



TRANSCRIPT OF PROCEEDINGS
Fair Work Act 2009

**VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER GREGORY**

AM2016/6

s.156 - 4 yearly review of modern awards

**Four yearly review of modern awards
(AM2016/6)
Real Estate Industry Award 2010**

Sydney

10.25 AM, WEDNESDAY, 23 NOVEMBER 2016

Continued from 22/11/2016

PN1672

VICE PRESIDENT HATCHER: All right, I take the appearances are the same? Mr Tracey, so we have the template agreements that have been supplied by your client.

PN1673

MR TRACEY: Thank you for that indication, your Honour.

PN1674

VICE PRESIDENT HATCHER: So I'll mark those. So these SIAG documents, is that right?

PN1675

MR TRACEY: That's correct, your Honour, yes, SIAG.

PN1676

VICE PRESIDENT HATCHER: The SIAG Template Contract Full Time and Part Time Employment will be marked exhibit 22.

EXHIBIT #22 SIAG TEMPLATE CONTRACT FULL TIME AND PART TIME EMPLOYMENT

PN1677

VICE PRESIDENT HATCHER: And the SIAG Template Contract for Commission Only Employment will be marked exhibit 23.

EXHIBIT #23 SIAG TEMPLATE CONTRACT FOR COMMISSION ONLY EMPLOYMENT

PN1678

VICE PRESIDENT HATCHER: Mr Farrell had you supplied an additional contract?

PN1679

MR FARRELL: I did sir, yesterday afternoon. Did that not come through?

PN1680

VICE PRESIDENT HATCHER: I'm not sure.

PN1681

MR FARRELL: Vice President, Mr Warren has kindly printed them off. Perhaps if I gave them to your associate and you could - - -

PN1682

VICE PRESIDENT HATCHER: I just want to mark it at this stage. Yes, Mr Farrell, we had a complete black out here yesterday afternoon, so we're still in a bit of chaos.

PN1683

DEPUTY PRESIDENT ASBURY: You all mercifully missed the evacuation down 16 flights of stairs.

PN1684

MR WARREN: Those ones that your associate just handed out, they're three distinct documents; there's not three copies of one document.

PN1685

VICE PRESIDENT HATCHER: So the one, the new one, the one that's new is the property - are these all new documents?

PN1686

MR FARRELL: No sir, the one that's new is the property manager; the one that yesterday, or it might have been the previous evening.

PN1687

VICE PRESIDENT HATCHER: So the document marked REEFWA Contract of Employment for Property or Strata Management will be marked exhibit 24.

**EXHIBIT #24 REEFWA CONTRACT OF EMPLOYMENT FOR
PROPERTY OR STRATA MANAGEMENT**

PN1688

MR FARRELL: Sorry sir, was there anything further you required from me on that?

PN1689

VICE PRESIDENT HATCHER: No.

PN1690

MR FARRELL: Thank you.

PN1691

VICE PRESIDENT HATCHER: All right, who would like to go first? Mr Clarke?

PN1692

MR CLARKE: I beg your pardon?

PN1693

VICE PRESIDENT HATCHER: Who would like to go first in this?

PN1694

MR CLARKE: Yes. Your Honour, and members of the Bench.

PN1695

MR TRACEY: I apologise for interrupting my friend Mr Clarke, I'm sorry, your Honour.

PN1696

MR CLARKE: You had the confidentiality order?

PN1697

MR TRACEY: Yes, the draft order. I'm sorry.

PN1698

VICE PRESIDENT HATCHER: Has everyone seen the draft Confidentiality Order?

PN1699

UNIDENTIFIED: Yes.

PN1700

VICE PRESIDENT HATCHER: Is there any opposition to us making that order?

PN1701

MR CLARKE: Not from us.

PN1702

VICE PRESIDENT HATCHER: I think I'll just read that Mr Tracey.

PN1703

MR TRACEY: Thank you, your Honour.

PN1704

MR CLARKE: Your Honour, just a bit of housekeeping to begin with.

PN1705

VICE PRESIDENT HATCHER: Can I just deal with this Confidentiality Order, Mr Clarke?

PN1706

MR CLARKE: I'm sorry.

PN1707

VICE PRESIDENT HATCHER: All right, well Mr Tracey we'll make an order to that effect and we'll formally issue it later today.

PN1708

MR TRACEY: If the Commission pleases.

PN1709

VICE PRESIDENT HATCHER: Mr Clarke.

PN1710

MR CLARKE: Thank you, sir. Because of Ms Bisbal's absence through personal tragedy, unfortunately, there's a part of her submission which while supporting REISA's claim for commission only to be increased to 160 percent, there was a reservation written into it about that was subject to basically the existing award minimum rate remaining the same and reserved their rights with respect to if there was any increase.

PN1711

Not long after that submission was put in, I did speak to Ms Bisbal. I hadn't been the Executive Officer of that association at the time the Heads of Agreement was entered into and where there was no such caveat in place. She assured me that she would, when she gave her submissions, make it clear that that caveat was not

being pursued by her organisation, so she would be on all four square with the other employer associations except for REEWA.

PN1712

But as she's not here, it may be my suggestion that the Bench may want to have her confirm it in writing. I just wanted to raise it now, rather than forget it.

PN1713

VICE PRESIDENT HATCHER: I think what we'll do is we'll give her an organisation an opportunity to put in a written submission within say, seven days, and they will say what they want to say in the submission.

PN1714

MR CLARKE: Yes, I understand that. Now, your Honour, with respect to our claims, all of our claims, I rely on the written submissions made on REISA's behalf and filed and served on the Fair Work Commission dated 2 July 2016 which dealt with its amended application dated 16 May 2016. Also REISA's submission in reply to the employers' submissions imposing certain elements of REISA's claims which is dated 2 November 2016.

PN1715

These claims not only involve the issues of dispute between REISA and some or all of the employer parties, but just as forcefully, we pursue, with respect to those award variations we've sought, where there has been agreement between all of the parties, such as - and when I say a new clause 17.3, our application deals with the current award clauses rather than the proposed variations.

PN1716

They deal with - there are only a couple of matters, they deal with entitlements for sales staff with respect to their share of commissions, post termination of their employment with respect to listed properties by the sales persons, but not sold at the date of the termination of their employment and the continued maintenance of the protection of their commission share for properties that had been sold, but not executed as at the date of their cessation of employment.

PN1717

That's not a contested matter, but I just wanted to make - and it is addressed in our submissions, back on 2 July 2016, but I just wanted to not let it slip under the radar and for the Bench to think that we've given away the claim or anything of this nature. It's part and parcel of that heads of agreement.

PN1718

VICE PRESIDENT HATCHER: So Mr Clarke, did you say you're Amended Draft Determination, what was the date of that?

PN1719

MR CLARKE: No, there was an amended Application.

PN1720

VICE PRESIDENT HATCHER: Yes, application - what was it dated.

PN1721

MR CLARKE: Of 16 May 2016.

PN1722

VICE PRESIDENT HATCHER: Right.

PN1723

MR CLARKE: We had the original one in January 2015 and there was an Amended Application put in by REISA dated 16 May 2016.

PN1724

VICE PRESIDENT HATCHER: So I take it that the pay rates in that Amended Application, haven't been adjusted to reflect the subsequent award - minimum wage and award increases.

PN1725

MR CLARKE: That's correct sir, and in terms of the submissions that I've put before you from 2 July 2016 contains the updated rates of pay.

PN1726

VICE PRESIDENT HATCHER: Right.

PN1727

MR CLARKE: Now, dealing with the contested issues, one of the most vigorously fought ones, or the most vigorously fought one, is the issue of the claim by the Association for a work value increase in a minimum award rates of pay with respect to all classifications. They've been extensively canvassed and the grounds for it and the legal underpinning sections of the Fair Work Act have already been extensively canvassed by myself and our submissions of 2 July 2016 and the subsequent submission of 2 November 2016.

PN1728

So I don't want to take my time with the Commission unnecessarily to go over all of that ground again. Other than to point out that now we've had the benefit of oral evidence both by the Association's witnesses and by the employer witnesses and where there's been cross-examination, we say that the evidence of our witnesses have not been challenged or contradicted by any of the employer parties. Indeed, insofar as the range of skills, responsibilities and the conditions under which the workers performed, which were highlighted in the witness statements of Ms Masson-Forbes, Mr Nathan Fox, Mrs Bell, a property manager from New South Wales and by Mr Thomas French, based in Queensland and his experience.

PN1729

Indeed, on the cross-examination of the employer witnesses over the last day and a bit, where they had their attention drawn to those aspects of Ms Masson-Forbes and Fox's evidence in particular, were agreed to. There were some differences of emphasis, but essentially, agreed to by all of the employer witnesses. So it shows a commonality across the jurisdictions, even though in each jurisdiction there may be differences in terms of the qualifications and the level of qualifications

required to be a practising property real estate sales person, both resident and/or commercial industrial.

PN1730

It is acknowledged that in South Australia there is a higher level of training and qualifications required to become licenced than some other states. But at the same time, the essence of the work, the skill required, particularly in an industry where a sales person is predominantly required to source their own stock, get their own houses, to convince vendors to entrust them with, in many cases, a family's largest asset they'll ever have in their life, namely the family home or their business or commercial premises.

PN1731

To entrust it to a sales person that they know what they're doing; that they know how to market, that they're trustworthy, that they know how to draft - get a proper marketing experience and a marketing tools to be utilised, subject to the resources that might be available to the vendor, in order to get the best price and be able to negotiate, and the skill of negotiating with prospective purchasers to obtain that price which can include of course, up to auctions, or expressions of interest - things of this nature.

PN1732

VICE PRESIDENT HATCHER: Mr Clarke, just to be clear, your work value case is not that there's been a change in work value since the modern award was made, but rather that the modern award did not in the first place correctly reflect the work value of the employees.

PN1733

MR CLARKE: Essentially, that's it. There have been some changes in legislation in some states. There's no more bait advertising allowed in South Australia, for example. Do you know what I mean by bait advertising?

PN1734

VICE PRESIDENT HATCHER: No.

PN1735

MR CLARKE: Deliberately going out to the market and saying the price is X, Y and Z, which is well below what the vendor expects and wants for their particular property, but to create you know, a mass of people to turn up to try and generate and stimulate demand. That sort of stuff is now outlawed in South Australia. And there's changes to technology.

PN1736

But yes, your Honour, we do say effectively our claim falls within section 156(3) which is that the work of these classifications of workers has not been work valued in the past and therefore it is now appropriate for it to be done.

PN1737

VICE PRESIDENT HATCHER: And again, in respect of the pay rates which you propose, what's the linkage between that and the Metals Award relativities? Where does that translate across?

PN1738

MR CLARKE: Well, could I ask - I was just going to deal with that. So could I ask you to just - one of the recent applications - sorry, decisions, I emailed your respective offices I think it was on Friday last week, is a decision of the South Australian Industrial Relations Commission, an application to vary the Clerk South Australia Award, 13 October 1992. It was emailed through.

PN1739

VICE PRESIDENT HATCHER: I'm not sure we have it, but in any event.

PN1740

MR CLARKE: It would have been Friday to your chambers, I believe, sir. I think I sent it also to all the other parties that I knew would be here.

PN1741

VICE PRESIDENT HATCHER: I'm just going to get it printed off Mr Clarke.

PN1742

MR CLARKE: Okay, well perhaps I'll leave that for the moment.

PN1743

VICE PRESIDENT HATCHER: All right.

PN1744

MR CLARKE: And I'll come back to that when you've got copies. I'll just deal with another decision which is supportive; it's not related to how you set the wage rates, I'll come back to that as a separate issue when you've got the State Award before you. In terms of section 156, and this relates to - the Fire Fighting Services decision of Justice Ross, SDP O'Callaghan and Commissioner Wilson on 15 November 2016 [2016] FWCFB 8025. Do you have that? I emailed - I think I emailed that as well. Probably all part of the - - -

PN1745

VICE PRESIDENT HATCHER: Not in front of us, but anyway that's the decision about part time employment, is it?

PN1746

MR CLARKE: Yes, and you're quite familiar with it, your Honour. I just draw your attentions in particular to paragraphs 20 to 40 inclusive in that decision and I'll come back to the relevance of what I've just said in a moment. Also paragraphs 97 to 105 in that decision.

PN1747

If I could paraphrase the decision, it dealt with part time employment in the Metropolitan Fire Brigade of Victoria and the Union was taking the position somewhat similar to the employers in this particular matter, where they said the modern award was made in 2010 - sorry, in 2009 from 1 January 2010 and therefore, it wasn't included at that time. There'd been no change in work value and therefore, that's where it stood. There had been no change and in terms of the circumstances that might apply to part time employment since that date, and therefore the matter should be dismissed.

PN1748

The Full Bench went on and said at paragraph 21,

PN1749

The Review is to be distinguished from inter partes proceedings. Section 156 imposes an obligation on the Commission to review all modern awards and each modern award must be reviewed in its own right. The Review is conducted on the Commission's own motion and is not dependent upon an application by an interested party. Nor is the Commission constrained by the terms of a particular application. 7 The Commission is not required to make a decision in the terms applied for (s.599) and, in a Review, may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of relevant statutory provisions, such as ss.134, 138 and 578.

PN1750

Then it refers to the scope of the Review was considered in the Preliminary Jurisdictional Issues Decision. Also a reference to the modern awards objective in paragraphs 24 and 25, which I don't think to read out, and refers to various other sections of the Act including 134. A reference to the Full Federal Court decision and the National Retail Association v Fair Work Commission.

PN1751

At paragraph 38,

PN1752

As observed by the Full Bench in the Preliminary Jurisdictional Issues decision, while it is appropriate to take account of previous decisions relevant to a contested issue arising in the Review it is necessary to consider the context in which those decisions were made. The particular context may be a cogent reason for not following a previous Full Bench decision, for example:

the legislative context which pertained at that time may be materially different from the Act;

the extent to which the relevant issue was contested and, in particular, the extent of the evidence and submissions put in the previous proceeding will bear on the weight to be accorded to the previous decision; or

the extent of the previous Full Bench's consideration of the contested issue. The absence of detailed reasons in a previous decision will be a factor in considering the weight to be accorded to the decision.

PN1753

So, at the end of the day, what the Full Bench found was that just because the modern award was made in 2009, the door was still open insofar as the part time employment was concerned within the - considering the contexts of the situation. We say that this decision reinforces earlier decisions of this Commission in modern award matters that where clearly an award where the classifications had not been subjected to a work value consideration once it's brought or is brought

into play, before a Full Bench, in a sense, you're enjoined to in fact do just that. Work value to create that fair, stable, minimum rates award.

PN1754

VICE PRESIDENT HATCHER: And do you say historically that the State Awards from which the rates were derived, have themselves not been the subject of a proper work value assessment?

PN1755

MR CLARKE: That was my evidence, your Honour, which, when I was subject to cross-examination, wasn't challenged on, the law and any of the evidence given by any of the employer witnesses, quite clear from my research, particularly in South Australian and New South Wales. In Queensland where there were State Awards, they had never been work valued; they had only ever received the State Award minimum wage, following state wage cases which followed national wage cases.

PN1756

They got structural efficiencies, but in terms of minimum rates adjustments, none of that took place with respect to any of those three state jurisdictions either. So when the modern award was made in 2009, as already stated in my submissions, the essence was it was simply the minimum rates of pay in each of the respective NAPSA's whichever was the highest, went to the classifications.

PN1757

The classifications we don't have a problem with, but the job descriptions that relate to property sales persons, strata title persons, property managers, but those tasks have never been work valued.

PN1758

Now, if I - I know you may not have this Clerk's Award in front of you at the moment. Unfortunately in 1992 the State Commission - - -

PN1759

VICE PRESIDENT HATCHER: South Australia you mean?

PN1760

MR CLARKE: Sorry? Of South Australia, did not number paragraphs, nor did they number pages, or at least when you printed them off, the page numbers won't come out. However, there are 13 pages and what I was able to print out and if I could just draw your attention to a couple of - the number of the pages.

PN1761

By way of background, and you may note later when you look on the back of the pages in terms of witnesses, I was a witness in that case. I was the Secretary at the time of the Federated Clerk's Union, South Australian Branch. What happened was that the Employer's Federation then headed by now Senior Deputy President O'Callaghan and myself, joined forces with one of his employees, Mr Trevor Evans to conduct a review of the classification structures of clerical workers under the State Common Law Award.

PN1762

Previously the classification criteria for each of the clerical jobs was back, really, we were still referring to 'flexo riders'.

PN1763

VICE PRESIDENT HATCHER: What are they?

PN1764

MR CLARKE: I don't know. I looked it up once and have since forgotten, because like the old abacus and so forth, I don't know what an abacus is and I don't know what a flexo rider is. But, it was that type of an award, where much of it was outdated and the multi-skilling and the introduction of word processors, personal computers on your desk top and so forth. I remember Mr O'Callaghan carrying around a mobile phone; he was one of the few who could afford it in those days and it was the size of a house brick. So it shows you how quickly technology takes place.

PN1765

VICE PRESIDENT HATCHER: And he's still got the same phone.

PN1766

MR CLARKE: Well, yes, he was always a bit keen on deep pockets.

PN1767

COMMISSIONER GREGORY: Did he have a flexo rider?

PN1768

MR CLARKE: I'm actually older than the Senior Deputy President, so I have less excuse than him to not know what a flexo rider is. But in any event, what happened was by a process of negotiations and following the Victorian Clerk's Award Full Bench hearing which struck a rate, and this is referred to in Commissioner's Stephen's decision in South Australia. The Victorian decision was the first decision which balanced the rates of pay for clerical workers against the metal trades and building trades, tradesperson.

PN1769

So, this agreement, that we came to through this study of a number of large and small offices in metropolitan Adelaide and a couple of country towns, we came up with, instead of six levels as in Victoria, we came up with five levels and broad banded two of them to make five, rather than six. That's explained in this decision.

PN1770

Where the difference was between the parties, was where do you say a clerk, an adult clerk and the type of work they perform, fits in with the metal tradesperson, or the building trades worker. You had some people arguing in those days that obviously look, a clerk doesn't have to be trained; doesn't have to do a four year apprenticeship, or go to trades school to get the C10. Obviously a lot of the workers in the clerical industry were female; female dominated type industry jobs. Typists, stenographers, receptionists, accounts clerks and things of this nature.

PN1771

It was agreed that there should be a level II which level I was to be entry level with a number of increments in it. There was differences between the union and the employers as to how many increments there should be. Likewise, the same with respect to level II. The employers would agree to a 100 percent at level II third year of service, whereas the union argued for level II second year of service. They were the areas where Commissioner Stephens had to make a decision.

PN1772

VICE PRESIDENT HATCHER: Right, so we've got that now Mr Clarke.

PN1773

MR CLARKE: Right, thank you. So, I'll ask you just to go to page 3. It won't have a number on it, but it's the third page and I'll just go to the bottom paragraph with the words "those principles" - this is referring to the State Wage Case principles of the State Commission.

PN1774

Those principles require that introducing a new classification structure in an industry, there will inter alia, be incorporated therein, appropriate skill related career paths, competency pays, classification criteria and work level definitions, appropriate incremental patterns and wage relativities established having regard to acknowledge the work value criteria. The metals and building base tradesperson's rate of pay and to classification rates and other awards where comparisons can suitable be made.

I now take each of these factors into consideration for examination in light of the material before me.

PN1775

It refers in the next paragraph about the bipartite report issued by Mr Evans and myself. Then jumping back to the fifth paragraph.

PN1776

They received considerable guidance in doing so from both the interim and final outcomes of the full session proceedings in respect of the Victorian Clerical and Administrative Employees' Award wherein a new six level structure was introduced into the Award.

PN1777

In fact, that decision still remains now.

PN1778

Any arbitrated decision dealing with general clerks in the private sector elsewhere in Australia and as a Full Bench decision must be accorded due weight by this Commission.

PN1779

Then it goes on at the seventh paragraph, the second one down.

PN1780

I commend and endorse that approach as being more in keeping with the establishment of skill related career paths and the concept of multiskilling than that taken in Victoria.

PN1781

That's where we broad banded a couple of classifications, rather than have six, to bring in five.

PN1782

It is clear from the evidence also more in keeping with actual industry practice in most cases.

PN1783

Then on page five, the third paragraph down.

PN1784

The two single most important features of the new criteria are, in my opinion, that they reflect the findings of the bipartite study that the vast majority of clerical employees these days require to exercise keyboard skills to perform their duties and whole rationale for the definitions of work levels themselves are that they promote the concept of multiskilling and exercise by employees a range of skills.

PN1785

Then he says:

PN1786

If I have any criticism of the new criteria, it is at this stage they do not incorporate any specific on-the-job or off-the-job training requirements.

PN1787

As Mr Wall said in his evidence, it would be more appropriate to put in a specific training component, but then refers to the fact there's not yet a TAFE qualification. As far as I know, that's still the case.

PN1788

I then refer down to the - I won't take you to them, but there's the last four paragraphs on that page, are of assistance. But on page six, which is dealing with his decision leading up to the awarding of 100 percent base rate - sorry, the second paragraph, it reads.

PN1789

The evidence points to entry into level I as to falling into one of three categories. The first of these are juniors who commence about 17 to 18 years of age, either straight from school. Years 11 and 12 are from school via a business college or TAFE.

By the time these employees are 21 years of age, they have had three or four years of relevant clerical hands on experience.

PN1790

Now, it's not dissimilar to the type of way the sales staff operate. They attend school; they may not go straight into selling real estate at a young age, you know, over the age of 18 years. They do other things, but they bring with them a life experience.

PN1791

Then it goes on.

PN1792

The second are mature aged employees of an employer in another category of work e.g. stores, who transfer into clerical work for the same employer. These employees usually bring with them maturity and a knowledge of the employer's operations and requirements.

The third are mature aged employees with so called life skills who may or may not have previously performed clerical work for another employer. These employees usually bring with them, maturity, interpersonal and life skills such as are involved in running a household.

PN1793

It seems to me from the evidence that most level I clerks will have some prior clerical experience, principally of junior employees. In fact, some could have already been close to fully confident to perform level I or even level II tasks proficiently at age 21.

