



AM2020/23

s.157 Fair Work Act 2009

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

Submission by the Real Estate Employers Federation of WA

30 June 2020

1. Pursuant to the directions handed down by Vice President Hatcher on 9 June 2020 the Real Estate Employers Federation of Western Australia (**REEFWA**) provides the following submissions opposing Mr Nathan Fox's application (AM2020/23) for variation to the *Real Estate Industry Award 2020 (Award)*.
2. REEFWA opposes Mr Fox's application on the basis that:
 - a. The proposed variations are not terms that may be included in modern awards;
 - b. the proposed application is contrary to the modern award objectives; and
 - c. the Applicant has failed to discharge their evidentiary burden and as such there is insufficient information before the Commission to support the claim.
3. We set out below our response to Mr Fox's applications and the evidence they hope to rely upon.

An Overview of Mr Fox's Application

4. Mr Fox's application seeks the following variations to the Award:
 - a. To prevent employers in the real estate industry from debiting against their salesperson's commission earnings, the \$1,500 per fortnight JobKeeper wage subsidy paid to the employer.
 - b. To provide for a limited period of time, a wage "top up" for commission -only salespersons where if for the period from the date of any order until the 1st October 2021 the commission only salesperson must be paid any shortfall between what they earn in commission payments and the minimum wage under the award, annualised.
 - c. To provide that no any employee not already (as at the date of any order until the 1st October 2021) employed as a commission only salesperson to be eligible to be employed as a commission only salespersons until the 1st October 2021.

Terms that may be Included in Modern Awards

5. Section 139 of the *Fair Work Act 2009 (FW Act)* sets out the terms that may be included in modern awards.
6. In particular of relevant:
 - a. Section 139(1)(a) relates to minimum wages;
 - b. Section 139(1)(b) relates to types of employment; and
 - c. Section 139(1)(g) relates to allowances.
7. It is the view of REEFWA that the variations to the Award being sought by Mr Fox are not terms that may be included in a modern award under the FW Act.

Modern Award Objectives

8. We submit that the application does not meet the objects of the modern awards. In particular the proposed amendments are contrary to s134(1):
 - (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
 - (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
 - (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
 - (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.
9. Firstly, the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020 (Act)* to which forms the arrangement known as “JobKeeper” was created as a payment wage subsidy scheme in response to the COVID-19 pandemic and economic downturn.
10. The JobKeeper scheme is not an award provision and is not underpinned by any of the Modern Awards.
11. It is submitted that it was the clear intention of Parliament not to import the JobKeeper scheme onto the Modern Award system.
12. Any variations to a Modern Award that seeks to mandate an application of the JobKeeper scheme would simply not meet the objectives of the FW Act relating to terms that may actually be included in Modern Awards.
13. Secondly, any arrangements of a ‘top up’ payment would be contrary to the objects of the Award.
14. Clause 16.7 of the Award provides the criteria in relation to commission-only employment including that it is a mutual agreement between the employer and employee as determined under clause 16.7(a) of the Award.
15. In particular a commission-only employee under clause 16.7(d) of the Award is required to meet the Minimum Income Threshold Amount (**MITA**) in any 12 month period.
16. Under clause 16.7(h)(iv), the commission-only arrangement must cease if the gross income of the commission-only employee is less than the MITA for the year under review.

17. It is the very nature of the commission-only arrangement that the onus is on the employee to ensure that they meet the MITA in each 12 month period and a failure to do so would result in the commission-only agreement ending.
18. An employee has the choice whether to operate or not as a commission-only employee and if they have concerns that they may not meet the MITA requirements they have the alternative option to be employed as a waged employee under the Award.
19. The operation of the commission-only arrangements are very clear and should not in any way be artificially topped up with payments that are directly made from the employer.
20. Thirdly, as noted above a commission-only employee freely chooses to undertake that particular arrangement in mutual agreement with the employer.
21. To prevent an employee from choosing to be engaged as a commission-only employee would impinge upon their workplace rights under s.341 of the FW Act.

Evidentiary Burden

22. The FWC has made it clear that where any significant change is proposed to the modern awards, it must be supported by "*probative evidence properly directed to demonstrating the facts supporting the proposed variation*".¹ This is necessary in order to ensure a 'stable' modern award system.²
23. The amendments being sought by Mr Fox would signify a significant change to the Award.
24. REEFWA submits that Mr Fox has failed to produce probative evidence in this matter.
25. In support of the application a combination of witness statements and submissions have been filed.
26. An unsigned witness statement from Mr Stephen Finch being relied upon was originally filed in support of the 4-yearly review of modern awards (AM2016/6).
27. REEFWA submits that the unsigned statement from Mr Finch should be ignored as it was filed in a completely separate application which has already been determined upon by the Commission.
28. The second document relied upon is a letter dated 25 May 2020 from Mr Ralph Clarke (Industrial Advisor to RRESSA) to the Secretary to the Senate Committee.

¹ 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788, at 60.

² 4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues [2014] FWCFB 1788, at 60; Fair Work Act 2009 (Cth), s 134(1)(g).

29. The third document relied upon is a witness statement dated 4 June 2020 from Mr Fox himself.
30. Mr Fox's statement attaches "extracts from the ATO website and REEF website." These documents are to be given very little if any weight as they provide no context as to its purpose and further there is no authority of the authors of those documents upon which they can be relied.
31. Both of these documents (Mr Clarke and Mr Fox) are statements of opinion only and cannot be considered as factual evidence.
32. It is the view of REEFWA that the witness statements/submissions of Mr Finch, Mr Clarke and Mr Fox do not provide evidence that can be relied upon in these proceedings on the basis that:
 - a. the views expressed by the witnesses are opinion only and do not constitute factually based evidence;
 - b. the information is irrelevant to the purposes of this application:and as such it is our view that their statements should not be given any weight.

Conclusion

33. For the reasons cited above REEFWA submits that the application to the amendments being sought to the Award should be dismissed.

Submitted on behalf of the

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