Benchbook

Jobkeeper disputes (Coronavirus economic response)

About this benchbook

This benchbook has been prepared by staff of the Fair Work Commission (the Commission) to assist parties lodging or responding to jobkeeper dispute applications under the *Fair Work Act 2009* (Cth).

Disclaimer

This benchbook should be used as a general guide only. It is not intended to be used as an authority in support of a case at hearing.

Precautions have been taken to ensure the information is accurate, but the Commonwealth does not guarantee, and accepts no legal liability whatsoever arising from or connected to, the accuracy, reliability, currency or completeness of any material contained in this benchbook or on any linked site.

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This benchbook is not a substitute for independent professional advice and users should obtain appropriate professional advice relevant to their particular circumstances.

In many areas of Indigenous Australia, it is considered offensive to publish the names of Aboriginal and Torres Strait Islander people who have recently died. Users are warned that this benchbook may inadvertently contain such names.

Glossary

The parties to jobkeeper disputes have generally been referred to in this benchbook as the 'Applicant' and the 'Respondent'. A glossary explaining these and other commonly used terms is at Attachment 1.

Links to external websites

Where this site provides links to external websites, these links are provided for the reader's convenience and do not constitute endorsement of the material on those sites, or any associated organisation, product or service.

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Contents

Part 1 – Introduction

This part provides an introduction to:

- the Fair Work Commission
- the jobkeeper scheme; and
- the Coronavirus Economic Response provisions.

More detailed information about the Coronavirus Economic Response provisions is in Parts 2 to 10.

About the Commission

The Fair Work Commission (the Commission) is Australia's national workplace relations tribunal.

Australia has had a national workplace relations tribunal for more than a century and it is one of the country's oldest key institutions. Over time it has undergone many changes in jurisdiction, name, functions and structure. Throughout its history, the tribunal has made many decisions that have affected the lives of working Australians and their employers. The Commission recognises the importance of promoting public understanding of the role of the tribunal and of capturing and preserving its history for display and research.

The Commission is responsible for applying provisions of the *Fair Work Act 2009* (the Fair Work Act) and the *Fair Work (Registered Organisations) Act 2009* (the Registered Organisations Act). This includes powers to deal with some disputes about the jobkeeper payment scheme.

About the jobkeeper payment scheme

The Coronavirus Economic Response Package (Payments and Benefits) Rules 2020 (the Payments and Benefits Rules) are made under s.20 of the Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (the Payments and Benefits Act). The Payments and Benefits Rules establish the jobkeeper payment scheme, including:

- when an employer or business is entitled to a payment
- the amount and timing of a payment, and
- other matters relevant to the administration of the payment.

Payments under the jobkeeper payment scheme are available in fortnightly periods between 30 March 2020 and 27 September 2020. A business that is entitled to a jobkeeper payment will be reimbursed a fixed amount of $1,500 per fortnight per eligible employee. The business must pay the employee before it is entitled to the jobkeeper payment.[1]

[1] Payment and Benefits Rules, ss.6(1)(d) and 10.

How does an employer qualify for the jobkeeper scheme?

Jobkeeper payments are administered by the Australian Taxation Office. Information about eligibility for jobkeeper payments is available on the business.gov.au website (see https://www.business.gov.au/Risk-management/Emergency-management/Coronavirus-information-and-support-for-business/JobKeeper-Payment-for-employers-and-employees JobKeeper Payment for employers and employees).

Commission staff cannot give advice on whether an employer is eligible for the jobkeeper scheme, and the following information is provided for information only.

A business that has suffered a substantial decline in turnover can be entitled to a jobkeeper payment of $1,500 per fortnight for each eligible employee. The business must satisfy the 'decline in turnover' test.[2] Different thresholds apply to the decline in turnover required, depending on the status of the entity, as follows:

- in most cases, more than 30%
- for larger businesses with aggregated turnover of $1 billion or more, more than 50%
- for registered charities, other than schools and some higher education providers, more than 15%.

Some employers are not entitled to receive jobkeeper payments.[3] These include:

- banks (or entities within consolidated groups of banks) liable to pay a levy under the *Major Banks Levy Act 2017* in any quarter ending before 1 March 2020
- Australian government agencies (and entities wholly owned by them)
- local governing bodies (and entities wholly owned by them)
- sovereign entities
- companies where a liquidator or provisional liquidator has been appointed in relation to the company; and
- individuals where a trustee in bankruptcy has been appointed to the individual's property.

The Commission cannot assist with disputes about whether an employer is eligible to receive a jobkeeper payment or whether an employee is an eligible employee for the purposes of the jobkeeper scheme.

Information about how employers can apply for the jobkeeper scheme, and which employees are 'eligible employees' for the purposes of the jobkeeper scheme, is available on the Australian Taxation Office website - see https://www.ato.gov.au/general/gen/jobkeeper-payment/

[2] Payments and Benefits Rules, ss.7(1)(b) and 8.

[3] Payments and Benefits Rules, s.7(2).

Related information

Part 6 – Disputes the Commission cannot assist with

Employer record keeping requirements

An employer is not entitled, and is taken never to have been entitled to, a jobkeeper payment unless it complies with record keeping requirements under the Payments and Benefits Act.[4]

When are employees eligible under the jobkeeper payments scheme?

Employers can claim the jobkeeper payment for eligible employees.[5] Jobkeeper payments are administered by the Australian Taxation Office. Information about eligibility for jobkeeper payments is available on the ATO website (see https://www.ato.gov.au/General/JobKeeper-Payment/Employees/Eligible-employees).

Commission staff cannot give advice on whether an employee is an 'eligible employee', and the following information is provided for information only.

Eligible employees are employees who:

- are currently employed by an employer that is eligible to receive the jobkeeper payment (including employees who are stood down or re-hired)
- were employed by the employer at 1 March 2020
- are full-time, part-time, or long-term casuals (a casual employed on a regular and systemic basis for longer than 12 months as at 1 March 2020)
- are a permanent employee of the employer, or if a long-term casual employee, not a permanent employee of any other employer
- are at least 16 years of age at 1 March 2020
- are an Australian citizen, the holder of a permanent visa, or a Special Category (Subclass 444) Visa Holder at 1 March 2020
- were a resident for Australian tax purposes on 1 March 2020
- are not receiving government paid parental leave, dad and partner pay, or payment under workers' compensation law for total incapacity to work, and
- are not in receipt of a jobkeeper payment from another employer.

[4] Payments and Benefits Act, s.14(1).

[5] Payments and Benefits Rules, s 6.

Overview of the Coronavirus Economic Response provisions in the Fair Work Act

The Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 introduces a new Part 6-4C into the Fair Work Act. The Part allows employers to give certain directions to employees and make certain requests of them. It also allows the Commission to deal with disputes about the operation of the new Part.

The provisions of the new Part are confined to an employer that is a 'national system employer' and to an employee who a 'national system employee' (s.789GC). Note also the extended meaning of these terms found in Division 2A of Part 1-3 of the Fair Work Act.

Directions

The new Part allows an employer who qualifies for the job keeper scheme and becomes entitled to jobkeeper payments for an employee during the relevant period, to give the employee three new kinds of directions:

- A 'job keeper enabling stand down' (s.789GDC) is a form of flexible stand down. It can require an employee not to work on a day they would usually work, work for a lesser period on a day, or work a reduced number of hours overall (which can be nil). Similar to a regular stand down under s.524 of the Fair Work Act or an award or agreement, there is a causative requirement, but one linked to the pandemic: the stand down direction can only be given if the employee 'cannot be usefully employed for the employee's normal days or hours ... because of changes to business' that are 'attributable to the COVID-19 pandemic' or to 'government initiatives' to slow its transmission (s.789GDC(1)(c)).
- Under s.789GE, an employer may direct an employee to perform other duties. The duties in question must be within the employee's skill and competency, and must be reasonably within the scope of the employer's business operations. The employee must also have any relevant licence or qualification required to perform the duties.
- An employer may also give an employee a direction to work at a different place (s.789GF). This can be any place that is different from the normal place of work, including the employee's home, provided that it is 'suitable for the employee's duties'. It must not require the employee to travel an unreasonable distance.

Each of these three directions is a 'jobkeeper enabling direction' and is subject to the employer payment obligations in Division 2 and conditions in Division 6. A direction does not apply to an employee if it is unreasonable (s.789GK). And the employer must consult the employee, and give the employee written notice of the intention to give the direction at least three days before it is given, or a lesser period if the employee genuinely agrees. A direction to perform other duties or to work at a different place must also be 'necessary to continue the employment of one or more employees' (s.789GL).

Each of the three substantive direction provisions contains additional requirements, including in relation to safety.

A direction has effect despite a 'designated employment provision' which includes a term of a contract and a fair work instrument, but operates subject to the protections in Division 12.

Leave continues to accrue as if the jobkeeper enabling direction had not been given (s.789GS).

Requests

There are also provisions that enable an employer that is qualified for the jobkeeper scheme, and entitled to jobkeeper payments for an employee, to give the employee a request, which the employee must then consider and not unreasonably refuse.

