

## Form F46 – Joint Application to vary a modern award

Fair Work Act 2009, ss.157–160

This is an application to the Fair Work Commission to make a modern award or make a determination varying or revoking a modern award, in accordance with Part 2-3 of the [Fair Work Act 2009](#).

### Applicant



These are the details of the person who is making the application.

Title	<input checked="" type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify:		
First name(s)	Bryan		
Surname	Wilcox		
Postal address	Level 6, 99 Bathurst Street		
Suburb	Sydney		
State or territory	NSW	Postcode	2000
Phone number	1300 616 170	Fax number	02 9261 2622
Email address	bryan@reef.org.au		

### If the Applicant is a company or organisation please also provide the following details

Legal name of business	Real Estate Employers' Federation (REEF)
Trading name of business	
ABN/ACN	
Contact person	Bryan Wilcox, Chief Executive Officer

### Applicant



These are the details of the person who is making the application.

Title	<input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input checked="" type="checkbox"/> Ms <input type="checkbox"/> Other please specify:
First name(s)	Sam
Surname	Forde

Postal address	The Watson, 33 Warwick Street		
Suburb	Walkerville		
State or territory	South Australia	Postcode	5081
Phone number	08 7425 1410/08 8552 5744	Fax number	
Email address	sforde@harcourts.com.au		

**If the Applicant is a company or organisation please also provide the following details**

Legal name of business	Real Estate Employers' Federation of South Australia and Northern Territory ( <b>REEF</b> )
Trading name of business	
ABN/ACN	
Contact person	Ms Sam Forde, President

**Does either Applicant need an interpreter?**



If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes – Specify language

No

**Does either Applicant require any special assistance at the hearing or conference (eg a hearing loop)?**

Yes – Please specify the assistance required

No

**Does either Applicant have a representative?**



A representative is a person or organisation who is representing the applicant. This might be a lawyer or paid agent, a union or employer organisation, or a family member or friend. There is no requirement to have a representative.

Yes – REEF's representative's details below

No – REEFSANT does not have a representative

## REEF's representative



These are the details of the person or organisation who is representing the Applicant (if any).

Name of person	Nigel Ward, CEO and Director		
Firm, organisation or company	Australian Business Lawyers & Advisors		
Postal address	Level 15, 140 Arthur Street		
Suburb	North Sydney		
State or territory	NSW	Postcode	2060
Phone number	(02) 9458 7005	Fax number	
Email address	nigel.ward@ablawyers.com.au		

### Is REEF's representative a lawyer or paid agent?

Yes

No

## 1. Coverage

### 1.1 What is the name of the modern award to which the application relates?



Include the Award ID/Code No. of the modern award

Real Estate Industry Award 2020 MA000106

### 1.2 What industry is the employer in?

Non applicable

## 2. Application

### 2.1 What are you seeking?

Specify which of the following you would like the Commission to make:

a determination varying a modern award

a modern award

a determination revoking a modern award

## 2.2 What are the details of your application?

See Annexure A

Attach additional pages, if necessary.

## 2.3 What are the grounds being relied on?

Using numbered paragraphs, specify the grounds on which you are seeking the proposed variations.



You must outline how the proposed variation etc is necessary in order to achieve the modern awards objective as well as any additional requirements set out in the FW Act.


See Annexure B

Attach additional pages, if necessary.

## Signatures



If you are completing this form electronically and you do not have an electronic signature you can attach, it is sufficient to type your name in the signature field. You must still complete all the fields below.

Signature	
Name	Nigel Ward
Date	14 April 2020
Capacity/Position	Representative of REEF

Signature	
Name	Sam Forde
Date	14 April 2020
Capacity/Position	President of REEFSANT



# DRAFT DETERMINATION

*Fair Work Act 2009*

s.157—Application to vary a modern award to achieve the modern award objective

## REAL ESTATE INDUSTRY AWARD 2020

[AM2020/\_\_\_\_\_]

JUSTICE ROSS, PRESIDENT

XXXXX

XXXXX

*Application to vary the Real Estate Industry Award 2020.*

A. The above award is varied as follows:

1. In the Table of Contents add a new Schedule I
2. Add the following Schedule I to the award:

### **Schedule I—Award Flexibility During the COVID-19 Pandemic**

**I.1** 0 operates from [\_\_\_\_\_] 2020. During the operation of 0, 16.7(h) is of no effect and the following provisions apply: **When commission-only arrangements must cease**

- (i) The gross income of commission-only employees must be reviewed annually to establish gross income.
- (ii) For employees on commission-only arrangements entered into prior to 2 April 2018 the review must occur no later than 12 months from 2 April 2018.