PN1794

Whilst taking into account the employer's submissions as to the length of time and the off-the-job training required to become a metal tradesperson, it seems to me that to reach a relativity of 97 percent, as has been agreed by the parties for level I maximum, and to reach full proficiency in level I duties as defined, does not require the average clerk three full years of adult service to attain.

PN1795

Then he refers to the Victorian clerical structure and so on and his thoughts about that. At the ninth paragraph he refers to -

PN1796

Insofar as level II is concerned, where the parties have agreed to a maximum of 100 percent relativity, the Commission's task is a little easier. Here the union claims two incremental steps and the employer's three, provided that in circumstances where an employee has already served an employer for 12 months on the maximum level I, that can be reduced to two steps.

PN1797

And at paragraph 10 -

PN1798

I can see no grounds on the application of work value principles for any such differentiation to occur and I would reject that approach of the employers. Further, I can see no ground on the application of work value principles for

the relativity of 97 percent at the maximum of level I to be the same as the starting point for level II, as claimed by the employers.

PN1799

At paragraph 7, on page 7, the Commissioner says -

PN1800

I've closely examined the evidence relating to the restructuring of the metal industry classification. In particular, that given by Mr Aspinal on the subject. That evidence does not however tell me how the percentage relativities were quantified other than the 100 percent reference point. In South Australia the 100 percent reference point for clerks will be at the maximum level of II.

I've also closely examined the reasons for the decision of the Victorian Industrial Relations Commission in full session in the Clerical Admin Award and the relativities established for grades I, II and III, which by and large encompasses the work done on our levels I and II.

I must say that I have not placed the same weight or given the same attention to the basket of clerical awards analysed in great detail by the union. That is not to say that I have overlooked them, but so many are by consent and/or paid rates, it is difficult to ascribe any real significance to them.

PN1801

So, on page 8, and he talks about -

PN1802

I've also given weight to the opinion evidence of various witnesses on this topic.

PN1803

Then he refers to -

PN1804

The main signpost for level I

PN1805

And he looks at level C12, level C11, the retail, and grades one and two of the Victorian Clerks Award. Then for level I he found the following relativities to be 91 percent first step, 94 percent second, a maximum of 97 percent.

PN1806

Looking at level II, he looked at the metal C10 rate, the Victorian Clerks Award which had a range of 98.8 to 100 percent -

PN1807

and I determined the following relativities:

First step 98 percent, 100 percent, the second step.

PN1808

Now when the Clerks Award Private Sector Award was made, which - and I might add I know from my experience as having been on the National Executive of the Clerks Union and being a Branch Secretary, and later National President, that virtually all of our common rule awards around Australia and a large number of our awards at a Federal level followed similar reasoning.

PN1809

There was different classification structures, but when the modern award Clerks Private Sector Modern Award was made in 2009. The classification structure and definitions of levels I to IV in the Clerks Award, Private Sector Modern Award, is exactly that, of the old South Australian Award. The South Australian Award - - -

PN1810

VICE PRESIDENT HATCHER: So in a Modern Clerks Award - - -

PN1811

MR CLARKE: Sorry?

PN1812

VICE PRESIDENT HATCHER: In a modern class award, which grade lines up with C10?

PN1813

MR CLARKE: The C10 in the Modern Clerks Award is level II first year. It differed from the South Australian one where you didn't get to the C10 until the second year of service, but when the modern award was made, it was set at level II year one, and there's two increments.

PN1814

DEPUTY PRESIDENT ASBURY: Where is it in the Retail Award?

PN1815

MR CLARKE: Sorry?

PN1816

DEPUTY PRESIDENT ASBURY: Where is it in the Retail Award?

PN1817

MR CLARKE: In the clerical?

PN1818

DEPUTY PRESIDENT ASBURY: No, in the Retail Industry General Award.

PN1819

MR CLARKE: The General Award, the clerks were around - sorry, not the clerks, the shop assistants were around 92 percent.

PN1820

VICE PRESIDENT HATCHER: So, in your proposal, where do we align with C10?

PN1821

MR CLARKE: We say the 100 percent should come in at the property sales persons.

PN1822

VICE PRESIDENT HATCHER: Representatives.

PN1823

MR CLARKE: Yes, sales representatives. That the property associate would be more akin to entry level and the relativities have been set akin to the level I in the Clerks Modern Award and that's set out in our application as to how we - if I can just find it.

PN1824

VICE PRESIDENT HATCHER: In the amended application?

PN1825

MR CLARKE: In the amended application it sets the rates of pay and in the grounds for the reasons, on page - attachment B under the heading Grounds and Reasons.

PN1826

VICE PRESIDENT HATCHER: Paragraph 7 is it?

PN1827

MR CLARKE: It's under paragraph K. If you don't have them in front of you, sir, I can read them out. It's headed Amended Application May 2016.

PN1828

VICE PRESIDENT HATCHER: Yes.

PN1829

MR CLARKE: On the Fair Work Application Form which is - but I'll read out if you like.

PN1830

VICE PRESIDENT HATCHER: I've opened them.

PN1831

MR CLARKE: You've got them. Well, at paragraph K, I set out the relativities, property sales associate 91.31. After six months 95.88, that is equivalent to level I in the Clerks Modern Award. Property sales person 100 percent which is level II first year. Property Sales Supervisor - going on the definition of the task of a property sales supervisor and looking at the roles and responsibilities of a level V clerk, I've equated them at 115.41 percent. Property Management Associate at 95.88 percent, equivalent of level I, year II of the Clerks Modern Award. Property Management Representative 105.62 percent, relating that to the level III in the Clerks Modern Award.

PN1832

Level III you start to get into a more specialist area of clerical work and looking at the work of the Property Manager and we've had the evidence of it. I saw a relationship between it.

PN1833

DEPUTY PRESIDENT ASBURY: So have you just taken the relativities between the 100 percent level in the Clerical Award, so that the level II in the Clerical Award and the level I, and applied that relativity to the rates that you're seeking in relation to the Property Sales Associate?

PN1834

MR CLARKE: Yes.

PN1835

DEPUTY PRESIDENT ASBURY: So you haven't aligned it to C11 or C12 in the Metals Award? You've aligned it to - because those relativities all got compressed and altered as time went on by flat rate adjustments instead of a percentage.

PN1836

MR CLARKE: They have been significantly impacted, but that is true of all awards.

PN1837

DEPUTY PRESIDENT ASBURY: So you've used the Clerical Award - yes.

PN1838

MR CLARKE: All modern awards - - -

PN1839

DEPUTY PRESIDENT ASBURY: But you're not using the initial Metal Industry Award, the old Metal Industry Award relativity framework to align to C11 and C12? You're saying that the level II year I in the Clerical Award if the 100 percent rate and you've just calculated the actual relativity between that rate and the rate for level I in the Clerical Award.

PN1840

MR CLARKE: Yes.

PN1841

DEPUTY PRESIDENT ASBURY: And applied it in this case?

PN1842

MR CLARKE: Yes, I did and the reason for that is this. All awards over a successive period of time, through earlier national wage decisions of flat wage increases, rather than percentages, have distorted relativities, but that has been across the board including in the metal trades and the building trades.

PN1843

DEPUTY PRESIDENT ASBURY: Yes I understand; I'm just trying to understand the basis for the rates and it's by taking the percentage of the level I rates are to the level II rate in the Clerical Award.

PN1844

MR CLARKE: Yes, that's right.

PN1845

DEPUTY PRESIDENT ASBURY: Yes, that you've derived your rates.

PN1846

MR CLARKE: I thought I had taken basically the compression of relativities that have occurred into account because I didn't see how I could turn back the clock to 1990 and say they shouldn't suffer the compression as every other worker has.

PN1847

DEPUTY PRESIDENT ASBURY: Yes.

PN1848

VICE PRESIDENT HATCHER: So the Property Sales Supervisor - the rate you've got for that is simply the clerk level V is not a rate that's actually 15.41 percent above the C10 rate?

PN1849

MR CLARKE: Sorry, it's not 100 - - -

PN1850

VICE PRESIDENT HATCHER: The Property Sales Supervisor.

PN1851

MR CLARKE: Yes.

PN1852

VICE PRESIDENT HATCHER: I'm just looking at your grounds and reasons if you keep that page open. You've simply got derived a rate from level V from the Modern Clerks Award. You haven't calculated it as 15.41 percent above the C10 rate?

PN1853

MR CLARKE: Yes, I've taken it from the level V Clerks Award. Looking at the duties that are defined in the Real Estate Award and looking at the characteristics
- - -

PN1854

VICE PRESIDENT HATCHER: Yes, I understand, but I just want to understand where the number came from.

PN1855

MR CLARKE: Yes, sorry. That's how I got it. And unfortunately with all safety net awards, they've suffered compression of relativities which made a lot of my work as Secretary of the Clerks Union in the 1990s, absolutely useless, basically. I've set in proper internal relativities as between awards, but that's how the national wage systems have progressed and I - - -

PN1856

VICE PRESIDENT HATCHER: I think we've all had that experience.

PN1857

MR CLARKE: We've all stuck with it. So, by that I wanted to show how we arrived at those figures and that they are not plucked out of the air. They have been - we have clerical and admin workers working in real estate offices, side by side, performing tasks that are encapsulated within the clerical award, alongside the sales staff, sales associates, property managers, where they've never been work valued and from the evidence that's been given, clearly don't reflect what many of them are being paid in the market.

PN1858

Now this is a safety net award, I appreciate that. It affects fewer people than there are actually the number of employees, but those to whom the award is their main source of income, they need protection and to have a modern, safe and relevant rate of pay which comes within all of the different sections of the Act that I've referred to with respect to 134, 284.

PN1859

VICE PRESIDENT HATCHER: And receptionist / administrative assistance in a real estate officer would be graded I on the Clerks Award?

PN1860

MR CLARKE: Many would be level II; depends on their tasks.

PN1861

DEPUTY PRESIDENT ASBURY: The minimum would be level I though.

PN1862

MR CLARKE: The minimum award is level I and I've actually acted for some people who've been seriously undervalued and the case was taken where they've been reclassified. But the fact that they might be paid as a level I, doesn't detract from the type of work. They might actually be a higher graded person. They might even be paid more money, but actually, still given a level I classification for a whole range of reasons.

PN1863

DEPUTY PRESIDENT ASBURY: Level I in the Clerical Award encompasses a very wide range of duties, clerical duties, and it's not just an entry level, because the beginning of level II is the trades level. So it follows, that level I has got a wide range of duties in it.

PN1864

MR CLARKE: Yes.

PN1865

DEPUTY PRESIDENT ASBURY: They can train other people; they can be responsible for their own work, all those sorts of things.

PN1866

MR CLARKE: Yes, much more limited though. If you read - the issue in the Clerks Award is the characteristics. That's the key - the indicative tasks are one thing; the characteristics is where you get the context in which that work is performed. And we say with respect to property sales people, for example, Mr

Fox's evidence with respect to commercial and a commercial and industrial sales person - that's highly skilled, highly skilled work, to be able to work out percentage yields and convince investors that they can build an office block or retail shopping centre and get \$X back - the type of skills that's required for that.

PN1867

Even in the residential sales area - one of the things which I found in the Clerks Award - this happened in a lot of the areas where there were non-trades in the service industry, was the fact that, well you didn't do four years' hard yards. Well, yes, in terms of a metal trades apprenticeship, and I don't devalue that at all. My father was a fitter and turner. But it is comparable skills; it's not the same work, but it's comparable value.

PN1868

The tradesperson doesn't have to source their own stock or inventory. They are not - if some debtor defaults, they don't find it a portion of that's taken out of their pay packet. The clients are presented to them; they do the work and they do it in a very skilled manner. A sales person has to go out and convince someone, with their biggest asset in most cases, trust me to sell your house to get the best price and I'll help you negotiate it, and I'll work out the planning and the marketing and all that goes with it and I've got to present myself and I'm competing against another half another agents who are all sharpening pencils to try and cut me out of the deal.

PN1869

And if they can't get their own stock of housing or properties to sell or lease, then they're held accountable by their employer; it's understandable. They only get money, as is pointed out by Mr Kuhne's evidence and others, that his income, his very viability, depends upon that sales person generating leads, using their networks to convince people to sell through him or her to get the end result.

PN1870

So when you look at those other range of factors, it's the sort of argument this industry used that I heard back in the 1990s when it came to women's - what was seen as traditional women's work. They don't do the same sort of work. A receptionist is not as skilled as a metal trade's person and all the rest of it. But when you delved into it and when you got the evidence out, as I went on this bipartite study trip around the state, the receptionist was highly regarded.

PN1871

If they were a grumpy so and so, and not particularly solicitous of clients as they came in or answering the phone, they lost business. You needed people with a range of interpersonal skills to be able to do it. You don't necessarily get all that just because you've got a trades certificate. It is comparable work. Different work, but comparable in value.

PN1872

I think in terms - unless you've got any other queries, I think I've canvassed all of the other points with respect of the powers and the objects and the Act and everything in my written submissions. So unless you want me - I can move onto another - - -

PN1873

VICE PRESIDENT HATCHER: Just think through the practical effects of this. I don't think anyone's suggested there were many, if any, persons engaged on salary only as property sales persons, is that right? That is salary and nothing else.

PN1874

MR CLARKE: There's very - to my knowledge, at least in South Australia, there's very few people on straight salaries without some form of commission or incentive payment. The incentive payment is very important, but there are some - like I do know of one whose just started in the job and the employer is just paying the award rate. They've only just got their licence, so they're getting the award rate, the award entitlements, but with a promise, but not in writing, that if things work out over the next six to 12 months as to the number of listings they might encourage them by commission. So it's really only that type of person who would probably be on just the state award rate.

PN1875

VICE PRESIDENT HATCHER: So for a person whose on - obviously it won't affect the person with these granted on commission only, except in respect of calculation of NES entitlements.

PN1876

MR CLARKE: Yes.

PN1877

VICE PRESIDENT HATCHER: But for a person on a debit-credit system, whose earning something above the proposed rates, increasing the minimum rate, would just increase the debit on the Commission calculation and therefore have no net effect. Is that right?

PN1878

MR CLARKE: We would say that on the evidence that's already been given by a number of the employers, and it won't be true in every case, but the increase in the award rate on the debit-credit person will mean very little, if anything, because it will be absorbed within their commission payment structure on the debit-credit.

PN1879

The advantage for the worker in getting the award rate up, is there are times when in between settlements of properties, when there's no commission coming in, they need to be able to live and pay their own mortgages and pay for their own family and they're very much dependent during those periods, on the award rate. Then when the commission comes in, they may get some of it, but as has been given in the evidence by the lady from South Australia at Semaphore, Ray White Semaphore. Her two debit-credit workers, one was on I think over \$100,000 and the other one was on \$75,000 in terms of earnings.

PN1880

So they probably won't see direct benefit out of the money in a sense, that will be absorbed within their debit-credit system. But there will be times when they are award reliant, particularly when things are getting slower in the market.

PN1881

VICE PRESIDENT HATCHER: So a prime issue - and this works both ways, is the cash flow issue. It benefits the employee in terms of having more regularity for a greater proportion of their income, but would require the employer, by the same token to make additional payments which may be in advance of the money to pay for.

PN1882

MR CLARKE: Yes, there would be - yes, it cuts both ways at different points, but we say this. That's true of all industries, whether there's commission paid or not, in terms of people - you don't face a safety net award rate of pay based on problems with recurrent cash flows or things of this nature, because you can't judge it across the industry as a whole. You've got to say, is this job worth \$X and does it provide a fair safety net award? Does it meet the objectives of the Act?

PN1883

Once that's done and it's set, then it will shake out. Now, we say this, there's been no arguments put and no evidence put that the claims that the Association has put forward is going to send the industry broke or it's a catastrophe. I'm not saying that certain individual employers, there may not be a cash issue, but there's no evidence that's been put to this Commission to show the industry as a whole - you know, it's not like suffering a drought or we've had 10 years of the GFC in a continuous cycle where there's no credit been let out.

PN1884

And effectively at that, really, it comes down to you can't base a wage rate on a safety net award based on those sorts of circumstances. That might influence what share of the employer's commission and an employer might offer an employee or even a current employee, where they say, look circumstances are such - where I used to give you 50 percent, it might have to be 45 or 40 percent. That's always within the ambit and control of the employer.

PN1885

And the employee can't insist on getting a greater share of the commission or even retaining their share of commissioning. That's a matter of bargaining between both parties. The safety net award minimums shouldn't take those sorts of vagaries into consideration. It's what is the value of the work and what is the proper rate of pay.

PN1886

DEPUTY PRESIDENT ASBURY: What do you say about phasing in, because the minimum rates adjustments that got the modern awards to where they are today, in their predecessors, were all phased in over a period of time and not awarded in one amount.

PN1887

MR CLARKE: That's true, your Honour. I think if I can recollect, it was phased in over four instalments over two years, six monthly apart. We say this, we've had a 25 year phase in period. We haven't had the benefit for 25 years of having this award work valued and minimum rates adjusted.

PN1888

VICE PRESIDENT HATCHER: Well, it's a national award, so when you say 'we' you have to take into account the fact that there is some states are award free, so they've got a totally different industry history.

PN1889

MR CLARKE: Yes, I apologise, you're quite accurate. In three states there were awards and they didn't have the benefit of the work value. In the other states I think they were, but basically award free. But since 2010, no we're over six years now, they've had a phase-in period.

PN1890

DEPUTY PRESIDENT ASBURY: Well, has there been an application made, ever in the history of work value? Because how can you phase something in where there hasn't been an application made for it to be granted?

PN1891

MR CLARKE: Look, I accept that that's an argument and it's one no doubt that will be pursued by the employers. We say there is no evidence of this that would support that. I can understand it in an area for an industry such as cleaning, for example, where there would be very little if any, over award payments for cleaning staff. Suddenly, if that hadn't been work valued and it came up, that would be a significant pay rise immediately for all employees, or most employees I that industry, and you might want to phase that in.

PN1892

But in this industry, the evidence from the employers is that we've had to date, is that there's a significant level of commission payments which obviously could be absorbed within the - I mean, we'd have to accept the absorption without complaint as part of the principles of the MRA, which would accept absorption.

PN1893

VICE PRESIDENT HATCHER: If the increases that are sought by you are granted, it may mean that employers might want to renegotiate their commission - their individual agreements with sales persons, that is, alter the arrangements for the payment on top of the salaries.

PN1894

MR CLARKE: They can do that at any time with the - an employer at any time and do, go to their employees and say from time to time, look we want to adjust the commission share. That's in the hands of individual employers. Now there may be some employers who are quite happy because the business is going along so well and their sales person, they don't want to lose them. They're bringing in the money, I'll suck it up. But, I'll absorb it without seeking a reduction in the commission share.

PN1895

There may be others who the amount the sales person is generating is only just barely covering their wages and so forth. They might then say to the employee, well look, we're going to have to adjust it. That's the cold, hard reality and employers do that all the time. They were doing it during the GFC.

PN1896

VICE PRESIDENT HATCHER: Well, I only raise it because they may require a reasonable amount of time to do that before any increases that might be awarded would kick in.

PN1897

MR CLARKE: I'm sorry, your Honour, just from the microphone.

PN1898

VICE PRESIDENT HATCHER: Yes, I raise that issue because from the employer's perspective, they need some time if those increases were to be award, or any increases, to make adjustments to existing commission arrangements.

PN1899

MR CLARKE: If it's not an unduly long period of time, I suppose we've waited 25 years, if it's just another few weeks, then that wouldn't cause us too much distress.

PN1900

VICE PRESIDENT HATCHER: All right.

PN1901

MR CLARKE: Now dealing with the issue of the debiting of unpaid but authorised vendor advertising, dealing with each of those issues separately.

PN1902

VICE PRESIDENT HATCHER: We might have done this before, but can you just explain again the concept of unpaid authorised vendor advertising.

PN1903

MR CLARKE: Yes, all right.

PN1904

VICE PRESIDENT HATCHER: So what happens?

PN1905

MR CLARKE: What it boils down to is this. It's only complicated, frankly, your Honour, because it's one of the few industries that just loves debiting things against commission, rather than just saying, here's your wage. After you've earned \$50,000 we'll pay you X percent over and above that, you know, like most other industries that I'm aware of. But no, they've got to start, to put it bluntly, arse about. But anyway, that's a personal view.

PN1906

So what happens is this. You sign an agency agreement. You want to sell your house through a particular agent. I can more authoritatively in South Australia, but it seems to be the case Australia-wide. You sign a contract to say that you have got exclusive rights to sell my property over the next 90 days and you will charge me X percent for the commission and look, if you want to do advertising, this is what we recommend and it's up to you, do you want to spend the money. It

could be on internet, it could be on the print media, local of state-wide. It could be on a number of other platforms, sign boards, the lot.

PN1907

VICE PRESIDENT HATCHER: I was under the mistaken impression that real estate agents simply paid for that out of their share, but - - -

PN1908

MR CLARKE: Well, some companies do do that, but they charge a higher percentage of commission. So you pay for it one way or the other, it's just not obvious in the latter case. So, what happens, then you agree to pay say \$3,000 in agreed advertising. The place goes on the market. In most instances where vendors refuse to pay, it's because the house doesn't sell and they don't want to pay advertising costs for a property that hasn't sold and they're going to have to remarket and spend the money again somewhere else if they're unhappy with that agent.

PN1909

VICE PRESIDENT HATCHER: So the authorisation advertised is not contingent upon the sale?

PN1910

MR CLARKE: It's a variety. Some companies insist on up-front payments and it's purely in the hands of the individual employer. Yes okay, you want to spend \$3,000 or \$4,000 up front payment or we invoice it as and when the costs are incurred and you've got to pay it within seven days or thereabouts. Or, you can pay it on the sale of the property and out of the settlement proceeds.

PN1911

It often depends upon the particular vendor as to whether they've got sufficient cash in hand, so to speak, to be able to say look, here's \$3,000 or \$4,000 to cover my advertising expenses. There would be a large number of people who would say take it out of the settlement.

PN1912

If the place isn't sold, there's a significant number of vendors; I don't say a majority because I don't know. But there are significant numbers of vendors who don't want to pay for a variety of reasons and usually end up wanting to blame the sales persons or the agent for not being able to sell their house at a price they want.

PN1913

VICE PRESIDENT HATCHER: That's not relevant here, because there was no commission in the first place.

