



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

10.04 AM, TUESDAY, 22 NOVEMBER 2016

Continued from 21/11/2016

PN1073

VICE PRESIDENT HATCHER: All right. So I understand the first witness is Mr Burns in Adelaide; is that right?

PN1074

MR FARRELL: Yes.

PN1075

VICE PRESIDENT HATCHER: So, Mr Burns, we'll just administer you the affirmation from Sydney.

PN1076

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

PN1077

MR BURNS: Mark Ian Burns (address supplied).

<MARK IAN BURNS, AFFIRMED

[10.05 AM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [10.05 AM]

PN1078

VICE PRESIDENT HATCHER: All right. So – sorry, Mr - - -

PN1079

MR FARRELL: Sorry, sir, I was under the understanding that you received my email last name. Ms Bisbal has had to return to Adelaide for a family bereavement.

PN1080

VICE PRESIDENT HATCHER: Yes. Yes.

PN1081

MR FARRELL: And has asked me to introduce the witness. So with your permission.

PN1082

VICE PRESIDENT HATCHER: I think I can do that and we'll see how we go.

PN1083

MR FARRELL: Yes, sir. Yes.

PN1084

VICE PRESIDENT HATCHER: So, Mr Burns, do you have a copy of your statement of evidence with you?---No, I don't.

*** MARK IAN BURNS

XN VICE PRESIDENT HATCHER

PN1085

All right. That's a good start. Well, we might have to adjourn and have a copy of it emailed and provided to you so that you're able to answer questions. So if you just stay where you are. We'll have to adjourn and we'll get that done as soon as we can. We'll now adjourn.

<THE WITNESS WITHDREW [10.06 AM]

SHORT ADJOURNMENT [10.06 AM]

RESUMED [10.22 AM]

<MARK IAN BURNS, RECALLED [10.22 AM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER,
CONTINUING [10.22 AM]

PN1086

VICE PRESIDENT HATCHER: So, Mr Burns, after that false start you have your witness statement with you now?---We do. My apologies.

PN1087

No, that's all right. So that's a statement with 12 paragraphs and it's signed by you and dated 28 September 2016?---Correct.

PN1088

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

PN1089

All right. Well, that statement will be marked exhibit 15.

**EXHIBIT #15 WITNESS STATEMENT OF MARK IAN BURNS
DATED 28/09/2016**

PN1090

VICE PRESIDENT HATCHER: Now, Mr Burns, Mr Clarke is now going to ask you some questions. So he'll stand up and you'll see him on the screen?---Thank you.

PN1091

If you can't hear anything please say so?---Will do.

CROSS-EXAMINATION BY MR CLARKE [10.23 AM]

*** MARK IAN BURNS

XN VICE PRESIDENT HATCHER

*** MARK IAN BURNS

XXN MR CLARKE

PN1092

MR CLARKE: Thank you. Now, Mr Burns, could I ask you to have a look at your witness statement and you refer, at paragraph 9, to responsibilities of the individual and the team. And you also referred earlier to, I think you've got, 14 staff; is that correct?---I have six.

PN1093

Sorry, six?---I have six staff.

PN1094

And what's the breakdown of the six staff?---Of the six staff they're – that's outside of myself, of course, so of the six staff we have two selling staff and - we have two selling staff, two property management staff, and two admin staff.

PN1095

And two admin staff. And the sales staff, the two sales staff, are they on a debit/credit system with respect to wages and allowances?---One is debit/credit, one is a commission only.

PN1096

Okay. And the two property managers, are they just on straight salaries?---Correct.

PN1097

Any commission?---They are incentivised so they are also incentivised for referrals and that incentive goes to a proportion of the letting fee.

PN1098

Right. And the two admin staff they're clerical admin people?---Clerical admin, also incentivised.

PN1099

All incentivised as well are they?---Correct.

PN1100

Right. So they get a wage plus incentivised. Now, when you say incentivised, with respect to the property managers and the admin staff, is any share of the salaries that admin staff or the property managers earn debited against their incentives?---No.

PN1101

So the incentives are on top of?---It's over and above.

PN1102

Right. Now, just dealing with the debit/credit person, how long has that person been with you?---Six years.

PN1103

Six years. And the commission only person?---Four years.

PN1104

Four years. Now, the debit/credit sales person, what is his gross commission share of your commission?---It is 45 per cent.

*** MARK IAN BURNS

XXN MR CLARKE

PN1105

Fort-five per cent. And the commission only person what's his share?---It is 50 per cent.

PN1106

Fifty per cent?---Both of those exclude superannuation, so superannuation is on top of that.

PN1107

Right. Super on top. And with the commission only person at 50 per cent, they get the superannuation on top and they get paid their annual leave or sick leave if it's required on top of?---Correct.

PN1108

Is the sick leave or the annual leave, when it's taken, is that debited against their 50 per cent share from future commission earnings at the same time?---Yes, it is.

PN1109

Right. Okay. Now, I don't want you to identify the individuals concerned, and you can put it in salary band if you like?---Sure.

PN1110

In terms of confidentiality but the sales person you've had on debit/credit and been with you for six years, what would have been his salary earnings, that's excluding any allowances, that is total earnings for the, say, the financial year just finished, 30 June 2016?---Seventy-five - - -

PN1111

I'm not expecting you to know the figure off the top of your head to the exact dollar but - - -?---Seventy-five thousand.

PN1112

Right. And with respect to the commission only person, sales person?---Yes, slightly less. I believe he was \$70,000.

PN1113

Right. Okay. All right. Thank you. Now, you don't have these in front of you so I'll try and get through them fairly quickly. By the way, are you purely residential property sales and property management and no commercial?---Predominantly. Yes, we have a small commercial part to our leasing which I personally handle.

PN1114

Right. Okay. But the other two sales persons, they - - -?---Purely residential.

PN1115

Okay. Thank you. Now, I'm just going to read to you a number of points raised in evidence by one of the witnesses, Ms Masson-Forbes, who is from South Australia, and in her witness statement at paragraph 6 headed The Role and Responsibilities of a Property Sales Person, I just want to take you through a few of the dot points, and at the end of each of those dot points I'll simply ask whether you agree or disagree, and if you disagree, as to why. Okay?---Sure.

PN1116

And if you want me to rephrase the question or make it clearer, please indicate. Now, she prefaces her comments with:

PN1117

I've looked at the description of a property sales person under the award and the indicative duties of a sales person. I agree with the description of the responsibilities as set out in the award and would say the following as to what I believe are the essential skills and responsibilities of a residential property sales person.

PN1118

And now in point order:

PN1119

Excellent interpersonal skills.

PN1120

Would you agree?---Agree.

PN1121

Be a very good negotiator/salesperson selling for most families the most valuable asset of their lives and should seek to extract the best possible price for the vendor.

PN1122

Do you agree?---That's legislative, agreed.

PN1123

Yes.

PN1124

Must be self-motivated and driven working whatever hours are necessary to list the properties for sale and selling them.

PN1125

?---Disagree.

PN1126

Disagree?---Mm.

PN1127

Why do you disagree?---Well, the premise that a deal needs to be done at any time of the day is something that was presented to me when I entered into the industry 15 years ago. That simply doesn't occur any more. If a deal needs to be done, a deal needs to be done. But there is never such a thing as life and death in a property transaction.

*** MARK IAN BURNS

XXN MR CLARKE

PN1128

Right?---Unless there are really special circumstances, most things can be done within business hours and if they can't they can be done after hours, but that time is in lieu for a salesperson. That doesn't tie them to the desk for that day and then they have to go and do another four hours afterhours. The days of a principal asking you to sit at a desk for an entire day and then go and do another five hours I haven't seen that in a very long time.

PN1129

Okay. But the description of them as needing to be self-motivated and driven, would you agree with that?---Absolutely.

PN1130

Must show a high degree of initiative in their work in marketing their skills to prospective clients.

PN1131

?---Essential in gaining the listing in the first place. Yes, agreed.

PN1132

Yes.

PN1133

High level of personal presentation.

PN1134

?---Agreed.

PN1135

To be able to handle or minimise conflict between vendors where there is a conflict perhaps amongst family members over the sale of a deceased estate or where couples are separating or divorcing.

PN1136

Would you agree?---Agreed, yes.

PN1137

Keep abreast of the market and doing sound research on property prices in different areas and be able to advise vendors as to the likely price ranges.

PN1138

?---Agreed with a caveat. That caveat now being that that - keeping abreast of that market was always the realm of solely the real estate agent. That hasn't been like that now for five to 10 years either. So my vendors, or more particularly a purchaser, has exactly the same information as I do.

PN1139

Yes?---So in having to educate them to a market that's changed completely. In most cases they have that knowledge in front of them.

*** MARK IAN BURNS

XXN MR CLARKE

PN1140

Wednesday advertiser looking at the various clearance sales, prices for different properties, I suppose?---No, the exact opposite. So very few of our clients now will use the paper. It is basically internet based; RP data or something like that will use – will be the underwriter to somebody like the NAB or, if you have seen the ads for the ANZ Bank apps, somebody can walk in to one of my opens, be a vendor or a purchaser, and they can have a paper valuation on their smart phone as they walk through the door.

PN1141

Is that right? Very good. And you obviously would agree with this point, another point I was just going to raise, that:

PN1142

Over the last six years much greater use of technology by sales staff, use of tablets to present to potential vendors; able to display type of marketing that is recommended; cost of draft contracts such as sales agency agreements; showing other sales by salespersons and sales prices obtained; sales staff now use SMS text to potential and/or clients, emailing accordingly –

PN1143

Et-cetera?---Yes, absolutely. As a 15 year old 15 year sales agent I'm now considered a dinosaur from what I did 15 years ago. So, yes, it's 180 degree change in how that works.

PN1144

Yes. And coming almost to the end:

PN1145

A salespersons also needs to be able to suggest the type of marketing advertising campaign for the property depending on the budget the vendor can afford using internet, maybe print media, local papers statewide or sign boards, leaflet drops, quality brochures, and give advice whether the property should be auctioned or not, and open inspections or by appointment only of expressions of interests.

PN1146

Would you agree - - -?---Agreed. Yes.

PN1147

And:

PN1148

Keep abreast of changes in the real state laws or legislation that could impinge on the value of the property.

PN1149

?---Agreed. That's not a huge part of the deal but, yes, you certainly need to keep in front of the legislation.

*** MARK IAN BURNS

XXN MR CLARKE

PN1150

Significant trees on a property a developer might want to know what the council's views are on those sorts of things?---Yes. Agree, yes.

PN1151

And if there was asbestos present in the property the need to declare it?---Not necessarily. So if it's a residential property you do, but if it's an outbuilding you don't have to. But if it is part of the property believe it or not you don't have to declare it but in South Australia that's why we have a form 3 which asks the purchaser to actually do their own due diligence. If we get asked a direct question, and we know it's there, then clearly then we state that it's there.

PN1152

Right. And lastly that:

PN1153

The salesperson may also give vendors advice on how best to present their property without incurring significant extra costs such as minor repainting, cleaning particular areas, dressing up rooms.

PN1154

?---Correct. Yes, agreed.

