



# FACT SHEET

## JobKeeper Enabled Directions

### *Fair Work Act 2009*

Created: 22 April 2020

#### **JOBKEEPER PAYMENT SCHEME**

The JobKeeper Payment scheme ('JobKeeper') is a wage subsidy from the Government to eligible businesses and not-for-profits affected by the COVID-19 pandemic to support them in retaining employees that were employed as at 1 March 2020, and who remain employed. This includes employees who are on leave or have been stood down from their employment.

Affected employers will be able to claim a payment of \$1,500 per fortnight (before tax) per eligible employee from 30 March 2020 until 27 September 2020.

#### **JOBKEEPER LEGISLATION**

Further to the Government's announcement regarding JobKeeper, on Wednesday, 8 April the following Bills were passed by the House of Representatives, and, later that evening, by the Senate:

- *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020*
- *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020*

The *Coronavirus Economic Response Package (Payments and Benefits) Bill 2020* provided for the Treasurer to make Rules in relation to the JobKeeper payments. The Rules accompanying the above Bills were released the evening of 9 April.

The above two Bills have since received Royal Assent. This means they are Acts of Parliament.

The Acts and the Rules combine to provide context, and the 'where', 'how' and 'why' to JobKeeper.

#### **QHA JOBKEEPER INFORMATION**

This Fact Sheet should be read in conjunction with the following QHA publications on COVID-19, JobKeeper and related information:

- Coronavirus COVID-19 Hospitality Venue Shutdown Employment Q&A
- JobKeeper Payment Hospitality Employment Q&A Information Guide
- Coronavirus COVID-19 Employee Information and Assistance
- Fact Sheets:
  - HIGA: Schedule L (with template letters to action Schedule L decisions)
  - Stand Down (with template stand down letters x2)
  - Redundancy
  - Consultation Provisions under the HIGA and RIA
- Templates:
  - Stand Down Letter
  - Employer notice of participate in JobKeeper
  - Employer notice of intention not to participate in JobKeeper

## **CORONAVIRUS ECONOMIC RESPONSE PACKAGE OMNIBUS (MEASURES NO. 2) ACT 2020 ('THE OMNIBUS ACT')**

The Omnibus Act has amended the *Fair Work Act 2009* ('the FW Act') by inserting into it a new Part 6-4C.

This new Part will be automatically repealed on 28 September 2020. It also requires that an independent review of its operation begin by 28 July and report to the relevant Minister by 8 September.

Part 6-4C details new JobKeeper-related rights for employers to change employment arrangements – either by direction or via request – in certain circumstances.

The new Part 6-4C also gives the Fair Work Commission ('FWC') the power to handle disputes.

The new JobKeeper-related directions for employers relate to:

1. An employer direction for an employee to work reduced hours or days (section 789GDC);
2. An employer direction for an employee to undertake alternative duties (section 789GE);
3. An employer direction for an employee to work at an alternative location (section 789GF).

In addition, an employer can make certain requests of an employee, and the employee must not unreasonably refuse the request. The requests are:

4. For an employee to work on different days and times to their ordinary hours and days (section 789GG);
5. For an employee to take accrued annual leave (section 789GJ).

The temporary changes that the Omnibus Act enables for employers will override any corresponding provision in an employment contract, in a modern award (such as the *Hospitality Industry (General) Award 2010* ('HIGA')), or in an Enterprise Agreement (including a pre July 2010 workplace agreement eg Collective Agreement).

Certain rules, protections and conditions apply before an employer can issue one of the above directions.

Only an employer who qualifies for the JobKeeper scheme can give any of the directions listed above. The ATO has been unable to provide guidance on when an employer becomes 'qualified', except to say that if the employer registers itself and its eligible employees, and makes payments as required by the scheme, the employer is likely 'qualified'.

The ATO has also advised the QHA that it will be assessing employee eligibility as registrations are submitted, and employers will be notified if an employee is not eligible for the scheme at the same time as the first Government payment to employers in May.

## **DEFINITIONS**

### **Wage Condition**

Section 789GD requires an employer to satisfy a 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

In this circumstance, the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the JobKeeper fortnight. An employer who does not comply with this condition will not be entitled to participate in JobKeeper for that JobKeeper fortnight.

The JobKeeper fortnights run from Monday to the following Sunday, and are:

30 March – 12 April	6 July – 19 July
13 April – 26 April	20 July – 2 August
27 April – 10 May	3 August – 16 August
11 May – 24 May	17 August – 30 August
25 May – 7 June	31 August – 13 September
8 June – 21 June	14 September – 27 September
22 June – 5 July	

### Minimum payment guarantee

As per section 798GDA, if a JobKeeper payment:

- is payable to an employer for an employee for a JobKeeper 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.

