



Form F46 – 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.

The Applicant



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

Title Mr Mrs Ms
 Other please specify:

First name(s) Nathan

Surname Fox

Postal address 18 Oakfield Avenue

Suburb Clarence Park

State or territory SA Postcode 5034

Phone number 0412 818 208 Fax number

Email address foxhome@adam.com.au

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

Legal name of business	
Trading name of business	
ABN/ACN	
Contact person	

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

Yes – Please specify the assistance required

No

Does the 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 – Provide representative's details below

No

Applicant's representative



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

Name of person	Ralph Clarke	
Firm, organisation or company		
Postal address	GPO Box 1005	
Suburb	Adelaide	
State or territory	SA	Postcode
Phone number	08 8410 0033	Fax number
Email address	clarker@bigpond.net.au	

Is the Applicant'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

1.2 What industry is the employer in?

The real estate industry, buying, and / selling real property and leasing of same

2. Application

2.1 What are you seeking?

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

- [X] a determination varying a modern award
- [] a modern award
- [] a determination revoking a modern award

2.2 What are the details of your application?

Insert a New Schedule 1A to the award to read as follows;

“Notwithstanding any other provision in this award the following provisions shall apply from the date of the order of the Fair Work Commission coming into force and shall expire on the 1st October 2021

(a) No employee, employed pursuant to clauses 14 and 16 of the award shall have any payments by their employer, pursuant to the Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020 -No.38 2020,(JobKeeper payment), debited against the employee's agreed share of the employer's commission, bonus or incentive payment with respect to the sale or lease of real property.

(b) An employee, employed pursuant to clause 16.7 of the award ,(Commission – only) shall not be paid less than the minimum wage (annualised) as prescribed by clause 14 of the award for the period from the 30th September 2020 and the 1st October 2021, or at an earlier date (on a pro rata basis), should the employee's employment cease prior to the 1st October 2021.

(c) No employee who is not at the date of this Schedule coming into force already employed as a commission -only salesperson, shall be eligible to be employed on a commission -only basis until the 1st October 2021.”

1.The variations to the award relate to the actions of both Commonwealth and State Governments imposing a number of restrictions on the ability of the employers bound by the award to conduct their business, arising from the Coronavirus pandemic and the significant flow on effect to their employees in earning an income from the sale and leasing of real property.

2.The variation include protecting employees from having their commission earnings incur the debiting of the employer's JobKeeper wage subsidy from the Australian Tax Office, against the employee's agreed share of the employer's commission, bonus or incentive payment.

3. The variation also seek to create a “level playing field” between employees who are paid a weekly wage and allowance and those remunerated as commission - only sales representatives, by having commission – only employees paid at least the minimum award wage, annualised for the period of 12 months after the JobKeeper wage subsidy ceases. The employer once no longer in receipt of the JobKeeper wage subsidy may have to reduce their staff numbers because of the lack of business. Sales staff should be selected for redundancy on factors free of one class of employee being disadvantaged because they have an award right to be paid minimum award wages and allowances and another class of employee who have no legal right to be paid any hourly rate of pay.

4.Further the award variation seeks to not allow for a fixed period, the employment of commission - only sales staff, who are not already employed on that basis . The reason being that it is likely that any upturn in real estate sales will take time as the community as a whole readjusts, following the lifting of pandemic restrictions imposed by the various Governments. It would be unfair to all sales employees for an increase in the number of commission – only employees at a time when it will be very uncertain if any commission – only salesperson would be able to earn even the award minimum wage, let alone meeting the costs of running their own vehicle, mobile phone and personal promotion expenses.

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.

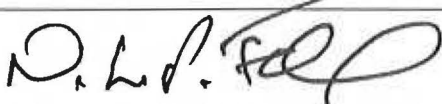
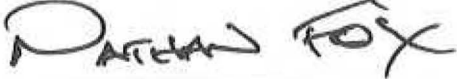

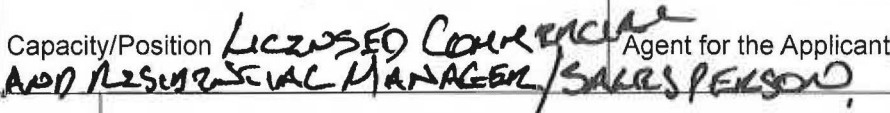

1. The salespersons employed pursuant to the award are reliant on the safety net award for the provision of their relative living standards and needs of the low paid (s134 (1) (a) of the FWA 2009), in particular being able to be paid in addition to the minimum wage under the award a share of the employer's commission on the sale or lease of real property.
2. A significant number of salespersons bound by the award are women with families and they rely on being able to receive in addition to the award minimum wage, their share of the employer's commission on the sale of or lease of real property, in order to be able to participate in the workforce and balancing the needs of children, child care costs and the like..(s 134 (1) (c))
3. Salespersons under the award rely on being able to earn a sufficient share of the employer's commission on the sale or lease of real property , to adequately provide additional remuneration to take into account the many unsocial hours of work, where the hours required to service clients and potential clients and buyers of properties require the employee to work on weekends, public holidays and outside of normal business hours. (s 134 (1) (da) (i) (ii) (iii)). This is particularly applicable to sales employees remunerated as a commission – only employee, where they are not subject to the following award protections, hours of work, minimum hourly rate of pay, overtime or allowances, such as use of their private vehicle on the employer's business.
4. The award variations sought, give effect to the intent and objective of s 789GDA of the Fair Work Act, 2009, which was amended to provide for a minimum payment guarantee known as JobKeeper, to assist employers by providing them a wage subsidy of \$1,500 per fortnight for each eligible employee.. The employer is required to pay their eligible employee not less than the greater of the amount payable to the employee for the fortnight, or the amounts payable to the employee in relation to the performance of work during the fortnight. The amounts referred to include if they become payable in respect of the fortnight, (a) incentive based payments and bonuses (b) loadings, (c) monetary allowances, (d) overtime or penalty rates and (d) leave premiums.
5. The variations sought with respect to the non debiting of the JobKeeper payment from the employee's agreed share of the employer's commission on the sale or lease of real property is in accordance with the spirit and intent of the Coronavirus Economic Response Package (Payments and Benefits) Rules 2020, Attachment A to the Explanatory Statement issued by the Treasurer of the Commonwealth, in particular page 18, in the page following marked at the bottom with the words SENSITIVE LEGAL 4th paragraph from the top of the page; "*The requirement that the component amounts be at least \$1,500 applies regardless of whether the employee ordinarily receives more or less than that amount. For example if an employee: Ordinarily receives \$1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;.....*"
6. Clauses (a) ,(b) and (c) of the proposed Schedule 1A meet the the Modern Award Objective in s 134 of the Act and s 3 Object of the Act , sub clauses (a),(b) and s 284 (1) (b),(c).

Attach additional pages, if necessary.

Signature



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		Ralph Clarke
Name		Ralph Clarke
Date		7 th May 2020
Capacity/Position		
	Where this form is not being completed and signed by the Applicant, include the name of the person who is completing the form on their behalf in the Capacity/Position section.	
PLEASE RETAIN A COPY OF THIS FORM FOR YOUR OWN RECORDS		