

# JobKeeper Payment

## Employer Guide

A brief employer guide to the new Federal Government JobKeeper wage subsidy

April 2020



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# Introduction

## JobKeeper Payment

### Quick Employer Guide



The novel coronavirus (COVID-19) pandemic has drastically shifted the course of life across the globe in 2020. As well as the global health crisis, each country now faces an economic one.

In Australia, the Federal Government has rolled out a suite of financial stimulus packages to buoy the Australian economy where possible and support employers, employees and those that now find themselves out of work.

The latest tranche of financial support described by the Prime Minister as “the biggest economic lifeline in Australia’s history” is aimed at preserving the employer-employee relationship, keeping more businesses in business and more people in jobs.

The \$1,500 per fortnight JobKeeper payment announced on Monday, March 30, will be paid directly to employers to help them keep staff on the books.

**ACCI has prepared this guide on the JobKeeper payment, which seeks to explain and answer some of the more common questions employers may have around the payment scheme.**

Employers should at all times be conscious of their particular legal obligations applicable under the Fair Work Act 2009, their respective State and Territory WHS legislation and workers compensation legislation, as well as enterprise agreements, awards, contracts and policies and should seek further advice where necessary.

*The content of this publication has been prepared based on material available to date (14 April 2020). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry accepts no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.*



# 1. Eligibility criteria

JobKeeper is the new Federal Government wage subsidy payment which will enable eligible employers to access a subsidy to continue paying their employees. Legislation giving effect to the JobKeeper payment was passed by Parliament on 8 April 2020.

The JobKeeper Payment (not to be confused with JobSeeker Payment) allows eligible employers who elect to participate in the scheme to claim a **fortnightly payment of \$1,500, before tax for each eligible employee** to subsidise their wage, from 30 March to 27 September 2020.

Employers do not have to be part of JobKeeper for the whole duration of the program. Employers can join at any time provided the employer submits the approved forms prior to the end of the relevant fortnightly period from which they intend to participate (see 1.1.7).

The full amount of the JobKeeper Payment, before tax, **must be** passed from employer to employee each fortnight or the business owner will face stiff penalties.

The first JobKeeper Payment will be reimbursed by the ATO from the **first week in May** but will be **backdated to 30 March 2020**.

## 1.1 Employer Eligibility Criteria

In order to receive the JobKeeper Payment **both** an employer and employee (or business participant) must meet the eligibility criteria (set out below).

### 1.1.1 Am I an eligible employer for the JobKeeper Payment?

**Eligible employers are businesses** carrying on business in Australia (including companies, partnerships, trusts, sole traders, partnerships, unincorporated associations and individuals) and not for profits:

- with an aggregated turnover of less than \$1 billion (for income tax purposes) whose turnover has fallen or will likely fall by more than 30% (of at least one month); **OR**
- with an aggregated turnover of \$1 billion or more (for income tax purposes) whose turnover has fallen or will likely fall by more than 50% (of at least one month).

**Registered charities** with the Australian Charities and Not-for-profits Commission (excluding universities and non-government schools) are eligible employers if they estimate their turnover has fallen or will likely fall by more than 15% (of at least one month).

A business **ONLY** need to satisfy the applicable fall in turnover test once – employer do not need to retest turnover each month.

Big banks subject to the Major Bank Levy, Australian government agencies, local governing bodies and sovereign entities are **not eligible**.

**Aggregated turnover** is an entity's annual turnover from carrying on a business plus the annual turnover from carrying on a business of any business or individual connected with or affiliated with the entity (whether based in Australia or overseas).

### 1.1.2 How is 'turnover' defined?

Turnover is calculated as it is for GST purposes and is reported on Business Activity Statements (BAS). It includes all taxable supplies and all GST free supplies but not input taxed supplies.

For registered charities, they may also include donations they have received or are likely to receive in their turnover for the purpose of determining if they have been adversely affected.

Only Australian based sales are included and therefore, only Australian based turnover is relevant for this test. A decline in overseas operations will not be counted in the turnover test.

### 1.1.3 How does an employer establish a % fall in turnover (30%, 50% or 15%)?

Most businesses are expected to be able to establish that their turnover has fallen or is projected to fall in the relevant month or quarter relative to their turnover a year earlier in 2019. For example projected GST turnover for April 2020 with GST turnover for April 2019.

However where a business or not-for-profit's turnover a year earlier is not representative of their usual or average turnover, (e.g. because there was a large interim acquisition or their turnover is typically highly variable) the Tax Commissioner will have discretion to consider additional information that the business can provide to establish that they have been significantly affected by the impacts of COVID-19.

The Tax Commissioner will also have discretion to set out alternative tests that would establish eligibility in specific circumstances (e.g. eligibility may be established as soon as a business has ceased or significantly curtailed its operations).

There will also be some tolerance where employers, in good faith, estimate a greater than 30 % (or 50%) fall in turnover but actually experience a slightly smaller fall.

#### **1.1.4 How does the turnover test apply to corporate groups or connected/affiliated businesses?**

The turnover test that will apply (15%, 30% or 50%) will be determined by the aggregate turnover of the businesses.

However, once the relevant test is determined, testing the decline in turnover is done on an individual employer entity basis. It only takes into account the turnover of the entity which is the employer, and not other members of a group.

#### **EXAMPLE – Corporate Group Turnover Test**

Eastfarmers is a large corporate group comprising of a number of businesses including Doles, a supermarket, Workoffice, an office supplies business and Jmart, a discount department store retailer.

The aggregate turnover of Eastfarmers is more than \$1 billion, so the 50% turnover test will apply to Eastfarmers and the businesses within the corporate group in order for them to be eligible for JobKeeper.

- Doles, the supermarket in the Eastfarmers group has been trading well during the pandemic selling food and groceries and so will not meet the 50% reduction in turnover test.
- Workoffice has similarly seen an increase in trade as more people work from home and so will also not be able to meet the 50% reduction in turnover test.
- Jmart, however has seen a significant reduction in consumer spending on its retail products. It is able to show more than a 50% reduction in turnover for the month of March compared to March 2019. As a result, Jmart will be eligible to receive the JobKeeper payment for its eligible employees.

#### **1.1.5 What if my business has been trading for less than 12 months?**

Where a business or not-for-profit has not been in operation for a year and therefore will have an issue showing that turnover has fallen relative to a year earlier, the Tax Commissioner will have discretion to consider additional information that the business or not-for-profit can provide to establish that they have been significantly affected by the impacts of COVID-19.

#### **1.1.6 What if my turnover has not yet decreased, but I believe it will in the coming month?**

Employers can apply for the JobKeeper Payment if they reasonably believe their turnover will fall by 30% (or 50%) relative to turnover in a corresponding period a year earlier.

The ATO will be providing guidance on doing such a self-assessment of anticipated falls in turnover.

#### **1.1.7 What if my turnover is likely to decrease later in the year?**

Businesses can apply for the JobKeeper Payment at a later time once the turnover test has been met. In this scenario, the JobKeeper Payment is paid from the date an employer becomes eligible (not backdated to the commencement of the scheme). JobKeeper Payments can be received up to 27 September 2020.

#### **1.1.8 What about businesses in liquidation or bankrupt?**

Businesses that are in liquidation are not eligible for JobKeeper.

Partnerships, trusts or sole traders in bankruptcy are not eligible for JobKeeper.

#### **1.1.9 What about partnerships?**

In a partnership ONLY one person can be nominated (as the entrepreneur) to receive the JobKeeper allowance, along with any eligible employees, noting a partner cannot be an employee.

The other partner may be entitled to some other form of income support from Services Australia (e.g. JobSeeker allowance).

#### **1.1.10 Can trusts receive the JobKeeper payment?**

Trusts can receive the JobKeeper Payments for any eligible employees.

Where beneficiaries of a trust only receive distributions, rather than being paid salary and wages for work done, only ONE individual adult beneficiary (that is, not a corporate beneficiary) can be nominated to receive the JobKeeper Payment.

A beneficiary who receives the payment cannot also receive the payment as an employee.

#### **1.1.11 Can company directors receive the JobKeeper payment?**

If company directors receive directors' fees then an eligible business can nominate ONE director (in a director capacity) to receive the payment, as well as any eligible employees.

A director who receives the payment cannot also receive the payment as an employee.

