



DECISION

Fair Work Act 2009

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

Applications to vary the Real Estate Industry Award 2020

(AM2020/14 and AM2020/23)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER SPENCER

SYDNEY, 4 AUGUST 2020

Applications to vary Real Estate Industry Award 2020 in response to COVID-19 pandemic.

Background

[1] This decision concerns two applications made pursuant to s 158(1) of the *Fair Work Act 2009* (Cth) (FW Act) seeking to vary the *Real Estate Industry Award 2020* (Award) in response to the COVID-19 pandemic. The first application is made jointly by the Real Estate Employers' Federation (REEF) and the Real Estate Employers' Federation of South Australia and Northern Territory (REEFSANT) (REEF application).¹

[2] The REEF application (as amended) seeks to add a Schedule to the Award to allow for the months from May to October 2020 to be excluded from the calculation of the Minimum Income Threshold Amount (MITA) for the purpose of the annual review of employees on commission-only arrangements required by clause 16.7(h) of the Award. Clause 16.7(h) requires commission-only arrangements to cease where the employee, on review, has failed to earn the MITA over a preceding 12-month period. The purpose of the variation is to prevent employees being excluded from commission-only arrangements where there have fallen below the MITA because of the extraordinary effects of the COVID-19 pandemic. The REEF application is supported by the Real Estate Employers Federation of Western Australia (REEFWA). It has been agreed that the REEF application may be dealt with on the basis of written submissions, and persons who provided statements of evidence were not required for cross-examination.

[3] The second application to vary the Award is made by Mr Nathan Fox, a Licenced Commercial and Residential Manager/Salesperson, who is the Vice President of the Registered Real Estate Salespersons' Association of South Australia (RRESSA), an organisation of employees registered under the *Fair Work Act 1994* (SA). While noting that the application is made by an individual, we will refer to it as the RRESSA application.² In summary, the RRESSA application seeks the insertion of a Schedule to the Award with the following effect:

- prohibiting JobKeeper payments pursuant to the *Coronavirus Economic Response Package Omnibus Measures (No 2) Act 2020* made to wages

employees who have agreements under the Award providing for commission, bonus or incentive payments being debited against those payments (the JobKeeper claim);

- requiring that employees on commission-only arrangements agreed in accordance with the Award are paid not less than the minimum wage (annualised) as prescribed under the Award, for the period from 30 September 2020 to 1 October 2021 (or an earlier date if employment ceases before 1 October 2021) (the commission-only claim); and
- prohibiting new commission-only arrangements being entered into with employees who are not employed on that basis as at 30 September 2020, until 1 October 2021 (the prohibition claim).

[4] The RRESSA application encompasses variations which RRESSA contends should be made to the Award if the REEF application is granted. The RRESSA application is opposed by REEF, REEFSANT and REEFWA.

[5] Because of the current pandemic, a hearing was conducted by telephone into the RRESSA application. Given the urgency with which COVID-19 applications are required to be dealt with and the relationship between the two applications, we have determined to deal with both in this Decision.

[6] Mr Fox and RRESSA were represented in both matters by RRESSA's Industrial Relations Advisor, Mr Ralph Clarke. REEF and REEFSANT were represented in both matters by Mr Nigel Ward of Australian Business Lawyers & Advisors Pty Ltd. REEFWA was represented in both matters by Mr Justin Lilleyman of the Chamber of Commerce and Industry of Western Australia.

Relevant Award provisions

[7] Clause 14.1 of the Award prescribes minimum rates of pay. The Award also makes provision for two alternative options for the payment of remuneration. The first is that an employee and employer may agree for the employee to be paid commission, bonus or incentive payments in addition to the prescribed minimum wage. In this respect, clauses 16.1-16.3 provide:

16.1 Payment by wages with commission, bonus or incentive payments

(a) Where the employer and the employee agree that, in addition to the minimum weekly wage, the employee will be entitled to a portion of the commission paid to the employer, then any method of calculation or any formula for calculating the amount of commission that will be payable to the employee must be evidenced in a written agreement between the employer and the employee.

(b) Where it has been agreed between the employer and the employee that the employee will be entitled to a bonus or an incentive payment (as opposed to commission under clause 16.1(a)) particulars of the bonus or incentive payment entitlement must be evidenced in a written agreement between the employer and the employee.

16.2 Written agreements generally

(a) Once a written agreement has been made as provided for in clause 16.1 or clause 16.7, any subsequent agreement to vary the employee's commission, bonus or incentive payment arrangements must be evidenced in a further written agreement between the employer and the employee.

(b) Where an employee agrees with the employer to a change in his or her commission, bonus or incentive arrangement, the employee will be entitled to receive sales commission, bonus or incentive payments calculated in accordance with the written agreement (whether made under clause 16.2 or clause 16.1) which was in force on the date the contract for sale or lease of property became legally enforceable. Provided that in circumstances where a non-commission-only employee is changing to a commission-only agreement, then the commission-only agreement must not include any provision for a deduction arising from any agreement which was in force immediately prior to the commission-only agreement becoming operative.

(c) A signed copy of every written agreement regarding commission, bonus or incentive payment arrangements must be provided by the employer to the employee.

16.3 Account to employee

The employer must account to the employee in written form for any commission, bonus or incentive payment-based entitlement as it becomes due and payable in accordance with the terms of any written agreement.

[8] The second alternative mode is for an employee who is engaged in property selling or leasing to be paid on a commission-only basis, in lieu of the minimum wages prescribed by clause 14.1. Clause 16.7(a) provides that commission-only employment arrangements may only be entered into by agreement, and that a commission-only employee must not be engaged on a part-time or casual basis. Clause 16.7(b) provides that the objective of commission-only employment is that a salesperson "*should achieve remuneration of 125% or more of the annualised minimum wage that an employee working at the same property sales level under this award would be entitled to be paid.*" Clause 16.7(c) provides for the minimum entry requirements to commission-only employment as follows:

(c) Minimum requirements for commission-only employment

(i) A person may only enter into an agreement to be a commission-only employee when all of the following conditions have been satisfied:

- the employee and the employer have made a written agreement as provided in clause 16.2 that the employee will be remunerated on a commission-only basis setting out the basis upon which the entitlement to commission will be calculated as provide in clause 16.2;
- the employee has been issued with a real estate agent's license or is registered or permitted to perform the duties of a real estate salesperson under real estate law;

- the employee has been engaged in property sales or commercial, industrial or retail leasing as a Real Estate Employee Level 2 or higher with any Licenced Real Estate Agent, or has operated his or her own real estate business, for at least 12 consecutive months in the 3 years prior to entering into a commission-only agreement;
- the employee is at least 21 years of age;
- the employee is not engaged as a part-time employee, a casual, a junior, a Real Estate Employee Level 1 or a trainee; and
- for an employee employed on a commission-only basis after 2 April 2018 the employee can establish (with the present or any past employer) that he or she has achieved the Minimum Income Threshold Amount (MITA) prescribed by clause 16.7(d) as may be amended from time to time). Provided that, the MITA will not have to be achieved in circumstances where the employee has operated his or her own real estate business within the last 3 years.