PN1155

Okay. Right. Now, you've got two property managers and we've had a witness from New South Wales who's involved in property management. I wondered if I might just go through – this is exhibit 6, the evidence of a Mrs Bell. Without reading all of the words out for you if I could just give you an overview of the different points she has raised and the types of skills and responsibilities she exercises as a property manager to see whether you agree or disagree as to some of those descriptions. Are you okay with that?---Sure.

PN1156

Okay:

PN1157

The skills and responsibilities that a property manager performs, based on my experience, are: absolute honesty in the handling of other people's money with respect to the company's trust account.

PN1158

?---Correct.

PN1159

Keen attention to detail in recording each transaction. Also ensuring the payment of accounts related to each of the properties.

PN1160

VICE PRESIDENT HATCHER: So, Mr Clarke, are you putting these propositions one at a time?

*** MARK IAN BURNS

XXN MR CLARKE

PN1161

MR CLARKE: Sorry?

PN1162

VICE PRESIDENT HATCHER: Are you putting these propositions one at a time?

PN1163

MR CLARKE: This was all in one paragraph, but I'll go - - -

PN1164

VICE PRESIDENT HATCHER: We're not getting the witness's answers to your propositions, so - - -

PN1165

MR CLARKE: Sorry?---Yes, I agree to everything you've said so far. Yes.

PN1166

Okay.

PN1167

Managing council rates, strata title fees, water rates, insurance, maintenance and repair works on properties.

PN1168

?---Agreed. Agreed.

PN1169

At the end of month have to prepare statements for landlords listing income and expenditure for each property.

PN1170

?---Agreed.

PN1171

And transfer any excess rent to the owner's bank account leaving a zero balance in each trust account.

PN1172

Is that right?---Agree.

PN1173

Yes. Are your trust accounts audited on a regular basis at all; your property management?---Yes, they have to be – yes, have to be – well, by legislation with the CBS here all of our trust accounts, be it sales or rentals, are audited every 12 months. On top of that being within a franchise group we have a second audit as well so our files or our trust accounts actually get audited twice a year; one to satisfy our franchise group and one to do our legislative satisfaction of the CBS, and then obviously we do an individual audit on a month basis on the month end, which is what, as a principal, I have to sign off on.

*** MARK IAN BURNS

XXN MR CLARKE

PN1174

Right. And she also goes on to say:

PN1175

Property managers must have drive and initiative to develop the business. It's very competitive amongst agents with varying fees.

PN1176

?---Correct, if it's a standalone property manager that role is often taken care of by a specific BDM, business development manager. It's fairly rare that a property manager would be given that role as well. It's two very, very different skill sets.

PN1177

Right. And in terms of your company, your property managers, do they seek to develop the business or is that left to you?---No, I do that personally. They're incentivised to find a lead and that's – their incentives are paid on the literally introducing a lead. But growing a business is a sales role and property management's role can be exceptionally detailed and process orientated. That's not necessarily the best skill set to have to grow a business.

PN1178

Right. She also goes on to say:

PN1179

The property manager must be able to give the owner of the property accurate information about rental return they can reasonably expect given the state of the property.

PN1180

?---Correct.

PN1181

Okay. Inspection of the property itself:

PN1182

Look out for any repairs that need to be made to achieve the best rental return and suggest what maintenance should be done before letting it out.

PN1183

Do you agree to that?---Agreed.

PN1184

Yes?---Yes.

PN1185

The need to be straight forward with the client telling them exactly the level of service they can expect from you and to stick to that undertaking.

*** MARK IAN BURNS

XXN MR CLARKE

PN1186

?---Well, that's specific of every business. I agree, but it's not specific to property management.

PN1187

I accept that.

PN1188

The property manager needs to undertake proper diligence in the selection of tenants.

PN1189

In her instance, and this involves advertising the property for rent on the internet, and in the front window display of available properties:

PN1190

Accepting online applications which include a privacy statement allow us to discuss their application with the referees and employer.

PN1191

Do you do - - ?---Correct.

PN1192

You agree.

PN1193

Our policy –

PN1194

This is Mrs Bell's company's policy –

PN1195

that we want at least two referees from their work and another two from friends.

PN1196

Do you have a similar policy?---We have a slightly different policy on personal referees, but, yes, referee checks are essential.

PN1197

Yes. And in Mrs Bell's case she also meets the applicants at the property to show the prospective tenants to outline any issues known to her about the property?---Correct.

PN1198

And your people do the same?---Absolutely, yes.

PN1199

She also says:

*** MARK IAN BURNS

XXN MR CLARKE

PN1200

I ask to see the applicant's bank details, employer pay slips, and how long they've worked for that employer.

PN1201

Is that the same?---Agreed. Agreed.

PN1202

And inquire where they've lived before making application and contact details of the previous landlord or real estate office.

PN1203

Do you - - -?---Agreed.

PN1204

Agreed.

PN1205

If the tenant is not looking after the property or is significantly in arrears, the property managers must follow the legislation governing evictions and ensure all the legislative requirements are met

PN1206

?---Agreed. Yes.

PN1207

In Mrs Bell's case if necessary she will appear before the New South Wales Civil and Administrative Tribunal to defend a decision to terminate a lease. Would your property managers attend, I think it's, the Residential Tenancies Tribunal in South Australia?---Correct. Slightly changed now in that a lot of it's now phone based, so the CBS have put a separate level in there where the, I guess, mediation is probably seen as the first step and a Tribunal now, in terms of appearing in front of a Tribunal, is the last step. So that's been a significant change over the last 18 months.

PN1208

Yes. Okay. So try to seek a mediation before a formal hearing?---Phone hookup mediation. Next step usually if face-to-face mediation and final step, if nothing can be rectified, is a Tribunal hearing.

PN1209

Okay. Thank you.

PN1210

Property managers –

PN1211

This is Mrs Bell –

*** MARK IAN BURNS

XXN MR CLARKE

PN1212

Need to have a high level of interpersonal skills and empathy, not only for the landlord, but also importantly tenants.

PN1213

And she gives an example that she's had of where tenants, often a female with young children, may have been the victim of domestic violence needs to be able to find alternative premises, potential breach of tenancy agreement, loss of bond money and the like?---Agreed. There certainly can be circumstances which are quite tricky to traverse and a property manager walks a tightrope.

PN1214

Yes. And Mrs Bell says:

PN1215

Property managers as a standard practice have a bank of maintenance tradespeople who can, at short notice, attend to any maintenance work at the property.

PN1216

And she refers to a number of plumbers and the like and getting quotes and so forth?---Agreed. That's common practice.

PN1217

Yes. She says:

PN1218

It's very important for a property manager to treat tenants with respect and attend to their reasonable demands such as if the hot water system breaks down you must ensure that there is a replacement that same day, if possible, or not later than the following day.

PN1219

?---Yes, agreed. Part of the legislation within South Australia dictates that as a must.

PN1220

And nearly at the end.

PN1221

A property manager not only needs to be aware of the specific legislation dealing with the rights of landlords or tenants but also the privacy laws and a number of other legislative measures which may impact on properties, for example, regulations dealing with swimming pools and the safety requirements regarding same, smoke alarms, the need to replace the batteries every 12 months, the issue of significant trees on the property and the rights of landlords to cut them down et cetera and the local council's policies regarding same.

PN1222

?---Agreed.

*** MARK IAN BURNS

XXN MR CLARKE

PN1223

Yes. And also the perennial issue of cats and dogs as pets on premises and the like?---Agreed.

PN1224

In her case Mrs Bell says:

PN1225

A property manager is on call for the tenant and/or landlord seven days of the week and 24 hours of the day. If there is a leak in the roof of the property or some other major fault with the property during the day or night the property manager has to be advised so that all necessary repairs can be organised at short notice.

PN1226

I take it are your property managers on call or take it in turn?---No. So the example that you just read out is, my assumption, is that it's a property manager who is a standalone property manager who has no backup whatsoever. We would have – we'll have an after hours number and that after hours number will be farmed out for emergencies only and we use a separate company to do that. Our property managers work 9 to 5 and do some after hours if required, but in terms of emergencies we've outsourced that. All other maintenance issues and so forth they're taken care of Monday to Friday.

PN1227

Yes. And the management of the rent roll, that is, the property management, that is a very important asset for any real estate office that has them; is it not?---Most – yes, I agree. Most businesses are two-tiered as a minimum, and the saleable asset, often it's referred to, is the property management.

PN1228

Right. Now, Mr Burns, just while I'm on the issue of residential property management. Are you aware that the State Government in South Australia is going to bring in legislation with respect to the licensing of residential property managers in South Australia?---Yes. Yes, that was announced last week.

PN1229

Yes. And I just want to – do you know Mr Greg Troughton from the Real Estate Institute of South Australia?---I know of Greg, yes.

PN1230

I've just got a paragraph I want to quote from a press release that he issued under the heading Residential Property Management – Licensing dated 11 November 2016:

*** MARK IAN BURNS

XXN MR CLARKE

PN1231

South Australia is the only State in Australia that currently has no requirement for residential property management licensing and it is fantastic that we are finally recognising the enormous skills and expertise required to become an effective residential property manager.

PN1232

Would you agree with that statement by Mr Troughton?---I would argue that a property manager does need to be licensed and I think it is right for that to recognise the skill sets of a property manager. The fact that they will now be licensed in South Australia doesn't actually change the requirements of their earnings though.

PN1233

What do you mean by that, it doesn't affect their earnings?---So the point I'm making is, yes, they will be licensed, but it actually doesn't change what they need to do to become licensed is my understanding. So the skill sets that a property manager in South Australia currently has won't change from last week to this week.

PN1234

Yes?---The only difference is that they will be licensed.

PN1235

Yes. And I know you gave me the salary ranges for your sales staff?---Sales people.

PN1236

But your property manager's salary ranges, without identifying the individuals?---That's okay. So neither of our property managers are FT equivalent, full-time equivalent so both of them are part somethings of that FTE and that's to work around flexibility for them as working mothers.

PN1237

Yes, I appreciate that?---So if I actually combined the two to give you an FTE, an FTE of our property manager would be \$60,000.

PN1238

Right. And then they have some of these incentive payments if and when they - - -?---Over and above.

PN1239

Over and above it?---Yes.

PN1240

Yes?---Plus super and sick leave and holidays and car allowances and phone allowances.

PN1241

Yes. Yes, the other benefits under the award?---Correct.

*** MARK IAN BURNS

XXN MR CLARKE

PN1242

All right. Now, with your sales staff do you use employment agreements that are issued, say, by the Real Estate Employers' Federation of South Australia and Northern Territory or do you use your own?---It would be a bit embarrassing as a

REEF board member not to use theirs, so, yes, sir. Yes, we do use the REEF ones.

PN1243

I hope they give you a discount?---Sadly they don't.

PN1244

Now, with respect to both your debit/credit and your commission only sales person, do you debit against their commission share any unpaid vendor authorised advertising from their commission share?---Not authorised, no.

PN1245

Right. Is that because it's not in the employment agreement or it's there but you choose not to use it?---We don't – I actually don't place that in our employment agreement. We only place in there unauthorised debits. So if there's unauthorised advertising taken place without the agreement of a vendor and without prior consent of myself then, yes, that's debited.

