

Memorandum

**To:** Ms Heidi Hervay  
The Crane Industry Council of Australia

**From:** Michael Selinger, Partner

**Date:** 8 April 2020

**Subject:** Q&A with respect to the measures put in place in response to the COVID-19 pandemic

**Confidential and subject to legal privilege**

Dear Heidi,

We refer to your email of 3 April 2020. You have requested responses to questions with respect to the government measures put in place in response to the COVID-19 pandemic, including the Federal Government's COVID-19 JobKeeper Payment.

We provide our response to your specific questions below as well as some additional questions and answers that may be of assistance.

We note that some our response are provided on a preliminary basis as the specific legislation with respect to the JobKeeper Payment, as at today, has not yet been passed. As a result, some details underpinning the JobKeeper Payment are not entirely known at this stage.

**STOP PRESS: JobKeeper temporary amendments to the Fair Work Act**

*Subject to the outcome of the parliamentary debate tonight, it's possible the following temporary changes may come into effect under the FW Act for those businesses eligible for JobKeeper permitting unilateral changes by employers as follows:*

- (a) If the employee cannot be usefully employed at their current weekly hours, the right to partially implement a temporary stand down to alter the number of working hours of an employee to such number of working hours that they can be usefully employed. This means that they will continue to accrue leave as if they were working their normal hours. They just don't need to be paid for the hours that they are 'stood down'. The 'JobKeeper-enabling stand down' would be reviewable by the Fair Work Commission.*
- (b) An employer can alter someone's usual duties and location of work, if safe, reasonable in all the circumstances, inside the skill and competency of the employee, and reasonably within the scope of the business in question. The changes would have to be reasonably necessary to ensure the employee's continuing employment. Again, directions to alter someone's location or duties of work would be reviewable by the Fair Work Commission.*

- (c) *Employers can agree with employees to change their working days and also to run down their annual leave to not less than 2 weeks. An employee could not unreasonably refuse to make such an agreement and that would be a determination of the Fair Work Commission.*

*Once passed, these proposed amendments may expand CICA members' options for managing the impact of COVID-19.*

### **Further Questions:**

- 1. What is classified as an 'Essential Service'? There are differing opinions but it would be good to get some official guidance but also correlate into sub industry's, Govt vs non-Govt work/private funded works for example:**

The Federal Government continues to make reference to 'essential services' but the Government has not provided real guidance as to what 'essential services' mean. Guidance can be found in each State and Territories' Public Health Orders or Directions.

For example, in NSW, the Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020 (NSW) (**Order**) which commenced on 31 March 2020 outlines which premises are to be closed and which gatherings are permitted.

The Order does not specify which industries are 'essential' or 'non-essential' but it does provide a specific list of which premises should be closed and which gatherings are permitted.

The Order also directs a person who is the occupier or operator of premises in NSW to not allow 500 or more persons for an outdoor space or 100 or more persons for an indoor space. Both outdoor and indoor space must be of sufficient size to fit 4 square metres of space for each person on the premises. However, this order does not apply to construction sites as it is classified as an 'essential gathering'.

Under the Order, the essential gatherings include a gathering:

- at an airport that is necessary for the normal business of the airport;
- for the purposes of or related to transportation, including in vehicles or at stations, platforms or stops or other public transport facilities;
- at a hospital or other medical or health service facility that is necessary for the normal business of the facility;
- for the purposes of emergency services;
- at a prison, correctional facility, youth justice centre or other place of custody;
- at a court or tribunal;
- at Parliament for the purpose of its normal operations;
- at a supermarket, market that predominately sells food, grocery store or shopping centre that is necessary for the supermarket, market store or centre;
- at a retail store that is necessary for the normal business of the store;
- **at an office building, farm, factory, ware house or mining or construction site that is necessary for the normal operation of the tenants within the building, farm, warehouse, factory or site;**
- at a school, university or other educational institution or child care facility, at the normal business but does not include a school event that involves members of the community in addition to staff and students;
- at a hotel, motel or other accommodation facility that is necessary for the normal operation of accommodation services; and
- at an outdoor space where 2 or more persons may be present for the purposes of transiting through the place.

