

Dealing with COVID-19 legal issues

Some practical information.

Information on coronavirus issues will be updated here as it occurs.
The main publications will only be amended if temporary measures
become permanent.

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Remote signing and witnessing

Practical issues relating to remote signing of documents such as agreements, deeds, affidavits, wills and powers of attorney by companies and individuals.

Remote signing of documents has become an important issue for practitioners and their clients due to the coronavirus pandemic. Face-to-face meetings are now largely excluded meaning clients are unable to attend at their practitioner's office to sign documents.

Documents which must be signed need to be mailed or emailed to clients and then signed remotely.

Many jurisdictions have now introduced emergency measures legislation providing for remote signing and witnessing of many important legal documents. See below for more detailed information. In jurisdictions that have not introduced such measures, this section of the commentary also provides some general guidance that can be followed.

Emergency measures legislation - Remote signing and witnessing

Summary

Jurisdiction	Emergency measures legislation
NSW	Electronic Transactions Amendment (COVID-19 Witnessing of Documents) Regulation 2020 . See below for more detailed information.
VIC	<p>COVID-19 Omnibus (Emergency Measures) Act 2020 – Amendment of Oaths and Affirmations Act 2018 to allow anything that needs to be done for an affidavit physically to be done electronically.</p> <p>COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020 – allows many documents such as wills, powers of attorney and statutory declarations to be signed electronically and witnessed by audio-visual means. Does not apply to the appointment of a medical treatment decision-maker or the making of an advance care directive.</p> <p>COVID-19 Omnibus (Emergency Measures) (Integrity Entities) Regulations 2020 - Amendment of Oaths and Affirmations Act 2018 to allow affirmation by audio-visual link or audio link.</p>

	See below for more detailed information.
QLD	<p>COVID-19 Emergency Response Act 2020 allowing regulations to address the physical attendance of witnesses.</p> <p>Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020 as amended by the Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020 – allows for the making, signing and witnessing of wills, affidavits, statutory declarations, oaths, deeds, mortgages lodged under the Electronic Conveyancing National Law, and enduring documents under the Powers of Attorney Act 1998 – including revocation documents - to be done through audio visual means.</p> <p>See below for more detailed information.</p>
SA	No changes. The Attorney-General (SA) has advised the Society (by letter 29 April 2020) that regulations will not be made at this time that allow the electronic attestation or witnessing of documents, the decision being on the basis that documents can currently be witnessed in a safe and physically distant manner whilst still complying with the law as it is currently.
TAS	<p>COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 allows minister to declare by notice that documents may be signed or witnessed electronically.</p> <p>Notice under Section 17 of COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020</p>
ACT	COVID-19 Emergency Response Legislation Amendment Act 2020
WA	COVID-19 Response and Economic Recovery Omnibus Act 2020
NT	No changes.

New South Wales

[Schedule 1](#) to the Electronic Transactions Regulation 2017 (NSW) came into operation on 22 April 2020 and allows for witnessing of documents by audio visual link in New South Wales. This practical step by NSW parliament allows wills, powers of attorney, deeds and agreements, enduring guardianship appointments, affidavits and statutory declarations to be witnessed through audio visual means, such as Zoom, Skype or Microsoft Teams, which integrates with LEAP.

Practitioners can post a copy of the document to the client, or email it to the client if they have printing facilities, arrange a meeting via any audio visual means and then be the witness to the client signing the document.

To effectively witness under the regulation the witness must:

- Observe the person sign the document in real time – this may involve ensuring that the practitioner can view the document on screen as the signature is made;
- Witness by signing the document or a copy of the document;
- Be reasonably satisfied that the document is the same document, or a copy of the document signed by the signatory; and
- Endorse the document, or a copy, with a statement specifying the method used to witness the signature and that the document was witnessed in accordance with the regulation.

The following wording is suggested for the endorsement:

This document was signed in counterpart and witnessed over audio visual link in accordance with clause 2 of Schedule 1 to the Electronic Transactions Regulation 2017.

The regulation allows a witness to sign a counterpart of the document, or, alternatively, have the client scan and email the signed document back to the practitioner who may then print and witness the copy. Of course, the client may also post the original back to the practitioner who may then witness by signing the original document on receipt.

The regulation also allows for swearing or affirming the contents of an affidavit by audio visual link.

[Schedule 1](#) expires 6 months from the date of commencement, being 22 October 2020.

Victoria

COVID-19 Omnibus (Emergency Measures) Act 2020

[COVID-19 Omnibus \(Emergency Measures\) Act 2020](#) – amends the Oaths and Affirmations Act 2018 to allow for anything that needs to be done for an affidavit physically to be done electronically.

COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020

The [COVID-19 Omnibus \(Emergency Measures\) \(Electronic Signing and Witnessing\) Regulations 2020](#) came into operation on 12 May 2020 and allows for witnessing of documents by audio visual link in Victoria. This practical step allows wills, enduring and non-enduring powers of attorney, supportive attorney appointments- including instruments of revocation - deeds, mortgages and statutory declarations to be witnessed through audio visual means, such as Zoom, Skype or Microsoft Teams, which integrates with LEAP. The regulations do not apply to the appointment of a medical treatment decision-maker or the making of an advance care directive. There is no relaxation of the strict signing requirements for these documents.

Practitioners can post a copy of the document to the client, or email it to the client if they have printing facilities, arrange a meeting via any audio visual means and then be the witness to the client signing the document.

To effectively witness under the regulations the witness must:

- Observe the person sign the document in real time – this may involve ensuring that the witness can view the document on screen as the signature is made;
- Witness by signing the document or a copy of the document; and
- Endorse the document, or a copy, with a statement indicating the document was witnessed in accordance with the regulations.

The following wording is suggested for the endorsement:

This document was signed in counterpart and witnessed over audio visual link in accordance with the COVID-19 Omnibus (Emergency Measures) (Electronic Signing and Witnessing) Regulations 2020.

The regulations allow a witness to sign a counterpart of the document, or alternatively, have the client scan and email the signed document back to the practitioner who may then print and witness the copy. Of course, the client may also post the original back to the practitioner who may then witness by signing the original document on receipt.

The regulations expire on 25 October 2020.

Queensland

Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020

The [Justice Legislation \(COVID-19 Emergency Response – Documents and Oaths\) Regulation 2020](#) came into operation on 15 May 2020. It allows for the making, signing and witnessing of wills, affidavits, statutory declarations, oaths, deeds, mortgages lodged under the Electronic Conveyancing National Law, and enduring documents under the Powers of Attorney Act 1998 – including revocation documents - to be done through audio visual means such as Zoom, Skype or Microsoft Teams, which integrates with LEAP.

The Regulation provides that a current requirement for the presence of a witness, signatory or other person is taken to be satisfied if the person is present by audio visual link.

A document may be witnessed by audio visual link only if at least one of the witnesses is a special witness and the general requirements for using an audio visual link under the Regulation are met.

A special witness includes:

- an Australian legal practitioner;
- a JP or commissioner for declarations; and
- a notary public;

The Regulation prescribes the following general requirements for using an audio visual link:

- the audio visual link enables the witness to be satisfied that the signatory or substitute signatory is signing the document;
- the witness must be satisfied that the signatory is making the document freely and voluntarily;
- the witness observes the signatory or substitute signatory signing the document in real time;
- the signatory or substitute signatory signs each page of the document;

- the witness observes the signatory direct the substitute signatory to sign the document, if applicable.

A witness for the signing of a document by audio visual link must take reasonable steps to verify the identity of the signatory and that the signatory is making the document freely and voluntarily. The witness must also be satisfied that the document is the original or a true copy of the document.

