



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

10.03 AM, MONDAY, 21 NOVEMBER 2016

PN1

VICE PRESIDENT HATCHER: All right. Can I begin by taking the appearances and we might do this very slowly so we keep track of everyone. So, Mr Clarke?

PN2

MR R CLARKE: Thank you, your Honour. I appear on behalf of the Registered Real Estate Sales Persons Association of South Australia, Clarke, initials R.D., and with me is president Ms Lynn Masson-Forbes. Thank you.

PN3

VICE PRESIDENT HATCHER: Thank you.

PN4

MR R WARREN: If the Commission pleases, I think permission was granted on the last occasion we were here, your Honour. I appear for the Real Estate Employer's Federation and the Queensland Real Estate Industrial Organisation of Employers.

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VICE PRESIDENT HATCHER: And you're with Mr Paterson, are you?

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MR WARREN: I'm with Mr Patterson.

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VICE PRESIDENT HATCHER: All right, thank you.

PN8

MR S FARRELL: Good morning, Vice President, Stephen Farrell from the Chamber of Commerce and Industry in Western Australia representing the Real Estate Employees Federal of Western Australia and I have with me Mr Peter Kuhne.

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

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MR J TRACEY: If the Full Bench pleases, I appear on behalf of the Real Estate Institute of Victoria and with me is Ms Pels, initial O.

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VICE PRESIDENT HATCHER: Right, thank you.

PN12

MS A BISBAL: Good morning. If the Full Bench pleases, Bisbal, initial A, for the Real Estate Employees Federation South Australia and Northern Territory.

PN13

VICE PRESIDENT HATCHER: Thank you.

PN14

MR H LEWOCKI: If the Commission pleases, Lewocki, initial H, from the Australian Property Services Association.

PN15

VICE PRESIDENT HATCHER: Right, thank you. Now, first we'll go to Brisbane. Mr French, you're appearing for the Queensland branch of the Property Services Association. Is that right?

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MR FRENCH: That is correct, your Honour.

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VICE PRESIDENT HATCHER: Yes, thank you. Then in Adelaide Mr Fox, is it?

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MR FOX: That's correct, your Honour. Vice President Registered Real Estate Sales Persons Association of South Australia.

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VICE PRESIDENT HATCHER: Right, thank you. All right, so Mr Clarke, according to the order of witness, which was helpfully provided to us, your organisation is going first, in effect. Is that right?

PN20

MR CLARKE: Yes. The order of appearances of our witnesses, your Honour, will be myself as the first witness. Our second witness will be Mr Fox. Our third witness will be Ms Masson-Forbes. The fourth witness is a Mrs Maria Bell or Raffaella Bell, I think, is the correct Christian name and our last witness will be Mr Tom French.

PN21

VICE PRESIDENT HATCHER: Right.

PN22

MR CLARKE: Now, Mr Warren has raised with me the issue of having witnesses that we are proposing to call still within the precincts of the court, so to speak, whilst other witnesses are giving evidence when they themselves will be giving evidence.

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Now, I don't have a problem, your Honour, with respect to when I'm giving evidence all of our witnesses are excluded for the period of time of that cross-examination, if that's - I mean, that is the usual situation. I appreciate that, although whether there are practical problems in terms of people appearing by video and there are going to be similar problems with the employer witnesses, not so much with the Real Estate Employer's Federation of New South Wales but, with respect, there are three employer witnesses from Adelaide, who I gather will be giving evidence sometime tomorrow. There will be at least one Western Australian and I think another Victorian giving evidence.

PN24

So it's a question as to there's a little bit of management there.

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VICE PRESIDENT HATCHER: All right. Mr Warren is there any particular reason you will need for witnesses to leave the room? I mean there's no issues of credit or anything like that in these matters is there?

PN26

MR WARREN: We're in your Honour's hands, in that the cross-examination will traverse areas probably similar from one witness to the next in some areas and it might be prudent if those persons were not aware of what the previous answers had been. That's the only issue we would raise but if your Honour was of a mind against that, then that's where it sits.

PN27

DEPUTY PRESIDENT ASBURY: All right. Mr Farrell, do you want to say anything about this?

PN28

MR FARRELL: From REEFWA's perspective, sir, I have with me - well, we have submitted written statements from two witnesses, Mr Whiteman and Mr Kuhne. Mr Whiteman, there's no issue. There's no video link to Perth today and he's not present and does not intend to be until required for cross-examination tomorrow. Mr Kuhne, however, is my instructor so from our point of view it is preferable that he remain and be able to assist me and instruct me whilst the proceedings are continuing. However, in terms of depth of feeling of that, sir, it's not a massive deal and whatever decision that the Full Bench makes we're content with.

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VICE PRESIDENT HATCHER: Right, thank you. Mr Warren, we're not going to require the witnesses or the future witnesses to leave the courtroom. We think there's strong logistical reasons why that might be impractical.

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So, Mr Clarke, do you want to say anything in opening before you give your evidence?

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MR CLARKE: I will be very brief, your Honour, because of the fact that evidence-in-chief and submissions from all interested parties are before you and no doubt you've read them all prior to today. So I don't want to go over too much of the grounds that would be well known to you.

PN32

In terms of the most contentious issues, what we say is simply this: with respect to the wage rises sought, not only for the sales staff but for all other classifications within the Real Estate Award, we say section 156 of the Act clearly empowers this Full Bench to work value an industry in the classifications where there's been no work value before.

PN33

The employer argument seems to be, as I put in my submissions to this Bench, somewhat like the laws of the Medes and the Persians. Once something was agreed in 2009, it is immutable.

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Now, the fact of the matter is in 2009 when the modern award was made, it was made without any work value content whatsoever with respect to the classifications that were inserted into the award. Section 156(3) certainly provides this Bench with the opportunity and the authority under that Act and, indeed, in my submissions, at the end of the witnesses, your Honour, a recent case only handed down, I think Friday or Thursday of last week by a Full Bench headed by the President with respect to the firefighting union in Victoria, that where classifications haven't been work value, then that is up to the Bench to decide based on the evidence and the merit of the case that's before them.

PN35

We also had part of our case is with respect to there was no Federal Award prior to this being made in 2009. There were only three state awards, which turned into NAPSAs after 2006: Queensland, New South Wales and South Australia. Their award rates of pay were based simply on the relevant state minimum award wages as at that time. No work value content. Whilst each of those three state awards were able to avail themselves of the structural efficiency principles developed in the late '80s and into the 1990s and had their minimum wages - that is the state minimum wages taken into account - there was no application of the minimum rates adjustment principle.

PN36

That was flagged in 1989 and I've given the reference to your Honours with respect to that major decision. It did flow on to all jurisdictions. They were all state jurisdictions in so far as the real estate people were concerned at that time but no state jurisdiction exercised or sought to exercise any powers with respect to the minimum rates adjustments with respect to those areas. So we say the time is well past and now we're asking for this Full Bench to accord the workers in this industry a proper safety net award based on their work value, their skills, responsibilities and the circumstances in which they perform their work.

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VICE PRESIDENT HATCHER: Mr Clarke, the rates in the modern award, where were they derived from in terms of the three state awards?

PN38

MR CLARKE: As I understand it, the evidence from our witness is basically whichever was the highest. In Queensland they had coverage of property managers, as well as sales persons from 1997. South Australia only had coverage for sales persons, not property managers or strata title, so there was no award coverage for those people in South Australia. New South Wales it was primarily there was property managers, as I understand it, and sales people were covered by their state awards, later to become NAPSAs. When the Federal Award was brought together, it was the highest of each of the categories and, for example, like in South Australia, which had a very low state minimum wage compared to

New South Wales, the increase in the award wage took place over the four year transitional period and we say that, whatever the reasons might have been for that, by the unions not running a work value case in 2009, that's neither here nor there in 2016, when it's undoubtedly these people have not been subject to work value.

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VICE PRESIDENT HATCHER: All right.

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MR CLARKE: In so far as the other contentious issues as outlined by the employers, we simply say this: with respect to the debiting of certain expenses against the commission earned by, particularly, sales people, whether they be wage and allowances paid, which are then debited against their commissions share or commission only, we find that the practice of the industry, certainly in South Australia, of debiting unpaid, authorised vendor advertising and marketing expenses against the employee's share of commission, is not only outrageous but unlawful.

PN41

The vendors, when they enter a sales agency agreement, it's a contract between the vendor and the principal of the business. The sales person signs them up to that sales agency agreement, yes, but they are not a legal party to that contract. They have no rights to sue themselves a defaulting vendor. They have no rights. It is purely at the discretion of the employer as to whether they choose to debit unpaid vendor advertising or not. It is purely the employer's discretion as to whether they'll chase a defaulting vendor or not. They do not need the agreement of the sales person who may have their share of commission debited. They just do it under the terms of the written employment agreement.

PN42

We say, as has been put in our submissions, not only is it not right ethically or in any way shape or form, we say it's just not allowed under the Act.

PN43

VICE PRESIDENT HATCHER: Well, (indistinct) that in South Australia there's a large number of a model WorkChoices era agreements that are still in place?

PN44

MR CLARKE: Yes. Look, you know - well, look, I can't speak about the other states.

PN45

VICE PRESIDENT HATCHER: (Indistinct) South Australia specifically.

PN46

MR CLARKE: In South Australia the typical employment agreement runs to ones that are issued by the Real Estate Employer's Federation, can run up to 27 pages. Your Honour, you presided over a Full Bench hearing, admittedly on an unfair dismissal matter, and it involved a collective agreement but you could strike out the word "collective agreement" and you would find similarly worded individual employment agreements. They are almost incomprehensible, self-

contradictory and very difficult to understand for a lay person. And when I appear before the Industrial Relations Court of South Australia and then go to mediations before trained and experienced lay industrial Commissioners to try and see if we can sort things out, they're as baffled as the employees as to what some of the terms actually mean so we - - -

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VICE PRESIDENT HATCHER: I certainly found it very difficult to understand them.

PN48

MR CLARKE: I beg your pardon?

PN49

VICE PRESIDENT HATCHER: I certainly found it very difficult to understand.

PN50

MR CLARKE: Yes. Yes. You are not alone in that, sir. In so far as long service leave, the debiting of long service leave, traditionally in South Australia the wording has been such as which I've indicated in my submissions, which is you authorise us to debit from your share of the commission, wages, however described, allowances however described, and they've, in the past, treated that as being including long service leave.

PN51

Now, your Honour the Vice President, in that unfair dismissal case, the Full Bench in that case didn't have to make a decision with relation to whether that person had effectively resigned or whether it was terminated by the initiative of the employer. That Full Bench made some noises that perhaps they could debit long service leave. Well, the matter went to trial before Industrial Magistrate Ardlie. Same employee or group of employees and same employer.

PN52

The magistrate, and this decision is under appeal and as at last week, Friday last week, still no decision from Hannon J, who is hearing the appeal, but the magistrate, Ardlie, made it quite clear in his judgment that the description in such agreement, such as wages however described, doesn't encapsulate long service leave payments. Wages is for work performed.

PN53

VICE PRESIDENT HATCHER: I read that description. I thought the problem was they've also used the word entitlements, which was - - -

PN54

MR CLARKE: Yes, and, look, I haven't got it in front of me right at the moment.

PN55

VICE PRESIDENT HATCHER: No.

PN56

MR CLARKE: I'm quite happy to take it up with you in the submissions. But as I understand Magistrate Ardlie's decision it was, look, long service leave is something conferred on employees by virtue of a statute. It's not for your work that you actually do. It's for the time you serve with your employer and, therefore, it doesn't fall within that description.

PN57

We also say it works against the very principle of long service leave. Why do you have it? Like annual leave it's rest and recuperation. It's how society says after you've done 10 years or 15 years, depending on the jurisdiction, you should take time off with pay to refresh and recuperate. We're not machines and I think, Cambridge C, although it was a dissenting judgment which I refer to in my submissions, deals with that pretty well, I think.

PN58

Now, the employers would argue that, look, we pay them the long service leave, we debit against their commission, they still get paid their long service leave but it becomes illusory, absolutely illusory and for a commission only sales person, they just don't take long service leave. That's the evidence and the experience that we have in South Australia, because if you're commission only, you only get fed on the number of sales you make and, therefore, given that it will take you from the signing up a house to the sale to the settlement if all goes well, it's something like eight to ten weeks before you can get your nett pay. So it's just an absolute discouragement with respect to people actually taking advantage of a benefit conferred by the parliament - their respective state parliament.

PN59

VICE PRESIDENT HATCHER: There's a difficulty, isn't there, that we don't have the power to deal with long service leave in modern awards.

PN60

MR CLARKE: No, it's not in the modern award. All we simply say is - - -

PN61

VICE PRESIDENT HATCHER: No, we don't have the power to make long service leave provisions.

PN62

MR CLARKE: But you do have power, we would argue, with respect to what you can debit and what you can't debit.

PN63

VICE PRESIDENT HATCHER: This may come up later but I'm just wondering whether debiting is the right word to describe what is actually going on. No doubt it will be put that it's not, in truth, a debit. It goes to the method of calculation of the commission payment you receive.

PN64

MR CLARKE: Yes, I accept that and that's something which perhaps I certainly will be addressing the Bench further on that. And the last contentious issue is superannuation. The debiting of superannuation. Again, the employers would

argue, well, look, that's built into the commission - the share of commission we offer the sales person and they know it and if it's included it's shown as it gets debited against their commission share. We're not actually asking the employers to pay more. What we're wanting to do is to have the value of their share of the commission far more transparent.

PN65

If you look at - and I'll take you to them in more detail during my submissions - but if you look at the list of debits that could possibly be applied, at least here in South Australia, and I've given examples of them, in just about any other industry I know of, if you work for a bank or a hedge fund operator, you get just basic salary and they're told after you earn X amount of dollars or bring in X amount of sales, we'll pay you a commission over and above it. They don't have this constant debit credit.

PN66

This industry stick to an antediluvian Dickensian approach, in my view, but they're entitled, as the employers, I guess, if that's what they want to do, to do it. It just kills motivation because what they say to the bright young sales person is, "You're going to get 50 per cent. You'll get 50 per cent." But when you take out all the debits, if you get 15 per cent at the end of it, you're lucky. It would be far preferable for the worker to know where they stand and how they can plan their future and plan their expenses if they had a salary and then told, you know, look, until you bring in \$50,000 in earnings sales you don't get anything and thereafter there'll be a progressive increase, if that's what's agreed between the parties. People know where they stand.

PN67

These days you go along and someone thinks they're getting 50 per cent at the end of the month, think, hell, I didn't get anything for that month because I had a debit from the month before that's been carried forward. I've sold three houses but that's been wiped out. But that's a broader issue which we are not arguing before the Full Bench today.

PN68

But we're just starting the first steps, I guess, and superannuation, effectively the rate we say that a waged salesperson was receiving back in the '90s was around 45 to 50 percent of the employer's commissioner. Superannuation was then around 3 per cent. It's now 9.5 per cent, going up to 12 per cent, but the commission share offered to employees is still in the order of 45 to 50 per cent if you are a waged employee.

PN69

So, in effect, their so called over award payment which is not an over award payment - it doesn't meet the definition of an over award payment, it's just commission - is constantly being eroded. Now, not saying that that's unlawful but what it does to - it's not transparent to the employees and the industry as to what the true value of their commission share actually is.

PN70

Now, the last part, we would say, I think, of the contention is the Real Estate Employers Federation view with respect to the Canavan decision. Our view is simply this: the Canavan decision is good law. Our award, as it's currently constituted, breaches that decision in terms of advance payments for certain NES standards and we say that that shouldn't happen; that, with respect to commission only sales people, they should be paid as and when they take annual leave or when they're sick and that what has been proposed, as I understand it, by REEF, in terms of an alternate description, the grandparent, so to speak, are that current commission only employees so that - if I understand it correctly, the minimum commission for a commission only sales person under the award is 35 per cent and let's say they get paid 50 per cent as part of a commission only deal, that any excess between the 35 per cent and whatever commission rate is agreed to, any excess above that can be debited from future commission earnings.

PN71

I just see the whole thing as being unnecessarily complicated. It requires a reconciliation exercise undertaken by an employer every time an employee takes leave or when they terminate, to work out whether or not they have correctly applied the award and they're dealing with two groups of employees. One group that is employed after any order of this Commission, bringing in the Canavan decision into effect and another group that's grandparented. Most of these employers, your Honours, have fewer than 15 employees.

PN72

Looking at - I'm just speaking particularly here in South Australia - if you're looking at the employment agreements of 22, 29 pages, I don't think anyone is going to understand it. There'll be more breaches, more problems with underpayment of wages. The simple fact is all they have to do is what I know the Employers Federation are doing in South Australia, is go down to their employees, get an addendum to their employment agreement and say, well, you'll get paid your annual leave and we'll debit it against future commission earnings.

PN73

Now, some commission only staff may kick up about that. Don't doubt it but that will start the conversation. But in so far as running a two track system with so many small employers scattered throughout the length and breadth of this country, where you can't even get an understanding by the Fair Work Ombudsman as to what the current award does with respect to the MIT, the minimum income threshold, should be how you describe that. I'm not saying it's their problem. I think it was the problem of the parties originally when they drew up the award clause. You can't make it overly complicated and so we simply say that that grandparenting position by REEF, effectively is overly complicated and will lead to more disputation rather than less.

PN74

So unless any members of the Bench have any further queries of me at this stage, I'll put myself in the box.

PN75

VICE PRESIDENT HATCHER: I might just see whether any other party wants to make an opening submission at this stage of the proceedings or leave it until later.

PN76

MR CLARKE: Right.

PN77

VICE PRESIDENT HATCHER: Mr Warren?

PN78

MR WARREN: We filed written submissions. Your Honour, we'll be addressing those when the evidence is concluded.

PN79

VICE PRESIDENT HATCHER: Right. Does any other party want to make an opening submission now or should we go straight into the evidence?

PN80

Right, well, that offer has been declined. All right, Mr Clarke, come forward. Thank you.

PN81

MR CLARKE: Thank you. Just should I bring my own file, sir, or - - -

PN82

VICE PRESIDENT HATCHER: Yes, you may.

PN83

MR CLARKE: Thank you.

PN84

THE ASSOCIATE: Face the Bench and please state your full name and address?

PN85

MR CLARKE: Ralph Desmond Clarke, (address supplied).

<RALPH DESMOND CLARKE, AFFIRMED

[10.33 AM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [10.33 AM]

PN86

VICE PRESIDENT HATCHER: All right. Well, so Mr Clarke, you have a copy of your witness statement with you?---I do.

PN87

And that's dated 25 July 2016?---Yes, sure, I'll just - yes, correct.

PN88

Yes, and it has a number of annexures attached to it?---Correct.

RALPH DESMOND CLARKE

XN VICE PRESIDENT HATCHER

PN89

And do you say the contents of that witness statement are true and correct to the best of your knowledge and belief?---I do, sir.

PN90

All right, so I'll mark that, unless there's any objections, mark that witness statement as exhibit - - -

PN91

MR WARREN: Well, can I simply say your Honour, paragraph 8 of the statement raises and asserts a number of matters with respect to either proposed applications for, one assumes, breach of award or underpayment of wages and other matters, where it's said agreement has been reached and so on and so forth but no details have been given. So to the extent that paragraph 8 traverse areas which in many regards is opinion, in other regards raises issues saying that certain employers have been pursued and agreement has been reached following that pursuit, yet no details are given of either the claim that's been brought before the court or any court orders, we note the deficiency in the evidence and the Commission, no doubt, will put appropriate weight on those.

PN92

VICE PRESIDENT HATCHER: All right. I note those comments. The statement of Ralph Desmond Clarke dated 25 July 2015 will be marked exhibit 1.

**EXHIBIT #1 STATEMENT OF RALPH DESMOND CLARKE
DATED 25/07/2016**

PN93

VICE PRESIDENT HATCHER: Mr Warren?

PN94

MR WARREN: Yes, thank you.

CROSS-EXAMINATION BY MR WARREN

[10.35 AM]

PN95

MR WARREN: Mr Clarke, you say in paragraph 6, you there go to the property sales persons and the classification and you've related it to tradesperson?---Yes.

PN96

You accept, don't you, and the paragraphs are not numbered but it's the third paragraph in paragraph numbered 6, that you say a summary of those requirements are attached, and you note the National Licensing Steering Committee study. You accept, don't you, that the South Australian requirements for a person to sell real estate, to become a real estate sales person, are significantly higher than the requirements to sell real estate either in Victoria, South Australia and Queensland, for example?---Certainly the - sorry.

PN97

Yes, go on, please.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN98

VICE PRESIDENT HATCHER: Did you mean New South Wales and Queensland?

PN99

MR WARREN: Sorry, I did, your Honour. Did I - - -

PN100

VICE PRESIDENT HATCHER: You said South Australia.

PN101

MR WARREN: Sorry, New South Wales, Victoria and Queensland?---There's no doubt that there's a higher level set in South Australia with respect to the qualifications required to be a sales person.

PN102

And, indeed, that qualification, in a formal sense, requires some 17 units in South Australia and some three units in Victoria and four units in New South Wales and I think it's seven units in Queensland. That's right, isn't it? So the formal qualifications are significantly higher in South Australia?---Yes. They are but the skills attached to catching and killing your own in terms of getting listings and selling are universal (indistinct).

PN103

Have you ever worked in the real estate industry in New South Wales? Have you ever worked in the real estate industry in New South Wales?---No.

