Guide to The JobKeeper Scheme April 2020

Employment in the time of COVID-19

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Part I

Overview

I. Overview

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

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

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

4. The new Part 6-4C enables:

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

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

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

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

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

5. Both the scheme, and the associated changes to the FW Act, are temporary. The FW Act amendments are intended to facilitate the scheme, providing employers with the legal means

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

6. This guide aims to:

   (a) provide a practical guide to the changes;

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

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

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

8. A number of aspects of the scheme, and the associated amendments to the FW Act, are intended to be supplemented by regulations. As at the time of the initial publication of this guide, no regulations have been enacted. This guide may be updated periodically to reflect future developments.

9. The law as stated in this guide is current to 14 April 2020.

10. The contents of this guide do not constitute legal advice, which should be sought to address your own, or your clients', individual circumstances. Liability for reliance on the views expressed in this guide is excluded.

Part II

To whom do the changes apply?

II. To whom do the changes apply?

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

12. Entitlement to a jobkeeper payment is determined by the payment rules (the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (**the Payment Rules**)). In the case of employers with paid employees, Division 2 of those Rules is the central focus.

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

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

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

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

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

    (a) the fortnight is a "jobkeeper fortnight": Payment Rules s 6(1)(a);

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

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

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

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

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

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

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

(b) Jobkeeper fortnights

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

Monday 30 March to Sunday 12 April

Monday 13 April to Sunday 26 April

Monday 27 April to Sunday 10 May

Monday 11 May to Sunday 24 May

Monday 25 May to Sunday 7 June

Monday 8 June to Sunday 21 June

Monday 22 June to Sunday 5 July

Monday 6 July to Sunday 19 July

Monday 20 July to Sunday 2 August

Monday 3 August to Sunday 16 August

Monday 17 August to Sunday 30 August

Monday 31 August to Sunday 13 September

Monday 14 September to Sunday 27 September

(c) Employer qualification for the JobKeeper scheme

(i) Overview

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

    (a) have been carrying on a business in Australia, or be a non-profit body pursuing its objectives principally in Australia on 1 March 2020; and

    (b) have suffered a decline in turnover at the time their eligibility is being assessed.

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

> Once an employer decides to participate in the JobKeeper scheme and their eligible employees have agreed to be nominated by the employer, the employer must ensure that all of these eligible employees are covered by their participation in the scheme. This includes all eligible employees who are undertaking work for the employer or have been stood down. The employer cannot select which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.

However, this 'key feature' does not seem to be reflected in the Payment Rules themselves, although some commentators have suggested that it may be introduced by the Australian Taxation Office acting administratively.

(ii) Eligible businesses

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

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

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

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

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

(d) sovereign entities;

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

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

(iii) The requisite decline in turnover

20. The requisite decline in turnover is:

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

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

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

(iv) Assessing a decline in turnover

21. To ascertain the decline in turnover section 8 of the Payment Rules requires a comparison – at the time eligibility for the scheme is being tested (the "test time") – between:

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

i. a calendar month ending after 30 March 2020 and before 1 October 2020; or

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

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

22. For example, an employer wishing to participate in the scheme on 2 May 2020 may elect to assess their decline in turnover by comparing their projected GST turnover for May 2020 against their current GST turnover for May 2019, or by comparing their projected GST turnover for the quarter commencing in April 2020 against their current GST turnover for the quarter commencing April 2019.

(v) The concept of "GST turnover"

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

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

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

25. The ATO also provides a useful outline of the amounts that should be included or disregarded here.

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

26. Projected GST turnover is the sum of the value of all "supplies" made, or expected to be made within the turnover test period – which generally comprises the total business income of an entity minus the items identified by the ATO referred to in paragraph 24 above. This excludes any supply made, or likely to be made in order to transfer ownership of a capital asset or "solely as a consequence of" ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise: GST Act s 188-25.

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

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

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

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

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

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

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

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

30. Employers would be well-advised to document the precise amount of their projected GST turnover during the turnover test period together with their reasoning behind the anticipated decline in projected GST turnover.

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

31. Current GST turnover in the relevant comparison is the sum of the value of all "supplies" made within that period, which generally comprises the total business income of an entity minus the items identified by the ATO referred to in paragraph 24 above. This excludes any supply made, or likely to be made in order to transfer ownership of a capital asset or "solely as a consequence of" ceasing to carry on an enterprise or substantially and permanently reducing the size or scale of an enterprise: GST Act s 188-25.

32. The same qualifications as set out above in relation to "projected GST turnover" at paragraph 27 apply here.

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

(viii) Assessing charities

34. The Payment Rules make special provision for assessing the decline in turnover for deductible gift recipients and ACNC charities which are not deductible gift recipients: see Payment Rules s 8(8)(f) and (g).

