



REAL ESTATE EMPLOYERS' FEDERATION

Submission concerning Payment of Wages - model term in modern awards

Matter No. AM2016/8

Submission on behalf of the Real Estate Employers' Federation

30 October 2017

1. INTRODUCTION

- 1.1 The Real Estate Employers' Federation (**REEF**) is a registered organisation of employers under the *Fair Work (Registered Organisations) Act* 2009. It has over 1,400 members in NSW, Victoria, Tasmania and the Australian Capital Territory.
- 1.2 This submission is filed on behalf REEF in accordance with the directions issued by the Full Bench in its Statement and Directions dated 19 September 2017 [2017] FWCFB 4817.
- 1.3 The *Real Estate Industry Award* 2010 (the **RE Award**) is an award currently under review in the Commission's 4-year award review process. The review of the Award is well advanced and on 6 July 2017, the Fair Work Commission released an exposure draft of the reviewed Award (the **Exposure Draft**).
- 1.4 REEF has not previously made submissions in Matter No. AM2016/8.

- 1.5 The Full Bench has expressed a provisional view that *“all modern awards should include a term providing for the method and frequency of payment as well as placing a limit on payment in arrears. We also consider that there is utility in establishing a model ‘payment of wages and other amounts’ award term.”*¹
- 1.6 The Full Bench has also expressed the view that there should be a *‘payment on termination’* model term.
- 1.7 REEF has considered the Full Bench’s provisional **‘payment of wages and other amounts’** model term and its provisional **‘payment on termination of employment’** model term set in its decision dated 1 December 2016.² (the **model terms**)
- 1.8 REEF contends that in addition to wages, remuneration of employees employed in the real estate industry is heavily focused around commission, bonus and other incentive based arrangements.
- 1.9 For the reasons detailed in this submission, REEF is concerned that the model terms either:
- Lack clarity concerning the timing of payment of commission, bonus and incentive payments as applied within the real estate industry; or
 - Will significantly and detrimentally affect how such payments have been made within the real estate industry over many years.
- 1.10 For the reasons contained in this submission, REEF respectfully asks the Full Bench to modify the model terms for the purposes of the RE Award only. The proposed amended clause is set out at Annexure A to this submission.
- 1.11 For avoidance of doubt, REEF states its support for the uniformity in the regulatory framework created by the model terms, but in recognition of the peculiarities that exist in the real estate industry, seeks the Full Bench’s endorsement of the proposed modification within the context of the RE Award.

¹ [2016] FWCFB 8463 at paragraph 33

² Ibid at paragraphs 34 and 117

2. The RE Award and commission, bonus and incentive based entitlements

- 2.1 It is trite to state that remuneration arrangements in the real estate industry are very much incentive driven. It's a results driven industry where employees are, in the main, rewarded based on performance.
- 2.2 The bedrock of creation relating to commission, bonus or incentive entitlements can be found in several clauses in the RE Award. While the RE Award does not seek to regulate or prescribe the methodology behind the calculation of commission, bonus or incentive arrangements (except as it relates to commission-only employees), importantly the RE Award provides 'administrative' protection for employees by requiring the employer to:
- (i) prepare a written agreement detailing the method by which any entitlement to commission, bonus or incentive payment will be calculated (clause 15);
 - (ii) account to the employee in written form when an entitlement to commission or bonus arises (clause 17.2);
 - (iii) after termination of employment, to credit the employee with the portion of commission, bonus or incentive payments as stated in the written agreement for any property transaction for which there was a legally enforceable contract in place prior to termination or during the notice period (clause 17.3); and
 - (iv) relevantly, for the purposes of these proceedings, an obligation to pay mechanism concerning any entitlement to commission, bonus or incentive payment (clause 21.1(c)).
- 2.3 The features of the RE Award described above form the base architecture of an employee's entitlement to commission, bonus or incentive payments.

3. The current mechanism for payment of commission, bonus and incentive based entitlements in the RE Award

- 3.1 The current ***Payment of Wages*** clause in the RE Award contains no less than two distinct payment provisions. The first provision regulates the payment of wages and allowances, not dissimilar to the intention of the model term to regulate this issue (see clause 21.1(a) of the RE Award). In addition the RE Award contains a unique provision regulating the payment of commissions, bonuses and incentives (see clause 21.1(c) extracted below:

Where an employee has become entitled to receive any commission, bonus or incentive payment in accordance with a written agreement made under either clause 15 - Payment by wages with commission, bonus or incentive payments or clause 16 – Commission-only employment, payment to the employee must be made within 14 days of the entitlement becoming payable. Provided that the employee's entitlement to commission, bonus or incentive payment only becomes payable once the employer has received cleared funds from its client for the transaction(s) to which the employee's entitlement relates.