PN104

Ever worked in the real estate industry in Victoria?---No.

PN105

Queensland?---No.

PN106

Can I just reiterate, whilst you say you readily accept don't you, that the formal qualifications to sell real estate - not to be a licensed real estate salesman but just to sell real estate in New South Wales and Victoria - is significantly lower than in South Australia?---They're less, yes.

PN107

Yes. And, indeed, you know, don't you, that indeed the rates of pay, and I think you've already said this in your opening, though I'll just reiterate it, the rates of pay for real estate sales persons in the modern award and, indeed, property managers, et cetera, all rates of pay were taken from the highest rates applicable in whatever state it was throughout Australia and that was then transferred into the modern award, wasn't it?---That's my understanding, yes.

PN108

You said in your opening, and I'm just addressing paragraph 7 of your statement, please, Mr Clarke?---Yes.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN109

You talk of your, in paragraph 7, your experiences in suing employers in the industry for underpayment of wages, commissions and, in my view, unlawful deductions. Did I hear you correctly in your opening that you said you're not suggesting that it's unlawful?---No, some - some elements may not be.

PN110

VICE PRESIDENT HATCHER: Sorry, just hold on. Suggesting what's not unlawful?

PN111

MR WARREN: Well, the deductions from sales persons' commissions that he refers to in paragraph number 7. He puts there:

PN112

"On behalf of RRESA I spend a considerable portion of my time before the Industrial Relations Court of South Australian suing employers in the industry for underpayment of wages, commissions and, in my view, unlawful deductions from sales persons' commission."

PN113

MR WARREN: This, your Honour, goes to - - -

PN114

VICE PRESIDENT HATCHER: Yes, I understand but what's the question again?

PN115

MR WARREN: In your opening you were addressing, if I heard you correctly, you were addressing employers deducting certain things from the payment of commission. Certain allowances?---Yes.

PN116

And certain other payments?---I'm not saying they are unlawful in terms of wages and allowances.

PN117

You accept, don't you, that in accordance with the award, a person who is a sales person, for example, must be paid the wage rate as prescribed in the award and any other allowances that are applicable to their engagement?---Yes. Correct.

PN118

And that's the obligation of an employer who engages a sales person?---Yes.

PN119

And any other payment above that is, of necessity, an over award payment?---Well, commission above the award, yes.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN120

It is an over award payment, isn't it?---Well, it depends. Like I've used as - I've myself described it as over award. I think it's more accurately describe as

commission in the terms of the - if you look at the actual definition in the Macquarie dictionary and employment law.

PN121

If you just return to my question?---Yes.

PN122

An employer is obliged to pay base rate of pay?---Yes.

PN123

As prescribed in the award?---That's right.

PN124

And any other allowances relevant to the employment of that person?---Yes.

PN125

Prescribed in the award?---Yes.

PN126

And any payment that is made above that is an over award payment?---In effect, yes.

PN127

And - - -

PN128

VICE PRESIDENT HATCHER: Mr Warren, I think this issue arose in a previous Full Bench I was on, where there was an issue about whether commission payments under commission only agreements were enforceable as award entitlements. Do you know what the position of that is? That is, what do you say about that? That is, if you have a commission only agreement under the award, is it a breach of the award not to pay in accordance with the agreement?

PN129

MR FARRELL: Excuse me, Vice President. Forgive me for the interruption. What I believe you're referring to was the hearing in relation to the schedule E transitional matters, where the Full Bench raised this issue as to whether the enforcement of the entitlement for commission could be enforced under the award. If you remember, there were submissions by Mr Dalton, who was representing the REIV at the time, who suggested that that was something that should be traversed during this hearing, during this process, in terms of the review. I don't remember there being a decision or an opinion expressed by the Full Bench.

PN130

VICE PRESIDENT HATCHER: No, the issue came up?

PN131

MR FARRELL: Yes, sir. Yes.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN132

VICE PRESIDENT HATCHER: I'm only raising it because if, in fact, commission arrangements are enforceable as provisions of the award, then it might not be accurate to describe them as over award payments but that depends on how they're characterised under the award.

PN133

MR WARREN: With respect to commission only employees.

PN134

VICE PRESIDENT HATCHER: Yes.

PN135

MR WARREN: And, indeed, my questions were directed not to commission only employees. Does the Commission have - - -

PN136

VICE PRESIDENT HATCHER: I'm not sure that was made clear in the questioning but.

PN137

MR WARREN: I will address that, your Honour, but can I just take the Commission, on the Commission's question, does the Commission have the exposure draft award?

PN138

VICE PRESIDENT HATCHER: Yes.

PN139

MR WARREN: Could I just indicate at the outside that the notation at the top of the first page which says "Changes agreed by parties", et cetera, there is an error in that, just for the Commission's attention. It says that, "Changes agreed by parties appear in red text." That's wrong. It's actually green text and the red is - - -

PN140

VICE PRESIDENT HATCHER: Mine's not in colour anyway so - - -

PN141

MR WARREN: Uncoloured, well, that makes it difficult. It was ordered by the Real Estate Employer's Federation on 24 June. Does your Honour have that?

PN142

VICE PRESIDENT HATCHER: There's another version.

PN143

MR WARREN: There's been a number of versions, your Honour.

PN144

VICE PRESIDENT HATCHER: All right.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN145

MR WARREN: One was attached to a letter on 24 June.

PN146

VICE PRESIDENT HATCHER: Yes, I have that. Yes, all right.

PN147

MR WARREN: Your Honour will go - - -

PN148

VICE PRESIDENT HATCHER: So that should say, "Green text", should it?

PN149

MR WARREN: Yes, green is agreed. Red is not agreed and then they're struck out.

PN150

VICE PRESIDENT HATCHER: Yes, all right.

PN151

MR WARREN: Now, if I could just take you in that document, if your Honour has that document there, page 17, bottom right-hand corner of that document, there's a minimum commission only rate.

PN152

VICE PRESIDENT HATCHER: Yes.

PN153

MR WARREN: It's 35 per cent of the employer's net commission. That is the situation that applies to commission only sales persons and there are other provisions. If your Honour turns back a page, there's a minimum income threshold, which is the subject of some debate in these proceedings. Your Honour will see the minimum income threshold, which is in green, which is agreed to by all parties but for, your Honour will see, there is a gross salary of at least - and it's written in red - \$57,948.80. That amount of money is not agreed by REEF Western Australia but the clause is agreed.

PN154

VICE PRESIDENT HATCHER: I think what I was thinking of, perhaps imperfectly, was agreements entered into under what is clause 9.2 in the exposure draft.

PN155

MR WARREN: Yes, your Honour.

PN156

VICE PRESIDENT HATCHER: That is whether a failure to comply with such an agreement would constitute a breach of the award. You don't have to answer this now, Mr Warren, but I only raise it in the context of describing these payments as over awards.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN157

MR WARREN: I've put to this witness that everything other than the rates and the allowances as prescribed in the award and whether those allowances are payable or not will depend on the person's engagement, of course. I put to this witness that that is the base amount of money, in terms of the award, that the employer is obliged to pay a real estate sales person excluding - I note your Honour's comment with respect to commission only persons and I don't direct my question to those persons.

PN158

VICE PRESIDENT HATCHER: But 9.2 is not concerned with commission only, is it?

PN159

MR WARREN: No, it is not.

PN160

VICE PRESIDENT HATCHER: The question was whether you've got to put the agreement in writing, whether if an employer contravenes that agreement, whether that constitutes a breach of the award. Now, again, that's a complicated question so you don't have to - - -

PN161

MR WARREN: Could I simply say this: if the agreement is breached, it's very much a question of how it's breached and, in general, the agreement expresses how an overall payment will be calculated, among other things and if that over award payment is so calculated, then we say that is an over award payment and is not a matter for the award. We'll expand on that in our submissions, your Honour.

PN162

VICE PRESIDENT HATCHER: All right.

PN163

MR WARREN: But that's the general thrust of the position that my clients have.

PN164

Mr Clarke back to you?---Yes, right.

PN165

VICE PRESIDENT HATCHER: Anyway, those last series of questions and answers were not concerned with commission only sales persons. Is that clear?---Yes.

PN166

MR WARREN: You understand that, Mr Clarke?---Yes, I do.

PN167

And you stand by your answers you've given?---Yes.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN168

Thank you. You see, Mr Clarke, and I'm struggling with paragraph numbers here. In paragraph numbered 7 - - - ?---Yes.

PN169

- - - it's under subparagraph (iii). It's on page 80?---Yes.

PN170

Top right-hand corner of your statement about halfway down the page you pass a comment with respect to commission only remuneration. You understand, don't you, that if an employer employs a sales person who, in the current award situation, has had less than 12 months service as a sales person, then that would be a breach of the award, wouldn't it?---Yes.

PN171

A breach of the current award?---Yes.

PN172

Indeed, in paragraph 8 on page 81, about halfway down - - - ?---Sorry, page?

PN173

Sorry, I understand the Commission doesn't have the top right-hand corner. It's page 9 at the bottom for the Commission?---Yes.

PN174

Sorry, I've got a differently marked up brief here. More assisted. About halfway down you said, "I've repeatedly pointed out to employers that I regard their actions as being unlawful." Well, that's your opinion but that hasn't been upheld by the courts, has it?---No, I keep taking them to court and they settle before I can get a bloody decision.

PN175

Well, speaking of the decisions, you're aware, aren't you, of the judgment of Industrial Magistrate Lieschke. Is that how it's pronounced?---Yes.

PN176

In Clarke, your namesake, Colin Clarke v Playford Real Estate?---Yes, I do. I remember it very well.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN177

That the learned industrial magistrate rejected the argument that the provisions that you, indeed, describe was in any way in breach of sections 324 or 326 of the Act?---Yes, that was on an entirely different exercise. That was a claim by Mr Clarke, Mr Colin Clarke to be precise, that the award - clause 15.1 says you'll be paid the minimum wage and, in addition, whatever portion of the employer's share of the commission. The argument Mr Colin Clarke was putting was that that meant you could not debit wages and car - sorry, his weekly wage that he was being paid against his share of the commission and the argument was used about sections 324 and 326 and Magistrate Lieschke, correctly as you pointed out, said, no, that as long as he's getting his minimum wage and his minimum car allowance, if the parties agree that after they've paid those amounts of money,

they can be debited against any share of commission, that's perfectly lawful. The advertising - unpaid authorised vendor advertising - never arose in that case. It was about the wages and allowances and the meaning of "in addition to."

PN178

But you'll agree, won't you, that the industrial magistrate found that sections 324 and 326 had no work to do once the person had been paid their minimum rate and their minimum allowances?---No, I don't accept that, because that was the only argument that was there. There was no argument of an advertising cost, for example.

PN179

I see. I see.

PN180

VICE PRESIDENT HATCHER: Well, can you give us the citation of that decision?

PN181

MR WARREN: Yes, I'll be referring to it in my submissions also, your Honour, but we've got copies of it we can hand up now.

PN182

Now, Mr Clarke, you say - I'm now speaking in page number 10. It's within paragraph number 8 and it's halfway down the page?---Yes.

PN183

And you refer to the matter of H or your attachment H?---Yes.

PN184

Your attachment H is really, it appears to be, some method of calculation of commission. Is that right?---Yes. This particular - - -

PN185

Just address my question, Mr Clarke?---Yes.

PN186

There appears to be though a two page - - - ?---Yes, it was an addendum.

PN187

A two page document?---It was an addendum to his original contract. I can explain why, if you like.

PN188

It's quite all right, Mr Clarke. You don't there include, do you, any claim that was made with respect to that? There's no formal claim there? It's just a document?---This is a document that was attached upon which the employer relied upon to withhold certain payments.

*** RALPH DESMOND CLARKE

XXN MR WARREN

PN189

But you haven't attached the original document to which that was attached?---No, I didn't have it. No.

PN190

No?---Just (indistinct) the original document had no authority to debit advertised - vendor advertising. This addendum provided for it.

PN191

No. Thank you, Mr Clarke.

PN192

VICE PRESIDENT HATCHER: Mr Farrell, do you want to ask the witness some questions?

PN193

MR FARRELL: Thank you, Vice President.

CROSS-EXAMINATION BY MR FARRELL

[10.54 AM]

PN194

Mr Clarke, I'm going to refer to you to clause 15.1. That's the current numbering of the award?---I don't have it in front of me but I know it pretty well, so I should be able to remember.

PN195

Okay. If I read it to you, you'd be able to say to me whether that was correct or not?---Yes. Yes. Yes.

PN196

"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."

PN197

?---Yes, I'm familiar with that.

PN198

You would agree that that's the clause?---Yes.

PN199

Sir, you would agree then, that where the employer and the employee don't agree, that there is no payment that an employee is entitled to for commission for the sale of the property?---Yes, if there's no agreement to share the employer's commission then that's it. It's just straight wage and allowances.

*** RALPH DESMOND CLARKE

XXN MR FARRELL

PN200

Thank you, sir. And obviously I'm referring to employees who haven't qualified or have not agreed to be engaged on a commission only arrangement?---So that's 15(1) you were referring to?

PN201

I was referring to 15?---That's where you are a wage person?

PN202

Correct, sir. Yes?---Right, yes.

PN203

Yes. So you have that understanding?---Yes.

PN204

Yes, thank you, sir. What is the minimum commission that's payable for a commission only employee?---35 per cent under the award.

PN205

Of the gross commission, sir?---Well, the employer's - yes, ex-GST, yes.

PN206

Certainly. And a commission only salesperson who is engaged on that basis cannot have any, what you refer to as debits or expenses that are taken from that commission. Would you agree, sir?---Well, I - well, it's only 35 per cent, I agree.

PN207

Yes, thank you. That's all I have for the Full Bench.

PN208

VICE PRESIDENT HATCHER: Right. Does any other person want to ask any questions of this witness? No? No.

RE-EXAMINATION BY VICE PRESIDENT HATCHER

[10.56 AM]

PN209

Well, I might give you the opportunity for the re-examination. If there's any matters that was raised in cross-examination that you want to expand upon or explain, then you may do so?---Well, if I may, Mr Warren referred to - I think it was where I make a statement, and I just can't find it directly, in terms of a number of cases that I've taken to the Industrial Court and give certain examples without naming them.

PN210

DEPUTY PRESIDENT ASBURY: Paragraph 8?---Pardon?

PN211

Paragraph 8?---About advertising and - - -

*** RALPH DESMOND CLARKE

RXN VICE PRESIDENT HATCHER

PN212

Of your statement. It's in paragraph 8 of your statement, yes?---Sorry. Thank you. My fault for not - yes, that's right. Well, look, I'm happy to recite them chapter and verse and name the employers. The only reason I haven't done it or the employee is because those matters were settled before going to trial. I thought, well, to name them in a public document might be unfair but if - and, in fact, Ms Bisbal would know from her organisation, because I largely deal with the Real Estate Employers Federation and we are regularly in communication about these particular problems that are members - some of them who are members of her association, but if there's going to be any doubt over it, I can - I can give you a number of examples right now that I'm dealing with. In fact, I'm dealing with the same employer, David Cook formerly of Ray White in Gawler, the fourth occasion in two years I've had to take him to court for the non-payment of commissions or withholding a share of commission for unpaid vendor authorised advertising. The last time it went to court before Industrial Magistrate Ardlie, he collapsed halfway through when he gave in because the magistrate gave him some very stern advice, so it was settled. So I'm happy to go through them chapter and verse.

PN213

VICE PRESIDENT HATCHER: Well, you weren't asked any questions about those matters, so I think we can take them as they are?---No, right.

PN214

Anything else?---No.

PN215

All right. Thank you for your evidence. You're excused and you can return to the Bar table.

<THE WITNESS WITHDREW

[10.59 AM]

PN216

VICE PRESIDENT HATCHER: So you're going to call Mr Fox next, Mr Clarke?

PN217

MR CLARKE: Yes, if I may.

PN218

VICE PRESIDENT HATCHER: All right. Mr Fox, can you step into the witness box, please. Just remain standing and we'll administer the affirmation from Sydney.

PN219

THE ASSOCIATE: Hi, Mr Fox.

PN220

MR FOX: The affirmation?

RALPH DESMOND CLARKE

RXN VICE PRESIDENT HATCHER

PN221

THE ASSOCIATE: Yes, please. Could you please state your full name and address?

PN222

MR FOX: Nathan Fox, (address supplied).

<NATHAN FOX, AFFIRMED

[11.00 AM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [11.00 AM]

PN223

MR CLARKE: Your Honour, I'm just wondering about the volume.

PN224

VICE PRESIDENT HATCHER: Yes, can we try and turn that up, Mr Clarke.

PN225

Mr Fox do you have a copy of your statement of evidence with you?---I do indeed.

PN226

And that's dated 25 July 2016 with a number of annexures?---Correct.

PN227

And do you say that the statement is true and correct to the best of your knowledge and belief?---I do.

PN228

All right. Well, unless there's any objection, the statement of Nathan Fox dated 25 July 2016 will be marked exhibit 2.

EXHIBIT #2 STATEMENT OF NATHAN FOX DATED 25/07/2016

PN229

VICE PRESIDENT HATCHER: All right, Mr Warren?

CROSS-EXAMINATION BY MR WARREN

[11.00 AM]

PN230

MR WARREN: Mr Fox, my name's Ralph Warren. I'm going to ask you some questions on behalf of the associations I represent. Your curriculum vitae is attached as annexure A to your statement. Do you have it there?---Let me just get that. Okay.

PN231

Now, you indicate, a bit over halfway down the first page or it is only one page, that you joined Rob Younger Real Estate. You were employed by Rob Younger Real Estate, weren't you?---Correct.

*** NATHAN FOX

XN VICE PRESIDENT HATCHER

*** NATHAN FOX

XXN MR WARREN

PN232

And can I suggest to you that Mr Younger was actually the manager of the practice and you were employed just as a sales representative?---Correct.

PN233

Now, in paragraph 5 of your statement, which is exhibit 2 in these proceedings, you give opinion - - - ?---I'm sorry, you'll have to speak up. I can't hear you from here.

PN234

Can you hear me now?---A little clearer, yes.

PN235

VICE PRESIDENT HATCHER: See if you can point that microphone closer to the lectern, Mr Warren?

PN236

MR WARREN: I'll see how we go. I'll move it round this side, if I can.

PN237

VICE PRESIDENT HATCHER: Mr Fox, if you can't hear any question, please say so before you try to answer it?---I will.

PN238

MR WARREN: Can you hear me now?---Yes.

PN239

Is that better?---It is.

PN240

Thank you, Mr Fox. Now, Mr Fox, if I could take you to paragraph 5 of your statement. You there give expression to what you consider to be the education and skills required for a commercial property sales person. Do you see that?---I do.

PN241

Do you have a four year degree in valuation?---No, I don't, sir, but I have an 18 month degree in the certificate of commercial industrial practice Australasia.

PN242

You there speak of persons, either the experience or qualifications of a valuer, who is required to successfully complete a four year degree. I'm just questioning, you haven't got a degree. You've got something else, have you?---I've got a - a commercial industrial certificate recognised by both New Zealand and Australia to operate within the commercial industrial field and that was through the real estate institute via a TAFE exercise some 18 months ago - sorry, for 18 months some 25 years ago.

PN243

So was that in New Zealand or in South Australia?---That was here in Adelaide.

*** NATHAN FOX

XXN MR WARREN

PN244

Fine, thank you. Now, you appear to highlight throughout paragraph 5 of your statement your position certainly with respect to the first three or four dot points, the significance or the differences between a person engaged as a commercial sales person to a person engaged as a residential property sales person? And is that correct?---Correct.

PN245

And you, indeed, were a, or still are a, commercial sales person?---No, I work right across the board in both residential and commercial industrial.

PN246

But you see that there is significant differences, as I perceive your statement, between the skills required for a commercial and those required for a residential sales person?---That is correct.

PN247

Now, furthermore, are you aware of the qualifications required of a sales person in New South Wales and Victoria?---I am.

PN248

Right. And, indeed, you note in the dot point at the middle of the page on page 2 of your statement that a sales person also needs to have an understanding of contract law. It's a fact, isn't it, that sales persons in South Australia are permitted to draw contracts for the sales of land?---It's a fact that we do 99.9 per cent of the transaction, including the contract and we simply hand the file to a conveyancer to settle.

PN249

And you know, don't you or do you, that in New South Wales and Victoria the sales person is not qualified and is not permitted to draw the contracts for the sale of property? Do you know that?---I'm not privy to that but my understanding is that they require a solicitor to finalise the transaction.

PN250

I'm suggesting to you that the qualifications required for a sales person in South Australia is far in excess of the qualifications required for a sales person in New South Wales, Victoria and Queensland. You would agree with that, wouldn't you?---Yes, I agree with that.

PN251

You were, indeed, part of RESA's negotiators when the modern award was made?---I was involved early in the piece until we had a personal tragedy.

PN252

I just note in paragraph 8, the last paragraph in paragraph 8 is you say, "I took part in the negotiations with respect to the making of a Real Estate Modern Award in 2009"?---2001 I - - -

*** NATHAN FOX

XXN MR WARREN

PN253

No?--- - - - was intricately involved in the South Australian one and I was part of the - the latter one.

PN254

And you know, don't you, that the 2009 Modern Award was made by consent?---Yes, I do and unfortunately I wasn't part of that latter outcome.

