

IN THE FAIR WORK COMMISSION

MATTER NUMBER: AM2016/6

s. 156 - 4 Yearly Review of Modern Awards

Real Estate Industry Award 2010

Outline of Submissions of the Real Estate Institute of Victoria

Overview

1. The Real Estate Institute of Victoria (**REIV**) opposes some of the proposed substantive changes to the Real Estate Industry Award 2010 (**Award**) which remain in dispute.
2. The proposed substantive changes are set out in full in the Exposure Draft – Real Estate Industry Award 2015 (**Exposure Draft 2015**).
3. For the reasons developed in this submission, the proposed substantive changes to the Award which the REIV opposes are:
 - a. an increase to the Award's minimum wages on work value grounds (Item 2, Exposure Draft 2015);
 - b. the prohibition on written agreements for commission payments permitting an employer to debit amounts for advertising/marketing, long service leave or superannuation (Item 5, Exposure Draft 2015); and

- c. the entitlement of commission-only employees to have their wages increased to the equivalent of the award wage if they do not earn the award wage in a six month period (Item 15, Exposure Draft 2015).

Background: award modernisation and the real estate industry

4. In March 2008, the *Workplace Relations Act 1996* (Cth) (**WR Act**)¹ was amended to include a new *Part 10A – Award Modernisation*. Since then, modern awards together with the ten National Employment Standards (**NES**) have become the minimum safety net for national system employees.
5. The modern awards objective in s134(1) of the *Fair Work Act 2009* (**FW Act**) is to achieve a ‘*fair and relevant minimum safety net of terms and conditions*’, taking into account specific matters listed therein.
6. Part 10A of the WR Act mandated that modern awards:
 - (a) *must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and*
 - (b) *together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and*
 - (c) *must be economically sustainable, and promote flexible modern work practices and the efficient and productive performance of work; and*

¹ After its repeal on 1 July 2009, Part 10A was continued in force by item 2 of Schedule 5 of the Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 (Cth).

(d) must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and

(e) must result in a certain, stable and sustainable modern award system for Australia (WR Act s.576(4)).

7. On 28 March 2008, the Federal Government made an 'award modernisation request' (**Request**)² to the Australian Industrial Relations Commission (**AIRC**).
8. Among other things, the Request directed the President of the AIRC to consult with the Australian Fair Pay Commission and State industrial tribunals as appropriate, and to hold conferences with major employer and employee representative bodies for the purpose of preparing exposure drafts. Further consultation was to occur after the publication of an exposure draft, to be conducted as an 'open and transparent' process.
9. The award modernisation process was allocated to the AIRC to complete within specified timeframes. The Full Bench of the AIRC (**Full Bench**) had the power to inform itself in any way it thought appropriate, including by undertaking or commissioning research, or consulting with persons, bodies or organisations in any manner it considered appropriate (WR Act s.576E).
10. Award modernisation was therefore a 'top-down' consultative process led by the Full Bench, with a focus on the views and contribution of industry representatives.

² The Request was ultimately amended seven times with additional specific instructions until 26 August 2009.

11. In the real estate industry, there had never been a Federal award for real estate agents and property managers, and at the commencement of the award modernisation process a real estate industry award was not proposed³.
12. The Award was created because employer and employee representatives in the industry repeatedly pressed the Federal government and the AIRC for a stand alone modern award.
13. In May 2008, in the first consultation stage of award modernisation, the Real Estate Employee Associations filed a submission with the AIRC ⁴ (**Consultation Submission**) that referred to meetings of a Real Estate Industry Group (**REIG**), made up of employee and employer associations from various States⁵.
14. The Consultation Submission put forward on behalf of the REIG submitted that:
- a. it would be inappropriate to group the Real Estate Industry with other industries when making a modern award as contemplated under the Act; and
 - b. the Real Estate Sector is in need of a federal award for real estate sales people and property management employees (which classifications can be accommodated in the same award) (at para 4).

³ Request from the Minister for Employment and Workplace Relations - 28 March 2006 - Full Bench - [2008] AIRC 387 published a Draft List of Priority Industries

⁴ Award Modernisation Consultation Submission Real Estate Employee Associations – May 2008

⁵ Parties to the REIG were the Property Sales Association of Queensland, Union of Employees; the Real Estate Association of New South Wales, Real Estate Salespersons' Association of South Australia; Real Estate Employers' Association Qld; Real Estate Employers' Federation of NSW; Real Estate Employers' Federation of South Australia; and Real Estate Employers' Federation of Western Australia.