A special witness who witnesses the signing of a document by audio visual link must sign a certificate that must be kept with the document and states:

1. that the document was signed and witnessed during the COVID-19 emergency period; and
2. that the document was signed and witnessed in accordance with the Regulation; and
3. the steps the witness took to verify the identity of the signatory; and
4. if a substitute signatory signed the document—
 - (a) the identity of the substitute signatory; and
 - (b) a description of the direction given by the signatory to the substitute signatory; and
5. if a substitute signatory was directed by audio visual link to sign the document—the grounds on which the witness is satisfied the substitute signatory is permitted under s 13 to be a substitute signatory for the document; and
6. the process followed for signing and witnessing the document; and
7. that the special witness is a special witness; and
8. whether an audio visual recording was made under s 26 of the signing or witnessing of the document; and
9. any other matters the special witness considers relevant to the signing or witnessing of the document.

This certificate is in addition to the witness certificate required under the Powers of Attorney Act 1998.

The Regulation also restricts who may sign as substitute signatory for documents made in accordance with the Regulation. A substitute signatory cannot be:

- a person witnessing the document;
- for a will, an executor or beneficiary or person witnessing the will or a relation of an executor or beneficiary; or
- for an enduring document, an attorney of the signatory or person witnessing the document or a relation of the attorney.

In addition, if the substitute signatory is not physically present with the signatory, then the substitute signatory must be an Australian legal practitioner or public trustee employee.

A witness may either sign the original signed document sent to them by the signatory or substitute signatory or a true copy of the document, such as a copy scanned and emailed to the witness. The official document is taken to be the document that was signed by the last witness and sent to the signatory or another person directed by the signatory. Contrary to current requirements, this official document need not bear the wet ink original signatures of all persons who are required to sign the document.

If a document made, signed or witnessed in accordance with the Regulation is required to be given, produced or used for any purpose, the official version of the document may be given and relied on as evidence of the document. However, the document bearing the original wet ink signature of the signatory or substitute signatory, the originating document, must be kept with the official document and may be required to be produced by a court in relation to a proceeding or by the registrar of titles if the official document is produced or lodged with the titles register.

The Regulation also allows an audio visual recording of the signing or witnessing of a document to be made with consent. However, whether a recording is made or not made does not affect the validity of the document or signing or witnessing of the document.

The Regulation also modifies the Powers of Attorney Act 1998 to enable nurse practitioners, in addition to doctors, to complete a certificate in an Advance Health Directive stating that the signatory, at the time of making the directive, appeared to have the capacity necessary to make it. The doctors or nurses may conduct the capacity assessment using audio visual link.

The Regulation will expire on 31 December 2020.

Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020

The [Justice Legislation \(COVID-19 Emergency Response—Wills and Enduring Documents\) Amendment Regulation 2020](#) extended emergency response measures to the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, mortgages lodged under the Electronic Conveyancing National Law and general powers of attorney.

Australian Capital Territory

The [COVID-19 Emergency Response Legislation Amendment Act 2020](#) amends the COVID-19 Emergency Response Act 2020 from 14 May 2020 to allow for witnessing of documents by audio visual link in the ACT. This practical step allows wills, powers of attorney, deeds and agreements, appointment of guardians and managers, health directives, affidavits and statutory declarations to be witnessed through audio visual means, such as Zoom, Skype or Microsoft Teams, which integrates with LEAP.

Practitioners can post a copy of the document to the client, or email it to the client if they have printing facilities, arrange a meeting via any audio visual means and then be the witness to the client signing the document.

To effectively witness under the Act the witness must:

- Observe the person sign the document in real time – this may involve ensuring that the practitioner can view the document on screen as the signature is made;
- Witness by signing the document or a copy of the document;
- Be reasonably satisfied that the document is the same document, or a copy of the document signed by the signatory; and
- Endorse the document, or a copy, with a statement specifying the method used to witness the signature and that the document was witnessed in accordance with the Act.

The following wording is suggested for the endorsement:

This document was signed in counterpart and witnessed over audio visual link in accordance with section 4 of the COVID-19 Emergency Response Act 2020.

The regulation allows a witness to sign a counterpart of the document, or, alternatively, have the client scan and email the signed document back to the practitioner who may then print and witness the copy. Of course, the client may also post the original back to the practitioner who may then witness by signing the original document on receipt.

The amendments also allow for swearing or affirming the contents of an affidavit by audio visual link.

These measures will expire at the end of a 12-month period during which no COVID-19 declaration has been in force.

Western Australia

Division 4 of Part 2 of the COVID-19 Response and Economic Recovery Omnibus Act 2020 allows for witnessing of certain documents by audio visual link in WA. This practical step by WA parliament allows affidavits, statutory declarations and other documents relating to 'relevant enactments', as set out in s 25, to be witnessed through audio visual means, such as Zoom, Skype or Microsoft Teams, which integrates with LEAP.

Practitioners can post a copy of the document to the client, or email it to the client if they have printing facilities, arrange a meeting via any audio visual means and then be the witness to the client signing the document.

To effectively witness under the Act the witness must:

- observe the person sign the document in real time – this may involve ensuring that the practitioner can view the document on screen as the signature or declaration is made;
- witness by signing the document or a copy of the document;
- be reasonably satisfied that the document is the same document, or a copy of the document signed by the signatory; and
- endorse the document, or a copy, with a statement specifying the method used to witness the signature and that the document was witnessed in accordance with the regulation.

The following wording is suggested for the endorsement:

This document was signed in counterpart and witnessed over audio visual link in accordance with s 24(2) of the COVID-19 Response and Economic Recovery Omnibus Act 2020.

The regulation allows a witness to sign a counterpart of the document, or, alternatively, have the client scan and email the signed document back to the practitioner who may then print and witness the copy. Of course, the client may also post the original back to the practitioner who may then witness by signing the original document on receipt.

The regulation also allows for swearing or affirming the contents of an affidavit by audio visual link.

Division 4 ceases to have effect at the end of 31 December 2021.

Tasmania

[Notice under Section 17 of COVID-19 Disease Emergency \(Miscellaneous Provisions\) Act 2020](#) came into operation on 8 June 2020 and allows certain documents, including affidavits and statutory declarations, to be executed and witnessed through audio visual means, such as Zoom, Skype or Microsoft Teams, which integrates with LEAP.

The Notice specifically allows for swearing or affirming the contents of an affidavit by audio visual link.

Practitioners can post a copy of the document to the client, or email it to the client if they have printing facilities, arrange a meeting via any audio visual means and then be the witness to the client signing the document.

The Notice allows a witness to sign a counterpart of the document, or, alternatively, have the client scan and email the signed document back to the practitioner who may then print and witness the copy. Of course, the client may also post the original back to the practitioner who may then witness by signing the original document on receipt.

To effectively witness under the Notice the witness must:

- Observe the person sign the document in real time – this may involve ensuring that the practitioner can view the document on screen as the signature is made;
- Witness by signing the document or a copy of the document;
- Be reasonably satisfied that the document is the same document, or a copy of the document signed by the signatory; and
- Endorse the document, or a copy, with a statement specifying the method used to witness the signature and that the document was witnessed in accordance with the Notice.

The following wording is suggested for the endorsement:

This document was signed in counterpart and witnessed over audio visual link in accordance with the Notice under Section 17 of COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020.

The Notice expires on 8 June 2021.

Affidavits

Some courts are currently accepting unsigned affidavits on the basis that, if necessary, they will later be formally executed. It is generally acceptable that the affidavit is signed by the deponent and that a paragraph is included in the body of the affidavit stating that it cannot be sworn or affirmed due to measures to minimise the spread of COVID-19. **The website of each court should be referred to as required.**

Agreements

An agreement can be in electronic form and executed electronically if witnessing is not required.

Most contracts, such as a contract for the sale of land, do not require a witness.

If witnessing is required it can be done electronically provided the witness is present when the deed is signed. If witnessing is not possible this way due to virus related isolation, then the counterparty will need to agree to another method.

Deeds

Deeds usually require signatures to be witnessed and to be in writing.

An electronically signed deed that is immediately printed out on paper may satisfy the common law requirement for paper with the first printed version being the original deed rather than a copy. However, parties to a transaction are better served to agree in advance to the acceptability of a particular form of deed and its electronic signature. Similarly, checking the requirements of organisations such as registries with whom the deeds must be registered will ensure their acceptability.