PN255

I see. Now, in paragraph 9 you give some approbation to a statement that you have read of Ms Masson-Forbes. She's yet to give evidence in these proceedings and you readily acknowledge don't you that you have never worked as either a property manager or a strata title manager?---Correct.

PN256

Are you currently employed, Mr Fox?---I am.

PN257

Employed as opposed to being an independent contractor?---I am employed under the state award or the national award, if you like.

PN258

I see. And the basis of your payment is it based on commission only or is based on some other form of calculation?---No, no, it's - it's the standard structure of \$18.77 per hour plus commission.

PN259

Plus commission. Do you get the commission in total or is there a debit credit arrangement entered into?---No, that's - that's adjusted after, obviously, the wage and other allowances are taken away.

PN260

And that's something you've agreed to?---That is a structure that the majority of sales people in South Australia are employed on, yes.

PN261

And so do I take it that whilst your evidence is it's the majority of sales persons, that you have agreed to it?---Yes.

PN262

Now, you refer to a number of various tasks in paragraph numbered 5. Do you have a copy of the current award with you in the witness box, Mr Fox?---I don't. I have in - in notes but - not to hand.

PN263

Would you accept when I put to you, that there has been consent as to the description of what the indicative tasks of a property sales representative are, in an exposure draft for the new award?---I agree there was consent when the new award was struck, yes.

*** NATHAN FOX

XXN MR WARREN

PN264

And I just - - -

PN265

VICE PRESIDENT HATCHER: Sorry, I think you're at cross-purposes, Mr Warren.

PN266

MR WARREN: You are aware, aren't you, Mr Fox, that there has been an exposure draft largely agreed to between all of the parties to the award, both from the unions' perspective and the employers' perspective and that exposure draft is in the hands of the Commission. Are you aware of that?---Yes.

PN267

VICE PRESIDENT HATCHER: So are you talking about schedule A, Mr Warren, are you?

PN268

MR WARREN: I am talking about schedule A, your Honour. I was just going to take the witness there but he - - -

PN269

Do you have a copy of that exposure draft with you?---Not in the witness box, no.

PN270

Are you familiar with it?---I have some idea of what it contains, yes.

PN271

Have you looked at and given consideration to schedule A to that, which is the definition of classifications in the award?---Briefly, yes.

PN272

Are you aware of, or have you taken account of, the indicative tasks for a property sales representative contained within the exposure draft?---Yes.

PN273

And you would therefore be aware, wouldn't you, that whilst those indicative tasks are agreed between the parties, including the entity of which you are a vice president, that you have indicated, in your paragraph numbered 5, matters that aren't contained within those indicative tasks. Are you aware of that?---I am aware that the skill set for negotiating in property sales has changed significantly since the new award some four of five years ago.

PN274

And you understand, don't you, that the association of which you are the vice president has agreed to the indicative tasks as found within schedule A to the exposure draft?---I understand they were a result of negotiations, yes.

PN275

VICE PRESIDENT HATCHER: I think you're at cross-purposes. I think the witness is referring to the modern award in his answers.

*** NATHAN FOX

XXN MR WARREN

PN276

MR WARREN: I'm sorry, your Honour?

PN277

VICE PRESIDENT HATCHER: I think the witness is referring to the original modern award in his answers, not the exposure draft.

PN278

MR WARREN: Well, indeed the indicative tasks haven't changed, your Honour.

PN279

VICE PRESIDENT HATCHER: Well, perhaps the - - -

PN280

MR WARREN: So if he is referring to the - well, I thought I clearly asked the question whether he had an exposure draft or whether he'd seen the exposure draft, your Honour.

PN281

VICE PRESIDENT HATCHER: Well, people assume that everyone knows what those types of terminology mean. All right.

PN282

MR WARREN: Okay. Mr Fox, have you seen a document entitled, "Exposure draft", which has been agreed between the parties as indicated in that document?---I haven't specifically seen that document.

PN283

Thank you?--I understand there is one there, yes.

PN284

All right. In that case, Mr Fox, have you seen the modern award?---I have.

PN285

The current modern award?---Yes.

PN286

And you've seen the schedule attached to that modern award, which describes indicative tasks of property sales representatives?---Yes.

PN287

And you're aware, aren't you, that the agreed position of the association you are vice president of has agreed to repeat those indicative tasks in the next award?---I understand negotiations have taken place and we've agreed to do that, yes.

PN288

Well, when you say you've agreed to do that, you've agreed to do what: negotiate or the indicative tasks?---No, well, whatever the document has said, I - I'm not privy to it. I've got 97,000 documents. The understanding is that what has been agreed is read. It's been tabled.

*** NATHAN FOX

XXN MR WARREN

PN289

When you say "read", do you mean R-e-a-d or R-e-d? It's relevant to these proceedings?

PN290

VICE PRESIDENT HATCHER: I thought it was green.

PN291

MR WARREN: Red. Red. Yes, it depends on where you (indistinct).

PN292

VICE PRESIDENT HATCHER: Weren't the agreed ones green, you just said?

PN293

MR WARREN: Yes, I know but the document says they're red and I was just trying to classify what he meant by red.

PN294

VICE PRESIDENT HATCHER: Well, Mr Warren, look, I'm not sure how far this can be taken without having the document in front of the witness.

PN295

MR WARREN: And that's the problem with having people in here.

PN296

VICE PRESIDENT HATCHER: Well, there was a direction about that, as you'll recall.

PN297

MR WARREN: Yes, and I understand that, your Honour, and I'm asking that witness whether he's got those documents and whether he's aware of those documents.

PN298

Mr Fox, can I suggest to you that the evidence you give in paragraph 5 goes far beyond the indicative tasks as agreed by the association, of which you're vice president, to be incorporated into the new award?---That is not correct. In South Australia the work required to be carried out is as per my statement and certainly it's head and shoulders above every other state.

PN299

When you say head and shoulders above every other state, you are putting to this Commission that the work required of a commercial or industrial property sales person in South Australia is significantly more complex than that required in other states?---I'm putting to the Commission that the work required in residential project work, some residential housing work and certainly commercial and industrial practice is significantly higher than any other state.

PN300

Thank you, Mr Fox.

*** NATHAN FOX

XXN MR WARREN

PN301

VICE PRESIDENT HATCHER: All right. Mr Farrell?

CROSS-EXAMINATION BY MR FARRELL

[11.18 AM]

PN302

MR FARRELL: Mr Fox, my name is Stephen Farrell and I'm representing the Real Estate Employees Federation of Australia?---Stephen, you'll have to speak up, I'm sorry. I'm not sure what's going on.

PN303

VICE PRESIDENT HATCHER: Yes, just hold on, Mr Fox. So Mr Farrell from the Western Australia Real Estate Employees Federation wants to ask some questions. So if you can't hear him, please say so?---Certainly. He will need to use another mic, because I can just hear you.

PN304

All right, Mr Farrell. We'll just get Mr Farrell to ask the question and then we'll see if you can hear it.

PN305

MR FARRELL: Mr Fox, can you refer to your paragraph 10 of your statement? Can you hear me now, sir?---Yes.

PN306

Thank you.

PN307

VICE PRESIDENT HATCHER: So, Mr Fox, if you see the screen, Mr Farrell is at the far right-hand end?---I'm sorry, you'll have to speak up.

PN308

Yes, if you look at the television screen or the whatever you call it, Mr Farrell - - - ?---No, I'm sorry, I can't hear you.

PN309

Can you hear me now, Mr Fox?---I can indeed.

PN310

Right, Mr Farrell's at the far right-hand end of the screen. He's waving his hand?---I'm not worried about on the screen. It's the audio.

PN311

Yes, all right. Go ahead, Mr Farrell.

PN312

MR FARRELL: Thank you, Vice President.

*** NATHAN FOX

XXN MR FARRELL

PN313

Mr Fox, at paragraph 10 and I'll paraphrase here, it is your contention that the South Australian award provided for a minimum income threshold of \$60,000 per annum in 2001 and that the current federal modern award prescription is far too lax, with a minimum income threshold of \$40,795.04. Sir, are you aware of any sales persons in Western Australia who have failed to earn sufficient money as a commission only sales person, after having qualified at that amount?---The commission only requirement certainly for South Australia was - - -

PN314

Sorry, sir, I'd interrupt you there. My question was very specific. My question was very specific, sir. Are you aware of any circumstances in Western Australia in which a sales person has failed to earn sufficient income after having qualified as a commission only salesperson?---I'm aware that there are significant commission only salespeople in Western Australia earning significantly less than the average weekly wage.

PN315

And on what basis - what evidence do you have to support that?---We don't have any evidence - - -

PN316

Thank you, sir?--- - - - across the - - -

PN317

Thank you, sir?--- - - - across the board.

PN318

VICE PRESIDENT HATCHER: No, no, Mr Farrell, allow him to answer the question, please.

PN319

MR FARRELL: He's answered the question.

PN320

VICE PRESIDENT HATCHER: Mr Fox, can you complete your answer, please?---I don't have any physical evidence to hand but, clearly, 35 per cent of - if we said in real estate an average for Western Australia would be some \$80,000 odd at 35 per cent, then clearly the sales person would have to gross close to \$300,000, which I suggest only, perhaps, the top two to five per cent do.

PN321

MR FARRELL: Mr Fox, have you worked as a real estate sales person in Western Australia?---No, I have not.

PN322

What involvement have you had, sir, in the real estate industry in Western Australia?---Only national linkups over the last 25 years (indistinct).

*** NATHAN FOX

XXN MR FARRELL

PN323

And they were national link ups with what employee representatives in Western Australia?---Both. Employer. Whenever we have a national meeting, there is some representation from - from WA.

PN324

That's with the employer, isn't it, sir?---Generally, yes.

PN325

Okay, so you would not be aware of any employees making those submission?---I haven't got those submissions, no.

PN326

No. So to repeat, you have no experience in the real estate industry in Western Australia. Is that correct?---I have not worked in the real estate industry in Western Australia, no.

PN327

So your contention that there are significant amounts of commission only sales people who have not earned sufficient income is your opinion. Would that be correct, sir?---No. I've actually read one of your witness' statement.

PN328

Who are you referring to, sir?---There's a gentleman - there are two. I can't think. Christiansen, is it?

PN329

Sorry, sir?---I think there were two, Kuhne and Christensen, the figures that were mentioned in one of them had 4,000 licensed sales people and 80 per cent of them on commission only.

PN330

Yes but the statement doesn't refer to them not earning sufficient income, does it, sir?---Depends on what you call sufficient income.

PN331

Okay. Well, It's your statement, sir, that you are aware of significant amounts of commission only sales people in Western Australia who haven't earned sufficient income?---No, I'm saying they've earned less than the average wage.

PN332

How would you know, sir?---Well, I think the statistics will bear that out. I haven't got them in front of me.

PN333

What statistics are those?---I'm happy to - I'm happy to obviously do some research and get those to you.

*** NATHAN FOX

XXN MR FARRELL

PN334

Okay, but you've made the statement, haven't you, sir, that you are aware of a significant amount of commission only sales people in Western Australia who do

not earn the average weekly wage but you have not done the research to get those statistics?---I've made that statement, yes.

PN335

Yes. So it's your opinion?---Yes.

PN336

Okay, thank you, sir. There's no further questions from me.

PN337

VICE PRESIDENT HATCHER: Right, does anyone else want to ask any questions of Mr Fox? Mr Clarke, do you want ask any questions in re-examination?

PN338

MR CLARKE: Yes, thank you.

RE-EXAMINATION BY MR CLARKE

[11.25 AM]

PN339

MR CLARKE: Mr Fox, can I ask you to go to your witness statement and in particular paragraph 5? I just want you to read - - - ?---Yes.

PN340

- - - take a minute, I beg your pardon - those dots points and then I want to ask you some questions?---The dot points for number 5?

PN341

I just want you to have a read of those dot points?---Yes, okay, fire away. Go on.

PN342

Okay. Just familiarise yourself with them?---Okay.

PN343

Okay. Okay?---Yes.

PN344

Right, thank you, Mr Fox. Now, in terms of residential or commercial and industrial property sales representatives, would it be fair to describe their work as a person engaged in the listing and/or sale of real property or businesses, either by way of private treaty, auction or tender?---That's a broad brush coverage.

PN345

Yes, and a property sales representative may alternatively be responsible for the leasing of commercial, industrial or retail property or act on behalf of a buyer of real property?---Correct.

*** NATHAN FOX

RXN MR CLARKE

PN346

And the type of work that you've indicated in your paragraph 5, is that encapsulated in those two definitions I've just read out to you?---I would think clearly obviously the statement goes into more detail.

PN347

Yes, okay. And in your role as a commercial and industrial sales person, do you perform market appraisals for sales of real property, businesses or commercial leasing?---I do.

PN348

Do you conduct market research?

PN349

MR WARREN: (Indistinct).

PN350

VICE PRESIDENT HATCHER: Sorry, just hold on, Mr Clarke. I thought - - -

PN351

MR FOX: I do.

PN352

VICE PRESIDENT HATCHER: Sorry, I thought you put to the witness there was a disparity between the skills required set out in paragraph 5 and the role description in the award?

PN353

MR WARREN: Yes, your Honour.

PN354

VICE PRESIDENT HATCHER: I think these questions are directed at that issue, aren't they?

PN355

MR CLARKE: Yes.

PN356

MR WARREN: (Indistinct)

PN357

MR CLARKE: They are.

PN358

MR WARREN: Well, maybe it would help to identify that. (Indistinct).

PN359

MR CLARKE: They are.

PN360

VICE PRESIDENT HATCHER: Right. Go on.

*** NATHAN FOX

RXN MR CLARKE

PN361

MR CLARKE: In your job, Mr Fox, you're required to use personal initiative, source prospective sellers or buyers of real property or businesses or prospective property owners or tenants in relation to the leasing of commercial property?---Of course.

PN362

Yes. I won't go through it all. Do you conduct market research and provide marketing advice to customers of the real estate business?---We do and we put all of that in writing.

PN363

Yes. Do you conduct inspections with interested parties for real property or businesses that are for sale, including open homes or commercial property that is for lease?---I do.

PN364

Liaise with conveyancers or solicitors involved in the sale or commercial leasing process?---We certainly do.

PN365

Do you supervise the necessary listing and sales documentation for real property or businesses or leases or agreements to lease associated with commercial property?---I do.

PN366

No further questions.

PN367

VICE PRESIDENT HATCHER: All right. Thank you for your evidence, Mr Fox. You're excused so you can just leave if you wish or return to the Bar table?---Thank you.

<THE WITNESS WITHDREW

[11.30 AM]

PN368

VICE PRESIDENT HATCHER: Right. Is Ms Masson-Forbes next?

PN369

MR CLARKE: Yes.

PN370

THE ASSOCIATE: So please state your full name and address?

PN371

MS MASSON-FORBES: Lynn Masson-Forbes, (address supplied).

<LYNN MASSON-FORBES, AFFIRMED

[11.30 AM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [11.30 AM]

*** LYNN MASSON-FORBES

XN VICE PRESIDENT HATCHER

PN372

MR CLARKE: Your Honours, I wondered if I - I just want to talk to my friends here on the other side. There's just a couple of documents I would like my client - sorry, Ms Masson-Forbes to identify. This only became very available at short notice. There's nothing untoward about it.

PN373

VICE PRESIDENT HATCHER: Well, let's just mark the statement first. So Ms Masson-Forbes you made a statement dated 25 July 2016?---Yes, I did.

PN374

And that's got one annexure. Do you have a copy of that with you?---The annexure? No, I don't.

PN375

You don't have the annexure?---I have a copy of the statement, yes. Yes, I beg your pardon, I do, yes.

PN376

Yes, all right. And do you say that statement is true and correct to the best of your knowledge and belief?---Yes, it is.

PN377

All right. The statement of Lyn Masson-Forbes dated 25 July 2016 will be marked exhibit 3.

EXHIBIT #3 STATEMENT OF LYNN MASSON-FORBES DATED 25/07/2016

PN378

VICE PRESIDENT HATCHER: Now, Mr Clarke, do you want to show the witness a document, do you?

PN379

MR CLARKE: If I could have that shown to her and then I'll get copies for the Full Bench.

CROSS-EXAMINATION BY MR CLARKE

[11.32 AM]

PN380

MR CLARKE: Ms Masson-Forbes, I've just handed two documents to you, one being a press release from RESA, the Real Estate Institute of South Australia, and the other one from the Deputy Premier of South Australia and the Minister for Consumer and Business Affairs, Mr John Rowell. Do you see both of those documents?---Yes, I do.

PN381

Now, these documents refer to changes foreshadowed with respect to the licensing of property managers in South Australia?---Yes.

*** LYNN MASSON-FORBES

XXN MR CLARKE

PN382

Sorry, you'll have to speak up?---Yes, they do.

PN383

And with respect to the Real Estate Institute of South Australia, there's a press release from Mr Greg Troughton, the CEO?---Yes.

PN384

Do you know Mr Trouton?---I do.

PN385

Have you served with him on other bodies at all?---I have done some work at the Real Estate Institute and have worked personally with Mr Troughton.

PN386

I've no further questions.

PN387

VICE PRESIDENT HATCHER: Do you want to tender those?

PN388

MR CLARKE: Just I'd seek to tender it as part and parcel of the - as an addendum if you like or attachment to - - -

PN389

VICE PRESIDENT HATCHER: I'll mark them separately. So the press release of the Real Estate Institute of South Australia dated 11 November 2016 will be marked exhibit 4.

EXHIBIT #4 PRESS RELEASE OF REAL ESTATE INSTITUTE OF SOUTH AUSTRALIA DATED 11/11/2016

PN390

VICE PRESIDENT HATCHER: And the press release of Mr John Rowell, the South Australian Minister for Consumer and Business Services dated 11 November 2016 will be marked exhibit 5.

EXHIBIT #5 PRESS RELEASE OF JOHN ROWELL, SOUTH AUSTRALIAN MINISTER FOR CONSUMER AND BUSINESS SERVICES DATED 11/11/2016

PN391

MR WARREN: Your Honour, could I indicate only that we may require - we need to examine what these licensing requirements are.

PN392

VICE PRESIDENT HATCHER: Right.

PN393

MR WARREN: And we may well have other evidence on later.

*** LYNN MASSON-FORBES

XXN MR CLARKE

PN394

VICE PRESIDENT HATCHER: All right.

PN395

MR WARREN: With respect to other states.

PN396

VICE PRESIDENT HATCHER: Mr Warren?

PN397

MR WARREN: Yes, thank you.

CROSS-EXAMINATION BY MR WARREN

[11.40 AM]

PN398

MR WARREN: You've evidence that you've been employed in the Real Estate Industry for the last 15 years, on what basis have you been employed? How are you paid?---I was employed as a paid real estate sales person.

PN399

Who by?---By a series of employers. I've always been on a - on a debit credit system.

PN400

So you have a guaranteed rate of pay and allowances under your award and then there's a debit credit system which attaches to what you may be able to be paid in excess of that?---Yes, that's right.

PN401

And that's in your employment?---Yes, it is.

PN402

Who are you currently - - -

PN403

VICE PRESIDENT HATCHER: Just stop for a second, Mr Warren.

PN404

MR CLARKE: Yes, it's very low. I can't hear. I can hear some echo.

PN405

VICE PRESIDENT HATCHER: There seems to be an echo. Right, let's keep on going, Mr Warren.

PN406

MR WARREN: Maybe I don't need to speak quite as loudly.

PN407

VICE PRESIDENT HATCHER: Right, go ahead.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN408

MR WARREN: So who are you currently employed by?---For that full 15 years mentioned there, I was employed by a variety of employers. I resigned from Gaitchens(?) Real Estate almost two years ago with the intention of starting my own business called My Next Phase. I'm still a licensed real estate sales person but stopped working shortly after setting up that business due to a cancer diagnosis. So I've been undergoing treatment for cancer for the last 18 months.

PN409

I'm sorry to hear that. But so you're currently not employed as a sales person?---That's right.

PN410

And the basis upon which you were employed up to that time was on the basis of receiving the award rate plus any allowances that were applicable?---Yes.

PN411

Plus an additional income. I'd name it as an over award payment calculated on a debit credit basis, depending on your sales?---Yes, that's right.

PN412

Is that right?---Yes.

PN413

Now, you give evidence of being employed by Gaitchens in paragraph 4?---Yes.

PN414

And that's up until, what, the last two years?---Yes, that's right.

PN415

You were a sales person?---Yes.

PN416

And I note that you say you had a higher salary with a lower commission?---Yes.

PN417

So, it's so, isn't it, that if your salary goes up, your commission goes down?---In this case, yes. It was an unusual circumstance. I was employed initially on the normal debit credit system. After having been involved with Gaitchens for a short period of time, I was asked to set up a division of their company that focussed on the sale of real estate for seniors and on that basis my base salary was a great deal larger than the norm and therefore I agreed to a reduced amount of commission because I would not be doing a lot of active selling.

PN418

I see. So there was a relationship between the salary going up and the commission going down?---There was indeed.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN419

It's been tendered through you two news releases. If I could take you to exhibit 4. The first paragraph speaks of a licensing requirement for property managers. Do you see that?---Yes.

PN420

Will those licensing requirements be the same as licensing requirements for sales people, to the best of your knowledge?---No.

PN421

What will be required to become licensed, do you know?---No. At the point that this media release came out, it wasn't specified publicly what the required number of components would be.