15. The Consultation Submission emphasised the spirit of cooperation between employer and employee groups, and anticipated a 'relatively smooth flow of negotiations and early agreement' on a real estate industry award (at para 22).
16. In supporting its call for a real estate industry modern award, the Consultation Submission relied upon the peculiarities of the industry, where 'income is determined in accordance with results' (at para 12), and 'remuneration is largely incentive driven' (at para 13).
17. On 20 June 2008 the AIRC recognised that 'the real estate industry requires separate consideration', and would not be covered by the Retail Industry Award⁶.
18. In early 2009, after several further meetings, the REIG reached broad agreement on the nature and content of the draft Award⁷.
19. The 'Real Estate Unions' subsequently filed a submission with the AIRC regarding the proposed Award (**Proposed Award Submissions**)⁸.
20. The Proposed Award Submissions again confirmed the spirit of cooperation in the industry:

We believe that this result [the draft Award] demonstrates that the sentiments expressed by the (now) Prime Minister on election night 2007, wherein he stated that "I want to put aside the old battles of the past, the old battles between business and unions..." can, and have, become a reality (p.8).

⁶ Request from the Minister for Employment and Workplace Relations - 28 March 2006 - Full Bench - [2008] AIRC 550; [2008] AIRCFB 550 (20 June 2008) at [84].

⁷ See Real Estate Unions' Submission to the AIRC, 'Proposed Real Estate Industry Award 2010 at p.8

⁸ Ibid

21. The draft Award was submitted as a consent award.
22. On 25 September 2009 the AIRC published an exposure draft of the Award.
23. The Award broadly adopted provisions from the New South Wales, Queensland, South Australian and Tasmanian state based awards.
24. The AIRC made the Award on 4 December 2009, and when it commenced on 1 January 2010⁹ it was one of the first 122 modern awards.

Proposed substantive change Item 2: wage increases on work value grounds

25. In its submission dated 27 July 2016, the Registered Real Estate Salespersons' Association of South Australia (**RRESSA**) claims that the minimum rates in the Award should be increased on work value grounds.
26. In support of that claim, RRESSA submits, in summary, that:
 - a. there has never been a work value case undertaken with respect to the non clerical employees in the real estate industry, including during the award modernisation process (para 6(a));
 - b. for the Award to be a fair and relevant minimum safety net award, it must be able to access the minimum rates adjustment principle that it had not accessed at the time the Award was made (para 6(h));
 - c. 'with respect to the work, skills and responsibilities of property salespersons and the other classifications in the award, it is a compelling argument for the FWC to exercise its powers under the Act...' (para 6(h)); and

⁹ Clause 2.1 of the Award

- d. there would be a minimal impact on employers, given the potential absorption of over award payments into commissions, bonuses and incentive payments (para 6(i)).

27. RRESSA filed several witness statements, which it claims support a work value case.

(i) Legislative framework

28. The main power of the Fair Work Commission (**FWC**) to vary modern award minimum wages is in annual wage reviews that are conducted under Part 2-6 of the FW Act.¹⁰

29. The minimum wages set in a modern award can also be varied in limited circumstances if the FWC is satisfied that the variation is justified by work value reasons (s.135(1)(a)).

30. Section 156 of the FW Act states:

(3) In a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons.

(4) **Work value reasons** are reasons justifying the amount that employees should be paid for doing a particular kind of work, being reasons related to any of the following:

(a) the nature of the work;

¹⁰ FW Act s.135 Note 1.

(b) the level of skill or responsibility involved in doing the work;

(c) the conditions under which the work is done.

31. The Fair Work Bill 2008 Explanatory Memorandum clarifies:

Subclause 156(3) ensures that FWA may only vary wages as part of a 4 yearly review where it is satisfied that the variation of minimum award wages is justified by work value reasons. The annual wage review is the main way in which wages will be set and varied by FWA. Variation of minimum award wages in a 4 yearly review for work value reasons is a limited exception to this approach (para 605).

32. The FWC has not as yet exercised its powers under s.156(3), but in the context of the *Equal Remuneration Decision 2015*¹¹ the Full Bench interpreted the phrase ‘work value reasons’ as follows:

If it is considered that the minimum rate for any classification in a modern award does not properly take into account the value of the work performed by employees in the classification – that is, that the work is ‘undervalued’ by the modern award – then an application may be made to the Commission in the circumstances prescribed by ss.156(3) or 157(2) ... to vary that modern award to rectify the perceived undervaluation.¹²

33. In considering the expression ‘work value’, the Full Bench made the following observations:

¹¹ United Voice and another [2015] FWCFB 8200 (30 November 2015)

¹² Ibid at [274]

[280] ... The established industrial conception of that term, as developed in decisions of this Commission's predecessor tribunals as well as by the various State industrial tribunals is the primary source of guidance in this regard. Such decisions point to the nature of the work, skill and responsibility required and the conditions under which the work is performed as being the principal criteria of work value. ... However, as noted in the principle set down in the 1972 Equal Remuneration Pay Case, work value enquiries have been characterised by the exercise of broad judgment....