As mentioned above, witnessing can be electronic provided the witness is present when the deed is signed. If this is not possible then the counterparty will need to agree to another method.

An acceptable method might be by video attendance of the party's lawyer who on return of the signed deed certifies it to be identical to the one submitted for signing and that the signing was witnessed by video.

Signatures

Signatures establish the identity of the person signing and their intention to create legal relations. It is this intention indicated by placing their mark on a document that gives it its legal character or functionality, not the mark itself. There is no real distinction made at law between handwritten signatures, marks or electronic signatures. Signing a document electronically might be done by typing one's name, pasting an image of one's usual signature, using a stylus or finger on a touchscreen or using e-signing software.

The common law recognises electronic signatures, but the [Electronic Transactions Act 2000](#), as enacted throughout Australia, puts beyond doubt that electronic signatures are equivalent to traditional hardcopy signatures. More specifically, the Act provides that a legal requirement for a manual signature can be satisfied with an electronic signature if a reliable method is in place to identify the person and to indicate that the person has approved the information that has been communicated.

The reliable method for evidencing the identity of the signatory and their intention to sign electronically is provided by their solicitor's confirmation that the party has signed electronically and intends to be bound by the contract. Likewise an authority signed electronically for an agent to sign on the party's behalf will satisfy the requirements of the relevant conveyancing Acts.

In summary, it is the intention of the signatory to create legal relations indicated by placing their mark on a document that gives a signature its legal character or functionality, not the mark itself. As a matter of interest, a signature has five functions that point to intent rather than the form of the signature. They are an evidentiary function, a cautionary function in that a signatory deliberates before signing, a function of a reliable true record, a function that establishes the mark as one of legal significance and a compliance function.

The practice of exchanging electronically signed contracts is now common practice. However, the legalities and procedures are worth knowing, particularly when parties or

their solicitors are confronted with tight deadlines or distance causing problematic delays that electronic signing can easily overcome.

The various electronic transactions Acts listed below outline the requirements for evidencing the intent of a person to be bound by a document that he or she has signed electronically. For example, [s 9](#) of the [Electronic Transactions Act 2000](#) states that the requirement of any law for a signature is 'taken to have been met in relation to an electronic communication if':

- (a) the signature identifies the person and indicates approval of the information;
- (b) the method of communication was appropriate in the circumstances; and
- (c) the person has consented to the use of electronic communication.

Electronic Transaction Acts enacted throughout Australia and the dates upon which they commenced are:

- [Electronic Transactions Act 1999](#) (Cth): 15 March 2010 and after 1 July 2001 applied to all laws of the Commonwealth unless specifically exempted;
- [Electronic Transactions Act 2000](#) (NSW): 30 November 2001;
- [Electronic Transactions \(Victoria\) Act 2000](#): 1 September 2000;
- [Electronic Transactions \(Queensland\) Act 2001](#)(Qld): 1 November 2002;
- [Electronic Transactions Act 2000](#) (Tas): 1 June 2001;
- [Electronic Transactions \(Northern Territory\) Act 2000](#): 13 June 2001;
- [Electronic Transactions Act 2001](#) (ACT): 1 July 2001;
- [Electronic Transactions Act 2011](#)(WA): 25 May 2011;
- [Electronic Communications Act 2000](#) (SA): 1 November 2002.

Witnesses

Execution of an agreement or contract by an individual, or by or on behalf of a company by an authorised officer is not required to be witnessed.

Witnessing an agreement or contract is merely for evidentiary purposes. It serves to evidence the person's intention to create legal relations. That intention exists whether the agreement or contract is witnessed or not. While it may be prudent to have a signature witnessed, it is not necessary.

Unlike agreements and contracts, deeds are usually required to be witnessed: see, for example, [s 38](#) of the Conveyancing Act 1919 and [Brown v Tavern Operator Pty Ltd \[2018\] NSWSC 1290](#) at [466].

The By Lawyers precedent Execution Clauses – Agreements and Contracts, available in all of our guides, provides execution clauses where no witnesses are required.

Electronic conveyancing requirements

A Client Authorisation form may be electronically signed, subject to specific jurisdictional requirements. Whilst the Verification of Identity Standard requires a face-to-face in person interview, compliance with the standard is not mandatory and taking 'reasonable steps' to verify the identity of the client, such as by video meeting, is sufficient.

The By Lawyers contracts for sale of land in NSW and in VIC allow for electronic exchange and electronic settlement in compliance with electronic transactions legislation and the Verification of Identity Standard rules.

Wills

The issue with executing wills remotely given social distancing is the availability of two witnesses who are not themselves beneficiaries.

Where the required two disinterested witnesses are not available the will may be executed informally by the testator, who after signing it returns it to their solicitor with a statement that they intend it to be their last will and testament. Accompanied by an affidavit explaining the signing in the prevailing circumstances, perhaps with video witnessing, a grant of probate of the informal will is likely to be made if required. Once the pandemic ends the will can be properly signed.

New South Wales

The execution of a will can be witnessed through audio visual means in accordance with [Schedule 1](#) to the Electronic Transactions Regulation 2017 (NSW). See above for further details.

Queensland

A registrar may dispense with the requirement under [s 10](#) of the Succession Act 1981 that a witness be in the presence of the testator, insofar as that phrase has the meaning to be physically in the presence of the testator, subject to the production of specific evidence to the satisfaction of the registrar. A will may be witnessed by a single witness via video conference. See the Supreme Court of Queensland [Practice Direction 10 of 2020](#) for further details. This practice direction is limited in its application to wills executed between 1 March 2020 and 30 September 2020.

Powers of attorney

A general power of attorney does not need a witness and can be signed remotely.

However, an enduring power of attorney must be witnessed by a prescribed witness – usually the principal’s solicitor – who must also certify that they explained the effect of the document to the principal and that they appeared to understand it. On that basis remote signing is technically impossible.

Where a face-to-face meeting is not possible – even one at an outdoor location with appropriate distancing – the document could be sent to the client by post or email for their written or electronic signature. Their lawyer could hold a video conference with the client and explain the document and see it signed by their client. When returned the lawyer can certify that they gave the explanation and were satisfied as to the principal’s understanding, but whilst unable to personally witness the document being signed they witnessed the signing in video conference.

In this practical way the power is likely to be acceptable in most cases where there is no issue raised.

Where this approach is taken the risks that the document may not be effective need to be explained to the client and appropriate file notes made.

Appointments of enduring guardian and advance medical directives

The same witnessing and certification procedures apply to these instruments as for enduring powers of attorney. Similar practical, emergency measures might be undertaken.

Company execution

A company can now execute a document electronically under [s 127](#) of the Corporations Act 2001. See below for further details.

LawConnect – Sharing documents with clients and colleagues

Sharing documents with clients and colleagues via LawConnect from your LEAP matter eliminates the issue of email security and provides more functionality.

Send or receive large files

Email servers set limits on the size of attachments. LawConnect simply provides a link to the documents removing the need to send multiple emails or zip files.

Better communication

Share documents from any LEAP matter and be notified when the recipient views the documents.

Restrict access

Unlike email, access to a LawConnect document can be revoked at any time, with or without notifying the client. If a document is shared with a client by mistake, access can be immediately restricted.

Risk-free access on the go

Colleagues and clients can access documents wherever they are, on any device convenient to them, whether iOS or Android phones or tablets. All LawConnect data is secured by Amazon Web Services, and is safer than email.

Companies, trusts, partnerships and superannuation

Company execution

Amendments introduced by the [Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020](#) that commenced on 6 May 2020 mean that a company can execute a document electronically under [s 127](#) of the Corporations Act 2001. The method used must be appropriate in the circumstances, identify the person in the electronic communication and indicate the person's intention in respect of the contents of the document. The Determination also provides for the execution of a document requiring a common seal to be executed otherwise: [s 6\(3\)](#).