First, an employer may request an employee to work on days or at times that are different from the employee's ordinary days or times, but which do not reduce the employee's number of hours of work (compared with the employee's ordinary hours) (s.789GG).

Second, an employer may request an employee to take paid annual leave, provided the request does not result in the employee having a balance of fewer than two weeks (s.789GJ(1)). (An employer and employee can also agree to the employee taking twice as much paid annual leave at half pay under s.789GJ(2).)

If an employer has given an employee a jobkeeper stand down enabling direction, the employee may give the employer a request to engage in 'reasonable secondary employment', or a request for training or professional development. The employer must consider and must not unreasonably refuse the request (s.789GU).

Requests are also subject to the relevant employer payment obligations in Division 2 and the protections in Division 12.

Disputes

The Commission 'may deal with a dispute about the operation of this Part,' including by arbitration (s.789GV(2)). Mediation, conciliation, recommendations and opinions are also contemplated (see the reference to s.595(2) in the note to s 789GV(2)). There must first be an application from an employer, employee, union or employer association.

The Commission 'may' make any of the orders in s.789GV(4), which includes any order it considers 'desirable' to give effect to a direction, setting aside a direction, or substituting a different direction. The Commission may also make 'any other order it considers appropriate'. The Commission must take into account 'fairness between the parties concerned' (s.789GV(7)).

Disputes coming before the Commission may concern, for example: whether a jobkeeper enabling stand down is 'because of' changes to business attributable to the pandemic or the government's response to it; whether an employee 'cannot be usefully employed for the employee's normal days or hours' (potentially less clear cut in the case of a partial stand down); safety implications of directions, including in relation to transmission of the virus; whether alternative duties are within an employee's skills and the scope of the business concerned; suitability of alternative workplaces; the reasonableness of employee refusals to work different days or times, or to take annual leave; whether a direction is unreasonable in all of the circumstances; employer compliance with consultation and notice requirements regarding a direction; and whether a direction to perform other duties or work at a different place is 'necessary to continue the employment of one or more employees'.

The relevant divisions of Part 6-4C are repealed with effect from **28 September 2020** and any jobseeker enabling directions (and agreed changes to working days and times) in effect at the time of repeal then cease to have effect. The Commission can deal with disputes after 28 September 2020 (but cannot make an order giving effect to a direction or substituting a direction after that date).

A copy of the Explanatory Memorandum for the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020* is available at www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r6533

Part 2 – Jobkeeper enabling directions

See Fair Work Act ss.789GC, 789GDC, 789GE, 789GF and Division 6 of Part 6-4C

Under Part 6-4C, an employer that qualifies for the jobkeeper scheme can give a 'jobkeeper enabling direction'. There are three types of jobkeeper enabling directions:

1. a **jobkeeper enabling stand down direction,** including a direction to reduce an employee's hours, under s.789GDC
2. a direction in relation to the duties to be performed by the employee under s.789GE, and
3. a direction to perform duties at a place different from the employee's normal place of work, including their home, under s.789GF.

More information about the three types of jobkeeper enabling directions is set out below.

- jobkeeper enabling directions apply even if they are not consistent with:
  - the Fair Work Act (subject to s.789GZ)
  - a 'fair work instrument' (such as a modern award or an enterprise agreement)
  - a contract of employment, or
  - a transitional instrument (within the meaning of item 2 of Schedule 3 to the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009).

Jobkeeper enabling directions must be in writing, must not be unreasonable, and are subject to the notice and consultation requirements.

Subject to any order made by the Commission in dealing with a dispute about the operation of Part 6-4C, jobkeeper enabling directions operate until they are withdrawn, revoked or replaced. All jobkeeper enabling directions cease to have effect at the start of 28 September 2020.

The Minister for Industrial Relations has the power to exclude one or more specified employers from being able to give jobkeeper enabling directions,[6] but this has not yet occurred.

Related information

Attachment 2 — Jobkeeper enabling directions checklist

See the checklist at Attachment 2 to identify whether a jobkeeper enabling direction is authorised and has effect.

[6] Fair Work act s.789GX

Service and entitlement accrual while a jobkeeper enabling direction applies

See Fair Work Act ss.22, 789GR and 789GS

For the purposes of the Fair Work Act, the period that an employee is subject to a jobkeeper enabling direction counts as service.

While a jobkeeper enabling direction applies to an employee:

- the employee accrues annual leave entitlements, and
- redundancy pay and payment in lieu of notice of termination are calculated,
- as if the direction had not been given.

When a jobkeeper enabling direction will have no effect

See Fair Work Act ss.789GDC, 789GE, 789GF and Division 6 of Part 6-4C

Jobkeeper enabling directions cannot be made retrospectively.[7] This means that directions given before Part 6-4C commenced operation on **9 April 2020** are not authorised by provisions in that Part. Depending on the circumstances, such directions given before 9 April 2020 may still have been authorised, for example under a fair work instrument or a contract of employment.

Jobkeeper enabling directions have no effect if they are unreasonable or the employee was not consulted.

Jobkeeper enabling directions about duties of work and location of work also have no effect unless the employer reasonably believes they are necessary to continue the employment of one or more employees.

Reasonableness

See Fair Work Act s.789GK

A jobkeeper enabling direction does not apply if it is unreasonable in all the circumstances. For example, a direction may be unreasonable because of the impact it would have on the caring responsibilities of the employee. Section 789GK does not otherwise provide guidance on what may be 'unreasonable'. See 'What is a reasonable belief?' below, for more information.

[7] Fair Work Act ss.789GDC(1)(a), 789GE(1)(a) and 789GF(1)(a).

Necessary to continue the employment of employees

See Fair Work Act s.789GL

To give a jobkeeper enabling direction about duties to be performed or location of work, the employer must have information before them that leads them to reasonably believe that the direction is necessary to continue the employment of one or more of their employees.

This is not required for jobkeeper enabling stand down directions.

What is a reasonable belief?

The expression 'reasonable belief' and similar expressions are used in a wide variety of contexts in statutes and by the common law.

In the context of discrimination laws, the High Court has held that what is reasonable must be ascertained taking into consideration all of the circumstances of the case, including by reference to the scope and purpose of the Act.[8]

What is a reasonable belief in the context of s.789GL of the Fair Work Act has not yet been considered. In light of previous High Court authority, however, what is reasonable should be considered in light of the objects of Part 6-4C of the Fair Work Act (see s.789GB), the objects of the Fair Work Act (see s.3), and the provisions to which the requirement pertains and the circumstances in the particular case to which the jobkeeper enabling direction relates.

It is clear from cases decided in those differing contexts that not only must the requisite belief actually and genuinely be held by the relevant person, but in addition the belief must be reasonable in the sense that, objectively speaking, there must be something to support it or some other rational basis for the holding of the belief and it is not irrational or absurd.[9]

In determining whether a jobkeeper enabling direction given by an employer to an employee is necessary to continue the employment of one or more employees of the employer, it does not matter that a similar jobkeeper enabling direction could have been given by the employer to an employee other than the relevant employee.[10]

[8] *Waters v Public Transport Corporation* [1991] HCA 49 per Mason CJ and Gaudron J at 32

[9] *Amie Mac v Bank of Queensland Limited and Others* [2015] FWC 774 (Hatcher VP, 13 February 2015) at para. 79.

[10] Fair Work Act 2.789G(2)

Hypothetical example

Sonya runs a café and employs Chris and Jill, who are both waiters. Sonya's business has qualified for the jobkeeper scheme.

As a result of COVID-19, Sonya cannot run her café as usual, so she decides that to keep the business running, she will offer home delivered meals. Sonya needs someone to do the deliveries, so she directs Chris to perform those duties. The direction has effect, even though Sonya could have directed Jill to do the deliveries rather than Chris.

Consultation

 See Fair Work Act s.789GM

A jobkeeper enabling direction does not apply to an employee unless:

- the employer gave the employee at least three days written notice of the employer's intention to give the direction. A lesser period of notice may apply if the employee genuinely agrees to a lesser notice period, and
- before giving the direction, the employer consulted the employee, or a representative of the employee, about the direction.

The Regulations may require that a written notice of the employer's intention to give the direction must be in a prescribed form. As at the date of publication of this benchbook, no relevant regulations have been made.

If an employer has already given notice and consulted with an employee, the employer can give a jobkeeper enabling direction without having to give notice and consult again if:

- the employer previously complied with the notice and consultation requirements in relation to a proposal to give the employee another jobkeeper enabling direction under the same provision, and
- the employee or their representative expressed views about the proposal to the employer, and
- the employer considered those views in deciding to give the direction.

An employer must keep a written record of a consultation with an employee or their representative.

Jobkeeper enabling stand down directions

 See Fair Work Act s.789GDC

Division 3 of Part 6-4C of the Act authorises an employer who qualifies for the jobkeeper scheme to give a *jobkeeper enabling stand down direction* to an employee.