[281] Depending upon the specific characteristics of the work under consideration, it may be appropriate to apply different or additional criteria in order to assess equality or comparability in value. Work in which discretionary bonuses make up a significant proportion of total remuneration, for example, would undoubtedly raise special considerations. ...

34. The REIV submits that those observations are relevant to RRESSA's submission, in effect, that the FWC should exercise its powers under ss.156(3).

(ii) Analysis of RRESSA's submission

35. As the party seeking a variation to the Award for work value reasons, it falls to RRESSA to advance a merit argument to support its case.

36. In the *4 Yearly Review of Modern Awards: Preliminary Jurisdictional Issues*¹³ (**Review Decision**), the Full Bench observed that ‘where a significant change is proposed 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’¹⁴.
37. RRESSA has not referred to or addressed the relevant legislative provisions in ss.156(3) and (4) and has not submitted any evidence properly directed to:
- (a) the nature of the work;
 - (b) the level of skill or responsibility involved in doing the work; or
 - (c) the conditions under which the work is done.
38. Although ss.156(3) does not refer to a datum point, it is the REIV’s submission that if the Award met the modern awards objectives at the time it was made (which RRESSA does not seem to dispute), then a claim for a significant increase in wages beyond the set increases must show that there has been an increase in work value since 2010.
39. Save for a brief reference to ‘the work, skills and responsibilities of property salespersons and the other classifications in the award’ (at para 6(h)), RRESSA’s submission does not advance an argument that the work covered by the Award is undervalued, or that it has changed since the Award was made. Instead, RRESSA relies heavily on historical, and irrelevant, considerations.
40. RRESSA is essentially asking the FWC to start afresh for a ground-up review, and that is not the function of the 4 yearly review of modern awards.

¹³ [2014] FWCFB 1788.

¹⁴ Review Decision at [23]

41. The Review Decision directs that in a 4 yearly review of a modern award, the FWC should assume that the award was properly made:

[24] In conducting the Review the Commission will also have regard to the historical context applicable to each modern award. Awards made as a result of the award modernisation process conducted by the former Australian Industrial Relations Commission (the AIRC) under Part 10A of the Workplace Relations Act 1996 (Cth) were deemed to be modern awards for the purposes of the FW Act (see Item 4 of Schedule 5 of the Transitional Act). Implicit in this is a legislative acceptance that at the time they were made the modern awards now being reviewed were consistent with the modern awards objective. The considerations specified in the legislative test applied by the AIRC in the Part 10A process is, in a number of important respects, identical or similar to the modern awards objective in s.134 of the FW Act. In the Review the Commission will proceed on the basis that prima facie the modern award being reviewed achieved the modern awards objective at the time that it was made.

42. RRESSA submits that 'for the current Real Estate Award to be a fair and relevant minimum safety net award, it must be able to access the minimum rates adjustment principle (**MRA**), it had not accessed at the time the 2010 award was made in December 2009' (at para 6(h)).

43. That claim is inconsistent with the consent position of the union and employer representatives at the time the Award was made.

44. In its Statement dated 26 September 2009 (**Exposure Draft Statement**), the AIRC published an exposure draft of the Award¹⁵.

¹⁵ [2009] AIRCFB 865

45. The Exposure Draft Statement, among other things, recorded that:

- a. prior to the pre-exposure draft consultations a draft award was filed which was supported by a number of real estate employer and employee associations [164] (industry draft award);
- b. until the award modernisation process, real estate specific awards only existed in New South Wales, Queensland, South Australia and Tasmania (all NAPSAs), and there had been no minimum wage order made for the industry other than the Victorian minimum wage order [167]. The Australian Fair Pay and Conditions Standard applied;
- c. the industry draft award contained 'numerous provisions said to be tailored to the needs of the real estate industry' [168] and based on the NAPSAs, including several classifications paid at the federal minimum wage or slightly above, limited overtime, and almost no penalty rates; and
- d. 'We acknowledge that the draft filed by the real estate parties reflects a consent position of associations representing a significant part of the industry and is the outcome of lengthy consultations' [169].

46. In relation to the proposed minimum wages in the Award, the Exposure Draft Statement noted one concern of the Full Bench:

For the purpose of the exposure draft we have left in the proposed rate of pay for a property sales associate. It is the same as the federal minimum wage. We note that the classification description contains no suggestion this is an entry level position nor is there any limit on the amount of time an employee will remain on this rate' [174].