Company meetings

Amendments introduced by the [Corporations \(Coronavirus Economic Response\) Determination \(No. 1\) 2020](#) that commenced on 6 May 2020 modify the provisions of the [Corporations Act 2001](#) and the [Corporations Regulations 2001](#), or any equivalent provisions in a company constitution, that require or permit a meeting to be held, or that regulate giving notice of a meeting or the conduct of a meeting, so that:

- a meeting can be held using one or more technologies that give all persons entitled to attend a reasonable opportunity to participate without being physically present in the same place. This would include platforms such as Zoom, Skype or Microsoft Teams;
- all persons thus participating in the meeting are taken for all purposes, including quorum requirements, to be present at the meeting;
- a vote taken at the meeting must be taken on a poll, and not on a show of hands, by using one or more technologies to give each person entitled to vote the opportunity to participate in the vote in real time and, where practicable, by recording their vote in advance of the meeting;
- a requirement to allow persons attending the meeting to speak, such as asking questions, may be complied with by using one or more technologies that allow that opportunity;

- a proxy may be appointed using one or more technologies specified in the notice of the meeting; and
- notice of a meeting may be given by using one or more technologies to communicate along with any other information to be provided, or details of an online location where the content can be viewed or downloaded. For example, a company could send members an email setting out or attaching a notice of a meeting and any other material relating to the meeting, or else providing a link to where the notice and the other material can be viewed or downloaded.

A notice of meeting must include information about how those entitled to attend can participate in the meeting, including how they can vote and speak at the meeting.

If notice of the meeting has been given before 6 May 2020, the person giving notice must, at least seven days before the meeting is held, give a fresh notice of the meeting that includes the information referred to above.

These temporary measures will expire on 21 March 2021.

Temporary changes to insolvency laws

Liquidation

The time for a debtor company to comply with a statutory demand has been extended from 21 days to six months. The threshold to issue a statutory demand has been increased from \$2,000 to \$20,000. These changes will apply until 25 September 2020.

Safe harbour

A new, temporary s 588GAAA ‘Safe harbour—temporary relief in response to the coronavirus’ of the Corporations Act 2001 provides that the existing civil penalties for directors failing to prevent insolvent trading under [s 588G\(2\)](#) do **not** apply in relation to a debt incurred by a company **if** the debt is incurred in the ordinary course of the company’s business and until 25 September 2020.

Practitioners should keep these changes in mind for the next six months and be aware of the end date which is 25 September 2020.

Conveyancing and property

FIRB approval

All foreign buyers now require Foreign Investment Review Board approval. Thresholds for all property classes have been reduced to \$0. All contracts entered into with foreign buyers after 29 March 2020 will need to include an appropriate FIRB approval condition. A condition can be found in the **Library of special conditions** folder in all By Lawyers **Conveyancing** guides. Expected approval times have increased from 30 days to up to six months.

Commercial, Industrial and Retail leases

The [National Cabinet Mandatory Code of Conduct](#) was released on 7 April 2020 to govern commercial, industrial and retail tenancies affected by the COVID-19 pandemic. A 'Deed of variation of lease – Deferral of rental payments during COVID-19' has been added to all By Lawyers **Leases** guides and complies with the code.

The implementation of the National Code varies between the states and territories so the applicable legislation should be reviewed. The above deed should also be adapted to suit where necessary:

VIC:

- [COVID-19 Omnibus \(Emergency Measures\) Act 2020](#)
- [COVID-19 Omnibus \(Emergency Measures\) \(Commercial Leases and Licences\) Regulations 2020](#)

NSW:

- [COVID-19 Legislation Amendment \(Emergency Measures\) Bill 2020](#)
- [Retail and Other Commercial Leases \(COVID-19\) Regulation 2020](#)
- [Retail and Other Commercial Leases \(COVID-19\) Amendment Regulation 2020](#)

QLD:

- [COVID-19 Emergency Response Act 2020](#)
- [Retail Shop Leases and Other Commercial Leases \(COVID-19 Emergency Response\) Regulation 2020](#)

WA:

- [Commercial Tenancies \(COVID-19 Response\) Act 2020](#)
- [Commercial Tenancies \(COVID-19 Response\) Regulations 2020](#)

SA:

- [COVID-19 Emergency Response Act 2020](#)
- [COVID-19 Emergency Response \(Commercial Leases No 2\) Regulations 2020](#)
- [COVID-19 Emergency Response \(Commercial Leases No 2\) \(Prescribed Period\) Variation Regulations 2020](#)

TAS:

- [COVID-19 Disease Emergency \(Commercial Leases\) Act 2020](#) – fully commenced 24/07/2020
- [COVID-19 Disease Emergency \(Commercial Leases\) Regulations 2020](#)
- [COVID-19 Disease Emergency \(Miscellaneous Provisions\) Act 2020](#)
- [COVID-19 Disease Emergency \(Miscellaneous Provisions\) Act \(No. 2\) 2020](#)

ACT:

- [Covid-19 Emergency Response Act 2020](#)

Residential leases

Relief measures are being introduced in many states for residential tenants impacted by COVID-19 to modify the usual remedies available to a landlord for rental arrears. The website of each government department should be referred to.

Land tax

Relief measures for landholders impacted by COVID-19 are being introduced in many states, including foreign surcharge relief. The website of each revenue authority should be referred to.

Registration of paper dealings

Land registries in most states are allowing paper dealings and documents that are not valid for electronic lodgement to be scanned as a PDF and uploaded via PEXA. See the relevant land registry website and the [PEXA website](#).

Criminal

The ongoing response to coronavirus means that emergency measures are rapidly being introduced to modify the usual procedures. The website of each court should be referred to.

Courts are making particular arrangements for matters to be dealt with on the papers, such as bail variations, guilty pleas, diversion hearings and domestic violence orders.

For example:

- In NSW, legal practitioners may currently submit a client's plea online using [Notice of Plea by Legal Representative form](#).
- In WA, the Magistrates Court has released the following practice directions providing for streamlined procedures where short matters are by consent, removing any need for practitioners or clients to attend court:
 - o [Practice Direction 4 of 2020](#) – Consent Adjournments and Pre-Sentence Reports;
 - o [Practice Direction 5 of 2020](#) – Applications to Adjourn Disclosure/Committal Hearings by Consent - note that this practice direction relates only to the Perth Magistrates Court.
- In QLD, online applications for criminal matters in the Magistrates Court were enabled on 9 July 2020. [Practice Direction 7 of 2020](#) allows for either prosecutors or defence legal representatives to submit an electronically lodged form for any matters listed in the Magistrates Court seeking an order for a date for a directions hearing, bail application or sentence. However, such applications must be by consent. While this arrangement was introduced in response to COVID-19, it is permanent.

Early guilty pleas

Anecdotal evidence from practitioners is that early guilty pleas are being strongly rewarded at the moment and unusual leniency is currently being granted in many sentencing cases.

Criminal court process and COVID-19

As a result of the COVID-19 pandemic, magistrates courts across the country have introduced a raft of temporary arrangements with a view to limiting the number of people attending courts. The following information relates to arrangements in the NSW Local Court, but generally reflects COVID arrangements in all criminal jurisdictions.

One of the main changes is the way in which accused persons and practitioners can facilitate their matters at various stages of the court process, namely:

- First mention
- Entering a plea of guilty or not guilty
- Proceeding to sentence on a guilty plea
- Proceeding to obtain orders for service of prosecution brief and adjournment for reply on a not guilty plea
- Proceeding to a hearing.

For preliminary stages of the process, the court will accept the appearance of a practitioner and their client if the practitioner emails the court prior to the mention date, indicates what their instructions are and asks the court to adjourn their client's matter depending on the plea being entered.