PN1914

MR CLARKE: No commission is paid. So, but the agent has incurred the cost of that advertising. They've got to pay up front to the media organisations for that advertising and the production of brochures and so forth. We argue that the employer is responsible for the collecting, the defaulting debt. They have the

contractual arrangement with the vendor that refuses to pay and if the vendor won't pay, they've got the right to sue.

PN1915

VICE PRESIDENT HATCHER: Are you saying that the debit may be for advertising a house that isn't sold.

PN1916

MR CLARKE: Isn't sold.

PN1917

VICE PRESIDENT HATCHER: And that's carried forward to the commission on the next house that is sold as a debit?

PN1918

MR CLARKE: Yes.

PN1919

VICE PRESIDENT HATCHER: I see.

PN1920

MR CLARKE: That's how it works.

PN1921

DEPUTY PRESIDENT ASBURY: But isn't it the case though, that what the employer is doing, is it's not debiting - the evidence as I understood it, is the debiting is not coming from the portion of the sales person's entitlement to the commission, it's coming out of the pool of commission before the sales person - so really it's coming out of money that's been paid to the employer who then has a formula by which is distributes the residual to employees. Some employers deduct it before they distribute and there's no evidence of any that deduct it after.

PN1922

MR CLARKE: Yes, your Honour, there are those examples and there are others such as those examples from South Australia where - attached to my witness statement that refer to the debits from the employee's share of unpaid vendor authorised advertising. But in addition, the point is this - and I think actually to clear this up, it should be - our application should be changed instead of the employee's share of the commission no debiting, it should be the employer's gross commission, no debiting.

PN1923

Because, what happens of the unpaid advertising costs, is the example that you used, and it was raised by SIAG, Ms Cook I think, yesterday. Is that you get \$10,000 and when you're determining a sales person sold a house that's worth \$10,000 to the organisation, say it's a 50:50 split, this is after the GST and everything else. Then there's a \$2,000 unpaid advertising bill from last week or in many instances of some years ago, I'm going to bring that into account now and take \$2,000 off that \$10,000; that leaves \$8,000 and your share of 50 percent is 50 percent of the \$8,000, not of the \$10,000.

PN1924

That might be all okay, except for one thing. The employee is not often asked by the employer, can I do that. Do you want to agree to that.

PN1925

DEPUTY PRESIDENT ASBURY: But does the employee have to agree to it, because it's not a deduction from monies that are due and payable to the - if there's a - I accept that the commission only sales people are different because they have - there's no more than 10 percent that can be taken out of the pool before the 35 percent kicks in. So they're a different category, but for the commission plus salary or commission plus wages sales persons, why is the employer not permitted to have a debit-credit system where it says the total commission's here, and from that we'll deduct X, Y, Z and then we'll give you the proportion of the rest? Because the monies it's deducting from were at no time ever monies payable to the employee, other than in the terms of the agreement.

PN1926

MR CLARKE: Except for one thing, your Honour, section 326 of the Act.

PN1927

DEPUTY PRESIDENT ASBURY: But section 326 of the Act applies to deductions from remuneration that's payable to an employee, not from a pool of money that may or may not be payable, and that's what the evidence was from the witness for SIAG that the deduction if it's made, is made from money that is payable as a commission to the employer and it doesn't become payable to the employee until the formula gets applied to it and the final amount is derived, and then it's payable.

PN1928

MR CLARKE: Except what you can't do through the front door, they are doing through the back door in terms of section 326. That \$2,000 - - -

PN1929

VICE PRESIDENT HATCHER: Sorry, we're just having a discussion.

PN1930

MR CLARKE: That's all right.

PN1931

VICE PRESIDENT HATCHER: It seems to me that in the Western Australian contract and Mr Farrell will contradict me if I'm wrong, it actually - advertising expenses come out of the employee's share.

PN1932

MR CLARKE: Yes and it is also in South Australia, but it can be, like the Deputy President has pointed it, you could try and get around it by saying look, we agree to - as part of our - any unpaid advertising fees come out of the next commission and your share is affected by it because of that mathematical description you put.

PN1933

DEPUTY PRESIDENT ASBURY: Well, I don't know what you mean by the term 'getting around' because as long as you've paid the employee, the minimum they're entitled to - I accept you don't think it's fair, but we're not dealing with only that, we're dealing with an award that sets the minimum.

PN1934

MR CLARKE: Yes.

PN1935

DEPUTY PRESIDENT ASBURY: And as long as a person is being paid the minimum - - -

PN1936

MR CLARKE: Well, you see, this comes back to the issue of the employment agreement and whether the employment agreement is enforceable because it forms part of the award as a requirement under the award for both debit-credit employees and commission only employees, to have written agreements to setting out what they're entitlements are in terms of the calculation of their - and we argue that that in itself, the contents of that employment agreement because we say it is enforceable under the Act, because it's a requirement of the Award that it be in writing and it specifies how you calculate things, that the contents of those employment agreements are automatically then covered within the context of section 324 to 326.

PN1937

VICE PRESIDENT HATCHER: It seems to me that you're getting us into the space of regulating over award payments, aren't you?

PN1938

MR CLARKE: No.

PN1939

VICE PRESIDENT HATCHER: That is people can enter into agreements for whatever they like about over award payments, but why do we get into the space of the regulator when in fact there's a decision which suggests that we don't want to be in that area.

PN1940

MR CLARKE: Well, first of all, I would argue - I keep wishing for a case that will actually not settle so I can get it determined by the industrial court. That the concept - just looking at advertising, that a contract between an employer and the vendor set on the policy lines by the employer as to when it should be paid, and it's defaulted on, where the employee has no say as to whether or not that defaulting vendor should get away with it or not, has no right to seek restitution because they have no standing, legal standing against that defaulting vendor.

PN1941

The employer does not even have to ask whether he likes it or not. They can and do just do it and I gave examples.

PN1942

VICE PRESIDENT HATCHER: But that's not the question.

PN1943

MR CLARKE: No, wait a moment. The issue would be, particularly if it comes out of the employee's share of commission, the courts, or at least I can only argue with respect to what has been said by Magistrates during the course of a case, but not a concluded decision, is they don't accept it. They don't accept an employer's got a right to do that.

PN1944

DEPUTY PRESIDENT ASBURY: Well, on the basis of a particular contract, they may or may not accept that there's been a breach of section 326 of the Fair Work Act.

PN1945

MR CLARKE: That's right.

PN1946

DEPUTY PRESIDENT ASBURY: But all we're concerned with is setting the minimum and so provided employees get the minimum, how can we regulate and require an employer to disburse income that the employer has received? Because the employer gets the commission and all the formula does is disburse it to the employee and then all the award can provide for, in the most general - and I'm putting this in the most general terms. All the award can provide for is that however the money is disbursed to the employee, it must not result in the employee getting less than they would be entitled to under the award. That's what the award can do.

PN1947

MR CLARKE: Well, the award, you see, provides - if there are incentive payments, commission payments, that they have to be regulated. Sections 323 specifically says they've got to be paid in full and includes incentive based payments and bonuses. We argue that the employment agreement themselves, because it's a requirement under the award, is enforceable and indeed that was argued by the West Australian employers and the Victorian employers in a Full Bench hearing related to the registration of the employment agreements for commission only employees. I give the references.

PN1948

VICE PRESIDENT HATCHER: Enforceable I think was a provision of the award.

PN1949

MR CLARKE: Sorry?

PN1950

VICE PRESIDENT HATCHER: You mean enforceable as if it was a provision of the award?

PN1951

MR CLARKE: Yes, that is, that if the agreement wasn't in writing, that was a breach of the award.

PN1952

VICE PRESIDENT HATCHER: Well, that's one thing, but the award as it currently stands, requires the agreement to be in writing so that if you didn't have it in writing, you'd be in breach of the award and you might get a penalty. But if the agreement is in writing, in accordance with the award - there's nothing in the award as it currently stands which says that it is a breach of the award not to comply with your written agreement, is there

PN1953

MR CLARKE: But - - -

PN1954

VICE PRESIDENT HATCHER: I mean is that right or not, I don't know?

PN1955

MR CLARKE: That's what the award says. It just says it's got to be in writing as to how you calculate it and that's enforceable and that agreement has got to be in writing and that's enforceable. But if it's enforceable, the contents of that document also must conform with the requirements of the Act.

PN1956

VICE PRESIDENT HATCHER: How does that follow?

PN1957

MR CLARKE: Because if for example, this is the only award that I'm aware of - modern award, where employment agreements have got to be in writing.

PN1958

DEPUTY PRESIDENT ASBURY: No it's not. Every single modern award's got an individual flexibility arrangement that requires an agreement to be in writing; requires it meet certain - - -

PN1959

MR CLARKE: But you don't see the debits like you get in this industry, like unpaid advertising or something similar - vendor advertising. But what I'm saying is that the Commission has the ability - you've got the power to regulate it.

PN1960

VICE PRESIDENT HATCHER: We have the power, but why should we? It seems to me this is all (indistinct). You might be right in saying that the West Australian contract, for example, breaches 326 because it allows advertising to be deducted from the employee's share, but if we then prohibit that, they just say well okay, we'll deduct it from the employer's share and adjust the percentage, same result and there's no contravention.

PN1961

MR CLARKE: All right, I was coming to that point. I thought of it much the same as the Deputy President, after the evidence from Victoria yesterday, which

was it's better to say you can't take it out of the gross commission, the employer's gross commission, which is defined under the award. You've got the power to do that.

PN1962

VICE PRESIDENT HATCHER: But is that a breach of the Act to take it out of the gross commission?

PN1963

MR CLARKE: Well, in terms of if you vary the award with respect to the non-debiting of unpaid authorised vendor advertising from the employer's gross commission, which is defined in the award, which is used for the purposes of the basis of the formula for how much might ultimately go to the employee.

PN1964

DEPUTY PRESIDENT ASBURY: You would then be asking us to, as the Fair Work Commission, to regulate an amount of money that is payable under a contract for sale of a property to a company. The only reason that there's a definition of the gross commission in the award, is for the purposes of calculating what the employee share has to be.

PN1965

MR CLARKE: I put this to you, this award, yes it's a safety net award, what is a very important part of the livelihood of people, the sales people in this industry, is their commission. In fact it's referred to in all the employer's submissions, the importance of commission, incentive drive and all rest of it. But commission's got a duty. There's no one really that can justify on merit grounds - forget the law for a moment - on merit grounds, that a vendor gets away scot-free because the employer chooses not to chase that vendor because it's easier to get the money off the sales person and that sales person has no legal rights of redress against the defaulting vendor or even to be asked whether they agree.

PN1966

VICE PRESIDENT HATCHER: Mr Clarke, the current minimum in the award for commission-only people, which nobody has challenged, is that you get a minimum of 35 percent of 90 percent without any further deductions. That's the minimum, so as long as people get that minimum, what does it matter what other deductions are made for some higher percentage or whether it's 50 percent?

PN1967

MR FARRELL: I apologise for Mr Clarke, and I apologise to the Full Bench. I do realise I will get an opportunity to address you, however you're asking questions of Mr Clarke that I believe are misinterpreted in the contract in Western Australia.

PN1968

VICE PRESIDENT HATCHER: Well, you can say that in due course.

PN1969

MR FARRELL: I'm just saying that may well affect Mr Clarke's answers, that's all I'm suggesting. I'm happy to do so during my turn, but.

PN1970

MR CLARKE: Carry on.

PN1971

VICE PRESIDENT HATCHER: The minimum for commission only sales persons, currently in the award, which nobody has challenged is 35 percent of 90 percent, correct?

PN1972

MR CLARKE: Well, that's for commission only.

PN1973

VICE PRESIDENT HATCHER: Yes, so, for those people as long as whatever is deducted or not deducted, whatever the percentage is in the contract, as long as they get at least 35 percent of 90 percent of the gross commission, why would we be bothered beyond that as to what happens in over award payments above that level?

PN1974

MR CLARKE: Well, it's their living stands, sir.

PN1975

VICE PRESIDENT HATCHER: It's what?

PN1976

MR CLARKE: It's their standard of living.

PN1977

VICE PRESIDENT HATCHER: But we set minimum; we don't set actual rates of payment.

PN1978

MR CLARKE: No, no I appreciate that. That's why I haven't sought to - well the Association hasn't sought to take out of all of the debits that the industry gets involved with, just those that are the most egregious and the most egregious one is somebody defaulting on paying what they should do to their agent, and the agent not following the vendor up and effectively paying the bill by making their employee pay it. That is outrageous.

PN1979

DEPUTY PRESIDENT ASBURY: But the employer is entitled for commission only sales people to withhold, deduct, 10 percent of its total. Why is it our concern what it ascribes, or what it designates as that 10 percent? The 10 percent is gone, if part of it is designated as default on advertising or not, it makes no difference. The employer is under the terms of the current award entitled to withhold 10 percent of the gross commission and required to pay the employee 35 percent of what's left, the 90 percent.

PN1980

MR CLARKE: Yes, yes.

PN1981

DEPUTY PRESIDENT ASBURY: Why do we concern ourselves with what's in the 10 percent? Because if we made them put advertising - exclude advertising from the 10 percent, they'd be entitled to just say well, okay, but we're still going to deduct 10 percent. It wouldn't matter what the 10 percent constitutes.

PN1982

MR CLARKE: Well, that may be so, but I mean at the end of the day, you come back to the position of where the employee is picking up the bill for a vendor because the employer won't chase it.

PN1983

DEPUTY PRESIDENT ASBURY: The employee is picking up the bill for 10 percent of the gross commission. That's what the employee is picking up, because that's coming out of the pie before it gets distributed. Why do we need to regulate what's in that 10 percent of the pie? Because it wouldn't become 12 percent or it wouldn't become nine or eight or seven necessarily.

PN1984

MR CLARKE: Well, in the case of the employee share, which does happen, it comes out of the employee share. If you look at, for example, in my witness statement, attachment I which is an employment agreement with a Mr Peter Francis Sutor and Vignes Warren Nominees Pty Ltd. You go to B4 on page 14, B4(i) debits debited to the statement. Go down to D, advertising expenses pertaining to you, unauthorised advertising expenses, then authorised advertising expenses.

PN1985

If the arrangements is that your client authorised advertising expenses are debited to your statement, then when the amount is recovered you will be entitled to a credit. If the employer does not make a genuine attempt to recover unpaid client authorised advertising spent by you, then you will be entitled to have the expenses credited back to your statement.

PN1986

Now, that is a common agreement with the same employer on about four occasions that I've tackled him on. That comes out of the employee share, not out of the gross commission where the boss's sharing the cost 50:50.

PN1987

DEPUTY PRESIDENT ASBURY: Then if the employee has received less than 90 percent - - -

PN1988

MR CLARKE: No, no, I'm sorry, your Honour.

PN1989

VICE PRESIDENT HATCHER: Is this a debit-credit contact, is it?

PN1990

MR CLARKE: This is the debit-credit exercise.

PN1991

VICE PRESIDENT HATCHER: All right, well from our perspective, as long as the employee has received the minimum wage prescribed in the award, you're telling us to regulate over the award.

PN1992

MR CLARKE: No, in this example, the employee is bearing 100 percent of the cost of the non-paid advertising expenses, right.

PN1993

VICE PRESIDENT HATCHER: I understand that, but our task is to make sure that this person receives the minimum wage, properly assessed in a modern award. If that person doesn't receive that wage, there's a breach of the award and if they do, then this is just in the area of over award payments, isn't it?

PN1994

MR CLARKE: So the Commission is not worried about - I'm not just saying as presently constituted - surely the role of the Commission - I mean, there is just no justification, no merit in what the employer seeks - - -

PN1995

COMMISSIONER GREGORY: Isn't that a definition though Mr Clarke? Doesn't that raise the question about whether these are the right proceedings to deal with this issue of concern to you? I understand the issue and why you don't like it and that you believe is in breach of arguably section 326, but doesn't raise the question about whether this is the right proceeding to be dealing with the issue that you've highlighted?

PN1996

MR CLARKE: Well, it is, for this reason Commissioner. Very few people, this is largely non-union, almost exclusively. Small employers and they read what they see and they think they might be stuck with it and to go ahead and see a lawyer, they take fright at paying \$450 an hour. You go the Fair Work Commission and they say, this is a - - -

PN1997

VICE PRESIDENT HATCHER: Mr Clarke, that's true of nearly all industries we deal with these days.

PN1998

MR CLARKE: But not with respect to advertising. Not where the vendor nicks off, won't pay and the employer whose got the legal right to sue them won't do so and says it's easier for me to take it out of your pocket of the salesman.

PN1999

COMMISSIONER GREGORY: Mr Clarke, just want to interrupt you, just so I understand your position and I do understand that you believe it's in breach of 326. What do you say to the unauthorised advertising expenses such as - - -

PN2000

MR CLARKE: I agree with that.

PN2001

COMMISSIONER GREGORY: On what basis, because they're not unreasonable in the circumstances under 326? Is that how you distinguish the two?

PN2002

MR CLARKE: That's where the sales person has exceeded - has run up an advertising bill - - -

PN2003

COMMISSIONER GREGORY: Yes, I understand the issue, but do you say because looking at 326 that it's not unreasonable in all the circumstances.

PN2004

MR CLARKE: It's not unreasonable in all the circumstances.

PN2005

COMMISSIONER GREGORY: That's how you distinguish between the two?

PN2006

MR CLARKE: Yes, because the employer has a perfect right not to be lumbered with the debt that they didn't authorise.

PN2007

COMMISSIONER GREGORY: Thank you.

PN2008

MR CLARKE: Or a vendor to be lumbered with a debt they didn't authorise.

PN2009

VICE PRESIDENT HATCHER: Mr Clarke, could the problem you've identified simply be solved this way, that in respect of written agreements about commission only or incentive payments, we just say there must be a written agreement and it must conform to the application provisions of the Fair Work Act?

PN2010

MR CLARKE: Yes.

PN2011

VICE PRESIDENT HATCHER: Right, what's the next issue?

PN2012

MR CLARKE: I'll try and be briefer, sir.

PN2013

VICE PRESIDENT HATCHER: No, no, this is very useful.

PN2014

MR CLARKE: With respect to long service leave. Now your Honour made a point the other day and it would be about section 155 of the Act which reads - I think it was 155, yes.

PN2015

VICE PRESIDENT HATCHER: Yes.

PN2016

MR CLARKE: Terms with dealing long service leave "A modern award must not include terms dealing with long service leave." I think that would be the point that you are raising.

PN2017

The explanatory memorandum to the legislation - I haven't got photocopies, I've got it on the computer - got no printing access. At paragraphs 5(9)(a) in explaining in the memorandum of 155, says as follows,

PN2018

Clause 155 prevents a modern award from including terms dealing with long service leave. This clause is not intended to prevent terms that have an incidental effect on long service leave entitlements such as a term that states whether a particular type of leave counts as service.

PN2019

And at paragraph 599,

PN2020

This provision anticipates the development of a National long service leave entitlement under the NES. This ensures that modern awards do not pre-empt the outcome of the development of a national standard.

PN2021

VICE PRESIDENT HATCHER: No sign of that happening, but - - -

PN2022

MR CLARKE: No, not until all states agree to South Australia's at least. But REISA is not seeking to have this Commission create entitlements or take away entitlements with respect to long service leave. Long service leave stays within the jurisdictions of the states or if they are under a pre-modern award, Federal award, if there was a long service leave provision, it stays intact.

PN2023

We're not seeking to do that. What we're asking the Commission to consider and to enact is a provision in the award which says with respect to long service leave, and it follows the logic of Magistrate Ardlie in the decision of Parsons v Popenichki which is attached to my submissions, your Honour which is in many instances, not necessarily in all, but in many of the agreements in South Australia, and it does also attach to some of the other states, that long service leave is encapsulated in terms such as wages leave however described and so on.

PN2024

Magistrate Ardlie pointed out, and I again emphasise that it is subject to appeal; it's been heard, but no decision yet by Judge Hannan that you differentiate wages from long service leave. Long service leave deals with you get something because you've survived - in our case in South Australia, seven years' continuous service or 10 to get the full 13 weeks.

PN2025

What we're asking is that so that you don't actually render long service leave annuity in effect, by allowing debiting of long service leave payments made against commission, the employee's commission, that that not be permitted. The employer might go around later and say look, since that's not going to be included, your commission share is going to be adjusted downwards, they may be able to do that. I'm not arguing they shouldn't.

PN2026

But it makes it transparent to the employee and the employer the value of long service leave and particularly, it doesn't discourage people from using long service leave for the purposes it was established for, which was to give people rest and recuperation after a period of time at work.

PN2027

VICE PRESIDENT HATCHER: Yes, but under the various state long service leave Acts, the effects of the Acts themselves is that for example, if the commission only sales persons chose to take long service leave, the Acts by their own force would require payments to be made at the time they took that leave.

PN2028

MR CLARKE: Yes.

PN2029

VICE PRESIDENT HATCHER: So what's the problem there?

PN2030

MR CLARKE: No, there's no - - -

PN2031

VICE PRESIDENT HATCHER: Parsons is a different category because they were under - at the relevant time, a work choices era agreement which was still in effect and over rode the state long service leave Act and was still in effect as against the modern award.

PN2032

MR CLARKE: Yes.

PN2033

VICE PRESIDENT HATCHER: So the modern award couldn't have solved that problem.

PN2034

MR CLARKE: No.

PN2035

VICE PRESIDENT HATCHER: Except in that category of cases, where the modern award is applicable, it seems to me that the long service leave Act in every state would require a long service leave payment to be made when the person chose to take the leave.

PN2036

MR CLARKE: Well, that's my understanding.

PN2037

VICE PRESIDENT HATCHER: So what's the problem?

PN2038

MR CLARKE: But they get it paid, but particularly like with commission only employees, they won't take long service leave because that debit comes out of their next commission. Given that at the best of times you might have to wait eight to ten weeks between listing and selling and settling a property, there's - we're not arguing that the employer should pay more, it's just that they shouldn't debit it from commission.

PN2039

If they want to refine the commission level down, that's their choice. The employee knows, gets to know the true value of their commission, rather than saying, you've got all this 50, 60 percent commission but when you start shedding it of all the debits, it's probably only worth 15 or 20 percent if that.

