DECISION

Fair Work Act 2009
s.157 - FWC may vary etc. modern awards if necessary to achieve modern awards objective

Victorian Automobile Chamber of Commerce and Ors
(AM2020/22)

Vehicle industry

JUSTICE ROSS, PRESIDENT
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE

MELBOURNE, 11 MAY 2020

Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010 – COVID-19 Pandemic – application approved – variation determination made.

1. Background

[1] This decision 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 (VACC) , 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] The proposed 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] At the request of the parties, the hearing of this matter was expedited.

[6] In a decision[1] concerning the *Hospitality Industry Award* 2010 (the Hospitality Decision) the Full Bench observed that the notice provided to parties of the hearing of that application was much shorter than the Commission's standard practice. We make the same observation in respect of the present matter. At [9] – [11] of the Hospitality Decision we set out the Commission's obligations to afford procedural fairness and noting the content of the doctrine of procedural fairness is determined by the context, we concluded as follows:

> '[11] Relevantly, s.577(a) and (b) provide that the Commission must perform its functions and exercise its powers in a manner that:
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> '(a) Is fair and just; and
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> (b) Is quick, informal, and avoids unnecessary technicalities;'.
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> [12] The key contextual considerations in the matter before us are:
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> - the statutory framework;
> - the consent of the key interested parties;
> - the parties' joint request for expedition; and
> - the need to respond quickly to a rapidly changing industrial environment.
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> [13] In this instance, the consent of the key industrial parties' is the central consideration.
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> [14] In the event that this application had been contested then, plainly, different considerations would have been enlivened, necessitating a more protracted hearing process than the one we have adopted in this matter.'

[7] Similar circumstances arise in the present matter. The Application was made with the consent of the key industrial parties. A Statement[2] in relation to the Application was published on the Commission's website and sent to all subscribers at about 10am on 6 May 2020 (the 6 May Statement). Any interested party was provided with an opportunity to respond to the

[1] [2020] FWCFB 2343.

[2] [2020] FWCFB 2356.

Application. In these circumstances we are satisfied that we have met our obligation to afford procedural fairness to those affected by the Application.

[8] The 6 May Statement sets out the background to the Application and the following *provisional* views:

> '[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.
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> [35] It is our *provisional* view that the terms proposed are permitted terms [in Schedule J] and that they are 'reasonable' within the meaning of s.93(3).
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> [37] It is our *provisional* view that clause J.2.3(e) is an ancillary or incidental term permitted by s.55 (4).'

[9] In the 6 May Statement we invited any interested party to file a submission responding to the Application and the *provisional* views set out in the Statement by **4pm Thursday, 7 May 2020**. The following submissions were filed:

- a joint submission by ACCI, VACC and Ai Group, in support of the Application (the Joint Employer submission); and
- a submission by the Australasian Convenience and Petroleum Marketers Association (ACAPMA).

[10] The Joint Employers also filed a revised draft determination at about 8:30am on Friday 8 May 2020. The revised draft addresses some numbering issues identified in the ACAPMA submission and the coverage of Schedule J with respect to 'Vehicle Manufacturing employees' who will shortly cease being covered by the Vehicle Award.

[11] The ACAPMA submission raises a number of 'drafting comments' in respect of the proposed variation determination and submits that the variation proposed in the Application is 'likely to be seen as not worth the effort'. We return to ACAPMA's submission shortly.

[12] We have taken the ACAPMA submission as opposing the Application, at least in some material respects, and for that reason the matter was the subject of a hearing at 10am on Friday 8 May 2020. The transcript of that hearing is available here.

2. The COVID-19 pandemic

[13] 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.

[14] On 31 March 2020, the Commonwealth Government announced the JobKeeper payment scheme, a wage subsidy program designed to assist businesses affected by the COVID-19 pandemic to cover the costs of wages of their employees.

[15] Under the scheme, eligible employers will be reimbursed $1500 per fortnight for each eligible employee, for up to 6 months, provided they satisfy certain requirements. Eligible

employers include those with an expected reduction in turnover of at least 30% (or at least 15% for some registered charities, and at least 50% if the business has an annual turnover of $1 billion or more). Eligible employers must pay their eligible employees a minimum of $1500 per fortnight before tax to claim the JobKeeper payment. The scheme started on 30 March 2020, with the first payments made in early May.