For example, where the client has been charged and wishes to enter a plea of not guilty, the matter might proceed as follows:

- On the first mention date, an email is sent to the court to advise that the client wishes to enter a plea of not guilty. In that email ask the court to make orders for service of the prosecution brief and adjourn the matter to a future date, usually two weeks after service of the brief, for reply. Also ask the court to acknowledge the appearance by virtue of the email sent and to place the email with the court's papers for the information of the presiding magistrate on the relevant day.
- The court will send an automatic reply acknowledging receipt of the email within a few minutes. A further email will usually follow from a court registry officer to advise the email has been placed with the court papers.
- On the mention date, usually after the court sittings have finished for the day, a further email will be received from the court with a Notice of Listing attached,

indicating the court result for the matter – for example, adjourned for reply on a certain date and brief to be served by a date 2 weeks prior.

- Shortly before the reply date, if the brief has been served and the practitioner's instructions remain to defend the charge, a further email is sent to the court and copied to the prosecutor confirming the plea of not guilty. A Local Court Listing Advice and Notice of Readiness should also be attached to this email, along with any unavailable dates, so the court can list the matter to a suitable date for hearing. Again, ask the court to acknowledge the appearance by virtue of the email.
- The prosecution will file a Notice of Readiness with the court for the reply date.
- The court in its practice directions, and generally, urges both defence and prosecution practitioners to liaise with each other to ensure the matter is ready to be listed for hearing, by resolving any issues that may cause a delay.
- If issues are unresolved and the matter is not ready to be listed for hearing, the parties should email the court and seek a further adjournment.
- Once again, an automatic reply is generated from the court and after the mention of the matter and hearing date is set, the court will send an email containing the Notice of Listing to the practitioner. Where the matter is not ready to list for hearing, the Notice will contain the adjournment date so the parties can continue to liaise.
- Unless there is any particular issue pertaining to bail, the courts are generally continuing bail as the matter progresses.
- When a matter is listed for finalisation and the defendant is legally represented, the court expects that both the practitioner and their client will appear in person, unless the offence is a 'fine only' offence. However, due to the current arrangements removing all short matters from the court lists, personal attendances before the court are generally far more efficient than they would previously have been.
- Final hearings are not being conducted by audio-visual links - attendance at court is required.

There are substantial benefits for all participants, including legal practitioners, from the current arrangements, including:

- Reduced proximity and interaction between people in court complexes.
- Court time can be more valuably used, only having practitioners and their clients appearing in person before the court when being sentenced or to defend matters.

- With fewer people in the court and fewer matters before the court, magistrates generally have more time to deal with sentences and complex applications.
- Far less time is spent attending court simply to seek to have a matter adjourned or to deal with interlocutory issues.
- Apart from final hearings or where there are bail issues, clients do not need to take time off from work or other commitments to attend court.
- Clients are generally understanding and appreciative of conferences with their lawyer being conducted via Zoom or similar means, but many clients are not technically adept and prefer face to face meetings. It is a matter for the practitioner whether and how to facilitate face to face meetings.
- From a costs perspective this streamlined process can be cheaper for clients, as drafting and sending an email can take considerably less time than it takes to travel to and from court and to conduct a court appearance in person. Clients have commented positively on the reduced costs of attendances via email.
- From the practitioner's point of view, while costs for individual attendances may be reduced, the time saved travelling and at appearing in court can result in increased billable time in the office and therefore increased fees overall. There may also be a shift away from time costing and towards fixed fee arrangements for adjournments and interlocutory issues that are dealt with via email, to level out the overall costs impact.
- Time and costs savings apply to the police and prosecuting authorities too. Prosecutors appear to be aware of the requirement to liaise with defence practitioners and are generally reported to be prompt and accommodating in their email responses.

It seems highly likely that many of these accommodations and streamlined procedures will remain in place and become the norm once the pandemic has ceased. If so, this is likely to have a sustained positive effect on the efficiency of the criminal jurisdiction.

Employment including JobKeeper

Employers have legal obligations to ensure the health and safety of their employees and contractors and also to ensure that the health and safety of members of the public is not put at risk from the conduct of their business or undertaking. This includes managing the risk of exposure to and spread of coronavirus in the workplace.

Health risks such as coronavirus need to be carefully and sensitively managed as they can give rise to a risk of claims of discrimination, unfair treatment and even unfair dismissal.

Therefore, employers should ensure they act fairly and on the basis of reliable and current medical information. Similarly, employers should not permit or encourage their employees to target or treat adversely any particular demographic in the workplace.

There are legal protections against discrimination or adverse action based on race, ethnicity, national origin or impairment, which can include disease or illness. In an atmosphere of heightened anxiety due to the impact of coronavirus it is important that employees' emotions and conduct are managed by clear and open communication from senior management.

The rapidly changing situation with the coronavirus pandemic means that many employers will be focused on reducing their labour costs in the current business climate. To reduce labour costs employers may consider options such as:

- Asking employees to take their accrued paid leave such as annual leave and long service leave;
- Implementing stand downs pursuant to [s 524](#) of the Fair Work Act 2009 (Cth); or
- Implementing redundancies.

Leave

Under the Fair Work Act full-time and part-time national system employees are entitled to 10 days personal/carer's leave each year of service. The entitlement accumulates progressively.

Employees who access their accrued personal/carer's leave due to injury or illness such as coronavirus are considered to be temporarily absent from work and, as such, are protected from dismissal because of their illness or injury: [s 352](#).

That does not mean that an employee on personal/carer's leave who is suffering from coronavirus cannot be required to obey reasonable and lawful occupational health and safety based instructions intended to minimise the risk of the person spreading disease in the workplace. For example, an employee diagnosed with coronavirus who disobeyed an instruction not to attend the workplace unless cleared medically would risk disciplinary action.

Stand down

An employer may stand down an employee during a period in which the employee cannot usefully be employed due to circumstances for which the employer cannot reasonably be held responsible.

The employer does not pay wages for the period of a stand down. This is not a deferment but a pause during the stand down on the obligation to pay wages.

An employee stood down continues to accrue entitlements to annual leave and personal/carer's leave under the National Employment Standards, as well as an entitlement to a public holiday that falls on a day the employee would ordinarily work during the stand down period: [s 524](#).

Redundancy

For a redundancy based dismissal employees who are dismissed on the grounds of a 'genuine redundancy' are **not** eligible to bring an unfair dismissal application: [s 385\(d\)](#).

A [genuine redundancy](#) occurs where:

- The person's employer no longer required the person's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- The employer has complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

A genuine redundancy does **not** occur if it would have been reasonable in all the circumstances for the person to be redeployed within:

- The employer's enterprise; or
- The enterprise of an associated entity of the employer.

Dismissal

When interviewing a client who claims to have been dismissed due to the coronavirus it is important to ascertain the basis of the client's belief. If there is evidence supporting the claim that the virus was the reason for the dismissal, then a claim for unfair dismissal or breach of general protections provisions may be available.

JobKeeper payment stimulus package

Under the JobKeeper Payment, businesses impacted by COVID-19 are able to access a wage subsidy to continue paying their employees. This includes the self-employed.

The JobKeeper initiative is designed to keep workers employed and support businesses to remain in 'hibernation' mode so that they can rebound quickly once the crisis eases.

The package has been extended for a further six months until 28 March 2021, with some changes to employer eligibility and payment rates.

The additional six-months is divided into two periods:

- 28 September 2020 to 3 January 2021; and
- 4 January 2021 to 28 March 2021.

Eligible employers will continue to claim a fortnightly payment of \$1,500 per eligible employee until 27 September 2020.

Eligible employees will continue to receive a minimum of \$1,500 per fortnight, before tax from their employer until 27 September 2020.

From 28 September 2020 the payment rates will be reduced.

This lifeline for many businesses, helps them keep the same level of capacity at a reduced wages cost.

The scheme is administered by the ATO, which has been given discretion to make specific and detailed rules to deal with different scenarios.

The following is discussed below:

- Who is eligible?
- How does it work?
- Answers to frequently asked questions.

Eligibility criteria

Both employee and employer must meet eligibility criteria. This covers most structures including companies, trusts, partnership, sole traders and not-for-profit organisations.