PN2040

DEPUTY PRESIDENT ASBURY: Well, would that concern be addressed if the written agreements required each entitlement and each matter that the commission encompasses to be identified and have a value ascribed to it?

PN2041

MR CLARKE: It would. If it particularly put in a value. I notice in Western Australia they talk about part of our commission, 1.3 percent or 1.7 percent is your long service leave entitlement. The irony of it is, is that if you're getting that benefit, if you are getting that benefit and you leave before you are actually due for long service leave or entitled to pro rata long service leave, you've got the benefit of that money without any debit.

PN2042

But the person who walks through until they - 10 years or 15 years is up and takes the long service leave, and have it debited against - the longer serving employee actually suffers more than someone whose been there five or six years and shoots through because they've had the 1.3 percent added to their commission. The long serving employee is the one who actually, as you yourself found in the Parsons case, illusory. Long service leave is largely illusory.

PN2043

Now just the next point is the superannuation. Now I did have facts too, your Honours, a decision of the Federal Circuit Court. I can't pronounce his name but it's Tjorpatzis v E J Love & Co Pty Ltd & Anor [2016] FCCA 2735 dated 3 November 2016. In this case, it did involve a real estate company, it involved superannuation. The problem seemed to be in particular that there was no real written agreement as to what would happen with respect to whether the monies paid to this person was including superannuation and including superannuation payments over the years or whether money was owed.

PN2044

I just draw your attention to paragraphs 44 to 53 of that judgment. Now, it's true if you look at many of the employer template agreements and the agreements I myself have tendered. In the written agreements, many of them say the party's commission may include superannuation component or not. Whereas in this case, there appeared to be a fair bit of confusion. There was no written document.

PN2045

At paragraph 46 the judge says -

PN2046

46. Even if the applicant had acquiesced in the first respondent deducting superannuation from his commissions, the law required the first respondent to pay superannuation on top of commissions. The applicant's equivocal conduct cannot be relied upon to undermine clear statutory obligations.

47. The respondents also argued that the parties had agreed to a "total package" and, on that basis, it was permissible for the superannuation to be deducted from commissions. For that argument, the respondents relied on the decision in Fortune Holding Group Pty Ltd v Zhang [2016] VSC 273. In that case, Riordan J said at [36(a)]:

The obligation to make the superannuation contribution is on the employer. In my opinion, in the absence of other circumstances, an offer to pay a salary of \$85,000 would not imply that the employer's compulsory superannuation contributions would be deducted from that sum. Such an inference would normally only be drawn if the employee was offered that sum as a 'total package'.

PN2047

Then at paragraph 50.

PN2048

VICE PRESIDENT HATCHER: Sorry, this might arise from the earlier discussions about advertising and long service leave, but is it correct in the first place to describe what is occurring here as deductions, as distinct from a specification of the method in which the commission payment is to be calculated? That is, it's not a case where you calculate an amount in accordance with the contract and then deduct something. These are simply integers of the method of calculation of how much the employee's entitled to in the first place.

PN2049

MR CLARKE: Yes, look, I would agree. I'm not saying that deductions with respect to superannuation, the debiting is unlawful with respect to superannuation. But what causes considerable unease amongst our membership is it always appears to them as they're paying for their own superannuation and particularly, as - if I can again refer you to that exhibit I attached to my witness statement at - I had it written down, sorry your Honour, I'll just find it. Page 13, B1(8).

PN2050

VICE PRESIDENT HATCHER: Of what?

PN2051

MR CLARKE: That's the attachment I to my witness statement. Page 13, that's the Vignes Warren Nominees Pty Ltd v Peter Francis Sutor. B1(8) Increases in Super.

PN2052

We expressly agree that any increase in the employer's nine percent superannuation contribution will be included in your credit, whether or not superannuation is already included in your credit B1(3).

PN2053

Now, your Honours and Commissioner, this particular document is 17 pages long, close typed. When an employee gets one of these agreements, yes they sign it, but they're very difficult to understand, very complex, particularly ranges of debiting that's permitted and all the rest of it. So, they're commission share stays unchanged.

PN2054

Now one of the West Australian witnesses, to his credit, says as the commission goes up and he debits the increased commission - sorry, the increased superannuation against the sales person's commission, he adjusts the commission payable to the employee by that proportion, so that their level of commission payment in real terms is not affected by a constant erosion of increases in the superannuation.

PN2055

The evidence, particularly in South Australia where obviously we have greater knowledge of, is for the debit-credit sales person, they get around about 45 to 50 percent. It's been that since superannuation was three percent. Now it's nine and a half, going into 12. Now, it's not unlawful, not saying it is. I'm saying that particularly in a safety net award, it ought to be crystal clear to an employee as to what the real value of their commission is and if the employer wants to - as suggested in our summary, the latest one, of do a one-off adjustment and reduce the commission share to cater - but still pay the superannuation of course, but reduce the commission share, that at least has the advantage for the employee to again understand what that commission share really means to them.

PN2056

COMMISSIONER GREGORY: Mr Clarke, can this matter be dealt with in the same way as the Vice President suggested regarding the unpaid authorised advertising expenses, that there must be a written agreement and it must confirm the provisions of the Fair Work Act?

PN2057

VICE PRESIDENT HATCHER: Applicable long service leave legislation and superannuation guarantee legislation.

PN2058

COMMISSIONER GREGORY: But the Federal Circuit Court decision, as you've said, doesn't - it seems to be more about the fact that there was no written agreement in regard to super, rather than - I notice the - - -

PN2059

MR CLARKE: That's right and there are a lot of arrangements where there are no written agreements in this industry because not everyone is a member of an employee's association. It's the whole gamut - so that's why in part, the safety net award is so important, particularly in areas of commission entitlements.

PN2060

VICE PRESIDENT HATCHER: I mean the problem you raise might well have arisen in any number of industries. That is, there may well be many industries who think of people on over-award payments where they have a contract which says you've got a \$100K package including super and there's a question of how that is affected by increases in the guarantee. But we've never gone into that.

PN2061

MR CLARKE: Yes, I appreciate that, but with commission, unlike a remuneration package of \$100,000 inclusive of super, and I've seen lots of those outside of this industry, is commission is such an important part of a person's standard of living in this industry and it's so variable.

PN2062

Whereas if you earn \$100,000 and you get your salary reviewed or whatever it might be and this is what your total package is, you understand it. It's there for at least the next 12 months. It's not subject to these constant variations and debittings and god knows what else that takes place. Now I don't know if I can take that much further, unless there's other questions, and I rely on the other parts of my submissions.

PN2063

In terms of the commission only, where there's a difference of opinion with respect to Western Australia, we don't resile from our claim and we stand by it.

PN2064

VICE PRESIDENT HATCHER: Just be clear, the 160 percent threshold which is proposed.

PN2065

MR CLARKE: Yes.

PN2066

VICE PRESIDENT HATCHER: You're saying that apart from Western Australia, that's consented to even on the basis of the higher base rates that you propose?

PN2067

MR CLARKE: Yes. I mean that was agreed to, but obviously with the employer parties free to argue as they have done so with respect to what the quantum, if any, should be with respect to the award claim.

PN2068

So, all we simply say with respect to the West Australian argument is, on the evidence that they produced, it doesn't affect any of their existing employees; it's

only with respect to new employees that come in as commission only. I'm restating the obvious that this is the only industry where piece workers aren't guaranteed an hourly rate of pay, for time and effort expended, as well incurring costs.

PN2069

We wanted to make sure that only those persons who have been able to demonstrate a track record of earning in excess of the award - not just marginally, because not only the award rate, you've got to take into account the costs of the running of a motor vehicle, mobile phone, all of those expenses that come under allowances which they are not entitled to under this award, is encapsulated and it brings it up to a figure of about \$57,000 on the current award rate of pay - \$57,000, \$58,000. I don't have it right in front of me. But it's within that order of magnitude.

PN2070

Yes it is considerably higher than what the current award provides which is basically \$41,000 which frankly doesn't pass by any stretch of the imagination, a safety net award with respect to people who are virtually, in effect, award free. Given that the industry Australia wide have agreed to that, other than the West Australians, we don't believe they made out a special case either for themselves, which they can't do anyway given the Fair Work Act as it provides no state differentials. There's no evidence of a probative value with respect to any real impact with respect to the industry as a whole in the coming years. It's a proper safety net provision to ensure that people, if they go commission only, is only really offered to people who can show they can make a good fist of it.

PN2071

I think I've addressed all the other matters either in contention or briefly as there hasn't been any other matters. I don't know if you want me to address the - - -

PN2072

VICE PRESIDENT HATCHER: Do you want to address the three propositions we ventilated yesterday?

PN2073

MR CLARKE: Yes. Do you want me to do that now?

PN2074

VICE PRESIDENT HATCHER: Yes.

PN2075

MR CLARKE: Well, it might be better perhaps after Mr Patterson puts a bit of wording down.

PN2076

MR WARREN: We've got a document to put up.

PN2077

MR CLARKE: It may be better to wait.

PN2078

VICE PRESIDENT HATCHER: All right, we'll wait for that then.

PN2079

MR CLARKE: Wait for that. So unless there's any other questions, your Honours and Mr Commissioner, that completes my submissions.

PN2080

VICE PRESIDENT HATCHER: I was thinking perhaps Mr Lewocki should go next since his interests most align with Mr Clarkes.

PN2081

MR CLARKE: Yes, certainly.

PN2082

VICE PRESIDENT HATCHER: Then we might take a lunch break. How long will you be Mr Lewocki?

PN2083

MR LEWOCKI: Ten minutes.

PN2084

VICE PRESIDENT HATCHER: Right, we might hear you and then take an early lunch I think.

PN2085

MR LEWOCKI: Thank you, thank you, your Honour, I appreciate that. APSA will be relying on - I'm sorry, can you hear me, should I move that there? We'd be relying on our submission and witness statements that we filed on - or prepared on 25 July and also your Honour and members of the Full Bench, the submissions in reply dated 31 October this year.

PN2086

There's only a couple of things I'd like to mention. Over the past couple of days we heard evidence and testimony from the employers' witnesses. There was Mr Kuhne from Western Australia. There was also Mr Whiteman. Mr White from the REIV and Mr Burns, Mr Harvey and Ms Kikianis from South Australia.

PN2087

They gave an account on how their business was operation, how their employees were remunerated and the conditions that their employees were engaged under. Mr Kuhne, Mr Whiteman and Mr White also stated that commission only employees could earn uncapped remuneration. I've got a mate whose a firey who used to say 'turbo dollars' when he used to work on weekends. But the fact is APSA's not opposed to commission only employment. What we are concerned about is the number of employees that are now having their work contract changed from debit-credit to commission only based on the fact that the employer indicates that they can't afford to pay them a wage any longer.

PN2088

What they do is simply say to them, from next Monday or next month, you're going to go on commission only. Now you might say, well, there's a choice there, but in fact there really isn't a choice because the employee, like many other employees, they have obligations that they need to fulfil. They need to earn a wage, they have household expenses, so reluctantly they move onto commission only. Now, the point is if an employer can't pay a wage, one would consider can the employer then pay a commission to a commission only sales person.

PN2089

So we don't believe that there is a large number of these particular employees working on commission only. I think in fact, it's relatively small. But it's undeniable that there are employees out there that are not earning the award wage.

PN2090

Our application goes to the fact that what we're seeking is a safety net where, if an employee has not earned the award wage in a six month period, then the employer would top that up to the wage. Your Honour and members of the Full Bench.

PN2091

VICE PRESIDENT HATCHER: That makes it, it's not commission only employment, is it? It's something different?

PN2092

MR LEWOCKI: Sorry?

PN2093

VICE PRESIDENT HATCHER: Well, under your proposal, it's not commission only employment anymore. You've changed it into something different.

PN2094

MR LEWOCKI: Well, I'm not sure - perhaps, but it really is an underlying protection to ensure the employee at least earns what the minimum award wage provides for.

PN2095

VICE PRESIDENT HATCHER: Yes, all right.

PN2096

MR LEWOCKI: So that's the essence of our submission your Honour and members of the Full Bench. We don't believe it's affecting a lot of workers in the industry. In fact I don't think it's going to have an impact on any of the real estate offices and their operation. It's just simply there are a small number of employees that are not earning the award wage when they're actually put on commission only.

PN2097

The other issue is that - - -

PN2098

VICE PRESIDENT HATCHER: Can I just raise this, that it seems to me that one of the key aspects of commission only employment which has emerged from the

evidence is the extent to which they operate on an unsupervised self-motivated basis. I think (indistinct) has said that's a key ingredient of the model.

PN2099

Once you have a requirement that they have to be topped up to the minimum wage, even if it's only every six months, it seems to me that that may have indirect effect on the employment model in the sense that the employer will then want to supervise their work and look over their shoulder in effect, to make sure that they're doing the work necessary to generate the income so that they don't have to pay the top up at the end of six months. That is, it may lead to a change in the model to introduce a level of supervision which isn't currently there and which people may regard as undesirable.

PN2100

MR LEWOCKI: I don't necessarily see it that way, your Honour. I mean, if a person wants to work in the real estate industry, they want to earn a living. I don't think they'd be sitting with their feet on the desk reading the form guide. They're there to really earn and they want to earn a living, but if it's not available for them to earn that living, well then something has to be done. There must be some duty of care for an employer to their employees.

PN2101

So I don't believe that the level of supervision would be required because I think that the employee themselves would be demonstrating that they are really trying to earn a living. Because, what's the point? They could go stack shelves in Coles and earn money than they can in real estate, to be honest with you.

PN2102

So, if they want to work in the industry, they're going to give it a fair crack, but if the product is not there for them to make a living, then there must be - the award must protect those type of people. And as I said, I don't believe there's a lot of them, but they are out there. That's undeniable. So I don't think it would be necessary for the employer to take that sort of action.

PN2103

VICE PRESIDENT HATCHER: Anything further Mr Lewocki?

PN2104

MR LEWOCKI: No, that's about it, your Honour, thank you.

PN2105

VICE PRESIDENT HATCHER: All right, well we may take an early lunch at this point. Do you want to hand up your document now so that we can peruse it over lunch?

PN2106

MR WARREN: I think we have three copies here. It's a first cast at trying to deal with it and obviously other parties might have something to say and we may even wish to play with it a bit ourselves.

PN2107

VICE PRESIDENT HATCHER: Thank you. Mr Warren, if we adjourn now and we resume at 1.30, we will finish definitely by four?

PN2108

MR WARREN: Our friends from the West have a bit of a problem, so I was going to go next, but they'll go next.

PN2109

VICE PRESIDENT HATCHER: What's your problem Mr Farrell?

PN2110

MR FARRELL: Your Honour, I actually have a listing of another matter at three o'clock Sydney time this afternoon, so I've requested Mr Warren to allow me to go first.

PN2111

VICE PRESIDENT HATCHER: All right. Well, subject to that, we'll finish by four?

PN2112

MR WARREN: I'd be very confident we'll finish by four.

PN2113

MR TRACEY: As will I, your Honour.

PN2114

VICE PRESIDENT HATCHER: Okay, we will adjourn now and resume at 1.30.

LUNCHEON ADJOURNMENT **[12.31 PM]**

RESUMED **[1.36 PM]**

PN2115

VICE PRESIDENT HATCHER: All right, so who's next?

PN2116

MR FARRELL: Thank you, Vice President. Sir, with the Fair Work Commission's indulgence I propose to start my closing submissions by addressing the three propositions that were ventilated yesterday.

PN2117

VICE PRESIDENT HATCHER: Yes.

PN2118

MR FARRELL: With the first one, in terms of changing the minimum percentage amount that a commission only sales person must be paid, and prepared to gross commission, we say that the current definition is clear, however if the Fair Work Commission were minded to, in their view, to make it clearer, we have no opposition, not that we have an opposition to that, but we have no opposition that should that be done. So are neutral on that particular issue. We say it's six to one, half a dozen of the other.

PN2119

In relation to proposition 2, Mr Warren handed up a document prior to us adjourning for the lunch break and in our view, and this was included in the document that was handed to the Full Bench, consideration needs to be taken into account when a commission only sales person, as the evidence given by Mr Kuhne, on his own volition, decides to withdraw from the workplace, decides to go and take some period of study, go on a holiday, and not actually work, so we believe that you need to include that consideration and that's at point (ii), sir, I believe, if you're looking at that.

PN2120

VICE PRESIDENT HATCHER: How's something like that treated in terms of continuity of employment? I mean, is that - - -

PN2121

MR FARRELL: It's considered continuity of employment, sir.

PN2122

VICE PRESIDENT HATCHER: But what, do you grant unpaid leave or something, or how does it work?

PN2123

MR FARRELL: Well, in the practice sense they just don't turn up for work and the employer doesn't chase them.

PN2124

VICE PRESIDENT HATCHER: And they continue to entitlements over that period?

PN2125

MR FARRELL: Yes, they continue to accrue annual leave and long service leave and those types of entitlements.

PN2126

VICE PRESIDENT HATCHER: So if that situation's somehow catered for, do you support this proposition?

PN2127

MR FARRELL: Yes, sir. Yes, we do. We accept that the current condition, once an employee qualifies as a commission only salesperson, then there's no continuation of that for at least five years. Now we are part of an agreement to reduce that to three years as one of the qualifications and as part of the heads of agreement that we signed last year, but as things currently stand, a person qualified now as a Commission only sales person could potentially earn under the award for five years – those things, so we believe that this is a common sense arrangement to protect the person on the minimum that we were referring to below.

PN2128

DEPUTY PRESIDENT ASBURY: So can you just explain to me how they were there - - -

PN2129

MR FARRELL: Certainly.

PN2130

DEPUTY PRESIDENT ASBURY: And under the award for – how they could earn under the award for five years?

PN2131

MR FARRELL: Sure.

PN2132

DEPUTY PRESIDENT ASBURY: Where does the five years come from?

PN2133

MR FARRELL: Certainly, ma'am. If you look at, currently clause 16.2 of the award – sorry, 16.3, I beg your pardon - - -

PN2134

DEPUTY PRESIDENT ASBURY: Yes.

PN2135

MR FARRELL: 16.3(a),

PN2136

The minimum income threshold has been achieved if, and only if, the employee can establish that if the lowest rate of Commission to be applied under the commission only agreement had been applied to the employee's real estate sales or commercial leasing transactions in any single 12 month period in the five years immediately prior to entering into the commission only agreement the employee would have been entitled to be paid the following amounts.

PN2137

And then - - -

PN2138

DEPUTY PRESIDENT ASBURY: But the five years relates to how you assess the qualification to become a commission only salesperson and it's got no relevance once you've become a commission only salesperson. It doesn't work the other way, does it, where - - -

PN2139

MR FARRELL: I beg to differ, ma'am, because it is quite clear that it's in the preceding, or the immediate five years beforehand.

PN2140

DEPUTY PRESIDENT ASBURY: Does that get - - -

PN2141

MR FARRELL: I take your – sorry, I - - -

PN2142

DEPUTY PRESIDENT ASBURY: That gets you in.

PN2143

MR FARRELL: Yes.

PN2144

DEPUTY PRESIDENT ASBURY: It doesn't operate as an ongoing threshold once you get in, does it?

PN2145

MR FARRELL: I take your point.

PN2146

VICE PRESIDENT HATCHER: What – what - - -

PN2147

MR FARRELL: How it - - -

PN2148

VICE PRESIDENT HATCHER: Sorry, I just – I mean, I've only heard this for the first time, unless I've missed it but the clause says, "A person may only be a commission only employee when the following conditions have been satisfied".

PN2149

MR FARRELL: Correct.

PN2150

VICE PRESIDENT HATCHER: So you say when it says, "be a commission only employee", you mean, "become and remain"?

PN2151

MR FARRELL: Yes.

PN2152

VICE PRESIDENT HATCHER: Right.

PN2153

MR FARRELL: Yes.

PN2154

DEPUTY PRESIDENT ASBURY: Right. Okay.

PN2155

MR FARRELL: Sorry, Deputy President, I apologise again.

PN2156

DEPUTY PRESIDENT ASBURY: All right, so the proposal is for the five years to be ongoing, not – it's become and remain?

PN2157

MR FARRELL: No, ma'am. The current situation is become and remain. The proposal is that each 12 month period after qualifying for Commission only employment a review is made of the income and should that income not equal the minimum wage, then they cannot remain as - - -

PN2158

DEPUTY PRESIDENT ASBURY: So you say the existing clause 16.3 requires they become and remain that way for five years?

PN2159

MR FARRELL: No, ma'am. What I'm saying is, it's – okay, can I start from the beginning, perhaps.

PN2160

DEPUTY PRESIDENT ASBURY: Right.

PN2161

MR FARRELL: What I'm currently saying is 16.3 is applied when a person is on a debit/credit arrangement or enters the – sorry, no, I shouldn't say, "enters into the real estate industry", becomes a new employee. So at that point in time an assessment is made whether they qualify under that amount. If they do qualify then they can only remain as a commission only employee for five years.

PN2162

DEPUTY PRESIDENT ASBURY: But you say that's how the existing award operates?

PN2163

MR FARRELL: That's existing. That's the existing.

PN2164

DEPUTY PRESIDENT ASBURY: I don't see that, I'm afraid. I'm not seeing that in it.

PN2165

MR FARRELL: Okay. May I perhaps expand a little bit more on where I'm getting at?

PN2166

VICE PRESIDENT HATCHER: Yes.

PN2167

MR FARRELL: So 16.2 says that, "A person may only be a commission only employee when all of the following conditions have been satisfied", and then names those conditions.

PN2168

DEPUTY PRESIDENT ASBURY: Yes.

PN2169

MR FARRELL: Okay. I am a real estate salesperson. I have been employed by my employer since the beginning of my entry into the industry. I am currently on a debit/credit arrangement. I've been with - - -

PN2170

DEPUTY PRESIDENT ASBURY: Where does it say all that?

PN2171

MR FARRELL: No, I'm giving you an example to explain my interpretation.

PN2172

DEPUTY PRESIDENT ASBURY: All right, sorry.

PN2173

MR FARRELL: I've been with my employer now 12 months. I wish to go onto a commission only arrangement and my employer agrees with that. An assessment is made on the income that I have earned at the minimum rate of 35 per cent for that 12 month period. I exceed or equal that threshold. I can then remain as a commission only employee regardless of what I earn, for five years.

