

Extract of Advice from Specialist Counsel

As sought by Bruce Siebenhausen, Real Estate Employers' Association &
Barry Gannon, Property Sales Association of Queensland

Impact of the New Modern Award and Other Changes Brought About by The Fair Work Act 2009

I refer to Bruce Siebenhausen's email to me of 9 December 2009 wherein I was requested to give advice with respect to the impact of the new Real Estate Industry Modern Award ("the Modern Award") as well as other changes brought about by the Fair Work Act 2009. I also refer to our recent telephone conversation . . . I now forward this advice addressing the questions raised in Bruce Siebenhausen's email.

What happens to current registered Employment Agreements generally?

In Queensland the award dealing with real estate sales people is the *Property Sales Award Queensland – State 2005*. This is an award of the Queensland Industrial Relations Commission and by clause 1.5.1 has application to employees principally engaged in the listing, sale, auction, tender, purchase and/or leasing of real property and to their employers.

However with the advent of the Work Choices amendments to the *Workplace Relations Act 1996* (Comm) that award ceased to apply to employees in Queensland that were trading or financial corporations. Generally speaking this probably affected most employers in the real estate industry in Queensland. That award because of schedule 8 of the Commonwealth Act was replaced by what is known as a NAPSA (a notional agreement preserving a state award). Generally speaking the terms of the NAPSA were those terms set out in the state award. However where the Australian Fair Pay and Conditions Standard made provision for a matter in relation to an employee then a term (other than a preserved notional term) of the NAPSA that also dealt with that matter in relation to the employee was unenforceable. (See clause 44 of schedule 8). Therefore the rate of pay provisions set out in the real estate industry NAPSA were unenforceable and instead the employer was obliged to pay his employees in accordance with the relevant pay scale under the Australian Fair Pay and Conditions Standard.

I am cognisant of the fact that that scale allowed for commission only arrangements to be entered into and I refer to the Australian Fair Pay Commission wage setting decision No.6 of 2007 which prescribed the "Real Estate Agents (Commission Only) Australian Pay and Classification Scale", [2007] APCS 3 which scale operated from 1 October 2007. However that scale currently operates as a transitional APCS. Pursuant to item 11 of schedule 9 of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Comm.)

"A transitional APCS ceases to cover an employee when a modern award that covers the employee comes into operation."

This means that as from 1 January 2010 it will be the modern award and not the pay scale decision which will be operative in so far as those employees covered by that award are concerned.

What happens to NAPSAs after 1 January 2010?

Under the transitional provisions of the Act that I have referred to NAPSAs become award based transitional instruments. Item 29(1) of schedule 3 of the *Transitional Act* says as follows:-

“If a modern award (other than the miscellaneous modern award) that covers an employee, or an employer or other person in relation to the employee, comes into operation, then an award based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee.”

Therefore in so far as NAPSAs are concerned as and from 1 January 2010 they will cease to apply to employers and employees covered by the modern award. It is important to realise that this is only in respect of those employers which are constitutional corporations namely trading or financial corporations. In so far as employees of those employers are concerned effectively as from 1 January 2010 the only industrial instrument (apart from enterprise agreements etc) that will apply will be the modern award. The provisions of the existing NAPSAs will cease to apply from that date.

What about non-constitutional corporations?

As I have said above my advice so far has related to constitutional corporations. Non-constitutional bodies such as partnerships and sole traders have a different treatment. This is because in Queensland the legislatures of that state has referred its legislative powers with respect to private employers who are not constitutional corporations to the federal government. This process is permitted by the Australian Constitution and it effectively means that private employers who are not constitutional corporations will become subject to the provisions of the *Fair Work Act 2009* (Comm.).