PN1246

Right. Thank you. And insofar as long service leave is concerned, in your employment agreement, is there any reference that specifically identifies any payments made with respect to long service leave will be debited against any employee's commission share when utilised?---No.

PN1247

Just so I'm absolutely clear, in terms of – anyone who either leaves your company but qualifies for long service leave payment on termination, or if they take long service leave whilst in your employment, the payment you make to them is not subsequently debited - - -?---Non-debitable.

PN1248

- - -against their commission share?---Correct.

PN1249

Right. Thank you. And in terms of superannuation I think you said the super - - -?---It's over and above.

PN1250

- - -is built in to the commission so therefore it is debitable?---No, superannuation is above the commissions.

PN1251

I see. I'm sorry, yes, you did say that. I couldn't read my own notes; on top of. So there's no debiting of commission. It's on top of?---Correct.

PN1252

Right. I think I'll make you the director of the REEF South Australia and Northern Territory. If you'll just excuse me, your Honour.

*** MARK IAN BURNS

XXN MR CLARKE

PN1253

VICE PRESIDENT HATCHER: Mr Burns, you said that your sales people, one earned about 70,000 and one earned about 75,000?---Yes.

PN1254

And you said they're residential sales persons. How many sales do you have to achieve in a year to earn that sort of income?---So the debit/credit sales person achieved 18 sales in a 12 month period that settled. Obviously there's more in that period that haven't settled, so that's 18 settled sales. And obviously the Commission only was less than that because he's a higher percentage, and I believe that was, from memory, about 15.

PN1255

All right. Thank you.

PN1256

MR CLARKE: No further questions, sir.

PN1257

VICE PRESIDENT HATCHER: Right, thank you. Mr Farrell, do you want to ask any questions in re-examination?

PN1258

MR FARRELL: No, sir. No, thank you.

PN1259

VICE PRESIDENT HATCHER: Yes, all right. Thanks for your evidence, Mr Burns. You're excused and you're now free to leave?---Thank you. Sorry for the hold up this morning, gentlemen.

<THE WITNESS WITHDREW

[10.54 AM]

PN1260

VICE PRESIDENT HATCHER: Mr White is next, Mr Tracey?

PN1261

MR TRACEY: Yes, thank you, your Honour. Mr White is available in Melbourne.

PN1262

VICE PRESIDENT HATCHER: All right.

PN1263

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

PN1264

MR WHITE: Geoffrey White, and my work address is 335 Camberwell Road, Camberwell, Victoria.

<GEOFFREY WHITE, SWORN

[10.55 AM]

*** MARK IAN BURNS

XXN MR CLARKE

PN1265

VICE PRESIDENT HATCHER: Mr Tracey?

PN1266

MR TRACEY: Thank you, your Honour.

PN1267

VICE PRESIDENT HATCHER: I don't see any sign of a statement in the witness box.

PN1268

MR TRACEY: I'm assured Mr White has a copy. Mr White, do you have a copy of your statement?---Yes.

PN1269

VICE PRESIDENT HATCHER: He does, yes.

PN1270

MR TRACEY: Yes, reassure you, your Honour. Mr White, could you please state your full name to the Full Bench?---Geoffrey White.

PN1271

And what's your address?---335 Camberwell Road, Camberwell.

PN1272

Thank you. And what's your occupation?---Administrator.

PN1273

Yes. And you have a role with the Real Estate Institute of Victoria?---That's correct.

PN1274

And what is that role?---Chief executive officer.

PN1275

Thank you. Have you prepared a witness statement in this proceeding?---Yes, I have.

PN1276

Do you have a copy of that before you?---Yes, I do.

PN1277

Could you please confirm that that's a statement of 18 paragraphs dated 4 October 2016?---I can confirm, yes.

PN1278

Have you had a chance to read that statement recently?---Yes, I have.

*** GEOFFREY WHITE

XN MR TRACEY

PN1279

Is that statement true and correct?---It is, yes.

PN1280

Yes. Thank you, Mr White. I tender the statement, your Honour.

PN1281

VICE PRESIDENT HATCHER: The statement of Geoffrey White dated 4 October 2016 will be marked as exhibit 16.

**EXHIBIT #16 WITNESS STATEMENT OF GEOFFREY WHITE
DATED 04/10/2016**

PN1282

MR TRACEY: If the Commission pleases.

PN1283

VICE PRESIDENT HATCHER: Mr White, Mr Clarke is going to ask you some questions now, so he'll be standing at the Bar table. You should be able to see him on the screen in the pale suit or pale jacket?---Thank you.

CROSS-EXAMINATION BY MR CLARKE

[10.57 AM]

PN1284

MR CLARKE: Mr White, if I could ask you to just go to your witness statement and take to your paragraph 9 where you say:

PN1285

Based on my experience and set out above the fundamentals of the work in the real estate sector have not changed. The key aspects of nurturing the client, listing, selling, and auctions remain the same. What has evolved is the manner in which client and prospective client engagement occurs. With the advancement in technology there are a greater number of touch points being increase capacity to communicate with clients –

PN1286

And so on. Now, in your experience, which goes back some years, were you involved personally either in both residential sales as well as commercial sales and leasing?---Yes, I have been and that's how I cut my teeth in the industry, yes.

PN1287

Right. Thank you. I just want to – you don't have it in front of you, and I'm sorry for the Bench and other members here around the table, but I've got to go through it, of - - -

PN1288

VICE PRESIDENT HATCHER: Well, I'm not sure you have to, but if you want to.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1289

MR CLARKE: All right. Well, it's a pretty good hint, Vice President. Could I put it to you, without going through every item, that two of our association's witnesses have given evidence with respect to the type of work sales people do and I'll try and break them down just to a few points such as, under the heading of Roles and Responsibilities of a Property Sales Person:

PN1290

Excellent interpersonal skills, be a very good negotiator, self-motivated with a high degree of initiative and high level of presentation.

PN1291

Would you agree with those descriptions?---Yes, I would agree. Yes.

PN1292

Yes.

PN1293

Have the ability to handle or minimise conflict between vendors when there may be family disputes over deceased estates or divorce or family break ups.

PN1294

?---Yes.

PN1295

In terms of selling a property?---Yes.

PN1296

Keeping abreast of the market.

PN1297

You've already referred to greater use of technology by sales staff.

PN1298

And being able to suggest the appropriate type of marketing and advertising campaign for the property concerned looking at the possible use of internet, print media, sign boards, leaflet drops and the like.

PN1299

Would you agree?---Yes, I agree.

PN1300

Yes?---Yes.

PN1301

And:

PN1302

Keeping abreast of changes in real estate laws and legislation which may impact on the value of a property.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1303

Such as significant tree laws. I don't know what they do in Victoria but in South Australia they have significant tree legislation which says if it's of a certain diameter you can't knock it down without the local council's approval which may impact on development opportunities. Do you have that sort of stuff in Victoria?---Yes, we do. And the estate agent is not required to know the intricacies of all of those laws but have a broad understanding of what's required.

PN1304

Yes. And in the commercial and industrial property skills and responsibility, one of our witnesses refers to:

PN1305

The necessity for a commercial sales person to learn the square meterage value of the land, the cost of building the property, be it multi-level or single-level, what the market return per square metre for that particular building would be once completed together with market yield that has to be within market acceptable range, together with GST implications and when they apply.

PN1306

Would you agree with these being some of the factors?---I would broadly agree, but nevertheless on the experience of the person involved that again their understanding would be varied. So, yes, but I broadly agree with that.

PN1307

Yes.

PN1308

The commercial property sales person needs to know the market rate per square metre with respect to rent, statutory outgoings in order to facilitate a full depreciation schedule for investors, relevant vacancy rate information and the location concerned, and have a full understanding of all this information to be able to deal with clients and potential tenants.

PN1309

?---Again, depending on experience that would be the case, but those that are entering the commercial/industrial real estate arena would perhaps not need to know that for a period of time.

PN1310

Yes. And:

PN1311

A sales person needs to have understanding of contract law, not that they draw up the contract for sale or lease of a commercial building but they need to have a knowledge of what's in the contract so as not to mislead potential purchasers.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1312

?---Yes. And they need to have a broad understanding. Invariably contracts are prepared by solicitors. They are – agents are to fill out the contracts so they need to know the basics of what the contract includes, that's correct.

PN1313

Okay. Thank you. Now, you say at paragraph 10 on the next page:

PN1314

RRESA submits that a work value case to be undertaken by the Fair Work Commission if such a review resulted in an increase in award rates would have minimal impact on employees given the award payments are absorbed by over-award payments. The industry is driven by employee desire to earn additional remuneration in excess of the award rate via commissions, bonuses, incentive payments.

PN1315

And then you say this:

PN1316

These payments are reward based and increasing the minimum rates under the award diminishes the impact and has the capacity to undermine the incentive and reward based remuneration structure that underpins this industry.

PN1317

What do you mean by in that particular sentence?---Effectively when a sales person is engaged or potentially going to be engaged to work for an agency there is a discussion primarily centred around the conditions that will be paid to that sales person under their employment agreement. It is fair to say that if a sales person is negotiating in relation to a minimum wage or minimum retainer and if that was to increase the employer would consider that in the framing of the whole of the agreement and therefore potentially provide less incentive or incentive payments to that person as a result of an increase in the salary to that person. So the whole salary and incentives are discussed at the point of engagement, and one can have an effect on the other.

PN1318

Well, I just want to explore that a bit further with you. Is your position really, to put it bluntly, is the lower the award wage the greater the incentive for the sales person to try and make a living?---No.

PN1319

That you'd suppress the wage and say well, if you want to get out of this you've got to get out and sell and sell a lot?---No, that's not the case. What I'm saying is that sales people are incentivised and the incentive is what most people focus on when they're coming in to a sales role, and the employer is in a position to obviously share a greater amount of that commission that is derived from each sale to that sales person dependent upon all of the factors in relation to the employment of that person.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1320

All right. Well, given that the award rate is currently \$713, I'll just do it to the nearest dollar, \$713 and the association's claim is for \$783, whilst that's a significant increase, for a sales person there's still a big incentive to get out and sell. It's not a lot of money, \$783, if you're buying a house in Melbourne, is it?---I don't know what your point is, but in relation to that - - -

PN1321

Well, he still has the incentive, surely, to want to get out and sell because otherwise he'll be stuck on a base rate, if our application is successful, of \$783 gross a week. Surely there's still a lot of drive in those sales people to earn more than \$783 a week?---I'm not referring to the fact that it's going to affect the drive. The drive would be there. However, what I'm saying is the employer will take into consideration the extra payment in terms of the base and award when calculating or arriving at an employment agreement with that person as a total payout for each sale that is made.

PN1322

Yes. So in your view, as the award rate would go up to whatever figure, the employer would seek to compensate by reducing the employee's portion of the commission that they bring in?---I'm saying that the total payout will be considered when negotiating any agreement with any potential employee, so there is – all of those factors are taken into consideration.