PN422

You know, don't you, that when it says - and I'm looking at the quotes halfway down the page - "South Australia is the only state in Australia that currently has no requirements for residential property management licensing", you know, don't you that, at least in New South Wales, licensing is not required?---Yes, I did know that.

PN423

So that's wrong then, isn't it, what they're stating there?---Yes. Yes, that's not my quote though.

PN424

No, but you've identified it and I'm suggesting to you that the quote is wrong and you're agreeing with me?---Yes, I am. Yes.

PN425

VICE PRESIDENT HATCHER: Is New South Wales the only state, apart from South Australia, that doesn't have a licensing requirement for property management?

PN426

MR WARREN: I'm sorry, your Honour, but New South Wales they're required to be registered but that's a different requirement than licensing. That's what I was pursuing the witness on and - - -

PN427

VICE PRESIDENT HATCHER: But any other state? Are they all required to be licensed?

PN428

MR WARREN: That's something we wish to investigate and come back to the commission afterwards and I'll just clarify with this witness that you recognise that when they use the words "licensed in South Australia", you don't know what will be the licensing requirements?---I don't.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN429

But you recognise that in New South Wales, at least, they're not required to be licensed but you understand they may be registered?---They may be registered, yes.

PN430

And there may be some qualification for that?---Yes. In South Australia they're not required to be registered either.

PN431

At all?---No.

PN432

I see.

PN433

VICE PRESIDENT HATCHER: So, Ms Masson-Forbes, do you know the position in the other states?---No. I was under the impression that there wasn't a formal licensing requirement but with regard to registration I'm not sure, no.

PN434

MR WARREN: You say in paragraph 7 and it's on page 4 of paragraph 7 that I'm referring to, where you state that the sales person - I'm looking at the last paragraph in paragraph 7 - "The sales person will often need their weekly award wage allowance to keep paying their own mortgage." Indeed they receive that, don't they?---Yes, they do. Yes.

PN435

And it's your clear evidence that the proposed - I'm looking at paragraph 14 - you are satisfied that the proposed new award, with respect to commission only sales persons, offers, in your words, "far greater clarity and protection." You're satisfied with that, aren't you?---We're now talking about commission only?

PN436

Yes?---Yes.

PN437

You say in paragraph 18 - you speak of an amendment sought by RESA to extend the protection to sales persons who have listed properties for sale but which have not been sold. That position has changed, hasn't it? Indeed, RESA has agreed with the exposure draft with respect to that issue, hasn't it?---Yes, it has.

PN438

So you no longer rely on your evidence with respect to paragraph 18, certainly the sentence I just read out?---We are just looking for greater clarification between the issues of a property having been sold or having been listed and also having been settled. There are very different categories.

PN439

But you know, don't you, that agreement has been reached, certainly from your organisation, with employers with respect to that entitlement?---Yes.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN440

And it's expressed in the exposure draft?---Yes, we're just seeking greater clarification.

PN441

Well, the words are as they're expressed in the exposure draft and you've agreed with them, haven't you?---Yes, we have.

PN442

VICE PRESIDENT HATCHER: What clause is that, Mr Warren? What exposure draft clause is it?

PN443

MR WARREN: I will turn it up, your Honour. Yes, it's in the exposure draft, 9.4, your Honour, in the green, which starts at - - -

PN444

VICE PRESIDENT HATCHER: Sorry, this is the - - -

PN445

MR WARREN: This is the coloured one.

PN446

VICE PRESIDENT HATCHER: Yes, all right.

PN447

MR WARREN: So just going back to your statement, the second sentence, of your statement starting, "The amendment" down to "with their employer", you recognise, don't you, that RESA has agreed with the words I've just highlighted to his Honour? Do you need to see the exposure draft?---I honestly can't remember the exact wording of the exposure draft.

PN448

I'll show you this. I'll just make sure it's on here, if I can. It's a very bad copy but if you can just - his Honour's associate is handing you a document.

PN449

VICE PRESIDENT HATCHER: Mr Warren, just so we - - -

PN450

MR WARREN: Yes, your Honour.

PN451

VICE PRESIDENT HATCHER: So people don't misread the transcript, the document you're actually referring to is not actually an exposure draft. It is the Commission's exposure draft. It's a document that's been modified by the parties?

PN452

MR WARREN: Yes. Yes, your Honour, certainly.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN453

VICE PRESIDENT HATCHER: So what's a different expression we can use?

PN454

MR WARREN: Amended or - - -

PN455

VICE PRESIDENT HATCHER: Well, why don't we call it the parties' amended exposure draft?

PN456

MR WARREN: Parties' agreed amended - or parties' amended exposure draft.

PN457

VICE PRESIDENT HATCHER: All right.

PN458

MR WARREN: And (indistinct) I'm referring to that which was sent to the Commission on 24 June 2016 by the Real Estate Employers Federation. Now, I accept it's a very difficult copy you've just been handed but if you could pick it up at 9.4, please, at the bottom of the page in (a) are you able to read all that or would you like to see mine?---No, I can read it, thank you.

PN459

Thank you. I just want to confirm with you that the association of which you're president, has agreed with that document, that wording?

PN460

VICE PRESIDENT HATCHER: Well, is there any dispute about this, Mr Clarke?

PN461

MR CLARKE: Your Honour, there is no dispute between us but we just thought, as part of our evidence, to try and convince the Bench to amend the award as the parties have agreed, that our witnesses would need to present themselves to the Commission and put their arguments forward as to why this agreed clause should be inserted into the award.

PN462

VICE PRESIDENT HATCHER: Sorry, in paragraph 18 of the statement, when it talks about the amendments sought by RESA, is that the same amendment that's in the parties' amended exposure draft?

PN463

MR CLARKE: Yes. It's as we negotiated in the heads of agreement.

PN464

VICE PRESIDENT HATCHER: Thank you.

*** LYNN MASSON-FORBES

XXN MR WARREN

PN465

MR CLARKE: It's word for word as agreed between the parties.

PN466

VICE PRESIDENT HATCHER: Yes, thank you.

PN467

MR CLARKE: Thank you.

PN468

MR WARREN: Have you ever been paid on a commission only basis?---No.

PN469

Thank you, Ms Masson-Forbes.

PN470

VICE PRESIDENT HATCHER: Mr Farrell?

PN471

MR FARRELL: Thank you, Vice President.

CROSS-EXAMINATION BY MR FARRELL

[11.49 AM]

PN472

MR FARRELL: Ms Mason-Forbes - Mason or Masson?---Masson.

PN473

Masson, I apologise. Ms Masson-Forbes, what experience do you have as a registered sales person in Western Australia?---None at all.

PN474

Have you been involved in any of the elected positions of the Real Estate Institute of Western Australia?---No, I have not.

PN475

Have you represented any Western Australian Real Estate employees in your position as president of the union that you are the president of?---No, I have not.

PN476

I'm going to refer you to paragraph 6 of your statement. I'll give you the opportunity to look at that. You have been a sales person for approximately 15 years. Is that correct?---Yes, that's right.

PN477

Yes. Would you agree that some of the skills that you've listed - "excellent interpersonal skills, be a good negotiator, must be self-motivated and driven, showing a high degree of initiative, a high level personal presentation, ability to deftly handle and minimise conflict and keeping abreast of the market" - are skills that have been required throughout your career? Would you agree with that?---Most definitely.

*** LYNN MASSON-FORBES

XXN MR FARRELL

PN478

With the next dot point, where you refer to the greater use of technology sales staff, you're referring to the use of technology to demonstrate properties to potential buyers to highlight the advantages of the property that you are selling and those types of tasks. Would you agree?---Yes.

PN479

Would you agree that that was done prior to the last six years but by different methods?---I would certainly say that the amount of use of technology has increased dramatically in the last couple of years.

PN480

Thank you, ma'am. I'm now going to refer you - I apologise. I've now lost my place. Paragraph 15 and 16 of your statement. You mention in your statement that a number of sales people during the period of 2009 to 2012 contacted you, being told that they would only be able to keep a job if they changed their remuneration from wage to commission only?---Yes, that's right.

PN481

You're aware, ma'am, aren't you, that one of the pre-conditions for an employee to be employed on a commission only basis is that they agree to do so, don't you?---That is what's supposed to occur, yes.

PN482

So you are stating that there's an award breach? That those employees didn't agree?---I'm simply stating that I was contacted by individuals who felt pressured to make that choice.

PN483

But they made the choice?---They felt pressured to make the choice. They hadn't decided whether that was going to be in their interests or not.

PN484

Had they agreed to be engaged on commission only?---Some of them chose to. Others decided to resign from the real estate industry.

PN485

Okay. How many of those people that approached you were from Western Australia?---None at all.

PN486

Thank you. You refer to, in that last sentence of paragraph 15, being recently approached by a commission only sales person. Was that a South Australian commission only sales person?---Yes, definitely.

PN487

You refer in a number of places in your statement, but most specifically in paragraph 16, that a property is sold and settled in a process that would take at least 8 to 10 weeks or, in many cases, longer?---It can do, certainly.

*** LYNN MASSON-FORBES

XXN MR FARRELL

PN488

That is in South Australia, isn't it?---Yes, it is.

PN489

What's the average time in Western Australia?---I honestly don't know.

PN490

Thank you. I'll leave that there, thank you, Vice President.

PN491

VICE PRESIDENT HATCHER: Does anyone else wish to question this witness? No? Yes, Mr Lewocki?

PN492

MR LEWOCKI: Thank you.

PN493

VICE PRESIDENT HATCHER: Well, Mr Lewocki - - -

PN494

MR LEWOCKI: Yes, Mr Lewocki. That's right.

PN495

VICE PRESIDENT HATCHER: I don't think that works because you're an aligned interest, so you really should have gone at the head of the queue and you're not allowed to ask leading questions. What do you want to ask the witness about?

PN496

MR LEWOCKI: Well, just relating to the question that was asked by Mr Farrell, paragraph 15 of Ms Masson-Forbes' statement. The question I'd like to ask - - -

PN497

VICE PRESIDENT HATCHER: I won't allow it Mr Lewocki. Look, you're an aligned interest. You can't cross-examine a witness after those opposing interests have cross-examined the witness.

PN498

MR LEWOCKI: Okay, thank you.

PN499

VICE PRESIDENT HATCHER: Mr Clarke, do you want to re-examine the witness?

PN500

MR CLARKE: No, your Honour.

PN501

VICE PRESIDENT HATCHER: Right, thank you for your evidence, Ms Masson-Forbes. You can now leave and return to the Bar table.

*** LYNN MASSON-FORBES

XXN MR FARRELL

<THE WITNESS WITHDREW

[11.54 AM]

PN502

MR CLARKE: Your Honour, if I may, my next witness has just sent me a message. She's downstairs finding her way up here.

PN503

VICE PRESIDENT HATCHER: All right. Well - - -

PN504

MR CLARKE: I'm just wondering if it might be a convenient time for a short - - -

PN505

VICE PRESIDENT HATCHER: Yes, we'll take a short morning tea adjournment of, say, ten minutes.

PN506

MR CLARKE: Yes.

PN507

VICE PRESIDENT HATCHER: And then we'll resume. So that's Ms Bell, is it?

PN508

MR CLARKE: Yes.

PN509

VICE PRESIDENT HATCHER: And then can we proceed to Mr French?

PN510

MR CLARKE: Yes.

PN511

VICE PRESIDENT HATCHER: Yes, all right. So we'll now adjourn and resume in approximately ten minutes.

SHORT ADJOURNMENT

[11.54 AM]

RESUMED

[12.10 PM]

PN512

VICE PRESIDENT HATCHER: Is Ms Bell ready now?

PN513

MR CLARKE: Thank you, sir. If I could ask Mrs Raffaella Bell to come to the witness box.

PN514

VICE PRESIDENT HATCHER: Yes. Come forward.

*** LYNN MASSON-FORBES

XXN MR FARRELL

PN515

MR CLARKE: Thank you.

PN516

THE ASSOCIATE: Please state your full name and address.

PN517

MRS BELL: Mrs Raffaella Bell (address supplied)

<RAFFAELA BELL, SWORN

[12.11 PM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [12.11 PM]

PN518

VICE PRESIDENT HATCHER: So Ms Bell, you've made a statement of evidence dated 21 July 2016?---Yes, I did.

PN519

And you've got a copy of that with you?---Yes, I have.

PN520

And you say the contents of that statement are true and correct to the best of your knowledge and belief?---Yes.

PN521

All right the statement of Mrs Raffaella Bell dated 21 July 2016 will be marked exhibit 6.

**EXHIBIT #6 STATEMENT OF RAFFAELA BELL DATED
21/07/2016**

PN522

VICE PRESIDENT HATCHER: All right. Mr Warren?

PN523

MR WARREN: I have no questions, your Honour.

PN524

VICE PRESIDENT HATCHER: No questions. Mr Farrell.

CROSS-EXAMINATION BY MR FARRELL

[12.12 PM]

PN525

MR FARRELL: Thank you, Vice President.

PN526

*** RAFFAELA BELL

XN VICE PRESIDENT HATCHER

*** RAFFAELA BELL

XXN MR FARRELL

Ms Bell, my name is Stephen Farrell. I'm representing the Real Estate Employees Federation of Western Australia. I just have a couple of questions for you. You mention in your statement that you've been a property manager within - sorry, that you've been employed in the Real Estate Industry for five years. How much of that time was spent in Western Australia?---None.

PN527

Thank you. At paragraph 5 of your statement, if you could review that - and I don't mean the whole line, it's a very quick question - you outline Roman numbers (i) to (xi)?---Yes.

PN528

I was testing my knowledge of Roman numerals there. How much of those duties have been done throughout your career?---I don't understand the question.

PN529

Okay. Of those duties that you've outlined, have you been doing those duties since you began as a property manager?---Absolutely, day one.

PN530

Thank you. That's all I have, Vice President.

PN531

VICE PRESIDENT HATCHER: All right. Any other questions? Any other re-examination?

PN532

MR CLARKE: I'm searching, sir, but no.

PN533

VICE PRESIDENT HATCHER: It would be hard from that cross-examination. All right. Thank you very much, Ms Bell. You are excused and you are now free to go?---Thank you.

<THE WITNESS WITHDREW

[12.13 PM]

PN534

VICE PRESIDENT HATCHER: All right. Who is the next witness? Shall we do Mr French?

PN535

MR CLARKE: Yes, Mr French. Now just as a bit of housekeeping, sir, Mr French is giving evidence both for my association and also for APSA, two separate witness statements about two different matters; APSA's claim for a minimum payment award wage for commission-only salespeople every six months if they fall below the minimum rate and then there is also with respect to the association I represent.

PN536

So I have only had a chance to briefly talk to my colleagues here and it would seem sensible that Mr French be subject to cross-examination on both witness statements while he is in the box. Now, I haven't heard from everyone and I'm not fussed to do it separately, I just - - -

*** RAFFAELA BELL

XXN MR FARRELL

PN537

VICE PRESIDENT HATCHER: Well, that's what is going to happen. I can assure you that.

PN538

MR CLARKE: Right.

PN539

VICE PRESIDENT HATCHER: So there's two different statements are there? Yes, all right. So Mr French, are you ready to give evidence?

PN540

MR FRENCH: Yes. I am ready, your Honour.

PN541

VICE PRESIDENT HATCHER: Can you hear us clearly?

PN542

MR FRENCH: I can hear you clearly, yes. There's no witness box in this room that I'm in though, your Honour.

PN543

VICE PRESIDENT HATCHER: That's all right. You can stay where you are. The court officer will now administer the affirmation to you.

PN544

THE ASSOCIATE: Mr French, could you please state your full name and address?

PN545

MR FRENCH: Thomas Clark French (address supplied)

<THOMAS CLARK FRENCH, AFFIRMED [12.15 PM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [12.15 PM]

PN546

VICE PRESIDENT HATCHER: Mr French, do you have your two witness statements with you?---I do, your Honour.

PN547

All right. So we will just go through those. The first one is signed by you, but undated with 10 paragraphs and one annexure?---That is the APSA support for Mr Lewocki, your Honour.

PN548

Yes. All right. So do you say the contents of that witness statement are true and correct to the best of your knowledge and belief?---I do.

PN549

All right. So that witness statement will be marked exhibit 7.

*** THOMAS CLARK FRENCH

XN VICE PRESIDENT HATCHER

EXHIBIT #7 STATEMENT OF MR FRENCH UNDATED

PN550

VICE PRESIDENT HATCHER: Have you made a further witness statement dated 21 July 2016 with 10 paragraphs?---I do.

PN551

DO you say that statement is true and correct to the best of your knowledge and belief?---I do.

PN552

Right. That statement will be marked exhibit 8.

EXHIBIT #8 STATEMENT OF MR FRENCH DATED 21/07/2016

PN553

VICE PRESIDENT HATCHER: All right. Mr Lewocki, is there any further examination-in-chief of this witness?

PN554

MR LEWOCKI: Yes, your Honour. If I may.

PN555

VICE PRESIDENT HATCHER: All right. Can you hear Mr Lewocki, Mr French?---Yes. I can, your Honour.

PN556

VICE PRESIDENT HATCHER: All right. So you can see he is standing in the second row?---Yes. I've got him visual.

PN557

All right, good. Go ahead, Mr Lewocki.

EXAMINATION-IN-CHIEF BY MR LEWOCKI

[12.16 PM]

PN558

MR LEWOCKI: Thank you, your Honour. Mr French, in your statement you indicate your experience and your service as an officer of the Queensland Branch of the APSA. Could you just highlight your experience in the real estate identify for the Full Bench?---Yes, thank you Mr Lewocki. As I've said in my statement, I commenced in the real estate industry in 1988, July as a real estate salesperson. I progressed and did a full licence under the CNJ system of training. I then became a trainer at the Sunshine Coast Institute of TAFE. I did my long service leave with that one agency and worked for them for 10 years.

*** THOMAS CLARK FRENCH

XN MR LEWOCKI

PN559

Then I became the sales and marketing manager for the (indistinct) real estate trainer full-time for the TAFE, Sunshine Coast, and then I became the sales and marketing manager of the Institute, covering all facets for all areas until 2002. Then I took up full time - I remained a licensed real estate agent and auctioneer,

conducting auctions on many occasions for all and sundry agents in the Southeast Queensland area. I then - I've lost my train of thought. Just hang on, please.

PN560

MR LEWOCKI: That's all right - - -?---I became a full-time employee of the - I was vice president of the Property Sales Association, subsequently becoming the Australian Property Services Association. But I became a full-time employee of the PSAQ in 2002 as a field officer and then helped negotiate the new state award in 2005 and was appointed field officer of the Queensland Property Industry Registry as was required under that new award and offered field services advice to employees and employers majorly in construction of employment agreements particularly.

PN561

Subsequent to that, I became secretary of the now Australian Property Services Association, succeeding Mr Barry Gannon who had been with us since the inception in 1994, and I remain a secretary of that association and also as the administrator secretary of the national branch of the Australian Property Services Association which covers all other states other than New South Wales and Queensland (indistinct) have inquiries from other states at this stage. I am still a fully licensed real estate agent, auctioneer, and chattels auctioneer and I will continue in that role. I think that sums it up, Mr Lewocki.

PN562

MR LEWOCKI: Thank you, Mr French. Now, during your time when you said you were a field officer and you were assisting the real estate industry in relation to employment agreements, were you also contacted by employees raising concerns regarding being a commission-only employee and being reverted - sorry, a wage plus commission employee and being converted to a commission-only employee?---Yes. Quite frequently between Mr Gannon and myself, we handled the contacts from all employees that came into the union and we've had approximately - I would estimate 100 inquiries per year, some of those requiring mediation. 90 percent of those complaints, if you like to call them complaints, were resolved without litigation - in excess of 95 per cent and we recovered much - a great amount - I haven't got the figures with me, but a great - you know, hundreds of thousands of dollars of unpaid entitlements through mediation. To answer your question fully, commission-only - people being pushed onto commission-only, because the employer stated they couldn't afford to pay them wages was quite a common complaint usually resulting in the employee resigning from that agency.

PN563

In your statement, Mr French, particularly paragraph 8, have you got your statement there? Could you read that?---I have.

PN564

Now, that refers to an employee from Western Australia who contacted your office, is that correct?

*** THOMAS CLARK FRENCH

XN MR LEWOCKI

PN565

MR FARRELL: I'm sorry. Objection. The witness has had ample - - -

PN566

VICE PRESIDENT HATCHER: I think you are leading the witness, Mr Lewocki.

PN567

MR FARRELL: That is one objection, sir, but the other one is this witness has submitted his statement some time ago and the intention of the practice of admitting witness statements beforehand is to provide - the examination-in-chief, so that all parties are aware of what is going on and can prepare accordingly. Mr Lewocki's question, apart from the fact that it was leading, (indistinct) information that the witness would have known at the time that he made his statement. It is not something that is in addition to, and in my view should be withdrawn.

PN568

VICE PRESIDENT HATCHER: Mr Lewocki, the idea of these witness statements is it sets out the evidence so that parties have notice of it. Why should we allow you to adduce new evidence?

PN569

MR LEWOCKI: I understand that, your Honour. Okay. I withdraw the question then.

PN570

No further questions, Mr French.

PN571

VICE PRESIDENT HATCHER: Thank you, Mr Lewocki. Mr Warren?

CROSS-EXAMINATION BY MR WARREN

[12.23 PM]

PN572

MR WARREN: Yes. Thank you, your Honour.

PN573

Mr French, can you hear me?---Yes. I can indeed, sir.

