



REAL ESTATE EMPLOYERS' FEDERATION

Submission concerning a proposed variation to the Real Estate Industry Award 2010 filed by the Queensland Real Estate Industrial Organisation of Employers

Matter No. 2016/6

10 December 2018

-
1. The Real Estate Employers' Federation ("REEF") makes this submission in response to the Directions issued by the Full Bench on 12 November 2018. The submission addresses **Direction Nos. 2 & 3** only. REEF has previously filed its submission in relation to Direction No. 1.
 2. The matter which is the subject of Direction Nos. 2 and 3, arose out of the proceedings before the Full Bench held in Sydney on Monday 12 November 2018 (the "**November 2018 proceedings**"). The Queensland Real Estate Industrial Organisation of Employers ("**QREIOE**") has filed a draft proposal to vary the *Real Estate Industry Award 2010* ("**the Award**").
 3. QREIOE's application seeks several variations to the Award, all of which address the vexed issue of "part-time" commission-only employment.
 4. While REEF seeks the continuation of part-time arrangements as currently prescribed in the Award for the reasons detailed in its submission dated 14 September 2018, it does not support QREIOE's proposed variations.

5. QREIOE's proposal for variation, if adopted, would fundamentally alter the nature of "commission-only" employment. The Full Bench will recall that the subject of commission-only employment was given extensive consideration during the earlier 4-year Award review proceedings¹ in AM2016/6 (the "**November 2016 proceedings**").
6. During the November 2016 proceedings, the advocate for the Australian Property Services Association, Mr. Lewocki, addressed his association's submission that commission-only arrangements should be underpinned with a wage 'safety net'. The Vice President responded to this submission by observing that:

"Well, under your proposal, it's not commission only employment anymore. You've changed it into something different."²

7. His Honour the Vice President also then relevantly raised with Mr. Lewocki the following in relation to the very nature of commission-only employment:

"Can I just raise this, that it seems to me that one of the key aspects of commission only employment which has emerged from the evidence is the extent to which they operate on an unsupervised self-motivated basis. I think (indistinct) has said that's a key ingredient of the model.

Once you have the requirement that they have to be topped up to the minimum wage, even if it's only every six months, it seems to me that that they may have indirect effect on the employment model in the sense that the employer will then want to supervise their work and look over their shoulder in effect, to make sure that they're doing their work necessary to generate the income to that they don't have to top up at the end of six months. That is, it may lead to a change in the model to introduce a level of supervision which isn't currently there and which people may regard as undesirable."³

8. While the current proceedings do not involve the subject of 'wage top up', REEF is concerned that QREIOE's proposal will similarly affect the integrity of the commission-only system, a point so pertinently raised by his Honour the Vice President in the November 2016 proceedings.

¹ Proceedings held in Sydney between 21 and 23 November 2016.

² Transcript of proceedings from 23 November 2016 at PN2093.

³ Ibid at PN2098/99.

9. We say this for the following reasons:

- (i) QREIOE's proposal would require the introduction of mandatory record keeping regime for the hours worked by commission-only employees (presumably for both part-time **and** full-time employees).⁴ As noted by Deputy President Asbury in the November 2018 proceedings:

“Part-time arrangement is always less than that [full time hours] but what you seem to want is part time of an unlimited – there’s no limit on hours that full-time employees can work and so speaking for my part, if you’re going to talk about this part-time concept, then you might be needing to walk into a whole lot of parameters for full-time employees which you mightn’t want to walk into.”⁵

Her Honour further noted in relation to this point that:

“...really, if you want to have part-time you have got to define full-time and do you want to do that.”⁶

Finally, his Honour the Vice President, when addressing REEF's concerns about the unfairness that would result from accruing the NES entitlements for a part-time commission-only employee at the full-time equivalent rate, observed that, while it might be unfair:

“...you have to come up with a system whereby you can demonstrate that they are only working [say] two days a week...and you can’t do that unless you introduce the whole regime of record keeping.”⁷

REEF contends that the introduction of a record keeping regime of a kind referred to, or at least implied, from the statements of both Vice President Hatcher and Deputy President Asbury, would be a significant diminution of the commission-only regime as the industry currently knows it. The very fabric of commission-only employment is built around two key elements, namely;

⁴ See paragraph 3 of QREIOE's submission filed with the FWC on 26 November 2018.

⁵ Transcript of the November 2018 proceedings at PN300.

⁶ Ibid at PN343.

⁷ Ibid at PN 395 and 397.

- The ability of the commission-only salesperson to command a higher share of the employer’s net sales commission than a salaried salesperson; and
- The flexibility enjoyed by a commission-only employee with greater control over their personal working arrangements. REEF contends that both employers and employees acknowledge, commission-only employees are conducting a ‘business’ within a business. The commission-only salesperson is generally quite individualistic, likes to work with others but not for others, but doesn’t necessarily want the responsibilities and/or ties that go with business ownership. In other words, they want to have the freedom to work when they want to work to earn the level of income they expect for their efforts, without the normal strictures imposed on a salaried salesperson. They resent having their day-to-day activities monitored or scutinised.

If these key elements are lost or diminished, it is REEF’s submission that, just as the Vice President observed in the November 2016 proceedings, it may lead to a change in the commission-only model and introduce a level of supervision which isn’t currently there and which the parties may regard as undesirable.

- (ii) QREIOE’s proposal would see the introduction of an **“hourly rate of pay”** into the commission-only regime, applicable to time worked by the part-time commission-only salesperson, albeit limited to circumstances where overtime is worked at the specific direction of the employer (and not otherwise). This proposition would, by implication, undoubtedly be extended in its application to a full-time commission-only employee who works in excess of 38 ‘ordinary’ hours.

REEF considers such a proposition to be a contradiction of the commission-only principle. Remuneration for such employees has always been ‘results based’ not ‘time based’, so the introduction of remuneration based on time worked, even in part, is an illogicality inconsistent with the concept of commission-only employment.

As his Honour the Vice President observed in the November 2018 proceedings:

“But isn’t the whole point of this [commission-only] system is that if you take more than 38 hours – if you take 50 or 60 hours you’re not going – the employer doesn’t have to pay overtime.”⁸

REEF agrees, this is a major feature of commission-only employment i.e. the flexibility of not being required to keep a track of the hours worked by a commission-only employee. A clear consequence of QREIOE’s proposal is the introduction of compensation by way of an hourly rate of pay where the employee works in excess of their contracted or ordinary hours of work (i.e. payment for overtime). This would very much alter the existing fabric of commission-only employment. In this regard, REEF does not support the establishment of a hybrid commission-only system.

10. For the reasons detailed in this submission, **REEF** does not support QREIOE’s draft proposal to vary clause 16 of the Award.

11. **REEF** thanks the Full Bench for its consideration of this submission.

GREG PATERSON
REEF
10 December 2018

⁸ Ibid at PN273.