(ii) For the purpose of clause 16.7(c)(i), “real estate business” shall mean a business involved in the sale of real property or businesses.

(iii) An employee who qualified to be employed on a commission-only basis under this award prior to 2 April 2018 will continue to be eligible for commission-only employment under the terms of this award as long as the employment with that employer continues, and subject to continuing to meet the MITA as required in clause 16.7(d).

[9] The MITA is prescribed by clause 16.7(d)(i) as follows:

(d) Minimum income threshold amount (MITA)

(i) For the purpose of entering into commission-only employment, the MITA has been achieved if the employee can establish that in any consecutive 12-month period in the 3 years immediately preceding entering into the commission-only agreement, the employee received annual remuneration (including any commission or bonus payments) at least equal to **125%** of the employee’s classification rate as specified in clause 14— Minimum rates, calculated as an annual amount, excluding statutory superannuation.

[10] Clause 16.7(e) provides that the provision of the awards relating to part-time and casual employment, minimum rates, payment by commission, bonus or incentives in addition to wages, allowances, overtime and annual leave loading do not apply to commission-only employees. Clause 16.7(f)(i) provides that the minimum commission-only rate is 31.5% of the employer’s gross commission, and clause 16.7(ii) provides that a commission-only employee is always entitled to at least the minimum commission-only rate “*for each sales or commercial leasing transaction for which the employee was responsible*” subject to clause 16.6(iii) and (iv), which establishes rules for the payment of commission where more than one employee is responsible for a sale or commercial leasing transaction.

[11] Clause 16.7(h) provides for when commission-only arrangements must cease:

(h) 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) 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.

[12] Clause 16.7(i) prescribed the circumstances in which commission-only arrangements can be resumed after they have ceased pursuant to clause 16.7(h). Clause 16.6 is concerned with the calculation of NES leave entitlements for commission-only employees.

The REEF Application

Evidence and submissions for REEF and REEFSANT

[13] The REEF application initially sought to postpone the annual review in clause 16(h) of the Award until October 2021. REEF subsequently amended the application to seek the addition of a new Schedule I – Award Flexibility During the COVID-19 Pandemic, to operate in lieu of clause 16.7(h) of the Award, as follows:

Schedule I—Award Flexibility During the COVID-19 Pandemic

I.1 Schedule I operates from [_____] 2020. During the operation of Schedule I, 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) Pursuant to this clause, where an annual review is undertaken after 1 May 2020, the months of May, June, July, August, September and October 2020 (the COVID-19 months) may be disregarded in the calculation of the MITA for the

preceding 12-month period under review if the work in that month has been impacted by COVID-19. The MITA will be adjusted accordingly in proportion to the number of months disregarded, provided that, where the commission-only employee's review date falls part way through any COVID-19 month, that month may only be disregarded where the review is due after the 14th of the month.

(v) 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.

[14] In support of the REEF application, REEF and REEFSANT submit that the claim arises as a direct result of the COVID-19 pandemic and government initiatives to contain the pandemic. Commission-only employment has been impacted by the pandemic and the initiatives. Commission-only employees have been prevented, or materially restricted, from operating normally in the pursuit of sales. As a result, such employees may have periods where they have failed, or may fail in future, to achieve any sales or may achieve a substantially reduced number of sales, compared to the norm. This has arisen through no fault of the employee or the employer and may produce a materially negative effect to the outcome of a commission-only employee's annual MITA review. The claim is targeted at preventing this inequity from occurring by allowing months where, because of the pandemic a commission-only employee has not made any sales, or a substantially reduced number of sales compared to the norm, to be disregarded for the purposes of the MITA. This will allow a fair and accurate assessment of performance over a period not "*artificially polluted by the Pandemic*".

[15] It is also submitted that the real estate industry is materially affected by Government initiatives to contain the spread of the pandemic, and these impacts are direct and indirect. Direct effects include social distancing measures which have prevented real estate agents from operating in a pre-pandemic manner. Although restrictions have been eased, restrictions on pre-pandemic conduct of real estate agents remain. Impact of the pandemic on the general economy has also had ripple-on effects on the real estate industry. The indirect impact and general economic conditions will have an ongoing impact, the extent of which can only be speculative given the uniqueness of the situation.

[16] Real estate auctions and open houses were banned from late March and restrictions only started to lift in late April-May. Not all restrictions have been lifted. The levels of listings are low and auction numbers are also lower with fewer auctions being held than the corresponding week a year ago. Evidence from witnesses who provided statements in support of the Application is that:

- commission-only employment is a common feature with the real estate industry;
- the pandemic and Government initiatives to control it have prevented the real estate industry from operating normally and have placed the industry under material economic stress;
- commission-only employees have had their usual work and sales opportunities negatively impacted by the pandemic and initiatives to contain the spread of the pandemic (initiatives);

- commission-only employees have been and will likely continue to be prevented from making sales in the normal manner, by the pandemic and initiatives;
- it is unclear when the real estate industry will return to the operating state existing before the pandemic or the initiatives started; and
- commission-only employees, through no fault of their own, may fail their next MITA review because of the negative effect of the pandemic and initiatives.

