

4 YEARLY REVIEW OF MODERN AWARDS –

**REAL ESTATE INDUSTRY AWARD 2010**

***SUBMISSION ON BEHALF OF THE REAL ESTATE EMPLOYERS' FEDERATION  
CONCERNING THE EXCLUSION OF PART-TIME COMMISSION-ONLY  
ARRANGEMENTS***

**Part A - Introduction & Executive Summary**

1. The Real Estate Employers' Federation (REEF) makes this submission with respect to the 4-year review of the *Real Estate Industry Award 2010* (the “**REI Award**”) and in accordance with the Directions issued by the Full Bench (the “**Full Bench**”) on 31 July 2018.
2. REEF is a registered organisation of employers under the provisions of the *Fair Work (Registered Organisations) Act 2009* and represents its members in New South Wales, Victoria and Tasmania as well as in the Australian Capital Territory.
3. As part of its 4-year review of the REI Award, the Full Bench conducted a 3-day hearing in Sydney on 21, 22 and 23 November 2016 to consider several ‘disputed substantive changes’ proposed by various industry stakeholders.
4. These proposed but disputed changes included, inter alia, matters concerning commission-only employment for employees covered by the REI Award.
5. Following the 3-day hearing, the Full Bench issued a Decision on 6 July 2017<sup>1</sup>, detailing its preliminary determinations for changes to the REI Award.

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<sup>1</sup> [2017]FWCFB 3543

6. At paragraph 107 of its July 2017 Decision and with reference to its decision in setting the Minimum Income Threshold Amount (the “MITA”) at 125% of the relevant employee’s classification, the Full Bench noted a preliminary view that:

*“We are of the view that because the REI Award does not provide for overtime payments for commission-only employees or any restrictions on when hours may be worked, part-time and casual employment concepts are neither useful nor relevant for commission-only employees.”*

7. It’s correct to say that there was a misunderstanding in the Full Bench’s provisional view in relation to part-time employment for commission-only employees which it expressed in paragraph 107 of the July 2017 Decision.
8. On 16 August 2017, REEF filed a submission with respect to various matters arising from the Full Bench’s provisional views as set out in the July 2017 decision. In this submission, REEF addressed the issue of the MITA being pro-rated for part-time employees. REEF strongly supported the existing part-time arrangements in the REI Award and argued that, for the reasons detailed in the submission, the MITA should be able to be pro-rated for part-time commission-only employees.
9. REEF noted in its submission<sup>2</sup> that *“...part-time work plays an important role in helping to create a more inclusive society as it assists various sectors of society, such as older workers and parents, to remain active and in gainful employment and it assists them to stay involved socially and to make a contribution to society. As such it is clear that increased part-time work can have a significant social benefit to different sectors of the Australian workforce. Indeed, the importance of fostering and extending the availability of part-time employment on account of its importance to social inclusion has long been recognised in the Australian workplace relations framework.”*

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<sup>2</sup> Para 3.10 of REEF’s submission dated 16 August 2017

10. Following a conference convened before Deputy President Asbury in Brisbane on 3 November 2017, the Full Bench subsequently issued a 2<sup>nd</sup> Decision dated 17 January 2018<sup>3</sup>. At paragraph 29 of this Decision the Full Bench noted:

*“The parties have discussed those provisions further and have agreed to their inclusion in the REI Award subject to some modifications.*

*Those provisions are:*

- ....
- *Non-application of casual and part-time employment provisions to employees on commission-only arrangements.”*

11. REEF respectfully contends that the subject of removing “part-time” employment arrangements for commission-only employees was not discussed and, more importantly, agreed between the parties. REEF is of the understanding that the only matter of discussion and agreement was in relation to:

(i) the “pro-rata” MITA issue for part-time commission-only employees. REEF decided not press its claim that this should form part of the 2015 REI Award. We contend, the Full Bench did not address this issue in its January 2018 Decision; and

(ii) the continued exclusion of “casual” commission-only employment.

12. REEF does not intend calling witnesses to support its claim for the continued inclusion of “part-time” commission-only arrangements but rather rely on the reasons detailed in this submission.

13. REEF contends there are sufficient grounds to justify maintaining the existing part-time commission-only arrangements in the 2015 REI Award. Briefly, these grounds include:

- The current arrangement meets the modern award objective;
- There is a lack of cogent evidence to justify its removal;
- There are strong safeguards provided in existing commission-only arrangements to protect against abuse;

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<sup>3</sup> [2018]FWCFB 354

- There is inequity and unfairness associated with its removal.
14. If the Full Bench determines to proceed in revoking part-time commission-only arrangements, such arrangements that are in place prior to the effective date of operation should be “grandfathered”. (see Part D of this submission)
  15. Finally, in its Directions statement dated 31 July 2018, the Full Bench said at paragraph 3, point 2 – “*Any party seeking a further conference to resolve any outstanding matters...is required to communicate this request by 5.00pm on Friday 28 September 2018.*”

REEF believes a further conference would be useful in determining the outstanding matter raised by RRESSA in its email to the Commission dated 30 July 2018. This important matter concerns the current construction of clause 16.3(a)(iii) of the REI Award.

**Part B - What is the impact of removing part-time commission-only arrangements from the REI Award?**

16. The Full Bench has previously noted that commission-only employees are not entitled to an hourly rate of pay or have entitlements to overtime pay. Accordingly, the hours and/or days worked by a commission-only employee will not, directly at least, influence the employee’s level of income. Income is a direct consequence of performance, not the number of hours worked.
17. That said, part-time commission-only employees are entitled to the benefits and protections afforded to them by the National Employment Standards (the “NES”). Relevantly, for the issue under consideration, this includes an entitlement to things such as paid annual leave, paid personal/carer’s leave, paid public holidays, notice of termination and redundancy pay. For part-time employees more generally, such entitlements are calculated on a “pro-rata” basis. This would be the case currently for an employee engaged to work on a commission-only basis.