For Public Health Orders of other States and Territories, please follow the links below:

- **ACT:** <https://www.covid19.act.gov.au/help-and-advice/public-health-directions>
- **VIC:** <https://www.dhhs.vic.gov.au/state-emergency>
- **NT:** <https://coronavirus.nt.gov.au/chief-health-officer-directions>
- **QLD:** <https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers>
- **SA:** <https://www.covid-19.sa.gov.au/emergency-declarations>
- **TAS:** <https://coronavirus.tas.gov.au/resources>
- **WA:** <https://www.wa.gov.au/government/document-collections/covid-19-coronavirus-state-of-emergency-declarations>

## 2. FIFO impacts and handling on 'essential industry's' above:

As mining and construction sites are deemed to be an 'essential gathering', businesses in these industries including FIFO workers may operate as usual at this point in time. In NSW, there is currently no border controls in place and FIFO workers from other states and territories may continue to arrive.

However, some states and territories have largely closed their borders, requiring persons arriving to self-quarantine for 14 days. There are some exemptions for anyone providing 'essential services' but the definition of 'essential services' may vary from State to State.

Below is the latest travel restrictions and requirements for each State and Territory.

**NSW:** There are currently no border controls in place.

**ACT:** There are currently no border controls in place.

**VIC:** There are currently no border controls in place.

**NT:** There are border restrictions in place requiring non-essential travellers to self-quarantine for 14 days unless exempted. Exemption categories can be found [here](#) and includes any person who is responsible for critical maintenance or repair of infrastructure critical to the Territory.

**QLD:** There are border restrictions in place preventing people from entering the State unless they are a Queensland resident or considered an 'exempt person'. From 11:59pm Saturday 4 April 2020, only critical resource sector FIFO workers will be allowed to enter Queensland. The list of critical resources sector employees can be found [here](#) and does not include construction sector. More information on the exemptions can be found [here](#).

**SA:** There are border restrictions in place requiring anyone entering the State to self-quarantine for 14 days unless exempted. Exemptions can be found [here](#) and include skills critical to maintaining key industries or businesses, including persons who ordinarily live or work in South Australia and travel for work purposes for regular periods according to established work schedules (for example, FIFO workers).

**TAS:** There are border restrictions in place for all non-essential travellers to self-quarantine for 14 days. Exemptions can be found [here](#) and include specialist skills critical to maintaining key industries or businesses, including any person who is responsible, while in Tasmania, for critical maintenance or repair of infrastructure critical to Tasmania. All workers, including essential travellers, will need to submit an arrival form with a short justification.

**WA:** There are strict border restrictions in place, a person will not be able to enter the State unless an exemption has been granted. Exemptions can be found [here](#) and include FIFO workers provided that the person will, at the expense of the person's employer, be subject to strict quarantine

provisions and complete a mandatory 14 day period of isolation in an agreed location immediately after entering the State and before the person enters a workplace in the State.

### **3. Two-Person Rule and how this correlate to the workplace, including a light vehicle?**

The Order prohibits a gathering in a public place of more than 2 persons. However, exceptions apply to a gathering of persons for the purposes of work and 'essential gatherings' as classified in the Order, which includes mining and construction sites that is necessary for the normal operation. A number of tasks performed by cranes would fall within both construction and mining sites.

### **4. Can an employer offer an employee a redundancy package opposed to retaining them on the \$1500 per fortnight Job Keeper Scheme?**

In short, yes if it is a genuine redundancy and the role is no longer required to be performed by anyone within the business. We recommend that employers seek further legal advice in respect to what constitute a 'genuine redundancy' and the legal risks with implementing a redundancy.

It is important to note that there are a number of options available to employers to reduce their workforce, such as reduction in hours, paid and unpaid leave and stand downs.

The JobKeeper Scheme aims at allowing businesses to retain their workforce rather than having to re-hire staff once business is back to normal after the pandemic and economic downturn, which can be a costly exercise for a lot of businesses.

However, if a business no longer requires the employee's job to be performed by anyone and this remains the situation for the foreseeable future, redundancy may be the most appropriate option for the business.

### **5. Does a business have to start paying all stood down employees the \$1500 per fortnight now, when we haven't been notified if our business is eligible?**

To be eligible for the JobKeeper Payment wage subsidy that will be paid to your business in the first week of May 2020 (with payments back dated to 30 March 2020 for all eligible employees), your business must be paying the stood down employees \$1,500 a fortnight (before tax) that your business stands to receive the subsidy for.

