REAL ESTATE EMPLOYERS' FEDERATION

Submission concerning Clauses 9.6(a) and 9.7(c)(i) of the exposure draft Real Estate Industry Award 2015

Matter No. 2016/6

27 July 2016

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1. INTRODUCTION

1.1 The Real Estate Employers' Federation ("**REEF"**) is a registered organisation of employers under the *Fair Work (Registered Organisations) Act* 2009. It has over 1,400 members in NSW, Victoria and the Australian Capital Territory.

1.2 The *Real Estate Industry Award* 2010 (the "**Award**") is an award to be reviewed in Group 3 of the Commission's 4-year award review process. On 18 December 2015, the Fair Work Commission (the "**Commission**") released an exposure draft of the Award (the "**Exposure Draft**").

1.3 In its statement dated 2 November 2015 in Matter Number AM2014/242, the Commission asked interested parties to provide "***comprehensive written submissions on the technical and drafting issues related to the exposure drafts in group 3***".

1.4 The Commission finalised the technical and drafting issues relating to the Exposure Draft with the exception of two issues which have been referred to this Full Bench in Matter Number 2016/6.[1] The two matters are:

(i) The notation to clause 9.6(a) in the Exposure Draft ("**Notation 1**") relating to the decision of the Commission in *Canavan Building Pty Ltd [2014] FWCFB 3202 (*"**Canavan**"); and

(ii) The notation relating to the term "real estate sales" found in clause 9.7(c)(i) of the Exposure Draft ("**Notation 2**").

1.5 REEF notes that Notation 1 is as follows:

In light of the Full Bench decision in Canavan Building Pty Ltd [2014] FWCFB 3202, parties are asked to comment on whether clause 9.6(a) is consistent with the NES.

1.6 REEF notes that Notation 2 is as follows:

Parties are asked to comment on whether the award should contain a definition of 'real estate sales'.

1.7 REEF makes this submission in respect to Notation 1 and Notation 2 in accordance with correspondence from His Honour President Ross[2] and the referral of these two matters to this Full Bench.

2. NOTATION 1

2.1 Clause 9.6(a) of the Exposure Draft is worded as follows:

> ***"(a) Any commission entitlement calculated in accordance with a commission-only agreement may also allow for annual leave and personal/carer's leave or any other entitlements under the NES to be paid in advance. Provided***

[1] Revised Summary of Submissions published by the FWC on 19 May 2016 in AM2014/242 – item numbers 10 and 14.
[2] Correspondence from Justice Iain Ross to REEF dated 21 March 2016.

that the monetary component for each of those entitlements must always be in addition to the minimum commission-only rate."

REEF notes that the above clause 9.6(a) in the Exposure Draft reproduces the current wording of clause 17.5(a) of the Award.

2.2 In general terms, the Commission is seeking comments from interested parties in relation to clause 9.6(a) because the clause provides for the payment of NES payments in advance to commission-only employees. Given the principle set out in Canavan that enterprise agreements cannot authorise pre-payment of annual leave in advance because payment of annual leave in advance is contrary to the *Fair Work Act* 2009 (the "**Act**"), clause 9.6(a) must now be considered against the reasoning in Canavan.

2.3 REEF wishes to make clear that it does not seek to challenge or overturn the principle laid down by the Full Bench of the Commission in Canavan.

2.4 However, REEF is aware that there are an unknown number of commission-only employees who are currently employed under written agreements which provide, *interalia*, for a portion of commission in excess of the minimum commission-only rate to be paid in advance of annual leave, paid personal/carer's leave or any other NES entitlement(s) and in reliance on the current clause 17.5(a) of the Award (or clause 9.6(a) of the Exposure Draft). Moreover, REEF is concerned that the number of commission-only employees presently employed under such written agreements may be relatively large.

