

# FEDERAL COURT OF AUSTRALIA

## Qantas Airways Limited v Flight Attendants' Association of Australia

[2020] FCAFC 227

Appeal from: *Qantas Airways Limited v Flight Attendants' Association of Australia (The JobKeeper Case)* [2020] FCA 1365

File numbers: NSD 1124 of 2020  
NSD 1125 of 2020

Judgment of: **JAGOT, BROMBERG AND WHEELAHAN JJ**

Date of judgment: 17 December 2020

Catchwords: **STATUTORY INTERPRETATION** – appeal – Commonwealth *JobKeeper Scheme* – meaning of “the amounts payable to the employee in relation to the performance of work during the fortnight” – extrinsic material – consideration of note to section – text, context and purpose – appeal allowed

Legislation: *Acts Interpretation Act 1901* (Cth) s 15AB(1)  
*Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth)  
*Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) ss 7 and 20  
*Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) rr 8 and 10(3)  
*Evidence Act 1995* (Cth) s 144(1)(a)  
*Fair Work Act 2009* (Cth) ss 323, 323(1), 789GA, 789GC, 789GD, 789GDA, 789GDA(2), 789GDA(2)(a), 789GDA(2)(b), 789GDB, 789GDC, 789GE, 789GF, 789GG and 789GQ  
Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, 8 April 2020, 2918-2922 (Josh Frydenberg, Treasurer)  
Explanatory Memorandum, Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (Cth) and Coronavirus Economic Response Package Omnibus (Measures No 2) Bill 2020 (Cth)  
Explanatory Statement, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth)

*Australian Concise Oxford Dictionary* (5th ed as at 2009)

*Macquarie Dictionary* (5th ed as at 2009)

Cases cited:

*Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd* [2019] FCA 1960

*Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461

*Bendigo Bank Ltd v Williams* [2000] FCA 482; (2000) 98 FCR 377

*Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1

*Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192

*Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619

*Elzac Pty Ltd v Commissioner of Patents* (1994) 53 FCR 86

*Glass v Defence Force Retirement and Death Benefits Authority* [1992] FCA 558; (1992) 38 FCR 534

*Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20* [2020] FCAFC 121

*Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601

*Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908

*Spence v Queensland* [2019] HCA 15; (2019) 93 ALJR 643

*WorkPac Pty Ltd v Rossato* [2020] FCAFC 84; (2020) 378 ALR 585

Division: Fair Work Division

Registry: New South Wales

National Practice Area: Employment and Industrial Relations

Number of paragraphs: 118

Date of hearing: 9 November 2020

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NSD 1125 of 2020):

Solicitor for the Respondent (NSD 1124 of 2020): Flight Attendants' Association of Australia

Solicitor for the First Respondent (NSD 1125 of 2020): Transport Workers' Union of Australia

Solicitor for the Second Respondent (NSD 1125 of 2020): Australian Municipal, Administrative, Clerical and Services Union

## ORDERS

NSD 1124 of 2020

**BETWEEN:**                    **QANTAS AIRWAYS LIMITED (ACN 009 661 901)**  
First Appellant

**QF CABIN CREW AUSTRALIA PTY LIMITED**  
**(ACN 128 382 105)**  
Second Appellant

**AND:**                         **FLIGHT ATTENDANTS' ASSOCIATION OF AUSTRALIA**  
Respondent

**ORDER MADE BY:**   **JAGOT, BROMBERG AND WHEELAHAN JJ**

**DATE OF ORDER:**   **17 DECEMBER 2020**

### **THE COURT ORDERS THAT:**

1.     The appeal be allowed.
2.     The cross-appeal be dismissed.
3.     The declaration made on 13 October 2020 be set aside.
4.     The parties are to provide a proposed form of order which substitutes the declaration made on 13 October 2020 to give effect to these reasons within 14 days.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

# ORDERS

NSD 1125 of 2020

**BETWEEN:**            **QANTAS AIRWAYS LIMITED (ACN 009 661 901)**  
First Appellant

**QANTAS GROUND SERVICES PTY LIMITED**  
Second Appellant

**AND:**                 **TRANSPORT WORKERS' UNION OF AUSTRALIA**  
First Respondent

**AUSTRALIAN MUNICIPAL, ADMINISTRATIVE,  
CLERICAL AND SERVICES UNION**  
Second Respondent

**ORDER MADE BY: JAGOT, BROMBERG AND WHEELAHAN JJ**

**DATE OF ORDER: 17 DECEMBER 2020**

## THE COURT ORDERS THAT:

1. The appeal be allowed.
2. The cross-appeal be dismissed.
3. The declaration made on 13 October 2020 be set aside.
4. The parties are to provide a proposed form of order which substitutes the declaration made on 13 October 2020 to give effect to these reasons within 14 days.

[Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.]

## REASONS FOR JUDGMENT

### JAGOT AND WHEELAHAN JJ:

#### Introduction

- 1 This appeal concerns the meaning to be given to a provision which forms part of the legislative package known as the *JobKeeper Scheme* enacted by the Commonwealth Parliament in response to the Coronavirus pandemic. The provision, s 789GDA of the *Fair Work Act 2009* (Cth) (the **Fair Work Act**), provides a minimum payment guarantee by which an employer must ensure that, if a jobkeeper payment is payable to an employer for an employee for a fortnight, the total amount payable to the employee in respect of the fortnight is the greater of the jobkeeper payment amount (\$1,500 initially and then subsequently reduced) or “the amounts payable to the employee in relation to the performance of work during the fortnight”.
- 2 The appellants (**Qantas**) contend (and contended before the primary judge) that the second amount (the amounts payable to the employee in relation to the performance of work during the fortnight) means the amount that would ordinarily be payable by the employer to the employee during the fortnight in relation to the performance of work (the **amounts payable construction**). The respondents contend (and contended before the primary judge) that the second amount means the amount that was earned by the employee in relation to the performance of work during the fortnight (the **amounts earned construction**). The primary judge concluded that the second amount means the amount that was both payable to and earned by the employee in relation to the performance of work during the fortnight (the **amounts payable and earned construction**): *Qantas Airways Limited v Flight Attendants’ Association of Australia (The JobKeeper Case)* [2020] FCA 1365.
- 3 The different constructions lead to the same or different amounts being paid by an employer to an employee depending on the facts. The primary judge provided three examples to expose the consequences of his preferred construction of subs 789GDA(2)(b) of the Fair Work Act which identifies the second amount. Those examples are set out below along with two additional tables for each example showing the consequences of each of the different constructions (noting that in each example it is assumed the employer would be eligible for the jobkeeper payment for the relevant fortnight and thus the employer is always subsidised by a jobkeeper payment of \$3,000 for the employee in each fortnight). These examples are provided only so

that each construction may be better understood. We ultimately conclude below that apparent anomalies in outcome are not a reliable guide to the preferable construction of s 789GDA(2).

### Scenario 1

#### *Amounts payable and earned construction adopted by primary judge at [33]*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
0 (fortnight prior to <i>JobKeeper</i> )	\$1,500 (ordinary wages) \$1,500 (overtime payable next fortnight)	\$1,500	\$1,500	\$1,500 (wages)
1	Nil – employee stood down	\$1,500 (overtime earned but not payable in previous fortnight – payable in <i>JobKeeper</i> fortnight 1)	Nil	\$1,500 ( <i>JobKeeper</i> payment) \$1,500 (overtime payable from previous fortnight)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$1,500</b>	<b>\$4,500</b>

#### *Amounts payable construction proposed by Qantas*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
0 (fortnight prior to <i>JobKeeper</i> )	\$1,500 (ordinary wages) \$1,500 (overtime payable next fortnight)	\$1,500	\$1,500	\$1,500 (wages)
1	Nil – employee stood down	\$1,500 (overtime earned but not payable in previous fortnight – payable in <i>JobKeeper</i> fortnight 1)	Nil	\$1,500 (overtime payable from previous fortnight)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$1,500</b>	<b>\$3,000</b>

#### *Amounts earned construction proposed by respondents*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
0 (fortnight prior to <i>JobKeeper</i> )	\$1,500 (ordinary wages) \$1,500 (overtime payable next fortnight)	\$1,500	\$1,500	\$1,500 (wages)
1	Nil – employee stood down	\$1,500 (overtime earned but not payable in previous fortnight – payable in <i>JobKeeper</i> fortnight 1)	Nil	\$1,500 ( <i>JobKeeper</i> payment) \$1,500 (overtime payable from previous fortnight)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$1,500</b>	<b>\$4,500</b>

4 In this example:

- (1) the employer receives \$3,000 in jobkeeper payments and is liable to pay the employee \$4,500 in respect of work worth \$3,000 on the construction preferred by the primary judge and the respondents; and
- (2) the employer receives \$3,000 in jobkeeper payments and is liable to pay the employee \$3,000 in respect of work worth \$3,000 on the construction preferred by Qantas.

## Scenario 2

### *Amounts payable and earned construction adopted by primary judge at [37]*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
2	\$3,000 (wages)	\$3,000	\$3,000	\$3,000 (wages)
3	Nil – employee stood down	Nil	Nil	\$1,500 ( <i>JobKeeper</i> payment)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$4,500</b>

### *Amounts payable construction proposed by Qantas*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
2	\$3,000 (wages)	\$3,000	\$3,000	\$3,000 (wages)
3	Nil – employee stood down	Nil	Nil	\$1,500 ( <i>JobKeeper</i> payment)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$4,500</b>

### *Amounts earned construction proposed by respondents*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
2	\$3,000 (wages)	\$3,000	\$3,000	\$3,000 (wages)
3	Nil – employee stood down	Nil	Nil	\$1,500 ( <i>JobKeeper</i> payment)
<b>Total</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$3,000</b>	<b>\$4,500</b>

- 5 In this example the three different constructions lead to the same result. The employee is paid \$4,500 for \$3,000 worth of work. The employer receives \$3,000 in jobkeeper payments.

## Scenario 3

### *Amounts payable and earned construction adopted by primary judge at [40]*

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
3	\$2,500 (payable next fortnight)	Nil (wages paid in second fortnight)	Nil	\$1,500 ( <i>JobKeeper</i> payment)

4	Nil – no work performed in this fortnight	\$2,500 (for wages earned in previous fortnight)	Nil	\$1,500 ( <i>JobKeeper</i> payment) \$2,500 (amount payable for fortnight 3)
<b>Total</b>	<b>\$2,500</b>	<b>\$2,500</b>	<b>Nil</b>	<b>\$5,500</b>

***Amounts payable construction proposed by Qantas***

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
3	\$2,500 (payable next fortnight)	Nil (wages paid in second fortnight)	Nil	\$1,500 ( <i>JobKeeper</i> payment)
4	Nil – no work performed in this fortnight	\$2,500 (for wages earned in previous fortnight)	Nil	\$2,500 (amount payable for fortnight 3)
<b>Total</b>	<b>\$2,500</b>	<b>\$2,500</b>	<b>Nil</b>	<b>\$4,000</b>

***Amounts earned construction proposed by respondents***

<i>JobKeeper</i> fortnight	Amount earned during fortnight	Amount payable in fortnight by Qantas for work performed (irrespective of <i>JobKeeper</i> )	Amount earned in the fortnight and payable in the fortnight	Total amount payable to employee for fortnight
3	\$2,500 (payable next fortnight)	Nil (wages paid in second fortnight)	Nil	\$2,500 (amount earned even if not payable in fortnight 3)
4	Nil – no work performed in this fortnight	\$2,500 (for wages earned in previous fortnight)	Nil	\$1,500 ( <i>JobKeeper</i> payment)
<b>Total</b>	<b>\$2,500</b>	<b>\$2,500</b>	<b>Nil</b>	<b>\$4,000</b>

6 In this example:

- (1) the primary judge’s construction results in the employer paying the employee \$5,500 for \$2,500 worth of work, while the employer receives \$3,000 in jobkeeper payments;
- (2) on the constructions of both Qantas and the respondents the employee would receive \$4,000 for \$2,500 worth of work, while the employer receives \$3,000 in jobkeeper payments;
- (3) on Qantas’s construction, there is no change imposed by the legislation on the employer’s ordinary payment arrangements so that, as the \$2,500 was not ordinarily payable in fortnight 3, it remains not payable in that fortnight and the employee is entitled to the jobkeeper payment amount as the greater of the two amounts identified in subs 789GDA(2)(a) and (b); and
- (4) on the respondents’ proposed construction, although the employee would not otherwise be entitled to a payment of \$2,500 in fortnight 3 (as the employer’s pay arrangements are a fortnight in arrears in this scenario), s 789GDA(2) operates so that, because the

employee has earned that amount in fortnight 3 and it is greater than the jobkeeper payment amount in subs 789GDA(2)(a), the employer must pay to the employee for fortnight 3 the amount of \$2,500.

