

**IN THE FAIR WORK COMMISSION**

**IN THE MATTER OF-**

**4 Yearly Review of modern awards – Real Estate Industry Award 2010**

**(AM 2016/6)**

**Response by RRESSA to the Exposure Draft of Real Estate Industry Award 2015 and matters arising from the decision of the FWCFB decision dated 6<sup>th</sup> July 2017 – [2017] FWCFB 3543.**

1. The Registered Real Estate Salespersons' Association of SA ( RESSA) response to the conclusions of the Full Bench summarised at paragraph [131] of its decision is as follows, in point order;
  - (a) We support the full implementation of the minimum rates wages adjustment for the property salespersons' classification and for all other award classifications from the 1<sup>st</sup> January 2018. ( Refer to 1 (b))

Whilst the award wage increases on the face of it are very significant for property sales persons and property sales associates, employees within these classifications have traditionally been paid in addition to their award rate a share of the employer's commission. It is the practice of employers in the Real Estate Industry to debit from the employee's commission share against any commission earned by the employee, their weekly wage, allowances such as vehicle allowances and mobile phone as well as superannuation entitlements. Therefore the economic impact of the proposed wage increase for employers would be significantly reduced.

In addition it should be noted that alone amongst employees covered by modern awards, the above employees have a 7 day working week where no overtime or penalty rates are paid to these sales staff unless they work in excess of 38 hours. The employers in this industry have benefited enormously from the 26 year delay in having the work of their non clerical admin staff work valued and are in a position to absorb the cost impost; particularly given that RRESSA 4 year Review claim has been actively pursued before the FWC since January 2015.

In so far as property management / strata title/ community title representatives, the wage increases sought are modest - \$24.10 p.w. Again it is RRESSA experience that the employers in the industry expect to and do pay significantly above award wages to these staff, including offering them bonuses or incentive payments for the introduction of new business to their employer's rent roll. The industry is able to absorb the modest wage rise for this classification of employee.

With respect to the Supervisory classifications in the award, the increase sought by RRESSA is \$86.40 p.w. for Sales supervisor reducing to \$32.40 p.w. in the other 2 supervisory classifications. Again the industry from RRESSA knowledge, pay such senior

staff well above the current award rate and indeed in excess of the proposed award claim by RRESSA. In addition given that many of the employers in the real estate industry employ fewer than 20 staff, the actual number of supervisors in any of their roles covered by the award would be small in number and really only apply to much larger employers who are able to absorb the impact of the wage increase sought by RRESSA.

(b) RRESSA believes that the relativities for each other classification in the award should be as follows, vis a vis the property salesperson's classification;

- (I) Property Sales Associate (1st 6 months of employment) – 94% = \$760.60 p.w.
- (II) Property Sales Associate (after 6 months employment) – 97% = \$784.80 p.w.
- (III) Property Sales Representative – 100% = \$809.10 p.w.
- (IV) Property Sales Supervisor – 130% = \$933.80\* p.w.
- (V) Property Management Associate – 97% = \$784.80 p.w.
- (VI) Property Management Representative – 100% = \$809.10 p.w.
- (VII) Property Management Supervisor – 130% = \$933.80\* p.w.
- (VIII) Strata/ community Title Management Associate – 97% = \$784.83 p.w.
- (IX) Strata/ community Title Management Representative – 100% = \$809.10 p.w.
- (X) Strata/ community Title Management Supervisor – 130% = \$933.80\* p.w.

NB \* DENOTES THE RELATIVITY AS COMPARED TO THE METAL TRADES AWARD - C5, WHEREAS THE MONETARY AMOUNT IS DEPRESSED OWING TO PAST NATIONAL WAGE INCREASES WHICH PROVIDED FOR FLAT ACROSS THE BOARD INCREASES, RATHER THAN PERCENTAGE INCREASES.

