

FOUR YEARLY REVIEW OF MODERN AWARD
PLAIN LANGUAGE – STANDARD CLAUSES

OUTLINE OF SUBMISSIONS OF
REAL ESTATE EMPLOYER'S FEDERATION ('REEF')

1. By a Statement and Directions given by the Full Bench on 18 October 2017¹, interested parties are asked to provide written submissions in relation to the termination clause to be included in Modern Awards.
2. The Real Estate Employer's Federation (REEF) respond to the Directions of the Full Bench of the Fair Work Commission ('FWC') in relation to the four yearly modern award review and the termination of employment standard clause.
3. We note that the directions ask for specific submissions on questions to do with clause E.1(c). However, these submissions are directed to the question of the uniqueness of the real estate industry and the need for the Termination clause in the *Real Estate Industry Award 2010 ('the Award')* to reflect the uniqueness of the industry, by limiting the amount of notice required to be given by employees, to one week.
4. REEF is a real estate employer association which provides advisory services for the real estate industry in New South Wales, Victoria, Tasmania and the Australian Capital Territory. It is the only registered organisation dedicated to assisting the real estate industry.
5. The Full Bench seeks to remove clause 11.2 from the Award which relevantly provides:

"11.2 Notice of termination by an employee

An employee must give one week's notice to the employer to terminate employment.

The employer may then elect to pay the employee one week's pay instead of notice.

Unless the parties mutually agree in writing to a notice period greater than one week, employment will terminate one week from the date that the employee gives the employer notice to terminate employment. In the event that the required notice is not

¹ [2017] FWCFB 5367

given, the employer may withhold from any monies due to the employee on termination an amount not exceeding the employee's full rate of pay in respect of the period of notice required by this clause, less any period of notice actually served by the employee." (**current clause 11.2'**)

6. The Full Bench proposed, subject to the submissions of interested parties, to replace the above current clause 11.2 with the following:

"E.1 Notice of termination by an employee

(a) *An employee must give the employer written notice of termination in accordance with Table X—Period of notice of at least the period specified in column 2 according to the period of continuous service of the employee specified in column 1.*

Table X—Period of notice

COLUMN 1 EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE WITH THE EMPLOYER AT THE END OF THE DAY THE NOTICE IS GIVEN	Column 2 Period of notice
<i>Not more than 1 year</i>	<i>1 week</i>
<i>More than 1 year but not more than 3 years</i>	<i>2 weeks</i>
<i>More than 3 years but not more than 5 years</i>	<i>3 weeks</i>
<i>More than 5 years</i>	<i>4 weeks</i>

NOTE: *The notice of termination required to be given by an employee is the same as that required of an employer except that the employee does not have to give additional notice based on the age of the employee.*

(b) *In paragraph (a) **continuous service** has the same meaning as in section 117 of the Act.*

(c) *If an employee fails to give the period of notice required under paragraph (a), the employer may deduct from any money due to the employee on termination (under this award or the ~~National Employment Standards~~ NES), an amount not exceeding the amount that the employee would have been paid in respect of the period of notice not given."*

Reasons for the retention of the current termination clause

7. REEF supports the retention of the current clause 11.2. The reasons for retaining the current clause 11.2 of the Award are specifically dealt with in the following sections and are summarised as being:
- (a) The relationships with clients;
 - (b) Access to confidential information;
 - (c) Transition to new employment;
 - (d) Difficulties with marketing;
 - (e) Increased costs;
 - (f) Convenience for employees and employers; and
 - (g) Uniqueness of commission only.

Relationships with clients

8. The real estate industry is a unique industry amongst industries with award coverage in that the work performed by employees requires high levels of interpersonal connection with clients (vendors) and potential clients as well as purchasers of property. Such interpersonal connection will often be with individual employed agents rather than with the actual proprietor of a real estate agency, however, these connections often represent the good will of the business of an employer and as such is an asset easily able to be put at risk through the departure of an employee;
9. The peculiarity of the real estate industry referred to above was recognised in the case of *Beaches and Bush Properties v Jennings*², where Justice Austin found³:

“The evidence shows that it is in the nature of the real estate industry that a real estate salesman's relationship with clients is direct and personal. According to the evidence, a real estate salesman builds up a relationship of trust and confidence with existing and prospective vendors and purchasers of properties, on behalf of his or her employer, and the clients rely to a substantial degree on the salesman's advice. The defendant gave evidence that salespersons working for the plaintiff have only a limited opportunity and time to develop personal relationships with clients, but that assertion appears to be inconsistent with the proposition, accepted by the defendant, that the duties of salespersons included making appraisals of properties and having "control" of listed properties in the way that he describes in his affidavit, which includes keeping the client informed by telephone and letter.”

² [2003] NSWSC 798

³ At paragraph 19

10. While standard employment contracts with individual employed agents contain restraints of trade (again unique in industries with award coverage), such restraints will quite often not act as a deterrent to some employees breaching their contracts and attempting to extract the good will of the business. This has often been the subject of litigation for a number of members of REEF;

Access to confidential information

11. It is a feature of the real estate industry that employees, through their employment with the employer, gain access to significant amounts of confidential and commercially sensitive information belonging to the employer for use during the course of employment.
12. This is often the case where many employers in the industry may be small franchise employers with closely knit small business teams where sensitive information is often shared between team members quickly.
13. Such confidential information includes, but is not limited to, various databases containing lists of vendors, property owners and prospective purchasers. The access to confidential information gained by an employee, as a result of their employment, creates a risk to the employer that an employee has the ability to take confidential information from the employer.
14. This risk arises during employment, however, the risk escalates once the employee has put the employer on notice that they are terminating the employment relationship.

