COVID-19: Employer Update

Implementing the JobKeeper Program

9 April 2020

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Introduction

In this report, we summarise the JobKeeper Program, described by Prime Minister Scott Morrison as "the biggest economic lifeline in Australia's history".

The report details what is currently known about the eligibility requirements, implementation process, the industrial implications and common questions asked by employers.

Overview of the Program

What is the JobKeeper Program?

The Federal Government has legislated A$130 billion to pay Qualifying Employers $1,500 per fortnight for each 'Eligible Employee' (**JobKeeper payment**) for the period of 30 March 2020 to 27 September 2020 (**Jobkeeper Period**).

Legislative framework

On 8 April 2020, Federal Parliament passed four bills to enable the Program:

1. *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020* (**Payments and Benefits Act**) which describes the mechanisms for the Government to make the JobKeeper payment to employers who qualify for the Program;
2. *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* (**Omnibus Act**) which, amongst other things amends the *Fair Work Act 2009* (Cth) (**FW Act**);
3. *Appropriation Bill (No.5) 2019–2020*; and
4. *Appropriation Bill (No.6) 2019–2020* (together, the **Appropriation Bills**) which authorise the expenditure of government funds required by the Program.

At the time of publication the bills are reported to have received Royal Assent, meaning that each commences today, 9 April 2020.

Framework

The *Payments and Benefits Act* establishes that the Treasurer, or by delegation the Commissioner of Taxation (**Commissioner**), may issue rules (**Rules**) providing for the implementation of the JobKeeper Program. The Rules will set out the detail of how the Program will operate.

The Government has released an exposure draft of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (**Draft Rules**) – the analysis in this update is based on the Draft Rules released on 8 April 2020. It should be noted that these Draft Rules may be amended as events unfold.

The amendments to the FW Act under the Omnibus Act will only operate during the JobKeeper Period (they have a sunset date of 28 September 2020).

How will the JobKeeper Program work?

The Program subsidises 'Qualifying Employers' who continue to pay the wages of 'Eligible Employees' during the JobKeeper Period.

After paying wages, Qualifying Employers will be reimbursed by the ATO at a flat rate of $1,500 (before tax) for each Eligible Employee per JobKeeper fortnight.

To enable Qualifying Employers lawfully to pay the JobKeeper payment, the Program will override certain terms and conditions of employment set out in modern awards, enterprise agreements and contracts of employment during the JobKeeper Period that would otherwise apply to Qualifying Employers and their employees. Pay rates in industrial instruments (modern awards and enterprise agreements), however, are unaffected by the amendments.

Who is a Qualifying Employer?

A Qualifying Employer is an entity that:

- carried on a business in Australia (or was a non-for-profit body that pursued its objectives principally in Australia) at 1 March 2020; and
- meets the decline in turnover test described below.[1]

An entity will encompass most forms of business organisation: an individual, body corporate, trust, partnership, superannuation fund and unincorporated association for example.[2] Some key issues associated with complex corporate or organisational structures are discussed further below.

Certain entities are excluded:[3]

- entities that are subject to the Major Bank Levy for any quarter ending before 1 March 2020, and their subsidiaries;
- Australian government, State and Territory governments, local governments, foreign governments (and their agencies or wholly-owned corporations of these bodies);
- sovereign entities;
- companies where a liquidator or provisional liquidator has been appointed;
- if the entity is an individual, where a trustee in bankruptcy has been appointed to the individual's property.

Other than entities which are subject to the Major Bank Levy, no entity is excluded because of the type of business it conducts.

Decline in turnover test

To access the Program, an employer entity must suffer a decline in revenue based on its projected GST turnover. The level of decline required depends on the nature of the entity and its aggregate revenue.

An employer (including not-for-profits and self-employed individuals) will be eligible for the Program if:

- where the entity has an aggregated turnover of $1 billion or more, the entity estimates its projected GST turnover has – or will likely – fall by 50% or more;[4]
- where the entity is a charity registered with the Australian Charities and Not-for-Profit Commission (**ACNC**), excluding non-government schools and universities, the entity estimates its projected GST turnover has – or will likely – fall by 15% or more;[5] and
- in all other cases – the entity estimates its projected GST turnover has or will likely fall by 30% or more.[6]

Aggregated turnover

An entity's aggregated turnover determines the extent to which it must suffer a decline in projected GST turnover.[7] Putting aside ACNC registered charities, the 30% decline test will apply to an entity unless its current or last income year's aggregated turnover exceeds $1 billion.