2.5 In particular, REEF is concerned that should the Commission decide to simply abolish clause 9.6(a) of the Exposure Draft, it may result in industrial disruption for a significant number of commission-only employees and their employers. This is because the existing contracts of employment for many commission-only employees prescribe a commission-rate (higher than the minimum commission-only rate of 35%) calculated to include advance payment of annual leave, paid personal/carer's leave or any other NES entitlement(s). As a result, REEF is concerned that the abolition of clause 9.6(a) may

result in industrial disruption and confusion by rendering a significant number of such contracts as being:

(i) invalid or frustrated;

(ii) lacking in certainty; or

(iii) incapable of operating as intended.

2.6 Moreover, REEF is concerned that the abolition of clause 9.6(a) may require the replacement of a significant number of existing contracts of employment with revised contracts in order to remedy any technical deficiency or uncertainty. The challenge which will then confront the industry is how to facilitate the consequential replacement of any such contracts of employment with the consent of both employer and employee. This will arise from the need to 're-balance' agreed commission arrangements previously struck on the basis that 9.6(a) had lawful operation. Clearly the cure in this regard is neither simple nor straight forward.

2.7 Accordingly, if the Commission determines that clause 9.6(a) of the Exposure Draft is inconsistent with the NES, REEF respectfully proposes that the Commission endorse the clause set out in paragraph 2.18 of this submission as a replacement to the existing clause 9.6(a). REEF's proposed clause has been constructed with a view to providing a *"grandfathering"* arrangement which will allow for the lawful operation of existing commission-only arrangements as it relates to the payment of NES entitlements. Importantly, the proposed clause in paragraph 2.18 of this submission would only apply to commission-only employees who are employed on such a basis immediately prior to the change to the existing clause 9.6(a) of the Exposure Draft.

2.8 By way of background, we draw the Commission's attention to the history behind the origin of clause 9.6(a) of the Exposure Draft.

2.9 Firstly, it is noted that clause 9.6(a) of the Exposure Draft only applies to commission-only employees who are pieceworkers as defined by s. 21(1)(a) of the Act. In this regard the Act prescribes:

*"**A pieceworker is ….a national system employee to whom a modern award applies and who is defined or described in the award as a pieceworker…**"*

2.10 Clause 9.7(a) of the Exposure Draft, prescribes that "***an employee engaged in a property sales classification may agree with the employer to be paid on a commission-only basis. Such an employee is considered a pieceworker, and is referred to in this award as a commission-only employee.***" It therefore follows that commission-only employees (correctly classified under the Award) are "*pieceworkers"* for the purposes of the Act.

2.11 Paragraphs 43 to 45 of the Minister's final consolidated Award Modernisation Request to the Australian Industrial Relations Commission (the "**AIRC**") stated that:

"43. The NES apply to a pieceworker.

*44. The NES rely on modern awards to define a piece worker and **set out rules relating to the payment of NES entitlements (based on ordinary hours of work) for a piece worker**.*

45. In modernising awards, the Commission must have regard to whether it is appropriate to include:

(a) a definition of piece worker in a modern award that applies to these types of employees (if an employee is employed on the basis of hours worked, it is not expected that such employees would be defined as piece workers); or

(b) *a provision that would provide a calculation of payment, a payment rate, or **a payment rule in relation to a piece worker employee with respect to paid leave or paid absence under the NES**. For example, a method of making payment to a piece worker employee when that employee is absent on annual leave. Any provisions setting out a calculation payment must take into account the various methods by which a piece worker may be*

remunerated under the modern award, including by incentive payments or bonuses."[3] (emphasis added)

2.12 In paragraphs 5 and 6 of its statement dated 22 May 2009, the Full Bench of the AIRC (the "**May 2009 Statement**") observed:

> ***[5]*** *…. There is, however, one matter of importance which requires attention in connection with a number of Stage 3 awards. That matter concerns piecework and in particular the calculation of pay for pieceworkers during paid leave provided for in the NES, including annual leave.*
>
> ***[6]*** *We note that while a number of pre-reform awards and Notional Agreements Preserving State Awards (NAPSAs) provide for piecework it is rare that the conditions of pieceworkers are not based in one respect or another on time. Typically piecework rates are based in some way on the quantity which could be produced by an average employee. This is in many cases subject to a minimum payment contained in a stipulation that the weekly remuneration of a pieceworker cannot fall below a particular amount fixed as a percentage above the ordinary pay for the relevant classification. It may be that an employee working under such provisions should be treated as a timeworker for the purpose of calculating pay while on leave. We also note that many pre-reform awards and NAPSAs do not exclude pieceworkers from the requirements governing ordinary hours of work. In those cases the view might be taken that any piecework should be dealt with by overaward arrangements. Among the industries in which these issues arise in Stage 3 are the wine industry and the timber industry. Where, on the other hand, there is provision for the establishment of a piecework rate but no provision for a minimum payment based on timework or for the application of ordinary hours, an averaging approach may be appropriate in calculating paid leave.* ***Another possibility is to include a component in the piecework rate which is referable to paid leave.*** *There may be other alternatives. We do not think these matters have as yet been adequately discussed. The variation to the consolidated request emphasises the need for such discussion…"*[4] *(emphasis added)*

2.13 The making of the Award was undertaken by the AIRC as part of the Stage 4 industries/occupations in the award modernisation process. After considering the Award Modernisation Request and the May 2009 Statement, REEF made a submission to

[3] Request under Section 576C(1) – Award Modernisation (Consolidated Version) 26 August 2009 – page 10
[4] AIRC Statement - re the exposure drafts of the Stage 3 modern awards – dated 22 May 2009

the Full Bench of the AIRC in which it filed a draft Real Estate Industry Award. The draft award was filed by consent of all major industry stakeholders (both employer and union). Following conference proceedings before the AIRC on 10 August 2009, the stakeholders re-drafted clause 17.5 to address a concern expressed by Senior Deputy President Harrison that the proposed clause lacked clarity concerning the payment rate for calculating NES entitlements for commission-only employees. Accordingly, a revised provision was filed for the AIRC's consideration that prescribed a "payment rule" for NES entitlements for commission-only employees in the following terms:

17.5 Inclusions

(a) Any commission entitlement calculated in accordance with a written agreement may be inclusive of an amount to satisfy the employer's obligation to pay occupational superannuation on the employer's behalf in accordance with the relevant Federal legislation.

(b) Any commission entitlement calculated in accordance with a commission-only agreement may also allow for annual leave and personal carer's leave to be paid in advance.

(c) For a commission-only employee, the entitlements under sub-clauses 17.5(a) and 17.5(b) must always be in addition to the Minimum Commission-Only Rate. In relation to sub-clause 17.5(b), the additional amount must at least equal 1/13th of the Minimum Commission-Only Rate as an advanced payment for annual leave and an amount at least equal to 1/26th of the Minimum Commission-Only Rate as an advanced payment for personal leave.

(d) The amounts referred to in sub-clause 17.5(a) must be paid directly by the employer into the employee's nominated superannuation fund.

17.6 Clarification

For the avoidance of doubt:

(a) any payments under sub-clauses 17.5(a) and 17.5(b) do not in any way avoid or cash out the employee's entitlement to take accrued leave under the Act.

(b) given that payment has been made in advance for such leave, further payment(s) for leave will not be made at the time that leave is taken.

(c) the application of sub-clauses 17.5(a) and 17.5(b) must be clearly set out in a written agreement.

(d) when an employee takes a type of leave referred to in sub-clause 17.5(b) or has accrued annual leave on termination of employment, the employer must ensure that the amounts the employee has been paid in advance for annual leave and personal/carer's leave, at least equals the entitlement calculated on the employee's Base Rate of Pay as defined under this award.

2.14 The Full Bench of the AIRC subsequently issued a statement dated 25 September 2009 (the "**September Statement**") to which it attached an exposure draft of the Real Estate Industry Award[5]. The exposure draft contained a clause 17.5 in the following terms:

17.5 Calculation of NES entitlements

(a) Any commission entitlement calculated in accordance with a commission-only agreement may also allow for annual leave and personal carer's leave or any other entitlements under the NES to be paid in advance. Provided that the monetary component for each of those entitlements must always be in addition to the minimum commission-only rate.