PN1323

So I'll put it to you this way, an employee if they kept the payrise to \$783 that would be absorbed as it happens now with a debit/credit system, into any commission they earn, the commission stays the same. It's just their commission share comes down by the \$70 a week, but their total earnings remain the same?---That could be the case. It would depend on the agreement that they're entering into. Not all are on a debit/credit system, so it may well be that they're on a non-refundable retainer so there are a variety of agreements out there.

PN1324

Right. I'll come to that in a moment. But the debit/credit system, what's in Victoria? What's the predominant – is it debit/credit or commission only or what?---Look, I think it depends upon experience. Most of the time people enter into this industry with a non-offsettable retainer when they start, and they're on a very, very low commission incentive, and the commission incentive invariably rises with experience to the point where it is a debit/credit. And I know many licensed estate agents that are very much – been in the industry a long time, they're commission only. They're not even focused on the retainer in any way, shape or form.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1325

I was just trying to get a picture in Victoria whether there's 65 or 70 per cent, as far as you know from REIV, debit/credit people, sales people and the balance being commission only, or whether, like it is in Western Australia, 80 per cent commission only and the 20 per cent being debit/credit. Do you have any of those sorts of figures? If you don't - - -I can't answer that definitively. My reaction

would be there would be quite a substantial number that are on debit/credit with the balance being primarily on commission only.

PN1326

Right. Thank you. Now, you also say just following on in your paragraph 10, the last sentence:

PN1327

Technological developments have assisted this industry by increasing the opportunity for employees to earn greater incentive and reward based remuneration which has been evidenced by the increasing commission rates over time.

PN1328

What do you mean by that sentence? What evidence?---Well, the evidence of increased commission rates is that, and I'm going back probably 30 years, it was more like a commission split of, you know, up to 25 per cent payout to a sales person whereas invariably that can be somewhere between 40 and 50 per cent now. So the percentage of commission that is paid to a sales person has risen over time and that's by virtue of the fact that the industry has evolved and also the technology and the fact that the cost to some agencies in engaging people and the overhead component was ever increasing in some cases is not as high because technology has facilitated that sort of cost savings in some areas.

PN1329

All right. So when you talked about 45 or 40 to 50 per cent, are you talking about a debit/credit person, you know, on his award wage and allowances and gets 45 to 50 per cent of the employer's share of the commission and they had their wages debited against that share? Is that the 45 to 50 per cent you're talking about?---Yes. That's correct. The higher percentage would relate more to commission only sales people and in some cases I'm aware that it exceeds 50 per cent for commission in Victoria. However the ones that are closer to the 40 per cent are on the debit/credit system, yes.

PN1330

And so a commission only sales person you're saying is how much again, in your experience?---It's invariably somewhere up in the high forties perhaps into the low 50 per cents that they're applying.

PN1331

And would that include the superannuation component?---Superannuation is always regarded as a separate payment, however it can be structured in it that the commission is including super but it's always discussed and it's agreed that it's a payment on top of commission.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1332

Now, does the REIV, like some employer associations in Australia, provide employment agreement templates which are available for their members to

utilise?---Not directly. We have an alliance with the Service Industry Advisory Group and we direct all of our members to that organisation for that service.

PN1333

I'll be dealing with Ms Cook later so I'll ask her about that then. Now, in paragraph 11 you refer to your organisation being a registered training organisation:

PN1334

which administers training and assesses competency of participants. There is not a requirement for an employee to have a high level qualification in order to work in a sales or property management capacity within this industry.

PN1335

The clerical admin staff in a real estate office in Victoria, are they required to have, in their level II classification, to have particular qualifications that's either equal to or greater than the sales staff in Victoria?---A clerical person is not required under the Estate Agents Act or doesn't fall under the Estate Agents Act if they don't perform the duties of an agent and therefore are not required to hold the three units that a sales person or property manager is required to hold, so, no.

PN1336

Okay. Now, with respect to paragraph 13 of your statement about the debiting of amounts from the commission arrangements; with your employer membership in Victoria do you know of any of your members that, in their employment agreements provide for the debiting from the Commission's share of the employee unpaid but authorised advertising expenses by vendors?---No, not to my knowledge.

PN1337

Is that a matter that you've directly raised with any of your members or been discussed at all within the REIV; the debiting of advertising expenses?---As an organisation we don't tend to get involved in employee/employer relations. We direct those inquiries to Service Industry Advisory Group and they manage that on behalf of our organisation, so specifically in relation to that question, no, we don't.

PN1338

Okay. And is that the case also with respect to the debiting of long service leave entitlements that are paid to a sales person being debited against the employee's share of commission? Would you know whether that happens or not in Victoria?---I'm sorry, I can't answer that. I don't have a good handle on that, yes.

PN1339

No, that's all right. No, no, that's okay. I just have to ask the questions and I'm not upset if you don't know them?---Thank you.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1340

And the issue of debiting of the superannuation guarantee charge from an employee as the sale person's share of commission, do you know whether any of your members do that?---Look, I'm aware that our members obviously pay

superannuation on commission earnings on top of the commission that is earned. Whether that is then represented as an inclusive figure or whether it's treated separately, I think there's a range of agreements out there.

PN1341

Okay. Now, I'm nearly finished. You say at paragraph 15:

PN1342

In my view the proposed variation would unnecessarily impinge on the capacity of an employer and employee to negotiate mutually beneficial over-award employment arrangements as the current arrangements provide flexibility and an appropriate safety net without needlessly curtailing the parties' ability to negotiate appropriate contractual arrangements.

PN1343

Why I draw your attention to that paragraph is you've just given evidence that you don't know whether any of your members debit vendor authorised advertising or long service leave or superannuation.

PN1344

MR TRACEY: Well, that's not a fair characterisation of the evidence, so I object to that.

PN1345

VICE PRESIDENT HATCHER: What was the objection again, Mr Tracey?

PN1346

MR TRACEY: The latter part of my friend, Mr Clarke's question, mischaracterised the evidence that Mr White gave in relation to superannuation, in my submission.

PN1347

VICE PRESIDENT HATCHER: What was the question again, Mr Clarke?

PN1348

MR CLARKE: My question was in relation to paragraph 15 Mr White had just given evidence that he was not aware of the practice of the employers in Victoria as to the debiting of vendor authorised advertising which was unpaid or the debiting of long service leave or the debiting of superannuation.

PN1349

VICE PRESIDENT HATCHER: I thought in respect of the first he said he wasn't aware that anybody did it. And with respect to superannuation it might be structured in different ways depending upon the individual arrangements.

PN1350

MR CLARKE: Yes, with superannuation it was on the basis of they paid it, but whether it was debited was my question to him originally.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1351

DEPUTY PRESIDENT ASBURY: And he said it's regarded as a separate payment but can be partially structured in, as I understood the evidence.

PN1352

MR CLARKE: Yes. Well, perhaps I should go back to that point with the superannuation just for clarity sake. With respect to your answer to me on superannuation, and you say you regarded it as – I'm sorry, her Honour, the Deputy President, used the correct words, I haven't got a note of them, but you treat it as a separate matter which may or may not be part of an employment agreement as to whether it's on top of or inclusive of that super component; is that correct?---Correct.

PN1353

Right. Well, just dealing with vendor advertising and long service leave your answer in paragraph 15, which is in response to our association's claim with respect to the debiting of each of those three items, two of those three you say would unnecessarily impinge on the capacity of the employer and employee to negotiate mutually beneficial over-award employment. But you weren't able to tell us what actually happens with your employers in Victoria now in any event. So why would it cause you a concern?---You specifically asked whether our organisation, the REIV, is aware of what its members do and whether that is a discussion. If the question was directed to me as a licensed estate agent with 30 years' experience I would have answered that differently because I would draw upon my experience as an employer, but you specifically referred to the fact of in my role at the REIV, so that's why I answered the question that way.

PN1354

Right. I'll rephrase it. In your former role as an employer in this industry did you debit unpaid but authorised advertising expenses by vendors from the sales persons' commission?---I personally didn't, however, having said that, I was aware that there were people in the industry some years ago that used to do that. But I don't know whether that's a common practice right now in my current role.

PN1355

Right. And in respect of long service leave entitlements, either in your business or when you were in business with other businesses that you dealt with, were you aware that there was any debiting of long service leave entitlements against the sales persons' commission share?---No.

PN1356

Right.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1357

COMMISSIONER GREGORY: Mr White, can I just ask you, just while Mr Clarke just checks whether he has anything further for you, Mr Clarke, I think, described the REIV as an employer organisation. Does the REIV represent both employers and employees?---In terms of our membership we do actually have members that are employers and employees so directly in terms of the product service and the information that we provide we actually provide them to both.

Historically the REIV, going back years, was always regarded as an employer organisation but in recent time it's probably both, to be honest.

PN1358

And you've indicated in your evidence, as I understand it, that you actually support the position that's being put by Mr Clarke's organisation of moving the threshold amount to 160 per cent. Am I right in that understanding?---Yes. That's correct.

PN1359

So that is a view that is generally held by the REIV. And just again to check my understanding, are you the only representative group of employers around the country that has taken that position?---I can't verify all of the employer organisations around the country, but certainly in Victoria that's the case.

PN1360

Yes. And can you just explain, in moving to 160 per cent, if that were to be introduced, in your view, what would that actually mean in terms of the industry? I mean, presumably it would limit the pool of people that were able to move into commission only roles; is that correct? And what other impacts do you think it might have?---Look, I think it will – look, I don't know the exact impact. Foreshadowing I guess is what we're looking at. It would certainly provide some adequate amount of security for those entering or working in a sales capacity, and would be certainly adequate I would have thought going forward.

PN1361

Thank you.

PN1362

MR FARRELL: Commissioner Gregory, if I may, just one of your questions was whether other employer associations had agreed with the position of Mr Clarke's organisation about the 160 per cent. I can confirm, sir, my organisation is the only one opposing that position.

PN1363

COMMISSIONER GREGORY: Thank you very much for that.

PN1364

MR FARRELL: Indeed.

PN1365

COMMISSIONER GREGORY: I didn't realise it was a contested matter. I didn't realise you were the only organisation contesting. Thank you for that clarification.

PN1366

MR FARRELL: Yes, sir. Thank you.

PN1367

MR CLARKE: If it wasn't for the iron ore, sir, we'd saw them off at the border.

*** GEOFFREY WHITE

XXN MR CLARKE

PN1368

COMMISSIONER GREGORY: I'll take that as a comment.

PN1369

MR CLARKE: No further questions.

PN1370

DEPUTY PRESIDENT ASBURY: Mr White, I just have one question for you. Just a moment ago in answer to the questions that Commissioner Gregory asked you, you said that the 160 per cent would be security for those entering but you also said it would be security for those going forward. Can you just elaborate on what you meant by that comment?---Only in terms of those that are contemplating going in to the industry and the industry progressing in a forward direction. That's what I meant by that.

PN1371

Okay. Thank you.

PN1372

VICE PRESIDENT HATCHER: Well, just to follow on from that, so whatever the threshold is, once you get past the threshold and become a commission only sales person, after that there is no threshold or monitoring about how much you earn; is that right?---Well, you've got to have earned a certain amount of money to be able to perform in this industry and quite honestly most commission only agents aren't too perturbed about what minimums are required, so they generally focus on the commission and what they can earn and most are earning above what the minimum was anyway.

