

# JobKeeper Explored for Borderline Business - Summary of Key Points



Chris Shay - Director

## THE BASIC TEST – WHAT IF I AM BORDERLINE?

What do I do?

1. Know your numbers – now more than ever, get up to date and stay that way. If you can't do it get help.
  - Are you positive that month of March and April don't work?
  - April is not over yet, will it finish the way your think it will?
  - Being up to date is the only way to be accurate with forecasting – more on that later.
  
2. Register and Enrol
  - Enrolment process only requires a few simple questions to be answered – no specific numbers yet.
  - Next week is too late and you will miss April if you do not enrol now.
  - If you are close, select "April" – it then covers you for either the month or the forecasted quarter starting April – i.e. it creates an option.
  - If close, try and work the numbers to satisfy for April 2020 based on actuals – it is all turnover based so should be easy to finalise in early May.
  - By satisfying an actual result for March or April you are in, no question, you only need to satisfy the eligibility test once.
  - If you need to rely on a forecast, that is still OK but do it properly.
  
3. Forecasting
  - Needed if eligibility is going to be based on how we think we perform in the coming 2 months i.e. May & June (we broadly know April by now).
  - Tips on forecasting
    - i. be realistic – understand best case, worst case and likely case.
    - ii. be logical – don't just forecast low and hope, properly consider what is happening and what you are experiencing, seeing, hearing.
    - iii. must be based on a reasonable expectation, considered in the context of the facts and circumstances of your business.
    - iv. Document it – proves your effort and logic if asked to justify later.

## SUMMARY

- If you are close and can work through a way to satisfy on March or April actuals, use that.
- If you need to forecast – do it properly and document reasoning.
- If close then enrol because it is a forecast – ATO is not expecting perfect, just reasonable and fact based.

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## THE ALTERNATIVE TEST

Released 23/04/20 and limited to specific circumstances.

If your business is not covered in the specific alternative tests that have been determined by the ATO, then it is not eligible.

The Alternative Test is not an “applied for” discretion, it is for situations where the ATO understand that the Basic Test, and more importantly the comparable period, are not appropriate.

You only consider these tests, if the comparable period for the Basic Test is not appropriate.

Seven (7) specific situations have been identified where an Alternative Test can be used.

1. New Business - business did not exist in the comparable period
  - Needs to have been established before 1 March 2020
  - Date of commencing business is the important date.
  - Comparable periods can be
    - Monthly average since commencing business
    - Average of previous 3 months
2. Disposals & Acquisitions
  - Covers situations where there has been a disposal or acquisition of part of the business and the businesses turnover was changed.
  - Comparable period can be
    - Month after the month the event occurred
3. Restructure
  - Entity has restructured part or all of their business and the businesses turnover was changed.
  - Comparable period can be
    - Month after the month the event occurred
4. Substantial increase in Turnover
  - Entity has had an increase in turnover of:
    - 50% or more over 12 months immediately before the test period,
    - 25% or more over 6 months immediately before the test period, or
    - 12.5% or more in the 3 months immediately before the test period.
  - Comparable periods can be
    - Average of the 3 months immediately before the test period
5. Effected by drought or other natural disaster
  - The effect of drought or natural disaster in the comparison period in 2019 makes the comparison not relevant.
  - Comparable period can be
    - Same period in the year before the drought or natural disaster was declared.
6. Irregular Turnover
  - Business has irregular turnover e.g. large construction contracts
  - Not intended for cyclical or seasonal businesses

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- Comparable period can be
  - Average of the 12 months immediately before the test period
- 7. Sole Trader or small partnership – sickness, injury or leave
  - Covers situation where the comparable period was a period when the sole trader or partner did not work for all or part of that period due to sickness, injury or leave.
  - Comparable period can be
    - If comparing a month, use the month immediately after the return to work,
    - If comparing a quarter, use the month immediately after the return to work and multiple by 3.
    - Avg of the 12 months immediately before the test period

### WHAT IF I GET IT WRONG?

- It is not OK to manufacture a situation to become involved.
- We should assume that data will be checked with what is lodged in BAS reporting and we should expect that variances will be checked.
- Clearly stated that the regular monthly reporting that will be part of the claim process is not designed to retest eligibility.
- Practically there will be variances – how you respond to any question is the important part.
- Best approach is to be well planned and know your numbers.

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## Danny Clifford - Director

The Explanatory Memorandum introducing the new JobKeeper legislation discusses the importance of the JobKeeper program in the context of 'connectivity' - keeping employees and employers connected so that the transition out of the current restrictive circumstances is efficient and manageable for employers and employees.

The legislation creating the framework for implementing and administering the JobKeeper program is the *Coronavirus Economic Response Package (Payments and Benefits) Bill) 2020* (Payments and Benefits Bill).