7 As the above examples make apparent, all three constructions assume that outside of s 789GDA(2) the employer is subject to an obligation to pay the employee wages. This is correct given the terms of s 323 of the Fair Work Act which provides that an employer must pay an employee amounts payable to the employee in relation to the performance of work in full, in money and at least monthly (further reference will need to be made to s 323 below). All three constructions also assume that, pursuant to their statutory or contractual obligations (as the case may be), the employer would otherwise be bound to make payments to the employee at a particular time and in a particular manner (for example, in advance, in arrears, partly in advance or in arrears, with leave or bonus entitlements being payable at some or other time in part or in full, and otherwise). This assumption must also be correct as it underlies the concept of “amounts payable to the employee” in s 323.

8 As the above examples also make apparent, the constructions preferred by the primary judge and the respondents mean that s 789GDA(2) imposes an obligation on the employer to calculate not only what the employer must ordinarily calculate to comply with the employer’s obligations (the amount payable to the employee for a period) and to make the proportion of that calculation of what is otherwise payable referable to the concept of the jobkeeper fortnight by which s 789GDA operates (see s 10(3) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) (the ***Coronavirus Rules***) which requires a reasonable allocation of payments to the fortnight if the pay period is longer than a fortnight), but also the amount the employee has earned referable to the jobkeeper fortnight. On the primary judge’s construction, if the latter amount is also payable in the jobkeeper fortnight and exceeds the jobkeeper amount, the employer must pay that latter amount. On the respondents’ construction, the latter amount is payable because the employee has by work during the jobkeeper fortnight earned that amount, even if but for s 789GDA(2) (on this construction) the employer would not be bound to make that payment in the jobkeeper fortnight. In other words, irrespective of how the employer’s payment obligations otherwise work, all three constructions require the employer to allocate what is payable to the employee in the ordinary course to a jobkeeper fortnight. The constructions of the primary judge and the respondents also require the employer to undertake a further separate calculation to determine what part of the

employee's pay is referable to the work the employee has actually performed during the jobkeeper fortnight.

9 One implication of the different constructions that may not be as apparent from the above examples is that the respondents' construction, which means that s 789GDA(2) is the source of a new obligation on an employer to calculate and pay to the employee the greater of the jobkeeper payment amount or the amount earned by the employee in the jobkeeper fortnight, also means that this new obligation involves no temporal requirement. That is, although the employer previously may have been obliged to pay the employee at a particular time pursuant to a contract or industrial instrument, s 789GDA(2) does not specify any time for payment. In particular, it does not require the amount payable to be paid in the jobkeeper fortnight. It requires only that the amount earned during the jobkeeper fortnight be paid at some indeterminate time. By contrast, the most natural and ordinary consequence of the constructions of Qantas and the primary judge (although Qantas maintained this was not essential to its construction) is that the amount payable be paid in the jobkeeper fortnight. This should be kept in mind when considering the competing constructions, particularly given that (as explained below) s 789GDA(2) is a civil penalty provision (that is, contraventions attract pecuniary penalties) so that certainty as to when a contravention has occurred is important and s 789GD requires the employer to satisfy the wage condition in the jobkeeper payment rules (concepts which will be explained below) by the end of the fortnight and is another civil penalty provision.

10 Otherwise, as a preliminary matter, it should be noted that none of the parties submitted that the primary judge's construction should be preferred. Qantas appealed against the declaration made by the primary judge reflecting the primary judge's construction on that basis that Qantas's own construction should be preferred. The respondents cross-appealed against the declaration on the basis that their construction should be preferred.

11 For the reasons which follow, we consider that Qantas's construction is to be preferred.

### ***The JobKeeper Scheme***

12 The relevant context in which the *JobKeeper Scheme* was enacted is a matter of common knowledge which may be taken into account under s 144(1)(a) of the *Evidence Act 1995* (Cth). After the Coronavirus pandemic was declared in Australia in March, the Commonwealth Parliament urgently enacted legislation to provide a wage subsidy to employers to continue paying their employees in circumstances where the Coronavirus pandemic resulted in many

businesses being temporarily shut down or limited in their operations as part of the public health response to the virus. The Commonwealth Parliament enacted a legislative package, the *JobKeeper Scheme*, on an expedited basis on 9 April 2020 to provide an economic response to the economic crisis presented by the Coronavirus pandemic.

13 As the primary judge pointed out at [9] of his reasons the main components of the *JobKeeper Scheme* are:

- the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) (the *Coronavirus Economic Response Act*) – ss 7 and 20 of which provide for the making of rules for the provision by the Commonwealth of Coronavirus economic response payments and the establishment of a scheme relating to those payments;
- the *Coronavirus Rules*; and
- the *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth) (the *Coronavirus Measures Act*) – which inserts Pt 6-4C into the Fair Work Act, including (in particular) ss 789GD and 789GDA.

14 These provisions were introduced in circumstances where s 323(1) of the Fair Work Act provided as follows:

- (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
  - (a) in full (except as provided by section 324); and
  - (b) in money by one, or a combination, of the methods referred to in subsection (2); and
  - (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

15 In the second reading speech for the legislative package made on 8 April 2020, and as recorded at [11] of the primary judge's reasons, the Commonwealth Treasurer said:

## The JobKeeper payment

The government will provide financial support to business, not-for-profits and sole traders affected by the coronavirus outbreak.

Under this framework, the government will deliver a wage subsidy to those employers significantly impacted by the coronavirus outbreak to continue paying their employees. The JobKeeper payment will support employers to maintain their connection to their employees, helping them to reactivate their operations quickly—without having to rehire staff—when the crisis is over.

Eligibility for the JobKeeper payment will be set out in the rules made by the Treasurer. The JobKeeper payment will be payable to an eligible employer who chooses to participate in the scheme, for a maximum of 26 weeks in respect of each employee that is on their books on 1 March 2020 and is retained or continues to be engaged by that employer. The program commences on 30 March 2020, the day of its announcement. Eligible businesses can begin distributing the JobKeeper payment immediately and will be reimbursed from the first week of May.

...

- 16 In the Explanatory Memorandum, Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 (Cth) and Coronavirus Economic Response Package Omnibus (Measures No 2) Bill 2020 (Cth) (the *Explanatory Memorandum*), as the primary judge recorded at [12], this is said:

### *Division 2—Employer payment obligations*

#### *Section 789GD (Obligation of employer to satisfy the wage condition)*

- 1.20 Section 6(1)(d) and 10 of the JobKeeper payment rules require the sum of amounts paid (or otherwise handled in ways permitted by those rules, such as by making salary sacrifice superannuation contributions for employees or withholding tax amounts) by an employer who is entitled to a JobKeeper payment for an individual for a fortnight, to equal or exceed \$1,500 in the fortnight (this is the wage condition of the JobKeeper payment rules).
- 1.21 New Section 789GD requires an employer that qualifies for the JobKeeper scheme, and would be entitled to the JobKeeper payment for a particular employee by satisfying the wage condition in respect of that employee, to ensure the wage condition is in fact satisfied by the end of the fortnight. This effectively requires the employer to pay their employee (or otherwise deal with amounts in ways permitted by the JobKeeper payment rules) the fortnightly value of the JobKeeper payment.
- 1.22 Section 789GD is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions upon application by an employee, employee representative or an inspector.
- 1.23 Note 2 to section 789GD makes it clear that under the JobKeeper payment rules, a JobKeeper payment is a payment to an employer for a particular employee for a fortnight.

#### *Section 789GDA (Minimum payment guarantee)*

1.24 Section 789GDA requires an employer who is eligible for the Jobkeeper scheme to ensure the total amount payable to a particular employee in respect of a fortnight is either:

- the amount of the JobKeeper payment for the employee; or
- if a greater amount is payable to the employee for the performance of work during the fortnight, that amount (in full).

1.25 Subsection 789GDA(2) is a civil remedy provision enforceable under Part 4-1 of the Fair Work Act, which provides access to the courts for (among other things) penalty and compensation orders to remedy contraventions.

(Original emphasis).

17 In the Explanatory Statement, Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (Cth) (the *Explanatory Statement*), as recorded by the primary judge at [13] of his reasons, this is said:

*What other entitlement criteria apply?*

The rules about a JobKeeper fortnight, when an employer qualifies for the JobKeeper payment and when a person is an eligible employee are described above. In addition to these rules, section 6 contains further rules for when an employer is entitled to a JobKeeper payment in relation to their employees. These further entitlement rules are described below.

*The employer must satisfy the wage condition*

For each JobKeeper fortnight, the employer is only entitled to a JobKeeper payment if the employer has satisfied the wage condition. The wage condition is set out in section 10 of the Rules.

Generally, the wage condition requires that an employer pay each participating employee at least \$1,500 for each JobKeeper fortnight. This reflects the practical operation of the JobKeeper scheme in which the JobKeeper payment is essentially a reimbursement to an employer of \$1,500 where the employer has paid a participating employee at least that amount.

The component amounts that together must equal or exceed \$1,500 are:

- amounts paid by the employer to the employee in the fortnight by way of salary, wages, commission, bonus or allowances (less PAYG withholding) – generally, this means the employee’s income before tax;
- amounts withheld from payments made to the employee in the fortnight under section 12-35 in Schedule 1 to the Taxation Administration Act 1953 – generally, this means amounts withheld by the employer for income tax or a HECS-HELP loan;
- contributions made in the fortnight to a superannuation fund or an RSA (retirement savings account) for the benefit of the employee, if the contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*); and
- amounts that, in the fortnight, are applied or dealt with in any way where the employee has agreed for the amount to be so dealt with in return for salary and

wages to be reduced – generally, this means amounts forming part of salary sacrifice arrangements.

The requirement that the component amounts be at least \$1,500 applies regardless of whether the employee ordinarily receives more or less than that amount. For example 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 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 sacrifice 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.

If an employer's ordinary arrangement is to pay its employees less frequently than fortnightly, then the payment can be allocated between fortnights in a reasonable manner. For example, if an employer's ordinary arrangement is to pay an employee every four weeks, it may be reasonable for the purposes of satisfying the wage condition if the employee is paid at least \$3,000 for every four week period.

(Original emphasis).

18 The *Coronavirus Economic Response Act* includes the following provisions:

### **3 Object of this Act**

The object of this Act is to provide financial support to entities directly or indirectly affected by the Coronavirus known as COVID-19.

...

### **6 Definitions**

...

***Coronavirus economic response payment*** is the collective name for all of the kinds of payments provided for by the rules.

...

***prescribed period*** means the period between 1 March 2020 and 31 December 2020.

...

### **7 Coronavirus economic response payments**

- (1) The rules may make provision for and in relation to:
- (a) one or more kinds of payments by the Commonwealth to an entity in respect of a time that occurs during the prescribed period; and
  - (b) the establishment of a scheme providing for matters relating to one or more of those payments, and matters relating to such a scheme.

Paragraphs (a) and (b) do not limit each other.

...

## **20 Rules**

- (1) The Treasurer may, by legislative instrument, make rules prescribing matters:
- (a) required or permitted by this Act to be prescribed by the rules; or
  - (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

...

(Original emphasis).

19 As set out in [15] of the primary judge's reasons (apart from the reference to s 14), the *Coronavirus Rules* include the following sections:

### **Part 2—Jobkeeper payment**

#### **Division 1—Simplified outline**

##### **5 Simplified outline**

The jobkeeper payment is intended to assist businesses affected by the Coronavirus to cover the costs of wages of their employees.

The jobkeeper scheme starts on 30 March 2020 and ends on 27 September 2020.

A business that has suffered a substantial decline in turnover can be entitled to a jobkeeper payment of \$1,500 per fortnight for each eligible employee. It is a condition of entitlement that the business has paid salary and wages of at least that amount to the employee in the fortnight.

A business can also be entitled to a jobkeeper payment of \$1,500 per fortnight for one business participant who is actively engaged in operating the business.

The jobkeeper scheme is administered by the Commissioner of Taxation.

The Commissioner pays the jobkeeper payment to entities shortly after the end of each calendar month, for fortnights ending in that month.

Some of the administrative arrangements for the scheme are set out in the Act.

#### **Division 2—Entitlement based on paid employees**

##### **6 Employer's entitlement to jobkeeper payment for an employee**

- (1) An entity (the *employer*) is entitled to a jobkeeper payment for an

individual for a fortnight if:

...

- (d) the employer has satisfied the wage condition in section 10 in respect of the individual for the fortnight; and

...

- (5) Each of the following is a *jobkeeper fortnight*:
  - (a) the fortnight beginning on 30 March 2020;
  - (b) each subsequent fortnight, ending with the fortnight ending on 27 September 2020.

