

Small Business Union/ADL Software

Submission for minimum wage
levels in the Real Estate Industry
for “Commission Only” Sales
Personnel

Submission Summary

The Small Business Union in conjunction with ADL Software (SBU/ADL) submits to the Australian Fair Pay Commission (the Commission) that the following factors need to be taken into account in the consideration of the appropriate wage levels in the upcoming wage review.

Overall

- As a result of the WorkChoices legislation all existing and new “commission only” agreements, (which is a form of “piece rates”) except pre reform AWAs or Certified Agreements are now subject to the AFPS minimums which approximate \$536 per week (in Qld) irrespective of whether the sales person sells anything or not. Most real estate agents still can’t believe that the non AWA “commission only” agreements they entered into in good faith with their sales personnel no longer achieve that goal of “commission only” and that they are in fact unwittingly accruing massive liabilities to under performing sales staff. All parties believe the sales staff should only be entitled to commissions on sales made. However as a consequence of the AFPS minimums, every week a \$536 debt (in Qld) accrues to the sales staff until such time as they sell enough to clear it. If they fail to sell enough and leave, the agent must pay them \$536 for every week since their last commission clearance. SBU/ADL contends that this is grossly unfair and has covertly changed traditional industry practice. Even worse it has exposed nearly all real estate agencies to huge liabilities, (many running into tens of thousands of dollars) that in most cases have already been accrued without their knowledge.
- The need to ensure that the simplified Australian Fair Pay and Classification Scales allow for the unique character of professional Real Estate sales to ensure that “Commission only” selling remain viable for the benefit of the consumers.

The Mechanisms

Irrespective of whether Real Estate sales personnel are on either individual or collective workplace agreements, the SBU/ADL contends the following should be implemented

- (i) Provided a declaration can be made by the employee that they have the skills and experience likely to indicate their capacity to earn at least more than the general AFPS and that they understand their only remuneration is from “commission” then there should be no applicable minimum wage standard for the industry for that class of experienced Salespeople.
- (ii) Alternately, because the expectations by employers in real estate are that employee salespeople service rosters, attend sales meetings averaging from 8-12 hours weekly, and those specific controlled and supervised times are nearly always clearly defined, then the AFPS should apply only to those hours on either a casual or permanent part time basis irrespective of the time actually spent unsupervised in pursuit of sales and that minimum (in general from between \$150-\$250 per week) be offset against commissions earned.

Either recommendation will allow for the effective continuation of the real estate industry in its current traditional form and will ensure that the simplified Australian Pay and Classification Scales properly reflects the Award process and protects outcomes in terms of wages and classification that have already been achieved through bargaining and industry practice.

1 Introduction

The Small Business Union (SBU) in conjunction with ADL Software (SBU/ADL) welcomes the opportunity to provide this submission and comment on the issues for consideration by the Australian Fair Pay Commission (the Commission).

Firstly ADL Software owned and operated by Alan D. Liddle is a firm which provides commercial software and services to over two thirds of the operational real estate agencies in Qld (over 1300 paying subscribers) and is clearly the market leader in the field. They have recently entered into a partnership with the SBU to provide their client base with the SBU range of professional services including both Collective and Individual Workplace Agreements (AWAs) drafted especially for the real estate industry.

Around 25% (300-400) of the ADL real estate clients now currently have their staff under pre and post reform AWAs. In terms of effective commercial representation of the real estate industry needs, the combined SBU/ADL would be equal to or greater than that of the REIQ the official industry representative body. This is not to imply criticism in any way but rather to illustrate the proportion of the industry which has asked us to represent them in this matter.

The SBU provides a range of professional services including Australian Workplace Agreements (AWAs) to support businesses. The SBU represents diverse industries such as real estate, horticulture, manufacturing and services.

Graeme Haycroft, General Secretary of the Small Business Union and Principal of the Labour Hire Australia Group, and a team of consultants working with their internal Finance and Accounting department and external legal advisors comprise the SBU.

Comments and feedback are gathered from client firms on many issues to ensure continual awareness of concerns affecting the workplace. SBU/ADL takes an industry approach to issues, creating an opportunity to lobby or develop actions for improved workplace conditions.

SBU/ADL continues to develop solutions for identified issues and is recognised for its innovation and strong support. The organisation continues to lodge a significant number of AWAs, and has an enviable reputation for providing significant industry outcomes very efficiently for its members. However whilst the working base of SBU/ADL is currently mainly in Queensland, the problems are Australia wide and the suggested solutions applicable Australia wide.

