Australian Chamber of Commerce and Industry

JobKeeper 2.0

Employer Guide

To assist businesses with phase two of the Federal Government's JobKeeper wage subsidy scheme.

28 September 2020 to 28 March 2021

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Index

JobKeeper 2.0

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The novel coronavirus (COVID-19) pandemic has drastically shifted the course of life across the globe in 2020. As well as the global health crisis, each country now faces an economic one. In Australia, the Federal Government has rolled out a suite of financial stimulus packages to buoy the Australian economy where possible and support employers, employees and those that now find themselves out of work.

The JobKeeper scheme, described by the Prime Minister as "the biggest economic lifeline in Australia's history" is aimed at preserving the employer-employee relationship, keeping more businesses in business and more people in jobs. With JobKeeper 1.0 having been utilised by almost a million businesses, supporting 3.5 million Australians and following Treasury's review of the scheme, JobKeeper has been extended until 28 March 2021, albeit in a revised form. The second phase of JobKeeper, to begin from 28 September 2020 targets support to businesses and not-for-profits that continue to be significantly impacted by COVID-19.

ACCI has prepared this guide on JobKeeper 2.0, which seeks to explain and answer some of the more common questions employers may have around the payment scheme and related Fair Work Act flexibilities.

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

The content of this publication has been prepared based on material available to date (19 October 2020). The material in this guide is of a general nature and should not be regarded as legal advice or relied on for assistance in any particular circumstance or situation. In any important matter, you should seek appropriate independent professional advice in relation to your own circumstances. The Australian Chamber of Commerce and Industry and the Chamber of Commerce and Industry Queensland accept no responsibility or liability for any damage, loss or expense incurred as a result of the reliance on information contained in this guide.

1. Employer Eligibility Criteria

JobKeeper is the Federal Government wage subsidy payment which enables eligible employers to access a subsidy to continue paying their employees.

The second iteration of the scheme, JobKeeper 2.0, will run from 28 September 2020 to 28 March 2021. The second phase of JobKeeper targets support to businesses and not-for-profits that continue to be significantly impacted by COVID-19.

The JobKeeper Payment allows eligible employers who elect to participate in the scheme to claim a **fortnightly payment for each eligible employee** to subsidise their wage. The payment rate is reduced in two phases and differs depending on the amount of hours worked (see section 3).

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

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

1.1 Employer Eligibility Criteria

In order to receive the JobKeeper Payments beyond 27 September 2020 **both** an employer and employee (or business participant) must qualify and meet the eligibility criteria (set out below).

1.1.1 I am already currently receiving JobKeeper will my business need to requalify for JobKeeper 2.0?

Yes. To be eligible post 27 September businesses will need to requalify. Businesses and not-for-profits seeking to claim the JobKeeper Payment will be required to demonstrate that they have suffered a decline in turnover using actual GST turnover (rather than projected GST turnover) in the September quarter 2020 to be eligible for the JobKeeper Payment from 28 September 2020 to 3 January 2021.

Businesses will again need to reassess their eligibility from 4 January 2021, by demonstrating they have met the relevant decline in turnover in the December quarter 2020 to be eligible for JobKeeper from 4 January 2021 to 28 March 2021.

1.1.2 Which employers are eligible for JobKeeper 2.0?

To be eligible for JobKeeper 2.0 business (including companies, partnerships, trusts, sole traders, partnerships, unincorporated associations and individuals) and not for profits will need to demonstrate that they have experienced the following decline in turnover (which remains the same percentages as the existing rules):

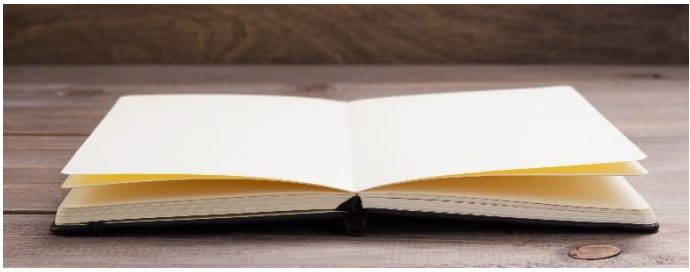
- **30%** or more (in the relevant quarter) for businesses with an aggregated turnover of less than $1 billion (for income tax purposes);
- **50%** or more (in the relevant quarter) for businesses with an aggregated turnover of $1 billion or more (for income tax purposes);
- **15%** or more (in the relevant quarter) for charities registered with the Australian Charities and Non-for-profits Commission (excluding schools and universities).

Big banks subject to the Major Bank Levy, Australian government agencies, local governing bodies and sovereign entities, and approved providers of an approved child care service are **not eligible**.

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

1.1.3 Will JobKeeper 2.0 be open to new recipients or is it only for those already using JobKeeper?

During Phase 2 of JobKeeper, payments will continue to remain open to new recipients, provided both employers and employees meet the eligibility requirements and the decline in turnover tests during the extension period.



1.1.4 How does an employer establish the % ongoing decline in turnover (30%, 50% or 15%) under JobKeeper 2.0?

In the second phase of JobKeeper there will be two periods during which an employer will need to be able to prove that their turnover has declined by the relevant % in order to be eligible to continue to receive JobKeeper.

First requalification period: From 28 September 2020, businesses and not-for-profits will be required to reassess their eligibility with reference to their actual GST turnover in the September quarter 2020 (July, August, September) relative to a comparable period (generally the corresponding quarter in 2019). They will need to demonstrate that they have met the relevant decline in turnover test (see above at 1.1.2) for the September quarter to be eligible for the JobKeeper Payment from 28 September 2020 to 3 January 2021.

Second requalification period: From 4 January 2021**,** businesses and not-for-profits will need to further reassess their turnover to be eligible for the JobKeeper Payment. They will need to demonstrate that they have met the relevant decline in turnover test (see above at 1.1.2) with reference to their actual GST turnover in the December quarter 2020 (October, November, December) relative to a comparable period (generally the corresponding quarter in 2019) to remain eligible for the JobKeeper Payment from 4 January 2021 to 28 March 2021.

1.1.5 How is 'turnover' defined?

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

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

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

Current GST turnover is defined in the GST Act but has been modified for JobKeeper purposes. The amounts included in calculating current GST turnover are the same regardless of whether the business is currently GST registered.

There are four main modifications to the GST turnover calculation:

- Current GST turnover is calculated for the relevant quarter being tested (rather than for 12 months).
- Where an entity is part of a GST group, the entity calculates its GST turnover as if it wasn't part of the group. This means that supplies made by one group member to another will be included in the GST turnover for the purposes of the fall in turnover test.
- The calculation includes the receipt of tax deductable donations by a deductible gift recipient. It also includes gifts of money, property (with a market value of more than $5,000) and listed Australian shares received by an ACNC-registered charity (that is not a deductible gift recipient). However, none of these receipts are included if they are from an associate.
- External Territories (e.g. Norfolk Island) are treated as if they formed part of the indirect tax zone (i.e. Australia).

Cash or accruals basis

Businesses may use an accruals basis of accounting to calculate both the current GST turnover and projected GST turnover. However, if the business usually prepares its activity statements on a cash basis, the ATO will allow it to calculate both the current and projected GST turnovers on a cash basis. The ATO expects businesses will usually use the same method as they use for GST. The ATO may seek to understand a business's circumstances where a different accounting method is used to normal.

1.1.6 When are supplies considered made?

The original JobKeeper scheme allocated supplies to a relevant period based on when the supply was made, determined with reference to the terms of a particular contract and the nature of the supply. In a significant departure from the original decline in turnover test, under JobKeeper 2.0 the Commissioner will now allow only one method to determine when a supply is made. Supplies must be allocated to a period in the same way taxable supplies are allocated for GST attribution purposes. This applies whether the entity is registered for GST or not.

1.1.7 Do GST adjustments change when a supply is made?

GST adjustments do not change the time in which a supply is made for the purposes of calculating current GST turnover and expressly states that adjustments should not be taken into account when calculating an actual decline in turnover. Any adjustments reported in the turnover test period or relevant comparison period, which relate to supplies made in another period, must be excluded from the GST turnover calculation. However, if a supply has been made in the turnover test period or relevant comparison period and the value of that supply changes during that same period, that change in value can be taken into account as part of GST turnover. This is because such changes are not adjustments for GST purposes.

EXAMPLE – GST ADJUSMENT

Peter's business made a supply in August 2019 and then issued a credit note in respect of that supply in October 2019. As a result, the credit note will constitute a GST adjustment that must be ignored for the purposes of calculating Peter's business's GST turnover for the quarter ended 30 September 2019.

1.1.6 What if there are circumstances making it difficult to compare actual turnover?

The ATO has determined alternative tests in specific circumstances where it is not appropriate to compare actual turnover with the relevant comparison period in 2019 (September or December quarter). These are very similar to those that applied during the first iteration of JobKeeper and are outlined in 1.2.

1.1.7 Will there be any modified decline in turnover tests for certain entities?

The ATO has made modifications in relation to certain group structures and other entities, such as business structures using separate entities for employment, as it did under JobKeeper 1.0. See section 1.3 for more information on these tests.

1.1.8 How does the turnover test apply to corporate groups or connected/affiliated businesses under JobKeeper 2.0?

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

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

Note that under JobKeeper 2.0, for certain group structures where staff are employed through a special purpose entity, rather than the operating entity, a modified decline in turnover test may apply, see section 1.3.1.

1.1.9 What do I do if my business has been trading for less than 12 months?

Where a business or not-for-profit has not been in operation for a year and therefore will have an issue showing that turnover has fallen relative to a year earlier, the business can apply the alternative test which has been determined by the ATO to address this (see section 1.2.3).

1.1.10 My Business Activity Statement (BAS) for the September quarter is due to be lodged in late October. Do I have to assess eligibility and pay my employees before the BAS deadline?

Treasury has advised that as the deadline to lodge a Business Activity Statement (BAS) for the September quarter is late October, and the December quarter (or month) BAS deadline is in late January for monthly lodgers or late February for quarterly lodgers, businesses will need to assess their eligibility in advance of the BAS deadline in order to meet the wage condition. The 'wage condition' requires employers to pay their eligible employees in advance of receiving the JobKeeper payment in arrears from the ATO.

The ATO is allowing employers until 31 October 2020 to meet the wage condition for all eligible employees, for the purposes of the JobKeeper scheme.

1.1.11 What if my business is not required to lodge a BAS?

Alternative arrnagements will be put in place for businesses and non-for-profits that are not required to lodge a BAS (for example, if the entity is a member of a GST Group).

1.1.12 What if my turnover has not yet decreased, but is likely to decrease later in the year?

Businesses can apply for the JobKeeper Payment at a later time once the turnover test has been met. For instance, employers who did not meeting the decline in turnover test for the September quarter but do meet the decline in turnover test for the December quarter, will be eligible for the period 4 January 2021 to 28 March 2021.

1.1.13 What about businesses in liquidation or bankrupt?

Businesses that are in liquidation are not eligible for JobKeeper. Partnerships, trusts or sole traders in bankruptcy are also not eligible for JobKeeper.

EXAMPLE – CORPORATE GROUP TURNOVER TEST

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

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

Doles, the supermarket in the Eastfarmers group has been trading well during the pandemic selling food and groceries and so will not meet the 50% reduction in turnover test.

Workoffice has similarly seen an increase in trade as more people work from home and so will also not be able to meet the 50% reduction in turnover test.

Jmart, however has seen a significant reduction in consumer spending on its retail products. It is able to show more than a 50% reduction in actual turnover for the September quarter 2020 compared with the September quarter 2019. As a result, Jmart will be eligible to receive the JobKeeper payment for its eligible employees.

CASE EXAMPLE – RETESTING TURNOVER UNDER JOBKEEPER PHASE 2

Dean owns and runs a wedding photography business, Happy Smiles. Dean started claiming the JobKeeper Payment for his eligible staff and himself as a business participant when the JobKeeper scheme commenced on 30 March 2020.

At the time, Dean estimated that the projected GST turnover for Happy Smiles would be 65% below its actual GST turnover in April 2019. To be eligible for the JobKeeper payment from 30 March 2020 to 27 September 2020, Dean needed to show the turnover for his business was estimated to decline by at least 30%.

As a monthly BAS lodger, Dean submitted his BAS in July, August and September. His actual turnover declined 61% for the September quarter.

As the actual turnover decline for September 2020 quarter was still greater than 30%, Happy Smiles was eligible for the JobKeeper Payment for the period of 28 September 2020 to 3 January 2021.

With restrictions easing, business improve for Happy Smiles, and actual turnover for the December 2020 quarter was 20% less than the December quarter 2019, so Happy Smiles was no longer eligible to claim JobKeeper for the second extension period starting from 4 January 2021.

1.2 Alternative decline in turnover tests

The ATO has determined the following alternative tests for fall in turnover for classes of entities where there is not an appropriate relevant comparison period:

- Businesses affected by drought or natural disaster (see 1.2.2)
- Entity is a new business (see 1.2.3)
- Acquisitions & disposals (see 1.2.4)
- Restructure that changed the entity's turnover (see 1.2.5)
- Business had a substantial increase in turnover (see 1.2.6)
- Businesses with an irregular turnover (see 1.2.7)
- Businesses that temporarily ceased trading during comparison period (see 1.2.8)
- Sole trader or small partnership with sickness, injury or leave (see 1.2.9).

Each of these tests are set out in further detail below.

1.2.1 What if more than one alternative test applies?

If you fall into more than one of the classes of entities covered by the alternative test, you can choose which alternative decline in turnover test to apply. You only need to satisfy one of the tests (it does not matter if you do not satisfy one of the other tests that applies).

1.2.2 Businesses affected by drought or natural disaster

Eligibility

Entities that conducted business in a declared drought or natural disaster zone during the relevant comparison period **AND** the drought or natural disaster changed the entity's turnover.

Alternative Turnover Test

Compare actual GST turnover for the September or December quarter (as applicable) for the same period in the year immediately prior to the year when the drought or natural disaster was declared, rather than those quarters in 2019.

EXAMPLE – NATURAL DISASTERS

Zane runs a White Water Rafting Adventure business in Far East Queensland. In 2019 Far East Queensland was a declared flood zone.

He wants to re-test his eligibility for JobKeeper 2.0, so he would ordinarily need to use the September 2019 quarter to see if he has the required decline in turnover.

Because he was in a declared flood zone in September 2019, Zane looks to use his entity's GST turnover for the September quarter 2018 instead to compare with the actual GST turnover for the September quarter 2020.

However, in May 2018, Zane's White Water Rafting Adventure business was also in a declared natural disaster zone.

Therefore, Zane uses his entity's GST turnover for the September quarter 2017 instead to compare with the actual GST turnover for the September quarter 2020. This is the comparison period in the closest year in which he wasn't in a declared drought or natural disaster zone.