This means that the employer needs to ensure that employee receives \$1,500 per fortnight (JobKeeper payment), or, if they perform work, the wage that is payable for the work performed – if that wage is greater than \$1,500 for that fortnight.

The wages amount includes:

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

### Hourly rate of pay guarantee

As per section 789GDB, the hourly rate guarantee means the following:

1. If a JobKeeper enabling direction is given by an employer to an employee in accordance with section 789GDC, the employer must ensure that the employee's *hourly* base rate of pay is not less than the employee's hourly base rate of pay that applied prior to the direction being made.

2. If a JobKeeper enabling direction is given to an employee by an employer in accordance with section 789GE, the employer must ensure that the employee's hourly base rate of pay is not less than the greater of:

- (a) the hourly base rate of pay that would have been applicable to the employee if the direction had not been given to the employee;
- (b) the hourly base rate of pay that is applicable to the duties the employee is performing\*.

*\* This means that if the duties carry a higher rate of pay, the higher rate is payable (as per clause 25 of the HIGA).*

Section 789GDB provides that an employee's ordinary hourly rate cannot be reduced. In practice this means that an employee's existing hourly rate must be maintained, irrespective of the JobKeeper payment and any directions given by the employer.

### **Section 789GDB(4) - Base rate of pay for certain payment arrangements**

If an employee is paid otherwise than:

- (i) on an hourly basis; or
- (ii) by reference to an hourly rate of pay (eg on a salary); and

a workplace instrument (eg Modern Award or Enterprise Agreement) applicable to the employee:

- (i) specifies the employee's base rate of pay for the purposes of the National Employment Standards; or
- (ii) sets out a method for working out the employee's base rate of pay for the purposes of the National Employment Standards;

then, the employee's base rate of pay is:

- the amount specified in the workplace instrument; or
- the amount worked out using the method set out in the workplace instrument.

### **Usefully Employed**

The term usefully employed is not defined in the FW Act, however it is an important consideration for JobKeeper enabling stand down directions, as well as for stand down in accordance with section 524.

Useful work does not have to be the work that the employee ordinarily performs, but it needs to be genuine and productive work that provides a benefit to an employer.

Where a stand down is actioned by an employer, they need to be able to demonstrate that the impacts of COVID-19 or the Government's measures to deal with the pandemic have caused an employee to not be able to be usefully employed for the period the employee is stood down.

Should an employee feel that a stand down was not genuine, they are able to lodge a dispute about it in the FWC.

## **JOBKEEPER ENABLING STAND DOWN DIRECTIONS / JOBKEEPER RELATED REQUESTS**

### **LEGAL EFFECT OF A DIRECTION**

Provided a direction made under sections 789GDC, 789GE, and 789GF in Part 6-4C of the FW Act satisfies the conditions for making such a direction, the direction will have effect and will authorise what would otherwise be a breach of employment conditions arising from:

- The FW Act;
- An employment contract;
- A Modern Award;
- An Enterprise Agreement.

What does this mean? An employer can issue a direction that will assist the ongoing viability of the business, even where it is inconsistent with terms and conditions of employment.

The direction must meet the conditions of each direction – as outlined below – and a failure to do so means that the direction has no legal effect, making the employer liable for the breach.

Significant penalties could apply if a direction is not issued in accordance with the relevant requirements.

### **INTERACTION WITH SCHEDULE L OF THE HIGA**

A direction to reduce hours of work that has been made as per Schedule L in the HIGA continues to have effect. Should an employer seek to make a direction under sections 789GDC, 789GE, and/or 789GF that direction will override the direction made in accordance with Schedule L.

#### **Annual Leave Direction – HIGA Schedule L**

Where an employer has directed an employee to take annual leave in accordance with Schedule L, that direction will continue to have effect for the purposes of the annual leave that is being taken. That is unless there is agreement otherwise.

Once the direction under Schedule L has been satisfied, that is, the period of annual leave directed to be taken has been taken, a request as per section 789GJ can be made. Please refer to that section of this Fact Sheet for more details.

### **BEFORE A DIRECTION CAN BE GIVEN**

In order to issue a direction contained in this Fact Sheet, an employer:

- Must give an employee at least three (3) days written notice of the direction;
- Must consult with the employee and their representative if they have one about the direction (section 789GM);
- Must keep a written record of the consultation eg a File Note;
- Must ensure that the direction is reasonable in the circumstances.

### Additional Information About the Notice:

- The notice referred to as the first dot point directly above can be issued electronically.
- The Regulations to the Omnibus Act provide that the notice may be a prescribed form\*.
- The notice will remain in place until it is replaced with another direction, it is revoked by the employer or by the FWC, or the JobKeeper scheme expires.

\* At the time of publishing this Fact Sheet, no prescribed form has been released.

### **DOES AN EMPLOYEE HAVE TO COMPLY?**

Yes, where a direction is given to an employee, and that direction complies with the Omnibus Act, the employee must comply with it.