[16] 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 scheme, 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.*

[17] The Application seeks to replicate some of the features of Part 6-4C of the Act. We return to this issue later.

[18] 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.
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> This includes rostering a limited number of employees into work at any one time and spacing employees out in the relevant worksite.'[3]

[19] The Applicants also rely on an analysis that suggests a significant impact on the global automotive industry due to COVID-19. According to GlobalData:[4]

- 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.

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[3] Application at [64] – [65].

[4] 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/.

[20] The Joint Employer Submission refers to data released by the Federal Chamber of Automotive Industries (FCIA) on 6 May 2020 which shows that:

- A total of 38,926 new vehicle sales were recorded in Australia for the month of April. This figure represents a fall of 48.5% over the same period last year (April 2019 saw 75,550 sales).

- The fall in April 2020 sales represents the largest single decrease in sales in any month since sales data collection was commenced by FCIA in 1991.

- Year to date new vehicle sales for 2020 have totalled to 272,287 sales, down from 344,088 in 2019. This equates to a 20.9 per cent decline.

[21] Commenting on this data, the Joint Employer submission states:

> 'This is an industry in crisis.
>
> Naturally, the measures proposed in the Application cannot arrest this unprecedented slide in vehicle sales. Employers will inevitably need to make difficult decisions about how they structure their businesses in future, which will likely involve some job losses and no doubt business closures.
>
> However, the measures proposed will make available mechanisms that enable employers to keep employees gainfully employed to some extent, as an alternative to redundancies. Measures proposed by the Application such as directing the taking of annual leave, closing down operations for a period and reducing employee hours by a measured and proportionate amount will all provide employers with means of maintaining their viability without involving redundancies.'[5]

[22] We note that in a series of decisions the Commission has granted consent applications to vary the:

- *Hospitality Industry (General) Award 2010*[6]

- *Clerks – Private Sector Award 2010*[7]

- *Restaurant Industry Award 2010*[8]

- *Educational Services (Schools) General Staff Award 2010.*[9]

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

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[5] Joint Employer submission at paras [2.4] [2.6].

[6] [2020] FWCFB 1574.

[7] [2020] FWCFB 1690.

[8] [2020] FWCFB 1741.

[9] [2020] FWCFB 2108.

[24] On 8 April 2020 a Full Bench of the Commission issued a decision[4] (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;
- Information Note on bargaining by business size;
- Information Note on Government responses to the COVID-19 pandemic; and
- Expert report by Professor Borland.

[25] 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

[26] 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.' The proposed schedule has a limited period of operation, until 30 June 2020.

[27] It is proposed that Schedule J will only operate with respect to those employees who are not participating in the new JobKeeper wage subsidy scheme implemented by the Australian Government. The Joint Employer submission explains the reasoning behind such a proposal as follows:

> 1. Employers who are participating in the JobKeeper Scheme are able to access some stimulus/relief payments from the Government, which may help address (in some cases and to some extent) the dire financial circumstances the employers face themselves in. For some of these employers accessing JobKeeper payments, the necessity to access the type of flexibilities outlined in Schedule J with respect to a particular employee may not be as great as those employers who are unable to access JobKeeper payments.
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> 2. Those employers who are accessing JobKeeper payments have the benefit of Part 6-4C of the Act, which has introduced a range of new temporary measures that employers are able to take to protect the ongoing viability of their business. These 'JobKeeper Flexibilities' are *not* available to employers who do not qualify for the JobKeeper Scheme; nor are they available with respect to those employees for whom qualified employers are not entitled to receive JobKeeper payments.[10]

[28] The intention to limit the operation of Schedule J to those employees who are not participating in the JobKeeper Scheme is given effect to by clause J.1(d) of Schedule J. Employers will only be entitled to utilise the provisions in Schedule J with respect to an employee if *that employee* is ineligible to receive JobKeeper payments.

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[10] Joint Employer submission at para [3.2].

[29] The Commission wrote to the parties about the drafting of clause J.1(d), in the following terms:

'Clause J.1(d) currently provides:

> '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*.'

