

**COVID-19 JOBKEEPER GENERAL ORDER PURSUANT TO
SECTION 50 OF THE ACT
WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

PARTIES THE CHAMBER OF COMMERCE AND INDUSTRY OF WESTERN AUSTRALIA LIMITED

APPLICANT

-v-

(NOT APPLICABLE)

RESPONDENT

CORAM CHIEF COMMISSIONER P E SCOTT
SENIOR COMMISSIONER S J KENNER
COMMISSIONER T B WALKINGTON

DATE FRIDAY, 15 MAY 2020

FILE NO. APPL 19 OF 2020

CITATION NO. 2020 WAIRC 00279

Result General Order issued

Representation

- Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited
- Ms C Purcell on behalf of the Hon. Minister for Industrial Relations
- Dr T Dymond on behalf of UnionsWA

General Order

Having heard from Mr P Moss on behalf of the Chamber of Commerce and Industry of Western Australia Limited, Ms C Purcell on behalf of the Hon. Minister for Industrial Relations and Dr T Dymond on behalf of UnionsWA, the Commission in Court Session, pursuant to the powers conferred on it by s 50 of the *Industrial Relations Act 1979* (WA) hereby makes a General Order in the terms set out in the attached Schedule.

CHIEF COMMISSIONER P E SCOTT
FOR AND ON BEHALF OF THE COMMISSION IN COURT SESSION

NOTE: amended by corrigenda ([2020] WAIRC 00311)

SCHEDULE

COVID-19 GENERAL ORDER

PROVISIONS RELATING TO THE JOBKEEPER PAYMENTS

1. – APPLICATION

- (1) This General Order applies to each employee as defined in subsection 7(1) of the *Industrial Relations Act 1979* throughout the State of Western Australia, except for employees of a public sector body within the meaning of the *Public Sector Management Act 1994* and police officers, police auxiliary officers and Aboriginal police liaison officers.
- (2) This General Order shall operate on and from the date this General Order issues until 28 September 2020, unless extended on application or at the initiative of the Commission.
- (3) The provisions of this General Order shall be reviewed at the initiative of the Commission no later than 30 June 2020.
- (4) There shall be liberty to apply to amend this General Order to any party named in **s 50 – General Orders, nature of and making**, subsection 2 of the Act.

2. – DEFINITIONS

- (1) Base rate of pay is the amount payable to an employee for his or her ordinary hours of work, but not including any of the following:
 - (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) monetary allowances;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.
- (2) Designated employment provision means a provision of:
 - (a) an award; or

- (b) an industrial agreement or employer-employee agreement; or
 - (c) an order made by the Commission, other than this General Order; or
 - (d) a contract of employment.
- (3) Hourly rate of pay guarantee has the meaning given by subclause 3(3) or 3(4).
- (4) Jobkeeper enabling direction means a direction authorised by clause 4, 5 or 6.
- (5) Jobkeeper payment means a payment that:
- (a) is payable by the Commonwealth in accordance with the jobkeeper payment rules; and
 - (b) is known as jobkeeper payment.
- (6) Jobkeeper payment rules means rules made under the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth).
- (7) Licence includes:
- (a) registration; and
 - (b) permit.
- (8) Minimum payment guarantee has the meaning given by 3(2).
- (9) Qualifies for the jobkeeper scheme has the same meaning as in the jobkeeper payment rules.
- (10) Wage condition means the wage condition set out in the jobkeeper payment rules.
- (11) Industrial instrument means:
- (a) an award; or
 - (b) an industrial agreement or employer-employee agreement; or
 - (c) an order made by the Commission, other than this General Order; or
 - (d) a contract of employment.

3. – EMPLOYER PAYMENT OBLIGATIONS

Obligation of employer to satisfy the wage condition

(1) If:

- (a) an employer qualifies for the jobkeeper scheme; and
- (b) the employer would be entitled to jobkeeper payment for an employee for a fortnight if (among other things) the employer satisfied the wage condition in respect of the employee for the fortnight;

the employer must ensure that the wage condition has been satisfied in respect of the employee by the end of the fortnight.

Minimum payment guarantee

(2) 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 following:

- (a) the amount of jobkeeper payment payable to the employer for the employee for the fortnight;
- (b) the amounts payable to the employee in relation to the performance of work during the fortnight.

Note – Amounts referred to in this subclause (other than paragraph (a) include the following, if they become payable in respect of the fortnight:

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

Minimum rate of pay – jobkeeper enabling stand down

(3) If a jobkeeper enabling direction given by an employer under clause 4 (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.

Minimum rate of pay – duties of work

(4) If a jobkeeper enabling direction given by an employer under clause 5 (duties of work) 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 greater of the following:

- (a) 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;
- (b) the base rate of pay (worked out on an hourly basis) that is applicable to the duties the employee is performing.

