

From: Luis Izzo <Luis.Izzo@ablawyers.com.au>

Sent: Tuesday, 5 May 2020 4:53 PM

To: COVID19Applications <COVID19Applications@fwc.gov.au>; Chambers - Ross J <Chambers.Ross.j@fwc.gov.au>

Cc: Sophie Ismail <sismail@actu.org.au>; Tamsin Lawrence

<Tamsin.Lawrence@australianchamber.com.au>; Brent Ferguson

<Brent.Ferguson@aigroup.com.au>; Sue-Anne Burnley <sue-anne@sda.org.au>;

David.Smith@amwu.org.au; Stephen Crawford <stephen.crawford@nat.awu.net.au>; Hamish

Harrington <Hamish.Harrington@aigroup.com.au>; Chesterman, Bill <bchesterman@vacc.com.au>;

Brian Savage - AADA <bsavage@aada.asn.au>

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

Dear Sir/Madam

I refer to the application filed earlier today in relation to the abovementioned Award.

I **attach**, for the purposes of filing, a revised draft determination, which the applicant parties seek to have made pursuant to the Application lodged earlier today. The revised determination is attached in clean copy and mark-up.

The primary changes are as follows:

1. The safeguard providing for arbitration of any dispute about a direction made under the Schedule has been updated to reflect the final version of the consent position reached between the parties (see clause J.1(g)).
2. The provision in clause J.2.2(h) regarding 'topping up' an employee's pay with accrued leave has been updated to reflect the final version of the consent position reached between the parties.

We have liaised with the employer parties and the ACTU which have all indicated that they are comfortable with the amendment to the determination. On that basis, we understand that the consent positions identified earlier today remains.

Yours faithfully

Luis Izzo

Managing Director – Sydney Workplace
Australian Business Lawyers & Advisors

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From: Luis Izzo

Sent: 05/05/2020 11:57 AM

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

Dear Sir/Madam

We act for the Victorian Automobile Chamber of Commerce, the Motor Trade Association of South Australia Incorporated, the Motor Traders Association of New South Wales and the Motor Trades Association of Queensland Industrial Organisation of Employers.

We **attach**, for the purposes of filing, a s157 Application that is jointly made by the abovenamed organisations and Ai Group.

We understand that the Application is consented to by the relevant unions with members covered by the Award and, in particular, the AMWU, the SDA and the ACTU.

The Application is also supported by the Australian Chamber of Commerce and Industry, the Australian Automotive Dealer Association (**AADA**) and the Motor Trade Association of Western Australia.

Should you have any queries in relation to the Application, please do not hesitate to contact me.

Yours faithfully

Luis Izzo

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DETERMINATION

Fair Work Act 2009

s.157 —FWC may vary etc. modern awards if necessary to achieve modern awards objective

Vehicle Manufacturing, Repair, Services and Retail Award 2020

(AM2020/XX)

VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL AWARD 2010

[MA000089]

Vehicle manufacturing, repair services and retail industry

JUSTICE ROSS, PRESIDENT

XXXXXX

XXXXXX

MELBOURNE, XX XXXXX 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

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DETERMINATION

Fair Work Act 2009

s.157 —FWC may vary etc. modern awards if necessary to achieve modern awards objective

Vehicle Manufacturing, Repair, Services and Retail Award 2020 (AM2020/XX)

VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL AWARD 2010

[MA000089]

Vehicle manufacturing, repair services and retail industry

JUSTICE ROSS, PRESIDENT
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- (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 clause is not valid unless it contains a written consent by the employer to arbitration under Clause 9.5—Dispute Resolution in respect of any dispute arising from the direction.~~

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- (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, ~~the employee can top up their weekly pay~~ 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).
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