Guide to The JobKeeper Scheme

Employment in the time of COVID-19

Version 4 (updated to 12 May 2020)

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Part I

Overview

I. Overview

A number substantial changes have occurred since the last edition of this guide: the Payment Rules have been amended to address some of the problems and uncertainties that have been apparent since the scheme commenced, the Commissioner of Taxation has issued rulings and guidance on the decline in turnover test and his approach to contrived schemes, the Fair Work Commission has published a Bench Book addressing jobkeeper disputes, and jurisprudence around the changes to the Fair Work Act has begun to develop.

In the lifetime of this guide, we have very gratefully received a number of comments, questions and corrections. We give particular thanks to Claire Bateman, Jonathon Corlett, Michael Cosgrove, Kristen Deards SC, Matthew Follett, Ian Humphreys, Michael Kobras, Janine Smith, Sebastian Tonkin and Sina Zevari for their suggestions and insights. We also thank Margery Ai, Bella Gooch, Liam Ogburn, and Nathan Twibill for their assistance ranging from proofreading to collation, distribution and research.

A list of all substantive updates to each version is included in Section IX. ***Several versions of this guide have been published. This is Version 4, updated as at 12 May 2020. To ensure that the version being used is the most up-to-date, please check for the latest version at www.5wentworth.com/news-events/ or www.ianneil.com/jobkeeper-guide.***

1. The purpose of this guide is to assist employment lawyers to understand and advise on the Commonwealth Government's JobKeeper scheme, and the consequential changes to the *Fair Work Act 2009* (Cth) (**FW Act**).

2. The headline impact of the scheme, in the great majority of cases, is to provide qualifying employers with $1,500 per fortnight for each eligible employee, on condition that they pay that employee at least $1,500 for the relevant fortnight. In most cases, an employer will qualify where they expect to experience a reduction in turnover of 30% or more in a calendar month or a quarter as against their turnover for the same period in the previous year.

3. In order to assist employers that qualify for the JobKeeper scheme, a new Part 6-4C (Coronavirus economic response) has been inserted into the FW Act by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) Sch 1. The changes took effect from 9 April 2020, the date on which the Act received Royal Assent.

4. The new Part 6-4C enables:

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(a) employers to stand down employees irrespective of whether they are otherwise entitled to do so under the FW Act, a workplace instrument or a contract of employment;

(b) employers to direct employees to perform different duties or perform duties at a different location (including the employee's home);

(c) employers and employees to enter into agreements to change ordinary working days and times, irrespective of what is said in a workplace instrument or a contract of employment;

(d) employers and employees to agree the employee will take annual leave at half pay, without contravening the FW Act, a workplace instrument or a contract of employment;

(e) employers to request employees to take annual leave, which the employee must not unreasonably refuse.

5. Both the scheme, and the associated changes to the FW Act, are temporary. The FW Act amendments are intended to facilitate the scheme, providing employers with the legal means to bypass contractual and statutory restrictions to which they would ordinarily be required to adhere, while in turn providing employees with a guaranteed minimum payment of $1,500 per fortnight at no additional cost to the employer. The repeal of these changes is legislated to take place on 28 September 2020: *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) s 2.

6. This guide aims to:

(a) provide a practical guide to the changes;

(b) identify key risks and pitfalls of which employers and employees should be aware; and

(c) to identify, and seek to answer, key questions that are likely to arise around the implementation of the scheme.

7. These objectives cannot be effectively achieved without considering the eligibility of employers and particular employees for payments made under the scheme. Except so far as is necessary, matters such as the mechanics of payment or other matters associated with the administration of the scheme are beyond the scope of this guide.

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8. A number of aspects of the scheme, and the associated amendments to the FW Act, have been and may continue to be supplemented by guidance, regulations and rulings. We will update this guide periodically to reflect those developments.

9. The law as stated in this guide is current to 12 May 2020.

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Part II

To whom do the changes apply?

II. To whom do the changes apply?

11. Part 6-4C of the FW Act applies only where the employer is entitled to a jobkeeper payment in respect of a particular employee.

12. Entitlement to a jobkeeper payment is determined by the payment rules (the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (**the Payment Rules**)). In the case of employers with paid employees, Division 2 of those Rules is the central focus. This section of the guide addresses the position of employers and employees. Division 3 of the Payment Rules governs "eligible business participants", including sole traders, partners in partnerships, adult beneficiaries of a trust and shareholders or directors of a company, and is addressed further below in paragraphs 153-166 of this guide.

13. It is critical that employers correctly assess their eligibility for the scheme for two reasons:

    (a) Attempting to exercise any of the rights provided in the new Part 6-4C may expose ineligible employers to claims for breach of contract and contraventions of an enterprise agreement or the FW Act.

    (b) Ineligible employers may be liable to repay the whole of any amount paid to it by the Commissioner of Taxation, together with interest: *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (**Payments and Benefits Act**) ss 9 and 10.

(a) Entitlement to a jobkeeper payment – overview of the eight conditions

14. The Payment Rules stipulate seven conditions that must be met for an employer to be entitled to a jobkeeper payment for an individual. There is effectively an eighth condition under the Payments and Benefits Act. Eligibility for the JobKeeper scheme is assessed on a fortnightly basis. If an employer becomes eligible at any point during a fortnight, the employer is eligible for the whole fortnight. The eight conditions are:

    (a) the fortnight during which an employer is entitled to a jobkeeper payment is a "jobkeeper fortnight": Payment Rules s 6(1)(a);

    (b) the employer qualifies for the JobKeeper scheme at or before the end of the fortnight: Payment Rules s 6(1)(b);

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(c) the individual is an "eligible employee" of the employer for the fortnight: Payment Rules s 6(1)(c);

(d) the employer has satisfied the "wage condition" for the fortnight: Payment Rules s 6(1)(d);

(e) the employer has elected, by notifying the Commissioner of Taxation in the approved form, prior to the relevant deadline, to participate in the JobKeeper scheme: Payment Rules s 6(1)(e);

(f) the employer has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form: Payment Rules s 6(1)(f);

(g) the employer has not notified the Commissioner, using the approved form, that they no longer wish to participate in the JobKeeper scheme: Payment Rules s 6(1)(g); and

(h) the record-keeping requirements have been met: Payments and Benefits Act s 14(1).

(b) Jobkeeper fortnights

15. Jobkeeper fortnights are defined in section 6(5) of the Payment Rules. The relevant fortnights, for the purposes of the JobKeeper scheme, are:

Monday 30 March to Sunday 12 April

Monday 13 April to Sunday 26 April

Monday 27 April to Sunday 10 May

Monday 11 May to Sunday 24 May

Monday 25 May to Sunday 7 June

Monday 8 June to Sunday 21 June

Monday 22 June to Sunday 5 July

Monday 6 July to Sunday 19 July

Monday 20 July to Sunday 2 August

Monday 3 August to Sunday 16 August

Monday 17 August to Sunday 30 August

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Monday 31 August to Sunday 13 September

Monday 14 September to Sunday 27 September

(c) Employer qualification for the JobKeeper scheme

(i) *Overview*

16. To qualify for the JobKeeper scheme at a particular point in time, section 7 of the Payment Rules provides that the employer must:

    (a) have been carrying on a business in Australia, or be a non-profit body pursuing its objectives principally in Australia or as a deductible gift recipient of a prescribed kind on 1 March 2020; and

    (b) have suffered a decline in turnover at the time their eligibility is being assessed (which must be at or before the end of a jobkeeper fortnight in respect of which a claim is made).

(ii) *The "one in, all in" principle*

17. The Explanatory Statement that accompanied the Payment Rules included this statement:

    > 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.

18. In earlier versions of this guide we observed that this 'key feature' did not seem to be reflected in the Payment Rules. An employer which failed to notify an employee who may otherwise be eligible did not thereby contravene the Payment Rules as originally made.

19. However, on 1 May 2020, section 10A(1) was inserted by the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* (**Payment Rules (Amendment No 2)**), requiring an employer electing to participate in the JobKeeper scheme to notify each individual who is employed by it on the day the employer notifies the Commissioner of its election. The notice must state that the employee must give the employer a nomination notice referred to in the preceding paragraph if they agree to be nominated as an eligible

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employee; and must include information about the steps the employee can take to give the nomination notice: s 10A(2)(b) and (c) of the Payment Rules (as amended). A note to the amended provision states that "refusal or failure to give a notice to an individual as required by this section is an offence under s 8C of the *Taxation Administration Act 1953*".

20. The requirement to notify all employees applies to employers who have notified the Commissioner of their election to participate in the scheme both before and after the recent amendment to the Payment Rules. The employer generally must give to its employees notice in writing of its election to participate in the scheme within 7 days of the employer notifying the Commissioner of its election to participate (or such later time as the Commissioner allows): s 10A(2) of the Payment Rules (as amended). However, if an employer has notified the Commissioner that it elects to participate in the JobKeeper scheme before the relevant amendment to the Payment Rules on 1 May 2020, the employer must give to its employees notice in writing of its election to participate in the scheme no later than 7 days after the commencement of s 10A, namely, 8 May 2020: s 105(1) of the Payment Rules (as amended).

(iii) *Eligible businesses*

21. There is no restriction as to the legal form of an employing entity for the purpose of qualifying for the scheme. Employing entities may comprise individuals in business as sole traders, partnerships, or bodies corporate (including corporations). Although the Payment Rules borrow from concepts used in the *A New Tax System (Goods and Services Tax) Act 1999* (**the GST Act**), there is no requirement that the employer be registered for GST in order to qualify.

22. However, a number of businesses are expressly not eligible for the scheme (Payment Rules s 7(2)):

    (a) banks (or entities within consolidated groups of banks) liable to pay a levy under the *Major Bank Levy Act 2017* in any quarter ending before 1 March 2020;

    (b) Australian government agencies (and entities wholly owned by them);

    (c) local governing bodies (and entities wholly owned by them);

    (d) sovereign entities (including entities that are 100% owned by a foreign government agency or a body politic of a foreign country, or part of a foreign country);

    (e) companies for which a liquidator or provisional liquidator has been appointed; and

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(f) individuals for whom a trustee in bankruptcy has been appointed.

(iv) *The requisite decline in turnover*

23. The requisite decline in turnover is:

    (a) in most cases, **30%**: Payment Rules s 8(2)(b) and (4);

    (b) for larger businesses (with aggregated turnover likely to exceed $1 billion in that income year at the time their qualification for the scheme is being tested, or with aggregated turnover in fact exceeding $1 billion in the previous income year), **50%**: Payment Rules s 8(4); and

    (c) for charities registered under the *Australian Charities and Not-for-profits Commission Act 2012* (Cth) other than schools or certain higher education providers, **15%**: Payment Rules s 8(2)(a) and (3).

(v) *Assessing a decline in turnover (the basic test)*

24. There are a number of ways in which a business can assess its decline in turnover for the purposes of the Payment Rules.

25. The basic test to be applied in most cases is prescribed in section 8 of the Payment Rules. It requires a comparison – at the time eligibility for the scheme is being tested (the "test time") – between:

    (a) the entity's "projected GST turnover" in the "turnover test period" in which the test time occurs. The turnover test period is either:

        i. a calendar month ending after 30 March 2020 (which must be March 2020, because that calendar month ends on the 31st) and before 1 October 2020; or

        ii. a quarter that starts on 1 April 2020 or 1 July 2020; and

    (b) the entity's "current GST turnover" for the same period in 2019 (known as the "relevant comparison period").

26. On 4 May 2020, the Commissioner of Taxation provided detailed guidance on the operation of the basic decline in turnover test: see the *Law Companion Ruling (LCR 2020/1), JobKeeper Payment – decline in turnover test* (**the Decline in Turnover Ruling**).

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27. An entity need only satisfy the decline in turnover test once. The decline in turnover test must be satisfied at or before the end of a jobkeeper fortnight for which payment is claimed: Payment Rules s 6(1)(b). This includes fortnights preceding the fortnight in which the payment is being claimed. In the result, there is no need for an entity to test its turnover in later months or quarters. Once an entity qualifies for the JobKeeper scheme, it has qualified for the entire duration of the scheme. This interpretation is supported by the Decline in Turnover Ruling (at paragraphs 15-17).

28. There are ongoing requirements to report monthly turnover once an entity becomes entitled to jobseeker payments: see s 16 of the Payment Rules. However, the information provided in accordance with those reporting requirements does not affect an entity's ongoing eligibility for jobkeeper payments: Decline in Turnover Ruling, paragraph 17.

29. In addition, "[t]he Commissioner expects that the comparison of turnover in the relevant month or quarter will be calculated at or shortly before either the time that the entity elects to participate in the JobKeeper scheme (under paragraphs 6(1)(e) or 11(1)(e) [of the Payment Rules]), or the time the entity gives the Commissioner information about its entitlement for the first fortnight for which it claims the JobKeeper payment. This means the time when you actually make this calculation may be after your test time (after the end of your turnover test period)": the Decline in Turnover Ruling, paragraph 18.

30. Where a business cannot satisfy the basic turnover test, it can apply one of the prescribed alternative tests (dealt with at paragraphs 43-78 below) set out in the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020* (**Alternative Test Rules**) and s 8A of the Payment Rules (inserted by the Payment Rules (Amendment No 2)). The alternative tests are intended to apply where there is not an appropriate comparison period in 2019 for the purpose of an entity in a class of entities satisfying the basic decline in turnover test. They enable the projected GST turnover for the "turnover test period" to be compared against something other than the current GST turnover for the "relevant comparison period". Satisfaction of one of the alternative tests is taken to be satisfaction of the requisite decline in turnover test: section 8(5) of the Payment Rules. An entity need only satisfy either the basic turnover test or one of the alternative tests. If an entity satisfies the basic test, an alternative test (if applicable) does not also need to be satisfied: see the Explanatory Statement to the Alternative Test Rules at paragraph 12 and the Commissioner's guidance here.

