

Promoting employment growth and improved national economic output within the SME Sector

- A Model Schedule for SMEs include in all Modern Industrial Awards

1. ABOUT THIS PAPER.

National discussion about the path to economic recovery has begun to focus on the national policies that will be needed to stimulate economic growth, business investment and job creation as Australia emerges from the other side of the COVID-19 crisis. Much of this discussed has sought to canvass the introduction of policy opportunities that have been previously raised but largely deemed to be politically unpalatable.

The once-in-a-generation nature of the economic downturn means that Australia must revisit these discussions and introduce structural and legislative change that minimises economic and social harm from having large numbers of Australians out of work for a prolonged period. One such area relates to industrial reform.

This paper canvasses an opportunity to introduce a new mechanism to cater for the fact that more than 50% of the Australia workforce was employed in Small to Medium Enterprises (SMEs) prior to the COVID-19 economic downturn in Australia. These SMEs have traditionally been disadvantaged by the operation of an industrial relations system that is complex, cumbersome and unresponsive to the flexibility requirements of an SME workplace.

Rather than seek the development of a dedicated Industrial Award for SMEs - which brings significant complexity as a result of cutting across the industry sector architecture of the current Award system - the Council of Small Business Organisations of Australia (COSBOA) believes that a possible remedy to the current issues is the inclusion of a *Model Schedule* for SMEs that operates under the umbrella of all existing Modern Industrial Awards.

2. BACKGROUND

Australia's industrial relations system is premised on the operation of Modern Awards (which came into effect in 2010) and their various Industrial Award predecessors. These IR mechanisms set out the minimum working conditions and wage rates for workers in specific industry segments. These Awards have been built up over a period of more than 40 years and despite iterative changes, have remained largely unchanged in both their architecture and operation.

These Awards were developed at a time when there was strong union representation in large institutional and enterprise workplaces. Large numbers of employees were represented by workplace

unions and large organisations developed in-house IR and employment teams to support the effective operation of the Award system.

Over the last 25 years or so, Enterprise Bargaining was introduced. This mechanism allows large enterprise and government organisations to utilise their in-house resources (often supplemented by external IR services) to develop an agreement beyond the minimum requirements of the Awards, with a view to providing mutual benefits to both the enterprise and the workers. The negotiation of these agreements is conducted under the umbrella of various safeguard mechanisms which, up until 2010, involved application of the No Disadvantage Test (or NDT).

Replacement of the (NDT) with the Better Off Overall Test (BOOT) in 2010 created a ‘high bar’ test by the Gillard Labor Government in 2012 that made the development of new EBAs, or renewal of existing EBAs, increasingly difficult. As a result, we now have a situation where many enterprises are operating under what is commonly termed ‘Zombie EBAs’ that have not been materially updated for nearly a decade – and there is some suggestion that this failure has been responsible for wage underpayment issues as a result of these Zombie EBAs not being updated in line with Award pay rate changes.

Notwithstanding the problems discussed above, the operation of the current industrial relations system (and its associated enterprise bargaining arrangements) has put small business at a distinct disadvantage. Small businesses don’t have the in-house resources need to interpret complex awards and/or negotiate EBAs to allow them to compete more effectively with their big business cousins. As a result, they are forced to fall back on the Modern Award structures which constrains their ability to innovate and realise associated productivity benefits.

The COVID 19 crisis, coupled with the attendant economic consequences, creates an opportunity to address this inherent workplace disadvantage for small business owners. There is an immediate opportunity to utilise the current period to recast small business’ role in the IR system by developing and implementing an IR mechanism that is purpose-built for small business operators.

3. PROBLEM STATEMENT

The current complexity of the Modern Award system puts small business at a significant disadvantage in that successful resolution of relatively straightforward issues is open to significant interpretation by the employer and employee alike, thereby requiring the parties to revert to a dispute process that often requires the employer to expend scarce capital on legal advice and/or pay ‘go away’ money to the employee.

In the face of the extreme economic uncertainty, the current complexity of Modern Awards is a significant barrier to employment creation amongst SMEs. SME owners believe that the risk of being caught out by the current complexity of the Modern Award system outweighs the benefit of taking on new employees – at least in the foreseeable future - thereby retarding the rate of future employment creation, in the wake of the largest economic downturn in Australia over the past 90 years.