[This was subsequently amended to be 28 March 2021 - *Coronavirus Economic Response Package (Payments and Benefits) Amendment Rules (No. 8) 2020*].

...

### **10 Wage condition**

- (1) For the purposes of paragraph 6(1)(d), an employer satisfies the wage condition in respect of an individual for a fortnight if the sum of the amounts covered by subsection (2) equals or exceeds \$1,500.
- (2) The amounts covered by this subsection are:
  - (a) amounts paid by the employer to the individual in the fortnight by way of salary, wages, commission, bonus or allowances, and
  - (b) amounts withheld by the employer from payments made to the individual in the fortnight under section 12-35 in Schedule 1 to the *Taxation Administration Act 1953*; and
  - (c) contributions made by the employer in the fortnight to a superannuation fund or an RSA for the benefit of the individual, if the contributions are made under a salary sacrifice arrangement (within the meaning of the *Superannuation Guarantee (Administration) Act 1992*); and
  - (d) other amounts, in the fortnight, are applied or dealt with in any way if the individual agreed:
    - (i) for the amount to be so applied or dealt with; and
    - (ii) in return, for amounts covered by paragraph (a) for the individual for the fortnight to be reduced (including to nil).
- (3) If there is a regular period for which the employer would usually pay employees in relation to the performance of work by the employees, and that period is longer than a fortnight, then in applying this section those payments are to be allocated to a fortnight or fortnights in a reasonable manner.
- (4) For the purposes of this section, the Commissioner may treat a particular event that happened in a fortnight as having happened in a

different fortnight or fortnights, if, or to the extent that, it is reasonable to do so in the Commissioner's opinion.

...

#### **Division 4—Payment**

##### **13 Amount of the jobkeeper payment for a fortnight**

The amount of an entity's jobkeeper payment for an individual for a fortnight is \$1,500.

##### **14 Payment of jobkeeper payment**

- (1) If the Commissioner is satisfied that an entity is entitled under section 6 or section 11 to a jobkeeper payment for a fortnight, the Commissioner must pay the entity the jobkeeper payment in accordance with this Division and the Act.

...

##### **15 When the Commissioner must pay jobkeeper payments**

The Commissioner must pay the jobkeeper payment no later than the later of:

- (a) 14 days after the end of the calendar month in which the fortnight ends; and
- (b) 14 days after the requirements in section 14 for the Commissioner to make the payment are met.

Note: For the method of paying the payment, see section 8 of the Act.

(Original emphasis).

20 The *Coronavirus Measures Act*, which inserts Pt 6-4C into the Fair Work Act, includes the following provisions:

##### **789GA Guide to this Part**

The purpose of this Part is to assist employers who qualify for the jobkeeper scheme to deal with the economic impact of the Coronavirus known as COVID-19.

This Part authorises an employer who qualifies for the jobkeeper scheme to give a jobkeeper enabling stand down direction to an employee (including to reduce hours of work).

This Part authorises an employer who qualifies for the jobkeeper scheme to give a direction to an employee about:

- (a) the duties to be performed by the employee; or
- (b) the location of the employee's work.

This Part authorises an employer who qualifies for the jobkeeper scheme and an employee to make an agreement in relation to:

- (a) the days or times when the employee is to perform work; or

(b) the employee taking annual leave, including at half pay.

This Part provides that an employer who qualifies for the jobkeeper scheme must consult an employee (or a representative of the employee) before giving a direction.

This Part provides that:

(a) a direction given by an employer who qualifies for the jobkeeper scheme to an employee does not apply to the employee if the direction is unreasonable in all of the circumstances; and

(b) a direction given by an employer who qualifies for the jobkeeper scheme to an employee in relation to the duties to be performed by the employee, or the location of the employee's work, does not apply to the employee unless the employer reasonably believes the direction is necessary to continue the employment of one or more employees of the employer.

This Part provides for other safeguards relating to directions given by employers who qualify for the jobkeeper scheme, including a rule that this Part will at all times operate subject to listed laws.

This Part provides that the FWC may deal with a dispute about the operation of this Part.

### **789GB Object**

The object of this Part is to:

- (a) make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their employers, during the unprecedented economic downturn and work restrictions arising from:
  - (i) the COVID-19 pandemic; and
  - (ii) government initiatives to slow the transmission of COVID-19; and
- (b) help sustain the viability of Australian businesses during the COVID-19 pandemic, including by preparing the Australian economy to recover with speed and strength after a period of hibernation; and
- (c) continue the employment of employees; and
- (d) ensure the continued effective operation of occupational health and safety laws during the COVID-19 pandemic; and
- (e) help ensure that, where reasonably possible, employees:
  - (i) remain productively employed during the COVID-19 pandemic; and
  - (ii) continue to contribute to the business of their employer where it is safe and possible for the business to continue operating.

## 789GC Definitions

In this Part:

***designated employment provision*** means:

- (a) a provision of this Act (other than a provision of this Part or a provision mentioned in section 789GZ); or
- (b) a provision of:
  - (i) a fair work instrument; or
  - (ii) a contract of employment; or
  - (iii) a transitional instrument (within the meaning of item 2 of Schedule 3 to the Transitional Act).

...

***fortnight*** means a 14-day period beginning on a Monday.

...

***jobkeeper payment rules*** means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

...

***minimum payment guarantee*** has the meaning given by section 789GDA.

...

***wage condition*** means the wage condition set out in the jobkeeper payment rules.

## Division 2—Employer payment obligations

### 789GD Obligation of employer to satisfy the wage condition

If:

- (a) an employer qualifies for the jobkeeper scheme; and
- (b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;

the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

Note: 1 This section is a civil remedy provision (see Part 4-1).

Note 2: Under the jobkeeper payment rules, a jobkeeper payment is a payment to an employer for a particular employee for a fortnight.

### 789GDA Minimum payment guarantee

- (1) For the purposes of this Part, the ***minimum payment guarantee*** consists of the rule set out in subsection (2).
- (2) If a jobkeeper payment is payable to an employer for an employee of

the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:

- (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;
- (b) the amounts payable to the employee in relation to the performance of work during the fortnight.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection (other than paragraph (a)) include the following, if they become payable in respect of the fortnight:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

#### **789GDB Hourly rate of pay guarantee**

For the purposes of this Part, the *hourly rate of pay guarantee* consists of the rules set out in subsections (2) and (3).

...

(Original emphasis).

21 Part 6-4C also includes:

- (1) s 789GDC relating to jobkeeper enabling stand down directions which an employer is authorised to give to an employee if, amongst other things, the employer qualifies for the jobkeeper scheme;
- (2) s 789GE enabling the employer to give an employee a direction about their duties of work if, amongst other things, the employer qualifies for the jobkeeper scheme;
- (3) s 789GF enabling the employer to give an employee a direction about their location of work if, amongst other things, the employer qualifies for the jobkeeper scheme; and
- (4) s 789GG enabling the employer to give an employee a direction about their days of work if, amongst other things, the employer qualifies for the jobkeeper scheme.

22 In each case, such a direction has effect despite a designated employment provision. By s 789GQ employees are required to comply with jobkeeper directions.

### Primary judge's construction

23 The primary judge correctly identified at [21] that s 789GDA(2) requires a comparison between two amounts – the amount of the jobkeeper payment which was \$1500 at the time of the primary judge's judgment (subsequently reduced) and the amounts payable to the employee in relation to the performance of work during the fortnight. Section 789GDA(2) requires the employer to pay the employee the greater of these two amounts.

24 In contrast to our view, the primary judge considered that there was no ambiguity in s 789GD(2): [23]. He identified at [24] three possible meanings to be given to the word "payable" in the section, saying it may refer to an amount that:

- may be earned by an employee for work performed during that fortnight;
- an employee may contractually be entitled to receive for work performed, with the balance of the amount earned being "*payable*" in a subsequent fortnight; or
- an employee may in fact receive for the work performed during that fortnight.

(Original emphasis).

25 The primary judge considered that the word "payable" in s 789GDA(2) had a natural and ordinary meaning of identifying an amount to which an employee is contractually (or otherwise) entitled to be paid for work performed during that fortnight in which the work is performed. He considered this construction meant that the phrase "during the fortnight" identifies with specificity not only the fortnight during which the work is performed but also the fortnight during which the amount is "payable to the employee": [26]. The primary judge said at [26]:

Such an interpretation places at the heart of s 789GDA(2) the necessity to identify both that point of time during which work is performed and that amount of money to which an employee is contractually entitled to receive. It casts aside any necessity to identify that point of time at which an employer in default of a contractual obligation (for example) may in fact make payment to an employee.

26 The primary judge continued at [27]:

Section 789GDA(2) does not invite a calculation or an identification of the amount that an employee may be entitled to receive during any given fortnight but in respect to work that may have been performed in some prior or subsequent fortnight. The provision is divorced from the manner in which an employer may be required to account to an employee for work that may have been performed for a period of time outside of "*the fortnight*". Pursuant to the terms of employment, or perhaps an industrial agreement, an employer may be entitled to pay an entitlement (for example) in arrears or in advance. But all such inquiries as to the pay cycle of employers or the terms upon which an employer may pay an employee assume no relevance for the

terms of s 789GDA(2)(b).

(Original emphasis).

27 It is convenient to note here that [27] does not appear to be correct. On the primary judge's construction it is necessary to identify both the time and the amount which the employee would receive under the ordinary pay cycle or it is not possible to perform the comparison required by the section, as acknowledged at [26] and [6] (where the primary judge correctly said that "[m]uch depends upon the pay cycle of an employer and the contractual or other entitlement of an employee to receive monies for work performed").

28 The primary judge said at [28] that:

Section 789GD does no more than impose upon an employer the necessity to ensure compliance with "*the wage condition*", namely "*the wage condition set out in the jobkeeper payment rules*" (s 789GC). Section 789GD cannot be construed as itself identifying the particular fortnight required to be considered when applying s 789GDA(2)(b).

(Original emphasis).

29 The primary judge thus explained at [29] that:

Irrespective of what monies may be received by an employee during any particular *JobKeeper* fortnight by reason of monies earned for work previously performed, s 789GDA(2), it is concluded, only invites an inquiry as to the amount payable to the employee for work actually performed during a particular *JobKeeper* fortnight. If that amount earned and payable to the employee for a given fortnight is less than \$1,500, the employer is subsidised by the *JobKeeper payment* covering the entirety of that lesser amount paid to the employee, with the employee receiving the balance of monies up to \$1,500. And it matters not whether that results in the payment to the employee of a sum in total greater than \$1,500 by reason of (for example) an employee also receiving monies for work performed prior to that fortnight. If the amount exceeds \$1,500 for the payment of monies earned and payable to the employee for work performed in that fortnight, the employer is subsidised by the Commonwealth up to \$1,500.

(Original emphasis).

30 In the primary judge's view this construction:

- (1) does not read additional words into the section, as "earned and payable" is but a different way of trying to give content and practical application to the phrase "payable to the employee in relation to the performance of work during the fortnight": [30];
- (2) does not involve, as does the respondents' construction, reading s 789GDA(2) as if it said "the amount earned during the fortnight in relation to the performance of work irrespective of when it is payable...": [43];

- (3) avoids the temptation of construing s 789GDA(2) in such a manner which may be perceived as conferring more of a subsidy upon the employer and less of a windfall upon the employee. This temptation must be resisted as it is necessary to construe legislation in accordance with its terms and not in a manner which a court may subjectively perceive as achieving a more equitable (or less anomalous) result: [46]; and
- (4) gives effect to the unambiguous language in s 789GDA(2): [51].

31 The primary judge referred to Qantas’s submission that the Notes to s 789GDA indicated that its construction was preferable. As the primary judge observed at [67] the example in Note 2(e) of leave payments “expressly raises the legislative recognition of the fact that there may be payable to an employee amounts which are not earned – or exclusively earned – by reason of the work performed in any given fortnight”. However, the primary judge rejected Qantas’s submission because:

- both the terms of s 789GDA(2) and *Note 2* employ the language of an “*amount payable in respect of the fortnight*” as opposed to the language in s 789GDA(2)(b) of the “*amounts payable to the employee in relation to the performance of work during the fortnight*” – the former expression “*in respect of*”, it is considered, permitting of a construction that is broader than the identification of those amounts “*payable ... in relation to the performance of work during the fortnight*”. The phrase “*in respect of*”, it may be noted, is also employed in s 789GDA(2) and should be given the same meaning when both appearing;

and/or, assuming that the difference in language between “*in respect of*” as opposed to “*in relation to*” is not to be given such significance:

- there is no ambiguity in the phrase employed in s 789GDA(2)(b) such that the *Note* should be used to give that phrase a meaning different to its normal and ordinary meaning (cf. *The Ombudsman v Moroney* (1983) 1 NSWLR 317 at 323-325 per Street CJ).

