

10 June 2020

## **COSBOA Communiqué**

### **SME recovery and the JobKeeper Transition**

#### **SYNOPSIS**

COSBOA's COVID-19 Roundtable has been re-tasked to focus on the nature of specific initiatives that could aid economic recovery and support job creation from an SME perspective. The first of these re-tasked meetings was convened on Friday 22 May 2020 and successive meetings continue to canvass the nature of specific policy and legislative opportunities in this regard.

This latest roundtable meeting was held on **Friday, 5 June 2020**. The meeting was addressed by the Hon. Brendan O'Connor in his capacity as Federal Shadow Minister for Small and Family Business. Mr O'Connor shared Federal Labor's perspective on the recovery challenge for SMEs post COVID-19. Two issues identified by Mr O'Connor in his address resonated strongly with the members of the roundtable, namely:

- The inadvertent JobKeeper exclusion of SMEs in sectors characterised by large numbers of casuals working fewer than 12 months (e.g. live entertainment and the arts)
- Managing the "September cliff" for SMEs, with a possible need to look at assistance beyond September 2020 to specifically support SMEs operating in industry sectors that face longer term impacts (e.g. international tourism).

Ms Sandra Parker, Fair Work Ombudsman, also attended the meeting to discuss practical issues relating to JobKeeper and the likely implications of the recent Federal Court ruling on casuals working in SMEs.

Much of the subsequent conversation amongst roundtable participants focussed on the increasing business uncertainty being created by the nature and timing of the JobKeeper transition, challenges associated with the practical operation of the COVID-19 rental assistance measures, and related industrial relations issues.

## **KEY THEMES**

The following key themes were discussed at this latest meeting:

### **1. The looming JobKeeper review is creating considerable challenges for SME owners in planning their business recovery**

- The Federal Treasurer has announced that the JobKeeper program will be the subject of a formal review during June and July, with changes to be announced on 23 July 2020.
- The JobKeeper review is right and proper given that this program is being funded by government borrowings, with a requisite requirement for this money to be paid back by all Australians in the future. It must be acknowledged, however, that many SMEs entered the JobKeeper program – and made associated commitments to their staff – based on their understanding that JobKeeper payments would be available until the end of September 2020.
- Accordingly, any changes made to the eligibility of businesses (as opposed to the quantum of the payment to employees) must provide enough time for businesses to prepare for non-JobKeeper operation. This preparation time should include provision of reasonable time for financial planning, staff planning and adjustment of payroll software.
- Roundtable participants noted that the timing of the conversation about the JobKeeper review is unfortunate given that some businesses are preparing to invest in transitioning their business using other assistance mechanisms (i.e. Instant Asset Write-Off) and the consequent uncertainty about wage costs may mean such business investment decisions are deferred indefinitely.

### **2. Inconsistency in reopening process across Australia**

- All roundtable participants noted that there is a significant level of uncertainty in the reopening strategy for SMEs across Australia's internal borders. This uncertainty is creating significant challenges for SME operation, with some SMEs being disadvantaged over others merely due to their geographic location.
- There are increasing incidents of inconsistency in enforcement of reopening guidelines, with SMEs confused by differences between the advice of state/territory regulators and local council enforcement actions.

### **3. The COVID-19 rental assistance issue remains unresolved for many SMEs and is apparently being 'gamed' by some larger landlords.**

- Despite the existence of a National Code of Conduct for commercial tenancies, there have been significant differences in the experience of Australian SMEs with this measure as a result of marked variation in the construct of the state/territory regulations that have been enacted to support the operation of this Code.
- Notwithstanding this variation, SME experience with small to medium landlords has been positive.

- Larger landlords, however, have apparently sought to ‘game’ the Code by making onerous and/or unreasonable requests for detailed financials. These actions amount to an apparent lack of good faith dealings by larger landlords.
- SMEs experiencing difficulties with the operation of the Code of Conduct for commercial tenancies should contact the small business commissioner in their respective state or territory.

#### **4. JobKeeper is creating some inadvertent IR challenges**

- SME owners are reporting some difficulties in getting JobKeeper employees to return to work in line with the reopening of their businesses. Roundtable participants were reminded that business owners have the right to terminate employees for refusing a reasonable request to return to work, regardless of whether the business is receiving JobKeeper payments for that employee or not. That is, the status of an employee who is receiving the JobKeeper payment is no different to any other employee.
- Some SME owners have stated that they have not applied for JobKeeper support owing to concern that such action could open them up to double-dipping claims from casuals (as per the issue presented at item 5 below).

#### **5. The laws surrounding employment of casuals are a ‘mess’**

- The recent Federal Court decision on casuals (*Workpac VS Rossato*) is creating considerable confusion among SMEs above the employment of casuals, with numerous and conflicting advice being given about the level of protection afforded to SMEs under the model *Casuals to Permanent Conversion* clause in all modern awards against the double-dipping risk.
- The double-dipping risk to SMEs is further heightened by the increasing incidence of class actions against employers – and the ease with which class actions can be instigated by law firms.
- This confusion cannot be addressed by legal advice and constitutes a clear and present danger to job creation in a post COVID-19 environment – the issue must be addressed by clear legislation defining what is meant by a casual under Australian employment law.
- Legislation must also be introduced to increase the legal threshold for instigation of class action in Australia, particularly in respect of common law actions pertaining to employment.
- Roundtable participants commended the Federal Attorney General and the ACTU for joining together to examine mechanisms for resolving this confusion in consultation with all stakeholders, under the auspices of the five IR working groups announced by the Prime Minister on 26 May 2020.

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