

6 April 2020

Justice Iain Ross
President
Fair Work Commission
Level 4, 11 Exhibition Street
MELBOURNE VIC 3000

By email: chambers.ross.j@fwc.gov.au

Dear Justice Ross

Re: Variation of awards on the initiative of the Commission (AM2020/12)

We refer to the Statement [2020] FWCFB 1760 (**Statement**) issued on 1 April 2020, in relation to the Fair Work Commission's proposal to vary various awards by inserting a new Schedule X - "Additional measures during COVID-19 pandemic" under section 157 of the *Fair Work Act 2009*.

mycar supports the proposed schedule being added to the Vehicle Award and awards as proposed generally.

mycar seeks to make the following submissions and observations about a continuing flexibility gap:

1. mycar (formerly known as Kmart Tyre & Auto Service) is covered by the Vehicle Manufacturing, Repair, Services and Retail Award 2010 (**Vehicle Award**), and also has a number of Enterprise Agreements in place that defer to Vehicle Award provisions.
2. mycar actively took steps to consult with a relevant union on intentions and flexibility, aiming to preserve employment of as many staff as possible and request the use of equitable rostering of remaining but impacted work generally, along with employee entitlements and potentially unpaid leave. It is observed, for the information of the FWC, that the response of the union to operationally suitable solutions which required co-operation from employees was one-dimensional and indicative of a failure to adapt and a protective stance which prefers operating with the limits of legislation and award / EA provisions. In response to a request that employees:

- a. waive notice requirements / conceptually apply for leave on non-viable working days;
- b. agree to rostering on an equitable, rotating basis with other employees that utilizes some leave entitlements because of trade downturn;
- c. be flexible regarding work locations and travel requirements

The union responded in relation to use of leave entitlements that directions to use leave must be in accordance with required timeframes in the enterprise agreements and Vehicle Award, which have significant notice requirements and restrictions on leave volume.

3. The provisional view of the FWC in relation to annual leave considerations and its conservative approach at paragraph 80 of the Section 157(3) statement are noted, but it is observed that a gap is created by failing to free up or provide greater flexibility to leave utilisation by direction. The gap that exists is most notably for workplaces that are trying to preserve jobs for as many staff as possible by reducing rosters and suggesting employees take leave: eg a 5 day roster is 4 days, with a 5th day rotating annual leave. Currently, this can only occur by employee/union cooperation and agreement. It cannot be achieved with required flexibility because of legislative requirements for notice of a direction to use leave, and requirements about the value of leave accrual before a direction can be made, or the amount of leave an employee can be directed to take.
4. Although the ability to convert to part-time work may address workplace need and this suits mycar's operational need, it is observed that to do so, employees then cannot access leave for the period that might have otherwise been worked because that is no longer a viable working day. Likewise, mycar wishes to avoid making staff redundant so that staffing is moderated to meet demand. As stand down provisions cannot conceivably be used for intermittent shifts and/or days of operation when trying to equitably share remaining workload, the options created by schedule X in the absence of greater flexibility around directions about annual leave are not conducive to across the board flexibility to preserve as many jobs as possible while enabling leave to support income.

A failure to address this gap will inhibit workplaces trying to equitably preserve jobs, and subsequent alterations may be too late to assist such circumstance. Some suggested approaches that may address this gap may be:

1. Expansion of the concept of unpaid pandemic leave to include leave at the direction of the employer where the employee cannot be utilized, with a discretion to apply for annual leave / government entitlements that may be available.

2. A temporary COVID variation to ss 524 & 525 of the *Fair Work Act 2009* to provide for partial stand-down of workplace units, locations or by way of equitable rostering of remaining workload. This way employees will still have partial active employment and be able to apply for leave at their own discretion.

We thank the FWC for all of the effort and resourcing that is being provided to address ever emerging workplace complexities due to the pandemic.

Yours sincerely



Fiona Murphy
General Manager, People and Culture