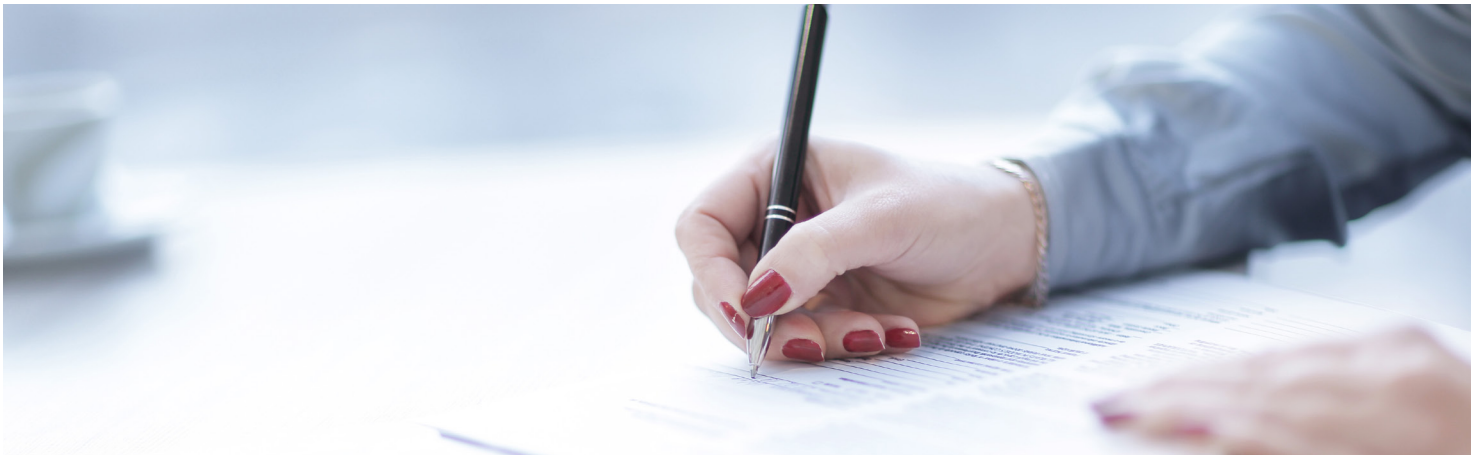
'Aggregated turnover' is not explained in the Rules. The concept is used in existing tax laws in relation to small business enterprises but it is not clear that such interpretation would be intended to apply. Fact sheets issued by Treasury suggest that the concept should look to group revenues in some way. Further clarification is required on this point.

A decline in turnover is measured by a comparison of an entity's GST turnover, as follows:

- projected GST turnover for a calendar month that ends after 30 March 2020 and before 1 October 2020 (**turnover test period**); and
- current GST turnover for the period in 2019 that corresponds to the turnover test period (**relevant comparison period**).[8]

GST turnover is determined in accordance with the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) (**GST Act**), as modified by the Rules. Importantly GST is determined on an entity (and not a GST group) basis.

1 *Coronavirus Economic Response Package (Payment and Benefits) Rules 2020* (**Draft Rules**) s 7.
2 *Coronavirus Economic Response Package (Payment and Benefits) Act 2020* (**Payments and Benefits Act**) s 6.
3 Draft Rules s 7(2).
4 Draft Rules s 8(2)(b).
5 Draft Rules s 8(2)(a) and (3).
6 Draft Rules s 8(2)(c).
7 Draft Rules s 8(4).
8 Draft Rules s 8(1).



Alternative tests

The Commissioner may, by legislative instrument, determine that an alternative test applies to a class of entities, if they are satisfied there is no appropriate relevant comparison period.[9] This flexibility is appropriate and will be important to deal with a range of circumstances, for example:

- not all entities need to be registered for GST purposes; and
- new businesses may not have a relevant comparison period.

However, the flexibility afforded to the Commissioner is, on its face, limited to where the Commissioner considers that an appropriate relevant comparison period is not available.[10] Flexibility may, therefore, not extend to formulating tests which accommodate complex group structures (discussed further below).

Who is an Eligible Employee?

An individual will be an Eligible Employee if they:

- are currently employed by a Qualifying Employer (including those stood down or re-hired);
- were employed by that employer as at 1 March 2020;
- are full-time, part-time, or long-term casuals (a casual employed on a regular and systemic basis for longer than 12 months as at 1 March 2020);
- are at least 16 years of age at 1 March 2020;
- are an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020;
- were a resident for Australian tax purposes on 1 March 2020; and
- are not in receipt of a JobKeeper payment from another employer.[11]

On the basis of the Draft Rules it is not clear whether an employee of a Qualifying Employer who is on a period of unpaid parental leave is an Eligible Employee (there is no express exclusion to this effect). However, employees on employer-funded paid parental leave[12] appear to remain eligible.

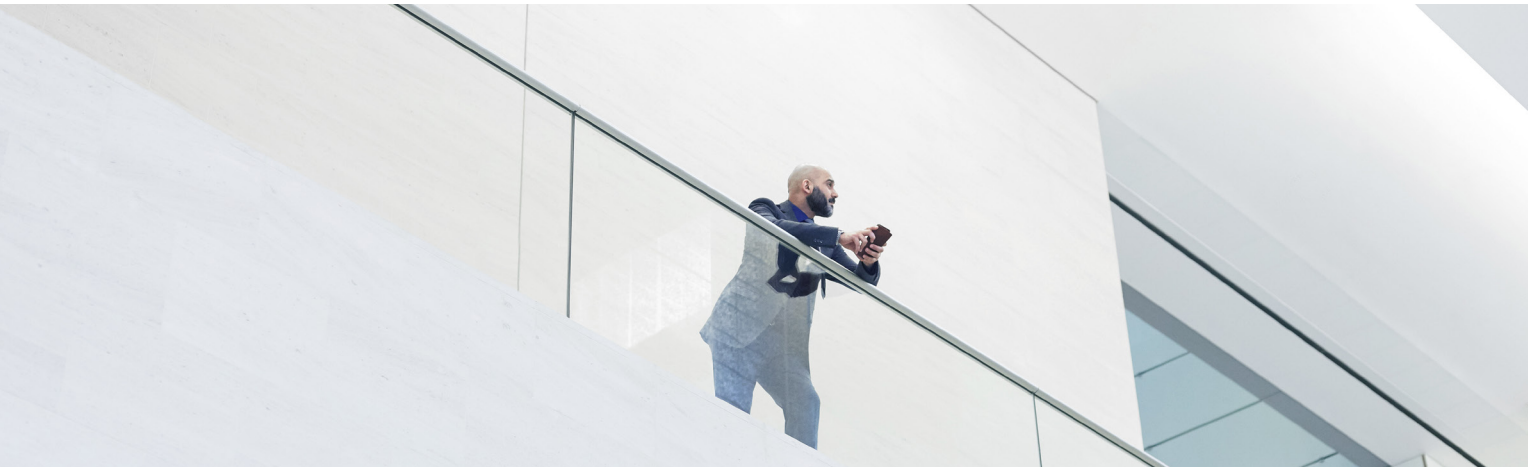
Does an employee's income matter?

