

IN THE FAIR WORK COMMISSION

MATTER NUMBER: AM2016/6

s. 156 - 4 Yearly Review of Modern Awards

Real Estate Industry Award 2010

Further Submissions of the Real Estate Institute of Victoria

Overview

1. Between 21 and 23 November 2016, a hearing was held before the Full Bench of the Fair Work Commission in its award modernisation processes regarding proposed substantive changes to the Real Estate Industry Award 2010 (**Award**), to be implemented in the proposed Real Estate Industry Award 2015 (**2015 Award**). SIAG Legal represented the Real Estate Institute of Victoria (**REIV**) at the hearing.
2. During the hearing, the Full Bench raised three propositions with respect to the engagement of commission only employees (collectively, the "**Propositions**") as possible matters to be included in the 2015 Award. The Propositions are, in summary:
 - A. Whether the commission only payment system should be clarified so that rather than providing for 35% of, in effect, the minimum 90% of the gross commission, whether the award should simply say that in all circumstances a commission only sales person must receive a minimum, an absolute

minimum of 31.5% of the gross commission, and that written agreements entered into in relation to commission only employees should make that the minimum in the contract to repeat the award requirement (**Proposition A**).

B. Whether in respect of commission only sales persons there should be a requirement that on an annual basis their gross income be reviewed and if that review reveals that their income is below the award minimum wage on an annualised basis that they cannot continue to be paid under the commission only system (**Proposition B**).

C. Whether the award in relation to commission only sales persons should contain something in the nature of an objective statement that would say something to the effect that:

*The purpose of the commission only payment system is to enable the average competent sales person to earn at least 15% in excess of the minimum weekly wage rate on an annualised basis (**Proposition C**).*

3. During the hearing, Counsel representing the Real Estate Employers' Federation and the Queensland Real Estate Industrial Organisation of Employers provided to the Full Bench and the parties with a draft proposed clause in respect of the Propositions (**Draft Clause**).

4. The REIV makes further submissions concerning the Propositions and Draft Clause as set out below.

Submissions in respect of the Propositions

5. As submitted by Counsel during the hearing, the REIV broadly agrees with the Propositions and does not oppose amendments regarding commission only arrangements to give effect to the Propositions being reflected in the 2015 Award.

6. As to Proposition A:

- a. The REIV submits that the method of calculating the minimum commission by reference to the employer's gross commission, as opposed to the employer's net commission, simplifies the calculations to be undertaken by employers when deriving an employee's net commission.
- b. The requirement that the arrangement be evidenced in writing between the parties is consistent with the existing obligations provided by Clause 16.2(a) of the Award.

7. As to Proposition B:

- a. The REIV draws to the attention of the Full Bench the practical implications of the 2015 Award precluding an employee from being engaged on a commission only basis where there are existing contractual arrangements in place. The REIV submits that where an existing commission only employee is precluded by the 2015 Award from being engaged pursuant to a commission only arrangement, the employee's employment should not consequentially terminate.
- b. The REIV observes that if the Award requires that a fundamental basis on which an employee is contractually engaged to work – namely, commission only – must cease, it is likely that the contract would be frustrated by operation of law (i.e., the Award term, given effect by the Fair Work Act). That is because the basis of payment is likely to be regarded as an essential or fundamental term of the contract between the parties and if that term is denied any effect by the Award, frustration of the whole contract is the likely result.
- c. If a clause giving effect to Proposition B is included in the 2015 Award, the REIV submits that the clause must be drafted with sufficient specificity, so as:
 - i. to identify that termination of commission-only payment structures does not terminate the employment relationship; and

- ii. to provide the ongoing manner in which the employee would be remunerated, on the assumption that the employment relationship continues notwithstanding the Award-mandated cessation of the commission only arrangement.

The REIV makes further submissions below regarding amendments to the Draft Clause, including making provision for “grandfathering” arrangements taking into account the interaction between the Award and contractual arrangements.