The only exception to this is if the direction is unreasonable in all of the circumstances. In such a case, the direction will not apply to the employee. An example of where a direction may not be reasonable is in circumstances where the direction has a significant impact of the employee's caring responsibilities.

### **WHAT ABOUT AN EMPLOYEE ALREADY ON STAND DOWN?**

Where an employee has been stood down under Section 524 of the *Fair Work Act 2009*, it is the QHA's view that an employee can return to work in conjunction with a JobKeeper Enabling Stand Down Direction as detailed in this Fact Sheet. This would have the effect of lifting the original stand down (eg rescinding it – which should be down in writing), and replacing that direction with the new JobKeeper Enabling Stand Down direction.

It is important to note that an employee that is stood down does not have to be working to be eligible to receive the JobKeeper payment, and employers should exercise some caution in the work employees are being asked to perform.

### **WHAT HAPPENS WITH LEAVE ENTITLEMENTS AND ACCRUALS?**

Section 789GS provides that:

#### Leave Entitlements

- a) an employee will continue to accrue leave entitlements as if the direction had not been given.

#### Service in the Case of Redundancy

- b) Should it become relevant, notice of termination and redundancy pay apply as if the direction had not been given.

This means that annual leave and personal/carer's leave accrual of entitlements continue to accrue based on the employee's pre-direction arrangements, as well as for calculating service for redundancy and notice of termination.

For example, a direction is issued for a full time employee to work reduced hours. During the operation of the direction, annual leave will accrue on the basis of the full time hours (38 ordinary hours per week), not on the basis of the reduced hours they have been working.

## **A DIRECTION DOES NOT HAVE THE EFFECT OF A REDUNDANCY (Section 789GZA)**

A JobKeeper enabling direction does not amount to a redundancy – giving a direction therefore does not trigger a redundancy.

## **INTERACTION OF DIRECTIONS AND REQUESTS WITH OTHER EMPLOYMENT RELATED LAWS**

Part 6-4C does not interrupt an employer's or an employee's obligations, responsibilities and entitlements under discrimination and workplace health and safety laws.

## **TYPES OF DIRECTION**

### **1. DIRECTION TO REDUCE HOURS OR DAYS (section 789GDC)**

An employee must comply with any direction to reduce hours of work or days of work.

A direction to reduce hours or day is called a JobKeeper Enabling Stand Down Direction ('JKESDD'). By issuing a JKESDD, an employer gives a direction to an employee to:

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

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

*\* For the purposes of a direction to work a reduced number of hours, the reduced number of hours may be nil.*

The Omnibus Act effectively allows for a partial stand down of work – some of the time is worked, the rest is on stand down. A partial stand down is not permissible for a Stand Down provided under section 524 of the FW Act.

### **When an employee is on leave**

A JKESDD does not apply to the employee during a period when the employee:

- (a) is taking paid or unpaid leave that is authorised by the employer; or
- (b) is otherwise authorised to be absent from their employment.

Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the JKESDD would otherwise apply.

### **Restrictions Associated with Issuing a JKESDD:**

An employer can only give this type of direction if:

- The employer is qualified for the JobKeeper scheme; and
- The employer is entitled to one or more JobKeeper payments for an eligible employee; and
- The employee cannot be usefully employed for the period the employee is directed not to work as per the direction because of changes to the business that are attributed to:
  - The COVID-19 pandemic; or
  - Government initiatives to slow the transmission of COVID-19; and

- The implementation of the JKESDD direction is safe, having regard to (without limitation) the nature and spread of COVID-19.

### Compliance

During the JobKeeper Enabling Stand Down Period, an employer is still required to comply with the following sections in relation to the employee who is subject to the direction:

- (a) section 789GD (refer to the Definitions section);
- (b) the minimum payment guarantee as defined;
- (c) the hourly rate of pay guarantee as defined.

Note: the above obligations only apply to the hours the employee is required to work, not those for which they are stood down.

## **2. DIRECTION TO UNDERTAKE ALTERNATIVE DUTIES (section 789GE)**

An employee must comply with any direction by the employer to perform any duties that are within the employee's skill and competency.

The direction can be given if:

- The employer qualifies for the scheme, and
- The employer is entitled to one or more JobKeeper payments for an eligible employee; and
- The duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and
- The employee has any license or qualification required to perform the duties the subject of the direction; and
- The duties are reasonably within the scope of the employer's business operations.

### Where a Direction may not have effect

A direction made under this section has no effect unless the employer reasonably believes the direction is necessary to continue the employment of one or more of its employees (section 789GL).

When considering this necessary requirement, it is immaterial that a similar direction could have been given to another employee.

### Employees performing other duties

With most parts of the hospitality industry currently shut down, in some instances there will be limited work that can be performed. Employers should exercise some caution in relation to the duties employees are asked to perform, particularly where an employee has previously been stood down and is now being asked to return to the workplace.