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31. All of the tests operate on the basis of a projection in the decline in turnover, and are agnostic as to whether that projected decline has any causal connection with the COVID-19 pandemic. This leaves scope for claims that are not consistent with the policy behind the JobKeeper scheme.

32. There is no requirement to establish that a decline in turnover is the direct or indirect result of COVID-19. However, an entity that is found to have participated in a contrived scheme for the sole or dominant purpose of becoming entitled to the jobkeeper payment will be treated as having never been entitled to the payment, and will be potentially liable for repayments and other penalties (see paragraphs 37 and 152 below).

33. The Government has suggested that whether the turnover test period is a calendar month or a quarter depends on the Business Activity Statement reporting period of that business (see *JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 4). However, the guidance on the ATO's website indicates that employers may choose which period they adopt. In addition, the Decline in Turnover Ruling (paragraph 14) confirms that entities may choose to compare the relevant month or quarter, regardless of whether they report quarterly or monthly for GST purposes. (Universities are an exception – they must use a prescribed period, namely, the period of 6 months starting on 1 January 2020: see Payment Rules (as amended) s 8(7)(aa)). The ATO's advice and the Commissioner's stance in this regard are consistent with our view of the Payment Rules.

34. As to whether the cash or accruals basis must be used, the ATO has given the following guidance (see here):

> As a practical matter, we expect that you will use the GST accounting method that you normally use. In other words, you may use a cash or accruals approach to determining the value of your sales in the relevant month or quarter. If you do this, typically, turnover for the relevant period will equal your GST exclusive sales less your input taxed supplies.
>
> If you use GST calculations to determine turnover, don't forget to include GST-free sales.
>
> If you normally account for GST on an accruals basis, but seek to calculate on a cash basis (or vice versa), we may seek to understand your circumstances to ensure that the calculation achieves an appropriate reflection of your turnover.

Further guidance is available in the Decline in Turnover Ruling, paragraphs 80 to 85.

35. Government guidance suggests that "There will be some tolerance where employers, in good faith, estimate a 30 per cent or more or 50 per cent or more fall in turnover but actually

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experience a slightly smaller fall" (*JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 4).

36. Notwithstanding this guidance, the condition for eligibility under the Payment Rules is a test of "projected GST turnover", which requires a prospective assessment – that is, a prediction – by the employer (as described in paragraphs 82-89 below). In our view, the fact that the prediction turns out not to be correct does not, of itself, have the effect of retrospectively invalidating the employer's claim. The governing criterion is always the reasonableness of the prediction. The fact and extent of a difference between the prediction and the actual result will undoubtedly always be factors in the assessment of reasonableness, but they should not by themselves be determinative. This proposition is consistent with the Commissioner's view that, once an entity satisfies the decline in turnover test, the information provided by the entity in accordance with the ongoing monthly turnover reporting requirements "does not affect your ongoing eligibility for JobKeeper payments": see the Decline in Turnover Ruling, paragraph 17. However, a significant difference between an entity's projected and actual turnover may cause the ATO to make further enquiries to ascertain the reasonableness of the entity's assessment of what was likely to happen at the point in time it calculated the test: see the Decline in Turnover Ruling, paragraphs 53-54.

37. Finally, section 19 of the Payments and Benefits Act provides that any participation in a scheme (within the meaning of the GST Act) for the sole or dominant purpose of making an entity entitled to a jobkeeper payment (or increasing the payment pursuant to such an entitlement) enables the Commissioner of Taxation to determine that the recipient never became entitled to the payment (or to a particular amount): s 19(1) of the Payments and Benefits Act. One potential consequence of such a finding is that the entity would be liable to repay jobkeeper payments made to them, with a general interest charge: Payment and Benefits Act ss 9 and 10.

38. On 1 May 2020, the ATO provided some guidance on its approach to schemes with the publication of the *Practical Compliance Guideline (PCG 2020/4) – Schemes in relation to the JobKeeper payment* (**the ATO Guideline on Schemes**).

39. According to the ATO Guideline on Schemes (paragraph 3) the Commissioner will be concerned about potential "contrived schemes" where an entity accesses or increases JobKeeper payment entitlements: (i) in circumstances where its business is not significantly

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affected by external environmental factors beyond its control, and/or (ii) in excess of those that would maintain pre-existing employment relationships.

40. The Commissioner will generally not apply compliance resources to consider the application of section 19 if:

    (a) the external operating environment is affected by factors beyond the control of the entity (and its related parties), and

    (b) that affected external operating environment significantly impacts the business of the entity or another entity the entity's employees serve in, and

    (c) the entity enters into the scheme in response to that impact and satisfies the decline in turnover test, and

    (d) the jobkeeper payment the entity receives is for individuals who were employed by the entity and serving in the significantly impacted business prior to that time and who remain employed as a result of that jobkeeper payment.

    (ATO Guideline on Schemes, paragraph 4)

41. This guideline usefully provides examples of the ATO's approach, such as where an entity that is not significantly affected by external factors beyond its control agrees with its customers to defer the making of supplies until after the period of projected decline in turnover, or to bring forward the making of supplies before the commencement of the period of projected decline in turnover (attracting a high risk of the Commissioner applying compliance resources); and where an employer/service company reduces the service fee paid to it by operating companies which have experienced a reduction in turnover resulting from external factors beyond the group's control (entailing a low risk of the Commissioner applying compliance resources).

42. Consistent with the COVID-19-agnostic nature of the various decline in turnover tests, the ATO Guideline on Schemes applies to entities with external operating environments that are adversely affected by factors – other than COVID-19 – that are beyond their control: the ATO Guideline on Schemes, paragraph 6.

(vi) *Alternative to the basic test: recently commenced businesses*

43. Businesses which commenced prior to 1 March 2020, but after the relevant "comparison period" in 2019, may apply either of two alternative tests: Alternative Test Rules s 6(1).

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44. The first alternative is that the entity may use the average monthly current GST turnover since it commenced business if the "turnover test period" is a month. If the "turnover test period" is a quarter, the business can use its average monthly current GST turnover multiplied by three: s 6(2).

45. Average monthly current GST turnover is either:

    (a) **Where the entity commenced business before 1 February 2020,** the entity's current GST turnover for each whole month after the entity commenced business and before 1 March 2020 added together and divided by the number of whole months: s 6(3)(a);

    (b) **Where the entity commenced business before 1 March 2020, but on or after 1 February 2020,** the entity's current GST turnover before 1 March 2020, divided by the number of days the entity was in business and multiplied by 29: s 6(3)(b).

46. The second alternative is that, if the entity has been in business for at least three months prior to 1 March 2020, it may compare the projected GST turnover from the turnover test period against:

    (a) if the "turnover test period" is a quarter, its current GST turnover from the three months prior to 1 March 2020; or

    (b) if the "turnover test period" is a month, its current GST turnover from the three months prior to 1 March 2020 divided by three: s 6(4), (5) and (6).

47. If the entity qualified for the ATO's Bushfires 2019-2020 lodgement and payment deferrals or Drought Help concessions during the alternative test period, then the alternative test period is, if possible, adjusted so as to not take into account the affected months: s 6(7).

48. Four examples of the application of this alternative test are given in the Explanatory Statement to the Alternative Test Rules, available here.

(vii) *Alternative to the basic test: business acquisition or disposal in past year*

49. An alternative test is available if part of a business was acquired or disposed of between the relevant comparison period and the "turnover test period", and this has changed the entity's turnover: s 7(1).

50. The entity may use the current GST turnover from either:

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(a) where the "turnover test period" is a month, the month immediately after the month in which the acquisition or disposal occurred; or

(b) where the "turnover test period" is a quarter, the figure in the previous subparagraph multiplied by three: s 7(2).

51. If there is more than one month in which a relevant acquisition or disposal occurs, the whole month immediately after the most recent acquisition or disposal is to be used so long as it is before the "turnover test period": s 7(3).

52. If there is no whole month between the last acquisition or disposal and the "turnover test period", the month immediately prior to the applicable test period is to be used: s 7(4).

53. If the entity qualified for the ATO's Bushfires 2019-2020 lodgement and payment deferrals or Drought Help concessions during the alternative test period, then the alternative test period is, if possible, adjusted so as to not take into account the affected months: s 7(5).

54. One example of the operation of this alternative test is given in the Explanatory Statement to the *Alternative Test Rules*:

> **Example 5 – Disposal or acquisition**
>
> First Co estimates its projected GST turnover for the month of April 2020 will be $90,000. In October 2019, First Co acquired another business. The GST turnover in November, being the first whole month after the acquisition, was $130,000. The alternative decline in turnover test will apply to First Co, as it acquired part of its business after the relevant comparable period and the acquisition changed their turnover. For the purposes of the basic test in section 8 of the Rules, First Co compares the projected GST turnover for April 2020 of $90,000 with the current GST turnover for November 2019 of $130,000 and finds it falls short by $40,000, which is more than 30%. The alternative decline in turnover test is satisfied.

(viii) *Alternative to the basic test: business restructure in past year*

55. An alternative test is available if an entity has restructured part of its business between the relevant comparison period and the turnover test period, and this changed the entity's turnover: Alternative Test Rules s 8(1).

56. This test is identical to the business acquisition or disposal alternative test referred to in section 7, save that the alternative relevant comparison period for which it provides is the period after the relevant restructure occurred. The principles are otherwise the same.

57. One example of the operation of this alternative test is given in the Explanatory Statement to the *Alternative Test Rules*:

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Example 6 – Restructure

Business Enterprises estimates its projected GST turnover for the month of April 2020 will be $80,000. Business Enterprises restructured its business operations by merging the operations of two of its businesses in August 2019 to increase efficiency and sales, it then continued restructuring in November 2019 by merging a third of the businesses it operates with the two businesses it merged in May. In March 2020 it completed that phase of its restructure by separating out the managerial and human resources operations of those now merged three businesses into a separate division to improve efficiency, reducing staff undertaking those roles. As it was still restructuring in the month before its turnover test period of April 2020, it uses the turnover for the month immediately before its turnover test period, being March 2020. The current GST turnover in March 2020 was $100,000. The alternative decline in turnover test will apply to Business Enterprises, as it underwent restructuring since the relevant comparison period month of April 2019 and the restructuring changed its turnover. For the purposes of the Basic test in section 8 of the Rules, Business Enterprises' compares the projected GST turnover for April 2020 of $80,000 with the current GST turnover of March 2020 of $100,000, and finds it falls short by $20,000, which is less than 30%. The alternative decline in turnover test is not satisfied.

(ix) *Alternative to the basic test: business had substantial increase in turnover*

58. An alternative test is available if an entity had a substantial increase in turnover immediately prior to the applicable turnover test period: Alternative Test Rules s 9(1).

59. The requisite increase in turnover needs to be:

    (a) a 50% increase in turnover for the preceding 12 months;

    (b) a 25% increase for the preceding 6 months; or

    (c) a 12.5% increase for the preceding 3 months: s 9(1).

60. Assuming the relevant increase in turnover can be demonstrated, the alternative test permits use of either:

    (a) where the "turnover test period" is a month, the total current GST turnover in the 3 months immediately before the turnover test period divided by three; or

    (b) where the "turnover test period" is a quarter, the total current GST turnover in the 3 months immediately before the turnover test period: s 9(2) and (3).

61. If the entity qualified for the ATO's Bushfires 2019-2020 lodgement and payment deferrals or Drought Help concession, the relevant 3 month period should be the 3 month period before the lodgement and payment deferrals, or the concession, commenced: s 9(4).

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(x) *Alternative to the basic test: business affected by drought or natural disaster*

62. An alternative test is available if an entity conducted business in a declared drought or natural disaster zone during the relevant comparison period, and the drought or natural disaster changed the entity's turnover: Alternative Test Rules s 10(1).

63. This alternative test treats the "relevant comparison period" as being the same time period as the "turnover test period" but from the year immediately preceding the declaration of drought or natural disaster: s 10(2).

(xi) *Alternative to the basic test: business has an irregular turnover*

64. An alternative test is available if an entity has irregular turnover: s 11(1). To demonstrate "irregular turnover", the entity's lowest turnover quarter in the twelve months preceding the "applicable turnover test period" must be no more than 50% of its highest turnover quarter, and its turnover must not be cyclical: Alternative Test Rules s 11(1).

65. This alternative test permits comparison of the projected GST turnover in the "turnover test period" against:

    (a) if the "turnover test period" is a calendar month, the entity's total current GST turnover for the 12 months prior to the "turnover test period" divided by 12; or

    (b) if the "turnover test period" is a quarter, the figure in the preceding subparagraph multiplied by three: s 11(2) and (3).

66. If the entity qualified for the ATO's Bushfires 2019-2020 lodgement and payment deferrals or Drought Help concessions, then the months covered by the concession or the deferrals are removed from the calculation: s 11(4).

(xii) *Alternative to the basic test: sole trader or small partnership with sickness, injury or leave*

67. An alternative test is available if an entity is a sole trader or small partnership with no employees, in which the sole trader or partner did not work for part of the period that would otherwise be the relevant comparison period due to sickness, illness or leave, and this affected turnover: Alternative Test Rules s 12(1).

68. This alternative test permits the entity to use:

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(a) in the case of a "turnover test period" that is a month, the current GST turnover from the month immediately after the month in which the sole trader or partner returned to work; and

(b) in the case of a "turnover test period" that is a quarter, the amount in the previous subparagraph multiplied by three if the relevant period is a quarter: s 12(2).

