

## **S.156 – Four Yearly Review of Modern awards**

### **Submissions in respect to Transitional Provisions of Modern award IN FAIR WORK COMMISSION**

**FWC Matter No.: AM2016/6**

**Award: Real Estate Industry Award 2010 (MA000106)**

1. The Real Estate Employers' Federation of Western Australia (REEFWA) is an association of real estate employers in Western Australia. Through a commercial arrangement with the Chamber of Commerce & Industry Western Australia (CCIWA), its members enjoy the membership benefits of CCIWA.
2. On 6 July 2017, the Full Bench of the Fair Work Commission issued its preliminary decision where, in summary, it provisionally determined to<sup>1</sup>:
  - (a) Grant the increase claimed by RRESSA to the minimum REI Award rate for Property Sales Representatives to \$783.30 per week with effect from 1 January 2018, subject to the views of the parties in relation to operative date for this increase.
  - (b) Provide the parties with a further opportunity to agree on the relativities for other classifications in the REI Award with reference to the new rate for Property Sales Representatives.
  - (c) Set the MITA for entry into commission-only employment arrangements at 25% of the minimum REI Award rate for salespersons classifications.
  - (d) Insert a provision into the REI Award requiring that the gross income of commission-only salespersons be reviewed annually and that if that income falls below the MITA the employee cannot continue to be employed on a commission-only basis.
  - (e) Insert a provision into the REI Award requiring that where an employee who has ceased to be a commission-only salesperson by reason of not meeting the MITA, seeks to subsequently enter into a further commission-only arrangement, the three year period over which an assessment of whether the employee has met the MITA commences no earlier than the date the employee ceased to be a commission-only employee.

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<sup>1</sup> [2017]FWCFB 3543 at para 131

- (f) Amend the provisions of the REI Award dealing with the minimum commission-only rate so that it is calculated as 31.5% of the employer's gross commission.
  - (g) Amend the provisions of the REI Award with respect to payment for NES leave entitlements to make clear that employees must be paid for leave at the time it is taken at a minimum of the base rate of pay prescribed for the employee's classification under the Award.
  - (h) Amend the REI Award to make clear that commission-only employees must not be engaged on a casual basis.
3. On 2 August 2017, the Full Bench issued directions requiring interested parties to file any further written submissions in relation to the proposed variations by 16 August 2017.
  4. REEFWA, being an association of employers in the real estate industry has a strong interest in the outcome of the Fair Work Commission's review of the *Real Estate Industry Award 2010* (REI Award) and as such has had an extensive involvement in this matter, participating since the review's inception and as such provides the following submissions.

Increase in Minimum Wages for Property Sales Representatives

5. REEFWA agrees with, adopts and supports the submissions of the Real Estate Employers' Federation (REEF) on this issue contained in paragraphs 2.1-2.64, including the schedules. It also wishes to make the following submissions in addition.
6. The experience in Western Australia is that employees who have not yet qualified to be paid on a commission only basis are mainly engaged as per the REI Award and are paid commissions for the sales of real estate properties on top of their entitlements under the REI Award using a calculation that provides for the deduction of REI Award entitlements from the commission. This is commonly referred to as a debit/credit basis.
7. Whilst REEFWA acknowledges the statement of the Full Bench at paragraph 89 of its decision when it states;  
*We accept that prima facie this is a significant increase. However, on the basis of the evidence before us we are satisfied that it will be offset because it will be absorbed into commission, bonus or incentive payments currently paid to a significant number of Property Sales Representatives.*
8. The witnesses from whom the evidence referred to by the Full Bench in paragraph 89 of its decision also gave the following evidence.
9. Mr Kuhne advised that he employed two property sales representatives who were paid on a debit/credit basis. One had approximately four months' experience in the industry and earned the award wages only.<sup>2</sup>
10. The other property sales representative had two years' experience and earned \$45000-\$50,000 in the year.<sup>3</sup>
11. Mr Burns gave evidence that the property sales representative that he employed on a debit/credit basis had six years' experience and earned \$75,000.<sup>4</sup>