#### **1.1.12 Can paid shareholders receive the JobKeeper payment?**

An eligible business that pays shareholders that provide labour in the form of dividends can nominate only ONE shareholder to receive the JobKeeper Payment.

A shareholder who receives the payment cannot also receive the payment as an employee.

## 1.2 Sole traders or the self employed

### 1.2.1 Are sole traders eligible for the JobKeeper payment?

Yes, people who are self-employed will be eligible for the JobKeeper Payment provided at the time of applying they:

- estimate their turnover has or will fall by 30% or more;
- had an ABN on or before 12 March 2020, and either had an amount included in its assessable income for the 2018-19 year and it was included in their income tax return lodged on or before 12 March 2020 (or such later time as allowed by the Commissioner), or made a supply during the period 1 July 2018 to 12 March 2020 and provided this information to the Commissioner on or before 12 March 2020 (or such later time as allowed by the Commissioner);
- are actively engaged in the business;
- are not entitled to another JobKeeper Payment (either a nominated business participant of another business or as an eligible employee);
- are not a permanent employee of any other employer
- were aged at least 16 years of age as at 1 March 2020; AND
- are an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020.

Once qualified a self-employed person will need to provide a monthly update to the ATO.

### 1.2.2 Can a self-employer person with another job still receive the JobKeeper Payment?

An individual can only receive the JobKeeper Payments from one source.

To be eligible as a self-employed individual, you must not be a permanent employee of any other employer.

However, whilst receiving the JobKeeper Payment, an individual can also receive income from other sources including another job.

#### EXAMPLE – Sole Trader

- Self-employed Kelsey is a sole trader running a florist. She does not have employees. Kelsey's business has been in operation for several years.
- The economic downturn due to COVID-19 has adversely affected Kelsey's business, and she expects that her business turnover will fall by more than 30 per cent compared to a typical month in 2019. Kelsey will be able to apply for the JobKeeper Payment and would receive \$1,500 per fortnight before tax, paid on a monthly basis.





## 1.3 Employee Eligibility Criteria

### 1.3.1 If I am an eligible employer how do I identify if my employees are eligible for the JobKeeper Payment?

Once an employer determines that they are an eligible employer (see 1.1.1), the employer then needs to consider which employees they employ are eligible for the payment (see 1.2.5).

#### Eligible employees:

- were employed by the employer at 1 March 2020;
- are currently employed by the employer (including those stood down or re-hired);
- are full-time or part-time (including fixed term), long-term casuals (casual employees who have been with their employer on a regular and systematic basis for at least the previous 12 months as at 1 March 2020 and not a permanent employee of any other employer) or a sole trader;
- are at least 16 years of age on 1 March 2020;
- are an Australian citizen, the holder of a permanent visa, a protected special category visa, a non-protected special category visa who has been residing continually in Australia for 10 years or more, or a New Zealander on a special category (subclass 444) visa (all other temporary visa holders are not currently eligible);
- were an Australian resident for tax purposes on 1 March 2020 **AND**
- Are not in receipt of a JobKeeper Payment from another employer.

### 1.3.2 Is there an income cap for employees?

There is no income cap on eligibility for employees. Therefore, an eligible employer may receive the subsidy in respect of any eligible employees including its highest paid employees.

### 1.3.3 What is a “regular and systematic” casual?

There is no guidance provided in the rules as to what a “regular and systematic casual”. However, the term has an established meaning under employment law.

The term 'regular' implies a repetitive pattern and does not mean frequent, often, uniform or constant. However, a clear pattern or roster of hours is strong evidence of regular and systematic employment.

The term 'systematic' requires that the engagement be 'something that could fairly be called a system, method or plan'.

Where there is no clear pattern or roster, evidence of regular and systematic employment can be established where:

- the employer offered suitable work when it was available at times that the employee had generally made themselves available, and
- work was offered and accepted regularly enough that it could no longer be regarded as occasional or irregular.

### 1.3.4 What about casuals who have moved between different businesses within the same corporate group?

A casual can still meet the test of working for 12 months on a regular and basis if they were transferred from one member of a wholly-owned corporate group to another member in the same group within the last 12 months.

### 1.3.5 How does the casual employee test apply if a business has changed ownership within the last 12 months or since 1 March 2020?

A casual employee is still eligible for JobKeeper where a business has changed ownership within the last 12 months so long as the casual has been working for the same business (despite the ownership change).

### 1.3.6 What about employees in receipt of workers compensation?

If an employee is still in an employment relationship with their employer and still partially working (e.g. reduced hours), then they can be eligible for the JobKeeper Payment, provided the employer has an obligation to pay some component of their salary or wages.

Employees will not be eligible for the JobKeeper Payment if:

- they are not currently working due to incapacity and supported by a worker's compensation scheme AND/OR
- they are fully compensated under WorkCover insurance.



### 1.3.7 What about employees on leave?

Employees are eligible to receive the JobKeeper payment even when they are on paid leave (such as annual leave, long service leave or personal leave) or a period of unpaid leave.

### 1.3.8 What about employees on parental leave pay?

Employees are not eligible for the JobKeeper Payment for the period they are receiving Parental Leave Pay or Dad and Partner Pay from Services Australia (formerly Centrelink).

However, an employee in receipt of paid parental leave from their employer will be eligible.

### 1.3.9 What about employees on fixed term contracts that end during the period of the JobKeeper payment?

Fixed term contract employees are eligible if they were employed at 1 March 2020 and meet eligibility criteria for the JobKeeper Payment.

If a fixed term contract employee's period of engagement ends during the duration of the JobKeeper Payment entitlement of the employer, the employer must notify the ATO and will stop receiving the payment for that employee, as they are no longer employed by the employer.

### 1.3.10 Can I unilaterally decide which eligible employees will be nominated for the JobKeeper Payment?

No, an employer cannot select which eligible employees will participate in the scheme. If an employer is an eligible and notifies its employees (within 7 days), the onus is then on any eligible employees to provide a nomination notice to that employer (in a form approved by the ATO).

Employers do not have any discretion when subsequently providing nomination notice for eligible employees to the ATO.

### 1.3.11 What happens if an employee makes a false statement with regards to their eligibility (for example, to receive multiple JobKeeper payments)?

This will result in the employee becoming ineligible. Any overpayment may be recovered directly from the individual. Making a false statement also renders the individual liable for criminal and administrative penalties.

## 1.4 Apprentices and Trainees

### 1.4.1 Are my apprentices and trainees eligible for the JobKeeper payment?

Yes, provided that they meet all of the relevant employee eligibility requirements in 1.2.1.

### 1.4.2 Are employers eligible to receive both the JobKeeper Payment and the Supporting Apprentices and Trainees wage subsidy?

No. The JobKeeper Payment is considered 'equivalent' for the purposes of Supporting Apprentices and Trainees wage subsidy, as it is designed to help businesses cover the costs of their employees' wages. Therefore, an employer will not be allowed to claim both payments simultaneously. For any period where the employer elects to claim the JobKeeper Payment they will not be able to claim the Supporting Apprentices and Trainees wage subsidy.

### 1.4.3 As the JobKeeper Payment starts on 30 March 2020, can eligible employers claim Supporting Apprentices and Trainees wage subsidy for wages paid during the period 1 January 2020 to 31 March 2020?

Yes, where an eligible employer claims the JobKeeper Payment from 30 March 2020, they will be eligible to claim the Supporting Apprentices and Trainees wage subsidy for wages paid during the period 1 January 2020 to 31 March 2020.

### 1.4.4 Where an employer is not eligible for the JobKeeper payments, can they still be assessed as eligible for Supporting Apprentices and Trainees subsidy?

Yes. Employers should contact their Australian Apprenticeship Support Network Provider for assistance.

Please find more information on the Supporting Apprentices and Trainees wage subsidy [here](#) and [FAQs](#).