Adjustments made to the other alternative tests

Allowances are also made within the other alternative tests set out below, if an entity qualified for or received one of the following in relation to those months:

- The ATO's Bushfires 2019-20 lodgement and payment deferrals
- Any concessions provided by the ATO where drought has caused financial difficulty, or
- Any Disaster Recovery Funding Arrangements 2018 assistance measures.

The months which were affected by the bushfires may be excluded from the calculation of turnover on the assumption the entities has a decline in turnover from the bushfires / drought already, and the inclusion of those months would unfairly reduce the turnover with which the current GST turnover test period is compared, unless there are no other appropriate months.

1.2.3 Entity is new to business

Eligibility

Entities that commenced business before 1 March 2020, but after the relevant comparison period (i.e. entities that have been in business for less than a year).

Alternative Turnover Test – Option 1

If the business commenced before 1 February 2020:

- The entity should compare its average monthly GST turnover since the entity started (before 1 March 2020), and multiply by 3. Then, compare this figure with the applicable current GST turnover for the September or December 2020 quarters.
- The average monthly GST turnover is the total of the current GST turnovers for each whole month since the entity started business and before 1 March 2020, divided by the number of those whole months.

If the business commenced on or after 1 February 2020, but before 1 March 2020:

- The entity should compare its average monthly GST turnover in February 2020 with its applicable current GST turnover for the September or December 2020 quarter.
- The average monthly GST turnover for February is its total current GST turnover for the days the business was in operation in February 2020 divided by the number of days it was in business in February 2020 and then multiplied by 29.

Alternative Test – Option 2

- This test can only be used if the business commenced after the relevant comparison period but **before 1 December 2019**.
- To calculate alternative turnover, compare current GST turnover for the September or December 2020 quarter with the current GST turnovers for the months of December 2019, January 2020 and February 2020.

1.2.4 Acquisitions and disposals

Eligibility

- Entities that acquired or disposed of part of their business after the relevant comparison period and before the applicable turnover test period, which changed the entity's turnover.

Alternative Turnover Test

- Compare the current GST turnover from the month immediately after the month the acquisition or disposal occurred multiplied by three. Compare that figure with the applicable GST turnover for the September of December 2020 quarter.

Alternative Test – Multiple acquisitions or disposals

- If the entity made multiple acquisitions or disposals after the relevant comparison period, use the whole month immediately after any of the acquisitions or disposals, multiplied by three. Compare that figure with the applicable GST turnover for the September or December 2020 quarter.

Alternative Test – No whole month after acquisition or disposal

- If there is no whole month between the acquisition or disposal and the turnover test period, then the entity should use the month immediately before the applicable turnover test period.

1.2.5 Restructure that changed the entity's turnover

Eligibility

- Entities that have restructured whole or part of their business after the start of the relevant comparison period and before the applicable turnover test period **AND** the restructure changed the entity's turnover. If the restructure did not impact the business in a way that changed its current GST turnover, then this alternative test cannot be used.

Alternative Turnover Test

- Use the current GST turnover from the month immediately after the month the restructure was completed and multiply that current GST turnover from that month by three. Then compare that figure with the applicable GST turnover for the September or December 2020 quarter.

Alternative Turnover Test – Multiple restructures

- Entities that have undertaken multiple restructures after the relevant comparison period can use the whole month immediately after any restructure undertaken was completed for the alternative test.

Alternative Test – No whole month after acquisition or disposal

- If there is no whole month between the last restructure and the turnover test period, the entity should use the month immediately before the applicable turnover test period.

EXAMPLE – RESTRUCTURE

Arches Enterprises restructured its business operations in November 2019 by merging the operations of two of its businesses to increase efficiency and sales. On 16 March 2020, it completed a further restructure by separating out the IT operations or those newly merged businesses into a separate division.

Arches Enterprises uses its current GST turnover of $300,000 for the turnover test period of the quarter ending on 30 September 2020. The current GST turnover for the month of December 2019 was $150,000 and the current GST turnover for the month of April 2020 was $100,000.

The alternative decline in turnover test will apply to Arches Enterprises, as it underwent restructuring which changed its turnover.

Arches Enterprises multiples the current GST turnover for December 2019 of $150,000 by three to get $450,000 and compares that with the current GST turnover of the quarter ending 30 September 2020 of $300,000. Arches Enterprises finds that its current GST turnover for the September 2020 quarter falls short of the figure worked out using the alternative test by $150,000. As this is greater than 30%, the alternative decline in turnover test is satisfied.

Arches Enterprises could also use its current GST turnover from April of $100,000 when applying the alternative decline in turnover test. Multiplied by three, to get $300,000 and compared to the current GST turnover of the September quarter 2020 of $300,000, the alternative decline in turnover test would not have been satisfied.

1.2.6 Business had a substantial increase in turnover

Eligibility

An entity that had an increase in turnover of:

- 50% or more in the 12 months immediately before the applicable turnover test period or before 1 March 2020,
- 25% or more in the 6 months immediately before the applicable turnover test period or before 1 March 2020, or
- 12.5% or more in the 3 months immediately before the applicable turnover test period or before 1 March 2020.

To test if the entity's current GST turnover increased in the 12 (or six or three) months immediately before the applicable turnover test period or before 1 March 2020, compare the current GST turnover for the month immediately before the applicable turnover test period or 1 March 2020 with the current GST turnover for the month immediately before the start of the 12 (or six or three) months.

Alternative Turnover Test

To determine if turnover has declined by the relevant amount (15%, 30% or 50%):

- **If you are using the period immediately before applicable turnover test period** to determine whether you had a substantial increase in turnover, compare the total of your entity's current GST turnover for the 3 months immediately before the applicable turnover test period, with the applicable current GST turnover in the turnover test period (September or December 2020 quarter).
- **If you are using the period immediately before 1 March 2020** to test whether you had a substantial increase in turnover, compare the total of your entity's current GST turnover for the three months immediately before 1 March 2020, with the applicable current GST turnover in the turnover test period (September or December 2020 quarter).

1.2.7 Businesses with an irregular turnover

Eligibility

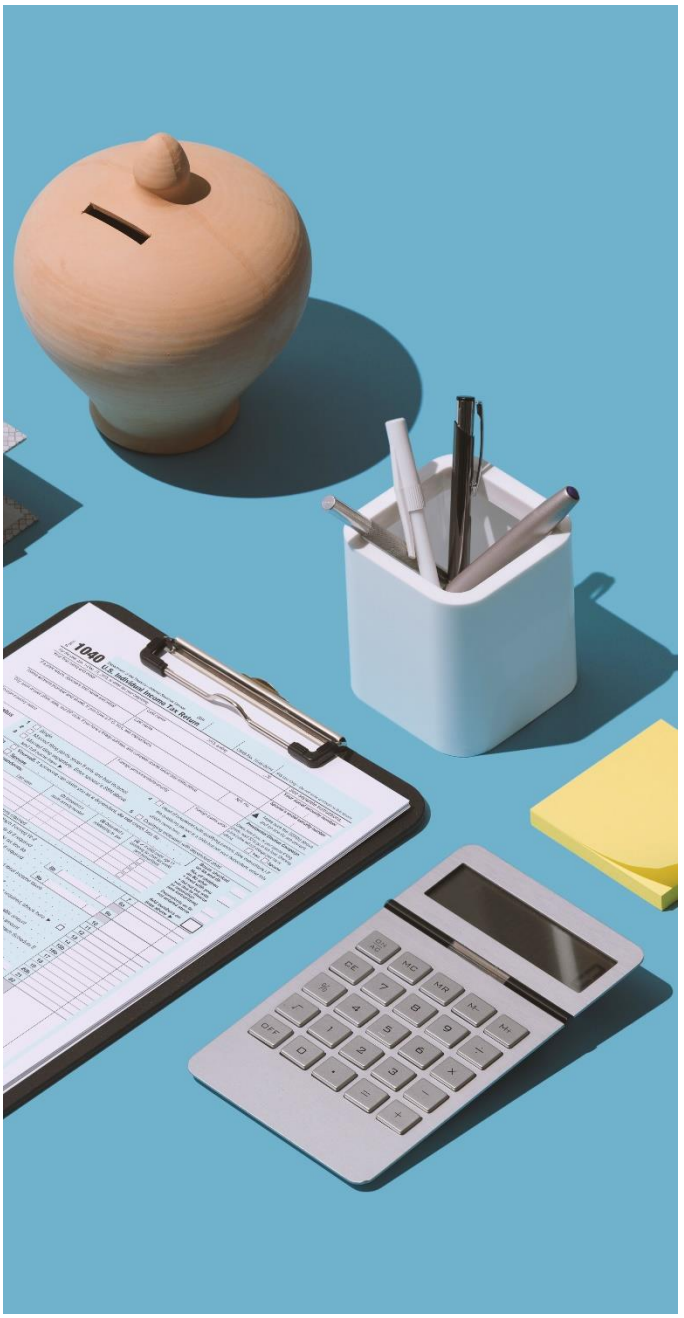
Entities can apply this test if:

- For the consecutive 3-month periods ending in the 12 months immediately before the applicable turnover test period or 1 March 2020, the entity's lowest turnover is no more than 50% of the highest of the entity's current GST turnover for any of those 3-month periods, AND
- The entity's turnover is **not cyclical**.

This means that, for example, a fruit growing business that is seasonal and usually has less turnover during certain months of the year cannot use this test. A business that usually has increased turnover in December from Christmas trade also cannot use this test.

Alternative Turnover Test

Entities must use their average monthly current GST turnover in applying this alternative test. To work this out, add the total of the current GST turnovers for each whole month in the 12 months immediately before the applicable turnover test period or 1 March 2020, and divide the total by 12. Then multiple the entity's average monthly GST turnover by three and compare that to the current GST turnover for the applicable test period.



1.2.8 Businesses that temporarily ceased trading during comparison period

Eligibility

Entities can apply this test if:

- The entity's business had temporarily ceased trading due to an event or circumstance outside the ordinary course of the entity's business,
- The entity's business had temporarily ceased trading for a week or more,
- Some or all or the relevant comparison period occurred during the time in which the entity had temporarily ceased trading, AND
- Trading resumed before 28 September 2020.

Temporarily ceasing to trade includes a business ceasing to make supplies or where it cannot otherwise offer its good and services to customers. It does not require that the entity stopped carrying on business but requires a suspension of the ordinary activities of the business due to an event or circumstance outside the ordinary course of business. Examples may include where a business that is run from a purpose-built premises ceased trading, or shut due to extensive damage from a storm or a blackout.

Ceasing trade at the end of a business day, or weekends and public holidays, or during the off-season of a seasonal business would not satisfy these requirements, as they form part of the ordinary course of the entity's business. The alternative test will also not generally apply where a business ceases trade because its sole trader or partner (in a small partnership) goes on planned leave.

Entities can use either of the following alternative tests:

Alternative Test 1

- Use the current GST turnover for the same period as the turnover test period in the year immediately before the business ceased trading. Then compare that figure with the applicable GST turnover for the September or December 2020 quarter.

Alternative Test 2

- Use the current GST turnover from the three months immediately before the month the business temporarily ceased trading. Then compare that figure with the applicable GST turnover for the September or December 2020 quarter.

1.2.9 Sole trader or small partnership with sickness, injury or leave

Eligibility

An entity is eligible for this alternative turnover test if:

- The entity is a sole trader or a partnership with four or fewer partners, and the entity has no employees
- The sole trader or one of the partners has not worked for all or part of the relevant comparison period due to sickness, injury or leave, and
- The turnover was affected as a result of the sole trader or partner not working for all or part of the period.

Alternative Turnover Test

Use the current GST turnover from the month immediately before the month in which the sole trader or partner did not work due to sickness, injury or leave and multiple that by three. Then compare that with the current GST turnover for the applicable turnover test period (September or December quarter 2020).

EXAMPLE – SOLE TRADER

Charlie is a sole trader running a chocolate shop. Charlie was sick from 15 August 2019 until 8 September 2019 and did not work during that period.

Charlie is considering the September 2020 turnover test period. Charlie multiples the current GST turnover from July 2019 by three and compares that with current GST turnover for the September 2020 quarter.

1.3 Modified decline in turnover test for certain entities

The modified decline in turnover tests that existed under JobKeeper 1.0 are retained for JobKeeper 2.0, albeit with some necessary amendments to account for the revised basic decline in turnover test (e.g. comparing current rather than projected GST, and to take into account the turnover test now requires comparison with a quarter, rather than permitting comparison with a month).

1.3.1 Business structures using separate entities for employment

The ATO has determined a modified decline in turnover test for certain group structures, where staff are employed through a special purpose entity, rather than the operating entity.

Eligibility

The modified test in applies if:

- The employer entity is a member of a consolidated group, consolidatable group or a GST group, AND
- The employer entity's **principal activity** is supplying other members of the group with services (employee labour services) consisting of the performance of work by individuals the employer entity employs.

> The **principal activity** is the main or predominant activity that the employer entity carries out. The employer entity may provide other services to the group, but that employer entity must not be an operating entity of the group and must provide no more than incidental services to third parties.

This test will not apply in circumstances where the Commissioner has made a determination that the modified decline in turnover test does not apply to the employer entity.

Modified Test

The employer entity satisfies the decline in turnover test if the following are satisfied at test time:

- In a turnover test period, the employer entity:
    - supplies employee labour services to one or more members of the group (each of which is a 'test member') for which their principal activity is making supplies to entities that are not members of the group; AND
    - only supplies labour services to entities that are members of the group (other than supplies that are merely incidental to the principal activity of the entity); AND
- The employer entity would satisfy the ordinary decline in turnover test at test time if the following modifications were made:
    - Instead of the employer entity's current GST turnover for the turnover test period, the sum of the current GST turnovers for that period of each test member is to be used; and
    - Instead of using the employer entity's current GST turnover for a relevant comparison period, the sum of the current GST turnovers for that period of each test member is to be used.
- This is to ensure that the decline in turnover test is applied to group members that predominantly undertake transactions with external entities on an arms-length basis rather than measuring the decline in intergroup transactions.

1.3.2 What if an entity is a member of two groups?

If an entity is a member of a consolidated group, a consolidatable group or a GST group – or more than one of those groups – it satisfies the modified decline in turnover test if it satisfies that test in relation to its membership of any of those groups. For example, this would address a situation where an entity may have both formed a consolidated group or is part of a consolidatable group and is part of a GST group also.

EXAMPLE – MODIFIED DECLINE IN TURNOVER TEST

The Shooting Star Group is a manufacture of sporting goods. It is a structured GST group.

Goal Employment is a member of the GST group comprising the Shooting Star Group. Goal Employment's principal activity within the Shooting Star Group is to supply employee labour services to other members of the Group. Goal Employment does this by supplying the services of individuals it has engaged to the other group members. Goal Employment has less than $1 billion aggregated annual turnover.