PN1373

Well, when you say "most" are there some who aren't?---I can't verify for everybody in the industry and there's over 10,000 people working in Victoria, but from what I understand the majority are certainly above and earning in excess of what the minimum is.

PN1374

Thank you. Any re-examination, Mr Tracey?

PN1375

MR TRACEY: No. Thank you, your Honour.

PN1376

VICE PRESIDENT HATCHER: All right.

PN1377

MR FARRELL: Sorry, Vice President, I have a question in relation to the questions that were asked of the witness by the Members of the Full Bench, and I'm referring to the minimum income threshold.

PN1378

VICE PRESIDENT HATCHER: Right. Ask the question.

*** GEOFFREY WHITE

XXN MR CLARKE

CROSS-EXAMINATION BY MR FARRELL

[11.29 AM]

PN1379

MR FARRELL: Thank you, sir. Mr White, currently the current minimum is 110 per cent in the award. How many complaints have you had from your members that after having qualified as a commission only sales person they were unable to earn a sufficient income?---We've had no complaints.

PN1380

Thank you, sir.

PN1381

VICE PRESIDENT HATCHER: All right. If there's no further questions, thank you for your evidence, Mr White. You're now excused and you're free to go?---Thank you very much.

<THE WITNESS WITHDREW

[11.29 AM]

PN1382

VICE PRESIDENT HATCHER: Ms Cook is next.

PN1383

MR TRACEY: If the Full Bench pleases I now call Sascha Cook.

PN1384

THE ASSOCIATE: Please state your full name and address.

PN1385

MS COOK: Sascha Louise McDonald Cook.

<SASCHA LOUISE MCDONALD COOK, SWORN

[11.30 AM]

EXAMINATION-IN-CHIEF BY MR TRACEY

[11.30 AM]

PN1386

MR TRACEY: Ms Cook, could you please state your full name to the Full Bench?---Sascha Louise McDonald Cook.

PN1387

And what's your occupation?---I'm a principal advisor at Service Industry Advisory Group.

PN1388

What's your address?---16/75 Lorimer Street, Southbank.

PN1389

Thank you. Have you prepared a witness statement in these proceedings?---I have.

*** SASCHA LOUISE MCDONALD COOK

XN MR TRACEY

PN1390

Do you have a copy of that with you in the witness box?---I do.

PN1391

Could I just confirm that that's a statement of 22 paragraphs dated 4 October 2016?---It is.

PN1392

Thank you. And have had a chance to read the statement recently?---I have.

PN1393

Is the statement true and correct?---It is.

PN1394

Thank you. I tender that statement.

PN1395

VICE PRESIDENT HATCHER: Statement of Sascha Cook dated 4 October 2016 will be marked exhibit 17.

**EXHIBIT #17 WITNESS STATEMENT OF SASCHA COOK DATED
04/10/2016**

PN1396

MR TRACEY: If the Commission pleases. That's the examination-in-chief.

PN1397

VICE PRESIDENT HATCHER: I do note that most of this statement appears to be a submission but in any event, Mr Clarke, you go ahead.

PN1398

MR TRACEY: Yes.

CROSS-EXAMINATION BY MR CLARKE

[11.31 AM]

PN1399

MR CLARKE: Now, Ms Cook, we've heard from Mr Whiteman[sic], and I think you may have heard his evidence in any event.

PN1400

VICE PRESIDENT HATCHER: It's Mr White. I think you're confusing witnesses.

PN1401

MR CLARKE: What did I say?

PN1402

MR TRACEY: Whiteman.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1403

MR CLARKE: Yes, sorry, my apologies, Mr White; his evidence, and he mentioned that basically if his members at REIV want industrial assistance that he refers them or the organisation refers them to your body, the SIAG, if I can use the acronym; that's correct, is it?---Yes.

PN1404

Yes. And does your organisation have any template employment agreements in place for those employers looking for assistance and, if so, do you have a number of templates depending on circumstances or just the one?---We have a number of templates dependent on the circumstances, and, yes, they are provided to subscribers of our service.

PN1405

Okay. Now, I'm just wondering if you wouldn't mind, I'm a bit hard of hearing with the microphone, or whatever, if you could just speak a bit more directly to it if you don't mind. Thank you?---Sure.

PN1406

So if I was an employer and I contacted you and I've got a number of sales people and I need to know my rights in terms of employing sales staff, could you explain to the Commission, please, what the various templates are, the different ones that you put on offer?---We have template contracts for clerical staff, whether they be permanent, being full time and part time and also a template contract for casual clerical staff. We also have a template contract for full-time/part-time property sales and property management staff. That is whereby we provide for base rates plus a commission payment. We also have template contracts in relation to commission only sales persons.

PN1407

Now, if I could deal with the sales persons for the moment. How many pages do these templates run to, just for the sales people for example?---To be frank I don't have the document in front of me but ordinarily they're approximately 10 to 12 pages I think. But to be frank I don't have it front of me.

PN1408

Yes. With the permission of the Full Bench I would ask that at some stage the SIAG provide your Chambers with copies of the templates used with respect to sales staff, whether it be debit/credit or commission only and likewise with respect to property managers.

PN1409

VICE PRESIDENT HATCHER: Mr Tracey, you've heard that request. Would you have any issue about - - -

PN1410

MR TRACEY: Well, only that it's very late in the day, your Honour, and Mr Clarke could have asked for this much sooner than this. I'll make inquiries and if it would assist the Full Bench then I'll certainly do it, but - - -

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1411

VICE PRESIDENT HATCHER: Yes, that would be good. Thank you.

PN1412

MR TRACEY: Yes. Yes.

PN1413

VICE PRESIDENT HATCHER: Yes, go ahead, Mr Clarke.

PN1414

MR CLARKE: Yes, thank you. Now, Ms Cook, again let's deal with the wage, the debit/credit sales person. Does your standard template provide for the debiting against the sales person's share of commission of vendor authorised but unpaid advertising expenses?---No.

PN1415

Has any of your clients sought to have it included in any of their agreements?---No.

PN1416

Is there any reference at all with respect to unpaid advertising expenses incurred with respect to a vendor property that is debitible in your agreements?---The template contract sets out a commission arrangement. Now, the commission arrangement will include the employer's gross commission figure. There are certain deductions that come off the employer's commission entitlement in order to derive a net payment. That is the employee's commission entitlement. But there are no deductions from the employee's net commission entitlement in relation to advertising.

PN1417

In relation to vendor advertising expenses?---Correct.

PN1418

Right.

PN1419

VICE PRESIDENT HATCHER: And that applies to the commission only template as well?---Well, the commission only template has a specific deduction requirement that it cannot be more than 10 per cent, so that's the standard arrangement that's put out in that document.

PN1420

So that's the deduction from the gross to the net commission amount?---Correct. Correct.

PN1421

But once you've got the net amount there's no further deduction for paid unauthorised vendor advertising?

PN1422

MR CLARKE: Yes.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1423

VICE PRESIDENT HATCHER: Is that right. Sorry, unpaid authorised vendor advertising.

PN1424

MR CLARKE: Yes, that's what I was just going to say.

PN1425

VICE PRESIDENT HATCHER: Yes. Is that correct, Ms Cook?---Yes.

PN1426

MR CLARKE: And with respect to long service leave entitlements either when long service leave is either taken whilst still employed or paid out on termination of employment is there any provision in your template with respect to the debiting of those sums of money, long service leave sums of money, from the employee's share of commission?---No.

PN1427

So long service leave is paid in addition to whatever commission that they are entitled to be paid?---Yes, there is no deduction from the employee's entitlement of commission.

PN1428

Right. And that's both with commission only and with debit/credit?---Yes. Long service leave is dealt with under the long service leave legislation. Ordinary earnings under the long service leave legislation deal with salary and commission. Commission forms part of that and so payments in relation to long service leave are in accordance with that Act.

PN1429

Right. Thank you. And with respect to superannuation, the SGC, the superannuation guarantee charge does your agreement, the agreements you organised for employers, provide for the debiting of any of the nine-and-a-half per cent, or whatever it was before it, from the employee's share of commission?---Our agreements set out that superannuation is payable on commissions, so in the circumstances the commission that an employee receives forms part of the ordinary time earnings for the purposes of superannuation guarantee legislation and is therefore payable on the salary plus the commissions earned by the employee.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1430

Yes. And when that person, say, terminates their employment, and are eligible for payment of long service leave, is that payment for long service leave debited from any outstanding commissions that he or she may be entitled to when properties settle further down the track after they've ceased employment?---As I've said previously there are no deductions from the employee's entitlement to commission. There is a calculation that is set out in the commission schedule of the agreement that has a gross figure. There are certain deductions that come off that gross figure in order to set out what the payment is that is made to the

employee. So the employee's entitlement, that being the commission, is not deducted from.

PN1431

Right. Thank you. So what are the elements that you put in to these employment agreements that are allowed to be deducted? What items do they cover generally speaking?---Do you mean – are you asking in terms of the gross commission that's received by the employer?

PN1432

Yes. There's the employer gets the gross commission and then you take off the GST, then you take off perhaps franchise fees and then there are other deductions I assume, like if you're a debit/credit person you have your wages debited against your commission, car allowance; is that right?---Yes. So the costs associated in relation to employment we set out certain parameters for that in the agreements. They are deducted from the employer's gross commission in order to derive the payment that is due and payable to the employee, that being the net figure.

PN1433

Yes.

PN1434

VICE PRESIDENT HATCHER: So once you've calculated the employer's net commission which can't be less than 90 per cent of the gross commission there's no further deductions? You just get a straight percentage of the employer's net commission?---So what happens is the employer will receive a commission amount. There are certain deductions depending on what's set out in the contract from that employer amount of money. That then determines the entitlement that the employee receives. So the employee will receive a net figure at the end of that.

PN1435

Yes.

PN1436

MR CLARKE: Probably best if we are able to see the document.

PN1437

VICE PRESIDENT HATCHER: Yes.

PN1438

MR CLARKE: Not for the purpose of recalling the witness but the document probably explains itself. But the important point, I guess, from our association's point of view, is that Ms Cook has stated, and no reason to disbelieve her, that in terms of the employment agreements that her organisation arranges for Victorian employers in this industry there is no provision for the debiting of authorised but unpaid vendor advertising, nor of long service leave entitlements once paid to the employer concerned, and likewise no debiting against the commission share of superannuation entitlements. I've got that right, Ms Cook?

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1439

MR TRACEY: Well, I object to the question. How is the witness supposed to answer that question if it's framed as a statement?

PN1440

VICE PRESIDENT HATCHER: Well, do you agree that what Mr Clarke said is correct, Ms Cook?---As I've said before there are no deductions from the employee's entitlements in terms of what they receive under the base rate plus net commission contracts, that's correct.

PN1441

So are there any deductions from the employer's entitlement?---Yes, there are, as I have said, so the costs associated - - -

PN1442

And what are they?---Well, they would include the base wage and that includes payments made to an employee when they are on leave. So those are costs associated with employment that are deducted from the employer's gross commission figure in order to then - - -

PN1443

Does that include long service leave?---That could include costs associated with long service leave. But the actual calculation of long service leave under the Act is an employee's wage or ordinary earnings plus any commissions that they have received so the net commission figure is in fact calculated as part of the ordinary earnings for the purposes of long service leave.