A jobkeeper enabling stand down direction is a direction 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, or
- work a reduced number of hours (compared with the employee's ordinary hours of work). This can include reducing the employee's working hours to nil.

The time during which a jobkeeper enabling stand down direction applies is called the jobkeeper enabling stand down period.

When is a jobkeeper enabling stand down direction authorised?

A jobkeeper enabling stand down direction is authorised if:

- the employer qualified for the jobkeeper scheme when the direction was given
- the employee cannot be usefully employed for the employee's normal days or hours during the jobkeeper enabling stand down period because of changes to business attributable to:
    - the COVID-19 pandemic; or
    - government initiatives to slow the transmission of COVID-19
- implementing the stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19, and
- the employer becomes entitled to one or more jobkeeper payments for the employee:
    - for a period that consists of or includes the jobkeeper enabling stand down period; or
    - for periods that, when considered together, consist of or include the jobkeeper enabling stand down period.

When does a jobkeeper enabling stand down direction not apply?

A jobkeeper enabling stand down direction does not apply during a period when the employee is taking paid or unpaid leave authorised by the employer, or the employee is otherwise authorised to absent from their employment.

Payment while a jobkeeper enabling stand down direction applies

During the jobkeeper enabling stand down period, the employer is required to comply with:

- the wage condition set out in the jobkeeper payment rules
- the minimum payment guarantee, and
- the hourly rate of pay guarantee,

but the employer is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.

Related information

Part 4 – Jobkeeper scheme and payments to employees

Employee requests for secondary employment, training and professional development during a jobkeeper enabling stand down

See Fair Work Act s.789GU

If a jobkeeper enabling stand down direction applies to an employee, the employee may ask their employer:

- to engage in reasonable secondary employment
- for training
- for professional development

The employer:

- must consider the request; and
- must not unreasonably refuse the request.

If the employer does not consider or unreasonably refuses the request, they contravene a civil remedy provision.

A ***civil remedy provision*** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

Stand downs that are not jobkeeper enabling stand downs

See Fair Work Act s.524

A *jobkeeper enabling stand down direction* is different to a direction to employees to stand down under s.524 of the Fair Work Act.

Under s.524, an employer can stand down an employee during a period in which the employee cannot usefully be employed because of:

- industrial action (other than industrial action organised or engaged in by the employer)
- a breakdown of machinery or equipment, if the employer cannot reasonably be held responsible for the breakdown, or
- a stoppage of work for any cause for which the employer cannot reasonably be held responsible.

An employer does not have to qualify for the jobkeeper payment scheme to stand down an employee under s.524, and does not have to make payments to the employee for the period of the stand down.

The Commission can deal with disputes about stand downs under s.524. See the Commission's Industrial Action Benchbook for more information on standing down employees under s.524 of the Fair Work Act, available at

www.fwc.gov.au/resources/benchbooks/industrial-action-benchbook.

Directions about duties and location of work

See Fair Work Act ss.789GE, 789GF, and 789GDB(3)

Division 4 of Part 6-4C of the Fair Work Act authorises an employer who qualifies for the jobkeeper scheme to give a jobkeeper enabling direction to an employee about their duties of work or the location where their work is to be performed.

Duties of work

An employer that has qualified for the jobkeeper scheme can direct an employee to perform any duties during a period (the relevant period) that are within the employee's skill and competency.

A direction about duties of work is authorised if:

- the duties are safe, having regard to (without limitation) the nature and spread of COVID-19
- where the employee was required to have a licence or qualification in order to perform those duties - the employee had the licence or qualification
- the duties are reasonably within the scope of the employer's business operations, and
- the employer becomes entitled to one or more jobkeeper payments for the employee
  - for a period that consists of or includes the relevant period; or
  - for periods that, when considered together, consist of or include the relevant period.

Payment while a direction in relation to duties of work applies

If a direction in relation to duties of work applies to an employee, the employer must ensure that the employee's hourly base rate of pay is not less than the greater of the following:

- the hourly base rate of pay that would have applied to the employee if the direction had not been given to the employee, or
- the hourly base rate of pay that is applicable to the duties the employee is performing.

Example

The following example is taken from the Explanatory Memorandum to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.*

Ameisa operates a warehouse in NSW. The Storage Services and Wholesale Award 2010 applies to the employees of the warehouse, including Meera. As a storeworker grade 4, Meera generally acts in a leading hand capacity, coordinating the work of other

storeworkers, performs liaison duties including with customers, and controlling inventory.

Ameisa's business is affected by the Coronavirus pandemic and qualifies for the jobkeeper scheme. Given the downturn in Ameisa's business operations, Meera is not required to perform her usual duties in respect of customer liaison. In order to keep Meera connected to employment during the pandemic, rather than reducing Meera's hours, Ameisa gives Meera a jobkeeper enabling direction that changes Meera's usual duties and enables her to be retain her regularly rostered hours, albeit in other duties.

Ameisa wants Meera to drive a forklift in the warehouse. Because the duties can be performed with appropriate social distancing and in a way that is safe with respect to the nature and spread of Coronavirus, reasonably within the scope of Ameisa's business operations, and Meera holds a current high risk work licence to operate a forklift (class LO), Ameisa is able to give a jobkeeper enabling direction authorised by s 789GE to drive the forklift.

While Meera's duties have been modified by the jobkeeper enabling direction, the other terms and conditions relating to her employment, such as the days and hours she works, are unchanged.

Related information

Part 4 – Jobkeeper scheme and payments to employees

Location of work

An employer that has qualified for the jobkeeper payment can give an employee a direction to perform work during a period (the relevant period), at a different location to the employee's normal place of work. This includes a direction that the employee must work from home.

A direction regarding the location of work is authorised if:

- the employer qualified for the jobkeeper scheme when the direction was given
- the place is suitable for the employee's duties
- if the place is not the employee's home—the place does not require the employee to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic
- the performance of the employee's duties at the place is safe, having regard to (without limitation) the nature and spread of COVID-19, and reasonably within the scope of the employer's business operations, and
- the employer becomes entitled to one or more jobkeeper payments for the employee
  - for a period that consists of or includes the relevant period; or
  - for periods that, when considered together, consist of or include the relevant period.

Part 3 – Jobkeeper enabling agreements

See Fair Work Act ss.789GG, 789GJ

An employer that is entitled to jobkeeper payments for an employee can make an agreement with the employee about the days or times the employee will work, and an agreement about the employee taking paid annual leave, including at half pay.

The Minister for Industrial Relations has the power to exclude one or more specified employers from making agreements about days or times of work under s.789GG, or about annual leave under s 789GJ,[11] but this has not yet occurred.

Days or time of work

See Fair Work Act s.789GG

If an employer qualifies for the jobkeeper scheme and is entitled to one or more jobkeeper payments for an employee, the employer may ask the employee to make an agreement with the employer about performing their duties on different days or at different times compared with the employee's ordinary days or times of work.

The employee:

- must consider the request, and
- must not unreasonably refuse the request.

The agreement is authorised if:

- the agreement is in writing
- the employer qualified for the jobkeeper scheme when the agreement was made
- the performance of the employee's duties on those days or at those times is safe, having regard to (without limitation) the nature and spread of COVID-19, and 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 with the employee's ordinary hours of work), and
- the employer becomes entitled to one or more jobkeeper payments for the employee
  - for a period that consists of or includes the relevant period; or
  - for periods that, when considered together, consist of or include the relevant period.

[11] Fair Work act s.789GX(d) and (e)

Annual leave

See Fair Work Act s.789GJ and 789GS

If an employer qualifies for the jobkeeper scheme and is entitled to one or more jobkeeper payments for the employee, the employer may ask the employee to take paid annual leave.

The employer can only make such a request if it will not result in the employee having a balance of paid annual leave of fewer than two (2) weeks.

The employee:

- must consider the request; and
- must not unreasonably refuse the request.

An employer and an employee may also agree in writing to the employee taking twice as much paid annual leave, at half the employee's rate of pay. An agreement is authorised if:

- the agreement is in writing
- the employer qualified for the jobkeeper scheme when the agreement was made, and
- the employer becomes entitled to one or more jobkeeper payments for the employee
  - for a period that consists of or includes the relevant period; or
  - for periods that, when considered together, consist of or include the relevant period.

If an employee agrees to take paid annual leave at half pay:

- the employee accrues annual leave entitlements, and
- redundancy pay and payment in lieu of notice of termination are calculated,

as if the agreement had not been made.

Part 4 – Employer payment obligations

Wage condition

See Fair Work Act s.789GD and Payment and Benefit Rules s.10

To be entitled to a jobkeeper payment for an eligible employee for a fortnight an employer must pay amounts totalling at least the $1,500 for the fortnight to or in respect of the eligible employee (the 'wage condition'). Employers cannot claim the jobkeeper payment unless they have already paid the employee. Failure to meet the wage condition means an employer may be liable for civil penalties.

The total of $1,500 includes:

- salary, wages, commission, bonus or allowances paid to the employee
- tax withheld
- salary sacrifice superannuation contributions, and
- agreed deductions.[12]

What is a 'jobkeeper fortnight'?