69. If the entity qualified for the ATO's Bushfires 2019-2020 lodgement and payment deferrals or Drought Help concessions in the month immediately after the month in which the sickness, injury or leave occurred, then the month immediately after the last month covered by the lodgement and payment deferrals or the concessions should be used: s 12(3).

(xiii) *Alternative to the basic test: modified test for certain group structures*

70. This alternative test is intended to deal with circumstances where the entity carrying on the substantive business differs from the entity which employs people to carry on that business. In such circumstances, an employer entity will rarely (if ever) be able to demonstrate a decline in turnover.

71. Four requirements must be satisfied for this test to apply:

(a) the entity must be a member of a consolidated group, consolidatable group or a GST group (Payment Rules s 8A(1)(a));

(b) the entity's principal activity must be to supply other members of the group ("test members") with services consisting of the performance of work by individuals the employer entity employs ("employee labour services") (Payment Rules s 8A(1)(b));

(c) the Commissioner must not have not made a determination that section 8A of the Payment Rules (as amended by Payment Amendment Rules (No 2)) does not apply to the entity (Payment Rules s 8A(1)(c) and (5)); and

(d) the entity must provide employee labour services to one or more members of the group during the turnover test period (and not to other non-group entities, other than incidentally) (Payment Rules s 8A(2)(a)).

72. Although not defined in the Payment Rules, the Explanatory Statement to the Payment Rules (Amendment No 2) (page 8) indicates that:

(a) a "consolidated group" is intended to be a "consolidated group" as defined by the *Income Tax Assessment Act 1997* (Cth) s 703-5, namely, a group consisting of a head

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company with all group companies/trusts/partnerships resident in Australia and wholly owned by the head company;

(b) a "consolidatable group" is intended to be as defined in *Income Tax Assessment Act 1997* (Cth) s 703-10, which is essentially a wholly-owned group that could consolidate for income tax purposes; and

(c) a "GST group" is as defined in section 48-5 of the GST Act. Generally, where there is 90% or more common ownership, one member of the group deals with all GST liabilities and entitlements and in most cases intra-group transactions are excluded from GST.

73. In determining the "principal activity" of the entity, the key question will likely be whether it is "the main or predominant activity" carried out by the entity: see Explanatory Statement to the Payment Rules (Amendment No 2), p 4.

74. If this test applies, the employer entity can use (a) the sum of the projected GST turnover of the turnover test period; and (b) the sum of the current GST turnover for the relevant comparison period of all "test members" to ascertain whether the entity satisfies the decline in turnover test: Payment Rules (as amended) s 8A(2) and (3). The example given in the Explanatory Statement to the Payment Rules (Amendment No 2), p 5 is:

> The Palette Group is a manufacturer of art supplies. It is structured as a GST group.
>
> Red Employment is a member of the GST group comprising the Palette Group. Red Employment's principal activity within the Palette Group is to supply employee labour services to other members of the Group. Red Employment does this by supplying the services of individuals it has engaged to the other group members. Red Employment has less than $1 billion aggregated turnover.
>
> The Palette Group's sales suffer as a result of the economic effects of the Coronavirus. As a consequence, Red Employment seeks entitlement to the JobKeeper payment in respect of its employees.
>
> In June 2020, Red Employment supplies employee labour services to three members of the Palette Group – Green Ltd, Yellow Ltd and Blue Ltd. Each of those members have as their principal activity, the selling of art supplies to distributors outside of the Palette Group. In this period, Red Employment does not provide employee labour services for any entity outside of the Palette Group.
>
> In the month of June 2020, the projected GST turnover for each of the test members is: Green Ltd - $100,000; Yellow Ltd - $65,000; and Blue Ltd - $35,000. This gives a total projected GST turnover of $200,000.
>
> In the relevant comparison period (June 2019), the projected GST turnover for each of the test members is: Green Ltd - $320,000; Yellow Ltd - $60,000; and Blue

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Ltd - $20,000. This gives a total projected GST turnover of $400,000. [*NOTE – we consider that "projected GST turnover" should be a reference to "current GST turnover" for this example to work*.]

The June 2020 turnover falls short of the June 2019 turnover by $200,000, which is 50 per cent of the June 2019 turnover and exceeds the specified percentage of 30 per cent. Red Employment satisfies the modified decline in turnover test.

75. However, if one of the alternative methods provided for by the Alternative Test Rules applies to a test member (see paragraphs 43-69 above) and permits them to compare their projected GST turnover to an amount other than the current GST turnover for a relevant comparison period, then that amount must be used instead of the test member's current GST turnover for the relevant comparison period. For example, if a test member was affected by drought or natural disaster, then for the purposes of determining the sum of the test members' current GST turnover for the relevant comparison, the current GST turnover from the same period in the year immediately preceding the declaration of drought or natural disaster would be used (see Alternative Test Rules s 10(2)): Payment Rules (as amended) s 8A(4).

76. The Commissioner can make a determination in writing that section 8A does not apply to an entity if he is satisfied, having regard to the purpose of the JobKeeper scheme and any other relevant matter, that the alternative test provided for by section 8A is either (or both): (a) unsuitable, in the circumstances of the group, for measuring the extent to which employees within the group are performing work in operations that have suffered a decline in turnover; (b) that the application of the section to the entity might, in the circumstances of the group (including the group's history of compliance with its taxation obligations), risk the integrity of the Commissioner's administration of the Scheme: Payment Rules (as amended) s 8A(5).

77. Although this new test only came into force on 1 May 2020, section 8A operates retrospectively: Payment Rules (as amended) s 101.

78. Finally, if an entity relies upon this test, the turnover reporting obligations are not to report the entity's own monthly GST turnover, but rather the sum of the current GST turnovers for all test members for the reporting month and the sum of their projected GST turnovers for the following month: Payment Rules (as amended) s 16(3).

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(xiv) *The concept of "GST turnover"*

79. The Payment Rules adopt and modify the concepts of "projected GST turnover" and "current GST turnover" from Division 188 of the GST Act.

80. The Australian Taxation Office describes "GST turnover" in the following way:

> Your GST turnover is your total business income (not your profit), **minus** any:
>
> - GST included in sales to your customers
> - sales that aren't for payment and aren't taxable
> - sales not connected with an enterprise you run
> - input-taxed sales you make
> - sales not connected with Australia.

81. The ATO also provides a useful outline of the amounts that should be included or disregarded here. For a more detailed insight into the Commissioner's view on the concepts of projected and current GST turnover in the context of the JobKeeper scheme, see paragraphs 19 to 98 of the Decline in Turnover Ruling here.

(xv) *"Projected GST turnover" for the purposes of the Payment Rules*

82. Projected GST turnover is the sum of the value of all "supplies" made, or expected to be made within the turnover test period – which generally comprises the total business income of an entity minus the items identified by the ATO referred to in paragraph 80 above. This excludes any supply made, or likely to be made in order to transfer ownership of a capital asset or "solely as a consequence of" ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise: GST Act s 188-25.

83. There are two qualifications to this for the purposes of the Payment Rules:

    (a) ordinarily, a sale connected with an "external Territory" of Australia would not be included, as it is deemed not to be a sale that is connected with Australia. However, for the purposes of the Payment Rules, supplies connected with "external Territories" must be included in the assessment of "projected GST turnover" in the turnover test period: Payment Rules s 8(8)(e); and

    (b) the rules concerning GST Groups (in sections 188-15 and 188-20 of the GST Act) are irrelevant and should be disregarded for the purposes of the Payment Rules: s 8(8)(b).

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84. All employers that are registered for GST should have the necessary records and account keeping practices to enable them to identify the value of the supplies that they have actually made within the turnover test period.

85. The Payment Rules do not shed any light on how to assess the value of supplies that an employer may be expected to make within the turnover test period. However, the Commissioner of Taxation has issued a public ruling which touches on this issue: GSTR 2001/7 *Goods and services tax: meaning of GST turnover, including the effect of section 188-25 on projected GST turnover*, referred to in paragraph 49 of the Decline in Turnover Ruling here. According to this ruling:

    (a) An objective assessment is required. An objective assessment is one that a reasonable person could be expected to arrive at having regard to the facts and circumstances which apply to the enterprise at the relevant time: at [16];

    (b) The expressions, 'likely to make', and 'likely to be made', mean that on the balance of probabilities, it can be predicted that the supply is more likely than not to be made: at [23]; and

    (c) "The Commissioner will accept [the employer's] assessment of these turnovers unless he has reason to believe that [the employer's] assessment was not reasonable": at [16].

86. Employers would be well-advised to document the precise amount of their projected GST turnover during the turnover test period together with their reasoning behind the anticipated decline in projected GST turnover. The evidence supporting the projected facts and circumstances for the remainder of the turnover test period must have been in existence at the time an entity calculates the projected GST turnover: see paragraph 49 of the Decline in Turnover Ruling here.

87. The ATO has now provided guidance on assessing projected GST turnover here. The key points are:

    (a) The relevant considerations to be taken into account may include:

        i. the period during which the business is not expected to trade because it has been closed due to the coronavirus, or its ability to trade has been restricted;

        ii. recent patterns in trading that are expected to continue; and

        iii. revised business plans.

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(b) The reasons for a fall in turnover are "not prescribed and are not limited only to the direct impacts of the coronavirus"; and

(c) If a business is contemplating making substantial changes to their structure and operations, they should not take into account supplies made by transfer of capital assets or supplies made as a consequence of substantially and permanently reducing size or scale of the enterprise. "Substantial" is generally accepted to be a 10% or more reduction in size and scale depending on the circumstances of the particular business. "Permanent" in this context means enduring, but not if it is reasonable to expect the reduction will end in a year or two.

88. The ATO gives an example:

> Donald runs a garden maintenance and landscaping business. The demand for garden maintenance typically falls in the fourth quarter (1 April 2020 to 30 June 2020) as winter approaches. He has noticed that there have been very few calls for quotes this year compared to usual.
>
> Donald forecasts that his projected GST turnover for this quarter to be $25,000. This is 50% less than for the same quarter in 2019. This projection includes both the impact of winter on his business and also lower demand for his work due to the more difficult economic conditions.
>
> This comparison is used by Donald to establish whether he satisfies the fall in turnover test.

89. For a more detailed insight into the Commissioner's view on the proper approach to determining "projected GST turnover" in the context of the JobKeeper scheme see the Decline in Turnover Ruling here, particularly at paragraphs 49 to 54.

(xvi) *"Current GST Turnover" for the purposes of the Payment Rules*

90. Current GST turnover in the relevant comparison is the sum of the value of all "supplies" made within that period, which generally comprises the total business income of an entity minus the items identified by the ATO referred to in paragraph 80 above. Earlier versions of this guide stated that this excludes any supply made, or likely to be made in order to transfer ownership of a capital asset or "solely as a consequence of" ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise. However, this exclusion (provided for in s 188-25 of the GST Act) does not apply to the calculation of "current GST turnover" under s 188-15 of the GST Act.

91. The same qualifications as set out above in relation to "projected GST turnover" at paragraph 83 apply here.

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92. Unlike "projected GST turnover", no element of prediction is involved in assessing the current GST turnover for the relevant comparison period. Employers should be able to use their existing records to work out the value of supplies made during the relevant comparison period.

93. For a more detailed insight into the Commissioner's view on the proper approach to determining "current GST turnover" in the context of the JobKeeper scheme see paragraphs 19 to 98 of the Decline in Turnover Ruling here.

(xvii) *Assessing charities*

94. The Payment Rules make special provision for assessing the decline in turnover for deductible gift recipients and ACNC charities which are not deductible gift recipients: see Payment Rules (as amended) s 8(8)(f)-(h) and (9).

(xviii) *Assessing universities*

95. Following the enactment of the Payment Rules (Amendment No 2), a modified decline in turnover test applies to universities: see Payment Rules (as amended) s 8(8)(ea).

(d) Eligible employee

96. Employers are only entitled to jobkeeper payments in respect of individuals who meet the following requirements:

    i. they were an employee of the employer during the relevant fortnight (Payment Rules s 9(1)(a));

    ii. as at 1 March 2020, they were 16 years or over (Payment Rules s 9(1)(b) and (2)(a));

    iii. as at 1 March 2020, they were an employee of the employer (Payment Rules s 9(1)(b) and (2)(b)(i));

    iv. as at 1 March 2020, they were not a casual employee, unless they were a "long term casual employee" of the employer (Payment Rules s 9(1)(b) and (2)(b)(i) and (ii));

    v. as at 1 March 2020, they were an Australian resident or an Australian tax resident holding a special category visa (Payment Rules s 9(1)(b) and (2)(c));

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vi. the individual has given their employer a notice in the approved form certifying certain matters (the "nomination notice") (Payment Rules s 9(1)(b) and (3)(a) and (b)); and

vii. the individual is not excluded from being an eligible employee (Payment Rules s 9(1)(c) and (4)).

97. Each of these requirements are addressed below.

(i) *The individual was an employee during the relevant fortnight*

98. Jobkeeper payment entitlements are calculated on the basis of fortnights. If the person was not an employee of the employer during a particular fortnight, the employer is not entitled to payment for that employee in that fortnight.

99. The question most likely to arise here is whether the individual was an employee or an independent contractor. Employers will not be entitled to payment in respect of individuals engaged to perform work as independent contractors. This is a complex and highly fact-dependent area. The relevant law is explained in Chapter 1 of Neil and Chin, *The Modern Contract of Employment* (2nd Ed, 2017).

100. However, although beyond the scope of this guide, independent contractors (in particular, sole traders) may be eligible to claim under the JobKeeper scheme in their own right under the "business participation" provisions of Division 3 of the Payment Rules.

