In the Fair Work Commission

In the matter of: An application pursuant to s 157 of the Fair Work Act, 2009 to vary the Real Estate Award 2020

BY

Nathan Fox
(Applicant)

(AM 2020/23)

Submission on behalf of Applicant

The applicant's submission concerns each of his claims to vary the award as set out in his application. In summary they are;

(a) To prevent employers in the real estate industry from debiting against their salesperson's commission earnings, the $1,500 per fortnight JobKeeper wage subsidy paid to the employer.

(b) To provide for a limited period of time, a wage "top up" for commission – only salespersons where if for the period from the date of any order until the 1st October 2021 the commission – only salesperson must be paid any shortfall between what they earn in commission payments and the minimum wage under the award, annualised.

(c) To provide that no any employee not already (as at the date of any order until the 1st October 2021) employed as a commission – only salesperson to be eligible to to be employed as a commission – only salespersons until the 1st October 2021.

1. JobKeeper Legislation

The JobKeeper legislation passed by the Federal Parliament in response to the Corona virus pandemic, was part of the Federal Government 's suite of legislation to aid affected businesses and employees, who through no fault on their part suffered economic loss arising from various directions of State and Federal governments. The omnibus legislation is the, "*Coronavirus Economic Response Package Omnibus (Measures No.2) Act 2020 No.38, 2020 . An Act to provide an economic response, and deal with other matters, relating to the corona virus, and for other purposes. "(Corona Act)*

A number of amendments were consequentially made to the Fair Work Act 2009 (FWA) to give effect to the JobKeeper provisions of the Corona Act.

The Explanatory Statement issued by the Treasurer described the object of the Corona Act as, "*The object of the Act is to provide financial support to entities to assist with the impact of the Coronavirus known as COVID – 19. In particular, the Act establishes a framework for the Treasurer to make rules about one or more kinds of payments to an entity in respect of a prescribed period. "* At page 18 of the statement it gives examples of the operation of JobKeeper, *"For example if an employee ordinarily receives $1,500 or more in income per fortnight before PAYG withholding and other salary sacrificed amounts, and their employment arrangements do not change they will continue to receive their regular income according to their workplace arrangements. The JobKeeper payment will assist the employer to continue operating by subsidising all or part of the income of the employee;"*

Of the amendments to the FWA that is most relevant to the applicant's application it is s 789GDA being the Minimum Payment Guarantee. It prescribes that the employer who applies for and is accepted to participate in JobKeeper must, in return for being paid a wage subsidy of $1,500 per fortnight for each eligible employee, *"........the employer must ensure that the total amount payable to the employee in respect of the fortnight is not less than the greater of;*

(a) the amount of the JobKeeper payment payable to the employer for the employee for the fortnight;
(b) the amounts payable to the employee in relation to the performance of work during the fortnight
Note 1: ...
Note 2: Amounts referred to in this section (other than paragraph (a)) include the following, if they become payable in respect of the fortnight:
(a) incentive based payments and bonuses;
(b) loadings;
(c) monetary allowances;
(d) overtime or penalty rates;
(e) leave payments."

2. Response of Real Estate Employers.

The employer peak industrial body in Australia is the Real Estate Employers Federation which has coverage throughout Australia except for SA and the NT where they have their own peak industrial association REEF SA/NT. They share the same views as REEF regarding the manner in which JobKeeper payments are to be dealt with in relation to salespersons on a debit/ credit employment contract and also for Commission – only salespersons.
Their views are as expressed in REEF's communication to its members and I refer to the attached information on this subject posted on REEF's website.

In short the employer's believe that legally because they have employment agreements which provide for the debiting of all wage payments against a salesperson commission share, that they are not required to only debit the amount paid above the JobKeeper payment. Clearly, even if the employers are right as to the legality of their action, is it not in the spirit and intent of the Corona legislation. The applicant certainly thinks not, as do the many employees who have contacted the Registered Real Estate Salespersons' Association of SA (RRESSA) industrial advisor, who cannot comprehend that alone amongst the Australian Workforce in receipt of JobKeeper payments that, that gift from the Australian taxpayer is able to be "clawed back" not by the Federal Government,but by a private employer getting a "double dip" at the subsidy, by debiting the whole of the wage paid to their sales staff against any commission they may otherwise be entitled to be paid.

It is clear from the wording of s 789GDA that the Federal Government intended that the worker would receive if working, their wage and any commission or incentive payment due to them, so long as they were paid not less than $1,500 per fortnight, being the JobKeeper subsidy. The Parliament's intent with respect to s 789GDA is further clarified in the explanation explaining the amendments to the Fair Work Act, 2009 at page 18 at point 1.24 which states *"Section 789GDA requires an employer who is eligible for the JobKeeper scheme to ensure the total amount payable to to a particular employee in respect of a fortnight is either:*
. the amount of the JobKeeper payment for the employee; or
.if a greater amount is payable to the employee for the performance of work during the fortnight,that amount (<u>in full</u>)".(my emphasis)

3. Impact on Employees

The applicant's witness statement speaks for itself as does the submission made to the Senate Committee by RRESSA with respect to the implementation of COV-19,(refer to attached submission). The employers are only able to achieve this "double dipping" because they are able to exploit the debit/ credit system using 19th century management techniques such as the "keep them lean and hungry"approach. That is offer to pay sales staff 45 – 50% of the employer's net commission but then debit the whole of the employee's wages, allowances and superannuation payments made by the employer. It is a pea and thimble trick to "incentivise" sales staff to strive harder for the next sale. However in the economic circumstances of COVID -19 and the implementation of job supporting schemes such as
JobKeeper the commission structure used by the employers in this industry is causing real economic hardship to thousands of debit / credit salespersons, who currently end up potentially with a debit of $19,500 at the end of September 20020 whereby their access to any of their commission share will be severely limited in a period of economic uncertainty.

4. Minimum payment claim for Commission – only salespersons.

(a) The applicant in his proposed clause (b) is seeking to ensure that commission – only salespersons receives at least the minimum annualised wages of a debit/ credit salesperson for the period 30th September 2020 - 1st October 2021. The COVID- 19 pandemic has caused many industries economic hardship, whilst the restrictions originally brought in by the Federal and State Governments has been relaxed in the Real Estate Industry, it is still to early to estimate how the real estate market will fare over the following 12 months after the JobKeeper wage subsidy is removed.

(b) With the removal of the wage subsidy employers may face the prospect of making sales staff redundant. Whilst the employers say that they will utilise the full matrix of the skill sets of selecting which of their employees are to be made redundant, in the real world of course the largest factor an employer will take into account is the costs of each employee. Commission – only salespersons only get paid if they sell properties. Debit./ credit salesperson are entitled to be paid the minimum wage and allowances. The choice is stark and with the experience gained from observing the real estate industry during the Great Financial Crisis during 2010 – 2012 the fact is many salespersons were told to become commission – only salespersons or lose their job as a debit/ credit salesperson. Many such employees felt they had no choice but to do as they were asked.

(c) One such employee gave evidence before the Full Bench of the FWC which dealt with the 4 Year Review of the Real Estate Award. I attach a copy of the witness statement of Mr Stephen Finch from South Australia and specifically refer to paragraphs 4 – 6 inclusive.
The danger for commission – only sales persons is that they can incur large costs such as motor vehicle costs, mobile phone's, personal promotion leaflets or advertising and still not earn enough to meet those costs. As Mr Finch's evidence shows for 304 days employed as a commission – only salesperson he earned in 2011 $13,825, from which he also had to meet his recurrent expenses such as his car, whilst prospecting for business in a regional area. The award at that time would have seen Mr Finch paid $23,111.07 plus a vehicle allowance of $5,460.

(d) The applicant's claim is limited as to the time it applies and provides a safety net for employees from poverty. The applicant's claim only provides for the minimum payment of the award rate of pay, for 12 months based on the current award rate of $862.50 p.w. = $44,850 (pro rata if the employment is terminated before the 12 months expires). Out of which the employee will still have to meet the cost of their motor vehicle and mobile phone.
Those expenses will obviously be variable depending upon where and in which region the

salesperson works. The actual amount an employer will pay as a "top up" of course will depend on what sales the commission only salesperson achieves during this period.

(e) The current Federal Minimum Wage (FMW) is $740.80 p.w. or $38,521.60 on an annualised basis. Effectively the commission – only salesperson, if they spent more than $6,328 on work related expenses for the 12 months, they would be earning less than the FWM. An amount the National Wage Full Bench of the FWC has determined as the absolute lowest wage an adult full-time employee must be paid.

The applicant seeks the insertion of his proposed clause (b) to both protect salespersons from being discriminated against when redundancy decisions are made on the basis whether they are guaranteed a minimum wage or not and to provide a safety net for commission – only employees from being made to work for less than the FWM.

5. No Further employment of Commission – only salespersons for up to 12 months.

The applicant's claim to have inserted his proposed clause (c) in the proposed Schedule 1 A of the award is based on restricting for 12 months the employment of commission – only sales staff. Commission- Only employees was designed around the more successful sales employees who could earn at least 125% of the minimum award wage ex Superannuation.
Given the economic fallout, not only in the Real Estate Industry but generally it is prudent to not increase the number of commission – only sales staff until the economic circumstances pre COVIC – 19 return. Particularly if there is a likelihood that debit/ credit salespersons may be told in effect to become commission – only because they qualify under the MITA, given they may have earned sufficient income in a single 12 month period in the 3 years immediately prior to becoming eligible to work as a commission – only employee, or be made redundant. That may well result in that employee earning less than the FMW (refer to paragraph 6 (d) & (e) above), and the FWC should ensure that a safety net is provided. The applicant has seen such circumstances occur during the GFC and examples such as they faced by Mr Stephen Finch were not uncommon.

6. Meeting the Modern Award Objective.

The applicant says that his application meets the tests set out in s 157 of the FWA 2009, in particular s 3 Object of the Act, sub clauses (a), (b), s 134 sub clause (1) paragraphs (a), (daa) (i)-(iii) inclusive, s 284 (1) (c).

Each of the variations sought seek to provide an effective safety net for low paid employees. The debit/ credit salesperson who due to the COVID – 19 pandemic will, unless the applicant's claims are awarded face a reduction in their standard of living because of the debiting of the JobKeeper payment from any commission they may earn leaving them without their variable over award payment., which in any event is under pressure given the impact on the economy as a whole and the real estate industry in particular. The applicant doesn't seek to advantage any employee, he seeks to just allow real estate debit/ credit salespersons to enjoy the rights of other employees bound by a Safety Net award, where if they are in receipt of an over award payment that over award is not absorbed by an employer in receipt of the JobKeeper wage subsidy.

