

7 May 2020

Justice Ross  
Fair Work Commission

[chambers.ross.j@fwc.gov.au](mailto:chambers.ross.j@fwc.gov.au)

Dear Justice Ross,

**Proposed changes to the Vehicle Manufacturing, Repair, Service and Retail Award 2010 in response to the COVID-19 Pandemic, Matter: AM2020/22**

Please find a copy of ACAPMA's submission on the proposed changes for consideration.

Thank you for the opportunity to provide a submission to this Inquiry. We would be happy to provide additional information or clarify any aspect of the report as required.

Yours sincerely,



Mark McKenzie  
Chief Executive Officer

**EVENTS**

**ADVOCACY**

**EMPLOYMENT**

**TRAINING**

**INFORMATION**

## **Submission to Fair Work Commission**

**Matter: AM2020/22**

**7 May 2020**

## 1. Introduction

This paper constitutes a submission by the *Australasian Convenience and Petroleum Marketers Association (ACAPMA)* to the Fair Work Commission regarding proposed changes to the Vehicle Manufacturing, Repair, Service and Retail Award 2010. As a national body representing the interests of fuel retailers and fuel wholesalers in Australia, this submission has been specifically developed to address the elements of the Matter.

### Concept

ACAPMA notes that in concept the proposed changes appear to be aimed at extending similar flexibility provisions to staff that are not eligible and participating in JobKeeper as were created in the JobKeeper adjustments.

In concept ACAPMA is supportive of such a goal, as increasing the flexibility tools open to businesses as they struggle to keep their doors open and keep trading in the current environment is a worthy goal. In addition the confinement of the flexibility provisions added with the JobKeeper to only JobKeeper eligible and participating staff has created a duality of employment systems within businesses at a time of crisis, and such duality only adds to the complexity, and the likelihood of errors and confusion.

### Overview: Execution

In execution however, ACAPMA note that the efficacy of such a restricted set of measures, with end dates of 30/6/2020 is significantly reduced, and likely to be seen as 'not worth the effort'. It is suggested that as with mirroring the JobKeeper Flexibility provisions the changes should mirror the JobKeeper Flexibility provisions date range, that is until 27/9/2020 unless withdrawn earlier.

More than the date range concern, the efficacy of this change in achieving its goal, of fostering and allowing for flexibility, is significantly undermined by the inclusion of the fortnightly minimum payment amounts at J2.2.d and J2.2.f. Simple testing of these rates, particularly for part timers, show that in reality there is no capacity to practically reduce hours at all with these minimums in place. It appears, based on the construction of the other clauses and the setting of the minimum hours that the intention of the changes is to cap the reduction to ensure that a staff member receive no less than 75% of their usual hours (or compensation for same) that a simple statement of this, rather than the setting of minimums that render reductions impossible, would be a more practical and workable solution.

### Detail Comment

Detailed comment on the clauses, including drafting notes, is included in the table of the model clause in the following pages at Section 3.

## 2. About ACAPMA

The Australasian Convenience and Petroleum Marketers Association (ACAPMA) is the national peak body representing the interests of the petroleum distribution and the petrol-convenience retail industry.

The Association is first and foremost an employer organisation that is formally recognised under Australian law as the industrial advocate for fuel marketing and fuel distribution businesses.

First established in 1976, the Association started operations as the Australian Petroleum Agents and Distributors Association (APADA) and subsequently changed its name to ACAPMA in 2007. The name change was accompanied by a change in the Association's Constitution to incorporate national representation of fuel retailers.

Today, the Association directly represents 95% of fuel distributors in the country and directly and indirectly (via franchisees and distributor-owned retailers) around 5400 of the 7300 service stations (i.e. 74%) operating in Australia.

The scope of ACAPMA's membership extends from 'refinery gate' through to the forecourt of Australia's national network of service stations and petrol convenience outlets – including fuel wholesale, fuel distributors, fuel retailers, petroleum equipment suppliers and petroleum service providers.