Base rate of pay for certain payment arrangements

(5) If:

- (a) an employee is paid otherwise than:
 - i. on an hourly basis; or
 - ii. by reference to an hourly rate of pay; and
- (b) an industrial instrument applicable to the employee:
 - i. specifies the employee's base rate of pay; or
 - ii. sets out a method for working out the employee's base rate of pay;

then, for the purposes of this clause, the employee's base rate of pay is:

- iii. the amount specified in the industrial instrument; or
- iv. the amount worked out using the method set out in the industrial instrument.

4. – JOBKEEPER ENABLING STAND DOWN

- (1) An employer may give an employee a direction (the jobkeeper enabling stand down direction) to:
 - (a) not work on a day or days on which the employee would usually work;
 - (b) work for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
 - (c) work a reduced number of hours (Compared with the employee's ordinary hours of work);during a period (the jobkeeper enabling stand down period).
- (2) For the purposes of subparagraph (1)(c), the reduced number of hours may be nil.
- (3) A jobkeeper enabling stand down direction is subject to:

- (a) when the direction was given, the employer qualified for the jobkeeper scheme;
 - (b) 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:
 - i. the COVID-19 pandemic; or
 - ii. government initiatives to slow the transmission of COVID-19;
 - (c) the implementation of the jobkeeper enabling stand down direction is safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - (d) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the jobkeeper enabling stand down period; or
 - ii. for periods that, when considered together, consist of or include the jobkeeper enabling stand down period.
- (4) If the jobkeeper enabling stand down direction applies to the employee, then, during the jobkeeper enabling stand down period, the employer:
- (a) is still required to comply with clause 3 (employer payment obligations);
 - (b) but is not otherwise required to make payments to the employee in respect of the jobkeeper enabling stand down period.
- (5) The jobkeeper enabling stand down direction does not apply to the employee during a period when the employee:
- (a) is taking paid or unpaid leave that is authorised by the employer; or
 - (b) is otherwise authorised to be absent from the employee's employment.
- Note: An employee may take paid or unpaid leave (for example, annual leave) during all or part of a period during which the jobkeeper enabling stand down direction would otherwise apply to the employee.
- (6) This clause has effect despite a designated employment provision.

5. – DUTIES OF WORK

- (1) An employer may direct an employee to perform any duties during a period (the relevant period) that are within the employee's skill and competency.

- (2) The direction is subject to:
- (a) when the direction was given, the employer qualified for the jobkeeper scheme; and
 - (b) those duties are safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - (c) in a case where the employee is required to have a licence or qualification in order to perform those duties, the employee had the licence or qualification; and
 - (d) those duties are reasonably within the scope of the employer's business operations; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the relevant period;
 - ii. for periods that, when considered together, consist of or include the relevant period.
- (3) This clause has effect despite a designated employment provision.

6. – LOCATION OF WORK

- (1) An employer may direct an employee to perform duties during a period (the relevant period) at a place that is different from the employee's normal place of work, including the employee's home.
- (2) The direction is subject to:
- (a) when the direction was given, the employer qualified for the jobkeeper scheme;
 - (b) the place is suitable for the employee's duties;
 - (c) 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;
 - (d) the performance of the employee's duties at the place is:
 - i. safe, having regard to (without limitation) the nature and spread of COVID-19; and

- ii. reasonably within the scope of the employer's business operations; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:
 - i. for a period that consists of or includes the relevant period; or
 - ii. for periods that, when considered together, consist of or include the relevant period.
- (3) This clause has effect despite a designated employment provision.

7. – DAYS AND TIMES OF WORK

- (1) An employer may request to make an agreement with an employee to perform duties during a period (the relevant period):
- (a) on different days; or
 - (b) at different times;
- compared with the employee's ordinary days or times of work.
- (2) Where an employer gives the employee a request to make an agreement with the employer under subclause (1), the employee:
- (a) must consider the request; and
 - (b) must not unreasonably refuse the request.
- (3) The agreement is subject to:
- (a) when the agreement was made, the employer qualified for the jobkeeper scheme;
 - (b) the performance of the employee's duties on those days or at those times is:
 - i. safe, having regard to (without limitation) the nature and spread of COVID-19; and
 - ii. reasonably within the scope of the employer's business operations;
 - (c) 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);
 - (d) the agreement is in writing; and
 - (e) the employer becomes entitled to one or more jobkeeper payments for the employee:

- i. for a period that consists of or includes the relevant period; or
 - ii. for periods that, when considered together, consist of or include the relevant period;
- (4) This clause has effect despite a designated employment provision.

8. – RULES RELATING TO JOBKEEPER ENABLING DIRECTIONS

Misuse of jobkeeper enabling direction

- (1) An employer must not purport to give a jobkeeper enabling direction if:
 - (a) the direction is not authorised by this General Order; and
 - (b) the employer knows, or ought to have reasonably known, that the direction is not authorised by this General Order.