In so far as the other two variations sought by the applicant are concerned the applicant seeks to protect commission – only salespersons from falling below the FMW given they are only paid commission if they sell a property that settles. In addition, the applicant seeks to have the playing field even, in the event that the industry finds itself having to make redundancies, where the present award structure clearly discriminates on cost grounds alone against debit/ credit salespersons for reasons as already advanced in this submission.

The applicant further seeks the pausing for a maximum period of 12 months the engagement of commission – only sales staff who are not as at the date of any order, already employed on a commission – only basis. It is reckless to allow for more commission – only sales staff to be engaged at a time of great economic uncertainty where commission – only salespersons are the only piece workers in the Country not entitled to a minimum hourly rate of pay for time worked. Commission – only was introduced into the award on the grounds that it was designed around the better sales performers who could command a greater share of the employer's commission. That being the case, the applicant doesn't want to see the repeat of instances such as that of Mr Stephen Finch who during the GFC suffered poverty on being forced to work on a commission – only basis.

Section 789GV of the FWA which deals with disputes about the operation of JobKeeper states at subsection (4) that the FWC may make any of the following orders; (a) – (c) not applicable, but (d) is , " *any other order that the FWC considers appropriate* ". In the applicant's submission this gives the FWC wide powers in arbitrating disputes between the parties such as the debiting of JobKeeper payments against an employee's normal commission payments for the period of those payments, subject to subsection (7) , " *In dealing with the dispute, the FWC must take into account fairness between the parties concerned.* "

For all of the above reasons and grounds the applicant seeks the orders as sought.

Filed by Ralph Clarke

Agent for the Applicant

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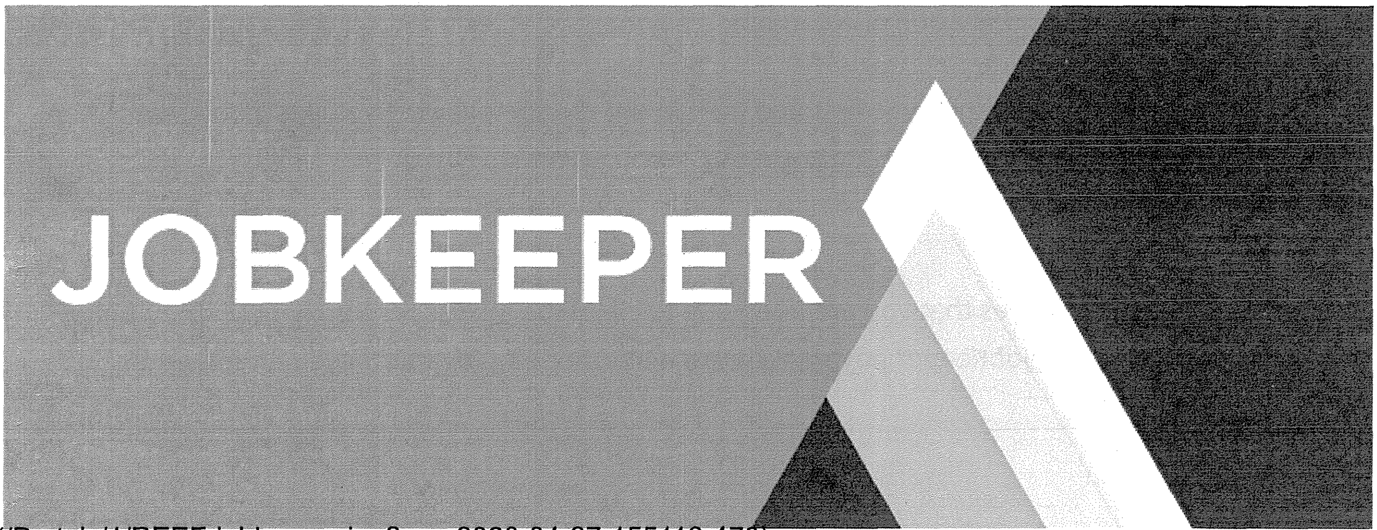

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27 April

JobKeeper Q&As - Part 2 - The wage subsidy explained ()

April 27, 2020 By Reef Admin (https://reef.org.au/News/Author/reef-admin/aid/3)
Fair Work Act (https://reef.org.au/News/cid/13?Category=fair-work-act) 0

Further to our previous article – *JobKeeper Q&As - Part 1 (https://www.reef.org.au/News/ArticleId/168/jobkeeper-wage-subsidy-part-1)*– please find following further important information. Set out in a Q&A style, the information reflects some of the questions REEF has been fielding from members.

payment/), if you haven't already done so.

STEP 2

Check you and your employees meet the eligibility requirements (refer to last Friday's REEF Employer Alert).

STEP 3

Ensure you pay your employees for each JobKeeper fortnight you plan to claim for. The first fortnight is from 30 March – 12 April and each JobKeeper fortnight follows after that. For the first two fortnight periods (30 March – 12 April, 13 April – 26 April), the Australian Tax Office (ATO) will accept the minimum $1,500 payment for each fortnight has been paid by you even if it has been paid late, **provided it is paid by you by the end of April**. This means that you can make two fortnightly payments of at least $1,500 per fortnight before the end of April, or a combined payment of at least $3,000 before the end of April.

Remember that you pay the employee first and then in the month following you get reimburse by the ATO.

STEP 4

Notify your eligible employees that you are intending to claim the JobKeeper payment on their behalf and check they aren't claiming JobKeeper payment through another employer or have nominated through another business.

STEP 5

Give the JobKeeper employee nomination form (https://www.ato.gov.au/Forms/JobKeeper-payment---employee-nomination-notice/) to your nominated employees to complete and return to you by the end of April if you plan to claim the JobKeeper payment for April. You don't need to lodge the forms – just keep them on file and provide a copy to your registered tax agent if you are using one.

STEP 6

From 20 April 2020, you can enrol with the ATO for the JobKeeper payment using the Business Portal and authenticate with myGovID. You must do this by the end of April to claim JobKeeper payments for April.

STEP 7

In the online form, provide your bank details and indicate if you are claiming an entitlement based on business participation, for example if you are a sole trader.

STEP 8

Specify the estimated number of employees who will be eligible for the first JobKeeper fortnight (30

No. Once you decide to participate in the JobKeeper scheme and your eligible employees have agreed to be nominated by you, then you must ensure that all of these eligible employees are covered by their participation in the scheme. This includes **all** eligible employees who are undertaking work for the employer or have been stood down.

You **cannot select** which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.

What happens if my employee will not sign and return the application form?

If an employee refuses to sign the application form then the employee becomes ineligible for the scheme and you will not receive the JobKeeper subsidy for that employee. An employee cannot be forced to sign the form.

Am I obligated to pass the payment on to a commission-only employee despite that employee not normally receiving any wages?

Yes. A central part of the JobKeeper scheme is creating an obligation on employers who receive a JobKeeper payment to ensure that it is paid to the applicable eligible employee. Therefore, you must pay it to a commission-only employee if you receive it for them.

Is there any way for me to 'claw back' or withhold the JobKeeper payment through the payment of commission to commission-only employees?

No. There is no mechanism in the REEF template commission-only agreements or the Real Estate Industry Award for JobKeeper payments to be subject to 'clawback' or recovery through the commissions paid to commission-only employees.

When I pay the JobKeeper subsidy to my commission-only employees, does the amount paid contribute to the MITA that the employee has to annually

reef (https://reef.org.au/)

Am I obligated to increase the wages paid to an employee in circumstances where they are being paid less than $750/week (say for part timers or casuals)?

Yes. You are obliged to make payment **of at least $750** per week or $1,500 per fortnight to comply with the rules of the JobKeeper scheme.

Can I increase the hours of a part time employee to ensure that the hours worked reflect the JobKeeper subsidy?

No. While you can make various types of JobKeeper enabling directions to an eligible employee (refer to last Friday's REEF Employer Alert) under the recent amendments to the Fair Work Act they do not enable you to increase an employee's working hours.

Can an employer continue to debit a debit/credit salesperson the full amount of their wages (which includes the JobKeeper payment) and allowances when calculating commission payments?

Yes. Provided the employee's written commission structure contains appropriate "debiting" arrangements. REEF's template debit-credit commission structures contain such a provision.

Remember, you can only debit what has actually been paid to the salesperson.

QUESTIONS

If you have any questions about this information, please email admin@reef.org.au (mailto:) (rather than calling the Helpline).

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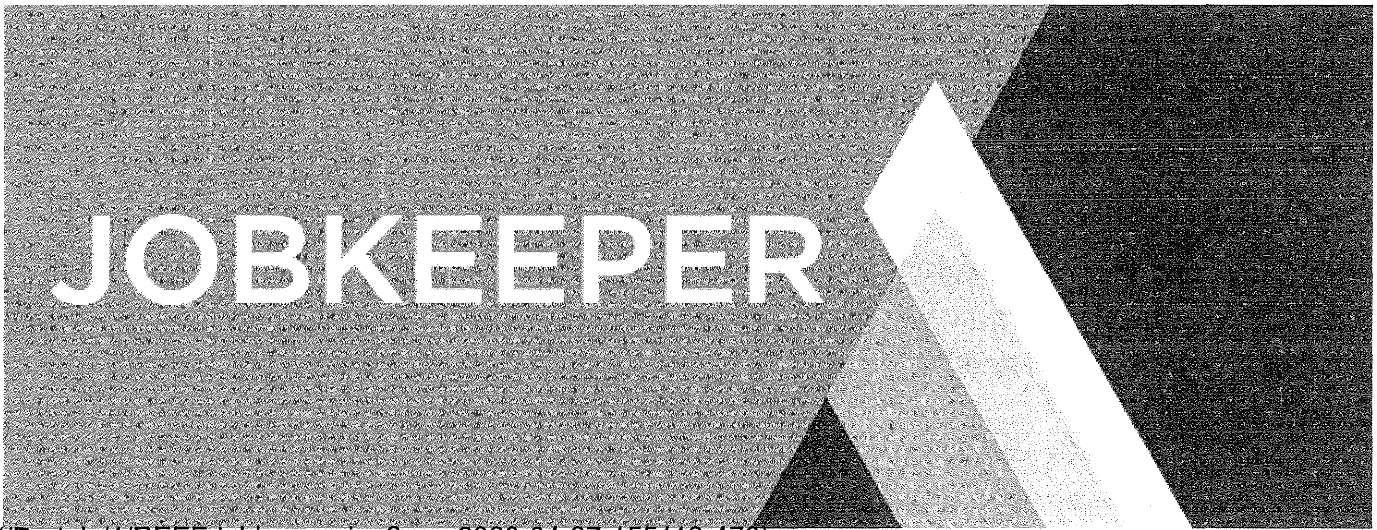

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28
April

JobKeeper Q&As - Part 3 - Commission-only agents ()

April 28, 2020 By Reef Admin (https://reef.org.au/News/Author/reef-admin/aid/3)
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Further to our previous articles – *JobKeeper Q&As - Part 1* (https://reef.org.au/News/ArticleId/168/jobkeeper-wage-subsidy-part-1) and *JobKeeper Q&As - Part 2* (https://reef.org.au/News/ArticleId/169/jobkeeper-qas-part-2-the-wage-subsidy-explained) – REEF has received legal advice clarifying the payment of the JobKeeper wage subsidy to commission-only employees.