Eligibility for employers

Until 27 September 2020

Businesses with turnover of less than \$1 billion must experience a decline in turnover of 30% relative to a comparable period a year ago, for at least a month. The relevant employment date is 1 March 2020 or 1 July 2020 and the employer needs to confirm that each eligible employee is currently employed. For businesses with more than \$1 billion turnover the turnover decline threshold is 50%.

From 28 September 2020 to 3 January 2021

Businesses with turnover of less than \$1 billion must experience a decline in turnover of 30% for the September quarter compared to the September 2019 quarter. The relevant employment date is 1 March 2020 or 1 July 2020 and the employer needs to confirm that each eligible employee is currently employed. For businesses with more than \$1 billion turnover the turnover decline threshold is 50%.

The decline in turnover is calculated on actual GST turnover rather than projected GST turnover.

From 4 January 2021 to 28 March 2021

As above, except the decline in turnover is calculated on actual GST turnover between the 2019 and 2020 **December** quarters.

Eligibility for employees

Full-time and part-time employees are eligible, including those stood down and re-hired. A casual employee is also eligible if they have been with the employer for at least the previous 12 months on a regular and systematic basis. Terminated employees have to be re-engaged to be eligible.

Visa status

Only employees who are Australian citizens, or a holder of a permanent visa, protected special category visa, a non-protected special category visa, who have been residing continually in Australia for 10 years or more, or a New Zealand citizen on a special category visa (subclass 444) qualify for the JobKeeper scheme.

Temporary visa holders, such as subclass 457, 482, student visas, and working holiday makers do not qualify.

Wage condition

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 either:

- the amount of JobKeeper payment payable to the employer for the employee for the fortnight set out below; or
- if a greater amount is payable to the employee for the performance of work during the fortnight, that amount in full. This includes incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates and leave payments.

JobKeeper payments

Until 27 September 2020

Employers will receive \$1,500 per employee fortnightly. Employees must therefore be paid a minimum of \$1,500 fortnightly before tax. If their usual wage is less than \$1,500, the employer must still pay \$1,500. If the usual wage is more than \$1,500, then employers will have to top up the employee's wage.

From 28 September to 3 January 2021

For employees who worked 20 hours or more per week on average in February 2020 or June 2020 the employers will receive \$1,200 per employee fortnightly. These employees must therefore be paid a minimum of \$1,200 fortnightly before tax.

For employees who worked less than 20 hours per week on average in February 2020 or June 2020 the employers will receive \$750 per employee fortnightly. These employees must therefore be paid a minimum of \$750 fortnightly before tax.

If employees were employed for both February 2020 and June 2020, then the period with the higher number of hours worked is to be used.

From 4 January 2021 to 28 March 2021

As above, except the relevant amounts fall from \$1,200 to \$1,000 and \$750 to \$650.

For each extended period, employers need to nominate the particular payment rate that will be claimed for each eligible employee.

Superannuation

It will be up to the employer if they wish to pay superannuation on any additional wage paid because of JobKeeper payments.

Method of payment

Employers will have to pay the employees as usual and then get it reimbursed by the ATO one month in arrears.

JobKeeper or JobSeeker payment

Employees can claim one payment only. The JobSeeker payment, paid through Centrelink, is significantly lower than the JobKeeper payment.

Notification requirements

Employers must notify employees if they are claiming a JobKeeper payment on their behalf. Employees who have multiple employers must notify the employer that is their primary employer. They also need to notify Services Australia.

Frequently asked questions

What is the definition of turnover?

This is as per the business activity statement (BAS) definition of turnover. It includes all taxable and GST-free supplies but excludes input-taxed supplies, for example, interest and dividends. Only Australian-based turnover is relevant; decline in overseas turnover will not count.

How does it apply to a group environment?

The test is applied on an entity-by-entity basis, not to the group as a whole. If the group turnover is more than \$1 billion, the 50% turnover test will apply to each entity within the group. If less than \$1 billion, the 30% test will apply.

How is the 30% or 50% decline in turnover calculated?

It is based on the BAS, whether quarterly or monthly depends on the reporting cycle of the business. As a general rule, the current period is compared with the same period last year.

From 28 September 2020 to 3 January 2021

The turnover is still based on the BAS, however actual GST turnover is used. The 2020 September quarter needs to have fallen by at least 30% compared to the 2019 quarter for businesses with a turnover of under \$1 billion.

For businesses with more than \$1 billion turnover, the relevant percentage rate is 50%.

From 4 January 2021 to 28 March 2021

As above, except the 2020 December quarter must fall by at least the relevant amount.

Note that employers will need to assess their eligibility ahead of the relevant BAS deadlines for either period so as to meet the wage condition.

What if:

1. The business did not exist 12 months before 1 March 2020?
2. The business has grown significantly by acquisition or scaling up?
3. The employee's hours in February were not regular?
4. It is not appropriate to compare actual turnover of a 2020 quarter with its 2019 equivalent?

In these scenarios the ATO will have the discretion to consider additional information to establish if the business has been significantly affected, and to set alternative tests.

What is the sequence of payment? What if an employer does not have money to pay their employees?

Employees need to be paid first; employers get reimbursed one month in arrears. Businesses struggling with cash flow have been advised to discuss with their banks as they may be able to use upcoming subsidy as the basis to seek credit.

If the business was purchased less than 12 months ago and casual employees were retained, are they eligible?

The new operating entity may qualify as an eligible employer. Casuals must satisfy the test of working for 12 months on a regular and systematic basis in the business.

Can an employer receive JobKeeper payment for employees who are on Workcover payment?

Not if they are fully incapacitated, unable to work and are being supported by a workers compensation scheme. If the employee is partially working and being paid reduced hours, then yes.

Can an employer use the JobKeeper payment to reduce an employee's leave entitlement?

No, although some companies have indicated they want to do it. The JobKeeper payment can be packaged with annual leave to pay the employees their regular wages.

Can the employee salary sacrifice the JobKeeper payment?

Yes, where the employer and employee agree.

What about self-employed?

Yes, self-employed are eligible, subject to meeting some conditions.

What about a partner of a partnership not receiving any salary?

Yes, only one partner is eligible.

What about a beneficiary of a trust receiving distributions only?

Yes, only one individual beneficiary is eligible.

What about company directors receiving directors fee only?

Yes, only one director is eligible.

What about shareholders receiving dividend only?

An eligible company may nominate one shareholder who receives payment for labour by way of dividends.

What if an employee has multiple jobs?

Employees can only receive the JobKeeper payment from the primary employer. Employees can continue to earn money from other employers.

What are the compliance and integrity measures?

Employers need to assess their own and their employees' eligibility according to the specific guidelines provided by the ATO. They will be subject to audits, data matching and other integrity measures, which will prevent employers from entering any artificial scheme to access these benefits.

An employer trying to illegally access the scheme will face large penalties and possible imprisonment.

Further information

For further information see the Government fact sheets below:

- [JobKeeper Payment — Frequently Asked Questions](#)
- [JobKeeper Payment — Information for employers](#)
- [JobKeeper Payment — Information for employees](#)
- [Extension of the JobKeeper Payment](#)

The ATO website sets out how to [Enrol for the JobKeeper payment](#).

Download the [JobKeeper employee nomination notice](#) in [PDF format](#) or [DOCX format](#) from the ATO.

New powers for employers under the JobKeeper scheme

The Federal Parliament has passed legislation that extends and amends the measures aimed at workplace flexibility known as the JobKeeper enabling directions. This amended scheme commences on 28 September 2020.

The JobKeeper enabling directions will continue under the extended scheme until 28 March 2021. [Part 6-4C](#) of the Fair Work Act temporarily allows an employer to modify certain employment terms and conditions for a particular employee if they are eligible for the extended scheme or were eligible for the initial scheme.

The temporary powers will continue to include options for flexibility for managing workforce costs, such as reducing working hours but no longer allow employers to require employees to take annual leave.

How these arrangements work is set out below.

If a business does not qualify, they will need to work within the existing legal framework for managing their workforce.