PN2174

VICE PRESIDENT HATCHER: It would be four years, wouldn't it?

PN2175

MR FARRELL: Sorry, yes. Yes, correct. Correct.

PN2176

VICE PRESIDENT HATCHER: So you could have one year in the past five years where you've exceeded the threshold?

PN2177

MR FARRELL: Yes. Yes, four years. For four years, you're absolutely correct. I am supporting the current proposal raised by the Commission with the amendment that I have mentioned because four years is a long time in which I could potentially not earn much, or little income. And so my association that I'm representing agrees with the proposition of the Commission that that should be regularly checked for an employee to remain as a commission only employee.

PN2178

DEPUTY PRESIDENT ASBURY: Right. Well, just so we're clear, you're agreeing on the basis of an interpretation of clause 16.3 which makes it an ongoing obligation, whereas I'm afraid I'm struggling to see how it is an ongoing obligation. I read it as being an – or a test to get you in the door, not one that keeps on operating for the next five years after you get in the door.

PN2179

MR FARRELL: If the words, "A person may only be a commission only employee", that are contained in 16.2 - - -

PN2180

DEPUTY PRESIDENT ASBURY: So you're saying to be – being in the future and - - -

PN2181

MR FARRELL: Yes.

PN2182

DEPUTY PRESIDENT ASBURY: Right.

PN2183

VICE PRESIDENT HATCHER: Albeit, at any particular time?

PN2184

MR FARRELL: At any particular point in time.

PN2185

VICE PRESIDENT HATCHER: Whether you were one in the past, or not?

PN2186

MR FARRELL: Yes, sir, that's correct.

PN2187

VICE PRESIDENT HATCHER: Right. So the proposal that's been handed up, is that mean to somehow – how does that sit with the minimum income threshold? Is it meant to replace it or does it restore the - - -

PN2188

MR FARRELL: That's going to be part of my argument that I address this application for, to increase that to 160 per cent. What I – to be fair, this is an assessment so I may be incorrect. My assessment of the concern the Commission has raised by making this proposal yesterday, is the concern that a commission only employee who qualifies could potentially remain on very little income for four years.

PN2189

DEPUTY PRESIDENT ASBURY: Or indefinitely.

PN2190

MR FARRELL: Or if the Deputy President's interpretation is correct, indefinitely. And that a check should be made on that to ensure that for that arrangement to continue the employee is earning a sufficient minimum income. We support that idea and we view that that would have benefits for employers as well as employees.

PN2191

VICE PRESIDENT HATCHER: That being what?

PN2192

MR FARRELL: That being ensuring that the – because if someone earns the minimum wage, or exceeds it, then they're meeting the threshold that's in place already. And so it would become a situation where only if they were in breach of the condition that you're proposing to include in the award, would they be in breach of the award. One of the difficulties employers have, as per my submissions, is the current wording of the minimum – and the Deputy President's conversation with me in relation to the issue about – is a good example of that, is it's difficult for employers to comply with that part of the award. Mr Kuhne has given evidence and certainly it's in my submissions that employees have raised these concerns with us in asking for advice. The proposal that the Commission is with the amendments that we're seeking would address that issue because there would be a regular check every 12 months of an employee's remuneration.

PN2193

VICE PRESIDENT HATCHER: But you would still have an entry requirement?

PN2194

MR FARRELL: You would still have an entry requirement, yes, sir. Yes. Are there any further questions on that point, or may I move on?

PN2195

VICE PRESIDENT HATCHER: Move on but I might think of something.

PN2196

MR FARRELL: Yes. I'd remain at the – now as per proposal 3, REEF are neutral on this one, as well. We don't agree that it is the intention of commission only employment for an average salesperson to earn 115 per cent of the minimum wage, however it has a number of different - - -

PN2197

VICE PRESIDENT HATCHER: Well, 15[sic] per cent was just a number, as an example. The parties could suggest anything but - - -

PN2198

MR FARRELL: Certainly, yes. But that was the proposal that we were to address.

PN2199

DEPUTY PRESIDENT ASBURY: Every other piece worker, pretty much in the Modern Award here, has got a provision that looks a lot like that where there's a statement of intention with respect to entering into piece work arrangements.

PN2200

MR FARRELL: You're correct, Deputy President, and hence why we maintain a neutral view. We don't oppose it, we maintain a mutual view on that statement. However, and it is our understanding that there is no intent for this, we would be opposed and we say the evidence isn't there to support it, any requirement for an employer to top up, because we say that takes the APSA proposal and extends it by another 15 per cent.

PN2201

Members of the Full Bench, this award, and there is evidence before you from the union witnesses, was a consent award amongst all parties and it is at that point of time, 2009, 2010, that the current provisions were put into the award. And as has already been outlined in the statement of 7 March 2014, it's the expectation that the Full Bench would take the view that the current conditions meet the Modern Award's objective. What we say for REISA's application to be successful is what has changed since then.

PN2202

VICE PRESIDENT HATCHER: What if they haven't?

PN2203

MR FARRELL: If the parties have agreed, and let me give you an example of the 160 per cent that I'm going to take further, REISA's argument is that there's always been an intention for an employee to have to demonstrate that they can make a sufficient income before going onto commission only and I take no quibble with that. Our point is, in 2009, remembering that this was by consent, that level was at 110 per cent, or a 100 per cent if the employee wasn't required to maintain and service the vehicle. What has changed, if that met the Modern Award objective then and was consented to by the union, what has changed since then to justify a significant increase, and that's what it is, it's another 50 per cent on top of that, for someone to have to earn before going to commission only? We say there is no evidence before you that demonstrates that.

PN2204

The Employee Association's witnesses have either said one or two things. If they worked, and I'm referring to the South Australian witnesses for the union, they say, "Oh, I've had people come to me with complaints". No details about what they were, no details or evidence produced about that being true. But if that was the case, why did not they call those employees? There is no evidence before you that demonstrate that. The witness of the Australian Property Service Association, first of all, we say should be given very little weight.

PN2205

Unlike every other witness, they were not tested. Two of them, according to Mr Lewocki in his statement to you, weren't prepared to come and give evidence.

PN2206

VICE PRESIDENT HATCHER: But at the end of the day, they were people in relation to whom the current provision wasn't complied with, as I read the statements.

PN2207

MR FARRELL: Yes. You've brought up something that I - - -

PN2208

VICE PRESIDENT HATCHER: So I'm not sure how that bears upon changing what the position should be. That is, if people won't comply with the current provision, they certainly won't comply with a different provision.

PN2209

MR FARRELL: Thank you, Vice President. Yes, you see, my next - - -

PN2210

VICE PRESIDENT HATCHER: I'm not sure where that gets us.

PN2211

MR FARRELL: Yes. My next argument was exactly going to be that, that a breach of the current provisions of the award is not justification for an addition of the award. There are procedures and processes in place for employees to prosecute those breaches of the award. So you're quite correct. We say there's no reason for it to be increased just because of those. Now from our point of view it's certainly a reasonable statement or a reasonable thought for people not within the

industry to think, well, yes, they should earn 160 per cent before going onto commission only. Yes, we accept that as a commission only, if they don't sell, they don't earn. However, so is 180 per cent, so is 300 per cent. Why 160, for starters? And second of all, what evidence is there to justify that? It is all agreed throughout all the witnesses that the real estate industry is going through a difficult period at this point in time. Surely that therefore means - - -

PN2212

VICE PRESIDENT HATCHER: In some places, it is.

PN2213

MR FARRELL: In some places, yes.

PN2214

VICE PRESIDENT HATCHER: Not in Sydney.

PN2215

MR FARRELL: Yes. Well, and actually that's another point that I make towards you is that markets are different in each cities and regions. Western Australian, in itself, there is no evidence of employees who have qualified as commission only employees and yet not earned sufficient income. And that brings me to another point. What is sufficient income? Mr Clarke has demonstrated that in his view, 40,000 or 41,000 is not, and I summarise, a very good income. What evidence is there to justify that? Absolutely none, particularly in Western Australia. What we do have though is evidence from both Mr Kuhne and Mr Whiteman and what the effect of that change would have on employment with that industry, which is one of the Modern Award's objectors.

PN2216

I accept that your task as a Full Bench is to balance the different interests between employment on an industry and ensuring that employees have a sufficient minimum wage, I accept that. But where we have a situation like we have here before you, where there's no evidence justifying the change, and there is evidence about what the effect of that change would be, surely indicates that that change should not be made. Mr Clarke has criticised us for the paucity of evidence on what the impact would have on the industry in Western Australia. I put to him and I put to yourselves, we're not required to demonstrate that. As per the full Bench's own statement it is incumbent on the party who is seeking to make the amendment to the award to demonstrate through probative evidence the justification for that change. It is not on the party seeking to maintain the current provisions of the award to demonstrate why that change should not be made.

PN2217

COMMISSIONER GREGORY: You are relying on the employment effects though in making those submissions. What do you say those employment effects are likely to be? Will they shrink the overall pool? Will there be more debit/credit employees? What do you say the impact will be?

PN2218

MR FARRELL: Yes. Thank you, sir. I appreciate that question, and I have addressed that in my submissions, as well. The effect will be - currently in

Western Australia, as per the evidence before you, eight out of ten real estate sales people are commission only.

PN2219

VICE PRESIDENT HATCHER: I think on the evidence, at least on the states we heard about, it suggests that Western Australia's got a much higher proportion of commission only than apparently South Australia and Victoria.

PN2220

MR FARRELL: Yes, and I'll accept that. As that pool decreases through the natural attrition of people retiring and people leaving the industry and you make it harder for people to enter, not the industry but the pool of commission only salespeople, that then shifts the balance of power in terms of negotiations between commission only salespeople and employees. If I can a commission only salesperson and I'm one of 3800, I would have less power than I would be if it was 1500, or 2000, or less than that number.

PN2221

VICE PRESIDENT HATCHER: The effect would be a smaller cadre of higher paid employees.

PN2222

MR FARRELL: I'm sorry, sir?

PN2223

VICE PRESIDENT HATCHER: The effect of the change, in your submission, would be a smaller group or cadre of employees but who would enjoy higher pay.

PN2224

MR FARRELL: Yes. And then the follow-on effect from that is that costs would have to be passed on to the consumer.

PN2225

VICE PRESIDENT HATCHER: Well, with respect, not necessarily. That is, they've got higher pay because it could be the same amount of income is being shared among a smaller group of people.

PN2226

MR FARRELL: No, sir, because - - -

PN2227

VICE PRESIDENT HATCHER: Not because they're actually charging more but they're getting more income because they're doing more work.

PN2228

MR FARRELL: I would not suggest that that's the case. I'm saying it's a higher commission per sale.

PN2229

VICE PRESIDENT HATCHER: Right.

PN2230

MR FARRELL: So not necessarily a higher salary, is my concern, but the higher commission per sale. So the costs per sale, and remembering in the real estate industry the employee only gets paid when a house is sold in most cases. I accept that there's property management and those types of ongoing - - -

PN2231

COMMISSIONER GREGORY: Aren't you likely – you're going to just have a smaller group of employees that are selling more houses per head than they were previously - - -

PN2232

MR FARRELL: No, sir.

PN2233

COMMISSIONER GREGORY: Thereby earning greater commissions?

PN2234

MR FARRELL: No, sir. What you are going to have is commissions going to employees, per sale of house. That's the important bit, sir. Not what the total remuneration over the 12 month period is, but per sale of house is going to be greater for a group of employees, i.e., commission only. So it is not a case of a lesser amount of people having a greater share from the same pool. It is one particular group of people are going to have a greater share of a lesser or greater (indistinct) per sale of houses. And the relevancy then is that is when an employer is paid.

PN2235

So currently, and I accept there's no evidence before you and I am not suggesting that you treat this with any great weight, but if we have an example that that an employer has a 10 per cent margin on which they make on the sale of a house, so income, i.e., the commission paid by the vendor, minus the costs involved in the selling of the house, the advertising, et cetera, et cetera, et cetera. Now if that margin decreases because the employee is able to demand a greater share of that commission then the margin will decrease and therefore that can only eventually – I accept that's not the only factor, sir, there will also be market forces and competition between agency and agency, but that would end up eventually being passed through to the consumer.

PN2236

VICE PRESIDENT HATCHER: But that will balance out because if the commission rates go up it will become easier to fully satisfy the minimum income threshold.

PN2237

MR FARRELL: Not necessarily, sir, because the evidence before you is that there was no evidence before you that commission only salespeople are earning less than the minimum income. In fact, it's the opposite. It far exceeds. And coming back to my original point is that an employer is reliant on the performance of his employees in successfully attracting the listing, plus the selling of the house before it gets any income. It is only on that occasion that the employee receives any income at all. If you have the situation like you potentially could it you make

it harder for people to enter into the pool of commission only salespeople and therefore that pool decreases, is what would now be 40, 50, so whatever the commission rate is, would be higher of that. Costs of advertising still remain the same. The costs of leasing and the other costs that are involved in running a business remain the same, but the costs involved in remunerating the employee would therefore increase, decreasing the margin and therefore – and remember, I'm talking about the one transaction here, not overall, and therefore would have to be recouped eventually through on costs onto the consumers.

PN2238

VICE PRESIDENT HATCHER: So do I take it from your submission that – and I'm not sure this was dealt with in the evidence but it must follow that at least the West Australian industry is currently employing people on a commission only basis who exceed the current threshold of 10 per cent but would not satisfy 60 per cent?

PN2239

MR FARRELL: Yes.

PN2240

VICE PRESIDENT HATCHER: And is the concern at the entry level or at maintaining the level over the five year period, or both?

PN2241

MR FARRELL: Both. The entry level into commission only employment and remember that could be, at a minimum, 12 months. Now the other aspect to it and I suppose my submission, sir, is I don't rely on that. I rely on the fact there's no evidence before you to justify the change. The Full Bench's and the Commission's own statement says back on 17 March 2014 that a party seeking to vary the award should demonstrate through probative evidence to justification of that change. There is no evidence before you, never mind any evidence of probative value to justify that. So our argument is, yes, I accept the other states have agreed, but the other states have agreed as part of the negotiations and to-ing and fro-ing of the original application made by REISA. So for example, REISA's original application wanted to seek penalty rates. That was a concern to some of my colleagues in other states and was a reason for them to agree as part of the negotiations and conciliation that was facilitated by Commissioner Hampton, to the 160 per cent, not because they agreed that it needs justification - - -

PN2242

MR CLARKE: Your Honour, I'm sorry to interrupt but if negotiations of which Mr Farrell and his organisation - - -

PN2243

VICE PRESIDENT HATCHER: Mr Clarke, you'll get a right of reply. I - - -

PN2244

MR CLARKE: Sorry?

PN2245

VICE PRESIDENT HATCHER: You'll get a right of reply, so – I just want to hear - - -

PN2246

MR CLARKE: It's just the issue of confidentiality. The conciliation conference is before the Commissioners.

PN2247

MR FARRELL: Sir, I am pointing out not anything that's a breach of confidentiality. I am pointing out all the Full Bench needs to is look at Mr Clarke's original application and then the amended one. But in any event the point that I'm making, it is not correct and this Full Bench should not take the view in our submission that just because the other states agreed, therefore there's the justification for it, that it was still incumbent on REISA to justify that change. It is saying, and in fact I will quote Mr Lewocki in terms of his comments regarding commission only employees earning less than the minimum wage, is that I don't believe there was a lot of them but I know they are out there. Well, where were they?

PN2248

This matter has been before the Commission for nearly two years. They have had plenty of opportunity during that time to bring forward the salesperson to say, I qualified as a commission only salesperson, I was employed on that basis, I agreed to it which, by the way, is another condition that needs to be satisfied, and yet I was not able to earn at least the minimum income. I was not able to earn a sufficient income for me to live. They weren't here, sir, and I point out to you, because they are not out there. And so that is why we are so strongly of the view that that change should not be allowed by the Full Bench. I would also point out that the Full Bench has addressed some of those issues with these propositions. So if, and I accept, Vice President, that 115 per cent was just a number and that other numbers can be pointed out but if that was to be accepted, 115 per cent, you would then be left in the situation where someone needs to earn more to qualify then they would to maintain. So unless there are any further questions in relation to that point of 160 per cent, I will move on.

PN2249

I now turn to the application by the Australian Property Services Association. I make the same comments about their application and the evidence that they have put forward as I do in respect to REISA's application for 160 per cent. There is no evidence before you. As you quite correctly pointed out, Vice President, the evidence that was before you from the witnesses was that they were employed in breach of the award in the first place. Now Mr Lewocki has pointed out that a number of their employees, or a number of their members have had their work contract changed. I still maintain there's no evidence of that. And that therefore during the GFC employees forced employees to go onto commission only, I point out that the current award actually says as one of the conditions at 16.2(a), that the employee has agreed in writing with the employer to be remunerated on a commission only basis.

PN2250

Now he'll follow that, that they'll be told, well, you don't have a job otherwise. There are processes and procedures in place for the employee to address that concern. The employee is entitled to make a general protections claim on the basis that he was dismissed for utilising a workplace right accorded to under the award. There is the opportunity for the employee to make an unfair dismissal claim on the basis that a dismissal on that purpose was unfair. I repeat my point I made earlier, the Commission should not involve itself in changing and varying awards merely to address breaches of the award. Parliament has put in procedures and processes in place to address those concerns.

PN2251

I now turn to REISA's application to prohibit the debiting of certain entitlements, and here is where I addressed my earlier comments. I apologise for interrupting Mr Clarke at the time. I was trying to facilitate a more accurate answer for your questions. But if you would turn to the contract for a real estate salesperson, either one, commission only or debit/credit, and at clause 5.2 in the body of the contract – actually, before I go into that, the way these contracts work is that the body of the contract is applicable to every employee, every salesperson within that category. The appendix is the individual negotiations between an employee and an employer. So Mr Kuhne and I, as an example, maybe working for the same employer, the bodies of our contracts will be the same. The appendices will be different. And at 5.2 - - -

PN2252

VICE PRESIDENT HATCHER: They can be modified by prima face you simply plug in the percentage, don't you?

PN2253

MR FARRELL: Plug in the percentage and delete or edit the deductions as per the negotiations between an employer and an employee. And they can remove in its entirety, the other items within the appendix.

PN2254

VICE PRESIDENT HATCHER: But the structure of it is that the employment costs are deducted not from the gross Commission to reach the net commission, but deducted from the employee's share of the net condition.

PN2255

MR FARRELL: Not necessarily, sir, and this is where there's a different to the term, and that's why the term, "gross commission" is there. You'll see "net commission", and "incentive commission".

PN2256

VICE PRESIDENT HATCHER: Right.

PN2257

MR FARRELL: Okay. Because quite often in Western Australia, employers will – it's called "pre split". We'll deduct pre split certain costs. And that's to the employee's advantage because then they're only paying half of those costs instead of the full amount.

PN2258

VICE PRESIDENT HATCHER: To use your expression, but – unless I'm completely misreading this, page 17 of the commission only contract, isn't that saying that the employment costs are deducted, post split, not pre split?

PN2259

MR FARRELL: No, what he's saying, sir, is those – and there's a note in there for the reader, as well, to say, "Editor's note, these can be added to or deleted, as per"

- - -

PN2260

VICE PRESIDENT HATCHER: I understand that.

PN2261

MR FARRELL: Yes.

PN2262

VICE PRESIDENT HATCHER: But just on the face of it, aren't these deducted, post-split?

PN2263

MR FARRELL: On the face of it, absolutely, but not necessarily the case. Because that note can be added to the previous item of incentive commission. Now the reason, as I said, that is done, is because that's to the employee's benefit. However, the 35 per cent minimum for a commission only would need to be on the definition of the award because that's an award provision.

PN2264

Now the other aspect is Mr Clarke's concern or objection to that is vendor paid or vendor authorised advertising, not necessarily advertising itself. There are two types of things. Let me address the vendor paid advertising. Clause 5.2 talks about when an employee is entitled to apportion the commission.

PN2265

VICE PRESIDENT HATCHER: Clause 5.2 of what?

PN2266

MR FARRELL: Clause 5.2, so in the body of the contract, sir.

PN2267

VICE PRESIDENT HATCHER: Right.

PN2268

MR FARRELL: Or actually, it would depend on which contract, whether you've got commission only or debit/credit, to be fair, but - - -

PN2269

VICE PRESIDENT HATCHER: Well, can we just stay with the commission only ones, so it is that 5.2?

PN2270

MR FARRELL: That, I believe, will be five – I'm trying to get my laptop on, sir. It's decided that it doesn't want to work for me. Here we go. I'll do the commission only one, sir. It is 5.2,

PN2271

The employee shall be entitled to a commission from the agent in respect of each completed sale transaction for which the agent has itself received commission and for which the employee is the effect of cause subject to supporting the claim with a copy of the valid authority to sell I respect of the transaction.

PN2272

So that's the entitlement. How that portion is calculated is in the appendix but there is a relationship between 5.2 and 5.3, of course, and the appendix. It is not contractually legal for an employer to deduct advertising expenses for a different property that's not contained in the authority to sell. That's the link in which an employee gets the remuneration. If I may give an example, I am an agent and you, sir, have given me authority to sell your property. Deputy President Asbury has also given me the same one. I spend money advertising your property, sir, that doesn't sell, and I mean no slight on your character - - -

PN2273

COMMISSIONER GREGORY: You're digging yourself in a bit of a hole there, Mr Farrell.

PN2274

MR FARRELL: With respect, the – I'm sorry, yes.

PN2275

COMMISSIONER GREGORY: No, I - - -

PN2276

MR FARRELL: I take your comment.

PN2277

COMMISSIONER GREGORY: Impugning the Vice President's character in this hearing.

PN2278

MR FARRELL: Can I suggest maybe another - - -

PN2279

COMMISSIONER GREGORY: Well, use me.

PN2280

MR FARRELL: How about you, sir, yes. Sorry.

PN2281

DEPUTY PRESIDENT ASBURY: Yes, one of us won't pay you for the advertising.

PN2282

COMMISSIONER GREGORY: Sorry, Mr Farrell, please continue.

