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JOBKEEPER 2.0 – AMENDMENTS AND VARIATIONS TO THE FAIR WORK ACT

INTRODUCTION
On Tuesday, 1 September 2020, the federal government passed legislation to extend the operation of the JobKeeper scheme and consequential amendments to *Fair Work* Act. In a previous TRMC bulletin we outlined the amendments to the wage subsidy scheme that would introduce a two-tiered payment scheme and gradual reduction of those payments.
https://www.therealmediacollective.com.au/jobkeeper-extension-21july-2020/

This document summarises the amendments and extension to the operation of the related terms within the Fair Work Act.

WORKPLACE FLEXIBILITIES POST-SEPTEMBER 2020
From 29 September 2020 there will be employers and employees who continue to qualify for the JobKeeper wage subsidy scheme **AND** those that previously qualified for JobKeeper but no longer qualify beyond 28 September 2020. This second category will be known as 'legacy employers' and 'legacy employees'.

JOBKEEPER QUALIFYING EMPLOYERS – BEYOND 28 SEPTEMBER 2020
Employers who continue to qualify for the JobKeeper wage subsidy scheme from 28 September 2020 may continue to give a JobKeeper enabling direction or stand down direction to a qualifying employee provided the relevant criteria for issuing the direction are met. This will include the continued ability to:

- reduce employee's hours of work (including to zero hours);
- require employees to perform different duties and from different locations;
- request employees to agree to work their hours different times and days (such request cannot be unreasonably refused).

Any JobKeeper enabling directions or agreements already in place on 27 September 2020 can keep applying after this date as long as the employer continues to qualify for the scheme, or when they're cancelled, withdrawn or replaced, or on 29 March 2021 (whichever comes first).

We recommend members consider where any active JobKeeper direction was drafted and applicable until '28 September 2020'. If that is the case, then reissuing the direction with a later end date may be required.

JOBKEEPER 'LEGACY EMPLOYERS'
Until 29 March 2021, employers who no longer qualify for the JobKeeper wage subsidy may still be able to reduce 'legacy employee' hours and amend duties or work locations with some limitations

and slightly different conditions that must be met. The amendments will extend modified flexibilities to those 'legacy employers' who are still experiencing at least a 10% decline in turnover.

10% DECLINE IN TURNOVER

The 10% reduction will need to be backed up by a "decline in turnover certificate" issued by an independent financial service provider (registered tax agent, BAS agent, or qualified accountant). A small business employer (less than 15 employees) may choose to provide a statutory declaration as proof. If a 'legacy employer' ceases to satisfy the 10% decline in turnover test for the quarters ending on 30 September 2020 and 31 December 2020, any related direction (discussed below) will cease to apply.

'LEGACY EMPLOYER' DIRECTIONS AND RELATED CONDITIONS

From 28 September 2020 a 'legacy employer' may continue to give a 'legacy employee':

- A direction to reasonably change duties and or place of work.
- A request to perform their duties on different days and or at different times (at least 2 consecutive hours of work on a work day must be given).
- A direction to reduce their hours of work. However, hours of work can only be reduced by up to 40% of the employee's ordinary hours (as at 1 March 2020) and cannot result in the employee working less than 2 consecutive hours in the day.

However, a 'legacy employer' cannot rely on a pre-exiting direction or agreement issued while under the JobKeeper scheme as they will be categorised differently from 28 September 2020.

As a result, members who will be categorised as 'legacy employers', and intend to continue giving related directions or agreements to 'legacy employees', should reissue the direction or give a new direction effective from 28 September 2020 and until a later date (providing the employer continues to meet the 10% turnover decline test).

'Legacy employers' must provide 'legacy employees' seven days' written notice before issuing a JobKeeper - enabling direction, up from the previous notice period of three days.

The written notice must include information about the nature of the direction, when the direction takes effect, the expected effects of the direction on the employee, and invite the employee, or their representative, to give views on any impact of the proposed direction.

The amendments enable a 'legacy employee' to appoint a representative, including their union, for consultations about a JobKeeper enabling direction and the representative must be recognised by the employer.

The consultation requirements must be met within these seven days after giving notice of a direction or request, but the consultations do not have to take the full seven days. Records of the direction and the consultation are required.

DISPUTES OVER JOBKEEPER AND LEGACY RELATED DIRECTIONS

The Australian Taxation Office remains responsible for the overall scheme including eligibility.

The Fair Work Commission ("FWC") will remain empowered to address any dispute relating to a JobKeeper enabling directions and agreements.

The Fair Work Ombudsman ("FWO") can ensure minimum wages and conditions under the Fair Work Act are met and the investigate the misuse of JobKeeper enabling directions by employers.

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

The Federal Court can make an order terminating a JobKeeper enabling direction given by a legacy employer if the court is satisfied that the employer did not satisfy the 10% decline in turnover test. The court can make the order on application by an employee, employee organisation or an FWO Inspector.

Contravention of the revised terms of the Fair Work Act can carry pecuniary penalties. The amendments include penalties of up to $13,200 for individuals and $66,600 for employers who do not meet the 10% test, but knowingly or recklessly try to use the provisions, or if they fail to notify employees that a JobKeeper enabling direction or agreement is continuing or ceasing each quarter.

ADDITIONAL CONSIDERATIONS

- From 28 September 2020, **the current ability of a JobKeeper qualifying employer to request agreement from a qualifying employee to take annual leave will be removed entirely from the Fair Work Act**. It will not apply to qualifying employers or legacy employers. If members intend to utilise this flexibility and make such a request, it must be applied before 28 September 2020.

- From 28 September 2020, employers and employees need to follow the usual rules for taking and requesting annual leave, including those set by an Award or agreement.

- Employees (qualifying or legacy) working reduced hours pursuant to a JobKeeper enabling stand down direction can continue to request to engage in reasonable secondary employment, training, or professional development.

- The revised provisions state that a direction will not apply where it is unreasonable considering all the circumstances. It will be unreasonable where it has an unfair effect on some employees compared to others who are subject to those directions.

- Clear and early communication with employees remains king.

Members with any related query should feel free to contact our GM – IR, Policy and Governance, Charles Watson, at charles@thermc.com.au to discuss.