- 3.2 Clause 21.1(c) of the RE Award is a mechanical term prescribing the timing of any commission, bonus or incentive based payment to an employee. Its inclusion in the RE Award during the award modernisation process was an adoption of a similar provision in the NSW NPSA. It was a provision supported by all key stakeholders to the RE Award.
- 3.3 Its construction recognises a number of important features concerning commission, bonus and incentive payments in the real estate industry which are distinct from the payment of wages and allowances. These features include:
- (i) commission, bonus and incentive payments are calculated pursuant to a common law contract (the written agreement) prepared from provisions contained in the RE Award;

- (ii) any entitlement to commission, bonus or incentive payment will be payable from the net commission or fees received by the employer associated with a settled property transaction;
- (iii) the entitlement to be paid any commission, bonus or incentive payment only crystallises once it is calculated in accordance with the formula set out in the written agreement. Importantly, the written agreement will set the period over which the entitlement is to be calculated;
- (iv) the “14-day” payment period recognises the unusual features associated with calculating commission, bonus or incentive arrangements in the real estate industry. In this regard it is noted:
 - The calculation of any entitlement will occur at the expiration of the stated time period in the agreement e.g. at the end of a quarter. At this time the employer must prepare a reconciliation of the property transactions conducted by the employee during the stated period.
 - A statement of account involving the employee’s property transactions during the period must be prepared and presented to the employee for consideration and acceptance;
 - Prior to payment being made, cleared funds must have been deposited into the employer’s account associated with all transactions completed by the employee during the relevant period. In this regard it is noted that 3rd party ‘players’ to the transaction such as lawyers, accountants and financial institutions can delay the employer’s receipt of funds;
 - The industry stakeholders have long understood that 14 days is a reasonable time period for the employer to resolve these administrative elements.

3.4 There is arguably no RE Award based entitlement for an employee to be paid any entitlement to commission, bonus and incentive payments except for the mechanism prescribed in clause 21(1)(c). We contend therefore that it is important to maintain clause 21(1)(c) of the RE Award as a safety net, as it provides the employee with the clear legal basis to pursue any unpaid commission, bonus or incentive entitlement.

4. The model terms and possible effect on the payment of commissions, bonus or incentive payments under the RE Award

- 4.1 REEF is concerned that the wording of the proposed model terms, particularly in relation to clause x.1(a) and payment on termination, will create uncertainty about when payment must be made for commission, bonus or other incentive based entitlements. We say this for a number of reasons. There is no issue however with the model terms with regard to the RE Award obligation to the payment of wages and allowances.
- 4.2 The proposed clause defines a “pay period” as either one week, two weeks or, by agreement with affected employees, one month.
- 4.3 It is arguable, though not certain, that the words in x.1(a)(ii) ***“all other amounts that are due to the employee under this award...”*** are referable to payments such as commission, bonus or other incentive based payments arising from, but not prescribed by, the RE Award. The issue of uncertainty arises from the architecture of the RE Award relating to such payments. There is no prescribed amount of such payments under the RE Award but simply a mechanism to create a written document that sets out a method or formula for the calculation of any such entitlement (including the period over which it will be calculated). Whether any amount payable to a real estate employee for commission, bonus or other incentive payment, is deemed to be an amount payable ***“under this award”*** as contemplated by the proposed model terms is, in REEF’s respectful submission, unclear. We consider that it is important to avoid the use of the Commission’s resources addressing these types of disputes along with satisfying the modern award objective *“to ensure a simple, easy to understand, stable and sustainable modern award system”* as per s134(1)(g) of the *Fair Work Act 2009*.