(Original emphasis).

### **Qantas’s submissions**

32 Qantas submitted that the primary judge was wrong to conclude that s 789GDA(2) was clear and unambiguous. Qantas submitted that the provision is ambiguous, there is a choice of constructions reasonably available (not including that reached by the primary judge), and its proposed construction was to be preferred having regard to the text, context and purpose of the provision.

33 Qantas submitted that the ordinary and natural meaning of the word “payable” in s 789GDA(2) is an amount required to be paid or an amount which is to be paid (*Macquarie Dictionary* (5th ed as at 2009): “1. owed; to be paid; due. 2. capable of being paid”; *Australian Concise Oxford Dictionary* (5th ed as at 2009): “1. that must be paid; due (payable in April); 2. that may be paid”). The ordinary meaning of the word is not “earned”. This starting point, said Qantas, is consistent with its construction which looks to what is required to be paid during the fortnight in question.

34 According to Qantas it is further apparent that the phrase in subs 789GDA(2)(b) “amounts payable to the employee in relation to the performance of work” is copied from s 323(1) of the Fair Work Act, as is Note 2. In s 323 it is plain that the amounts payable in relation to the performance of work mean the amounts required to be paid to the employee in accordance with whatever contract or industrial instrument applies. The amounts in s 323(1) are not the amounts earned by an employee during the period but the amounts payable. Further, under s 323(1), it is also plain that the legislature assumed in Note 2 that leave and other entitlements which are payable “in relation to the performance of work” even though, strictly speaking, such amounts may be payable not so much in relation to the performance of work but because of, for example, the length of service. The words added to the end of s 789GDA(2) “during the fortnight” impose an additional requirement to that in s 323(1), that the amounts payable in relation to the performance of work must be payable (that is, are required to be paid) during the fortnight. That is, we interpolate, those amounts are required to be paid during the fortnight under whatever contract or industrial instrument regulates the payment obligations of the employer in the ordinary course (as is the case for s 323(1)).

35 Qantas submitted that Note 2 confirms this construction. Note 2, said Qantas, is an explanatory note of the very provision in question and is thus of central significance in seeking to ascertain the legislative intent of the provision. Such a Note can be taken into account whether or not it forms part of the Act: *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29; (2020) 381 ALR 601 at [17] and footnote 21; *Spence v Queensland* [2019] HCA 15; (2019) 93 ALJR 643 at [33] (Kiefel CJ, Bell, Gageler and Keane JJ), [133] (Gordon J), [334] (Edelman J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v BFW20* [2020] FCAFC 121 at [123]-[124]. See also, in relation to the Notes to s 323(1) of the Fair Work Act, *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84; (2020) 378 ALR 585 at [1012].

36 Qantas’s point is that some of the types of payments in Note 2 to s 789GDA are not payable for the performance of work during the fortnight. Leave payments, for example, are payable when the employee is not performing work. The constructions preferred by the primary judge and the respondents do not resolve this conundrum. Given that Note 2 is only referable to s 789GDA(2) it should be given weight in ascertaining the preferred construction of the provision. Qantas gave this example:

To illustrate, consider an employee who is on annual leave during a jobkeeper fortnight and to whom \$2,000 of annual leave is payable during the fortnight. This example will be common – and was clearly in the Parliament’s contemplation – because s 789GJ(1) of the FW [Fair Work] Act allows an employer who qualifies for the jobkeeper payment to request an employee in respect of whom the employer is receiving jobkeeper payments to take annual leave, which request the employee must not unreasonably refuse. On Qantas’s construction of s 789GDA(2), the minimum payment guarantee would require the employer to ensure that the annual leave was paid in the fortnight. Annual leave is a payment in relation to the performance of work generally; it accrues for prior work. However, it is not payable in relation to the performance of work during the fortnight in respect of which it is payable. Accordingly, on [the primary judge’s] construction (and that advanced by the Unions below), the amount in s 789GDA(2)(b) would be nil. The result is that the “minimum payment guarantee” would not achieve its obvious purpose of providing a guarantee that the employee will be paid his or her entitlements where they exceed the amount of the jobkeeper payment.

37 Qantas submitted that its construction is also consistent with the key words in the chapeau to s 789GDA(2), that the employer must ensure that the total amount payable to the employee in respect of the fortnight is the greater of the two amounts in (a) or (b). The total amount payable to an employee in respect of the fortnight is not the same as the total amount earned by the employee in respect of work done in the fortnight (as required by the constructions of the primary judge and the respondents). Even then, according to Qantas, the implicit re-writing of the section does not work because the payment under subs 789GDA(2)(a) is not payable in respect of work done in the fortnight.

38 Qantas submitted that the competing constructions of the respondents and the primary judge are inconsistent with the purpose of the legislative package. As the second reading speech disclosed, the purpose of the *JobKeeper Scheme* is to provide a “wage subsidy to those employers significantly impacted by the coronavirus outbreak to continue paying their employees”. Further, as Qantas put it:

Section 789GA is a “Guide to this Part”, the first sentence of which states that “[t]he purpose of this Part is to assist employers who qualify for the JobKeeper scheme to deal with the economic impact of the Coronavirus known as COVID-19”. Section 789GB identifies the object of the Part as including to “make temporary changes to assist the Australian people to keep their jobs, and maintain their connection to their

employers, during the unprecedented economic downturn and work restrictions ...”, to “help sustain the viability of Australian businesses during the COVID-19 pandemic...”, and to “continue the employment of employees”. Section 789GD requires the employer to satisfy the wage condition by the end of each jobkeeper fortnight in respect of which the employer is entitled to receive a jobkeeper payment for an employee.

39 According to Qantas, the obvious purpose of s 789GDA(2) is to ensure that while eligible employees receive as a minimum the jobkeeper payment, they are guaranteed also to receive their employee entitlements ordinarily required to be paid during the fortnight. On the competing constructions, however, they are guaranteed only a portion of their ordinary entitlements (that portion relating to work performed during the fortnight).

40 Its construction, Qantas submitted, was also supported by the *Explanatory Statement*. Part 6-4C of the Fair Work Act expressly builds on the provisions of the *Coronavirus Rules*: see the definition of “jobkeeper payment”, “qualifies for the jobkeeper scheme”, and “wage condition” in s 789GC, each of which is defined in accordance with the *Coronavirus Rules*. As the primary judge said at [78], the *Coronavirus Rules* and the accompanying *Explanatory Statement* were part of a “contemporaneously prepared” legislative framework, and therefore may be taken into account in construing the legislation: *Elazac Pty Ltd v Commissioner of Patents* (1994) 53 FCR 86 at 90 per Heerey J; *Bendigo Bank Ltd v Williams* [2000] FCA 482; (2000) 98 FCR 377 at [13]-[14] per Moore and Lehane JJ.

41 The *Explanatory Statement*, Qantas noted, includes the following explanation of the operation of the scheme:

For example if an employee:

- ordinarily receives \$1,500 or more in income per fortnight before PAYG withholding and other salary sacrifice 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 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 ...

(Emphasis added).

42 As Qantas put it, the first example suggests that where an employee would be entitled according to existing workplace arrangements to be paid more than \$1,500 in a fortnight, the employee will continue to receive that money. In that case, the jobkeeper payment paid to the employer

will operate as a true wage subsidy to the employer, which was the stated purpose of the *JobKeeper Scheme*. By contrast the competing constructions displace the existing workplace arrangements for payment between the employer and employee.

43 The fact that another purpose of the *JobKeeper Scheme* is to provide a minimum level of income to employees does not mean that the anomalous results of the competing constructions should be ignored. On the primary judge’s construction, for example, an employer who pays their employees fortnightly in arrears on the first Monday of a jobkeeper fortnight will receive no effective subsidisation of wages at all, whereas an employer who pays fortnightly in arrears at the end of a jobkeeper fortnight will receive the full subsidy (for our part, we find this example of a supposed anomaly obscure). This kind of arbitrariness of outcome, Qantas said, should be taken into account in interpreting the provision.

44 Qantas also relied on the fact that the competing constructions will commonly require employers to perform a calculation of pay additional to, and quite different from, their ordinary payroll system. This, said Qantas, will impose a significant additional burden on businesses which by definition are in significant financial distress (given the turnover reductions necessary to qualify for the *JobKeeper Scheme*: see s 8 of the *Coronavirus Rules* for the decline in turnover test which determines an employer’s eligibility for the scheme). According to Qantas, it is most unlikely that the legislature intended to impose a significant additional compliance burden on financially distressed businesses.

45 Qantas stressed that on the respondents’ construction, which is that the words “in respect of the fortnight” in the chapeau involve no temporal requirement, it will be unclear when s 789GDA(2) is contravened. As Qantas put it:

- (a) From the perspective of the employer, it is important that the employer know when it must satisfy its obligation, breach of which exposes it to a civil penalty: “[I]ike the imposition of criminal liability, the imposition of a civil penalty should be ‘certain and its reach ascertainable by those who are subject to it’”: *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [[2013] HCA 36] (2013) 248 CLR 619, [48]....
- (b) From the perspective of the employee, a guarantee that the employer will pay earnings at some future unspecified time is hardly consistent with the purpose of the section asserted by the [respondents]...

46 According to Qantas, the respondents’ construction assumes that the words “in relation to” in s 789GDA(2) connect the “amounts payable” with the “performance of work during the fortnight”. However, once the source of s 789GDA(2) is recognised to be the text of s 323(1),

it is apparent that the words “in relation to” must be read as part of the composite expression “amounts payable in relation to the performance of work” (as per s 323(1)), which is then qualified by the concluding words “during the fortnight”.

47 Further, Qantas submitted, the respondents’ construction re-writes the chapeau as if it read “the employer must ensure that the total amount payable to the employer [sic] in respect of **work performed during** the fortnight...”. However, where the amount in (a) is greater than the amount in (b) that concept makes no sense as, in that case, by definition the total amount payable will not be wholly in respect of work performed during the fortnight; at least a portion will be the jobkeeper payment.

48 Contrary to the respondents’ submissions, Qantas submitted that s 789GDA(2) is not a “safeguard” against the making of directions by the employer as permitted by Pt 6-4C. Jobkeeper may be payable, and s 789GDA apply, whether or not such a direction has been given. Further, Qantas said, on the respondents’ construction, the evident statutory purposes are unfulfilled as:

- the section is apparently concerned with amounts “payable” but does not actually require payment at any time;
- the section does not guarantee the payment of leave or other entitlements not relating to the performance of work during the fortnight which Note 2 makes clear the section was plainly meant to encompass, in common with s 323(1); and
- the section does not guarantee that the employee receives their entitlements in full; it provides no guarantee for any entitlement required to be paid but for work done in previous periods, including leave, bonuses, incentive-based payments etc.

49 Contrary also to the respondents’ submissions, Qantas submitted that para 1.24 of the *Explanatory Memorandum* merely paraphrases the statutory language. Paragraph 8.3 of the *Explanatory Memorandum* supports Qantas. It says that the employer must ensure that at least the value of the jobkeeper payment “is passed on to such employees **each fortnight**, or the amount they **would receive for the work they have performed if that would be greater**” (emphasis added). The reference to “each fortnight” is inconsistent with the respondents’ proposition that the employer has some temporally unspecified payment obligation. Further, there is no limitation stated there that the work performed be work performed in the fortnight. Rather, the *Explanatory Memorandum* identifies the amount the employee would otherwise be

entitled to receive for work done, independently of when that work was performed, consistently with Qantas's submission.

50 Qantas submitted that the respondents' submission that the *Coronavirus Rules* and the accompanying *Explanatory Statement* cannot be used as an aid to construction should be rejected as the provisions of Pt 6-4C expressly rely on the *Coronavirus Rules*. Whilst that part of the *Explanatory Statement* on which Qantas relies (see [41] above) is under the heading "*The employer must satisfy the wage condition*" it is plainly addressing the operation of s 789GDA(2). Thus, all of the extrinsic material supports Qantas's construction.

51 Qantas submitted that the absurd consequences identified by Qantas arise in any case where there is a mismatch between the fortnight in which employees earn their wages and the fortnight in which employees are paid. It is commonplace for employees to be paid wages in arrears. Accordingly, the respondents' submission that Qantas's example bears little relationship to reality must be rejected.

52 According to Qantas, the fact that on Qantas's construction in some circumstances an employee will receive a windfall by receiving money they did not earn, but in other circumstances they do not, is not a reason to construe the provision so that employees receive more of a windfall. The respondents' apparent premise is that the purpose of the *JobKeeper Scheme* is to provide a windfall gain to employees, rather than providing a wage subsidy to employers. According to Qantas, this is not so.