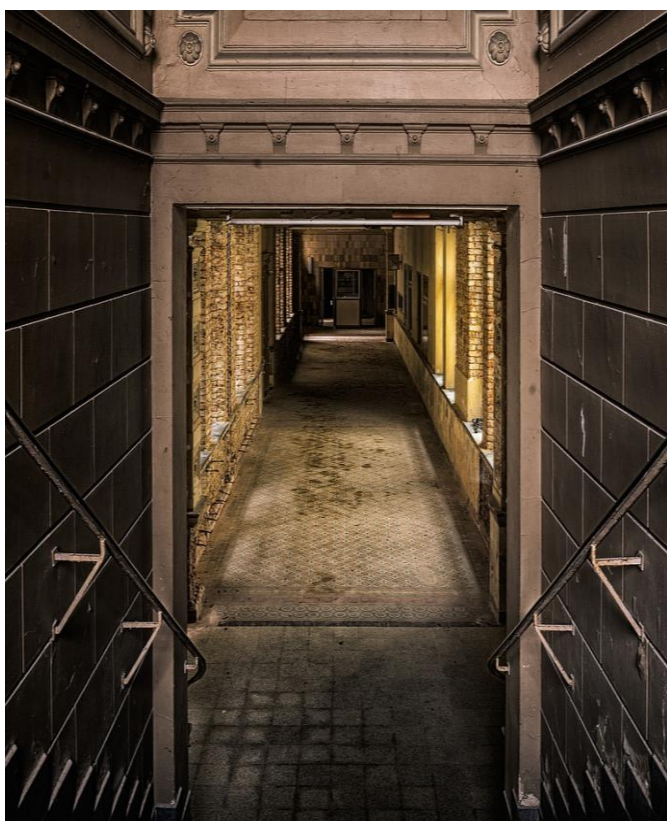
## 2. Employees with multiple employers

### 2.1 Employees with multiple employers

Where employees have multiple employers – only one employer will be eligible to receive the payment.

The employee will need to notify their primary employer to claim the JobKeeper Payment on their behalf.

The claiming of the tax-free threshold will in most cases be sufficient notification that an employer is the employee's primary employer. The ATO will be providing additional guidance to assist employees in determining which employer to notify.



#### EXAMPLE – Employee with multiple employers

- Michelle currently works two permanent part-time jobs, at an art gallery during weekdays, and at the local café on the weekend. Due to the impact of COVID-19, the gallery has closed and Michelle has been stood down without pay under the Fair Work Act.
- Michelle continues to work at the café delivering take-away orders.
- Michelle can only receive the JobKeeper Payment once, from the employer from whom she nominates as her primary employer.
- As Michelle only claims the tax free threshold from her job at the art gallery, this will be treated as her nomination of the art gallery as her primary employer.
- The art gallery is eligible for the JobKeeper Payment. The art gallery will pass the JobKeeper Payment on to Michelle, so she will receive \$1,500 per fortnight before tax.
- During the application process, the art gallery will need to notify the ATO that Michelle receives the payment from them. The art gallery is also required to advise Michelle that she has been nominated to the ATO as an eligible employee to receive the payment.
- The café is not eligible to receive the JobKeeper Payment for Michelle. The income that Michelle receives from her job at the café does not change her entitlement to the JobKeeper Payment she receives from the art gallery.



## 3. Job Keeper payment process

### 3.1 How do employers receive the JobKeeper Payment?

In order to receive the JobKeeper payment employers must do the following:

- Employers **must enroll** in the JobKeeper scheme from 20 April 2020 through the ATO website.
  - In the interim employers can register their interest online now at the ATO website.
  - In applying for JobKeeper employers will need to provide information to the ATO on the number of eligible employees engaged as at 1 March 2020 and those currently employed by the business (including those stood down or rehired). For most businesses the ATO will use Single Touch Payroll data to pre-populate the employee details for the business.
  - The ATO will need to assess whether an employer has experienced the required turnover decline (employers will need to provide supporting information demonstrating the necessary downturn in their business).
- **Employer must notify** all eligible employees that you intend to participate in the JobKeeper scheme **AND ask** eligible employee if they **agree to be nominated** by the employer as the primary employer of the employee so that the employer can receive JobKeeper payment for them. This must occur within 7 days of providing the eligible employee's details to the ATO.
  - To do this employers must complete a **JobKeeper employee nomination notice** with each eligible employee.
  - This form does not need to be sent to the ATO, however employer need to keep the completed form (generally for 5 years) as a record that the employee agreed for the employer of claim the JobKeeper Payment for them.
- Once approved, ensure that each eligible employee receives at least \$1,500 per fortnight (before tax). See sections 3 to 5 for further information on this.
- Provide monthly updates to the ATO on the number of eligible employees employed by the business.

#### 3.1.1 Are there any JobKeeper scheme cut off dates that employers need to be aware of?

Yes, if an employer wishes to be paid the JobKeeper payment for the first two fortnight periods between 30 March and 26 April, then the employer **MUST** elect to participate in the JobKeeper scheme at or before 26 April 2020.

For a fortnight period after 26 April an employer must notify the ATO before the end of the fortnight.

In order to keep track of the payment periods and scheme cut off dates see **Annexure A** JobKeeper fortnight calendar.

#### 3.1.2 Is the JobKeeper Payment part of Centrelink?

**No**, the JobKeeper payment is not a Centrelink welfare payment, it is a wage subsidy administered by the ATO.

#### 3.1.3 When and how will the JobKeeper Payment be paid to employers?

The first JobKeeper Payment will be reimbursed by the ATO from the **first week in May** but will be **backdated to 30 March 2020**. Payments will be made to the employer monthly in arrears by the ATO. However, for the month of April, the Commissioner can make an advance payment.

Once an eligible employer is approved (we understand the ATO will commence approvals in the coming weeks), they can start making JobKeeper payments to their approved eligible employees. This will include any back pay to 30 March that may not have been paid to eligible employees at the time (e.g. because they were stood down and not otherwise entitled to payment at that time).

#### 3.1.4 What happens if I don't have the cash flow to pay eligible employees once approved until I receive the payment from the ATO?

Many businesses, in particular those that have been forced to shut their doors now have little to no revenue coming in, so these employers may be unable to pay wages in advance of ATO payment in arrears.

The current guidance from the Government is that those businesses may want to speak to their bank to discuss their short-term loan options.

ACCI understands this remains a significant issue for many employers and is engaging further with the Government to secure effective assistance for businesses in these circumstances, to enable them and their employees make use of the JobKeeper scheme. ACCI will include any updates in relation to this important issue in the next edition.

### 3.1.5 What are the eligible periods for reimbursement?

Employers will need to satisfy payment requirements in respect of each 14-day period covered by the scheme. The first fortnight period started on Monday, 30 March 2020 and ended on Sunday, 12 April 2020.

Employers must pay their eligible employees a minimum of \$1,500 per fortnight in the scheme payment periods.

### 3.1.6 What if I pay my employees monthly?

Where an employer pays their staff monthly, the ATO will be able to reallocate payments between periods. However, overall an employee must have received the equivalent \$1,500 per fortnight.

### 3.1.7 How long will the JobKeeper Payments last?

For up to six months, running from 30 March 2020 to 27 September 2020. The final period will start on Monday 14 September and end on Sunday 27 September 2020.

### 3.1.8 Do employers have any reporting obligations whilst receiving JobKeeper Payments?

The ATO requires employers receiving the JobKeeper payment to report monthly to the ATO Commissioner to show payments have been made to employees and to provide information on employer turnover and other matters relevant to the entitlement and the operation of the JobKeeper Payment.

This reporting will be integrated with existing reporting processes such as Single Touch Payroll, where this is possible.

In serious cases payments may be withheld until information provided can be verified.

### 3.1.9 Do employers have any record keeping obligations whilst receiving JobKeeper Payments?

Employers receiving JobKeeper are required to retain records to allow any information provided to the Tax Commissioner to be verified for five years after it is provided in relation to a payment.

### 3.1.10 What penalties can the ATO hand out for abuses of the JobKeeper program?

The JobKeeper Legislation includes an anti-avoidance regime which entitles the ATO Commissioner to make a subjective determination where he is satisfied of the existence of a scheme.

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.

More generally employers who do not comply with the obligations tied to the JobKeeper payment can be liable for a wide range of significant sanctions.

The below table sets out some of the offences and penalties linked to the misuse of the JobKeeper Program.