You should ensure that both your business and the applicable employee(s) are eligible for the JobKeeper Payment wage subsidy before you begin to pay the \$1,500 fortnightly payment.

The 5 April 2020 Australian Government fact sheet contains the following useful information in regards to your query, although it should be noted this position may change once the law is actually passed:

***IF I HAVE STOOD DOWN MY EMPLOYEES AFTER 1 MARCH 2020, AND ARE NO LONGER PAYING THEM, DO I NEED TO PAY THEM, FOR WHAT PERIOD AND BY WHEN?***

*Yes. You can claim JobKeeper for employees that were stood down after 1 March 2020. To be eligible in relation to these employees, you will need to pay them a minimum of \$1,500 per fortnight (before tax) for the payment periods of the JobKeeper Scheme.*

*The first payment period under the scheme is from 30 March 2020 to 12 April 2020. Where an employer pays their staff monthly the monthly payment must be equivalent to the required fortnightly payment.*

*For all following payment periods you will need to continue to pay your employees a minimum of \$1,500 per fortnight (before tax), before the end of the payment period.*

**WHAT HAPPENS IF I DON'T HAVE THE MONEY TO CONTINUE PAYING MY ELIGIBLE EMPLOYEES UNTIL THE PAYMENTS ARE MADE?**

*The JobKeeper Payment is a reimbursement scheme that will be paid by the ATO monthly in arrears. In cases where this may present cash flow difficulties, those businesses may want to speak to their bank to discuss their options. The banks have said businesses may be able to use the upcoming JobKeeper payment as a basis to seek credit in order to pay their employees until the scheme is making its first payments.*

**6. Do permanent employees that have leave accrued, need to take that leave prior to being stood down under the Job Keeper Scheme, or can they choose to retain their leave?**

No. At the present time, employees are not required to take their accrued leave before receiving the JobKeeper Payment wage subsidy from their employer although it should be noted this position may change once the law is actually passed.

In the event that an employee requests to take their annual leave or long service leave during any period of stand down, an employer must not unreasonably refuse the employee's request for leave.

**7. What options if any, will an employer have if an employee on the Job Keeper Scheme refuses to make themselves available for work, if it arises?**

Regardless of the JobKeeper Payment, if an employee fails to make themselves available to undertake their role, and fails to perform the inherent duties and responsibilities of their role as stated in their employment contract (or as varied by agreement in light of the current situation), the employee may be subject to disciplinary action, in the normal course. Should this arise, we recommend seeking legal advice on managing those employees who do not make themselves available for work and who may be subject to disciplinary action.

**8. How do we manage to pay staff if we get locked down? There is no reference in the award for it and we would like to keep them on. Are we in breach of the award if we put them on a retainer or some similar arrangement? It's all well to say they can get Centrelink but in reality, that will take months and crush their spirit and hopefully we're all back at work by then!**

In the event that your operations are affected by an enforced lock down, we would recommend registering and applying for the JobKeeper Payment wage subsidy from the Australian Government.

By way of background the 5 April 2020 Australian Government fact sheet sets out the following on the JobKeeper Payment wage subsidy:

*The JobKeeper Payment is a payment made to eligible businesses and not-for-profits affected by the Coronavirus to support them in retaining employees.*

*Eligible businesses that elect to participate will receive a payment of \$1,500 per fortnight per eligible employee to support the people they employed as at 1 March 2020 who are retained in employment.*

*Businesses must have paid their employees before they are entitled to receive the JobKeeper payment. Where an employee's total remuneration is less than \$1,500 per fortnight (before tax), or has been stood down, the employer must provide the employee at least \$1,500 per fortnight (before tax). Where an employee earns more than \$1,500 per fortnight, employers can use the payment to subsidise the employee's wages.*

There is an eligibility criteria for both employers who seek the subsidy and the employees whose wage the employers seek to subsidise. Information on the eligibility criteria and other helpful information is

available here: [https://treasury.gov.au/sites/default/files/2020-04/JobKeeper\\_frequently\\_asked\\_questions.pdf](https://treasury.gov.au/sites/default/files/2020-04/JobKeeper_frequently_asked_questions.pdf)

If either your business or particular employees are not eligible for the JobKeeper Payment wage subsidy, there are a number of options available to keep them employed with your business (paid and unpaid) during a lockdown, including:

- Direct the employee to take paid leave (this can be at half rate i.e. 10 days of annual leave taken over 20 days at 50% pay); and/or
- Agree with the employee to take unpaid leave.

