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Subject: AM2020/22 - Application to vary the Vehicle Manufacturing, Repair, Services and Retail Award 2010

Dear Sir/Madam

We **attach**, for the purposes of filing, a joint submission by ACCI, Ai Group and VACC in support of the Application to vary the Vehicle, Manufacturing, Repair, Services and Retail Award 2010.

The submission is filed in accordance with directions issued on 6 May 2020.

Yours faithfully

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AM2020/22

VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL AWARD 2010

S157 APPLICATION TO VARY A MODERN AWARD

ACCI, VACC & AI GROUP SUBMISSIONS IN SUPPORT OF APPLICATION

1. BACKGROUND

- 1.1 These submissions are made on behalf of the Australian Chamber of Commerce and Industry (**ACCI**), the Vehicle Automobile Chamber of Commerce (**VACC**) and the Australian Industry Group (**Ai Group**) in support of the Application to vary the Vehicle, Manufacturing, Repair, Services and Retail Award 2010 (**Award**).
- 1.2 Substantive grounds in support of the Application were filed on 5 May 2020 as part of Annexure B to the Application.
- 1.3 ACCI, VACC and Ai Group rely on those grounds in support of the Application.
- 1.4 In these submissions, ACCI, VACC and Ai Group:
 - (a) identify some further matters particular to the vehicle retail sales industry that have become public since the Application was filed;
 - (b) address how the proposed Schedule J would interact with the recently introduced 'JobKeeper' amendments to the *Fair Work Act 2009* (**FW Act**) (Part 6-4C of the FW Act); and
 - (c) provide explanations regarding a number of the safeguards that form part of the draft determination which further support the granting of the Application (and which have not to date formed part of other Applications of this nature made in response to COVID-19).

2. THE VEHICLE MANUFACTURING, REPAIR, SERVICES AND RETAIL INDUSTRY

- 2.1 Paragraph 66 of Annexure B to the Application has already identified data suggesting that:
 - (a) a material disruption has taken place with respect to the industry of manufacturing automobiles; and

- (b) this material disruption has, in turn, likely affected the “*highly integrated*” industry, which extends beyond manufacture into retail sales.
- 2.2 Yesterday, the Federal Chamber of Automotive Industries (**FCAI**) released further data demonstrating what can only be described a crash in vehicle sales since the arrival of COVID-19 on Australian shores.
- 2.3 The data¹ demonstrates that, amongst other things:
- (a) 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).
 - (b) 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.
 - (c) 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**.
 - (d) These drastic falls in sales compound decreases in vehicles sales that had been experienced more generally before COVID-19.²
- 2.4 This is an industry in crisis.
- 2.5 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.
- 2.6 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.
- 2.7 These measures accordingly strongly align with the modern awards objective as they:

¹ Available at <https://www.fcai.com.au/news/index/view/news/622>

² FCAI claims that the Australian new vehicle market has been under stress for some time, with April 2020 representing the 25th consecutive month of declining sales on a year-on-year basis - <https://www.fcai.com.au/news/index/view/news/622>

- (a) improve/maintain/protect the relative living standards of the low paid, by enabling employers to maintain the employment of award-covered workers - see section 134(1)(a) of the FW Act;
- (b) promoting social inclusion through increased workforce participation - see section 134(1)(c) of the FW Act;
- (c) promote flexible modern work practices, having regard to the specific circumstances arising from COVID-19 - see section 134(1)(d) of the FW Act; and
- (d) should, in an incremental and proportionate fashion, positively impact employment growth, and the sustainability of the national economy - see section 134(1)(h) of the FW Act.

3. INTERACTION WITH JOBKEEPER AMENDMENTS TO THE FW ACT

3.1 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.

3.2 The reasoning behind such a proposal is twofold:

- (a) Firstly, 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.
- (b) More importantly, those employers who are accessing JobKeeper payments have the benefit of Part 6-4C of the FW 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' outlined in Part 6-4C of the FW Act are not available:
 - (i) to employers who do not qualify for the JobKeeper Scheme; or
 - (ii) with respect to those employees for whom qualified employers are not entitled to receive JobKeeper payments for pursuant to the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*.