Reasonableness

- (2) A jobkeeper enabling direction given by an employer to an employee does not apply to the employee if the direction is unreasonable in all of the circumstances.

Note: A direction may be unreasonable depending on the impact of the direction on any caring responsibilities the employee may have.

Continuing the employment of employees

- (3) A jobkeeper enabling direction given by an employer to an employee of the employer under clause 5 (duties of work) or 6 (location of work) has no effect unless the employer has information before the employer that leads the employer to reasonably believe that the direction is necessary to continue the employment of one or more employees of the employer.
- (4) In determining whether a jobkeeper enabling direction given by an employer to an employee (the relevant employee) is necessary to continue the employment of one or more employees of the employer, it is immaterial that a similar jobkeeper enabling direction could have been given by the employer to an employee other than the relevant employee.

Consultation

- (5) A jobkeeper enabling direction given by an employer to an employee does not apply to the employee unless:
 - (a) the employer gave the employee written notice of the employer's intention to give the direction;
 - (b) the employer did so:

- i. at least 3 days before the direction was given; or
 - ii. if the employee genuinely agreed to a lesser notice period – during that lesser notice period; and
 - (c) before giving the direction, the employer consulted the employee (or a representative of the employee) about the direction.
- (6) Subclause (5) does not apply to a jobkeeper enabling direction (the relevant direction) given by an employer to an employee of the employer under a particular clause of this Order if:
- (a) the employer previously complied with the requirements of subclause (5) in relation to a proposal to give the employee another direction under that clause; and
 - (b) in the course of consulting the employee (or a representative of the employee) about the proposal, the employee (or the representative of the employee) expressed views to the employer; and
 - (c) the employer considered those views in deciding to give the relevant direction.
- (7) An employer must keep a written record of the consultation.

Form of direction

- (8) A jobkeeper enabling direction must be in writing.

Duration

- (9) A jobkeeper enabling direction given by an employer to an employee continues in effect until:
- (a) it is withdrawn or revoked by the employer; or
 - (b) it is replaced by a new jobkeeper enabling direction given by the employer to the employee under the relevant clause.
- (10) Provided that a jobkeeper enabling direction ceases to have effect at the start of 28 September 2020.
- (11) Subclause (9) has effect subject to an order made by the Commission under clause 11 (Disputes).

Compliance

- (12) If a jobkeeper enabling direction given by an employer applies to an employee of the employer, the employee must comply with the direction.

9. – SERVICE AND ACCRUAL

- (1) For the purposes of the *Minimum Conditions of Employment Act 1993* and any applicable industrial instrument, if an employee is subject to a jobkeeper enabling direction during a period, that period counts as service.
- (2) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the employee accrues leave entitlements as if the direction had not been given.
- (3) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the following are to be calculated as if the direction had not been given:
- (a) redundancy pay;
 - (b) payment in lieu of notice of termination.

10. – EMPLOYEE REQUESTS FOR SECONDARY EMPLOYMENT, TRAINING ETC

- (1) If a jobkeeper enabling direction under clause 4 (jobkeeper enabling stand down) applies to an employee, the employee may request:
- (a) to engage in reasonable secondary employment;
 - (b) training;
 - (c) professional development.
- (2) The employer must consider, and not unreasonably refuse, the request.

11. – DISPUTES

- (1) Where there is a question, dispute or difficulty arising under this General Order, the employer and the employee (or their representatives) must confer among themselves and make reasonable attempts to resolve the matter.
- (2) If the employer and employee are unable to resolve the matter within 24 hours of the question, dispute or difficulty being raised, the employer or an organisation of which

the employee is a member of or is eligible to become a member of, may apply to the Commission for conciliation and if required, arbitration.

- (3) If the employer and employee are unable to resolve the matter within 48 hours of the question, dispute or difficulty being raised and the matter has not been referred to the Commission in accordance with (2):
- (a) the employee may:
 - i. request mediation under the *Employment Dispute Resolution Act 2008* (WA), by lodging **Form 1 – Request for Mediation** with the Western Australian Industrial Relations Commission. It should be noted that for mediation to occur under this arrangement, the employer must consent to the mediation.
 - ii. notify the Registrar of the Western Australian Industrial Relations Commission that the employer has or is, by some act, omission or circumstance, taking industrial action against them for the purpose of compelling them to accept terms or conditions of employment contrary to the terms of this General Order, and asking the Registrar to refer the notification to the Commission. The Commission will then consider whether to convene a conciliation conference.
 - iii. make an application to the Industrial Magistrate's Court for enforcement of the General Order, by lodging Form 1.1.
 - (b) the employer or organisation, including registered industrial organisations such as a union, may apply to the Commission for conciliation and, if necessary, arbitration, under s 44 of the *Industrial Relations Act 1979* (WA).