Offence	Penalty
Administrative penalties for making a false and misleading statement	<ul style="list-style-type: none"> <li>Financial penalty up to 75% of the amount of any overpayment</li> </ul>
Criminal offences for making false or misleading statements to taxation officers	<ul style="list-style-type: none"> <li>Imprisonment for up to 12 months AND</li> <li>A fine of up to 50 penalty units for an individual and 250 penalty units for corporate entities</li> </ul>
Failure to comply with the requirements under taxation law	<ul style="list-style-type: none"> <li>Imprisonment for up to 12 months AND</li> <li>A fine of up to 50 penalty units for an individual and 250 penalty units for corporate entities</li> </ul>
Obtaining financial advantage	<ul style="list-style-type: none"> <li>Imprisonment for up to 12 months</li> </ul>
Obtaining financial advantage by deception	<ul style="list-style-type: none"> <li>Imprisonment for up to 10 years</li> </ul>
Conspiracy to defraud	<ul style="list-style-type: none"> <li>Imprisonment for up to 10 years</li> </ul>

## 3.2 Tax consequences

All JobKeeper payments are assessable income of the business that is eligible to receive the payments. The normal rules for deductibility apply in respect of the amounts your business pays to its employees where those amounts are subsidised by the JobKeeper payment.

The JobKeeper payment is not subject to GST



## 4. JobKeeper and employee pay

### 4.1 How does the JobKeeper Payment effect the wages of employees employed at 1 March 2020?

#### 4.1.1 Where an employee currently earns LESS THAN \$1500 a fortnight (before tax)?

They are about to get a pay rise (if they are an eligible worker).

- Once approved, eligible employers will be legally required to pass on all of the \$1,500 JobKeeper Payment they receive for an eligible employee (even where this is more than the employee currently earns).
- It will be up to the employer in this circumstance to decide if they want to pay superannuation on the additional wage earned by that employee (the additional money the employee is making from JobKeeper on top of their normal wage) because of the JobKeeper Payment (see example of Tasha in example on the following page 13).

#### 4.1.2 Where an employee currently earns \$1500 OR MORE a fortnight (before tax)?

- An employee's terms of employment are not changed as a result of this scheme. If an employee is paid \$1,500 or more a fortnight (under an award, enterprise agreement or contract of employment), an employer is still liable to pay that amount (unless otherwise renegotiated).
- Therefore, if an employee ordinarily receives \$1,500 or more (before tax) in income per fortnight, employers will now receive the \$1,500 JobKeeper Payment toward their salary but will need to continue paying their regular income amount.

#### 4.1.3 Can I require a part-time worker who usually earns less than \$1,500 per fortnight to do additional hours (for example up to the equivalent of hours of their \$1,500 income)?

An employer cannot require or force such an employee to do additional hours because they are receiving an increase to their income as a result of the JobKeeper payment. Employers and employees can of course however agree to vary their arrangements via mutual consent.

Employers should be careful when taking any subsequent action against an employee who declines a request to

work additional hours whilst in receipt of JobKeeper as any action taken against the employee could potentially give rise to an adverse action claim.

#### 4.1.4 How does the JobKeeper Payment affect an employee who is salary sacrificing's wage?

Salary sacrificing arrangements can continue as is. The JobKeeper Payment may be paid to an employee in cash or as a fringe benefit or an extra superannuation contribution where the employee and employer agree.

### 4.2 How does the JobKeeper Payment effect the wages of employee/s hired after 1 March 2020?

In order to be eligible for the JobKeeper Payment, an employer must have been in an employment relationship with the eligible employee as at 1 March 2020, and the employee must be currently engaged.

If a new employee has or is hired after 1 March 2020 (who was not in an employment relationship with the employer on 1 March 2020) they are not eligible for the JobKeeper payment for that employee.

### 4.3 JobKeeper and the end of the employment relationship.

#### 4.3.1 What happens to any JobKeeper payments if an employee resigns?

An employee must be currently employed by the eligible employer in order to receive the JobKeeper Payment.

If an employee for whom an employer is receiving the JobKeeper Payment resigns, the employer is no longer entitled to receive the Payment for that employee from the date their resignation takes effect.

The employer must notify the ATO, as they may need to repay some money to the ATO if the resignation takes effect in the middle of a payment fortnight.

#### 4.3.2 Can an employee be made redundant or have their employment terminated whilst in receipt of the JobKeeper Payment?

The JobKeeper Program does not 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 Fair Work Act continue to operate.

Employers should update the ATO where the employment of an eligible employee ends and specify the exact date when the employment relationship will end.



### EXAMPLE – Employer with different types of employees on different wages

Sarah owns a retail clothing business with four employees. The business is still operating at this stage but Sarah expects that turnover will decline by significantly more than 30 per cent in the coming months (if it hasn't already). The employees are:

- Tilly, who is a permanent full-time employee on a salary of \$2,500 per fortnight before tax who has been working for Sarah for 2 years and who continues working for the business;
- Tasha, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah for 1 year and who continues working for the business;
- Melanie, who is a permanent part-time employee on a salary of \$1,000 per fortnight before tax who has been working for Sarah since 7 March 2020 and who continues working for the business; and
- Alex, who is a casual employee paid on average \$600 per fortnight before tax who has been working for Sarah since 1 October 2019 and who continues working for the business.

Sarah is eligible to receive the JobKeeper Payment for the following employees:

- Tilly, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works full-time.
- Tasha, who was in an employment relationship with Sarah on 1 March 2020, is currently still engaged as an employee and works part-time.

Sarah is not eligible to receive the JobKeeper Payment for the following employees:

- Melanie, as she wasn't in employment relationship with Sarah as at 1 March 2020, given that she was employed on 7 March 2020.
- Alex, as she is a casual employee who had not been engaged on a regular basis for longer than 12 months as at 1 March 2020.

The JobKeeper Payment would mean the following for Sarah's two eligible staff's wages:

- Sarah continues to pay Tilly her full-time salary of \$2,500 per fortnight before tax but receives \$1,500 per fortnight from the JobKeeper Payment to subsidise the cost of Tilly's salary, meaning she only needs to pay the remaining \$1,000 per fortnight before tax towards Tilly's wages with the rest covered by the JobKeeper Payment. Sarah will need to continue paying the superannuation guarantee on Tilly's \$2,500 income; and
- Sarah will receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Tasha's salary. As this is more than Tasha's current \$1,000 per fortnight salary Tasha will see an increase of \$500 per fortnight before tax being paid whilst Sarah is receiving the JobKeeper Payment. Sarah must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Tasha is earning. Sarah has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Tasha under the JobKeeper Payment.

Sarah is required to advise her employees that she has nominated them as eligible employees to receive the JobKeeper Payment.

Sarah will be required to register and apply for the JobKeeper payment and to provide information to the ATO on a monthly basis. She will receive the payment monthly in arrears.

# 5. Fair Work Act changes for employers and employees on JobKeeper

As part of the JobKeeper Package, the Government has made a number of significant temporary changes to the Fair Work Act 2009 for employers and employees who have access to the JobKeeper wage subsidy.

Note these changes ONLY apply to employers and employees receiving JobKeeper.

These temporary changes override ANY:

- Employment contract;
- Modern award; or
- Enterprise agreement.

## 5.1 JobKeeper changes

Under the temporary Fair Work Act changes employers and employees who qualify for and receive JobKeeper are allowed to do the following:

- Issue directions** (known as JobKeeper enabling directions) changing current employment arrangements which require an employee to:
  - Work reduced hours or days (a JobKeeper enabling stand down direction) for any period that they cannot be usefully employed (including no hours/days) (see 5.3).
  - Undertake alternative duties (see 5.4); or
  - Work at an alternative location (see 5.5).
- Make the following **requests** of an employee which cannot be unreasonably refused:
  - To work different days/times to their ordinary hours/days
  - To take accrued annual leave.
- Agree** with employees for double annual leave to be taken at half pay.

## 5.2 Issuing JobKeeper Directions

An employer can issue three types of directions as set out above (a direction to reduce days/hours, perform alternative duties and perform work at an alternative location). For all three directions an employer must follow set procedural steps which are covered in the following section. **Annexure B** also contains an employer checklist for giving a direction under the new provisions.

### 5.2.1 Does an employer have to give an employee notice of a JobKeeper direction?

Yes, an employer must give an employee **at least 3 days written notice** before they give a JobKeeper direction (or a lesser period if agreed with the employee).

Employers must also consult with the employee (or their representative) about the JobKeeper direction, and keep a written record of the consultation.

See Annexure B for an employer checklist when giving directions.

### 5.2.2 How must an employer give an employee a JobKeeper direction?

A JobKeeper direction must be given to an employee in writing (this could include by electronic means) and in a form set out in the regulations (note this is not yet published).