The Shooting Star Group's sales suffered as a result of the restrictions put in place due to COVID-19. Goal Employment seeks entitlement to the JobKeeper payment in respect of its employees.

In the September quarter 2020, the current GST turnover for each of the test members is: Basketball Ltd - $100,000; Football Ltd - $65,000; and Tennis Ltd - $35,000. This gives a total projected GST turnover of $200,000.

In the relevant comparison period (September quarter 2019), the GST turnover for each of the test members is: Basketball Ltd - $320,000; Football Ltd - $60,000; and Tennis Ltd - $20,000. This gives a total GST turnover of $400,000.

The September quarter 2020 turnover falls short of the September quarter 2019 turnover by $200,000, which is 50% of the September quarter 2019 turnover and exceeds the specified percentage of 30%. Goal Employment satisfies the modified decline in turnover test.

1.3.3 Charity employers receiving government revenue

Employing ACNC-registered charities can elect to exclude government revenue from the turnover test.

This would maintain the 15% turnover test for charities, but would allow them to either use their total turnover OR turnover excluding government revenue (such as grants) for the purposes of eligibility for the JobKeeper payment.

Government revenue is any consideration received for a supply made to an Australian government agency, local governing body, the United Nations or an agency of the United Nations.

Where a charity has employees that are fully funded from government revenue and the charity meets the turnover decline test by excluding the revenue, the charity may choose not to nominate those employees.

1.3.4 Universities

Universities that are Table A providers within the meaning of the Higher Education Support Act must meet **both** the original decline in turnover test and an actual decline in turnover test (all other universities are permitted to use the basic decline in turnover test).

The **original decline in turnover test** for universities (Table A providers) is met if:

- the universities **projected** GST turnover for the period 1 January 2020 to 30 June 2020 falls short of its current GST turnover for the period 1 January 2019 to 30 June 2019, and
- the decline is by a specified percentage (either 30% or 50%).

The calculation of turnover includes the amount received under the Higher Education Support Act 2003 or the Australian Research Council Act 2001.

The actual decline in turnover test must also be satisfied. It applies to universities in the same way as all other entities.

1.2.5 Registered Religious Institutions

Generally, religious practitioners are not employees and usually receive financial support via non-monetary benefits and/or a stipend, rather than salary and wages.

However, the Rules now provide that registered religious institutions that meets the eligibility requirements of JobKeeper will be able to receive the JobKeeper payment for each eligible religious practitioner for which they are responsible under the tax law.

1.2.6 International Aid Organisations

An entity will be eligible, subject to the decline in turnover test, if it is an approved organisation under the Overseas Aid Gift Deduction Scheme (OAGDS).

1.4 Business owners actively engaged in their business

Businesses in the form of a company, trust or partnership can also qualify for JobKeeper 2.0 payments where a business owner (a shareholder, adult beneficiary or partner) is actively engaged in the business, or a director is actively engaged in the business.

This is limited to one entitlement for each entity even if there are multiple business owners or participants.

1.4.1 Paid shareholders

An eligible business that pays shareholders that provide labour in the form of dividends can nominate only ONE shareholder to receive the JobKeeper Payment. A shareholder who receives the payment cannot also receive the payment as an employee.

1.4.2 Company Directors

If company directors receive directors' fees then an eligible business can nominate ONE director (in a director capacity) to receive the payment, as well as any eligible employees. A director who receives the payment cannot also receive the payment as an employee.

1.4.3 Trusts

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

1.4.4 Partnerships

In a partnership ONLY one person can be nominated (as the entrepreneur) to receive the JobKeeper allowance, along with any eligible employees, noting a partner cannot be an employee. The other partner may be entitled to some other form of income support from Services Australia (e.g. JobSeeker allowance). A beneficiary who receives the payment cannot also receive the payment as an employee.

EXAMPLE – PARTNER IN A PARTNERSHIP

Vanessa, Dannii and Bronwyn are individual partners in a partnership operating an Australian business, VDB Marketing. The partnership has an ABN and was formed in 2011. They are partners (not employees) and they each receive partnership distributions. There are also three full-time staff employed by VDB Marketing.

VDB Marketing qualified for JobKeeper 1.0 as it had projected a fall in turnover of 40% for April 2020 (when compared to April 2019). VDB Marketing will need to re-qualify for JobKeeper 2.0 from 28 September 2020.

At the end of September 2020, VDB Marketing assessed that business had improved slightly, and that it suffered a fall in turnover of approximately 20% in the compared to the September quarter 2019. This means the business is not eligible for the JobKeeper Payment scheme at this time.

However, at the end of December 2020, VBD Marketing assessed that it had suffered a fall in turnover of 40% for the December quarter 2020 when compared to the December quarter 2019, as demand was severely down. This means VDB Marketing meets the requirements for fall in turnover and is eligible to receive JobKeeper payments for the period 4 January 2021 to 28 March 2021.

The partnership will need to decide which individual is nominated as the eligible business participant for the JobKeeper payment, as only one of the partners can be nominated. This choice applies for the duration of the time VDB Marketing is participating in the JobKeeper scheme.

If the JobKeeper eligibility conditions for its employees are also satisfied, VDB Marketing could also qualify for each of its eligible employees.

VDB Marketing could receive up to four JobKeeper payments in respect of each fortnight (that is, for one eligible business participant, and its three eligible employees).

EXAMPLE – BENEFICIARY OF A TRUST

Marnie is dance instructor and operates both a dance studio and an online training program. Marie runs her Australian business through a discretionary trust where she is a beneficiary and receives trust distributions.

The trust was settled and acquired an ABN in 2011. Marnie is not employed by her business but actively manages the business. She is not employed anywhere else. Marnie also has two permanent part-time employees.

The dance studio was closed on 19 March 2020 as a result of the government directive placing a limit on gathering. The online training program is still operating. As a result of the dance studio closure, the trust's turnover fell by 75% in the September quarter 2020 compared with the September quarter 2019.

Marnie is 33 years old and is an Australian resident. She is an eligible business participant and the business (structured as a trust) qualifies under the JobKeeper Payment scheme, with the business receiving the JobKeeper payment.

The two permanent part-time employees are also eligible for JobKeeper, so the business qualifies for an additional two JobKeeper payments.

1.5 Sole traders or the self employed

1.5.1 Are sole traders eligible for JobKeeper 2.0?

Yes, people who are self-employed will be eligible for JobKeeper 2.0 payments provided on 1 March 2020 they were carried on a business in Australia and at the time of applying they:

- satisfy the fall in turnover test (generally 30%);
- had an ABN on or before 12 March 2020, you had either lodged on or before 12 March 2020 at least one of a 2018–19 income tax return showing an amount included in your assessable income in relation to carrying on that business, or an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing you made a taxable, GST-free or input-taxed sale.
- are not an approved provider of child care service
- have not entered bankruptcy
- are actively engaged in the business;
- are not entitled to another JobKeeper Payment (either a nominated business participant of another business or as an eligible employee) and have not previously given another entity or the ATO a JobKeeper nomination notice;
- are not an employee (other than a casual employee) of any other employer;
- were aged at least 18 years of age as at 1 March 2020 (16 and 17 year old's can also qualify if they are independent or not undertaking full time study);
- are an Australian resident, or a resident for income tax purposes and the holder of a Special Category (Subclass 444) visa; AND
- were not in receipt of any of these payments during the JobKeeper fortnight:
    - government parental leave or Dad and partner pay under the Paid Parental Leave Act 2010 OR
    - a workers compensation payment in respect of your total incapacity to work.

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

1.5.2 What does it mean to be actively engaged in the business?

Sole traders will be considered actively engaged if they regularly:

- perform or manage the performance of services the business provides
- sell or manage the sale of goods of the business
- perform other activities associated with managing the business
- exercise control over activities related to business strategy and growth.

Individuals will not be considered actively engaged simply because they:

- own an interest in the business or invest capital in it
- provide advice or other assistance of the business from time to time

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

An individual can only receive the JobKeeper Payments from one source. To be eligible as a self-employed individual, you must not be a permanent employee of any other employer. However, whilst receiving the JobKeeper Payment, an individual can also receive income from other sources including another job.

1.5.4 What if a sole trader did not meet the 12 March deadline in the eligibility criteria.

The ATO Commissioner has the discretion to grant further time but only in limited circumstances to:

- hold an ABN where an ABN was not held on 12 March 2020; and
- provide notice of assessable income or taxable supplies during the relevant period to the Commissioner, where notice was no provided by 12 March 2020

In order for sole traders to apply for further time sole traders need to use this form.

EXAMPLE – SOLE TRADER WITH ANOTHER JOB

James works as a part-time bricklayer 2 days per week for Nick, who is a builder with a home renovation business. Nick's business is doing well, so he is not eligible for the JobKeeper payment.

James however also owns his own design consulting business. His business has been greatly affected and his turnover has dropped by 50%.

Can James as a sole trader get the JobKeeper Payment?

No, as he does not pass the eligibility test, as he is a permanent employee of another employer. Because James would be claiming as an eligible business participant, he cannot be an employee (other than a casual employee) of another entity.

If however James was both a long-term casual employee of Nick's (and also an eligible sole trader), he could choose to either claim JobKeeper through his employer if Nick was eligible, or he could claim as a sole trader, but not both.

2. Employee Eligibility Criteria

2.1 Employee Eligibility

2.1.1 What are the employee eligibility criteria for employees under JobKeeper 2.0?

The employee eligibility rules for JobKeeper 2.0 are slightly different to the first iteration of JobKeeper as the Federal Government in August this year expanded the eligibility criteria for employees to qualify for JobKeeper to make it easier for more employees to qualify.

These changes have applied since the JobKeeper payment fortnight commencing 3 August and continue to apply to JobKeeper 2.0. Under the changes there are two eligibility tests that continue to apply in different circumstances known in this guide as the 1 March 2020 Test and the 1 July 2020 Test. The eligibility for these tests is set out below from 2.1.3.

On this basis employees are eligible for the JobKeeper 2.0 payment if they meet one of the following categories:

1. ***Ongoing eligible employees***: employees that were in receipt of JobKeeper before 2 August 2020 and continue to remain eligible under original 1 March 2020 Test and employed by the same employer;
2. ***Eligible re-employed former employees***: employees who prior to 3 August 2020 were employed by the employer and in receipt of JobKeeper under the 1 March 2020 Test, who subsequently ceased employment between 1 March 2020 and 1 July 2020 and were then re-employed by the same employer after 1 July 2020 without ever becoming or renominating as an eligible employee with a different employer/entity.
3. ***Eligible employees that meet the 1 July 2020 Test.***

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

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

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

2.1.3 CATEGORY 1 - Original 1 March 2020 Test

Eligible employees before 2 August 2020:

- were employed by the employer on or before 1 March 2020;
- are currently employed by the employer (including those stood down or re-hired);
- are full-time or part-time (including fixed term), long-term casuals (casual employees who have been with their employer on a regular and systematic basis for at least the previous 12 months as at 1 March 2020 and not a permanent employee of any other employer) or a sole trader;
- are at least 18 years of age on 1 March 2020;
- are 16 or 17 years of age on 1 March 2020 and are independent or not undertaking full time study;
- are an Australian citizen, the holder of a permanent visa, a protected special category visa, a non-protected special category visa who has been residing continually in Australia for 10 years or more, or a New Zealander on a special category (subclass 444) visa (all other temporary visa holders are not currently eligible);
- were an Australian resident for tax purposes on 1 March 2020 **AND**
- are not in receipt of a JobKeeper Payment from another employer.

EXAMPLE: ONGOING ELIGIBLE EMPLOYEES

- Lama's Pyjamas employs three permanent employees for which it qualified for the JobKeeper scheme since 30 March 2020. Under the Rules, these three employees' eligibility is preserved under the 1 March 2020 Test for Lama's Pyjamas.
- Lama's Pyjamas continues to qualify for JobKeeper payments in respect of its three ongoing employees that it had in employment on 1 March 2020 for JobKeeper fortnights on and after 3 August 2020. This is because this business was eligible for the JobKeeper payment for these employees for the JobKeeper on or before 2 August 2020 and continue to meet the remaining eligibility requirements.

2.1.4 CATEGORY 2 – Eligible re-employed former employees

Employees who are re-employed by a former eligible employer under certain circumstances may be eligible for JobKeeper payments under what is called the preservation of the 1 March 2020 test for re-employed employees.

A re-employed former employee can requalify for JobKeeper with their same employer so long as the following conditions are satisfied:

- The employee must have qualified for JobKeeper payments at 1 March 2020 and nominated with their employer.
- The employee ceased employment with their employer between 1 March 2020 and 1 July 2020.
- The employee was re-employed by the same employer after 1 July 2020.
- The employee continues to satisfy the employee eligibility conditions that applied at 1 March 2020.
- The employee has not at any point nominated for JobKeeper payments with a different employer (including during the period where they had ceased employment with the initial employer).

EXAMPLE: ELIGIBLE RE-EMPLOYED FORMER EMPLOYEES

Donut Days qualified for JobKeeper payments for four eligible employees for the JobKeeper fortnight beginning 30 March 2020 and later fortnights.

On May 10, one of the eligible employees, Dinki, left Donut Days due to the lack of business and to pursue another opportunity with Churro Club. During this later time, Donut Days qualified for JobKeeper payments for only three eligible employees.

On 28 July 2020 Dinki returned to Donut Days and resumed ongoing full-time employment. Further, Dinki was not eligible to nominate as an eligible employee with Churro Club as they did not qualify for JobKeeper.

For JobKeeper fortnights beginning on or after 3 August 2020, despite Dinki not meeting the 1 July 2020 requirements, Donut Days can qualify for the JobKeeper Payment for Dinki as she meets the 1 March 2020 Test under the rules as a re-employed former employee, previously employed on 1 March 2020, and she did not qualify as an eligible employee of another qualifying employer after ceasing employment and before returning to Donut Days.

2.1.5 CATEGORY 3 - Newly eligible employees that meet the 1 July 2020 Test

Eligible employees from 3 August 2020:

- were employed by the employer on or before 1 July 2020;
- are currently employed by an eligible employer (including those stood down or re-hired);
- are full-time or part-time (including fixed term), long-term casuals (casual employees who have been with their employer on a regular and systematic basis for at least the previous 12 months as at 1 July 2020 and not a permanent employee of any other employer) or a sole trader;
- were at least 18 years of age on **1 July 2020** (16 and 17 year old's can also qualify if they are independent or not undertaking full time study);
- were either:
    - an Australian citizen, the holder of a permanent visa or a special category holder who is a protected special category visa holder OR
    - an Australian resident for the purposes of the Income Tax Assessment Act 1936 AND the holder of New Zealand citizen subclass 444 (Special category) visa for as at **1 March 2020**. All other temporary visa holders are not currently eligible;
- were not in receipt of any of these payments during the JobKeeper fortnight:
    - government parental leave or Dad and partner pay under the Paid Parental Leave Act 2010 OR
    - a workers compensation payment for an individual's total incapacity for work.
- are not in receipt of a JobKeeper Payment from another employer.