SBU/ADL understands that the Commission's first minimum wage decision is due in Spring 2006 and this submission is intended to assist the Commission in reaching an appropriate decision at that time.

However, given the relatively short timeframe within which public comments and submissions are required to be provided to the Commission on the issues, SBU/ADL provides the following brief submissions on a preliminary basis. It would welcome the opportunity for more detailed consultation over the coming months and, if appropriate, to provide more comprehensive written submissions or responses to the Commission on particular issues.

2 The role of the Australian Fair Pay Commission

2.1 Wage-setting functions

The Commission has been established by the Federal Government to undertake wage-setting functions as set out in the *Workplace Relations Act 1996* (**the Act**), which are:

- conducting wage reviews; and
- exercising wage-setting powers as necessary, depending on the outcome of the wage reviews.

The main wage-setting powers of the Commission give the Commission the power to:

- set and adjust the federal minimum wage;
- set and adjust minimum classification rates of pay in the Australian Pay and Classification Scales;
- set and adjust the federal minimum wage for juniors, trainees (including school-based apprentices) and employees with disabilities;
- set and adjust **minimum wages for piece workers**; and
- set and adjust casual loadings.

2.2 Wage-setting parameters

The Act specifically provides that the objective of the Commission in performing its wage-setting functions is to promote the economic prosperity of the people of Australia having regard to four factors:

- the capacity for the unemployed and low paid to obtain and remain in employment;
- employment and competitiveness across the country;
- providing a safety net for the low paid; and
- providing minimum wages for junior employees, those in training, and employees with a disability to ensure those employees are competitive in the labour market.

3 The principles underlying the Work Choices Act

3.1 General principles

The WorkChoices amendments to the Workplace Relations Act (**the Act**) emphasise an enterprise focussed approach to the determination of terms and conditions of employment. Following the commencement of the WorkChoices amendments, the revised Section 3 of the Act provides that:

“The principal object of this Act is to provide a framework for cooperative workplace relations which promotes the economic prosperity and welfare of the people of Australia by:

(a) *encouraging the pursuit of high employment, improved living standards, low inflation and international competitiveness through higher productivity and a flexible and fair labour market; and*

...

(c) *providing an economically sustainable safety net of minimum wages and conditions for those whose employment is regulated by this Act; and*

(d) *ensuring that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level; and*

...

(g) *ensuring that awards provide minimum safety net entitlements for award-reliant employees which are consistent with Australian Fair Pay Commission decisions and which avoid creating disincentives to bargain at the workplace level; and...*”

The Australian Fair Pay and Classification Scales are currently drawn from existing State and Federal Awards. Awards in both the Federal and State systems have primarily been established as instruments which apply to those employers and employees who are, for some reason, unwilling or unable to reach agreement on the terms and conditions of employment at their workplace. However, it is SBU/ADL’s view that this does not change the fundamental principle behind the WorkChoices amendments to the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level. This is an important principle which SBU/ADL considers should strongly influence the Commission’s approach to the minimum wage setting process.

4 Piece rates in the Real Estate Industry

4.1 Why are piece rates so important?

The real estate industry use of piece rates, commonly called “commission only” arrangements are the basis for the fair and equitable remuneration of its employees. For the purposes of this submission “commission only” shall be also be referred to as “piece rates”. In functions such as sales, there is no direct link between the work performed and realised property sales. Piece rates are important to the industry because they allow employers and their employees to focus on maximising opportunities while guaranteeing flexibility. In particular, in an industry in which the value added by employees performing these functions is related to effective activity rather than time spent (given that quality is essential throughout the process), piece rates provide support to new entrants as they develop to become more productive and efficient. The essential tasks of networking and prospecting are largely unmeasurable because opportunities are sought throughout each day. Piece rates also help guarantee a certain cost per transaction which is essential for planning and forecasting purposes in the real estate organisation.

4.2 The Commission’s role in setting piece rates

As part of the process of rationalising the Australian Fair Pay and Classification Scale, the Commission is empowered to set minimum piece rates. The extent of the Commission’s power is dealt with in s.191 of the Workplace Relations Act.

“191 The guarantee where basic piece rates of pay are involved

(1) This section applies if:

(a) the AFPC proposes to exercise any of the following powers

(subject to subsection (4)):

(i) adjusting the standard FMW;

(ii) adjusting a preserved APCS;

(iii) determining or adjusting a new APCS;

(iv) revoking a preserved or new APCS; and

(b) either or both of the following subparagraphs apply in relation to a particular employee who will be affected by the exercise of the power:

(i) immediately after the exercise of the power takes effect, there will, under section 182, be guaranteed basic piece rates of pay for the employee;

(ii) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), there would, under section 182, have been guaranteed basic piece rates of pay for the employee if the employee had at that time been in his or her current circumstances of employment.