Transition to new employment

15. It is not uncommon for an employee to terminate their employment to either commence (or alternatively, take up employment with) a business that competes directly with the employer.
16. Such commencement of an alternative employment raises a high risk that the employee, within a notice period, would fail to safeguard the employer's interests.
17. Again, uniquely among industries with award coverage, the employment relationship in real estate is such that the interests of the employer and employee are strongly linked and related to the sales performance of employees.
18. However, in circumstances where an employee has gained employment elsewhere, their interests are already aligned with another employer and their future income depends on selling properties for that other employer.

19. This re-alignment of interests happens as soon as an employee is able to gain employment with another employer regardless of whether the employee has given notice or not.

Difficulties with marketing

20. The real estate industry is also unique among industries covered by industrial awards in that employees of agencies are quite often the subject of extensive marketing campaigns by their employers.
21. This marketing by the agency will often involve the employer actively promoting particular employees to the general public for their skills as agents. Such marketing is necessary in order to build up the confidence that the public has in the ability to particular agents.
22. In circumstances where an employee has given notice that their employment is to cease and that the employee concerned is likely to take up employment with a new employer, such marketing efforts are incongruous.
23. For the current employer who needs to market their properties and the agents that are selling them, the problem is that until the employee takes up employment, they will effectively be marketing an employee of another agency (potentially a direct competitor).
24. For an employer to whom the employee is transitioning, this is also not ideal as such an employer will want to market such an agent as their own employee as soon as possible and will want to truncate the period during which a new employee is associated with another agency.
25. For the employee it is not ideal as they will not be associated with their employer of choice until they can take up employment with that employer.

Incentives between old and new employers

26. The real estate industry is incentive driven as remuneration is commonly linked to an employee's individual sales performance. Therefore, if an employee is to provide notice to terminate their employment there is no incentive for performance due to the termination of employment.
27. For an employee in such a situation, there is nothing that he or she can gain from a longer period of notice as they are unlikely to be permitted by their employer to continue to sell properties and thus during such a period, they will be unable to earn what will be either a significant component of their income or alternatively, their only income (where the employee is employed as a commission only employee).

Increased Costs

28. A real estate employer will invariably bring the employment relationship to an immediate end once the provision of notice of termination by the employee has been given, for the reasons addressed above.
29. Accordingly, employers, many of which may be small employers, will be put in the position of paying out long notice periods in circumstances where they are not the instigator of the change in the employee's employment situation.
30. In such circumstances, it is inappropriate to maintain the employment relationship between the employer and employee for the duration of any notice period of more than one week as provided by the current clause 11.2 of the Award.
31. If extended notice, of more than one week, is required to be given by the employee as outlined in the proposed clause 11.2, significant cost implications will result for employers, as termination entitlements will need to be calculated as if the employee had worked during the notice period.

Convenience of transition to employees

32. The current clause 11.2 benefits an employee as, generally when notice by an employee is provided to terminate the employment relationship, the employee has found alternative employment elsewhere and then, the employee is in a position to actively transfer to the alternative employment within a short period of time.
33. Further having a clause which gives certainty to the employee of only having to wait one week between working for one employer and transitioning to the new employer allows the employee to adequately arrange their affairs in a timely manner and encourages them to give notice only when it is clear that they will be working for the other employer shortly thereafter.

Uniqueness of Commission only employment

34. Uniquely among industries, there is the ability in the real estate industry to employ agents on a commission only basis.
35. This has led to a number of provisions being inserted into the Award that are particularly unique to the real estate industry and recognise that commission only employment creates differences with employment in other industries.

Previous proceedings

36. The termination clause currently included in the Award was the subject of submissions during the Award Modernisation process. By way of submission made at the time, REEF argued many of the same reasons as articulated above.
37. Further those submissions pointed out that similar provisions had been the subject of agreed standards in industrial instruments prior to the Award such as the provisions that was at the time contained in the *Notional Agreement Preserving the Real Estate Industry (State) Award (NSW)* that had been agreed for inclusion in the pre-existing common rule State Award in 1995.
38. Whilst in proceedings before Senior Deputy President Harrison, there was some question as to the uniqueness of the industry, the Full Bench of the Australian Industrial Relations Commission accepted⁴ the position of the real estate parties as expounded through their draft provision which was included in the modern award.

Conclusion

39. REEF would be happy to be heard in proceedings concerning this clause in relation to the need for the retention of the current termination clause in the Award, noting that it has not been the subject of a decision previously as part of the work of the Plain Language Full Bench.
40. For the reasons given above, REEF respectfully requests that the removal or amendment of the current clause 11.2 of the Award does not proceed.

Filed for the Real Estate Employers Federation

Dated: 13 November 2017

⁴ [2009] AIRCFB 865 at [173]