Jobkeeper fortnights are defined in s.6(5) of the Payment and Benefit Rules. The relevant fortnights, for the purposes of the jobkeeper scheme, are:

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

If the employer does not comply with the wage condition, they contravene a civil remedy provision.

[12] See the Explanatory Memorandum to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020*, p.17

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

Example

The following example is taken from the Explanatory Memorandum to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.*

Jo is employed as a waiter in Anna's restaurant. Anna's restaurant has reduced operations to takeaway only because of Coronavirus restrictions. Anna qualifies for the jobkeeper scheme in relation to Jo, and gives Jo a jobkeeper enabling stand down direction not to attend work for 4 weeks, compared to her usual roster of 40 hours per week.

Anna is required to ensure Jo is paid the appropriate value of jobkeeper payments ($3000) during the four week jobkeeper enabling stand down period (section 789GD, which contains the wage condition obligation).

Minimum payment guarantee

See Fair Work Act s.789GDA

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

- the amount of jobkeeper payment payable to the employer for the employee for the fortnight, or
- the amounts payable to the employee in relation to the performance of work during the fortnight.

Amounts payable to the employee in relation to the performance of work during the fortnight include the following, if they become payable in respect of the fortnight:

- incentive-based payments and bonuses
- loadings
- monetary allowances
- overtime or penalty rates, and
- leave payments.

If the employer does not meet the minimum payment guarantee, they contravene a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

Hourly rate of pay guarantee

See Fair Work Act s.789GDB

If a jobkeeper enabling stand down direction applies to an employee, the employer must ensure that the employee's base rate of pay, worked out on an hourly basis, is not less than the base rate of pay, worked out on an hourly basis, that would have been applicable to the employee if the direction had not been given to the employee.

If a direction in relation to duties of work applies to an employee, the employer must ensure that the employee's hourly base rate of pay is not less than the greater of the following:

- the hourly base rate of pay that would have applied to the employee if the direction had not been given to the employee, or
- the hourly base rate of pay that is applicable to the duties the employee is performing.

Example

The following example is taken from the Explanatory Memorandum to the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020.*

Rachel works as an administrator for a manufacturing business whose retail operations have moved online as a result of significantly reduced shopfront demand and a 30 per cent reduction in turnover, following the Coronavirus outbreak. Rachel's employer qualifies for the jobkeeper scheme in relation to Rachel and gives her a jobkeeper enabling stand down direction under section 789GDA that reduces her ordinary hours of work from 38 to 32 hours per week. Rachel's contractual base pay rate is $30 per hour, which cannot be reduced for her hours of work, regardless of how many hours she is directed to work (section 789GDB, which contains the hourly rate of pay guarantee).

As a result of the jobkeeper enabling stand down direction reducing her hours, Rachel's fortnightly pay has reduced from $2280 ($30/hr multiplied by 76 hours worked in a fortnight) to $1920 ($30/hr multiplied by 64 hours worked in a fortnight).

Rachel must be paid for hours she worked, and as her reduced fortnightly pay is still higher that the value of the fortnightly jobkeeper payment ($1,500) she must be paid that higher amount (section 789GDA, which contains the minimum payment guarantee).

However, under the jobkeeper scheme, Rachel's employer can apply the value of the jobkeeper payment towards her fortnightly pay.

If the employer does not meet the hourly rate of pay guarantee, they contravene a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

Part 5 – Protections

See Fair Work Act ss.789GXA, 789GY, 789GZ and 789GZA

Part 6-4C contains a number of protections for employees.

An employer is prohibited from purporting to give a jobkeeper enabling direction if the direction is not authorised by Part 6-4C and the employer knows the direction is not authorised. This is a civil penalty provision.

Part 3-1 of the Fair Work Act prohibits an employer taking adverse action against an employee because of the employee's workplace rights. Workplace rights under Part 6-4C include:

- an employee's benefit arising because of their employer's obligation to satisfy the wage condition in accordance with s.789GD
- an employee's agreement or disagreement to perform duties on different days or at different times in accordance with s.789GG(2)
- an employee's agreement or disagreement to take paid annual leave in accordance with a request under s.789GJ(1), or to take annual leave at half pay in accordance with s.789GJ(2), and
- an employee's request in relation to secondary employment and training under s.789GU.

Part 6-4C operates subject to the following sections and parts of the Fair Work Act:

- Division 2 of Part 2-9, which deals with payment of wages
- Part 3-2, which deals with unfair dismissal
- Part 3-1 (general protections) and s.772 (employment not to be terminated on certain grounds).

Part 6-4C also operates subject to:

- Commonwealth, State or Territory anti-discrimination law
- laws that deal with health and safety obligations of employers or employees
- workers' compensation laws, and
- a person's right to be represented, or collectively represented, by an employee organisation (a union) or an employer organisation.

Giving a jobkeeper enabling direction does not amount to a redundancy.

Part 6 – Disputes the Commission cannot assist with

The Commission is able to assist with disputes about the operation of Part 6-4C of the Fair Work Act. The Commission cannot assist with all disputes in relation to the jobkeeper payment scheme.

Entitlement to jobkeeper payments

The Commission cannot assist with disputes about decisions of the Commissioner of Taxation as to whether an employer is entitled to receive jobkeeper payments. Objections to such decisions are dealt with in the manner set out in Part IVC of the Taxation Administration Act 1953. This includes review by the Administrative Appeals Tribunal, and appeal to the Federal Court of Australia.

For information on disputes about jobkeeper eligibility, see 'Dispute or object to an ATO decision' on the ATO's website at https://www.ato.gov.au/General/Dispute-or-object-to-an-ATO-decision.

Employers refusing to apply for jobkeeper payments

The Commission cannot assist where an employer refuses to apply for jobkeeper payments.

Disputes about underpayments

The Commission can deal with disputes under the dispute resolution procedure in an enterprise agreement or modern award (see ss.738-739 of the Fair Work Act), but the Commission cannot generally assist with claims for underpayment of wages and entitlements, including payments under the jobkeeper scheme.

You can contact the Fair Work Ombudsman for information and advice about claims involving underpayment – see www.fairwork.gov.au.

Part 7 – Applications to deal with a dispute about the operation of Part 6-4C

See Fair Work Act s.789GV, *Fair Work Commission Rules 2013* rule 8

Section 789GV provides that the Commission may deal with a dispute about the operation of Part 6-4C of the Fair Work Act.

An application for the Commission to deal with a dispute about the operation of Part 6-4C of the Fair Work Act can be made by lodging a completed and signed Form F13A – *Application for the Commission to deal with a jobkeeper dispute (coronavirus economic response)*.

There is no fee for making an application to the Commission to deal with a jobkeeper dispute.

Links to application form

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

www.fwc.gov.au/documents/forms/form_f13a.docx (Word)
www.fwc.gov.au/documents/documents/forms/form_f13a.pdf (PDF)

All forms available on the Commission's Forms webpage
www.fwc.gov.au/about-us/resources/forms

Who can make an application

You can apply to the Commission to deal with a jobkeeper dispute under the coronavirus economic recovery provisions in the Fair Work Act if you are:

- a national system employee
- a national system employer
- an employee organisation (a union)
- an employer organisation.

A national system employee is employed, or usually employed, by a national system employer (see s.13 of the Fair Work Act). In some circumstances, textile, clothing and footwear industry contract outworkers are taken to be national system employees (see s.789BB of the Fair Work Act).

A national system employer is an employer covered by the national workplace laws (see s.14 of the Fair Work Act).

Who is covered by national workplace relations laws?

The national workplace relations system covers:

- all employees in Victoria (with limited exceptions in relation to State public sector employees), the Northern Territory and the Australian Capital Territory
- all employees on Norfolk Island, the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands
- those employed by private enterprise in New South Wales, Queensland, South Australia and Tasmania
- those employed by a constitutional corporation in Western Australia (including Pty Ltd companies) – this may include some local governments and authorities
- those employed by the Commonwealth or a Commonwealth authority, and
- waterside employees, maritime employees, or flight crew officers in interstate or overseas trade or commerce.

Amending an application

Section 586 of the Fair Work Act provides a power for the Commission to correct or amend an application, or waive an irregularity in the form or manner in which an application is made.[13]

An applicant can apply to the Commission to amend an application if they have made a mistake on the form such as misspelling the name or not providing the full name of the employer. In certain circumstances, this power may also be used to substitute the name of the employer.[14]

Responding to an application

When a person lodges a Form F13A – *Application for the Commission to deal with a jobkeeper dispute (coronavirus economic response*), the Commission will serve a copy on the Respondent named in the application. The Commission usually does this by emailing the application to the email address listed in the Form F13A.

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[13] Fair Work Act s.586; see *Narayan v MW Engineers Pty Ltd* [2013] FWCFB 2530 (Ross J, Sams DP, Bull C, 29 April 2013) at para. 6, [(2013) 231 IR 89].