- (iii) For employees engaged on commission-only arrangements entered into after 2 April 2018 the review must occur no later than 12 months from the date those arrangements were entered into.
- (iv) Notwithstanding the provisions of subclauses (ii) and (iii) above, where an annual review is due to be undertaken after 2 April, 2020 pursuant to this clause, the review may be postponed to 1 October 2021 at which time the commission-only employee's gross income will be determined for the preceding 12-month period. Where this postponement in the annual review applies, the date of 1 October will become the commission-only employee's new annual review date.
- (v) For employees engaged on commission-only arrangements entered into after 1 October 2020 the review must occur no later than 12 months from the date those arrangements were entered into.
- (vi) Where the review establishes that the gross income of a commission-only employee for the year under review is less than the MITA as provided in clause 16.7(d) the commission-only arrangement must cease.

## **Annexure B**

### **General**

1. The Real Estate Employers' Federation (**REEF**) and the Real Estate Employers' Federation of South Australia and the Northern Territory (**REEFSANT**) seek a determination to vary the Real Estate Industry Award 2020 MA000106 (the **Award**), which can mitigate against the current impacts COVID-19 is having on a limited number of employees and employers covered by the Award.
2. The variations to the Award are necessary to achieve the Modern Awards Objective in the circumstances of the COVID-19 virus.

### **COVID-19**

3. Coronaviruses (CoV) are a large family of viruses that cause illness ranging from the common cold to more severe diseases such as Middle East Respiratory Syndrome (MERS-CoV) and Severe Acute Respiratory Syndrome (SARS-CoV).<sup>1</sup>
4. Coronavirus disease (COVID-19) is a new strain that was discovered in 2019 and has not been previously identified in humans.
5. Common signs of infection include respiratory symptoms, fever, cough, shortness of breath and breathing difficulties. In more severe cases, infection can cause pneumonia, severe acute respiratory syndrome, kidney failure and even death.
6. Most people (about 80%) recover from the disease without needing special treatment. Around 1 out of every 6 people who gets COVID-19 becomes seriously ill and develops difficulty breathing.<sup>2</sup>
7. In December 2019 / January 2020, an outbreak of a new virus and disease began in Wuhan, China, which was subsequently identified as a new type of coronavirus.<sup>3</sup>

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<sup>1</sup> [World Health Organisation.](#)

<sup>2</sup> [World Health Organisation.](#)

<sup>3</sup> [World Health Organisation.](#)



8. As of 20 January 2020, confirmed cases of COVID-19 were reported from three other countries, including Thailand, Japan and the Republic of Korea (South Korea).<sup>4</sup>
9. COVID-19 cases continued to spread to Europe, and on 25 January 2020 Australia reported its first confirmed case.<sup>5</sup>
10. According to the World Health Organisation (WHO), as at 14 April 2020 there were 213 countries, areas or territories with cases.<sup>6</sup>

### **COVID-19 progresses from an epidemic to a pandemic**

11. On 30 January, the WHO declared the outbreak a Public Health Emergency of International Concern (PHEIC), following a second meeting of the Emergency Committee convened under the International Health Regulations. This was largely due to the concern of the potential for the virus to spread to countries with weaker health systems, and which are ill-prepared to deal with it.<sup>7</sup>
12. On 11 March 2020, the WHO Director-General characterized COVID-19 as a pandemic.
13. The WHO Director-General stated that the WHO has been assessing the outbreak around the clock and are deeply concerned both by the alarming levels of spread and severity, therefore impacting its decision.<sup>8</sup>
14. In the two weeks prior to that characterization, the number of cases of COVID-19 outside China had increased 13-fold, and the number of affected countries has tripled. At that point (11 March), there were more than 118,000 cases in 114 countries, and 4,291 people had lost their lives.