(b) Any inclusions as referred to in clause 17.5(a) must be clearly set out in a written agreement.

(c) The base rate of pay in relation to entitlements under the NES for an employee, who is paid on a commission-only basis, is the minimum wage in clause 14.1 for the employee's classification level.

[5] AIRC Statement – re the exposure drafts of the Stage 4 modern awards - 25 September 2009

(d) The full rate of pay in relation to entitlements under the NES for an employee, who is paid on a commission-only basis, is the minimum wage in clause 14.1 for the employee's classification level plus 35%.

In paragraphs 175 and 176 of the September Statement, the Full Bench noted:

> *[175] …. We have not put cl.17.5(a) and (d) as contained in the real estate parties' draft in the exposure draft. It is not entirely clear what those clauses mean and how the superannuation calculation for a commission-only employee is to be made for the purposes of an employer's contributions. We think it better this be left for the superannuation legislation to operate and for employers to comply with such provisions as may relate to an employee remunerated in this way rather than to provide for it in the modern award.*
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> *[176] We would be assisted if the parties would again consider the calculations for NES entitlements for these employees and, in doing so, the piecework provisions in the FW Act and the consolidated request. On a provisional basis we have accepted the parties' submissions that it is open to them to agree to incorporate these entitlements into commission-only payments as and when they are made. As noted, a definition of base and full rate of pay has been put into cl.17 and submissions are invited about those provisions. We have also made it clear that any NES entitlements must be in addition to the minimum commission-only rate.*

2.15 In its submission to the AIRC, the real estate parties sought an amendment to the AIRC's definition of "*full rate of pay*" for commission-only employees.

2.16 The Full Bench of the AIRC handed down the Award (in its final form) on 4 December 2009. The Award adopted the proposed definitional change to "*full rate of pay*" and it also maintained the inclusion of the AIRC's amended clause 17.5(a) (Clause 9.6(a) of the Exposure Draft).

2.17 As previously stated, REEF does not ask the Commission to review or overturn the principle laid down by the Full Bench in Canavan.

REEF'S proposed amended Clause 9.6(a)

2.18 If the Commission finds that clause 9.6(a) of the Exposure Draft is inconsistent with the NES and with a view to minimising any industrial disputation or confusion that may result from the possible abolition of the clause, REEF respectfully requests that the current clause 9.6(a) be deleted and the following clause be inserted in lieu thereof:

> *9.6(a)(i) From [insert date of variation], existing written agreements for commission-only employees which provide for a commission component in excess of the minimum commission-only rate (**"excess commission"**) to be paid in advance of annual leave, paid personal/carers leave or any other NES entitlement(s), will from [insert date of variation], operate on the basis that any excess commission paid is permitted to be deducted from any future annual leave, paid personal/carers leave or any other NES entitlement(s) which become due and payable after an amount of excess commission has been paid.*
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> *9.6(a)(ii) For the avoidance of doubt, the authorisation in clause 9.6(a)(i) above does not apply to any employee who was:*
>
> - *not employed on a commission-only basis on or before [insert date of variation]; or*
> - *employed on a commission-only basis on or before [insert date of variation], but whose written agreement on [insert date of variation] did not provide for excess commission to be paid in advance of annual leave, paid personal/carers leave or other NES entitlement(s)"*

The legislative power for the re-worded clause 9.6(a)

2.19 REEF contends that there is legislative jurisdiction for the Commission to make the abovementioned variation pursuant to s.324(1)(c) of the Act which states that:

> *324 (1) An employer may deduct an amount from an amount payable to an employee in accordance with subsection 323(1) if:*

…..

(c) the deduction is authorised by or under a modern award or an FWC order;"

Importantly, s.324(1)(c) of the Act expressly allows for permitted deductions contained in a modern award to be made from amounts which are payable to an employee under s.323(1) of the Act provided that the deductions do not contravene s.325 or s.326 of the Act. Moreover, the statutory note 2(e) to s.323(1) of the Act makes clear that "*leave payments*" are one of the payments that must be paid in accordance with s 323(1). It therefore follows that s.324 permits a modern award to contain a term allowing for permitted deductions to be made from leave payments.

