BEFORE THE FAIR WORK COMMISSION

MATTER NO: AM2016/6

4 YEARLY REVIEW OF MODERN AWARDS –

REAL ESTATE INDUSTRY AWARD 2010

Submission Date: 2 November 2016

SUBMISSION ON BEHALF OF THE REAL ESTATE EMPLOYERS' FEDERATION AND QUEENSLAND REAL ESTATE INDUSTRIAL ORGANISATION OF EMPLOYERS

1. The Real Estate Employers' Federation (**"REEF"**) and the Queensland Real Estate Industrial Organisation of Employers (**"QREIOE"**) make this submission with respect to the 4-year review of the *Real Estate Industry Award 2010* (**"Award").**

2. REEF and QREIOE are registered as organisations of employers under the provisions of the *Fair Work (Registered Organisations) Act 2009.* REEF's eligibility rules enable it to register as members, real estate employers in the states of New South Wales, Victoria and Tasmania as well as in the Australian Capital Territory. QREIOE's eligibility rules enable it to register as members, real estate employers in the state of Queensland.

3. These submissions deal with the notation to clause 9.6(a) in the Exposure Draft of the Award which states as follows:

> ***In light of the Full Bench decision in Canavan Building Pty Ltd [2014] FWCFB 3202, parties are asked to comment on whether clause 9.6(a) is consistent with the NES.***

For convenience the above notation is referred to in this submission as the "**Notation**".

4. It is noted that Clause 9.6(a) of the Exposure Draft reproduces clause 17.5(a) of the Award in its present form. Accordingly, a reference in this submission to clause 9.6(a) of the Exposure Draft by extension includes reference to clause 17.5(a) of the current Award and vice versa.

5. In response to directions issued by his Honour Hatcher VP on 30th May, 2016:

- REEF lodged a submission in respect to the Notation on 27 July 2016 (**"REEF's Initial Submission"**); and
- The Registered Real Estate Salespersons Association of South Australia (**"RRESA"**) lodged a submission in reply to REEF's submission on 28 September 2016 (**"RRESA's Submission in Reply"**).

6. QREIOE supports REEF's Initial Submission.

7. For the reasons outlined in REEF's Initial Submission (and herein), if the Commission finds that clause 9.6(a) in the Exposure Draft Award is inconsistent with the NES, REEF and QREIOE propose that the clause be replaced with the following clause:

> *"9.6(a)(i) From [insert date of variation], existing written agreements for commission-only employees which provide for a commission component in excess of the minimum commission-only rate (**"excess commission"**) to be paid in advance of annual leave, paid personal/carers leave or any other NES entitlement(s), will from [insert date of variation], operate on the basis that any excess commission paid is permitted to be deducted from any future annual leave, paid personal/carers leave or any other NES entitlement(s) which become due and payable after an amount of excess commission has been paid.*
>
> *9.6(a)(ii) For the avoidance of doubt, the authorisation in clause 9.6(a)(i) above does not apply to any employee who was:*
>
> - *not employed on a commission-only basis on or before [insert date of variation]; or*
> - *employed on a commission-only basis on or before [insert date of variation], but whose written agreement on [insert date of variation] did not provide for excess commission to be paid in advance of annual leave, paid personal/carers leave or other NES entitlement(s)."*

For convenience, the above clause is referred to in this submission as the "**Proposed Alternate Clause**".

8. REEF and QREIOE make this submission in response to RRESA's Submission in Reply.

9. REEF and QREIOE disagree with the assertion in paragraph 2 of RRESA's Submission in Reply that *"REEF's proposed amendment to clause 9.6(a) ... is contrary to the Fair Work Act 2009, specifically to ss 323(1), 324(1)(c), 324 (3), & 326(1)(a) and (c)".*

10. Firstly, REEF and QREIOE note that RRESA has not provided any grounds, reasons or evidence to substantiate its assertion in paragraph 2 of its submission in reply that the Proposed Alternate Clause is contrary to any provisions of the Fair Work Act 2009 (**Act**) including to *ss.323(1),324(1)(c), 324 (3), 326(1(a)* and *(c).*

11. It is also noted that RRESA consented to the contents of the Award including paragraph 9.6(a) in the making of the Award during the award modernisation proceedings (referred to in paragraph 2.13 of REEF's Initial Submission and also in paragraph 17 of REEF's submission lodged on 28 September 2016).