*(2) The AFPC must exercise the power in a way that it considers will not result in an employee of **average capacity**, after the exercise of the power takes effect, being entitled to less basic pay per week than he or she would have been entitled to because of this Division immediately after the reform commencement if the employee had at that time been in his or her current circumstances of employment.*

(3) In applying this section in relation to a particular exercise of a power by the AFPC, the effect of any other exercise of a power by the AFPC that takes effect at the same time must also be taken into account.

(4) This section does not limit the AFPC's power to make APCs for the purpose of section 220 or 221, or to adjust APCs made for the purpose of either of those sections."

4.3 Categorisation of Sales Personnel

Whilst there are many variations of real estate remunerations systems, depending to some extent on region (Victoria has a predominance of salary plus bonus arrangements whereas Qld, SA, WA are almost entirely "commission only"). It's also a franchise or individual agency preference.

For the purpose of this submission there is no suggestion that one is better or worse than another other than to point out that the predominant system (commission only) is precluded by the blanket AFPS minimums from working with any certainty. This uncertainty will lead directly to a significant reduction of employment opportunities for new sales person entrants to the industry.

Salespeople in their generality fall into three broad groups.

- (i) Inexperienced salespeople who need close supervision whilst they learn the skills. They are generally paid for a 38 hour week.
- (ii) Experienced salespeople who whilst not necessarily having real estate sales experience, believe they have the characteristics and determination to succeed in a real estate sales career.
- (iii) Experienced real estate salespeople who have demonstrated success in real estate sales and who having the necessary skills set can pretty much succeed anywhere.

Group (i) are not affected by AFPS minimum because they will be paid that minimum whilst they learn in those real estate agencies which have the infrastructure to teach them.

Provided Group (iii) are on workplace agreements with "averaging forward" provisions, such as in the SBU/ADL workplace agreements then their overall earnings will well and truly cover the AFPS minimum entitlements. However that is not the case for Group (iii) sales personnel under non AWA agreements or no agreements at all. Irrespective of their performance should one just stop selling say for a month or two as often happens for what ever reason, holiday, negotiating new job or career, sickness etc then every week since their last commission settlement until the time they leave, the real estate agency is liable for an extra \$536 per week. Times that for every non performing sales person across the industry doing likewise and we have largely unknown to the real estate agencies, huge but indefensible debts to those particular sales staff running into multi millions of dollars.

The vast majority of new entrants to the real estate industry fall into Group (ii) where the problems with the AFPS minimum entitlements arise. All can make a declaration that they believe they have the requisite skills and application set to succeed. Almost universally they are in a position to fund their own “training and orientation” to their new vocation and only want to work on “commission only” because it maximizes their potential income. Generally less than 10 or 12 hours a week is worked under supervision or activities such as “sales meetings” or “rostered days on” with the rest of the time out of the office networking, prospecting or working through sales processes.

Real estate selling is challenging and whilst most are trying to succeed, many of them still fail. Training and development will not result in someone who is unsuitable succeeding and it's not possible to identify them easily. Recruiting processes attempt to identify the most successful however the pre-eminent challenge is that person who seems suitable but when employed, is not.

Before Workchoices 27th March 2006, new sales people who failed to make sales or too few sales simply left the industry, wiser but perhaps a little poorer. Their employers, who had invested time and resources to help them, got little or no return on their money, but at least they didn't have to pay them for results they didn't achieve. However, from 27th March 2006 all of these salespeople will have to be paid the AFPS minimum which approximates \$530 - \$540 per week, when at best their supervised hours are about 10 or so a week. There is wide spread confusion over this issue because certain influential advisory groups have been erroneously advising the AFPS minimums did not in fact apply to existing non AWA “commission only” agreements. WorkChoices is however quite clear on the point. The AFPS minimums do apply.

4.4 “Average capacity” when related to Real Estate

The key concept in this provision of the Act is that piece rates or “commission only rates” must be set having regard to employees of **average capacity**. This however is an alien concept in sales performance measurement because the combination of skills and application required to achieve sales in real estate cannot be quantified. A person with poor communication skills could devote 100 hours a week to the task and still not make a sale, whereas a gifted communicator given the “luck of happenstance” could make 10 sales from 10 enquiries in 10 hours. In reality real estate sales performance is mainly a function of finding qualified buyers. The process of matching them to suitable properties and getting contracts signed, whilst still requiring high levels of sales and communications skills, is actually the lesser function. Networking for prospects is a genuine skill performed by successful real estate salespeople every waking minute of their lives. It is not possible to quantify the time taken to do either function in any meaningful way.