- (c) RRESSA supports the decision to make the MITA entry level – commission – only salesperson as 125% of the minimum award wage (annualised) for a property salesperson.
- (d) RRESSA supports the decision to have the award provide where a commission – only salesperson in a single 12 month period earns less than 125% of the minimum award wage(annualised) that they must cease being employed on the commission only basis and revert to being paid as a waged salesperson. The proposed wording in the draft exposure award 2015, clause 9.7 (a)-(i) is agreed to.
- (e) RRESSA supports the Full Benches decision and the wording proposed in the exposure draft award 2015, ( subject to those minor modifications outlined in paragraph 3 below)
- (f) RRESSA supports the minimum commission- only rate to be 31.5% and no further debits from the commission payable allowed.
- (g) RRESSA supports the proposed amendments with respect to the payment for NES leave entitlements.
- (h) RRESSA strongly supports the Full Benches decision that commission –only salespersons cannot be employed on a casual basis.

2. Grounds in support of the proposed relativities outlined in 1 (b) above.

- (a) The property sales associate (PSA) is an entry level position for graduating into becoming a licensed property sales representative. PSA, as defined by the current award criteria are employed to assist a property sales representative in the listing and/ or sale of real property or businesses and/ or the leasing of commercial, industrial or retail property. They perform many tasks but always under the direction of authorised personnel such as the property sales representative.

When comparing the duties and responsibilities of a PSA with similar entry level employees in other career industries, e.g. Clerks Private Sector Award, level 1 which has 3 annual increments, representing 91.31%, 95.83% & 98.82% respectively of the level 2 1<sup>st</sup> year of service clerk, the relativities put forward by RRESSA are well within the parameters of like awards and the metal trades award of 94.89% at the C11 classification.

In further support of RRESSA submission we refer the Full Bench to the arbitrated decision of then Commissioner GM Stevens, in the then Clerks (SA) Award with respect to the setting of the wage relativities for clerks in levels 1 and 2 of that award in 1992, [1992] SAIR Comm 106 ( 13 October 1992).

The Commissioner at page 8 of his decision, after considering the relativities of the Metals award, classifications C.12 and C.11 ( 87.4% -92.4%), Retail Award sales assistant at 92.4% and the then arbitrated Full Bench decision of the then Victorian Industrial Relations Commission for clerks at their Grade 1, of 89.7% - 92.1%and Grade 2, 94.6% - 97.1%, determined that the entry level of the Clerks Award (SA), level 1 should have a relativity over the three annual increments of 91%, 94% & 97% respectively.

When comparing the work and responsibilities of a PSA in relation to the General Retail Award 2010 the level most approximating the responsibilities of a PSA is a Retail Employee level 3. The award refers to indicative tasks and job titles of the Retail Level 3 employee as, supervisory assistance to a designated section manager or team leader, opening and closing of premises and associated security, machine operators, 2IC to department manger, senior salesperson, senior salesperson and the like. A level 3 Retail employee is paid \$793.60 p.w. or 98.08% of the “tradespersons” rate of a level 4 retail employee. A level 2 retail employee is paid \$781.40 p.w. or 96.58% of the level 4 retail employee. Again the relativities sought by RRESSA for PSA (94% - 97%) are well within the range of comparable industries and the responsibilities of the employees concerned.

- (b) With respect to the property management associate, RRESSA believes the duties and responsibilities are essentially the same as for a property sales associate and ask that the relatives of both be treated the same, except that as per the current award where the property management associate has just the one rate of pay which we say should be \$784.83 p.w. (97%) of the property management representative base rate of pay (as proposed below by RRESSA).