PN1444

Yes. Well, that's a different issue. We're just trying to clarify how the commission element of the remuneration is calculated. So you've said employment costs including leave entitlements would be deducted before the employee's share; is that right?---Correct.

PN1445

And is superannuation deducted as an employee cost?---No.

PN1446

No. And is paid unauthorised vendor advertising deducted before the employee's share?---Yes.

PN1447

It is.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1448

MR CLARKE: Right. So I think I understand it now. The way the maths work, and correct me if I'm wrong, is you've got \$100 commission, the employer - you take \$10 or whatever it is say you need for GST, that brings you down to \$90. You then take out, say, \$8 for franchise fees. That leaves you \$82 or whatever the figure is, and then the employer deducts from that commission the cost of the person's wages, car allowances, any long service leave that might be paid, and any

unpaid vendor authorised advertising, and any other deductions, business cards or whatever, and then what is left the employee is entitled to 45, say, per cent of what's left; is that how it works?---Effectively, yes.

PN1449

Right. And superannuation likewise? The SGC component?---Well, super is payable on the wage – on the ordinary term earnings and also commissions. Commissions are on top and super is payable on that.

PN1450

Okay. Now, upon what basis does your organisation or employers justify the debiting, even if it's from the overall gross amount that the employer collects, of unpaid vendor authorised advertising? What is the basis for that?---Well, if those are matters that have not been authorised, then they're moneys that are a loss to the employer, so that then comes off the commission in terms of the gross figure, and that's the basis upon which an end result is determined which is the amount that's payable to the employee.

PN1451

And can I ask you, this situation is South Australia is that when a sales agency agreement is entered between a vendor and a business, a real estate business, it is a contract between the legal entity, the employer, and the vendor. The sales person might sign the contract but they sign it on behalf of the business, the company, but is not a party to the sales agency agreement. Is that the same case in Victoria?---Look, I'm not familiar with those circumstances, so I'm just not in a position to answer that.

PN1452

But would you need to know that if you were dealing in the real estate industry?---Well, I deal with the employment contracts that deal with the manner in which the commission arrangements are structured. I don't deal with sales agreements.

PN1453

All right. Well, if I could ask you this question, when an employee sales person leaves the industry and they've listed a property but it remains, does it remain with the employer or is the sales person free to take any unsold listings with him or her to their next employer?---I don't deal with the contractual arrangements associated with exclusive agency or otherwise. That would be the arrangements that are put in place separate to the advice that we provide.

PN1454

Yes. But do your employment agreements refer to anything in relation to listings of properties that are left behind after termination; what the rights of an employee is with respect to properties that they've listed but not sold at the time of their leaving?---They do do that, and they set it out in accordance with the award requirements.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1455

And what about the listings, the unsold listings, as at the date? Don't your employment agreements refer to where they stay?---Look, my apologies, I don't have the document in front of me and I'm simply not able to answer that question at this stage.

PN1456

All right. Do you know the legal basis upon which your clients assert that they're entitled to debit the unpaid but authorised vendor advertising expenses?

PN1457

MR TRACEY: I object to the question. This witness is not a qualified lawyer. She can't answer that.

PN1458

MR CLARKE: Your Honour - - -

PN1459

VICE PRESIDENT HATCHER: I'll allow the question.

PN1460

MR CLARKE: I beg your pardon?

PN1461

VICE PRESIDENT HATCHER: I'll allow the question.

PN1462

MR CLARKE: Right.

PN1463

VICE PRESIDENT HATCHER: Did you hear the question, Ms Cook?---I'm sorry, no, I did not.

PN1464

Yes. So ask the question again.

PN1465

MR CLARKE: Yes, sorry. My question to you is do you know what the legal basis, the employers that ask you to incorporate that debiting of authorised but unpaid vendor advertising, upon what legal basis they say they're entitled to do that?---The contracts are structured so that it's the employer's entitlement in terms of the employer's moneys received in relation to gross commissions. So any deductions are from the employer's moneys received in relation to the sale of a property. The employee's entitlement is derived from that calculation. So the deductions are only from moneys that are due and payable to the employer and it's then the moneys that are due and payable to the employee that are the net figure. So the deductions are not from the employee's entitlement, but from an entitlement that's set out for the employer.

PN1466

Shrinks the apple. Okay. Now - - -

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1467

VICE PRESIDENT HATCHER: Mr Clarke, isn't the answer simple, that is, it's authorised by the employment contract between the employee and the employer?

PN1468

MR CLARKE: Yes.

PN1469

VICE PRESIDENT HATCHER: That's the legal basis of it.

PN1470

MR CLARKE: That's right. Now, sorry where was I? Just checking my notes. In terms of debit/credit sales people, is there a sort of a general field of that, in addition to their wage, they're entitled to a gross commission of a figure somewhere between perhaps 45 and 50 per cent, or are they all over the place with respect to the wage debit/credit system?---In terms of those staff, in terms of the contracts that we prepared, where they are in receipt of a base wage plus a net commission figure or a commission that's payable on top, the figures do range from anywhere between 25 to 50 per cent. It does depend on the circumstances.

PN1471

Right. And for commission only, do you have a similar range if you're commission only?---Commonly they are in excess of the 35 per cent but prescribed.

PN1472

Sorry I just missed that. Thirty-five per cent?---Commonly they're in addition to that. So usually around 50 per cent.

PN1473

Fifty per cent. Right. Sorry, your Honour, I think most of the questions I was going to ask have been answered already. No further questions.

PN1474

DEPUTY PRESIDENT ASBURY: Ms Cook, I'm sorry to take you back to some previous evidence, but I just want to make sure I'm clear exactly what your evidence is. So, as I understand it, your evidence about the structure of commission arrangements is that there's a commission that goes to the employer, which is the employer's commission on a sale, and that's the total pool of commission. The employer then deducts from that pool certain amounts, so overhead costs, and I'll come back to superannuation, but overhead costs, and I'm assuming the employer has paid for advertising?---Yes, they deduct off any costs that are associated with that but advertising is normally recouped from the vendor.

PN1475

But has the employer paid for it in the first place and then recoup it from the vendor?---That's my understanding, yes.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1476

Okay?---Or they simply send an account to the vendor for the vendor to pay those moneys.

PN1477

And with respect to annual leave, does the employer deduct an amount for annual leave from those total commission payments received by the employer?---Well, not the employee commission payment but, yes, in terms of total figures it's a gross figure, yes.

PN1478

A gross figure. And then with respect to long service leave does the employer deduct an amount for accrual of the leave?---No.

PN1479

And when the employee takes long service leave does the employer deduct an amount from that gross commission that it receives?---Yes.

PN1480

VICE PRESIDENT HATCHER: And going back to annual leave, is that accrued annual leave that's deducted or annual leave that's actually taken?---Taken.

PN1481

DEPUTY PRESIDENT ASBURY: Okay. Can I also understand the minimum wage is deducted from that for a commission plus wages employee, a person who's on wages plus commission, the minimum wage under the award is also deducted from that?---Yes.

PN1482

And is it the case that for a commission only employee that all of those deductions cannot amount to more than 10 per cent of the deduction from the employer's gross commission?---There is a maximum amount that can be deducted under the commission only arrangements and that is a 10 per cent figure.

PN1483

Okay. Thank you.

PN1484

VICE PRESIDENT HATCHER: And for commission only people is there some mechanism to ensure that the employee always gets the 35 per cent prescribed by the award?---It's set out in the award that that's a requirement and there cannot be more than a 10 per cent deduction from the gross figure.

PN1485

So, Ms Cook, you've heard Mr White's evidence to the effect that the Real Estate Institute has employed sales representatives as well as employers as members. Are they referred to your organisation for advice?---No, only directors and employers.

PN1486

Right. Thank you.

*** SASCHA LOUISE MCDONALD COOK

XXN MR CLARKE

PN1487

Any re-examination, Mr Tracey?

PN1488

MR TRACEY: No, thank you, your Honour.

PN1489

VICE PRESIDENT HATCHER: Thank you for your evidence, Ms Cook. You're excused and you're free to go?---Thank you.

<THE WITNESS WITHDREW

[12.00 PM]

PN1490

VICE PRESIDENT HATCHER: I might take a short morning tea adjournment for about 10 minutes and then resume.

SHORT ADJOURNMENT

[12.01 PM]

RESUMED

[12.16 PM]

PN1491

VICE PRESIDENT HATCHER: So, Ms Kikianis, we're just going to administer the affirmation now.

PN1492

THE ASSOCIATE: Ms Kikianis, could you please state your full name and address?

PN1493

MS KIKIANIS: Nella Kikianis (address supplied).

<NELLA KIKIANIS, AFFIRMED

[12.16 PM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [12.16 PM]

PN1494

VICE PRESIDENT HATCHER: Please sit down, Ms Kikianis. Now, Ms Kikianis, do you have a copy of your statement of evidence with you?---I do.

PN1495

And that has 14 paragraphs and is dated 16 September 2016, and has a document annexed to it?---That's correct.

PN1496

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

PN1497

Well, that statement will be marked exhibit 18.

*** NELLA KIKIANIS

XN VICE PRESIDENT HATCHER

**EXHIBIT #18 WITNESS STATEMENT OF NELLA KIKIANIS
DATED 16/09/2016**

PN1498

VICE PRESIDENT HATCHER: Now, Ms Kikianis, Mr Clarke is in the pale suit who is going to stand up in a second and who is going to ask you some questions.

CROSS-EXAMINATION BY MR CLARKE

[12.17 PM]

PN1499

MR CLARKE: Thank you. Ms Kikianis, or can I call you Nella, if that's all right?---That's fine. Thank you.

PN1500

VICE PRESIDENT HATCHER: No, we use the last names. No, we use the last names here.

PN1501

MR CLARKE: I beg your pardon?

PN1502

VICE PRESIDENT HATCHER: We use the last names here.

PN1503

MR CLARKE: The last names here. Okay. Sorry, Ms Kikianis?---Okay.

PN1504

I notice in paragraph 1 you have 12 employees. Would you be able to give the commission a breakdown of those employees as between sales people and in property management and in clerical admin support staff? Not by names but just the numbers?---Yes. Okay. There's five sales people; one sales associate; two receptionists; they're both part time; an administration part time; two property managers and a part-time property manager/administrator

PN1505

Sorry, I missed that last one?---And one part-time property manager/administrator, support for property management. Clerical, I would say rather – yes.

PN1506

More clerical than property management?---Clerical, yes. Yes, but assisting the two property managers.

PN1507

Right, assisting. Thank you very much. Now, of your sales staff, the five sales staff how many would be on a debit/credit system with respect to being paid their award wage and allowances plus a share of commission?---Yes, we've got two by the debit/credit system and three casuals. No commission only staff.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1508

Right. And three casual debit/credit sales people?---Yes. Only because they have employment elsewhere.

PN1509

In the real estate industry or?---No. No, no, one is a full-time fireman who has some casual work with us, so a minimum of three hours, and the other two are just casual because they'd prefer to be casual and/or part time.