101. Labour hire workers often are not employees of the end user under typical labour hire contracts. In that case their employer will be the labour hire agency. In such cases, the agency may be entitled to claim jobkeeper payments in respect of their employees.

102. Finally, the individual need not be a "national system employee" (a person in respect of whom the Federal Parliament is constitutionally competent to regulate their employment). All employees are potentially covered subject to the other eligibility requirements of the scheme being met.

(ii) *16 years or over as at 1 March 2020 and independent or not in full-time study*

103. Initially under the JobKeeper scheme, all individuals aged 16 and 17 years were "eligible employees". However, the Payment Rules were amended on 1 May to exclude all individuals

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aged 16 and 17 years unless they are independent or not undertaking full-time study: see Payment Rules (as amended) s 9(2)(a).

104. These amendments are prospective. They do not affect the entitlement of employees aged 16 and 17 years who were otherwise eligible in accordance with the terms of the Payment Rules in jobkeeper fortnights prior to 1 May 2020: Payment Rules (as amended) s 102.

105. "Independent" in this context means independent within the meaning of the *Social Security Act 1991* (Cth) s 1067A. This section contains a number of detailed tests which include among those considered to be "independent": persons who are legally married, persons with children who are reliant on their partners, orphans, persons with parents who are unable to exercise their parental responsibilities, refugees, persons in the care of the State, people for whom it is unreasonable to live at home for prescribed reasons, persons who are self-supporting (as determined by specific tests set out in that section), and persons who are disadvantaged in an identified manner.

106. Whether or not a person is in full-time study is also determined by reference to the *Social Security Act*.

(iii) *Employee of the employer as at 1 March 2020*

107. The object of the JobKeeper scheme is to preserve jobs that might otherwise be lost as a consequence of the COVID-19 pandemic. Employers cannot claim in respect of individuals whom they did not already employ on 1 March 2020.

108. Where there has been a change of employing entity, or a business transition, since 1 March 2020, an employee employed by the predecessor entity on 1 March 2020 will be treated as having been employed by the new employer on that date if either:

    (a) the earlier employing entity was another entity in the same wholly-owned group as the later entity; or

    (b) the same business is now being carried on by a different entity.

109. Further, the fact that the assessment takes place at 1 March 2020 means that it is open to an employer to rehire an employee whose employment was terminated after 1 March 2020, and to retain that employee using payments made under the JobKeeper scheme (the Explanatory Memorandum to the Payment Rules expressly contemplates such an arrangement). One question that has been posed is whether employers are required to rehire any or all such

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employees who may have been dismissed. In our view, the Payment Rules do not impose any such obligation on employers. There is no express requirement to re-engage, and we do not consider that one would be readily implied. The consequences of an implied requirement to re-engage would be significant and could, for example, have the result of requiring employers to re-hire those dismissed for reasons unrelated to the COVID-19 pandemic - including, for example, serious misconduct.

110. If the employer had stood down the employee as at 1 March 2020, that employee is nonetheless eligible. Standing down an employee preserves their status as an employee. The ATO has confirmed their eligibility here.

111. If the employee has been stood down since 1 March 2020 (whether or not pursuant to a jobkeeper enabling direction), that person remains an employee and will be an eligible employee if they were employed as at 1 March 2020 (see *JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 5).

112. If the employee was employed on a fixed term contract as at 1 March 2020, they will still be an eligible employee (*JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 9). Such an employee should continue to be an "eligible employee" if that contract is extended, or if the employee is rehired following the expiry of their fixed term contract.

(iv) *Not a casual employee, other than a long-term casual employee, as at 1 March 2020*

113. Employees are either permanent (eg. part time and full time) or casual employees. Employers may claim for permanent employees under the JobKeeper scheme.

114. Employers are not eligible for payment in respect of casual employees. Identifying who is, or is not, a casual employee can be a complex task (especially where the employee works pursuant to a roster). The law in this area is currently being reconsidered by the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* (QUD724/2018). Until the decision of the Full Court in that case is handed down, the law is as stated by the Full Court in *Skene v WorkPac Pty Ltd* (2018) 264 FCR 536:

    (a) The essence of casual employment is the "absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work".

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(b) A casual employee is a person who is under no obligation to work, and in respect of whom the employer has no obligation to give work.

(c) Whether the requisite firm advance commitment is absent or present must be objectively assessed including by reference to the surrounding circumstances including:

i. the contractual terms;

ii. the regulatory regime; and

iii. the conduct of the parties to the employment relationship ie. the way in which the work was actually carried out.

115. If the individual was a casual employee at 1 March 2020, and had at that point been a casual employee for at least 12 months, it is possible that they were a "long term casual employee" at that time. If so, they are a person in respect of whom the employer may be entitled to receive jobkeeper payments. The critical question is whether such a casual employee was employed by the entity on a regular and systematic basis during the period of 12 months ending on 1 March 2020: Payment Rules s 9(5).

116. The definition of "long term casual employee" in the Payment Rules is drawn from the definition of that term in the FW Act s 12. To be employed on a "regular and systematic" basis suggests that the employee was not simply working regularly, but also with a degree of frequency in accordance with some kind of system, method or plan: see *Yakara Holdings Pty Ltd v Giljevic* (2006) 149 IR 339. The question is not necessarily whether a "continuing relationship" between the employer and the employee has been established, or whether the employment was "occasional or irregular": see *Burke v Marist Brothers St Joseph's College T/A St Joseph's College* [2015] FWC 7324, considering *Ponce v DJT Staff Management Services Pty Ltd t/as Daly's Traffic* [2010] FWA 2078.

117. If the business has changed hands in the twelve months preceding 1 March 2020, and the casual employee was employed by both the old employing entity and the new employing entity, then the service of that casual employee prior to the change should be taken into account for the purposes of ascertaining whether they are a long term casual: Payment Rules s 9(6).

118. The ATO provides some examples of what it considers might be long term casual employees for the purpose of the jobkeeper payments (but not "advice about how 'regular and

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systematic' employment might arise under" the FW Act). The Explanatory Memorandum to the Payment Rules offers the following example of a long term casual employee:

> On 1 March 2019, Sam commences employment as a casual employee at Annie's Bakery. Sam has a regular work schedule – working between 3 and 4 days each week. On 1 July 2019, ownership of Annie's Bakery changes hands. Sam continues to be employed as a casual employee of Annie's Bakery and continues to work according to their regular work schedule from that date until 10 March 2020, when Sam is stood down.
>
> For the purposes of determining whether Sam is a long term casual employee and an eligible employee, the fact that the business has changed hands will not disadvantage Sam, Sam is able to demonstrate regular and systematic employment at Annie's Bakery for over 12 months. He is therefore a long term casual employee for the purposes of the JobKeeper scheme.

(v) *Australian resident, or New Zealand citizen lawfully with Australian tax residency as at 1 March 2020*

119. The person must have been an "Australian resident" as defined in the *Social Security Act 1991* (Cth). That means that as at 1 March 2020:

(a) they resided in Australia; and

(b) were:

i. an Australian citizen;

ii. the holder of a permanent visa; or

iii. a special category visa holder who is a protected SCV holder: Payment Rules s 9(2)(c)(i).

120. Alternatively, they must have been a citizen of New Zealand who was resident in Australia for tax purposes (a resident of Australia for the purposes of the *Income Tax Assessment Act 1936* holding a Subclass 444 (Special Category) visa): Payment Rules s 9(2)(c)(ii).

(vi) *Notice is given to the employer, by the individual, in the approved form (nomination notice)*

121. An individual must give the employer notice in an "approved form". The ATO has created a JobKeeper employee nomination notice available from the ATO's website in .docx format (here) and .pdf format (here). It requires the individual to certify (amongst other things) the various matters that make them eligible employees (age, employment as 1 March 2020, residency) as well as the fact that they are not:

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(a) excluded from being an eligible employee (see section (vii) below);

(b) that they are not an employee (other than a casual employee) of another entity; and

(c) that they have not given a nomination notice to another entity, or to the Commissioner in their capacity as an "eligible business participant": see Payment Rules s 9(3)(b).

122. However, the ATO's JobKeeper employee nomination notice does not appear to be an "approved form". The ATO explicitly contemplates that employers may create their own employee nomination notices so long as it contains the following:

(a) business name;

(b) Australian Business Number;

(c) employee's full name;

(d) employee's date of birth;

(e) employee's street address;

(f) employee's contact phone number and/or email address;

(g) a confirmation by the employee that they:

i. agree to be nominated as an eligible employee of the employer listed for the purposes of the JobKeeper Payment scheme;

ii. meet the eligibility requirements; and

iii. have not agreed to be nominated by any other employer/entity and have not given another entity a nomination form for the purpose of the JobKeeper Payment scheme.

123. In the case of an employer's bespoke employee nomination notice, the ATO does not require the employee's signature. It may be submitted through, for example, a business HR portal or via email.

124. This requirement is an attempt to avoid double-dipping. If an individual is overpaid because they gave more than one nomination notice, they may be jointly and severally liable with the employer for repayment of the overpayment (and any general interest charge on the overpayment) under section 11 of the Payments and Benefits Act.

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125. Employees should bear in mind that, if they were employed by two different employers on 1 March 2020 and both employers are eligible to receive jobkeeper payments in respect of their employment, only one of those employers may receive such payments. In such a case, and subject to the exception referred to in the next paragraph, the employee effectively has the election as to which employer will receive the payment, and therefore have the ongoing obligation to pay them $1,500 per fortnight. The Explanatory Memorandum to the Payment Rules suggests that, if the employment relationship between the employee and their nominated employer ends, the employee will be unable to submit another nomination notice to another employer at that point. This appears to be the result of the requirement that the nomination notice certify that the employee has not given a nomination notice to another entity in Payment Rules s 9(3)(b)(iii).

126. The ATO Guidance (here and here) suggests that where an employee is a permanent employee of one employer and a long term casual employee of another, the employee must choose their permanent employer. This constraint on the choice between multiple employers arises from the requirement that a long term casual employee who gives their employer a nomination notice cannot also be a permanent employee of another employer: see Payment Rules s 9(3)(b)(ii).

(vii) *The individual is not excluded from being an eligible employee*

127. Under section 9(4) of the Payment Rules, an individual is not an eligible employee if, during the relevant fortnight:

   (a) parental leave pay within the meaning of the *Paid Parental Leave Act 2010* (Cth) is payable to them for a period overlapping with the relevant fortnight;

   (b) the individual is paid dad and partner pay within the meaning of the *Paid Parental Leave Act*; or

   (c) the individual is totally incapacitated for work and due workers compensation payments in respect of that capacity for any period overlapping with the relevant fortnight.

128. It is worth noting that only parental leave pay or dad and partner pay under the *Paid Parental Leave Act 2010* affects the eligibility of an employee. Payments made by employer-funded schemes will not affect the employee's status for the purpose of the JobKeeper scheme.

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129. Furthermore, individuals with a partial incapacity for work and who are receiving workers compensation for that partial incapacity are not excluded. The Explanatory Memorandum explains that this is because the employer would likely be paying part of their wages in addition to the workers compensation scheme and jobkeeper payments should be available to the employer to support the employee.

(e) The "wage condition"

130. The "wage condition" is found in the Payment Rules s 10.

131. The "wage condition" requires an employer to pay the employee at least $1,500 for the relevant fortnight. This applies to all employees. The Explanatory Memorandum to the Payment Rules offers four useful examples:

> … if an employee:
>
> - ordinarily receives $1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employee to continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;
> - ordinarily receives less than $1,500 in income per fortnight before PAYG withholding and other salary sacrificed amounts, the employer must pay the employee at least $1,500 per fortnight, subject to PAYG withholding and other salary sacrificed amounts to the value of $1,500;
> - has been stood down, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500; or
> - was employed on 1 March 2020, subsequently ceased employment with the employer, and then has been rehired by the same eligible employer, the employer must pay the employee at least $1,500 per fortnight, before PAYG withholding and other salary sacrificed amounts to the value of $1,500.

132. Critically, eligibility for jobkeeper payments depends on the wage condition already having been satisfied. This means that jobkeeper payments are made in arrears and, for employers to be eligible for the payment, they must have already paid at least $1,500 during the relevant fortnight to any employees for whom they are claiming the payment. The Government's guidance indicates that cash flow difficulties will not provide an excuse, recommending that businesses contact their banks to obtain credit on the basis of the anticipated jobkeeper

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payments (*JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 5). The payment of $1,500 can be made up from the following amounts:

(a) salary/wages/commission/bonuses/allowances paid in the fortnight (ie. pre-tax income);

(b) PAYG withholding (including repayment for HELP loans) that takes place within the fortnight;

(c) superannuation contributions (but only if made under a salary sacrifice arrangement) made within the fortnight;

(d) other payments made, by agreement with the employee, as part of an agreement to reduce the employee's salary/wages/commission/bonuses/allowances for that fortnight (including to nil). In other words – amounts forming part of salary sacrifice arrangements.

133. Clearly, not all employers pay fortnightly. Where payment is made for longer periods, the Payment Rules provide that the amounts counting towards the "wage condition" are to be "allocated to a fortnight, or fortnights" in a reasonable manner: s 10(3).

134. There is scope for the Commissioner to treat payments made in a fortnight as having been made in a different fortnight where it is considered reasonable to do so (see Payment Rules s 10(4)). The Explanatory Memorandum to the Payment Rules suggests that this power is intended to deal with matters like accidental underpayments that are addressed in subsequent fortnights or inconsistencies created by payment systems that work on a monthly rather than a weekly or fortnightly basis. It appears the Commissioner has made a decision to do so, informing employers that they can, in respect of the first two jobkeeper fortnights, make a single combined payment of $3,000 for the first two fortnights paid by end of April 2020: see here.

