

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

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**This information is accurate as of 6:00 P.M. Monday 27 April 2020 and is subject to change as this situation evolves.*

On 8 April, the Federal Parliament 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) and only in relation to employees eligible for the JobKeeper payment.

Much of the detail of how the JobKeeper Payment will be administered in practice is governed by Treasury Rules released on 9 April 2020. The most recent update on the JobKeeper scheme was released by the Federal Government on 27 April 2020.

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 who is eligible for the JobKeeper payment in relation to the:

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

The changes also allow an employer to request an employee agree to:

- change the days or times at which an employee performs work, or
- the employee is 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?

The Treasury Rules state 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. Registered religious organisations that meet the turnover test will be able to receive the JobKeeper Payment for each eligible religious practitioner (with the exception of those that are students only) for which they are responsible under the tax law.

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, an estimated 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, an estimated 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 an estimated reduction in turnover of 15% or more.

Business Size	Estimated 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, entities which have had a liquidator appointed, and businesses subject to the Major Bank Levy.

**ACNC registered charities which are a school, university, or a Table A or Table B provider are not eligible and will be assessed as regular businesses. Universities will be required to include the core Commonwealth Government financial assistance provided to universities in the JobKeeper turnover tests.*

BASIC TURNOVER TEST

Businesses must establish that turnover has or will likely fall in the relevant month or quarter as relevant to their turnover in a corresponding period a year earlier. Whether it is a relevant month or quarter depends on the business' Business Activity Statement (BAS) reporting period. Generally speaking, the turnover that will be used for comparison purposes will be the same as the turnover that is reported for GST purposes. This includes turnover referable to taxable supplies and GST free supplies, but excludes input taxed supplies. There are some modifications to the usual GST turnover concepts. For example, turnover from intra-group supplies that may usually be ignored will need to be taken into account.

Charities may include donations they have received or are likely to receive in their turnover. They may also elect to exclude government revenue from the turnover test.

If the business was not in operation a year earlier, or their turnover a year earlier was not representative of their usual or average turnover, an alternative turnover test may apply. The Commissioner has the discretion to set out the alternative tests, and the businesses to which those tests apply, in a legislative instrument.

DOES THE TURNOVER TEST APPLY TO SEPARATE ENTITIES OF A BUSINESS?

The basic turnover test will separately apply to each entity connected with or affiliated with the business in question. Individual businesses within a corporate group may be eligible for the JobKeeper payment, while other businesses in the group may not be eligible.

ALTERNATIVE TURNOVER TEST

As noted above, an alternative turnover test may apply in a number of situations. See our [Employer Guide to the JobKeeper Scheme \(Third Edition\)](#) for further details regarding these tests.

WHO ARE ELIGIBLE EMPLOYEES?

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

- was employed as at 1 March 2020, and
- be 16 years and over at 1 March 2020 (however see comments below regarding new prospective rule expected to be introduced this week regarding full time students)
- be a full time, part time or long term casual employee
- be an Australian citizen, permanent resident or the holder of a Special Category (subclass 444) visa at 1 March 2020, and
- be 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.

The following employees are specifically ineligible:

- Employees receiving Parental Leave Pay from Services Australia. However, employees on parental leave from their employer will be eligible.
- Employees receiving workers compensation will generally not be eligible. However if they are working, for example on reduced hours, they will be eligible.
- Full-time students who are 17 years old and younger, and who are not financially independent, are not eligible on a prospective basis.

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.

To be eligible for the JobKeeper payment from their casual employer, the long term casual employee must not be a permanent employee of any other employer.

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.

HOW DO EMPLOYERS APPLY?

Employers must elect to participate in the JobKeeper scheme by enrolling via the [Australian Taxation Office website](#). They must provide supporting information demonstrating a downturn in their business.

Generally, employers must register before the end of the relevant fortnight to receive a JobKeeper payment in respect of that fortnight. However, in relation to the JobKeeper fortnights in April and May, employers have until 31 May 2020 to enrol (with any payments for those initial JobKeeper periods conditional on all other requirements being satisfied).

WHEN DO PAYMENTS NEED TO BE MADE TO EMPLOYEES?

Initially, Treasury guidance stated 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. To qualify for the first JobKeeper fortnight, payments must be made to employees by 8 May 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.

However, these employers still have options to deal with a COVID-19 downturn including directing employees to work, reasonably redeploying an employee to perform other duties and where permitted under the Fair Work Act and any applicable award or EBA, directing employees to take annual leave. Employers may also reach agreement with employees regarding new work arrangements including varying days or time of work, reducing hours of work with a corresponding reduction in pay. Where certain requirements are met by employers in relation to a stoppage of work, employers may also be able to stand down employees without pay.

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