PN2283

MR FARRELL: No, no, no, that's correct, sir. I apologise. I took it the wrong way. And you don't pay that advertising. I cannot deduct that from the employee's share of the portion for the selling of Asbury DP's house. Because the authority to sell, for which I need to justify for the payment and remuneration in 5.2, would have Asbury DP's address – sorry, not your address, the property that I'm selling at that address - - -

PN2284

VICE PRESIDENT HATCHER: But I don't think it relates to the – I mean, I'm just reading it as it speaks, but that only relates to entitlements received – the commission, in the first place but there's nothing to say that the deductions identified on page 17 have to relate to that particular property.

PN2285

MR FARRELL: I disagree, sir, and I say that authority to sell will do that.

PN2286

VICE PRESIDENT HATCHER: For example, it says, "value of accrued leave". It's not annual leave that accrued while the property was being sold, is it?

PN2287

MR FARRELL: No, it's not but advertising expenses would be the cost of advertising for that property because the property is related to the property that's contained in the authority to sell.

PN2288

VICE PRESIDENT HATCHER: Why would you read it that way? I mean, you could say that, advertising expenses relating to the property, the subject of a commission. You could say that, but it doesn't say that.

PN2289

MR FARRELL: Again, that would be a wording issue in terms of the - - -

PN2290

VICE PRESIDENT HATCHER: And as you say, if item 7 is just variable by the parties anyway, they could make it clear, any advertising expenses whatsoever.

PN2291

MR FARRELL: Yes, they could, and that's my point. So that's number one, is there's no – and Mr Whiteman, clearly in his cross-examination, stated that. He said words to the effect of, "Why would they do that?"

PN2292

VICE PRESIDENT HATCHER: Because they could.

PN2293

DEPUTY PRESIDENT ASBURY: Because they can.

PN2294

MR FARRELL: That was it. That was it. That was his statement. Once again though, I point out it is the – Mr Clarke in his organisation needs to demonstrate the justification of that. We don't need to demonstrate and argue the justification of why not.

PN2295

VICE PRESIDENT HATCHER: Well, there was floated this morning, proposition that it could simply require that the agreement which is already required by the award to be in writing, should be in conformity with the requirements as applicable in the Fair Work Act, the Superannuation Guarantee legislation and applicable long service leave legislation.

PN2296

MR FARRELL: I say that occurs anyway, whether that insertion is put in place or not, but we have no, obviously, opposition to that. So we could address that that way, absolutely.

PN2297

VICE PRESIDENT HATCHER: All right.

PN2298

MR FARRELL: Long service leave. As the Full Bench would be aware, long service leave entitlements are different in every state. Mr Clarke has referred to the provision in our contracts of 1.7 per cent of the commission that is payable, is for the long service leave. That is because in Western Australia, section 5 of the Long Service Leave Act allows limited contracting out of the provision of that Act by agreement between the employer and employee provided that there's an equivalent benefit in lieu. Now that hasn't been tested. There is no case on that point in Western Australia from the West Australian Industrial Relations Commission who would have jurisdiction over that matter to say that the 1.7 per cent in commission would not be an equivalent benefit in lieu. But it is permissible under the Act for an employee and an employer, as a limited contracting out which is the title of the section of the Act, to make an agreement to do so. Our point, our contention - - -

PN2299

VICE PRESIDENT HATCHER: What's the name of the Act in Western Australia?

PN2300

MR FARRELL: The Long Service Leave Act 1958, section 5, sir. We say that that would be an equivalent benefit in lieu. The difficulty that Mr Clarke would have is, obviously my colleagues would be able to have greater information on that but that's a, not necessarily a unique provision but not a usual provision within the long service leave entitlements throughout Australia. So if you were to allow Mr Clarke's application it would have quite a significant effect on Western Australia given that it would change the entitlement, which as you correctly pointed out, Vice President, is something that you do not have the power do in varying the Modern Award, so that's our point no. 1.

PN2301

Number 2, these payments, in terms of above the 35 per cent as it is currently, and/or for commission only, and above the minimum wage for debit/credit people, are above award payments. What Mr Clarke is seeking to do is for you to regulate above award payments. If you start going down that slope, we say that that's a very slippery slope for the Commission to go down and is in excess of the powers that you are permitted to do in varying awards. It goes against what the Modern Award's objective is and we say should not be allowed.

PN2302

Now I accept, and particularly, this was outlined last week in the firemen's case that the Full Bench here, you have wide discretion. This is your review. All you are doing is you are seeking the views of interested parties. I accept that and I don't quibble with that. However, if you were to allow these applications and particularly the ones I'm addressing of 160 per cent for the minimum income threshold, and APSA's application for topping up, on the paucity of evidence that's before you right now, what is to stop future applications from employers with similar paucity of evidence in the hope that they may get a different Full Bench? You may continue to be getting and dealing with these applications in the future and I say that will be against the public interest to do so. I urge you all to have a look at the evidence before you, some of which I restate those witnesses were not prepared to sit in that box and swear to that truth and have their evidence tested, that little weight should be given to it and particularly to those applications that I've referred to today. And I thank you for allowing me to make those submissions.

PN2303

VICE PRESIDENT HATCHER: So do you want to say anything about the adjustment to the minimum rates proposed for Mr Clarke's organisation?

PN2304

MR FARRELL: No, sir. That's going to be addressed to you by my colleagues elsewhere. I don't believe in repeating those - - -

PN2305

VICE PRESIDENT HATCHER: All right. And there was the third proposition which we raised for consideration yesterday. That is that in relation to commission only, that the award should be amended to say that, one, you get 31 and a half per cent of the gross commission with no deductions, and secondly that the written agreement should have to say that.

PN2306

MR FARRELL: We believe that it's not necessary for that written agreement to do so. By the term of the award that would apply. However, once again as per my submission in relation to including that it must comply with the Fair Work Act and superannuation then it'll apply. Whether you make it clearer, that's your prerogative. There is one other issue I want to address with you and that's in relation to a matter that was addressed in the Full Bench that you were on a couple of years ago, from Ross P, and that is whether the content of the written agreements should be able to be enforced as an award provision.

PN2307

VICE PRESIDENT HATCHER: First of all, whether they currently can be, and whether they should be.

PN2308

MR FARRELL: Okay. Let me answer the first part of that. Our view is no, they currently can't. The award provision is that there must be a written agreement. Once there is one, that satisfies that award condition. As to the second part we say, no, they shouldn't. These contracts deal with above award payments, for starters. The second aspect is that the intention of that clause was to give the employee the right so that there's no verbal – or misunderstanding in terms of what their entitlement is in relation to those commissions. Now I'll just go back to these commissions as correctly identified by Asbury DP before. They're just a calculation of an employee's entitlement. If it starts with 50 per cent, that's the starting point. They're not entitled to 50 per cent. This is why these deductions are not unlawful in our view. It is the calculation by which an employee's entitlement is derived and it is only after that calculation has come up with a sum of money, or in the usual cases, that no further deductions could be allowed except for those provided for in the Fair Work Act. And so why should, in the real estate industry, that agreement be allowed to be, in effect, imported into the terms of the award, the content of that agreement, when the majority, in our view, and I appreciate you have no evidence before you to support that, this is just a statement from the Bar, of employees in Australia like myself who have contracts of employment that are above award entitlements, why should they not get it? If that was the case then we will be needing a lot more Commissioners and you will be doing a lot more work in relation to these disputes.

PN2309

DEPUTY PRESIDENT ASBURY: But you're not covered by an award.

PN2310

MR FARRELL: I'm sorry, ma'am?

PN2311

DEPUTY PRESIDENT ASBURY: You're not covered by an award.

PN2312

MR FARRELL: Maybe not, okay. But then if we say the award covers employees that do have contracts of employment. In my previous history I have been covered by the award.

PN2313

VICE PRESIDENT HATCHER: But we're talking about commission only people, we're not about just over-award payments, we're talking about a system in which, in effect, the agreement substitutes for the obligation to pay a minimum wage. That is, the employee's entitlement actually derives from the written agreement and not from the award.

PN2314

MR FARRELL: Yes, I disagree, sir, because the employee's entitlement is 35 per cent which is in the award. Even if the contract is silent on that matter that

employer would be in breach of the award because you can't contract out form the award – it would be in breach if it didn't pay 35 per cent of the gross commission.

PN2315

VICE PRESIDENT HATCHER: I should have asked this before but can anyone tell me, and you can do so in turn, but where this number of 35 per cent came from and what its rationale is?

PN2316

MR FARRELL: I would have no idea. I wasn't around at that time, but (indistinct), I believe it was.

PN2317

VICE PRESIDENT HATCHER: Right.

PN2318

MR FARRELL: Mr Paterson(?)?

PN2319

VICE PRESIDENT HATCHER: No, we'll come to them but do you - - -

PN2320

MR FARRELL: Okay. I don't know, sir. I was not involved at that time. I've only been involved in the last couple of years, just before the schedule E hearing a couple of years ago, so I apologise. I can't give you any information on that. Mr Kuhne wasn't involved in that time either, so I can't even get instructions. Unless there are any other further questions, sir, I'll rest at that point.

PN2321

VICE PRESIDENT HATCHER: All right. Thank you, Mr Farrell.

PN2322

MR FARRELL: Thank you for your time.

PN2323

VICE PRESIDENT HATCHER: Mr Warren?

PN2324

MR WARREN: Thank you, your Honour. Your Honour, those parties I represent have filed three submissions, one on 27 July, one on 28 September, and another one on 2 November. We don't repeat them. Is it necessary to have those marked?

PN2325

VICE PRESIDENT HATCHER: No.

PN2326

MR WARREN: Thank you. We don't repeat those submissions and I'll touch briefly on parts of some of them as I go on. Your Honours, Commissioner, I've referred earlier in this matter to the employers' amended exposure draft. Is that appropriate to be marked?

PN2327

VICE PRESIDENT HATCHER: No.

PN2328

MR WARREN: I'll refer to it again as we're going through today. The first matter that the union pursues is a work value claim. Your Honour just raised the issue of the commission and the 35 per cent. Whilst it's fresh in my mind, I understand that came from an application to the Fair Pay Commission back in those days and an assessment was made by the Fair Pay Commission on evidence provided to it as to what would be an appropriate scale or an appropriate rate of pay for commission only - - -

PN2329

VICE PRESIDENT HATCHER: So it doesn't come from the state awards?

PN2330

MR WARREN: It comes from the Fair Pay Commission. It does not come from the state awards.

PN2331

VICE PRESIDENT HATCHER: No, but did any of the state awards have a commission only percentage?

PN2332

MR WARREN: No minimum percentage, your Honour.

PN2333

VICE PRESIDENT HATCHER: All right.

PN2334

MR WARREN: But that's where it came from.

PN2335

VICE PRESIDENT HATCHER: And did they publish a decision which reveals the reasons for that?

PN2336

MR WARREN: Yes, I understand they did, your Honour.

PN2337

VICE PRESIDENT HATCHER: Perhaps, Mr Warren, then I'll burden you with providing us a copy of that?

PN2338

MR WARREN: Mr Paterson has just indicated he will locate it and - - -

PN2339

VICE PRESIDENT HATCHER: All right.

PN2340

MR WARREN: We'll locate it and provide it in soft copy to the Commission.

PN2341

VICE PRESIDENT HATCHER: Thank you.

PN2342

MR WARREN: For the Commission to grant wage increases on work value grounds, section 156(3) of the Act provides, or prescribes that this Commission must be satisfied that they're justified on work value grounds.

PN2343

VICE PRESIDENT HATCHER: Yes.

PN2344

MR WARREN: It's our submission that there is scant evidence of such position. The work value claim, and can I refer briefly to two parts of our earlier submissions, the work value claim by RESIA also contains a claim for property managers and strata title managers. We have put in our submissions that such a claim cannot properly be bought by REISA because of their constitutional membership rule. However we clearly recognise the position of the Fair Work Commission and its responsibility under the Act to review all Modern Awards and to look at the matters that have fairly been bought before it. We note the submissions on the lack of evidence of change in the period since the Modern Award was made. We don't repeat them and we further note the decision of this Commission in the firefighters' decision last week and we recognise the force of that decision.

PN2345

The evidence is very limited, as I've said, with respect to work value, both in substance and in geographic area. It's important that the Commission has an appreciation and I've got no doubt it has, with respect to where the bulk of employees and businesses are within this industry. Mr Clarke in his evidence which has been marked as exhibit 1, gave in attachment C to it a breakdown of the business locations throughout Australian in the real estate industry.

PN2346

And I note on page 153, bottom right-hand corner of his statement which is exhibit 1, and part of attachment C, that therein he sets out that of the industries and business locations throughout the country, some 83 per cent are found in New South Wales, Queensland and Victoria. Indeed, some 57 per cent found alone in New South Wales and Victoria, and South Australia account for some five per cent of the industry. And this has become apparent in some of our cross-examine of witnesses and at page 168 of annexure D to exhibit 1, therein Mr Clarke has attached under the heading of, "Agent or sales representative", a reading from the second sentence.

PN2347

The current scope of work for an agent's sales representative in Western Australia and South Australia is broader than in other jurisdictions. For example, the draft in contracts is that in the scope of the licence in South Australia, conversely South Australia includes non-residential property management in the scope of work of an agent's representative.

PN2348

On the same page is set out the certain levels of training and the levels of competency that particular estate agents need to obtain, both either to get a licence or to obtain the capacity to work as a sales representative in the industry. It is more clearly put out and set out in exhibit 14, a statement tendered by those I represent of Ms Danielle Andrews. It's exhibit 14 in these proceedings. And Ms Andrews, on the second page of exhibit 14 in paragraph numbered 7, demonstrates the incredibly diverse range of competencies of necessary standards for a person to commence work as a real estate sales representative. It is apparent, if one – there's an entry level competency and there is a licence competency.

PN2349

With respect to my friend, Mr Clarke, he's been intertwining the word, "licence", with entry level and a licence is a different situation than entry level. And there it's apparent that – and these are units of competency that are of a national standard and indeed, Ms Andrews details the nature of that standard in the following paragraphs of her statement. But it's apparent from that that a person to commence work as a real estate sales person in Victoria only needs three units of competency from a Cert IV. I note that Cert IV, to get a full Cert IV, requires 24 units of competency. In South Australia it's the highest by far at 17 units, Western Australia at seven units, Queensland, seven, Tasmania is five but it's a different situation. In the Northern Territory it's a very high level, they need Cert IV, and in New South Wales, it's four units of competency. There then is set out in her table, what is required for a licence and that ranges from a Cert IV qualification to a diplomat, although one notes the position in Queensland.

PN2350

Now what is clear from that and if we move through further in Ms Andrews' statement, in paragraph 15 she there details the search of the national register for manufacturing training package and then sets out on the last page the qualification. Cert I in process manufacturing the need seven units, Cert II, they need 14 units, Cert III, they need 21 units. Now I note that C10 is at Cert III, requiring 21 units. Now we recognise of course that there are factors, other factors with respect to the work value of a person but here is a very good yardstick as to the relationship, we say, between qualification and classification within what could be said to be award positions. If I could - - -

PN2351

DEPUTY PRESIDENT ASBURY: I'm sorry to interrupt you but if you - - -

PN2352

MR WARREN: Certainly.

PN2353

DEPUTY PRESIDENT ASBURY: Leave that to one side, if you start from the proposition that a real estate agent, an employer in the real estate agency industry could for a level 1, year 1, clerk, so someone off the street with absolutely no experience whatsoever, to put them behind the reception desk and answer the phone, if they were an adult they'd have to pay them \$715.20 per week, and for a property sales associate presumably off the street, who's going to be – I mean, without prejudging the matter you can – I think I would know roughly what they would do and the minimum wage for that person is \$672.70.

PN2354

MR WARREN: That's not the current rate.

PN2355

DEPUTY PRESIDENT ASBURY: Well - - -

PN2356

MR WARREN: For the associate, yes.

PN2357

DEPUTY PRESIDENT ASBURY: Yes.

PN2358

MR WARREN: Sorry, yes.

PN2359

VICE PRESIDENT HATCHER: It's the person off the street.

PN2360

MR WARREN: Yes.

PN2361

DEPUTY PRESIDENT ASBURY: For the person off the street.

PN2362

MR WARREN: Yes.

PN2363

DEPUTY PRESIDENT ASBURY: And then after six months, \$696.20.

PN2364

MR WARREN: Yes.

PN2365

DEPUTY PRESIDENT ASBURY: And for your level 1 clerk, after a year they're going to go to \$750.60 because between – if I'm correct in my recollection, the Clerks' Award, the increments are just automatic within a level but not between a level. So they're going to go to the next - - -

PN2366

MR WARREN: They move up automatically as the years go by.

PN2367

DEPUTY PRESIDENT ASBURY: Yes. Yes but they don't go automatically from level 1 to level 2, so leaving that aside, you know, the top of – but the starting point, it would – even a property sales representative is getting less under the minimum rate in the Real Estate Industry Award than they would if they were walking in off the street to do a clerical job.

PN2368

MR WARREN: Your Honour, we recognise the force of what your Honour puts. But can I, if possible, (indistinct) pass on that and look at the Retail Award, and

look at the retail with respect to property sales persons. We say if you anchor it on the property sales person, that's the person who is the – the evidence clearly is the nuts and bolts of the industry. And we say it's more appropriate to relate that person, if relation be what is necessary to be done - we accept the commission looks at these cross-referencings but the appropriate award to look at is the General Retail Industry Award and if I could hand up copies. I have handed up a copy of the General Retail Industry Award 2010, indeed, the schedule B to it which details the classifications.

PN2369

If I could start – perhaps if we go to the back of it and look at the part 4 in "classifications and wage rates", the minimum weekly wages in clause 17, the retail employee, level 4, is at the C10 rate. If one then looks to retail employee level 4 and the indicative tasks of a retail employee level 4, which is at B4, B4.1, B4.2, B4.2 indicative - - -

PN2370

VICE PRESIDENT HATCHER: Just slow down, Mr Warren.

PN2371

MR WARREN: Sorry, your Honour.

PN2372

VICE PRESIDENT HATCHER: So level 4.

PN2373

MR WARREN: Level 4, "indicative tasks".

PN2374

VICE PRESIDENT HATCHER: Yes.

PN2375

DEPUTY PRESIDENT ASBURY: Right.

PN2376

MR WARREN: "Management of a defined section, supervision of up to four sales staff, stock control, buying, ordering requiring the exercise of discretion as to price, quantity, quality, et cetera. Employee required to use the skills of a trades qualification". Now we say that clearly the skillset of a salesperson in real estate does not include management of a defined section, does not include supervision of up to four sales staff, does not include stock control and does not include exercising discretion insofar as price, quantity and quality is concerned. We accept there are different skillsets. But those are quite significant skillsets that attract the C10 rate.

PN2377

DEPUTY PRESIDENT ASBURY: But it's also clerical functions, level 2.

PN2378

MR WARREN: But - - -

PN2379

DEPUTY PRESIDENT ASBURY: Which pegs it back to the Clerical Award.

PN2380

MR WARREN: I understand that, your Honour. But your Honour, I think, raised the question of the retail earlier and we say the assessment of the proper – if there is to be an across award assessment, the proper assessment is to retail, not to clerical. We say the proper assessment – it's a sales function. Retail is a sales function.

PN2381

VICE PRESIDENT HATCHER: Yes, so, I mean, management, supervision aren't relevant, but certainly, property sales representative is unsupervised and self-managed.

PN2382

MR WARREN: Yes. Yes. Yes.

PN2383

VICE PRESIDENT HATCHER: In terms of stock control, the evidence says that they, in effect, are the ones responsible for obtaining the supply of properties to be sold. And in terms of discretion as to price, quantity, quality, they're the ones who negotiate the price at which the house is to be sold. So I'm not sure that it's not a bad analogy, is it?

PN2384

MR WARREN: If one looks at retail employee level 1, one gets close to where they are. They display goods for sale, they receive a range, making payments by any means, recording means of sales, the delivery of goods, the demonstration of goods for sale – that's what a real estate agent does, demonstrates the goods for sale. Now we accept that it's difficult to get a perfect match and it wouldn't be so, but you've got a situation here where when one looks at the units required so far as basic education is concerned, they are minimal when it comes to real estate salespersons. They are not minimal - - -

PN2385

VICE PRESIDENT HATCHER: So level 1 is at \$738.80.

PN2386

MR WARREN: Yes.

PN2387

VICE PRESIDENT HATCHER: What is the property sales representative at now?

PN2388

MR WARREN: \$713. Now - - -

PN2389

VICE PRESIDENT HATCHER: Even on that bare analysis we're talking about the need for work value adjustment, aren't we?

PN2390

MR WARREN: I'm not denying that and I'm about to come to that, your Honour.

PN2391

VICE PRESIDENT HATCHER: All right.

PN2392

MR WARREN: What we are putting is that it is not appropriate that these persons be at the C10 level, for education reasons, for length of training, et cetera, et cetera. They're not C10. They are at best, we suggest, C12 or somewhere between C12 and C11. If they were to relate to the retail employee, level 1, that would equate to 94.3 per cent. We say clearly it's difficult to compare apples with oranges. I accept that. But here we have a retail award, a selling award, we have the qualifications that are required, as the Commission is well aware, of process manufacturing and the level of certificate qualification that aligns in that award. And C10 there aligns to 21 units of competency. Sales reps in New South Wales and Victoria, which account for over 50 per cent of the businesses, require three or four units of competency, if you swing into Queensland you've got another seven units of competency. So we say it's always a balancing factor, always a balancing factor. To what extent do you put weight on education and the need for qualifications and the need for training and to what extent do you put other weights in other areas? We accept that. But what is clear, we say, is that these people are not C10. These people who are the sales reps are somewhere less than that and we identify as perhaps the most appropriate, as being the retail level 1 which would amount to 94.3 per cent on my calculation of the C10 rate, but some, approximately 20, 25 per cent of \$25 a week.

PN2393

VICE PRESIDENT HATCHER: I don't think there's any level 1 retail workers who are capable of earning a hundred grand plus a year, are there?

PN2394

MR WARREN: Well, now we're talking about commissions, your Honour. And that's a very, very different situation and it's treated separately in the award. As is recognised in the industry and I think as the Commission has recognised during the course of this case, you've got commission only people and they're a different body. They're a different - - -

PN2395

VICE PRESIDENT HATCHER: This affects them because it goes to the level at which their NES entitlements are paid, doesn't it? Doesn't it? Or does it?

