



FairWork
Commission

STATEMENT

Fair Work Act 2009

s.157—Variation of a modern award to achieve the modern awards objective

Joint application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010

(AM2020/22)

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, 6 MAY 2020

Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010 – COVID-19 Pandemic – provisional views.

1. Background

[1] This statement concerns an application to vary the *Vehicle Manufacturing, Repair, Services and Retail Award 2010* (MA000089) (the Vehicle Award) (the Application). The Application was filed by the Victorian Automobile Chamber of Commerce, the Motor Trade Association of South Australia Inc, the Motor Traders Association of New South Wales, the Motor Trades Association of Queensland Industrial Organisation of Employers and Ai Group at around noon on Tuesday 5 May 2020. A revised draft variation determination was filed at around 5pm that day.

[2] The Application is supported by ACCI, the Australian Automotive Dealer Association and the Motor Trade Association of Western Australia and is also consented to by the Australian Manufacturing Workers Union, the Shop Distributive and Allied Employees Association and the ACTU.

[3] The Application is said to be necessary to mitigate the impact COVID-19 is having on employees and employers covered by the Vehicle Award and seeks to insert a new Schedule – Schedule J – into the Vehicle Award.

[4] Schedule J:

- contains a clause regarding operational flexibility (clause J.2.1);
- allows an employer to temporarily reduce the hours of work for full time and part time employees, in certain circumstances and subject to safeguards (clause J.2.2);

- provides that in certain circumstances an employer may request that an employee take paid annual leave and the employee is obliged to consider and not unreasonably refuse the request (clause J.2.3); and
- in circumstances where an employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of the coronavirus an employer may require an employee to take paid annual leave, subject to safeguards (see J.2.4 and J.2.5).

[5] The revised draft award variation determination in the Application is attached.

[6] At the request of the parties, the Commission's consideration of the application will be expedited. Any party wishing to respond to the Application and the *provisional* views set out in this statement is to file a submission by **4pm Thursday, 7 May 2020**. Instructions for the filing these submissions are in 'Next steps' below.

2. COVID-19

[7] The application arises from the unique set of circumstances pertaining to the COVID-19 pandemic. The Commission has published an Information Note about measures taken in response to the COVID-19 pandemic, which can be accessed [here](#).

[8] On 31 March 2020, the Commonwealth Government announced the JobKeeper Payment, a wage subsidy program designed to allow employees to retain employment and continue to earn income during the COVID-19 crisis.

[9] Under the scheme, eligible employers will be paid \$1500 per employee for up to 6 months. Eligible employers include those with an expected 30% reduction in turnover (or 50% if the business has an annual turnover of \$1 billion or more). Eligible employees will receive a minimum of \$1500 per fortnight before tax and can be topped-up by their employer. The subsidy started on 30 March 2020, with the first payments made in early May.

[10] Consequential amendments to the *Fair Work Act 2009* (the Act), through the insertion of a new Part 6-4C, allow employers, which qualify for the JobKeeper subsidy, to make certain directions and requests of their employees. The changes to the Act are made by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.

[11] The Applicants contend that the vehicle, manufacturing, repair, services and retail industry is currently materially impacted by the COVID-19 pandemic, and that:

'Those still attending work are adopting new work patterns to reduce the level of exposure to colleagues and clients.

This includes rostering a limited number of employees into work at any one time and spacing employees out in the relevant worksite.'¹

¹ Application at [64] – [65].

[12] The Applicants also rely on an analysis that suggests a significant impact on the global automotive industry due to CoVID-19. According to GlobalData:²

- the outbreak of COVID-19 “has rendered automakers helpless with large-scale supply chain disruptions and retail outlet shutdowns”.
- Automakers are suffering from “supply chain volatility” and a “sentimental crash in Q4 2019”, with many automakers expressing concerns regarding COVID-19.
- Many large automotive companies have announced shutdowns because of difficulties procuring parts from China, and the spread of COVID-19 across Europe and the United States.
- The supply chain network is highly integrated in the industry. Importantly, the analysis suggests that the disruptions affects the industry across the globe. Sales volumes have significantly declined and large losses are expected. Even if factories in China have recommenced operation, the industry will need time to recover due to the continuing lockdowns in place.
- There is even speculation concerning whether automakers will “emerge intact” from the COVID-19 crisis.

[13] In a series of decisions we have granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*³
- *Clerks – Private Sector Award 2010*⁴
- *Restaurant Industry Award 2010*⁵
- *Educational Services (Schools) General Staff Award 2010*.⁶

[14] These decisions have inserted short term measures to provide additional flexibilities to address the consequences of the COVID-19 pandemic.