Employees do not receive JobKeeper payments. They receive the benefit of Jobkeeper payments, but Jobkeeper payments are made to the employer.

Employees can be 'eligible employees' as defined under s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*, in which case their employer can claim the jobkeeper payment for the employee. To receive the benefit of a jobkeeper payment, the employee would need to be an 'eligible employee', and employed by an employer that decides to participate in the jobkeeper scheme. An employee could be an 'eligible employee', but be employed by an employer that decides not to participate in the jobkeeper scheme.

Assuming that clause J.1(d) intends to capture eligible employees, it is proposed that the clause be amended as follows:

> ' Schedule J does not apply to any employee employed by an employer ~~who~~ that 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*~~ an eligible employee as defined in s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.'

In order to finalise this matter quickly, you are requested to provide any comment on the proposed clause by **3pm today**. All comments to chambers.ross.j@fwc.gov.au.'

[30] The parties supporting the Application either supported or did not oppose the amendment proposed.

[31] ACAPMA responded in the following terms:

'Further to the drafting issue raised below, it is noted that participation in the JobKeeper Program is not mandated, regardless of the businesses eligibility, as such a business may be eligible and not participating. Use of 'qualification' or 'eligibility' of the business to participate in the JobKeeper Program, rather than actual participation, could give rise to unintended coverage issues. As such it is suggested that rather than reflecting the businesses eligibility the drafting be adjusted to reflect the businesses enrolment in the JobKeeper Program

To reflect this distinction and assuming that clause J.1(d) intends to capture eligible employees of participating businesses, it is proposed that the clause be amended as follows:

> Schedule J does not apply to any employee employed by an employer ~~who qualifies for~~ is enrolled in the JobKeeper Scheme if the employee is ~~eligible to receive 'JobKeeper' payments pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*~~ an eligible employee as defined in s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.'[11]

[32] The proposal advanced by ACAPMA was opposed by the ACTU and unions involved and did not attract any support from any other party.

[33] The adoption of ACAPMA's proposed amendments to clause J.1(d) would mean that an employer would only be able to utilise Schedule J if they cannot, *or choose not*, to access JobKeeper payments. This would plainly depart from the intention of those supporting the Application. The Joint Employer submission, in reference to the flexibilities that Part 6-4C provides to employers participating in the JobKeeper scheme, said:

> 'Employers who are participating in the JobKeeper Scheme are able to access some stimulus/relief payments from the Government, which may help address (in some cases and to some extent) the dire financial circumstances the employers face themselves in. For some of these employers accessing JobKeeper payments, the necessity to access the type of flexibilities outlined in Schedule J with respect to a particular employee may not be as stark as those employers who are unable to access JobKeeper payments.'[12]

[34] This extract indicates that the proposal is intended to benefit employers that *cannot* participate in the JobKeeper scheme for a particular employee, *not* employers who choose not to participate.

[35] 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.'[13] 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.

[36] As we have already mentioned, proposed 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 (see clause J.2.2);

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[11] ACAPMA correspondence, 8 May 2020.

[12] Joint Employer submission at [3.2(a)].

[13] Application at [77].

- 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).

[37] Two types of safeguards are contained within the proposed Schedule J:

- 'universal' safeguards that apply at large to requests or directions made under the Schedule; and

- specific safeguards that apply with respect to individual provisions of the Schedule.

[38] The Joint Employer submission provides a detailed explanation of the nature of the safeguards and the reason for their inclusion.

[39] We now turn to the detail of the variation proposed.

Operational flexibility

[40] Clause J.2.1(a) provides that where necessary employees may be directed to perform any duties that are within their skill and competency regardless of their classification 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.

[41] The power to direct is subject to the following protections:

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

- An employer must not reduce an employee's pay if the employee is directed to perform duties in accordance with clause J.2.1.

- An employee given a directive under clause J.2.1 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.

Temporary reduction of hours of work for full time and part time employees

[42] Clause J.2.2(b) provides that 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 and the arrangements for working ordinary hours in clauses 37 and 44.1 will apply on a pro-rata basis.

[43] Clause J.2.2(c) provides that 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.

[44] An employer may only implement a temporary reduction in hours of work under clause J.2.2 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.

