FAIR WORK COMMISSION
AM2016/15

FOUR YEARLY REVIEW OF MODERN AWARDS
STANDARD CLAUSE E – TERMINATION OF EMPLOYMENT

SUBMISSION CONCERNING

REAL ESTATE INDUSTRY AWARD 2010

1. INTRODUCTION

1.1 This submission is filed in relation to the decision of the Full Bench dated 14 August 2018 ([2018] FWCFB 4704) (**the "2018 Decision"**).

1.2 This submission is filed on behalf of the following organisations (collectively referred to in this submission as the **"industry stakeholders"**):

(i) Real Estate Employers' Federation (**REEF**);

(ii) Registered Real Estate Salespersons' Association (South Australia) (**RRESSA**);

(iii) Australian Property Services Association (**APSA**); and

(iv) Real Estate Employers' Federation of WA.

1.3 The industry stakeholders represent the majority of both employers and employees in the Australian real estate industry and are key representative bodies to the modern *Real Estate Industry Award 2010* (the "**REI Award"**).

1.4 At paragraph [15] of the 2018 Decision, the Full Bench states its *provisional* view that "***all modern awards should be varied to replace the relevant existing terms with the standard clauses. That provisional view would only be displaced in respect of any particular award if it is demonstrated that there are matters or circumstances particular to that award which compel the conclusion that the achievement of the modern award objective for that award does not necessitate the inclusion of the model standard terms.***"

1.5 Attachment A of the 2018 Decision sets out the consolidated version of standard clauses A-H. This submission is made only in respect of ***Standard clause E – Termination of Employment***, and filed pursuant to paragraph [16] of the 2018 Decision. For convenience, the term "**Standard Clause**" is used in this submission to refer to **Standard Clause E**.

1.6 It is noted that in November 2017 both REEF and RRESSA filed submissions concerning the proposed Standard Clause (**the 2017 submissions**). This was in response to the Full Bench's Statement & Directions issued on 18 October 2017 ([2017] FWCFB 5367).

1.7 The 2017 submissions sought the retention of the existing termination clause prescribed in the REI Award (clause 11.2) to the exclusion of the proposed Standard Clause and set out reasons for this position. More particularly, the industrial stakeholders sought the retention of the "*one week notice period*" rather than the notice period based on length of continuous service as prescribed in the Standard Clause.

1.8 The industry stakeholders respectfully seek modification of the Standard Clause (the "**modified Standard Clause**") so that the REI Award continues to prescribe a one week notice period (or longer period if agreed). The modified Standard Clause proposed by the industry stakeholders is set out in section 5 of this submission.

1.9 The industry stakeholders maintain the position that there are sufficiently strong and cogent reasons, characteristic of an incentive-driven industry like real estate, which justify the adoption of the modified Standard Clause. Further, the industry stakeholders contend that the modern awards objective does not necessitate the adoption of the Standard Clause into the REI Award.

2. THE CURRENT EFFECT OF THE "TERMINATION" CLAUSE IN THE REI AWARD

2.1 Clause 11 of the REI Award is headed "*Termination of employment*". Relevantly, clause 11.2 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 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**') - our emphasis

2.2 The current clause 11.2 imposes a requirement for an employee to give only 1 weeks' notice of termination irrespective of the employee's period of continuous service, unless the employer and employee have agreed in writing to a longer notice period. Unless a longer period has been agreed, employment is taken to come to an end at the expiration of the one week notice period.

2.3 The industry stakeholders contend that the modified Standard Clause is sufficiently clear and flexible to protect the employment interests of both employers and employees in the real estate industry.

2.4 The current clause 11.2 was the subject of submissions during the Award Modernisation process. The Full Bench of the Australian Industrial Relations Commission (AIRC) accepted the position of the industry stakeholders that there were features of the real estate industry sufficiently unique to justify a departure from the more standard "termination" provisions in other modern awards.

3. DISTINGUISHING FEATUES OF THE REAL ESTATE INDUSTRY & THE IMPORTANCE TO NOTICE OF TERMINATION

3.1 There are several important features which distinguish the real estate industry from other industries and which the industry stakeholders contend justify the adoption of the modified Standard Clause. These features are summarised in paragraphs 3.1.1 to 3.1.3 below.

3.1.1 Relationships with clients and access to confidential information – a particularly distinguishing characteristic of the real estate industry, especially when compared to other industries with award coverage, is the strong interpersonal relationship that develops between employees and clients of the employer (either vendors or purchasers of property). Employees in an operational role in real estate practice (i.e. in either sales or property management) really are the 'human face' of the business for whom they work.

The establishment of trust and confidence between employee and client are representative of the goodwill that is built up in a real estate business but which can easily be put at risk through the departure of an employee.

Similarly, it is a feature of the real estate industry that employees gain access to significant amounts of confidential and commercially sensitive information belonging to the employer for use during employment. Such confidential information includes, but is not limited to, various databases containing lists of vendors (and importantly, prospective vendors), property owners and prospective purchasers. The access to confidential information gained by an employee creates a risk to the employer that an employee has the ability to take confidential information from the employer.

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. This risk, we contend, is far more pronounced than in other industries.