[17] In relation to the s 134 considerations, REEF and REEFSANT submit that the variation is necessary to achieve the modern awards objective in the circumstances of the pandemic. In particular they submit that the Commission should have regard to the following relevant considerations:

- s 134(1)(c) – Failing to vary the Award as claimed could negatively impact workforce participation for a discrete but important part of the real estate industry.
- s 134(1)(d) – Commission-only employment represents a flexible modern work practice that is entered into by written agreement and provides flexibility to both the employee and the employer. Should commission-only employees fail to remain as such through no fault of their own or their employer, this mitigates against the orderly and effective operation of commission-only employment and is contrary to this sub-section.
- s 134(1)(f) – commission-only employment represents a driver of productivity for employers in the real estate industry as it operates on a results basis and incentivises employees to maximise sales thus improving the productivity of the agency concerned. Failing to vary the Award in the manner sought would be contrary to this subsection.
- s 134(1)(g) – commission-only employment is a legitimate form of paying employees under the Award and allowing an external event beyond the control of the employer and the employee to potentially defeat or compromise the orderly operation of the system strikes at the notion of a “sustainable” modern award system. Accordingly failing to vary the Award in the manner sought would be contrary to this subsection.
- s 134(1)(h) – the notion of employment growth should also include the notion of employment retention. As such, the claim is supported by the intention of this sub-section as it seeks to allow a commission-only employee to remain in employment despite a unique external event beyond the control of the employee and the employer, working to potentially defeat or compromise the orderly operation of the commission-only employment system and this type of employment.

[18] REEFWA supports the REEF application and submits that it is necessary to provide the real estate industry, both employers and employees, with a level of certainty in relation to the commission-only remuneration scheme. The proposed variation will provide flexibility for the gross income review of commission-only employees for the period ending 1 April 2021. REEFWA provided data to establish that 43% of WA based real estate services have suffered a 50% reduction or more in customer levels.³ These rates are unsustainable and directly impact the ability of employers to maintain the employment of their staff. Without the proposed

variation being accepted, REEFWA submits that there is a real prospect that commission-only employees will lose their employment as a result of not being able to meet the MITA requirements, which would only have occurred due to the severe economic impacts of COVID-19.

Evidence and submissions for RRESSA

[19] RRESSA does not argue with the information in the submissions in support of the REEF application as to the effect of COVID-19 on the real estate industry and the Australian economy. According to RRESSA, what is in dispute is whether the REEF application is warranted given the significance as to its impact on borderline commission-only salespersons and their ability to earn a living wage for the period May 2020 – May 2022.

[20] RRESSA contends that for salespersons engaged on a commission-only basis who are high performers, the MITA will not be a problem and while such employees may earn less than they have in the past, if they fit the description in REEF evidence as high performers, they will meet the current MITA. Those in danger of missing out are the borderline commission-only salespersons. It is submitted that under normal circumstances, this category of commission-only salespersons would be debit-credit salespersons with a guaranteed wage.

[21] RRESSA further contended that if REEF's members were truly worried about ensuring their commission-only salespersons MITA, they could increase the percentage share of the employer's commission on a temporary basis, or top-up the difference after the JobKeeper subsidy has been applied. RRESSA also submits that the effect of the REEF application is to seek to reduce wages and notwithstanding COVID-19, no other award had been varied in such a manner. Redundancies may be inevitable unless the employers adopt different strategies by sharing the pain by increasing the percentage share for commission-only salespersons or topping up their earnings. RRESSA opposes the REEF application on the basis that it undermines the requirements of s 134 of the FW Act.

The RRESSA Application

RRESSA submission and evidence

[22] The RRESSA application seeks the insertion of a new schedule 1A into the Award in the following terms:

Notwithstanding any other provision of this Award, the following provision 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 this 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.

[23] RRESSA submits that the JobKeeper claim concerns employees who have made written agreements as provided in clause 16.1 of the Award for payment of wages with commission, bonus or incentive payments. It is necessary to note that there is a practice in the real estate industry whereby such agreements operate on the basis of a "debit-credit" system. The debit-credit system operates so that in an agreed period, an employee (usually a real estate salesperson) is "credited" with an agreed percentage of the net commission he or she generates from property sales. From this credit calculation, the costs associated with employing the salesperson are debited. Once the debiting of employment-based payments and other agreed amounts has been undertaken, the employee's commission account will either be in debit (i.e. the employee has not generated sufficient sales commission to be entitled to any additional remuneration) or it will be in credit (i.e. the employee has generated sufficient sales commission to become entitled to additional remuneration). Where there is a "credit" resulting from the calculation, this amount then becomes an amount payable to the employee. Conversely, if the salesperson has been paid more by way of employment-based entitlements than is credited to them from settled sales, the negative balance carries over to the next period and the calculations start again for that period, using the negative balance as the starting point for the notional balance in the commission account.

[24] There are also systems for commission, bonus or incentive payments that operate as a target system. Under a target system the employer sets a target of net commission that the employee must generate before there is an entitlement to receive sales commission. The employee is credited with a total amount of net commission from the components of each property transaction for which they were responsible. Commission is only payable to the employee after the agreed target has been exceeded.

[25] The JobKeeper claim is intended to address what RRESSA submits is "double dipping" by employers in a manner that exploits the JobKeeper subsidy. RRESSA submits that real estate employers in receipt of the JobKeeper subsidy are paying the subsidy to wages employees operating under the debit-credit system, totalling \$1500 per fortnight, and an additional payment to equal the Award rate plus allowances, and are then debiting the entire amount against the employee's future commission earnings.

[26] RRESSA provided an example whereby a base salesperson classified as a Real Estate Salesperson Level 2, is entitled to be paid approximately \$1,000 per week, comprising the Award rate of \$862.50 plus car and phone allowance. An employer in receipt of the \$750 per week JobKeeper subsidy is said to be "clawing back" the subsidy by paying it to the employee and then debiting the full amount of wages and allowances to the salesperson's future commission earnings. RRESSA further contends that if a salesperson in such circumstances makes no sales due to the impact of the COVID-19 pandemic, that salesperson will have a debit of \$26,000 after a six month period, with the result that he or she will not be entitled to be paid any commission until the debit is expunged.

[27] It is submitted by RRESSA that this is morally and ethically wrong, and inconsistent with the intention of the JobKeeper subsidy. It is also submitted that this practice is inconsistent with the manner in which salespersons on commission arrangements in other industry sectors receive the JobKeeper subsidy which is paid to such employees in addition to commissions such that they are not required to “refund” the JobKeeper subsidy which was applied for in the employee’s name “under the umbrella of the employer”.

