



## DECISION

*Fair Work Act 2009*

s.160 - Application to vary a modern award to remove ambiguity or uncertainty or correct error

**Real Estate Employers' Federation of New South Wales, The**  
(AM2010/212)

**REAL ESTATE INDUSTRY AWARD 2010**  
[MA000106]

Real estate industry

SENIOR DEPUTY PRESIDENT HAMBERGER

SYDNEY, 4 NOVEMBER 2010

*Application to vary or remove Clause 4.2 from the Real Estate Industry Award 2010 to remove ambiguity.*

[1] The Real Estate Employers' Federation of NSW (REEFNSW) has applied to vary the *Real Estate Industry Award 2010* (Real Estate Award) to remove an ambiguity or uncertainty or to correct an error pursuant to s.160 of the *Fair Work Act 2009* (the Act).

[2] The variation sought is to delete sub-clause 4.2 (and re-number the following sub-clauses appropriately) of the Real Estate Award. This sub-clause provides that:

“This award does not cover employers and employees covered by the *Banking, Finance and Insurance Award 2010*.”

[3] A hearing was held on 29 October 2010 where REEFNSW was represented by Mr G. Paterson. The Australian Industry Group (AIG) and Elders Ltd also made submissions at the hearing in support of the application. Both were represented by Mr M. Mead.

[4] Written submissions in support of the application were received from the Australian Federation of Employers and Industries, the Real Estate Employer's Federation of South Australia, the Real Estate Employer's Federation of WA, the Real Estate Association of NSW and the Property Sales Association of QLD - Unions of Employees. There were no submissions opposing the application.

[5] At the conclusion of the hearing I indicated that the Real Estate Award would be varied in line with the application. The reasons for my decision are outlined below.

[6] The Real Estate Award covers employers in Australia in the real estate industry in respect of their employees engaged in classifications prescribed under the award. The real estate industry is defined as the provision of:

“...services associated with sales, acquisitions, leasing and/or management of residential, commercial, retail, industrial, recreational, hotel, retirement and any other leasehold or real property and/or businesses. Such services include:

- real estate agency;
- business and hotel broking;
- strata and community title management (or similar service however described);
- stock and station agency;
- buyers agency; and
- real estate valuation.”

[7] As already referred to, the award specifically excludes employers and employees covered by the *Banking, Finance and Insurance Award 2010* (the Banking Award)

[8] Clause 4 of the Banking Award states:

“4.1 This industry award covers employers throughout Australia who are engaged in the banking, finance and insurance industry in respect of work by their employees in a classification in this award and those employees to the exclusion of any other modern award.”

[9] The Banking Award then provides in sub-clause 4.2 a definition of the banking, finance and insurance industry as follows:

“**Banking, finance and insurance industry** means the industries of banking, lending, loaning, providing credit, investment, finance, superannuation, all forms of insurance, credit unions, building societies, financial intermediaries, trustee creditors and agencies, money market dealers, credit or charge institutions, wool broking, **agribusiness** and services to the above industries such as broking, trading, debt recovery, financial consulting, valuation, money changing, data processing, transaction accounts, telephone enquiries and transaction processing.”

(Emphasis added)

[10] I note that the Agribusiness Employers’ Federation (AEF) made submissions on behalf of its members in the making of the Real Estate Award. While generally supporting the draft award filed by the real estate employers it sought an exclusion for its members in relation to their activities covered by the Banking Award.

[11] No definition of the term “*agribusiness*” is provided in the Banking Award. However, examining the proceedings that led to the making of that award, and the classifications contained therein, it was most likely intended to cover the provision of financial, insurance, banking and like services to the agricultural industry.

[12] The alleged ambiguity arises in the context of coverage of employers engaged in an enterprise that operates in the dual industries of real estate *and* agribusiness. I am satisfied that the Australian Industrial Relations Commission (AIRC), in making the Real Estate Award intended that all employers in the real estate industry should be covered by that award including, by virtue of the reference to “stock and station agencies”, those that sell rural land or livestock. However, the effect of Clause 4.2 is such that it could be construed completely to exclude real estate employers and their employees from coverage by the Real Estate Award if the employer engages in any activities that fall within the scope of “agribusiness”. Mr Paterson gave as an example one of his members who obtains income of around \$1,000 a year from selling water licences, but who otherwise operates a traditional real estate business. On the assumption that selling water licences is “agribusiness”, sub-clause 4.2 could be construed as meaning that all the employees, whatever their duties and including those primarily engaged in real estate activities, would be covered by the Banking and not the Real Estate Award. I note that the terms and conditions in the Banking Award are not well suited to the real estate industry.

[13] The deletion of sub-clause 4.2 would allow a clearer and more logical approach to the case of employers that operate in both industries. In particular, the operation of sub-clause 4.8 of the Real Estate Award could then be used to deal with employers that operate both in the real estate and agribusiness industries. Sub-clause 4.8 is a standard provision that states that where an employer is covered by more than one award, an employee of that employer is covered by the award classification which is most appropriate to the work performed by the employee and to the environment in which the employee normally performs the work. This would mean, for instance, that the employees of an employer that operates in both industries would be covered by whatever award was most appropriate: if they mainly conducted real estate functions they would be covered by the Real Estate Award, and if they were mainly engaged in agribusiness they would be covered by the Banking Award. I also note that this outcome would be more in line with the original submissions made by the AEF at the time of the making of the Real Estate Award.

## **Conclusion**

[14] I am satisfied that the ambiguity created by the operation of sub-clause 4.2 of the Real Estate Award has the potential to create unnecessary confusion and its deletion would be the most appropriate course.

**[15]** The application is therefore granted and a determination varying the Real Estate Award will be issued accordingly.

SENIOR DEPUTY PRESIDENT

*Appearances:*

*G. Paterson*, for the Real Estate Employers' Federation of New South Wales.

*M. Mead*, for the Australian Industry Group and Elders Ltd.

*Hearing details:*

2010.

Sydney.

October 29.

Printed by authority of the Commonwealth Government Printer

<Price code A, MA000106, PR503293>