53 Contrary to the respondents' submissions, Qantas said that there is never a windfall to an employer on its construction. While a change in the timing of when the employee performs work (eg as permitted by stand down directions) or a change in the timing of when payment is required may lead to more of the employer's wages bill being subsidised (up to a maximum of \$1,500), the very purpose of the scheme is to provide employers with a wage subsidy. Similarly, the fact that Qantas's construction allows an employer to be subsidised for wages which accrued prior to the introduction of the *JobKeeper Scheme* but which were not required to be paid until the scheme's introduction is not a point against the construction. The wage subsidy is concerned with subsidising the payment of wages, not their accrual. In any event, on Qantas's construction, it is also the case that wages earned in the final fortnight of the *JobKeeper Scheme* but not required to be paid until the following fortnight will not be able to be subsidised because the requirement to pay those wages will fall outside the scheme.

54 Qantas submitted that the fact that a contract or industrial instrument may give an employer some flexibility as to the satisfaction of payment obligations does not mean that Qantas's construction will enable employers to manipulate the operation of s 789GDA(2). The contract or industrial instrument will continue to apply in accordance with its terms. There is no suggestion by the respondents that Qantas has done anything other than continue its ordinary pay arrangements in applying s 789GDA(2) of the Fair Work Act consistently with Qantas's construction.

### **Respondents' submissions**

55 The respondents submitted that Qantas's construction is inconsistent with the text of s 789GDA(2), involves impermissibly reading words into the subsection and ignoring important textual elements of the provision, and is also apt to lead to unreasonable and arbitrary outcomes. If the primary judge erred (but the respondents maintain his Honour's construction was reasonably open), then the respondents' construction is to be preferred. This is because the respondents' construction:

- (1) is more consistent with the language of s 789GDA(2) than the construction of the primary judge. Unlike s 789GD, the text of s 789GDA does not suggest a temporal requirement in relation to the payment, but rather requires an employer ensure the amount payable in respect of rather than during the jobkeeper fortnight be not less than the greater of the amounts referred to in subss 789GDA(2)(a) and (b);
- (2) does not result in anomalies based on an accident of timing of any payment; and
- (3) is consistent with the purpose of s 789GDA in that it ensures that employees are paid in respect of a fortnight either the amount of the jobkeeper payment payable to the employer or the full amount payable to the employee in relation to the performance of work during the fortnight.

56 The respondents submitted that properly understood s 789GDA is one of the "safeguards" referred to in s 789GA relating to the capacity of employers to give directions (directions to stand down or as to kinds, locations or days of work) to employees. The power given to employers to give such directions with which employees must comply (s 789GQ), is an extraordinary one, allowing an employer to modify or remove entitlements under an employment contract, the Fair Work Act, a modern award or an enterprise agreement, thus sanctioning conduct that would otherwise be unlawful. Section 789GDA(2), in that context, should be understood as requiring the amount payable to an employee in respect of a jobkeeper

fortnight to be no less than the greater of the jobkeeper payment to the employer for the employee (which at the time of hearing before the primary judge was \$1,500) and the amount payable to (meaning earned by) the employee in relation to the performance of work by the employee during the particular jobkeeper fortnight, whether or not those amounts are actually paid or required to be paid during the jobkeeper fortnight.

57 According to the respondents, para 1.24 of the *Explanatory Memorandum* describes subs 789GDA(2)(b) as requiring that if an amount is payable to the employee for the performance of work, the employee is to be paid that amount in full. This emphasises the intended operation of subs 789GDA(2)(b) as ensuring the employee receives full payment for work actually performed during a particular fortnight plus \$1,500 in respect of any fortnight in which he or she earned less than that amount through the performance of work. Paragraph 8.3 refers to an object of Pt 6-4C as being to ensure that “at least the value of JobKeeper payments they receive through the Commissioner is passed on to such employees each fortnight, or the amount they would receive for the work they have performed if that would be greater”. In common with para 8.20 (which refers to “the employer must ensure the person’s salary is the greater of the JobKeeper payment or the amount that is payable to the employee in relation to the work performed during the fortnight”) this confirms that the intended practical operation of s 789GDA is to ensure employees receive the greater of the value of the jobkeeper subsidy paid to their employer or the amount the employee earned from work performed in a particular jobkeeper fortnight.

58 Qantas’s construction, according to the respondents, is that s 789GDA(2) refers to any amount paid to an employee during a jobkeeper fortnight whether or not the amount relates to work performed during the fortnight or at some other time. This is inconsistent with the text of the section as the ordinary meaning of “payable” is “capable of being paid” or “liable or required to be paid”: *Glass v Defence Force Retirement and Death Benefits Authority* [1992] FCA 558; (1992) 38 FCR 534 at 537; *Clyne v Deputy Commissioner of Taxation* [1981] HCA 40; (1981) 150 CLR 1 at 9-10. “Payable” does not mean “paid”. Further, s 789GDA(2) focuses on amounts payable in respect of the fortnight rather than a temporal requirement that amounts are to be paid by the end of the fortnight (contrast s 789GD).

59 The respondents said that in s 789GDA(2) the use of the definite article before “fortnight” makes plain that the amount payable must pertain to a particular fortnight, and not any other period. Qantas’s approach confuses the requirement to pay an amount during a particular

fortnight (the subject of s 789GD) with the requirement to ensure the amount payable to an employee in respect of the fortnight exceeds the minimum. Further, the phrase “in relation to” in s 789GDA(2) requires the amount payable to be payable to the employee for the performance of work during the particular jobkeeper fortnight. Qantas thus asks the Court to rewrite the provision so it reads “the amounts ~~payable~~ paid to the employee during the fortnight in relation to the performance of work ~~during the fortnight~~ whenever undertaken”.

60 Qantas’s construction means that the minimum payment guarantee turns upon the amounts an employer pays to an employee in a fortnight, regardless of whether those amounts relate to work performed during that fortnight. For instance, according to the respondents, where an employee is paid only every four weeks, an employee who worked through the four-week period would have nothing “due” in the first fortnight and would be required, according to Qantas, to be paid the \$1,500 jobkeeper payment. The employee would then, in addition, be entitled to receive full payment in the second fortnight referable to all work performed in the four-week period.

61 The respondents submitted that it would be absurd if the minimum payment guarantee depended purely on the timing of a payment. If an employee worked sufficient hours to earn \$3,000 in one fortnight, all of which is due in that fortnight, and did not work the following fortnight, the employee must be paid \$4,500 over the four week period (\$3,000 in the first fortnight plus a \$1,500 jobkeeper payment in the second fortnight). If the same employee earned \$3,000 in the first fortnight, but only \$1,500 was due in that fortnight, and \$1,500 was overtime paid in the following fortnight, on Qantas’s construction, the employee would receive only \$3,000 in total (\$1,500 wages in the first fortnight and \$1,500 overtime payment in the second fortnight). The section would not be construed so as to produce such starkly different outcomes purely as a result of an accident of timing. On the respondents’ construction, the outcome would be the same irrespective of the timing of the payment.

62 According to the respondents, another consequence of Qantas’s construction is that an employer is able to receive a windfall gain from the taxpayer subsidy by allocating remuneration earned in one jobkeeper fortnight to another jobkeeper fortnight to avoid paying an employee, in full, for the performance of work for a particular fortnight. Thus, if an employee worked unsocial hours in one jobkeeper fortnight and earned \$3,000, \$1,500 of which was overtime, and was then stood down for the subsequent jobkeeper fortnight, the employer could pay the employee the subsidy of \$1,500 for the jobkeeper fortnight in which

the work was performed and allocate the \$1,500 in overtime to the following jobkeeper fortnight, thereby receiving an indemnity from the taxpayer for productive work performed in the previous fortnight.

63 The respondents submitted that the purpose of s 789GDA is to require an employer to pay an employee the amount of the jobkeeper payment (where there is insufficient work for the employee to perform) or the full amount payable for the performance of work (if the employer has a greater amount of work available). Qantas's construction is inconsistent with this purpose. Qantas's construction would permit employers to satisfy the minimum payment guarantee by offsetting moneys earned in other periods, including periods prior even to creation of the *Jobkeeper Scheme*.

64 According to the respondents:

...s 789GDA must be construed in light of its protective purpose. It is a provision designed to benefit and protect employees by providing a minimum payment guarantee in circumstances in which extraordinary powers are conferred on employers to stand down employees and alter their hours, duties or locations of work. The section should be given a construction consistent with this purpose, not one which allows an employer to set-off amounts earned in one fortnight against the amounts it is required to pay to a particular employee for work actually performed.

65 Otherwise, according to the respondents:

- (1) Note 2 does not form part of the Fair Work Act and regard can only be had to it if the criteria under s 15AB(1) of the *Acts Interpretation Act 1901* (Cth) are met;
- (2) incentive based payments and bonuses in item (a) may be payments in relation to the performance of work during a particular fortnight or they might not. Nothing in particular can be drawn from the reference to such payments in the Note;
- (3) Note 2 appears to have been transposed from s 323 without attention being given to the reference in s 789GDA(2) to amounts being payable in respect of the fortnight and in relation to work being performed during the fortnight. The references to leave payments in item (e) of Note 2 should be approached with some caution for this reason;
- (4) it has been at least assumed that leave payments are payments in relation to the performance of work (*Association of Professional Engineers, Scientists and Managers Australia v Bulga Underground Operations Pty Ltd* [2019] FCA 1960 at [116]-[119]). If leave payments do not answer the description of being payments in relation to the performance of work then, on any construction including that advanced by Qantas, such payments fall outside subs 789GDA(2)(b);

- (5) it is not permissible to construe s 789GDA(2) by reference to explanatory material relating to statutory rules made under another, albeit related, piece of legislation. In any event, the aspect of the *Explanatory Statement* relied on by Qantas addresses the wage condition, which is the subject of s 789GD, not the minimum payment guarantee prescribed in s 789GDA; and
- (6) nothing in the text or context suggests that “pay cycles” were relevant to the enactment of s 789GDA. On the respondents’ construction, any need to change pay cycles would arise from s 789GD and not s 789GDA.

### Discussion

66 For the reasons given below, we consider that Qantas’s construction is to be preferred. Accordingly, we would allow Qantas’s appeal and dismiss the respondents’ cross-appeal.

67 First, the respondents’ submissions do not properly characterise Qantas’s construction. It is not Qantas’s construction that “payable” in s 789GDA(2) means “paid”. Qantas’s construction is that “payable” means what it says – that is, liable or required to be paid. The very word “payable” in s 789GDA(2), in our view, necessarily calls up for consideration the question of the source of the obligation to pay. In common with s 323(1) of the Fair Work Act, the source of the obligation to pay is in the contract or industrial instrument which both statutory provisions pre-suppose govern the liability or requirement on the employer to pay. Nor is it Qantas’s case that subs 789GDA(2)(b) is to be read as “the amounts ~~payable~~ paid to the employee during the fortnight in relation to the performance of work ~~during the fortnight~~ whenever undertaken”. On Qantas’s construction, the phrase “the amounts payable to the employee in relation to the performance of work” are to be read as a whole and the words “during the fortnight” are to be read as qualifying the whole phrase. That is, the amounts payable to the employee in relation to the performance of work is a phrase which has been copied over s 323(1) and takes the same meaning in subs 789GDA(2)(b) as it does in s 323(1). It means the amounts which are required to be paid to the employee in accordance with the applicable contract or industrial instrument. The words “during the fortnight”, which have been added to the end of the phrase common to s 323(1) and subs 789GDA(2)(b), have been added to make it clear that under s 789GDA(2) the payment obligation relates to the jobkeeper fortnight. This is then facilitated by s 10(3) of the *Coronavirus Rules* which permits attribution of pay to the relevant jobkeeper fortnight.

68 Second, the urgency with which the legislative package was introduced is material to its proper construction. Ambiguity in the text (including by repetition and redundancy and apparent clumsiness of language) and anomalies in outcome are not necessarily a reliable guide to the meaning intended by the legislature. They may equally reflect the exigencies of the drafting process. Once this is recognised, the fact that subs 789GDA(2)(b) was copied from s 323(1) (including the copying over and adaptation of Note 2 to s 323(1)) takes on significance. It indicates that it is unlikely that Parliament intended that the same phrase in the two sections have a different meaning. The phrase “amounts payable to an employee in relation to the performance of work” in s 323(1) of the Fair Work Act does not mean the amounts earned by the employee. Nor does it mean the amounts earned by and payable to the employee. It means only that the employer is liable to pay the amounts to the employee. The amount to be paid and the time at which the payment must be made are not regulated by s 323(1) (other than the requirement that employees be paid at least monthly). They are regulated by the applicable contract or industrial instrument. This forms an important part of the context in which s 789GDA was enacted. It indicates that, to the extent possible, the phrase in subs 789GDA(2)(b) should be given the same meaning as is given to that same phrase in s 323(1). It also indicates that Parliament did not intend by subs 789GDA(2)(b) to impose on employers a new obligation to ascertain not merely what is payable to an employee but also what the employee earned during the fortnight whether or not the amount earned would be payable to the employee during the fortnight.