12. Section 324(1)(c) of the Act allows a modern award to provide for deductions from any National Employment Standards including annual leave and paid personal/carer's leave. Indeed as REEF noted in its original submission, most modern awards contain a term allowing for a permitted deduction from termination pay in circumstances where an employee fails to work out the required period of notice on termination. Section 324(1)(c) of the Act can be applied in the manner proposed by REEF and QREIOE .

13. The Full Bench decision in *Canavan Building Pty Ltd [*2014] FWCFB 3202 (***"Canavan"***), the decision of Cambridge C. in *Warren & Hull–Moody Finishes Pty Ltd* [2011] FWAFB 6709 and the decision of Gray J. in *Construction Forestry Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* [2012] FCA 45 (***"Jeld-Wen"***) did not find that a permitted deduction under s.324 was not able to be made from annual leave or from paid personal/carer's leave (or from any other NES entitlements). Simply put, those cases did not deal with the issue of permitted deductions under s.324 of the Act.

14. RRESA's assertion in paragraphs 2 and 3(e) of its submission is that any deduction made under the Proposed Alternate Clause (if approved) would be void under s.326(1) of the Act on grounds that it would be either unreasonable or principally for the employer's benefit is incorrect. Indeed, for a deduction to be able to be made in accordance with the Proposed Alternate Clause it will be the case that:

I. The employer and the employee had agreed in writing that pursuant to clause 9.6(a) the employee will be paid an above award rate of commission i.e. commission in excess of the prescribed minimum commission-only rate of 35% **("excess commission")** as an advance of NES entitlements; and

II. The employer will be authorised to deduct from an applicable NES entitlement only the actual dollar amount of any excess commission that it has paid to the employee pursuant to clause 9.6(a) and therefore in respect to the NES entitlement.

15. In regard to paragraphs 2 and 3(e) of RRESA's Submission in Reply, clearly s.324(3) of the Act does not affect the validity of the Proposed Alternate Clause. In REEF and QREIOE's view, the Proposed Alternate Clause does not propose a variation in how much may be deducted, thus s.324(3) of the Act would not affect the operation or validity of the Proposed Alternate Clause.

16. Paragraph 3 of RRESA's Submission in Reply interprets and describes the operation of the Proposed Alternate Clause incorrectly. The manner and scope in which the Proposed Alternate Clause would operate is clear on its face, and it is not as described in RRESA's submission.

17. REEF and QREIOE disagree with the contentions in paragraph 3(a) of RRESA's Submission in Reply and note that RRESA has provided no evidence to support those contentions.

18. As mentioned previously, it is REEF and QREIOE's view that there is jurisdiction for the Proposed Alternate Clause from s.324 of the Act. As such any deduction made under REEF and QREIOE's Proposed Alternate Clause would require that an actual deduction be made from the applicable NES entitlements. It would be the case that a reconciliation would need to be done to determine the dollar value of excess commissions that need to be deducted from the NES entitlement. Clearly, if an employer fails to exercise its right to make a deduction from a NES payment when it pays that NES entitlement it would lose its right to deduct from that NES payment though it would remain entitled to deduct that amount from any applicable future NES payments. For example, at the point a commission-only employee elects to access a period of paid annual leave, the provisions of s.88 of the Act are activated and an amount must be calculated for the period of annual leave to be taken. Subject to the annual leave reconciliation, this amount will be reduced by application of the Proposed Alternate Clause before any payment is made.