### 5.2.3 How long does a JobKeeper direction given by an employer last?

A JobKeeper direction given by an employer operates and has effect until one of the following occurs:

- It is withdrawn or revoked by the employer.
- It is replaced by a new employer direction.
- An order of the Fair Work Commission requires it.
- There are no further JobKeeper Payments.

### 5.2.4 Does an employee have to follow a JobKeeper direction given by an employer?

**Yes**, employees must comply with a JobKeeper employer direction unless the direction is unreasonable in all the circumstances (this could for example, depend on its impact on an employee's caring responsibilities).

Where a direction is unreasonable it does not apply to an employee.

### 5.2.5 Can an employer give a JobKeeper direction which has the effect of making an employee **redundant**?

No, a JobKeeper direction cannot amount to redundancy.

### 5.2.6 What penalties are there for employers who **misuse** a JobKeeper direction?

Employers must not knowingly give a JobKeeper direction which is not authorised by law.

The penalty for doing so is up to **\$126,000** for an individual and **\$630,000** for a business.





## 5.3 Direction to work reduced hours/days (JobKeeper stand down)

### 5.3.1 What are the new stand down provisions that apply to employers and employees on JobKeeper?

The new stand down provisions which apply to employers and employee on JobKeeper allow an employer to give a **direction** (called a JobKeeper enabling stand down direction) to an employee to:

- Not work on a day or days on which the employee would usually work.
- Work for a lesser period than the period which the employee would ordinarily work on a particular day or days.
- Work a reduced number of hours (compared with the employee's ordinary hours of work),

and **not be paid** for the period that work is not performed.

An employer can give this direction so long as:

- For the period of the stand down the employee cannot be **"usefully employed"** for the employee's normal days or hours because of changes to business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (explained at 5.2.2).
- The direction can be implemented **safely**, having regard to the nature and spread of COVID-19.
- The **"wage condition"** is satisfied. This requires an employee to be paid at a minimum \$1,500 per fortnight before tax.
- The **minimum payment guarantee** (explained at 5.2.3) and **hourly rate of pay guarantee** (explained at 5.2.4) are met
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities.

### 5.3.2 How does an employer know if an employee cannot be "usefully employed"?

This situation arises when an employee has no **useful work** available to perform because of the COVID-19 pandemic or because of the Public Health Orders and Directions (however described in each State and Territory) imposing restrictions on individuals and businesses.

**Useful work** does not have to be the work that the employee ordinarily performs but needs to be genuine productive work that provides a "net benefit" to the employer. Employers should be able to demonstrate that the impacts of the virus or the Government's measures to deal with it have caused the fact that there is no useful work available for the period the employee is stood down.

### 5.3.3 What is the "minimum pay guarantee" and how does an employee ensure that the minimum payment guarantee is met?

When an employee is on a JobKeeper enabling stand down direction (either partially or for all of their usual hours of work), an employer needs to pay the employee either:

- the JobKeeper payment (\$1,500) OR
- their usual pay for any hours that they do work during the fortnight.

#### Whichever payment is higher

An employee's usual pay includes any of the following that may have become payable during the fortnight: incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments.

### 5.3.4 What is the "hourly rate of pay guarantee" and how does an employee ensure that the hourly rate of pay guarantee is met?

Reducing the hours/days an employee works (via a JobKeeper enabling stand down) **cannot** reduce an employee's "hourly base rate of pay" (the hourly rate the employee earned before the reduction in hours/days).

An employee **must** still be paid their "hourly base rate" for any work they perform during the fortnight.

An employee's "hourly base rate" does not include any additional allowances, loadings or penalties added.

#### Calculating an employee hourly base rate

If an employee is not paid hourly, the hourly base rate of pay will generally be determined by:

- The provisions of any applicable industrial instrument (e.g. a modern award or enterprise agreement).
- Where no industrial instrument applies, dividing the payment made in each pay cycle by the number of ordinary hours in the period (again, minus any additional allowances, loadings or penalties added).

Further advice should be sought regarding this issue where unique payment arrangements exist with varying numbers of ordinary hours in each pay cycle.

#### Employee performing different duties

For an employee performing new duties (see section 5.4) their hourly base rate is either:

- The employee's new hourly rate for the new duties being performed if they attract a higher rate of pay OR
- The employee's old hourly rate if the new hourly rate for the new duties is lower than the old rate (prior to the direction to change duties)

**EXAMPLE - Employee stood down for 20 hours, JobKeeper payment is less than normal pay**

Boris runs a café. He has qualified for JobKeeper and has been receiving payments of \$1,500 for his employee Dominic, who usually works full-time, 38 hours a week (76 hours a fortnight).

Due to the government restrictions, Boris has only been operating his café as a take away shop with shorter opening hours. As result there are now only 18 hours of work for Dominic to perform per week (36 hours per fortnight), Boris cannot usefully employ Dominic for the remaining 20 hours a week (40 hours per fortnight).

Boris therefore decides to use the new JobKeeper stand down provisions to direct Dominic to stand down for the 20 hours per week he cannot be usefully employed. Dominic continues to work 18 hours a week.

Dominic is usually paid \$2,508 (before tax) a fortnight for 76 hours of work (equating to \$33 per hour). As his hours have been reduced to 36 hours, Boris would normally pay Dominic \$1,188 (before tax) for the fortnight. This amount however is below the \$1,500 JobKeeper amount. So, Boris instead must pay Dominic the full \$1,500 (before tax) for the 36 hours he works a fortnight but doesn't have to pay any more than that.

Boris is only required to pay superannuation on what he would normally pay Dominic for 36 hours (the \$1,188 (before tax)).

**EXAMPLE - Employee stood down for all hours, JobKeeper payment is more than normal pay**

Tom owns a wedding photography business. Due to the COVID-19 government restrictions limiting weddings to 5 people, Tom currently has no work.

Tom qualifies for JobKeeper and has been receiving payment of \$1,500 each fortnight for his one employee Jack who usually worker part-time, 15 hours a week (30 hours a fortnight).

Tom issues a stand down direction to Jack under the new JobKeeper enabling stand down provisions.

Jack is usually paid \$1,000 (before tax) a fortnight for 30 hours of work. Under the JobKeeper scheme Tom has to pay Jack the full \$1,500 (before tax) for the fortnight.

**5.3.5 Can a stand down direction issued by an employer apply when an employee is on leave (annual, personal etc.)?**

If an employee is taking paid or unpaid leave (such as annual leave) or is otherwise entitled to be absent from work (such as on a public holiday), the direction doesn't apply.

This means that when an employee is stood down (partial or full) and they subsequently go on leave or it's a public holiday, their rate of pay will be what it was prior to the direction to stand down.

However, if an employee normally receives a leave payment that would be less than the JobKeeper payment for a fortnight (\$1,500) the employee is still entitled to an amount that is equal to the JobKeeper payment for the fortnight.

**5.3.6 If an employee is stood down as a result of JobKeeper direction from an employer what happens to the accrual of their leave entitlements?**

Employees continue to accrue leave entitlements as if the direction to stand down had not been given.

**5.3.7 Does the period when an employee is stood down count towards continuity of service?**

Yes, it counts for the purpose of continuity of service for the purposes of redundancy and pay in lieu of notice.

**5.3.8 What requests can an employee make while stood down (in whole or in part) as a result of a JobKeeper direction?**

An employee may request for permission to engage in any of the following for the duration of the stand down:

- Secondary employment
- Training; or
- Professional development.

Employers must consider these requests and cannot unreasonably refuse them.

Examples of a reasonable refusal might include a request to engage in secondary employment where:

- The request would involve the employee working for a clear competitor
- The secondary employment would lead to a disclosure of confidential information belonging to the employer
- It would pose a risk to the employee's health and safety

Penalty for doing so - up to \$12,600 for an individual and \$63,000 for a business.



## 5.4 Direction to change usual duties

### 5.4.1 When can an employer direct an employee to change their usual work duties?

The new provision allow an employer to give a **direction** (called a JobKeeper enabling stand down direction) to an employee who receives JobKeeper payments to change their normal duties to provided that:

- The modified duties are within the employee's **skill and competence** and the employee holds any necessary license or qualification required to perform the duties.
- The duties are **safe** considering the nature and spread of COVID19.
- The duties are **reasonably within the scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities. AND
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 5.3.2).

