

# COVID-19 and its Impact on Industrial and Employment Law, Awards and Enterprise Agreements

**Greens List CPD Webinar**

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# Useful Resources

- Fair Work Commission COVID-19: <https://www.fwc.gov.au/about-us/coronavirus-covid-19-updates-advice>
- Fair Work Commission Jobkeeper Benchbook: <https://www.fwc.gov.au/resources/benchbooks/jobkeeper-disputes-benchbook>
- ATO Jobkeeper payment update page: <https://www.ato.gov.au/general/jobkeeper-payment/>
- The Australian Government COVID-19 page.

# Key legislation

- *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*
- *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (the Payment and Benefits Rules)*
- *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (the Omnibus Act)*

# *Coronavirus Economic Response Package (Payments and Benefits) Act*

- Authorises the making of the Payment and Benefits Rules.
- Provides for method of payment of Jobseeker payments to eligible companies (s 8).
- Rules governing overpayments (s 9 -11).
- No entitlement to payments unless record keeping requirements are met (s 14).

# *Payment and Benefits Rules*

## **Jobkeeper payment**

- \$1,500 for an individual each fortnight (s 13).

## **Section 7 – An entity qualifies for the jobkeeper scheme if:**

- on 1 March 2020, the entity carried on a business in Australia, or was a non-profit body that pursued its objectives principally in Australia; and
- the entity has satisfied the decline in turnover test.

# Section 6 – Employer is entitled to a jobkeeper payment for an individual if:

- The fortnight during which an employer is entitled to a jobkeeper payment is a “jobkeeper fortnight” (s 6(1)(a))
- The employer qualifies for the jobkeeper scheme (1)(b)
- The individual is an eligible employee (1)(c)
- The employer has satisfied the wage condition (1)(d)
- The employer has given adequate notification and information in the approved form to the ATO (s 6(e)-(g)).
- “Jobkeeper fortnights” – each fortnight, beginning 30 March 2020 and ending on 27 September 2020.

# Payment and Benefits Rules

## Section 8 – Decline in turnover test

An entity satisfies the decline in turnover test if:

- The **projected GST turnover** in a calendar month (or quarter) falls short of the GST turnover for the calendar month 1 year ago (or the relevant quarter 12 months ago) (s8(1), (7)).
- The shortfall exceeds:
  - 15% for eligible ACNC-registered charities;
  - 50% for employers with an aggregated turnover of \$1 billion for the income year; and
  - 30% for all other employers.

## Alternative tests – s 8

- (6) The Commissioner may determine that an alternative decline in turnover test applies to a class of entities, if the Commissioner is satisfied that there is not an appropriate relevant comparison period for the purpose of an entity in the class of entities satisfying the decline in turnover test under subsection (1).
- [https://www.ato.gov.au/General/JobKeeper-Payment/In-detail/Applying-the-turnover-test/?page=3#Alternative\\_test](https://www.ato.gov.au/General/JobKeeper-Payment/In-detail/Applying-the-turnover-test/?page=3#Alternative_test)
- *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020*

## **Circumstances where an alternative test applies:**

- The entity commenced business after the relevant comparison period (the business did not exist in that period) but not on or after 1 March 2020.
- The entity acquired or disposed of part of the business after the relevant comparison period (the business is not the same business in that period as it is now).
- The entity undertook a restructure after the relevant comparison period (the business is not the same business in that period as it is now).
- The entity's turnover substantially increased by
  - 50% or more in the 12 months immediately before the applicable turnover test period, or
  - 25% or more in the 6 months immediately before the applicable turnover test period, or
  - 12.5% or more in the 3 months immediately before the applicable turnover test period.
- The entity was affected by drought or other declared natural disaster during the relevant comparison period.
- The entity has a large irregular variance in their turnover for the quarters ending in the 12 months before the applicable turnover test period, excluding entities that have cyclical or regular seasonal variance in their turnover, or
- The entity is a sole trader or small partnership where sickness, injury or leave have impacted an individual's ability to work which has affected turnover.



# *Eligible employees and employers*

- Eligible employees:
  - Employed by the entity at any time during the reporting fortnight;
  - Aged 16 years or over;
  - A permanent employee or a long term casual employee;
  - Australian resident
- (5) An individual is a ***long term casual employee*** of an entity at a time if:
  - (a) at that time, the individual was a casual employee of the entity; and
  - (b) the individual had been employed by the entity on a regular and systematic basis during the period of 12 months that ended at that time.
- The test for long term casual is the same as the *Fair Work Act 2009* (section 384(2)(a)).