ACAPMA's member businesses range from Australian-owned subsidiaries of international companies, to large Australian-owned businesses, to independently owned mid-cap Australian companies, and small single retail site family-owned businesses.

In terms of the Adelaide Market, our current members include Woolworths/EG, On-the-Run, Liberty, Puma, Coles/Viva Energy and BP Australia.

Given the diversity of our membership base, ACAPMA strives to assemble an aggregate market picture designed to provide a comprehensive discussion of some *whole-of-market* trends in the fuel retail sector - with a view to aiding an understanding of the nature of operation of the market and the factors that can contribute to cost differences.

Given the wide variance in the market propositions (and market presence) of individual market participants, this "aggregate market picture" should not be taken as necessarily being representative of the position of any individual fuel retailer.

It is therefore possible that one or more of ACAPMA's members may have elected to provide an individual submission to this Inquiry that differs – either in part or as a whole – from the *whole of industry* perspective presented in this paper.

### 3. Detailed Comments

Model Clause	Comment
<b>J.1 - Award flexibility during the COVID-19 Pandemic</b>	
(a) The provisions of Schedule J are aimed at preserving the ongoing viability of businesses and preserving jobs during the COVID-19 pandemic and not to set any precedent in relation to award entitlements after its expiry date.	
(b) Schedule J operates from [insert date] until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission.	<b>C1</b> - End date of 30 June 2020 with no mechanism to roll into the new Award without any objection makes this a flexibility that is extremely short in nature (6 weeks) and therefore of very little value when the mirror provisions, which are tied to the JobKeeper run until 27/6/2020 unless removed earlier. Suggest to increase efficacy this provision match the JobKeeper by having an end date of 27/6/2020, unless removed by the Commission earlier.
(c) A direction under this Schedule ceases to have effect when it is withdrawn, revoked or replaced by the employer, or on 30 June 2020, whichever is earlier.	See comment <b>C1</b> above
(d) Schedule J does not apply to any employee employed by an employer who qualifies for the JobKeeper Scheme if the employee is eligible to receive 'JobKeeper' payments pursuant to the <i>Coronavirus Economic Response Package (Payments and Benefits) Act 2020</i> .	
(e) Any direction or request given by an employer under this Schedule must be given in writing and does not apply to the employee if the direction is unreasonable in all of the circumstances.	
(f) Any dispute regarding the operation of Schedule J may be referred to the Fair Work Commission in accordance with Clause 9—Dispute Resolution.	

(g) Any direction given by an employer under this Schedule is not valid unless the employee is advised in writing that the employer consents to a dispute arising from the direction being settled by the Fair Work Commission through arbitration in accordance with Clause 9.5—Dispute Resolution and section 739(4) of the Act.

### J.2.1 Classifications and duties RS&R employees

(h) As directed by their employer, where necessary employees will perform any duties that are within their skill and competency regardless of their classification under Clause 33—Classifications and minimum weekly wages and Schedule B—Vehicle Industry RS&R - Skill Level Definitions, provided that the duties are safe, reasonably within the scope of the employer’s operations, and the employee is licensed and qualified to perform them.

Drafting Note - the lettering is out in this section

(i) Clause 33.6—Higher duties will apply to employees engaged on duties carrying a higher rate than their ordinary classification.

(j) An employer must not reduce an employee’s pay if the employee is directed to perform duties in accordance with clause J.2.1.

(k) An employee given a directive under this clause will revert to their duties prior to the commencement of Schedule J once the directive ceases to have effect in accordance with Clause J.1.(c), unless otherwise agreed between the employer and employee.

### J.2.2 Temporary reduction of hours of work—full-time and part-time employees

(a) An employer may only implement a temporary reduction in hours of work under this clause if the employee cannot be usefully employed for their normal days or hours as a consequence of business changes attributable to the COVID-19 pandemic or government initiatives to slow the spread of the virus.

