

COVID-19: (AUSTRALIA) JOBKEEPER LEGISLATION – HOW DOES IT CHANGE THINGS?

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**This information is accurate as of 9.00 am Thursday 9 April 2020 and is subject to change as this situation evolves.*

The Federal Parliament yesterday approved a suite of legislation to implement the Coronavirus financial packages announced in recent weeks. One of the key packages is the JobKeeper scheme aimed at supporting employers and employees to stay connected throughout the restrictions put in place due to the coronavirus and ensuring the continued employment of employees.

To support the operation of the JobKeeper scheme, a number of changes have been made to the Fair Work Act. We have set out the key changes below and will continue to provide updates as new guidance materials become available.

A cautionary note - the new ability to issue directions standing down employees and varying duties and hours of work in accordance with the amending JobKeeper legislation applies only to employers who meet the deduction in turnover test (currently 30% for business with a turnover up to A\$1 billion, 50% for those employers with a turnover in excess of A\$1 billion and 15% for registered charities).

Further, much of the detail of how the JobKeeper Payment will be administered in practice will be the subject of Treasury Rules which had been produced and issued but yesterday were removed from the Treasury website. On that basis, there is uncertainty around some key aspects of the reforms. Our comments below about eligibility to participate in the scheme are based upon fact sheets and FAQs previously provided by Treasury.

What are the changes?

The changes to the Fair Work Act are broad sweeping and importantly **temporary**. They are available only to eligible employers until 27 September 2020.

The changes allow employers to issue a **direction** (referred to as a JobKeeper Enabling Direction) to an employee in relation to:

- the employee being stood down from all work;
- the employee working reduced hours;
- the duties performed by the employee; and
- the location the employee performs the work.

The changes also allow an employer and employee to reach an agreement regarding:

- the days or times at which an employee performs work; or

- the employee taking annual leave, including at half pay.

Can a JobKeeper Enabling Direction be issued without the employee's consent?

Yes. An employer can direct an employee to work reduced hours (including not working at all), to perform different duties, and to work at a different location without the consent of the employee.

However, the legislation does provide for certain safeguards including issuing a written notice and consulting with employees before issuing directions. Further, any direction must not be unreasonable in all the circumstances.

In the case of a direction given by an employer regarding the duties to be performed by an employee, or the location of the employee's work, the direction must be reasonably necessary to continue the employee's employment.

The Fair Work Commission is able to deal with the disputes regarding JobKeeper enabling directions by arbitration. The Fair Work Commission may order anything it considers appropriate to deal with the dispute, include that the JobKeeper enabling direction be given effect, be substituted for another direction, or be set aside.

What do I pay employees who are stood down or working reduced hours?

Employers are effectively required to pay no less than either the JobKeeper payment of A\$1,500 per fortnight, or the minimum payments that an employee is entitled to under their employment contract, award or enterprise agreement during the fortnight. That is they should pay the amount which is greater.

This means that an employee working reduced hours who is entitled to be paid more than A\$1,500 per fortnight, should receive their reduced hours salary.

An employee who is on reduced hours who, taking into account their reduced hours, will earn less than A\$1,500 per fortnight, will need to receive a top up payment so that the total payment received is A\$1,500 per fortnight.

The period that an employee is subject to a JobKeeper direction is counted in calculating an employee's service and the employee continues to accrue their leave entitlements during this time.

Who are eligible employers?

Treasury guidance states that an employer will qualify for the JobKeeper scheme if on 1 March 2020 the employer carried on a business in Australia, or was a not-for-profit body pursuing its objectives principally in Australia and has satisfied the decline in turnover test. Sole traders will also be eligible, if they themselves are the business entity.

The scheme will apply to all businesses with an annual turnover of less than A\$1 billion who have experienced, or are projected to experience, a fall in turnover (of at least a month) by 30% or more.

Businesses (or consolidated groups of businesses) with an annual turnover of more than A\$1 billion must experience, or be projected to experience, a reduction in turnover of 50% or more.

Charities registered with the Australian Charities and Not-For-Profit Commission* will be eligible for the subsidy if they experience a reduction in turnover of 15% or more.

Business Size

Turnover Reduction Threshold

Turnover less than A\$1 billion	≥30%
Turnover exceeding A\$1 billion	≥50%
Charity registered with ACNC	≥15%

Employers excluded from the scheme include government agencies, local governing bodies and entities which have had a liquidator appointed.

**ACNC registered charities who are a school, or a Table A or Table B provider are not eligible.*

Who are eligible employees?

To be eligible to receive the JobKeeper payment, an employee must satisfy the following requirements:

- have been employed as at 1 March 2020
- be 16 years and over at 1 March 2020
- be a full time, part time or long term casual employee
- an Australian citizen, permanent resident or the holder of a Special Category (subclass 444) visa at 1 March 2020, and
- were a resident for Australian tax purposes on 1 March 2020.

Treasury guidance includes notification requirements which require the employee to give their employer a notice confirming that they satisfy the requirements of the scheme applicable to them.

What is a long term casual employee?

Treasury guidance states that a long term casual is an employee who has been employed as a casual for at least 12 months at as 1 March 2020 on a regular and systematic basis.

Accordingly, employers will need to assess whether or not their casual employees can properly be characterised as "regular and systematic". It is important to note that if an employer commences making payments to casual employees to satisfy JobKeeper requirements and those employees are not in fact employed on a regular and systematic basis, the employer may not be eligible to receive the JobKeeper payment for those employees.

What is the duration of the scheme?

The scheme will run from 30 March 2020 and end on 27 September 2020.

When do payments take effect?

The government will make payments to employers shortly after the end of each calendar month for fortnights ending in that month. Payments will commence in the first week of May 2020.

What are the notification requirements?

To participate in the JobKeeper scheme from 30 March 2020, an employer must have notified the Australian Taxation Office by the end of the second JobKeeper fortnight, that is, by 26 April 2020.

When do payments need to be made to employees?

Treasury guidance states that the payment to employees (referred to as a wage condition) must be made "in the fortnight" for which an employer wishes to receive the JobKeeper Payment. It appears there will not be much flexibility around this requirement. However as the Rules have not yet been finalised this requirement may change at least for the first JobKeeper fortnight which ends on 12 April 2020.

What if I don't meet the turnover requirements now but will at some time before 27 September 2020?

Employers are entitled to receive JobKeeper payments for any fortnight that they meet the eligibility requirements, including the turnover reduction requirements

What if I will not meet the turnover requirements at any time?

It is very important that employers who are not eligible for the JobKeeper scheme understand that the ability to direct employees to work reduced hours and accept reduced pay does not apply to them. They should ensure that any changes to employment conditions are made by consent.

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