



SUBMISSION ON BEHALF OF THE AUSTRALIAN FEDERATION OF  
EMPLOYERS AND INDUSTRIES (AFEI)

AM2008/87

AWARD MODERNISATION

**AFEI**  
Australian Federation of  
Employers & Industries

**BEFORE THE AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION**

**AWARD MODERNISATION**

**MATTERS NO. AM2008/87 – INDUSTRIES NOT OTHERWISE**

**ASSIGNED – REAL ESTATE INDUSTRY**

1. AFEI has earlier provided written and oral submissions to the Commission concerning AM 2008/87. AFEI makes this submission with respect to the proposed Real Estate Industry Award 2010 (“the Exposure Draft”)

**Commission-Only and Casuals**

2. AFEI submits that commission-only arrangements should be extended to casual employees, as proposed and agreed by the Real Estate Employers’ Combined Consultative Group (REECCG) and the Real Estate Unions.
3. AFEI submits that there are no compelling reasons why a casual employee under a property sales classification should be prevented from being remunerated by way of commission only.
4. AFEI notes and support the comments made by the REECCG in their additional submission filed 17 August 2009 that:

*“A common situation is where an experienced salesperson has elected to undertake greater domestic responsibilities in favour of permanent work. Given the salesperson’s experience, contacts and market knowledge, he or she may wish to be involved in the sale of property but only where an opportunity arises that causes minimal inconvenience to their other responsibilities. The commission-only arrangement, on a casual basis, is ideal in such circumstances for both the salesperson and the employer”<sup>1</sup>*

5. Commission-only employees in the real estate industry have considerable flexibility and autonomy with the hours they work. Their income is not measured by the number of hours they perform but by results. This is true whether they are employed on a permanent or casual basis. The key difference between the two categories of employees is that permanent employees will be entitled to accrue benefits provided under the NES and will be expected to perform a specified number of hours per week.
6. At the suggestion of the parties, the Exposure Draft provides appropriate safeguards to ensure that only those who are experienced and have a proven record of achieving satisfactory sales are eligible to be paid by Commissions.
7. We note that the submissions of the parties at the pre-drafting consultation stage did not directly address how casual commission-only employees were to be compensated. AFEI proposes that the standard 25% casual loading that has been adopted by the Commission in modern awards is to be paid to casual commission-only employees in lieu of NES benefits. Where a casual commission-only sales representative is employed on the minimum 35% of net commission, the total casual commission rate would equate to 43.75% (35% x 1.25).

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<sup>1</sup> REECCG Additional Submission filed 17 August 2009 at paragraph 2, page 7

8. AFEI proposes the following amendments to the Exposure Draft:

- delete the exclusion of casuals from being remunerated by way of commission only at clause 16.2(e); and,
- insert a new subclause (e) at clause 17.5 that provides:

*“A casual employee remunerated on a commission only basis must receive the casual loading provided in clause 10.4(b) and 10.4(c) of the award.”*

### **Commission-Only Employees and NES Entitlements**

9. At para 176 of the Full Bench’s Stage 4 Exposure Draft Statement (“the Statement”), the Commission urged the parties to consider whether NES entitlements may be incorporated into a piecework rate of pay having specific regard to the legislative provisions in the FW Act and the Minister’s consolidated award modernisation request.
10. AFEI has considered the legislative framework and the Ministerial request and submits that no term of either would prohibit the Commission making provision for piecework arrangements that allow NES entitlements to be paid in advance.

### **Termination of Employment and Commission-Only Employees**

11. At para 173 of the Statement, the Full Bench invited further submissions with respect to how the provisions dealing with termination of employment will operate in relation to commission-only employees.

12. AFEI submits that for those who are paid an “all up” rate of pay, no further payments will need to be made to the employee during the prescribed period of notice if they have been paid a sufficient amount in their commission payments in advance of the entitlement. Otherwise, the employee will be entitled to a ‘top up’ payment to ensure that their legislative entitlement is met.
13. Where the employee has not had the payment incorporated into their commission rate, the employee is entitled to the applicable notice (or pay in lieu of notice) at the full rate (however defined) as provided under the *Fair Work Act, 2009 (Cth)*.