47. In response, the Real Estate Employers' Combined Consultative Group, and the Real Estate Unions 'engaged in dialogue to achieve a more just outcome for this classification'¹⁶, and jointly proposed a two tiered classification for property sales associates comprising a minimum weekly wage for the first six months and thereafter, which was adopted in the current clause 8.1 of the Award¹⁷.
48. The Australian Council of Trade Unions (**ACTU**) also submitted to the AIRC that the property sales associate classification should progress from an entry level after a fixed period of time¹⁸. The ACTU further stated, 'Whilst the ACTU believes that a proper work value assessment should be undertaken for all classifications in the award we recognise that this is unlikely to be undertaken in the time available...'¹⁹
49. The suggestion of a work value assessment was not pursued by the industry parties, or the AIRC. Nor did the ACTU suggest that the Award could not be properly made without it.
50. RRESSA's submission fails to acknowledge that commission is, and was at the time the Award was made, the bedrock of the real estate industry.²⁰ That is one of the circumstances under which the Award was framed, and the minimum rates were struck.

¹⁶ Submission by the Real Estate Employers' Combined Consultative Group to the exposure draft of the Real Estate Industry Award 2010 dated 16 October 2009

¹⁷ Ibid, and Real Estate Unions' Response to the Australian Industrial Relations Commission 15 October 2009.

¹⁸ ACTU Submission to the AIRC Award Modernisation Stage 4 Exposure Drafts 16 October 2009 para 184.

¹⁹ Ibid at para 187.

²⁰ See Statement Geoff White at para 10.

51. As the Full Bench stated in the Equal Remuneration Decision 2015, 'Work in which discretionary bonuses make up a significant proportion of total remuneration, for example, would undoubtedly raise special considerations'²¹ in the application of work value reasons.
52. Since at least 2007, the real estate industry has fought against being designated with other industries in a Federal Award, because of its unique incentive based remuneration arrangements.²²
53. The Wages and Allowances part of the Award is structured to include minimum wages for various classifications; commission, bonus or incentive payments; commission only arrangements in certain circumstances; and allowances – thereby providing appropriate regulation of remuneration, and a safety net, for employees in the industry.
54. The Full Bench of the AIRC, in making the Award, included some, but not all, of the proposals of the union and employer groups. In the *Award Modernisation - Decision - re Stage 4 modern awards [2009] AIRCFB 945 (4 December 2009)*, the Full Bench recorded that it:
- a. had declined to include clerical employees in the Award, or to make special flexibility provisions in the Clerks Modern Award;
 - b. had decided to include strata and community title management employees in the Award;
 - c. had included the two levels of pay for property sales associates as proposed by the industry in response to the Exposure Draft Statement;

²¹ Equal Remuneration Decision at [281]

²² Letter dated 7 August 2007 from Barry Gannon for the REIG to the Workplace Authority asking not to be designated an award for the real estate industry

- d. had excluded casuals from eligibility for Commission only payments;
and
- e. had refused to include an annualised salary provision²³.

55. The AIRC was thereby satisfied that the Award met the modern award objectives. The extrinsic material to the Award demonstrates that the Award was made after in depth consultation with and involvement of unions and employer groups from the real estate industry, who agreed on all of the Award's fundamental terms.

56. In circumstances where RRESSA has not given evidence of any of the FW Act's work value reasons, and in which the minimum wages were properly set at the time the Award was made, there is no case for minimum wage increases beyond the set annual wage reviews.

Proposed substantive change Item 5: debiting amounts from commission agreements

57. RRESSA seeks to insert a new clause 9.2(d) in the Exposure Draft 2015 in relation to written agreements pertaining to commission, bonus or incentive arrangements:

The written agreement must not contain any provision which permits the debiting from an employee's commission/ bonus/incentive entitlement, any amount relating to;

- (i) vendor authorised advertising and / or marketing expenses, how so ever described, or

²³ Award Modernisation - Decision - re Stage 4 modern awards [2009] AIRCFB 945 (4 December 2009) at [170] to [176]

- (ii) an employee's entitlement to the relevant State or Territory Long Service Leave legislation, or superannuation payments made on the employee's behalf by the employer pursuant to clause 11 of this award.

58. The reasons for the proposed change are, in summary, that:

- a. it is unlawful for an employer to debit vendor-authorised advertising and marketing expenses against an employee's commission under sections 323, and 324-326 of the FW Act;
- b. deductions of superannuation from commission payments in effect diminish the value of the over award commission payment; and
- c. employees whose long service leave is offset against commissions do not take their long service leave, which is contrary to the intent of long service leave legislation.

(i) Legislative framework

59. The modern awards objective in s.134(1) of the FW Act is to achieve a 'fair and relevant minimum safety net of terms and conditions' taking into account specific matters therein.

60. In a 4 yearly review of modern awards, the FWC may make determinations to vary a modern award (FW Act ss.156(2)(b)(i)).

61. A proposed variation may only be made if it meets the modern awards objective. Section 138 of the FW Act states:

A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wages objective.

(ii) Analysis of RRESSA's submission

62. The observations of the Full Bench in the Review Decision are relevant in determining the proposal for a new clause 9.2(d) of the Award:

The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a ‘stable’ modern award system (s134(1)(g)). 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.²⁴

63. The variations sought in relation to permitted deductions from commission payments are not matters that are necessary to achieve the modern awards objective or to achieve a fair and relevant minimum safety net.