### **COVID-19 in Australia**

15. Globally, at 14 April 2020, there have been more than 1,776,800 confirmed cases of COVID-19 and more than 111,800 deaths.<sup>9</sup>

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<sup>4</sup> [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10\\_4](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov.pdf?sfvrsn=20a99c10_4)

<sup>5</sup> [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200125-sitrep-5-2019-ncov.pdf?sfvrsn=429b143d\\_8](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200125-sitrep-5-2019-ncov.pdf?sfvrsn=429b143d_8)

<sup>6</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

<sup>7</sup> [https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-\(2019-ncov\)](https://www.who.int/dg/speeches/detail/who-director-general-s-statement-on-ihc-emergency-committee-on-novel-coronavirus-(2019-ncov))

<sup>8</sup> <https://www.who.int/dg/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020>

<sup>9</sup> <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>

16. It took over three months to reach the first 100,000 confirmed cases, and only 12 days to reach the next 100,000.<sup>10</sup>
17. In Australia, as at 6am on 14 April 2020 there have been 6,366 confirmed cases of COVID-19. Of those, 61 have died from COVID-19. There were 44 new cases in the 24 hours from 6am on 13 April 2020.<sup>11</sup>
18. Previous analysis has shown the number of confirmed cases of COVID-19 in Australia was doubling every 3-4 days.<sup>12</sup>

### **Government Response**

19. The Government has made a number of announcements so far on actions to protecting the Australian community from the spread of COVID-19.
20. On 13 March 2020, Commonwealth, State and Territory governments agreed to provide public advice against holding non-essential, organised public gatherings of more than 500 people from Monday 16th March 2020.<sup>13</sup>
21. On 18 March 2020, the Government announced:<sup>14</sup>
- a. All non-essential indoor gatherings of greater than 100 people (including staff) will no longer be permitted from Wednesday 18 March 2020.
  - b. Outdoor events of more than 500 attendees may not proceed.
22. On 20 March 2020, the Government announced in addition to the above that for all non-essential indoor gatherings of fewer than 100 people including that in a given occupied space, there must be a density of no more than one person per four square meters of floor space, from 20 March 2020.

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<sup>10</sup> [https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200319-sitrep-59-covid-19.pdf?sfvrsn=c3dcdef9\\_2](https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200319-sitrep-59-covid-19.pdf?sfvrsn=c3dcdef9_2)

<sup>11</sup> <https://www.health.gov.au/news/health-alerts/novel-coronavirus-2019-ncov-health-alert/coronavirus-covid-19-current-situation-and-case-numbers>

<sup>12</sup> See Inga Ting, Michael Workman and Mark Doman, '[Coronavirus data reveals how COVID-19 is spreading in Australia](#)', *ABC News*, 20 March 2020.

<sup>13</sup> The Hon. Scott Morrison MP, Prime Minister, Media Statement, '[Advice on coronavirus](#)', 13 March 2020.

<sup>14</sup> The Hon. Scott Morrison MP, Prime Minister, Media Statement, '[Update on coronavirus](#)', 18 March 2020.

<sup>15</sup> The Hon. Scott Morrison MP, Prime Minister, Media Statement, '[Update on coronavirus](#)', 20 March 2020.

23. On 22 March 2020, the Government announced that a number of facilities are to be restricted from opening from midday on 23 March. These include:<sup>16</sup>

- a. Pubs, registered and licenced clubs (excluding bottle shops attached to these venues), hotels (excluding accommodation)
- b. Gyms and indoor sporting venues
- c. Cinemas, entertainment venues, casinos, and night clubs
- d. Restaurants and cafes will be restricted to takeaway and/or home delivery
- e. Religious gatherings, places of worship or funerals (in enclosed spaces and other than very small groups and where the 1 person per 4 square metre rule applies).

24. On 24 March 2020, the Government announced that the restrictions would apply to the following facilities from midnight on 26 March:

- a. Amusement parks and arcades
- b. Indoor and outdoor play centres
- c. Community and recreation centres, health clubs, fitness centres, yoga, barre, spin facilities, saunas, wellness centres, boot camps
- d. Personal training is limited to a maximum of 10 people
- e. Social, sporting-based activities, swimming pools
- f. Beauty therapy, tanning, waxing, nail salons and tattoo parlours
- g. Weddings can go ahead with no more than five people and funerals can go ahead with no more than 10 people. Both are subject to social distancing rules
- h. Galleries, museums, national institutions, historic sites, libraries, community centres, nonessential facilities, community facilities such as halls and PCYCs
- i. Food courts in shopping centres will no longer be able to continue, though takeaway can continue
- j. Auction houses, open house inspections, gathering in auction rooms
- k. Outdoor and indoor markets will be addressed specifically in individual states and territories

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<sup>16</sup> <https://www.pm.gov.au/media/update-coronavirus-measures-220320>

25. On 29 March 2020, the Government announced further restrictions and provided further guidance, effective from midnight 30 March 2020:<sup>17</sup>

a. Indoor and outdoor gatherings are limited to two persons only.

Exceptions to this limit include:

- People of the same household going out together;
- Funerals - a maximum of 10 people;
- Wedding - a maximum of 5 people;
- Family units.