[28] It is further submitted that the JobKeeper claim, if granted, will create a level playing field between employees on wages with commission, bonus or incentive payments under clause 16.1 of the Award and employees on commission-only arrangements entered into under clause 16.7. This is because commission-only salespersons who make no sales in a fortnight receive the \$1,500 JobKeeper subsidy. If a sale is made by a commission-only salesperson in a particular fortnight entitling the salesperson to an amount of commission exceeding the JobKeeper subsidy, the sales person would receive the commission only and there would be no carry-over of any debit, from one fortnight to the next.

[29] In support of the contention that employers are double dipping with respect to JobKeeper payments to employees covered by wages and commission agreements made pursuant to clause 16.1 of the Award, RRESSA tendered a document distributed by REEF to its members, set out in Question and Answer form, containing the following information:

“Is there any way for me to claw back, or withhold the JobKeeper payment through the payment of commission to commission-only employees?

No. There is no mechanism in the REEF template commission-only agreements or the Real Estate Industry Award for JobKeeper payments to be subject to ‘claw back’ or recovery through the commissions paid to commission-only employees.

....

Can an employer continue to debit a debit/credit salesperson the full amount of their wages (which includes the JobKeeper payment) and allowances when calculating commission payments?

Yes. Provided the employee’s written commission structure contains appropriate ‘debiting’ arrangements. REEF’s template debit-credit commission structures contain such a provision. Remember you can only debit what has actually been paid to the salesperson.”

[30] RRESSA also tendered copies of messages posted on an on-line chat forum containing questions and answers from various persons about JobKeeper payments for employees on debit-credit arrangements. These were said to establish that there is a significant amount of confusion about such matters.

[31] The commission-only claim seeks to establish an entitlement for commission only salespersons to receive at least the minimum annualised wages for debit credit salespersons for the period from 30 September 2020 to 1 October 2021. In relation to this claim, it is submitted that the COVID-19 pandemic has caused economic hardship in many industries and while restrictions have been relaxed in the real estate industry, it is too early to estimate how the real estate market will fare over the 12 months following the removal of the JobKeeper subsidy.

[32] RRESSA contends that if employers decide to effect redundancies, they will select debit credit employees, given their higher wages cost in comparison with commission-only employees. In this regard, the commission-only claim is intended to protect debit credit employees from discrimination, on the basis of whether or not they are entitled to a minimum wage, when decisions about redundancy are made by employers. RRESSA also contends that this claim will provide a safety net for commission-only employees from poverty and prevent them from working for less than the federal minimum wage.

[33] In its prohibition claim, RRESSA seeks that there be no further employment of commission-only employees for a twelve month period. It submits that commission-only employment was designed around the more successful sales employees who could earn at least 125% of the Award rate excluding superannuation. The economic fall-out of the COVID-19 pandemic in the real estate industry and generally makes it prudent not to increase the number of commission-only employees until there is an improvement in economic circumstances. RRESSA also contends that there is a real prospect that current debit credit employees will be forced onto commission-only arrangements, as an alternative to redundancy, on the basis of their earnings prior to the pandemic. This may result in such employees earning less than the federal minimum wage.

[34] RRESSA submits that the application meets the tests in s 157 of the FW Act. The application is also submitted to be consistent with object of the FW Act in section 3(a) and (b) and the provisions in s 134 and s 284(1)(c). In this regard it is submitted that each of the variations provide an effective safety net for low paid employees. Debit credit employees will, unless the claim is granted, face a reduction in their standard of living because of the debiting of the JobKeeper payment from any commission they may earn, leaving them without their variable over-award payment, which is under threat in any event, due to the economic impact of the COVID-19 pandemic. Insofar as the other variations are concerned, RRESSA submits that they seek to protect commission-only salespersons from falling below the federal minimum wage given they are only paid commission if they sell a property that settles. In addition, RRESSA seeks to establish a level playing field in the event that there are redundancies in the industry, on the basis that the present award structure discriminates against debit credit employees on the grounds of wage costs. The 12 month pause is sought on the basis that it would be reckless to allow further commission-only employees to be employed at a time of great economic uncertainty.

[35] Mr Clarke also provided a statement in relation to the REEF and REEFSANT claim to vary the provisions of the Award in relation to commission-only employees. In that statement, Mr Clarke indicated that RRESSA believes that the amendments sought in the REEF and REEFSANT application needed to be accompanied by safeguards such as those sought in the present application including the top-up payment for commission-only salespersons.

Submissions in opposition to the RRESSA application

[36] REEF and REEFSANT oppose the RRRESSA application and submit that the application is made by an individual employee who has a materially different legitimate interest to that of a representative organisation. It is also submitted that the Mr Fox's actual experience is limited to South Australia and his personal experience potentially as a current salesperson although this is not entirely clear, and his role as Vice President of a South Australian organisation. This should colour how the Commission approaches the exercise of discretion in this matter.

[37] REEF and REEFSANT submit that because the variations are not self-evident, to succeed the Applicant must adduce probative evidence to support that the variations to the Award are necessary to achieve the modern awards objective (ss 157 and 134). It is submitted that there is no probative (and in most cases no evidence at all):

- about the impact of the COVID-19 pandemic on any employer or employee in the Real Estate Industry, not even Mr. Fox himself;
- concerning the use of JobKeeper in the Real Estate Industry;
- concerning the operation of JobKeeper in regard to a commission-only employee or an employee earning wages and an incentive, not even Mr. Fox.

[38] It was submitted that there is also no direct evidence from an employer or employee that could be said to support the application or allow the Commission to make the necessary findings to grant the application. Mr Fox's statement is said to be more submission than evidence and contains no evidence concerning Mr Fox as an employee. There is also nothing in the statement that could lead to a conclusion that he is qualified to give opinion based evidence on the Real Estate Industry generally and certainly not outside of South Australia. Chat material tendered by Mr Fox was also submitted to be random on-line comments of unidentified contributors without any understanding of their circumstances or the truth of their comments and with no way of testing the statements and should not be admitted.

