

Amendments to the Fair Work Act to facilitate the JobKeeper stimulus package

As part of the Government's COVID-19 "JobKeeper" stimulus package, the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* (**Bill**) was passed in both houses of Federal Parliament on 8 April 2020, and will come into force shortly.

The Bill provides several novel amendments to the *Fair Work Act* aimed at maintaining the employment relationship thus enabling the JobKeeper payment to be made, and increasing flexibility and options for employers at this time.

These amendments are outlined below.

1 JobKeeper Enabling Stand Down Direction

This appears to be a brand new stand down option for employers who may not otherwise have the option under a contract of employment or industrial instrument.

Once the Bill receives Royal Assent, a "JobKeeper Enabling Stand Down Direction" will authorise an employer who qualifies for a JobKeeper payment to direct an employee (for a given period) to:

- a) not work on a day or days which they would normally work; or
- b) work for a lesser period than they ordinarily would work on a particular day or days; or
- c) work a reduced number of hours when compared with the ordinary hours of work,

where the employee cannot be usefully employed **for the employee's normal days or hours** due to changes attributable to the COVID-19 pandemic, or government initiatives to slow the transmission of the COVID-19 virus. The reference to being unable to be usefully employed "for the employee's normal days or hours" suggests that such a direction can be given where there has been a slowdown of work rather than a complete stoppage.

This addresses a significant shortcoming in the *Fair Work Act* highlighted by COVID-19, which only allowed the stand down of employees when there had been a "stoppage" of work (as opposed to a slow down - even where employees were largely unable to be usefully employed).

Where an employee has been given a "JobKeeper Enabling Stand Down" direction, the employer only needs to pay the employee the greater of the JobKeeper payment for that employee or the amount payable for hours actually worked by the employee at their ordinary base rate of pay.

This does not affect continuity of service - leave entitlements will continue to accrue as if the direction had not been given.

2 Other "JobKeeper Enabling Directions"

The amendments will authorise employers to:

- a) direct an employee to perform any duties that are within the employee's skill and competency, so long as they are safe, having regard to the nature and spread of COVID-19, and they are reasonably within the scope of the employer's business operations;
- b) direct an employee to perform duties at a place that is different from the employee's normal place of work, including the employee's home, so long as the place is suitable for the employee's duties and, if the place is not the employee's home, the place does not require the employee to travel an unreasonable distance and the performance of duties at the place is safe and reasonably within the scope of the employer's business operations; and
- c) request that the employee agree in writing to the employee providing duties on different days or at different times when compared with their ordinary hours or times of work, which request cannot

be unreasonably refused. Again, this is subject to the request to perform those duties being safe and reasonably within the scope of the employer's business operations. Additionally, this agreement cannot have the effect of reducing the employee's number of hours of work when compared with their ordinary hours of work.

3 Taking paid annual leave

These amendments allow:

- a) employers to request employees to take paid annual leave, which cannot be reasonably refused by the employee so long as the request would not result in the employee being left with an annual leave balance of fewer than two weeks; and
- b) the employer and the employee may agree in writing to the employee taking twice as much paid annual leave at half the employee's rate of pay for the period and still maintaining eligibility for the full JobKeeper payment.

4 Checks and balances

The legislation includes a number of checks and balances on the exercise of the above authority including:

- a) any JobKeeper Enabling Direction will not apply if the direction is unreasonable in all the circumstances. The legislation notes that a direction may be unreasonable depending on the impact of the direction on any caring responsibilities that the employee may have;
- b) the direction will be of no effect unless the employer has before them information that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer;
- c) there are requirements on employers to consult with the employee in writing and at least three days before any direction is given;

- d) the civil penalty provisions of the Fair Work Act apply if an employer purports to give a JobKeeper Enabling Direction where it is not authorised under the legislation and the employer knows that it is not authorised;
- e) additionally, the making of a JobKeeper Enabling Stand Down does not affect:
 - i) the employee's period of service;
 - ii) any employee entitlement to redundancy pay; or
 - iii) payment in lieu of a notice of termination.
- f) there is a general "sunset" clause providing that all JobKeeper Enabling Directions (and any FWC order relating to the JobKeeper Enabling Directions) will cease to have effect at the start of 28 September 2020.

5 Dealing with Disputes

As expected, the Fair Work Commission can deal with disputes about the operation of this part. Employers, employees, employee organisations and employer organisations may all apply to the Fair Work Commission to deal with the dispute relating to these amendments.

The Commission has broad powers including the power to make any order that the Commission considers desirable to give effect to a JobKeeper Enabling Direction and an order setting aside a JobKeeper Enabling Direction.

Given that:

- almost all amendments incorporate "reasonableness" as the precondition for any direction; and
- the situation is moving rapidly,

there will still be some unpredictability in the precise operation of these measures, however, it is clear that they have been enacted to provide an employer with greater flexibility than previously existed.

It will be interesting to see how Fair Work Commission deals with the amendments, and whether they are dealt with consistently across the country.

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