The advice states:

"If an eligible employer makes a commission payment to an eligible employee in a particular fortnight that exceeds $1,500 then the employer is not obliged to make an additional JobKeeper payment to the employee.

Where no commission payment is made in a specific fortnight, then the minimum JobKeeper payment of $1,500 must be made.

If a commission payment is made that is less than $1,500 in the specific fortnight, then the eligible employer can use the monies paid to it under the JobKeeper scheme to top up the total value paid to the eligible employee to be no less than $1,500 per fortnight."

Example 1

Henry is a commission-only employee and is an eligible employee under the JobKeeper scheme. Henry's employer is an eligible employer and has registered to receive JobKeeper payments for Henry commencing the month of April 2020.

Henry is due to be paid a settled commission of $10,000 on the 24 April from a sale he made in February 2020. As the commission payable to Henry is in excess of the $1,500 fortnightly JobKeeper subsidy, the payment to Henry will satisfy the JobKeeper obligations **for that fortnight only**.

Therefore, other than the commission, no additional payment needs to be paid to Henry for that fortnight.

Example 2

Billy is a commission-only employee and is an eligible employee under the JobKeeper scheme. Billy's employer is an eligible employer and has registered to receive JobKeeper payments for Billy commencing the month of April 2020.

Billy is due to be paid a settled commission of $900 (plus super) on 24 April from a sale he made in February 2020. As the commission payable to Billy is less than the $1,500 fortnightly JobKeeper subsidy, the payment to Billy will not satisfy the JobKeeper obligations for that fortnight.

ATO Community

Real Estate Retainers and Job Keeper

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Ask a question

Jozeppi7 (Newbie)
a week ago
42 1

I am an eligible employee and am a real estate agent on a debit/ credit pay, and employer is receiving $1500 on my behalf but is keeping the job keeper and advancing us our retainer as a debit which will have to be paid in full not the portion above $1500. Both fairwork and ATO are not giving us answers .

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Our employer presented us with some.extract of information or advice they believe to be correct but it still refers to them pocketing the jobkeeper and then recovering advancement.

Someone please help answer this at appears many agents are asking but going in circles.

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debit credit retainer real estate

Go to answer below

1 ACCEPTED ANSWER

Best answer

KatieAcacia (Enthusiast)

a week ago

0

The same principal applies as for any other employee. If your usual wage or commission or retainer is more than $1500 per fortnight, then you get your usual payment. You do not get your usual PLUS JK. The JK payment to your employer is to reduce stress of paying employees to help businesses stay open. The only time you get your usual pay plus JK is of your pay is less than $1500 per fortnight usually, and in that case you will receive $1500 less PAYG.

Reply 0 Likes Report as inappropriate

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MENU

1 REPLY

ASK SEARCH LOGIN

Best answer

KatieAcacia (Enthusiast)

a week ago

0

The same principal applies as for any other employee. If your usual wage or commission or retainer is more than $1500 per fortnight, then you get your usual payment. You do not get your usual PLUS JK. The JK payment to your employer is to reduce stress of paying employees to help businesses stay open. The only time you get your usual pay plus JK is of your pay is less than $1500 per fortnight usually, and in that case you will receive $1500 less PAYG.

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ATO Community

Job keeper real estate credit / debit retainer

Highlander40 (I'm new)
3 weeks ago
90 5

Hi All,

I work in real estate sales on a "credit / debit" retainer or otherwise known as salary absorbed by commission (meaning that sales commission from selling homes is

MENU ASK SEARCH LOGIN

used to pay back the business for my wage before bonuses are paid.)

Our business is receiving the Jobkeeper package however our company has told us that $1500 per fortnight will still be added to our debit retainer and we (employees) will end up paying the government support back to our employer, even though that money was paid by government / taxpayer.

There is no specific advice for the real estate industry as this has been rolled out so fast, and I have spent hours in the phone to the ATO and fair work who both point the finger at each other for the response to this question.

Because of the vagueness of the current factsheet wording I believe that mine and other real estate employers are using this package as an opportunity to profit from their staff due to the strange nationwide employment conditions / contracts that we have in place.

I have seen the wording around “employers can’t ask for a fee or to pay part of the package to receive the job keeper package”, however they are not asking us to pay it, they are using the ‘salary absorbed by commission’ to justify the payment of the government money and then have us pay it back (to the business again) before any bonuses is paid.

Thanks in advance for any clarification.

Reply **0 Likes** Report as inappropriate

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Commission credit debit real estate sales

Go to answer below

1 ACCEPTED ANSWER

MENU Best answer ASK SEARCH LOGIN

etchasketch (Dynamo)
2 weeks ago
3

If you and your employer are both eligible, they have to pay you $1,500 before tax per fortnight before each due date. They can't claim Jobkeeper if they don't do this.

There's a similar conversation happening over here: Jobkeeper payment

Reply 0 Likes Report as inappropriate

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5 REPLIES

Best answer

etchasketch (Dynamo)
2 weeks ago
3

If you and your employer are both eligible, they have to pay you $1,500 before tax per fortnight before each due date. They can't claim Jobkeeper if they don't do this.

There's a similar conversation happening over here: Jobkeeper payment

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Jozeppi7 (Newbie)
2 weeks ago
2

The same thing is occurring in our office. We are eligible and employer is receiving $1500 but is keeping the job keeper and advancing us our retainer as a debit which will have to be paid in full not the portion above $1500. Both fairwork and ATO are not giving us answers .
Our employer presented us with some.extract of information or advice they believe to be correct but it still refers to them pocketing the jobkeeper and then recovering advancement.
Someone pleass help answer this at appears many agents are asking but going in circles.

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JasonT (Community Support)
a week ago
1

Hi @Jozeppi7 ,

Thanks for your patience and sorry you've been unsuccessful in getting clear direction.

Please see How Much to pay which outlines the employer's responsibilities for paying eligible employees
Also, What you can't do

Fair Work can help with questions about workplace entitlements and obligations in relation to the JobKeeper Payment scheme. Refer to Resolving workplace issues during coronavirus

- Enforcement of the JobKeeper scheme: what we can help with

- asked an eligible employee to give all or part of a payment made to them under the JobKeeper scheme back to their employer

I hope this helps,
JasonT

Reply 0 Likes Report as inappropriate

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Jozeppi7 (Newbie)
a week ago
0

Thank you for your reply. I have along with colleagues all made investigation into several areas of written policy from the ATO website on this as it appears others sales people in the same position around the country are currenlty doing the same from these forums. However there has been no example that specifically relates to an advanced retainer to the employee that the business is then paid back on commissions from the employee when properties settle and at the same time receiving the job keeper on the employees behalf during this time. Effectively being reimbursed twice, once from the employee and once from ATO.

I am sure in all of these quieries and cases all we wish to have is the policy, direct evidence to correctly advise our employers they are in the wrong and incorrectly advised by their advisors, be it REEF, REI or their interpretatin of ATO. Noone really wishes to "make a Tip Off" before trying to resolve issues. Fairwork do not answer the issue either. We are unfortunately still not having the actual concern addressed from ATO policy which is the advancement of the retainer of multiple pay periods amounting to a debit to the employee, the repayment of that advancement on commission paid in the future while the employer retains the JOBkeeps and has not applied its portion from the jobkeeper as every other eligible employee receives! _
We understand that if you are eligible as an employee for $1500 or more then the employer is obligated to pass this on, but the employer believes this jobkeeper to be considered a bonus not a replacement of accumulated retainer, this is what isn't being resolved in any of the links that are replied to.

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ato

MarkATO (Community Support)
Thursday
0

Hi @Jozeppi7

I hear your angst. If I understand correctly though generally the **debit/credit** system is aimed at shifting the financial reward towards listing and sales success. The agent is paid a salary every month, usually a rather low one, and when a sale is made these wages are deducted from their commission. Jobkeeper for its part guarantees any employee eligible must receive gross $3000 per month. See JobKeeper real estate sales

Anything above that will fall to the award or the said instrument. I understand you wanting to establish what is the right thing to start with.Therefore if you have questions about workplace entitlements and obligation in relation to the JobKeeper Payment scheme, the Fair Work Commission has released guidance on how it can assist with JobKeeper disputes. If your concerned that someone is doing the wrong thing in relation to JobKeeper payment, you can tell us about it. To report illegal or behaviour of concern, see Making a tip off.

MarkATO

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IN THE FAIR WORK COMMISSION

IN THE MATTER OF;

4 YEARLY REVIEW OF MODERN AWARDS

REAL ESTATE AWARD 2010

AM2016/6

WITNESS STATEMENT OF Stephen D. E. FINCH

`1 . My name is Stephen David Edward Finch OF 131 Berry Road St. Kitts SA.

2. I was employed as a property salesperson between 2005 – December 2011 with various real estate agents. From the 3rd May 2010 – 5th December 2011 I was employed by the Stell Family Pty Ltd (Stell) t/a First National Gawler SA.

3. When I commenced employment with Stell on the 3rd of May 2010 I was employed as a waged salesperson with a vehicle allowance and other entitlements under the award, debitable against any share of the employer's commission I earned.

4. On the 17th September 2010 I was advised in writing by Stell that unless I met certain sales targets he could not afford to maintain paying me the award wage as I was in debit to him (i.e. my commission on sales had not equalled or exceeded my award entitlements). I was warned if I did not meet the sales targets I would have to be employed on a commission only basis to keep my employment. I was reluctant to accept a commission only appointment as sales were slow, (the effects of the Great Financial Crisis and its impact on housing sales were being felt in the industry as a whole at this time).