[39] In relation to the claim with respect to commission-only employment, REEF and REEFSANT submit that such employment has been the subject of exhaustive consideration in the 2012 Transitional Review and 4 Yearly Review of modern awards. It is submitted that a number of things can be concluded from this exhaustive examination of commission-only employment, including:

- commission-only employment is an accepted method for paying certain salespersons in the real estate industry;
- commission-only employment should not be seen as more or less controversial than any other method of paying employees in the industry;
- the operation of commission-only employment is subject to rigorous safeguards both in terms of entry to such a payment method and also the retention of such persons in that payment method;
- entry to a commission-only employment arrangement and retention in it is conditioned by the MITA;
- the MITA is in effect a minimum earnings threshold that needs to be achieved and maintained;
- subject to meeting the entry requirements to the commission-only employment system an employee and employer may agree on the employee becoming a commission-only employee; and

- having become a commission-only employee an employee must have their gross income reviewed annually. If the review establishes that the gross income of the commission-only employee for the year under review is less than the MITA the commission-only employment arrangement “must” cease.

[40] It was also submitted that these safeguards have only recently been reset to ensure that the modern awards objective is met.

[41] REEF and REEFSANT contend that the terms of how the proposed RRESSA schedule would actually operate appears to be that, despite any commission-only arrangement, the employee would receive the minimum Award weekly wage (annualised). It is submitted that this is entirely inconsistent with the notion of commission-only employment and strikes at the character of such employment. It is also submitted that there is no probative evidence to support the findings required to vary the Award as claimed. Neither is there evidence that the current safeguards in the Award have failed; manifestly. There is also no evidence to support how the pandemic or initiatives to manage it require such a change, so the Award meets the modern awards objective.

[42] It is also submitted that it should be uncontroversial and self-evident that a certain number of commission-only employees will be beneficiaries of JobKeeper. In simple terms as JobKeeper operates on a “one in, all in” basis, commission-only employees will receive a minimum \$1500 a fortnight payment in circumstances where their employer is eligible for JobKeeper and will be paid minimum fortnightly wages that would not normally have been the case. In this sense where an employer is suffering material revenue impairment to trigger the relevant threshold (30%) any commission-only employees will receive some level of wages other than simply commission payments.

[43] In relation to the prohibition claim, REEF and REEFSANT submit that the claim is extraordinary and would result in a situation where, for a period of time, the Award would prohibit a form of employment, which it specifically contemplates. It is submitted that for such a claim to succeed RRESSA would in effect have to demonstrate (based on probative evidence) that the form of employment to be prohibited was manifestly inconsistent with s 134 and the modern awards objective. RRESSA would also need to prove that the many safeguards built around commission-only employment as part of the 4 Yearly Review are a failure resulting in some manifest injustice offending the notion of the safety net. REEF and REEFSANT contend that rather than insufficient evidence on these matters there is simply no evidence probative of the findings required to be made to reach these conclusions and that the claim is offensive to s 134 and the modern awards objective.

[44] REEF and REEFSANT submit that a number of matters should be uncontroversial in considering the JobKeeper claim in relation to employees under debit credit agreements. Real estate agencies receive income principally in the form of commission for the selling of a client’s home, business or investment property, which is paid at the time of settlement/completion and typically consists of a percentage of the sales price. It is a success-based fee, which is not payable, in whole or in part, if the agency does not sell the property. The real estate industry is by nature an incentive-driven industry. Putting aside commission-only employment, a real estate salesperson is remunerated by the payment of wages and allowances and where the employer and employee agree, this minimum remuneration can be complemented by an entitlement to commission/incentive/bonus based on the individual performance of the

employee. REEF and REEFSANT submit that this entitlement constitutes an over-award entitlement and any entitlement to additional remuneration (commonly known as “sales commission”) will be determined in accordance with the individual employee’s contract of employment.

[45] REEF and REEFSANT submit that the purpose of the JobKeeper scheme is to provide a certain level of financial support to a business that has experienced material impairment to its revenue on a year for year comparison provided that it maintains the employment of its employees and pays them a minimum amount of remuneration. Eligibility for JobKeeper payments depends on a wage condition having been met which means that JobKeeper payments are made in arrears and, for employers to be eligible for the payment, they must have already paid at least \$1,500 during the relevant fortnight to any employees for whom they are claiming the payment. The payment of \$1,500 can be made up from the salary/wages/commission/bonuses/allowances paid in the fortnight and superannuation contributions (but only if made under a salary sacrifice arrangement) made within the fortnight.

[46] REEF and REEFSANT provided the following example as context in which the claim in respect of debit credit employees could be considered. Prior to JobKeeper an employee may have operated on the basis of wages and then a debit/credit incentive sales commission system. In this example the employee would have had an amount corresponding to their wages notionally placed in the debit/credit account as a debit. The purpose of this is to ensure that the employees labour costs are deducted from any credits placed in the debit/credit account. The incentive is then a periodic payment based (on agreed terms) on any positive net balance in the debit/credit account. While such an arrangement is required by clause 16 of the Award to be recorded in writing where the employer and employee agree on a scheme, and any change to an existing arrangement to be further set out in writing once it is agreed to, it is evident from the Award that the Commission has, as a matter of discretion, left commission, bonus and incentive payments paid in addition to the minimum weekly wage etc. to the employer and employee. The Commission has not to date seen fit to regulate how such an arrangement should in terms operate, leaving it to the contracting parties.

[47] REEF and REEFSANT submit that the application seeks the Commission to invade this space for the first time. They also submit that there is an equity issue that weighs against the claim in relation to debit credit employees, which arises when considering that:

- employees are no worse off under JobKeeper than not being under JobKeeper in terms of any debit/credit arrangement;
- if the JobKeeper Claim is granted there will be inequity between employees; and
- if granted some employers will be disadvantaged in a way not contemplated by JobKeeper.

[48] In relation to these propositions, it is submitted that the first should be self-evident. JobKeeper is a business support/stimulus package (designed to subsidise the cost of employment to promote it being maintained) if the example above is considered, and placed in the context of an employer in receipt of JobKeeper and one who is not, the employee is in no different a situation. In the first case the employee has their wages debited to the debit/credit account. In the second case the employee has their wages debited to the debit/credit account and no injury befalls the employees in either case.