There is no income cap on eligibility for employees. A Qualifying Employer may receive the subsidy in respect of its highest paid employees, as well as employees whose employment terms and conditions are not in any way impacted by COVID-19.[13]

Although not clear on the face of the Draft Rules, it appears the intention is that the subsidy will be available to a Qualifying Employer in respect of an employee whose salary is less than $1,500 per fortnight, if the Qualifying Employer pays them at least $1,500 per fortnight during the JobKeeper Period as required by the 'wage condition' set out in Section 10 of the Rules.[14] That will likely mean that the Qualifying Employer will need to vary the terms of employment for the JobKeeper Period or otherwise pay bonuses for this category of individuals to ensure they receive at least $1,500 in a fortnight. That position requires urgent clarification given:

- the Government encouragement of employers to commence paying stood down workers or to rehire them ahead of finalisation of the Rules or confirmation of entitlement from the Commissioner; and
- the anti-avoidance rules set out in the *Payments and Benefits Act* discussed below.

9 Draft Rules s 8(6).
10 Draft Rules s 8(6).
11 Draft Rules s 9.
12 Not receiving Parental Leave Pay under the *Paid Parental Leave Act 2010*, which in some cases is paid to the employee by the employer.
13 Department of the Treasury – 'JobKeeper Payment – Information for employers' (5 April 2020).
14 Draft Rules s 10.



Ineligible employees

The following categories of workers are not Eligible Employees:[15]

- employees who have been stood down by a business that is not a Qualifying Employer;
- employees who have been made redundant but are not rehired; and
- employees where Parental Leave Pay or Dad and Partner Pay is payable from Services Australia for any period of the relevant JobKeeper fortnight. Services Australia is the agency that now delivers Medicare, Centrelink and Child Support payments and services.

Employees receiving workers compensation will generally be ineligible if they are not working. However, those working (for instance, on reduced hours) remain eligible.

It should be noted that, subject to further announcements, workers who are ineligible to receive a benefit under the Program may be entitled to receive other benefits (such as the JobSeeker Allowance).

Registration and notification requirements

Qualifying Employers must register with the ATO to access the JobKeeper payment in respect of Eligible Employees.

A Qualifying Employer must notify an Eligible Employee within seven days of providing the Eligible Employee's details to the ATO.[16]

Each Eligible Employee must notify their primary Qualifying Employer that they nominate to receive the JobKeeper payment. The nomination must be in approved form, confirming the employee meets eligibility requirements and is not seeking the JobKeeper payment from another employer.[17]

If Eligible Employees are receiving income support payments, they must also update Services Australia of their JobKeeper payment.

Changes in employers

The Draft Rules seek to accommodate situations where an individual has been employed by a business that changed ownership on or after 1 March 2019.

This is primarily relevant for long-term casual employees who must demonstrate regular and systematic employment over a 12-month period: broadly such an employee will satisfy the 12-month test if they have been employed by wholly-owned entities within the same corporate group, or where the individual has worked in the same business even though ownership changed during the 12-month period.

No guidance is provided on what constitutes regular and systematic employment.

Anti-avoidance regime

The Payments and Benefits Act includes an anti-avoidance regime. It appears that the Commissioner is entitled to make a subjective determination where the Commissioner is satisfied of the existence of a scheme (within the meaning of the *GST Act*).[18] A scheme will arise if an entity, in effect, enters into an arrangement under which it receives a JobKeeper payment (or a larger JobKeeper payment) which, but for the arrangement, it would not receive.

There are some technical issues with the formulation of the anti-avoidance regime, along with its breadth and subjectivity. These will likely need addressing in order to ensure that actions which, for example, result in Eligible Employees being re-hired or conditions of employment varied in order to attract the operation of the subsidy are not treated as a scheme for this purpose.

15 See Draft Rules s 9(4).
16 Draft Rules s 6(4).
17 Draft Rules s 9.
18 Payments and Benefits Act s 19.

Accessing the JobKeeper Program

How are corporate groups treated?

The position is not yet clear.

Aggregated turnover

Earlier fact sheets released by Treasury indicated that what is now described as 'aggregated turnover' for an entity (i.e. whether above or below $1 billion) would be determined by reference to turnover of a tax consolidated group.[19] For example:

> *… if at the time of applying ... their business has an annual turnover of $1 billion or more (or is a part of a consolidated group for income tax purposes with turnover of $1 billion or more) and …*

And:

> *If a business is part of a consolidated group for income tax purposes, with a turnover of more than $1 billion, the 50 per cent or more turnover test will apply to each business in that consolidated group If the consolidated group has turnover of less than $1 billion, the 30 per cent or more turnover test is applied to each business in that consolidated group. Individual businesses within a consolidated group may be eligible for the JobKeeper payment while other businesses in the group may not be eligible.*

However that approach is not reflected in the first iteration of the Draft Rules.

As indicated above, no particular meaning is given to an "entity's aggregated revenue" for the purposes of determining whether a 30% or 50% decline in turnover test applies. Until that is clarified an entity will not be able to definitively conclude whether the turnover of parents (including offshore parents), wholly-owned group members, controlled-group members or non-controlled affiliates should be taken into account.