- 3.3 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 the proposed Schedule J to the Award.
- 3.4 As a result, employers will only be entitled to utilise the provisions in Schedule J with respect to an employee if *that employee* is ineligible to qualify for JobKeeper payments that are made pursuant to the Scheme.

4. SAFEGUARDS CONTAINED IN THE PROPOSED SCHEDULE J

- 4.1 Two types of safeguards are contained within the proposed Schedule J:
- (a) 'universal' safeguards that apply at large to requests or directions made under the Schedule; and
 - (b) specific safeguards that apply with respect to individual provisions of the Schedule.
- 4.2 ACCI, VACC and Ai Group explain the nature of these safeguards below and their reasons for inclusion in Schedule J.
- 4.3 Importantly, ACCI, VACC and Ai Group's support for these safeguards with respect to the Award should not be taken as evincing any broader support for these type of safeguards outside of the award variations being made in response to the current extraordinary circumstances presented by COVID-19. This is expressly identified in clause J.1(a) of the proposed Schedule J which identifies that the variations proposed are not intended to create any precedent after the expiry of the Schedule.

Universal safeguards

- 4.4 There are three universal safeguards that apply.

Requests and directions to be in writing

- 4.5 The first universal safeguard is that all requests or directions must be made in writing. This is given effect to by clause J.1(e).
- 4.6 ACCI, VACC and Ai Group do not accept that, as a general proposition, it is necessarily the case that requests or directions issued under the Award must be in writing in order for the modern awards objective to be satisfied. There may be cases where providing requests or directions in writing is impractical or otiose.
- 4.7 However, given the unprecedented nature of some of the variations proposed, the unprecedented urgency which might give rise to these requests and directions and that the Application is being made by consent, ACCI, VACC and Ai Group support

this safeguard being implemented in the present circumstances for the purposes of making this Schedule J.

Directions are not to be unreasonable

- 4.8 The next universal safeguard requires that directions issued under Schedule J cannot be unreasonable in all of the circumstances. If a direction is unreasonable, the Schedule provides that the direction will not apply to the employee.
- 4.9 This is given effect to by clause J.1(e).
- 4.10 This safeguard mirrors section 789GK of Part 6-4C of the FW Act.
- 4.11 It therefore aligns with the safeguards applicable to all directions issued under the JobKeeper amendments to the FW Act and ensures 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 FW Act.

Direction to be accompanied with written consent to arbitration as part of dispute resolution process

- 4.12 The final universal safeguard provides that a direction given under Schedule J is not valid unless it contains consent by the employer to participate in arbitration pursuant to the dispute resolution procedure of the Award. This is given effect to by clause J.1(g).
- 4.13 There are two matters that are pertinent to this safeguard.
- 4.14 The first is that, ordinarily, the Award's dispute resolution process only permits the Fair Work Commission to arbitrate a dispute if the arbitration is consented to by the relevant parties at the time when the dispute arises. This is because of the operation of clauses 9.5 and 9.6 of the Award and section 739 of the FW Act.
- 4.15 The second is that, directions issued under Part 6-4C of the FW Act may be disputed in the Fair Work Commission and section 789GV of the FW Act permits the Commission to arbitrate such disputes.
- 4.16 This safeguard accordingly mirrors the protection outlined in section 789GV and serves to ensure that employees receiving directions pursuant to Schedule J are not placed in a materially different position to those receiving directions pursuant to Part 6-4C of the FW Act.