[49] If RRESSA’s claim is granted, this level playing field is upended. An employee working for an employer who is not part of the JobKeeper scheme (and this could be by a fine margin; 29% revenue impairment to the required 30%) will debit wages from the debit/credit account as normal. An employee working for an employer who is part of the JobKeeper scheme (and this could be by a fine margin the other way; 30% revenue impairment to 29%) will not debit wages from the debit/credit account as normal and in so doing will likely have commission payments made when they would not ordinarily be made; an extra (or earlier) payment as there are fewer debits in the debit/credit account.

[50] It is submitted that this extra or earlier payment will need to be funded from somewhere, in effect cash flows from the business, which indirectly means the employer will not get the full benefit of JobKeeper as intended. In this regard, the employer was meant to get the \$1500 subsidy for maintaining employment, and not \$1500 minus some extra commission payment not otherwise required to be paid by the Award or the employment contract. These inequities are unsatisfactory features of a fair and relevant minimum safety net and a misuse of JobKeeper.

[51] REEF and REEFSANT submit that the grant of the RRESSA claim is not necessary to achieve the modern awards objective and should be dismissed.

[52] REEFWA supports the submissions of REEF and REEFSANT and opposes the RRESSA application on essentially the same basis.

Legislative framework

[53] By virtue of s 157 of the FW Act, the Commission may make a determination varying a modern award if the Commission is satisfied the determination is necessary to achieve the modern awards objective. The modern awards objective is to “*ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions*”, taking into account the particular considerations identified in s 134(1)(a)–(h) (the s 134 considerations).

[54] The modern awards objective is very broadly expressed.⁴ It is a composite expression which requires that modern awards, together with the National Employment Standards (NES), provide a fair and relevant minimum safety net of terms and conditions, taking into account the matters in s 134(1)(a)–(h).⁵ Fairness in this context is to be assessed from the perspective of the employees and employers covered by the modern award in question.⁶ The obligation to take into account the s 134 considerations means that each of these matters, insofar as they are relevant, must be treated as a matter of significance in the decision-making process.⁷ No particular primacy is attached to any of the s 134 considerations⁸ and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award.

[55] It is not necessary to make a finding that the award fails to satisfy one or more of the s 134 considerations as a prerequisite to the variation of a modern award.⁹ Generally speaking, the s 134 considerations do not set a particular standard against which a modern award can be evaluated; many of them may be characterised as broad social objectives.¹⁰ In giving effect to the modern awards objective the Commission is performing an evaluative function taking into

account the matters in s 134(1)(a)–(h) and assessing the qualities of the safety net by reference to the statutory criteria of fairness and relevance.

[56] What is “*necessary*” to achieve the modern awards objective in a particular case is a value judgment, taking into account the s 134 considerations to the extent that they are relevant having regard to the context, including the circumstances pertaining to the particular modern award, the terms of any proposed variation and the submissions and evidence.¹¹ It is also the case that where variations are not self-evident, an applicant seeking a change, must adduce probative evidence to support the contention that the variations are necessary to achieve the modern awards objective.¹²

Consideration

The REEF application

[57] We have determined to grant the REEF application as amended. In our view it is an appropriate response to the impacts of the COVID-19 pandemic on commission-only employees and their ability to earn commission, and is necessary to meet the modern awards objective. The extraordinary market effects of the COVID-19 pandemic were not anticipated when the MITA was established. To include the peak period of the pandemic in the calculation of the MITA for the purpose of the annual review required under clause 16.7(h) might result in commission-only employees being removed from those arrangements in circumstances where, in normal circumstances, they would earn commission in excess of the MITA. Removal from commission-only arrangements in the current economic climate is likely to place the employee’s employment at risk if the employer cannot afford to retain the employee on a wages basis.

The RRESSA application

[58] In relation to RRESSA’s JobKeeper claim and the commission-only claim, we make the following observations. The provisions of the Award in relation to wages employees with commission, bonus or incentive agreements, are not prescriptive as to the substantive terms of those arrangements but rather are procedural. Those procedural terms are: that such agreements are required to be in writing (clause 16.1 (a) and (b)); that variations are in writing (clause 16.2 (a) and (b)); a signed copy of an agreement is given to the employee party (clause 16.2(c)); the employer accounts to the employee in written form as the amounts calculated in the agreed manner become payable (clause 16.3); providing the conditions under which an employee is entitled to be paid amounts on or after termination of employment (clause 16.4); and providing for a dispute settlement procedure in relation to disputes about whether all or any part of the commission is due to an employee pursuant to clause 16.1 (clause 16.5).

[59] The Award stipulates only the minimum weekly wage rates and allowances, and other NES entitlements for employees who make agreements pursuant to clause 16.1 and does not stipulate the manner of calculating commission, bonus or incentives for such employees. Further, the debit-credit arrangements or the target arrangements are not provided for in the Award. In short, the arrangements operate in the over-award space and are a mechanism commonly used by the parties in the real estate industry for purposes including incentivising employees while guaranteeing them minimum wages and other Award conditions and allowing the employer to offset those amounts. For example, such an arrangement may allow the employer to pay such amount of commission, bonus or incentive, as and when it determines, in

its absolute discretion, subject only to the terms of the direction. The Award does not regulate quantum or timing of commission, bonus or incentive payments and leaves the matter to be agreed between the employer and the employee.

[60] In relation to commission-only employees, the Award provides for some additional matters which regulate entry into, and continuation of, commission-only employment and arrangements for such employment, as follows:

- the minimum classification level that an employee must be entitled to be classified at, in order to enter into a commission-only agreement – clause 16.7(a)(i);
- a prohibition on an employee paid on a commission-only basis being engaged as a part-time or casual employee – clause 16.7(a)(ii);
- minimum requirements and conditions for entry into an agreement to be a commission-only employee – clause 16.7(c);
- a formula for establishing the MITA for the purposes of entering into commission-only employment – clause 16.7(d);
- an annual review process for determining whether a commission only arrangement must cease or conversely may remain in effect – clause 16.7(h); and
- conditions for resumption of a commission-only arrangement where a commission-only employee has ceased to be employed on such arrangement because of the operation of clause 16.7(h) – clause 16.7(i).