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<sup>2</sup> PN797 – Transcript 21 November 2016

<sup>3</sup> PN797 and 798 – Transcript 21 November 2016

<sup>4</sup> PN1102 – Transcript 22 November 2016

12. Ms Kikianis gave evidence that she employed two property sales representatives on a debit/credit basis, one has been in her employ approximately four years and the other approximately 11 years.<sup>5</sup> These two property sales representatives earned approximately \$95,000 and \$110,000 respectively.<sup>6</sup>
13. Mr Harvey gave evidence that he employs six property sales representatives and their salaries ranged from \$50,000 to over \$100,000.<sup>7</sup> Whilst he didn't give evidence in relation to the length of service of these employees, he does discuss the provision of long service leave<sup>8</sup> and given the vast range in salaries, it would not be difficult to deduce that this range would be the result of experience.
14. Thus, whilst REEFWA accepts that there was some evidence before the Full Bench that an increase in the minimum wage will be offset and absorbed into payment of commission, that evidence needs to be viewed in context of;
  - (a) The evidence was from four out of the thousands of real estate employers in Australia
  - (b) Those property sales representatives earning above award salaries had significant experience of between two and eleven years in the industry and as such have had time to build customer lists, databases and sales techniques
  - (c) There was evidence that a property sales representative with little experience was only being paid award wages and allowances.
15. Mr Whiteman gave evidence to the Full Bench that he elaborated upon in cross examination, that in his experience, new salespersons require at least six months' experience before they are able to successfully list and sell properties and at least twelve months' experience before they are successfully selling enough properties to cover their wages and allowances.<sup>9</sup>
16. It then follows that there will be a period of at least twelve months before the significant increase in the minimum wage for property sales representatives that the Full Bench has preliminarily decided to award property sales representatives whereby the employer is required to absorb the increase before it can be offset against commissions.
17. Therefore, the assumption of the Full Bench at paragraph 89 of its decision is not correct for employers engaging property sales persons with no prior experience who will need to bear the full brunt of the increase awarded for at least a twelve-month period, if not longer.
18. S.134 of the *Fair Work Act 2009*, sets out the objective for modern awards, being to "*provide a fair and relevant minimum safety net of terms and conditions*" and requires the Commission, when deciding what are fair and relevant safety net of conditions, to consider certain factors specified in s.134(1).

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<sup>5</sup> PN1512 – Transcript 22 November 2016

<sup>6</sup> PN1521 and PN1522 – Transcript 22 November 2016

<sup>7</sup> PN1595 and PN1601 – Transcript 22 November 2016

<sup>8</sup> PN1616 – Transcript 22 November 2016

<sup>9</sup> Paragraph 23 of the witness statement of Mark Whiteman and PN996-PN1000 – Transcript 21 November 2016

19. S.134 (1) of the *Fair Work Act* 2009 states;
- (1) *The FWC must 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:*
- (a) *relative living standards and the needs of the low paid; and*
  - (b) *the need to encourage collective bargaining; and*
  - (c) *the need to promote social inclusion through increased workforce participation; and*
  - (d) *the need to promote flexible modern work practices and the efficient and productive performance of work; and*
  - (da) *the need to provide additional remuneration for:*
    - (i) *employees working overtime; or*
    - (ii) *employees working unsocial, irregular or unpredictable hours; or*
    - (iii) *employees working on weekends or public holidays; or*
    - (iv) *employees working shifts; and*
  - (e) *the principle of equal remuneration for work of equal or comparable value; 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.*
20. Parliament has not ranked these factors in any order of preference or importance and thus, REEFWA submits that all of these factors in s.134(1) are of equal importance and all must be taken into consideration by the Full Bench.
21. There is evidence before the Full Bench that any increase in the minimum wage will have an effect on the employment within the real estate industry. This evidence goes towards factors 134(1)(c), (f) and (h), which must be taken into consideration by the Full Bench in equal importance as the factors that support the increase in the minimum wage.
22. Therefore, REEFWA submits that as per the position of REEF, in order to reduce the effect on employers of the significant increase in minimum wages the Full Bench proposes, the increase needs to be introduced in the stages outlined in Schedule B of its submissions.