19. RRESA's contention in paragraph 3(b) that the Proposed Alternate Clause would create *"greater concern and uncertainty for employers"* is incorrect. It is well known that industrial tribunals in Australia have a long history of allowing for transitional or grandfathering provisions that continued to apply to existing employees and different provisions that will apply to employees who were employed after the change. REEF and QREIOE contend that:

    I. The effect of the Proposed Alternate Clause is as similar as practicable to the effect of the current clause 9.6(a) having regard to the principles set out by the Full Bench in *Canavan*; and

    II. The wording of the Proposed Alternate Clause makes it clear that it can only have application to a particular and easily identifiable group of commission-only employees.

20. It is clear that the REEF and QREIOE's proposal is different in nature from paying two different pay rates to the same class of employees as RRESA appears to suggest. It is also clear that the total minimum dollar amounts payable to commission-only employees under the Award and the NES will remain the same for all commission-only employees. Moreover, REEF and QREIOE contend that the potential industrial disruption that may be caused by the abolition of clause 9.6(a) of the Exposure Draft without any grandfathering provision could vastly exceed any of the potential *"concern"* or *"uncertainty"* that RRESA foreshadows in paragraph 3(b) of its submission.

21. It is also clear that the Proposed Alternate Clause will only operate for a limited duration, and that the number of employees employed under the Proposed Alternate Clause will decrease over time. The proposed change put by REEF and QREIOE will be minimal in effect as the application of the Proposed Alternate Clause is limited to a discrete (and limited) group of commission-only employees and is easily corralled off from the standard application to other commission-only employees and also from non-commission-only employees.

22. Indeed, the REEF and QREIOE proposed change to the wording of clause 9.6(a) in the Exposure Draft is designed as far as practicable to maintain the status quo and to minimise industrial disruption while having regard to the principles of the Full Bench decision in *Canavan.* REEF and QREIOE also contend that:

I. All of the conditions of the current clause 17.5(a) must have been complied with including the requirement that there was a written agreement providing for additional commission to be paid in advance of NES entitlements; and

II. Only the amount of excess commission paid to a commission-only employee will able to be deducted from a NES entitlement.

23. REEF and QREIOE's Proposed Alternate Clause seeks to prevent and minimise the likely industrial disruption between real estate employers and any current commission-only employees who have voluntarily entered into written commission-only arrangements that rely on clause 9.6(a).

24. RRESA's contention in paragraph 3(c) suggesting that all real estate employers simultaneously became aware of the potential effect of the *Canavan* decision when it was handed down in 2014 or the potential effect of the *Jeld-Wen* decision when it was handed down in 2012 is incorrect. REEF and QREIOE contend that RRESA's submission to that effect is self-evidently illogical and implausible. Further RRESA's submission on this point fails to consider the possibility that clause 9.6(a) may potentially be distinguished from the principles in *Canavan* as all employees covered by clause 9.6(a) are piecework employees as defined by the Act, whereas the employees affected by the proposed agreement in *Canavan* were not. Moreover in the view of REEF and QREIOE, it is clear that the introduction of the Proposed Alternate Clause (if adopted by the Commission) would not have retrospective effect as suggested in paragraph 3(c) of RRESA's Submission in Reply.

25. In respect to paragraph 3(e) of RRESA's Submission in Reply, the statutory Note 1 to s.324(1) of the Act does not apply to the types of deductions under s.324(1)(c) in general, including to any deductions made under the Proposed Alternate Clause should it be approved. It is clear that deductions made under s.324(1)(c) are not a class of deductions to which statutory Note 1 could apply.

26. For the reasons outlined in this submission and in REEF's Initial Submission, there is no statutory impediment to the Commission adopting the Proposed Alternate Clause. Should the Commission determine that clause 9.6(a) of the Exposure Draft is inconsistent with the Act, REEF and QREIOE seek that the Commission amend clause 9.6(a) of the Exposure Draft in accordance with paragraph 2.18 of REEF's Initial Submission.