(b) Subject to Clause J.2.2(a), (d), (e) and (g), and despite clause 11 - Full time employment, an employer may direct a full-time employee to work an average of between 22.8 and 38 ordinary hours per week. The employee will be paid on a

C2 The effect of calling up J2.2.d in this clause, in a practical sense renders the whole clause useless in a retail fuel setting.

pro-rata basis. The arrangements for working ordinary hours in Clauses 37 and 44.1 (which pertain to ordinary hours of work) will apply on a pro-rata basis.

A reduction to the minimum outlined hours here in J2.2.b would result in a permanent console operator, working 22.8 hours per week at the base rate, earning \$491.11 per week before tax, or \$982.22 per fortnight.

The effect of J2.2.d, in setting a minimum fortnightly earnings of \$1,115.70, results in a restraint to the reduction of hours available to 25.90 hours, in order to meet the minimum before tax amount outlined in J2.2.d.

C3 The use of fractions of hours here (22.8) is likely to be a failure point in practical implementation and to cause issues with many small businesses

**(c)** Subject to Clause J.2.2(a), (f) and (g), and despite Clause 12.3, 12.4, 12.5 and 44.2 (which pertain to part-time employment), an employer may direct a part-time employee to work an average of between 75% and 100% of their agreed hours per week, or an average of between 75% and 100% of their agreed hours per week over the roster cycle.

C4 The effect of calling up J2.2.f in this clause, in a practical sense renders the whole clause useless in a retail fuel setting.

A permanent part time console operator who usually works 21 hours a week, usually earns \$ 452.34 before tax per week, or \$904.68. A reduction to the minimum outlined hours here in this example to 15.75 hours per week would result in the part time console operator earning \$339.26 before tax per week, or \$678.51 before tax per fortnight.

The effect of J2.2.f, in setting a minimum fortnightly earnings of \$836.78, results in a restraint to the reduction of hours in this case to 20.05 hour per week, in order to meet the minimum before tax amount outlined in J2.2.f – so the amount the clause actually allows the hours to be reduced by is less than 1 hour.

It is noted that the example uses 21 hours per week, which is a common rate in the industry, though there are many part timer workers who work less than this and who, according to the minimums set in J2.2.f would not be able to have their hours reduced at all.

**(d)** Subject to Clause J.2.2(e), a full-time employee at Level 1-5 may not have their hours reduced pursuant to Clause J.2.2(b) where the amount payable under the reduced hours falls below \$1,115.70 a fortnight (not including any tool, meal or

See comment C2 above

leading hand allowances paid under Part 4 – Allowances and Related Matters), as a consequence of the reduction.

**(e)** A full-time Vehicle Industry Tradesperson at Level 1 or 2 may not have their hours reduced pursuant to Clause J.2.2(b) where the amount payable under the reduced hours falls below \$1,500.00 a fortnight (not including any tool, meal or leading hand allowances paid under Part 4 – Allowances and Related Matters), as a consequence of the reduction.

**(f)** A part-time employee who prior to the commencement of this schedule had an agreed pattern of hours under Clause 12 that would have entitled the employee to earn over \$836.78 a fortnight in respect of those hours, may not have their ordinary hours reduced pursuant to Clause J.2.2 (c) to a point that would cause them to receive less than \$836.78 a fortnight (not including any tool, meal or leading hand allowances paid under Part 4 – Allowances and Related Matters), as a consequence of the reduction. See comment **C4** above

**(g)** Prior to any employer issuing any direction under Clause J.2.2(b) or (c) an employer must:

**(i)** consult with the affected employee/s in accordance with Clause 8A— Consultation about changes to rosters or hours of work and provide as much notice as practicable; and

**(ii)** if the affected employee/s are members of a union, notify the relevant union of its intention to implement these arrangements.