5. In January 2011 Stell spoke to me and said from February 2011 I was going to be employed on a commission only basis or I had no job. Stell believed that from my previous sales with former employers, 2005 – 2010 when I joined his company I would be eligible under the award to be remunerated as commission only. I did not understand how that formula in the award worked and how it was to be applied. In any event I felt I had no choice but to agree to go commission only as I had a young family to support.

I commenced being remunerated as a commission only employee from the 4th February 2011 until I left on the 5th December 2011. During those 304 days of commission only employment I earned a total of $13,825. Out of that money I had to pay the costs of running my private motor vehicle and mobile phone, attending open inspections, doing appraisals and the like. The area I was prospecting covered the regional town of Gawler and the surrounding Barossa Valley where distances I travelled were considerable.

The commission share I was paid was 50% of the employer's net commission and that money was debited by 10% to go towards paying off the debit I had with Stell, when I was being paid the award wage.

6. The award wage for the period 4th February 2011 – 5th December 2011 totalled $23,111.07 and the vehicle allowance $5460. In all, the commission paid to me as compared to the minimum award entitlements, there was a shortfall of $9,286 in wages and $5,460 in vehicle allowance, (Ralph Clarke my agent representing the Salespersons' Association did the calculations on my behalf). This matter was the subject of an underpayment of wages claim by me against Stell, (liability was denied) in the Industrial Relations Court of SA, (File Number 3266/2012W). It was settled by agreement on a confidential basis.

7. I am no longer working in the real estate industry. Commission only is a big risk for any sales person. Income is not guaranteed but expenses are; such as the cost of your motor vehicle, mobile phone, personal advertising and simply working many hours for little or no return. One year you could be a "prince" and the next year a "pauper" because of factors out of your control, high unemployment, increases in distressed sales arising from the unemployment, lack of finance or high interest rates and the like.

I make this statement as being true and correct to the best of my knowledge and recollection.

....

Stephen D.E. Finch

....

Date

Secretary to the Senate Committee

Reviewing the Federal Government

Cov – 19 Response

25th May 2020

Dear Committee Members

I write to you as a registered Agent representing the industrial interests of employees with respect to matters before the Fair Work Commission and employment matters that are dealt with in the SA Employment Tribunal such as breaches of Awards and contracts of employment. I have operated my own consultancy business in SA since 2003.I am also the Industrial advisor to the Registered Real Estate Salespersons' Association of SA (RRESSA) an employee association registered under the SA Fair Work Act 1994. I have been their industrial advisor since 2011.

On behalf of RRESSA I wish to make the following points regarding the implementation of the JobKeeper job subsidy scheme introduced by the Federal Government to ameliorate the loss of employment of many Australians because of the Cov – 19 pandemic.

Real Estate Industry

This industry has been affected by the decisions of all Australian governments to first ban open inspections of properties for sale and the holding of the traditional auction sale of properties. Secondly, whilst these measures have recently been relaxed, nonetheless the Cov -19 pandemic has dealt a blow to the industry not only because of the restrictions placed on the sale or lease of properties but also by the sharp downturn in sales arising from the growing level of unemployment and the uncertainty as to how long existing restrictions imposed for good health reasons, will remain in place and how the economy will fair even after all restrictions are removed.

Many real estate employers have applied for and received approval to participate in the JobKeeper scheme introduced by the Federal Government. The Federal Government's action in this matter is applauded, although RRESSA would have preferred to have a scheme which was more inclusive and broader in its application. **However, dealing with the existing scheme there are some anomalies which need to be addressed and very soon to protect the public interest.** I refer specifically to the following examples in the Real Estate Industry;

1. RRESSA in recent discussions with the Real Estate Employers Federation or REEF as it is known (the peak employer body with respect to Industrial Relations issues in Australia) over various proposals to amend the Real Estate Award to accommodate the impact of Cov – 19 on the real estate industry. The parties discussed how the $1,500 Jobkeeper payment would be implemented in this Industry. There are effectively two methods of remunerating real estate salespersons under the award;

   (a) (i) A debit / credit salesperson who is paid the award minimum weekly wage of currently $862.50 p.w. plus allowances such as for the use of their private vehicle on the employer's business. In most cases the salesperson is "incentivised" to list and sell properties by being promised a share of the employer's commission on each sale. The commission rate varies from salesperson to salesperson but in the debit/ credit scenario it would be fair to say the employee's commission share of the employer's net commission (ex GST and any Franchise Fee of 7-10%) is of the order of 45 – 50%. This agreement then sets out the mathematical formula for determining how much of the employee's commission share is payable to the employee. Overwhelmingly the parties agree to debit from the employee's commission their weekly wage ($862.50), car allowance, superannuation contributions and any other items as agreed. The salesperson is then only entitled to any payment of the residual left after the formula has been completed and the amount is in credit. If after the calculation there is no surplus commission to be paid there is a debit balance, that debit is carried over to the next month and the process continues each month.

(ii)The employer members of REEF have been advised, acting on legal advice that real estate employers are legally permitted to debit against their salespersons' commission the whole of the weekly wage of $862.50, notwithstanding that they, as employer's have received a subsidy of $750 from the Australian taxpayer , thereby allowing that same employer to claim the $750 back from their employee, by debiting the whole of the wage against the employee's commission share, even though the employer has only taken out $112.50 p.w. from their own pocket.

(iii) The effect on these salespersons is extreme, not only have they suffered financially by the overall economic impact caused by Cov – 19 they will be paying back to their employer the $750 p.w which had been paid as a subsidy to the employer under JobKeeper! Given the down turn in real estate sales, it is unlikely many salespersons' in Australia will be in credit in their commission statements for some time. After 6 months of JobKeeper there is a real likelihood that those salespersons will start off with a debit of $19,500 in JobKeeper payments, which they will have to pay the employer through reductions in their commission earnings. Commissions in the real estate industry are in effect variable over award payments. JobKeeper is intended to subsidise the employer with respect to their employee's wages. **No other industry has the same advantages under JobKeeper that real estate employers have.**

(iii) The JobKeeper legislation makes it unlawful for an employer receiving JobKeeper payments for their employees, to pay them less than the employee's normal wage or the award rate of pay whichever is the greater amount. If a clerical worker of a real estate employer was paid more than the Clerks award rate of $862.50 p.w. such as say $1,000, p.w. The employer cannot under the JobKeeper Rules simply reduce that clerk's wage to the award rate of $862.50, whereas the salesperson working for the same employer is having their over award commission earnings reduced because the employer can and will debit the whole of the JobKeeper subsidy from the salesperson's commission entitlement.

(iv) The employer receives the $1,500 subsidy from the ATO, that is passed on by the employer to the salesperson as a wage payment, and by virtue of an employment agreement which allows the employer to debit against commissions earned by the salesperson, any wages paid by the employer. Hence the salesperson becomes responsible in effect to pay the employer the $1,500 or $19,500 (after 26 weeks) that the employer received as a gift from the taxpayer! *The real estate employer gets both the ATO $1,500 subsidy fortnightly, and then claims the same $1,500 from the salesperson's commission share. That is an outrageous rort and should not be tolerated by the Federal Government!*

2. Commission – Only Salespersons is the second category of employed real estate salespersons. They are not paid any minimum award wage and are not entitled to be paid any allowances, or overtime and are not required to work within the hour's clauses of the award. In short if they want to be feed and housed, they have to sell real estate or starve!

They are entitled to be paid JobKeeper and both REEF and ourselves agree that legally all commission – only salespersons' must be paid at least $1,500 each fortnight and, in those fortnights, that the salesperson receives a commission payment, the $1,500 JobKeeper payment for that fortnight can be absorbed within the commission paid. If the commission was $3,000 then no JobKeeper is payable on top of the commission, if the commission paid is less than $1,500 the employer must make up the difference.

However, it has come to RRESSA's attention that some real estate employers are carrying forward the Jobkeeper payments into the employee's commission statement and causing these commission – only salespersons to carry forward a debit which should not be happening. By their very nature commission – only salespersons' do not receive any wage whatsoever, JobKeeper is a subsidy not a wage and therefore no debiting should take place.

3. The problem RRESSA see arising from the above circumstances that with the debit/ credit salesperson, the employers are embolden to undertake if not an illegal act, at least a morally repugnant stance and the employee affected will be disadvantaged particularly if they wish to challenge the matter in our court system. The Fair Work Ombudsman can barely "scratch themselves" with the workload they have already and the realistic chances of the employer being held to account will be minimal.

   (a) Given the employees are almost 100% non-union and will have to represent themselves. If they seek representation via lawyers, they will effectively be handing over any gains made to their lawyers. **The Federal Government should now change the JobKeeper rules to prevent the Real Estate employer's profiting from the taxpayer.**

   (b) RRESSA has filed a claim to vary the Real Estate Award that would forbid any employer from debiting the JobKeeper subsidy from the salespersons' commission. That matter comes before the FWC on the 4th June 2020 for a direction hearing and the setting of hearing dates. All this takes time and the REEF have said they will fight the variation to the award. **RRESSA is seeking, a simple change to the rules of JobKeeper which is all that is needed. We ask the Senate committee to urge just that type of action on the Federal Government.**

4. Lastly, the issue of enforcement is important. With less than 10% of the private sector unionised the opportunity of widespread rorting of JobKeeper is real. There is no government agency sufficiently resourced to police and enforce compliance. Waiting lists for the Federal Circuit Court is so long for trial dates, that employees get disheartened and give the case away or they find they have to handle their case themselves because they cannot afford a lawyer.

The Federal government is to be congratulated for the JobKeeper imitative, notwithstanding that the eligibility criteria could have been greater in scope. However, this scheme is a positive one and a credit to all Australians who through their taxes have agreed to help those who have found themselves out of work or underemployed because of the Cov – 19 pandemic. That generosity of spirit should not be debauched by those employers who want to scam the system.

Ralph Clarke
Industrial Advisor to RRESSA
GPO Box 1005 Adelaide SA 5001
Email: clarker@bigpond.net.au, ph 08 8410 0033

In the Fair Work Commission

In the matter of an application: To vary the Real Estate Award 2020,

pursuant to s 157 of the Fair Work Act, 2009.

BY: Nathan Fox

(Applicant)

(AM2020/23)

Applicant's Witness Statement

1. When the Jobkeeper Subsidy was announced in relation to the COVID Act running March 30 through to September 30, 2020 industry comment herein South Australia through employers was very concise and simple.

That was for $750 per week or $1,500 per fortnight would be paid as a subsidy directly to employers who qualified to receive the subsidy to maintain the employment of those licensed sales people employed under standard Agency Agreements on a non debitable basis. Simply meaning the payment was made to support sales people in a climate whereby national figures have indicated that residential real estate in terms of turnover has dropped by a minimum of 40% plus and commercial and industrial real estate in the order of 60% plus. The general consensus is the subsidy is designed to support both sales people by way of being paid to the employer and the employer then passing it on to the sales people by way of a wage subsidy.