Individual states and territories may choose to mandate and/or enforce this requirement.

b. The National Cabinet provided strong guidance to all Australians to stay home unless for:

- shopping for what you need - food and necessary supplies;
- medical or health care needs, including compassionate requirements;
- exercise in compliance with the public gathering requirements;
- work and study if you can't work or learn remotely.

c. The National Cabinet also announced that playgrounds, skate parks and outside gyms in public places will be closed. Bootcamps will be reduced to two persons, including the trainer.

d. Social Distancing - further measures

The states and territories have agreed that they would implement further measures specific to their own region, including closing categories of venues, where medical advice supported this action.

e. Advice for Senior Australians including those with existing health conditions

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<sup>17</sup> Material in this paragraph taken from National Cabinet Statement, Media Statement, 29 March 2020: <https://www.pm.gov.au/media/national-cabinet-statement>.

The National Cabinet strongly advised self-isolation at home to the maximum extent practicable for Australians:

- over 70 years of age;
- over 60 years of age who have existing health conditions or comorbidities; and
- indigenous Australians over the age of 50 who have existing health conditions or comorbidities.

These groups should limit contact with others as much as possible when they travel outside.

26. As at 9 April 2020, the Commonwealth Government provides the following “Essential information” highlighting in a non-exhaustive manner the restrictions in place:

- A mandatory Code of Conduct for commercial tenancies will be implemented;
- Public gatherings can not exceed more than 2 people, excluding household members;
- People should stay at home except to shop for what is needed, receiving medical care, exercising, or travelling to work or education;
- Places of worship are to remain closed over Easter, and religious services can only be streamed.

27. These measures are in the addition to the travel bans that were initially in place for China, Italy, Iran and the Republic of Korea (South Korea), before the Government’s decision to close its borders to all non-citizens and non-residents from 9pm on 20 March 2020,<sup>18</sup> affecting the level of tourists that may have otherwise frequented Australian businesses.

#### **State Health Orders declared to give effect to the Government announcements**

28. Measures to reduce exposure to CoV have been given effect to by the states, under public health orders issued under their respective Public Health Acts or equivalent. These include, among other things, stay-at-home orders, mass gathering restrictions and the closure of the classes of business and business activities above. In some states, there are restrictions on interstate travel.

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<sup>18</sup> <https://www.pm.gov.au/media/border-restrictions>

## **Government Economic Intervention**

29. On 12 March 2020, the Australian Government announced COVID-19 a pandemic and introduced a \$17.6 billion economic stimulus package to support the economy in the first half of 2020.<sup>19</sup> The package included payments to provide cash flow support for small to medium businesses (turnover up to \$50 million) and wage subsidies for apprentices and trainees of up to 50% of their wages. These measures were both targeted at assisting employers to retain employees over the next six to 12 months, keeping people in work to lessen the number of workers that are laid off.
30. On 22 March 2020, the Government announced further stimulus measures that build on and strengthen measure announced in the first stimulus package.
31. The package has three parts targeted at supporting individuals and households, businesses and the flow of credit.

### Supporting individuals and households

32. Income support to households, casual workers and sole traders through a time-limited Coronavirus supplement has been increased. Measures include increases in both income support for individuals and payments to support households, and early access to superannuation.

### Support for business

33. The Boosting Cash Flow measure announced in the first package is enhanced by increasing the maximum payment to \$100,000 and the minimum payment to \$20,000 and extending eligibility to not-for-profits. Temporary relief is provided for financially distressed businesses to reduce the threat of actions that could put them out of business.

### Support for the flow of credit

34. A Coronavirus SME Guarantee Scheme has been established to provide otherwise viable businesses access funding of up to \$250,000 from banks. Red tape has been cut to provide lenders to small businesses with temporary exemption from responsible lending obligations.

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<sup>19</sup> The Treasury 2020 *Economic Response to Coronavirus*. Commonwealth of Australia.  
<https://treasury.gov.au/coronavirus>