**(h)** Where the amount paid to an employee under this clause is less than the normal weekly pay an employee received prior to a directed reduction in hours under this clause, the employee can have their weekly pay increased, by agreement with the employer, to the normal weekly pay they received prior to a directed reduction in hours by access to accrued paid annual leave or any other form of accrued paid leave (other than personal/carer’s leave where the employee is not entitled to take this leave).

**(i)** An employee given a direction under Clause J.2.2(b) or (c) will continue to accrue annual leave and personal leave, and any other applicable accruals under



this award, based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule J.

(j) Nothing in Schedule J prevents an employer and an individual employee agreeing in writing (including by electronic means) to reduce the employee's hours or to move the employee temporarily from full-time to part-time hours of work, with a commensurate reduction in the minimum weekly wage.

(k) If an employee given a direction under Clause J.2.2(b) or (c) takes a period of paid annual leave or personal leave, the payment for that leave will be based on the full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule J.

(l) If an employee who has been given a direction under Clause J.2.2(b) or (c) is made redundant while working reduced hours, any applicable redundancy payment will be calculated based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule J.

(m) An employee given a directive under this clause will revert to their ordinary hours of work prior to the commencement of Schedule J once the directive ceases to have effect in accordance with Clause J.1.(c).

See comment C1 above

### J.2.3 Annual leave

(a) Subject to Clause J.2.3(g) and despite Clauses 29.4, 29.5 and 29.6 (Annual leave), an employer may, subject to considering an employee's personal circumstances, request an employee to take paid annual leave, provided that the request does not result in the employee retaining a balance of less than 2 weeks annual leave after the leave is taken. Such a request must be made a minimum of 72 hours before the date on which the annual leave is to commence.

(b) An employee must consider and may not unreasonably refuse a request to take annual leave made pursuant to Clause J.2.3.

(d) Clauses J.2.3(a) and (b) do not prevent an employer and an employee agreeing to the employee taking annual leave at any time.

Drafting Note – seems c was missed from this clause

(e) Employers and individual employees may agree to take up to twice as much annual leave at a proportionately reduced rate for all or part of any agreed or directed period away from work, including any close-down.

(f) The period of annual leave must commence before 30 June 2020 but may end after this date.

(g) An employer can only request that an employee take annual leave pursuant to this clause if the request is made for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of COVID-19 and to assist the employer to avoid or minimise the loss of employment.

#### J.2.4 Close-down

(a) Clause J.2.4 applies only if the employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of the coronavirus.

(b) Subject to Clause J.2.4(a) and (c) and instead of Clause 29.12 (Annual leave), an employer may:

(i) require an employee to take paid annual leave as part of a close-down of its operations, or part of its operations, by giving at least one week's notice, or any shorter period of notice that may be agreed; and

(ii) where an employee has not accrued sufficient paid leave to cover part or all of the close-down, the employee is to be allowed paid annual leave for the period for which they have accrued sufficient leave and given unpaid leave for the remainder of the close-down.

(c) Clause J.2.4(b) does not permit an employer to require an employee to take leave for a period beyond the period of operation of Schedule J.

(d) Where an employee is placed on unpaid leave pursuant to Clause J.2.4(b), the period of unpaid leave will count as service for the purposes of relevant award and NES entitlements.

### J.2.5 Secondary jobs/training

(a) If an employee is directed to take unpaid leave under Clause J.2.4 or work temporary reduced hours under Clause J.2.2 and the employee makes a request to engage in:

- a. reasonable secondary employment;
- b. training;
- c. professional development;

the employer must consider and not unreasonably refuse the request.

## 6 Further information

ACAPMA is available to the Commission to discuss any of the comments, concerns and suggestions raised herein.

### Contact Details

CEO

Mark McKenzie

[markm@acapma.com.au](mailto:markm@acapma.com.au)

0447 444 011

Executive Manager for Employment and Training

Elisha Radwanowski

[elishar@acapma.com.au](mailto:elishar@acapma.com.au)

0428 020 083