64. In *SDAEA v NRA (No 2)*,²⁵ Tracey J accepted that there is a distinction to be drawn between terms that are “necessary”, and terms that may be “desirable”, whilst recognising that reasonable minds may differ about where the line is drawn in any particular case.²⁶ In that case, Tracey J was dealing with a different provision of the FW Act, but the reasoning would apply equally to s.138 of the FW Act.²⁷

65. It is the REIV’s submission that the proposed variation contains matters that could be appropriately dealt with under common law employment contracts, and should not be included in the Award.

66. The proposed variation would impinge on the capacity for an employer and employee to negotiate mutually beneficial over award employment arrangements by reducing the flexibility that is permitted and enjoyed within the current structure²⁸.

67. Commission payments are over award incentive payments for which the Award currently provides sufficient employee protections. The current clause 15.1 of the Award (cl.9.1 in the Exposure Draft 2015) deals with commission payments in the following terms:

²⁴ Review Decision at [23]

²⁵ (2012) 205 FCR 227

²⁶ Ibid at [46]

²⁷ Review Decision at [39]

²⁸ See Statement Geoff White at para 13 to 15.

“15.1 Where the employer and the employee agree that, in addition to the minimum weekly wage, the employee will be entitled to a portion of the commission paid to the employer, then any method of calculation or any formula for calculating the amount of commission that will be payable to the employee must be evidenced in a written agreement between the employer and the employee.”

68. In considering over award payments, Full Bench in the Review Decision stated:

Modern Awards are part of the minimum safety net of terms and conditions established by the FW Act. It is not the function of such a minimum safety net to regulate the 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 left to individual employers and employees to determine.²⁹

69. RRESSA is incorrect to claim that deductions for advertising and marketing expenses from commission are unlawful. Subsection 324(1) of the FW Act includes permitted deductions, one of which is ‘(c) the deduction is authorised by or under a modern award or an FWC order’.

70. Nor does RRESSA make a sufficient merit argument for the inclusion of the proposed change. In the REIV’s submission the proposed cl.9.2(d) of the Exposure Draft 2015 is not supported by evidence, is not necessary, and would not meet the modern awards objective.

71. Further, RRESSA’s submission unnecessarily seeks to include in the Award prescriptive matters that are properly dealt with under separate legislation, including long service leave legislation, superannuation guarantee legislation and the FW Act. The submissions of RRESSA do not provide evidence that suggest there is non-compliance with employers meeting obligations both under the FW Act, applicable long service leave and superannuation legislation, so as substantiating the amendments sought to the Award.³⁰

²⁹ *Review Decision* at [74].

³⁰ See Statement Sascha Cook at para 17.

Proposed substantive change Item 15: Six monthly top up for Commission only employees

72. The Australian Property Services Association (**APSA**) seeks to vary clause 16 of the Award to entitle commission only employees, if they have not earned the equivalent of the award wage in any six month period, to be paid the difference between their commission earnings and the Award wage for the respective period.
73. The legislative provisions outlined in paragraphs 59 to 61, above, apply to the FWC's consideration of this proposed substantive change to the Award.
74. APSA has not made out a case that the change would be necessary to meet the modern awards objective.³¹
75. In the REIV's submission, the proposal is unnecessary, especially given the extensive safeguards included in 9.7 of the Exposure Draft 2015 for commission only employees.
76. The REIV consents to RRESSA's proposed change at Item 13 of the Exposure Draft 2015 to increase the minimum income threshold amount that is a pre-requisite for commission-only employment arrangements to 160% of the annualised minimum Award wage for an adult Property Sales Representative.³²
77. That is an additional and reasonable benchmark for assessing an employee's likely ability to work on a commission-only basis.³³
78. Commission-only arrangements are only available to experienced employees with proven results. The evidence from the real estate industry in Victoria is that commission-only arrangements are often made at the initiative of employees, and that it is employees who initiate negotiations for written terms in their favour.³⁴
79. The proposal is contrary to the purpose of commission-only agreements, whereby an employee voluntarily enters into an agreement for purely incentive based payments, as an alternative to the minimum Award wage.

³¹ See Statement Sascha Cook at para 23 and 24.

³² See Statement Geoff White at para 18.

³³ See Statement Sascha Cook at para 22.

³⁴ See statement Geoff White at para 17

80. APSA has not provided sufficient evidence that the proposal is necessary. For example, it has not submitted appropriate evidence that commission-only employees, engaged in compliance with the current Award obligations, are earning less than minimum Award rates.³⁵

Conclusion

81. For the reasons outlined above, the FWC should decline to vary the Award to include the proposed substantive changes numbered Items 2, 5 and 15 of the Exposure Draft 2015.