PN574

Thank you. Mr French, if I could take you to your statement which has been marked as exhibit 7, the first statement that was referred to. Do you see that?---I've got that. Yes.

*** THOMAS CLARK FRENCH

XXN MR WARREN

PN575

Look at paragraph 6, please. I just want to clarify in the final sentence in that, you speak of "an APSA New South Wales application providing for the Commission-only salesperson and at least the commissioning income defined", you are not there referring, are you, or perhaps you could clarify, please, the commission-only

rate and minimum commission-only rate in the existing award and in the proposed award is 35 per cent of the employers net Commission. Are you referring to that?---I would suggest that I am referring to the MIT value.

PN576

The MIT value, which is found in paragraph 9.7 - I'm stating this as much for the record as anything, Mr French - minimum income threshold sub (c) speaks of a total gross salary of at least \$57,948 in a 12-month period in the preceding three years immediately entering a Commission only agreement. In other words, it's a proof of capacity to earn. Is that what you are referring to?---Just let me refresh myself, please.

PN577

Yes No problem at all.

PN578

VICE PRESIDENT HATCHER: So what part of the clause does that number appear, Mr Warren?

PN579

MR WARREN: That I've just referred to is clause 9.7. I'm referring to the exposure draft put forward by the employers, your Honour. Clause 9.7, subclause (c), minimum income threshold and it's on page - I think it will be page 16 of exposure draft. Subclause (c)(i). Does your Honour have that? On my document it's at the top of the page. It's in green.

PN580

VICE PRESIDENT HATCHER: The parties' amended exposure draft, I think you are referring to?

PN581

MR WARREN: That's the - yes, your Honour. Yes. The parties' amended exposure draft - - -

PN582

VICE PRESIDENT HATCHER: Yes, I see it now.

PN583

MR WARREN: I will try and catch up with that expression, your Honour.

PN584

VICE PRESIDENT HATCHER: Thank you.

PN585

MR WARREN: Do you have that?---Yes.

PN586

Is that what you are referring to, Mr French? I am just a bit - - -?---Yes. I'm referring to that \$50,000 figure. Yes.

*** THOMAS CLARK FRENCH

XXN MR WARREN

PN587

The 59,000?---Yes, the proposed amendment to the MIT and the application by APSA New South Wales, particularly in their application and the protection. I believe it's necessary as stated.

PN588

That a person has a proven record of a capacity to earn a certain amount of money?---Yes.

PN589

Before they can become a commission-only salesperson? Is that what you were - -?---Absolutely. That's inherited in the current award, that they have a proven track record. The adjusted MIT is just raising the bar.

PN590

And quite significantly raising the bar?---Which, when you take into account allowances that are foregone, because the commission-only people are not allowed any allowances under the award, I believe it's quite reasonable to raise it that high.

PN591

And indeed, in your evidence, in paragraph 7, you note that the vast majority of commission-only classified persons generate personal income well in excess of that minimum income threshold. That's your experience?---Correct.

PN592

That's your experience?---Yes. Yes.

PN593

And, indeed, the persons who are on a commission-only basis, both in the current modern award and in the proposed award can only enter a commission-only arrangement by agreement?---Yes.

PN594

And when you speak of, in paragraph 7 of your statement, which has been marked as exhibit 7 in these proceedings, when you speak of employers seeking to exploit, you're speaking in terms of employers who indeed, if they were seeking to engage persons as a commission-only salesperson who had not so qualified, they are the people you're speaking of exploiting, is it?---Yes. Yes.

PN595

Indeed, they would be breaching the award?---Yes.

PN596

You understand, don't you, from your broad experience in working in this industry that businesses so far as sales are concerned can be, what I could refer to as seasonal. There can be peaks and troughs in any year?---Peaks and troughs, I would agree with.

*** THOMAS CLARK FRENCH

XXN MR WARREN

PN597

And indeed - sorry, go on. Please proceed?---That is governed by supply of listings.

PN598

Could it also, with respect to commission-only sales people, govern whether they want to work every week of the year or they may have a good month and then want to take a bit of time off?---That's not my experience.

PN599

I see. You accept though, don't you, that commission-only salespersons generally earn far higher incomes than persons who are not commission-only?---Legitimate commission-only salespeople who qualify under section 16 of the current award usually make in excess of what is required.

PN600

VICE PRESIDENT HATCHER: I don't think that was the question, was it?

PN601

MR WARREN: I am happy with that answer, your Honour. My question went to whether they earn - - -

PN602

VICE PRESIDENT HATCHER: It's a circular answer. That is, if the employee - I thought the question was do commission-only salespersons generally earn more than others?

PN603

MR WARREN: Than others.

PN604

VICE PRESIDENT HATCHER: Than others.

PN605

MR WARREN: Than others. And the witness said that people who were legitimately engaged as commission-only salespeople, and I was going to follow that up as to what he actually meant by that, but legitimately engaged commission-only salespersons earned more than people who weren't so engaged.

PN606

VICE PRESIDENT HATCHER: That's not what he said.

PN607

Mr French, can you clarify that? I think the question was do commission-only salespersons, and I assume we're talking about salespersons who are actually engaged in accordance with the award?---The award, yes.

PN608

In your experience, do they generally earn more than salespersons engaged on another basis?---Yes, your Honour.

*** THOMAS CLARK FRENCH

XXN MR WARREN

PN609

Right.

PN610

MR WARREN: Thank you, Mr French.

PN611

VICE PRESIDENT HATCHER: Mr Farrell.

CROSS-EXAMINATION BY MR FARRELL

[12.31 PM]

PN612

MR FARRELL: Mr French, in an answer to Mr Warren's question in - and the Vice President's question just then - you refer to "legitimately engaged" and that was in accordance with the award. Is that correct?---Yes, Mr Farrell.

PN613

I'm sorry, Mr French, I just had of that has exited my mind. I do apologise. Okay. Mr French, have you worked as a real estate salesperson in Western Australia?---No.

PN614

Mr French, have you been elected to or involved in a position of a leading organisation such as the real estate identify of Western Australia, that's West Australian based?---No.

PN615

Thank you, Vice President. That's all I have.

PN616

VICE PRESIDENT HATCHER: All right. Any re-examination, Mr Lewocki or Mr Clarke?

RE-EXAMINATION BY MR CLARKE

[12.32 PM]

PN617

MR CLARKE: I've got one question.

PN618

VICE PRESIDENT HATCHER: Yes.

PN619

MR CLARKE: Mr French, whilst you've not worked in Western Australia as a salesperson, in terms of the essential task a real estate salesperson in Queensland, putting aside what qualifications you might need for licensing, is the essence of the job any different in Queensland to that of the evidence given by Ms Masson-Forbes and Mr Fox with respect to the essence of the task of a real estate salesperson?

*** THOMAS CLARK FRENCH

XXN MR FARRELL

*** THOMAS CLARK FRENCH

RXN MR CLARKE

PN620

MR FARRELL: Excuse me, Vice President. How could the witness possibly know that. By his own evidence, he's only had experience in Queensland and whilst I accept that he may have been in discussions with Ms Masson-Forbes, given they have both - they're in organisations that have common interests, I object to the question on the basis that it's not possible for him to have any knowledge of that.

PN621

VICE PRESIDENT HATCHER: Are you contending that real estate agents in different states do different things?

PN622

MR FARRELL: I am, sir. Yes. I'm not saying I would agree that the - there is common ground, they sell real estate property, but there are different laws - Ms Masson-Forbes refers to one of them in South Australia - that are involved.

PN623

MR CLARKE: Your Honour, in all of the evidence of the employer witnesses in this matter, they don't - whilst there's a factual difference in terms of licensing requirements, in terms of what the actual job requires, they don't differ.

PN624

VICE PRESIDENT HATCHER: IF that's right, we don't need the question, do we?

PN625

MR CLARKE: No.

PN626

VICE PRESIDENT HATCHER: All right. I won't allow the question.

PN627

MR CLARKE: Yes.

PN628

VICE PRESIDENT HATCHER: Thank you for your evidence, Mr French. You are now excused and you are free to come and go as you please.

<THE WITNESS WITHDREW

[12.34 PM]

PN629

VICE PRESIDENT HATCHER: Now, are there any other witnesses that we can do before lunch?

PN630

MR CLARKE: There's none from us, your Honour. We have completed ours. I'm just wondering, perhaps, if we go off record for a moment just to see how we might be able to handle it so we don't lose time. There are some employer witnesses who are present in the room. So whether they - - -

*** THOMAS CLARK FRENCH

RXN MR CLARKE

PN631

VICE PRESIDENT HATCHER: All right. If there are employer witnesses who are present today, why can't they give evidence this afternoon?

PN632

MR FARRELL: Sir, from Mr Kuhne's point of view he is absolutely available to give evidence this afternoon, but doesn't Mr Lewocki have other witnesses? Are they not available?

PN633

VICE PRESIDENT HATCHER: Well, I think on the agreed program they are listed as unable to appear, so I was proposing to deal with those statements, but I assume they are unable to be cross-examined, Mr Lewocki.

PN634

MR LEWOCKI: No. They are not available, your Honour. No.

PN635

VICE PRESIDENT HATCHER: When you say they're not available, in what sense do you mean they're not available?

PN636

MR LEWOCKI: Well, the South Australian witness indicated personal and work commitments.

PN637

VICE PRESIDENT HATCHER: Which one is that?

PN638

MR LEWOCKI: Finch.

PN639

VICE PRESIDENT HATCHER: Yes.

PN640

MR LEWOCKI: And Mr Freeland and Mr S [REDACTED] indicated that they weren't prepared to give evidence.

PN641

VICE PRESIDENT HATCHER: What does that mean?

PN642

MR LEWOCKI: They just weren't prepared. I don't know. They just said they wouldn't attend.

PN643

VICE PRESIDENT HATCHER: All right. Well, in any event, does anyone object to the admission of those statements?

PN644

MR FARRELL: I'm sorry, Vice President. Yes, I do.

PN645

VICE PRESIDENT HATCHER: On what basis? On the basis they have not made themselves available for cross-examination. I intended to ask - I admit, it wasn't going to be a long cross-examination but remember questions to those witnesses. This hearing has been scheduled for some time now and certainly it was Mr Lewocki's knowledge when he submitted those witness statements that the hearing would be this week, and in my view should have informed his witnesses of the obligation that they attend in order to be cross-examined.

PN646

He failed to do so, sir and the fact that the witnesses are not prepared to attend indicates that they are - in my view that they do not support what they have put in their witness statement.

PN647

VICE PRESIDENT HATCHER: Let's just take these statements one at a time. Mr Freeland's statement, did you have any instructions challenging the veracity of anything stated in the statement?

PN648

MR FARRELL: Well, for starters, I would be asking questions about what he states was the way in which he left the industry.

PN649

VICE PRESIDENT HATCHER: In which he what?

PN650

MR FARRELL: In which he left the industry. He refers in this paragraph - - -

PN651

VICE PRESIDENT HATCHER: Which paragraph?

PN652

MR FARRELL: To paragraph 6 and 7.

PN653

VICE PRESIDENT HATCHER: Yes, but do you have instructions upon which you could challenge the veracity of what he says.

PN654

MR FARRELL: The veracity, sir, no. I don't have instructions to challenge the veracity, but certainly there would be questions in which I would be seeking to clarify his statement. At the end of - you know, I'm struggling, sir, with the greatest of respect, to understand that it is common practice within this Fair Work Commission that for witness statements to be accepted that they be available for cross-examination.

PN655

Now, if no one intends cross-examination, then yes, then I accept that they can be tendered and accepted as evidence. We gave indication last Monday, sir, before you.

PN656

VICE PRESIDENT HATCHER: I understand that, Mr Farrell, but the usual practice applies when the statement - there's a statement of evidence and somebody wishes to challenge the truth of the contents of the statement.

PN657

MR FARRELL: Well, not necessarily, sir. I mean, there's other things in - I've gone through a train of cross-examination of the current witnesses. That is one area that I wish to explore with these witnesses. I was - as an example, this - - -

PN658

VICE PRESIDENT HATCHER: When you say "train of cross-examination of witnesses", what do you mean by that?

PN659

MR FARRELL: In terms of their experience in Western Australia and in terms of their knowledge of Western Australia and in terms of the business practices that are in there.

PN660

DEPUTY PRESIDENT ASBURY: But he said he doesn't give any evidence of experience in Western Australia or knowledge about it, does he?

PN661

MR FARRELL: That's correct, ma'am. He doesn't.

PN662

DEPUTY PRESIDENT ASBURY: So why do you need to cross-examine him about it?

PN663

MR FARRELL: Because that is one way in which I will challenge in my submission the evidence that he has given to your Honours - - -

PN664

DEPUTY PRESIDENT ASBURY: But you can simply say he's given no evidence about Western Australia, so it's irrelevant, can't you, to Western Australia. You don't need to cross-examine him to say that, do you?

PN665

MR FARRELL: No, I don't need to cross-examine him to say that, but of course there is the issue in terms of the way that his (indistinct) sets up. As you are aware, our witness from REEFWA, Mr Whiteman, is the chief executive officer of the Western Australian Ray White business and this statement was given to Mr Whiteman in terms of the employment arrangements that occurred with Mr Freeland. And in essence, the reasons why APSA have submitted this statement is to support their argument that commission-only employment needs to be further regulated as per their application.

PN666

Now, we would be challenging that argument, but as well as the basis on which it's founded.

PN667

VICE PRESIDENT HATCHER: But does Mr Whiteman contradict anything in the statement?

PN668

MR FARRELL: His information is different. Yes, sir.

PN669

VICE PRESIDENT HATCHER: About what? That is - let me just find it. Does he reply to the statement in any fashion?

PN670

MR FARRELL: No, he doesn't reply to the statement at all.

PN671

VICE PRESIDENT HATCHER: Mr Lewocki, is it conceded that Mr Freeland has no relevant knowledge or experience of real estate in Western Australia?

PN672

MR LEWOCKI: He would not have any knowledge of Western Australia at all, your Honour.

PN673

MR WARREN: Will your Honour hear me before your Honour makes a ruling?

PN674

VICE PRESIDENT HATCHER: Yes. Although I note you didn't require him for cross-examination.

PN675

MR WARREN: That was when he said that he wasn't available. He's said he's not available.

PN676

VICE PRESIDENT HATCHER: No. With the greatest of respect, Mr Warren, that's not the way it works.

PN677

MR WARREN: We will be objecting to his statement being put in. It doesn't mean that we don't require him for cross-examination, but there is nothing in there that we can - I cannot say to this Commission that I have instructions that what he said there is incorrect. I can't say that. I can't say that.

PN678

VICE PRESIDENT HATCHER: Mr Warren, there were directions for parties to identify which witnesses they required for cross-examination.

PN679

MR WARREN: I understand that, your Honour.

PN680

VICE PRESIDENT HATCHER: And these three witnesses were not required by your organisation.

PN681

MR WARREN: Your Honour, it became apparent when we were last before your Honour, that those three witnesses were - it was indicated they were not able to appear and so it was a pointless exercise saying they were required for cross-examination. They were not able to appear. It then gets down to an issue of whether because they do not appear, whether their witness statement should be accepted by this Commission or not.

PN682

VICE PRESIDENT HATCHER: With the greatest respect, Mr Warren, it doesn't work like that.

PN683

MR WARREN: Well, that's the position we are putting, your Honour. We openly say and readily say that we do not have instructions that what they have said in their statements is incorrect. We would note, of course, that what they say in their statements does not comply with the award. We would note, of course, that. That's the submission.

PN684

VICE PRESIDENT HATCHER: Issues of relevance and weight are different matters.

PN685

MR WARREN: We wish to put that to the Commission.

PN686

VICE PRESIDENT HATCHER: All right. Thank you. We propose to admit the statement of Michael Freeland, dated 10 July 2016 subject to any submissions about relevance or weight, which parties may wish to make later in the proceedings. So that statement will be marked exhibit 9.

**EXHIBIT #9 STATEMENT OF MICHAEL FREELAND DATED
10/07/2016**

PN687

VICE PRESIDENT HATCHER: We do so noting the concession made by Mr Lewocki that the witness has no relevant experience of real estate in Western Australia.

PN688

Now, is the relevant position any different with respect to the other two witnesses? That is, Mr S [REDACTED] and Mr Finch. Is there any different consideration which arises in either of those statements?

PN689

MR FARRELL: If I may start, Vice President, noting your earlier ruling in relation to Mr Freeland, we say nothing further in relation to the witness statements other than as I've already put on the record our objection to them being admitted.

PN690

VICE PRESIDENT HATCHER: And I take it, Mr Lewocki, you make the same concession about those two witnesses?

PN691

MR LEWOCKI: Yes. I do, your Honour.

PN692

VICE PRESIDENT HATCHER: That is, they have no relevant knowledge of Western Australia?

PN693

MR LEWOCKI: Correct, yes. Absolutely.

PN694

VICE PRESIDENT HATCHER: All right. Again, so I make the same (indistinct). We will admit both those statements subject to any submissions any party wishes to make about their relevance or weight and noting the concession that they relevantly have no knowledge of the real estate industry in Western Australia. So the statement of Mr Michael S [REDACTED] dated 20 July 2016 will be marked exhibit 10.

**EXHIBIT #10 STATEMENT OF MICHAEL S [REDACTED]
DATED 20/07/2016**

PN695

VICE PRESIDENT HATCHER: And the statement of Stephen Finch dated 22 July 2016 will be marked exhibit 11.

**EXHIBIT #11 STATEMENT OF STEPHEN FINCH DATED
22/07/2016**

PN696

VICE PRESIDENT HATCHER: All right. So we do Mr Kuhne at 2 o'clock, Mr Farrell?

PN697

MR FARRELL: Yes. Mr Kuhne can make himself available.

PN698

VICE PRESIDENT HATCHER: All right. Is there any other witness that can be made available this afternoon, Mr Tracey?

PN699

MR TRACEY: Your Honour, I've made inquiries. Both my witnesses unfortunately have commitments, so unfortunately they can't appear today.

PN700

VICE PRESIDENT HATCHER: All right. Well, we will do Mr Kuhn and then we will resume tomorrow. So we will adjourn now and resume at 2 o'clock.

PN701

MR TRACEY: Sorry, your Honour, just before we adjourn, I apologise - - -

PN702

VICE PRESIDENT HATCHER: Yes.

PN703

MR FARRELL: I will check with Mr Whiteman's associates and see if he can make himself available. If he is, I could perhaps maybe liaise with your associate about getting a room available in Perth. I note that might be able to be organised until tomorrow.

PN704

VICE PRESIDENT HATCHER: All right. Well, if you give us notice just by way of email or message as soon as you can, we will see if we can organise a video-link to Perth.

PN705

MR FARRELL: Yes. My apologies.

PN706

VICE PRESIDENT HATCHER: No, that's all right. Thank you. We now adjourn.

LUNCHEON ADJOURNMENT [12.45 PM]

RESUMED [2.03 PM]

PN707

VICE PRESIDENT HATCHER: Yes. Mr Farrell, Mr Kuhne will go first. Is that right?

PN708

MR FARRELL: That's correct, Vice President. If I may call Mr Kuhne to the stand.

PN709

VICE PRESIDENT HATCHER: Yes.

PN710

THE ASSOCIATE: Please state your full name and address?

PN711

MR KUHNE: Peter Kuhne (address supplied)

<PETER KUHNE, AFFIRMED [2.04 PM]

EXAMINATION-IN-CHIEF BY MR FARRELL

[2.04 PM]

PN712

VICE PRESIDENT HATCHER: Yes. Go ahead, Mr Farrell.

PN713

MR FARRELL: Mr Kuhne, did you prepare a statement for - as in your evidence-in-chief in this matter?---Yes, I did.

PN714

Do you have that in front of you, sir?---Yes, I do.

PN715

Does that contain five pages, 48 paragraphs?---Yes, it does.

PN716

And your name is contained on the last page?---Yes, it does.

PN717

And is that statement true and correct to be the best of your ability and - - - ?---Yes, it is.

PN718

I wish to tender that statement, please.

PN719

VICE PRESIDENT HATCHER: Yes. No objection? The statement of Peter Kuhne undated will be marked exhibit 12.

EXHIBIT #12 STATEMENT OF PETER KUHNE

PN720

MR FARRELL: I tender the witness. Thank you.

PN721

VICE PRESIDENT HATCHER: Yes. All right. So who is cross-examining this witness? You, Mr Clarke?

CROSS-EXAMINATION BY MR CLARKE

[2.05 PM]

PN722

MR CLARKE: Thank you, sir.

PN723

Mr Kuhne, if I could take you to your paragraph 14 where you refer to your association getting services from the chamber of commerce and industry of WA and you produce a template for contract of employment that are fully compliant with the award and employment legislation. Now, how - the employment contract, the template; how many pages would there be?---I am going to - I think there's about eight to 10 pages.

*** PETER KUHNE

XXN MR CLARKE

PN724

Yes. And what does it cover? What type of subjects does that employment contract template - - -?---It covers your remuneration in its entirety, what the salesperson is to be paid, hours of work expected et cetera.

PN725

Yes. And what about debits? Any commission share?---Yes. There is a debit/credit contract as well.

PN726

Right. And what type of debits are in your template?---They can vary. The employer has a right, obviously, to not cover the whole gambit of deductions, but on a commission-only debit/credit basis, as I'm sure you're aware, Mr Clarke, you can deduct superannuation. There's a whole range of things, as long as a person is paid above award.