69 This unlikelihood is reinforced by two matters:

- (1) the obligation imposed by s 789GDA(2) is to be found in the chapeau to the provision (the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following). Subsections (a) and (b) do no more than identify amounts. It would be odd if that part of a provision doing no more than identifying an amount had the effect of requiring employers to ascertain the amounts employees had earned during each relevant fortnight; and
- (2) as Qantas submitted, if s 789GDA(2) applies to an employer, the employer is necessarily in significant financial distress (otherwise the employer would not qualify for the *JobKeeper Scheme*). It would again be odd to discern from the text and context a legislative intention to impose substantial new administrative burdens on employers in significant financial distress.

70 Third, ss 789GD and 789GDA are both civil penalty provisions. It is essential that each provision is construed in a manner that enables any contravention to be certain and ascertainable: *Construction Forestry Mining & Energy Union v Mammoet Australia Pty Ltd* [2013] HCA 36; (2013) 248 CLR 619 at [48]. On the respondents' construction the obligation imposed by s 789GDA(2) never crystallises. There is no time by which the employer must pay the employee the greater of the two amounts in subss 789GDA(2)(a) or (b). Such a construction is to be avoided if possible given the uncertainty which it creates for the ascertainment of a contravention of a civil penalty provision. It is possible to avoid that uncertainty by construing the words "in respect of the fortnight" in the chapeau to s 789GDA(2) as imposing a temporal requirement. At worst, this approach involves recognising that the words "respect of" are redundant and the phrase in the chapeau could equally be "in the fortnight". Even if the imposition of this temporal requirement is not open on the text of the chapeau to s 789GDA(2) it does not mean that Qantas's construction is necessarily wrong. It means merely that there is uncertainty about the time at which the obligation in the chapeau is to be fulfilled.

71 Fourth, it is clear there is some overlap and circularity in the statutory provisions. Section 789GD requires the employer to satisfy the wage condition by the end of the fortnight. The wage condition requires the employer to pay to the employee a total amount which equals or exceeds \$1,500: s 10(1) of the *Coronavirus Rules*. Section 789GD itself, however, applies only if the employer would be entitled to a jobkeeper payment if the employer satisfied the wage condition. Further, satisfaction of the wage condition in s 789GD overlaps with the obligation in s 789GDA(2) to pay to the employee the greater of either the amount of the jobkeeper payment (which is the same amount as the wage condition) or the amounts payable to the employee in relation to the performance of work during the fortnight. This suggests that apparent infelicities of language in s 789GDA(2) should not necessarily determine its construction. This should be kept in mind when considering the meaning of the words "in respect of the fortnight" in the chapeau to s 789GDA(2). This also reinforces our conclusion that the language of s 789GDA(2) is not clear and unambiguous (in contrast to the conclusion of the primary judge). It seems to us that there is ambiguity in the provision. At the least, the meaning of "in respect of the fortnight" in the chapeau and of "during the fortnight" in (b) are open to more than one possible interpretation. This means that the ascertainment of the meaning of the provision involves a choice of constructions having regard to the text, context and purpose of the provision.

72 Fifth, given that the phrase “the amounts payable to the employee in relation to the performance of work” in subs 789GDA(2)(b) has been copied over from s 323(1), there is nothing strained or artificial in Qantas’s approach of reading the words “during the fortnight” as an addition, necessitated by the fortnightly pay structure of the *JobKeeper Scheme*, which qualifies everything that precedes it in (b) and does not qualify merely the words “in relation to the performance of work”. The constructions preferred by the primary judge and the respondents read the words “during the fortnight” as if they relate only to the “performance of work”. This is the foundation for the proposition that the section is concerned with payment for the work in fact performed during the fortnight whether or not such payment would ordinarily be payable “in respect of the fortnight” under the applicable contract or industrial instrument. If, however, the words “amounts payable to the employee in relation to the performance of work” are seen as a composite phrase copied over from s 323(1) which have the same meaning as in that section (which is concerned not with when work is performed but payment assumed to be regulated by a contract or industrial instrument), then the words “during the fortnight” can be more readily seen as qualifying the whole composite phrase which precedes those words. The effect of this reading is that the relevant relationship is not between the fortnight and the work performed during the fortnight but is between the fortnight and the amounts payable in relation to the performance of work (that is, as per s 323(1), the amounts payable in relation to the performance of work whenever the work was actually performed) during the fortnight. The argument against this approach, that this involves re-writing subs 789GDA(2)(b), at least by transposing the words “during the fortnight”, so that the section reads “the amounts payable to the employee during the fortnight in relation to the performance of work ~~during the fortnight~~”, does not carry particular weight once it is recognised that:

- (1) “amounts payable to the employee in relation to the performance of work” is a composite phrase copied over from s 323(1);
- (2) it was necessary to link that concept to the jobkeeper fortnight for the statutory scheme to function; and
- (3) it is unsurprising that the drafter chose to link the concepts merely by adding the words at the end of the phrase, even if this had the effect of introducing a level of ambiguity that would not exist if the words “during the fortnight” had been added after the word “employee”.

73 It is easier to accept that there is a drafting infelicity in s 789GDA(2) than it is to accept that the Parliament intended the phrase “amounts payable to the employee in relation to the performance of work” to mean something different in subs 789GDA(2)(b) from the meaning they take in s 323(1). This, however, is the consequence of the construction of the primary judge and the respondents. Those words, on their construction, do mean the amount the employer is liable to pay in accordance with the applicable contract or industrial instrument during the fortnight but mean the amount the employee has earned and the employer is liable to pay in accordance with the applicable contract or industrial instrument during the fortnight (the primary judge’s construction) or the amount the employee has earned in accordance with the applicable contract or industrial instrument during the fortnight irrespective of whether that amount would be payable to the employee during the fortnight in accordance with the applicable contract or industrial instrument (the respondents’ construction).

74 Sixth, the importance of s 323(1) of the Fair Work Act to the context of s 789GDA(2) is reinforced by the fact that it is also clear that Note 2 has been copied from the former provision in the latter provision. We accept Qantas’s submissions about the relevance of the Notes. They are able to be taken into account whether or not they form part of the Act. In circumstances where Note 2 explains the very provision which is under consideration the Note is entitled to material weight in ascertaining the meaning of the provision. It may be accepted that Note 2 to s 323(1) uses the words “amounts...if they become payable **during a relevant period**”. Note 2 to s 789GDA uses the words “amounts...if they become payable **in respect of the fortnight**”. This introduces a further source of ambiguity. Why change the word “during” to “in respect of” if the intended meaning was the amounts payable during or in the fortnight? All that can be said is that we acknowledge that this is a further source of ambiguity. Had Note 2 said “amounts...if they become payable during the fortnight”, the construction of s 789GDA(2) proposed by the primary judge and the respondents would be plainly inconsistent with the Note. The fact that Note 2 does not say this, but instead says “amounts...if they become payable in respect of the fortnight” reinforces the ambiguity of the provision.

75 The ambiguity exists then, but is perhaps all the greater on the construction of the primary judge and the respondents if Note 2 is read as a whole. For one thing, Note 2 contains no reference to work during the fortnight. In its terms, it is concerned not with work performed during a fortnight but whether amounts are payable in respect of the fortnight. This is conceptually the same as Qantas’s construction of the provision. It is also conceptually distinct from the constructions of the primary judge and the respondents which focus on work

performed during the fortnight. Further, and as Qantas submitted, Note 2 expressly refers to incentive-based payments and bonuses, monetary allowances and leave payments, none of which are necessarily related to work performed during the fortnight, one of which, leave, is about the direct opposite (work not being performed in the fortnight), and all of which are clearly intended to form part of the amounts payable by the employer to the employee under (b). The fact that Note 2 explains that subs 789GDA(2)(b) is to cover all of these amounts (in common with s 323(1)) strongly suggests that the focus of subs 789GDA(2)(b) is not the work performed by the employee during the fortnight, but the amount which is payable by the employer to the employee during the fortnight, in a general sense (as with s 323(1)), in relation to the performance of work whether or not the work has been performed during the fortnight.

76 Seventh, we are unable to accept the respondents' conception of s 789DGA(2) as a safety net for employees if, but only if, it is construed in the manner for which the respondents contend. As Qantas observed, s 789GDA(2) operates whether or not an employer has given a direction to employees authorised by Pt 6-4C of the Fair Work Act. Further, on any of the constructions available, s 789GDA(2) operates as a form of safety net for employees. On Qantas's construction, for example, the employees are guaranteed to be paid the greater of the jobkeeper payment or the amount that would otherwise be payable to them during the fortnight in accordance with the applicable contract or industrial instrument. This is a meaningful safety net for employees. It guarantees them a right to the payment of the greater amount if the amount payable exceeds the jobkeeper payment. It guarantees them a payment of the jobkeeper payment if the amount payable is less than the jobkeeper payment.

77 Eighth, and consistently with the seventh point made above, we do not accept an oral submission made by the respondents that Qantas's construction gives s 789GDA(2) no work to do because s 789GD guarantees the payment of the jobkeeper amount and the applicable contract or industrial instrument guarantees the payment of the amount payable so that s 789GDA(2) adds nothing. We consider this involves a misconception. For one thing, s 789GD, 789GDA, and 789GDB are a cascading set of provisions, with the later provisions building on (and overlapping with) the earlier provisions. Thus, s 789GD requires the wage condition to be met by the end of the fortnight. Section 789GDA provides for the minimum payment guarantee. Section 789GDB provides for the hourly rate of pay guarantee. For another, as we have said, all the competing constructions provide employees with a meaningful safety net. The respondents have not explained why the function of s 789GDA(2) as a safety net for employees (a function which may be acknowledged) drives the outcome towards the

particular construction which the respondents propose. On Qantas's construction s 789GDA(2) is ensuring that, whatever else may be the case, if the employee is otherwise entitled to be paid greater than the jobkeeper payment, the employer must pay that greater amount. It cannot rely on the *JobKeeper Scheme* to justify paying some lesser amount.

78 Ninth, although we have provided examples of the different outcomes which the different constructions yield based on the three scenarios provided by the primary judge, we are not persuaded by the submissions of any of the parties that the supposedly anomalous results driven by a particular construction should determine the construction adopted. In particular, the concepts of a “windfall” to an employer (as relied upon by the respondents) or to an employee (as relied upon by Qantas) do not seem to us to be a reliable guide to the construction of the provision. The *JobKeeper Scheme* as a whole provides a wage subsidy to employers. In one sense, this is a necessary “windfall” for an employer as their wages bill will be subsidised either in whole or in part by the scheme. A condition of the scheme is that the employer must pay the wage subsidy (at least) to the employee whether or not the employee has performed work for the employer. This is a form of “windfall” to the employee. By this means, the scheme achieves its object, as set out in the second reading speech, of supporting employers to maintain their employment connection to employees so that they can reactivate their operations quickly, and without having to rehire staff, once the Coronavirus crisis is over. That different fact combinations give rise to different extents of so-called “windfalls” depending on the construction adopted is not a reason to prefer one construction over another. On all three constructions, the employer will always receive the jobkeeper payment and the employee will always receive that amount per fortnight – that is the object of the scheme and it is achieved on any construction. Parliament must be taken to have accepted that there will be apparent anomalies in the operation of the scheme, particularly given that the jobkeeper payment is an arbitrary amount, unconnected to any amount that is otherwise payable to any particular employee. For this reason, apparent anomalies do not appear to us to be a reliable guide to the preferable construction. Otherwise, we do not accept the respondents' submission that Qantas's construction results in anomalies as a result of an “accident” of timing. The timing that the respondents have in mind is no “accident” – it is the time at which the employer is required to pay the employee in accordance with the applicable contract or industrial instrument the existence of which ss 323(1) and 789GDA(2) both pre-suppose.