4 October 2016

Service Industry Advisory Group (Legal) Pty Ltd
on behalf of the REIV

³⁵ See statement Sascha Cook at para 24.

IN THE FAIR WORK COMMISSION

MATTER NUMBER: AM2016/6

s.156 – 4 Yearly Review of Modern Awards

Real Estate Industry Award 2010

WITNESS STATEMENT OF GEOFFREY WHITE

Introduction

1. My full name is Geoffrey Robert White and my professional address is 335 Camberwell Road, Camberwell in the State of Victoria.
2. I am the Acting Chief Executive Officer (**Acting CEO**) of the Real Estate Institute of Victoria Limited (**REIV**) and I have held this position since May 2016.
3. I have held various positions at the REIV during my real estate career which commenced in 1984.
4. The positions I have held with the REIV include two periods as Director of the REIV from 1999 to 2007 and October 2014 to May 2016; holding the position of President of the REIV Board in 2003 to 2004 and October 2015 to May 2016; serving in excess of 10 years on the REIV Board; holding various positions on REIV Committees and Councils and holding the position of Member Services Manager of the REIV from February 2008 until December 2011.
5. REIV was established in 1936 and is the peak professional association for the Victorian real estate industry. REIV has over two thousand member real estate agencies in Victoria (**Members**). The Members specialise in all facets of real estate including but not limited to residential sales, commercial and industrial sales, auctions, property management and business broking. Members are from diverse locations throughout Victoria, city, rural and regional areas.

6. In addition to my experience with the REIV, my professional experience in the real estate sector has included a diverse range of roles from my commencement as an agents representative working in sales early in my career; managing and later becoming the co-owner of a small real estate practice, William White & Sons; followed by more senior positions including the Chief Executive Officer of Wilson Pride Franchises Pty Ltd from August 1999 to December 2002 and the Victorian and Tasmanian Real Estate Manager of Elders Limited from January 2012 until September 2014.
7. My experience in the real estate sector, in the various capacities throughout my career to date, has afforded me an understanding of both the technical requirements of sales, property management and support positions within a real estate office (of various sizes), the practical work demands of such roles, balanced with an understanding of the demands and requirements of the employers which operate real estate practices.

Proposed substantive change Item 2: wage increases on work value grounds

8. I have had an opportunity to review the submissions filed by the Registered Real Estate Salespersons' Association (**RRESSA**) dated 27 July 2016 in regard to increasing the minimum award wages set out at Clause 14 of the current Real Estate Industry Award 2010 (**Award**). I note it is submitted by RRESSA that the increase should be on the basis of work value grounds.
9. Based on my experience, as set out above, the fundamentals of the work in the real estate sector have not changed. The key aspects of nurturing the client, listing, selling and auctions remain the same. What has evolved is the manner in which client and prospective client engagement occurs. With the advancement in technology, there are a greater number of 'touch points', being increased capacity to communicate with clients and prospective clients via different methods. However, these communication advancements are not distinct to real estate.

10. RRESSA submits that a work value case to be undertaken by the FWC, if such a review resulted in an increase in award rates, would have minimal impact on employers given the award payments are absorbed by over-Award payments. The industry is driven by employee desire to earn additional remuneration (in excess of the Award rates of pay), via commissions, bonuses and incentive payments. These payments are reward based and increasing the minimum rates under the Award diminishes the impact, and has the capacity to undermine, the incentive and reward based remuneration structure that underpins this industry. Technological developments have assisted this industry by increasing the opportunity for employees to earn greater incentive and reward based remuneration which has been evidenced by the increasing commission rates over time.
11. The qualification required to be an agent's representative (a salesperson or property manager) is three units of competence towards a Certificate IV Course. The REIV is a registered training organisation which administers this training and assesses the competency of participants. There is not a requirement for an employee to have high level qualifications in order to work in a sales or property management capacity within this industry.
12. The matter of having increases to the minimum rates of pay is therefore in my view is not warranted in the circumstances as the nature of the work, level of skill and responsibility in undertaking such work, is adequately remunerated under the current wage arrangements.

Proposed substantive change Item 5: debiting amounts from commission arrangements

13. An important aspect of engaging in a sales agent is the negotiation of individual terms to be incorporated in the employee's contract of employment. The negotiation is based on an expectation that the parties will enter into a mutually beneficial arrangement.

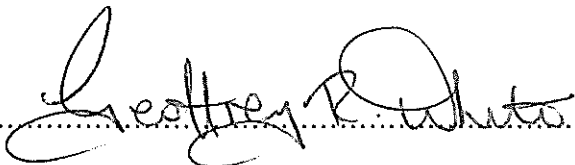
14. Employers and prospective employees, in my experience, enter into an arrangement that meets, or is in excess, of the requirements currently prescribed by the Award including in relation to the manner in which commission arrangements are structured including what matters will be deducted from any commissions payable to the employer in order to derive the employee's net commission entitlement or included in the employee's commission payment. This may include a commission payment that is structured to be inclusive of superannuation.
15. In my view, the proposed variation would unnecessarily impinge on the capacity of an employer and employee to negotiate mutually beneficial over Award employment arrangements as the current arrangements provide flexibility and an appropriate safety net without needlessly curtailing the parties' ability to negotiate appropriate contractual arrangements.