135. There is no scope for employers to withhold from their employees payments made to them through the scheme. The Commonwealth Government's position was explained by Senator Cash on 16 April 2020: "Let us make this very, very clear: as an employer if you qualify for jobkeeper, you must – I underline "must" – pass on the full $1,500 benefit to the employee". In our view this is an accurate statement of the effect of the Payment Rules and the amendments to the FW Act.

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136. In our view, an employer is required to comply with the wage condition even if the employee refuses to attend work. While a person remains an eligible employee and the employer is receiving jobkeeper payments in respect of that individual, those payments must be passed on by reason of the wage condition. An employee's refusal to comply with a reasonable direction to attend and perform work may constitute a repudiation of their contract of employment. This would entitle the employer to terminate the employment. In these circumstances, the obligation to meet the wage condition would cease only if the employer terminates the employment contract (as would the employer's entitlement to receive jobkeeper payments in respect of that employee).

137. The employer's obligation to comply with the wage condition in respect of an employee for whom it is receiving jobkeeper payments is also not affected if the employee is stood down but obtains work elsewhere during the stand down period (see *JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 8). However, employees in this position will need to take care to ensure that they have not submitted a jobkeeper notification to more than one employer.

138. Further, if an employee is an "eligible employee" but is stood down without pay on or after 1 March 2020, compliance with the wage condition means that the employer will need to back-pay them $1,500 per fortnight for any jobkeeper fortnights in which they were not paid (see *JobKeeper Payment – Frequently Asked Questions Fact Sheet*, p 5).

(f) Employer election to participate

139. There will be an approved form for employers to provide to the Commissioner giving notice of their election to participate. At the time of writing this form had not been prescribed, but it appears that the application to claim jobkeeper payments will be made online through the ATO'S Business Portal (see here).

140. This notification must be submitted by a particular deadline (Payment Rules s 6(2)):

    (a) 26 April 2020: where the entitlement arises in the first fortnight (Monday 30 March to Sunday 12 April 2020) or second fortnight (Monday 13 April to Sunday 26 April 2020) of the scheme.

    (b) Where the entitlement arises in any other fortnight, the notice must be given by the end of that fortnight.

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141. A notification is effective only on a fortnight-by-fortnight basis. Thus, for every fortnight that the employer wishes to participate in the scheme and believes that they are eligible to do so in respect of one or more eligible employees, they must submit separate notifications to the Commissioner: see Explanatory Memorandum to the Payment Rules, pp 19-20.

142. There is power for the Commissioner to defer the time for giving an approved form (*Taxation Administration Act 1953* (Cth) Sch 1 s 388-55).

(g) Provision of information about the relevant employee to the Commissioner

143. There will be an approved form for an employer to submit information about the jobkeeper entitlement, including details of the individuals in respect of whom the entitlement is due, to the Commissioner. At the time of writing this form had not been prescribed. However, it appears that this will occur through the ATO's Business Portal (see here) from 4 May 2020 onwards.

144. At this stage, it is not clear what information employers will be required to provide, but the Explanatory Memorandum to the Payment Rules suggests that it will include:

(a) the name of the employee;

(b) the type of the employee's employment; and

(c) the employee's citizenship or residency status.

145. An employer must inform eligible employees of the fact that this information has been provided to the Commissioner within 7 days of doing so: Payment Rules s 6(4).

146. While the Explanatory Memorandum suggests that information will not need to be provided in every subsequent fortnight unless there is a material change (for example, an employee ceases to be an eligible employee), the Payment Rules do not provide for this.

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(h) Employer notification that they no longer wish to participate

147. There will be an approved form for an employer to notify the Commissioner that they no longer wish to participate in the scheme. At the time of writing this form had not been prescribed.

148. There is no obligation on the part of the employer to consult with, or obtain the consent of, eligible employees if the employer wishes to cease participating in the scheme: Explanatory Memorandum to the Payment Rules, p 20. Employers should nonetheless be cautious that, if they do intend to advise the Commissioner that they no longer wish to participate, that they are not doing so for a reason prohibited by Part 3-1 of the FW Act (general protections) or for a reason which would be discriminatory under anti-discrimination legislation.

(i) Record keeping requirements

149. Employers will not be entitled, and will be taken never to have been entitled, to a jobkeeper payment in respect of a fortnight unless they have complied with two record keeping requirements: (a) the pre-payment record keeping requirements; and (b) the post-payment record keeping requirements: Payments and Benefits Act s 14(1).

150. To satisfy the pre-payment and post-payment record keeping requirements, the employer must keep records that enable the employers to substantiate any information that the entity provided to the Commissioner in relation to the payment both before the entity was paid and after the entity was paid: Payments and Benefits Act ss 15(2) and 16(2). There is provision for the Commissioner to specify, by legislative instrument, the kinds of records that must be retained and the manner in which they are kept: Payments and Benefits Act ss 15(5) and 16(5). However, at the time of writing, no such legislative instrument had been registered.

151. The record must be retained for a period of 5 years after the payment was made: Payments and Benefits Act s 16(6) and (7).

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(i) *The potential for administrative and criminal sanctions*

152. A Fact Sheet produced by Treasury (see here) notes that "[a]n entity that does not comply with its obligations in relation to the JobKeeper Payment is also potentially liable for a wider range of significant administrative and criminal sanctions under the tax law and general criminal law". It explains that the penalties will "not affect entities that act honestly and with reasonable care" but will be of concern to "entities that seek to abuse the scheme, especially those that seek to engage in fraud". The Fact Sheet identifies the following possible administrative and criminal penalty provisions.

LIST OF KEY PENALTY PROVISIONS

Provision	Description	Penalty
Section 284-75 in Schedule 1 to the *Taxation Administration Act 1953*	Administrative penalties for false and misleading statements	A financial penalty of up to 75 per cent of the amount of any overpayment
Section 8C of the *Taxation Administration Act 1953*	Criminal offence for a failure to comply with requirements under the taxation law	Imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Sections 8K and 8N of the *Taxation Administration Act 1953*	Criminal offences for making false or misleading statements to taxation officers	Imprisonment for up to 12 months and a fine of up to 50 penalty units (250 penalty units for corporate entities)
Section 135.2 of the Criminal Code	Obtaining financial advantage	Imprisonment for up to 12 months
Section 134.2 of the Criminal Code	Obtaining financial advantage by deception	Imprisonment for up to 10 years
Section 135.4 of the Criminal Code	Conspiracy to defraud	Imprisonment for up to 10 years

(j) The eligibility of non-employees (eligible business participants)

153. The JobKeeper scheme is also open to "eligible business participants" – individuals with a role in a business who are not employees, including sole traders, partners, beneficiaries of a trust, shareholders or directors of a company. The regulation of entitlements for both business participants and employers to receive jobkeeper payments are largely the same. For

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business participants, seven conditions are prescribed (with, effectively, an eighth record-keeping condition imposed by the Payments and Benefits Act). They are:

i. the fortnight during which an entity is entitled to a jobkeeper payment is a "jobkeeper fortnight": Payment Rules s 11(1)(a);

ii. the entity is not a non-profit body: Payment Rules s 11(1)(b);

iii. the entity qualifies for the JobKeeper scheme at or before the end of the fortnight: Payment Rules s 11(1)(c);

iv. the individual is an "eligible business participant" for the entity for the fortnight: Payment Rules s 11(1)(d);

v. the entity has elected, by notifying the Commissioner of Taxation in the approved form, prior to the relevant deadline, to participate in the JobKeeper scheme: Payment Rules s 11(1)(e);

vi. the entity has given information about the entitlement for the fortnight, including details of the individual, to the Commissioner in the approved form: Payment Rules s 11(1)(f);

vii. the entity has not notified the Commissioner, using the approved form, that they no longer wish to participate in the JobKeeper scheme: Payment Rules s 11(1)(g); and

viii. the record-keeping requirements have been met: Payments and Benefits Act s 14(1).

(i) *JobKeeper fortnights*

154. This is addressed at paragraph 15 above.

(ii) *Entity not a "non-profit body"*

155. This requirement is an additional requirement that does not apply to employers claiming jobkeeper payments.

(iii) *Entity qualification for the JobKeeper scheme*

156. The qualification requirements of an entity are the same as the qualification requirements of an employer. These are addressed at paragraphs 16-95 above.

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157. However, there is an additional requirement that the entity must be an active business. The Payment Rules seek to achieve this by requiring an entity to:

(a) have an ABN on 12 March or some later time allowed by the Commissioner of Taxation: Payment Rules s 11(6); and

(b) either:

i. have included in its assessable income for 2018-19 an amount in relation to carrying on a business or the Commissioner had notice before 12 March 2020 that this notice should be so included; or

ii. have made a taxable supply at a time on or after 1 July 2018 but ending before 12 March 2020 (or the Commissioner had notice on or before 12 March 2020 that the taxable supply had been made): Payment Rules s 11(6), (7) and (8).

(iv) *Eligible business participants*

158. For an individual to be an "eligible business participant", they must:

(a) not be employed by the entity at any time in the fortnight: Payment Rules s 12(1)(a);

(b) both at a time in the fortnight, and on 1 March, be engaged in the business carried on by the entity: Payment Rules s 12(1)(b), (2)(a) and (3)(b);

(c) vis-à-vis the entity, both at a time in the fortnight and on 1 March – be a sole trader, a partner in a partnership, an adult beneficiary of a trust or a shareholder in or a director of a company: Payment Rules s 12(1)(b), (2)(b) and (3)(b);

(d) as at 1 March 2020, be 16 years or over: Payment Rules s 12(1)(b) and (2);

(e) as at 1 March 2020, be an Australian resident or a New Zealand citizen with Australian tax residency: Payment Rules s 12(1)(c) and (3)(c));

(f) the individual has given to either the entity, or in the case of a sole trader – the Commissioner of Taxation, a notice in the approved form certifying certain matters (the "nomination notice") (Payment Rules s 12(1)(c) and (4)); and

(g) the individual is not excluded from being an eligible employee (Payment Rules s 12(1)(d) and (6)).

159. These requirements largely reflect the requirements for eligible employees (discussed in paragraphs 96-129 above). There are two features worth noting.

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160. *First*, the requirement that the employee be "actively engaged in the business" is not further explained. The Explanatory Statement to the Payment Rules (p 23) expands on the requirement, explaining that the person must be "actively engaged in the operations of the body".

161. *Second*, as for employees, the eligible business participant may not receive more than one jobkeeper payment. This means that they must certify in their nomination notice that they have not given any other entity or the Commissioner a nomination notice as either an eligible business participant or as an employee: ss 11(3) and 12(4)(a)(i) and (4)(b)(iii).

162. However, where (for example) a sole trader is also an employer, they would potentially be entitled to a jobkeeper payment for themselves in their capacity as an "eligible business participant" and also in respect of their employee(s) in their capacity as an employer.

(v) *Entity election to participate*

163. An entity may only nominate a single "eligible business participant" in respect of whom it is to be eligible for jobkeeper payments: Payment Rules s 12(3). Thus, for example, only one partner in a partnership would be entitled to receive a jobkeeper payment in respect of that partnership.

(vi) *Provision of information about the eligible business participant to the Commissioner*

164. See paragraphs 143-146 above. Unless the entity is a sole trader, the entity must notify the individual in writing within 7 days of giving the Commissioner details of the eligible business participant: s 11(5).

(vii) *Entity notification that they no longer wish to participate*

165. See paragraphs 147-148 above.

(viii) *Record keeping requirements*

166. See paragraphs 149-152 above.

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Part III

The obligations of employers in all cases

III. The obligations of employers in all cases under the FW Act

167. The amendments to the FW Act will apply to an employer when and if the employer both (a) qualifies for the scheme (as to which, see paragraph 16ff above); and (b) is in fact entitled to receive jobkeeper payments (as to which, see paragraph 14ff). One important consequence of (b) is that Part 6-4C of the FW Act will apply to a particular employer only once that employer actually applies to participate in the JobKeeper scheme – that is, it requires an employer to take each of the positive steps referred to in paragraph 14 (in particular, subparagraphs 14(e) and 14(f)).

168. Amendments to the FW Act require that employers that qualify for the JobKeeper scheme and would be entitled to jobkeeper payments must comply with two conditions:

    (a) the "wage condition" (s 789GD); and

    (b) the "minimum payment guarantee" (s 789GDA).

(a) The "wage condition" (s 789GD)

169. The "wage condition" is found in the Payment Rules s 10.

170. The substance of the condition is explained in paragraphs 130-138 above. It has two purposes:

    (a) *First*, under the Payment Rules, it is one of the preconditions to an employer's entitlement to a jobkeeper payment. An employer is only entitled to a payment if it has complied with the obligation in the relevant fortnight.

    (b) *Second*, where an employer would be entitled to a jobkeeper payment in a fortnight assuming the wage condition was satisfied, the employer is obliged to ensure that the wage condition has been satisfied by the end of that fortnight: FW Act s 789GD.

171. A fortnight in this context is "a 14 day period beginning on a Monday": s 789GC. When this is read together with the Payment Rules, the relevant period must sensibly conform to the jobkeeper fortnight (the full list of which are set out at paragraph 15 above).

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172. The obligation to satisfy the wage condition is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the Federal Court (**FCA**), the Federal Circuit Court (**FCCA**) and an eligible State or Territory court. The penalties are up to 600 penalty units for a serious contravention or, in any other case, 60 penalty units.

(b) The "minimum payment guarantee" (s 789GDA)

173. Employers entitled to receive a jobkeeper payment must ensure that, for the fortnight that the employer is entitled to the payment, eligible employees are paid the greater of the following:

    (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight (ie. $1,500); or

    (b) the amounts payable to the employee in relation to the performance of work during the fortnight.