[61] There are further provisions which deal with the substantive terms of commission-only employment, as follows:

- setting an objective for commission-only employment arrangements as providing a mechanism by which a salesperson who meets the requirements for entry into employment on that basis, of achieving remuneration of 125% or more of the annualised minimum wage that an employee working at the same property sales level under this award would be entitled to be paid – clause 16.7(b);
- stipulating Award clauses which do not apply to commission-only employees – clause 16.7(e);
- setting the minimum commission-only rate by reference to a stipulated percentage of the employer's gross commission – clause 16.7(f); and
- stipulating the manner of calculating NES entitlements for commission-only employees – clause 16.6.

[62] We observe that other than setting a minimum percentage of the employer's gross commission as the minimum for the purposes of a commission-only agreement, the Award says little about the quantum or method of calculation of commission. In the context of the current Award provisions dealing with commission, incentive or bonus agreements for wages employees and commission-only agreements, the variations sought in the present application

would constitute a significant departure from the current approach. We also accept that, for the reasons set out above, the changes are not self-evident, and would require probative evidence to justify departure from the current Award provisions.

[63] It is apparent that the JobKeeper subsidy is a payment to employers to support them to retain staff and to continue paying them, during the period of downturn resulting from the COVID-19 Pandemic. The scheme directs that employers use the subsidy to pay their employees, and requires them to retain such employees in employment. In order to qualify for the subsidy, businesses must have suffered a decline in turnover of the required amount at the required time. Where an employer does not qualify for the JobKeeper subsidy, the employer is not prohibited under the present terms of the Award from debiting wages paid to employees who are employed on a wages and commission, bonus or incentive payments basis, provided that the employee is paid in each pay period the minimum wages prescribed by clause 14.1 and relevant allowances under clause 17 of the Award. The effect of granting the JobKeeper claim in the present case will be to remove the benefit of the JobKeeper subsidy from the employer and thereby undermine its rationale.

[64] It is also relevant, as pointed out by the employer parties in this case, that whether or not an employer is in receipt of the JobKeeper subsidy does not alter the effect on an employee who is working under an agreement for wages and commission, on a debit-credit basis. The ability of such an employee to earn income from commissions will be impacted by the current pandemic irrespective of whether his or her employer is in receipt of the JobKeeper subsidy. The employee will be paid wages regardless and will have those wages debited, if the employee is not entitled to commission in the relevant period. The employee suffers no additional detriment from the employer's receipt of the JobKeeper subsidy and when the employee's wages are paid, the employee has received the value of the wages from the employer as required by the scheme. The employee continues to have an entitlement to be paid any commission earned in the period in accordance with the Agreement.

[65] While we accept that as a result of the pandemic, the quantum of an employee's debit balance may increase, that is a function of the fact that there is less commission to be earned in the market rather than the manner in which employers may deal with the JobKeeper subsidy. In short, the quantum of the debit is not impacted by the JobKeeper subsidy. Commission-only employees in receipt of JobKeeper payments also suffer no detriment as a result and receive a guaranteed income, and in addition, are entitled to be paid commission in accordance with their commission-only arrangements.

[66] Finally, we note that the arrangements that will be impacted if the RRESSA application is granted – whether they are wages with commission, bonus or incentive or commission-only – are individual agreements entered into by employers and employees under the auspices of the Award. The variations sought by RRESSA to the Award would override those arrangements and impose outcomes on the parties to them which are not agreed and would extend the Award into a realm where it does not currently operate. Those variations would also transform commission-only employment into an entirely different form of employment.

[67] For these reasons, we do not consider that the JobKeeper claim or the commission-only claim should be granted. However, we have determined to grant, in part, the prohibition claim made by RRESSA. In light of our decision with respect to the REEF application, we have determined that it would be appropriate in all of the circumstances, to place a moratorium on any entry into commission-only employment for a period approximating the period covered by

the variation to clause 16.7(h) of the Award resulting from the granting of the REEF application. If the unusual circumstances of the pandemic make it inappropriate to exclude persons from commission-only arrangements having regard to earnings in the period from May to October 2020, it is equally inappropriate for persons to enter such arrangement in this period. This limited prohibition may only be put into effect prospectively, so the moratorium on commission only employment will operate from 6 August 2020 and will remain in effect until 30 October 2020.

[68] We turn now to identify how, in reaching the above conclusions, we have taken to s 134 matters into account.

s 134(1)(a): relative living standards and the needs of the low paid

[69] In relation to the criteria in s 134(1)(a), the parties did not make submissions or place evidence before us in relation to any impacts on relative living standards and the needs of the low paid with respect to either of the applications.

[70] It is well established that a threshold of two-thirds of median full-time wages provides “a suitable and operational benchmark for identifying who is low paid”¹³ within the meaning of s 134(1)(a). The most recent data for median earnings is for August 2019 from the ABS Characteristics of Employment (CoE) survey. Data on median earnings are also available from the Survey of Employee Earnings and Hours (EEH) for May 2018. On the basis of the data from the CoE survey for August 2019, two-thirds of median weekly earnings for full-time employees is \$916.67. Data available from the EEH survey for May 2018 on median weekly full-time earnings found that two-thirds of median earnings is equal to \$973.33.

[71] Using the two-thirds of median full-time wages as the benchmark, there are employees paid the wages prescribed by the Award in the Award who are “low paid” within the meaning of s 134(1)(a). The effect of the variations sought by RRESSA in relation to the JobKeeper claim and the commission-only claim would likely result in increased earnings for employees while they are in receipt of the JobKeeper payment, and in a higher debit balance for wages employees on commission, incentive or bonus arrangements which they will be required to make up before they can earn additional amounts above the Award minimum. This weighs in favour of granting the application in respect of these claims, albeit slightly, given the likely negative impacts of granting the application set out below.

[72] In relation to the REEF application, we are of the view that it does not alter substantive wages and conditions in the Award and as such the relative living standards and needs of the low paid are a neutral consideration in that matter.

s 134(1)(b): the need to promote collective bargaining

[73] Collective bargaining is not a feature of the real estate industry and whether we grant or refuse either, or both, of the applications, there will be no impact in relation to this matter. Accordingly, it is a neutral consideration.

s 134(1)(c): the need to promote social inclusion through increased workforce participation

[74] This consideration is directed at obtaining and maintaining employment. In our view, the impact of granting the RRESSA application would have a negative impact on employment.