Proposed substantive change Item 15: six monthly top up for Commission only employees

16. On the matter of the Australian Property Services Association (**APSA**) submission, I note the proposal is to impose an obligation on employers to undertake a six monthly review of employee's commission earnings to assess whether such employees have received sufficient remuneration equivalent to the applicable Award rate of pay. In my experience, commission only arrangements are properly reserved for employees that have demonstrated their ability to earn remuneration in excess of the Award minimums and the current protections set out at Clause 16.2 and 16.3 of the Award are sufficient to ensure that it is only those persons with demonstrated capacity are engaged under a commission only arrangement.

17. Employees who are engaged under commission only arrangements are those with a proven track record of earning well in excess of the prescribed Award minima and those persons actively seek to be engaged by employers under the commission only arrangements and negotiate higher commission rates than those that are prescribed under the commission only arrangements under the Award. These are persons with sufficient knowledge and experience that enables them to effectively negotiate beneficial contractual arrangements.
18. The REIV consents to RRESSA's proposed change at Item 13 of the Exposure Draft 2015 to amend the minimum income threshold amount (**MITA**) arrangements. By consent, the parties have varied the MITA provision to enhance the safe guards, namely to amend the assessment period from achieving the MITA in any consecutive 12 month period in the last 3 years immediately preceding entering into a commission only arrangement. Further, the REIV has also consented to RRESSA's application to amend the MITA pre-requisite for commission only employment to 160% of the annualised minimum Award wage for an adult Property Sales Representative. In those circumstances, with the enhanced MITA protection, including the proposal to increase the MITA to 160%, should such an amendment be made to the Award by the Fair Work Commission, there are sufficient protections afforded to employees without the imposition of a further administrative burden as proposed by the APSA variation.

Signed:


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Date: 4/10/16

IN THE FAIR WORK COMMISSION

MATTER NUMBER: AM2016/6

s.156 – 4 Yearly Review of Modern Awards

Real Estate Industry Award 2010

WITNESS STATEMENT OF SASCHA COOK

1. My full name is Sascha Louise McDonald Cook and my professional address is 16/75 Lorimer Street, Southbank in the state of Victoria.
2. I am a Principal Advisor at the Service Industry Advisory Group Pty Ltd (**SIAG**) and have been employed at SIAG since 7 September 1998.
3. SIAG is a private company, founded in 1993, that provides employment, human resources and industrial relations services to employer clients in a range of industries.
4. In my capacity as a Principal Advisor I am a primary contact for the Real Estate Institute of Victoria (**REIV**) member queries.
5. I spend a significant amount of my working time providing advice to REIV members on a broad range of employment matters including human resource management, contracts of employment and disputes arising under the *Fair Work Act 2009* (Cth) (**FW Act**).
6. Since approximately May 2004, SIAG has provided industrial relations advice to REIV employer members.

The Real Estate Industry in Victoria

7. The REIV collects data in regard to the demographics of the Real Estate Industry (**industry**) and its membership.

8. John Mitchell, Membership Manager of REIV, has advised me that the total number of individual (ie. Agents Representatives and Licensed Estate Agents) REIV members is currently 4451.

The Real Estate Industry Award 2010

9. Prior to the operation of the *Real Estate Industry Award 2010 (Award)*, the primary industrial instrument in Victoria was Property and Business Services Industry Sector Minimum Wage Order - Victoria - 1997.
10. Since the Award commenced operation on 1 January 2010 I have not noted any significant increase in award compliance issues.
11. In my dealings with real estate employers since the Award commenced operation, I have noted over this period that they have become more conversant with the Award and its requirements.
12. In the course of advising real estate agencies of their obligations pursuant to the Award, I have provided advice in relation to:
 - a. the drafting of contractual terms to ensure compliance with the Award, including as to commission, bonus and incentive arrangements;
 - b. the appropriate remuneration arrangements for the engagement of existing and prospective employees;
 - c. tailored commission arrangements specific to an employer's over-Award payment structures, including implementing appropriate off-set arrangements in common law contracts to ensure compliance with the Award; and
 - d. employee and employer negotiations as to commission, bonus and incentive arrangements.