# *Nomination requirements*

- (3) The requirements are that:
- (a) the individual has given to the entity a notice (the ***nomination notice***) in the approved form stating that:
  - (i) the individual satisfies the requirements in subsection (2) and in paragraph (b) of this subsection in relation to the entity; and
  - (ii) the individual agrees to be nominated by the entity as an eligible employee of the entity for the purposes of the jobkeeper scheme; and
- (b) at the time the individual gives the entity the nomination notice:
- (i) the individual is not excluded under subsection (4) from being an eligible employee.

# *Excluded employees*

- (4) An individual is excluded from being an eligible employee of an entity for a fortnight if:
  - (a) parental leave pay is payable to the individual and the individual's PPL period overlaps with, or includes, the fortnight; or
  - (b) at any time during the fortnight, the individual is paid dad and partner pay; or
  - (c) The employee is receiving workers' compensation payments.

## *The Wage condition (section 10)*

An employer satisfies the wage condition in respect of an individual for a fortnight if the sum of the amounts paid equals or exceeds \$1,500. Payments include:

- (a) amounts paid by way of salary, wages, commission, bonus or allowances; and
- (b) PAYG withholding amounts; and
- (c) contributions made by the employer in the fortnight to a superannuation fund or an RSA for the benefit of the individual, if the contributions are made under a salary sacrifice arrangement; and
- (d) other amounts that, in the fortnight, are applied or dealt with in any way if the individual agreed for the amount to be so applied or dealt with.
- (3) If regular payments are usually made in intervals longer than a fortnight, then in applying this section those payments are to be allocated to a fortnight or fortnights in a reasonable manner.

# *Enrolment for employers for the Jobkeeper payment*

- ATO Advice for Employers:
  - Log into to the Business Portal using myGovID.
  - To enrol, you will need to confirm:
    - business has experienced a fall in turnover
    - expected number of eligible employees (if you have them)
    - an eligible business participant, if you are enrolling one
    - bank and contact details for receiving JobKeeper payments
  - Notify all your eligible employees that you have nominated them.
  - You will need to enrol before you can move to Step 2, and identify any employees you are claiming for.
  - Enrolments are open until the end of May if you need extra time.

(See the ATO Jobkeeper Guides for further information)

## *ATO - Key dates*

- From 20 April, complete Step 1: Enrol for the JobKeeper payment.
- From 4 May, complete Step 2: Identify and maintain your eligible employees and eligible business participant.
- By 8 May, pay your eligible employees at least \$1,500 (before tax) for each JobKeeper fortnight to claim JobKeeper payments for April.
- 31 May is your final date to complete steps 1 and 2 if you want to claim for JobKeeper fortnights in April and May.
- Each month, complete Step 3: Make a business monthly declaration to reconfirm your eligibility.

# 'One in all in'

- Treasurer's explanatory statement to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*:

*"Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme."*

- It is not clear where this rule appears in the legislation!
- But ATO guidelines dictate that an employer nominate all eligible employees (<https://www.ato.gov.au/general/jobkeeper-payment/employers/your-eligible-employees/>)

# Amendments to the *Fair Work Act 2009*

- *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*
- Inserts a new Part 6-4C—Coronavirus economic response into the Fair Work Act.
- Core provisions will expire on 28 September 2020.
- This Part authorises an employer who qualifies for the jobkeeper scheme to give a ***jobkeeper enabling stand down direction*** to an employee (including to reduce hours of work).
- This Part authorises an employer who qualifies for the jobkeeper scheme to give a direction to an employee about:
  - (a) the duties to be performed by the employee; or
  - (b) the location of the employee's work.



# Part 6-4C - Employer payment obligations

- **789GD Obligation of employer to satisfy the wage condition**

If:

- (a) an employer qualifies for the jobkeeper scheme; and
- (b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;

the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

- This is a civil remedy provision (60 penalty units or 600 penalty units for a serious contravention).
- Thus a failure to make the jobkeeper payment to an eligible employee is an offence under the FW Act.

# Part 6-4C - Minimum payment guarantee

- **789GDA Minimum payment guarantee**
- (1) For the purposes of this Part, the *minimum payment guarantee* consists of the rule set out in subsection (2).
- (2) If a jobkeeper payment is payable to an employer for an employee of the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:
  - (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;
  - (b) the amounts payable to the employee in relation to the performance of work during the fortnight.
- This is a civil remedy provision (60 penalty units).

# Part 6-4C – Jobkeeper enabling stand down

## Section 789GDC

- If an employer gives a direction to an employee to:
  - Not work on a typical day;
  - Work for a lesser period on a typical day;
  - Work reduced hours; and
- The employee qualified for the jobkeeper scheme; and
- The employee cannot be usefully employed for their usual hours because of changes attributable to COVID-19; and
- The direction is safe (having regard to COVID-19 factors); and
- The employer is entitled to jobkeeper payments for the relevant period;

The employer may give a jobkeeper enabling stand down direction.