35. The stimulus measures are addressed through the *The Coronavirus Economic Response Package Omnibus Bill 2020*, which passed by Parliament on 24 March 2020.
36. On 29 March 2020, the National Cabinet agreed to a “moratorium on evictions over the next six months for commercial and residential tenancies in financial distress who are unable to meet their commitments due to the impact of coronavirus.”<sup>20</sup>
37. It encouraged commercial tenants, landlords and financial institutions to enter into dialogue to find a way to ensure that businesses can survive and be there on the other side of the Pandemic. The National Cabinet agreed to a common set of principles, which the Treasurers endorsed, to underpin and govern intervention to aid commercial tenancies as follows:<sup>21</sup>
- a short term, temporary moratorium on eviction for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress due to coronavirus;
  - tenants and landlords are encouraged to agree on rent relief or temporary amendments to the lease;
  - the reduction or waiver of rental payment for a defined period for impacted tenants;
  - the ability for tenants to terminate leases and/or seek mediation or conciliation on the grounds of financial distress;
  - commercial property owners should ensure that any benefits received in respect of their properties should also benefit their tenants in proportion to the economic impact caused by coronavirus;
  - landlords and tenants not significantly affected by coronavirus are expected to honour their lease and rental agreements; and
  - cost-sharing or deferral of losses between landlords and tenants, with Commonwealth, state and territory governments, local government and financial institutions to consider mechanisms to provide assistance.

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<sup>20</sup> National Cabinet Statement, Media Statement, 29 March 2020: <https://www.pm.gov.au/media/national-cabinet-statement>.

<sup>21</sup> Taken from National Cabinet Statement, Media Statement, 29 March 2020: <https://www.pm.gov.au/media/national-cabinet-statement>.

38. On 31 March 2020, the Commonwealth Government announced the JobKeeper Payment, a wage subsidy program designed to allow employees to retain employment and continue to earn income during the COVID-19 crisis.
39. Under the scheme, eligible employers will be paid \$1500 per employee for up to 6 months. Eligible employers include those with an expected 30% reduction in turnover (or 50% if the business has an annual turnover of \$1 billion or more). Eligible employees will receive a minimum of \$1500 per fortnight before tax and can be topped-up by their employer. The subsidy started on 30 March 2020, with the first payments to be made in early May.
40. Consequential amendments to the *Fair Work Act 2009*, through the insertion of a new Part 6-4C, allow employers, which qualify for the JobKeeper subsidy, to make certain directions and requests of their employees. These will create added flexibility in the workplace. The changes to the *Fair Work Act 2009* are made by the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*.
41. On 2 April 2020, the Commonwealth Government announced the Early Childhood Education and Care Relief Package, providing fee-relief for parents and with the purpose of keeping early child centres open and relevant employees in work. It also announced that small businesses and other eligible employers can apply for a wage subsidy of 50% of an apprentice or trainee's wages in the period from 1 January 2020 to 30 September 2020.
42. On 3 April, the Commonwealth Government launched a Jobs Hub to assist people to find employment during the pandemic.

#### **Other Initiatives**

43. The Australian Banking Association has announced that small businesses impacted by the COVID-19 pandemic will be able to defer their loan repayments for six months.

#### **COVID-19 Impact on the Australian Stock Market**

44. With COVID-19 continuing to spread to more countries at the end of February, the financial markets began to react both in Australia and international, in response to fears of a longer-term economic impact.



45. Companies across the board have grappled with an uncertain earnings outlook, withdrawing their earnings forecasts in droves, causing wild swings in the market day by day.<sup>22</sup>
46. The ASX200 lost 33% between 21 February and 19 March 2020.<sup>23</sup>
47. To the week end 20 March 2020, the S&P/ASX 200 Index closed the week 13.1% lower at 4816.6, with \$703.3 billion being wiped off the boards in the last four weeks.<sup>24</sup> This is the second largest fall on record, surpassing the 10.9% decline seen in the previous week.<sup>25</sup> Only the a 15.6% slide in October 2008, during the peak of the Global Financial Crisis, has been larger since the index was created in 2000.<sup>26</sup>

### **RBA Position**

48. Many businesses, in particular those that have been forced to shut their doors now have little to no revenue coming in, so they do not have enough cash flow available to pay their bills, wages, rent and other outputs.
49. On 19 March 2020, the RBA announced it would be introducing quantitative easing measures to stem the deterioration of trading liquidity. These measures include buying Australian Government bonds on the secondary market to support the smooth functioning of the market and short term (1-month and 3-month) repo operations to provide liquidity to financial markets.<sup>27</sup>
50. In addition, the RBA lowered the cash rate to a historic low of just 0.25% following an extraordinary meeting of the Board.<sup>28</sup> The banks have responded by handing that on in full, so small business loans will be reduced by 0.25%.
51. In addition, the RBA is providing a \$90 billion, 3-year funding facility to Authorised Deposit-taking Institutions (i.e. banks and other lenders), so they can make more money available to loan to businesses. The ADIs will be able to obtain funding for up to 3% of outstanding credit and can

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<sup>22</sup> William McInnes, '[ASX ends week 13pc lower, rocked by coronavirus uncertainty](#)', *AFR*, 20 March 2020.