13. In my experience, based on the advice provided to SIAG's clients, few employees are engaged solely pursuant to the minimum entitlements provided by the Award. There are a limited number of employers who rely only on the minimum wage, rather they have in place incentive based structures which incorporate those minimum entitlements and are enhanced by above-Award payments which are provided through commissions, bonuses and incentives. Based on my work, I have observed that, when settling contractual arrangements with employers, it is the employees, in their negotiations with their employer, that are seeking increasingly higher commission rates rather than higher minimum wages as the basis for their remuneration. In the case of commission only arrangements, I have noted that employees are commonly engaged in accordance with commission rates that are in excess of the prescribed minima set out in the Award.

Proposed substantive change Item 5: debiting amounts from commission arrangements

14. The Registered Real Estate Salespersons' Association of South Australia (**RRESSA**) has submitted that the Award should be amended to stated that written agreements regarding commission, bonus and incentive arrangements must not contain provisions which permit the deduction, from an entitlement payable to an employee, of vendor authorised advertising and/or marketing expenses, or an employee's entitlement to long service leave or superannuation.

15. The Award currently sets out that commission, bonus or incentive arrangements, paid in addition to the minimum weekly wage, must be evidenced in a written agreement (see clause 15 of the current Award, and clause 9 of the Exposure Draft – Real Estate Industry Award 2015 (**Exposure Draft 2015**)). Whilst it is important that the industrial instrument set out the requirement that the method of calculation or any formula for calculating the amount of commission that may be payable to an employee be evidenced in a written agreement between the employee and employer, it is not a function of the minimum safety net set out in the Award to regulate or curtail over-Award payment arrangements.
16. Commission, bonus or incentive arrangements are over Award matters that are properly negotiated between the employer and employee. The variations sought in relation to permitted deductions from commission payments are not matters that are necessary to achieve the Award’s objective or to achieve a fair and relevant minimum safety net. In essence, the variation sought is to include a preferred, or desired, term in the Award which goes beyond what is necessary to achieve the modern award’s objective, and to the extent applicable, the minimum wages objective.
17. RRESSA’s proposed amendment pertains to matters ordinarily dealt with by the employee and the employer, during the negotiation of commission, bonus and incentive payments, and evidenced in common law contracts. Pursuant to RRESSA’s submission, it is seeking that amendments be made to the Award which unnecessarily seek to prescribe matters that are properly dealt with under separate legislation, including long service leave legislation, superannuation guarantee legislation and the *Fair Work Act 2009* (Cth) (**FW Act**). A common law contract must meet the minimum standards provided by the Award and applicable legislation including those aforementioned.

18. In my experience, the current Award provisions provide sufficient framework within which employers and employees negotiate over-Award payments, evidenced appropriately in common law agreements. The submissions of RRESSA do not provide evidence that suggest there is non-compliance with employers meeting obligations both under the FW Act, applicable long service leave and superannuation legislation.

Proposed substantive change Item 15: six monthly top up for Commission only employees

19. The Australian Property Services Association (**APSA**) has submitted that employers should undertake a six monthly review of an employee's commission earnings to assess whether employees have received sufficient remuneration equivalent to the applicable Award rate of pay, and if not, make a top up payment to reach the minimum Award rate of pay.

20. The REIV has consented to amend the minimum income threshold arrangements (MITA) set out at clause 9.7(b) of the Exposure Draft 2015. The consent variation enhances the MITA safe guards, specifically amending the assessment period for achieving the MITA to be any consecutive 12 month period in the last 3 years preceding entering into a commission only arrangement and simplifying the definition of the MITA to provide greater clarity and certainty. The reduced assessment period provides a more up-to-date review of a prospective commission only employee's ability to earn commission in accordance with the prescribed threshold requirements set out in the Award. The REIV has also consented among other parties, namely the Real Estate Employers' Federation, the Real Estate Employers' Federation of South Australia and the Northern Territory, and the Queensland Real Estate Industrial Organisation of Employers, to RRESSA's application to amend the MITA prerequisite for commission only employment to 160% of the annualised minimum Award wage for an adult Property Sales Representative. The increase in the MITA amount to 160% also represents a higher threshold thereby ensuring that only those with a demonstrated earning capacity, well in excess of the prescribed minimum rates, will be eligible to be engaged pursuant to commission only arrangements set out in the Award.
21. Given the REIV's consent to RRESSA's application, whilst we contend that the current safety net is sufficient, the further variation enhances those protections for commission only employees.
22. In support of its application, APSA relies upon witness statements outlining circumstances which have purportedly related to alleged non-compliance with the commission only provisions in the Award. Alleged non-compliance with Award provisions are matters for which employers are exposed to claims, disputes and prosecution. Those are mechanisms by which alleged non-compliance can be remedied in accordance with the FW Act, and those examples do not provide a proper basis upon which APSA can submit that the current Award provisions are insufficient.

Signed:



A handwritten signature in black ink, appearing to be 'S. G. J.', is positioned above a horizontal dotted line.

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Date: 4 October 2016