4. PROPOSED SOLUTION

4.1 A Model Schedule for SMEs

Mindful of the principles outlined in the preceding section, COSBOA believes that consideration should be given to the development of a *Model Schedule* for inclusion in all Modern Awards. This *Schedule* would operate along the same lines as a 'Model Clause' but would establish specific *carve outs* for small businesses in all Modern Awards.

The principal benefit of this approach, as opposed to a dedicated small business award, is that it doesn't cut across the foundation architecture of the current award system – which is almost entirely occupationally based. This means that the Schedule would effectively provide a simplified *tier* for eligible SMEs *within all existing Modern Awards* – as opposed to the creation of a separate, stand-alone Award for SMEs that cuts across the existing Industry-based Awards.

4.2 Six key elements

It is suggested that this 'Model SME Schedule' would incorporate, but not necessarily be limited to, the following specific 'carve-out' elements as being appropriate to SME workplaces:

4.2.1 *Specification of a single 'all-hours' rate (commonly referred to as a loaded rate)*

It is envisaged that this rate would be developed around a prescribed formula to ensure that the *loaded rate* reflects changes in the normal rates, loadings and penalties of the relevant Award. Ideally, the formula would be universal to all Awards (although there would be capacity for tailoring of the formula to the specific nuances of individual Awards where necessary)

It is envisaged that this rate would aggregate all salary elements other than public holiday loadings and overtime.

4.2.2 *Directed work hours reduction*

Inclusion of a provision developed along similar lines to the current JobKeeper IR Bill that provides for a directed reduction (capped at a maximum of 25% of hours worked). The reduction could be instituted immediately upon mutual agreement or directed with 1 weeks' notice to the affected employee.

4.2.3 *Flexible part-time employment*

Inclusion of a provision for the employer and employee to agree to work increased part-time hours at the normal rate (i.e. without paying overtime loadings) up to the maximum weekly hours denoted in the relevant Award. Overtime rates would be paid once the employee had worked full-time hours in any given week (as stipulated for full-time employees in the relevant industrial instrument).

4.2.4 *Universal Casual to Permanent conversion process*

Inclusion of specific provisions for casual conversions (i.e. single timeline and processes) for all SMEs, regardless of the industry in which the SME operates.

4.2.5 *Stand-down provisions*

A formal provision allowing a business to stand down employees where the business has experienced a dramatic reduction in income as a result of a natural disaster, pandemic or similar macroeconomic event over which it has no control. *(Note that Section 524 (1)(c) has proven inadequate in the wake of a business impact caused by a pandemic and the indirect impacts of natural disasters such as fire and floods. This 'grey area' has created considerable uncertainty that needs to be addressed in the wake of the 2020 experience of the impact of natural disasters and global pandemics on business income).*

4.2.6 *Redundancy provisions*

A universal provision for SMEs (as per the current NES) for all eligible businesses, regardless of the Award under which the SME operates.

4.2.7 *Unfair dismissal*

A universal provision for SMEs (largely as per current NES, but with formalised eligibility criteria for employee claims to be lodged), regardless of the Award under which the SME operates. This implantation of this clause would ideally address the issues and findings of the 2019 Australian Small Business and Family Enterprise Ombudsman's *Review of the Fair Dismissal Code for SMEs*. (see <https://www.asbfeo.gov.au/sites/default/files/documents/ASBFEO%20FINAL%20AUGUST%202019.pdf>).

4.3 SME eligibility

It is suggested that the Model Schedule would apply to businesses that employ 40 FTEs or fewer, the majority of which have historically been unable to effect Enterprise Agreements. This threshold has been estimated as the point at below which, SMEs cannot practicably access the flexible work arrangements that are available to bigger business as a result of Agreement making mechanisms being out of their practical reach (i.e. constitutes an inherent competitive disadvantage in the current IR Award system)

4.4 Workplace utilisation (Employer Opt-in)

It is proposed that the Model Schedule would not be compulsory for eligible SMEs. Rather, eligible employers would be able to activate the Model SME Schedule on an *opt in* basis under the relevant Award. The employer would be required to issue a modified National Employment Statement to all staff upon engagement (and issue to all existing staff upon the initial decision to opt into this IR arrangement).