## **Transitional Arrangements**

### *Real Estate Industry Award 2010*

14. At para 179 of the Statement, the Full Bench questioned whether the model phasing schedule is necessary given the “numerous transitional provisions” included in the Exposure Draft. AFEI submits that the model phasing schedule is necessary to deal with increases in minimum wages and loadings.
15. As indicated at para 167 of the Statement, there are several “award-free” jurisdictions where no real estate award-based transitional instruments apply. These are the ACT, NT, Vic and WA. These jurisdictions will require transitioning arrangements to deal with the increase in wages and to allow time for employers in those jurisdictions to bring their industrial arrangements into line with the conditions provided in the modern award.

16. The loadings and penalty rates clause of the model phasing schedule is also necessary to deal with increases in the casual loading. For the “award free” jurisdictions mentioned above, the casual loading will increase from the default 20% casual loading to the standard 25% casual loading adopted by the Commission in modern awards. In Tasmania, the casual loading will significantly increase from currently 10% to 25%.
17. The changes identified above are indicative of some of the changes that will require transitioning through the model phasing schedule.

*Clerks – Private Sector Award 2010*

18. AFEI submits that as a result of the Commission’s decision not to include clerks in the Exposure Draft, there will be a significant impact on employers in the real estate industry, particularly in NSW. The impact includes:
  - Increases in wages;
  - Significant increase in penalty rates and no ability to work ordinary hours on Sundays despite the fact that the real estate industry is a seven day industry.
19. AFEI relies on its previous submissions regarding the increase in wages for those moving from the NSW Clerical and Administrative Employees (State) Award (“the NSW Clerks NAPSA) to the Clerks – Private Sector Award 2010 (“the Modern Clerks Award) classification and wages structure<sup>2</sup>. The increases in wage costs identified by AFEI in relation to the NSW Clerks NAPSA also apply to real estate employers covered by the NSW Real Estate Industry Clerical and Administrative Employees State Award NAPSA (“the NSW Real Estate Clerks NAPSA”).

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<sup>2</sup> See para 27-29 of AFEI Transitional Submission – Priority and Stage 2 Awards filed 29 May 2009

20. These cost increases will be amplified for real estate employers as the NSW Real Estate Clerks NAPSA provides for a penalty rate regime recognising that ordinary hours may be worked on weekends (Saturday *and* Sunday).
21. The following table provides a comparison of the provisions:

	<b>NSW Real Estate Clerks NAPSA</b>	<b>Modern Clerks Award</b>
<b>Ordinary hours</b>		
Saturday Sunday	7am – 7pm 7am – 7pm	7am – 12.30pm N/A
<b>Weekend Penalty</b>		
Saturday Sunday	Ordinary hours 25% Ordinary hours 50%	Ordinary hours 25% Overtime – 100%

22. We note that the span of hours on Saturday in the Modern Clerks Award significantly restricts the ordinary hours of work on a Saturday. Any work performed between 12.30pm to 7.00pm is considered overtime under the Modern Clerks Award.
23. AFEI submits that the ordinary span of hours and the weekend penalties in the NSW Real Estate Clerks NAPSA should be preserved for the full five year transition period.
24. AFEI proposes that the following clause be inserted as a new clause A.8 in Schedule A to the Modern Clerks Award:

***A.8 REAL ESTATE INDUSTRY – NSW***

***A.8.1*** *The following transitional arrangements apply to an employer in NSW which, immediately prior to 1 January 2010:*

- (a) was obliged,*
  - (b) but for the operation of an agreement-based transitional instrument would have been obliged, or*
  - (c) if it had been an employer in the industry or the occupation covered by this award prior to 26 March 2006 would have been obliged*
- to observe the conditions of the award-based transitional instrument derived from the NSW Real Estate Industry Clerical and Administrative Employees (State) Award.*

**A.8.2** *The ordinary hours of work shall be a maximum of 38 per week worked over no more than 5½ days in any seven day period or 76 hours worked over no more than 12 days in any 14 day period. Meal breaks will not be regarded as time worked. The daily ordinary hours shall be worked between 7.00 am to 7.00 pm and shall not exceed 10 per day.*

**A.8.3** *All ordinary hours worked on Saturday shall be paid for at the rate of time and one quarter.*

**A.8.4** *All ordinary hours worked on Sunday shall be paid at the rate of time and one-half.*

**A.8.5** *These provisions cease to operate from the beginning of the first full pay period on or after 31 December 2014.*

**16 October 2009**