PN727

Right. Now, I will come back to those in a moment. I just wanted to understand about the template, and the individual member or employer can pick and choose which parts of the template they want it?---No. No. Most of the template is set by statute. Obviously things like people's name are able to be, you know, personalised. But no, the template as approved by the real estate employer's federation remains in its entirety.

PN728

But if an employer wanted to reduce the number of debits or add to it, they could do so?---Well, they can't add to it, unless it's lawful of course. They could reduce the amount of deductions, of course. That would be to the employee's benefit.

PN729

Right. Now, when you first got into the industry back in, I think, 1990 - that's at paragraph 2, you were employed as sales representative and that was, what, as a commission-only?---Correct. Yes, it was.

PN730

And commission-only was the only form of employment, was there, for a real estate salesperson there then?---I would assume that 99 per cent of salespeople then were, but I think there was the instance where employers may have elected to pay some sort of retainer, but the general way of employment in Western Australia at that time was commission-only.

PN731

And was there any legislative or any other bar or barrier that said unless you achieve certain - when I say that, you know, a minimum income threshold, or something of that nature before you could become commission-only or - - - ?---No. No.

*** PETER KUHNE

XXN MR CLARKE

PN732

So you could employed day one as commission-only?---Absolutely. That is correct.

PN733

All right. Okay. Now, you tell us at paragraph 24 and thereafter that you employ four sales people. Two are on paid on the debit/credit system, wages plus commission less debits. Is that right?---That's correct.

PN734

And two commission-only?---That's correct.

PN735

Now, were your commission-only employees, were they working for you prior to the introduction of the modern award?---One was. One wasn't.

PN736

Right. And the one that was employed prior to the modern award coming in to force, how long had that person been with you?---I believe he started work in 2008 - 2007 or 2008.

PN737

Okay. Now - - -

PN738

VICE PRESIDENT HATCHER: Are they both on the template agreement, Mr Kuhne?---The commission-only sales reps, yes.

PN739

Yes. And in that template agreement, what's the commission rate?---They achieve - they start at 50 per cent.

PN740

Yes?---50 per cent inclusive super, and goes up from there.

PN741

MR FARRELL: Excuse me, Vice President. May I clarify with your question what is in the template or what his employees were with - - -

PN742

VICE PRESIDENT HATCHER: I think the first question was are they employed under the template.

PN743

MR FARRELL: Yes, sir.

PN744

VICE PRESIDENT HATCHER: And the answer was yes. And then I asked the witness what was the commission rate in the template?---That is my personal - - -

PN745

I see. Does the template actually set a commission rate?---You must pay above 35 per cent as a minimum.

*** PETER KUHNE

XXN MR CLARKE

PN746

All right. But the template doesn't actually - it allows the employer to fill out some other amount?---That's correct. That's correct, yes.

PN747

Thank you.

PN748

MR CLARKE: Now, that 50 per cent, including super, does that 50 per cent provide for annual leave or carer's leave and payment in lieu of notice. Is that all billed in to that 50 per cent?---Yes, it is.

PN749

And are they identified in terms of quantum as to how much of that 50 per cent is ascribed to annual leave in advance, carers personal leave in advance and - - - ?---Yes, there's a percentage allowed for those contingencies.

PN750

And they're separately identified, are they?---They're separately identified, but they are included in the 50 per cent.

PN751

VICE PRESIDENT HATCHER: And so just so I understand it, Mr Kuhne, so if a salesperson takes four weeks annual leave, how are they paid for that?---The four weeks annual leave can be a debit/credit from commissions payable forward.

PN752

But when they actually take the annual leave, do they receive any payment?---Yes, they do. Yes, they do.

PN753

So they receive it - - -?---They receive it. Yes, they do. They receive the four weeks, yes.

PN754

At the award rate?---Yes.

PN755

And then that's at some future stage debited from the Commission balance?---Yes, that's correct. Yes.

PN756

MR CLARKE: So can I put this to you, since the - would you understand what I mean by the Canavan decision?---I have a fair understanding of it.

*** PETER KUHNE

XXN MR CLARKE

PN757

Yes, which if I could explain it, that's a decision of the Full Bench of this Commission stating that you cannot pay annual leave or carer's leave in advance?---No, sorry. Okay. I apologise to the Commission. They are paid their

leave entitlement when they take leave. So when they go on holidays for four weeks they get their four weeks' holiday.

PN758

Right, and this includes your commission-only?---That's correct, yes.

PN759

Commission-only as well as your debitable - those two staff that are on a wage? You've got two groups of employee?---Yes, that's correct.

PN760

So all four get paid when they go on annual leave?---Yes. That's correct.

PN761

And all four have what they get paid for annual leave debited against their commission?---That's correct.

PN762

Okay. And likewise, if they go on sick leave, paid sick leave, that's debited from their Commission?---I haven't had any recent times that I can recall on sick leave, but it is there as a provision.

PN763

All right.

PN764

VICE PRESIDENT HATCHER: Just so I understand, Mr Kuhne, for the commission-only salespersons, let's assume at the time they take annual leave, they're on a - there's no commission owing to them. You pay them four weeks' pay when they take their four weeks' annual leave?---Yes.

PN765

That appears on a debit on their commission balance?---That's correct.

PN766

And at some future stage, when they sell a house, and you calculate the Commission, you - well, say it's 50 per cent, you give 50 per cent, but you would deduct the debit amount, which is the four weeks annual leave?---That's correct.

PN767

Right. Thank you.

PN768

DEPUTY PRESIDENT ASBURY: Can I just clarify, do you keep that as a running total so they can ascertain at any time what the balance of their debit/credit is?---Absolutely, yes. Yes.

*** PETER KUHNE

XXN MR CLARKE

PN769

Okay. And can I also just understand if we looked at the contract document, there would be, I guess, line items that would show what percentage is allocated to which entitlement?---Yes.

PN770

Yes. Okay, thanks.

PN771

MR CLARKE: I will come back to the debit/credits a bit further on in my cross-examination. But I just wanted to finish with Mr Kuhne's witness statement before I go back into those areas.

PN772

Now at paragraph 32, and go earlier than that at paragraph 27, "The reason for this", that's in relation to paying a higher commission for persons who are commission-only:

PN773

The reason for this is that as a real estate business I am totally reliant on the salesperson's ability to convince vendors to list their properties with my business in order to have stock to sell and therefore derive income.

PN774

Now, my understanding in the industry is that what makes real estate unique is that a salesperson unlike salespeople in other industries, car industry et cetera selling, they have to get their own stock. Is that right?---That in itself is a correct statement. I would often assist salespeople in obtaining their stock, but that is obviously if we don't list a house, we don't have anything for sale.

PN775

Yes. So for your business to prosper, you've got to be able to have sales staff, whether it's - do you sell commercial properties or lease commercial properties?---90 per cent - 80 to 90 per cent of my business is residential sales.

PN776

Right. So your ability - your business' ability to generate income is very much dependent on the ability of the sales person to find potential vendors, get them to sign an agency agreement with you, the vendor and your particular company?---That's correct. That and my ability to do exactly the same and pass those listings on to my sales people.

PN777

Yes.

*** PETER KUHNE

XXN MR CLARKE

PN778

VICE PRESIDENT HATCHER: What do individual salespersons do to generate listings? What sort of activity do they - -?---An experienced successful salesperson will have a database of clients which is their security, if you like, that they continually tap into. A new salesperson generally speaking, works an area.

They would have an area of 1000 to 2000 homes, in my instance, that they are attempting to derive listings from that source.

PN779

How do they do that? What sales techniques do they use?---A current new sales person I have is very proactive in the community. That would be a model - sponsors schools et cetera to get his name out there. A lot of it is genuine - it's just getting in front of people. It's phone canvassing. Not so much anymore, of course, that's not as popular, but he would be working his area and finding out what's going on in that area, talking to people when he can and, as I said, sponsoring different sporting things and school functions and that type of thing. It's generally typical hard work when you start to get your career started. He would be a good case in point, because he is three or four months into it.

PN780

I assume a lot of people who sell their houses, as it were, just walk in the door and say, "I want to sell my house"?---Not many.

PN781

Not many?---Not many. I mean, I have a prominent location, which helps. But that might be 25 per cent at best, I would think.

PN782

MR CLARKE: Would it be, if I suggested this to you, would it be fair with respect to your business and salespeople in Western Australia for that matter generally that many vendors look towards a particular salesperson. They might indeed follow that salesperson from one agent to another because they've been satisfied with that person's selling ability?---Absolutely.

PN783

And that's a very important part of the skill in the job of being a successful salesperson, isn't it?---It's fundamental. Absolutely.

PN784

Yes. So the vendors have a close relationship to their salesperson, less of a relationship with the business in itself?---No, it's a combination, because there's a local factor. Most vendors want to engage a local agency. So they will perhaps not go outside the area too much. So it's a combination of both.

PN785

Yes. Now, have you looked at the - well, I will start with Ms Masson-Forbes' witness statement. Have you had a - have you studied her - - -?---I have. I haven't got a copy of it at the moment.

PN786

I've got a copy that I can just show you and I've - - -?---Thank you.

*** PETER KUHNE

XXN MR CLARKE

PN787

And I just draw your - I just ask you to spend a few moments just refreshing your memory. If you just look at paragraph 10?---Is this the one referring to a property manager and strata manager?

PN788

This is the one at paragraph - - -?---Page 5?

PN789

Sorry. Paragraph 6, I should have had it in front of me. It's headed, "The role and responsibilities of a property salesperson"?---Yes. Yes, I have it.

PN790

And it goes over the second page. I don't mind if you want to take a couple of minutes to remind yourself of what was in there?---I did read it in its entirety earlier on in the day.

PN791

Right. Is there anything in those dot points in paragraph 6, that you would disagree with in terms of describing the type of skills and responsibilities that a salesperson would need to carry out their task?---I would add that the most important thing that they need is enormous drive. But other than that, no, I don't disagree with the statement.

PN792

Thank you.

PN793

VICE PRESIDENT HATCHER: That's the third dot point, isn't it?---"Must be self-motivated and driven." So I guess that would be pretty close.

PN794

MR CLARKE: Okay. And if I could - now, do you do any - about 20 per cent, is it, of your work you do with commercial leasing?---No. No, we sell rural properties, which would be - and a little bit of commercial property to make up the remainder.

PN795

I see. And in selling rural properties, similar type of skills as for the residential urban areas?---No. No. Far more - far more local, far more neighbourly. No. A different - a different - quite a different skill set.

PN796

Right. Similar but not the same?---Yes. That's correct.

*** PETER KUHNE

XXN MR CLARKE

PN797

Okay. All right. Now, with your - I don't want you to identify the individuals concerned of your staff members, but if you look at your waged salespeople that you - plus commission and debit, is there a salary range - that's excluding any allowances that may have been paid that you can indicate what - for example, any of them of those two earn in terms of wages, say between a range of 40 or \$50,000

last financial year?---Sure. One salesperson commenced work as a salesperson on 1 July after being previously employed for two months as a leasing agent. In that - what are we now - four and a half month's time, that four and half-month period, he has earned his salary and very little commission. So he's - he would have had - he's been on basically the payment of 700 or \$800, whatever it is per week, plus a - that would be - it would be very close to that. The other person, last financial year his income was somewhere around 50,000 - 45 to 50,000.

PN798

And he'd been with you for how long?---Coming up for two years now.

PN799

Right. And in terms of your two commission-only salespeople, again without identifying the individuals, what salary range would they have achieved, say in the last financial year to 30 June, 50 to \$60,000 or 60 to 70 or greater?---One of them is in the order of 70 to 80. The other one less than that - has had some health issues.

PN800

Yes. And out of that, they pay for their own vehicle and allowances as - - - ?---That's correct. That's correct. That's correct.

PN801

They don't get any of the award allowances?---That's correct Yes.

PN802

VICE PRESIDENT HATCHER: And that 70 or 80,000 - roughly speaking, how many sales would that represent?---That particular salesperson is the salesperson that does some rural properties.

PN803

Right?---They tend to be larger sales, but he would probably have sold 20, 25 properties to - that gross commission of 150 to 180,000 for the year; perhaps a bit more than that. It would be something like that.

PN804

MR CLARKE: That particular person, he's been with you for how long?---Eight years.

PN805

Eight years. So he's an experienced salesperson?---He's an experienced salesperson.

PN806

Yes. And - okay. Does that include - and that

PN807

\$80,000, does that include the superannuation or that's - - -?---Yes, it does.

*** PETER KUHNE

XXN MR CLARKE

PN808

It does include the super - the nine and a half per cent?---Yes.

PN809

Okay. Now, at paragraph 37, you say:

PN810

The above factual scenario means in hiring these sales persons I have taken on a risk of \$41,000 per employee, should that employee not be successful in obtaining listing of properties.

PN811

Now, at the moment, if one of your employees could prove that they earned \$41,000 in 12 months within a five-year span, they could be made commission-only. Is that right?---That's exactly the case with one my salaried salespeople. He is qualified to go on commission-only and has elected not to.

PN812

Yes. Now, and that person - sorry, is that the one that has just been with you for a few months or is - - - ?---No. No, that's Ryan, who's been about two years.

PN813

Right?---Two years, perhaps a bit more.

PN814

And I'm sorry, just remind me again, I haven't got a note of it, what would that person have earned by way of wages?---Somewhere around 50,000 in the last financial year. A bit higher than that.

PN815

Yes. So what commission - share of commission do the waged salesperson receive?---In his instance, 46 per cent.

PN816

Sorry?---In his instance, 46 per cent.

PN817

46 per cent And the other person?---The other person is on 42 per cent.

PN818

42 per cent. Okay. Now, essentially that person making about 50,000, they also receive a car allowance?---That's correct.

PN819

And would that be less than a five-year-old vehicle or - - -?---I'm not sure of the age of his vehicle.

PN820

Let's say somewhere - the car allowance could have been, depending on the size and the age of the vehicle, somewhere between say seven and ten thousand dollars a year?---Somewhere in that order. Yes. I don't have that - - -

*** PETER KUHNE

XXN MR CLARKE

PN821

No, I'm not holding you to the absolute accuracy of it. Now, if he was to go commission-only, would he get the 50 per cent?---He would get an immediate increase in his commission that he would be paid, yes.

PN822

Would it be fair to suggest 50 per cent?---No, he would - he's probably already gone over one threshold. He would be on 52 per cent.

PN823

I see. Now, of course, they then don't get annual leave - sorry, they don't get a car allowance of a mobile phone allowance. Is that correct?---That's correct, yes.

PN824

And they only get paid as and when properties are sold?---That's correct.

PN825

And settled, I should say, also?---Yes. More importantly. Yes.

PN826

In your experience in, say, the last 12 months, what time lag is there between a sale - a contract being signed and settlement?---We're finding across the board it's gone from four weeks to more than six. Approximately six or seven weeks.

PN827

Right. That's a very - that's a hard question to answer, because there's so many different types of contracts (indistinct) obviously, yes.

PN828

So to get a listing, once you've got a listing, you've got to do open inspections and various things like that. Is that correct?---Yes.

PN829

And would that take about four weeks with an advertising campaign and open inspections?---Our time on market in Perth now is closer to 70 days, unlike a lot of Australia.

PN830

Right. So it's closer to 70 days?---That's exactly the reason why the person that's entitled to go on commission-only has elected not to and with my full support.

PN831

Right. And then so it's 70 days to market a property and hopefully sell it and then, what, about another four weeks or five - did you say five? How many weeks to settle usually?---I think about six I would be telling people to rely upon.

PN832

Say about six?---Yes.

*** PETER KUHNE

XXN MR CLARKE

PN833

Right. So you would need quite a number of - I put it to you that you would need quite a number of sales as a commission-only salesperson to be able to generate sufficient income on a rolling basis to be able to meet your own needs and expenses of running your car, mobile phone, your mortgage payments and whatever else?---Well, specifically as a salesperson, they need to generate enough income to do enough appraisals to list enough properties to forward forecast their income. So that's part of the training and the skill set and, yes, they do need some financial management.

PN834

Yes. But you - but REEFWA thinks that a 160 per cent bar that you have to jump over in terms of being able to show you've earned that in wages over the - for any single 12-month period in any three years preceding the date of that agreement is too high?---Absolutely. It's our opinion that if we agree to that 160 per cent, there will be less people given the opportunity to go into the industry and earn a serious income.

PN835

Well, yes. I was going to come to that, because you point that out in paragraphs 39, 40 and so on. You talk about the risk of hiring unqualified salespersons will increase dramatically. Now "unqualified", do you mean persons not reaching the minimum income threshold?---Well, that's right. Every time you employ a salesperson, it's - you're taking some sort of judgment as to their likelihood of success, because it is a unique industry. So it's hard to pinpoint. The best salesperson I ever had was a librarian before she became a real estate salesperson. There's no one - no model that would tell you that she should have succeeded, but she succeeded stunningly. But it's hard to pick who is going to be successful within the industry. So the higher that threshold is, there will be less employment in our opinion.

PN836

But wouldn't you - you've got to do it anyway in the first 12 months to have somebody on a - who has not been in the industry before to work as a salesperson on a debit/credit wage system. You do that now?---That's correct.

PN837

And the industry would know or you as the employer would know after 12 months whether they're cut out for the real estate industry, wouldn't you?---I've seen it work not quite as simply as that. You're probably going to have a very good idea within 12 months.

PN838

Yes. And the young person - or the person you were speaking about who has been with you only since, I think, January you said?---No. No, less than that. I have one salaried salesperson who has only been with me a handful of months.

PN839

Yes. And so far he's achieved sufficient sales to cover his wages?---No. He hasn't. No.

*** PETER KUHNE

XXN MR CLARKE

PN840

No?---No. He has not.

PN841

Still in debit is he?---Yes.

PN842

By much?---I guess it would be significant by the end of the 12 months if there's not a few more sales, Mr Clarke, but - - -

PN843

VICE PRESIDENT HATCHER: I'm sorry. I thought your evidence before was that he had earned his salary and very little commission?---Yes. Sorry. He's been paid what he's been - paid by myself as his salary and he's settled about \$20,000. So he would not be in front. No. He would not be in front.

PN844

MR CLARKE: So if this person or another salesperson only generated in effect the minimum award wage plus 10 per cent if they're operating their own vehicle, how could they possibly afford to work commission-only, even if they qualify on such a low bar, given they're up for the costs of a motor vehicle and all expenses and the irregularity of income? How could anyone possibly afford - - -?---I've never met a salesperson that's entered the real estate industry with the intention of earning the basic award payment and I've never met an employer that's wanted to employ anyone to have them receive the basic award. People enter the industry for the opportunity to earn a serious income. The point that you are raising though, I guess, is at what point do you decide that that person is not going to be successful within the industry and perhaps has to look elsewhere at their employment. They are certainly not going to want to stay around and, as you said, earn \$40,000 a year with the stress that's involved with the industry at that level.

PN845

Yes. So selling real estate, there are so many factors beyond the skill of an individual salesperson or principal, isn't there? I will give you some examples. You don't control interest rates. Is that right?---That's a hundred per cent correct.

PN846

Interest rates go up. Credit gets reduced for the sale of houses for example. That imposes significant burdens on selling real estate, doesn't it?---We could get into a debate about the economics, but no, I think if you had an interest rate increase at the moment that perhaps would help our industry, because people might buy to secure a house at a lower rate, before they get on to the treadmill of rising interest rates. So sometimes it's not what appears obvious is not the case. I think you're raising the point that, yes, there are factors outside of the salesperson's control. Good salespeople tend to succeed no matter what the market it.

*** PETER KUHNE

XXN MR CLARKE

PN847

And for example, in Western Australia, with the ending of the mining boom or the construction phase of it, that's impacted significantly on the value of properties?---Not so much that. The high water point in Western Australia for property transactions was set in 2006. The so-called mining boom was when the projects in the northwest were being constructed and lasted approximately four years, 2010 to 2014. So it was well outside that record being set 10 years ago. It's had an effect, but not quite the effect that people think, because a lot of those people were itinerant. They weren't necessarily coming to Perth and buying houses. They were travelling all around Australia to source work in that so-called boom.

PN848

But the property market has softened?---It's definitely softened and that would be a factor, as we're a resource state, so obviously it's a factor.

PN849

Yes.

PN850

VICE PRESIDENT HATCHER: And the commercial market has softened?---The commercial market, probably more so. Probably more so.

PN851

MR CLARKE: Now, you say at paragraph 45:

PN852

As a former commission-only salesperson, I know from experience that there are benefits to employees to be engaged on a commission-only basis. Most importantly for me, there was no limit on the potential for me to earn remuneration.

PN853

That's a bit of an exaggeration, isn't it?---Not at all. Not at all. I've always thought that the real estate industry is an industry that people go into for opportunity. Not for security. They go in for the opportunity to earn a serious income. No one tells them at the start of the year that, "You can only earn" whatever. If they are successful, they get the results. Their income is reflected in it. So it's - they don't have a ceiling put on them at the start of a financial year to say that "This is all you will earn."

PN854

Yes. And - but that's equally true for a wage-plus-commission person too, because if they can sell a lot of houses they'll get a lot of commission?---Granted. That is a fact. That is a fact. They don't seem to make as much money as commission-only people though.