2.20 Most modern awards contain a term allowing for a "*permitted deduction*" from termination pay in circumstances where an employee fails to work out the required notice of termination. Such termination pay may include annual leave which would otherwise have been paid out on termination of employment.

2.21 REEF also notes that s 55(2) of the Act provides that:

"A modern award or enterprise agreement may include any terms that the award or agreement is expressly permitted to include:

(a) by a provision of Part 2-2 (which deals with the National Employment Standards);…"

Section 93(4) of the Act is headed – *Terms about taking paid annual leave* – and prescribes that: "*A modern award or enterprise agreement may include terms otherwise dealing with the taking of paid annual leave."*

2.22 As such, REEF further submits that pursuant to s. 55(2) of the Act, the Commission has statutory power to make the proposed variation to clause 9.6(a) as set out above, as it is a permitted term in accordance with s. 93(4).

2.23 If endorsed by the Commission, the re-worded clause 9.6(a) will operate to enable NES payments paid to a commission-only employee through the agreed excess commission

rate, to be an authorised deduction pursuant to s.324(1)(c) from the NES entitlement as it becomes due and payable.

2.24 The calculation and reconciliation of any NES entitlement(s) at the time it is due to be paid, will in REEF's submission, not offend the principle set out by the Full Bench in Canavan.

2.25 REEF commends the proposed variation to clause 9.6(a) above, on the basis that if adopted by the Commission it would:

(a) be limited to existing commission-only employees who already have written agreements which rely on the current clause 17.5(a) of the Award as at the date the award clause is varied;

(b) avoid any potential inconsistency with the NES, the Act or the decision of the Full Bench in Canavan through the application of s.324(1) of the Act;

(c) help to avoid or minimise any industrial disputation or confusion arising from the abolition of clause 9.6(a) of the Exposure Draft because of the consequential effects on the contracts of employment of commission-only employees;

(d) operate with a limited life; and

(e) help promote "*harmonious and cooperative workplace relations*" in accordance with s.577(d) of the Act.

3. NOTATION 2

3.1 Clause 9.7(c)(i) in the Exposure Draft provides a description of the performance based test (the "*Minimum Income Threshold*") that must be satisfied in order for an employee to qualify to be engaged on a commission-only basis. This test assesses the sales performance of the employee over a 12-month period by applying the proposed commission-only commission rate against the "***real estate sales***" of the employee in the selected 12-month period.

3.2 In 2013, REEF engaged in discussions with the Fair Work Ombudsman (the "Ombudsman") about its concerns that the reference to the term "*real estate sales*" in connection with the Minimum Income Threshold was without any clear definition. The Ombudsman expressed the view that this lack of clarity was causing confusion in advising employees about their employment entitlements. The Ombudsman formed its own interpretation as to the meaning of the term 'real estate sales' where it considered the term referred to the sale price of the property sold by the employee.

This was different to the interpretation held by the industry stakeholders who participated in the making of the Award and who considered the term to be referable to the employer's net commission received from the sale.

3.3 The Commission is advised that as part of the 4-year award review process most of the major industry stakeholders (both employer and union) have entered into a Heads of Agreement (the "HOA") concerning agreed and non-agreed changes to the Award. This HOA has been filed with the Commission. As part of the discussions which led to the signing of the HOA, the issue of the Minimum Income Threshold was extensively canvassed.

3.4 It was agreed by the major industry parties (which is reflected in the terms of the HOA) that the Minimum Income Threshold should be modified to eliminate the mathematical 'gymnastics' demanded by the present clause. The revised definition of the Minimum Income Threshold which has been proposed by the major industry parties will, if adopted by the Commission, resolve the matter raised in Notation 2 as the term "*real estate sales*" would no longer be contained in the Award.

3.5 In the event that the Commission decides not to adopt the amendment to clause 9.7(c) proposed by the parties in the HOA, REEF would seek to make verbal submissions in respect to Notation 2.

REEF thanks the Commission for the opportunity to make this submission.