<sup>23</sup> Melissa Yeo, '[ASX down 13pc for the week, 33pc decline from February 20 record high close](#)', *The Australian*, 20 March 2020.

<sup>24</sup> William McInnes, '[ASX ends week 13pc lower, rocked by coronavirus uncertainty](#)', *AFR*, 20 March 2020.

<sup>25</sup> <https://www.smh.com.au/business/markets/asx-posts-largest-weekly-fall-since-gfc-20200320-p54cd0.html>

<sup>26</sup> <https://www.smh.com.au/business/markets/asx-posts-largest-weekly-fall-since-gfc-20200320-p54cd0.html>

<sup>27</sup> Reserve Bank of Australia - Media release 19 March 2020 *Statement on Monetary Policy Decision* - <https://www.rba.gov.au/media-releases/2020/mr-20-08.html>

<sup>28</sup> Reserve Bank of Australia *Monetary Policy Decision*. 19 March 2020 - <https://www.rba.gov.au/media-releases/2020/mr-20-06.html>

draw additional funding if they increase lending to business – 1% for every \$1 to large business and 5% for small business.

### **Australian Economy Generally**

52. The risks, and potential impact of COVID-19 on the Australian economy are increasing by the day. It is very clear it will have a major impact on economic growth in 2020.

53. Treasurer Josh Frydenberg stated on 19 March 2020 that a recession was now "very hard to avoid".<sup>29</sup> It has also been predicted that Australia's economic growth in 2020 will be the worst since the Great Depression.<sup>30</sup>

54. On 19 March 2020, Philip Lowe, Governor of the RBA said:<sup>31</sup>

*The coronavirus is first and foremost a public health issue, but it is also having a very major impact on the economy and the financial system. As the virus has spread, countries have restricted the movement of people across borders and have implemented social distancing measures, including restricting movements within countries and within cities. The result has been major disruptions to economic activity across the world. This is likely to remain the case for some time yet as efforts continue to contain the virus.*

55. On 3 March 2020 the Reserve Bank of Australia (RBA) cut the cash rate to a new record low of 0.50% at its board meeting in early March. In the accompanying statement, RBA Governor Lowe said this was a pre-emptive move "to support the economy as it responds to the global coronavirus outbreak".<sup>32</sup> On 19 March 2020, the RBA lowered the cash rate to a historic low of just 0.25% following an extraordinary meeting of the Board.<sup>33</sup>

56. In terms of unemployment, on 18 March 2020, Westpac chief economist Bill Evans predicted that Australia's unemployment rate would spike to 7 per cent in October, up from his previous forecast

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<sup>29</sup> <https://www.afr.com/politics/federal/late-government-relents-on-newstart-concedes-recession-likely-20200319-p54blv>

<sup>30</sup> <https://www.theaustralian.com.au/business/economics/coronavirus-prediction-australian-economic-growth-to-be-worst-since-great-depression/news-story/7bb9ddcf4da09ef38539e3e8d45f050c>

<sup>31</sup> <https://www.rba.gov.au/media-releases/2020/mr-20-08.html>

<sup>32</sup> RBA, Statement by Philip Lowe, Governor: Monetary Policy Decision, 3 March 2020. <https://www.rba.gov.au/media-releases/2020/mr-20-06.html>

<sup>33</sup> Reserve Bank of Australia *Monetary Policy Decision*. 19 March 2020 - <https://www.rba.gov.au/media-releases/2020/mr-20-06.html>

of 5.8 per cent to 6 per cent due to the abrupt slowdown in the economy.<sup>34</sup> There is commentary that this estimate now looks, “if anything, optimistic”.<sup>35</sup> Analysts at investment bank UBS predicts unemployment will increase to as much as 8%.<sup>36</sup>

57. Globally, International Monetary Fund managing director Kristalina Georgieva said the economic outlook for the world economy for 2020 "is negative—a recession at least as bad as during the global financial crisis or worse. But we expect recovery in 2021".<sup>37</sup>

### **Impacts on the Real Estate Industry**

58. The real estate industry is currently materially impacted by CoV.

59. Auction houses, open house inspections, gathering in auction rooms and auctions have been banned<sup>38</sup> by government order.