Employees will continue to receive the JobKeeper Payment through employers during the period of the extension provided both they and the employer are eligible and the employer is claiming the JobKeeper Payment. However, the amount of the JobKeeper Payment will change during Phase 2 (see section 3).

2.1.6 Can employees or business participants renominate with a new employer/business entity if they move employers/businesses?

Employees with a new employer BETWEEN 1 March 2020 and 1 July 2020

Employees and business participants can re-nominate with a new eligible employer/business entity if they:

- were employed or actively engaged by their new employer/business entity between 1 March 2020 and 1 July 2020;
- during the same time, between 1 March 2020 and 1 July 2020 their relationship with their previous JobKeeper qualifying employer or business entity ceased and has not restarted. In other words, they are no longer employed/haven't been rehired or actively re-engaged as a business participant in the business; AND
- they can meet the remainder of the 1 July 2020 Test eligibility requirements (see 2.1.5).

The reason the employee or business participant ceased their relationship with their initial employer/business entity does not matter, for example, they could have had their employment terminated, they could have resigned, or their employer may have ceased to exist.

For completeness, an employee or business participant cannot be eligible if they either stay in employment or continue to actively engage in a business as a business participant in respect of another entity, and attempt to switch their eligibility with reference to a second employer if they have not ceased their employment or business engagement with the first qualifying entity.

2.1.7 What about new employees employed by a new employer AFTER 1 July 2020, can they qualify with their new employer for JobKeeper?

Unfortunately no, new employees are only eligible to receive JobKeeper if they were employed by their new employer before 1 July 2020.

EXAMPLE: NEW EMPLOYEES SINCE 1 MARCH 2020 & LONG-TERM CASUALS

James qualified for the JobKeeper Scheme for his business Jungle Jym for five of his employees from March 2020. However, James' Jungle Jym did not qualify for JobKeeper payments in respect of one of its employees, Ginia, who was employed on a casual basis and did not meet the definition of long-term casual employee on 1 March 2020.

Two of James' employees in April resigned from the Jungle Jym as they took up other job opportunities, and so in May 2020 when things begun to reopen James decided to employ Kristy, a new permanent ongoing employee.

By 1 July 2020, Ginia has been employed on a regular and systematic basis for over 12 months and accordingly, James' Jungle Jym qualified for the JobKeeper payment in respect of Ginia for the JobKeeper fortnight starting on 3 August 2020 and later fortnights.

Although Kristy was not an eligible employee for the JobKeeper fortnights ending on or before 2 August 2020 (as she was not employed by James' Jungle Jym on 1 March 2020), Kristy is also an eligible employee because she meets the 1 July 2020 requirements. In addition to meeting other eligibility requirements, Kristy had an ongoing employment relationship with James' Jungle Jym on 1 July 2020.

EXAMPLE: NEW EMPLOYEE WHO JOINS FROM A FORMER EMPLOYER WHO WAS ELIGIBLE FOR JOBKEEPER PAYMENTS

James decided in June 2020 that his Jungle Jym needs to employ another new full-time staff member. He advertises for the role and Bev applies and gets the job commencing on 27 June 2020. Bev had been working as a long-term casual for her previous employer who had qualified for JobKeeper in respect of Bev since 30 March 2020 until she left in June. As Bev left her former employer, her former employer no longer qualifies for the JobKeeper payment in respect of Bev as an eligible employee.

James' Jungle Jym qualified for JobKeeper payments for Bev as an eligible employee because she satisfied the 1 July 2020 eligibility requirements and is not excluded from being nominated under the JobKeeper scheme because she left her former employer between 1 March and 1 July 2020 and was employed by James' Jungle Gym on 1 July 2020.

2.2 Casuals

2.2.1 What is a "regular and systematic" casual?

Whether casual employment is on a "regular and systematic basis" depends on the circumstances of each case. However, a casual employee is likely to have been employed during the relevant 12 month period on a regular and systematic basis if they had a recurring work schedule or maintained a reasonable expectation of ongoing work.

While a pattern or roster of hours may be a strong indication of regular and systematic employment, it is not necessary to have worked the same days and hours over each pay period. For example, due to the effects of the coronavirus on employment, an individual may have worked fewer shifts in the months of March to June 2020.

An individual may have been employed on a regular and systematic basis where there was a pattern of work with hours regularly offered and accepted.

Relevant factors which may indicate that an individual was not employed on a regular and systematic basis include:

- the employer was unable to offer suitable work to the individual for substantial periods of time
- the individual made themselves unavailable for work over a substantial period of time
- the individual was only offered, and/or only accepted, work irregularly or occasionally.

EXAMPLE – CASUAL WITH A PERIOD OF ABSENSE DUE TO COVID-19

Phil had a recurring work schedule throughout the first 2 months of the 12 month period that ended on 1 July 2020. However, after those 2 months, he did not work for a period of 2 weeks, after which he returned to his recurring work schedule. His employer became unable to offer shifts to Phil for around 3 months from March 2020. However, Phil returned to work with shifts in June 2020. The combined absences of around 3-4 months may affect whether he was employed on a regular and systematic basis during the 12 month period.

Although Phil did not work for a period of around 3-4 months in the 12 month period that ended on 1 July 2020, both before and after his periods of absence he had recurring work. As Phil had recurring work for about 8-9 months out of the 12 month period that ended on 1 July 2020, it is likely that he will have been employed on a regular and systematic basis throughout the 12 month period.

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

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

2.2.3 How does the casual employee test apply if a business has changed ownership within the last 12 months?

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

2.3 Fixed Term Contracts

2.3.1 Are employees on fixed term contracts eligible for JobKeeper 2.0?

Fixed term contract employees are eligible if they were employed at 1 March 2020 or 1 July 2020 (depending on the applicable test) and meet eligibility criteria for the JobKeeper Payment.

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

2.4 Apprentices and Trainees

2.4.1 Are my apprentices and trainees eligible for the JobKeeper payment?

Yes, provided that they meet all of the relevant employee eligibility requirements in 2.1.

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

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

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

Yes. Employers should contact their Australian Apprenticeship Support Network Provider for assistance. Find more information on the Supporting Apprentices and Trainees wage subsidy here and FAQs.

3. JobKeeper Payment Rates

3.1 JobKeeper Payment Rates

3.1.1 What are the JobKeeper 2.0 payment rates compared with JobKeeper 1.0?

From 28 September 2020 - 3 January 2021, the two payment rates will be:

- $1,200 per fortnight for eligible employees who worked 80 hours or more in the 28-day period finishing on the last day of the pay cycle that ended before either 1 March 2020 or 1 July 2020 (whichever is higher) (known as the ***reference period***).
- $750 per fortnight for other eligible employees.

An eligible business participant will receive the higher rate if they were actively engaged in the business for 80 hours or more in the month of February 2020, otherwise the lower rate will apply.

From 4 January 2021 to 28 March 2021 the two payment rates will be:

- $1,000 per fortnight for eligible employees who worked 80 hours or more in the 28-day period finishing on the last day of the pay cycle that ended before either 1 March 2020 or 1 July 2020 (whichever is higher).
- $650 per fortnight for other eligible employees.

An eligible business participant will receive the higher rate if they were actively engaged in the business for 80 hours or more in the month of February 2020, otherwise the lower rate will apply.

An **alternative reference period** may apply if the standard reference period (e.g. 28-day period mentioned above) is not suitable. See section 3.2 for further information.

FORTNIGHTLY PAYROLL CYCLE	JOBKEEPER 1.0	JOBKEEPER 2.0	
Employee hours worked in 28 day period finishing on the last day of pay cycle ending before 1 March 2020 or 1 July 2020	30 Mar 2020 to 27 Sept 2020	28 Sept 2020 to 3 Jan 2021	4 Jan 2021 to 28 Mar 2021
More than 80 Hours	$1,500 per fortnight	$1,200 per fortnight	$1,000 per fortnight
Less than 80 Hours		$750 per fortnight	$650 per fortnight

3.1.2 How does an employer calculate the hours worked if an employee has been on leave, etc?

In addition to the actual hours the employee worked, any hours for which an employee received paid leave (e.g. annual, long service, sick, carers and other forms of paid leave) or paid absence for public holidays also counts towards the 80 hours test.

The total number of hours covered by the leave taken is counted even where the employee took their leave at half pay, or through a purchased leave arrangement. For example, if the employee took 8 hours of annual leave at half pay, 8 hours is counted towards to 80-hour threshold, not 4 hours.

Unpaid leave is not counted towards the 80-hour threshold. However, if an employee takes unpaid leave, an alternative reference period may apply.

3.1.3 What if the pay cycle for the employee is longer than 28 days?

Where the relevant pay cycle for an employee is longer than the 28-day reference period (e.g. monthly) then a pro-rated calculation is used to determine the applicable hours of the longer pay cycle that are attributable to the 28 day period.

To calculate: multiply the total hours by (28 ÷ total days in the pay cycle)

The 80-hour threshold will be met if the eligible employee's hours worked, hours of paid leave and hours of paid absence on public holidays are at least the following:

Pay cycle days or hours

Days in monthly pay cycle	Hours in monthly pay cycle
29	82.86
30	85.72
31	88.53

3.1.4 Are employers required to nominate the pay rate?

Yes. Businesses will be required to nominate which payment rate they are claiming for each of their eligible employees (or business participants) and notify the ATO. The ATO has advised employers should do this in their November monthly business declaration in relation to JobKeeper payment fortnights beginning on or after 28 September 2020.

There is no requirement for the entity to notify the ATO a second time for JobKeeper fortnights beginning on or after 4 January 2021 as no further testing of the hours of work apply from this date to determine the rate of JobKeeper payments.

CASE EXAMPLE – CALCULATING THE JOBKEEPER PAYMENT RATE

Rita owns and runs the Tasty Restaurant. After retesting her turnover, she has calculated that she will remain eligible for JobKeeper for the period of 28 September 2020 to 3 January 2021. She now needs to work out how much to claim for each of her staff, and for herself as a business participant.

Rita was working full-time at her restaurant during February 2020, so she is entitled to claim $1,200 per fortnight from 28 September 2020 to 3 January 2021, as an eligible business participant.

She has two full-time employees who all worked 38 hours per week throughout February 2020, so are each eligible to be paid $1,200 per fortnight.

She has a part-time employee, Lachlan, who worked on average 22 hours per week throughout February 2020. To calculate this, Rita used the 28-day period ending at the end of the most recent pay cycle before 1 March 2020 – the relevant pay cycle fortnights being from 1 February 2020 – 14 February, and 15 February – 28 February 2020. During this 4 week period, Lachlan worked 24 hours in week 1, 18 hours in week 2, 22 hours in week 3 and in week 4 he did not work and took 22 hours of annual leave. Lachlan is eligible to be paid $1,200 per fortnight, given that it is over the required 80 hours during the relevant 28-day reference period.

Rita has another part time employee Tom whose hours vary each week, so Rita looks at his pay records for the 28-day reference period prior to 1 March 2020 and 1 July 2020. She sees that in both instances he was employed for less than 80 hours, so Rita claims $750 per fortnight for Tom.

Rita has a long-term casual Sarah who she has employed since 1 June 2018. Rita looks at her pay records for the 28 day reference period prior to 1 March 2020 and sees that she didn't work more than 80 hours, so she looks to the 28 day reference period prior to 1 July 2020. Sarah did work more than80 hours during this period, so Rita claims $1,200 per fortnight for Sarah.

Rita also started employing Amelia on 15 May 2020 to assist with pivoting her business in response to the COVID-19 restrictions. As Amelia was employed at Tasty Restaurant on 1 July 2020, Rita can claim the JobKeeper payment for Amelia. Amelia was employed less than 80 hours for the 28 day pay period ending prior to 1 July 2020, so Rita claims $750 per fortnight for Amelia, from 28 September 2020 to 3 January 2021.

CASE EXAMPLE – CALCULATING HOURS FOR MONTHLY PAY CYCLE

Employees of Meal Masters Inc are paid on a monthly pay cycle that ends on the last day of each month. To determine the rate of JobKeeper payment Meal Masters Inc can receive in respect of Terrence, it considers which of the reference periods is most beneficial (i.e. March or July reference period). It establishes the total hours of its employees during each reference period by multiplying the total hours by (28 ÷ number of days in the cycle), to pro-rata a 28-day reference period.

Meal Masters Inc first uses the 28-day period ending at the end of the most recent pay cycle before 1 March 2020. The relevant pay cycle is from 1 February – 29 February (29 days). Terrence worked for 142.5 hours and took 22.5 hours of paid leave. His total hours for the pay cycle was 165. Terrence's pro-rata hours for the pre-March period was 165 x 28 ÷ 29 = 159 hours.

During the pay cycle ended 30 June 2020, Terrence worked 75 hours and was entitled to 7.5 hours for public holidays. Terrence took no paid leave during this pay cycle. His total hours were 82.5 and his pro-rata hours for the pre-July period was 82.5 x 28 ÷ 30 = 77 hours.

Meal Masters Inc nominates Terrence for the higher rate based on the 159 hours calculated in the pre-March period (i.e. $1,200 per fortnight for the first period of the JobKeeper extension).

3.1.5 What if an employer has insufficient records (or no records) to calculate the employee's hours?

The ATO Commissioner has made a Determination setting out specific circumstances where the higher JobKeeper payment amount will be taken to apply, in circumstances where an employer does not have any record, or has incomplete records, of an employee's total hours of work, paid leave and paid absence on public holidays during the reference period.

This includes where an individual is paid salary, wages, commission, bonus or allowances that are not tied to an hourly rate or contracted rate, where there are no (or incomplete) records of the relevant hours.

If any of the three tests below are satisfied, the higher rate will apply:

1. The employer paid the employee $1,500 or more during their 28-day reference period (subject to an exception if the employer paid JobKeeper top-up amounts).
2. There was a written agreement for the employee to work 80 hours or more during their 28-day reference period.
3. A reasonable assumption can be made that the employee worked at least 80 hours during their 28-day reference period.

Test 1: $1,500 or more in salary, wages, commission

This test is satisfied if an employer paid its eligible employee $1,500 or more in their 28-day reference period. This includes gross salary, wages, commission, bonus payments and allowances, inclusive of PAYG withholding, and any amounts provided under an effective salary sacrifice agreement.

JobKeeper top-up amounts are not included (i.e. any additional payments made to an employee to meet the $1,500 JobKeeper wage condition).

Test 2: Written agreement to work 80 hours or more

This circumstance is satisfied if there was a written requirement for an eligible employee to work (or be on paid leave or paid public holidays) for 80 hours or more in their 28-day reference period. This includes employees under a written award, enterprise agreement, employment contract or similar instrument that governs their employment relationship.