The concept of average capacity, whilst applicable to say a piece rate worker in the horticulture industry where almost any worker prepared to apply themselves can quite quickly be trained or motivated to achieve at least average performance, is simply not relevant to professional real estate selling.

Those who are attracted to real estate selling by the perception of high remuneration levels and lifestyle flexibility may not have the motivation to maintain the networking and prospecting disciplines necessary to put them before enough potential buyers to enable them to sell enough to survive let alone succeed.

A necessary motivation for success is the pressure created by only being rewarded for sales success instead of time spent.

In this SBU/ADL submission, if the Commission sets “piece” or “commission only” rates minima in the Australian Fair Pay and Classification Scale without reference to the industry reality of performance based remuneration, then the outcome will not only be a system that expressly rewards employees for working below the average capacity, if such a thing really has meaning to the real estate industry, but will in fact destabilize the sale costing process. This increased cost threatens the sustainability of employment in the real estate industry and decreased supply of sales people forces up the transaction costs for consumers.

4.5 Implications for the real estate industry

SBU/ADL submits that setting piece rate standards without reference to traditional industry standards will cause major problems for management, payroll and workplace culture. The scenario described above will have the following implications in the workplace.

- It is important to set the rate at a level which encourages employees to be productive and efficient so that employees are motivated to exert effort. An unnecessary high minimum paid rate reduces the incentive to do so. As a result, businesses that currently use piece rate remuneration may not be able to continue to operate in the same way they have done in the past and may, in fact, become unviable in the longer term.
- The “fairness” of piece rates is that an employee must be given a “fair” opportunity and “fair” piece rate to allow and give an incentive to them to earn at or above the average rate. Unless piece rates are tied to results instead of minimum hourly wages, there will be a lack of fairness in comparing the average capacity and hourly wage employees with piece rate employees.
- Commissions are the powerful incentive for successful real estate sales people. Remuneration for time spent in the workforce creates dissention amongst sales people as successful sales people see themselves as carrying the non or poor performers. There is no incentive for poor performers to improve. A flow on from this in businesses where there is a combination of hourly and piece rates is comparative wage injustice for hourly employees which has the potential to lead to hourly wage claims which will then fuel piece rate claims in a continuing spiral.

5 Interaction with the work of the Award Review Taskforce

5.1 Award rationalisation and simplification process

One of the significant aspects of the amendments made to the Act by the WorkChoices legislation involves a revised position for awards in the Federal industrial relations system. In particular, Federal awards:

- are to be both “simplified” and “rationalised”;
- will play a reduced role in the “safety net” of minimum terms and conditions for employees; and
- will no longer be the basis against which workplace agreements are tested for compliance – rather, such agreements will be tested against the statutory minima in the Australian Fair Pay and Conditions Standard (**AFPCS**).

The Federal Government has established the Award Review Taskforce (**the Taskforce**) to make recommendations in relation to the first of those, namely the “rationalisation” of Federal awards.

5.2 Potential impact on bargaining outcomes

One of the more significant principles underlying the WorkChoices Act is the determination of terms and conditions of employment by agreement making between the direct parties to the employment relationship. In this respect, the new system has much in common with agreement-based systems which apply internationally and represents a further move away from the compulsory arbitration system which has uniquely applied in Australia in various forms for the past 100 years.

SBU/ADL submits that this consideration leads to the conclusion that award classification wage rates should be maintained at safety net minimum levels only, and in the case of real estate selling on commission only or piece rates that it should be either set to nil or applicable only to the controlled hours each week to ensure that appropriate bargaining over wage rates and other conditions of employment is able to take place within the economy. Where award wage rates are set higher than necessary, employers are automatically placed at a disadvantage in negotiations to achieve productivity and efficiency increases in return for higher wage rates:

- the minimum wage is presently at a high level;
- the expectation of an annual increase in the safety net acts as a disincentive to bargaining;
- if the increase granted by the Commission is significant, that would be a disincentive to bargaining;
- an across-the-board increase which is not properly targeted will be a disincentive to bargaining; and
- there is no evidence to refute the proposition that all employees across the award structure have the ability to bargain.

The emphasis on agreement making “by choice” is an important principle which SBU/ADL considers should strongly influence the Commission’s approach to the wage-setting process. In particular, given that it appears likely that awards will become “industry based”, care must be taken to ensure that award wage rates are not set too high which has the potential to act as a disincentive to bargaining.