Please note that there is some risk in asking employees to return to the workplace to perform other duties, such as painting, cleaning and maintenance. An employee might challenge or dispute a direction of this nature, or this might lead to an employee questioning the lawfulness of the original stand down.

### 3. DIRECTION TO WORK AT AN ALTERNATIVE LOCATION (section 789GF)

Section 789GF provides that an employer can direct an employee to change their location of work to a place that is different to their usual place of work if:

- The employer qualifies for the scheme, and
- The employer is entitled to one or more JobKeeper payments for an eligible employee; and
- The new location is suitable for the employee to perform their duties; and
- The new location is within a reasonable travelling distance for the employee; and
- The new location is reasonably within the scope of the employer's business operations; and
- The new location is safe, having regard to (without limitation) the nature and spread of COVID-19.

#### Where a direction may not have effect

A direction made under this section has no effect unless the employer reasonable believes the direction is necessary to continue the employment of one of more of its employees (section 789GL).

When considering this *necessary* requirement, it is immaterial that a similar direction could have been given to another employee.

### TYPES OF REQUESTS

#### 4. REQUEST TO ALTER THE EMPLOYEE'S DAYS AND TIMES OF WORK (section 789GG)

An employer can request an employee to work on different days and/or at different times to the employee's usual work days and times.

Section 789GG provides that:

- Where an employer qualifies for the scheme, and
- The employer is entitled to one or more JobKeeper payments for an eligible employee; and
- The employer requests to make an agreement with the employee regarding the days and/or times of work;
- The employee must consider the request and must not unreasonably refuse the request.

The type of agreement the employer can request the employee to make with them includes:

- That the employee's duties will be performed on different days to days usually worked by the employee; or
- That the employee's duties will be performed at different times to times the employee usually works.

If an employee does not agree to the employer's request, the FWC can settle the dispute about the request via arbitration.

#### Requirements of the Request

The request must:

- Be safe, having regard to (without limitation) the nature and spread of COVID-19; and
- Be reasonably within the scope of the employer's business operations; and
- Not result with the employee's number of hours of work reducing.

## Request Example

An employee may request an employee who usually works weekend to work weekdays as the venue no longer trades on a weekend due to the impact of the COVID-19 pandemic.

## **5. REQUEST TO TAKE ANNUAL LEAVE** (section 789GJ)

An employer can request an employee to take paid annual leave provided the employer qualifies for the JobKeeper Payment scheme.

Section 789GJ provides that:

- Where an employer qualifies for the scheme, and
- The employer is entitled to one or more JobKeeper payments for an eligible employee; and
- The employer requests that the employee takes a period of annual leave\*;
- The employee must consider the request and must not unreasonably refuse the request.

*\* The employee must retain at least two weeks of annual leave accrued.*

If an employee does not agree to the employer's request, the FWC can settle the dispute about the request via arbitration.

## Taking Annual Leave at Half Pay

New section 789GJ(2) provides that an employer and employee can agree to take the annual leave at half pay.

For example, the employee takes three weeks of annual leave at half pay. The employee is on annual leave for six weeks and is paid the value of three weeks of annual leave.

Where this arrangement occurs:

- ✓ Annual leave taken in this manner will accrue as if the agreement to take the leave at half pay had not been made;
- ✓ Redundancy pay and payment in lieu of notice of termination calculations are calculated as if the agreement had not been made.

## **FAIR WORK COMMISSION'S ROLE TO ARBITRATE DISPUTES**

Section 789GV of the amended FW Act provides that an employee or their Union (as their representative), **or** an employer or their employer association (as their representative) may lodge a dispute with the FWC to deal with a dispute arising under the Omnibus Act.

The relevant form to complete to notify FWC of the dispute is [Form F13A](#).

The FWC, in dealing with the dispute, can:

- Mediate;
- Conciliate;
- Express an opinion; or
- Arbitrate (i.e. make a binding decision)

the dispute.

Where arbitrating a dispute, the FWC may make an Order:

- That the FWC considers it desirable to give effect to the employer's direction.
- To set aside the employer's direction
- Substituting the employer's direction for another direction.
- That the FWC considers appropriate.

Failure to follow an Order can result in penalties of up to \$12,600 for an individual and \$63,00 for a business.

### **DOCUMENT, DOCUMENT, DOCUMENT!**

The QHA recommends that all arrangements agreed to, or directed, be documented.

As stated earlier in this Fact Sheet, documentation requirements exist when issuing directions as per sections 789GDC, 789GE, and 789GF. A request made by an employer, as set out in this Fact should also be documented.

Documented agreement with employees (preferably with the employee's signature / email, confirming consent to the agreement) are valuable for confirming agreements that have been reached in the event of dispute at a later stage.

#### **Further Assistance**

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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