### 5.4.2 When will changing an employee's duties be considered "necessary" to maintain the employment of the employee?

The employer needs to have actual factual information before them that leads them to reasonably believe that it is necessary.

"**Necessary**" is best thought of as something more than desirable or preferred.

We suggest in consider whether something is "necessary" employers apply the following test to their thinking:

- = "But for" directing the employee to perform different duties the employee would be made redundant.

### 5.4.3 Pay rates for employee performing different duties

Employers must pay an employee performing new duties **the higher** of: an hourly base rate which is either:

- The base hourly pay rate that applies to their previous duties (prior to the direction to change duties); OR
- The base rate that applies to the new duties the employee is performing.

#### EXAMPLE - Direction to change usual duties

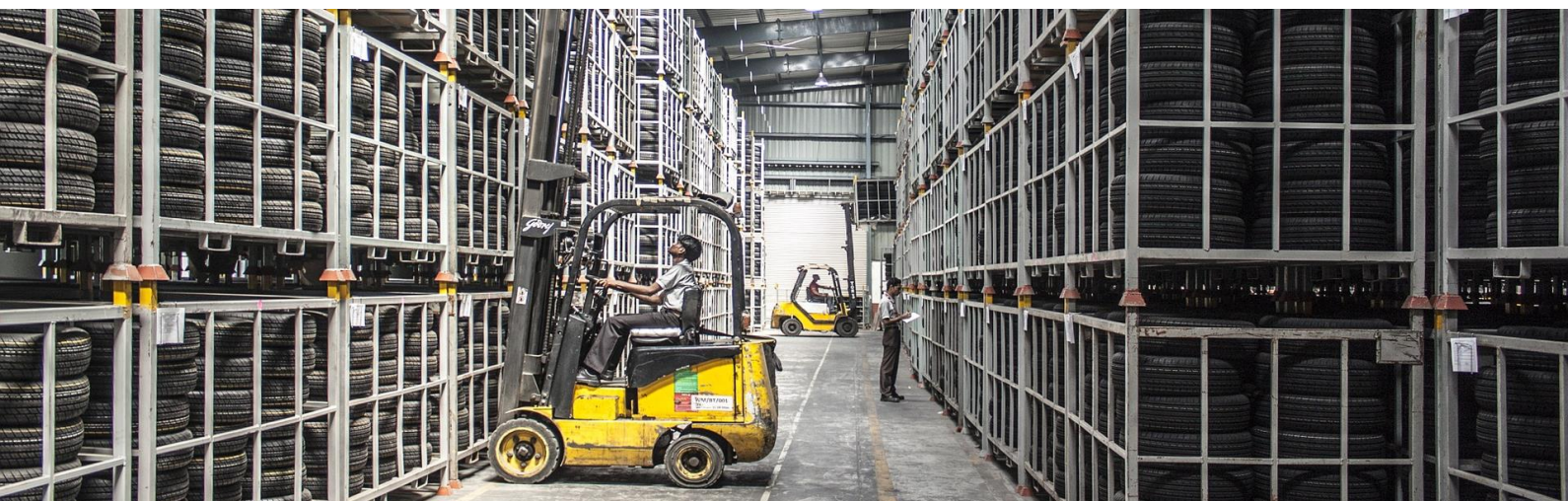
Judy runs a Melbourne warehouse business. Judy's business is affected by COVID-19 and qualifies for the JobKeeper program. Judy employs Richard as a full-time leading hand.

Given the downturn Judy no longer needs Richard to perform his leading hand duties. Instead, Judy directs Richard to carry out forklift driving duties temporarily. Judy is able to make this direction because:

- Richard has experience driving forklifts and holds the appropriate licences
- The driving duties are safe and can be performed with appropriate social distancing measures in place
- The driving duties are within the scope of the warehouse's business.

Under this change Richard is doing duties of a lower classification, with a lower base rate of pay under the applicable Storage Services and Wholesale Award. As a result, Richard's rate of pay does not change. The base pay rate that applied to his previous duties continues to apply.

Richard's other employment conditions have also not changed (such as hours and days of work).





## 5.5 Direction to change location of work

### 5.5.1 When can an employer direct an employee to change their location of work?

An employer can **direct** an employee who qualifies for JobKeeper and is entitled to payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is **suitable** for the employee's duties.
- The location is **safe** considering the nature and spread of COVID-19.
- The performance of duties at the new location is reasonably within the **scope** of the employer's business operations.
- The new location is within a **reasonable travelling distance**.
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 5.3.2).

### 5.5.2 When will the changing of an employee's location be considered "necessary" to maintain the employment of the employee?

The employer needs to have actual factual information before them that leads them to reasonably believe that it is necessary.

"**Necessary**" is best thought of as something more than desirable or preferred.

We suggest in consider whether something is "necessary" employers apply the following test to their thinking:

- = "But for" directing the employee to perform different duties the employee would be made redundant.

## 5.6 Days / times of work

### 5.6.1 When can an employer alter an employee's days and time of work?

An employer can **request** an employee who qualifies for JobKeeper and is entitled to payments to perform their duties on different days and/or at different times compared to the employee's normal ordinary days /hours of work provided that:

- the performance of the duties on those days is generally safe considering the nature and spread of COVID-19.
- the performance of the duties on those days is reasonably within the scope of the employer's business operations.

An employee **cannot unreasonably** refuse such a request.

For example, an employee who usually works weekends could reasonably be required to work on weekdays in a situation where their employer's business can no longer trade on weekends as a result of the COVID-19 pandemic.

If an employee does not agree to such a request, the Fair Work Commission could settle a dispute about this by arbitration (see 5.7 Disputes).

## 5.7 Annual Leave

### 5.7.1 When can an employer request an employee to take paid annual leave?

An employer can **request** an employee who qualifies for JobKeeper and is entitled to payments to take paid annual leave provided that:

- The employee will maintain a paid annual leave balance of at least two weeks.

An employee **cannot unreasonably** refuse such a request.

If an employee does not agree to such a request, the Fair Work Commission could settle a dispute about this by arbitration (see 5.7 Disputes).

### 5.7.2 What rate of pay applies when an employee is directed to take annual leave?

Payment for the annual leave is based on the rate of pay that applied to the employee before the JobKeeper legislation operated.

### 5.7.3 When can an employee take double leave at half pay?

An employer and employee can **agree** to take double the paid annual leave at half pay.

For example, an employer and employee can agree to six weeks leave being taken, but the employee only has three weeks annual leave deducted and is only paid for three weeks annual leave, the payment of which is spread across six weeks.

### 5.7.4 If an employee takes double annual leave at half pay what happens to their accrual of leave entitlement during that period?

The employee continues to accrue annual leave as if the agreement for annual leave at half pay had not been made.

Following on from the example at 5.7.3 this means the employee will over the six weeks of double leave at half pay accrue leave for six of the weeks.



## 5.8 Disputes

The Fair Work Commission can deal with disputes between employers and employees about the JobKeeper Fair Work Act temporary changes.

The Fair Work Commission may arbitrate the dispute and will impose a decision on the employer and employee.

**Arbitration** – a formal process, where if the parties are not able to agree to a solution the Commission can sometimes decide for them what the solution should be. This decision would only be made after the parties have had a chance to present their evidence and arguments.

The Fair Work Commission can also mediate, conciliate, make a recommendation or express an opinion.

In dealing with the dispute, the Fair Work Commission must take into account fairness between the parties in dispute.

### 5.8.1 Who can bring a dispute about a JobKeeper direction to the Fair Work Commission?

An application (Form F13A) to the Fair Work Commission to deal with a JobKeeper dispute may be made by:

- an employee or a union; or
- an employee or an employer organisation.

### 5.8.2 What orders can the Fair Work Commission make?

In making a decision about JobKeeper, the Fair Work Commission can:

- Make an order that the Commission considers desirable to give effect to a JobKeeper employer direction.
- Make an order setting aside a JobKeeper employer direction.
- Make an order substituting a different JobKeeper employer direction for the one made.
- Make any other order that the Commission considers appropriate.

### 5.8.3 What is the penalty for failing to follow a decision imposed by the Fair Work Commission regarding JobKeeper?

Up to **\$12,600** for an individual and **\$63,000** for a business.