Clarity is required.

Entity approach

On its face, availability of the Program is restricted to an entity that employs an individual and itself suffers a decline in turnover. Whereas earlier fact sheets referred to a 'business' experiencing a decline in turnover,[20] the Draft Rules refer only to an entity.

Accordingly, the initial formulation of the Draft Rules does not contemplate complex corporate or organisational structures; for example, where an employing entity does not itself generate sales or supply services for GST purposes or where complex sales structures are utilised.

The approach may also not accommodate COVID-19 impacts on organisations that operate through divisions,for example, where an entity (say a company) operates different businesses within a divisional structure, some of which suffer a decline in projected GST turnover in respect of some operating divisions while others do not. Unless the company's overall turnover is impacted by the requisite threshold the Program will not be available in respect of impacted employees or business units.

The current approach reflected in the Draft Rules suggests that, for a corporate group with many operating subsidiaries, eligibility must be assessed for each individual entity.

The approach of assessing individual turnover impacts on entities within a group structure arguably does not respond to the fact that many groups are, from both economic and liability perspectives, an integrated whole. For example, groups which are subject to an ASIC Deed of Cross Guarantee in which there is joint and several liability across the group in particular circumstances.

As indicated above, there is a question whether the flexibility afforded to the Commissioner under the Draft Rules would allow the development of alternative tests to accommodate complex structures in order to preserve the Government's intention that businesses that suffer revenue declines can receive the wage subsidy. Ideally the ability to determine an alternative test would be broader than currently expressed.

19 See for example, Department of the Treasury – 'JobKeeper Payment – Information for employers' (5 April 2020).
20 See for example, Department of the Treasury – 'JobKeeper Payment – Information for employers' (5 April 2020).

What information needs to be provided to the ATO?

In the usual course an entity will have to provide evidence to the ATO to establish that it has incurred or faces either a 15, 30 or 50 % decline in turnover compared to a comparable period in 2019. In assessing this the ATO will consider past business activity statements.

For new businesses that do not have a 12-month operating period, or where turnover a year earlier was not representative of their usual or average turnover, the Commissioner will have discretion to assess other information that proves the organisation has been similarly impacted by COVID-19.

It is likely employers will need to provide the following information to the ATO for assessment as a Qualifying Employer:

- the number of Eligible Employees employed by the business;
- the relevant period in 2020 where the decline in turnover has occurred or is likely to occur (from 1 March and of at least one month);
- turnover for what is most appropriately considered a corresponding period in 2019; and
- evidence of the change in revenue between the 2019 and 2020 period.

It does not appear that an application must establish, or provide evidence of, a direct causal link between the decline in turnover and COVID-19.

On the information available it appears that the ATO will make a determination as to whether the eligibility criteria are satisfied.

Implementing the JobKeeper Program

When do payments need to be made?

The ATO will reimburse Qualifying Employers a fortnightly payment of $1,500 (before tax) per Eligible Employee. The JobKeeper payments will be payable by the ATO for each fortnight during the JobKeeper Period. First payments will reach Qualifying Employers in May.[21]

In order to access the reimbursement, a Qualifying Employer must first pay Eligible Employees at least $1,500 (before tax) if they were employed at any time in a JobKeeper fortnight.[22] This payment from the employer to the employee of at least $1,500 is described in the Draft Rules as the 'wage condition'.

How much should I pay each employee?

If an Eligible Employee ordinarily receives $1,500 or more in income per fortnight before tax, they will continue to receive their regular income according to their prevailing workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of their employee(s).

Worked Examples

If an Eligible Employee ordinarily receives less than $1,500 in income per fortnight before tax, their employer must pay that employee, at a minimum, $1,500 per fortnight, before tax.

If an Eligible Employee has been stood down, their employer must pay them, at a minimum, $1,500 per fortnight, before tax.

If an Eligible Employee was employed on 1 March 2020, subsequently ceased employment with their employer, and then has been re-engaged by the same Qualifying Employer, the employee will receive, at a minimum, $1,500 per fortnight, before tax.

Qualifying Employers will still be required to pay superannuation guarantee contributions based on the usual wages of any Eligible Employees and have discretion to determine if they want to pay superannuation on any additional wage paid because of the JobKeeper payment.

Worked Examples – Superannuation

If an Eligible Employee usually receives $2,500 per fortnight, they will continue to receive $2,500 per fortnight and the Qualifying Employer will continue to be required to pay a superannuation guarantee contribution for that Eligible Employee based on the full $2,500.

If an Eligible Employee usually receives $1,100 per fortnight, they will now receive $1,500 per fortnight and the Qualifying Employer will continue to be required to make a superannuation guarantee contribution based on the usual wage of $1,100 per fortnight.[23] We assume the same position will apply to casual employees.

21 Draft Rules s 15.
22 Draft Rules s 6(1)(d), 10.
23 We assume the same position will apply for casual employees.

The JobKeeper Program requires employers to adhere to a 'Minimum Payment Guarantee', which if breached, may incur a civil penalty. The guarantee means employers must at minimum pay Eligible Employees the jobkeeper payment amount ($1,500 before tax) or the amount payable to the employee under their usual contractual obligations, if it is a higher amount.

This means that an employee's terms of employment are not changed as a result of this Program. If under an industrial instrument or contract of employment an employee is paid more than $1,500 a fortnight, an employer is still liable to pay that amount. The JobKeeper payment will subsidise part of that cost.