[14] See for e.g. *Djula v Centurion Transport Co. Pty Ltd* [2015] FWCFB 2371 (Catanzariti VP, Harrison SDP, Bull C, 12 May 2015) at para. 28.

The matter will then be allocated to a Commission Member to deal with. The Commission Member will make directions about how the Respondent must respond to the application.

Objecting to an application

The Commission can only deal with jobkeeper disputes that fall within its powers, also known as its 'jurisdiction'. If a respondent believes that the Commission does not have jurisdiction to deal with the application, or that the applicant is not eligible to make the application, then the respondent can make a jurisdictional objection.

For example, the respondent could make a jurisdictional objection if:

- the applicant is not a person or organisation that can make an application (e.g. they are not a national system employer), or
- the dispute is not about the operation of Part 6-4C of the Fair Work Act (such as a dispute about whether an employer qualifies for the jobkeeper scheme).

By making a jurisdictional objection, the respondent is saying that the Commission does not have the power to deal with the dispute. Making a jurisdictional objection will NOT stop the jobkeeper dispute application. Jurisdictional objections must be determined by the Commission. This is done by a member holding a conference or hearing and making a formal decision. A respondent may be required to provide evidence and/or submissions on its objections.

Discontinuing an application

📖 See Fair Work Act s.588

An applicant may discontinue the application in accordance with the procedural rules, whether the matter has settled or not.[15]

How to file a notice of discontinuance

There are two ways to discontinue a matter before the Commission. A signed 'Notice of Discontinuance' [Form F50] can be lodged with the Commission to discontinue the application. A copy of the signed Notice of Discontinuance must then be served on the respondent. The Member dealing with the application may dispense with the requirement to lodge a Notice of Discontinuance and accept discontinuance orally or by some other means.[16]

[15] Fair Work Act s.588.

[16] Fair Work Commission Rules 2013, rules 6 and 10.

Links to form

Form F50 – Notice of Discontinuance

- www.fwc.gov.au/documents/forms/form_f50.docx (Word)
- www.fwc.gov.au/documents/documents/forms/form_f50.pdf (PDF)

All forms available on the Commission's 'Forms' webpage
www.fwc.gov.au/about-us/resources/forms

Part 8 – Commission processes

General information

See Fair Work Act ss.577, 578, 585 – 595, and 789GV

The Fair Work act sets out various requirements as to how the Commission may proceed in dealing with a dispute about the operation of Part 6-4C of the Fair Work Act.

The Commission may, except as provided by the Fair Work Act, inform itself in relation to any matter before it in such manner as it considers appropriate.[17]

The Commission must perform its functions and exercise its powers in a manner that:

- is fair and just
- is quick, informal and avoids unnecessary technicalities
- is open and transparent, and
- promotes harmonious and cooperative workplace relations.

In performing its functions or exercising powers in relation to a jobkeeper dispute, the Commission must take into account:

- the objects of the Fair Work Act and the objects of Part 6-4C of the Act
- equity, good conscience and the merits of the matter, and
- the need to respect and value the diversity of the work force by helping to prevent and eliminate discrimination on the basis of race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.[18]

The Commission may deal with a dispute about the operation of Part 6-4C of the Fair Work Act by:

- mediation or conciliation (helping parties to agree on how to resolve the dispute)
- a Commission Member making a recommendation or expressing an opinion,
- arbitration by a Commission Member (making a decision and, if necessary, issuing an order).

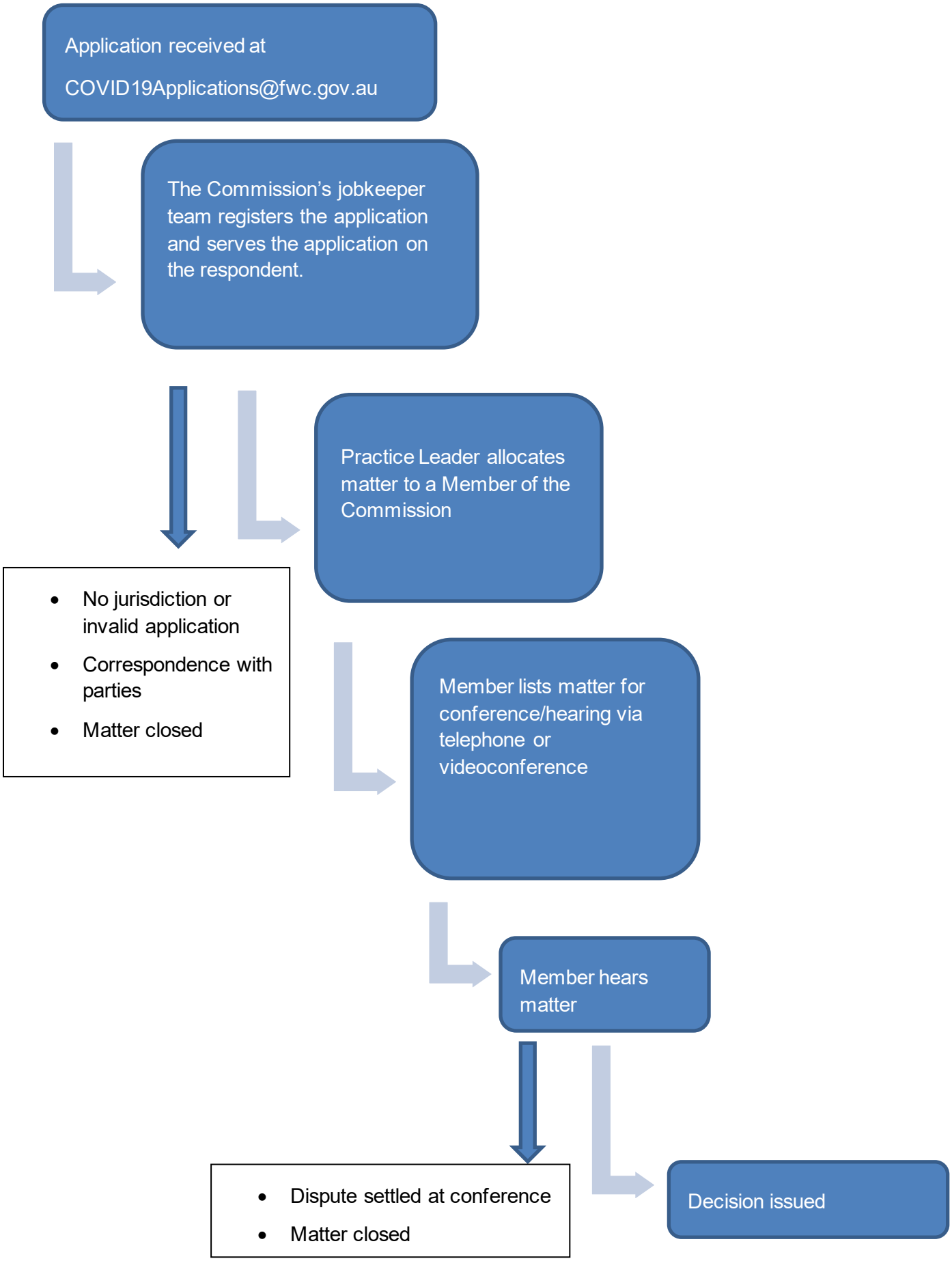
Commission conferences, sometimes known as mediation or conciliation, are conducted in private, unless the Commission Member dealing with the matter directs that they be conducted in public. This means that members of the public are excluded from the conference.

Commission hearings must be held in public, subject to s.593(3) (see 'confidentiality orders').

The chart on the next page sets out the process that the Commission will normally follow when it receives an application to deal with a jobkeeper dispute.

[17] Fair Work Act s.590.

[18] Fair Work Act s.578.


Application received at COVID19Applications@fwc.gov.au
The Commission's jobkeeper team registers the application and serves the application on the respondent.
Practice Leader allocates matter to a Member of the Commission
No jurisdiction or invalid application
Correspondence with parties
Matter closed
Member lists matter for conference/hearing via telephone or videoconference
Member hears matter
Dispute settled at conference
Matter closed
Decision issued

Conferences and hearings during the COVID-19 pandemic

The Commission will hold all conciliations, hearings and conferences by phone or videoconference where possible.

Some cases may also be dealt with 'on the papers'. This means a Commission Member will deal with your case using the written materials you and the other parties have lodged. If this happens, the Commission will not need oral submissions or evidence.

The Commission Member dealing with your matter will contact you if they decide to deal with your case on the papers.