# 6. Stand down prior to JobKeeper

## 6.1 Stand down prior to JobKeeper

### 6.1.1 Are employers who have already stood down employees without pay eligible for the JobKeeper Payment?

**Yes**, employers who have stood down their employees (in part or full) are still eligible for the JobKeeper Payment.

Employees who have been stood down must be paid at a minimum the \$1,500 JobKeeper Payment per fortnight, before tax for the payment periods of the JobKeeper Scheme.

It will be up to the employer in this circumstance to decide if they want to pay superannuation on the JobKeeper Payment to their employees.

### 6.2 What if an employee who was stood down after 1 March 2020 has since applied for income support (JobSeeker)?

Employers who nominate for JobKeeper must advise their eligible employees. A person receiving the JobKeeper Payment **cannot** also receive the JobSeeker Payment.

Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if their employer notifies them that they have nominated for JobKeeper.

### 6.3 What if my employee who was stood down after 1 March 2020 has since got another job?

Employees can **only** receive the JobKeeper payment **once**.

If an employee was stood down (after 1 March 2020) and has subsequently got another job (and have not resigned from their employer who stood them down), they are still eligible for the JobKeeper payment with their employer who has stood them down. Meaning their employer can apply and can pay them \$1,500 per fortnight before tax.

The employees' new employer will not be eligible for the JobKeeper Payment for them as they have been employed after 1 March 2020 and are therefore not an eligible employee with that employer.

If employer who stood the employee down registers and applies for the JobKeeper Payment they should notify that employee.

### 6.4 Can I direct my employee who's been stood down and subsequently receives JobKeeper from me to do work?

No, not while they are still stood down under section 524 of the Fair Work Act. A stand down by its very definition means that an employer's employees cannot be "usefully employed" by the employer because of a stoppage of work for which the employer cannot reasonably be held responsible.

However, if circumstances change and an employer decides that they can now "usefully employ" an employee, an employer can take an employee off stand down. An employer may then seek to utilise the new JobKeeper enabling stand down provisions, which allow more flexibility in terms of a reduction of hours (including a complete reduction to nil). The notice and consultation requirements under these new provisions should be followed (see Section 5.2).

In these circumstances, employers need to be mindful of and weigh up the risk of a potential claim that the initial stand down was unlawful (e.g. that the employee could have in fact been "usefully employed"), as they could be ordered to back pay their employees.





### EXAMPLE – Employees previously stood down, moved to JobKeeper enabling stand down

- Tim runs a gym. Ordinarily, he employs three permanent part-time gym instructors who each earn \$1,600 a fortnight (before tax) for 40 hours work per fortnight. However, the government directive that gyms can no longer operate has required him to shut the business. As such he was been forced to stand down all his three gym instructors without pay on 23 March 2020.
- Tim's turnover will decline by more than 30 per cent, so he is eligible to apply for the JobKeeper Payment for each part-time employee and must pass on \$1,500 per fortnight (before tax) to each of his gym instructors for up to six months. Tim will maintain the connection to his employees and be in a position to quickly resume his operations.
- Tim is required to advise his employees that he has nominated them as eligible employees to receive the Payment. It is up to Tim whether he wants to pay superannuation on the additional income paid to the three employees because of the JobKeeper Payment.
- If Tim's employees have already started receiving income support Payments like the JobSeeker Payment when they receive the JobKeeper Payment, they will need to advise Services Australia as employees cannot be in receipt of both payments. If some of Tim's employees have since got other jobs after he stood them down they will still be eligible to receive the JobKeeper Payment from Tim. They will not be eligible to also receive the JobKeeper Payment from their new employer.
- One month after Tim commences paying his staff the JobKeeper payment (\$1,500 per fortnight (before tax)) he is contacted by some of his former gym membership holders asking for him to produce a series of recorded gym tutorials which they can watch and exercise with at home.
- To take up this business opportunity Tim decides he can move his three part-time employees off the section 524 Fair Work Act stand down. However, Tim determines that he will not be able to usefully employ all three part-time employees at their ordinary hours as he calculates that making the video tutorials will only take 10 hours per employee per week for the next month.
- As a result, Tim determined he will need to give a JobKeeper enabling stand down direction to his three employees to reduce their hours once they come off the section 524 stand down. To do this Tim does the following:
  - He notifies the three employees that they are no longer stood down in accordance with section 524 of the Fair Work Act.
  - He gives all three employee three days written notice (via email) of his intention to give a direction to reduce their employee hours down to 10 hours each per week (20 hours per fortnight). This is a reduction of 20 hours per fortnight for each part-time employee.
  - After giving the notice, Tim consults with each employee and keeps a written record of the consultation.
  - Tim then gives a written direction regarding the reduction in hours to 20 hours per fortnight to each employee. The three employees will now work 20 hours each per fortnight.
- The three part-time employees are usually paid \$1,600 per fortnight (before tax) for 40 hours work (equating to \$40 per hour). As their hours have been reduced to 20 hours per fortnight, Tim would normally have to pay them \$800 per fortnight (before tax). This amount however is below the \$1,500 JobKeeper amount. So instead Tim must pay each employee the full \$1,500 per fortnight (before tax) for the 20 hours they work each fortnight but doesn't have to pay any more than that.
- Tim is only required to pay superannuation on what he would have normally paid to the three employees for their 20 hours work per fortnight (\$800 per fortnight (before tax)).



# 7. Dismissal and JobKeeper

## 7.1 What happens if an employer has dismissed an employee/s since 1 March?

Employees who were employed on 1 March 2020 and have subsequently been let go can now be **re-engaged by the same eligible employer** and they will be eligible to receive the \$1,500 a fortnight JobKeeper Payment.

This effectively means employees who have been laid off since 1 March 2020 can be put back on the books. However, employer can only pay employee who are re-hired from the fortnight they are re-engaged. Employer cannot claim retrospectively for employees re-engaged.

Employers should be aware that it is still not yet clear whether under this re-engagement:

- Employers will have a right to claw back termination, or redundancy, payments previously paid to the employee;
- The employee has to be employed on the same terms and conditions of employment as they were on before their previous employment was terminated for the employer to receive the JobKeeper Payment; and
- The termination and re-hire will break continuous service.

## 7.2 What if my employee who was dismissed after 1 March 2020 has since applied for income support (JobSeeker)?

Employers who nominate for JobKeeper **must advise** their eligible employees.

A person receiving the JobKeeper Payment cannot also receive the JobSeeker Payment (formerly Newstart).

Employees who have already applied for JobSeeker can notify Services Australia (formerly Centrelink) to withdraw and shift to the JobKeeper Payment if they are re-engaged by their employer and they notify them that they have nominated for the JobSeeker Payment.

## 7.3 What if my employee who was dismissed after 1 March 2020 has since got another job?

Employees can **only** receive the JobKeeper payment once.

If an employee was dismissed (after 1 March 2020) and has subsequently got another job, they will not be eligible for the JobKeeper Payment with their new employer as they have been employed after 1 March 2020 and are therefore not an eligible employee with that employer.

However, if their former employer (as at 1 March 2020) decided to re-engage them then that employer will be eligible to receive the JobKeeper payment of \$1,500 per fortnight before tax for them, even where they continue to keep their other job.

## 7.4 What else should employers be mindful about if they are considering re-hiring an employee/s?

Where an employer is considering a re-hire they should be mindful of the following considerations:

- Unfair dismissal laws, as it is important that an employer can still prove that the original redundancy was “genuine”; and
- Any tax concession received for a redundancy payment that has arisen as a result of a “genuine redundancy”.

### EXAMPLE – Employer who made employees redundant after 1 March 2020

- On 23 March 2020, a cinema made its five permanent part time employees redundant in response to the Government directive that cinemas close.
- In response to the announcement of the JobKeeper Payment, the cinema decides they want to re-engage the five former part-time employees, so they are well placed to resume operations once the COVID-19 restrictions are lifted.
- As the cinema is unable to open as a result of the Government directive, the five employees who choose to accept the offer to be re-hired are on stand down.
- The cinema receives \$1,500 a fortnight before tax in JobKeeper Payments for each of the five employees re-hired and passes it on to them in full.



### EXAMPLE – Employer who dismissed an employee after 1 March 2020 but now wishes to re-engage the employee

Ingrid runs a café. At 1 March 2020 she employed one full time chef Scott on a salary of \$2,000 per fortnight and two casual staff Jennifer and Tammy who earn \$1,000 per fortnight and have all worked regularly for the café for longer than two years.