At the same time as introducing this Bill, the Government introduced an additional Bill to amend the *Fair Work Act 2009* (Cth).

The amendments to the Fair Work Act provide employers with the management tools to manage their workforces in a flexible and fair manner.

### **JOBKEEPER ENABLING DIRECTIONS**

The amendments to the Fair Work Act apply only to employers and employees who are eligible to participate in the JobKeeper program.

The amendments enable employers to issue two types of directions to their employees. They include:

1. A JobKeeper enabling stand down direction.

This type of direction enables an employer to stand an employee down and then (if appropriate) adjust the employee's hours and days that an employee is required to work.

This direction is designed to apply to those employees who cannot usefully be employed for the employee's ordinary days and hours of work, because of the business changes that are attributable to the COVID 19 pandemic.

In order to affect this direction, the employer must:

- firstly, consult the employee about the stand down and the changes to their days and hours of work;
- secondly, record that consultation process in writing; and
- thirdly, ensure that the changes are safe, having regard to the nature and spread of COVID 19.

Importantly, the amendments to the Fair Work Act also states that:

*If a JobKeeper enabling direction given by an employer under section 789GDC (JobKeeper enabling stand down) applies to an employee of the employer, 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.*

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This direction does not apply to an employee who is taking paid (or unpaid) leave or is otherwise authorised to be absent from work.

### 2. A JobKeeper enabling direction.

This type of direction enables an employer to make changes to an employee's duties, their location of work and / or the employee's days of work.

Similarly, any such direction must be reasonable, safe and within the skillset of the individual (for example, the employee must have the necessary licenses in order for it to be reasonable).

The rules relating to a JobKeeper enabling directions are as follows [note these rules must be satisfied for a direction to be authorised]:

- a. if the direction is unreasonable, then it will not be authorised;
- b. the employer must have information to reasonably believe that the direction is necessary to continue the employment of the employee;
- c. notice of the intention to give the direction is given to the employee in writing, and such notice is given at least three days before the direction is given;
- d. consultation about the direction has occurred;
- e. the direction is made in writing;
- f. the direction will continue until it is withdrawn or revoked by the employer or it is replaced by a new JobKeeper enabling direction.

Specifically, in relation to any agreement by an employee to work different days and times, the employer needs to make sure that:

- performance of duties on different days/ at different times is safe considering the nature and spread of Covi-19 and is reasonably within scope of employer's business operations;
- the employee's usual work hours are not reduced (reducing work hours would require a JobKeeper enabling stand down direction).

If an employer asks their employee to make these changes, the employee must consider the request, and cannot refuse it unreasonably. Agreements must be recorded in writing.

### 3. Annual leave request

The new provisions enable an eligible employer:

- to request an eligible employee to take paid annual leave (if they keep a balance of at least 2 weeks);
- to agree in writing with that employee for them to take annual leave at half their usual pay for twice the length of time.

Employees who make an agreement to take annual leave at half pay still accrue their usual leave entitlements for the period the agreement applies as if the agreement had not been made.

Redundancy pay and payment in lieu of notice of termination are also calculated as if the agreement had not been made.

If an employer asks their employee to take annual leave, the employee must consider the request, and cannot unreasonably refuse it.

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## OVERPAYMENT

The concept of overpayment is briefly explored in two scenarios.

1. Firstly, if an employer pays an employee the JobKeeper payment in anticipation of their application for eligibility to the JobKeeper program is successful; and
2. Secondly, if an employer is an eligible employer for the purposes of the JobKeeper program and receives a JobKeeper payment, but that payment is subsequently deemed to be an overpayment.

In both scenarios, careful consideration needs to be given by the employer in managing each situation.

The first scenario is relatively straight forward to the extent that if an employee has been overpaid, then the employer can seek to recover that overpayment from the employee. Importantly, monies should not be deducted from an employee's pay without permission.

The second scenario is more complex.

The Payments and Benefits Bill expressly contemplates overpayments made under the JobKeeper framework. It states:

*Where the Commissioner has overpaid an entity a payment under the framework, the entity must repay the overpaid amount to the Commissioner. This can arise where:*

- *the entity is not entitled to the whole or part of a payment that is made; or*
- *the entity is paid more than the correct amount.*

It is unclear as to when these situations may arise, but from a practical perspective, such a situation may arise, for example if:

- a. an employee is dismissed during a JobKeeper payment period and the employer receives the benefit of the payment that would otherwise go to the employee; or
- b. for one reason or another, the employer is no longer entitled to a JobKeeper payment, such as the failure by the employer to meet its record keeping requirements.