Procedural issues

Confidentiality orders

 See Fair Work Act ss.593–594

The Commission is generally required to perform its functions and exercise its powers in a manner that is open and transparent,[19] and conducts proceedings in a manner that is consistent with the principles of open justice.[20] Commission hearings are normally required to be public,[21] and the Commission is required to publish its decisions.[22]

The rationale for open justice has been summarised as follows:

'The reason for the principle of open justice is that, if the proceedings of courts of justice are fully exposed to public and professional scrutiny and criticism, and interested observers are able to follow and comprehend the evidence, the submissions and the reasons for judgment, then the public administration of justice will be enhanced and confidence in the integrity and independence of the courts will be maintained. Not only does the conduct of proceedings publicly and in open view assist in removing doubts and misapprehensions about the operation of the system, but it also limits the opportunity for abuse and injustice by those involved in the process, by making them publicly accountable. Equally, public scrutiny operates as a disincentive to false allegations and as a powerful incentive to honest evidence.' [23][citations omitted]

There are limited exceptions to the principle of open justice. In particular, the Commission has power to make orders:

- that all or part of a hearing be held in private,

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[19] Fair Work Act s.577(c).

[20] United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board [2017] FWCFB 2400 at [34].

[21] Fair Work Act, s.593

[22] Fair Work Act s.601.

[23] Seven Network (Operations) Limited & Ors v James Warbuton (No 1) [2011] NSWSC 385 at [2]

- restricting the persons who may be present at a hearing,
- prohibiting or restricting the publication of the names and addresses of persons appearing at the hearing, and
- prohibiting or restricting the publication or disclosure of evidence given at the hearing, documents referred to in the proceedings, and the Commission's decision or reasons in relation to the matter.[24]

Jobkeeper disputes may involve disclosure of sensitive business information and employees' personal information, and a party may seek confidentiality orders under s.593(3) or 594(1).

While the Commission has discretion to make orders under s.593(3) or s.594(1), departure from the principle of open justice is only justified where it would frustrate the administration of justice by unfairly damaging some material private or public interest.[25] Open justice considerations are not to be applied in a vacuum and need to be considered in the context of the express power to prohibit or restrict publication of certain material having regard to its confidential nature or for any other reason and the circumstances of a particular case.[26]

Representation by lawyers and paid agents

 See Fair Work Act ss.12 and 596, Fair Work Commission Rules 2013 r 11–12A

A party to a jobkeeper dispute requires permission of the Commission to be represented by a lawyer or paid agent at a conference or hearing, unless they are represented by a lawyer or paid agent covered by s.596(4) of the Fair Work Act – see s.596 of the Fair Work Act and rule 12 of the *Fair Work Commission Rules 2013.*

Relevantly, a person's lawyer or paid agent is covered by s.596(4) of the Fair Work Act if the lawyer or paid agent is an employee or officer of the person, or an employee or officer of:

- a registered organisation,
- an association of employers that is not registered under the *Fair Work (Registered Organisations) Act 2009*, or
- a peak council

that is representing the person.

The *Fair Work Commission Rules 2013* also set out when the Commission must be notified that a person is represented, or is no longer represented, by a lawyer or paid agent.

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[24] Fair Work Act ss.593–594.

[25] *United Firefighters' Union of Australia v Metropolitan Fire and Emergency Services Board* [2017] FWCFB 2500 at [34].

[26] *Bowker and Others v DP World Melbourne Limited T/A DP World and Others* [2015] FWC 4542 (Gostencnik DP, 6 July 2015) at para. 15.

The **Practice note: Lawyers & paid agents** provides procedural guidance on when and how the Commission is notified that a lawyer or paid agent acts or has ceased to act for a person, and when and how permission to be represented by a lawyer or paid agent can be sought. Go to www.fwc.gov.au/resources/practice-notes/lawyers-and-paid-agents.

Part 9 – Evidence

See Fair Work Act ss.590 and 591

Section 590 of the *Fair Work Act 2009* (the Fair Work Act) outlines the ways in which the Fair Work Commission (the Commission) may inform itself including by:

- requiring a person to attend the Commission
- requiring written and oral submissions
- requiring a person to provide copies of documents
- taking evidence under oath or affirmation
- conducting inquiries or undertaking research, or
- holding a conference or a hearing.

Section 591 of the Fair Work Act states that the Commission is not bound by the rules of evidence and procedure (whether or not the Commission holds a hearing).

Although the Commission is not bound by the rules of evidence, they are relevant and cannot be ignored where doing so would cause unfairness between the parties.[27]

The rules of evidence 'provide general guidance as to the manner in which the Commission chooses to inform itself'.[28]

Commission members are expected to act judicially and in accordance with 'notions of procedural fairness and impartiality'.[29]

Commission members are ultimately expected to get to the heart of the matter as quickly and effectively as possible, without unnecessary technicality or formality.[30]

Orders to attend and orders for production of documents

See Fair Work Act s.590, *Fair Work Commission Rules 2013* rules 53 and 54

The Commission can order a person to attend Commission proceedings or order a person to produce documents, so as to obtain information relevant to a matter before it. Orders to

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[27] *Re Construction, Forestry, Mining and Energy Union* PR935310 (AIRC, Ross VP, 25 July 2003) at para. 36.

[28] *Australasian Meat Industry Employees' Union, The v Dardanup Butchering Company Pty Ltd* [2011] FWAFB 3847 (Lawler VP, Hamberger SDP, Gay C, 17 June 2011) at para. 28, [(2011) 209 IR 1]; citing *Hail Creek Coal Pty Ltd v Construction, Forestry, Mining and Energy Union* PR948938 (AIRCFB, Ross VP, Duncan SDP, Bacon C, 12 July 2004) at paras 47–50, [(2004) 143 IR 354].

[29] *Coal & Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 25, [(2011) 192 FCR 78]; Fair Work Commission, 'Member Code of Conduct' (1 March 2013), at p. 2.

[30] ibid.

produce assist the Commission to make informed decisions based on reliable evidence and facilitate efficient conduct of matters before the Commission.

An application for an order to attend can be made by lodging a completed and signed Form F51 – *Application for an order requiring a person to attend Fair Work Commission*.

An application for an order to produce documents can be made by lodging a completed and signed Form F52 – *Application for an order requiring production of documents etc to Fair Work Commission.*

The **Practice note: Orders to attend & orders to produce** provides a general explanation of the usual process for requesting, making and giving effect to orders to attend and orders to produce.

Go to: https://www.fwc.gov.au/resources/practice-notes/orders-attend-orders-produce.

Links to application forms

Form F51 – Application for an order requiring a person to attend before the Commission

- www.fwc.gov.au/documents/forms/form_F51.docx (Word)
- www.fwc.gov.au/documents/documents/forms/form_f51.pdf (PDF)

Form F52 – Application for an order for production of documents, records or information to the Commission

- www.fwc.gov.au/documents/forms/form_F52.docx (Word)
- www.fwc.gov.au/documents/documents/forms/form_f52.pdf (PDF)

All forms available on the Commission's 'Forms' webpage: www.fwc.gov.au/about-us/resources/forms

Part 10 – What are the outcomes of Commission dispute resolution under Part 6-4C?

See Fair Work Act ss.595 and 789GV

The Commission may deal with a dispute about the operation of Part 6-4C of the Fair Work Act by:

- mediation or conciliation conducted by a Commission Member (helping parties to agree on how to resolve the dispute)
- a Commission Member making a recommendation or expressing an opinion
- a Commission Member arbitrating.

The Commission may make any of the following orders in dealing with a dispute under Part 6-4C:

- an order that the Commission considers desirable to give effect to a jobkeeper enabling direction
- an order setting aside a jobkeeper enabling direction
- an order setting aside a jobkeeper enabling direction and substituting a different jobkeeper enabling direction
- any other order that the Commission considers appropriate.

Although the Commission can continue to deal with disputes about the operation of Part 6-4C after 28 September 2020,[31] the Commission must not make an order giving effect to a jobkeeper direction or substituting a different jobkeeper direction on or after 28 September 2020 (and any order giving effect to a jobkeeper direction ceases to have effect at the start of 28 September 2020).[32]

Contravening an order of the Commission

A person must not contravene a term of an order dealing with a dispute about the operation of Part 6-4C of the Fair Work Act.[33] This is a civil remedy provision.

A **civil remedy provision** is a provision of the Fair Work Act that if breached, means that the person affected can apply to a Court for an order for a financial penalty against the alleged wrong-doer, or any other order the Court considers appropriate such as an injunction.

[31] Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020, Part 2 of Schedule 1.

[32] Fair Work Act s.789GV.

[33] Fair Work Act s.789GW.

An application regarding a breach of a civil remedy provision is made to the Federal Court, the Federal Circuit Court or an eligible State or Territory court. This application may be made by an employee, an employee organisation or a Fair Work inspector.[34] To seek the assistance of a Fair Work inspector to enforce an order, a party should contact the Fair Work Ombudsman.

An application regarding a breach of a civil remedy provision must be made within six years of the alleged contravention.[35]

Appeals

See Fair Work Act s.604

The following information is limited to providing general guidance for appeals.

For information about lodging an appeal, stay orders, appeals directions and the appeals process please refer to the Appeal Proceedings Practice Note.