New eligibility requirements for employers

The amendments change the eligibility requirements for employers. Two broad categories of employers have been created: those who qualify for the new scheme after 28 September 2020, referred to as 'qualifying employers'; and those who previously received at least one payment but no longer qualify, referred to as 'legacy' employers.

Qualifying employers

As stated previously, the new eligibility requirements to qualify for the scheme are:

From 28 September 2020 to 3 January 2021

Businesses with turnover of less than \$1 billion must experience a decline in turnover of 30% for the September quarter compared to the September 2019 quarter. The relevant employment date is 1 March 2020 or 1 July 2020 and the employer needs to confirm that each eligible employee is currently employed. For businesses with more than \$1 billion turnover the turnover decline threshold is 50%.

The decline in turnover is calculated on actual GST turnover rather than projected GST turnover.

From 4 January 2021 to 28 March 2021

As above, except the decline in turnover is calculated on actual GST turnover between the 2019 and 2020 **December** quarters.

Legacy employers

Firstly, legacy employers must have received one or more JobKeeper payments in the period prior to 28 September 2020, but no longer qualify.

Secondly, legacy employers need to experience a 10% decline in current GST turnover for the previous quarter.

Finally, legacy employers need to obtain a '10% decline in turnover certificate' from a financial service provider that is independent of and external to the employer.

The test needs to be satisfied and a certificate held for each relevant quarter.

Small business employers – those with less than 15 employees – are exempt from having to obtain the certificate. Instead they may choose to make a statutory declaration to the effect that the employer satisfied the 10% decline in turnover test for the designated quarter.

JobKeeper enabling directions

Qualifying employers

Employers who qualify under the extended scheme have the ability to stand down employees or reduce their hours, change the duties they perform or change their location of work. These are known as JobKeeper directions, which are discussed in more detail below. However, before a JobKeeper direction can be given, employers must meet some minimum requirements.

Any JobKeeper enabling directions or agreements existing on 27 September 2020 remain valid if the employer continues to qualify for the scheme.

Requirement to receive JobKeeper payments

A JobKeeper direction can only be made in relation to employees covered by the JobKeeper scheme. Therefore, during the period that the direction applies:

- the employer must qualify for the JobKeeper scheme; and
- the employer must be entitled to one or more JobKeeper payments for the employee for a period that consists of or includes the period to which the direction applies, or periods that, when considered together, consist of or include the period to which the direction applies.

If either of these does not apply, the direction is not authorised.

Legacy employers

Employers who qualified for the initial scheme under the requirements immediately listed above but no longer qualify have been given access to modified JobKeeper enabling directions.

Any JobKeeper enabling directions or agreements existing on 27 September 2020 will need to be reissued or new arrangements made.

Reasonableness requirement

A JobKeeper direction will not be permitted if the direction is unreasonable in all of the circumstances. It may be unreasonable due to the impact of the direction on any caring responsibilities of the employee.

Consultation requirements

Employers must consult with employees before making a JobKeeper direction. A JobKeeper direction will have no effect unless:

- the employer gave the employee written notice of the employer's intention to give the direction at least three days before the direction was given, or a lesser time if genuinely agreed to by the employee; and
- before giving the direction, the employer consulted with the employee or a representative of the employee about the direction.

An employer must keep a written record of the consultation.

Legacy employers have extra notice and consultation requirements:

- as above except the notification period is at least seven days, or a lesser time if genuinely agreed to by the employee;
- employees must be given written notice as to the employer obtaining the necessary certificate or statutory declaration for the relevant quarter; and
- employees must be given written notice as to whether the directions or agreements are to continue or end.

JobKeeper direction to stand down including reducing hours

Previously an employer could only reduce an employee's hours of work by agreement with the employee. Now an employer can give an employee a direction in writing to stand down by:

- not working on a day or days on which the employee would usually work;
- working for a lesser period than the period which the employee would ordinarily work on a particular day or days; or
- working a reduced number of hours compared with the employee's ordinary hours of work, which may be nil.

An employer can only do this if:

- the employee cannot be usefully employed for the employee's normal days or hours during the stand down period because of changes to the business attributable to the COVID-19 pandemic or government initiatives to slow the transmission of COVID-19; and
- the implementation of the stand down direction is safe, including having regard to the nature and spread of COVID-19.

An employer does not need to pay an employee for a period of stand down apart from the JobKeeper payment. However, they still need to meet the requirement to pay the designated amount per fortnight JobKeeper payment to the employee.

See **JobKeeper payments** above.

These provisions do not permit employers to reduce the employee's rate of pay. It only allows employers to reduce the number of hours worked. Employers must ensure that an employee's base rate of pay is not less than the base rate of pay that would have been applicable to the employee if the direction to stand down had not been given.

A stand down will not apply during any period when the employee is taking paid or unpaid leave authorised by the employer, or is otherwise authorised to be absent from the employee's employment, such as during public holidays.

If an employee has been given a JobKeeper direction to stand down, the employee can make a request to the employer to engage in reasonable secondary employment, training or

professional development. If an employee makes such a request, the employer must consider the request and must not unreasonably refuse the request.

Legacy employers may continue to issue a direction to reduce hours provided that an employee does not end up working less than:

- two hours per day; or
- 60% of their ordinary hours as at 1 March 2020.

See the following example content letters to employees:

- [Notice of intention to give JobKeeper enabling stand down direction or reduction in hours](#); and
- [JobKeeper enabling stand down direction or reduction in hours](#).

JobKeeper direction to change an employee's duties

An employer can direct an employee in writing to perform any duties that are within the employee's skill and competency during the period.

An employer can only do this if:

- the duties are safe, including having regard to the nature and spread of COVID-19;
- the employee has any required licence or qualification in order to perform those duties;
- the duties are reasonably within the scope of the employer's business operations.

An employer must ensure that the employee's base rate of pay is not less than the greater of the following:

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

A direction to change duties can only be made for the purpose of allowing employees to continue in employment. Therefore, it will have no effect unless the employer has information before them that leads them to reasonably believe that the direction is

necessary to continue the employment of one or more employees. It is immaterial that a similar direction could have been given by the employer to an employee other than the relevant employee.

Legacy employers can continue to issue these directions with the same requirements as those for qualifying employers.

See the following example content letters to employees:

- [Notice of intention to give JobKeeper enabling direction to change duties](#); and
- [JobKeeper enabling direction to change duties](#).

JobKeeper direction to change an employee's location of work

An employer can direct an employee in writing to perform duties during a period at a place that is different from the employee's normal place of work, including at the employee's home.

An employer can only do this if:

- the place is suitable for the employee's duties;
- 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 circumstances surrounding the COVID-19 pandemic;
- the performance of duties at the place is safe, including having regard to the nature and spread of COVID-19; and
- the performance of the duties at the place is within the scope of the employer's business operations.

A direction to change an employee's location of work can only be made for the purpose of allowing employees to continue in employment. Therefore, it will have no effect unless the employer has information before them that leads them to reasonably believe that the direction is necessary to continue the employment of one or more employees. It is immaterial that a similar direction could have been given by the employer to an employee other than the relevant employee.

Legacy employers can continue to issue these directions with the same requirements as those for qualifying employers.

See the following example content letters to employees:

- [Notice of intention to give JobKeeper enabling direction to change place of work](#); and
- [JobKeeper enabling direction to change place of work](#).

Duration of JobKeeper directions

A JobKeeper direction will continue in effect until:

- it is withdrawn or revoked by the employer;
- it is replaced by a new direction given by the employer; or
- the end date of 29 March 2021.

Agreements to change days or times of work

An employer can also request an employee to agree to perform duties during a period on different days or at different times compared to their ordinary days or times of work. If an employer does so, the employee must consider the request and must not unreasonably refuse the request.

An employer can only do this if:

- performance of the employee's duties on those days or at those times is safe, including having regard to the nature and spread of COVID-19;
- performance of the employee's duties on those days or at those times is reasonably within the scope of the employer's business operations; and
- the agreement does not have the effect of reducing the employee's number of hours or work compared with their ordinary hours of work.