PN1510

I see?---Semi-retired.

PN1511

I see. Right?---Mm.

PN1512

And with the two debit/credit full-timers have they been with you long?---One has been with us for over 10 years, about 11 and-a-half, and the other one for approximately four.

PN1513

Okay. And the property managers, the two property managers, are they full time?---Part time.

PN1514

Part time?---And they have been with me for over 10 years.

PN1515

Now, with respect to the debit/credit full-time sales staff, what is their gross commission share of any sale that they list and sell of property?---Yes, that's one is on 55 per cent and the other on 65 per cent.

PN1516

Sorry, I missed that last one?---So one is on 55 per cent.

PN1517

Yes?---And the other on 65 per cent.

PN1518

Sixty-five per cent. All right. And the casual sales staff, the three casual sales staff, what's their share of the gross commission?---Yes, two are only new, they're semi-retired. They're on, at this stage, on 55, and the other is on 70 per cent.

PN1519

Yes. Okay. With your property management staff, I know they're part time, but do they have any incentive scheme or bonuses or commission in addition to a salary?---No, the only bonus they may receive is from if they bring in a listing for sales and/or any loan referrals.

PN1520

Right. Now, I don't expect an exact answer to the dollar?---No, okay.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1521

But, for example, the full-time sales person on 55 per cent gross, would you know how much their earnings, excluding allowances, would have been come 30 June this year? Without identifying the individuals concerned, or a salary range?---No, that's all right. The one on the 55 per cent earned approximately \$95,000.

PN1522

Yes.?---And I think the 65 per cent was around the 110,000 dollar mark.

PN1523

Right.

PN1524

COMMISSIONER GREGORY: Ms Kikianis, who's the person that's been employed for 11 years out of those two?---The one with the 65 per cent.

PN1525

Thank you.

PN1526

MR CLARKE: Okay?---Can I also add that everything is reviewed every 12 months just - - -

PN1527

Yes. And the - - -

PN1528

VICE PRESIDENT HATCHER: When you say reviewed, what's reviewed?---You know, where they're up to with their, you know, if they were to get an increase.

PN1529

Right?---So we're quite fair in the fact that if they've done the work they are entitled to an increase in percentage.

PN1530

Yes. Right, thank you?---Okay.

PN1531

MR CLARKE: Now, with respect to your property managers, I appreciate they are part time, do they job share like they do one full week's work between the two of them?---No, no, they have a certain amount of properties each. They have a property portfolio.

PN1532

Yes?---And so that's – and they just maintain that portfolio.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1533

I see. And if you don't mind me asking, again without identify the individuals concerned, what their salary would have been as at approximately 30 June of this

year understanding that they're part-timers?---If they worked on a full-time wage they'd be somewhere in the vicinity of over the \$55,000, about 58,000.

PN1534

Right?---Approximately, yes.

PN1535

That's equating it to a full-time equivalent?---Correct.

PN1536

Yes. Thank you. Now, with respect to your sales staff have you got written employment agreements with respect to each of them?---Yes, I do.

PN1537

Right. And I guess because you're a board member of the Real Estate Employers' Federation of South Australia do you use one of their templates with respect to those employment agreements?---Correct, yes. I do.

PN1538

Right. Now, with respect to vendor advertising when there's a sales agency in South Australia my understanding is the sales agency contract is between the employer and the vendor. It might be signed by the sales person but there's a contract between the business and the vendor?---That's correct, yes.

PN1539

Correct?---That's correct. And then the property is represented by the sales person.

PN1540

Yes. And in any of your employment agreements with any of your five staff, whether they be casual or full time, is there a provision allowing your company to debit against the commission of the employee any unpaid vendor authorised advertising?---No, if it's authorised vendor it's not taken out of any of the commissions.

PN1541

Right. And that's not allowed for at all in your particular agreements?---No. No.

PN1542

But if there was an over run and without authority then of course the employee would be responsible; is that how it goes?---That's correct.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1543

Yes. All right. Now, with respect to long service leave in any of your agreements, that is, with respect to sales staff casual or otherwise, does it provide that any payments received by those staff upon their, say, termination or if they decide to take long service leave if they qualify for it, is there any provision within that employment agreement where that amount of money paid to them in those circumstances can be debited against their commission statement?---No. So

they receive – that's completely separate. My understanding is that they receive long service leave. That's completely separate from any deductions.

PN1544

Right. So your agreements, as you understand them, don't allow you, if I can put it that way, to debit against the employee's share of commission, the long service leave payments?---Correct. Correct.

PN1545

What about is there any provision in terms of when you start working out, you know, you've got \$10,000 being brought into your office by a commission from the sale of a property that, as you work your way through the formula as to how much should be divided between the employer and the employee, is there a formula that says wages are debited against it, car allowances are debited against that amount, any unpaid advertising expenses can be debited against it, any paid long service leave can be debited against it, and then what's left after all of that can be shared, in your case, somewhere between 55 and 65 per cent in the instance of two sales people?---No, I do have a formula, but I don't deduct advertising and/or long service leave.

PN1546

Okay. Thank you?---Yes.

PN1547

And insofar as superannuation, the nine-and-a-half per cent superannuation, with respect to your sales staff, is superannuation in addition to that commission that you offer them or is it part of?---No, it's included.

PN1548

Included. So you have in your employment agreements the ability to, as you pay your superannuation contributions to their super fund, that that amount of money is debited against their commission share; is that right?---It is, yes.

PN1549

Yes?---But it's included in the commission, so if they make more commission on top of their split, just say they've sold 10 properties in a month, it's included in that 55 per cent share, or 65 per cent.

PN1550

Right. I understand. Now, you refer to, I think it's your 55 per center, if I can term it that way?---Mm-hm.

PN1551

It made roughly, well, approximately \$95,000 last financial year?---Ninety. Yes.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1552

How many house sales would it have taken for him to earn that amount of money?---I think she probably sold approximately 16 properties maybe for the year. Sixteen I presume. Yes, 16 properties because we, as an office, I think we sold 100 for the – most of which were sold by the principal.

PN1553

And insofar as - - -?--- So about 16 I think.

PN1554

I beg your pardon?---So approximately 16, I think.

PN1555

Right?---I don't have that figure in front of me unfortunately.

PN1556

Yes, that's okay?---That's all right, yes.

PN1557

And the 65 per cent person earning \$110,000 would that have – how many sales would that have taken?---Possibly about 18 depending on – and it depends on her commission structure with her vendors so I think about 18 – 19 sales.

PN1558

Eighteen to 19, yes. And the area that Ray White Semaphore is allowed to compete in amongst the Ray White franchisees what area does that take in, in terms of the metropolitan area around it?---It's the north-western area but not – you're not excluded from entering into other areas. It's just – there's no such thing as a farming area any more. It's just a guideline.

PN1559

Right?---So if you've got a property, say, in the city, you can still market around that property.

PN1560

I see. Now, just excuse me, your Honour. Sorry, I think I'm just about finished. Just dealing for a moment with your three casual sales persons?---Mm-hm.

PN1561

What would their earnings have been? I know - - -?---Two have only just commenced with us approximately two months ago, six weeks ago.

PN1562

Yes?---So they've only just put properties under contract.

PN1563

Okay. So they're just starting the process?---Just commenced, yes. They're the semi-retired couple. They're actually a couple that are doing – yes, working together.

PN1564

And - - -?---The other casual he's probably around 40,000 for the last financial year.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1565

I see. And that's on the basis of working a minimum of three hours a day?---No, a week. Three hours a week, so – and unless I ask them to do extra they only get paid for a certain - - -

PN1566

I see?---Yes. So that's the - - -

PN1567

They get paid a wage for three hours a week for three hours' work?---Yes.

PN1568

Do they only do the three hours' work or do they put in extra time that - - -?---Sometimes they put in extra. As I said, the new ones are just starting off. If they do extra weekends they will get remunerated for that, but the one that's on 70 per cent, who is the fireman, he works – he may get a listing and we – sometimes I may have to go out and do some of his opens if he's working, so it works. It's a bit of a give and take situation.

PN1569

I see?---But he still gets paid per week a minimum at least of three hours.

PN1570

All right?---Because he's not always able to meet his commitments if he's working as a – in his other role.

PN1571

Yes. Yes, I could imagine that?---Mm.

PN1572

With respect, are the two semi-retired people, they'd be working just the minimum of three hours or would they – to get listings and sales they'd be working more, wouldn't they?---Sometimes, yes. As I said with their – they may do five hours on a weekend, on a Saturday, and appointments but at this stage they haven't increased their workload that much.

PN1573

And if they work in a week greater than three hours, do you pay them the wage for that extra three or four hours or whatever it might be in a week?---Yes. Yes, they fill in a time book.

PN1574

Okay?---And it may be that we decide to go part time or, you know, 20 hours a week after – we'll review it in another three months' time.

PN1575

Yes?---So there's always a review period.

PN1576

All right. I think I'm just about done.

*** NELLA KIKIANIS

XXN MR CLARKE

PN1577

DEPUTY PRESIDENT ASBURY: Can I just clarify with you, Ms Kikianis, when you gave us those salaries, or the earnings of 95,000 and 110,000 for your full-time sales people, can I just clarify does that include or exclude superannuation? Do you count that in those earnings as part of the salary, or is it on top?---No. No, no, that's on top, superannuation, because that's just going on their certificate whatever, the - - -

PN1578

Yes?---I can't think of the word for it, now. Their certificate that we give them at the end of their - - -

PN1579

Group certificate, yes?---The group certificate, yes.

PN1580

Okay. Thank you for that?---Thank you.

PN1581

VICE PRESIDENT HATCHER: All right. Thank you for your evidence, Ms Kikianis. You're excused. You're now free to leave?---Thank you.

<THE WITNESS WITHDREW

[12.38 PM]

PN1582

VICE PRESIDENT HATCHER: And we'll call Mr Harvey next.

PN1583

THE ASSOCIATE: Will you please state your full name and address?

PN1584

MR HARVEY: Andrew William Harvey (address supplied).

<ANDREW WILLIAM HARVEY, AFFIRMED

[12.38 PM]

EXAMINATION-IN-CHIEF BY VICE PRESIDENT HATCHER [12.39 PM]

PN1585

VICE PRESIDENT HATCHER: Now, Mr Harvey, you've made a statement of evidence for this matter; is that right?---That's right. Yes.

PN1586

And you have a copy of that with you in the witness box?---Yes.

PN1587

And the statement has 12 paragraphs and is dated 16 September 2016?---Yes.

PN1588

And it's signed by you?---Yes.

*** ANDREW WILLIAM HARVEY

XN VICE PRESIDENT HATCHER

PN1589

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

PN1590

All right. Well, that statement will be marked exhibit 19.

EXHIBIT #19 WITNESS STATEMENT OF ANDREW WILLIAM HARVEY DATED 16/09/2016

PN1591

VICE PRESIDENT HATCHER: And Mr Clarke, who's the gentleman over here who is about to stand, will ask you some questions.

CROSS-EXAMINATION BY MR CLARKE

[12.39 PM]

PN1592

MR CLARKE: Yes, good afternoon, Mr Harvey?---Good afternoon, Ralph Clarke.