Overview

A person who is aggrieved by a decision made by the Commission (other than a decision of a Full Bench or Expert Panel) may appeal the decision, with the permission of the Commission.[36]

A **person who is aggrieved** is generally a person who is affected by a decision or order of the Commission and who does not agree with the decision or order. The term can extend beyond people whose legal interests are affected by the decision in question to people with an interest in the decision beyond that of an ordinary member of the public, such as, in some circumstances, a union or an employer association.[37]

In determining whether a person is a 'person aggrieved' for the purposes of exercising a statutory right of appeal, it is necessary to consider the relevant statutory context.[38]

[34] Fair Work Act s.539(2).

[35] Fair Work Act s.544.

[36] Fair Work Act s.604(1).

[37] See for e.g. *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited T/A Coles and Bi Lo* [2015] FWCFB 7090 (Watson VP, Kovacic DP, Roe C, 27 October 2015).

[38] *Tweed Valley Fruit Processors Pty Ltd v Ross and Others* [1996] IRCA 407 (16 August 1996).

Intervention

There is no provision of the Fair Work Act expressly dealing with intervention however the Commission has used the broad procedural power in s.589(1) to empower it to permit intervention in an appropriate case.[39]

Time limit for appeal – 21 days

An appeal must be lodged with the Commission **within 21 days** after the date the decision being appealed was issued.[40] If an appeal is lodged late, an application can be made for an extension to the time limit.[41]

Considerations

In each appeal, a Full Bench of the Commission needs to determine two issues:

- whether permission to appeal should be granted, and
- whether there has been an error in the original decision.

Permission to appeal

The Fair Work Act requires the Commission to grant permission to appeal if the Commission is satisfied that it is in the public interest to do so.[42]

Public interest

The task of assessing whether the public interest test has been met is a discretionary one involving a broad value judgment.[43]

Some considerations that the Commission may take into account in assessing whether there is a public interest element include:

- where a matter raises issues of importance and general application
- where there is a diversity of decisions so that guidance from an appellate court is required
- where the original decision manifests an injustice or the result is counter intuitive, or

[39] *J.J. Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963 (Lawler VP, O'Callaghan SDP, Bissett C, 23 December 2010) at para. 9.

[40] Fair Work Commission Rules r 56(2)(a)–(b).

[41] Fair Work Commission Rules r 56(2)(c).

[42] Fair Work Act s.604(2).

[43] *Coal and Allied Mining Services Pty Ltd v Lawler* [2011] FCAFC 54 (19 April 2011) at para. 44, [(2011) 192 FCR 78].

- that the legal principles applied appear disharmonious when compared with other recent decisions dealing with similar matters.[44]

The public interest test is not satisfied simply by the identification of error or a preference for a different result.[45]

Grounds for appeal

Error of law

An error of law of law may be a jurisdictional error, which means an error concerning the Commission's power to do something, or it may be a non-jurisdictional error concerning any question of law which arises for decision in a matter.

In cases involving an error of law, the Commission is concerned with the correctness of the conclusion reached in the original decision, not whether that conclusion was reasonably open.[46]

Error of fact

An error of fact can exist where the Commission makes a decision that is 'contrary to the overwhelming weight of the evidence'.[47]

In considering whether there has been an error of fact, the Commission will consider whether the conclusion reached was reasonably open on the facts.[48] If the conclusion was reasonably open on the facts, then the Full Bench cannot change or interfere with the original decision.[49]

It is not enough to show that the Full Bench would have arrived at a different conclusion to that of the original decision maker.[50] The Full Bench may only intervene if it can be demonstrated that some error has been made in exercising the powers of the Commission.[51]

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[44] *GlaxoSmithKline Australia Pty Ltd v Makin* [2010] FWAFB 5343 (Kaufman SDP, Ives DP, Spencer C, 23 July 2010) at para. 27, [(2010) 197 IR 266].

[45] See e.g. *Qantas Airways Limited v Carter* [2012] FWAFB 5776 (Harrison SDP, Richards SDP, Blair C, 17 July 2012) at para. 58, [(2012) 223 IR 177].

[46] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

[47] *Azzopardi v Tasman UEB Industries Ltd* (1985) 4 NSWLR 139, at pp. 155–156.

[48] *SPC Ardmona Operations Ltd v Esam* PR957497 (AIRCFB, Ross VP, Hamilton DP, Hingley C, 20 April 2005) at para. 40, [(2005) 141 IR 338].

[49] *House v The King* [1936] HCA 40 (17 August 1936), [(1936) 55 CLR 499].

[50] ibid.

[51] ibid.

Links to application form

Form F7 – Notice of Appeal:

- www.fwc.gov.au/documents/forms/Form_F7.docx (Word)
- www.fwc.gov.au/documents/forms/Form_F7.pdf (PDF)

All forms available on the Commission's Forms webpage www.fwc.gov.au/resources/forms

Staying decisions

See Fair Work Act s.606

If the Commission hears an appeal from, or conducts a review of a decision, the Commission may order that the operation of the whole or part of the decision be stayed by making a stay order.

The stay order can be made on any terms and conditions that the Commission considers appropriate, until a decision in relation to the appeal or review is made, or the Commission makes a further order.

If a Full Bench is hearing the appeal or conducting the review, a stay order in relation to the appeal or review may be made by:

- the Full Bench
- the President
- a Vice President, or
- a Deputy President.

Role of the Court

Enforcement of Commission orders

If a person does not comply with an order in relation to a jobkeeper dispute then:

- an employee
- an employee organisation, or
- an inspector;

may seek enforcement of the Commission's order through civil remedy proceedings in:

- the Fair Work Division of the Federal Circuit Court of Australia
- the Fair Work Division of the Federal Court of Australia, or
- an eligible State or Territory Court.[52]

[52] Fair Work Act s.539, table item 40.

Failure to comply with an order in relation to a jobkeeper dispute may result in the Court imposing a pecuniary penalty or making other orders.

Normally an order from the Commission will provide a timeframe within which the order must be complied with. It is advisable to wait until the timeframe has lapsed before seeking enforcement of the order.

Types of order made by the Court

 See Fair Work Act ss.545, 546 and 570

The Federal Court or the Federal Circuit Court may make any order the court considers appropriate if the court is satisfied that a person has contravened, or proposes to contravene, a civil remedy provision.

Orders the Federal Court or Federal Circuit Court may make include the following:

- an order granting an injunction, or interim injunction, to prevent, stop or remedy the effects of a contravention
- an order awarding compensation for loss that a person has suffered because of the contravention (which can include interest).

Pecuniary penalty orders

The Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers is appropriate if the court is satisfied that the person has contravened a civil remedy provision.

The pecuniary penalty for an individual must not be more than the maximum penalty for the relevant contravention set out in section 539 of the Fair Work Act.

In the case of a body corporate, the maximum penalty is five times the maximum for an individual.

A **penalty unit** is used to define the amount payable for pecuniary penalties.

For example, the maximum number of penalty units for contravening section 789GXA of the Fair Work Act (which prohibits an employer misusing jobkeeper enabling directions) is 600 penalty units.

From 1 July 2017 a penalty unit was $210.[53]

- for an individual – 600 penalty units = $126,000
- for a body corporate – 5 x 600 penalty units = $630,000

[53] Crimes Act 1914 (Cth) s.4AA.

The court may order that the pecuniary penalty, or a part of the penalty, be paid to:

- the Commonwealth
- a particular organisation (such as a union), or
- a particular person.

Costs orders

A party to proceedings (including an appeal) in a court in relation to a matter arising under the Fair Work Act may be ordered by the court to pay costs incurred by another party to the proceedings.

The party may be ordered to pay the costs only if the court is satisfied that:

- the party instituted the proceedings vexatiously or without reasonable cause
- the party's unreasonable act or omission caused the other party to incur the costs, or
- the party unreasonably refused to participate in a matter before the Commission, and the matter arose from the same facts as the proceedings.

Attachment 1 – Glossary of terms

The glossary explains common terms used in this benchbook.

Adjournment	To suspend or reschedule proceedings (such as a conciliation, conference or hearing) to another time or place, or indefinitely.
Appeal	An application for a Full Bench of the Commission to review a decision of a single member of the Commission and determine if the decision was correct. A person must seek the permission of the Commission to appeal a decision.
Applicant	A person who makes an application to the Commission.
Application	The way of starting a case before the Commission. If there is a form prescribed by the *Fair Work Commission Rules 2013* (Cth), that form must be used.
Arbitration	The process by which a member of the Commission will hear evidence, consider submissions and then make a decision in a matter. Arbitration generally occurs in a formal hearing and generally involves the examination and cross-examination of witnesses.
Commission Member	Someone appointed by the Governor-General as a Member of the Commission. A member may be a Commissioner, a Deputy President, a Vice President or the President.
Conciliation	An informal method of resolving a dispute by helping the parties to reach a settlement, which may involve making observations and recommendations. An independent conciliator can help the parties explore options for a resolution without the need for a determinative conference or hearing before a member.
Conference	A proceeding conducted by a Commission Member which is generally held in private.
Court	In this benchbook, a reference to 'Court' generally means the Federal Court or Federal Circuit Court.