- (c) RRESSA seeks the same relativity as that applying for the property sales representative, i.e. 100% of the C.10 rate or \$809.10 p.w. The duties and responsibilities of the property manager is equivalent to that of a property salesperson as can be seen from comparing the duties and responsibilities of both classifications and from the evidence lead by RRESSA and supported by the employer witnesses in cross examination during the hearing of the claims in November 2016.
- (d) For all of the aforementioned reasons in (b) and (c) above RESSA seeks the same relativities for the Strata / community Title management associate and the Strata /community Title representative, as sought for the abovementioned Property Management Associate and Property Management Representative – i.e. their duties and responsibilities are equivalent .
- (e) RRESSA seeks the 130% relativity for each of the Supervisory positions named in the award, i.e. Property Sales Supervisor, Property Management Supervisor and Strata/ Community Title Management Supervisor.

In each of the classification definitions in the current award relating to each of the above supervisory roles, the following common range of responsibilities and duties are apparent e.g. *“...to perform a broad range of skilled applications and the provision of leadership and guidance to others...”* *“The role involves significant initiative, judgement, decision making and problem solving in relation to ...”*, *“ The position may also involve contribution towards the development of a broad business plan/ strategies and budgets and having accountability and responsibility for self and others in achieving the outcomes”*.

Some of the indicative tasks common to each of the 3 supervisory classifications include amongst others, the following, *“Provide leadership in the workplace, Supervise and/ or manage work team(s), Ensure compliance with the various obligations imposed under the relevant real estate law, Manage personal work priorities and professional development of self and others in the work team(s), facilitate change and innovation, develop and implement customer service strategies”*.

The level 5 clerk in the Clerks Award, which has been work valued at 130% of the metal tradesperson rate has had the duties of a level 5 described in the award under the heading Characteristics as,

*“Employees at this level are subject to broad guidance or direction and would report to more senior staff as required. Such employees will typically have worked or studied in a relevant field and will have achieved a standard of relevant and / or specialist knowledge and experience sufficient to enable them to advise on a range of activities and features and contribute, as required, to the determination of objectives, within the relevant field(s) of their expertise.*

*They are responsible and accountable for their own work and may have delegated responsibility for the work under their control or supervision, including, scheduling*

*workloads, resolving operations problems, monitoring the quality of work produced and counselling staff for performance and work related matters.*

*They would be able to train and to supervise employees in lower levels by means of personal instruction and demonstration. They would also be able to assist in the delivery of training courses. They would often exercise initiative, discretion and judgement in the performance of their duties.*

*The possession of relevant post secondary qualifications may be appropriate but are not essential”.*

The level 5 employee in the Banking, Insurance and Finance Award (an industry not dissimilar to the real estate industry in respect of the sale, purchase, land/or leasing of property, both domestic and commercial) and which has been work valued at 130% of the metal tradespersons’ rate of pay is defined as;

*“The position maybe:*

- (a) A specialised role, possibly supported by one or two junior staff members, requiring formal qualifications and/ or specialised vocational training; and/ or*
- (b) A managerial role (managing 5-10 people) responsible for the operation of part or parts of the employer’s business.*

*Those employed at this level exercise considerable discretion and/ or responsible for operational planning.*

*Indicative job list – human resources consultant, senior learning and development officer, accountant, senior claims officer, analyst programmer, fraud investigator, call centre team leader, credit controller, administration manager, underwriter, sales manager, customer service team leader, assessor, loss control officer, business analyst, assistant branch manager, personal lending specialist, team leader.”*

In the retail industry the employee graded as a level 8 retail employee has been work valued at 130% of the metal tradespersons rate and is defined as someone who works at a higher level than a retail employee level 7 and maybe a person with a Diploma qualification and has indicative job titles which include, “*A shop manager of a shop with Departments/Sections, or a Clerical officer level 5”*. The definition of a Retail Clerical Officer has the same characteristics as those that apply in the Clerks Private Sector Award.