[45] Subclauses J.2.2(d), (e) and (f) provide that employees may not have their hours of work reduced if the amount payable under the reduced hours falls below the minimum amounts specified in these subclauses. We return to these subclauses in our consideration of the ACAPMA submission.

[46] Prior to an employer issuing any direction under clause J.2.2(b) or (c) the employer must:

- 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

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

[47] Where the amount paid to an employee under clause J.2.2 is less than the normal weekly pay an employee received prior to a directed reduction in hours under clause J.2.2, the employee can have their weekly pay increased, by agreement with the employer, to the weekly pay they received prior to a directed reduction in hours, by accessing 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).

[48] 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 the Vehicle Award, based on each full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule J.

[49] 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 accessing that accrued annual leave will be based on the full-time or part-time employee's ordinary hours of work prior to the commencement of Schedule J. Further, 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.

[50] An employee given a directive under clause J.2.2 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).

Annual leave

[51] Clause J.2.3 contemplates a regime whereby:

(a) an employer may request an employee to take annual leave;

(b) the request must be 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;

(c) the employer must not request the taking of leave if it results in an employee retaining an annual leave balance of less than 2 weeks;

(d) the request must be made 72 hours before the leave is to be taken; and

(e) the employee is required to consider and not unreasonably refuse the request.

[52] Clause J.2.3(e) provides that 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.

[53] This regime has been adopted to mirror section 789GJ of Part 6-4C of the Act.

[54] Each of the protections outlined in clause J.2.3 are contained in section 789GJ, other than:

- the requirement to provide 72 hours' notice of the annual leave being taken (which derives from section 789GM of Part 6-4C of the Act); and

- the reference to any request being attributable to COVID-19 or COVID-19 Government initiatives (which is an additional safeguard included in the Award Schedule).

[55] The Joint Employer submission submits that by adopting this regime the Commission can be satisfied that:

'(a) leave provisions of the Schedule will not be utilised to exhaust an employee's leave. Rather requests must be attributable to operational concerns that have arisen as a result of COVID-19 or COVID-19 related Government initiatives. Furthermore, employees will still have an ability to take recreation periods subject to the Act's usual requirements;

(b) a period of consultation is enshrined into the leave taking process, allowing employees to consider and take advice on any leave requests; and

(c) on an overarching basis, if any circumstances that arise that make the leave request unreasonable, employees are able to resist such a request. This prevents unjustifiable prejudice being caused in a particular case, if unique circumstances arise that make a leave request unreasonable. It ensures a level of protection for every individual and for scenarios that might not presently be envisaged.'[14]

[14] Joint Employer submission at para [4.25]

Close down

[56] Clause J.2.4 provides that 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.

[57] Clause J.2.4 only applies 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.

[58] 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.

[59] 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 National Employment Standards (NES) entitlements.

[60] If an employee is directed to take unpaid leave under Clause J.2.4 or to work temporary reduced hours under Clause J.2.2 the employer must consider and not unreasonably refuse an employee's request to engage in:

- reasonable secondary employment;
- training; and
- professional development.

4. The ACAPMA Submission

[61] ACAPMA submits that it is a national body representing the interests of fuel retailers and fuel wholesellers in Australia. ACAPMA states:

> '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.'[15]

[62] ACAPMA raises two substantive matters in relation to the proposed variation determination. ACAPMA is not opposed to the concepts addressed in the proposed variation or to those aspects of the proposal not addressed in their submission.

Operative period of Schedule J

[63] As we have mentioned, the proposed Schedule has a limited period of operation, until 30 June 2020. ACAPMA contends that the 'end date' of Schedule J should match that of the JobKeeper flexibility provisions in Part 6-4C of the Act and submits:

> '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.'[16]

[64] During the course of oral argument ACAPMA's representative noted that the reference to 27/6/2020 is an error and the intention was to submit that the Schedule operate until 27 September 2020.

[65] Clause J.1(b) of the draft determination provides that:

> 'Schedule J operates…until 30 June 2020. The period of operation can be extended on application to the Fair Work Commission'.

[66] The change proposed by ACAPMA is not supported by those parties involved in the negotiation of the package of measures before us.