The JobKeeper Program does not permit an employer to renegotiate salaries other in accordance with the relevant provisions of the FW Act. As discussed in our recent publication, if an employer is unable to sustain wage or salary payments at their current rate (even with the assistance of the JobKeeper payment), it may attempt to renegotiate salaries and working hours with their employees as an alternative to standing down those employees.

What if I am not sure whether the entity or an employee is eligible?

The ATO has been given the discretion to provide payments for the first two JobKeeper fortnights (30 March – 26 April) without being satisfied that the entity is a Qualifying Employer.[24] However, this provision protects the ATO (and not necessarily the employer) from risk if, in fact, an employer applied and was not eligible.

The Commissioner has flexibility to address issues where employers have made an honest mistake and did not retain any personal benefit from an overpayment they received.[25]

It is unclear from the Draft Rules whether employers can abstain from paying the $1,500 (before tax) per fortnight whilst they seek confirmation from the ATO on whether they are a Qualifying Employer. It is not clear whether the ATO would subsequently provide back payment from 30 March 2020 if the employer was deemed eligible after that reporting period had come to an end.

Accurate report keeping and communication with the ATO is vital for employers to reduce the risk of incurring overpayments for periods where an employee or employer was not eligible.

What information needs to be provided to my employees?

Qualifying Employers will be obliged to inform employees that their wages are being subsidised as part of the Program and submit monthly information (a week before the end of each month) to the ATO in order to continue receiving the payments.

A Qualifying Employer must notify an Eligible Employee within seven days of providing the employee's details to the ATO.[26]

Public disclosure – do I need to notify shareholders?

Neither the *Payment and Benefits Act* nor the Rules require an entity to report publicly that it is accessing the Program. Further, information acquired by the Commission under the *Payments and Benefits Act* will be subject to the confidentiality obligations and exceptions in Division 355 in Schedule 1 to the *Taxation Administration Act 1953*. This is because the Commissioner has the general administration of the *Payments and Benefits Act*, under section 5, and as a consequence the *Payment and Benefits Act* will be a taxation law within the meaning of the *Taxation Administration Act*.

For listed companies ongoing continuous disclosure obligations will dictate whether and how disclosure to the market should occur. However, clearly such an entity should not access the Program without appropriately having updated the market about the revenue impacts of COVID-19.

Do any conditions come with the JobKeeper Program?

Unlike other jurisdictions that have introduced similar wage subsidy initiatives (in particular, the UK's Coronavirus Job Retention Scheme[27] and the Coronavirus Aid, Relief, and Economic Security Act[28] in the US), so far availability of the Program does not appear to be highly conditioned – other than in respect to the initial eligibility requirements (although the *Payments and Benefits Act* allows the Rules to impose further conditions). For example:

- no restrictions are imposed on the manner in which the entity operates (for example, payment of bonuses to executives, distributions to shareholders and the like);
- Eligible Employees accessing the Program do not appear to be restricted from terminating employees during or after the JobKeeper Period; and
- no implications arise if the entity moves into liquidation or bankruptcy during the JobKeeper Period.

24 Draft Rules s 14(3).

25 Explanatory Memorandum to the *Payments and Benefits Act*, para 2.30.

26 Draft Rules s 6(4).

27 Government of the United Kingdom, *Guidance – Claim for your employees' wages through the Coronavirus Job Retention Scheme* (last updated 4 April 2020).

28 *Coronavirus Aid, Relief, and Economic Security Act* H.R.748.

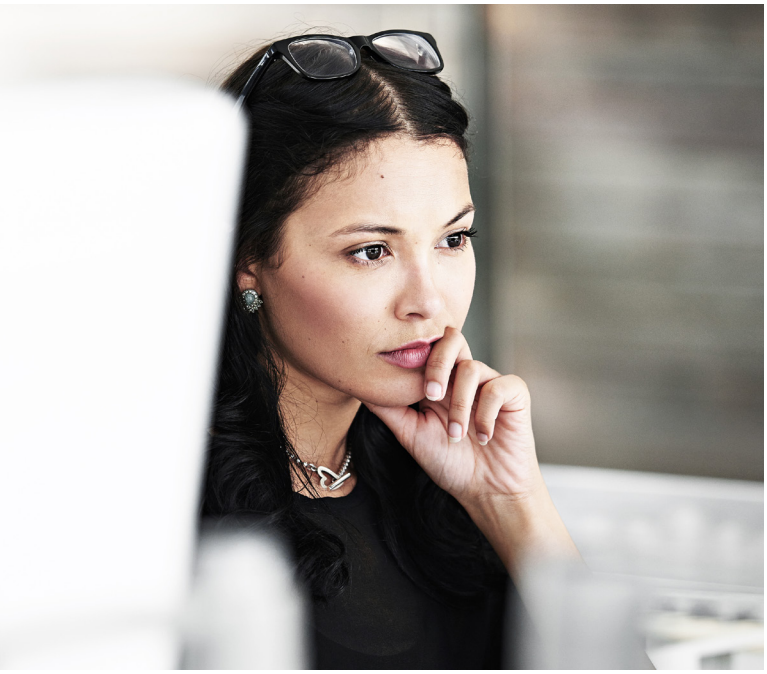
Industrial implications

How will this affect existing obligations under employment contracts, modern awards or enterprise agreements?

The *Omnibus Act* amends the *FW Act*, on a temporary basis, to authorise Qualifying Employers to issue two forms of 'JobKeeper enabling directions' and agree to flexible work arrangements despite any limitation under a 'designated employment provision' (being a provision of the *FW Act*; an applicable modern award or enterprise agreement or a 'transitional instrument').