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

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

62. Analysis suggests a significant impact on the housing market due to CoV and related restrictions. According to CoreLogic, the weekend of 4-5 April had the lowest auction clearance rate since it started auction reporting in 2008. Only 35.5% of scheduled auctions had success; 50% were withdrawn. The previous lowest recorded clearance rate was the week prior. Only 495 auctions were scheduled for the Easter weekend; even accounting for the historically-low number of auctions over Easter, half were predicted to return a withdrawn result.<sup>39</sup>

63. Potential for income on a commission-basis in the real estate industry has thus been weakened due to CoV.

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<sup>34</sup> Richard Gluyas, ‘Coronavirus: Scott Morrison to unveil huge package of fiscal and monetary measures’, *The Australian*, 18 March 2020.

<sup>35</sup> See Jennifer Hewett, ‘Australia enters the great unknown’, *AFR*, 18 March 2020.

<sup>36</sup> Ben Butler, ‘They’re going to go under’: Australia’s coronavirus-hit restaurants, bars and caterers seek bailout’, *The Guardian*, 18 March 2020.

<sup>37</sup> <https://www.afr.com/policy/economy/imf-forecasts-2020-global-recession-recovery-in-2021-20200324-p54d7h>

<sup>38</sup> The restrictions on auctions vary across the states and territories. NSW, for example, has banned auctions at which persons attend in person. Auctions have begun to be conducted online.

<sup>39</sup> CoreLogic, ‘National Auction Market Preview - 12 April’: <https://www.corelogic.com.au/news/national-auction-market-preview-12-april> accessed on 9 April 2020.

64. The businesses have no choice in this matter, given the directives issued by the Federal Government and supported by State Government public health orders.

### **Section 157**

65. This application is made pursuant to section 157 of the *Fair Work Act 2009* (the **Act**).

66. Section 157 empowers the Fair Work Commission (the Commission) to vary modern awards if necessary to meet the Modern Awards Objective (the **MAO**).

67. The MAO requires the Commission to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions generally and having regard to the matters set out in section 134 (1) of the Act.

68. The application seeks to vary the Real Estate Industry Modern Award in unprecedented circumstances; the COVID-19 pandemic (the **Pandemic**).

69. As set out above the Pandemic has had a material impact on Asian, American and European countries and is progressively spreading to all parts of the globe and now Australia.

70. The Pandemic is unusual in that it has a level of infection akin to the common cold.

71. The Pandemic results in a death rate materially higher than the 'flu'; depending on the country exposed 0.1% for the flu to >3% for the Pandemic.

72. As can be seen from the above paragraphs, the Australian Government (supported by State and Territory Governments) has implemented a series of measures (the **Measures**) to:

- (a) slow the progress of the Pandemic in Australia in an endeavour to protect the health system from being 'overwhelmed' which if this occurred could materially increase the death rate; and
- (b) cushion the economic impact of the Pandemic.

73. These Measures have forced various categories of people to self-isolate, withdraw from working at the slightest suggestion of being unwell, curtail normal social activities, cease some businesses from operating, work from home or adopt unusual working arrangements.

74. The pressures on business at this time are multifaceted and cumulative in nature; demand, cash flow, viability.

75. The impact on employers and employees is material.

76. For casual employees the impact comes in reduced hours of employment through to no work at all. Casual employees are likely to be, and have been, the first casualty, with business being forced to contract in the face of the Pandemic.
77. For permanent employees the challenge is temporary but necessitates an increased need for flexibility followed by sustaining ongoing employment against increasing commercial pressure to reduce cost.
78. This is resulting in the necessary stepped approach for business; balancing decreased cash flow against maintaining employment.
79. In such a context employers and employees (and their unions) are now in a dialogue to maintain the business while trying to maintain employment as best as can be done. This could be a matter of days, weeks or months.
80. This necessitates a level of trade off:
- (a) Additional operational flexibility can allow some businesses to hold off taking other steps;
  - (b) Employees may be willing, in the Pandemic, to trade off some employment benefits to stay in work and receive some income; and
  - (c) From here accessing paid leave (annual leave and long service leave) that is already provisioned for on the balance sheet will allow other businesses to reduce cash flow burdens, reduce operational activity while still maintaining employment with employees continuing to be paid.

### **Section 134 Considerations**

81. The variation to the Award is necessary to achieve the MAO in the circumstances of the Pandemic.
82. The notion of the safety net must always be contextually calibrated.
83. What is “fair” is a ‘relativist’ consideration. What may be “fair” outside of the Pandemic and the Measures is different to what is “fair” in the context of the Pandemic and Measures.
84. “Relevant” is again a contextual consideration. What may have been relevant 6 months ago is no longer relevant now in the context of the Pandemic and Measures.