[67] During the course of oral argument Mr Izzo (on behalf of ACCI, VACC, MTAs of SA, NSW and Qld) submitted that a feature of the current crisis facing the sectors covered by the Vehicle Award has been the rapid pace of change and the emerging challenges for employers. In these circumstances a relatively short duration is appropriate. Mr Izzo also highlighted that the parties to the consent package are to meet on 30 May in order to discuss the terms of the Schedule and its period of operation. Ms Ismail, on behalf of the ACTU noted that ACAPMA is welcome to participate in those discussions.

[68] We do not propose to make the change proposed. The parties are committed to ongoing discussions in relation to the Schedule and its period of operation. In our view that is the

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[15] ACAPMA submission at page 3.

[16] Ibid at page 4.

appropriate means of addressing the issue raised by ACAPMA. Any employer, employee or organisation that is covered by the Vehicle Award may make an application to vary the terms of the Award, including to extend the period of operation of Schedule J.

The minimum payment amount

[69] ACAPMA contends that the efficacy of the changes proposed 'is significantly undermined by the inclusion of the fortnightly minimum payment amounts at J.2.2(d) and J.2.2(f)'.[17] The subclauses which are the subject of ACAPMA's submission provide as follows:

> **(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.
>
> **(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.

[70] ACAPMA submits that these provisions 'in a practical sense renders the whole clause useless in a retail fuel setting' and that:

> '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.
>
> 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
>
> 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.

[17] Ibid at page 2.

> 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.'[18]

[71] ACAPMA's written submission was not the subject of much elaboration during the course of oral argument.

[72] The Joint Employer submission provides the following explanation in respect of these provisions:

> '(a) For Levels 1-5 full time employees - $1,115.70 a fortnight. This represents the entry level 'Job Seeker' payment amounts applicable for unemployed persons at present.[19] It aligns with the Job Seeker payment for single employees without children. The use of this payment floor ensures full time employees cannot have their hours (and therefore pay) reduced to a level that falls below payments applicable for unemployment benefits.
>
> (b) For Levels 1-5 part time employees, the same threshold figure has been adopted, with a 25% reduction. For this reason, the threshold of $836.78 a fortnight has been adopted for those part time employees who currently earn over this amount. The 25% reduction accounts for the fact that part-time employees will be working less hours than full time employees. By reducing the threshold payment for these employees, the Application accordingly maintains an ability to reduce part-time employee hours by a loosely proportionate or corresponding amount to the full time employees (noting that no precisely pro rata figure can easily be applied given that part time employee hours can vary markedly).
>
> (c) For Levels T1 and T2 (the tradesperson levels), a threshold of $1,500 per fortnight has been adopted, which aligns to the JobKeeper payment. This recognises that tradespersons are paid more than the other levels and, in this industry, usually above the Award minimum wage requirements. The minimum floor has accordingly been raised to ensure any reduction in income (in both dollar and percentage terms) is not significantly more drastic than that which might apply for Level 1-5 employees.'[20]

[73] Mr Izzo and Ms Ismail responded to ACAPMA's submission during the hearing on 8 May 2020. Mr Izzo noted that clause J.2.2 provides that an employer may unilaterally reduce the hours worked by employees (by 40% for full time employees and by 25% for part time employees) subject to the three minimum wage floors described in subclause J.2.2(d), (e) and (f). Mr Izzo submitted that the minimum wage floors perform two functions,:

- protecting the living standards of the relevant employees; and
- providing an incentive for work.

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[18] Ibid at page 3.

[19] https://www.servicesaustralia.gov.au/individuals/services/centrelink/jobseeker-payment/how-much-you-can-get

[20] Joint submission at 4.22.

[74] The latter point concerns the interrelationship between the minimum wage floors and the Job Seeker benefit. Absent a minimum wage floor there would be circumstances in which there would be no economic incentive to attend work at all. As Mr Izzo pointed out, such a circumstance plainly engages s.134(1)(c). Further, in the event that the scheme led to employees not presenting for work it would have an adverse impact on business.