79 Tenth, leaving aside Note 2 to s 789GDA(2), which we have already discussed above, we consider that the balance of the extrinsic material is either consistent with or supports Qantas's

construction. The second reading speech said the purpose of the *JobKeeper Scheme* is to provide a “wage subsidy to those employers significantly impacted by the coronavirus outbreak to continue paying their employees”. It did not say that the purpose was to impose a new obligation on employers to pay to their employees what the employee had earned in the fortnight irrespective of whether or not that amount would be payable to the employee under the applicable contract or industrial instrument. The *Explanatory Statement* referred to amounts “ordinarily” received by an employee per fortnight and said, if that amount was \$1,500 or more, the employee “will continue to receive their regular income according to their workplace arrangements”. This focus on what is ordinarily payable to an employee continuing if it is \$1,500 or more supports Qantas’s construction and is inconsistent with the competing constructions. The references in the *Explanatory Memorandum*, on which the respondents relied, as Qantas submitted, merely re-state the statutory language or, in fact, are supportive of Qantas’s construction.

80 Eleventh, it is difficult to escape the fact that subs 789GDA(2)(b) is concerned with the amounts “payable” to an employee. As both parties submitted, “payable” does not mean “paid” or “earned”. “Payable” means liable or required to be paid. The constructions of the primary judge and the respondents both involve construing “payable” other than in accordance with its ordinary meaning. On the primary judge’s construction “payable” means “earned by and payable to the employee”. On the respondents’ construction, “payable” means “earned by the employee”. It is only on Qantas’s construction that the word “payable” takes its ordinary meaning of liable or required to be paid. This is a powerful indicator that Qantas’s construction is to be preferred even if it most naturally (but not essentially) involves the imposition of a temporal obligation (that is, a required time for payment) on the employer which is less than clear on the face of s 789GDA(2).

81 Twelfth, the concept of “manipulation” by an employer of pay cycles seems inapt. On Qantas’s construction, the employer will be bound to pay employees in accordance with the applicable contract or industrial instrument and subject to the requirements of s 323(1) and, pursuant to the *JobKeeper Scheme*, ss 789GD, 789GDA, and 789GDB. Whatever is payable to the employees under those provisions will remain payable if it exceeds the jobkeeper payment. Any flexibility given to an employer in respect of what is payable to an employee will be given by the applicable contract or industrial instrument. It is difficult to characterise payments required to be made as the result of “manipulation” by an employer if the employer is satisfying the applicable contract or industrial instrument. The “manipulation” which the respondents

suggest in the present case (by, for example, overtime being payable by Qantas in arrears and thus Qantas not being required to pay that amount in the fortnight in which the overtime was worked), in fact, is in accordance with Qantas’s obligations under the applicable industrial instruments and reflects the continuation of Qantas’s ordinary pay cycle.

82 Finally, while we accept that Qantas’s construction does not perfectly resolve every textual ambiguity in s 789GDA(2) (in particular, the provision would work better with Qantas’s construction if, in the chapeau to s 789GDA(2), the phrase used was “total amount payable to the employee in the fortnight” and if, in subs 789GDA(2)(b), it said “the amounts payable to the employee during the fortnight in relation to the performance of work”), this must be compared with the textual and contextual difficulties which arise on the competing constructions but not on Qantas’s construction, namely:

- (1) “payable” is to be given a meaning other than its ordinary meaning of liable or required to be paid. On the competing constructions “payable” must be given the meaning of “earned by and payable to” (the primary judge) or “earned by” (the respondents);
- (2) the composite phrase copied over from s 323(1) of the Fair Work Act into subs 789GDA(2)(b) (“the amounts payable to the employee in relation to the performance of work”) is to be given a different meaning in subs 789GDA(2)(b) than it has in s 323(1). In subs 789GDA(2)(b) the phrase will mean “earned by and payable to” (the primary judge) or “earned by” (the respondents) when in s 323(1) the phrase will mean liable or required to be paid;
- (3) the words “during the fortnight” in subs 789GDA(2)(b) will be read as qualifying only the words “in relation to the performance of work” and not the words “the amounts payable to the employee” in circumstances where it is apparent that the whole of the composite phrase “the amounts payable to the employee in relation to the performance of work” has been copied over from s 323(1) and the words “during the fortnight” have been tacked on to the end of the composite phrase in a manner which is most naturally understood as tying the whole of the composite phrase to the relevant fortnight which is the foundation of the *JobKeeper Scheme*;
- (4) the clear legislative intention expressed in Note 2 to s 789GDA(2) to ensure that exactly the same kind of payments as are identified in s 323(1) are also payable to employees under s 789GDA(2) cannot be given effect without straining the language because annual leave is not payable to or earned by the employee (the primary judge’s

construction) or earned by the employee (the respondents' construction) in relation to the performance of work during the fortnight and incentive-based payments and bonuses and monetary allowances may not also not be so earned;

- (5) the clear legislative intent apparent from the scheme as a whole to make payments relate to the jobkeeper fortnight will not be given effect, as on the respondents' construction there will be no time at which the obligation to pay in accordance with subs 789GDA(2)(b) crystallises (in contrast to subs 789GDA(2)(a) where the timing obligation is "by the end of the fortnight" as provided for in s 789GD). As a result, it will not be possible on the respondents' construction to ascertain when a contravention of subs 789GDA(2)(b) has occurred despite that being a civil penalty provision;
- (6) the minimum payment guarantee will not guarantee to employees that that they receive the amount to which they would ordinarily be entitled to be paid in relation to the performance of work in accordance with the applicable contract or industrial instrument if that amount exceeds the jobkeeper payment. Rather, if a jobkeeper payment is payable to the employer, the employee is to be paid, at some indefinite time, only the amount which they have earned in relation to the performance of work during the relevant fortnight, if that amount exceeds the jobkeeper payment. The amount earned during the fortnight may be greater or less than the amount to which the employee would ordinarily be entitled to be paid in relation to the performance of work in accordance with the applicable contract or industrial instrument but that is immaterial as only the amount earned in each jobkeeper fortnight by the performance of work in that fortnight is covered by subs 789GDA(2)(b) on the competing constructions; and
- (7) employers will be subject to a new obligation to ascertain the amounts earned by the employee in a jobkeeper fortnight which, depending on the existing payment obligations of the employer, may involve substantial additional administrative costs in circumstances where the very purpose of the *JobKeeper Scheme* is to provide financial assistance to businesses in significant financial distress. On the evidence, at least in the case of Qantas, this will present substantial difficulties of compliance: see the affidavit of Douglas Haigh sworn 24 August 2020. Given that payment in arrears is commonplace (as are other combinations of payment obligations) and the *JobKeeper Scheme* is both intended to potentially apply to all employers and to provide a wage subsidy to all qualifying employers, who are by definition in significant financial distress as a result of the Coronavirus crisis, it is difficult to accept that it was the

legislature's intention to impose such a potentially large administrative burden on employers.

83 For these reasons, we prefer Qantas's construction. As a result, we consider that the appeal should be allowed and the cross-appeal dismissed. The declaration made by the primary judge should be set aside. Further consideration should be given to the terms of a substitute declaration.

I certify that the preceding eighty-three (83) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justices Jagot and Wheelahan.

Associate:

Dated: 17 December 2020

## REASONS FOR JUDGMENT

### BROMBERG J:

84 I have had the considerable benefit of reading a draft of the reasons for judgment of Jagot and Wheelahan JJ but the misfortune of not agreeing with the conclusions arrived at by their Honours. I gratefully adopt the account of the facts, the procedural background, the relevant legislation and extrinsic material and the summary given by Jagot and Wheelahan JJ of the reasons of the primary judge and of the contentions of the parties. The abbreviations made in those reasons are here continued.

85 It may, however, be helpful to the reader if s 789GDA of the Fair Work Act, the critical provision being here construed, is set out again in full:

#### **789GDA Minimum payment guarantee**

- (1) For the purposes of this Part, the *minimum payment guarantee* consists of the rule set out in subsection (2).
- (2) If a jobkeeper payment is payable to an employer for an employee of the employer for a fortnight, the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of the following:
  - (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;
  - (b) the amounts payable to the employee in relation to the performance of work during the fortnight.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection (other than paragraph (a)) include the following, if they become payable in respect of the fortnight:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments.

86 In my view of the competing constructions of s 789GDA(2), the preferable construction is that for which the respondents contended by their cross-appeals.

87 The essential difference between the construction contended for by Qantas and that of the respondents is concerned with the meaning of “amounts payable” in para (b) of s 789GDA(2).

Qantas contends the expression “amounts payable” is concerned with amounts which are payable by reason of a liability of the employer to the employee (whenever incurred) which is due to be paid in the particular jobkeeper fortnight in relation to the performance of work by the employee. The respondents contend that the expression “amounts payable” is concerned with amounts that are payable by the employer to the employee by reason of a liability incurred during the jobkeeper fortnight in relation to the performance of work by the employee in that fortnight.

88 The respondents’ construction closely follows and applies the language of the provision. It requires that the phrase “during the fortnight” in para (b) be understood as qualifying the phrase that immediately precedes it – “in relation to the performance of work”. The structure of para (b) and the positioning of the phrase “during the fortnight” accommodates that construction without difficulty because, grammatically, the placement of the expression “during the fortnight” is appropriate to support the meaning for which the respondents contend. Furthermore, the respondents’ construction does not give the word “payable” a meaning other than its ordinary meaning of liable to be paid. Both Qantas and the respondents contended that “payable” meant liable to be paid. That the respondents referred to the “amounts payable” to the employee as equating to the amounts “earned by” the employee, involved no departure from their contention that “payable” meant “liable to be paid”, as in my view it does.

89 In contrast, the construction contended for by Qantas requires the phrase “during the fortnight” in para (b) to be understood as only qualifying the phrase “the amounts payable”. If that was intended, grammatically, the more natural and appropriate placement of the phrase “during the fortnight” is following the word “payable”, as is shown if the language of s 789GDA(2)(b) was reworded as follows:

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

90 It is only if the phrase “during the period” is de-coupled from the phrase “in relation to the performance of work” that Qantas is able to say that para (b) is not dealing with the amount payable to the employee for those employee entitlements that have accrued or have arisen in the jobkeeper fortnight but is instead dealing with amounts payable (in the sense of receivable by the employee) in that fortnight, irrespective of when the employer’s liability for the amount payable arose or accrued.

91 The other textual difficulty faced by Qantas is that its construction requires the phrase “in respect of” in the chapeau of s 789GDA(2) (which grammatically works perfectly well on the respondents’ construction) to be replaced with the word “in” or “during”. That construction makes the words “respect of” redundant and imposes a meaning significantly different from the ordinary meaning of “in respect of” in circumstances where that phrase qualifies another phrase critical to the analysis – “the total amount payable to the employee”.

92 It is axiomatic that the text of s 789GDA(2) must be read in its context. As Allsop CJ recently stated in *Construction, Forestry, Maritime, Mining and Energy Union v Australian Building and Construction Commissioner (The Bay Street Appeal)* [2020] FCAFC 192 at [4] in a summation of the applicable principles of statutory construction (citations omitted):

The principle is clear: Meaning is to be ascribed to the text of the statute, read in its context. The context, general purpose and policy of the provision and its consistency and fairness are surer guides to meaning than the logic of the construction of the provision. The purpose and policy of the provision are to be deduced and understood from the text and structure of the Act and legitimate and relevant considerations of context, including secondary material.

93 In ascribing the meaning for which it contended to the text of s 789GDA(2), Qantas relied heavily on context and in particular on the apparent fact that the phrase “amounts payable to the employee in relation to the performance of work” used in s 789GDA(2) as well as Note 2 to that sub-section, emanate from s 323(1) of the Fair Work Act. It is necessary then to consider the meaning and operation of s 323(1) to see whether the context which it provides supports the meaning of s 789GDA(2) for which Qantas contended.

94 Section 323(1) of the Fair Work Act provides:

**Method and frequency of payment**

- (1) An employer must pay an employee amounts payable to the employee in relation to the performance of work:
  - (a) in full (except as provided by section 324); and
  - (b) in money by one, or a combination, of the methods referred to in subsection (2); and
  - (c) at least monthly.

Note 1: This subsection is a civil remedy provision (see Part 4-1).

Note 2: Amounts referred to in this subsection include the following if they become payable during a relevant period:

- (a) incentive-based payments and bonuses;
- (b) loadings;

- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) leave payments

95 Paragraphs (a) and (b) of s 323(1) are not relevant for current purposes. They form part of a scheme to address the evils historically dealt with by what were known as the “Truck Acts”, being payments made by an employer in kind rather than in money and inappropriate deductions made by an employer from an employee’s wages: see *Australian Education Union v Victoria (Department of Education and Early Childhood Development)* (2015) 239 FCR 461 at [163]-[175] where I traced the relevant history and provenance of those provisions, and see further Irving M, *The Contract of Employment* (2<sup>nd</sup> ed, LexisNexis Butterworths, 2019) at [12.29].