(ix) Alternatives to the basic turnover test

35. Finally, for those employers who do not meet the basic turnover test, there is provision for the Commissioner of Taxation to specify an alternative test for a class of entities in respect of which the Commissioner is satisfied that there is no appropriate comparison period for the purposes of the basic test: s 8(5). At the time of writing, no such determination has been made, although the Explanatory Memorandum to the Payment Rules identifies as examples two classes for which determinations might be made: farmers (on the basis that they are drought-affected) and tech start-up companies (on the basis that they may not have been in business during the comparison period).

(d) Eligible employee

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

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

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

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

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

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

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

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

37. Each of these requirements are addressed below.

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

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

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

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

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

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

(ii) 16 years or over as at 1 March 2020

43. This requirement speaks for itself and requires no further elaboration.

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

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

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

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

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

46. Further, the fact that the assessment takes place at 1 March 2020 means that it is open to an employer to rehire an employee whose employment was terminated after 1 March 2020, and to retain that employee using payments made under the jobseeker scheme (the Explanatory Memorandum to the Payment Rules expressly contemplates such an arrangement).

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

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

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

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

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

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

i. the contractual terms;

ii. the regulatory regime; and

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

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

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

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

52. The Explanatory Memorandum to the Payment Rules offers the following example of a long term casual employee:

> On 1 March 2019, Sam commences employment as a casual employee at Annie's Bakery. Sam has a regular work schedule – working between 3 and 4 days each week. On 1 July 2019, ownership of Annie's Bakery changes hands. Sam continues

to be employed as a casual employee of Annie's Bakery and continues to work according to their regular work schedule from that date until 10 March 2020, when Sam is stood down.

For the purposes of determining whether Sam is a long term casual employee and an eligible employee, the fact that the business has changed hands will not disadvantage Sam, Sam is able to demonstrate regular and systematic employment at Annie's Bakery for over 12 months. He is therefore a long term casual employee for the purposes of the JobKeeper scheme.

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

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

    (a) they resided in Australia; and

    (b) were:

        i. an Australian citizen;

        ii. the holder of a permanent visa; or

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

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

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

55. An individual must give the employer notice in an "approved form". As at the date of publication, the "approved form" has not been prescribed. It will require the individual to certify the various matters that make them eligible employees (age, employment as 1 March 2020, residency) as well as the fact that they are not:

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

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

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

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

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

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

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

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

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

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

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

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

(e) The "wage condition"

61. The "wage condition" is found in the Payment Rules reg 10.

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

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

63. Critically, eligibility for jobseeker payments depends on the wage condition already having been satisfied. This means that jobkeeper payments are made in arrears and, for employers to be eligible for the payment, they must have already paid at least $1,500 during the relevant fortnight to any employees for whom they are claiming the payment.

64. The payment of $1,500 can be made up from the following amounts:

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

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

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

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

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

66. There is scope for the Commissioner to treat payments made in a fortnight as having been made in a different fortnight where it is considered reasonable to do so (see Payment Rules s 10(4)). The Explanatory Memorandum to the Payment Rules suggests that this power is intended to deal with matters like accidental underpayments that are addressed in subsequent fortnights or inconsistencies created by payment systems that work on a monthly rather than a weekly or fortnightly basis.

(f) Employer election to participate

67. There will be an approved form for employers to provide to the Commissioner giving notice of their election to participate. At the time of writing this form had not been prescribed.

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

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

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

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

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

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

71. There will be an approved form for an employer to submit information about the jobseeker entitlement, including details of the individuals in respect of whom the entitlement is due, to the Commissioner. At the time of writing this form had not been prescribed.

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

    (a) the name of the employee;

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

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

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

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

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

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

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

(i) Record keeping requirements

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

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

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

Part III

The obligations of employers in all cases

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

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

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

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

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

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

82. The "wage condition" is found in the Payment Rules reg 10.

83. The substance of the condition is explained in paragraphs 61-66 above. It has two purposes:

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

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

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

85. The obligation to satisfy the wage condition is a civil remedy provision. Section 539(2) of the FW Act has been amended to make clear that employees, unions and inspectors can

bring proceedings for contraventions in the Federal Court (**FCA**), the Federal Circuit Court (**FCCA**) and an eligible State or Territory court. The penalties are up to 600 penalty units for a serious contravention or, in any other case, 60 penalty units.

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

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

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

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

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

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

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

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

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

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

91. Where the employee is working less than they ordinarily would, an employee whose entitlement to receive wages depends on the actual performance of work would be entitled

to the greater of $1,500 per fortnight or the amount that would be due to them for the work actually performed.

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

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

Part IV

“Jobkeeper enabling directions”

IV. "Jobkeeper enabling directions" under the FW Act

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

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

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

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

(a) Stand down directions (s 789GDC)

(i) The power

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

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

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

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

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

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

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

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

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

100. Part 6-4C now provides for such an authorisation. A stand down direction under section 789GDC, where it applies, is a simple method of lawfully standing down an employee without breaching the contract of employment. It should, in most cases, have the practical effect of ousting an employer's obligation to pay wages under a contract of employment, a workplace instrument or the FW Act, and substituting it with the wage condition, the minimum payment guarantee and, where applicable, the hourly rate of pay guarantee (as to which see below at paragraphs 107-108). In essence, the employee is not being stood down without pay, but rather is being stood down with the right to a minimum payment of $1,500 per fortnight, which is provided by the Government as a jobseeker payment at no net cost to the employer.