[75] As to the example used by ACAPMA, Mr Izzo described it as 'hypothetical' and 'focusses on extremes'.[21] Mr Izzo provided a range of other examples in support of his submission that the provision 'will have material work to do'.[22]

[76] Mr Izzo's submissions were supported by Mr Harrington, on behalf of Ai Group, who noted that the proposed variation was the product of a very lengthy negotiation process which will provide 'real value to business' and should be implemented 'sooner rather than later'.[23] The sentiments expressed by Mr Harrington were echoed by the other parties supporting the Application.

[77] Ms Ismail submitted that ACAPMA had provided no material demonstrating the necessity to adopt the changes it proposed.

[78] The Applicants have advanced a compelling case in opposition to the criticisms put by ACAPMA. ACAPMA has sought to enter this process late in the game. It has provided no probative evidence in support of the position it advances and nor has it sought to address any of the s.134 considerations. The other parties have been actively engaged in negotiating the matters before us for over a month. The outcome is a credit to all of the participants and, as submitted by Ai Group, will provide 'real value to business'.

[79] The paucity of the material advanced by ACAPMA was said to be due to the fact that ACAPMA only became aware of the Application on Thursday 7 May 2020. We note that ACAPMA did not seek any further time within which to file more detailed submissions or any evidence, in support of its position. It is also relevant to observe that a representative of ACAPMA was involved in earlier discussions between the ACTU and other employer bodies about a response to the COVID-19 pandemic. It was evident at that time that award specific discussions were envisaged but, apparently, ACAPMA chose not to involve itself in those discussions.[24]

[80] We do not propose to adopt any of the changes proposed by ACAPMA.

[81] ACAPMA's late intervention in this matter has, regrettably, simply served to delay the implementation of changes which will benefit business and facilitate the retention of employees in employment.

5. Consideration

[21] Transcript, 8 May at [78].

[22] Ibid at [87] – [89].

[23] Ibid at [105] – [107].

[24] Ibid at [91] – [93].

[82] The Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is in s.134 of the Act and provides as follows:

'What is the modern awards objective?

134(1) The FWC must 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:

(a) relative living standards and the needs of the low paid; and

(b) the need to encourage collective bargaining; and

(c) the need to promote social inclusion through increased workforce participation; and

(d) the need to promote flexible modern work practices and the efficient and productive performance of work; and

(da) the need to provide additional remuneration for:

(i) employees working overtime; or

(ii) employees working unsocial, irregular or unpredictable hours; or

(iii) employees working on weekends or public holidays; or

(iv) employees working shifts; and

(e) the principle of equal remuneration for work of equal or comparable value; and

(f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and

(g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and

(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.'

This is the **modern *awards objective***.

When does the modern awards objective apply?

(2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:

(a) the FWC's functions or powers under this Part; and

(b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).'

[83] 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).

[84] The modern awards objective is very broadly expressed.[25] It is a composite expression which requires that modern awards, together with the NES, provide 'a fair and relevant minimum safety net of terms and conditions', taking into account the matters in ss.134(1)(a)–(h).[26] Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.[27]

[85] The obligation to take into account the s.134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.[28] No particular primacy is attached to any of the s.134 considerations[29] and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[86] It is not necessary to make a finding that the award fails to satisfy one or more of the s.134 considerations as a prerequisite to the variation of a modern award.[30] Generally speaking, the s.134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.[31] In giving effect to the modern awards objective the Commission is performing an evaluative function taking into account the matters in s.134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[87] Section 138 of the Act emphasises the importance of the modern awards objective:

'Section 138 Achieving the modern awards objective

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.'

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[25] *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* (2012) 205 FCR 227 at [35]

[26] (2017) 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [41]–[44]

[27] [2018] FWCFB 3500 at [21]-[24]

[28] *Edwards v Giudice* (1999) 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]-[84]; *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [56]

[29] *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161 at [33]

[30] *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [105]-[106]

[31] See *National Retail Association v Fair Work Commission* (2014) 225 FCR 154 at [109]-[110]; albeit the Court was considering a different statutory context, this observation is applicable to the Commission's task in the Review

[88] 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.[32]

[89] 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 employer can claim 'JobKeeper' payments for the employee pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*.

