued such guidance.
2. The first matter to note is that the Commissioner’s argument does not give primary effect to the statutory language read in context; rather, it looks to the extrinsic material and presumes that to have been the intended meaning of the statutory text. This was the error on the part of the Full Court which the High Court corrected in *Commissioner of Taxation v Consolidated Media Holdings* (2012) 250 CLR 503 at [39].
3. The second matter to note is that the Commissioner cannot alter the nature of the discretion as enacted by issuing guidance as to when the discretion might be exercised. That is not to say that the Commissioner’s guidance might not be useful. It is merely to record that the Commissioner has the discretion afforded by s 11(6) and it is that discretion which must be exercised, not some other articulation of it. If the Treasurer had intended that the discretion be “limited” by certain matters, he would have said so by identifying the matters. He has not. He has enacted a broad discretion to permit the objects of the CERP Act and Rules to be met by providing economic stimulus to the entities identified. Section 11(6) furnishes a broad discretion according to its terms, confined only by statutory purpose and context.
4. The third matter to note is that it is not clear in any event that Mr Apted does not fall within the language of the explanatory statement. Mr Apted was running an active business before 12 March 2020 and was not required to have an ABN to operate it: s 8 of the ABN Act. Mr Apted could have had an ABN on 12 March 2020 and, absent his oversight, would have had an ABN on that day. As is made plain by government announcements and the provisions of the legislation, the jobkeeper payment was intended to benefit taxpayers in Mr Apted’s general circumstances. The only matter which disentitled him was the lack of ABN registration on 12 March 2020. The Commissioner, in his reasons, did not point to any good reason not to exercise the discretion in s 11(6) in Mr Apted’s favour; it is clear that the real reason for the Commissioner’s refusal to exercise the discretion was the lack of ABN registration on 12 March 2020. But this was the very thing which lay the foundation for the exercise of the discretion. Of itself, this was not a proper basis to refuse to exercise the discretion.
5. The Commissioner also contends that the Tribunal reached a conclusion that was infected by error of law in taking into account matters said to be “extraneous”, namely that:
6. Mr Apted’s failure to re-activate his ABN was due to “oversight”: T[71];
7. Mr Apted “is the kind of person who was intended to benefit from the Jobkeeper scheme”: T[73], when, according to the Commissioner, he was not; and
8. “[t]here is nothing to be achieved by denying him access to the payments in order to make a point about the desirability of obtaining an ABN”: T[73].
9. Mr Apted submits that the Tribunal’s reasoning does not disclose error of the kind identified by Dixon J in ***Avon Downs*** *Pty Ltd v Commissioner of Taxation* (1949) 78 CLR 353 at 360. Mr Apted’s reference to *Avon Downs* is not to be understood as suggesting that the “later time” discretion is one based on a state of satisfaction or the formation of an opinion conditioning the exercise of the power. Rather, it should be understood as a reference to the fact that the matters referred to by Dixon J in *Avon Downs*, being matters which are broadly equivalent to those identified in *House v The King* (1936) 55 CLR 499, are ones which – if shown in relation to the exercise of a statutory discretionary power – might be capable of establishing jurisdictional error. This is because it is to be presumed that the Treasurer intended the discretion to be exercised reasonably and if the matters referred to by Dixon J in *Avon Downs* were established then it might be shown that the decision was legally unreasonable – see: *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 at [68]; *Minister for Immigration and Border Protection v Stretton* (2016)237 FCR 1 at [4] and [5]. Each of the matters identified above which the Tribunal took into account was relevant. The Tribunal was not shown to have taken into account any irrelevant material. It did not misunderstand its task so far as concerned the exercise of the “later time” discretion. No jurisdictional error has been shown.

# CONCLUSION

1. The application should be dismissed.

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| I certify that the preceding eighty-nine (89) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Thawley. |

Associate:

Dated: 24 March 2021