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

(ii) Conditions

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

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

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

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

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

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

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

(iii) Employer's obligations during stand down period

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

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

(iv) Hourly rate of pay guarantee

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

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

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

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

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

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

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

(vi) Impact of stand down on employee service

112. If a stand down direction is given for a period, that period will count towards the employee's service: s 789GR(1).

113. In contrast, if a stand down is directed pursuant to Part 3-5 of the FW Act, under an enterprise agreement or under the employee's contract of employment, the time the employee is stood down will not count to the employee's service: see s 789GR(2), and compare s 22(2)(b)(ii).

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

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

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

(viii) Retrospective operation?

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

(ix) Exclusions

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

(b) Directions changing duties (s 789GE)

(i) The power

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

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

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

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

(ii) Conditions

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

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

(b) the new duties are:

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

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

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

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

122. Further, the direction will have no effect "unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer": s 789GL(1). This requirement suggests that it would be prudent for the employer to:

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

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

123. This further condition does not mean that the employer must be satisfied that the direction is necessary to continue the employment of the employee to whom the direction is made. It

can be justified on the basis that making the direction is necessary to continue the employment of another employee or employees.

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

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

(iii) Hourly rate of pay guarantee

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

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

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

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

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

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

(iv) Exclusions

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

(v) Retrospective operation?

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

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

(i) The power

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

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

134. The power appears to be intended as another fall-back to a stand down direction. Bearing in mind that a stand down direction can only be given where the employee is not able "to be usefully employed for their normal days or hours during the stand down period because of business changes attributable to COVID-19 or government initiatives to slow the

pandemic" (s 789GDC(1)(c)), this power enables the employer to put the employee to use at a location where the employer has a need for the employee to carry out work at a time where there may be limited – or no – call for the employee to perform duties at their usual place of work.

(ii) Conditions

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

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

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

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

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

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

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

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

136. Further, the direction will have no effect "unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer": s 789GL(1). This requirement suggests that it would be prudent for the employer to:

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

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

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

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

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

(iii) Exclusions

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

(iv) Retrospective operation?

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

(d) Requirements applying to all jobkeeper enabling directions

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

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

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

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

(i) The reasonableness condition (s 789GK)

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

144. The only guidance in provisions as to what factors might make a direction unreasonable is the note to section 789GK, which indicates that a direction might be unreasonable "depending on the impact of the direction on any caring responsibilities the employee may have". The Explanatory Memorandum does not shed any further light on how this could be interpreted. The guiding factors are likely to be the purpose of the provision authorising the direction in question, taken both on its own and as part of the overarching purpose of the amending legislation.

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

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

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

148. An employee who relied on the unreasonableness of a direction as a justification for not complying with it would not contravene a civil remedy provision if the direction proved to be reasonable, because s 789GQ is not a civil remedy provision. However, the employee could be required to comply by an order of the Fair Work Commission directing compliance. Failure to comply with that order would be a contravention of a civil remedy provision: s 789GW.

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

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

150. The process prescribed by section 789GM is:

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

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

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

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

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

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

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

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

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

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

154. Any jobkeeper enabling direction must be:

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

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

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

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

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

156. A jobseeker enabling direction will continue into effect until:

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

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

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

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

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

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

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

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

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

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

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

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

Part V

Flexibility agreements

V. Flexibility agreements under the FW Act

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

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

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

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

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

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

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

(ii) The requirements for an agreement

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

(a) it must be in writing;

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

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

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

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

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

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

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

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

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

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

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

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

(iv) Exclusions

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

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

(i) Ability to agree annual leave at half pay

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

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

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

(ii) The requirements for an agreement

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

(a) it must be in writing;

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

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

(iii) Accrual of leave entitlements while taking leave

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

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

(iv) Exclusions

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

Part VI

Requests to take annual leave

VI. Requests to take annual leave under the FW Act

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

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

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

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

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

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

Part VII

Employee protections

VII. Employee protections under the FW Act

(a) Interaction with general protections

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

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

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

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

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

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

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

(b) Interaction with unfair dismissal

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

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

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

(c) Interaction with anti-discrimination laws

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

(d) Interaction with health and safety obligations

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

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

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

Part VIII

Dispute resolution

VIII. Dispute resolution under the FW Act

(a) Role of the Fair Work Commission

183. The Fair Work Commission is vested with jurisdiction to deal with disputes about the operation of Part 6-4C, including by arbitration: s 789GV(1) and (2). It must deal with disputes taking into account fairness between the parties: s 789GV(7).

184. Applications for dispute resolution may be brought by employers, employees, employee organisations and employer organisations: s 789GV(3).

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

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

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

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

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

(b) Role of the Courts

(i) The FCA and the FCCA

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

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

(ii) Eligible State and Territory Courts

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

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

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

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

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

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