174. The statutory notes indicate that the "amounts payable to the employee in relation to the performance of work" include incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments, provided that they are payable in respect of the fortnight.

175. The minimum payment guarantee is presumably intended to ensure that employees performing any work for their employer are not disadvantaged. They must be compensated as they would ordinarily be (whether under their contract of employment or a workplace instrument) if the amount they would have earned for amounts payable in relation to the performance of work during the relevant fortnight exceeds $1,500.

176. There are a number of circumstances in which this guarantee could come into play.

177. One circumstance is where the employee continues to work as normal. In such a case:

    (a) if they are entitled to less than $1,500 per fortnight for the work they ordinarily perform, they must now be paid a minimum of $1,500 per fortnight; and

    (b) if they are entitled to more than $1,500 per fortnight for the work they ordinarily perform, they must continue to be paid the greater amount referable to the performance of work during that fortnight.

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178. Where the employee is working less than they ordinarily would, an employee whose entitlement to receive wages depends on the actual performance of work would be entitled to the greater of $1,500 per fortnight or the amount that would be due to them for the work actually performed.

179. Difficult questions might arise here in the rare case of contracts of employment that do not expressly tie the employee's right to remuneration to the performance of work by the employee. These cases will be highly fact specific, depending on the terms of the contract in question.

180. The minimum payment guarantee is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 60 penalty units.

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Part IV

“Jobkeeper enabling directions”

IV. “Jobkeeper enabling directions” under the FW Act

181. Part 6-4C provides for three “jobkeeper enabling directions” (see s 789GC) to be made by an employer, namely:

   (a) Stand down directions (s 789GDC);

   (b) Directions changing duties (s 789GE); and

   (c) Direction changing the location of work (s 789GF).

(a) Stand down directions (s 789GDC)

(i) *The power*

182. Section 789GDC permits an employer to give an employee a direction that for a period (the **stand down period**):

   (a) not to work on a day or days that they would usually work;

   (b) to work for a lesser period than they would ordinarily work on a particular day; or

   (c) to work fewer hours than their ordinary hours of work (including to nil: s 789GDC(4)).

183. This direction, so long as the conditions are met, will give statutory authorisation (that is, in effect, absolution) to what would otherwise be a breach of a “designated employment provision”: s 789GDC(5). This includes any breach of the FW Act, an enterprise agreement, a transitional agreement or a contract of employment.

184. The FW Act s 524 already provides for employers to stand down employees where they cannot be usefully employed because of three circumstances (industrial action, breakdown of machinery equipment and stoppage of work – in each case where the employer is not responsible). Of these three circumstances, only the third (stoppage of work) seems apt in the circumstances created by the COVID-19 pandemic – and then only in limited circumstances, the full extent of which is presently controversial. For present purposes, the

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critical point is that the stand down direction provided for by Part 6-4C, where it is available, avoids all of these controversies.

185. Further, stand down provisions may be found in contracts of employment and enterprise agreements. The usefulness of such provisions in present circumstances will depend entirely on the terms of the individual provisions. Again, where the stand down direction in Part 6-4C is available, it avoids any limitations in the relevant contract or enterprise agreement.

186. If an employer stands down an employee without pay (that is, the full amount of their contractual entitlements), and there is no contractual or statutory authorisation for doing so, the employer will be in breach of contract: see Neil and Chin, *The Modern Contract of Employment* (2nd Ed, 2017) at [9.20]-[9.25].

187. Part 6-4C now provides for such an authorisation. A stand down direction under section 789GDC, where it applies, is a simple method of lawfully standing down an employee without breaching the contract of employment. It should, in most cases, have the practical effect of ousting an employer's obligation to pay wages under a contract of employment, a workplace instrument or the FW Act, and substituting it with the wage condition, the minimum payment guarantee and, where applicable, the hourly rate of pay guarantee (as to which see below at paragraphs 194-195). In essence, the employee is not being stood down without pay, but rather is being stood down with the right to a minimum payment of $1,500 per fortnight, which is provided by the Government as a jobkeeper payment at no net cost to the employer.

188. There could, foreseeably, be complexities where the proper construction of an employee's contract of employment is that they are entitled to payment irrespective of whether they have performed work, or certain hours of work, in any event (for example, salaried workers). They will be highly fact specific.

(ii) *Conditions*

189. To be entitled to give such a direction, the following conditions must be satisfied (s 789GDC(1)):

   (a) the employer must qualify for the JobKeeper scheme when the direction was given;

   (b) the employee must not be able to be usefully employed for their normal days or hours during the stand down period because of business changes attributable to COVID-19 or government initiatives to slow the pandemic;

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(c) the implementation of the stand down must be safe, having regard to the nature and spread of COVID-19; and

(d) the employer must become entitled to one or more jobkeeper payments for the employee during a period "that consists of or includes" the stand down period, or for periods that "when considered together, consist of or include the jobkeeper enabling stand down period".

190. However, the stand down direction does not apply while the employee is taking paid or unpaid leave authorised by the employer or is otherwise authorised to be absent from the employment. In other words, an employee may take (with the employer's agreement) paid or unpaid leave during the stand down period: s 789DC(3).

191. It is important to note the difference between the employer being qualified for the JobKeeper scheme and becoming entitled to jobkeeper payments. The entitlement to payments will not arise until all of the conditions identified in Payment Rules s 6(1) are satisfied. It is possible that an employer that has suffered a 40% decline in turnover, as assessed at the beginning of a jobkeeper fortnight, could give an immediate stand down direction at that time. However, for the direction to become legally effective, the employer would need to ensure that it became entitled to payments (including by giving all of the relevant information to the Commissioner) for that period by the end of the fortnight.

(iii) *Employer's obligations during stand down period*

192. During the stand down period, the employer must continue to meet the "wage condition" and the "minimum payment guarantee" with respect to the employee. They must also comply with the "hourly rate of pay guarantee": s 789DC(2).

193. However, if the employee is taking paid or unpaid leave authorised by the employer during the stand down period, the employer must pay the employee as they would have done had no stand down direction been given: s 789DC(3).

(iv) *Hourly rate of pay guarantee*

194. The "hourly rate of pay guarantee" in the context of a stand down direction requires the employer to ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay that they would have been paid if the stand down direction had not been given. Subsection 789GDB(4) provides a mechanism for working out the

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hourly rate of pay for employees to whom a "workplace instrument" (eg. a modern award or enterprise agreement) applies.

195. The hourly rate of pay guarantee in the stand down context is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 60 penalty units.

(v) *Employer obligation with respect to employee requests for secondary employment/training/professional development (s 789GU)*

196. Where an employee has been stood down and they request (a) to engage in secondary employment; (b) training; or (c) professional development, the employer is obliged to consider the request, and must not unreasonably refuse it.

197. Although not explicit in the terms of the provision, the implication of an employer not being able to "unreasonably refuse" training or professional development is that the employer is expected to either provide the training or professional development itself, or to pay for it. The cost or work required in providing or paying for the training or professional development would almost certainly be a factor going to the reasonableness of any decision to refuse an employee request. The Explanatory Memorandum sheds no light on this.

198. The requirement to consider and not unreasonably refuse requests for secondary employment/training/professional development is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 60 penalty units.

(vi) *Impact of stand down on employee service*

199. If a stand down direction is given for a period, that period will count towards the employee's service: s 789GR(1). An earlier version of this guide incorrectly stated that the time an employee is stood down under Part 3-5 of the FW Act, an enterprise agreement or the employee's contract of employment would not count as service. Section 22(2)(b)(ii) of the FW Act has the effect that such time would count as service.

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(vii) *Impact of stand down on accrual of leave and other entitlements*

200. Employees who are stood down continue to accrue leave entitlements as if they had not been stood down: s 789GS(1).

201. Similarly, redundancy pay and payment in lieu of notice of termination are to be calculated as if the employee had not been stood down: s 789GS(2).

(viii) *Retrospective operation?*

202. The statute does not provide retrospective authorisation for stand down orders given before 9 April 2020 (the date that the section commenced). Accordingly, employers who did so will need to have relied upon a specific power under s 524 of the FW Act, an industrial instrument, or a contract of employment.

(ix) *Exclusions*

203. There is power for the Minister to exclude certain specified employees from the operation of section 789GDC: s 789GX(a). Such exclusions must be made by legislative instrument and none had been registered at the time of publication.

(b) Directions changing duties (s 789GE)

(i) *The power*

204. Section 789GE permits an employer to give an employee a direction that for a period the employee perform any duties that are within the employee's skill and competence.

205. Some contracts of employment and workplace instruments place constraints on the employer's power to give directions as to the work an employee is required to perform. This direction, so long as the conditions are met, effectively does away with those constraints, by giving statutory authorisation to any breach of a "designated employment provision" that otherwise would have occurred: s 789GE(2). This includes any breach or contravention of the FW Act, an enterprise agreement, a transitional agreement or a contract of employment. In other words, it will prevent any breach or contravention occurring.

206. The power appears to be intended to be a fall-back to a stand down direction. Bearing in mind that a stand down direction can only be given where the employee is not able "to be usefully employed for their normal days or hours during the stand down period because of

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business changes attributable to COVID-19 or government initiatives to slow the pandemic" (s 789GDC(1)(c)), this power enables the employer to put the employee to use performing other duties where there is no call for, or limited call for, their usual duties to be performed.

207. It is important to remember that where a contract of employment stipulates and confines the employee's duties, it is possible for employers and employees to agree by mutual consent that the contract should be varied either temporarily or permanently. Accordingly, where an employee agrees to a change in duties, it is not necessary to utilise a jobkeeper enabling direction to facilitate such a change. However, ordinary contractual principles apply. The critical question is whether a change falls inside or outside a pre-existing contractual latitude for variation. Some caution is required here. See generally, Neil and Chin, *The Modern Contract of Employment* (2nd Ed, 2017) at [4.30]-[4.50].

(ii) *Conditions*

208. To be entitled to give such a direction, the following conditions must be satisfied (s 789GE(1)):

(a) the employer must qualify for the JobKeeper scheme when the direction was given;

(b) the new duties are:

i. safe, having regard to (without limitation) the nature and spread of COVID-19; and

ii. reasonably within the scope of the employer's business operations;

(c) the employee has any licence or qualification required to perform the duties; and

(d) the employer must become entitled to one or more jobkeeper payments for the employee during a period "that consists of or includes" the period to which the direction applies, or for periods that when considered together, consist of or include the period to which the direction applies.

209. Further, the direction will have 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": s 789GL(1). This requirement suggests that it would be prudent for the employer to:

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(a) make a record of the decision to make the direction, which makes explicit the existence of the requisite state of mind;

(b) identify as a part of that record, the matters (and ideally the evidence relied upon) which led the employer to believe that the direction was necessary to continue the employment of one or more employees.

210. This further condition does not mean that the employer must be satisfied that the direction is necessary to continue the employment of the employee to whom the direction is made. It can be justified on the basis that making the direction is necessary to continue the employment of another employee or employees.

211. "Necessary" in this context is unlikely to connote "essential" in the sense that it was the only way of achieving the continuation of the employment of another employee or employees. Section 789GL(2) makes clear that the fact that a direction could have been given to a different employee instead is not relevant to whether or not the direction in fact given was "necessary". However, employers remain subject to anti-discrimination laws and the general protections provisions of the FW Act and should be clear that they are not making decisions about who they are giving directions to for unlawful reasons.

212. Finally, it is important to note the difference between the employer being qualified for the JobKeeper scheme and becoming entitled to jobkeeper payments. The entitlement to payments will not arise until all of the conditions identified in Payment Rules s 6(1) are satisfied. It is possible that an employer who has suffered a 40% decline in turnover, as assessed at the beginning of a jobkeeper fortnight, could give an immediate change of duties direction at that time. However, for the direction to be effective, the employer would need to ensure that they became entitled to payments (including by giving all of the relevant information to the Commissioner) for that period by the end of the fortnight.

(iii) *Hourly rate of pay guarantee*

213. The "hourly rate of pay guarantee" in the context of a direction to perform other duties requires the employer to ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the greater of:

(a) the base rate of pay (worked out on an hourly basis) that would have been applicable if the direction had not been given; or

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(b) the base rate of pay (worked out on an hourly basis) applicable to the duties the employee is required by the direction to perform.

214. In other words, an employee cannot be penalised by a change of duties direction and cannot be paid less than they would have ordinarily been entitled to for performing the duties they are directed to perform.

215. Subsection 789GDB(4) provides a mechanism for working out the hourly rate of pay for employees to whom a "workplace instrument" (eg. a modern award or enterprise agreement) applies.

216. The hourly rate of pay guarantee in the context of a change of duties direction is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 60 penalty units.

(iv) *Exclusions*

217. There is power for the Minister to exclude certain specified employees from the operation of section 789GE: s 789GX(b). Such exclusions must be made by legislative instrument and none had been made at the time of publication.

(v) *Retrospective operation?*

218. One observation that must be made is that this section does not provide retrospective authorisation for directions changing duties given before 9 April 2020 (the date that the section commenced). Accordingly, employers who did so will need to have relied upon a specific power under the FW Act, a workplace instrument or a contract of employment.

(c) Direction changing location of work (s 789GF)

(i) *The power*

219. Section 789GF permits an employer to give an employee a direction that for a period the employee perform duties at a place different from the employee's normal place of work, including the employee's home.

220. Some contracts of employment and workplace instruments place restraints on the employer's power to give directions as to the work an employee is required to perform. This

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direction, so long as the conditions are met, will give statutory authorisation to any breach of a "designated employment provision" that otherwise would have occurred: s 789GF(2). This includes any breach of the FW Act, an enterprise agreement, a transitional agreement or a contract of employment. In other words, it will prevent any breach occurring.