As the government directive required her café to only serve takeaway on 22 March Ingrid decided she had to let go of Tammy in order to be able to continue to operate.

Tammy subsequently goes out and gets a new casual job with a large supermarket stacking shelves in the evening earning \$1,000 per fortnight.

With the announcement of the JobKeeper payment Ingrid considers that she may now be able to afford to re-engage Tammy as a casual staff member again, as the JobKeeper Payment means the following for Ingrid's cafe:

- Ingrid continues to pay Scott his full-time salary of \$2,000 per fortnight before tax but receives \$1,500 per fortnight from the JobKeeper Payment to subsidise the cost of Scott's salary, meaning she only needs to pay the remaining \$500 per fortnight before tax towards Scott's wages with the rest covered by the JobKeeper Payment. Ingrid will need to continue paying the superannuation guarantee on Scott's \$2,000 income.
- Ingrid will receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Jennifer's salary. As this is more than Jennifer's current \$1,000 per fortnight salary Jennifer will see an increase of \$500 per fortnight before tax being paid whilst Ingrid is receiving the JobKeeper Payment. Ingrid must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Jennifer is earning. Ingrid has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Jennifer under the JobKeeper Payment.
- Tammy can be re-engaged by Ingrid and Ingrid will then receive \$1,500 per fortnight before tax from the JobKeeper Payment to subsidise Tammy's salary. As this is more than the \$1,000 per fortnight salary Tammy is offered to be re-engaged at, Tammy will see an increase of \$500 per fortnight before tax being paid whilst Ingrid is receiving the JobKeeper Payment. Ingrid must continue to pay the superannuation guarantee on the \$1,000 per fortnight of wages that Tammy is earning. Ingrid has the option of choosing to pay superannuation on the additional \$500 (before tax) paid to Tammy under the JobKeeper Payment.
- Tammy can also continue to remain working at the large supermarket in the evening earning \$1,000 a fortnight. Her new employer will not be eligible for the JobKeeper payment for her as she was not employed by them at 1 March 2020.
- This means Tammy's new salary is \$2,500 per fortnight before tax (\$1,500 before tax from her job with Ingrid at the café plus \$1,000 per fortnight before tax with the supermarket).







## 8. Where and who to contact for further information and assistance?

### 8.1 Key resources

The following are links to government websites and information on the JobKeeper payment.

**Australian Tax Office** – [JobKeeper Payment](#)

**Business.gov.au** – [JobKeeper Payment for employers and employees](#)

**Treasury** – [JobKeeper Payment](#)

#### 8.1.1 Key Forms

**ATO** - [JobKeeper Employee Nomination Notice](#)

**FWC** – [Form F13A – Application for the Commission to deal with a JobKeeper dispute \(coronavirus economic response\)](#)

### 8.2 Key contacts

Have a question or situation that isn't covered by this guide? The Australian Chamber of Commerce and Industry is here to help and answer any questions you might have on (03) 9668 9950

**Scott Barklamb**

Director Workplace Relations

**Tamsin Lawrence**

Deputy Director – Workplace Relations

**Ingrid Fraser**

Senior Adviser – Workplace Relations

A list of ACCI member organisations in each state and territory and representing major industries can also be accessed [here](#), or you can call ACCI on (03) 9668 9950 to be referred to our members.

# Annexure A - JobKeeper Calendar

\*Last day for an employer to nominate for the JobKeeper Program if an employer wishes to apply for first two JobKeeper payment fortnights (March 30 to 12 April and 13 April to 26 April).



Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
March 30 <i>Start of Fortnight 1</i>	March 31	April 1	April 2	April 3	April 4	April 5
April 6	April 7	April 8	April 9	April 10	April 11	April 12 <i>End of Fortnight 1</i>
April 13 <i>Start of Fortnight 2</i>	April 14	April 15	April 16	April 17	April 18	April 19
April 20	April 21	April 22	April 23	April 24	April 25	April 26* <i>End of Fortnight 2</i>
April 27 <i>Start of Fortnight 3</i>	April 28	April 29	April 30	May 1	May 2	May 3
May 4 <i>ATO payments commence this week</i>	May 5	May 6	May 7	May 8	May 9	May 10 <i>End of Fortnight 3</i>
May 11 <i>Start of Fortnight 4</i>	May 12	May 13	May 14	May 15	May 16	May 17
May 18	May 19	May 20	May 21	May 22	May 23	May 24 <i>End of Fortnight 4</i>
May 25 <i>Start of Fortnight 5</i>	May 26	May 27	May 28	May 29	May 30	May 31
June 1	June 2	June 3	June 4	June 5	June 6	June 7 <i>End of Fortnight 5</i>
June 8 <i>Start of Fortnight 6</i>	June 9	June 10	June 11	June 12	June 13	June 14
June 15	June 16	June 17	June 18	June 19	June 20	June 21 <i>End of Fortnight 6</i>

Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
June 22	June 23	June 24	June 25	June 26	June 27	June 28
<i>Start of Fortnight 7</i>						
June 29	June 30	July 1	July 2	July 3	July 4	July 5
						<i>End of Fortnight 7</i>
July 6	July 7	July 8	July 9	July 10	July 11	July 12
<i>Start of Fortnight 8</i>						
July 13	July 14	July 15	July 16	July 17	July 18	July 19
						<i>End of Fortnight 8</i>
July 20	July 21	July 22	July 23	July 24	July 25	July 26
<i>Start of Fortnight 9</i>						
July 27	July 28	July 29	July 30	July 31	August 1	August 2
						<i>End of Fortnight 9</i>
August 3	August 4	August 5	August 6	August 7	August 8	August 9
<i>Start of Fortnight 10</i>						
August 10	August 11	August 12	August 13	August 14	August 15	August 16
						<i>End of Fortnight 10</i>
August 17	August 18	August 19	August 20	August 21	August 22	August 23
<i>Start of Fortnight 11</i>						
August 24	August 25	August 26	August 27	August 28	August 29	August 30
						<i>End of Fortnight 11</i>
August 31	September 1	September 2	September 3	September 4	September 5	September 6
<i>Start of Fortnight 12</i>						
September 7	September 8	September 9	September 10	September 11	September 12	September 13
						<i>End of Fortnight 12</i>
September 14	September 15	September 16	September 17	September 18	September 19	September 20
<i>Start of Fortnight 13</i>						
September 21	September 22	September 23	September 24	September 25	September 26	September 27
						<i>End of Fortnight 13</i>



# Annexure B - Employer JobKeeper Enabling Direction checklist

*This checklist is for employers who wish to issue a JobKeeper enabling direction to employees to:*

- *Work reduced hours or days (a JobKeeper enabling stand down direction) for any period they cannot be usefully employed*
- *Undertake alternative duties, or*
- *Work at an alternative location*



## Preliminary matters

- ☐ **Establish Eligibility:** Are you eligible as an employer (or business participant) and have you qualified for the JobKeeper scheme? Which of your employees are eligible and entitled to JobKeeper payment/s? (See Part 1 - 3 of the Guide to check)
- ☐ **Check pre-requisites:** Have you met all the pre-requisites which allow you to issue a JobKeeper enabling direction? (See Part 5 of the Guide to check)



*For example, is a direction to perform different duties or duties at a different location necessary to maintain the employment of the employee?*

## Before issuing a JobKeeper enabling direction

- ☐ **Give written notice:** Give the employee at least 3 days' written notice before giving the JobKeeper enabling direction (or less if the employee agrees)



- *This can be by electronic means*
- *The notice may be required to be in a prescribed form set out in the regulations (none yet published/prescribed)*

- ☐ **Consult:** Consult with the employee/s (or their representative) about the direction
- ☐ **Keep records:** Keep a written record of the consultation
- ☐ **Check whether the direction is 'reasonable':** Consider whether the direction is reasonable, including taking into account the employee's response during consultation



*Where a direction is unreasonable in all the circumstances, it will not apply to the employee. You need to consider anything relevant, including the personal circumstances of the employee (including for example, the impact on an employee's caring responsibilities)*

- ☐ **Monitor expiry:** Monitor circumstances to ensure the JobKeeper direction still applies (see Part 5.1.3 of the Guide to check)



*For example, a JobKeeper enabling direction no longer operates when there are no further JobKeeper payments, if it is replaced by a new direction, etc*