2. In relation to commission only sales people, those sales people are remunerated on the basis of when a commission is paid due to their sale, generally it's on a 50% basis. For example, $10,000 commission 50% is paid to the sales person and 50% is paid to the employer, (although some of them may well have agreements that pay higher commissions such as 60 % or more).

The commission only sales person draws no guaranteed income from the employer and currently under the Jobkeeper Subsidy a commission only sales person is paid $1,500 every fortnight through the employer and it is our understanding that will continue until the 30th of September. A commission only sales person, not making a sale at all during this period would not incur a debitable payment of $19,500 to their employer for that six month period.

3.In relation to a debit credit sales person who is being paid the minimum award plus allowances which is approximately $1,000 per week and if they for a six month period not make a sale, under the Real Estate Employers Federation Guidelines the employer is permitted to debit against the salesperson's future commission earnings, the whole of the JobKeeper payment the employer received and paid by way of subsidy to the employee, ($19,500) will be clawed back to the employer and instead of the employee having a debit of $250 per week or approximately $1,000 per month they wind up with a debit of $3,000 per month. Put simply again the subsidy in the current downturn disadvantages the debit credit sales person and that is not the intention according to the attached extract from the ATO.

Again, the general consensus was that if the sales person was paid $1,000 approximately per week $750 of that would be non debitable for the period of Jobkeeper payment. Allowing the pressure to be taken off the debit credit sales person and instead of a $19,500 debit against his future commission earnings, there would be approximately a $6,000 debit over the six month period.

Example 1 - Commission only:

- $10,000 sale
- 50% = $5,000 to sales person
- 50% = $5,000 to employer

Currently Jobkeeper $3,000 per 2 fortnightly payments being paid to commission only sales person i.e. $1,500 per fortnight and the current interpretation of Jobkeeper is if there is no commission earned in that period the commission only sales person keeps the $1,500 on a non debitable basis, however if there is a commission in a fortnight which is equal to or greater than $1,500 no further payment by the employer is required. If the commission payment is less than $1,500 the employer must make a "top up" payment to meet the minimum JobKeeper payment of $1,500. The important point is that Commission – only salespersons' do not legally have their JobKeeper payment carried forward as a debit against future commission earnings. My concern is that some employers in the industry are carrying forward the fortnightly JobKeeper payment of $1,500 to the next fortnight and if a commission is paid of say $5,000 the commission only salesperson in that fortnight may only receive $3,500 rather than the $5,000.

Example 2 – Debit Credit:

A debit credit sales person, again being paid under the award and allowances of approximately $1,000 per week makes no sales for six months and their employer is paid the $1,500 Jobkeeper Subsidy per fortnight, therefore the sales person should only have a debit of $250 per week over a six month period, the debit should be $6,500. However, the salesperson is debited the full $1,000 which is a debit of $26,000 again with the employer standing to recover the full $26,000 by way of debiting the salesperson's future commission earnings, including the $750 per week which is $19,500 through Jobkeeper.

Example of how it should work: Commission Only

- $10,000 commission
- 50% = $5,000 to sales person
- 50% = $5,000 to employer
- Jobkeeper paid on a fortnightly basis if no commission settled in that period $1,500 is paid to the commission only sales person and if there is a commission to which the sales person earns more than $1,500 for that two week period then the salesperson gets paid the commission only. There is no carryover from one fortnight to the next of any "debit".

Example 2 how it should operate with debit credit:

- Current award pay rate for a base sales person is $862.50 per week plus car allowance, phone allowance pushing it to approximately $1,000 all paid in advance and currently debited in full against future commissions.
- Enter Jobkeeper Subsidy $750 per week, $19,750 over current COVID Act 30 march to 30 September 2020.
- Sales person makes no sales for a six month period and incurs a debit of $26,000, Jobkeeper is paid to the employer of some $19,500 and is a subsidy paid towards the wages bill of the salesperson i.e. instead of incurring a debit of $1,000 per week the debit should only be $250 per week with the $750 compensating, thus after a six month period the sales person finishes with a debit of $6,500 instead of $26,000.

It is morally and ethically wrong and not the intention of Jobkeeper Subsidy (paid by the Taxpayer) to have payment made and then clawed back by the employer. Put simply there is a blatant anomaly with the property sector in Australia employing approximately 85,000 employees with approximately 50,000 being licensed sales people employed on either commission only or debit credit which is simply commission paid in advance and debited when earned. Hence why I have made my application to the FWC seeking to vary the award.

Example private sector other than Real Estate

> Sales person is employed by JB HiFi or Toyota Dealership paid $50,000 salary per annum non debitable plus commission on sales. Jobkeeper paid $750 per week indirectly to the employee thus for expediency over a 6 month period $19,500 subsidy, employer actually paying $5,500 for the employee in salary plus normal commissions. The JB HiFi or Toyota sales person does not have to refund the Jobkeeper Subsidy which was applied for in his name under the umbrella of the employer.

Other matters

I have read the submission of my Agent and filed with the FWC, in particular Points 4 and 5 dealing with two other variations I have sought to have made to the award, namely, Minimum payment claim for commission – only salespersons and No further employment of commission – only employees for up to 12 months respectively. I agree with those submissions and note that they address very real concerns I have had during the COVID – 19 pandemic disruption to our industry.

I am aware, given my history with the Real Estate Salespersons Association and my work in the industry that many debit/ credit sales staff during the aftermath of the Great Financial Crisis of 2009- 2012 were forced (if they wanted to keep a job) to go commission – only at the very time real estate sales were very hard to obtain owing to the lack of confidence in the community and difficulties in obtaining finance. This resulted in a number of those sales staff earning less than the award minimum wage for some time.

Applicant's Work History

In terms of background, the applicant has been in the Real Estate business for over 30 years, is a Licenced Real Estate Sales Person, Licenced Real Estate Manager and Licensed Land Agent, is a former Director and Trustee for SA Real Estate Superannuation Fund, has been Vice President of Real Estate Sales Persons' Association in South Australia for the past 25 years, sits on the Commercial and Industrial Committee for the Real Estate Institute of South Australia for the past 20 years and is currently an Industry Assessor for the Real Estate Industry appointed by the Attorney General since 2012, sitting in the Magistrates and District Court advising on all matters Real Estate.

Nathan Fox
email: foxhome@adam.com.au

4th June 2020

Attached are extracts of a submission to the Secretary of the Senate Committee dealing with the Federal Government's response to COVID – 19, together with extracts from the ATO website and REEF website.

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27/5/2020

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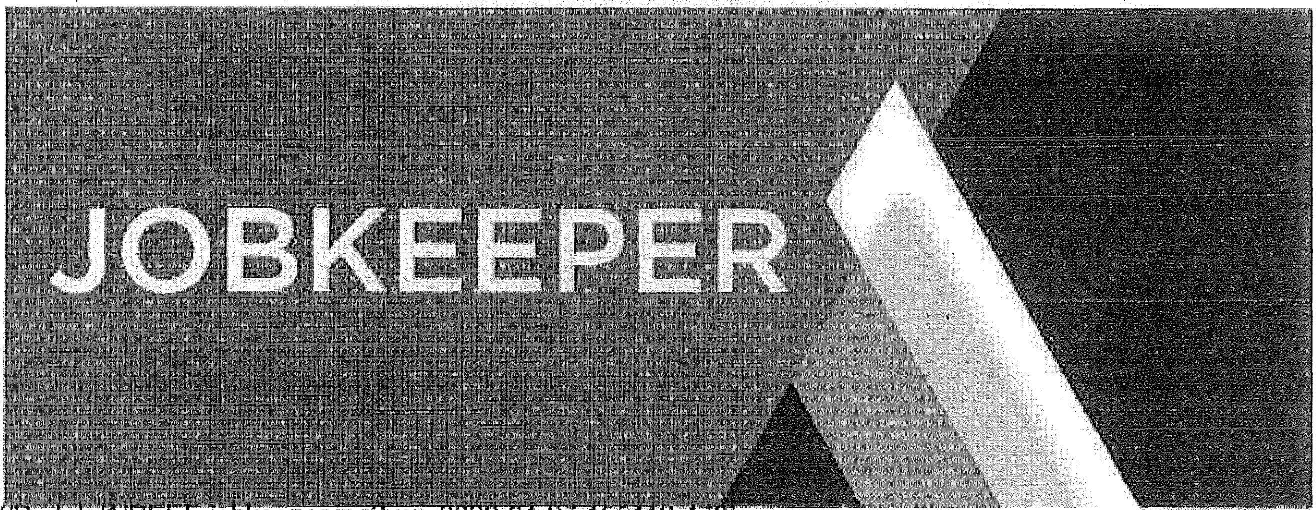

(/Portals/1/REEF-jobkeeper.jpg?ver=2020-04-27-155112-470)

27 April

JobKeeper Q&As - Part 2 - The wage subsidy explained ()

April 27, 2020 By Reef Admin (https://reef.org.au/News/Author/reef-admin/aid/3)

Fair Work Act (https://reef.org.au/News/cid/13?Category=fair-work-act) 0

☆☆☆☆☆

Further to our previous article – *JobKeeper Q&As - Part 1 (https://www.reef.org.au/News/ArticleId/168/jobkeeper-wage-subsidy-part-1)*– please find following further important information. Set out in a Q&A style, the information reflects some of the questions REEF has been fielding from members.

payment/), if you haven't already done so.

STEP 2

Check you and your employees meet the eligibility requirements (refer to last Friday's REEF Employer Alert).

STEP 3

Ensure you pay your employees for each JobKeeper fortnight you plan to claim for. The first fortnight is from 30 March – 12 April and each JobKeeper fortnight follows after that. For the first two fortnight periods (30 March – 12 April, 13 April – 26 April), the Australian Tax Office (ATO) will accept the minimum $1,500 payment for each fortnight has been paid by you even if it has been paid late, **provided it is paid by you by the end of April**. This means that you can make two fortnightly payments of at least $1,500 per fortnight before the end of April, or a combined payment of at least $3,000 before the end of April.

Remember that you pay the employee first and then in the month following you get reimburse by the ATO.

STEP 4

Notify your eligible employees that you are intending to claim the JobKeeper payment on their behalf and check they aren't claiming JobKeeper payment through another employer or have nominated through another business.