[90] The flexibilities provided in Schedule J are subject to three general safeguards:

> 1. Any direction or request given by an employer under Schedule J must be given in writing.
>
> 2. Any direction given by an employer under Schedule J does not apply to the employee if the direction is unreasonable in all of the circumstances.
>
> 3. Any dispute regarding the operation of Schedule J may be referred to the Commission in accordance with clause 9—Dispute Resolution of the Vehicle Award. Further, any direction given by an employer under Schedule J 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 Commission through arbitration, in accordance with clause 9 and section 739(4) of the Act.

[91] The safeguards provided in Schedule J are similar to those which apply to all 'JobKeeper enabling directions' under Part 6-4C of the Act, in particular:

- A JobKeeper enabling direction does not apply to an employee if it is unreasonable in all the circumstances (s 789GK).
- A JobKeeper enabling direction does not apply to an employee unless the employer gave the employee written notice of the employer's intention to give the direction (s 789GM).
- The Commission may deal with a dispute about the operation of Part 6-4C by arbitration (s 789GV).

[92] As noted in the Joint Employer submission the safeguards in Schedule J are intended to ensure that 'employees receiving directions pursuant to Schedule J are not in a materially different position to those receiving directions pursuant to Part 6-4C of the Act'.

[93] In circumstances where an application to vary a modern award proposes flexibilities which are the same or analogous to those which apply to JobKeeper enabling directions and requests under Part 6-4C of the Act it is entirely appropriate that such a variation also

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

incorporate the relevant safeguards provided in Part 6-4C. Indeed, in the context of this Application, we have given significant weight to the provision of the safeguards in Schedule J set out above at [91] in our consideration of whether the variation of the Vehicle Award in the manner proposed would ensure that the Award provides 'a fair and relevant minimum safety net of terms and conditions' within the meaning of s.134(1).

[94] We now turn to the modern awards objective. The considerations in s.134(da), (e) and (g) are not relevant to the Application. We deal with the other considerations below.

s. 134(1)(a): relative living standards and the needs of the low paid

[95] A threshold of two-thirds of median full-time wages provides 'a suitable and operational benchmark for identifying who is low paid,'[33] within the meaning of s.134(1)(a).

[96] The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is $920.00. Data on median weekly full-time earnings are also available from the EEH survey for May 2018, and two-thirds of median earnings is equal to $973.33.

[97] Using the two-thirds of median full-time wages as the benchmark, most of the award reliant employees covered by the Vehicle Award are 'low paid' within the meaning of s.134(1)(a).

[98] We accept that the proposed variation may result in low paid employees working less hours and consequently receiving less pay. It is axiomatic that such a reduction in pay will mean that they are less able to meet their needs. But, as noted in the Hospitality decision, employers and employees face an invidious choice and the retention of as many employees as possible in employment, albeit on reduced hours, is plainly a priority.

[99] We also note the agreed measures to mitigate the impact of reduced hours, particularly by maintaining relevant accruals; the minimum wages 'floor provisions' in subclauses J.2.2(d), (e) and (f); and the requirement for consultation with affected employees in accordance with clause 8A. The general safeguards set out at [91] above are also relevant.

s. 134(1)(b) the need to encourage collective bargaining

[100] The proposed variation may be said to decrease the incentive for employers to bargain; but it is also likely that employee and employer decision making about whether or not to bargain is influenced by a complex mix of factors. It is also relevant that the proposed variation is time limited. Section 134(1)(b) speaks of 'the need to *encourage* collective bargaining'. We are not persuaded that the proposed insertion of Schedule J would '*encourage* collective bargaining'. It follows that this consideration weighs against the variation proposed.

s. 134(1)(c) the need to promote social inclusion through increased workforce participation

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[33] [2017] FWCFB 1001 at [166]

[101] This consideration is directed at obtaining employment. As noted in 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'. The variation will facilitate the parties' shared objective of retaining as many employees in employment as practicable in the current crisis. While the variation will not increase workforce participation it will assist in mitigating the employment impacts associated with the COVID-19 pandemic.

> *s. 134(1)(d) and (f) the need to promote flexible modern work practices and the efficient and productive performance of work and the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden.*

[102] It is convenient to deal with these considerations together. The proposed variation will promote flexibility and the 'efficient and productive performance of work' and will reduce the regulatory burden on business. This is a factor which weighs in favour of making the variation sought.