In the Manufacturing and Associated Industries and Occupations Award 2010, the C5 classification has been work valued at 130% of the base trade rate and includes, Advanced Engineering Tradesperson – Level 2 and Engineering/ Laboratory Technician - Level 5. Whilst these classifications require formal training such as a Diploma of engineering – Advance Trade or equivalent, or Diploma of Engineering – Technical , or equivalent, they do not perform a number of the responsibilities of

the 3 Real Estate Award supervisory classifications, such as supervise and/ or manage work teams, ensure compliance with obligations under particular legislation, develop and implement customer service strategies, supervision of the overall office, development of departmental business plans etc. Therefore whilst the work is different as are their skills and responsibilities, taken as a whole the work value of the real estate supervisors is at least comparable with the C5 metal award classification.

3. Comment on other parts of the Draft Exposure Award – Real Estate 2015

(a) RRESSA refers to proposed new clause 9.2 (b) -Written agreements generally.

Whilst RRESSA submitted a the draft clause with the agreement of all stakeholders arising from the Heads of Agreement made in September 2015, the Association has harboured some concerns with the use of the word, "accountability" used in sub clause 9.2. (b). This sub clause deals with any changes made between the employer and a property salesperson, where the salesperson may agree to go from being paid a wage and allowances to become commission – only. The last sentence in the sub clause deals with the position of a non commission only salesperson changing their status to being remunerated on a commission – only basis. The intent of the last paragraph is to make it clear that in the new commission – only employment agreement relating to the commission payable to the employee does not provide for the carryover of any debit from the commission statement the employee had immediately prior to their agreeing to be remunerated on a commission – only basis.

The word "accountability" in RRESSA view does not express the intent meant by the parties. Accountability according to the various dictionaries the Association has consulted is a noun meaning, *"The definition of accountability is taking or being assigned responsibility for something you have done or something you are supposed to do" and a noun "that describes taking responsibility, or admitting you made a mistake"*.

In light of the above definitions and the use of a word which is far from clear as to the intent of the drafting parties, RRESSA submits that the wording of the last paragraph of 9.2.(b) should read as follows, *"Provided that in circumstances where a non – commission – only employee is changing to a commission – only agreement , then the commission – only agreement must not include any carry over debit the employee may have had under the commission agreement which was in force immediately prior to the commission – only agreement becoming operative".( the suggested change in wording is underlined).*

The word debit is defined in the Oxford Dictionary as, *"entry into account of sum owed, the sum itself or total of such sums, enter on debit side of account"*.

Given that all parties to the Heads of Agreement agree on the principle and intent of the proposed sub clause, RRESSA only seeks to ensure clarity as to the meaning of the words used in the award. The term "debit" in the real estate industry is widely known and

understood by both employers and salespersons' who receive a share of the employer's commission in addition to their award wage, where their commission statement is subject to a variety of agreed debits from any commission earned by the salesperson.

- (b) Clause 9.4 (b) of the exposure draft 2015, the words, "*must be the same*" in the 3<sup>rd</sup> line is repeated a second time and needs to be deleted.
- (c) Clause 10 – Allowances
  - (i) The draft exposure award 2015 does not include a reference to a new allowance to be paid to employees who use their personal motor scooter or motor cycle on the employers business. RRESSA refers to the Heads of Agreement between the stakeholders and contained in Commissioner Hampton's report to the Full Bench dated 2<sup>nd</sup> September 2015 – Schedule F and asks for it to be included in the new award.
  - (j) We refer to clause 10.6 of the draft exposure award, - Mobile Telephone allowance. The exposure draft maintains the existing award wording, whereas in the Heads of Agreement all parties agreed to a new clause dealing with the same subject matter, in particular the proposed new clause as per Schedule G in the Heads of Agreement. RRESSA seeks the inclusion of the proposed new clause in the new award.
- (d) Clause 13.5 (b) (ii) Annual Leave Loading refers to commission – only salespersons not being paid annual leave loading. RRESSA seeks the deletion of that paragraph, which only made sense in the terms of the existing award when commission –only employees could have their annual leave and sick leave entitlements paid in advance. Given that will no longer be the case, the rationale for not paying commission –only employees leave loading ceases.

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