STEP 5

Give the JobKeeper employee nomination form (https://www.ato.gov.au/Forms/JobKeeper-payment---employee-nomination-notice/) to your nominated employees to complete and return to you by the end of April if you plan to claim the JobKeeper payment for April. You don't need to lodge the forms – just keep them on file and provide a copy to your registered tax agent if you are using one.

STEP 6

From 20 April 2020, you can enrol with the ATO for the JobKeeper payment using the Business Portal and authenticate with myGovID. You must do this by the end of April to claim JobKeeper payments for April.

STEP 7

In the online form, provide your bank details and indicate if you are claiming an entitlement based on business participation, for example if you are a sole trader.

STEP 8

Specify the estimated number of employees who will be eligible for the first JobKeeper fortnight (30

No. Once you decide to participate in the JobKeeper scheme and your eligible employees have agreed to be nominated by you, then you must ensure that all of these eligible employees are covered by their participation in the scheme. This includes **all** eligible employees who are undertaking work for the employer or have been stood down.

You **cannot select** which eligible employees will participate in the scheme. This 'one in, all in' rule is a key feature of the scheme.

What happens if my employee will not sign and return the application form?

If an employee refuses to sign the application form then the employee becomes ineligible for the scheme and you will not receive the JobKeeper subsidy for that employee. An employee cannot be forced to sign the form.

Am I obligated to pass the payment on to a commission-only employee despite that employee not normally receiving any wages?

Yes. A central part of the JobKeeper scheme is creating an obligation on employers who receive a JobKeeper payment to ensure that it is paid to the applicable eligible employee. Therefore, you must pay it to a commission-only employee if you receive it for them.

Is there any way for me to 'claw back' or withhold the JobKeeper payment through the payment of commission to commission-only employees?

No. There is no mechanism in the REEF template commission-only agreements or the Real Estate Industry Award for JobKeeper payments to be subject to 'clawback' or recovery through the commissions paid to commission-only employees.

When I pay the JobKeeper subsidy to my commission-only employees, does the amount paid contribute to the MITA that the employee has to annually

reef (https://reef.org.au/)

Am I obligated to increase the wages paid to an employee in circumstances where they are being paid less than $750/week (say for part timers or casuals)?

Yes. You are obliged to make payment **of at least $750** per week or $1,500 per fortnight to comply with the rules of the JobKeeper scheme.

Can I increase the hours of a part time employee to ensure that the hours worked reflect the JobKeeper subsidy?

No. While you can make various types of JobKeeper enabling directions to an eligible employee (refer to last Friday's REEF Employer Alert) under the recent amendments to the Fair Work Act they do not enable you to increase an employee's working hours.

Can an employer continue to debit a debit/credit salesperson the full amount of their wages (which includes the JobKeeper payment) and allowances when calculating commission payments?

Yes. Provided the employee's written commission structure contains appropriate "debiting" arrangements. REEF's template debit-credit commission structures contain such a provision.

Remember, you can only debit what has actually been paid to the salesperson.

INTERPRETATION — MEANING THE PORTION OVER AND ABOVE THE $750 JOBKEEPER SUBSIDY

QUESTIONS

If you have any questions about this information, please email admin@reef.org.au (mailto:) (rather than calling the Helpline).

Related

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COVID-19 update: Check out our answers to common questions about JobKeeper payment and early release of super.

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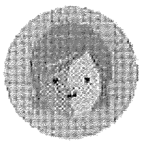

KL21 (Newbie)
on 23 April 2020
286 1

I work in real estate sales under a debit/credit system. We have been approved to pay me the $1500 job keeper payment however the office advised that this still falls under the debit/credit system and I need to pay this back at the end of the month.

This doesn't sound right. This would mean that I get no benefit from the job keeper payment and the office will profit $750 per week. Is this correct?

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credit debit Job Keeper real estate

Tags: credit debit JobKeeper real estate Sales person

Go to answer below

1 ACCEPTED ANSWER

Best answer

wonka5 (Devotee)
a month ago
0

I don't know what the debit / credit system is but there is no requirement for you to payback JobKeeper. Your employer must pay you a minimum of $1500 before tax a fortnight:

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1 REPLY

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Australian Taxation Office
Working for all Australians

Secretary to the Senate Committee

Reviewing the Federal Government

Cov – 19 Response

25th May 2020

Dear Committee Members

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1. RRESSA in recent discussions with the Real Estate Employers Federation or REEF as it is known (the peak employer body with respect to Industrial Relations issues in Australia) over various proposals to amend the Real Estate Award to accommodate the impact of Cov – 19 on the real estate industry. The parties discussed how the $1,500 Jobkeeper payment would be implemented in this Industry. There are effectively two methods of remunerating real estate salespersons under the award;

   (a) (i) A debit / credit salesperson who is paid the award minimum weekly wage of currently $862.50 p.w. plus allowances such as for the use of their private vehicle on the employer's business. In most cases the salesperson is "incentivised" to list and sell properties by being promised a share of the employer's commission on each sale. The commission rate varies from salesperson to salesperson but in the debit/ credit scenario it would be fair to say the employee's commission share of the employer's net commission (ex GST and any Franchise Fee of 7-10%) is of the order of 45 – 50%. This agreement then sets out the mathematical formula for determining how much of the employee's commission share is payable to the employee. Overwhelmingly the parties agree to debit from the employee's commission their weekly wage ($862.50), car allowance, superannuation contributions and any other items as agreed. The salesperson is then only entitled to any payment of the residual left after the formula has been completed and the amount is in credit. If after the calculation there is no surplus commission to be paid there is a debit balance, that debit is carried over to the next month and the process continues each month.

(ii)The employer members of REEF have been advised, acting on legal advice that real estate employers are legally permitted to debit against their salespersons' commission the whole of the weekly wage of $862.50, notwithstanding that they, as employer's have received a subsidy of $750 from the Australian taxpayer , thereby allowing that same employer to claim the $750 back from their employee, by debiting the whole of the wage against the employee's commission share, even though the employer has only taken out $112.50 p.w. from their own pocket.

(iii) The effect on these salespersons is extreme, not only have they suffered financially by the overall economic impact caused by Cov – 19 they will be paying back to their employer the $750 p.w which had been paid as a subsidy to the employer under JobKeeper! Given the down turn in real estate sales, it is unlikely many salespersons' in Australia will be in credit in their commission statements for some time. After 6 months of JobKeeper there is a real likelihood that those salespersons will start off with a debit of $19,500 in JobKeeper payments, which they will have to pay the employer through reductions in their commission earnings. Commissions in the real estate industry are in effect variable over award payments. JobKeeper is intended to subsidise the employer with respect to their employee's wages. **No other industry has the same advantages under JobKeeper that real estate employers have.**

(iii) The JobKeeper legislation makes it unlawful for an employer receiving JobKeeper payments for their employees, to pay them less than the employee's normal wage or the award rate of pay whichever is the greater amount. If a clerical worker of a real estate employer was paid more than the Clerks award rate of $862.50 p.w. such as say $1,000, p.w. The employer cannot under the JobKeeper Rules simply reduce that clerk's wage to the award rate of $862.50, whereas the salesperson working for the same employer is having their over award commission earnings reduced because the employer can and will debit the whole of the JobKeeper subsidy from the salesperson's commission entitlement.

(iv) The employer receives the $1,500 subsidy from the ATO, that is passed on by the employer to the salesperson as a wage payment, and by virtue of an employment agreement which allows the employer to debit against commissions earned by the salesperson, any wages paid by the employer. Hence the salesperson becomes responsible in effect to pay the employer the $1,500 or $19,500 (after 26 weeks) that the employer received as a gift from the taxpayer! *The real estate employer gets both the ATO $1,500 subsidy fortnightly, and then claims the same $1,500 from the salesperson's commission share. That is an outrageous rort and should not be tolerated by the Federal Government!*

2. Commission – Only Salespersons is the second category of employed real estate salespersons. They are not paid any minimum award wage and are not entitled to be paid any allowances, or overtime and are not required to work within the hour's clauses of the award. In short if they want to be feed and housed, they have to sell real estate or starve!

They are entitled to be paid JobKeeper and both REEF and ourselves agree that legally all commission – only salespersons' must be paid at least $1,500 each fortnight and, in those fortnights, that the salesperson receives a commission payment, the $1,500 JobKeeper payment for that fortnight can be absorbed within the commission paid. If the commission was $3,000 then no JobKeeper is payable on top of the commission, if the commission paid is less than $1,500 the employer must make up the difference.

However, it has come to RRESSA's attention that some real estate employers are carrying forward the Jobkeeper payments into the employee's commission statement and causing these commission – only salespersons to carry forward a debit which should not be happening. By their very nature commission – only salespersons' do not receive any wage whatsoever, JobKeeper is a subsidy not a wage and therefore no debiting should take place.

3. The problem RRESSA see arising from the above circumstances that with the debit/ credit salesperson, the employers are embolden to undertake if not an illegal act, at least a morally repugnant stance and the employee affected will be disadvantaged particularly if they wish to challenge the matter in our court system. The Fair Work Ombudsman can barely "scratch themselves" with the workload they have already and the realistic chances of the employer being held to account will be minimal.

   (a) Given the employees are almost 100% non-union and will have to represent themselves. If they seek representation via lawyers, they will effectively be handing over any gains made to their lawyers. **The Federal Government should now change the JobKeeper rules to prevent the Real Estate employer's profiting from the taxpayer.**

   (b) RRESSA has filed a claim to vary the Real Estate Award that would forbid any employer from debiting the JobKeeper subsidy from the salespersons' commission. That matter comes before the FWC on the 4th June 2020 for a direction hearing and the setting of hearing dates. All this takes time and the REEF have said they will fight the variation to the award. **RRESSA is seeking, a simple change to the rules of JobKeeper which is all that is needed. We ask the Senate committee to urge just that type of action on the Federal Government.**

4. Lastly, the issue of enforcement is important. With less than 10% of the private sector unionised the opportunity of widespread rorting of JobKeeper is real. There is no government agency sufficiently resourced to police and enforce compliance. Waiting lists for the Federal Circuit Court is so long for trial dates, that employees get disheartened and give the case away or they find they have to handle their case themselves because they cannot afford a lawyer.

The Federal government is to be congratulated for the JobKeeper imitative, notwithstanding that the eligibility criteria could have been greater in scope. However, this scheme is a positive one and a credit to all Australians who through their taxes have agreed to help those who have found themselves out of work or underemployed because of the Cov – 19 pandemic. That generosity of spirit should not be debauched by those employers who want to scam the system.