Legacy employers can continue to make these agreements provided an employee is not asked to work less than two hours per day.

See the example content letter to employees: [JobKeeper agreement to change days or times of work](#).

Taking paid annual leave

This is only possible up until 28 September 2020. From this date the usual rules apply.

An employer can request an employee to take paid annual leave, provided that complying with the request will not result in the employee having a paid annual leave balance of less than two weeks. If an employer does so, the employee must consider the request and must not unreasonably refuse the request.

An employer and employee can also agree in writing to the employee taking twice as much paid annual leave for a period at half the rate of pay.

Accrual of entitlements during a period of leave at half pay will continue as if the agreement had not been made.

See the example content letter to employees: [JobKeeper agreement to take paid annual leave](#).

Wage condition and enabling directions

Employers are still required to comply with this requirement if they have given an employee a JobKeeper direction to stand down, including by reducing hours.

If an employer has given an employee a JobKeeper direction to stand down, including by reducing their hours of work, the amount payable to the employee for performance of work during the fortnight would be the amount payable for the new hours of work.

The new provisions place a positive obligation on employers to satisfy this obligation with civil penalties applying for failure to comply.

Dealing with disputes in the Fair Work Commission

An employer or employee can apply to the [Fair Work Commission](#) to deal with a dispute about any of these new provisions. The Commission may deal with a dispute by mediation, conciliation, making recommendations, expressing an opinion or arbitration.

In dealing with a dispute, the Commission must take into account fairness between the parties concerned.

The Commission can make an order that it considers desirable to give effect to a JobKeeper direction, set aside a JobKeeper direction or substitute a different JobKeeper direction.

The Commission has the power to deal with disputes relating to legacy employers and the satisfaction of the 10% decline in turnover test.

Misusing the new provisions

An employer must not give a direction to stand down, change an employee's duties or change their location of work if it is not authorised by these new provisions and the employer knows it is not authorised by the new provisions. An employer may have to pay a civil penalty if they do so.

Federal Government Safe Work Australia website

The Federal Government has launched [Safe Work Australia](#) to provide a central online information hub of work health and safety guidance and tools that Australian workplaces can use to help manage health and safety risks posed by COVID-19.

Resources include:

- [COVID-19 Information for workplaces](#)
- [COVID-19 resource kit](#)
- [National COVID-19 safe workplace principles](#)

Fair Work Ombudsman website

The Fair Work Ombudsman [Coronavirus and Australian workplace laws](#) page provides a helpful summary of employee and employer rights and responsibilities under the COVID temporary measures.

Family law

For COVID-19 updates and information see the [Family Court](#) or the [Federal Circuit Court](#).

Parenting orders and the Coronavirus

The Chief Justice of the Family Court has issued a comprehensive and helpful bulletin on parenting orders and the coronavirus.

A key point in the bulletin is His Honour's call that:

As a first step, and only if it is safe to do so, parties should communicate with each other about their ability to comply with current orders and they should attempt to find a practical solution to these difficulties. These should be considered sensibly and reasonably. Each parent should always consider the safety and best interests of the child, but also appreciate the concerns of the other parent when attempting to reach new or revised arrangements.

His Honour notes that the courts remain open to assist parties and to provide parents with general guidance. The [Family Court's general coronavirus arrangements](#) are available on the court's website and are being regularly updated.

The most important point regarding coronavirus and parenting arrangements is that the best interests of the children remains the paramount consideration: [s 60CA](#) Family Law Act 1975.

In accordance with their obligations to act in their children's best interests, parents and carers are expected to comply with court orders in relation to parenting arrangements, notwithstanding the 'highly unusual' current circumstances. This includes facilitating time being spent by the children with each parent or carer pursuant to parenting orders. This is where sense and reason need to be applied by the parties and where lawyers can play a critical role.

For more information about parenting orders and coronavirus, including what the parties should consider and what the court will consider when making orders, see the commentary on parenting orders in the By Lawyers [Family Law – Children](#) guide.

Insolvency – Bankruptcy and liquidation

The federal government has made temporary changes to insolvency laws under the [Coronavirus Economic Response Package Omnibus Act 2020](#) aimed at relieving current economic pressures on individuals and companies.

The Act commenced on 25 March 2020.

The temporary changes to insolvency laws are as follows.

Bankruptcy

The time for a debtor to comply with a bankruptcy notice has been extended from 21 days to six months. The threshold for initiating bankruptcy proceedings increases from \$5,000 to \$20,000. These changes will apply for six months from commencement of the Act.

The same six month time extension applies to the time within which a debtor is protected from enforcement action by a creditor following their presentation of a declaration of intention to present a debtor's petition under [s 54A](#) of the Bankruptcy Act 1966.

Liquidation

The time for a debtor company to comply with a statutory demand has been extended from 21 days to six months. The threshold to issue a statutory demand has been increased from \$2,000 to \$20,000. These changes will apply until 25 September 2020.

Safe harbour

A new, temporary [s 588GAAA](#) 'Safe harbour—temporary relief in response to the coronavirus' of the Corporations Act 2001 provides that the existing civil penalties for directors failing to prevent insolvent trading under [s 588G\(2\)](#) do **not** apply in relation to a debt incurred by a company **if** the debt is incurred in the ordinary course of the company's business and until 25 September 2020.

Practitioners should keep these changes in mind for the next six months and be aware of the end date which is 25 September 2020.

Litigation

The courts in each state have implemented changes to reduce the risk of the spread of coronavirus. It is important to check the relevant court website for detailed information.

Wills, powers of attorney and estates

The courts in all states have announced a suite of changes to processes and procedures in response to coronavirus. It is important to check the relevant court website for detailed information.

For example, in Victoria, the Supreme Court has issued a [Notice to the profession](#) allowing an application for probate or administration to be submitted with a copy of the will in circumstances where an original will is stored at a legal practitioners' office.

Wills

The issue with executing wills remotely given social distancing is the availability of two witnesses who are not themselves beneficiaries.

Where the required two disinterested witnesses are not available the will may be executed informally by the testator, who after signing it returns it to their solicitor with a statement that they intend it to be their last will and testament. Accompanied by an affidavit explaining the signing in the prevailing circumstances, perhaps with video witnessing, a grant of probate of the informal will is likely to be made if required. Once the pandemic ends the will can be properly signed.

New South Wales

The execution of a will can be witnessed through audio visual means in accordance with [Schedule 1](#) to the Electronic Transactions Regulation 2017 (NSW). See **Remote signing** above for further details.

Queensland

A registrar may dispense with the requirement under [s 10](#) of the Succession Act 1981 that a witness be in the presence of the testator, insofar as that phrase has the meaning to be physically in the presence of the testator, subject to the production of specific evidence to the satisfaction of the registrar. A will may be witnessed by a single witness via video conference. See the Supreme Court of Queensland [Practice Direction 10 of 2020](#) for further details. This practice direction is limited in its application to wills executed between 1 March 2020 and 30 September 2020.

Powers of attorney

A general power of attorney does not need a witness and can be signed remotely.

However, an enduring power of attorney must be witnessed by a prescribed witness – usually the principal’s solicitor – who must also certify that they explained the effect of the document to the principal and that they appeared to understand it. On that basis remote signing is technically impossible.

Where a face-to-face meeting is not possible – even one at an outdoor location with appropriate distancing – the document could be sent to the client by post or email for their written or electronic signature. Their lawyer could hold a video conference with the client and explain the document and see it signed by their client. When returned the lawyer can certify that they gave the explanation and were satisfied as to the principal’s understanding, but whilst unable to personally witness the document being signed they witnessed the signing in video conference.

In this practical way the power is likely to be acceptable in most cases where there is no issue raised.

Where this approach is taken the risks that the document may not be effective need to be explained to the client and appropriate file notes made.

Appointments of enduring guardian and advance medical directives

The same witnessing and certification procedures apply to these instruments as for enduring powers of attorney. Similar practical, emergency measures might be undertaken.