PN2396

MR WARREN: Yes, it does. Yes, it does. But their NES entitlements, and I'll come to those in a moment but yes, it does affect them but it's a bit of a tail wagging the dog if the NES entitlements are establishing what the rate of pay should be, with respect. And the commissions only people are a different type of person and a small business unto themselves and I think the evidence is clear on that. So if we're looking at what is an appropriate minimum rate of pay we say there are some yardsticks the Commission can use.

PN2397

COMMISSIONER GREGORY: Mr Warren, what about when you look at the indicative job titles of level 1 in the Retail Award and the indicative typical journeys and skills? They seem worlds away from some of the evidence we've heard in this matter about the roles performed by a real estate salesperson.

PN2398

MR WARREN: With respect, Commissioner, which real estate salespersons that weren't commission only people, is a question I rhetorically ask. And the amount of evidence you've actually received is rather sparse on that. There's been some evidence given as to what commission only salespersons earn. There's been some evidence given on what persons who are on, what I call, a debit/credit arrangement which is another animal altogether which I wish to address briefly on, as well. But when you're looking at the basis rate of pay it is not, with respect, anything like a C10 when you pull that rate of pay apart, when you see what this Commission has traditionally awarded tradespersons, what's required to become a tradesperson and the ongoing responsibilities there. Whilst on evidence, you have some evidence on salespersons, you've got some evidence on property managers, you've got no evidence on any other classification in the award as to what their work value or work structure is or may be.

PN2399

VICE PRESIDENT HATCHER: One course we could take on this issue is to identify with respect to the property sales representative what we consider the appropriate relativity is and then leave to the parties, the further discussions, conciliation and necessary arbitration as to how the other classifications should then be weighed in accordance with that core classification.

PN2400

MR WARREN: Yes, certainly that's a way of looking at it, your Honour, and obviously your Honour is able to do that but there is certainly no evidence either side of it for the Commission to do anything.

PN2401

VICE PRESIDENT HATCHER: I mean, the issue you've raised with the Retail Award, just on its face, demonstrates that there's a work value problem. That is, the threshold to establish cogent reasons for change is demonstrated even on your own analysis with the comparison of the Retail Award and even at the level 1. So it then becomes a question of it needs to change, how should it be changed.

PN2402

MR WARREN: Yes.

PN2403

VICE PRESIDENT HATCHER: But we've got a fair bit of evidence about property sales representatives. Once we use that as the anchor classification then the parties can consider further, perhaps, how the other classification should be ranked as a percentage of, or a relativity of that anchor classification.

PN2404

MR WARREN: That's obviously a matter for the Commission. Can I now turn to the minimum income threshold which has received a degree of comment already.

PN2405

VICE PRESIDENT HATCHER: Do you agree with what Mr Farrell said about the way it currently works?

PN2406

MR WARREN: No. No. No, not at all. We say, currently, if you look at over the past five year period, if you look at a 12 month block in that period and if that 12 month block can demonstrate currently 110 per cent, the person can be engaged as a commission only sales rep and that's the test. And it's not re-tested. And we note - - -

PN2407

VICE PRESIDENT HATCHER: So if someone says to be a commission only sales person, that's not something that continues to apply once you become one?

PN2408

MR WARREN: Once you become one with that employer, with that employer. If the person moved employment, a different issue. That would then have to reawaken itself. And we note, of course, in this Bench's suggestion, questions. We note, of course, that which we have attempted to distil by – in the words here, that we note that in 9.7(a), little Roman (i) is the objective part of it. And the operative parts are (ii), (iii), and (iv). And those I represent. If this is the way the application with respect to an underlying wage guarantee is dealt with, we would support that and not otherwise.

PN2409

VICE PRESIDENT HATCHER: But you'd still have the threshold as the entry-way?

PN2410

MR WARREN: Absolutely, and I'll take the Commission to that now. And it is at – and I'm referring to the employer's amended exposure draft – it's at 9.7(c) and in green. And therein it's expressed, and I note that all parties other than the Western Australian employers consent to this and obviously it goes without saying, as do those persons who are instructing me. I - - -

PN2411

VICE PRESIDENT HATCHER: And so that includes consent to any number which is 160 per cent of the base rate?

PN2412

MR WARREN: It's 160 per cent of whatever the award rate might be.

PN2413

VICE PRESIDENT HATCHER: Yes, all right.

PN2414

MR WARREN: And I note, of course, the dollar amount that's inserted there, it's in in red. That's the amount it was at the time. That's moved up since then and it's just spelled out there for clarity's sake. But it's 160 per cent of the total gross salary. And that's consented to and we urge that on the Commission. It's accepted

by all the parties other, as I've said, than the West Australian and it's an appropriate level of assessment for a person to enter a commission only employment. It - - -

PN2415

VICE PRESIDENT HATCHER: But why 60 per cent as distinct from 50, 70 - - -

PN2416

MR WARREN: It was discussed between the parties and it seems like it's a significant increase but the parties felt – those that are consenting to it felt comfortable that demonstrated a person's capacity to earn a significant income on commission only.

PN2417

DEPUTY PRESIDENT ASBURY: But that - - -

PN2418

VICE PRESIDENT HATCHER: The difficulty may be that Western Australia seems to be an industry structured differently from the other states and that has a much larger proportion of commission only sales persons and it might have a much bigger effect on that state than in other states.

PN2419

MR WARREN: Yes, well, that's a matter for assessment but when one looks, for example, and I'm not avoiding your Honour's question but the evidence put forward by Mr Lewocki where there were various employees who, frankly, should never have been employed as commission only persons because they didn't - - -

PN2420

VICE PRESIDENT HATCHER: They've never – because that was in breach of the award as it stands.

PN2421

MR WARREN: Exactly. They didn't meet the standard.

PN2422

VICE PRESIDENT HATCHER: Well, if they breach it now, they'll breach whatever we make, whether it's 60, 70, 80 per cent.

PN2423

MR WARREN: I perhaps shouldn't comment on that. But it is the position of the parties, I would perceive, that 160 is an appropriate amount. Now where that sits with the people in the West is another issue, of course. That's matter for assessment from this Commission, of course.

PN2424

DEPUTY PRESIDENT ASBURY: And that consent is also not dependent on the point about the ongoing annual review? That doesn't change your position in relation to it?

PN2425

MR WARREN: No. No, it doesn't. No, it doesn't. Because the annual review is a different calculation on the assessment that – on the suggestion.

PN2426

DEPUTY PRESIDENT ASBURY: On your - - -

PN2427

MR WARREN: With respect, someone from the Bench is suggesting that – that that's – we sit with that in terms as expressed there and it is, we say, an appropriate way of continual assessment of whether the person is making the grade or not, and if they don't, well then they'd have to go back to employment maybe on a debit/credit basis or maybe on an award basis. That's another issue.

PN2428

DEPUTY PRESIDENT ASBURY: Or no basis.

PN2429

MR WARREN: I can't comment on that, your Honour. I can't comment on that, whether it's no basis at all. We accept the proposition that was put forward by the Commission yesterday as an appropriate way of dealing with the underpinning wage. Because to do what is sought with respect to an underpinning wage, it is not commission only sales work. It's a simple as that. That is not commission only sales work if the person gets a top up every time they don't get there. And that's another good reason why the high qualification comes in at 160. They've got to be a proven person that can do it and then they're set free to do what they do.

PN2430

VICE PRESIDENT HATCHER: What about the 31.5 per cent position?

PN2431

MR WARREN: Yes, we accept that.

PN2432

VICE PRESIDENT HATCHER: And that would be included in commission only contracts, that is - - -

PN2433

MR WARREN: Yes.

PN2434

VICE PRESIDENT HATCHER: Yes.

PN2435

MR WARREN: Yes. I mean, I think it was pointed out yesterday, 35 is – 35 of 90 is 31.5 of a hundred, and that's fine. We see no reason to change that. And that's an appropriate level, minimum pay, as I think has been pointed out in discussions from the Bench to the Bar table already today, with respect to piecework rates. These people are recognised in the award as pieceworkers. It's with the definition of a commission only person that they're identified as pieceworkers and it's an appropriate level of piecework remuneration, we see it.

PN2436

Can I address the issue of debit/credit and employment contracts. The claim by REISA appears to be for this Commission to determine that certain matters should not be capable of forming part of the debit/credit arrangements for what is quite clearly an over award payment calculation. We note the submissions filed by those I represent and without taking the Commission necessarily to it in detail we just refer to paragraph 37 of those submissions of 28 September and the comments there extracted and determinations by this Commission, and I merely only quote one of those being in connection with the Modern Award review, and I think your Honour, the Vice President, was on the Bench and we refer to it in paragraph 37.

PN2437

The Modern Awards are part of the minimum safety net of terms and conditions as established by the Fair Work Act. It is not the function of such a minimum safety net to regulate interaction between minimum award entitlements and over-award payments. Such matters are adequately dealt with by the common law principles of set-off to which we have referred and should be left to individual employers and employees to determine.

PN2438

That is clearly the appropriate position this Commission has taken. It is clear that an employee has an entitlement to receive payment of minimum wages as prescribed in the award, and allowances. Anything above that is an over-award payment. Any method by establishing what that over-award payment will be is not a matter this Commission should involve itself in. And it's a matter this Commission has not traditionally involved itself in. The method by which, whether there is debits, what debits they may be to Commission structures, is a matter between the parties. It's a matter between the employer and the individual employee. And the award goes no further, and should go no further than setting out that if you do have an over-award payment structure then it should be detailed in writing so the parties know what they're talking about and so that it's evidenced in writing.

PN2439

Indeed, as the Commissioner indicated, the prosecution of that may be for another matter but this Commission should not move into the area of over-award payments in any manner, in any way. And the debit/credit arrangements is quite crystal clear. It's an over-award payment. It's just a method by which an over-award is established and the parties agree that they will establish their over-award payment in a certain way. And that's what's established. And the employees are entitled to receive the minimum wages as prescribed in the award, and the allowances. And that's the level and element that this Commission should attach to and should not be entertaining any description or limitation of how an over-award payment – or what should compose an over-award payment in any way. That is where the parties should be left to their own devices. So in other words, the debit/credit arrangements is just a method of calculating what the over-award is and how it is to be applied, and nothing more and that's where it should rest.

PN2440

Mr Clarke has indicated the question of the deduction of long service leave as an unpopular debiting factor in these over-award payments. Once again I just reiterate what I've previously said. It's clear the evidence that when a person takes long service leave, they're paid long service leave. There is no evidence that any employer is not paying in accordance with the Long Service Leave Act. We note, of course, the provision in the Fair Work Act prohibiting this Commission venturing into long service leave and that's where it sits.

PN2441

VICE PRESIDENT HATCHER: Could we make a provision that any written agreement must comply with applicable long service leave legislation?

PN2442

MR WARREN: Probably not.

PN2443

VICE PRESIDENT HATCHER: Why not?

PN2444

MR WARREN: Because that's then the Commission making an award to do with long service leave. It wouldn't concern, can I say, those that I represent if this Commission made a provision that any arrangement between the employer and the employee must comply with the Fair Work Act and its provisions. And indeed if the Commission was of a view that it was within jurisdiction it wouldn't greatly concern those I represent. However I just wave a flag of caution. I'm not sure whether the Commission would be acting within its jurisdiction if it so prescribed.

PN2445

So the other issues with respect to NES entitlements, our submissions have already been put on with respect to the Canavan(?) decision in both our submissions of 22 July and 2 November. We don't repeat them. We don't seek this Commission to reconsider Canavan. Our submissions as they identify, identify a distinction in this case and indeed, in the case of Commission only employees with the Canavan decision. We note that in our submission of 27 - - -

PN2446

VICE PRESIDENT HATCHER: But your case is that on any model, whether Commission only or debit/credit, if they take annual leave they'll get paid the base rate of pay when they take it?

PN2447

MR WARREN: Yes. And if it is part of the over-arrangement between the parties that there's a debiting of that, well that's where that sits, with respect to debiting against Commission or arrangement. But they take annual leave, they get paid annual leave. So I don't repeat our submissions on Canavan but we just simply note that Canavan did not deal with pieceworkers and in our subs of 27 July at paragraphs – so it'll be five and six, we've highlighted that factor. If you are against our proposal with respect to Canavan not being determinative of any issue with respect to Commission only salespersons, we press upon the Commission the grandfathering clause that we have proposed in our submissions

of 27 July at page 10. Unless I can be of any further assistance, those are the submissions.

PN2448

VICE PRESIDENT HATCHER: Right, than you.

PN2449

MR WARREN: Any other matters, no?

PN2450

VICE PRESIDENT HATCHER: I thought I had something but - - -

PN2451

MR WARREN: It may have been the 31.5 per cent, your Honour.

PN2452

VICE PRESIDENT HATCHER: No, we dealt with that.

PN2453

MR WARREN: We dealt with that. And I think Mr Paterson is going to provide the Australian Fair Pay Commission - - -

PN2454

VICE PRESIDENT HATCHER: Yes, all right. Thank you. Mr Tracey?

PN2455

MR TRACEY: If the Commission pleases. The Full Bench would have the Real Estate Institute of Victoria submissions dated 4 October 2016. I don't propose to read those. I do wish to make some oral submissions which elaborate those submissions and so before I do I should just check, can the Full Bench hear me from back here? Is that - - -

PN2456

VICE PRESIDENT HATCHER: Just move that microphone a bit closer.

PN2457

MR TRACEY: Move the microphone a bit closer. If I can be heard from here then I'll keep my voice up but - - -

PN2458

VICE PRESIDENT HATCHER: Just keep your voice up a bit, I think.

PN2459

MR TRACEY: I'll keep my voice up. Thank you, your Honour. So I'd now just propose to address four matters by way of oral submissions. First of all I'm going to make some general submissions about the task of the Full Bench on this four yearly review of the Real Estate Industry Award. Secondly, I'll deal with the proposed wage increases. Thirdly, I'll deal with the proposed clause limiting deduction, and fourthly and finally I'll make some submissions about the proposed top-up clause and at that time I will also address the three propositions your Honour put to the parties yesterday. So if I could just begin in making some general submissions about the task of the Commission, I don't propose to be long

on this because we already have the review decision of 2014 where the Full Bench explained the task for future full benches in relation to reviewing Modern Awards on a 4-yearly basis. We also have, quite helpfully, the recent decision that has been referred to in argument in the firefighting case handed down on 15 November. Now that case is quite helpful because it sets out principles from the review decision as well as some other relevant principle that govern the task that the Full Bench has in the present case.

PN2460

The first point I wish to refer to is what's said at paragraph 22 of the firefighting decision and in particular, Roman (iii), 22 (iii). I'm sorry I don't have a copy of this but - - -

PN2461

VICE PRESIDENT HATCHER: No, we have it so - - -

PN2462

MR TRACEY: I'm grateful for the indication. The proposition there at (iii) is that "the Commission will proceed on the basis that prima face the Modern Award being reviewed achieve the Modern Award's objective at the time it was made". That's the first principle that is important. If I could then take the Full Bench to paragraph 25 which sets out section 134 of the Fair Work Act and the Modern Award's objectives. In my submission for the present case the main relevant objectives are at (d), (e), (f) and (g), and I won't read all of them out. But in my submission those considerations or objectives at section 134 sub-section 1(d), (e), (f) and (g) of the Act are all matters for considerations which the Full Bench should take into account in deciding whether to make variations to the current award.

PN2463

And at paragraph 28 of the firefighting decision it's clear that the Commission must take into account those considerations and that arises from the decision of the full Federal Court referred to in paragraph 27. If I could then go down to paragraph 30 of the firefighting case, and 31, there section 138 of the Act is set out and that's an important term because it makes it clear that variations to the award should only be made to the extent necessary to achieve the Modern Award's objective. To the extent you go beyond achieving the Modern Award's objective then the variation is not necessary. That's what follows. And paragraph 32 helpfully refers to what is meant by "necessary". That's going to be a value judgment in each case, taking into account the section 134 considerations.

PN2464

Paragraph 35 has relevance in the present case. That part of the firefighting decision has made clear that it is not necessary, relevantly in this case, for REISA to have to establish that there has been a change in circumstances since 2010 when the Real Estate Industry Award was made. That's not a prerequisite for the Commission to make a variation at this four-yearly review stage. However, I will be making the submission and this is in relation to the wage rates issue and I'll come to it, that the fact that there has not been a change in the way real estate agents work, the nature of their work, the conditions of their work in the last four years and I submit that's the force of the evidence before this Full Bench, is a

relevant consideration and it is one that militates against increasing wage rates but I'll come to that in a moment.

PN2465

Just dealing still with some further broad principles, paragraph 36 – and this is the citation and quotation from the review decision, the preliminary jurisdictional issues decision back in 2014, just the second sentence of that quote,

PN2466

The need for a stable Modern Award system suggests that a party seeking to vary a Modern Award in the context of the review must advance a merit argument in support of the proposed variation.

PN2467

Skipping the next two sentences,

PN2468

However where a significant change is proposed,

PN2469

and in my submission the wage rates change is a significant change as is the proposed APSA top up clause change,

PN2470

it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

PN2471

And I submit that that's a very important principle in this case and I'll develop that shortly. The final principle is about half way through the second paragraph of the quotation where it's stated that,

PN2472

Implicit in this is a legislative acceptance that at the time they were made the Modern Award's now being reviewed were consistent with the Modern Award's objective.

PN2473

That's just reiterating a point that I've already made.

PN2474

So moving from those general principles to the wage rates issue, the second matter I wish to address orally, and this is dealt with at paragraphs 30 to 40 of the Real Estate Institute of Victoria's written submissions, if I could just take the Full Bench to some of those paragraphs but particularly paragraph 30 on page 7 of the submissions, we have set out there the relevant sub-sections of section 156 of the Act and it's very important in my submission for the Full Bench to take into account what is provided by sub-section 156(3), namely,

PN2475

In a four-yearly review of Modern Award the Fair Work Commission may make a determination varying Modern Award minimum wages only if the Commission is satisfied that the variation of the Modern Award minimum wages is justified by work value reasons.

PN2476

Now in my submission the Full Bench, and this is my broad submission, the Full Bench cannot be satisfied on the evidence before it in this case, that a variation of the minimum wages is justified by work value reasons. I'll develop that shortly but if I could just then turn over to the next page, the Full Bench will see that at paragraph 31 we set out the relevant clause from the explanatory memorandum and the second sentence of that is quite clear in showing the legislative intention that it is the annual wage review that is the main way in which wages will be set and varied by the Commission. Now it is not on four-yearly reviews that there is as a matter of course for, usually, a variation to wages. So we begin with that proposition that it is unusual and, in fact, not the norm and in fact has never been done, and this is the point made at paragraph 32 of the submissions for a Full Bench to exercise its powers under section 156(3) to vary wage rates on this kind of review. Of course, section 156(3) gives the Full Bench the power to do that but in my submission for the Full Bench to exercise that power there must be a detailed, cogent and compelling work value case advanced which is supported by the evidence. That is not the case here in my submission.

PN2477

The evidence going to the work value question, and it's important for you to focus on the evidence about what real estate agents do and there's no doubt, some evidence about that – paragraph 6 of Ms Masson-Forbes' witness statement deals with it, there's some evidence about property management agents and the like but broadly speaking the evidence educed in weak, it's full of opinion, hearsay, assertion and conclusionary statements. Just to take one example, and this is really as high as the evidence really goes on this point, is paragraph 8 of what Ms Masson-Forbes states, that is, the statement that's exhibit 3. The statement there is that

PN2478

when I compare the award wage and the work value for a salesperson with all of the legal and ethical obligations they have, with the award wage and work value of a level 2 clerk working in the same office, I'm not told what clerks do, at all, no evidence about what a clerk does, it is absolutely inequitable for there to be such a wage differential comparing the work value of each of those workers.

PN2479

That is the nature of the evidence educed by REISA in support of its work value case. It is conclusionary, there's no red to any evidence which enables the Full Bench to say on the one hand, here is what real estate agents do, of all the different classifications and what my learned friend, Mr Warren, said about the lack of evidence about particular classifications is important here, as well. But you take that evidence, for example, paragraph 6 of Ms Masson-Forbes. That's what real estate agents do but there is no evidence that compares that with what a

clerk does or with what a retail sales type employee does, or what a travelling salesperson or anybody does.

PN2480

VICE PRESIDENT HATCHER: With respect, Mr Tracey, we have basically uncontradicted evidence about, at least what a property sales representative does.

PN2481

MR TRACEY: Absolutely, your Honour.

PN2482

VICE PRESIDENT HATCHER: And as Mr Warren has just demonstrated in his closing submissions, they get paid a minimum award wage which is less than an entry level sales assistant.

PN2483

MR TRACEY: Yes, but we don't know what an entry level sales assistance does. We have absolutely no evidence whatsoever.

PN2484

VICE PRESIDENT HATCHER: We know what they do from the task that describes their classification in the award.

PN2485

MR TRACEY: With respect, your Honour, in my submission we don't know that. All the award says is that "indicative of the tasks which might be required of, for example, a level B or level 4 employee under the Retail Award, are the following tasks". That in my submission is not evidence. Evidence is the kind of evidence we've heard in paragraph 6, for example, of Ms Masson-Forbes' statement. The Commission doesn't have before it any evidence about what clerks do. But there's an anterior question, as well. Why should clerks be the right comparison? Why should retail sales be the relevant comparison?

PN2486

VICE PRESIDENT HATCHER: I think the point that's raised is this, that you're comparing with awards that have been thoroughly work valued assessed over a long period of time and aligned with other awards, including the Core Metals Award, by the minimum rates adjustment process where the work value was properly assessed, and then you have this award which either in its current guise or in the guise of its state predecessors, has never had any form of proper work value assessment.

PN2487

MR TRACEY: I accept that there's been no such assessment.

PN2488

VICE PRESIDENT HATCHER: So those two circumstances alone make a compelling reason as to why this award needs some consideration of work value, don't they?

PN2489

MR TRACEY: What your Honour has just said then may be the case but it is a different step to say that under section 156(3) the Full Bench can, on the evidence of this case, be satisfied, and I add satisfied, properly in accordance with the evidence and the facts that an increase of some kind is justified on work value grounds. That's a different question, in my submission and - - -

PN2490

VICE PRESIDENT HATCHER: Why is – I mean, it's not – the section could have said, "on the basis of work value change", but it doesn't say that.