By these amendments, a Qualifying Employer is authorised, to:

- give a direction to work fewer days or hours to an employee who cannot usefully be employed for the employee's normal days or hours ('a JobKeeper enabling stand down');
- give a direction to an employee about the nature of the employee's duties, within their skill and competency[29] or to perform duties at a place different from their normal place of work, including the employee's home;[30]
- agree to an employee working different days or at different times compared with the employee's ordinary days or times of work;[31] and
- agree to an employee taking paid annual leave, including at half pay.[32]



'JobKeeper enabling stand-down direction'

The FW Act has been amended to include an additional basis on which Qualifying Employers can lawfully direct employees to 'stand down' from the commencement of the *Omnibus Act* to the end of the JobKeeper Period.

The *Omnibus Act* provides that a Qualifying Employer may give a 'JobKeeper enabling stand down direction' to an employee (including to reduce hours of work).[33]

This can be triggered on one or more occasions where the employee cannot be usefully employed for the employee's normal days or hours during the JobKeeper enabling stand-down period because of changes to business attributable to:

- the COVID-19 pandemic; or
- government initiatives to slow the transmission of COVID-19.

Employers seeking to rely on this as a basis for standing employees down will need to demonstrate a link between the COVID-19 pandemic (or government initiatives) and 'changes to the business'. Critically employers will also need to demonstrate that those employees being directed to stand down cannot otherwise be usefully employed. In undertaking this assessment employers should carefully consider their ability to direct employees to perform alternative duties and at a different location as part of these amendments.

During a period of stand down pursuant to this amendment, employers must:

- continue to satisfy the 'wage condition' under the Rules;
- pay an Eligible Employee not less than the JobKeeper payment or the amount payable (inclusive of any loadings, allowances and penalties) in relation to the performance of work in a fortnight;[34] and
- ensure that the employee's base rate of pay (worked out on an hourly basis) is not less than the base rate of pay (worked out on an hourly basis) that would have been applicable to the employee if the direction had not been given to the employee.

29 FW Act s 789GE.
30 FW Act s 789GF.
31 FW Act s 789GG.
32 FW Act s 789GJ.
33 FW Act s 789GDC.
34 FW Act s 789GDA.

A Qualifying Employer is not otherwise required to pay other entitlements that may otherwise be payable.[35]

Qualifying Employers are not required to make superannuation guarantee contributions on any JobKeeper payments made to Eligible Employees who have been stood down without pay.

If the stand down direction is for a reduction in hours, and the Eligible Employee is still receiving a portion of their wage, the Qualifying Employer will continue to be liable for the amount of superannuation guarantee contribution that they would ordinarily have been required to pay for each Eligible Employee for the number of hours worked.

Employers who are not Qualifying Employers may only rely on section 524 of the *FW Act* or an express provision in an industrial instrument or contract of employment to lawfully stand down employees.

Direction to alter an employee's duties or usual place of work

The second set of 'JobKeeper enabling directions' authorise Qualifying Employers to direct Eligible Employees to perform alternative duties or duties at a location other than at their normal place of work.[36]

A Qualifying Employer may direct an employee to perform duties other than duties an employee would normally be required to perform if:

- the duties are safe (having regard, without limitation, to the nature and spread of COVID-19);
- the employee is licensed and qualified to perform the duties (if a licence or qualification is necessary); and
- the duties are reasonably within the scope of the employer's business operations.

A Qualifying Employer may direct an employee to perform duties at a place (including the employee's home) that is different from the employee's normal workplace, provided:

- the place is suitable for the employee's duties;
- if the place is not the employee's home – it does not require the employee to travel a distance that is unreasonable in all the circumstances (including those surrounding the COVID-19 pandemic); and
- performance of the employee's duties at the place is safe, having regard (without limitation) to the nature and spread of COVID-19, and is reasonably within the scope of the employer's business operations.

These directions must be adhered to unless they are unreasonable in all the circumstances.

Validity of 'JobKeeper enabling directions'

For a 'JobKeeper enabling direction' to be valid:

- an employer must give written notice of its intention to give the direction at least three days in advance of giving the direction to an employee;[37]
- an employer must consult with an employee (or a representative of the employee) before giving the direction;[38]
- the direction to stand down must be in writing;[39]
- in giving the direction to stand down, an employer does not need to specify the duration of the period of stand down.

Amendments to days of work

The third group of changes provides increased flexibility in relation to an Eligible Employee's days and times of work.

The changes give an employer the power to make a direction for employees to change an employee's usual working days and/or times of work providing it does not change the employee's ordinary hours of work.[40]

Although couched in terms of 'agreement' the effect of this amendment is that an employee has limited capacity to refuse the employer's reasonable request.

The capacity to issue such directions is subject to a number of qualifications:

- changes must be by mutual agreement;
- consultation with the employee (or their representative) is required;
- the employee must consider the request and cannot unreasonably refuse it;[41]
- the employer cannot make a direction if it is unreasonable in all of the circumstances; and
- the change in days or hours must be safe (having regard to the nature and spread of COVID-19) and reasonably within the scope of the employer's business operations.[42]

Where the employee and employer reach agreement, this should be recorded in writing.

35 FW Act s 789GDC(2).
36 FW Act ss 789GE and 789GF.
37 FW Act s 789GM(1)(a)-(b).
38 FW Act s 789GM(1)(c).
39 FW Act s 789GN.
40 FW Act s 789GG(2)(d).
41 FW Act s 789GG(1).
42 FW Act s 789GG(2)(c).

Requirement to take Annual Leave

The changes relating to annual leave give increased flexibility in relation to paid annual leave entitlements.[43]

Qualifying Employers can direct an Eligible Employee to take paid annual leave (provided that the employee is not left with a balance of fewer than two weeks leave).