Specific safeguards

Reduction in hours of work

- 4.17 Clause J.2.2 pertains to the reduction in hours of work.
- 4.18 The clause contains some safeguards which have been seen in similar applications of this nature, including:
- (a) limitations on the percentage of hours or number of hours that may be reduced (clause J.2.2(b) and (c));
 - (b) consultation obligations and notification obligations with respect to any known union members (clause J.2.2(g));
 - (c) preservation of accrual of service-based entitlements by reference to an employee's ordinary hours before any reduction took place (J.2.2(i)); and
 - (d) provisions pertaining to the payments to be made with respect to any leave taken or redundancies implemented during the period where hours are reduced (clause J.2.2(k) and (l)).
- 4.19 However, clause J.2.2 also introduces two further safeguards.
- 4.20 Firstly, there is a requirement that the employee must not be able to be usefully employed during the hours that have been reduced. This ensures that any reduction in hours is necessary due to operational impacts that have arisen during this COVID-19-affected period. This safeguard mirrors the protection in section 789GDC(1)(c) of Part 6-4C of the FW Act.
- 4.21 Secondly, clause J.2.2 introduces the concept of a 'minimum payment floor' into the Schedule, beyond which no further directions to reduce hours can be given.
- 4.22 These minimum floors are designed to ensure that reductions in hours cannot reach a magnitude whereby employee pay falls below a certain threshold. The thresholds that have been set are as follows:
- (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.³ It aligns with the Job Seeker payment for single employees without children. The use of this payment floor ensures full time employees

³ <https://www.servicesaustralia.gov.au/individuals/services/centrelink/jobseeker-payment/how-much-you-can-get>

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.

Annual leave

- 4.23 Unlike previous applications of this nature, Schedule J does not confer on an employer an ability to direct the taking of annual leave (or at least the provisions are not expressed in those terms).
- 4.24 Instead, clause J.2.3 contemplates a regime whereby:
 - (a) an employer may request an employee to take annual leave pursuant to Schedule J;
 - (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.

- 4.25 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 FW 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.
- 4.26 This regime has been adopted to mirror section 789GJ of Part 6-4C of the FW Act.
- 4.27 Each of the protections outlined in clause J.2.3 are contained in section 789GJ, other than:
- (a) the requirement to provide 72 hours' notice of the annual leave being taken (which derives from section 789GM of Part 6-4C of the FW Act); and
 - (b) 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).
- 4.28 Again, this serves 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 FW Act.

Secondary employment for reduction in hours or unpaid leave

- 4.29 Where an employee has their hours reduced under clause J.2.2 or is placed on unpaid leave as part of a close down initiated under clause J.2.4, proposed clause J.2.5 requires employers to consider and not unreasonably refuse employee requests to undertake:
- (a) reasonable secondary employment;
 - (b) training; or
 - (c) professional development.

- 4.30 These safeguards mirror the protections outlined in section 789GU of Part 6-4C of the FW Act.
- 4.31 Although section 789GU only applies to reductions in hours, the Application extends this protection to employees who are placed on unpaid leave (acknowledging that the impact of unpaid leave can be the same as having one's hours reduced).
- 4.32 Again, this serves 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 FW Act.

5. CONCLUSION AND DISPOSITION OF THE APPLICATION

- 5.1 Having regard to the above, ACCI, VACC and Ai Group urge the Commission to expeditiously determine the Application and introduce Schedule J into the Award as proposed by the Applicants.
- 5.2 This is particularly the case given the numerous additional safeguards that have been identified in these submissions.
- 5.3 The circumstances facing some Australian industries (of which this industry is a notable example) are frighteningly dire.
- 5.4 It has to be acknowledged that, for some employers, these amendments either:
- (a) may not be sufficient to arrest their slide into unviability; or
 - (b) might be overtaken by steps the employer feels compelled to take (and does take) to save their business.
- 5.5 However, ACCI, VACC and Ai Group respectfully submit that it is incumbent on those parties who have a recognised role under the industrial regulatory regime (including the Commission and employer and employee organisations) to take whatever steps necessary and to make whatever changes are practical and possible to militate against the adverse consequences being caused by this unprecedented crisis.
- 5.6 Where measures are available to maintain employment and to facilitate new safe working arrangements - no matter how modest - the objects of the FW Act and the modern awards objective mandate that such measures must be implemented.

7 May 2020