## Increase in MITA to 125% of minimum wage

23. In its statement of 17 March 2014, this Full Bench observed

*“The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s.134(1)(g)). The need for a ‘stable’ modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.”*

24. REEFWA respectfully submits that the preliminary decision of the Full Bench to increase the MITA from 110% is a significant change and that no evidence was adduced by RRESSA or before the Full Bench nor did the Full Bench refer to any such evidence in support of its decision to increase the MITA to 125% from 10%.

25. REEFWA recognises that other employer groups do not object to the increase in the amount a real estate salesperson must make in commissions in order to qualify as a commission only salesperson.

26. However, this agreement by other parties does not dissolve the onus on RRESSA, as the proposing party, to demonstrate the necessity of this proposal, through probative evidence.

27. There is no evidence adduced, never mind on a national level, whereby real estate salespersons, who have qualified to be employed as commission only salespersons, have then struggled to survive and earn a living.

28. RRESSA have merely only relied on its own submissions that in its own view, it is necessary for this threshold to be increased.

29. On the other hand, evidence has been adduced, via the witness statements of Peter Kuhne and Mark Whiteman, of the negative effective this proposal will have on the labour market in Western Australia. S.134(10) of the *Fair Work Act 2009* requires the Commission to have regard to costs of employment and the effect that any proposed inclusion to an award will have on employment in the industry.

30. Whilst it is acknowledged that Mr Kuhne and Mr Whiteman’s evidence only relate to Western Australia, REEFWA points out that this is irrelevant as the onus is not on REEFWA to demonstrate that the proposed increase of the income threshold is not appropriate, the onus is in fact on RRESSA to demonstrate the proposed increase is necessary.

31. Thus, REEFWA vigorously opposes the preliminary decision of the Full Bench to increase the MITA to 125% and respectfully points out this Full Bench has acted against its own rules set in 2014.

32. As previously stated by REEFWA, the onus was on both RRESSA and APSA to demonstrate that its proposed change to MITA was supported by probative evidence demonstrating what has occurred since this Award was created that make it necessary for the proposed change to MITA be included in the award.

33. In REEFWA’s view, RRESSA did not successfully discharge this onus and the Full Bench’s preliminary decision to increase the MITA to 125% of minimum wage should not be implemented.

34. REEFWA also notes the Commission's preliminary decision to insert a provision into the REI Award requiring that the gross income of commission-only salespersons be reviewed annually and that if that income falls below the MITA the employee cannot continue to be employed on a commission-only basis.
35. Whilst REEFWA did not oppose this proposal at hearing, it respectfully points out that this proposal is also a significant change and there is no evidence, never mind of a probative nature to support this change.
36. However, whilst making the above statement, should the Full Bench make its proposed change, REEFWA adopts and supports the submissions made by REEF in paragraphs 3.7-3.13 of its submissions and would be able to adduce evidence to support these submissions if required by the Full Bench.
37. Furthermore, as submitted by REEF, it is an attractive feature of commission-only employment to employees that there is a significant flexibility in how long and when they work. It is therefore, not that uncommon for commission only employees to structure their finances to enable them to take significant periods of time off to go on holiday or study.
38. If the Full Bench were to make the proposed amendment to the Award, these employees would be penalised by not being able to continue their employment on a commission only basis and so this is a further reason that the amendment to the proposal of the Full Bench as advocated by REEF should be made.