PN2491

MR TRACEY: No.

PN2492

VICE PRESIDENT HATCHER: And as you've quoted in your submissions in the equal remuneration decision it was made clear that even in the absence of work value change, if we come to the conclusion that the Modern Award classification undervalues the work then that can enliven 156(3).

PN2493

MR TRACEY: I accept that, your Honour, but to come that conclusion there must be cogent evidence on which the Full Bench can be satisfied. Now - - -

PN2494

VICE PRESIDENT HATCHER: It depends. I mean, I'd draw your – if you take us to the firefighters attention(?), I think the relevant paragraph in that connection is paragraph 22, Roman (iv), which requires a merit based argument but the extent of the argument you will require will depend on the circumstances. There are some cases where a proposition is advanced, and I'm not saying it's this proposition but certainly there's been cases raised in the Modern Award reviews where simply stating the proposition makes it clear that there's something wrong with the current award. It doesn't require evidence as does an obvious merit-based proposition. And I'm not saying that applies here but the extent to which evidence is required depends upon the nature of the proposition being advanced.

PN2495

MR TRACEY: I accept that, as well, your Honour. I do say though that in this case the content of the obligation on a party like REISA which is advancing a work value case, must have evidence in it. And not just evidence as we have here of what real estate agents and the various kinds of real estate agents do, if that's all we've got – we need evidence that justifies another kind of employee, for example, a clerk or whatever, receiving the rate they do and then being able to hear what they do, what their tasks are, being able to do a comparison on the basis of each of the evidence in relation to a clerk, in relation to a real estate agent, and then form a proper fully informed assessment as to what the work value reality is. But here we don't have any evidence of that comparison and the nature of that comparison. There doesn't have to be change. REISA doesn't have to show change in the nature of the tasks being done by real estate agents. However what must be done is there must be evidence as to the present situation of real estate agents versus other employees in another industry. There must be submissions as to why that industry is the relevant comparator and why those other employees in

the other industry are relevant comparators, and then the work value assessment must be done based on the comparison. There's simply no evidence to compare real estate agents and their tasks and obligations and conditions of work with.

PN2496

VICE PRESIDENT HATCHER: But that issue about comparative evidence depends upon the nature of the comparison. And I must say, at least speaking for myself, I would have thought it verges on self-evident that a property sales representative performing the duties described in this evidence does not perform work of a lesser value than an entry level shop assistant.

PN2497

MR TRACEY: In my submission that's how - - -

PN2498

VICE PRESIDENT HATCHER: Speaking for myself, I would not need evidence to establish that proposition.

PN2499

MR TRACEY: Well, in my submission it's not self-evidence but if I'm wrong about that, your Honour, it is not appropriate for a party advancing the work value case just to assert that, say a level 1 clerk or shop assistant does less valuable work than a real estate agent. There has to be evidence of what that person does and that evidence has to be able to be tested by a party which might oppose any work value assessment. That has not been able to be done in this case because there's simply no such evidence.

PN2500

VICE PRESIDENT HATCHER: All right.

PN2501

MR TRACEY: So in my submission, as I said, the Full Bench cannot be satisfied under 156(3) of what is really a jurisdictional fact that a variation to wages, let alone the particular variation sought in this case, the significant variation as Mr Clarke said of about \$70 a week, is justified on work value grounds. So that's the broad submission I make. But putting that to one side, if I'm wrong about that the industry we're dealing with here involves commission and we've heard evidence that commission is bedrock in the industry, it's an important part of ensuring that a person's standard of living in this industry is maintained. And Mr Clarke made that submission earlier. Now here we have employees who are invariably, in fact most of them, is the evidence, are earning commissions or bonuses and the like, on top of – over award payments on top of the minimum rates. That places this case from a work value perspective in a unique situation and I've cited in the submissions a comment made – this is at paragraph 33 – a comment made by the Full Bench in the equal remuneration decision at paragraph 281,

PN2502

Depending upon the specific characteristics of the work under consideration it may be appropriate to apply different or additional criteria in order to assess a quality or comparability in value.

PN2503

So here again we have the comparing work tasks and employees and value of work. Working in which discretionary bonuses make up a significant portion of total remuneration, for example, would undoubtedly raise special considerations and I submit that commission is something that does raise special considerations for the Full Bench in determining work value.

PN2504

VICE PRESIDENT HATCHER: But we're not comparing actual remuneration, we're – I think you've taken that out of context with respect – we're not comparing the actual remuneration of real estate salespersons with anybody else, we're comparing the minimum award rate of remuneration.

PN2505

MR TRACEY: Yes. Yes.

PN2506

VICE PRESIDENT HATCHER: And that does not include discretionary bonuses.

PN2507

MR TRACEY: But the reality of the industry on the evidence, your Honour, is that most employees who are subject to this award, covered by this award, are paid bonuses and commissions.

PN2508

VICE PRESIDENT HATCHER: Yes.

PN2509

MR TRACEY: Well, "bonus" is not really the right word, commission. So if we're going to do a comparison with a sales employee or a clerk, they don't get that benefit or the opportunity to earn the benefit of commission.

PN2510

VICE PRESIDENT HATCHER: Well, some do but - - -

PN2511

MR TRACEY: Some do but it would be rare in my submission. Once again we're speculating and that in my submission is - - -

PN2512

VICE PRESIDENT HATCHER: No, but we're not speculating, we're making the wrong comparison because again, we're not comparing actual take home pay, we're comparing their minimum award rate of pay which is a different thing.

PN2513

MR TRACEY: In my submission, yes, we are, but we're also looking at the nature of the job, the conditions of the job in assessing the work value of each employee, whether it's a clerk, salesperson or real estate agent, and in assessing the conditions it is a relevant consideration that there is an opportunity to earn a commission. That's how I put that submission. The final point I'll make on the

point about wage increases is that we've heard evidence, and this has been set out by my learned friend, Mr Warren, to the effect that South Australia and Western Australia are quite unique in terms of the obligations and requirements of the job as a real estate agent. For example, drafting contracts of sale, having more onerous qualifications and skilled based training. And we've also heard the evidence about the very small proportion of the industry which those states cover. It is not enough, in my submission, to just have this assessment really which is very much directed at South Australia. We've heard evidence from other states in cross-examination that real estate agents do similar tasks. However, to base a work value case on the evidence that has been educed in relation to South Australia in particular, is not a compelling basis to increase wages nationally.

PN2514

So it I could turn to deductions, the item 5 matter. I could indicate to the Full Bench that a clause of the kind that has been discussed in argument earlier which refers to the need for deductions to be performed in accordance with the Fair Work Act, for example, section 324, that would be something that the Real Estate Industry of Victoria would not oppose or have no difficulty with. I do see difficulty because of section 155, in having long service leave referred to in that but the broad submission I make about deductions is that it's unnecessary. I'm not going to go over old ground because it's been covered but we're dealing here with over-award payments that the commission should not be regulating and that was a point made by the Full Bench in the review decision, and the relevant quotation in my submissions is at paragraph 68 where the Full Bench stated that,

PN2515

It is not the function of such minimum safety net to regulate the interaction between minimum award entitlements and over-award payments. Such actions are adequately dealt with by the common law principles of set-off to which we have referred and should be left to individual employers and employees to determine.

PN2516

So I adopt what my learned friend, Mr Warren, said about that. The fact is that the superannuation guarantee legislation and the long service leave legislation is all protective of employee rights in relation to those entitlements. There is no warrant for further regulation which actually goes beyond the Modern Award objectives. And that's the nature of what is sought by REISA in the proposed clause 9.2(d) of the party's amended exposure draft.

PN2517

So far as the top-up clause that's advanced by APSA is concerned, in REIV's submission that would fundamentally change the nature of commission only employment, something averted to by, your Honour, the last President. It is not commission only employment any more if you have to have these top up payments of minimum rates. In the REIV's submission the entry requirements, and it's agreed by the REIV that 150 per cent, or 57,000, that figure should be the amount that is required before one becomes commission only, that is a sufficient safeguard to protect employees on the commission only basis. But that said, the institute would also broadly support the three propositions that the Full Bench referred to yesterday. In particular, 2 and 3 would operate as a further safeguard

for commission only employees and that is agreed to in principle. So far as the proposed clause that was handed up this morning is concerned that the New South Wales Federation has produced, we haven't had the opportunity to take instructions on that. We would ask the Full Bench for some further time to make some submissions about how that might be drafted to give effect to the three propositions.

PN2518

VICE PRESIDENT HATCHER: Can I indicate that I think what we broadly envisage is that any decision we issue as a result of this hearing will result in a further exposure draft being issued about which the parties will then have a further opportunity to make comment.

PN2519

MR TRACEY: I'm grateful to that, your Honour. Could I just flag, just as assistance to the Full Bench, two very brief issues about this proposal. If one looks at proposed clause 9.7(a)(3) the effect of that as currently drafted would be that the existing commission only employment agreement, the contracts, and this is in my submission the likely legal analysis, would be frustrated by operation of law in the form of his provision. That is, you would have an award that would require an agreed commission only employment under a contract to cease. That's like – commission only is a fundamental term of that kind of employment contract, in my submission and if that contract is frustrated in that way that would probably terminate the employment. That's I think a concern that needs to be addressed in the drafting. Now I think that's something though that could be remedied by drafting.

PN2520

The other issue is what I submit could be described as a grandfathering issue. Because of that fundamental effect on the contract of employment that this kind of provision would have, in my submission and we can develop this further in written submissions if that would assist, is that out of fairness to the parties, the employer and the employee, this would need to be a prospective arrangement. So the existing commission-only employees shouldn't be affected by this kind of clause and that is because they have agreed to commission-only employment which is a fundamental kind of employment and this would frustrate that. But I am happy to make further submissions on that.

PN2521

VICE PRESIDENT HATCHER: If we give it another seven days to put a further note in about this, is that sufficient?

PN2522

MR TRACEY: Yes – could I have until next Friday, your Honour, is that possible?

PN2523

VICE PRESIDENT HATCHER: We'll make it 14 days.

PN2524

MR TRACEY: I'm grateful, thank you.

PN2525

VICE PRESIDENT HATCHER: And Mr Clarke, can I leave it to you to communicate to the Real Estate Employers' Federation of SA and NT that they can file a written closing submission within 14 days?

PN2526

MR CLARKE: Yes.

PN2527

VICE PRESIDENT HATCHER: Yes, all right. Is there anything further, Mr Tracey?

PN2528

MR TRACEY: Just one final matter, just in relation to the APSA top-up clause. In my submission the evidence that was filed by APSA doesn't support that amendment and it would affect workplace flexibility, which is a Modern Award's objective and the REIV opposes that amendment.

PN2529

VICE PRESIDENT HATCHER: Just going back to the minimum income threshold, what's your view of the submission made by Mr Farrell that as it currently stands it's not just an entry requirement, it's also an ongoing requirement? Do you - - -

PN2530

MR TRACEY: I think I'm ad idem with Mr Warren on this point. In my submission clause 16 of the current award, I don't think puts a time limit on commission only employment. As I read it at the moment, commission only can just continue well into the future, as long as the real estate agent has first met the criteria to become commission only.

PN2531

VICE PRESIDENT HATCHER: Right, thank you.

PN2532

MR TRACEY: If the Commission pleases.

PN2533

VICE PRESIDENT HATCHER: So reply submissions, briefly – firstly, Mr Lewocki, do you have anything in reply?

PN2534

MR LEWOCKI: Once again, your Honour, it's our submission that if the clause that we're seeking to insert in the award is actually inserted, very few employees will be affected by it, very few. So that's all I've got to say. The evidence that's been produced over the last couple of days, particularly Western Australia, the employers have shown that their employees are earning considerable amounts of money, \$110,000, \$50,000, seventy-five – well, beyond the normal basic award wage. So it would not affect the industry to the extent that the extent that the employees are concerned about. But it will protect a minority of employees that are not making the award wage.

PN2535

VICE PRESIDENT HATCHER: And do you want to say anything about the document Mr Warren handed up?

PN2536

MR CLARKE: Yes - - -

PN2537

VICE PRESIDENT HATCHER: No, Mr Lewocki first.

PN2538

MR CLARKE: I'm sorry.

PN2539

MR LEWOCKI: Sorry, sir?

PN2540

VICE PRESIDENT HATCHER: Do you want to say anything about Mr Warren's document?

PN2541

MR WARREN: We support that.

PN2542

VICE PRESIDENT HATCHER: All right. Thank you. Mr Clarke?

PN2543

MR CLARKE: While we're on that document, sir, I can advise that REISA is generally supportive. We do have, and I've raised with Mr Paterson, just some wording changes we might like and there may be some others later but the principle, no problems, just a bit of wording, I think.

PN2544

VICE PRESIDENT HATCHER: All right. And what's your view about the way the threshold currently works? That is, do you agree with Mr Farrell about that?

PN2545

MR CLARKE: No, I agree with Mr Warren and Mr Tracey that once you get through the gate to be commission only, that's the question, isn't it - - -

PN2546

VICE PRESIDENT HATCHER: Yes. So you say it's not - - -

PN2547

MR CLARKE: You're there forever, even if you're earning nothing.

PN2548

VICE PRESIDENT HATCHER: It's not a rolling five year period?

PN2549

MR CLARKE: It just carries on. You have – you're stuffed, you're on it.

PN2550

VICE PRESIDENT HATCHER: And where did the threshold come from?

PN2551

MR CLARKE: I wasn't involved so I wash my hands of it to a certain degree. But the different - - -

PN2552

VICE PRESIDENT HATCHER: Does it come from one of the - - -

PN2553

MR CLARKE: The different states had certain thresholds people had to have. In South Australia it actually had to be as high as \$60,000 dating back to 2001. And if you indeed didn't make it the next year around, you revert – the \$60,000, you reverted to debit/credit. The other states had a different version and I wasn't there but that's what we ended up with.

PN2554

MR WARREN: I understand Mr Paterson might have some information on this.

PN2555

MR PATERSON: Your Honour, if I could just address your Honour's question briefly - - -

PN2556

VICE PRESIDENT HATCHER: Yes.

PN2557

MR PATERSON: The threshold arose out of the proceedings before the Australian Fair Pay Commission 2006/7.

PN2558

VICE PRESIDENT HATCHER: Will that be part of the decision you're going to supply us with or?

PN2559

MR PATERSON: Yes, it will be.

PN2560

VICE PRESIDENT HATCHER: Right.

PN2561

MR PATERSON: But it evolved because the legislation at the time had a piece rate of pay. You had to satisfy the legislative requirement that a person of average capacity could earn at least the minimum rate prescribed by the award. So the parties at the time, the employer and union parties at the time produced evidence to the Fair Pay Commission all in support of the establishment of a new piece rate rate of pay for Commission only and the Fair Pay Commission wanted to provide some protections around it so it went, all right, well, how many houses do you have to sell in order to make the certain amount of money, and we're going to set the minimum rate at 35 and to qualify you have to be able to show the 110 per cent figure.

PN2562

VICE PRESIDENT HATCHER: Right.

PN2563

MR PATERSON: There wasn't a magical number that arose through a formula. It was just deemed at the time to be a reasonable figure to qualify someone to go onto commission only, if that's at all helpful.

PN2564

VICE PRESIDENT HATCHER: Thank you. So Mr Clarke, anything else in reply?

PN2565

MR CLARKE: Just in reply and I think these will cover all the submissions put by the other parties, as well – I don't want to go into the deductions again, I think we've had enough debate, unless the members of the Bench would like me to go over it again. I just point out this thing with respect to over award payments. It may be – I've used the term myself and I think it's a loose term, "over award payments". They are commissions. Over award payments, as I refer in one of my submissions, the most recent submission, is defined by the Macquarie Dictionary of Law and Employment as, "an amount greater than the award rate".

PN2566

Whereas a commission is something which is variable depending on the value of the goods or services that are sold and the volume of it. And that's exactly what the position is here in the real estate industry where you do not have a set over award payment, you have a variable commission payment and they can – in the times that are good, like it has been in Sydney in recent times, you do very well – you get a slump in the industry, you might be just on the award rate.

PN2567

So what I mean by that is that that is why we say the Commission does have the powers that we seek and I've expanded on it in my submissions and I won't beyond that now. Insofar as Mr Tracey's reference to the paragraph 281 of the equal remuneration case with respect to, you might go easy on the minimum award rate if there was significant over award payments, or as far as part of the remuneration, of course, that was dealt with under a different division of the Fair Work Act. It was dealing with the gender pay gap rather than addressing itself to section 156 and the work value components which we are dealing with in this award.

PN2568

Now insofar as the rhetorical questions of Mr Tracey and to some extent, Mr Warren got involved in terms of how do you make the assessments of the relativities when you don't allegedly know what a clerk does or a shop assistant does, vis-à-vis, a real estate officer – well, under the Fair Work Act members of the Commission can exercise their own knowledge. You were appointed in the first place because you have a very wide ranging knowledge of industrial activities and employment pursuits. We don't - - -

PN2569

DEPUTY PRESIDENT ASBURY: Or shopping.

PN2570

MR CLARKE: We don't operate in a vacuum. You actually have in this case an award which spells out what a property salesperson does, what a strata title person does, what a property manager does, which has been amplified and given meat to the bone, so to speak, by witnesses not only from South Australia but also, Mr French from Western Australia, a property manager from here in New South Wales, and when employer witnesses who employed property managers in different states and sales representatives indifferent states, I put to them, somewhat laboriously I do admit but because I was anticipating this line of argument by the employers, that they all concurred with respect to the descriptions and the skills and responsibilities of salespersons and property managers that they knew of in their own home state. So basically, all bar Tasmania and the territories were covered in the scope of the evidence.

PN2571

Insofar as the Retail Award is concerned I regard that as farcical in terms of level 1 relativities, even though that's greater than the real estate salesperson's rate of pay at the moment. There's no comparison. Salespeople have got to get out, catch and kill their own to survive. They've got to get their stock, they've got to convince the vendor, and the employer witnesses agreed to it. They rely totally on, for their businesses, on the skill and aptitude of those salespeople to get out and sell themselves to vendors and then sell those properties and get them a fair price, and at the best price you can possibly get. And I won't go into all the attributes again.

PN2572

But a commercial traveller selling lollies gets 100.25 per cent of the C10 rate without one qualification, selling lollies or soft drinks, and they're probably entitled to commissions, as well, but we're not dealing with commission or incentive payments, we're dealing with the work value of people. A commercial traveller can be selling lollies or soft drinks, or can be selling some of the most high tech, professional equipment wholesale to retailers and to equate retail real estate salespersons to a shop assistant, with due respect to the shop assistants, they have nowhere near the legislative requirements on their job or the manner in which they carry out the job, or the responsibility of which they carry. And I might also add this is an award the HR Nicholls Society would die for, a 38 hour week, seven days a week, no penalty rates, you know? It's the sort of ultimate freedom for the employer, largely. Barry Purvis, my old sparring partner of the (indistinct) and Employer's Federation, he would love an award like this. He would think he was in seventh heaven.

PN2573

Finally with respect to the commission only and the 160 per cent which the West Australians are upset about, employers, that is. It's worth repeating although you've probably heard it too often from me, these people have fewer protections than a trolley collector at a supermarket. They at least are guaranteed an hourly rate of pay for every hour they work and if they have to spend a dollar on behalf of their employer to do something on their employer's behalf, they're reimbursed. A commission only salesperson, once they pass through the gate and are eligible,

and the gate is so low as to be laughable at \$41,000 which doesn't even meet the current award rate with respect to the minimum award rate and a car allowance of someone who just earns that. The car allowance is worth between \$7,000 and \$10,000 a year.

PN2574

VICE PRESIDENT HATCHER: Sorry, isn't the threshold exclusive of everything else?

PN2575

MR CLARKE: The current threshold is approximately \$41,000. It's 110 per cent of the minimum award rate, \$713, and that's it. No overtime, no allowances - - -

PN2576

VICE PRESIDENT HATCHER: So it's not an amount exclusive of allowances?

PN2577

MR CLARKE: Sorry, if you're a wage covered person, a debit/credit person, you get the minimum award rate of \$713.30 and you get an allowance for the use of your car on company business.

PN2578

VICE PRESIDENT HATCHER: I understand that but in terms of them passing the threshold, the allowances count for the purpose of the threshold?

PN2579

MR CLARKE: No, they don't count.

PN2580

VICE PRESIDENT HATCHER: Right.

PN2581

MR CLARKE: The allowances don't count but they say if you're using your own car, for the purposes of this very complicated existing clause for the minimum income threshold which nobody can understand - most people around this table have different views of how you actually apply it and the Fair Work Ombudsman has thrown his hands up and I don't blame them, it's not their fault - - -

PN2582

VICE PRESIDENT HATCHER: Her hands.

PN2583

MR CLARKE: Sorry?

PN2584

VICE PRESIDENT HATCHER: Her hands. Her hands.

PN2585

MR CLARKE: Her. Yes, that's right. Sorry, I'm not up to date. Sorry. And so we say, go to 160 per cent. It's not outrageous. It's, in round figures, to the nearest 10,000, so \$60,000, one twelve month period in the three year period prior to the – up to the time of signing your agreement to go commission only. You

need to protect those people and to be able to ensure that they can make a reasonable standard of living before you put them into the dog house because you are there, you've got to chase sales.

PN2586

Unless you have any further questions, I've now completed - - -

PN2587

VICE PRESIDENT HATCHER: All right, thank you. Mr Warren, can you send a copy of your documents to Ms Bisbal so that they get an opportunity to make a submission about that, as well?

PN2588

MR WARREN: Certainly.

PN2589

VICE PRESIDENT HATCHER: So subject to the further submissions we have identified we'll reserve our decision. I thank the parties for their submissions and we'll now adjourn.

ADJOURNED INDEFINITELY

[3.50 PM]

LIST OF WITNESSES, EXHIBITS AND MFIs

**EXHIBIT #22 SIAG TEMPLATE CONTRACT FULL TIME AND PART
TIME EMPLOYMENTPN1676**

**EXHIBIT #23 SIAG TEMPLATE CONTRACT FOR COMMISSION
ONLY EMPLOYMENTPN1677**

**EXHIBIT #24 REEFWA CONTRACT OF EMPLOYMENT FOR
PROPERTY OR STRATA MANAGEMENTPN1687**