Test 3: Reasonable assumptions

This circumstance is satisfied if it can be determined, based on reasonable assumptions, that an employee's hours in their 28-day reference period were 80 hours or more (including paid leave and paid absence on public holidays).

For assumptions to be reasonable, they must be based on verifiable information. This could include information on how an employer's business usually operates, such as the ordinary business hours, average staffing level in any given week, common shift lengths for certain types of employees and the average number of shifts of employees.

3.1.6 Are employers required to notify their employees of the pay rate?

Yes. Within 7 days of notifying the ATO which payment rate applies, employers must also notify each eligible employee in writing of their rate.

3.1.7 What if the employee or business participant's hours were not usual during February 2020?

The ATO has issued a determination which provides an alternative reference period for determining whether the higher or lower JobKeeper payment amount applies, in circumstances where the standard reference period may not be appropriate. See section 3.2.

3.1.8 Are there any additional requirements for eligible business participants?

Eligible business participants must provide the entity with a written declaration confirming they were actively engaged in the business for 80 hours of more in their 29-day reference period. If they do not, then the entity is only entitled to the lower payment rate with respect of the business participant.

3.1.9 Are there any changes to how the JobKeeper payment is paid?

The JobKeeper Payment will continue to be made by the ATO to employers in arrears.

Employers are still required to make payments to employees equal to, or greater than, the amount of the JobKeeper Payment (before tax), based on the payment rate that applies to each employee.

3.2 Alternative Reference Periods

The ATO has issued a determination which provides an alternative reference period for determining whether the higher or lower JobKeeper payment amount applies, in circumstances where the standard reference period may not be appropriate. This includes with respect to the following:

- Total number of hours is less than 80-hours and not representative of a typical 28-day period
- Employed part-way through the reference period
- First pay cycle ended on or after 1 March 2020 or 1 July 2020
- Businesses that changed hands or transferred in a wholly-owned group.

Alternative reference periods also apply for similar circumstances with respect to eligible business participants. See the ATO's website for further information.

3.2.1 What if more than one alternative reference period applies?

Where more than one alternative reference period can apply to an eligible employee, each of those alternative reference periods can apply to determine whether the total number of hours is 80 or more in that period.

3.2.2 Less than 80 hours and not representative

This alternative reference period can be used if the eligible employee's:

- total hours of work, paid leave and paid absences on public holidays was less than 80 hours in the pre-March or the pre-July reference period, and
- when compared to earlier 28-day periods, the pre-March or the pre-July reference period is not representative of that eligible employee's total number of hours in a similar 28-day period.

For example, this could be due to unpaid leave, particular rostering schedules such as those of FIFO workers, etc, or the employee's hours being affected due to the employer conducting business in a declared drought zone or declared natural disaster zone.

Alternative reference period

The alternative reference period is the 28-day period:

- ending at the end of the most recent pay cycle for the employee for you before 1 March 2020 or 1 July 2020
- in which the employee's total number of hours of work, paid leave and paid absence on public holiday was representative of a typical 28-day period.

CASE EXAMPLE – LESS THAN 80 HOURS AND NOT REPRESENTATIVE

Rosebud Motel employs Johnny and he typically works 30 hours a week. He was a permanent employee of Rosebud Motel at 1 July 2020, but not at 1 March 2020 – meaning Rosebud Motel can only use the pre-July reference period.

Rosebud Motel pays Johnny every second Wednesday for the hours he worked in the fortnight that ended on the previous Friday. The reference period is from 30 May to 26 June 2020 as that is the 28 days which finish on the last pay cycle that ended before 1 July 2020. However, during that pre-July reference period, Johnny had to care for his ill daughter Alexis from 6 June 2020 to 19 June 2020. He was unable to attend work and took unpaid leave.

Johnny worked only 60 hours from 30 May to 26 July 2020, which is less than the 120 hours he usually works in a similar 28-day period. This means he satisfies both conditions for the 80 hours alternative reference period to apply.

The alternative reference period for Johnny will be the period from 2 May to 29 May 2020. This period is used as it represents a typical 28-day period for Johnny's total hours of work, paid leave and paid absences on public holidays ending at the end of the most recent pay cycle for Kobe before 1 July 2020. Johnny satisfies the 80-hour threshold because in this period the total hours he worked (including a public holiday, and two days of annual leave) was 120 hours (i.e. more than 80 hours).

3.2.3 Employed part-way through the reference period

This alternative reference period applies to employees who were not employed by the employer during all or part of the pre-March or pre-July reference period.

Alternative reference period

The alternative reference periods are as follows:

- **Pay cycles less than 28 days** (e.g. fortnightly, or weekly): the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during consecutive pay cycles.
- **Pay cycles of 28 days or more** (e.g. monthly), the alternative reference period is the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during a pay cycle.
- **Employees stood down** part way through the first 28-day period, the first 28-day period starting on the first day of a pay cycle on or after 1 March 2020 or on or after 1 July 2020 in which they were not stood down.

3.2.4 First pay cycle ended on or after 1 March 2020 or on or after 1 July 2020

This alternative reference period applies if the start of an eligible employee's employment was on or before 1 March or 1 July 2020 but their first pay cycle ended on or after 1 March or 1 July 2020.

Alternative reference period

The same forward looking alternative reference period applies as described above for employees not employed for the whole standard reference period. That is:

- **Pay cycles less than 28 days** (e.g. fortnightly, or weekly): the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during consecutive pay cycles.
- **Pay cycles of 28 days or more** (e.g. monthly), the alternative reference period is the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during a pay cycle.
- **Employees stood down** part way through the first 28-day period, the first 28-day period starting on the first day of a pay cycle on or after 1 March 2020 or on or after 1 July 2020 in which they were not stood down.

3.2.5 Employee of a business changing hands or transferred in a wholly-owned group

For businesses that changed hands, an eligible employee is treated as having been employed by an entity in the pre-March or pre-July reference period even though that entity began employing them at a later date.

This rule can also apply for employment changes within a wholly-owned group. However, the rule is only relevant if an employer is eligible for the JobKeeper scheme in its own right and the employee meets other eligibility requirements.

Alternative reference period

The same forward-looking alternative reference period applies as described above for employees not employed for the whole standard reference period. That is:

- **Pay cycles less than 28 days** (e.g. fortnightly, or weekly): the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during consecutive pay cycles.
- **Pay cycles of 28 days or more** (e.g. monthly), the alternative reference period is the first 28-day period, ending on or after 1 March 2020 or 1 July 2020, that wholly occurs during a pay cycle.
- **Employees stood down** part way through the first 28-day period, the first 28-day period starting on the first day of a pay cycle on or after 1 March 2020 or on or after 1 July 2020 in which they were not stood down.

3.3 How does the JobKeeper Payment effect the wages of employees?

3.3.1 Where an employee currently earns LESS THAN the fortnightly JobKeeper rate (before tax)?

They are about to get a pay rise (if they are an eligible worker). Once approved, eligible employers will be legally required to pass on all of the required JobKeeper Payment they receive for an eligible employee (even where this is more than the employee currently earns).

It will be up to the employer in this circumstance to decide if they want to pay superannuation on the additional wage earned by that employee (the additional money the employee is making from JobKeeper on top of their normal wage) because of the JobKeeper Payment.

3.3.2 Where an employee currently earns at OR ABOVE the fortnightly JobKeeper rate (before tax)?

An employee's terms of employment are not changed as a result of the JobKeeper scheme. If an employee is paid at or more than the JobKeeper rate a fortnight (under an award, enterprise agreement or contract of employment), an employer is still liable to pay that amount (unless otherwise renegotiated or subject to a JobKeeper enabling stand down direction).

3.3.3 Can I require a part-time worker who usually earns below the JobKeeper fortnightly amount per fortnight to do additional hours?

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

Employers should be careful when taking any subsequent action against an employee who declines a request to work additional hours whilst in receipt of JobKeeper as any action taken against the employee could potentially give rise to an adverse action claim.

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

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

3.4 JobKeeper and the end of the employment relationship.

3.4.1 What happens to any JobKeeper payments if an employee resigns?

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

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

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

Note in some cases a re-employed employee formerly eligible for JobKeeper as at 1 March 2020 may still be eligible for JobKeeper see section 2.1.4 above for details.

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

The JobKeeper Program does not affect an employer's right to terminate a contract of employment with notice or for cause. Further, the laws relating to unfair dismissal and general protections under the Fair Work Act continue to operate.

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

4. Interaction with JobSeeker

4.1 JobSeeker

4.1 How does JobKeeper 2.0 interact with JobSeeker?

In addition to the JobKeeper 2.0 changes commencing at the end of September 2020 there will also be changes to JobSeeker that employers and employees should be aware of.

The JobSeeker coronavirus supplement – the amount extra paid per fortnight – will also be reduced from September from $550 to $250 a fortnight in addition to the base JobSeeker payment of $565.60, meaning the total payment for an individual will go from $1,115 to $815 per fortnight.

The JobSeeker partner income test will also rise from 25c for every dollar earned over $996 a fortnight to 27c of every dollar earned over $1,165. Importantly however, after September individuals on Jobseeker will also be able to earn $300 a fortnight, instead of the previous $106, before their payment is affected. For every dollar of income above $300, their income will be affected by 60c.

This means that for the first time it will be possible for some individuals to receive both JobKeeper and JobSeeker at the same time because JobSeeker is available to anyone earning less than a $1,256 fortnightly income (who also meet the JobSeeker assets test) and both new JobKeeper rates will drop below this threshold on 28 September 2020.

The government hopes that in doing this, individuals will be encouraged to seek out work without worrying about their JobSeeker payments being cut.

The following table sets out the potential income change that could apply to an employee currently receiving JobKeeper where the employee also subsequently becomes eligible for JobSeeker.

	April - Sept	**October – December**			
	JobKeeper Income	**JobKeeper Income**	**JobSeeker Income**	**Gross income**	**Gross change**
Part-Time	$1,500	$750	$554	$1,304	-$196
Full-Time	$1,500	$1,200	$554	$1,484	-$16

*Part-time equates to a worker performing less than 20 hours on average per week

*Grattan institute calculations, based upon single household only. Also assumes no private employment income; ignores access to Rent Assistance or family payments. Include energy supplement.

5. JobKeeper Payment Process

5.1 How do employers receive the JobKeeper 2.0 Payment?

5.1.1 Do I need to re-enrol to receive JobKeeper 2.0?

From 28 September 2020, business seeking to claim JobKeeper 2.0 payment will be required to re-assess their eligibility for JobKeeper 2.0 with reference to their actual turnover in the September quarter by demonstrating that they have met the relevant turnover test.

Employers do not need to re-enrol to claim payments if they are already enrolled in JobKeeper. After they have assessed their continuing eligibility, they simply need to submit this information to the ATO between 1 – 31 October 2020.

5.1.2 What are the notification requirements about the JobKeeper payment rates?

Employers need to notify the ATO of the payment tier they are claiming for each eligible employee or business participant. If employers are using Single Touch Payroll to notify the ATO of its eligible employees, it should provide each eligible employee's tier as part of its normal payday reporting from 28 September. From 1 November 2020 employers should complete their monthly business declaration and confirm what payment tier they are claiming for each employee.

Within 7 days of notifying the ATO which rate applies, employers must also notify each individual in writing of their rate.

5.1.3 JobKeeper nomination notices

Employers must notify all eligible employees that they intend to nominate them for the JobKeeper scheme within 7 days of providing the eligible employee's details to the ATO.

For clarity, employers only have to notify new eligible employees, they do not have to give a notice to the following employees:

- Employees that the employer has previously given a notice in writing advising that the business has elected to participate in the JobKeeper scheme;
- Employees that had previously provided the employer with a nomination form in relation to the JobKeeper Scheme;
- Individuals who the employer reasonably believes do not satisfy the Test requirements; and
- For employers that are ACNC-registered charities that have elected to disregard certain government and related supplies and the individual's wages and benefits are funded from such government and related sources.

In notifying your employees you must:

- **Include notification** that you (their employer) intend to participate in the JobKeeper scheme.
- **Ask** eligible employees if they **agree to be nominated** by the employer as the primary employer of the employee so that the employer can receive JobKeeper payment for them.
- **Inform** eligible employees of the steps they need to take to give you back their completed nomination notice.

Note there are additional employee notification requirements for individuals re-employed after 1 July 2020. For further details on these specific requirements see section 5.1.5 below.

To assist employers, the ATO has template **JobKeeper employee nomination notices** which employers can use in order to meet their notification requirements**.** Below are the links to each of the nomination notices:

- ATO JobKeeper employee nomination notice.
- ATO JobKeeper nomination notice for eligible business participants.
- ATO JobKeeper religious practitioner nomination notice.

Employers can also choose to create their own nomination notice (see 5.1.4).

When providing the nomination notice employers must not forget to inform eligible employees in writing of the steps they need to take to give the employer back their completed nomination notice.

This form does not need to be sent to the ATO, however employers need to keep the completed form (generally for 5 years) as a record that the employee agreed for the employer to claim the JobKeeper Payment for them.

5.1.4 Creating your own employee nomination notice

Employers may choose to create their own nomination notice instead of using the JobKeeper employee nomination notice if it is not practical to have each employee complete and return the ATO version to them.

Practical reasons employers may wish to create their own employee nomination notice might include having a large number of employees or preferring to use their own portal or communication channel to obtain this information.

The written notice must:

- State that you (their employer) intend to participate in the JobKeeper scheme
- Ask that the individual give the employer a nomination notice if they agree to be nominated as an eligible employee for the purposes of the JobKeeper scheme
- Include information about the steps they can take to give the employer the nomination notice.

The following information must also be captured:

The employer's business details:

- Business name and ABN

The employee's details:

- Full name, date of birth, street address, contact phone number and/or email address.

In making the nomination, the employee must confirm:

- They agree to be nominated as an eligible employee of the employer listed for the purposes of the JobKeeper Payment scheme
- Meet the eligibility requirements
- Have not agreed to be nominated by any other employer/entity and have not given another entity a nomination form of the purposes of the JobKeeper Payment scheme.

The signature of the employee is not required by the ATO, but can be requested by an employer. Employees can submit their nomination notice through their internal business process (for example, a HR portal), or their own form of communication channel (for example, email)

EXAMPLE – Notification to employees

In accordance with section 6(4) of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* this memorandum is to confirm that [insert business name] has given information to the Australian Taxation Commissioner, including your details, and details about your entitlement, confirming you are an eligible employee to receive JobKeeper payments for the payment fortnight/s [insert start date of payment fortnight] to [insert end date of payment fortnight].

We will continue to make JobKeeper payments to you in accordance with the eligibility rules.

If you have any further questions or concerns in relation to this matter, please contact [insert name] on [insert number].