#### Casual Employees

39. Clause 16.2(e) of the current Award prohibits the engagement of casual employees on a commission only basis. This has been replicated in clause 5.4(d) of the Exposure Draft.
40. Thus, REEFWA opposes any further amendment to the Award in relation to casual employment as suggested by the Full Bench in its decision.
41. However, despite paragraph 35 above, REEFWA notes that at paragraph 108 of its preliminary decision, the Full Bench stated

*We have also formed an in-principle view that commission-only employees should not be employed on a casual basis and that the REI Award provision in relation to the MITA should make this clear. If there is a capacity to employ commission-only employees as casuals, then consideration will need to be given to the manner in which the MITA will reflect the casual loading which would be payable to such employees in lieu of leave and other entitlements. The parties should consider these matters and provide their views in relation to them.*

42. Whilst REEFWA, in the substantive hearing, did not press for any inclusion of casual commission only arrangements, it has considered the matters raised by the Full Bench and so takes this opportunity to make comment on this issue.
43. REEFWA agrees with, adopts and supports the submissions of the Real Estate Employers' Federation (REEF) on this issue contained in paragraphs 3.4-3.6. It also wishes to make the following submissions in addition.
44. In REEFWA's view, there should be no contest to the fact that Western Australia is Australia's largest state. It has a total land area of 2,529,875 km<sup>2</sup> (inclusive of Christmas Island)<sup>10</sup> and a population of 2,567,800 people, which is 10.5% of the Australian population.<sup>11</sup>

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<sup>10</sup> <http://www.ga.gov.au/scientific-topics/national-location-information/dimensions/area-of-australia-states-and-territories#heading-1>

<sup>11</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>

45. Of Western Australia's population, 78% live in the capital, Perth, leaving the remainder scattered around the rest of the state.<sup>12</sup> This means that there are a large number of regional towns with a small population, which in turn means less housing is required to accommodate the people living in these towns and less properties that are available to sell.
46. There would therefore be many towns throughout the state whereby permanent employment would not be economically viable for employers due to the very small amounts of properties. As an example, Christmas Island is one of these remote areas.
47. To the best of REEFWA's understanding, approximately ten properties per year are sold on Christmas Island.
48. The median price for a house in Christmas Island is \$345,000.<sup>13</sup> Assuming that there was only one real estate sales representative on the island and a vendor commission of 2%, the employer of that real estate sales representative could expect an income of only \$62,727 (exclusive of GST) from which all the costs of employment would need to be deducted such as wages, commission, taxes, insurances etc. There would be very little profit to be made unless the vendor commission rate were to be increased.
49. An increase in vendor commission would have an effect on the amount of properties that are likely to be sold.
50. On the other hand, casual commission only employment would enable employers to engage a qualified, professional salesperson such as those outlined in the REEF submissions, which given the lesser cost of employment for commission only would keep the vendor commission rates competitive, without passing on costs to vendors.
51. In fact, in these circumstances, it is only when the employer itself receives income from the sale of the property that it will incur the cost of employing the casual commission only sales representative. Thus, it will be more viable for the employer to employ the sales representative, which in turn would enable the community to be serviced by professional licensed real estate sales persons.
52. Furthermore, REEFWA opposes the insertion of the model casual conversion clause as outlined in the decision of the Full Bench of the Fair Work Commission.
53. REEFWA asserts that casual employment in the real estate industry is rare and is only applied when it suits the employee and employer.
54. Furthermore, to REEFWA's knowledge, there have been no incidents whatsoever of employees wanting to convert to part time and employers refusing those requests.
55. REEFWA would be happy to adduce evidence at a hearing to support these submissions should the union parties disagree and it be necessary.

#### Exposure Draft

56. REEFWA adopts and supports the submissions of REEF in paragraphs 4.1-4.5 of their submissions.

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<sup>12</sup> <http://www.abs.gov.au/ausstats/abs@.nsf/Lookup/1306.5main+features32014#Demography>

<sup>13</sup> <https://reiwa.com.au/wa/christmas-island/6798/>

Conference

57. REEFWA agrees with RRESSA and REEF that there would be value in the parties participating in a conference before Asbury DP. To assist Asbury DP in scheduling, REEFWA is not available on the following dates;

- 29-31 August 2017
- 4-6 September 2017
- 11-12 September 2017
- 25-29 September 2017



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Filed on behalf of the Real Estate Employers' Federation of WA by  
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