The concepts underlying, and the structure of, the WorkChoices Act are designed to promote enterprise and business specific industrial arrangements. SBU/ADL is concerned that these goals may be significantly hampered by the imposition of an inappropriate wage rate. Most notably, that may reduce the incentive to engage in truly effective enterprise bargaining and

reduce the opportunity to use flexible working conditions which will be of benefit to both employers and employees.

Prior to the commencement of the WorkChoices amendments to the Act, a number of SBU/ADL clients were able to introduce enterprise specific piece rate arrangements through the use of Australian Workplace Agreements (AWAs). This was because the Act previously utilised a “no disadvantage test” which allowed the piece rate levels to be considered globally in the context of all other benefits provided in the AWA. With the introduction of the Australian Fair Pay and Classification Scales it will not be possible for an AWA to provide for a piece rate that is lower than that contained in the scales. The Scales are a minimum safety net amount which has no application in the field of “commission only” sales if genuine flexibility is to continue.

5.3 The need to ensure award classification wage rates are true minimums

The simplification process has, at its core, the principle that awards must be comprised only of a genuine safety net of basic conditions of employment only. This has important ramifications for the work of the Commission, in particular, the need to ensure that, in the light of the approach of the Taskforce, the wage rates set for each classification reflect that fact that award wages are intended to be true minimum safety net entitlements. Award wages should not become de facto “paid rates”. Such a result will have a debilitating effect on the incentives for employers to grow the numbers of employees in their business.

The rationalisation of awards is likely to have the effect that classification structures in awards will be substantially simplified, with a reduced number of work classifications. This emphasises the need to ensure that the minimum wages set for each classification structure:

- are set at the appropriate minimum rates for the work done within that classification – that is, the wage rates accurately reflect the work done within that classification
- do not overvalue the work done within those particular classifications by, for instance, setting, as a minimum wage, a rate equivalent to the “average” wage rates for work within that classification – that is, the wage rates should be true minimum wage rates for the work within each classification and no more.

5.4 Enterprise specific flexibilities

SBU/ADL is also concerned that:

- wages and classifications will be maintained at or above present levels;
- the enterprise-specific flexibilities (clauses in awards which allow work to be organised in a certain way) which have been extracted as a result of negotiations about wages and classifications will not form part of any future industry award applying to SBU/ADL’s operations.

SBU/ADL has serious concerns that the removal of those previously negotiated flexibilities will force the parties back to the bargaining table to re-engage in negotiations concerning terms and conditions to apply to employees. In such negotiations, employees (or, at least, their representatives) will be bargaining from a significantly superior position, in the sense that the wages and classifications will be outside the control and are guaranteed to be set at least at present levels.

This outcome will make it significantly more difficult for clients of SBU/ADL to regain the necessary flexibilities and ensure efficient and productive business operations. To that end, the SBU/ADL submits that no great increase should occur in the first wage round to ensure that award rationalisation beds in properly in the meantime without distorting industrial outcomes.

6 Factors which the Commission is charged to consider

6.1 The capacity for the new industry entrants to obtain and remain in employment

One of the key benefits of piece rate remuneration is the certainty of labour cost for a business. In other words the “actual” labour cost to a business is similar regardless of the number of sales a commission-only sales person makes (overheads and management input is higher with ‘low sales’ people). This is paramount in the real estate industry where compliance conditions are strict and direct labour constitutes about 50% (it can vary to as high as 90% in some cases) of the cost of a sales commission to the vendor by the real estate agency.

If the unit cost for a ‘low sales’ person is higher than an average sales person then businesses won’t be able to retain existing or new employees who can’t meet the average rate. This is not desirable because many who want to work and are willing to accept remuneration commensurate with their ability, even if their calculated hourly rate is less than the minimum, will be excluded from entering the real estate industry.

If real estate firms become uneconomic they will close, leaving these persons that they employed without work. The ability to work is an important factor in achieving solid harmony and strong communities.

6.2 Employment and competitiveness across the country

The real estate industry is an important employer throughout Australia. SBU/ADL has members located in diverse locations throughout Australia. These locations vary from those with strong economic conditions to those with relatively weak economic conditions. No business can afford to carry non-productive people. It is essential that the simplified Australian Pay and Classification Scales reflect at best the minimum acceptable rate. Which should either be set at zero or at least only for the controlled hours each week (from 8-20 usually) for either “casual” or “permanent part time” designations of salespeople.

Small Business Union / ADL Software

Acknowledgement: Because of the essential similarity of “piece rates” and “commission only” arrangements, with the express permission of the Australian Mushrooms Growers Association, certain aspects of their submission on piece rates have been included and incorporated into this submission