Ralph Clarke
Industrial Advisor to RRESSA
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IN THE FAIR WORK COMMISSION

In the matter of: An application to vary to vary the Real Estate Award (2020) pursuant to s157 of the Fair Work Act, 2009.

BY

Real Estate Employers Federation and Real Estate Employers Federation SA/NT

Re AM 2020/14

Witness Statement by Ralph Clarke and Submission of the Registered Real Estate Salespersons' Association of SA

1. RRESSA is a union registered pursuant to the Fair Work Act, 1994 (SA), representing real estate salespersons in the State of SA. RRESSA played a significant role in the 4 Yearly Review of the Real Estate Award (2010) which was to the benefit of all non-clerical employees in the Industry.

2. The employer applicants in their summary (attachment B of their original application) of the impact on the coronavirus pandemic in Australia, not only with respect to the health of the citizens and residents of Australia but also its impact on the Australian economy and the real estate industry in Australia, is not challenged by RRESSA.

3. The major difference between the parties and RRESSA is that it believed that the changes sought (and as amended) needed to be accompanied by certain safeguards such as those proposed by RRESSA at the time and now the subject of a separate application by it to the FWC in the name of its Vice President Mr Nathan Fox, an employee covered by the award.

4. RRESSA's concerns with respect to commission – only employment is well known. The fact that they alone among piece workers, covered by a modern award are not subject to a guaranteed hourly rate of pay, no protection in relation to reimbursement of the costs of using their private vehicle on the employer's business, no penalty rates or overtime payments.

   The Full Bench of the FWC in their 4 Yearly Review of the former Real Estate Award made a number of significant changes to the award effective 2/4/2018 which offered greater protection to commission – only salespersons, including the increased income threshold commission – only employees had to reach before becoming eligible to be remunerated on that basis and to be allowed to continue being employed as commission only employees.

5. REEF's application seeks to have any of the months from May – October 2020 disregarded for the purposes of conducting the annual review of each commission – only salespersons MITA, if their work that any of those months had been impacted by the COVIC -19. The suggestion is that an unknown number of commissions – only salespersons may fall short of their MITA given the loss of business over the next 6 months. Further that if those commission – only sales staff miss out on their MITA threshold they will not be converted to a waged position and therefore be made redundant.

6. The employers submission is that there have been a number of modern awards where variations have been made to help employers adjust to changed economic circumstances,

such as the hospitality, private sector clerical, and restaurant awards have been varied to provide a greater spread of ordinary hours, employees being required to take annual leave including on half pay and other measures specific to those industries such as employees being able to be directed to perform other tasks that they would not ordinarily undertake, provided it was safe for them to do so. However, the point overlooked is that each of those industries have guaranteed hourly rates of pay, plus allowances when using their own tools of trade paid. Their hours of work maybe reduced but they still get paid their award rate for any of the hours they do work.

Commission – only salespersons have the most flexible working conditions of any employee bound by an award, unlimited ordinary hours (save for s 62 of the FWA 2009), able to work any day of the week, any time of the day and pay all their own costs such as motor vehicle use, mobile phones, without so much as $1 guaranteed to be paid to them for their time.

7. The employer's submission is essentially they need to relax the current award provisions with respect to the calculation of the MITA because otherwise a number of commissions – only salespersons will fail to meet the threshold leading in the current economic climate to those salespersons being made redundant., The present threshold is $56,062.50. To reach that threshold in SA, Adelaide Metropolitan Area in 2020 based on the median price of housing as at the March quarter is $480,000 (re attached SA Gov Alert) at a commission rate of 2% ex GST less franchise fee of say 8% = $8,830 employer net commission, if employee share is 50% ex super = $4,415, which equals 13 house sales over 12 months, or at 60% commission ex super = 11 sales in 12 months.

   Non-Metropolitan Adelaide, major towns the median house price was $270,000, using the same formula for metropolitan Adelaide the number of sales per 12 months is 23 and 19 sales respectively. In practice the commission rate for lower priced housing attracts a higher %, e.g. 2.5 – 3.00% ex GST.

   In Sydney and Melbourne, the median house prices are greater than in Adelaide, e.g. in Metropolitan Melbourne the median house price was $893,000 and non-Melbourne Metropolitan $419,000 (see attached REIV document for the March 2020 quarter).

   Depending on the commission rate charged it would seem obvious that a commission only salesperson in the larger cities and States would find it far easier to meet the MITA than in SA. The other important factor is what is the actual commission rate paid to the salesperson? RRESSA has no reliable data to state but anecdotally at least in SA, it is not worth it for a salesperson to go commission – only unless their share of the employer's commission is between 55- 60% ex superannuation. Those salespersons on commission – only in SA who receive 50% ex super are usually very borderline as to earning above or below the MITA, except in rural areas where broadacre properties are sold with high sale prices being made.

   In summary RRESSA believes that the above average commission – only salesperson will meet the current MITA notwithstanding the current economic circumstances in the market. Those most at risk of not meeting the MITA are those who are borderline average performers. Yet they are the most likely to suffer the most if the MITA test is weakened. Whilst they may be likely to be made redundant rather than employed, the alternative is to fall below the MITA and remain as commission – only incurring work expenses they may never recoup and earn a wage far below both the award rate and the Federal Minimum Wage of $740.80 p.w. ($38,521.60 p.a.). That is a race to the bottom! RRESSA in particular refers to the evidence of Mr Stephen Finch before the FWCFB dealing with the 4 Yearly Review of the Real Estate Award 2010 – see attached witness statement.

Alternatives

There are alternatives to the employer's variation and they include the following either one or a combination, a number of which simply rely on the employer taking action on their own such as;

(a) Agree or the FWC to order a variation the award to provide a top up payment of the commission – only salespersons income to ensure they did not receive less than the award. After deducting the costs of running a private motor vehicle of the employer's business and mobile phone the salesperson would at least be likely to earn not less than the Federal Minimum Wage of $740.80 p.w. As all commission only salespersons are entitled to the JobKeeper payment of $1,500 per fortnight, that would count towards the MITA and the shortfall, if any of the cost to the employer should be manageable. Or

(b) The employer for the period of the economic uncertainty increase the share of commission payable to the commission – only salesperson. If that was done plus the benefit of JobKeeper payments most commission – only salespersons would meet the MITA except those who are just too borderline and simply may not be suitable for the job. And / or

(c) The principals ensure that telephone enquiries and "walk ins" from potential vendors or buyers are evenly distributed amongst their staff rather than being directed to the principal themselves, which was not what happened during the Great Financial Crisis.

Summary

The MITA test is not onerous for the above average sales performer, which was the rationale for allowing commission – only employment to be inserted into a modern award in 2010. The current economic circumstances are still to hard to work through except that the economic fall out in Australia and much of the world because of Covid – 19 will be deep and probably last longer than the GFC, where there was no increase in unemployment generally and the economy never went into recession.

The economic impact on the real estate industry will depend very much on the confidence of the market as to their view as to whether their jobs are secure and their wages will cover their every day costs as well as a mortgage on buying a home. The median house prices in SA during the GFC peaked in June 2010 at $410,000 (Adelaide Metro) and then went down and didn't recover until December 2013 when it returned to $410,000.

The current MITA is a reasonable compromise between allowing a salesperson to make at least slightly better than the award wage and falling below the FMW which is seen as the least amount an adult can earn and still meet the necessities of life.

Whilst redundancies may occur they will in any event, whether it is the commission – only salesperson who can't make the MITA and the employer will or cannot afford to employ them as a waged employee or it will be the debit/ credit salesperson who will be made redundant because it is cheaper to keep an employee who has no guaranteed wage.

The employers proposed variation does not meet the test of meeting the modern awards objective, nor the maintenance of a safety net award for low paid workers and their families.

Background of Ralph Clarke

Ralph has been the industrial advisor to RRESSA since 2011. He is a registered agent pursuant to the Fair Work Act, 1994 (SA) and represents employees before the FWC and the SA Employment Tribunal with respect to unfair dismissals, general protections and underpayment of wages. Ralph has been registered as an agent since 2003 and his prior industrial relations experience includes being secretary of the former Federated Clarkes Union of SA and the National President of that Union, before becoming a member of the SA Parliament and is a former Shadow Minister for Industrial Affairs.

Filed By: Ralph Clarke

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ALERT

COVID-19

Get the most recent information on South Australia's response to the Coronavirus pandemic.

> Planning and property > Buying and selling > Researching a property > Median house sales by quarter

Median house sales by quarter

Quarterly median house price information for metropolitan and non-metropolitan major towns including Millicent, Mount Gambier, Murray Bridge, Port Augusta, Port Lincoln, Port Pirie, Victor Harbor and Whyalla.

Adelaide is listed in the table below. Additionally, quarterly median house prices for metropolitan Adelaide by suburb are available at www.data.sa.gov.au.

This graph displays a history of the median house prices for metropolitan Adelaide by quarter (33.9 KB PNG).

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Mar 2020	$480,000	$270,000
Dec 2019	$485,000	$280,000
Sep 2019	$473,000	$265,000

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Jun 2019	$480,000	$269,000
Mar 2019	$477,500	$272,000
Dec 2018	$476,000	$275,000
Sep 2018	$469,000	$270,000
Jun 2018	$470,000	$267,750
Mar 2018	$466,000	$270,000
Dec 2017	$460,500	$260,000
Sep 2017	$450,000	$265,000
Jun 2017	$452,000	$264,500
Mar 2017	$455,000	$268,000
Dec 2016	$447,500	$262,000
Sep 2016	$439,700	$270,000
Jun 2016	$446,000	$262,500

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Mar 2016	$436,000	$267,250
Dec 2015	$440,000	$260,000
Sep 2015	$428,000	$250,000
Jun 2015	$426,000	$255,000
Mar 2015	$425,000	$265,000
Dec 2014	$425,000	$260,000
Sep 2014	$411,000	$255,000
Jun 2014	$418,000	$255,000
Mar 2014	$412,800	$268,000
Dec 2013	$410,000	$260,000
Sep 2013	$395,000	$262,500
Jun 2013	$398,250	$250,600
Mar 2013	$393,000	$260,000

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Dec 2012	$395,000	$250,000
Sep 2012	$385,000	$256,500
Jun 2012	$392,750	$255,000
Mar 2012	$381,000	$260,000
Dec 2011	$390,000	$250,000
Sep 2011	$387,750	$240,000
Jun 2011	$400,000	$269,750
Mar 2011	$407,750	$280,000
Dec 2010	$405,000	$270,000
Sep 2010	$400,000	$272,250
Jun 2010	$410,000	$270,000
Mar 2010	$405,000	$276,500
Dec 2009	$385,000	$250,000