18. If the Full Bench proceeds with its determination to exclude part-time arrangements for commission-only employees, employee's working less than full-time hours will become entitled to accrue NES entitlements at the full-time equivalent rate. For example, a commission-only employee who works only on the weekend (say 16 hours), will accrue 152 hours (4 weeks) of paid annual leave not the standard pro-rata amount of 64 hours (8 days).
19. There will clearly be a financial impact on both business owners and on employees should the part-time commission-only provisions be excluded from the REI Award. Employers will need to accrue paid NES entitlements on behalf of commission-only employees at a rate not reflective of the hours or days worked. The corollary of this will be the unfortunate expectation that the commission-only employee work full-time hours and days – this may well be something that is neither desirable or practicable given the employee's circumstances.
20. The Full Bench's decision to exclude part-time commission-only arrangements may have the unfortunate consequence of limiting employment opportunities for successful salespeople at a point in their life when part-time work is their desire.

**Part C – The existing safeguards support the retention of part-time commission-only employment**

21. As part of its review into commission-only arrangements in the real estate industry, the Full Bench established a number of significant safeguards to protect the interests of employees engaged on a commission-only basis. These safeguards, supported by REEF, included:
  - Increasing the MITA from 110% to 125% of the employee's minimum award classification rate; and
  - Providing an annual review of the MITA – this will mean that a commission-only employee who does not earn the MITA in the preceding 12-month period, can no longer be engaged on a commission-only basis;
  - The MITA must be achieved without regard to the number of hours/days worked by the commission-only employee.

22. It can be seen from these safeguards, that commission-only employment has been deliberately restricted in its application to proven sales performers. It is not available to new entrants in the industry, for casual employment or for salespeople without a successful sales history. From 2 April 2018, where the performance of a salesperson falls below the MITA, the commission-only arrangement must cease.
23. If we accept these significant safeguards form the ultimate protection against industrial abuse for full-time commission-only employees, why can't the protections be equally relevant for employees engaged on a part-time basis? REEF contends they can!
24. We say this because the part-time employee must firstly satisfy the MITA before being engaged on a part-time basis and then, to stay employed on this basis, re-qualify each 12 months against the MITA review without any pro-rata adjustment for the part-time arrangement. The effect of this is that a "part-time" commission-only employee must perform at the same level as a "full-time" commission-only employee for the purposes of qualifying and re-qualifying for this arrangement.
25. The key issue of substance therefore becomes the accrual of paid NES entitlements. REEF contends that annual leave for example, should be able to be accrued proportionate to the hours worked by the salesperson, not automatically defaulted to the full-time employee rate of accrual.

#### **Part D – The impact on current part-time commission-only employment**

26. A matter of concern to REEF is the impact the proposed exclusion of part-time arrangements will have for employees currently so employed. It is impossible to know how many employees throughout Australia are engaged on a part-time commission-only basis. In any event, such employees may have entered into a lawful part-time commission-only arrangement many years ago.
27. The issue of how the Commission's exclusion of part-time commission-only arrangements will impact on current employees is one which presents real contractual difficulties. Existing part-time employment contracts will, in effect, become invalid from the date the award is varied to accommodate the

exclusion. The impact on the accrual of both past and future paid NES entitlements will be a potential for dispute. In REEF's view such complications are unnecessary and avoidable.

28. If, however, the Full Bench is disinclined to alter its position on this issue, REEF urges it to "grandfather" existing part-time commission-only arrangements for employees engaged prior to the date of change.

**Part E – What's changed to necessitate the change?**

29. REEF understands and accepts that the 4-year review of modern awards, including the REI Award, is the Commission's review. The *Fair Work Act* requires that the Commission ensure that each modern award continues to meet the modern awards objective. While the Commission has the power to vary a modern award of its own initiative, REEF contends this should be done cautiously and only so that the award can continue to meet the modern awards objective. In REEF's view there is no evidence to support a finding that the current award provision allowing for part-time commission-only arrangements, is offensive to the modern awards objective.
30. REEF notes that the proposed removal of part-time commission-only arrangements was not a matter raised by any party to the proceedings (including the unions) but rather it was announced by the Full Bench of its initiative. It may well be convenient for RRESSA to now support the proposed change but it was not a matter of such importance for it to be raised in the formal proceedings in November 2016.
31. There is certainly no evidence before the Full Bench to enable it to conclude that the change is necessary to enable the REI Award to meet the modern awards objective, or that it is being improperly applied at the enterprise level. Rather, it seems that the Full Bench has simply formed the view that part-time arrangements "*are neither useful nor relevant for commission-only employees*" because of the flexible nature of the hours of work provision in the REI Award. We contend this does not justify the revocation of the part-time commission-only arrangements. This "flexibility" has been a feature of our industry awards at both the State and Federal level for many years and applies just as equally and importantly to non commission-only employees.

32. Moreover, with the recent introduction of additional safeguards for commission-only employees and as detailed in paragraph 21 of this submission, there is even less need for the Full Bench to incorporate the proposed change into the REI Award.
33. REEF urges the Full Bench not to introduce the proposed prohibition on part-time commission-only arrangements for the reasons detailed in this submission.
34. If the Full Bench is not persuaded to do so, then it should provide “grandfathering” provisions for employees engaged on part-time commission-only arrangements prior to the effective date of change.

**Filed by the Real Estate Employers’ Federation**

**14 September 2018**