- d. The REIV submits that should the Full Bench determine to include such a provision in the 2015 Award, its inclusion obviates any need to grant the application made by the Australian Property Services Association (**APSA**) to vary clause 16 of the Award so as to provide for bi-annual top up payments for commission-only employees where their remuneration falls below the minimum rate of pay provided by the Award. The REIV submits that, in conjunction with the implementation of Proposition C and the Draft Clause as amended below (**REIV’s Draft Clause**), an annual review of remuneration provides a sufficient safety net for commission only employees.

- 8. The REIV agrees with Proposition C being implemented.

Submissions in respect of the Draft Clause

- 9. The REIV submits that the Draft Clause provides insufficient clarity regarding the ongoing employment of the employee should they become ineligible to be engaged on a commission only arrangement. The REIV submits that the Draft Clause may cause confusion for employers and employees who may readily equate the cessation of commission only payment arrangements with the cessation of the employment relationship.
- 10. Given the concerns identified above, the REIV submits that it would be appropriate to grandfather the implementation of any clause in the 2015 Award giving effect to Proposition B. The REIV asks the Full Bench to consider the following issues:
 - a. the ability of a provision in an industrial instrument to terminate contractual arrangements entered into separately from that instrument;

- b. whether the contractual arrangements would be frustrated by the implementation of Proposition B, or whether the employer would be deemed to have terminated the contractual arrangements if giving effect to Proposition B;
- c. if the commission only engagement is considered to be an essential or fundamental part of the contractual arrangements, whether frustration of the remuneration arrangements thereby frustrates the employment relationship.

11. To address the REIV's concerns, the REIV has amended the Draft Clause and submits that the alternative wording provided by the REIV's Draft Clause at Annexure A is appropriate. The REIV's Draft Clause:

- a. expressly states that the employment relationship continues notwithstanding the loss of an employee's eligibility to be remunerated on a commission only basis;
- b. addresses commission that may be payable to the employee pursuant to the commission only arrangement, notwithstanding the cessation of same;
- c. provides the clause does not operate retrospectively to commission only arrangements made prior to the commencement of the clause; however, provides a date by which an employer and employee must review and vary existing arrangements to ensure compliance.

12. The REIV submits that the REIV's Draft Clause gives practical effect to the Propositions.

13. The REIV understands the Full Bench anticipates publishing a further exposure draft regarding the proposed 2015 Award. The REIV will make further submissions in due course in respect of the Propositions and relevant drafting.

7 December 2016

Service Industry Advisory Group (Legal) Pty Ltd
on behalf of the REIV

ANNEXURE A - REIV's Draft Clause

9.7 Commission-only employment

9.7(a) The objective of Commission-only employment

- (i) Commission-only employment as provided for under this clause reflects the unique incentive-based remuneration structure within the real estate industry.

The objective of this clause is that an employee engaged on a commission-only arrangement should be able to achieve at least 115% of the wage rate specified in clause [insert] – Minimum weekly wages, for the employee's classification.

- (ii) In the 12 months from the commencement of a commission-only arrangement, and for each subsequent 12 month period, if a commission-only employee earns less than the wage rate specified in clause [insert] – Minimum weekly wages (excluding any periods of leave without pay or unauthorised absences in which circumstances the assessment will be on a pro-rata basis), for the employee's classification, the commission-only arrangement will cease.
- (iii) The employee's employment will continue, subject to this Award, and the employee will be entitled to receive commission in accordance with any subsequent written agreement made under sub-clause 9.1(a) of this Award.
- (iv) The employer must ensure that an employee, whose commission-only arrangement has ceased due to the operation of this clause, receives commission payments in accordance with the commission-only agreement for any property for which there was a legally enforceable contract in place for the sale of a property before the commission-only arrangement ceased.
- (v) This clause does not operate retrospectively with respect to commission-only arrangements that were made prior to the commencement of this clause (**existing arrangement**). However, an employer party to an existing arrangement must, no later than [insert date], review the commission only-arrangement and, where necessary, amend it to ensure compliance with this clause, where the commission-only employee requests and agrees to such an amendment.