4.4 If the words in x.1(a)(ii) are to be applied to the payment of commission, bonus or incentive arrangements, REEF contends two issues of concern arise from the proposed model terms:

- (i) clause x.1(a) prescribes that payment of wages and all ***other amounts that are due to the employee under this award*** must be made no later than 7 days after the end of each pay period. While for the purposes of wage/salary and allowance payments, a real estate employee's "pay period" may be either weekly or fortnightly, the entitlement to receive any commission, bonus or other incentive payments may not be realised until after the expiration of a longer period as set out in a written agreement. There is concern about the practical operation of clause x.1(a)(ii) in this context.
- (ii) Similarly, even if the concern detailed in paragraph (i) above is unfounded, the proposed model terms would presumably operate to provide payment of any commission, bonus or incentive payment to an employee within 7 days after the end of the pay period in which the entitlement becomes due in accordance with the written commission/bonus agreement. If clause 21(1)(c) of the current RE Award is lost as a result of the adoption of the model terms, employers will, in some circumstances, be forced to pay commission/bonus payments to employees prior to actually receiving the commission or fees associated with a settled property transaction from the client. Again, REEF reiterates, an employee's entitlement to commission, bonus or incentive payment is always payable from the net commission or fees actually received by the employer associated with a settled property transaction. REEF contends it would be unjust to force an employer to make payment to an employee of any commission/bonus entitlement prior to the receipt of monies from a client.

4.5 REEF contends therefore that any uncertainty that could arise concerning the timing of payment to a real estate employee of any commission, bonus or incentive entitlement is easily overcome by a modest amendment to the model terms for the purposes of the RE Award only. The proposed amendment is set out in Annexure A

to this submission with the changes readily identified in italics/bold print. In brief, the amendment sought is the retention of clause 21(1)(c) of the current RE Award.

- 4.6 The proposed amendment will maintain the integrity of the system provided for in the RE Award dealing with the important issue of commission, bonus or incentive arrangements and the time frame for payment once the entitlement has crystallised.

REEF thanks the Commission for the opportunity to make this submission.

Attachment A – the changes to the model term are in italics and bold

X. Payment of wages and other amounts

x.1 Pay periods and pay days

- (a) The employer must pay each employee no later than 7 days after the end of each pay period:
 - (i) the employee's wages for the pay period; and
 - (ii) ***subject to paragraph (g)***, all other amounts that are due to the employee under this award and the NES for the pay period.
- (b) An employee's pay period may be:
 - (i) one week;
 - (ii) two weeks; or
 - (iii) subject to paragraph (e), one month.
- (c) The employer must notify each employee in writing of their pay day and pay period.
- (d) Subject to paragraph (e), the employer may change an employee's pay day or pay period after giving 4 weeks' notice in writing to the employee.
- (e) An employer may only change from a one week or two week pay period to a one month pay period by agreement with affected employees. If employees in a particular classification were paid monthly prior to *[insert date of commencement of this clause]*, the employer may continue to pay employees in that classification monthly without further agreement.
- (f) Where an employee's pay period is one month, two weeks must be paid in advance and two weeks in arrears.
- (g) ***Where an employee has become entitled to receive any commission, bonus or incentive payment in accordance with a written agreement made under either clause 15 - Payment by wages with commission, bonus or incentive payments or clause 16 – Commission-only employment, payment to the employee must be made within 14 days of the entitlement becoming payable. Provided that the employee's entitlement to commission, bonus or incentive payment only becomes payable once the employer has received cleared funds from its client for the transaction(s) to which the employee's entitlement relates.***

x.2 Method of Payment

Payments under x.1(a) must be made by electronic funds transfer to the account of a bank or financial institution nominated by the employee, or by cash or cheque.

Payment on termination of employment

- (a) Subject to paragraph (b), the employer must pay an employee no later than 7 days after the employee's last day of employment:
 - (i) the employee's wages for any complete or incomplete pay period up to the end of the employee's last day of employment; and
 - (ii) **subject to paragraph (c)**, all other amounts that are due to the employee under this award and the NES.
- (b) The requirement to pay an employee no later than 7 days after the employee's last day of employment is subject to s.117(2) of the Act and to any order of the Commission in relation to an application under s.120 of the Act.
- (c) **Following termination of an employee's entitlement, the payment of commission, bonus or incentive will be made in accordance with clause 17.3 of this award.**

Note 1: Section 117(2) of the Act provides that an employer must not terminate an employee's employment unless the employer has given the employee the required minimum period of notice or "has paid" to the employee payment instead of giving notice.

Note 2: Section 120 of the Act provides that in some circumstances an employer can apply to the Commission to reduce the amount of redundancy pay an employee is entitled to under the NES. In dealing with an application, the Commission could make an order delaying the requirement to make payment until after the Commission makes a decision on the application.