

**Vice President Hatcher**

**Fair Work Commission**

**c/- email address**

**14<sup>th</sup> September 2018**

**Re Submission to Full Bench of FWC - 4 Yearly Review of Real Estate Award 2010, in particular FWCFB Directions dated 31<sup>st</sup> July 2018 – AM2016/6**

1. The Real Estate Salespersons' Association of SA (RESSA) fully supports the provisional findings of the Full Bench in its decision dated 6<sup>th</sup> July 2017 ([2017] FWCFB 3543) and which was further referred to in a subsequent decision of the Full Bench in its decision of 29<sup>th</sup> March 2018 ([2018] FWCFB 1882, re the employment of commission – only salespersons on a part time or casual basis as being, “.. neither useful nor relevant..”.

It is not the intention of RESSA to call witnesses in support of its position, unless in rebuttal if required, as a result of any witness statements submitted by employer bodies in opposition to the Full Benches provisional view on this matter.

2. The determination of the Full Bench issued on the 29<sup>th</sup> March 2018 makes it clear that casual commission – only employees are not permitted. Therefore the only substantive issue left from the 4 year review of the award is the usefulness or relevance of employing them on a part time basis. To these questions RESSA view is that they are not! Its reasons are as follows;

2.1 The award allows commission – only salespersons to work very flexible working hours already and they are excluded from a number of award benefits because of their employment status, such as allowances, in particular car allowance and mobile phone allowance, and importantly overtime where they can and do work any day of the week and whatever hours of the day are required to secure a sale or lease of a property.

Whilst commission – only employees have the right to a 38 hour working week, if they exceed those hours even with the permission / instruction of the employer they are not able to claim overtime rates of pay, because they are not guaranteed a rate of pay whatever their efforts on behalf of the employer.

2.2 When one considers an employee's entitlements under the National Employment Standards (NES), how does one calculate their entitlement to annual leave, personal leave, and notice period on termination, redundancy pay and community service leave? All of

those entitlements are based on the employee's base rate of pay for his or her number of ordinary hours worked per week.

However, in the case of commission - only sales staff, they are the only piece workers covered by an award in Australia that doesn't have a guaranteed payment of an hourly rate of pay. One could find a part time commission – only salesperson engaged for say 10 hours p.w. where the employer knows that if they are to earn anything like an income to live on the salesperson would need to work full time in most instances.

In the calculation of any of the NES entitlements the hours worked would in practice be based on the employment agreement of 10 hours p.w. and multiplied by the base hourly rate of pay, being the minimum award rate in clause 14.1. Therefore if an employee worked in effect full time, they would only be paid out their NES entitlements on 10 hours p.w., unless the employee could prove that they had been authorised to work longer hours and had the time recorded in a time book, which is not a requirement under the Fair Work Act regulations.

Regulation 3.33 (3) of the FWA 2009 provides that where an employee is paid an incentive - based payment the employer must set out details of the payment , bonus, loading, rate, allowance or entitlement, nothing is stated about the number of hours worked. Every other piece worker they would have to have had their hours of work recorded to calculate the payment made to them, but not commission – only employees in the real estate industry who only earn their income on the sale or lease of properties, whatever the number of hours actually worked. Therefore the only record required to be kept under the regulations is the actual payment of commission and any deductions, not the actual hours worked.

Contrast regulation 3.33 (3) with regulation 3.33 (2) which deals with casual employees or irregular part time employees; Reg. 3.33 (2) requires the employer in those circumstances to record the hours worked where they are guaranteed a rate of pay. That cannot be the case for a part time commission - only real estate salesperson that is not guaranteed an hourly rate of pay!

2.3 Employers often put the case that there are some employees who may have retired from the industry but would like to earn some extra money by working part time, or are persons with parental responsibilities and cannot work full time on a commission - only basis, which justifies allowing part time employment. RRESSA rejects that assertion, there is no impediment to those employees who wish to work fewer than full time hours, to work on a casual basis, where they are paid for the hours worked.

The award provides that non commission – only, casual salespersons have to be paid a minimum of 3 hours per engagement and pro rata payment with respect to any vehicle allowance. The employer and employee are free to agree to a commission share whereby the casual wages and allowances can be offset against the employee share of any commission that is agreed to.

Further the employee and employer can agree that they work part time as a wages employee on a debit / credit system as occurs and the employee is guaranteed a minimum hourly rate of pay and pro rata accrued benefits such as annual leave etc. The only reason an employer would prefer to have part time commission – only employees is that they are not bound to pay them a minimum wage. That is not a reason which justifies potential wide spread abuse in a safety net award and is contrary to the objects of the FWA ( s 3 (b) & (c) and the Modern Award Objective - s 134 (1), in particular paragraphs (a) & (da)

2.4 For all of the above reasons and in support of the Full Benches provisional view on this issue, RRESSA opposes allowing the employment of part time commission - only salespersons’.

3. RRESSA also continues to press its submission to the Full Bench dated 30<sup>th</sup> July 2018 dealing with amendments to clause 16.3 (a) (iii) of the current award, (Clause 9.7 (c) (i) 3<sup>rd</sup> dot point in the Exposure Draft Award 2015), which seeks to clarify the terms under which real estate sales staff become eligible to be remunerated on a commission – only basis. RRESSA doesn’t believe the amendments sought are controversial; they simply add clarity as to the intent of the clause as set out in the existing award.

Regards

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