221. The power appears to be intended as another fall-back to a stand down direction. Bearing in mind that a stand down direction can only be given where the employee is not able "to be usefully employed for their normal days or hours during the stand down period because of business changes attributable to COVID-19 or government initiatives to slow the pandemic" (s 789GDC(1)(c)), this power enables the employer to put the employee to use at a location where the employer has a need for the employee to carry out work at a time where there may be limited – or no – call for the employee to perform duties at their usual place of work.

222. It is important to remember that where a contract provides for work to be performed at a particular location, it is possible for employers and employees to agree by mutual consent that the contract should be varied either temporarily or permanently. Accordingly, where an employee agrees to change their work location, it is not necessary to utilise a jobkeeper enabling direction to facilitate such a change. However, ordinary contractual principles apply. The critical question is whether a change falls inside or outside a pre-existing contractual latitude for variation. Some caution is required here. See generally, Neil and Chin, *The Modern Contract of Employment* (2nd Ed, 2017) at [4.30]-[4.50].

(ii) *Conditions*

223. To be entitled to give such a direction, the following conditions must be satisfied (s 789GF(1)):

(a) the employer must qualify for the JobKeeper scheme when the direction was given;

(b) the place must be suitable for the employee's duties;

(c) if the place is other than the employee's home, it must not require the employee to travel a distance that is unreasonable in all the circumstances (including the circumstances surrounding the COVID-19 pandemic);

(d) performance of the employee's duties at the place directed is:

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i. safe, having regard to (without limitation) the nature and spread of COVID-19; and

ii. reasonably within the scope of the employer's business operations; and

(e) the employer must become entitled to one or more jobkeeper payments for the employee during a period "that consists of or includes" the relevant period, or for periods that when considered together, consist of or include the relevant period.

224. Further, the direction will have 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": s 789GL(1). This requirement suggests that it would be prudent for the employer to:

(a) make a record of the decision to make the direction, again making explicit the existence of the requisite state of mind;

(b) identify as a part of that record, the matters (and ideally the evidence relied upon) which led the employer to believe that the direction was necessary to continue the employment of one or more employees.

225. This further condition does not mean that the employer must be satisfied that the direction is necessary to continue the employment of the employee to whom the direction is made. It can be justified on the basis that making the direction is necessary to continue the employment of another employee or employees.

226. Again, "necessary" in this context is unlikely to connote "essential" in the sense that it was the only way of achieving the continuation of the employment of another employee or employees. Section 789GL(2) makes clear that the fact that a direction could have been given to a different employee instead is not relevant to whether or not the direction in fact given was "necessary". However, employers remain subject to anti-discrimination laws and the general protections provisions of the FW Act and should be clear that they are not making decisions about who they are giving directions to for unlawful reasons.

227. Finally, it is important to note the difference between the employer being qualified for the JobKeeper scheme and becoming entitled to jobkeeper payments. The entitlement to payments will not arise until all of the conditions identified in Payment Rules s 6(1) are satisfied. It is possible that an employer who has suffered a 40% decline in turnover, as assessed at the beginning of a jobkeeper fortnight, could give an immediate change of

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location direction at that time. However, for the direction to be effective, the employer would need to ensure that they became entitled to payments (including by giving all of the relevant information to the Commissioner) for that period by the end of the fortnight.

(iii) *Exclusions*

228. There is power for the Minister to exclude certain specified employees from the operation of section 789GF: s 789GX(c). Such exclusions must be made by legislative instrument and none had been made at the time of publication.

(iv) *Retrospective operation?*

229. This section does not provide retrospective authorisation for directions changing the location of work given before 9 April 2020 (the date that the section commenced). Accordingly, employers who did so will need to have relied upon a specific power under the FW Act, a workplace instrument or a contract of employment.

(d) Requirements applying to all jobkeeper enabling directions

230. In addition to meeting the conditions set out above, the direction must comply with the rules relating to jobkeeper enabling directions (Division 6). They are:

    i. the direction must be reasonable in all of the circumstances (**reasonableness condition**): s 789GK;

    ii. the employer must adhere to the notification and consultation requirements: s 789GM; and

    iii. the direction must be in writing: s 789GN.

(i) *The reasonableness condition (s 789GK)*

231. Any jobkeeper enabling direction must not be "unreasonable in all of the circumstances". If it is, an employee need not comply with it.

232. The only guidance in provisions as to what factors might make a direction unreasonable is the note to section 789GK, which indicates that a direction might be unreasonable "depending on the impact of the direction on any caring responsibilities the employee may

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have". The Explanatory Memorandum does not shed any further light on how this could be interpreted. The guiding factors are likely to be the purpose of the provision authorising the direction in question, taken both on its own and as part of the overarching purpose of the amending legislation.

233. In the context of stand down directions, one might expect that a direction to work for a minute or an hour on a day the worker was otherwise rostered to work an eight hour shift would be "unreasonable in all the circumstances". It is highly unlikely that the fact that an employee's pay might be reduced, by reason of the stand down direction, would of itself render the direction unreasonable – provided that the wage condition, minimum payment guarantee and hourly rate of pay guarantees are complied with by the employer. It is more likely that arbitrary, strange or capricious requests that have an adverse and (potentially unjustifiable) impact on particular employees, or classes of employees, will fall into the "unreasonable in all the circumstances" category. In that case the assessment of what is "unreasonable" will require consideration of the particular circumstances of particular employees.

234. With respect to change of duties directions, it is again difficult to see what could render the direction "unreasonable in all the circumstances". The conditions that must be satisfied for a change of duties direction to be lawful already includes a number of built in safeguards around (a) the employee's capacity to perform the duties; (b) health and safety; and (c) there being a reasonable and rational connection between the employer's business and the new duties. Again, the key criterion is likely to be any particular effect on particular employees or classes of employees that might render the duties unreasonable in their particular case. It is likely to pick up extreme and obvious examples, like (for example) requiring senior executives to clean toilets in lieu of their usual duties.

235. As to the location of work duties, the preconditions have reasonableness factors already built in, namely: (a) the employee's capacity to perform the duties; (b) health and safety; (c) there being a reasonable and rational connection between the employer's business and the new duties; (d) the new location being a suitable place for the employee to perform their duties; and (e) the direction not requiring the employee to travel a distance that is unreasonable in the circumstances.

236. An employee who relied on the unreasonableness of a direction as a justification for not complying with it would not contravene a civil remedy provision if the direction proved to

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be reasonable, because s 789GQ is not a civil remedy provision. However, the employee could be required to comply by an order of the Fair Work Commission directing compliance. Failure to comply with that order would be a contravention of a civil remedy provision: s 789GW.

237. There is, however, the possibility that the employee's failure to comply with a lawful direction made under these provisions could be a breach of their contractual duty to comply with a lawful and reasonable direction. As such, even if non-compliance on the grounds of asserted unreasonableness would not have immediate statutory consequences for the employee, it may constitute a breach of the contract of employment potentially entitling the employer to summarily dismiss the employee.

(ii) *Notification and consultation requirements (s 789GM)*

238. The process prescribed by section 789GM is:

(a) The employer must give written notice of their intention to give a direction. If regulations require that notice to be in a particular form, it must be in that form: s 789GM(1)(a) and (2). At the time of writing no such regulations had been made.

(b) The notice must be given at least 3 days before the direction is given, or, where the employee genuinely agrees to a lesser period, within that lesser period: s 789GM(1)(b).

(c) Before the direction is given (as distinct from the notice of intention to give the direction), the employer must consult the employee (or their representative) about the direction: s 789GM(1)(c). A written record of the consultation must be kept: s 789GM(4).

239. Employers are exempt from these notice and consultation requirements if they have previously consulted on a different jobkeeper enabling direction, the employee or their representative expressed views about the previously proposed direction, and the employer considered those views in deciding to give the different direction: s 789GM(3).

240. The substance of the obligation to consult is not prescribed. However, several factors suggest that the consultation is not intended to be onerous or elaborate. In particular:

(a) the notice of the intention to give a direction need only be given 3 days in advance of a direction being given (s 789GM(1)(b)); and

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(b) the context of jobkeeper enabling directions is that they are temporary measures, in place for less than five months (not irreversible decisions like mass redundancies to which FW Act s 531 applies); and

(c) the object of "assist[ing] the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from" the COVID-19 pandemic and government initiatives to slow the transmission of COVID-19: s 789GB(a).

241. Consultation does not confer a right of veto. However, the consultation should be genuine (with a bona fide opportunity to influence the employer) and should not be limited to perfunctory advice on what is to happen: *CFMEU v BHP Coal Pty Ltd* (2016) 262 IR 176 at [23], [59], [60]; cf *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Vodafone Network Pty Ltd*, PR911257 (AIRC, Smith C, 14 November 2001).

(iii) *Form of the direction (s 789GN)*

242. Any jobkeeper enabling direction must be:

(a) in writing: s 789GN(1); and

(b) in the form prescribed by the regulations: s 789GN(2). At the time of writing no such regulations had been enacted.

(e) Effect of a direction (s 789GQ)

243. The effect of a valid jobkeeper enabling direction is that the employee is required to comply with it.

(f) Duration of a direction (s 789GP)

244. A jobkeeper enabling direction will continue into effect until:

(a) it is withdrawn or revoked by the employer;

(b) it is replaced by another such direction to the employee;

(c) it is set aside or substituted by the FWC under s 789GV(4)(c); or

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(d) 28 September 2020, when the JobKeeper scheme is due to end.

(g) Direction does not constitute redundancy (s 789GZA)

245. A jobkeeper enabling direction "does not amount to a redundancy" (s 789GZA).

246. One of the main effects of this provision is to make clear that giving a direction will not trigger redundancy under the NES, a modern award or an enterprise agreement.

(h) Misuse of a jobkeeper enabling direction (s 789GXA)

247. An employer must not purport to give a jobkeeper enabling direction under Part 6-4C, which is both:

    (a) not authorised by Part 6-4C; and

    (b) which the employer knows is not authorised by Part 6-4C.

248. If an employer does so, they will be contravening a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 600 penalty units.

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Part V

Flexibility agreements

V. Flexibility agreements under the FW Act

249. Employers and employees are entitled to enter into agreements dealing with the following topics:

(a) alternative hours of work (s 789GG)

(b) taking annual leave at half pay (s 789GJ(2))

(a) Agreeing alternative hours of work (s 789GG)

(i) *Ability to agree alternative days and times of work*

250. Section 789GG(2) permits employers and employees to agree, in writing, to the employee performing duties during a period on different days or times compared with their ordinary days or times of work.

251. While employers and employees could always vary their contract by mutual agreement, such an agreement permits the employer and employee to effectively contract out of any requirements imposed by a "designated employment provision", including the FW Act, an enterprise agreement, a transitional agreement or a contract of employment: s 789GG(3). "Contract out" is used in a loose sense here. An agreement complying with the requirements of the provision would be effective to excuse what would otherwise be a contravention of a "designated employment provision", regardless of whether there was, for example, consideration given for that agreement.

(ii) *The requirements for an agreement*

252. For the agreement to be effective, the following conditions must be met (see s 789GG(2)):

(a) it must be in writing;

(b) the employer must qualify for the JobKeeper scheme at the time it is made;

(c) the performance of the employee's duties at the proposed days/times must be:

i. safe having regard to (without limitation) the nature and spread of COVID-19; and

ii. reasonably within the scope of the employer's business operations;

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(d) must not have the effect of reducing the employee's number of hours of work compared with their ordinary hours of work; and

(e) the employer must become entitled to one or more jobkeeper payments for the employee during a period "that consists of or includes" the relevant period, or for periods that when considered together, consist of or include the relevant period.

(iii) *Employee obligations with respect to requests to make agreements*

253. While s 789GG does not confer any power on the employer to make a direction, it does trigger an obligation on behalf of the employee to consider, and "not unreasonably refuse" a request by an employer to make an agreement. The obligation only arises where certain conditions are met:

(a) the employer qualifies for the JobKeeper scheme (s 789GG(1)(a));

(b) the employer is entitled to one or more jobkeeper payments for the employee in question (s 789GG(1)(b)); and

(c) the request is made by the employer to the employee (s 789GG(1)(c)).

254. Notably, there is no obligation on the employer to consider and not unreasonably refuse a request by the employee to make an agreement.

(iv) *Exclusions*

255. There is power for the Minister to exclude certain specified employees from the operation of section 789GG: s 789GX(d). Such exclusions must be made by legislative instrument and none had been made at the time of publication.

(b) Agreeing annual leave at half pay (s 789GJ(2))

(i) *Ability to agree annual leave at half pay*

256. Section 789GJ(2) permits employers and employees to agree, in writing, to the employee taking twice as much paid annual leave, at half the employee's rate of pay, for a period.

257. While employers and employees could always vary their contractual entitlements by mutual agreement, an agreement under section 789GJ(2) permits the employer and employee effectively to contract out of any requirements imposed by a "designated employment

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provision", including the FW Act, an enterprise agreement, a transitional agreement or a contract of employment: s 789GJ(3). "Contract out" is used in a loose sense here. An agreement complying with the requirements of the provision would be effective to excuse what would otherwise be a contravention of a "designated employment provision" whether or not there was, for example, consideration given for that agreement.

(ii) *The requirements for an agreement*

258. For the agreement to be effective, the following conditions must be met (see s 789GJ(2)):

   (a) it must be in writing;

   (b) the employer must qualify for the JobKeeper scheme at the time it is made;

   (c) the employer must become entitled to one or more jobkeeper payments for the employee during a period "that consists of or includes" the relevant period, or for periods that when considered together, consist of or include the relevant period.