*** PETER KUHNE

XXN MR CLARKE

PN855

Why? Have you sat down and - is there some analysis that's been done by REEFWA or is that just what you think?---My own 26 years' experience where I, at one stage, had the three leading salespeople in the area in my office. I'm

pleased to say they all earned more money than I did and all deserved every dollar, of course. They were working enormous hours and making big money. But that was - that is harder to do now, because they may not have been given the opportunity.

PN856

Yes. Well, you also say in paragraph 47 about there are many reasons why commission-only employees can have a weak six-month period where they do not earn at least the minimum wage due to factors beyond their control. For example, commission-only employees may decide to have a long overseas vacation or decide to study full-time. Have you - did you ever when you were commission-only, as an employee, take an overseas trip for three months?---No, but what I did do, the moment I started selling real estate was go for my licence, which in those - in that period, I studied two subjects every six months. It took me about three or four years to obtain my licence. In Western Australia now you can do that in a lump of six months. You can go in and get your certificate in real estate and management, which enables you to have a (indistinct) on your licence to open your own business or run a trust account or be a manager. So that would be an intensive six-month period. One of my commission-only salespeople did exactly that a few years ago, so obviously his income in that six-month period was greatly affected.

PN857

That's while he was working for you?---That's right. He was working for me and took advantage of the ability to obtain his license in an intensive six-month study period.

PN858

COMMISSIONER GREGORY: Can I just ask there, Mr Kuhne, just following up on an earlier question from the Vice President as well, you said that your commission-only staff when they take annual leave, you pay them in advance before - - -?---No. No, sir. No, I did correct that. At the time they take the holiday.

PN859

Yes, sorry. At the time they take the holiday, you pay them for that leave period?---Mm-hm.

PN860

What do you base that payment on?---It's on the award. If I was ever - questioned it, I would check with people at CCI as to what I needed to pay.

PN861

So you based that for a commission-only staff member, when they go on a period of leave, you based that payment on the award minimum rates?---That's correct.

PN862

Thank you.

*** PETER KUHNE

XXN MR CLARKE

PN863

VICE PRESIDENT HATCHER: In Western Australia are commission-only salespersons entitled to long service leave?---Yes.

PN864

MR CLARKE: Right. Now - - -

PN865

VICE PRESIDENT HATCHER: And the same would apply if they took long service leave? Perhaps they tend not to do it - - -?---I'm not sure on the answer to that question, Vice President. I would need to check with Stephen on that.

PN866

That's not something that you've experienced?---No. Well, not in recent times, I haven't. No.

PN867

What if a long-serving salesperson who would have qualified for long service leave leaves your employment? Do you have to pay them out?---Yes. We have to pay obligations under the long service, yes. But the question as to whether that's recuperable, I've never recouped it, so I assume it's not.

PN868

Just going back to the annual leave scenario, you have paid somebody for their annual leave and they've taken annual leave, it's then a debit on their commission balance, but then they terminate the employment before they make another sale. Is that debit then just simply unrecoverable?---That's correct. Yes.

PN869

MR CLARKE: Now, with the template employment agreement utilised, is there any provision within that template for the debiting of authorised but unpaid vendor advertising or marketing expenses?---There is provision for that, yes.

PN870

Right. Now, in Western Australia, is it like South Australia where there's a sales agency agreement entered into between the vendor and the real estate company having exclusive rights to sell their property over 90 days or whatever period?---Well, that's - that would be the case most of the time. There's obviously different forms of agency agreement, but the most common is an exclusive authority. I have never charged a sales the salesperson advertising because I see it as a management role, but I understand the provision is there to do it.

PN871

Yes. Now, I appreciate that you don't debit the unpaid vendor-authorised advertising - unpaid authorised advertising. In your position as president though, you say that you are aware that some companies do do that.

PN872

MR FARRELL: Objection. That's not what the witness stated. The witness stated that there is a provision for it, not that other people do it.

*** PETER KUHNE

XXN MR CLARKE

PN873

MR CLARKE: Okay. I will rephrase it.

PN874

Are you aware of any real estate employer in Western Australia that do in fact utilise that provision and debit unpaid authorised vendor advertising from the salesperson's share of commission?---So specifically there's sales companies in Western Australia that pay the sales people 100 per cent commission. They pay desk fees and all the expenses. So they pay all of their costs; everything they do. But they receive in return 100 per cent commission. So that's a model that seems to come about from time to time in Perth and perhaps other places as well. So those people absolutely would be charging expenses in their entirety.

PN875

Yes. But what about if less than 100 per cent share of the advertising? Like, you know, a Ray White or an LJ Hooker, people like that, franchises?---I'm not aware of it, because our advertising is quite controllable now, because of the Internet. I doubt it, but it would be possible. I can't state that it doesn't happen.

PN876

Okay. Now, do these templates provide for the debiting of long service leave entitlements?---Are we talking about commission-only salespeople?

PN877

No. For both. If they're separate, tell me. Let's deal with the waged person, which is debited against commission. Are they - - -?---I've never had a salesperson that has qualified for long service leave they have been on a salary, but I am sure that it wouldn't be recoverable but I'm not sure. I would need to refer to my industrial relations expert here.

PN878

Right. And insofar as commission-only?---I've never recovered it. I understand that you can on commission-only.

PN879

VICE PRESIDENT HATCHER: That you can?---Yes.

PN880

Right.

PN881

MR CLARKE: Is that under one of your employment agreements with your commission-only sales staff that specifically says we pay you long service leave, but it will be debited from subsequent commission payment or something like that?---It can be. Yes.

PN882

But do you - what is your employment agreement say about long service leave - the ones that you use?---No, that we don't recover it.

*** PETER KUHNE

XXN MR CLARKE

PN883

Right. So long service leave payments are paid on top of whatever the Commission?---That's correct. That's correct.

PN884

That's for commission-only?---That's correct.

PN885

Now, the - you have already referred to it and I just want to go back over it again. The superannuation, the nine and a half per cent, that's incorporated. Is that debited from your sales people's commission share?---Well, we do it to make the mathematics easier. We could pay 46 per cent plus super. We pay 50 per cent inclusive super as a minimum for a commission-only salesperson. So the mathematics, I believe, are it's 45 point something or other, plus superannuation equals 50 per cent.

PN886

Yes?---My understanding of it, of course, is that's well in excess of the 35 per cent so we are entitled to do that.

PN887

Now, have any of your employees or are you aware of any employees with another company that may have expressed concern that they see that as paying their own superannuation?---Not at all. Not at all. They don't see themselves as traditional employees really, it must be said, because they consider that they're running their own business without the onerous responsibilities of paying rent et cetera. But able to live their life the way they want to live it, as long as they do the right thing with all the legislative requirements and the opportunity to earn a large amount of money. They would all be paid well above award. So no, I don't believe anyone would be expressing concern that they're paying too little on a commission basis. They might complain about the market conditions, but not the pay structure within their office.

PN888

Well, why does the industry have this business of telling people, "Look, you will get 50 per cent or 55 per cent commission" when in reality it is less than that, when you take out all the debits?

PN889

MR FARRELL: Objection to that question. Mr Kuhne has his own specific experience, of course, and if the question was directed to his own experience, that would be fine. But Mr Clarke is asking him why the industry does this. We don't accept the premise of his question.

PN890

VICE PRESIDENT HATCHER: But Mr Kuhne is not just here as a - giving evidence about his own business, is he?

*** PETER KUHNE

XXN MR CLARKE

PN891

MR FARRELL: No, sir. He is also giving evidence as president of REEFWA. I accept what. But Mr Clarke's question is why does the real estate industry say to employees, and Mr Kuhne - well, sorry, let me rephrase. I don't know whether Mr Kuhne accept the premise of the question or not.

PN892

VICE PRESIDENT HATCHER: but the question that Mr Clarke has asked is assuming that there's an ethical lack there. If someone pays 50 per cent inclusive superannuation and it's all stated for the salesperson where no one is any way signing a contract that they don't know what they've been paid.

PN893

MR CLARKE: Well, take the person who has been with your for eight years, I think the commission-only?---Mm-hm.

PN894

Has his commission share been 50 per cent inclusive of superannuation for the whole of those eight years?---There's bonus structures as there would be in most companies. The better he does, his percentage increases. So he's aware that he's paid. His percentage is inclusive of superannuation, if that's your question.

PN895

Yes. So what I'm getting at is this; when he first became commission-only - I appreciate you might have a stage increase of, you know, you get a minimum of 50 per cent up to so many thousands of dollars of commission brought in and it might go up to 52 per cent or 55 per cent, again inclusive of super, but was that structure that you've currently got for this gentleman the same as it was when he started with you eight years ago?---Well, obviously the maths are different, because the superannuation levee was lower then, of course.

PN896

Yes?---So there's been adjustments on that. But his pay has never gone back.

PN897

But when you say - you're quite right. Superannuation has increased since he joined in 2008. What I am trying to get at is has his share of the employer's commission increased commensurate with the increase in the superannuation?---Yes, absolutely.

PN898

So he was on less than, say, the base figure of 50 per cent eight years ago?---That's correct. Yes, that's correct.

PN899

And it's gone up?---That's correct.

PN900

As a result of an increase in superannuation?---And his own performance. Yes.

*** PETER KUHNE

XXN MR CLARKE

PN901

Is that identified in any email or discussions with the employee that, "Look, next year the super contribution goes up from 9 per cent to nine and a half per cent and we're going to adjust your base figure by whatever that quantum is so that you keep the same relative payment"?---Absolutely. Of course, yes.

PN902

Yes?---Yes.

PN903

And is that - would that be true of other real estate companies in Western Australia? Would they do the same as you?---I know no company that's not paying what they need to pay in superannuation.

PN904

Yes. I appreciate that, but what you're suggesting is that as the superannuation guarantee goes up from - it was at one stage three per cent up to now nine and a half per cent, that the Commission share that you give your employees has risen accordingly?---Absolutely.

PN905

To compensate. So they're not actually losing out on their share of the - a proper share of the employer's commission?---That's correct.

PN906

And are you saying that happens in Western Australia?---Absolutely.

PN907

With all employers?---Absolutely. I have no knowledge of anyone not doing exactly how you've outlined that there.

PN908

I better put you in charge of the South Australian REEF. Now, are you aware of the application by the Real Estate Employer's Federation of New South Wales and Queensland, that they want to grandparent, if I can term it, for commission-only staff with respect to how you treat payments in advance - sorry, payments for commission-only people taking annual leave or carer's leave? Have you - they've put in a submission - there's nothing from the REEFWA to indicate what their view is with respect to the New South Wales employer's proposal. I'm just wanting to know, before I go any further with you on questions, as to whether you know what I'm talking about and whether - - -?---I'm not fully over that.

PN909

Okay. All right. If you just excuse me, members of the Bench, I will just - I think I'm nearly finished.

PN910

VICE PRESIDENT HATCHER: While we're waiting, would it be possible for us to be provided with a copy of REEFWA's template contract.

*** PETER KUHNE

XXN MR CLARKE

PN911

MR CLARKE: Yes, absolutely.

PN912

MR FARRELL: If I may answer that Vice President, I can get that to you this afternoon.

PN913

VICE PRESIDENT HATCHER: Thank you.

PN914

MR CLARKE: Excuse me, your Honour. No further questions.

PN915

VICE PRESIDENT HATCHER: All right. Any re-examination, Mr Farrell?

RE-EXAMINATION BY MR FARRELL

[2.58 PM]

PN916

MR FARRELL: Just one short one. Thank you, Vice President.

PN917

Mr Kuhne, Mr Clarke made a couple of statements and some questions regarding the mobile phone allowance and car allowance and in particular he was stating the difference between a person on a wage - I appreciate this is leading, but I will ask some indulgence on this.

PN918

A commission-only salesperson, are they debited for motor vehicle allowance and phone allowance when they're not paid it?---When they're not paid it?

PN919

That's correct?---No.

PN920

Thank you. That's all I have.

PN921

VICE PRESIDENT HATCHER: Sorry. That went too fast for me to comprehend.

PN922

MR FARRELL: I apologise.

PN923

VICE PRESIDENT HATCHER: What was the question again?

*** PETER KUHNE

RXN MR FARRELL

PN924

MR FARRELL: The question was whether a commission-only salesperson in calculating the quantum of remuneration they had earned, whether the motor

vehicle allowance and the mobile phone allowance, which you will appreciate is not paid, whether that was debited.

PN925

VICE PRESIDENT HATCHER: Yes. The answer was obviously now.

PN926

MR FARRELL: Yes. The answer was no. Yes.

PN927

DEPUTY PRESIDENT ASBURY: But it's encompassed in the commission share that they get?---Provided that that commission is enough above the award to cover it.

PN928

Yes?---So it must be well above the 35 per cent.

PN929

And you identify - do you identify that component?---That's correct. Yes. You will see that when you see the contract.

PN930

Yes. Okay. Thanks.

PN931

VICE PRESIDENT HATCHER: All right. Thank you for your evidence, Mr Kuhne. You are excused and you can return to the Bar table?---Thank you.

<THE WITNESS WITHDREW

[2.59 PM]

PN932

MR FARRELL: Thank you, Vice President. I notice our video-link to Perth is up and Mr Whiteman is in the box.

PN933

VICE PRESIDENT HATCHER: All right. Mr Whiteman, can you hear us?

PN934

MR WHITEMAN: Yes, I can.

PN935

VICE PRESIDENT HATCHER: All right.

PN936

THE ASSOCIATE: could you please state your full name and address.

PN937

MR WHITEMAN: Mark Whiteman (address supplied)

<MARK WHITEMAN, AFFIRMED

[3.00 PM]

*** PETER KUHNE

RXN MR FARRELL

PN938

VICE PRESIDENT HATCHER: Mr Farrell?

PN939

MR FARRELL: Thank you, Vice President.

PN940

Mr Whiteman, good afternoon, sir. Did you prepare a statement for evidence for these proceedings?---Yes.

PN941

Do you have that statement in front of you?---Yes.

PN942

Does that statement contain 37 paragraphs and four pages?---Yes.

PN943

And your name is listed at the bottom of the last page?---Yes.

PN944

Is that statement true and correct to the best of your belief?---Yes.

PN945

Thank you, Mr Whiteman. Vice President, I have no further questions. Sorry, before I do, I tender the witness statement.

PN946

VICE PRESIDENT HATCHER: Yes. The statement of Mark Whiteman, undated, will be marked exhibit 13.

EXHIBIT #13 STATEMENT OF MARK WHITEMAN UNDATED

PN947

VICE PRESIDENT HATCHER: Mr Clarke.

PN948

MR FARRELL: Sorry, Mr Whiteman, what was that last comment sir?---I was just speaking to the young lady here to say I couldn't hear the last comment made by whoever that was that spoke.

PN949

Okay. The Vice President just outlined your witness statement was listed as an exhibit and its number. That's all?---Yes. Sure. Sorry, thanks a lot.

PN950

VICE PRESIDENT HATCHER: Mr Whiteman, Mr Clarke will ask you some questions now. So if you can't - if you can't hear any question, please say so before trying to answer the question?---I will yes.

*** MARK WHITEMAN

XN MR FARRELL

PN951

Yes. Go ahead, Mr Clarke.

CROSS-EXAMINATION BY MR CLARKE

[3.02 PM]

PN952

MR CLARKE: Thank you, Vice President.

PN953

Now, Mr Whiteman, if I could just go to your witness statement and paragraph 14:

PN954

Real estate employees only receive income when their businesses sell properties for clients and then pay them a commission -

PN955

and so on. I just put it to you, and I don't think it's controversial, but just to be out of an abundance of caution, there would be many real estate agents also that have property managers - property management deals, which they receive income from. Is that correct?---That's a fair point.

PN956

Yes. And a number of those people would be your franchisees in Western Australia?---Yes. That's correct. The comment I make in point 14, Mr Clarke, was in relation to sales incomes.

PN957

Yes, I appreciate that. I realise you weren't deliberately obstructive. I just thought I'd get it on the record. Now, at paragraph 15 - I'm sorry, paragraph 16 - you refer to the employer as solely reliant on its employees' performance in winning the client to list their property with the business and then selling that property. Now, I know you've made that paragraph in relation to commission-only salespeople, but I put it to you that that would be equally applicable to salespersons who are on a debitable wage plus allowances. Would you agree?---Of course.

PN958

Yes. And have you read the witness statements of my organisation's two witnesses, Mrs Lynne Masson-Forbes and Mr Nathan Fox at all?---No, I have not.

PN959

Okay. Well, if I could - I just want to read out now and I won't take it word for word - your representatives here have copies of Ms Masson-Forbe's witness statement and Mr Fox's, so if I - you can rest assured that if I am misleading in anything I put to you, he will be right on the job. Now, Ms Masson-Forbes, under the heading, "The role and responsibilities for property salespersons" says:

*** MARK WHITEMAN

XXN MR CLARKE

PN960

I have looked at the description of a property salesperson under the award and the indicative duties of a salesperson. I agree with the description of the responsibilities as set out in the award and would say the following is to what I believe are the essential skills, responsibilities of a residential property salesperson.

PN961

Now, I just want to then go through just a few of the points that she has made and I'd like you to comment on each one as I make them, either that you agree with them or that you disagree and if you do, why. Okay. And if I go too fast, please pull me up. Lynn says, in dot point order:

PN962

Believing the essential skills are: excellent interpersonal skills.

PN963

Agree?---It's certainly an advantage.

PN964

Then,

PN965

To be a very good negotiator, because the person is selling, for most families, the most valuable asset of their lives.

PN966

Would you agree?---Again, that's an advantage.

PN967

Then,

PN968

Must be self-motivated and driven, working whatever hours are necessary to list properties for sale, then selling them.

PN969

?---I agree.

PN970

Then,

PN971

Must show a high degree of initiative in their work and in marketing their skills to prospective clients.

PN972

Do you agree?---Yes.

PN973

Then

*** MARK WHITEMAN

XXN MR CLARKE

PN974

High level of personal presentation.

PN975

?---Yes.

PN976

Then,

PN977

Able to deftly handle or minimise conflict between vendors where there is a conflict between family members, such as over the sale of deceased estate, couples separating or divorcing, where each party has a different view as to whether a sale should take place and on what terms.

PN978

Would you agree?---Well, I would have worded that differently in that they need the patience to be able to help people work through that. I don't - I'm not sure how you specifically help family members negotiate through stuff like that, but often the patience to allow them to communicate and to facilitate that discussion. But I imagine something similar to what you've just said.

PN979

Yes. NO, that's fine.

PN980

Must keep abreast of the market doing sound research on property prices in different areas and being able to advise vendors as to the likely price range a property might fetch.

PN981

?---Yes.

PN982

You agree?---Yes.

PN983

And then,

PN984

Over the last six years, much greater use of technology by sales staff; example, the use of tablets to present themselves to potential vendors. Being able to display the type of marketing that's recommended; cost draft contracts such as sales agency agreements showing other sales by the salesperson or sale prices obtained and things like that.

PN985

Would you agree?---The ability to use technology certainly has been an added skill that they need. Yes.

*** MARK WHITEMAN

XXN MR CLARKE

PN986

And,

PN987

A salesperson needs to be able to suggest the type of marketing advertising campaign for the property concerned and the budget, the vendor or can afford, eg use of the Internet, use of print media and use of the local papers and state wide, signboard, leaflet drops, quality brochures during open inspections and advice as to whether a property should be auctioned and any additional costs.

PN988

Would you agree?---I think - and this is where the industry, I think it's fair to say, varies. Different salespeople will have a different opinion on what you just said on the same clients, and therefore it is not an exact science, but certainly they need a knowledge of marketing. They need knowledge of the best methods of sale. So the majority of what you just said there, I would agree with, as I say, subject to what I just added.

PN989

That's fine. And,

PN990

The need for a salesperson to keep abreast of changes in real estate laws or legislation that could impinge on the value of a property. For example, any significant tree legislation, the presence of asbestos on the property and things of that nature.

PN991

?---Yes.

PN992

And finally,

PN993

The salesperson giving vendors advice on how best to present their property without incurring significant costs, eg a bit of repainting, cleaning particular areas and dressing up particular rooms.

PN994

That sort of stuff. Would you agree with that?---Yes. Sometimes those things that an owner needs to do though do require investment and some owners have the capacity to do so and a salesperson recognising both would probably recommend that as well.

PN995

Yes?---So correct, but whether it would be insignificant cost to the seller or not depends on each case.

*** MARK WHITEMAN

XXN MR CLARKE

PN996

Yes. Yes, I appreciate that. Now, going back to your witness statement, your paragraph 21. This is in the lead-up to some paragraphs dealing with a salesperson. You take on a risk of approximately \$41,000 a year if they're not commission-only and you accept that an employer is entitled, provided it does so fairly, to dismiss an employee for poor performance, for legislative as well as cost reasons, new employees need to be trained and given time to be able to successfully perform in the real estate industry. Given your experience in the industry, what would you believe to be a reasonable period of time to assess whether a salesperson has got it in them to be a success, not only for themselves but for their employer?---It completely varies on each employee and on each employer for that matter, but obviously you're directing the question to me.

PN997

Yes?---It definitely depends on each employee. Quite simply put, there are certain activities that lead to a sales person's success and if they demonstrate none of those activities over a period of time, then probably a fair indication that they're not going to succeed. For example, call reluctance, failure to follow up, basic skills which, I guess, go to work ethic more than knowledge or skill. They go to whether or not someone is a worker or they're more on the lazy side. Those things could be evident far quicker than what most people, I think, in the industry would probably suggest. So I think varies on each case. Sometimes you see someone who is trying really hard, who just hasn't quite got it yet. They might be given more time to succeed, where is someone who might be reluctant to do the necessary tasks that are required to be successful, and if they're showing that consistently enough, well then you really owe it to the employee and your own business to identify that quickly and if unrectifiable, by willingness on the part of the employee, well, then that would probably mean a shorter period of time, Mr Clarke.