> *s.134(1)(h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.*

[103] Granting the application is not likely to have any appreciable impact on 'employment growth, inflation and the sustainability, performance and competitiveness of the national economy'. Accordingly, this consideration is neutral.

[104] 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.

[105] 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)

[106] 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)).[34]

- 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)).

[107] As we have mentioned, 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.

[108] 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 the employer must consider and not unreasonably refuse an employee's request to engage in reasonable secondary employment, training or professional development;

- 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; and

- 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.

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[34] 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.

[109] Clauses J.2.3(a) and (b) provide 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.

[110] 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'.

[111] 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 the provisions we have mentioned are 'reasonable' within the meaning of s 93(3).

[112] 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 does not apply to the employee if the direction is unreasonable in all the circumstances and any dispute about such a direction may be referred to the Commission for arbitration. In our view the terms proposed are permitted terms and they are 'reasonable' within the meaning of s.93(3).

[113] 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.'

[114] We are satisfied that clause J.2.3(e) is an ancillary or incidental term permitted by s.55(4).

6. Conclusion

[115] We are satisfied that the terms in Schedule J may be included in a modern award pursuant to ss.93(3), 136(1)(a) and ss.139(1)(a), (b), (c), (h) and (j) of the Act.

[116] We are also satisfied that the variation proposed is necessary to achieve the modern awards objective (s.157) and in so deciding we have taken into account the considerations in s.134(1)(a) to (h) insofar as they are relevant. Further, once varied the Vehicle Award will only include terms to the extent necessary to achieve the modern awards objective (s.138).

[117] For the reasons set out above we will make the variation determination sought. The determination will come into operation on 11 May 2020. As required by s.165(3) the determination does not take effect in relation to a particular employee until the start of the employee's first full pay period that starts on or after the day the determination comes into operation.

[118] A copy of the variation determination is attached to this decision.

[119] For completeness we note that the *Vehicle Repair, Services and Retail Award 2020* (the 2020 Award) will come into effect on Friday, 29 May 2020. The 2020 Award will no longer cover employees who are currently covered by section 2—Vehicle Manufacturing Employees, Section 3—Drafting, Planning and Technical Employees, and Section 4—Supervisory Employees. We note that the variation determination only applies to section 1—Vehicle Industry RS&R Employees and so the change in coverage will have not any effect on the variation we are making to the current Vehicle Award. The 2020 Award will be amended to include the new Schedule J. We note that the 2020 Award will not include J.1(d)(ii) as it will not be necessary.

PRESIDENT

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<PR719149>

Appearances:

L Izzo for Australian Chamber of Commerce and Industry, 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 Victorian Automobile Chamber of Commerce

T Lawrence for Australian Chamber of Commerce and Industry

E Radwanowski for Australasian Convenience and Petroleum Marketers Association

H Harrington for Australian Industry Group

D Smith for "Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union" known as the Australian Manufacturing Workers' Union (AMWU)

S Crawford for The Australian Workers' Union

S Ismail for Australian Council of Trade Unions

S Burnley with Mr Gavin van Rensburg for Shop, Distributive and Allied Employees Association

B Chesterman for Victorian Automobile Chamber of Commerce

Hearing details:

Melbourne, by telephone
2020
8 May

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
DEPUTY PRESIDENT MASSON
COMMISSIONER LEE MELBOURNE, 11 MAY 2020

Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010 COVID-19 Pandemic – application approved – variation determination made.

A. Further to decision [[2020] FWCFB 2367] issued by the Full Bench on 11 May 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 11 May 2020 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:

(i) by an employer that qualifies for the JobKeeper Scheme if the employee is an 'eligible employee' as defined in s.9 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020*; or

(ii) under Sections 2, 3 or 4 of this Award (Vehicle Manufacturing Employees, Drafting, Planning and Technical Employees and Supervisory Employees).

(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

(a) 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.

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

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

(d) 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 Clauses 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 Clauses J.2.2(a), (f) and (g), and despite Clauses 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 Clauses 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 Clauses 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 Clauses 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 Clauses 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.

(c) 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.

(d) 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.

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

(f) 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 Clauses 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:

(i) reasonable secondary employment;

(ii) training; or

(iii) 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 operation on 11 May 2020. 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 11 May 2020.

PRESIDENT

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