I have not been able to view a copy of the federal legislation which deals with this issue (that is the issue of the coverage of non-constitutional corporation employees) but I have been able to review the federal bill for the relevant Act. I have based this advice on the provisions of this Bill as it is likely that the Act will be in very similar if not identical terms. The Bill is the Fair Work Amendment (State Referrals and Other Measures) Bill 2009. By item 3(2) of schedule 2 of that Bill and hence Act the relevant state award that I have referred to above (that is the Queensland award) will become what is known as a division 2B state award and will be taken to include the same terms as are in the present state award. It will also not only cover present employees but future employees. However division 2B state awards will not include a term that provides for disputes relating to matters arising under the awards to be settled by a state industrial body or a person who is independent of the employers, employees or organisations covered by the state awards. However a term of the award that is expressed to confer a power or function on a state industrial body has

effect as if it referenced the body as Fair Work Australia in lieu of the state industrial body.

By item 21 of schedule 2 of the Bill and hence the Act a Division 2b State Award terminates 12 months after the referral commencement. This will seem to indicate (if the referral commencement is taken as 1 January 2010) that the Division 2B State Award will terminate at midnight on 31 December 2010. During that 12 month period Fair Work Australia must consider whether any modern awards should be varied to include terms that are included in those state awards. These terms would take effect at the end of the 12 months after the referral commencement and would cease to have effect at the end of 5 years after the referral commencement. These time periods would seem to have been designed to coincide with the transitional periods for state based differences in modern awards.

Further these state based awards are to be read so that that there is no detriment suffered by an employee otherwise covered by them when compared to the National Employment Standards under the *Fair Work Act 2009* (Comm).

By item 43 of schedule 2 of the Bill and hence the Act while a division 2B state award covers an employee or an employer a modern award does not cover the employee or the employer. Further by item 45 of the same Bill and hence Act if an enterprise agreement or work place determination applies to an employee or an employer then the state award ceases to apply to the employee and the employer whilst it is in operation.

Summary

Accordingly the following can be said with respect to real estate employers and employees in Queensland as from 1 January 2010 namely:-

- a. In respect of those employers who are constitutional corporations (and are not otherwise covered by an enterprise agreement) then it is the Real Estate Industry Modern Award which will apply in so far as prescribed terms and conditions of employment are concerned;
- b. For those employers who are not constitutional corporations then the state based awards will apply for 12 months from 1 January 2010 (assuming that is the referral commencement date).

Does the current Agreement (registered or otherwise) for an employee to be paid commission only, be deemed to be operative as a commission only agreement under the new award?

In my opinion the answer to this must be no for the Queensland Award and Nabsis. The reason I say that is that the commission only arrangement set out in Schedule E of the Real Estate Industry Modern Award is referable to that award only. It contemplates that agreements will be reached pursuant to that award. Agreements reached pursuant to the Queensland Award and whether registered or not would not be made pursuant to the Federal Award.

Therefore in my opinion to take the benefit of the commission only arrangements or commission arrangements set out in the Federal Modern Award with respect to the

Real Estate Industry Agreements will have to be entered into and under that award and in the case of Queensland registered under Schedule E to be operative.

What happens with commission only under existing AWA's, ITEA's and Collective Agreements?

By item 28 of schedule 3 of the *Transitional Act* agreement based transitional instruments such as workplace agreements and AWA's oust the application of a modern award. If an AWA or an ITEA applies then an enterprise agreement will not apply to an employee under the Fair Work Act. These agreements will continue to apply until terminated which can be done after their nominal expiry period occurs through application to Fair Work Australia.

Workplace agreements, AWAs and ITEAs are treated as transitional instruments under the *Transitional Act*. Generally speaking, by item 23 of schedule 3 of that Act if a term of such an agreement is detrimental to the employee when compared to the National Employment Standards (which come into force on 1 January 2010) then the term is of no effect. Further under item 13 of Schedule 9 of that Act the rate of pay in such an agreement cannot be less than that set by the modern award.

What will be the status of existing registered Agreements of the private sector employers, and what will be their obligations with respect to agreements and commission only during the 12 month transition to the Federal system?

The reference in this question seems to me to be a reference to private sector non constitutional corporation bodies such as partnerships and sole traders. I have dealt with this question above and in summary during the first 12 months which will probably operate from 1 January 2010 the current state award in Queensland will apply to those employers, but in the mean time Fair Work Australia will be required to look at the particular modern award to see what terms should be incorporated into it.