5.1.5 What are the notification requirements for individuals re-employed after 1 July 2020?

There are specific notification requirements for employees who had qualified as at 1 March 2020 and are re-employed after 1 July 2020. Under these requirements a re-employed employee must provide their employer with a notice if the following conditions are satisfied:

- The individual was previously an eligible employee of the employer as at **1 March 2020**;
- The individual ceased being an employee of the employer between **1 March 2020 and 1 July 2020**; and
- The individual is re-employed by the employer **after 1 July 2020**.

This notice must be provided to the employer within 7 days of the employee being re-employed and it must state whether or not the employee had given a nomination notice to another employer.

This notice will enable the re-employing entity to determine if they are able to rely on the original nomination notice provided by the employee when they were originally nominated (prior to ceasing employment).

Employees who provide a false or misleading statement may be liable to criminal and administrative penalties.

If an employee does not provide the required notice, employers should ensure they obtain a statement from the employee confirming their eligibility, before claiming JobKeeper for the employee.

Failure of an employee to provide a statement that is required to be provided may also constitute an offence or give rise to administrative penalties.

5.1.6 When and how are JobKeeper Payments be paid to employers?

Payments are made to an employer monthly in arrears by the ATO.

5.1.7 What if I pay my employees monthly?

Where an employer pays their staff monthly, the ATO will be able to reallocate payments between periods. However, overall an employee must have received the required JobKeeper Payment amount per fortnight.

See Annexure A for the schedule of payment fortnights under JobKeeper 2.0.

5.1.8 What if I pay my employees less frequently than fortnightly?

If an employer's ordinary arrangement is to pay its employees less frequently than fortnightly, the payment can be allocated between fortnights in a reasonable manner.

5.1.9 What happens if an employee has been paid annual leave during some or all of the payment fortnights?

Annual leave is treated the same as normal pay. An employer will need to ensure the amount paid to the employee including any annual leave payments meet the required JobKeeper payment amount per fortnight.

5.2 Tax consequences

As per JobKeeper 1.0 all JobKeeper 2.0 payments are assessable income of the business that is eligible to receive the payments. The normal rules for deductibility apply in respect of the amounts your business pays to its employees where those amounts are subsidised by the JobKeeper 2.0 payment.

The JobKeeper 2.0 payment is not subject to GST.

5.3 Ongoing reporting and other obligations

5.3.1 What are the reporting obligations whilst receiving JobKeeper 2.0 Payments?

Exactly the same as JobKeeper 1.0, the ATO requires employers receiving the JobKeeper 2.0 payments to report monthly to the ATO Commissioner to show payments have been made to employees and to provide information on employer turnover and other matters relevant to the entitlement and the operation of the JobKeeper Payment. This must be done by the 14th day of each month to receive reimbursements for payments made in the previous month.

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

5.3.2 Will employers continue to have record keeping obligations whilst receiving JobKeeper 2.0 Payments?

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

5.3.3 What penalties can the ATO hand out for abuses of the JobKeeper 2.0 program?

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

A scheme will arise if an entity, in effect, enters into an arrangement under which it receives a JobKeeper payment (or a larger JobKeeper payment) which, but for the arrangement, it would not receive.

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

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

Offence	Penalty
Administrative penalties for making a false and misleading statement	• Financial penalty up to 75% of the amount of any overpayment
Criminal offences for making false or misleading statements to taxation officers	• Imprisonment for up to 12 months AND • A fine of up to 50 penalty units for an individual and 250 penalty units for corporate entities
Failure to comply with the requirements under taxation law	• Imprisonment for up to 12 months AND • A fine of up to 50 penalty units for an individual and 250 penalty units for corporate entities
Obtaining financial advantage	• Imprisonment for up to 12 months
Obtaining financial advantage by deception	• Imprisonment for up to 10 years
Conspiracy to defraud	• Imprisonment for up to 10 years

6. Fair Work Act changes for employers and employees on JobKeeper

As part of the JobKeeper 2.0 Package, the temporary flexibilities under the Fair Work Act 2009 continue (with some minor modification) to apply to employers and employees who have access to the JobKeeper 2.0 wage subsidy.

These temporary changes continue to override ANY:

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

The flexibilities covered in this section ONLY apply to employers and employees receiving JobKeeper 2.0.

For Legacy Employers no longer eligible for payments under JobKeeper 2.0 see section 7.

6.1 Fair Work Act Flexibilities

6.1.1 What Fair Work Act flexibilities are available for employers who qualify for JobKeeper 2.0?

Under the temporary Fair Work Act changes employers and employees who continue to qualify for and receive JobKeeper 2.0 are allowed to do the following:

A. **Issue directions** (known as JobKeeper enabling directions) changing current employment arrangements which require an employee to:
   - Work reduced hours or days (a JobKeeper enabling stand down direction) for any period that they cannot be usefully employed (including no hours/days);
   - Undertake alternative duties; or
   - Work at an alternative location.

B. **Request** an employee to work different days/times to their ordinary hours/days. This request cannot be unreasonably refused.

6.1.2 What Fair Work Act flexibilities are no longer available that were available under JobKeeper 1.0?

The following flexibilities have been removed from JobKeeper 2.0, and therefore **cannot** be utilised from 28 September 2020:

- The ability for an employer to request an employee take accrued annual leave (which the employee must not unreasonably refuse); and
- The ability for an employer to agree with employees for double annual leave to be taken at half pay.

6.2 Extending existing JobKeeper direction/requests

6.2.1 What steps do employers need to take if they wish to extend a JobKeeper enabling directions/ request that was issued prior to 28 September?

JobKeeper enabling directions given by or agreements made with qualifying employers that are in place on 27 September 2020 will automatically carry over from 28 September 2020 if the employer remains eligible to give that direction or make that agreement in those terms and it does not otherwise cease, for example because it is withdrawn, revoked or replaced or is subject to an order by the Fair Work Commission.

Employers should review the notice they provided to employees on issuing a direction/request to ensure that it can automatically roll over. Employers should also review this section to ensure that the minor modifications to the temporary flexibilities do not impact the terms of the direction/request.

6.3 Consultation & notification requirements when issuing new JobKeeper directions/requests

6.3.1 What procedural steps need to be taken to issue a JobKeeper enabling direction?

Employers who wish to issue a JobKeeper enabling direction must follow set procedural steps.

There are no changes to the procedural requirements around issuing JobKeeper enabling directions for employers who are eligible for JobKeeper 2.0. This includes notifying an employee before giving a JobKeeper direction, fulfilling consultation requirements, and providing the direction in writing.

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

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

A JobKeeper direction must be given to an employee in writing (this could include by electronic means).

See Annexure B for an employer checklist when giving directions.

6.3.2 How long can a JobKeeper enabling direction/ request last?

For employers who qualify for JobKeeper 2.0, a JobKeeper direction/request operates and has effect until one of the following occurs:

- It is withdrawn or revoked by the employer.
- It is replaced by a new employer direction.
- An order of the Fair Work Commission requires it.
- There are no further JobKeeper Payments which an employer is eligible to receive for the employee the subject of the direction/request.

6.3.3 Are there any changes to the requirement for an employee to follow a JobKeeper direction?

Yes. As under JobKeeper 1.0, employees must comply with a JobKeeper employer direction unless the direction is unreasonable in all the circumstances (this could for example, depend on its impact on an employee's caring responsibilities).

Under JobKeeper 2.0, if directions relating to the reduction of hours are given, the directions may be unreasonable if the directions have an unfair effect on some employees in the same category, when compared with other employees in that category who are also subject to those directions.

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

6.4 Requests to take annual leave

Under JobKeeper 2.0 employers can no longer direct employees to take annual leave.

Any requests to take annual leave made by an employer under JobKeeper 1.0 that extend beyond the end of JobKeeper 1.0 (27 September) cease to have effect on 28 September.

For example, if an employee on 15 September under JobKeeper 1.0 had been directed by their employer to take two weeks annual leave from 5 October to 16 October this direction will cease to have effect on 28 September. Meaning that the employee is NOT required to follow the direction to take annual leave during October.

Of course, this only applies to request made under the JobKeeper Fair Work Act flexibilities. Any other annual leave arrangements an employer and employee have in place at the end of JobKeeper 1.0, such as a standard agreement to take annual leave, can continue unaffected.

6.4.1 What happens to an agreement between an employer and an employee about the taking of annual leave at half pay after 27 September?

An agreement made between an employer and employee about the taking of double annual leave at half pay under the JobKeeper provisions of the Fair Work Act ceases to have effect from 28 September 2020.

Employers and employees who wish to make an agreement about taking double annual leave at half pay outside of the JobKeeper provisions may consider whether they can utilise alternative avenues, such as utilising 'Schedule X – Additional Measures During the COVID-19 Pandemic' that has been inserted into a number of modern awards, which allows agreement to be reached on the taking of double annual leave at half pay.

6.5 Direction: to work reduced hours/days (JobKeeper stand down)

6.5.1 What are the stand down provisions that apply to employers and employees on JobKeeper 2.0?

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

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

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

An employer can give this direction so long as:

- For the period of the stand down the employee cannot be "**usefully employed"** for the employee's normal days or hours because of changes to business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (explained at 6.5.2).
- The direction can be implemented **safely**, having regard to the nature and spread of COVID-19.
- The **"wage condition"** is satisfied. This requires an employee to be paid at a minimum the JobKeeper payment rate per fortnight before tax.
- The **minimum payment guarantee** (explained at 6.5.3) and **hourly rate of pay guarantee** (explained at 6.5.4) are met.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction.

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

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

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

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

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

- the JobKeeper payment OR
- their usual pay for any hours that they do work during the fortnight.

Whichever payment is higher

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

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

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

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

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

Calculating an employee's hourly base rate

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

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

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

Employee performing different duties

For an employee performing new duties (see section 6.6) their hourly base rate is either:

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

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

Boris runs a café. He has qualified for JobKeeper and has been receiving payments of $1,200 for his employee Dominic, who usually works full-time, 38 hours a week (76 hours a fortnight).

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

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

Dominic is usually paid $2,508 (before tax) a fortnight for 76 hours of work (equating to $33 per hour). As his hours have been reduced to 36 hours, Boris would normally pay Dominic $1,188 (before tax) for the fortnight. This amount however is below the $1,200 JobKeeper amount. So, Boris instead must pay Dominic the full $1,200 (before tax) for the 36 hours he works a fortnight but doesn't have to pay any more than that.

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

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

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

Tom qualifies for JobKeeper and has been receiving payment of $1,200 each fortnight for his one employee Jack who usually works part-time, 20 hours a week (40 hours a fortnight).

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

Jack is usually paid $1,000 (before tax) a fortnight for 40 hours of work. Under the JobKeeper scheme Tom has to pay Jack the full $1,200 (before tax) for the fortnight.

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

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

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

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

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

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

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

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

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

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

- Secondary employment
- Training; or
- Professional development.

Employers must consider these requests and cannot unreasonably refuse them.

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

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

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

6.6 Direction: to change usual duties

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

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

- The modified duties are within the employee's **skill and competence** and the employee holds any necessary license or qualification required to perform the duties.
- The duties are **safe** considering the nature and spread of COVID19.
- The duties are **reasonably within the scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction AND
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 6.6.2).

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

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

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

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

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

6.6.3 Pay rates for employee performing different duties

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

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

EXAMPLE - DIRECTION TO CHANGE USUAL DUTIES

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

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

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

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

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

6.7 Direction: to change location of work

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

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

- The place is **suitable** for the employee's duties.
- The location is **safe** considering the nature and spread of COVID-19.
- The performance of duties at the new location is reasonably within the **scope** of the employer's business operations.
- The new location is within a **reasonable travelling distance**.
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 6.7.2).

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

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

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

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

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

6.8 Request: Days / times of work

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

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

- the performance of the duties on those days is generally safe considering the nature and spread of COVID-19.
- the performance of the duties on those days is reasonably within the scope of the employer's business operations.
- The agreement does not have the effect of reducing the employee's number of hours of work compared to the employee's ordinary hours of work.

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

6.8.2 Requests and general protections

An employee's ability to agree or disagree to perform duties on different days or at different times at the request of an employer is a workplace right for the purposes of general protections under the Fair Work Act. Adverse action cannot be taken against an employee because of the employee's workplace right.

6.9 Disputes

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

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

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

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

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

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

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

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

6.9.2 What orders can the Fair Work Commission make?

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

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

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

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

7. Fair Work Act flexibility for JobKeeper Legacy Employers

7.1 Fair Work Act Flexibilities for legacy employers and employees

Legacy Employers: Employers who qualified for JobKeeper 1.0 prior to 28 September 2020 who do not qualify for JobKeeper 2.0 but are still able to show at least a 10% decline in turnover and so are able to access some modified workplace law flexibilities for their employees who previously received JobKeeper payments.

Under the temporary Fair Work Act changes employers and employees who previously received JobKeeper subsidies under the first iteration of the scheme (known as legacy employers) will continue to be able to give modified JobKeeper enabling directions **for employees for whom the employer previously received a JobKeeper payment** if they satisfy **a 10% decline in turnover test**.

These temporary provisions are designed to provide ongoing assistance to businesses who do not re-qualify for JobKeeper 2.0 because they do not meet the requisite decline in turnover test but can still show they are suffering some level of distress.

Under the flexibilities legacy employers who can demonstrate a 10% decline or more in turnover in relevant quarter in 2020 compared to 2019 can give employees for whom the employer previously received a JobKeeper payment:

A. **Directions:** changing their current employment arrangements which require the employee to:
   - Work reduced hours or days (a JobKeeper enabling stand down direction) to no less than 60% of the employee's ordinary hours as at 1 March 2020 and that does not require the employee to work less than 2 consecutive hours in a day;
   - Work at an alternative location; or
   - Undertake alternative duties.

B. **Request** the employees to work different days/times to their ordinary hours/days (as long as the agreement does not require the employee to work less than 2 consecutive hours in a day). This request cannot be unreasonably refused.

These directions can only take effect for a period beginning on or after 28 September 2020.

The flexibilities that apply to legacy employers are not a mirror image of the original JobKeeper Fair Work Act flexibilities that applied to them in JobKeeper 1.0 so it is critical that employers understand the difference includes a number of restrictions that are set out in the following section.

If an employer currently has a JobKeeper direction/request in place but the employer will not qualify for JobKeeper 2.0 and will instead qualify as a legacy employer from 28 September 2020, that existing direction/request will automatically cease at the start of 28 September 2020.

In order to re-issue the direction/request employers will need to make sure that they meet the legacy employer requirements for the direction/request and that they comply with the notification and consultation requirements, both of which are set out in this section.

7.2 Annual Leave

Legacy employers CANNOT direct employees to take annual leave.

Any requests to take annual leave made by an employer under JobKeeper 1.0 that extend beyond the end of JobKeeper 1.0 (27 September) cease to have effect on 28 September.