85. In terms of the matters the Commission has regard to in setting the safety net the following is now relevant:

- (a) “relative living standards and the needs of the low paid”; this must now be seen in the context of seeking to maintain employment rather than losing employment even if this means some employees choose temporarily to maintain employment while accepting reduced employment benefits and take-home pay.
- (b) “the need to promote social inclusion through increased workforce participation”; this must be seen in the context of seeking to maintain employment rather than losing employment.
- (c) “the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden”; this must be seen in the context of allowing business to survive the Pandemic and the Measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the Pandemic passes.
- (d) “the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy”; again this must be seen in the context of allowing business to survive the Pandemic and the Measures so that they can operate to sustain what employment they can and be in an effective position to recover and maintain and then grow employment once the Pandemic passes.

**Previous decisions**

86. There have been a number of Fair Work Commission decisions varying modern awards in response to COVID-19, including:

- (a) On 8 April, a Full Bench of the Fair Work Commission varied most Modern Awards to include provisions granting unpaid pandemic leave and annual leave flexibility. Its aim was to help maintain employment and business viability in the extraordinary circumstances occasioned by the Pandemic. The variations were made on the Fair Work Commission’s own initiative ([2020] FWCFB 1837).

(b) On 31 March, a Full Bench of the Fair Work Commission considered changes with respect to the Restaurant Industry Award 2010. The decision accepted the changes proposed by the parties to those proceedings ([2020] FWCFB 1741) (Restaurant Decision).

(b) On 28 March 2020, a Full Bench of the Fair Work Commission considered changes with respect to the Clerks - Private Sector Award 2010. The decision accepted the changes proposed by the parties to those proceedings ([2020] FWCFB 1690) (Clerks Decision).

(c) On 25 March 2020, a Full Bench of the Fair Work Commission considered changes with respect to the Hospitality Industry (General) Award 2010. The decision accepted the changes proposed by the parties to those proceedings ([2020] FWCFB 1574) (Hospitality Decision).

### **The Proposed Variation**

87. The provisions contained in the Draft Determination contained in Annexure A are specific to the real estate industry.

88. Commission only remuneration has been the subject of extensive consideration by the Commission. The concept has remained an important feature of the Real Estate Industry Modern Award 2020 but operating with an extensive number of safeguards; qualification criteria, annual re-qualification review etc.

89. Commission only remuneration is a scheme of arrangement that suits some employers and some employees.

90. The proposed variation seeks to vary clause 16.7(h) of the Award by the inclusion of subclauses (iv) and (v), with the existing subclause (iv) becoming subclause (vi).

91. It seeks to allow the postponement of the annual gross income review of commission-only employees until 1 October 2021, for the purposes of the Minimum Income Threshold Amount (**MITA**).

92. COVID-19 has impacted the real estate industry such that the period from March 2020 to October 2020 is likely to be a 'black hole' for the industry materially impacting any MITA review that includes this period.

93. COVID-19 has materially affected the real estate industry:

- (a) Social distancing requirements (first recommended and then enforced through Public Health Orders or their equivalent) have prevented real estate agents from operating in a pre COVID-19 manner;
- (b) Open houses and showings have effectively ceased preventing the normal process for sales to occur;
- (c) while the industry has been generally affected the impact on 'commission only' sales people is material as they have been prevented from performing normal work from about mid-March 2020;
- (d) the Measures currently imposed by Governments to stop/slow the spread of COVID-19 are not currently scheduled to be wound back or ceased;
- (e) the current prognosis is that despite the future potential winding back or cessation of the Measures, the Australian economy will likely see two to three negative quarters of GDP growth with the June quarter being material (in the order of 5% to 8%); and
- (f) extending the review date for the MITA will allow a fair and accurate assessment of the commission-only salesperson's performance over a period not artificially polluted by the impact of COVID-19.

94. Absent this, employers and employees who wish to maintain a commission only arrangement may be artificially expelled from the arrangement through no fault of their own but caused by the Pandemic and the Measures.

95. This will arise because it is unlikely that a fair and accurate assessment of gross income can be undertaken in the immediate future.

96. The proposed variation does not seek to change the underlying safeguards on the operation of commission only remuneration.

97. Rather it introduces a modest but necessary change to the timing of the safeguards which is in the interests of employers and employees.

98. This is consistent with section 134 and in particular section 134 1 (c), (f) and (h).

99. For such other grounds and reasons that the Commission deem fair and appropriate.