PN998

Well, if I could take you down to your paragraph 25 - paragraph 24 first:

PN999

Furthermore, the risk to employers in hiring inexperienced salespersons increases, which would make it less palatable for employers to hire people new to the real estate industry.

PN1000

And this is in relation to the association I represent wanting to increase the minimum income threshold to 160 per cent. And then you say at paragraph 25:

PN1001

This in turn will mean that as time go by, the poorer-qualified experienced commission-only salespeople will diminish, as qualified salespersons leave the industry, and will not be replaced in the same quantity by newly-qualified salespersons.

*** MARK WHITEMAN

XXN MR CLARKE

PN1002

Now, with Ray White Western Australia in the corporate office, do you have a breakdown of the number of commission-only salespeople that earn above a certain amount of money - you know, between ranges of 50 to 60,000, 80 to 100,000 or anything like that?---I don't understand your question.

PN1003

Right. You're the franchisor for some 200 franchisees. What I'm trying to get at is - - -?---It's potentially 200 - there are potentially 200 salespeople.

PN1004

Sorry, 200 salespeople?---Yes.

PN1005

My apologies, but - - -?---No, I don't have direct stats on what each of them necessarily - sorry, I do have stats on what they generate and obviously, which goes to the point you were making about paragraph 24 and 25, we've seen a significant reduction in that number due to the first instance of the introduction some time ago of requirement to pay salaries. So my points at paragraph 24 and 25 were made off the back of that information, that we have less salespeople today than we did prior to wages being brought in here in Western Australia.

PN1006

Yes. Now, is - I will put this to you and if you disagree with it please say so. I will put this proposition. Isn't it the case that the real complaint from Western Australia real estate employers is that they just can't employ as many commission-only employees as they used to be able to do prior to the introduction of this award where basically anyone who was a qualified salesperson, whether they'd ever sold a house or not, immediately qualified to be commission-only. Isn't that right?---That's not a complaint, that's just a reality that the fact of the matter is that now you are required to pay the salary. Each business has a certain capacity cash flow, capital resources and each business if you like has a certain amount to bet on new salespeople. Some have more than others and as I say, it's a case by case scenario. Since wages came in, obviously the risks to putting someone on went up as far as the employers were concerned. One that, you know, we've all worked through and get on with today, but the fact of the matter is that there are less salespeople who are given a start since wages came in to prior to them coming in.

PN1007

Well - - -?---I don't know that it's a complaint. It's not necessarily a complaint. It's an observation, I think, some employers might make and that is that I'd probably put on more salespeople, but I need to factor in the risk or the fact that I need to be paying the retainer, the wages that's now required and because of that, I'm not able to put as many on from a practical point of view. So I don't know that it's a complaint, Mr Clarke, and I'm not trying to be argumentative. I just think it's an observation.

PN1008

No, I am not accusing you of being argumentative at all?---No. I'm just trying to qualify what I am saying.

*** MARK WHITEMAN

XXN MR CLARKE

PN1009

Yes. You have been frank and I appreciate that. So I put it to you really, the issue is that the industry in Western Australia would prefer to be able to hire many more people even if they couldn't earn the award rate. Isn't that right?---No, I don't - well, I will disagree with that and then I will agree with that. I know that will be confusing for everybody. Firstly, employees - many of them prefer commission only, purely based on the fact that it provides such freedom for them. You know, you can have salesperson employed and I understand there are part-time et cetera provisions that can be applied under the award. I am not ignoring that.

PN1010

What I am saying is that commission-only provides enormous freedom to the salespeople to take greater control over their lives and very much to owning a business within a business is the expression sometimes used by commission-only salespeople within a real estate agency. So simply put, commission-only salespeople certainly have enormous amount more freedom in terms of their time et cetera and the award or the impost of salaries is both ways, both on employees and employers, I think, if I was to survey many of them.

PN1011

The other thing is that with wages, in many cases there would be some employers that would probably be pretty pleased to employ some of their top people on salaries, because invariably as the risk to the employer goes up - so you've got to pay a base salary or what have you, the bonuses often aren't quite as high as - I happened to be sitting here when the other chap was giving evidence and it's quite right, there are companies here in Western Australia and I presume elsewhere in the country, I don't know, that fundamentally pay the entire share or the lion's share of the Commission to the salesperson.

PN1012

Now, in some of our businesses, that is also the case as well. Not 100 per cent, of course, but high - a very high percentage rate. So salespeople, I think, enjoy the commission-only structure, as well as employers. Obviously, from the employer's point of view, it does increase both the risk to putting new people on and I think the vast majority that I speak to anyway would like to give more people an opportunity in real estate, particularly given the state of our economy here at the moment. But naturally they have to be more careful and more prudent. Obviously, you've got to do that whether it's commission-only or wages. I would submit that as well, but I don't think it's a desire that it's one way or the other and with only employers. I think many employees enjoy it was well. In fact, many employees in real estate may well have gone and opened their own business, but see commission-only sales opportunity as a near to business ownership experience without some of the hassles and in the simpler form.

*** MARK WHITEMAN

XXN MR CLARKE

PN1013

VICE PRESIDENT HATCHER: Mr Whiteman, does it follow that a regulatory model which leads you to reducing the - that leads the industry to employing less salespeople as a whole leads to them having greater average remuneration and vice versa; that is, if you have a model which allows you to flood it with more

commission-only salespersons, the average remuneration goes down?---I do apologise. I couldn't quite hear all of that. I got bits of it.

PN1014

I will just repeat it. Can you hear me now, Mr Whiteman?---That's brilliant. Thank you.

PN1015

Does it follow from your evidence that if you have a regulatory model which, in effect, leads the industry to employing less salespeople, particularly commission-only salespeople, the average income across that group goes up and conversely if you have a model where you can flood the industry with commission-only salespersons, the average income goes down?---Well, that's a difficult one for me to agree entirely with, because I think the fact of the matter is that the 80/20 or the 90/10 rule still applies. Now, what happens is that the very best in the industry, certainly their incomes will go up and I guess that will lead the average up. So I guess logically from the outside it would appear as though that makes sense.

PN1016

However, it doesn't necessarily follow, given that averages would still leave a vast number at lower numbers, just because we have got less numbers in the industry, but my concern is that so much around that, from a person in the industry's point of view, but around the fact that the competition which then leads to consumer sentiment and consumer's choice is reduced and I don't - I don't know whether that's a healthy thing or not. But yes, perhaps less numbers and same amount of volume of transactions you would imagine may lead to a higher number when divided by its participants. I can only - yes, perhaps that is the case, but I would be concerned about whether that would be of value to the consumer. Maybe it would be a higher skill set or something, but I am not sure that would follow either.

PN1017

VICE PRESIDENT HATCHER: So in Western Australia, since the modern award came in, do you say there has been any consequential effect on charges to purchasers - sorry, to the vendors - from the sale price?---I don't have any evidence to properly comment on that. Look, the - why I am being careful with that is to say prices have risen since then. Mind you, they've come off dramatically, which is an interesting anecdote as well. So commission rates as a percentage of sale, obviously that increased. So in some cases and there are many factors here.

*** MARK WHITEMAN

XXN MR CLARKE

PN1018

Some time prior to the award coming in, we had deregulation of our market as well, which naturally had an effect on what the sellers were charged as well. Ultimately though - and look, I would have to say, look no, I don't believe consumers had a great deal extra charged, but certainly what has happened is that the flexibility around which a salesperson is allowed to charge a consumer - a seller - is reduced given that there's certain criteria- you know, they've got to meet a minimum bar. Overall though, the key thing from where I sit and in terms of

my evidence has been that I just see that any change to the award would potentially - because we won't know until something happens - but potentially means there's going to be less people given an opportunity in the industry.

PN1019

VICE PRESIDENT HATCHER: Thank you.

PN1020

MR CLARKE: Thank you.

PN1021

Now, at paragraph 33, you talk about firstly there is no limit on the potential for the employer to earn more and more remuneration. I put it to you that's just rhetoric?---Sorry?

PN1022

I put it to you that that statement is just rhetoric, Mr Whiteman. That anyone could say there is a potential to earn unlimited amounts of money, but it's subject to a whole range of constraints, such as whether you've got properties to sell, whether the vendors are realistic in the prices they set, whether there's a tight control of credit. What the interest rates may be. A whole range of factors?---My experience is that - - -

PN1023

So it's not, as you suggest, your potential is unlimited. That's correct, isn't it? It's not unlimited?---Absolutely unlimited. We've got salespeople in this market with - I think I believe I heard the last gentleman commenting on the shift in the marketplace here. We've probably - look, it's always argumentative, but probably not seen a market like this for two decades arguably. I would suggest - not suggest - I can tell you we've got salespeople earning significantly outstanding results in this marketplace. So it's not completely dependent upon interest rates or employment or on all of these other economic factors. It is very much a wonderful industry where, if I am prepared to work done hard, no matter what the circumstances are, I can have an unlimited income or at least an uncapped; that's probably a better expression if that helps you get around my words there. It is not capped. Our potential is not capped. It is capped by our ability to work. It is capped by our ability to serve customers well and gain a great reputation and I think that's wonderful thing, and that's the only thing I was trying to say there, is that one of the great attractions to people in real estate is that their income is not capped. Their potential is uncapped.

PN1024

But of those 200 employees that work for your franchisees, 80 per cent of whom are commission-only, you can't tell us what the average earnings are in the period of service for those employees. You have no empirical evidence to back up your assertion, do you?---Well, empirical evidence to back up the fact that the income is uncapped?

*** MARK WHITEMAN

XXN MR CLARKE

PN1025

As to even what the level of income was received by your commission-only sales staff, the 200 of them or the 80 per cent of those 200 to 30 June last year, for example. To be able establish whether in fact they've earned such a great deal of money?---Well, that's a different question. What I am saying in my statement, as a former commission-only salesperson, I know from experience that there are benefits to employees in being engaged on a commission-only basis. It's based around the fact that potential is uncapped, and I could give you specific examples, if necessary, of salespeople which I haven't got with me, obviously, who have earned significantly wonderful incomes, irrespective of the marketplace and that is my only point in that - that was my only point in that whatsoever. Of the 200 salespeople, of the 80 per cent of the 200 salespeople in Western Australia, there would be a variance in what they've earned. Some extraordinarily well, based on their effort and the way they've applied themselves and their knowledge skills et cetera, to others that have not earned as high as the top members.

PN1026

Well, I put this to you, Mr Whiteman, that despite the market coming down a bit as you've put it, people are making such fantastic money then basically you shouldn't have any problems about recruiting more commission-only salespeople as they are able to achieve the - if it comes into force - the 160 per cent of the award rate for one year out of a - over the previous three years. Based on what your evidence is, there should be no trouble whatsoever in you convincing people to go commission-only. There will be plenty of them available to put their hand up, because they will all be qualified.

PN1027

MR FARRELL: I'm sorry. Is this a question or a statement to the Bench?

PN1028

MR CLARKE: Pardon?---If I might add. I'm happy to answer. My point, Mr Clarke, is that - we've jumped from a couple of points to different things here - is that the increase that is proposed, and I'm not making a factual statement that this is what will happen, it is my concern that this will happen and that is that less people will be given the opportunity to enter the cycle, because if they don't get given any opportunity and that starts on salaries in Western Australia now - if they don't - aren't given that opportunity then they've never got an opportunity to go to commission-only, no matter how well trained they are or how uncapped the potential is. So again, I go back. I think the two items are what you can earn being uncapped, and that's one point I've made in my statement, to the fact that employers are going to have to factor in the increase into whether they put someone on. But that's the case with any increase, whether it's an increase in whatever the costs are of running a business. You've got to factor that in. If you are going to employ more of that resource. And that is - that was the only point that I've made on that.

*** MARK WHITEMAN

XXN MR CLARKE

PN1029

Yes. Well, I will just finish on this - well, I have got other questions to ask you, but on this line of questioning I will just put the last point to you to agree or disagree. Based on your evidence to date about how well - maybe not. As well as

it has been in the past, but how well the market is in Western Australia, and that many commission-only salespeople are making good money and that therefore logically there shouldn't be too many problems of waged employees being able to accept commission-only work on the 160 per cent barrier. That's only \$57,000 a year. The way your evidence reads is they should achieve that very quickly. Very easily. So why are you worried?---And again, I make the point to you, Mr Clarke, that they may not be given the opportunity in the same number to enter in the industry and that is my only point that if - and it's already been a case, as I say, where - and again I don't have the numbers in front of me to support it, but it certainly - my instincts on it and I'm fairly certain that I'm not wrong that there are less salespeople necessarily starting in the industry and albeit with our population growth since wages first came in. If we increase it, there may be - and please note I've said that some commission-only sales people, not many by the way, just to correct your comment - some - the point of the matter is that there may be less given that opportunity.

PN1030

Whether or not there should be an ease of people going through that process into commission-only is a different matter. The matter of most importance from my point of view is whether or not these people are going to be given a chance. And if we increase it, and I might be wrong, but my view is that there will be less given an opportunity, which economically, as I say, the average business has got a certain amount or a business has got a certain amount to bet on new people. Now, as soon as we've put the price up, we've naturally got to give less opportunities and that was the only point I'm making.

PN1031

MR CLARKE: Okay. Now, I just want to - are you familiar with the Real Estate Employer's Federation of Western Australia's template employment agreements?---I've seen one. Correct. I'm familiar as anyone could be without one in front of them and having had - I don't know when the last time I read one was.

PN1032

No, that's all right. Now, with your dealings with your franchisees, are you aware of any that debit their salesperson with respect to unpaid vendor-authorised advertising or marketing expenses?---No. Not on a case-by-case basis. I guess the best answer I could give you is that dependant on the arrangement between the employee and the employer; in other words, are they on a high rebate commission structure with their own specific set of costs et cetera, in those cases, yes, some might be, where they're being paid large percentages of what they bring in and are very much making their own arrangements with the sellers. In those cases, some of those might be. I could check. In some cases, no they're not. When they're on lower commission rates and those sorts of things, starting out then not necessarily.

*** MARK WHITEMAN

XXN MR CLARKE

PN1033

And the sales agency agreements that are entered into in Western Australia there between the vendor and the principle of the business, they're the only parties to

the contract. Is that correct?---That's correct. The salesperson enters into that as a representative of the employer.

PN1034

Yes, that's right. Yes, I accept that. Now, with respect to your franchisees, I appreciate that a different franchisee might have a different attitude but I'm just wanting to know your view as to first of all, are you aware of franchisees debiting, against the employee's share of commission, their long service leave entitlements, when they're paid out?---I would hate to even make a comment, I think, because I don't know.

PN1035

No, that's okay?---(Indistinct) case by case. Yes, we do do, as I mentioned in my statement, just to help you with your points. I'm not being evasive at all.

PN1036

You don't need to. You've answered my question.

PN1037

VICE PRESIDENT HATCHER: Mr Clarke, just let him finish.

PN1038

Finish your answer, Mr Whiteman?---I was going to say we - - -

PN1039

MR CLARKE: Go ahead. Sorry, the Vice President - - -?---Sorry. We order our businesses on a (indistinct) basis and one of the key things for us as an organisation in Western Australia is to make sure that our employers are doing the right thing by their employees. So if we were to find inappropriate practices in place then we would make a very strong stand with that franchisee, and then monitor its rectification through to the end. So it's something that we do get involved in, but I don't have any necessarily anecdotal case-by-case stuff right here to go through with you.

PN1040

Okay. And the - I'm coming towards the end. This may be a similar answer, but I will just put the question to you, are you aware of any of your franchisees debiting the nine and a half per cent and whatever its predecessor figures were for the superannuation guarantee charge against the employee's share of the Commission?---What I am - no. I'm not necessarily - no, I'm not. But what I am aware of is in some cases where - and this might be somewhat of a contradictory point, so I will leave it to you guys to judge, but in some cases where an employee might be offered, for example, 70 per cent of the commission, and that's the rate of commission obviously, plus the superannuation guarantee levee, they are then given, for want of a better description, a bulked up or grossed up commission percentage and then from that grossed up commission percentage, which is on their contract, they are then - they would then have - the commission would be part of the admin process would be deducted prior to the payment of the employee's 70 per cent.

*** MARK WHITEMAN

XXN MR CLARKE

PN1041

So it might be whatever that works out to be, 74 or 75 per cent, 76 per cent or whatever it might be and then from that 76 or whatever, you would then find that the superannuation would be deducted. Invariably the employee - sorry, not invariably, but in each case the employee ends up with the percentage of commission that they had agreed on with their employer, prior to commencing.

PN1042

MR CLARKE: Okay. If the members of the Bench would just excuse me for a moment. No further questions, your Honour.

PN1043

VICE PRESIDENT HATCHER: Any re-examination, Mr Farrell?

RE-EXAMINATION BY MR FARRELL

[3.39 PM]

PN1044

MR FARRELL: Thank you, Vice President. I just have one question for Mr Whiteman.

PN1045

Mr Whiteman, are you aware of any instances where any of your franchisees deduct from the commissions payable or as part - sorry, let me rephrase that, I think, as a proper way of doing it - include as part of the calculation of remuneration that is owed to the employee, advertising costs that are already paid for by the vendor?---Sorry, Mr Farrell. I don't understand the question.

PN1046

Certainly?---Then include - - -

PN1047

If I - I have to be careful, Mr Whiteman, because I can't lead you to an answer?---Yes. What's the question?

PN1048

Certainly. Are you aware of any instances with your franchisees when, in calculating the portion of vendor commission that is owed to them, that the cost of advertising that's already been paid for by the vendor is deducted from the Commission?---Absolutely not. So if I can - are you talking about vendor paid or are you talking about what the agent gets? One, any of the commission that's - any of the vendor-paid that comes in that has been paid for by the seller would not be obviously deducted, because it's been paid for. In addition to that actually, any vendor paid that's not been spent needs to go back to that vendor. So no, I don't - I think that's - I don't know whether that's what you're asking, but if it's been paid for by the seller, why would they want to deduct it?

PN1049

Thank you, Mr Whiteman. Thank you, Vice President.

*** MARK WHITEMAN

RXN MR FARRELL

PN1050

VICE PRESIDENT HATCHER: All right. Thank you for your evidence, Mr Whiteman. You are now excused and you are free to leave?---Thanks guys. Cheers.

<THE WITNESS WITHDREW

[3.41 PM]

PN1051

VICE PRESIDENT HATCHER: So that's all the witnesses we can deal with today. But Mr Warren, we can - Ms Andrews is not required for cross-examination.

PN1052

MR WARREN: Could I tender her statement, please?

PN1053

VICE PRESIDENT HATCHER: Yes, all right. So the statement of Mrs Danielle Andrews dated 28 September 2016 will be marked exhibit 14.

EXHIBIT #14 STATEMENT OF DANIELLE ANDREWS DATED 20/09/2016

PN1054

VICE PRESIDENT HATCHER: So that leaves us with five witnesses for tomorrow. Is that right?

PN1055

MR TRACEY: That's right, your Honour. I am looking at the list as well. Just to assist the Full Bench and my friend Mr Clarke, I've spoken with Ms Bisbal. Mr Burns, who is one of her witnesses, has limited availability. So what we are proposing, subject to the Full Bench's convenience is that he would go first tomorrow.

PN1056

VICE PRESIDENT HATCHER: Yes.

PN1057

MR TRACEY: And then we would resume the order where I would call Mr White and Ms Cook, and then we would return to the order with Ms Kikianis.

PN1058

VICE PRESIDENT HATCHER: All right. Mr Clarke, since you are the cross-examiner, how long do you think it will take to get through these five witnesses?

PN1059

MR CLARKE: About the same as today, sir.

PN1060

VICE PRESIDENT HATCHER: What's that, about an hour each?

PN1061

MR CLARKE: Three-quarters, to an hour.

PN1062

VICE PRESIDENT HATCHER: All right. Okay. Anything else we can deal with this afternoon, Mr Warren?

PN1063

MR WARREN: Perhaps the matter of transcript, your Honour. Is it possible to put today's transcript on a 24-hour turnaround, so we can then probably deal with it in submissions on Wednesday?

PN1064

VICE PRESIDENT HATCHER: Perhaps on whether you are prepared to pay for it, Mr Warren.

PN1065

MR WARREN: We might be able to come to an arrangement, your Honour.

PN1066

VICE PRESIDENT HATCHER: I'll give some thought to that.

PN1067

MR WARREN: Thank you, your Honour.

PN1068

VICE PRESIDENT HATCHER: All right. Anything else? We will now adjourn
- - -

PN1069

MR FARRELL: Sorry, Vice President. I beg your pardon. Sorry, I do apologise. I know I've interrupted you. In terms the template contracts that you are seeking - - -

PN1070

VICE PRESIDENT HATCHER: Well, if you could just bring those tomorrow and perhaps we will tender them tomorrow?

PN1071

MR FARRELL: Okay. No worries. Thank you.

PN1072

VICE PRESIDENT HATCHER: All right. We will now adjourn and we will resume at 10 am tomorrow.

ADJOURNED UNTIL TUESDAY, 22 NOVEMBER 2016

[3.44 PM]

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