[15] On 8 April 2020 a Full Bench of the Commission issued a decision⁴ (the April 2020 Decision) varying 99 modern awards to insert the new Schedule – ‘Schedule X: Additional measures during the COVID-19 pandemic’. Schedule X provides an entitlement to unpaid ‘pandemic leave’ and the flexibility to take twice as much annual leave at half pay. The following documents informed the Commission’s decision:

- Information Note on modern awards and industries;

² GlobalData, “Sentiments crash for several global automakers”, 27 April 2020, accessed on 1 May 2020 from <https://www.globaldata.com/sentiments-crash-for-several-global-automakers/>.

³ [2020] FWCFB 1574.

⁴ [2020] FWCFB 1690.

⁵ [2020] FWCFB 1741.

⁶ [2020] FWCFB 2108.

- Information Note on bargaining by business size;
- Information Note on Government responses to the COIVD-19 pandemic; and
- Expert report by Professor Borland.

[16] In the April 2020 Decision the Full Bench also encouraged industrial parties to continue (or enter into) discussions directed towards consent applications to vary modern awards.

3. The Application

[17] The Applicants contend that the impact of the COVID-19 pandemic on employers and employees covered by the Vehicle Award is material and that ‘pressures on business at this time are multifaceted and cumulative in nature; demand, cash flow, viability.’⁷ It is in this context employers and employees (and their unions) have been in a dialogue to maintain businesses while trying to maintain employment as best as can be done. The parties acknowledge that this has necessitated a level of trade off.

[18] As we have already mentioned, proposed Schedule J:

- contains a clause regarding operational flexibility (clause J.2.2);
- allows an employer to temporarily reduce the hours of work for full time and part time employees, in certain circumstances and subject to safeguards (see clause J.2.2);
- provides that in certain circumstances an employer may request that an employee take paid annual leave and the employee is obliged to consider and not unreasonably refuse the request (see clause J.2.3); and
- in circumstances where an employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of the coronavirus an employer may require an employee to take paid annual leave, subject to safeguards (see clauses J.2.4 and J.2.5).

[19] As noted in proposed clause J.1(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.’

[20] The proposed schedule has a limited period of operation, until 30 June 2020 and 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 *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

⁷ Application at [77].

[21] Further, any direction or request given by an employer under the Schedule must be given in writing and does not apply to the employee if the direction is ‘unreasonable in all of the circumstances’.

[22] Any dispute regarding the operation of Schedule J may be referred to the Commission in accordance with Clause 9—Dispute Resolution and any direction given by an employer under the Schedule is not valid unless it contains a written consent by the employer to arbitration in respect of any dispute arising from the direction.

4. Provisional views

[23] The Commission may make a determination varying a modern award if the Commission is satisfied that the determination is necessary to achieve the modern awards objective. The modern awards objective is to ‘ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions’, taking into account the particular considerations identified in ss.134(1)(a)–(h) (the s.134 considerations).

[24] What is ‘necessary’ to achieve the modern awards objective in a particular case is a value judgment, taking into account the s.134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.⁸

[25] We have set out above what is proposed through the Application. We note that proposed Schedule J is about matters that may be included in a modern award pursuant to ss.136(1)(a) and (c), and ss.139(1)(a), (c) and (h) of the Act.

[26] It is our *provisional* view, taking into account the relevant s.134 considerations, that the variation of the Vehicle Award as proposed in the Application is necessary to achieve the modern awards objective.

[27] Additional considerations apply to the annual leave flexibilities in clause J.2.3 and the capacity to direct an employee to take paid annual leave in the event of a close down, in clause J.2.4.

[28] Subsections 93(3) and (4) of the Act are relevant in this regard and provide as follows:

‘Terms about requirements to take paid annual leave’

(3) A modern award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take paid annual leave in particular circumstances, but only if the requirement is reasonable.

‘Terms about taking paid annual leave’

(4) A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave.’ (emphasis added)

⁸ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* (2012) 205 FCR 227.

[29] Section 93 is part of the NES. Modern awards and the NES interact in different ways:

- A modern award may include any terms that the award is expressly permitted to include by a provision of Part 2-2 (which deals with the NES) (ss.55(2) and 136(1)(c)).⁹
- A modern award may include terms that:
 - (i) are ancillary or incidental to the operation of an entitlement of an employee under the NES; or
 - (ii) terms that supplement the NES (s.55(4)).

[30] If an employer has decided to close down for reasons attributable to the COVID-19 pandemic or Government initiatives to slow the transmission of the coronavirus then clause J.2.4(b) provides that the 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.