# Part 6-4C – Jobkeeper enabling stand down

- If the ***jobkeeper enabling stand down direction*** applies to the employee, then, during the jobkeeper enabling stand down period, the employer is still required to comply with:
  - (a) section 789GD (which deals with satisfying the wage condition – so the employee must still be paid \$1,500 per fortnight); and
  - (b) the minimum payment guarantee (see section 789GDA); and
  - (c) the hourly rate of pay guarantee (see section 789GDB);
- but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.

# Part 6-4C – Hourly rate of pay guarantee

- **789GDB Hourly rate of pay guarantee**
- If a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer, the employer must ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee.
- This is a civil remedy provision (60 penalty units).

# Part 6-4C – Directions as to duties, location and days of work

- Division 4 of Part 6-4C
- The employer may give jobkeeper enabling directions to a jobkeeper qualified employee to perform different duties, at different locations and on different days of work where:
  - That direction is safe having regard to the nature and spread of COVID-19;
  - That direction is reasonably within the scope of the employer's business operations.
- In respect of the days of work, an employee must not unreasonably refuse a direction to work different days, provided that the agreement does not result in a reduction in the employee's number of hours of work.

# Part 6-4C – Jobkeeper enabling directions rules

- **789GK Reasonableness**
- A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee if the direction is unreasonable in all of the circumstances.
- **789GL Continuing the employment of employees**
- (1) A jobkeeper enabling direction given by an employer to an employee has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.
- A jobkeeper enabling direction has effect until it is withdrawn, revoked, replaced or otherwise ceases to have effect on 28 September 2020.

# Part 6-4C – Jobkeeper enabling directions rules

- **789GM Consultation**
- (1) A jobkeeper enabling direction given by an employer to an employee of the employer does not apply to the employee unless:
  - (a) the employer gave the employee written notice of the employer's intention to give the direction; and
  - (b) the employer did so:
    - (i) at least 3 days before the direction was given; or
    - (ii) if the employee genuinely agreed to a lesser notice period—during that lesser notice period; and
  - (c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.
- A jobkeeper enabling direction must be in writing (**s 789GN**).



# Part 6-4C – Annual leave requests - s 789GJ

If:

- the employer gives the employee a request to take paid annual leave; and
- complying with the request will not result in the employee having a balance of paid annual leave of fewer than 2 weeks;
- the employee:
  - must consider the request; and
  - must not unreasonably refuse the request.

# Part 6-4C – Training requests

- **789GU Employee requests for secondary employment, training etc.**

If:

(a) a jobkeeper enabling direction given by an employer under section 789GDC (jobkeeper enabling stand down) applies to an employee of the employer; and

(b) the employee gives the employer any of the following requests:

(i) a request to engage in reasonable secondary employment;

(ii) a request for training;

(iii) a request for professional development;

the employer:

(c) must consider the request; and

(d) must not unreasonably refuse the request.

This is a civil remedy provision (60 penalty units).

# 789GV – Jobkeeper disputes in the Fair Work Commission

- The FWC may deal with a dispute about the operation of Part 6-4C
- The FWC may make any of the following orders:
  - (a) an order that the FWC considers desirable to give effect to a jobkeeper enabling direction;
  - (b) an order setting aside a jobkeeper enabling direction;
  - (c) an order:
    - (i) setting aside a jobkeeper enabling direction; and
    - (ii) substituting a different jobkeeper enabling direction;
  - (d) any other order that the FWC considers appropriate.

# Part 6-4C – Protections

## **789GXA Misuse of jobkeeper enabling direction**

An employer must not purport to give a jobkeeper enabling direction if:

- (a) the direction is not authorised by this Part; and
- (b) the employer knows that the direction is not authorised by this Part.

## **789GY Protection of workplace rights**

Each of the following is a ‘workplace right’ within the meaning of Part 3-1:

- the benefit that an employee of an employer has or derives because of an obligation to satisfy the wage condition;
- Agreeing or not agreeing to perform different duties, on different days or times, or taking paid annual leave in accordance with s 789GJ.
- Making a request for secondary employment training.

## **789GZA Redundancy**

- The giving of a jobkeeper enabling direction does not amount to a redundancy.

# Issues

- JobKeeper payments where an employee is employed by two separate employers
- Interaction between Part 6-4C and existing stand down provisions in s 524.
- Interaction between Part 6-4C and unfair dismissal / constructive dismissal.
- Interaction between Part 6-4C and industrial instruments. For example:
  - Consultation clauses about major workplace change.
  - Consultation clauses about changes to rosters or hours of work.
  - Employee classifications.

Questions?