PSAQ
Property Sales Association of Queensland

Extract of Advice from Specialist Counsel

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

REEA
REAL ESTATE EMPLOYERS' ASSOCIATION

Impact of the New Modern Award on Existing Employment Agreements

I refer to the email forwarded to me of 14 January 2010 and our subsequent discussions. The issue raised is whether employment agreements registered pursuant to the Property Sales Award Queensland – State 2005 (a Queensland award) which became a NAPSA under the *Workplace Relations Act 1996* (Cth) remain effective for the purposes of the Real Estate Industry Award 2010 being a modern award brought into force by the *Fair Work Act 2009* (Cth). I thought that I had addressed this issue in my previous advice to you of 16 December 2009 but it appears that what I said in that advice needs to be stated with greater clarity. Simply put my advice is that prior employment agreements entered into under awards or NAPSAs cease to have effect from 1 January 2010 and for employment agreements to be effective insofar as commission only or part commission only or bonus or incentive arrangements are concerned then there must be an employment agreement entered into pursuant to that award and in the case of Queensland registered with the QPIR to be effective. Prior employment agreements entered into pursuant to the State award or NAPSA will not be effective for that purpose. This is because as I have pointed out in my earlier advice NAPSAs cease to have effect once a modern award covers the employee and employer. This follows from item 29(1) of schedule 3 of the *Fair Work (Transitional Provisions and Consequential Amendments)* Act *2009* (Cth).

Unless those prior employment agreements are preserved under the Real Estate Industry Award 2010 so as to be effective for the purposes of that award then they cannot have effect insofar as that award is concerned. I appreciate that clause E.2.2 of schedule E of the Real Estate Industry Award 2010 says that the intent of the registration provisions of employment agreements or letters of employment in New South Wales, Queensland and South Australia would continue however I think that the words in that clause namely "but in an amended form to suit the purposes of this award" are of critical importance. Firstly because it recognises that it is the intent of the registration provisions not the employment agreement themselves which are

preserved but also that those provisions are not to be applied *mutatis mutandis* but will be modified. A perusal of the Queensland award supports, in my opinion, the notion that agreements registered under that award works for the purpose of that award and not for any other purpose.

With respect to the Queensland award, when one looks at for example clause 15.1.3 reference is made to the minimum income threshold of 125% of the employees prescribed award rate of pay. The award rate of pay being of course the award rate of pay set out in the Queensland award. Again in clauses 16.2 and part 17 of that award the clear reference is to provisions which are in substitution for those provisions and entitlements in the Queensland award not a Federal award. Those references are entirely inapplicable to an agreement which is to have effect under the *Fair Work Act 2009* (Cth) such as the Real Estate Industry Award 2010.

When one turns to the Real Estate Industry Award 2010 itself one can see for example in clause 15.1 it is stated in part namely:-

> *"where the employer and employee agree that, in addition to the minimum weekly wage…"*

This can only be a reference to the minimum weekly wage under that award. In other words the agreement must reference the minimum weekly wage as set out in the Federal award. Further in clause 16.2(f) it refers to an employee demonstrating that they can achieve the minimum income threshold set out in clause 16.3. The minimum income threshold set out in clause 16.3 is calculated according to amounts set out in the Federal award not the State award or NAPSA.

However in my opinion the following clause, 17.1(a) of the Federal award, puts the matter beyond doubt when it says:-

> *"Once a written agreement has been made with respect to clause 15 – Payment by wages with commission, bonus or incentive payments or clause 16 – Commission-only employment, any subsequent agreement to vary the employee's commission, bonus or incentive payment arrangements must be evidenced in a further written agreement between the employer and the employee."*

In my opinion the proper construction of this clause and the award itself is that the written agreement must be made with respect to clause 15 or clause 16 of the award not with respect to any provisions of a pre-existing State award or NAPSA.

Having regard to the above I confirm my previous advice to you that for employment arrangements to be effective for the purposes of the Federal Real Estate Industry Award 2010 they must be made pursuant to that award and not any pre-existing State award or NAPSA.

I trust the above advice is sufficient for your purposes. If you require any further advice please do not hesitate to contact.