For example, if an employee on 15 September under JobKeeper 1.0 had been directed by their legacy employer to take two weeks annual leave from 5 October to 16 October this direction will cease to have effect on 28 September 2020. Meaning that the employee is NOT required to follow the direction to take annual leave during October.

Of course, this only applies to requests made under the JobKeeper Fair Work Act flexibilities. Any other annual leave arrangements an employer and employee have in place at the end of JobKeeper 1.0, such as a standard agreement to take annual leave, can continue unaffected.

7.3 Threshold requirement: 10% or more decline in turnover

For legacy businesses to qualify to use the Fair Work flexibilities they are required to prove at least a 10% decline in turnover in relevant quarters in 2020 compared with 2019 in order to access the flexibility provisions.

In order to prove the decline business are required to:

- obtain a 10% decline in turnover certificate from a financial services provider; OR
- if they choose to, self-certify where the employer is a small business with less than 15 employees (by head count, excluding casuals who are not employed on a regular and systematic basis).

To be clear a small business employer can still elect to obtain a written certificate from an eligible financial service provider if they choose.

The 10% decline in turnover test requires that:

- **between 28 September and 27 October,** a legacy employer must have a 10% decline in turnover certificate/self-certify for the June quarter (April, May and June) compared to June quarter 2019.
- **between 28 October and 27 February 2021,** a legacy employer must have a 10% decline in turnover certificate/self-certify for the September quarter (July, August, September) compared to September quarter 2019.
- **Between 28 February and 28 March 2021,** a legacy employer must have a 10% decline in turnover certificate/self-certify for the December quarter (October, November, December) compared to December quarter 2019.

Note: these dates align with the BAS lodgment dates for each completed quarter NOT the application of the turnover test for employers to qualify for JobKeeper.

IMPORTANT: A Legacy employer MUST obtain a 10% decline in turnover certificate/self-certify for each subsequent quarter in order to continue to be eligible to continue to use the Fair Work Act flexibilities.

A direction/request automatically ceases to lawfully operate if an employer does not obtain the relevant certificate each quarter.

7.3.1 Which financial service providers can issue a decline in turnover test certificate?

The following financial service providers can issue a certificate:

- a registered tax agent, BAS agent; or
- a qualified accountant.

Excluding financial service providers who are directors, employees or an associated entity of the employer or an associated entity of the employer.

7.3.2 How do small businesses self-certify?

Small business owners (less than 15 employees) may choose to have a statutory declaration to the effect that the employer satisfies the 10% decline in turnover test for the designated quarter applicable to a specified time.

The declaration must be made by an individual who either is, or is authorized by, the employer, and who has knowledge of the financial affairs of the employer.

7.3.3 How is 'turnover' defined?

Current GST turnover is to be calculated in the same was as it is calculated for the purposes of the actual decline in turnover test for JobKeeper.

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

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

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

Current GST turnover is defined in the GST Act but has been modified for JobKeeper purposes. The amounts included in calculating current GST turnover are the same regardless of whether the business is currently GST registered.

There are four main modifications to the GST turnover calculation:

- Current GST turnover is calculated for the relevant quarter being tested (rather than for 12 months).
- Where an entity is part of a GST group, the entity calculates its GST turnover as if it wasn't part of the group. This means that supplies made by one group member to another will be included in the GST turnover for the purposes of the fall in turnover test.
- The calculation includes the receipt of tax deductable donations by a deductible gift recipient. It also includes gifts of money, property (with a market value of more than $5,000) and listed Australian shares received by an ACNC-registered charity (that is not a deductible gift recipient). However, none of these receipts are included if they are from an associate.
- External Territories (e.g. Norfolk Island) are treated as if they formed part of the indirect tax zone (i.e. Australia).

Cash or accruals basis

Businesses may use an accruals basis of accounting to calculate both the current GST turnover. However, if the business usually prepares its activity statements on a cash basis, the ATO will allow it to calculate both the current and projected GST turnovers on a cash basis. The ATO expects businesses will usually use the same method as they use for GST. The ATO may seek to understand a business's circumstances where a different accounting method is used to normal. The basis used must be the same for calculating both the current and the projected GST turnover.

7.3.4 What if there are circumstances making it difficult to compare actual turnover?

The Commissioner of Taxation has set out alternative tests in specific circumstances where it is not appropriate to compare actual turnover in a quarter in 2020 with actual turnover in a quarter in 2019 under JobKeeper 2.0, which similarly apply to the 10% decline in turnover test that applies for legacy employers. See section 1.2 for further information.

7.3.5 How does the turnover test apply to corporate groups or connected/affiliated businesses?

The 10% decline in turnover test will be determined by the aggregate turnover of the businesses.

Note that, for certain group structures where staff are employed through a special purpose entity, rather than the operating entity, a modified decline in turnover test may apply. See section 1.3.1 for further information.

7.3.6 What do I do if my business has been trading for less than 12 months?

This situation has been addressed by an alternative test determined by the Commissioner of Taxation. Where a business or not-for-profit has not been in operation for a year and therefore has an issue showing that turnover had fallen relative to a year earlier, the business can apply the alternative test which has been determined by the ATO to address this. See section 1.2.3 for further information.

7.3.7 What if my business is not required to lodge a BAS?

Alternative arrangements will be put in place for businesses and non-for-profits that are not required to lodge a BAS (for example, if the entity is a member of a GST Group).

7.3.8 What happens if a legacy employer does not obtain (for whatever reason) the relevant certificate (or self-certify) for a quarter in a subsequent period?

Where an employer doesn't obtain the required certificate/self-certification for a subsequent period then:

- any directions or requests in place cease to operate on the first day of the subsequent period (either 28 October or 28 February). AND
- the employer cannot give any new directions or requests under the Fair Work Act flexibilities (unless they later get the required certificate/self-certification and satisfy all other requirements to re-issue or remake the direction or request).

7.3.9 What penalties are there for employers issuing directions or making requests without meeting the 10% decline in turnover test?

An employer who knowingly or recklessly fails to meet the 10% turnover test who proceeds to issue a JobKeeper-enabling direction or makes a request faces penalties of up to $13,200 for individuals and $66,600 for body corporates. These penalties may also apply where employees are not notified that a JobKeeper-enabling direction or agreement is continuing or will end during a quarter. Similar civil penalties also apply where an employer knowingly gives false or misleading information to an eligible financial service provider or makes a false declaration.

7.3.10 Can an employee challenge whether an employee has satisfied the 10% decline in turnover test?

A dispute can only be brought before the Fair Work Commission about whether an employer holds a 10% decline in turnover certificate for a relevant period, or whether the certificate was issued by an eligible financial service provider, but the Fair Work Commission cannot otherwise consider the 10% decline in turnover test.

An examination of whether an employer has actually satisfied the 10% decline in turnover test can only be brought in the Federal Court. If the Federal Court finds the employer did not meet the requirement, they can terminate the direction or request.

7.4 Direction: to work reduced hours or days

IMPORTANT: The ability to direct employees to work reduced hours or days for legacy employers is NOT the same as applied under JobKeeper 1.0.

7.4.1 What are the stand down provisions that apply to legacy employers and employees?

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

- Work a reduced number of hours or days to a **minimum of 60%** of an employee's **ordinary hours** (as assessed on 1 March 2020).
- BUT cannot result in an employee working **less than two consecutive hours** in a day that they work (minimum engagement requirement).

An employer can give this direction so long as:

- The employee cannot be "**usefully employed"** for the employee's normal days or hours because of changes to the business attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 (explained at 7.4.3).
- The direction can be implemented **safely**, having regard to the nature and spread of COVID-19.
- The **hourly rate of pay guarantee** (explained at 7.4.4) is met.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction.

7.4.2 What are an employee's "Ordinary Hours as at 1 March 2020"?

An employee's ordinary hours are not the hours the employee did or did not work on 1 March 2020 specifically. Rather, 'ordinary hours' are the quantum of hours the employee is contracted to work, as set out in the employee's industrial instrument or contract of employment. To be clear, ordinary hours does not include the specific days an employee might normally perform those hours, it is just the number of hours.

For example, an employee's ordinary hours as assessed at 1 March 2020 might be 38 hours per week.

Casual employees do not have 'ordinary hours' because, by virtue of the nature of casual employment, they are free to accept or refuse work, and their employers are free to offer work or not.

Regulations have been issued to deal with employees for whom ordinary hours as at 1 March 2020 cannot be calculated for example because the employee was not employed on 1 March 2020 or was on parental leave then. See section 3.2 for further information.

7.4.3 What if it is not possible or appropriate to determine an employee's "Ordinary Hours as at 1 March 2020"?

There are alternative methods of determining an employee's ordinary hours for the purposes of JobKeeper enabling stand down directions for whom it is not possible or appropriate to assess their ordinary hours as at 1 March 2020.

Employees whose hours changed for non-COVID reasons

This method applies to employees whose ordinary hours of work have changed on or after 1 March for reasons that are not attributable to either the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19. This could include, for example, employees on long term unpaid leave on 1 March 2020 (such as employees on unpaid parental leave), or employees who increased from a part-time to a full-time role.

For these employees, their ordinary hours for the purposes of ascertaining the 60% minimum threshold of hours are the ordinary hours of work of the employee as most recently changed for non-COVID reasons, disregarding the effect of any JobKeeper enabling stand down direction applying to the employee.

Employees not employed on 1 March 2020

This method applies to employees who were not employed by the employer on 1 March 2020.

For these employees, the ordinary hours for the purposes of for the purposes of ascertaining the 60% minimum threshold of hours are either:

- the ordinary hours of work of the employee when the employee started employment with the employer; OR
- if those hours of work have changed for non-COVID reasons, those hours of work as most recently changed for non-COVID reasons.

The effect of any JobKeeper enabling direction applying to the employee should be disregarded for the purposes of the above assessment.

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

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

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

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

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

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

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

Calculating an employee's hourly base rate

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

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

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

Employee performing different duties

For an employee performing new duties (see section 7.6) their hourly base rate is either:

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

7.4.6 Can a direction to work reduced hours/days apply when an employee is on leave (annual, personal etc.)?

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

This means that when an employee is on leave or it's a public holiday, their rate of pay will be their pay according to their ordinary hours of work (as if the direction had not been given).

7.4.7 If an employee's hours/days of work are reduced as a result of a direction from an employer what happens to the accrual of their leave entitlements?

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

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

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

7.4.9 What requests can an employee make while stood down as a result of a JobKeeper direction to reduce hours/days of work?

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

- Secondary employment
- Training; or
- Professional development.

Employers must consider these requests and cannot unreasonably refuse them.

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

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

Penalty for unreasonably refusing - up to $12,600 for an individual and $63,000 for a business.

EXAMPLE: DIRECTION TO WORK REDUCED HOURS/DAYS

Justin works as a receptionist in Chrishell's gym. He is engaged under the Fitness Industry Award 2010 at Level 3. On 1 March 2020, Justin was employed as a full time employee. This means that at the requisite time, his ordinary hours under the Fitness Industry Award 2010 were 38 hours per week.

In late March 2020, Chrishell's gym closed due to government restrictions aimed at slowing the spread of Coronavirus, and Chrishell consequently qualified for the JobKeeper scheme in relation to Justin.

When restrictions were eased in June 2020, Chrishell reopened the gym, but for reduced hours. She gave Justin a JobKeeper enabling stand down direction reducing his hours from 38 to 15 per week until 27 September 2020.

By 28 September 2020, Chrishell's business has started to recover financially and will not qualify for the extended JobKeeper payment from this date. The actual GST turnover of Chrishell's gym in the June 2020 quarter was at least 10% below the business' actual GST turnover in the June 2019 quarter, and Chrishell has obtained a certificate from an eligible financial service provider to this effect.

Chrishell wants Justin to continue to work reduced hours because the gym still hasn't returned to its normal opening times. The existing direction that applies to Justin cannot continue automatically because Chrishell is a legacy employer. The terms of the existing direction also reduced Justin's hours to below 60% of his ordinary hours on 1 March 2020, which is not permitted by legacy employers after 28 September 2020.

Chrishell gives Justin a new JobKeeper enabling stand down direction under section, which applies from 28 September 2020 and requires Justin to work a minimum of 22.8 hours per week (60% of his ordinary hours on 1 March 2020), with at least 2 consecutive hours on each day Justin works – he works 5 hours on Monday, Tuesday and Wednesday, 7.84 hours on Thursday, and no hours on Friday. Chrishell gives Justin seven days written notice of her intention to give this direction, consults Justin about the direction during the seven days prior to making the direction and keeps a written record of this consultation.

The new direction can apply from 28 September 2020 until 27 October 2020. Once the September quarter is complete, Chrishell must obtain a new 10% decline in turnover certificate for the September 2020 quarter. She will need to notify Justin before 28 October 2020 that the JobKeeper enabling stand down direction will not cease to apply to him on that date. If she does so, the direction can apply until 27 February 2021.

Once the December 2020 quarter is complete, Chrishell must again obtain a new 10% decline in turnover certificate for the December 2020 quarter. She must again notify Justin before 28 February 2021 that the JobKeeper enabling direction will not cease to apply to him on that date. If she does so, the direction can then continue to apply until the start of 29 March 2021. If in the September or December 2020 quarters the business recovers, and no longer satisfies the 10% decline in turnover test (and can therefore not get the certificate), Chrishell will not be eligible to give her employees a JobKeeper enabling direction for the subsequent period. She would need to notify Justin before 28 October 2020 (if the gym no longer satisfies the 10% decline in turnover test for the September 2020 quarter) or before 28 February (if the gym no longer satisfies the test for the December 2020 quarter) that the JobKeeper enabling direction will cease to apply to him on that date (whichever applies).

Justin's base rate of pay under the Fitness Industry Award 2010 is $21.54 per hour, which cannot be reduced for his hours of work, regardless of the actual number of hours he works.

7.5 Direction: to change location of work

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

A legacy employer may give a **direction** (called a JobKeeper enabling stand down direction) to an employee who previously received JobKeeper payments to perform their duties at a place different to their normal workplace including the employee's home provided that:

- The place is **suitable** for the employee's duties.
- The location is **safe** considering the nature and spread of COVID-19.
- The performance of duties at the new location is reasonably within the **scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction.
- The employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 7.5.2).

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

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

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

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

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

7.6 Direction: to change usual duties

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

A legacy employer may give a **direction** (called a JobKeeper enabling stand down direction) to an employee who previously received JobKeeper payments to change their normal duties to provided that:

- The modified duties are within the employee's **skill and competence** and the employee holds any necessary license or qualification required to perform the duties.
- The duties are **safe** considering the nature and spread of COVID-19.
- The duties are **reasonably within the scope** of the employer's business operations.
- The direction is **reasonable** in all the circumstances, including (but not limited to) considering the employee's caring responsibilities and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction AND
- the employer has information before them that leads them to **reasonably believe** that this JobKeeper direction is **necessary** to maintain the employment of the employee (explained at 7.6.2).