4.5 Growth Transition (to full Award)

One of the benefits of introducing the Model SME Schedule under the relevant Award is that the business would be required to operate under all relevant provisions of the Modern Award that is applicable to the industry in which the SME operates – apart from the special clauses stipulated in the Model Schedule.

Once the business exceeds the FTE threshold, it is envisaged that the business would be given a maximum of 18 months to convert to the provisions of full Award.

5. PROJECTED EMPLOYMENT BENEFITS

A large proportion of the jobs that have been lost during the COVID-19 economic downturn have been lost from the SME Sector. It therefore follows that, in the face of a relatively mature economy, the potential for growth of jobs in the near term will similarly occur in the SME Sector – notwithstanding the likely estimated destruction of around 20% of Australian SMEs (see https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses).

There were around 910,000 SMEs registered under the Federal Government JobKeeper programme (employing an estimated 2.9M Australians). Within this context, and assuming up to 20% of these SMEs will not survive the current downturn, the employment of just 1 additional FTE by the remaining 80% of SMEs has the potential to generate up an estimated 728,000 jobs over the next 3-5 years.

Even assuming that this figure is just 60% correct, the potential for creation of new jobs in Australian SMEs is likely to be around 430,000 full time jobs.

6. KEY BENEFITS.

6.1 Accelerated job creation

The unprecedented downturn created by COVID-19 – and the immediately preceding fire and flood disasters of 2019/20 – have created an environment of extreme economic uncertainty. This uncertainty - coupled with the complexity of the current Modern Award system - is likely to be a major deterrent to job creation within the Australian SME Sector over the next 3-5 years. Key provisions of the proposed Model Schedule for SMEs attempt to address this issue by maximising workforce flexibility and simplifying navigation of a highly complex IR system for SMEs (i.e. with their lean resources and limited/no in-house IR resources).

6.2 Reduced precarity for employees

The Model Schedule described in this paper proposes the insertion of provisions that improve the capacity of SMEs - in the face of likely near term volatility of annual revenues - to provide a level of permanency of employment (with proportionate entitlements) to workers, as an alternative to the traditional wholesale use of casuals (see sub-section 4.2.3 above).

This does not mean that casuals will not continue to be used but it does rebalance the system by creating a flexible employment arrangement that is less precarious than casual employment, while simultaneously promoting an effective mechanism of casual to permanent conversion (see sub-section 4.2.4 above).

6.3 More effective enforcement regimes

By simplifying the system for SMEs via the inclusion of specific provisions in all Awards that are tailored to their needs, there is less potential for SMEs to make honest mistakes in relation to compliance with the Award. This observation suggests that the inclusion of a Model SME Schedule in all Modern Awards offers the potential to improve the efficacy of enforcement of IR laws.

6.4 Competitive neutrality

SMEs have long suffered a competitive disadvantage relative to their larger competitors (e.g. General Retail Industry) as a result of their inability to access the Enterprise Bargaining Agreement mechanism of the IR system – largely as a result of these businesses having a lack of internal IR resources and zero capacity to spend the necessary time and capital to negotiate a suitable agreement for their workplace (i.e. notwithstanding the current difficulties of the Agreement making mechanism).

Adoption of the Model SME Schedule would provide SMEs with access to the labour force benefits that been enjoyed by their larger competitors, effectively addressing a longstanding competitive disadvantage in terms of labour force flexibility and staffing costs.

7. SUMMARY.

COSBOA believes that the COVID-19 crisis, and the consequent economic and IR impact on Australian business, provides a clarion call for the reform of the IR system to address a longstanding disadvantage to small business arising from the current IR framework. This call is made more urgent given that the majority of jobs shed during the COVID-19 crisis since March 2020 have been lost from SMEs, who are likely to be less inclined to re-employ in the face of extreme economic uncertainty in the near term and a highly complex IR system that is increasingly difficult to navigate.

COSBOA believes that the settings for accelerated job creation could be substantially enhanced by the implementation of a new IR Mechanism – the Model SME Schedule – in all Modern Awards, thereby supporting other key economic recovery initiatives being advanced by all Australian governments.

This paper is not intended to prescribe the detail of the Model SME Schedule. Rather it is intended to highlight the merits of such an approach as a means of enhancing employment creation in the SME sector by making the IR system simpler to navigate and providing a level of workforce flexibility that has been enjoyed by larger organisations in the past (i.e. as a result of their access to the EBA mechanism).

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