The Payments and Benefits Bill goes on to state that:

- general interest charges will be automatically applied to the overpayment;
- the Commissioner may waive obligation to repay an overpayment and / or it may make a written determination to say that an overpayment is not required to be repaid;
- in some circumstances both the employer and another entity (including an employee) can be deemed to be jointly and severally liable for the overpayment.

Importantly (and relevantly), for an employee to be eligible to participate in the JobKeeper program, the employee must be asked by the employer if they wish to participate and whether they agree to be nominated as an eligible employee for the purposes of the JobKeeper program.

Because the employee's consent is required to participate in the JobKeeper program, the employer should discuss its obligation to repay any payment it receives if it is deemed that the payment to the employer was an overpayment at this time.

Each matter ought to be considered and assessed on case-by-case basis.

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## MANAGING EMPLOYEE SCENARIOS

In each of the three scenarios discussed below, it is important to remember that the JobKeeper program does not displace the ordinary laws that apply to the employer and employee relationship and so both employees and employers ought to be mindful of their ongoing obligations owed to each other.

Three scenarios:

1. *What if an employee refuses to participate at work, notwithstanding the fact that they remain employed and are in receipt of the JobKeeper payment?*

So long as the employer is an eligible employer and has complied with the requirements for issuing a JobKeeper direction, then an employee who fails or refuses to comply with a request to undertake certain work activities, may be in breach of a lawful and reasonable direction.

2. *Can I ask an employee to increase their hours or days of work, so as to reach the \$750 per week value of work in circumstances where they are usually paid less?*

Again, so long as the employer is an eligible employer and has complied with the requirements for issuing a JobKeeper direction, then an employer can request that an employee undertake more work than is usually performed.

It is important however that an employer keep in mind any obligations it might owe to an employee to pay overtime or penalty rates in this situation.

3. *What if an employee is currently on leave (or has been in the past month), and I receive JobKeeper allowance for the period they are/were on leave?*

Nothing changes, the employee gets paid their ordinary leave entitlements and the corresponding leave balance is reduced.

Finally, the ATO has updated its rules by stating that if an employer decides to participate in the JobKeeper program, then all eligible employees must be nominated.

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## Naomi Wilson - Director

While the focus is on JobKeeper Payment at the moment, we can't lose sight of the human element.

Business leaders have an opportunity and a responsibility during this time to be aware of the impact all of this is having on their teams and to take this into consideration in their actions and their communication.

The impact is widespread for companies and their people – recent AHRI survey found:

- 80% of respondents say their company has experienced a decrease in business activity of some kind
- 24% have retrained staff in different arms of their business
- 47% have redeployed staff
- 21% have had to make tough downsizing choices – we believe this figure is likely to be much higher by the end of this, despite JobKeeper Payment

2 key messages we would like to get across today:

- 1) How business leaders can be focused on their people right now; and
- 2) The importance of being deliberate and smart in decisions around staffing

### CONSIDERATIONS FOR RE-ENGAGING EMPLOYEES

JobKeeper is being sold as a saviour to the workforce with a lot of noise around people who were employed as of 1 March and let go able to be re-employed through these payments.

This is great, but we believe you need to be deliberate and smart in how you handle this situation.

If you have employees that were employed on 1 March but you since made redundant, do you want to offer re-employment?

Was the decision purely economic? If so, get them back – you have trained them, worked with them, they have great knowledge in their heads - don't lose that.

Important to gauge their headspace at this point in time - do they understand why you had to let them go, can the relationship be rebuilt? Have this conversation with them!

What about employees who are stood down?

We've been asked by some businesses whether they can choose who to bring back from stand down. It is one-in-all-in. If your business is eligible for JobKeeper Payment, you need to give all eligible employees the opportunity to nominate.



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Aside from that, consider carefully what the impact is on relationships, on morale, on culture and on you as a leader if you have the opportunity to pay someone JobKeeper and appear to want to chose not to.

### MEANINGFUL JOBS

Do you have meaningful work for them to do?

How can you make sure that the JobKeeper Payment is put to good use?

We said in previous webinar that the worst thing that could happen with the JobKeeper Payment is that having employee who are receiving \$1500 a fortnight but are stood down and sitting at home.

Find meaningful work for them. Again, engage them in the conversation, there is information on our website in the [previous webinar](#) to help you.

Don't forget you may have the option of using the new [Fair Work JobKeeper Enabling Directions](#) to only have employees working the hours that make up to \$1500 and having them stood down for the balance of their time if you are not able to afford their normal full wage.

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## Disclaimer

- Being general information, the information in this presentation should never override any Covid-19 advice provided to you by the state or federal governments.
- We strongly encourage you to keep updated on all Covid-19 information provided by the state and federal government. Where it requires your action, we encourage you to take immediate action.