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Sep 2009	$375,000	$245,000
Jun 2009	$360,000	$248,000
Mar 2009	$355,000	$240,000
Dec 2008	$359,000	$245,000
Sep 2008	$362,500	$246,000
Jun 2008	$367,000	$240,000
Mar 2008	$362,750	$253,750
Dec 2007	$352,500	$240,000
Sep 2007	$323,000	$215,000
Jun 2007	$314,126	$220,000
Mar 2007	$302,500	$210,000
Dec 2006	$295,000	$203,500
Sep 2006	$287,000	$195,000

152

Quarter	Metropolitan Adelaide	Non-metro (major towns)
Jun 2006	$288,000	$200,000
Mar 2006	$280,000	$195,000

Provided by: Department of Treasury and Finance

URL: https://www.sa.gov.au/topics/planning-and-property/buying-and-selling/researching-a-property/median-house-sales-by-quarter

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Printed on: 25/05/20

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Houses | Units

Median data for March 2020 Quarter. Click here for details. (/property-data/about-our-research)

Metropolitan Melbourne

$893k Median Sale Price

3.7% Quarterly Price Change

$460 Median Rent

2.8% Rental Yield

Sales Data

Insight (Houses & Units)	Metro

Rental Data

Median rent by Bedrooms	Metro

Insight (Houses & Units)	Metro
Clearance Rate	73.1%
Days on Market	32
Median price by Bedrooms	**Metro**
2 Bedrooms	$880,000
3 Bedrooms	$750,000
4 Bedrooms	$885,000

Median rent by Bedrooms	Metro
2 Bedrooms	$500
3 Bedrooms	$440
4 Bedrooms	$490

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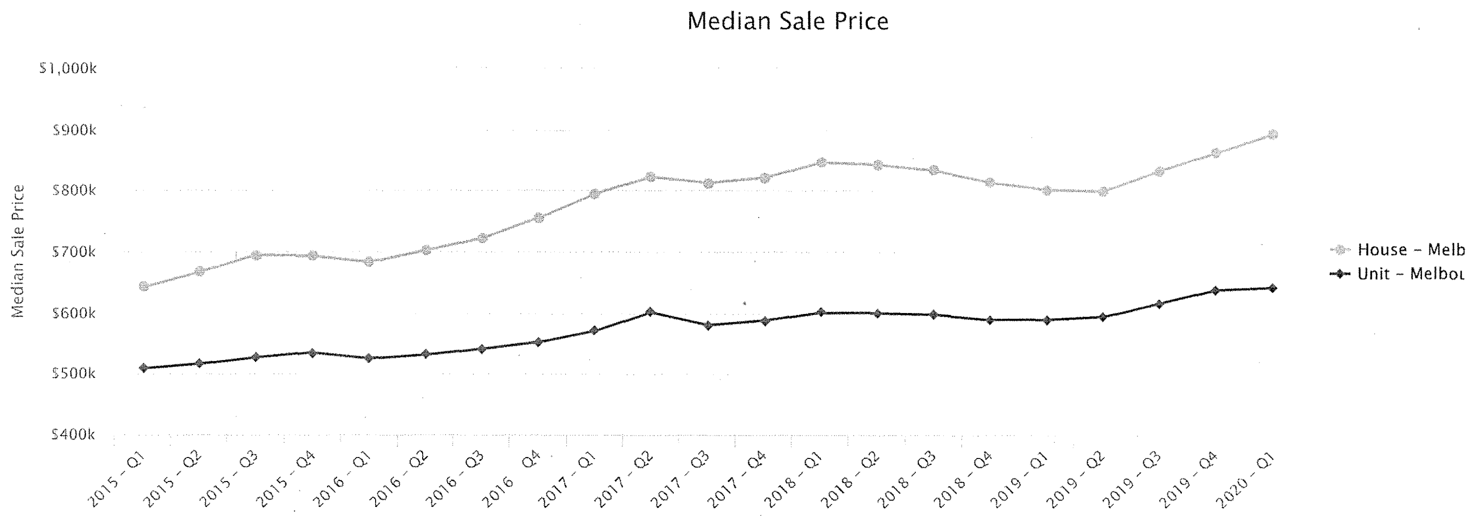
Median Sale Price



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Houses

Units

Median data for March 2020 Quarter. Click here for details. (/property-data/about-our-research)

Regional Victoria

$419k	-0.5%	$350	4.4%
Median Sale Price	Quarterly Price Change	Median Rent	Rental Yield

Sales Data

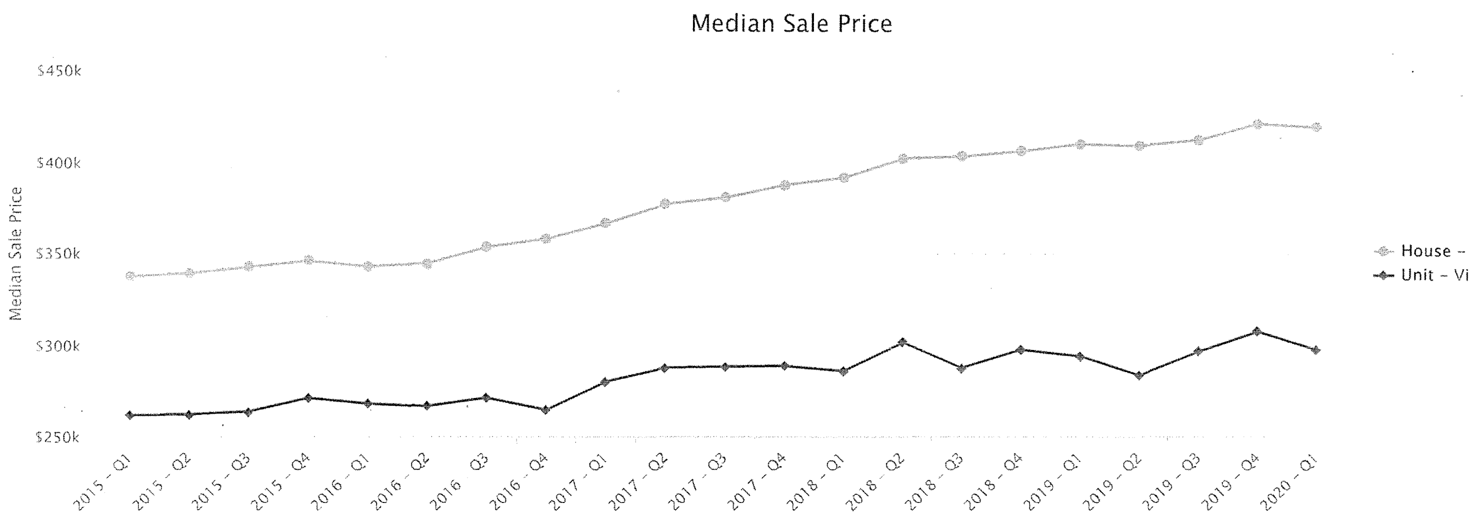
Insight (Houses & Units)	Regional
Clearance Rate	63.5%
Days on Market	56
Median price by Bedrooms	**Regional**
2 Bedrooms	$298,500
3 Bedrooms	$369,000
4 Bedrooms	$512,000

About Our Research (/PROPERTY-DATA/About-Our-Research)

Rental Data

Median rent by Bedrooms	Regional
2 Bedrooms	$280
3 Bedrooms	$340
4 Bedrooms	$410

Median Sale Price



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IN THE FAIR WORK COMMISSION

IN THE MATTER OF;

4 YEARLY REVIEW OF MODERN AWARDS

REAL ESTATE AWARD 2010

AM2016/6

WITNESS STATEMENT OF Stephen D. E. FINCH

`1 . My name is Stephen David Edward Finch OF 131 Berry Road St. Kitts SA.

2. I was employed as a property salesperson between 2005 – December 2011 with various real estate agents. From the 3rd May 2010 – 5th December 2011 I was employed by the Stell Family Pty Ltd (Stell) t/a First National Gawler SA.

3. When I commenced employment with Stell on the 3rd of May 2010 I was employed as a waged salesperson with a vehicle allowance and other entitlements under the award, debitable against any share of the employer's commission I earned.

4. On the 17th September 2010 I was advised in writing by Stell that unless I met certain sales targets he could not afford to maintain paying me the award wage as I was in debit to him (i.e. my commission on sales had not equalled or exceeded my award entitlements). I was warned if I did not meet the sales targets I would have to be employed on a commission only basis to keep my employment. I was reluctant to accept a commission only appointment as sales were slow, (the effects of the Great Financial Crisis and its impact on housing sales were being felt in the industry as a whole at this time).

5. In January 2011 Stell spoke to me and said from February 2011 I was going to be employed on a commission only basis or I had no job. Stell believed that from my previous sales with former employers, 2005 – 2010 when I joined his company I would be eligible under the award to be remunerated as commission only. I did not understand how that formula in the award worked and how it was to be applied. In any event I felt I had no choice but to agree to go commission only as I had a young family to support.

I commenced being remunerated as a commission only employee from the 4th February 2011 until I left on the 5th December 2011. During those 304 days of commission only employment I earned a total of $13,825. Out of that money I had to pay the costs of running my private motor vehicle and mobile phone, attending open inspections, doing appraisals and the like. The area I was prospecting covered the regional town of Gawler and the surrounding Barossa Valley where distances I travelled were considerable.

The commission share I was paid was 50% of the employer's net commission and that money was debited by 10% to go towards paying off the debit I had with Stell, when I was being paid the award wage.

6. The award wage for the period 4th February 2011 – 5th December 2011 totalled $23,111.07 and the vehicle allowance $5460. In all, the commission paid to me as compared to the minimum award entitlements, there was a shortfall of $9,286 in wages and $5,460 in vehicle allowance, (Ralph Clarke my agent representing the Salespersons' Association did the calculations on my behalf). This matter was the subject of an underpayment of wages claim by me against Stell, (liability was denied) in the Industrial Relations Court of SA, (File Number 3266/2012W). It was settled by agreement on a confidential basis.

7. I am no longer working in the real estate industry. Commission only is a big risk for any sales person. Income is not guaranteed but expenses are; such as the cost of your motor vehicle, mobile phone, personal advertising and simply working many hours for little or no return. One year you could be a "prince" and the next year a "pauper" because of factors out of your control, high unemployment, increases in distressed sales arising from the unemployment, lack of finance or high interest rates and the like.

I make this statement as being true and correct to the best of my knowledge and recollection.

....

Stephen D.E. Finch

....

Date