Decision	A determination made by a single member or Full Bench of the Commission[54]. A decision in relation to a matter before the Commission will generally include the names of the parties and outline the basis for the application, comment on the evidence provided and include the judgment of the Commission in relation to the matter.
Error of law	An error of law is a common ground for legal review. It occurs when a member of the Commission has misunderstood or misapplied a principle of law; for example, by applying the wrong criteria, or asking the wrong question.
Evidence	Information which tends to prove or disprove the existence of a particular belief, fact or proposition. Certain evidence may or may not be accepted by the Commission, however the Commission is not bound by the rules of evidence. Evidence is usually set out in an affidavit or given orally by a witness in a hearing.
Explanatory Memorandum	An Explanatory Memorandum is a document that provides additional information about how proposed legislation is expected to operate and details about individual sections and provisions of that legislation.
Fair Work Act	The *Fair Work Act 2009* (Cth) is Commonwealth legislation dealing with workplace relations in Australia.
Fair work instrument	A fair work instrument means: (a) a modern award; or (b) an enterprise agreement; or (c) a workplace determination; or (d) a Commission order.

[54] The General Manager of the Commission, or a member of staff delegated powers under ss.625 or 671 of the Fair Work Act may also make a decision.

Full Bench	A Full Bench of the Commission comprises at least three Commission members, one of whom must be a presidential member. Full Benches are convened to hear appeals, matters of significant national interest and various other matters specifically provided for in the Fair Work Act. A Full Bench can give a collective judgment if all of its members agree, or independent judgments if the members' opinions differ.
Hearing	A proceeding or arbitration conducted before the Commission which is generally open to the public.
Individual	A natural person.
Jurisdiction	The scope of the Commission's power and what the Commission can and cannot do. The power of the Commission to deal with matters is specified in legislation. The Commission can only deal with matters for which it has been given power by the Commonwealth Parliament.
Lodge	The act of delivering an application or other document to the Commission in a manner provided for in the *Fair Work Commission Rules 2013*.
Matter	Cases at the Commission are referred to as matters.
Mediation	A method of dispute resolution promoting the discussion and settlement of disputes facilitated by an independent mediator.
Member	See Commission Member
Order	A formal direction of the Commission which gives effect to a decision and is legally enforceable.
Outcome	See resolution
Party	A person or organisation involved in a matter before the Commission.
Pecuniary penalty	An order to pay a sum of money which is made by a Court as a punishment.
Practice Leader	The Commission Member who has oversight of one of the Commission's national practice areas. See National practice areas on the Commission's website.

Procedural fairness	Procedural fairness requires that a person whose interests will be affected by a decision receives a fair and reasonable opportunity to be heard before the decision is made. Procedural fairness is concerned with the decision making process followed or steps taken by a decision maker rather than the actual decision itself. The terms 'procedural fairness' and 'natural justice' have similar meaning and can be used interchangeably.
Representative	A person who acts on a party's behalf. This could be a lawyer, a paid agent, an employee or employer organisation or someone else. Generally, a lawyer or paid agent can only represent a party before the Commission with permission of the Commission.
Resolution (or outcome)	An agreed resolution of a dispute. Generally, a negotiated outcome which all parties are satisfied with and bound by.
Respondent	A party responding to an application made to the Commission.
Serving documents	See service
Service (Serve)	Service of a document means delivering the document to another party or their representative, usually within a specified period. Documents can be served in a number of ways. The acceptable ways in which documents can be served are specified in Parts 7 and 8 of the *Fair Work Commission Rules 2013*.
Witness	A person who gives evidence in relation to a situation that they had some involvement in or saw happening. A witness is required to take an oath or affirmation before giving evidence at a formal hearing. The witness will be examined by the party that called them and may be cross examined by the opposing party to test their evidence.

Attachment 2 – Jobkeeper enabling directions checklist

Use this checklist to check that a jobkeeper enabling direction is authorised, has effect and applies to an employee under the Fair Work Act.

- The direction was given after Part 6-4C commenced on 9 April 2020	☐
- The employer qualified for the jobkeeper scheme when the direction was given	☐
- The employee is an eligible employee	☐
- The employer is entitled to one or more jobkeeper payments for the employee for the relevant period - This includes keeping records substantiating any information provided to the ATO in relation to the payment	☐
- The employer has given the employee at least 3 days' **written notice** before giving the direction, or the employee has genuinely agreed to less than 3 days' notice	☐
- The employer has **consulted** the employee (or their representative) about the direction	☐
- The direction is not **unreasonable** in all the circumstances	☐
For a jobkeeper enabling stand down direction:	
- The employee cannot usefully be employed for their normal days or hours during the period of the direction because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19	☐
- The implementation of the direction is safe, having regard to (without limitation) the nature and spread of COVID-19	☐
For a jobkeeper enabling direction about duties of work:	
- If the employee is required to have a licence or qualification in order to perform the duties, the employee has that licence or qualification	☐
- The duties are reasonably within the scope of the employer's business operations	☐
- The duties are safe, having regard to (without limitation) the nature and spread of COVID-19	☐
- The employer has information leading it to reasonably believe the direction is necessary to continue the employment of one or more employees of the employer	☐

For a jobkeeper enabling direction about location of work:	
- The place is suitable for the employee's duties	☐
- If the place is not the employee's home, the employee does not have to travel a distance that is unreasonable in all the circumstances, including the circumstances surrounding the COVID-19 pandemic	☐
- Performing the duties at the location is safe, having regard to (without limitation) the nature and spread of COVID-19, and reasonably within the scope of the employer's business operations	☐
- The employer has information leading it to reasonably believe the direction is necessary to continue the employment of one or more employees of the employer	☐

Attachment 3 – Jobkeeper disputes jurisdictional checklist

The purpose of Part 6-4C of the Fair Work Act is to assist employers that qualify for the jobkeeper scheme to deal with the economic impact of COVID-19. Part 6-4C allows employers that qualify for the jobkeeper scheme and are entitled to jobkeeper payments for an eligible employee to give the employee a 'jobkeeper enabling direction', request the employee agree to change their days or times of work, and request the employee agree to take annual leave (including at half pay), subject to a number of safeguards for employees.

The Commission has power to deal with disputes about the operation of Part 6-4C. The Commission cannot deal with other disputes about the jobkeeper scheme.

Use this checklist to check that the Commission can deal with your jobkeeper dispute. If your dispute does not fit the criteria in the checklist, see the 'Need help?' section on the Commission's website for information about government agencies that may be able to assist. If you still aren't sure, contact us.

1. You are one of the following: See: 'Who can make an application' on pages 21 – 22 of this benchbook for more information.	
- a national system employee - a national system employer - an employee organisation - an employer organisation	☐
2. Your dispute relates to at least one of the following:	
- a jobkeeper enabling stand down direction For example, the dispute could be about: - whether the direction is reasonable in all the circumstances - whether the employer consulted with the employee - whether the jobkeeper enabling stand down direction is safe - whether the employee cannot be usefully employed for their normal days or hours - whether the jobkeeper enabling stand down direction is because of changes to business attributable to COVID-19 or the government's response to it - whether the employer has complied with the hourly rate of pay guarantee - whether the employer has calculated the employee's leave entitlements while the jobkeeper enabling stand down direction is in place as though	☐

the direction had not been made * The examples provided are not exhaustive.	
- a direction about the duties an employee is to perform For example, the dispute could be about: - whether the direction is reasonable in all the circumstances - whether the direction is necessary to continue the employment of one or more of the employer's employees - whether the employer consulted with the employee - whether the direction is safe - whether the duties are within the employee's skill and competency, or the employee has the appropriate licence or qualification to perform the duties - whether the employer has paid the employee the jobkeeper payment, or the amount payable for the duties the employee is performing, whichever is greater * The examples provided are not exhaustive.	☐
- a direction about the location where the employee is to perform work For example, the dispute could be about: - whether the direction is reasonable in all the circumstances - whether the direction is necessary to continue the employment of one or more of the employer's employees - whether the employer consulted with the employee - whether it is safe to perform work in the location - whether the direction requires the employee to travel an unreasonable distance * The examples provided are not exhaustive.	☐
- a request that an employee agree to a change in the days or times when the employee is to work For example, the dispute could be about: - whether performing the duties on the days or at the times requested is safe, or is reasonably within the scope of the employer's business operations - whether the employee has considered the request, or has unreasonably refused the request	☐

* The examples provided are not exhaustive.	
- a request that an employee agree to take annual leave For example, the dispute could be about: - whether the request will mean the employee has a balance of paid annual leave of less than 2 weeks - whether the employee has considered the request, or has unreasonably refused the request * The examples provided are not exhaustive.	☐
- an agreement that the employee take annual leave at half pay For example, the dispute could be about: - whether the employer agreed in writing to the employee taking leave at half pay - whether the employer has calculated the employee's leave entitlements as though the agreement had not been made * The examples provided are not exhaustive.	☐
- an employee's request for secondary employment, training or professional development, where the employer has given a jobkeeper enabling stand down direction For example, the dispute could be about: - whether the employer has considered, or has unreasonably refused, the request * The example provided is not exhaustive.	☐