3.1.2 Immediate transition to new employment & the convenience of transition

It is not uncommon for an employee to terminate their employment to commence employment with a business that competes directly with the employer. As RRESSA observed in its 2017 submission, "*There is a great deal of mobility amongst sales staff in particular between different agents and franchises and once the staff member has decided to seek employment elsewhere, both the outgoing employee and the employer want to see the employment relationship conclude as quickly as possible.*"

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. Understandably, for an employee who has presented notice to his/her employer, there will be a lack of motivation to promote the employer's interests to potential customers. This is because the rewards that might otherwise be obtained from generating new business (such as introducing a property for sale), will, in most circumstances, be incapable of being realised over the notice period.

As stated previously, it is a characteristic of the real estate industry that the employment relationship is such that the interests of the employer and employee are strongly linked and related to the relationships established with customers or prospective customers. However, in circumstances where an employee has gained employment elsewhere, their interests are already aligned with another employer as their future income depends on selling or managing properties for that other employer.

This re-alignment of interests happens as soon as an employee gains employment with another employer regardless of whether the employee has given notice or not. The current clause 11.2 benefits an employee as the employee can actively transfer to the alternative employment within a short period of time.

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, the employee can adequately arrange their affairs in a timely manner and is encouraged to give notice only when it is clear that they will be working for the other employer shortly thereafter. As RRESSA puts it in its 2017 submission, it helps avoid the unwanted and awkward situation where the departing employee is 'benched' for the duration of an extended notice period thus denying them the opportunity to move on immediately and commence listing/selling/managing property for the new employer.

3.1.3 Incentives an important, or sole, component of remuneration

It is an incontrovertible fact that the real estate industry is incentive driven as remuneration is commonly linked to an employee's individual sales performance.

For an employee in such a situation, there is nothing that he or she can gain from a longer period of notice. Once notice has been given, the employee is unlikely to be permitted by their employer to continue to list, manage and sell properties during the notice period. The consequence being they will be unable to earn what is generally a significant component of their income in the form of commission or other incentive payments. In relation to commission-only employees such payments are their only source of income.

4. THE INDUSTRY'S SPECIAL CHARACTERISTICS & THE MODERN AWARD OBJECTIVE

4.1 The Full Bench has made clear that if the Standard Clause is to be displaced in a particular award, it will need to be demonstrated there are circumstances particular to that award "*which compel the conclusion that the achievement of the modern award objective for that award does not necessitate the inclusion of the standard terms*" (our emphasis).

4.2 The "***modern award objective***" is to ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account the considerations in s.134(1)(a)-(h) of the *Fair Work Act 2009.*

4.3 As the Full Bench observed in its *Preliminary Jurisdictional Issues Decision* ([2014] FWCFB 1788), the application of the s.134 considerations may apply differently in relation to different awards. At paragraph 32 the Full Bench stated, "*No particular primacy is attached to any of the s.134 considerations and not all of the matters identified will necessarily be relevant in the context of a particular proposal to vary a modern award*".

4.4 At paragraph 33 the Full Bench added: "*The need to balance the competing considerations in s.134(1) and the diversity in the characteristics of the employers and employees covered by different modern awards means that the application of the modern awards objective may result in different outcomes between different modern awards.*"

4.5 The industry stakeholders contend that **ss.134(1)(f)** and **(g)** are the most relevant considerations to the matters raised in this submission.

4.6 Section 134(1)(f) of the modern award objective concerns "*the likely impact of any exercise of modern award powers on business, including productivity, employment costs and the regulatory burden*". Section 134(1)(g) addresses "*the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards*".

4.7 In addressing s.134 considerations and for the reasons outlined above, several key "features" of the real estate industry concerning notice periods on resignation, should be acknowledged.

4.8 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.

4.9 Accordingly, employers, many of which are small employers, will be put in the position of paying out longer notice periods in circumstances where they are not the instigator of the change in the employee's employment situation. 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. If, however, the parties accept that a longer notice period is appropriate to the circumstances of the employee's role with the business, the modified Standard Clause provides the option to agree to a longer notice period.

4.10 If extended notice of more than one week is required to be given by the employee as prescribed in the Standard Clause, 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.

4.11 Alternatively, having given notice, the employee will be placed on 'garden leave' by the employer thus preventing from moving on to the new employer. This will result in the employee being denied the opportunity to more quickly transition into listing and selling real estate with the new employer with a consequential loss in remuneration through sales commission.

4.12 Both of these possible consequences result in unfavourable outcomes for employers and employees covered by the REI Award. The circumstances detailed in this submission and which characterise the real estate industry, present a compelling case that the achievement of the modern award objective for the REI Award, is better served by adopting the modified Standard Clause.

5. CONCLUSION

5.1 For the reasons given in this joint submission, the industry stakeholders (which represent the overwhelming majority of both employers and employees in the Australian real estate industry) are of one mind – operational employees in the real estate industry should not be required to give more than one week's notice of termination unless the parties have specifically and intentionally agreed to a longer period.

5.2 We respectively request that the Full Bench insert the modified Standard Clause into the REI Award as set out below. The only variation of significance to the Standard Clause is sub-paragraph (b) which has been highlighted and underlined.

E. Termination of employment

NOTE: The NES sets out requirements for notice of termination by an employer. See sections 117 and 123 of the Act.

E.1 Notice of termination by an employee

(a) This clause applies to all employees except those identified in sections 123(1) and 123(3) of the Act.

(b) ***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.***

(c) If an employee who is at least 18 years old does not give the period of notice required under paragraph (b), then the employer may deduct from wages due to the employee under this award an amount that is no more than one week's wages for the employee.

(d) Any deduction made under paragraph (c) must not be unreasonable in the circumstances.

Filed for the industry stakeholders
Dated: 7 September 2018