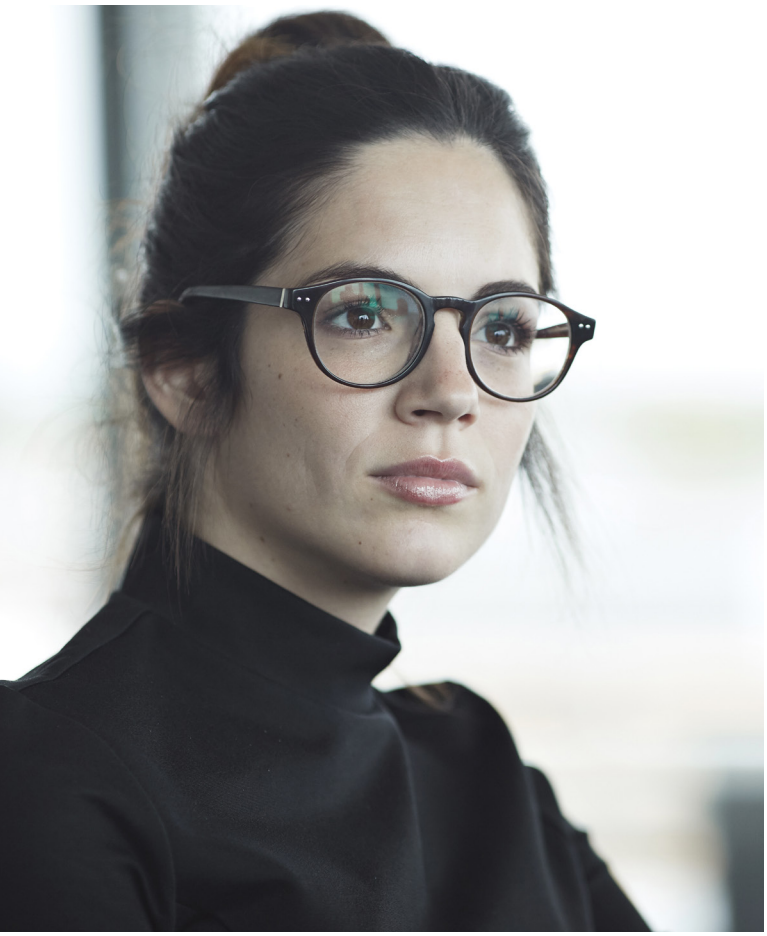
An employee may take twice as much annual leave, at half pay, if the period includes or consists of an eligible JobKeeper fortnight and the agreement is in writing. This agreement will stand despite any conflicting fair work instrument or contract of employment.

Similarly to the other changes, consultation is required. The direction must not be unreasonable and the employee must consider the request and not unreasonably refuse it.

Consultation continues to apply

A Qualifying Employer must consult with affected employees (or their representative) prior to implementing any JobKeeper enabling direction.[44]

Consultation obligations in applicable industrial instruments may also be enlivened by an employer's direction in accordance with these amendments to the *FW Act*.



Disputes about application of the Program during the JobKeeper Period

The *FW Act* has been amended to vest the Fair Work Commission (**FWC**) with jurisdiction to 'deal with' disputes about the operation of the provision. This includes the power to arbitrate and make orders in relation to disputes about the operation of the provisions included by the Omnibus Act.[45]

Applications to the FWC can be made by employers, employees and representative organisations.

Penalties for misuse of the JobKeeper Program

Provision	Penalty
Obligation of employer to satisfy the wage condition (s 789GD)	$12,600 $126,000 for serious contraventions
Obligation of employer to satisfy the minimum wage guarantee (s 789GDA(2))	$12,600
Minimum hourly rate of pay guarantee during stand down (s 789GDB(2))	
Minimum hourly rate of pay guarantee for duties of work (s 789GDB(3))	
Employer's obligation to consider employee's request for secondary employment, training or professional development (s 789GU)	
Contravention of a FWC order dealing with a dispute under Part 6-4C Coronavirus economic response (s 789GW)	
Misuse of jobseeker enabling direction (s 789GXA)	$126,000

Automatic Repeal

The Omnibus Act provides that these amendments are to be automatically repealed on 28 September 2020.

43 FW Act s 786GJ.
44 FW Act s 789GM(1)(c).
45 FW Act s 789GV.

Common questions

My entity is not currently eligible based on the turnover test. Can I apply for the Program if circumstances change and the entity becomes eligible at a later point in time?

Employers can apply for the payment if they reasonably expect that their turnover will fall by 30% (or 50% or more for entities with a turnover of $1 billion or more) relative to their turnover in a corresponding period a year earlier.[46]

If an entity does not meet the decline in turnover test at the start of the Program on 30 March 2020, the entity can start receiving the JobKeeper payment at a later time once the decline in turnover test has been met. In this case, the JobKeeper payment is not backdated to the commencement of the Program.