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

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

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

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

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

7.6.3 Pay rates for employee performing different duties

Employers must pay an employee performing new duties **the higher** of:

an hourly base rate which is either:

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

7.7 Request: to work different days / times of work

IMPORANT: The ability to request employees to work different hours or days for legacy employers is NOT the same as applied under JobKeeper 1.0.

7.7.1 When can an employer request an employee alter their days/time of work?

A legacy employer can **request** an employee who previously received JobKeeper payments to perform their duties on different days and/or at different times compared to the employee's normal ordinary days /hours of work provided that:

- the performance of the duties on those days is generally safe considering the nature and spread of COVID-19.
- the performance of the duties on those days is reasonably within the scope of the employer's business operations.
- The agreement does not have the effect of reducing the employee's number of hours of work compared to the employee's ordinary hours of work.
- The agreement does not have the effect of requiring the employee to work less than 2 consecutive hours in a day that they do work (minimum engagement requirement).

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

Employees must be paid in full for the days/time they work including any applicable penalty rates, loadings or other allowance which might apply to their alternative days/times of work.

7.7.2 Requests and general protections

An employee's ability to agree or disagree to perform duties on different days or at different times at the request of an employer is a workplace right for the purposes of general protections under the Fair Work Act. Adverse action cannot be taken against an employee because of the employee's workplace right.

7.8 Notification and consultation requirements BEFORE a direction/request is given

A direction given by a legacy employer WILL NOT apply to an employee unless the employer provides notice and takes the following steps to consult at least 7 days before the direction is to be given and keeps a written record of the consultation:

- **provide written notice** of the employer's intention to give the direction (or less if the employee agrees)
  - this can be by electronic means
  - this notice may be required to be in a prescribed form set out in regulation, none has yet been published/prescribed
- **provide the employee or their appointed representative (if any) with information** about the proposed direction. This may include for example:
  - information about the nature of the direction;
  - information about when the direction is to take effect;
  - information about the expected effects of the direction on the employee

  Note: employers are NOT required to disclose confidential or commercially sensitive information to the employee.
- **Invite the employee or their appointed representative (if any) to give their views** about the impact of the proposed direction on the employee (including any impact in relation to family or caring responsibilities).
  - Employers must give prompt and genuine consideration to these views.

Employers must recognize an employee's representative in the consultation process if an employee advises them of one. If this occurs midway through consultation, an employer must recongise the representative for the remainder of the consultation.

Note: If an employee (or their representative, if any) gives views about a proposed direction and the employer in considering those views modifies the proposed direction to take account of their view, the employer does not have to repeat the notice and consultation requirements to give the modified direction.

EXAMPLE: NOTIFICATION & CONSULTATION

Alyssa works as a retail assistant in Cody's pet accessories boutique. Cody's business qualified for the JobKeeper scheme prior to 28 September 2020. His business is starting to recover so he will not requalify for the extended JobKeeper scheme, though he has still satisfied the 10% decline in turnover test for the June 2020 quarter. Cody has obtained a certificate from an eligible financial service provider to this effect.

Alyssa was given a valid JobKeeper enabling stand down direction in April 2020 that will cease at the start of 28 September 2020 (because Cody's business will no longer qualify for the JobKeeper scheme). As a legacy employer, Cody can give Alyssa a JobKeeper enabling stand down direction. All of the requirements of this section have been met, and Cody wants to give Alyssa a new JobKeeper enabling stand down direction on 28 September 2020 with effect from that day.

On 14 September 2020, Cody gives Alyssa notice of her intention to give the new direction (more than the statutorily required seven days' notice).

On 16 September 2020, Cody decides to start consultation. Cody sends Alyssa an email in which she sets out information about the proposed new direction, including that it is a JobKeeper enabling stand down direction that proposes to direct Alyssa to work 70% of her ordinary hours as at 1 March 2020. The email states the proposed direction would take effect from 28 September 2020 and sets out a proposal for how Alyssa's normal days and times of work would be reduced to give effect to the fewer hours. The email invites Alyssa to give her views on the impact of the proposed JobKeeper enabling stand down direction.

On 18 September 2020, Alyssa decides to appoint Emily, her friend, to be her representative for the purposes of this consultation. Alyssa tells Cody she has appointed Emily. Emily asks Cody if they can have a phone call to discuss the proposed direction, and they agree on a call on 23 September 2020. During the call, Emily conveys Alyssa's concern that Cody's proposal for how Alyssa's normal days and times of work would be reduced will make it harder to arrange care for her young child because she would work shorter shifts each day. Alyssa would prefer to work her normal length shifts on fewer days, instead.

On 24 September 2020, Cody considers his full staffing availability and rosters to see whether he can accommodate Alyssa's request, which she determines that she can. Cody emails Emily and Alyssa to tell them this, and sets out the new proposal for Alyssa's reduced hours. Emily replies noting that Alyssa prefers the new proposal, and Cody confirms this arrangement will be reflected in the direction she gives. Cody does not have to repeat the notice and consultation requirements for the reformulated direction as she has already done this for the original proposal.

On 26 September 2020, Cody gives Alyssa the direction reflecting the agreed days and times Alyssa will work, to take effect from 28 September 2020. The effect of this direction can continue until 27 October 2020. After 27 October 2020 it will depending on whether Cody's business satisfies the 10% decline in turnover test for the September 2020 quarter, obtaining the necessary 10% decline in turnover certificate and notifying Alyssa of the direction continuing (or ceasing if no certificate).

7.9 Notification requirement EACH SUBSEQUENT PERIOD

As explained in 7.3 legacy employers **MUST** obtain a 10% decline in turnover certificate/self-certify for each subsequent quarter in order to continue to be eligible to use the Fair Work Act flexibilities**:**

- **28 September and 27 October:** 10% decline in turnover certificate for June quarter
- **28 October and 27 February 2021:** 10% decline in turnover certificate for September quarter
- **28 February and 28 March 2021:** 10% decline in turnover certificate for December quarter

This means after originally qualifying on 28 September employers will need to get a new turnover certificate/self-certification at the start of each test time (on 28 October 2020 and on 28 February 2021) if they are to continue to qualify to use the legacy employer Fair Work Act flexibilities.

TEST TIME: The first day of each subsequent new period requiring a new certificate:

- **28 October 2020** (September quarter certificate required) and
- **28 February 2021** (December quarter certificate required).

Employers **MUST** notify employees before Test Time (before 28 October 2020 and 28 February 2021) as to whether a direction/request currently in operation will either:

- continue to apply as a result of the employer obtaining a relevant certificate OR
- will ceases to apply as a result of the employer not obtaining the relevant certificate.

A direction/request automatically ceases to lawfully operate if an employer does not hold the relevant certificate at the Test Time.

EXAMPLE: NOTIFICATION OF DIRECTION CEASING

If an employer has given an employee a JobKeeper enabling stand down direction to reduce an employee's hours of work between 28 September and 27 October 2020, but the employer does not obtain the certificate for the September 2020 quarter before 28 October 2020, that reduction in hours direction will cease at the start of 28 October 2020.

The employer must therefore notify the employee in writing before 28 October 2020 informing them that the direction will cease from 28 October 2020.

EXAMPLE: NOTIFICATION OF DIRECTION CONTINUING

If an employer has given an employee a JobKeeper direction to work from an alternative location between 28 October 2020 and 27 February 2021, and the employer does obtain the certificate for the December 2020 quarter before 28 February 2021, that direction will continue on and after 28 February 2021 (until the provisions repeal at the start of 29 March 2021).

The employer must therefore notify the employee in writing before 28 February 2021 that the direction will continue.

7.9.1 Are there any penalties that apply if an employer fails to notify an employee?

If an employer fails to properly notify an employee on more than one occasion, they may face civil penalties.

To be clear 'more than one occasion' covers the failure to notify different employees at different times.

7.10 Disputes

The Fair Work Commission can deal with disputes between employers and employees about the directions/requests by legacy employers.

As explained at 7.3.10 a dispute can only be brought before the Fair Work Commission about whether an employer holds a 10% decline in turnover certificate for a relevant period, or whether the certificate was issued by an eligible financial service provider. The Fair Work Commission cannot otherwise consider the 10% decline in turnover test.

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

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

The Fair Work Commission can also mediate, conciliate, make a recommendation or express an opinion. In dealing with the dispute, the Fair Work Commission must take into account fairness between the parties in dispute.

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

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

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

7.10.2 What orders can the Fair Work Commission make?

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

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

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

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

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

8.1 Key resources

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

Australian Tax Office – JobKeeper Payment

Business.gov.au – JobKeeper Payment for employers and employees

Treasury – JobKeeper Payment

8.1.1 Key Forms

ATO - JobKeeper Employee Nomination Notice

Fair Work Commission – Form F13A – Application for the Commission to deal with a JobKeeper dispute (coronavirus economic response)

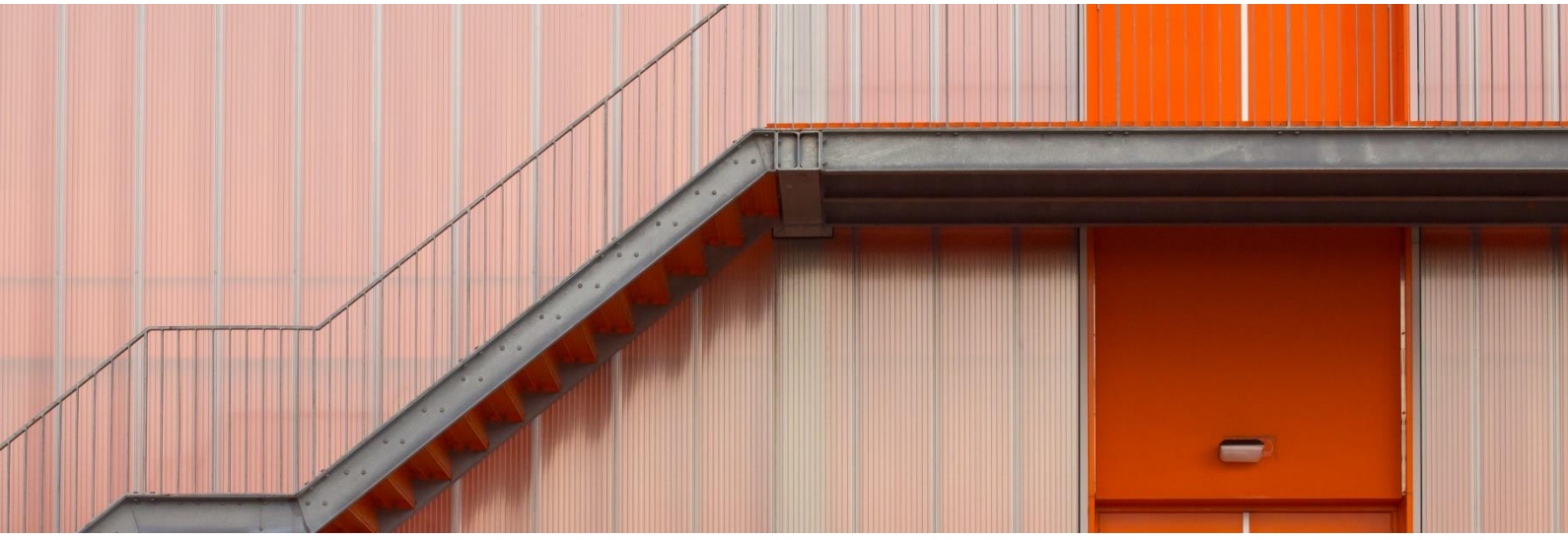
8.2 Key Contacts

Have a question or situation that isn't covered by this guide? The Australian Chamber of Commerce and Industry network is here to help and answer questions you might have. A list of ACCI member organisation in each state and territory and representing major industries can be accessed here, or you can call ACCI on (03) 9668 9950 to be referred to our members.

Key ACCI Contacts for the Guide

Tamsin Lawrence
Deputy Director – Workplace Relations

Ingrid Fraser
Senior Advisor – Workplace Relations



Annexure A - Schedule of JobKeeper fortnights

JOBKEEPER FORTNIGHT			ATO PAYMENT MONTH	PAYMENT PER ELIGIBLE EMPLOYEE
Eligibility Period One (September Quarter Turnover Test applies)	14.	28 September 2020 – 11 October 2020	November 2020	$2,400 (full) $1,500 (partial)
	15.	12 October – 25 October 2020		
	16.	26 October 2020 – 8 November 2020	December 2020	$2,400 (full) $1,500 (partial)
	17.	9 November 2020 – 22 November 2020		
	18.	23 November 2020 – 6 December 2020	January 2021	$2,400 (full) $1,500 (partial)
	19.	7 December 2020 – 20 December 2020		
	20.	21 December 2020 – 3 January 2021	February 2021	$3,200 (full) $2,050 (partial)
Eligibility Period Two (December Quarter Turnover Test applies)	21.	4 January – 17 January 2021		
	22.	18 January 2021 – 31 January 2021		
	23.	1 February 2021 – 14 February 2021	March 2021	$2,000 (full) $1,300 (partial)
	24.	15 February 2021 – 28 February 2021		
	25.	1 March 2021 – 14 March 2021	April 2021	$2,000 (full) $1,300 (partial)
	26.	15 March 2021 – 28 March 2021		

Annexure B – Qualifying Employer JobKeeper Enabling Direction checklist

This checklist is for JobKeeper 2.0 qualifying employers who wish to issue a JobKeeper enabling direction to employees in receipt of JobKeeper payments to:

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

*THIS CHECKLIST IS **NOT** FOR LEGACY EMPLOYERS*

Preliminary matters

☐ **Establish Eligibility:** Are you eligible as an employer (or business participant) and have you qualified for the JobKeeper scheme? Which of your employees are eligible and entitled to JobKeeper payment/s? (See Part 1 - 3 of the Guide to check)

☐ **Check pre-requisites:** Have you met all the pre-requisites which allow you to issue a JobKeeper enabling direction? (See Part 6 of the Guide to check)

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

Before issuing a JobKeeper enabling direction

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

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

☐ **Consult:** Consult with the employee/s (or their representative) about the direction

☐ **Keep records:** Keep a written record of the consultation

☐ **Check whether the direction is 'reasonable':** Consider whether the direction is reasonable, including taking into account the employee's response during consultation

Where a direction is unreasonable in all the circumstances, it will not apply to the employee. You need to consider anything relevant, including the personal circumstances of the employee (including for example, the impact on an employee's caring responsibilities) and if the direction will have a disparate effect on a category of employees over others who are subject to the same direction

☐ **Monitor expiry:** Monitor circumstances to ensure the JobKeeper direction still applies (see Part 6.3.2 of the Guide to check)

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

This guide was written and edited by Tamsin Lawrence and Ingrid Fraser.

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and Industry