96 Of relevance to the issue here being addressed is paragraph (c) of s 323(1) which, when read with the chapeau to the sub-section, provides that “[a]n employer must pay an employee amounts payable to the employee in relation to the performance of work...at least monthly”. That requirement was not a traditional part of the “Truck Acts” and was described by Jessup J in *Murrihy v Betezy.com.au Pty Ltd* [2013] FCA 908 at [142] as follows:

A significant innovation introduced by the FW Act was the imposition of an obligation upon a “national system employer” (such as each of the respondents was) to pay its employees amounts payable to them in relation to the performance of work in full at least monthly: s 323(1) of the FW Act. Thus the legislation picks up, amongst other things, entitlements arising under contracts of employment and gives statutory consequences to an employer’s failure to make good on them.

97 Section 323(1) does not identify the amount of money payable to the employee. That is left to the contract or relevant industrial instrument. Section 323(1) does, however, regulate when that amount is to be paid on the assumption that a periodic payment will be made for the performance of work. It does that by providing for the outer permissible temporal limit by which an amount payable in relation to the performance of work must be paid to the employee. The outer temporal limit is a month, meaning that all work performed by an employee must be paid for within the period of one month after its performance. The expression “at least monthly” acknowledges that a shorter period may be imposed by a contract or an industrial instrument and, if that is so, the shorter period will apply. The provision contemplates that (unless made earlier and in advance of the performance of the work), a payment in arrears must be made by the end of a period, for work performed during that period.

- 98 What that analysis reveals is that the amount that must be paid to the employee under s 323(1) is referable to the performance of work in the period prior to the time the payment falls due. The relevant period will be defined by the outer temporal limit applicable, either a month or some shorter period imposed by the relevant contract or industrial instrument. Section 323(1) imposes an obligation to pay in respect of a liability referable to the performance of work performed in a particular period and not merely in respect of the performance of work whenever performed. If that was not so, the very purpose of the provision – that work performed must be paid for within the limited period allowed – would be defeated. That s 323(1)(c) operates in respect of a period is recognised in Note 2 and is there referred to as “the relevant period”. The period in contemplation is the period in which the work being paid for was performed.
- 99 Turning then to Note 2 to s 323(1), it seems to me that its purpose is to clarify that the word “amounts” in para (b) is to be understood as including amounts arising from the employer’s liability to pay (i) incentive - based payments and bonuses; (ii) loadings; (iii) monetary allowances; (iv) overtime or penalty rates; and (v) leave payments, if those entitlements become payable in the period contemplated by s 323(1)(c).
- 100 The point made by Qantas about Note 2 to s 789GDA(2) and which must equally apply to Note 2 of s 323(1), that leave payments (and possibly incentive-based payments and bonuses) are not necessarily payable in relation to work performed in the period for which the payment is made, is really beside the point for present purposes. What is important, is that the period contemplated by s 323(1) is the period in which the work being paid for was performed. The terms of Note 2 do not purport to alter that period or serve to de-couple the period from its nexus to the performance of work in that period even if it be the case that an entitlement consequential upon the performance of work outside of the period, like a payment for annual leave, is payable in the period. The exception there made to the general rule is not sufficiently significant to suggest that the general rule does not exist.
- 101 Largely the same text and the same textual structure has been adopted by the draftsman in s 789GDA(2). The expression “amounts payable to the employee in relation to the performance of work” is found in s 323(1) and Note 2 to that provision is largely identical to Note 2 to s 789GDA(2). I accept that transplantation from s 323(1) may be construed as intended to carry with it the same soil in which the original text was planted.
- 102 If that is done, the nature of the period contemplated by each provision should be construed as being the same. In each case there is a correspondence between the time at which work is

performed and the period in which the work performed is to be paid for. The ordinary meaning of the text of s 789GDA(2) conveys that understanding and, in particular, that the payment to be made is in respect of the period in which the work being paid for was performed.

103 Qantas' contention that s 323(1) leaves it to the contract or industrial instrument to regulate when amounts due for the performance of work are to be paid and accordingly that that is the case for s 789GDA(2), is not persuasive. That is because s 323(1) does regulate when such amounts are to be paid when its field of operation is engaged. The meaning of the phrase "amounts payable to the employee in relation to the performance of work" in s 323(1) is to be construed by reference to the circumstances that engage that provision and not by reference to circumstances that do not. Nor, correspondingly, is it correct to say that s 323(1) is not concerned with when work is performed. As discussed, that provision is vitally concerned with when work has been performed and when, relative to the performance of that work, payment for that work is to be made.

104 There is, however, one observation that may be made which although not relied upon by Qantas seems to me to point against the respondents' construction. Although, for the reasons identified already, s 323(1) is concerned with what the requisite payment with which it deals is a payment for, the section is also clearly concerned with when the payment is to be made. In contrast the respondents' construction of para (b) of s 789GDA(2) is not concerned with when the amount payable there referred to is to be paid.

105 There are therefore aspects of s 323(1) which assist Qantas' construction and others that do not. In the end, I am not persuaded that the context provided by s 323(1) is of significant assistance to either of the competing constructions.

106 Nor does the context provided by s 323(1) assist Qantas to overcome the textual hurdle imposed by the need to render redundant the words "respect of" in the chapeau to s 789GDA(2). Just like its position in relation to para (b), Qantas' construction requires that the phrase "amount payable to the employee" in the chapeau, be read as though it was qualified by the phrase "in the fortnight" or "during the fortnight". The same applies in respect of Note 2, where on Qantas' construction the word "payable" in the chapeau to that Note is to be understood as qualified by the phrase "in the fortnight" or "during the fortnight". However, in neither case has that qualifying language been utilised. In each case, the qualifying phrase is "in respect of the fortnight" and in each case, read in context, that phrase bears a very different meaning to

the meaning that would have been attributed to each chapeau if the phrase “in the fortnight” or “during the fortnight” had been used.

107 Other reliance upon context was made by each of the parties and that was done by reference to the asserted purpose of s 789GDA and the wider scheme of which it forms part. Reliance was variously placed upon extrinsic material and the intended purpose of s 789GDA was sought to be demonstrated by reference to examples of the different outcomes or consequences that the competing construction would yield. The detail of that reliance has been addressed in the reasons of Jagot and Wheelahan JJ.

108 I am not persuaded by that material and those contentions. In particular, I am not persuaded that the textual hurdles faced by Qantas’ construction are able to be explained or rationalised as the product of the unintended use of infelicitous language. Like Jagot and Wheelahan JJ, I take the view that the fact that in some scenarios as opposed to others, a particular construction results in what may be seen to be an anomalous outcome either in favour of the employee or in favour of the employer, is not really a reliable guide to the construction of the provision. The provision is part of a scheme enacted urgently to address an emergency. A ‘one size fits all’ rather than a bespoke approach has been taken. Inevitably, there will be winners and losers and anomalous outcomes.

109 Qantas contended that on the respondents’ construction and because the fortnightly structure of the jobkeeper scheme may not coincide with the existing pay cycle utilised by an employer, employers would be faced with the additional administrative burden of ascertaining what is payable to each of their employees for work performed during the jobkeeper fortnight.

110 It may be accepted that Parliament would not wish to unnecessarily impose administrative burdens upon persons likely to be facing financial distress. However, the imposition of administrative burdens is the likely product of every scheme in which persons, including highly distressed persons, are subsidised out of public funds. That one scheme for providing subsidisation is less administratively burdensome than another is unlikely to be a reliable guide to construction in the absence of a proper understanding of the extent of any extra burden imposed by one approach as opposed to the other. Nor can any reliable guidance be provided without understanding the extent of preference or commitment Parliament attached to one scheme as opposed to another alternative.

111 There is a conceptual difference to the scheme for subsidisation on the respondents' construction as compared to that of Qantas. On the respondents' construction, the subsidy provided by the Commonwealth can be seen to be directed at alleviating the financial impact upon the employee of the lack of productive work that was available for the employee to perform in the particular jobkeeper fortnight. On Qantas' construction what is alleviated is the shortfall in wages received in the particular jobkeeper fortnight by the employee, irrespective of whether that shortfall is referable to the lack of work in the jobkeeper fortnight. Part 6-4C, in which s 789GDA is found, includes provisions described in s 789GA as authorising employers who qualify for the jobkeeper scheme "to give a jobkeeper enabling stand down direction to an employee (including to reduce hours of work)". That part of the scheme, which provides employers with an extended capacity to stand down an employee, suggests that the subsidisation component of the scheme is directed to alleviating the consequences for an employee of a reduction in the employee's hours of work in a jobkeeper fortnight. A necessary consequence of a scheme which is focused upon and is committed to that objective, is that the hours worked in the jobkeeper fortnight must be ascertained.

112 It is by no means obvious to me that any additional burden imposed by that exercise was regarded as anything more than the necessary consequence of achieving Parliament's objective. Furthermore, the Court has been left to speculate as to the extent of any additional burden that may be imposed. Insofar as this contention about an additional burden was directed to the respondents' construction (rather than the construction adopted by the primary judge), the contention was only put by way of an undeveloped assertion in which even the extent of the asserted extra burden upon Qantas was not quantified.

113 Qantas did refer to the evidence of Douglas Haigh given by an affidavit made on 24 August 2020. That evidence did address difficulties that would be experienced by Qantas if the amounts payable to flight attendants for a jobkeeper fortnight had to be calculated and paid to those employees within the fortnight. That evidence addressed the difficulty of collecting information referable to the final few days of a pay cycle necessary for calculating various allowances and other non-base payments payable to flight attendants working the non-standard and variable work patterns worked by those particular employees. Evidence to substantially the same effect was given by other witnesses called by Qantas, but in relation to other categories of Qantas employees. However, that evidence did not materially address any additional administrative burden of the kind that may be imposed on employers on the respondents' construction of s 789GDA(2).

114 On that construction, the calculation that must be made about the amounts payable to an employee in relation to performance of work during the jobkeeper fortnight does not need to be made within the particular fortnight, nor is there any requirement that the employee be paid within that fortnight in respect of the work performed during the fortnight. The obligation to “ensure” that s 789GDA(2) imposes upon an employer, is an obligation concerned with the “total amount payable to the employee in respect of the fortnight” and not the amount paid to the employee in the fortnight.

115 In each jobkeeper fortnight an employee of a qualifying employer must be paid the “jobkeeper payment” to which s 789GDA(2)(a) refers. At the time of the primary judge’s judgment that amount was \$1500. That amount must be paid during the fortnight because pursuant to s 789GD the employer must satisfy the “wage condition” by the end of the fortnight. What, in practical terms, is required of the employer by s 789GDA(2) is an assessment of whether any ‘top up’ payment needs to be made to the employee beyond the \$1500 already paid, because the amount payable to the employee in relation to the performance of work during the fortnight exceeded \$1500.

116 That assessment, as I have said, need not be made during the jobkeeper fortnight. In relation to many employees and in particular those who have not worked in the fortnight or whose working hours do not give rise to the possibility of a ‘top up’, no assessment would be necessary at all. Further, the assessment is unlikely to place any additional burden upon an employer where the employer’s pay period is aligned with the jobkeeper fortnights as is the case, according to the evidence given by Mr Haigh, for Qantas flight attendants. The extent to which the pay periods of other employers are also so aligned or able to be readily aligned with the jobkeeper fortnights was not the subject of evidence. Nevertheless I accept that many employers would be burdened with the need to make an additional assessment of the kind I have described. However, on the evidence relied upon by Qantas, I would not conclude that many or most employers would face a substantial additional burden. This consideration does not justify the departure from the text and plain meaning of s 789GDA(2) for which Qantas contended.

117 Nor am I persuaded that the departure from the text contended for by Qantas is justified because on the respondents’ construction there would be uncertainty as to whether s 789GDA has been contravened. I do not accept that any uncertainty arises. Whilst it may be true that, on the respondents’ construction, s 789GDA(2) itself does not impose an obligation to pay any ‘top

up' within the particular jobkeeper period, the timely obligation upon the employer to make that payment, a payment for the performance of work, is imposed by s 323(1) as well as any contract or industrial instrument which is applicable. If that payment is not made or an insufficient payment is made at that time, the employer will not have "ensured" that which s 789GDA(2) requires be ensured and that provision will have been contravened. There is no uncertainty, or relevantly, no greater uncertainty for the ascertainment of a contravention on the respondents' construction than that which pertains on Qantas' construction.

118 For those reasons I prefer the respondents' construction. I would dismiss the appeals, allow the cross-appeals and set aside the declarations made by the primary judge. In my view, substitute declarations should be made reflecting the respondents' construction of s 789GDA(2) of the Fair Work Act.

I certify that the preceding thirty-five (35) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromberg.

Associate:

Dated: 17 December 2020