We note that the Commissioner may, by legislative instrument, determine that an alternative turnover test applies to a class of entities, if they are satisfied there is no appropriate relevant comparison period.[47]

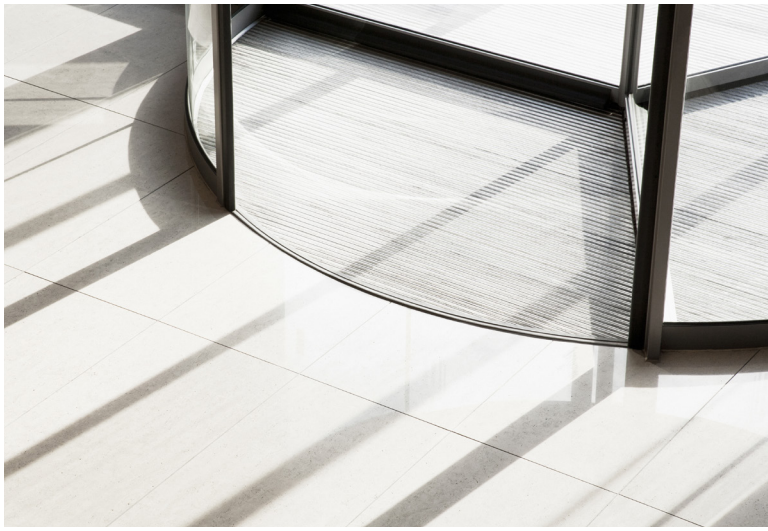
The Government has also stated the ATO will provide further guidance to assist employers with determining whether they meet the decline in turnover test. This guidance will provide clarification surrounding circumstances that 'do not fit neatly into more general circumstances that the majority of businesses are in'.

I have already stood down part of my workforce – do I need to pay them for the period from 30 March 2020?

If a Qualifying Employer elects to be part of the JobKeeper Program, they will be required to pay all Eligible Employees $1,500 (before tax) per fortnight (including those who have been stood down or rehired as of 1 March 2020).[48]

If the Qualifying Employer elects to be part of the JobKeeper payment for the 30 March 2020 to 12 April reporting period, they will be required to pay stood down workers at least $1,500 (before tax) per fortnight.

However, the Qualifying Employer will not be required to back pay Eligible Employees for the period prior to 30 March 2020.



It is unclear from the Draft Rules whether employers can abstain from paying the $1,500 (before tax) per fortnight to stood down employees whilst they seek confirmation from the ATO on whether they are a Qualifying Employer. It is not clear whether the ATO would subsequently provide back payment from 30 March 2020 if the employer was found to be eligible after that reporting period had come to an end.

However, the Government has stated the ATO will provide further guidance to assist employers with determining if they meet the decline in turnover test. This guidance will provide clarification surrounding circumstances that 'do not fit neatly into more general circumstances that the majority of businesses are in'.

Do I need to rehire workers who have been made redundant since 1 March 2020?

The object behind the JobKeeper Program is to encourage employers who have made staff redundant due to the COVID-19 pandemic, to retain or rehire their employees.

However, there is no express requirement in the legislation or the Draft Rules to rehire employees made redundant since 1 March 2020.

Do I have to provide work to employees who have been stood down since 1 March 2020?

In announcing the JobKeeper Program, Prime Minister Scott Morrison said, "if you're an employer who's been forced as a result of the downturn following the coronavirus to retrench workers, you'll put them back on your books and you'll receive this $1,500 payment".

Under the Draft Rules and the Payments and Benefits Act, there is no requirement for employers to provide work to employees who have been stood down. Provided that the employees are kept 'on the books', they will be entitled to the JobKeeper payment.

46 Draft Rules s 9.
47 Draft Rules s 8(5).
48 Draft Rules s 13.

Will some employees receive more than they currently earn as wages under the Program?

Yes, the JobKeeper Program is not a 'pure' subsidy. The Program incorporates a 'minimum payment guarantee' of $1,500 (before tax) per fortnight to all Eligible Employees including those who might usually be paid less than $1,500 a fortnight by a Qualifying Employer (e.g. casual workers and part-time employees who have been stood down).

Employers are not required to pay superannuation or other entitlements (such as annual leave accruals) on any amount that is in excess of an employee's statutory or contractual entitlements.

Can employment be terminated if a Qualifying Employer is in receipt of the JobKeeper payment?

There is no indication that the JobKeeper Program will affect an employer's right to terminate a contract of employment with notice or for cause. Further, the laws relating to unfair dismissal and general protections under the *FW Act* continue to operate.

In the event that a Qualifying Employer undertakes a restructure during the period, it may consider placing an employee whose job would otherwise be made redundant on a form of special leave (payable at the JobKeeper payment rate).

For compliance purposes, Qualifying Employers should update the ATO where the employment of an Eligible Employee ends, and specify the exact date when the former employee's salary will cease.

The ATO has the ability to recover any amount (plus interest) from the Qualifying Employer for any JobKeeper payments made for periods when the former employee was no longer eligible (for example if the employment ends during a 'JobKeeper fortnight'). Entities can be held joint and severally liable for any overpayments.[49] However, as mentioned above, the ATO will have discretion where a 'Qualifying Employer' may have made an 'honest mistake'.[50]

What if I don't have sufficient liquidity to pay employees $1,500 per fortnight between now and May when the JobKeeper subsidies are paid to me?

Qualifying Employers who face difficulties paying Eligible Employee wages before May 2020 are advised to discuss their options with their bank. Banks have indicated that Qualifying Employers may be able to use their upcoming JobKeeper payments as grounds to seek additional credit until the first JobKeeper payments commence in May 2020.

What records am I required to keep to access JobKeeper?

A Qualifying Employer has record keeping obligations that apply prior to and after payment of the JobKeeper payment.[51] The Commissioner is yet to indicate the specific form these records should take. Generally, employers must create and retain records substantiating information provided to the ATO in relation to the JobKeeper payment. This includes keeping records of adhering to consultation, notification and nomination requirements.

Resources

- ATO portal
- Treasury information: JobKeeper Payment – Information for employers

49 Payments and Benefits Act s 9-11.
50 Explanatory Memorandum to the Payments and Benefits Act, para 2.30.
51 Draft Rules s 16.

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