Our view is that there is a risk that a retainer agreement or similar would likely breach modern award obligations if they require the employee to perform any work over the duration of the retainer. Given this risk, we would recommend pursuing the above options before looking to implement an agreement of this nature.

### **9. What are our obligations in regards to notifying eligible employees that they are receiving the JobKeeper Payment?**

Once the employer registers for the JobKeeper Payment, it needs to notify those employees that it has nominated to be 'eligible employees' for the JobKeeper Payment. The 'eligible employee' definition is set out below.

In addition, it is good practice to notify eligible employees that they may have further obligations. For example:

- employees who receive income support from Services Australia (including those who have applied to receive the JobSeeker Payment and Coronavirus Supplement) should notify Services Australia that they will be receiving income under the JobKeeper Payment scheme;
- non-citizen eligible employees will need to notify you of their visa status – this may affect their eligibility for the JobKeeper Payment; and
- if an employee has multiple employers, they must nominate a primary employer – only the primary employer will be eligible to receive the JobKeeper Payment in respect of that employee.

#### Who is an 'eligible employee'?

'Eligible employees' are those who:

- are currently employed by the eligible employer (this includes those who have been stood down);
- were employed by the employer at 1 March 2020;
- are full time, part time or long term casuals (i.e. a casual employed by the employer on a regular basis for 12 months or more as at 1 March 2020);
- are Australian citizens, holders of permanent visas or holders of Special Category (Subclass 444) Visas;
- are at least 16 years old; and
- are not receiving the JobKeeper Payment from another employer.

It is also useful to note that those employees who are 're-engaged' after 1 March 2020 will also become eligible employees.

### **10. Since employees who have been stood down are entitled to the JobKeeper payment, can we request them to work less than their ordinary hours?**

Employees who are stood down by their employer, in accordance with section 524 of the *Fair Work Act 2009* (Cth) (**FW Act**), are eligible for the JobKeeper Payment. Employers must pass on the \$1,500

wage subsidy to those eligible employees. For an employee to be stood down in accordance with section 524 of the FW Act, they must be unable to be usefully employed. If there is work that they could perform, the employer does not technically have a right to stand the employee down. If there is no work for employees to perform, you may want to consider re-engaging them to work reduced hours (by agreement) while receiving the JobKeeper Payment.

**11. Will the staff paid under JobKeeper scheme receive all the \$1,500 per fortnight even if they earn and work much less per fortnight?**

Yes. Employers who receive the JobKeeper Payment must ensure that each eligible employee receives at least \$1,500 per fortnight, even if this is more than they would ordinarily earn.

**12. Does annual leave accrue on the wage subsidy?**

Annual leave accrues by reference to an employee's ordinary hours of work and also accrues during a period of stand down. The information presently available does not address whether annual leave accrues by reference to the wage subsidy, however, we consider that to be unlikely and, instead, annual leave would accrue by reference to the employee's ordinary hours of work in the usual way.

**13. Should employers continue to pay superannuation on an employee's regular salary or wages and would it be up to the employer if they want to pay superannuation on any additional wage paid because of the Job Keeper Payment?**

Yes. For example, if an employee's wage is \$1,700 per fortnight, you will need to make a superannuation contribution in respect of that entire amount. If an employee's usual wage is \$1,100 per fortnight, you will need to pay them the entire amount of the \$1,500 JobKeeper Payment. Superannuation is payable in respect of the employee's ordinary wages (\$1,100), and it is a decision for the employer as to whether it chooses to make a superannuation contribution in respect of the additional \$400. For employees who receive the JobKeeper Payment while stood down, the employer is not obliged to make any superannuation payment.

**14. If people are on reduced hours and want to offset it with annual leave, is there any issue or impact to the subsidy?**

Whether the JobKeeper Payment is used to offset leave entitlements or ordinary wages is a decision that may be made at the employer's discretion and as agreed between the employer and the employee. However, employees will unlikely choose to top up pay with their annual leave accruals if the top up will be met by the JobKeeper Payment. For those who earn in excess of the subsidy this may be a more attractive option.