With respect to the JobKeeper application, the incentive for employers to maintain employees in employment will be reduced if employers are not permitted to receive the full benefit of the subsidy. In relation to the commission-only claim, there will be a similar disincentive to maintain commission-only employees in employment, in circumstances where the entire basis of their employment has effectively been transformed into wages and commission. It is also the case that the prohibition claim will not promote increased workforce participation by virtue of excluding a type of employment which is well-established in the real estate industry.

[75] In contrast, we are of the view that the REEF application will promote increased workforce participation, by providing a mechanism to retain commission-only salespersons in employment during a period where the COVID-19 pandemic prevents or hinders them in carrying out their role and earning commission. We also note that commission-only salespersons who are employed by employers eligible for the JobKeeper subsidy are in receipt of JobKeeper payments, which is subsidising their income.

s 134(1)(d): the need to promote flexible modern work practices and the efficient and productive performance of work

[76] We accept that wages and commission, incentive or bonus and commission-only employment are mechanisms which promote flexibility and efficiency. These mechanisms achieve this by encouraging and incentivising employees to sell property and thereby increase their earnings and the income of the employer. Notwithstanding RRESSA's trenchant criticism of commission-only employment, it is a well-established system of employment in the real estate industry. While it is unique, so is the real estate industry. It is also the case that the provisions of the Award in relation to commission only employment have been extensively reviewed including increases to the minimum Award rates in recognition of skills exercised by employees. This has benefited commission-only employees by increasing the minimum level of earnings on which the MITA is based. Further, there have been additional protections for commission-only employees included in the Award.

[77] Accordingly, the current Award provisions may be presumed to meet the modern awards objective, and any variation that significantly alters those provisions would require cogent supporting evidence. The evidence placed before the Commission by RRESSA does not persuade us to vary those provisions in the substantive manner claimed. Much of that evidence is opinion based on past experience and not on the operation of the current Award provisions.

[78] The RRESSA claim in its entirety will not promote flexible modern work practices and the efficient and productive performance of work and this is a matter that weighs against granting the claim.

[79] We are of the view that to the extent that it will maintain existing commission-only employees in employment, to a greater degree than would otherwise be the case, the REEF application proposes variation to the Award which will promote flexible modern work practices and the efficient and productive performance of work.

s 134(1)(da): the need to provide additional remuneration for employees working certain hours

[80] This consideration is not relevant in the present case.

s 134(1)(e): the principle of equal remuneration for work of equal or comparable value

[81] This consideration is also not relevant in the present case.

s 134(1)(f): the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden

[82] The mechanisms by which employers in the real estate industry implement agreements for wages with commission, incentive or bonus and commission-only employment, are well established. Employer organisations produce template documents and those documents are used to enter into agreements under the Award. The JobKeeper claim and the commission-only claim will impact on those agreements in a manner that will increase both employment costs and the regulatory burden. Both claims fundamentally alter the existing employment arrangements provided for under the Award. The effect of the commission-only claim is to create an entirely new category of employment.

[83] In contrast, the variation proposed in the REEF application is consistent with the existing provisions of the Award and does not alter them in a substantive way. As such the impact on the regulatory burden and employment costs for employers of such a variation will be negligible.

s 134(1)(g): the need to ensure a simple, easy to understand, stable and sustainable award system

[84] For similar reasons as those relating to s 131(1)(f) our view is that to grant the RRESSA application would be contrary to the consideration of ensuring a simple, easy to understand, stable and sustainable award system. The provisions of the Award in relation to commission-only employment are relatively simple, easy to understand, stable and sustainable, given the extensive review to which they have been subjected in recent times. To vary the Award in the manner proposed with respect to the JobKeeper claim and the commission-only claim would be contrary to this consideration.

[85] Conversely, the REEF application does not propose a substantive alteration to the provisions of the Award which it seeks to vary.

s 134(1)(h): the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

[86] The applications before us relate to a single award. There is no evidence as to the likely impact of any claims on the matters for consideration in s 134(1)(h) and this is a neutral consideration in the present case.

Conclusion

[87] A draft determination to give effect to the variations we will make is appended to this Decision. Any submissions in response to the draft determinations must be filed by **2.00pm** on **Wednesday 5 August 2020**. The variations will take effect from **Thursday 6 August 2020**.



VICE PRESIDENT

Appearances:

Mr *N Ward* and Mr *D Collits* on behalf of REEF and REEFSANT.

Mr *B Wilcox* on behalf of REEF.

Ms *A Bisbal* on behalf of REEFSANT.

Mr *J Lilleyman* and Mr *P Moss* on behalf of REEFWA.

Mr *R Clarke* on behalf of RRESSA and Mr Nathan Fox.

Mr *T French* on behalf of the Australian Property Services Association.

Hearing details (AM2020/23):

3 July.

Sydney (via telephone):
2020.

Final written submissions (AM2020/14):

REEF and REEFSANT – 4 June 2020, 16 June 2020

REEFWA – 4 June 2020

RRESSA - 16 June 2020

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¹ AM2020/14.

² AM2020/23.

³ CCIWA *COVID-19 Business Impact Survey*.

⁴ *Shop, Distributive and Allied Employees Association v National Retail Association (No 2)* [2012] FCA 480, 205 FCR 227, 219 IR 382 at [35]

⁵ [2017] FWCFB 1001, 265 IR 1 at [128]; *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [41]–[44].

⁶ [2018] FWCFB 3500 at [21]–[24].

⁷ *Edwards v Giudice* [1999] FCA 1836, 94 FCR 561 at [5]; *Australian Competition and Consumer Commission v Leelee Pty Ltd* [1999] FCA 1121 at [81]–[84]; *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [56].

⁸ *Shop, Distributive and Allied Employees Association v The Australian Industry Group* [2017] FCAFC 161, 253 FCR 368, 272 IR 88 at [33].

⁹ *National Retail Association v Fair Work Commission* [2014] FCAFC 118, 225 FCR 154, 244 IR 461 at [105]-[106].

¹⁰ See *ibid* at [109]-[110]; albeit the Court was considering a different statutory context.

¹¹ See generally: *Shop, Distributive and Allied Employees Association v National Retail Association (No.2)* [2012] FCA 480, 205 FCR 227, 219 IR 382.

¹² *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* ; [2014] FWCFB 1788, 241 IR 189 at [23].

¹³ [\[2017\] FWCFB 1001](#), 265 IR 1 at [32].