(iii) *Accrual of leave entitlements while taking leave*

259. An employee taking annual leave at half pay will accrue leave entitlements as if no agreement under s 789GJ(2) has been made: s 789GS(3).

260. Similarly, if an employee takes annual leave under a s 789GJ(2) agreement, their redundancy pay and payment in lieu of notice of termination will be calculated as if no agreement had been made: s 789GS(4).

(iv) *Exclusions*

261. There is power for the Minister to exclude certain specified employees from the operation of section 789GJ: s 789GX(e). Such exclusions must be made by legislative instrument and none had been made at the time of publication.

(v) *Corresponding entitlement under modern awards*

262. The Fair Work Commission has introduced a temporary new schedule into 99 modern awards most affected by the COVID-19 pandemic which permits employers and employees to agree, in writing, to the employee taking twice as much annual leave, at half the employee's rate of pay, for a period: see *Variation of awards on the initiative of the Commission* [2020] FWCFB 1837. In order to give effect to such an agreement, and provided the employee's employment

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is covered by one of the affected modern awards, it is not necessary for an employer to qualify for the JobKeeper scheme, or to be entitled to jobkeeper payments in respect of an employee. For a full list of the affected awards, see here.

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Part VI

Requests to take annual leave

VI. Requests to take annual leave under the FW Act

(a) Requests of employees to take annual leave (s 789GJ(1))

263. An employee is required to consider and not unreasonably refuse a request by the employer that they take leave: s 789GJ(1)(e) and (f). This is subject to a number of conditions being met:

(a) the employer qualifies for the JobKeeper scheme (s 789GJ(1)(a));

(b) the employer is entitled to one or more jobkeeper payments for the employee in question (s 789GJ(1)(b));

(c) the request is made by the employer to the employee (s 789GJ(1)(c)); and

(d) complying with the request would not result in the employee having a balance of fewer than 2 weeks' paid annual leave (s 789GJ(1)(d)).

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Part VII

Employee protections

VII. Employee protections under the FW Act

(a) Interaction with general protections

264. The new provisions of the FW Act expressly operate subject to Part 3-1 of the FW Act (General Protections): s 789Z(1)(b). Furthermore, section 789GY expressly identifies the following as "workplace rights" for the purposes of the general protections provisions:

   (a) the benefit that an employee of an employer has or derives because of an obligation of the employer under section 789GD to satisfy the wage condition;

   (b) agreeing, or not agreeing, to perform duties on different days or at different times under s 789GG(2);

   (c) agreeing, or not agreeing, to take paid annual leave in compliance with a request by the employer under s 789GJ(1);

   (d) agreeing, or not agreeing, to take paid annual leave in accordance with s 789GJ(2); and

   (e) making a request under s 789GU (a request by an employee who has been stood down for secondary employment, training or professional development).

265. This means, for example, that an employee cannot be subjected to adverse action because they had exercised their rights to reasonably refuse to agree to perform duties at different days/times or to take annual leave, or for refusing to agree (whether reasonably or otherwise) to take annual leave at half pay.

(b) Interaction with unfair dismissal

266. Part 6-4C is also subject to the unfair dismissal protections: FW Act s 789GZ(1)(c). Notably, the giving of a jobkeeper enabling direction does not amount to a redundancy: s 789GZA. For unfair dismissal purposes, that means that a jobkeeper enabling direction neither constitutes a "dismissal" or a "genuine redundancy" for unfair dismissal purposes.

267. Further, it is likely that there will be arguments that the availability of the alternatives to dismissal in Part 6-4C are centrally relevant to an assessment of whether a dismissal undertaken at this time was "harsh, unjust or unreasonable" for the purposes of FW Act s 389. Eligible employers dismissing employees during the currency of the JobKeeper scheme

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would be well-advised to have a sound and considered reason why any of the provisions in Part 6-4C do not provide in the circumstances of the particular case a suitable alternative to dismissal.

(c) Interaction with anti-discrimination laws

268. Part 6-4C operates subject to any anti-discrimination law (s 789GZ(1)(e)). For a list of the anti-discrimination laws to which this refers, see ss 12 and 351(3).

(d) Interaction with health and safety obligations

269. Nothing in Part 6-4C derogates from any requirements of the law of the Commonwealth or a State or Territory concerning the health and safety obligations of employers or employees.

270. Although a number of the provisions of Part 6-4C expressly require the employer to consider whether a direction they are giving is safe, it will be necessary for employers to consider – and continue to adhere to – their statutory obligations under work health and safety legislation. In the current environment, where the risk of contracting COVID-19 is obvious, and the potential consequences for employees' health are significant, employers will need to be particularly astute to ensure that they make no requirements of employees that expose them to that risk, and that, if they do require employees to work, social distancing and other measures are implemented and enforced so far as reasonably practicable within workplaces. There are real questions, beyond the scope of this guide, about the practical content of employers' duties under work health and safety legislation in relation to employees who are working from home.

271. Furthermore, employers' common law duty to provide a safe system of work is unaffected. Again, this is something to which employers must give urgent and unremitting attention.

272. The Fair Work Commission has made determinations inserting a temporary new schedule into 99 awards most likely to be affected by the pandemic: see *Variation of awards on the initiative of the Commission* [2020] FWCFB 1837. The new schedule gives employees the right to two weeks of unpaid pandemic leave if they are required by government authorities or medical advice to self-isolate, and would otherwise be required to work at premises operated by an employer.

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273. The Fair Work Ombudsman has expressed the view (here) that an employee receiving jobkeeper payments from their employer can still take unpaid pandemic leave under their award whilst receiving the jobkeeper payment. We agree with this view, given that taking unpaid leave does not bring the employment to an end. Assuming the employee is an "eligible employee" for the purposes of the Payment Rules, the fact that the employee was taking unpaid pandemic leave would not affect their status as an "eligible employee" and the wage condition accordingly requires that they be paid at least $1,500 per fortnight.

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Part VIII

Dispute resolution

VIII. Dispute resolution under the FW Act

(a) Role of the Fair Work Commission

274. The Fair Work Commission is vested with jurisdiction to deal with disputes about the operation of Part 6-4C, including by arbitration: s 789GV(1) and (2). The Commission's website provides some guidance on the disputes with which it can deal. The Commission has accepted as falling within its jurisdiction a dispute about compliance with the wage condition and the minimum payment guarantee in respect of an employee who was stood down pursuant to FW Act s 524 (and not pursuant to a jobkeeper enabling direction): see *Mazzitelli v Qantas Airways Limited* [2020] FWC 2413 at [40]-[43].

275. The Commission must deal with disputes taking into account fairness between the parties: s 789GV(7).

276. Applications for dispute resolution may be brought by employers, employees, employee organisations and employer organisations: s 789GV(3). The Commission has adopted a specific *Application for the Commission to deal with a JobKeeper dispute (coronavirus economic response form)*, available on the Commission's website here.

277. The Commission has also published a Bench Book for dealing with jobkeeper disputes, available here.

278. The FWC may make any order it considers appropriate, including:

    (a) an order it considers desirable to give effect to a jobkeeper enabling direction; and

    (b) an order setting aside a jobkeeper enabling direction (whether or not it substitutes a new jobkeeper enabling direction): see s 789GV(4).

279. While the Commission cannot exercise judicial power and finally determine the legal rights of parties, it can, for example, make orders to the effect that an employer's payment practice be reviewed against the Payment Rules: *Mazzitelli* at [50].

280. The FWC's jurisdiction to deal with disputes about Part 6-4C will continue beyond 28 September 2020. However, on or after that date, the FWC may not make orders giving effect to, or substituting, a jobkeeper enabling direction: s 789GV(5). Orders made prior to that date will cease to have effect at the start of 28 September 2020: s 789GV(6).

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281. A person who contravenes an order made by the FWC in dealing with a dispute contravenes a civil remedy provision: s 789GW. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can bring proceedings for contraventions in the FCA, FCCA or an eligible State or Territory court. The maximum penalty is 60 penalty units.

282. Finally, it should be noted that section 789GV is not the only source of the Commission's jurisdiction to deal with matters related to the JobKeeper scheme. In *Coxon v Precious Cargo Lockelys Pty Ltd T/A Precious Cargo Education* [2020] FWC 2246, an employee challenged her employer's decision not to include her in the employer's JobKeeper application on the basis that the employer considered that she was not a long-term casual employee. Instead of Part 6-4C, the Commission relied upon FW Act s 739 and an empowering provision of an applicable enterprise agreement as the source of its jurisdiction to deal with the dispute.

(b) Role of the Courts

(i) *The FCA and the FCCA*

283. As in all matters concerning the operation of the FW Act, the FCA and the FCCA are vested with general jurisdiction under ss 562 and 566. The Federal Court also enjoys a general grant of jurisdiction under *Judiciary Act 1903* (Cth) s 39(1A)(c).

284. Both the FCA and the FCCA may grant injunctions, order compensation, order reinstatement, and impose penalties where a breach of a civil remedy provision is established: ss 545 and 546.

(ii) *Eligible State and Territory Courts*

285. Eligible State and Territory Courts include: a District, County or Local Court, a magistrates court, the Industrial Relations Court of South Australia, and the Industrial Court of NSW: s 12. The South Australian Employment Court is also prescribed as such an eligible State and Territory Court by *Fair Work Regulations 2009* (Cth) reg 1.05.

286. These Courts may, subject to their own jurisdictional limits:

(a) order an employer to pay an amount to, or on behalf of an employee, if satisfied that they were required to pay the amount under the FW Act or a fair work instrument and they contravened a civil remedy provision in doing so: s 545(3);

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(b) impose penalties for contraventions of civil remedy provisions: s 546.

287. The main role for eligible State and Territory Courts in the context of the amendments is likely to be enforcing the "wage condition" and the "minimum payment guarantee" or imposing penalties for contraventions of any of the new civil remedy provisions.

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Part IX

What’s new

IX. What's new

(a) Updates since 29 April 2020

288. This version of the guide incorporates the following updates from the 29 April 2020 version:

    (a) The guide now covers "eligible business participants" – sole traders, partners, shareholders and directors who are not employees of an entity.

    (b) A number of updates, occasioned by the *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 2) 2020* registered on 1 May 2020, have been made, including:

        i. the "one in, all in" principle section has been updated to reflect the new section 10A of the Payment Rules (as amended);

        ii. a new alternative to the basic test, found in section 8A of the Payment Rules (as amended), has been included; and

        iii. the section covering the eligibility of 16 and 17 years old employees has been amended to reflect the changes to section 9(2)(a) of the Payment Rules.

    (c) The Decline in Turnover Test section has been updated with references to:

        i. the Commissioner of Taxation's *Practical Compliance Guideline (PCG 2020/4) – Schemes in relation to the JobKeeper payment*, published on 1 May 2020; and

        ii. the Commissioner of Taxation's *Law Companion Ruling (LCR 2020/1), JobKeeper Payment – decline in turnover test*, published on 4 May 2020.

    (d) The Fair Work Commission section has been updated to make reference to the JobKeeper Disputes Benchbook published by the Commission, and early decisions of the Commission on Part 6-4C.

(b) Updates since 20 April 2020

289. This version of the guide incorporates the following updates from the 20 April 2020 version:

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(a) The employer qualification section has been updated to include the alternative decline in turnover tests now provided for by the *Coronavirus Economic Response Package (Payments and Benefits) Alternative Decline in Turnover Test Rules 2020*.

(b) Some significant amendments to the Payment Rules foreshadowed by the Treasurer have been noted as relevant, including:

i. changes to the age criterion for "eligible employees";

ii. clarification that the "one in, all in" principle is a part of the scheme;

iii. revisions to the way charities can assess their GST turnover; and

iv. a further alternative test to cover situations where a special purpose entity is used to employ employees.

(c) The section on flexibility agreements has been updated to note that, following amendments to a number of modern awards by the Fair Work Commission, agreements to take annual leave at half pay are also available for a number of award covered employees irrespective of whether or not their employer is entitled to jobkeeper payments for them.

(d) The section on health and safety obligations has been updated to note the amendments made to a number of modern awards by the Fair Work Commission permitting employees to take two weeks of unpaid pandemic leave if they are required or advised to self-isolate and would otherwise be required to work at an employer's premises.

(e) An error in paragraph 38 of the previous version about the way in which current GST turnover could be calculated has been corrected.

(c) Updates since 14 April 2020

290. This version of the guide incorporates the following updates from the 14 April 2020 version:

(a) Further consideration has been given to the supposed requirement that employers nominate all eligible employees for the scheme (the "one in, all in" principle).

(b) The decline in turnover section has been updated to incorporate new ATO guidance which addresses how proposed GST turnover should be assessed.

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(c) The eligible employees section has been updated to address ATO and Government guidance on the treatment of workers stood down or dismissed after 1 March 2020.

(d) The eligible employees section has been updated to address ATO guidance on how employee nominations should be made.

(e) The wage condition section has been updated to clarify the scope of the employer's obligation including:

i. where an employee refuses to attend work;

ii. where an employee is employed elsewhere during a stand down period; and

iii. where an employee is stood down on or after 1 March 2020 and throughout a jobkeeper fortnight.

(f) A new section has been added to address the potential for administrative and criminal sanctions arising out of abuse of the scheme.

(g) An error in paragraph 113 of the previous version about the effect of stand down directed otherwise than under a jobkeeper enabling direction on an employee's service has been corrected.

(h) A link to the Fair Work Commission's Application for the Commission to deal with a JobKeeper dispute (coronavirus economic response) form has been added to the Dispute resolution under the FW Act section.

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