[31] The following safeguards and conditions are associated with clause J.2.4(b):

- clause J.2.4(b) does not permit an employer or require an employee to take leave for a period beyond the period of operation of Schedule J.
- 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.
- 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 reasonable secondary employment, training or professional development, the employer must consider and not unreasonably refuse the request.
- any direction given under clause J.2.4(a) must be given in writing and does not apply to the employee if the direction is unreasonable in all the circumstances.

⁹ Section 127 provides that the Regulations may permit modern awards to include terms that would or might otherwise be contrary to Part 2-2 or s.55, or prohibit modern awards from including terms that would or might otherwise be permitted by Part 2-2 or s.55. No such regulations have been made.

- any direction given under clause J.2.4(a) is not valid unless it contains a written consent by the employer to arbitration under clause 9.5 in respect of any dispute arising from the direction.

[32] Clause J.2.3 provides that in certain circumstances an employer may request that an employee take paid leave and the employee is obliged to consider and not unreasonably refuse the request. Importantly, before making any such request the employer must consider the employee's personal circumstances.

[33] Clause J.2.3(e) provides that:

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

[34] Subject to the requirement to take leave being reasonable, a modern award term which provides that an employee can be required to take a period of annual leave is a term of the type contemplated by s.93(3) of the Act. The issue before us is whether these provisions are 'reasonable' within the meaning of s 93(3).

[35] We note that the terms in Schedule J are of limited duration to address an extraordinary set of circumstances. Further, a direction to take annual leave requires the giving of at least one weeks' notice and such a direction may only be made after the employer has considered the employee's personal circumstances. It is our *provisional* view that the terms proposed are permitted terms and that they are 'reasonable' within the meaning of s.93(3).

[36] In relation to clause J.2.3(e) we note that, the statutory notes to s.55(4) provides a relevant example. Note 1 states:

'Ancillary or incidental terms permitted by paragraph (a) include (for example) terms:

- (a) under which, instead of taking paid annual leave at the rate of pay required by section 90, an employee may take twice as much leave at half that rate of pay.'

[37] It is our *provisional* view that clause J.2.3(e) is an ancillary or incidental term permitted by s.55 (4).

[38] For completeness we note that the [Vehicle Manufacturing, Repair, Services and Retail Award 2020](#) will come into effect on Friday, 29 May 2020. Any variation to the 2010 Award will also be made to the 2020 Award.

5. Next steps

[39] Any submission supporting or opposing the Application and our *provisional* views set out above must be filed by **4pm Thursday, 7 May 2020**. Submissions should be:

- sent to chambers.ross.j@fwc.gov.au include the matter number (AM2020/22) in the subject line.

- filed in Word format.

[40] If no submissions are filed opposing the Application and our *provisional* views we will grant the Application and vary the Vehicle Award accordingly.

[41] If any submissions are filed opposing the Application and our *provisional* views then a hearing will take place at **10am Friday, 8 May 2020, by telephone.**

[42] Any party who wishes to attend the hearing in relation to this matter should send an email to Chambers.Ross.j@fwc.gov.au specifying a name and contact telephone number by **4pm on Thursday, 7 May 2020.**

[43] In the event that no submissions are filed opposing our *provisional* view then the hearing proposed for the morning of **Friday, 8 May 2020** will not be necessary and will be vacated.

PRESIDENT

Printed by authority of the Commonwealth Government Printer

<PR719134>



DRAFT DETERMINATION

Fair Work Act 2009

s.157 —Application to vary or revoke a modern award

Victorian Automobile Chamber of Commerce and Ors

(AM2020/22)

VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL AWARD 2010

[MA000089]

Vehicle manufacturing, repair services and retail industry

JUSTICE ROSS, PRESIDENT

XXXXXX

XXXXXX

MELBOURNE, XX XXX 2020

Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010.

A. Further to decision [[2020] FWCFB XXXX] issued by the Full Bench on XX XXXXX 2020, the above award is varied as follows:

1. By inserting Schedule J as follows:

J.1 - Award flexibility during the COVID-19 Pandemic

- (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.
- (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.
- (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 *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

- (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.
- (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 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.

- (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.
- (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 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.
- (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).

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.
- (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.

2. By updating the table of contents and cross-references accordingly.

B. This determination comes into effect on [insert date]. In accordance with s.165(3) of the Fair Work Act 2009 this determination does not take effect until the start of the first full pay period that starts on or after [insert date].

PRESIDENT

Printed by authority of the Commonwealth Government Printer