PN1593

I beg your pardon?---Good afternoon, Mr Clarke.

PN1594

Thank you. Now, you employ 14 people, as you say at paragraph 1. Would you be able to just break down for the Fair Work Commission, please, the categories of those 14 staff members between sales staff and if they're sales staff, how many are debit/credit or commission only, property managers and clerical/admin staff? You don't need to give their names just the - - -?---Sure. I have four property managers and they're all full time. And I have seven sales people and they're all full time. I've got an admin person and an administrator – sorry, an admin person and a receptionist.

PN1595

And of your seven sales staff, how many would be on a debit/credit wage system versus commission only?---Six are on debit/credit wage and one is on commission only.

PN1596

And with the four property managers, do they have any incentive or commission structure in addition to their salary?---Yes, they get paid a bonus for each property management listing they bring into the office. Yes, that's their bonus.

PN1597

Okay. And with respect to the six debit/credit sales people, their share of the commission, of the gross commission, are they all the same or are they different?---They're all the same.

*** ANDREW WILLIAM HARVEY

XXN MR CLARKE

PN1598

Yes. And what would that percentage be?---They initially get 45 per cent and then there is a bonus structure after that.

PN1599

And the commission only person?---He gets 50 per cent plus the bonus structure.

PN1600

Okay. Now, without identifying any of the individual staff members, and I appreciate, as does the Commission, that you wouldn't have these figures on hand with you at this stage, and you might only be able to give an approximate figure which is perfectly reasonable, with respect to the income earned by your debit/credit employee sales staff as at 30 June this year, say, for example?---Yes, they all vary a lot.

PN1601

Yes?---Two of them are into the six figures, so over 100,000. And then they vary down to about 50,000.

PN1602

So it ranges between basically 60,000 at the bottom end to, for two people, over 100,000?---Correct.

PN1603

And for the commission only person, have you got a salary range, earnings he would've brought in, say, in the last - - -?---Yes, he's over 100,000.

PN1604

Okay. And what would the salary range be, or the earnings of your property managers be as at 30 June this year?---I have three property managers plus a senior property manager. The three regular property managers earn about 46,000 plus car allowance plus phone allowance. And their car allowance amounts to around 7000 a year.

PN1605

And the senior?---And the seniors a couple of thousand more.

PN1606

So around 48 approximately?---Yes.

PN1607

Okay?---And she also receives \$100 a week to hold the afterhours phone number and answer any emergency calls.

PN1608

Okay. Thank you. Now, as a board member of the Real Estate Employers' Federation of South Australia and Northern Territory do you avail yourself of their services with respect to employment agreements with each of your sales staff?---Yes, I do. They're all on agreements except two.

*** ANDREW WILLIAM HARVEY

XXN MR CLARKE

PN1609

Right. Are you talking about the sales staff, are you or - - -?---That's right.

PN1610

Right. So when you say the two aren't on agreements, what, there's no employment agreement at all with them or are they just on straight wage and allowances?---They're on the debit/credit system the same as everyone else. I just have to admit that I've been lax in getting their – in that they're the last two employees, I've been lax in getting their agreements made up.

PN1611

Okay. All right, I understand. Now with your employment agreements do they make provision for the debiting from the commission payable to the employee of authorised but unpaid vendor advertising?---No. No, we don't debit advertising from the sales people.

PN1612

Yes. Have you ever done it in the past?---Yes.

PN1613

And how recently?---We changed our rule I think about five years ago.

PN1614

Right?---I mean, the practice became quite unpopular and looking into it I thought that it was better to change to the current system whereby the business takes responsibility for all the advertising.

PN1615

Yes, I appreciate that. And you've been in the industry a long time, do you know of other employers in South Australia in the real estate industry that do provide for the debiting of authorised but unpaid vendor advertising from the Commissions?---I would only be guessing. I don't know specifically.

PN1616

Okay. Now, with respect to long service leave, if long service leave is paid out because somebody leaves or takes long service leave, takes the time off and paid during that period of time, do any of your employment agreements provide for the debiting of that sum of money from the employee's commission share?---Yes, long service leave is, in my agreements, included in their commission share.

PN1617

Right. Now - - -?---All except for the – sorry, to interrupt – all accept for the sales person I have the commission only sales person.

PN1618

Yes?---He actually gets separate long service leave.

PN1619

That's on top of his commission, the 50 per cent structure?---That's right. Yes.

*** ANDREW WILLIAM HARVEY

XXN MR CLARKE

PN1620

Okay. Now, in your employment agreement how is it described as long service leave? Is it sort of ascribed to wages paid and howsoever or is there a specific reference to long service leave, those words used, specifically in your employment agreements?---I'm pretty sure it's described as included in their commission share.

PN1621

The words long service leave is specifically mentioned?---I'm pretty sure, yes.

PN1622

When you work out the commission that should be, you know, you want to agree or come to agreement with a sales person, how do you work out the long service leave entitlements, given they don't materialise in South Australia until at least after seven completed years of service pro rata? I mean, do you say well, as part of the commission you're getting an additional X per cent that goes towards your long service leave payment when it's finally taken or anything of that nature?---No, it's not described specifically as a percentage.

PN1623

Yes. And in terms of the occupational superannuation, currently 9 and-a-half per cent, is that subject to being debited against the employee's commission share?---No, superannuation is paid on top of that.

PN1624

I see. So 45 and 50 per cent, with respect to the sales staff, the superannuation is an addition?---That's right.

PN1625

Right. Okay. No further questions, your Honour.

PN1626

VICE PRESIDENT HATCHER: Thanks for your evidence, Mr Andrews[sic]. You're excused and you're free to leave?---Thank you.

<THE WITNESS WITHDREW

[12.53 PM]

PN1627

VICE PRESIDENT HATCHER: Now, Mr Farrell, I just might mark the two standard contracts you kindly sent us. So the REEFWA Contract of Employment Debit/Credit Template will be marked exhibit 20.

**EXHIBIT #20 REEFWA CONTRACT OF EMPLOYMENT
DEBIT/CREDIT TEMPLATE**

PN1628

MR FARRELL: Thank you.

PN1629

VICE PRESIDENT HATCHER: And the REEFWA Template Contract of Employment Commission Only will be marked exhibit 21.

*** ANDREW WILLIAM HARVEY

XXN MR CLARKE

**EXHIBIT #21 REEFWA CONTRACT OF EMPLOYMENT
COMMISSION ONLY TEMPLATE**

PN1630

MR FARRELL: Vice President, I earlier heard, I believe it was, Mr Clarke's request from the SIAG in Victoria for property managers. We do have template property managers contracts. Would the Commission like that as well?

PN1631

VICE PRESIDENT HATCHER: Yes, if you've got it with you.

PN1632

MR FARRELL: I don't have hard copies because of where I am but I can easily electronically get that to you.

PN1633

VICE PRESIDENT HATCHER: All right. Well, that would be much appreciated.

PN1634

MR FARRELL: Yes.

PN1635

VICE PRESIDENT HATCHER: Mr Tracey, when do you think you can have those Victorian contracts to us by?

PN1636

MR TRACEY: We could provide them electronically this afternoon, your Honour.

PN1637

VICE PRESIDENT HATCHER: All right.

PN1638

MR TRACEY: I just would raise one concern, if I may, they're in the nature of SIAG's intellectual property, as you would imagine. There's certainly no problem producing them to the Full Bench. What I would submit is an appropriate course would be if any party wants to look at them, they could inspect them, rather than be given a hard copy or an electronic copy just to preserve the organisation's rights to that information.

PN1639

VICE PRESIDENT HATCHER: Well, I think more appropriate, isn't it that we simply make a non-publication order and an order that they can't be used for any purpose other than the proceedings.

PN1640

MR TRACEY: Yes, under section – I've got the section.

PN1641

VICE PRESIDENT HATCHER: All right. When you bring the documents tomorrow can you also formulate an appropriate order to go with it?

PN1642

MR TRACEY: Sure. I certainly will, thank you, your Honour. Yes.

PN1643

MR WARREN: Your Honour, could we possibly have the other parties that are providing this material provide it to REEF and any confidentiality matter will be obviously honoured. If we do that today or this afternoon that way we can look at it overnight and be in a position to address it tomorrow.

PN1644

VICE PRESIDENT HATCHER: All right. That brings me to the next question. Do the parties want to proceed to submissions at 2 or start tomorrow?

PN1645

MR CLARKE: In many respects it would be good to get it over with today, but I would prefer to consider, I don't think we're going to get transcript in time for the final submissions, to go over my notes and so forth with respect to the evidence that's transpired and I'm sure the other parties here may want to do the same so that we can do justice to the case and finish it tomorrow. I'm not anticipating that – I think we could well finish by lunch tomorrow. I don't know about the other parties.

PN1646

MR WARREN: We might hold you to that.

PN1647

MR CLARKE: Sorry?

PN1648

MR WARREN: We might hold you to that.

PN1649

VICE PRESIDENT HATCHER: Anyway, is that the consensus of the parties to start tomorrow morning at 10 on the basis we'll finish all submissions by tomorrow?

PN1650

MR WARREN: Absolutely. That would be our intention. If we can get the material this afternoon that would be very handy. Yes.

PN1651

VICE PRESIDENT HATCHER: All right. Mr Farrell, do you agree with that?

PN1652

MR FARRELL: Yes, on that point, I have no concerns about it. May I just go back to the dissemination of documents, obviously our documents, Mr Warren referred to as well, we would be happy to provide the other parties subject to the same non-disclosure order. We have the same concerns as outlined by Mr Tracey.

PN1653

VICE PRESIDENT HATCHER: All right. Well, when Mr Tracey gives his draft order tomorrow we'll apply the same order to exhibits 20 and 21 and to any further contract that you provide.

PN1654

MR FARRELL: On that basis I'm happy to provide that this afternoon. I agree it'll be helpful for that this afternoon.

PN1655

MR TRACEY: Yes. And I can indicate we can do the same on the basis that it would be covered by the order.

PN1656

VICE PRESIDENT HATCHER: Yes. All right. Is there anything else we can deal with today? Yes, that is, we've dealt with all the evidence apart from the documents yet to come.

PN1657

MR WARREN: If the transcript can't be arrived at today then we don't need it bearing in mind what your Honour has said about the costs.

PN1658

VICE PRESIDENT HATCHER: Yes, all right. Now, given the parties are going away to give some thought to their positions can I just raise three propositions which the parties might want to give some thought to and address us upon it tomorrow if they wish to do so, and these propositions all relate to the commission only payment system. The first proposition is whether the commission only payment system should be clarified so that rather than providing for 35 per cent of, in effect, the minimum 90 per cent of the gross commission, whether the award should simply say that in all circumstances a commission only sales person must receive a minimum, an absolute minimum of 31.5 per cent of the gross commission, and that written agreements entered into in relation to commission only employees should make that the minimum in the contract to repeat the award requirement. That's the first proposition. Mr Clarke, you appear to be confused, or giving an impression of confusion. Do you not understand that proposition? I'm not saying you agree with it. Do you understand it?

PN1659

MR CLARKE: No, it's 31 and-a-half per cent you're proposing of the absolute gross commission rather than 35 per cent of 90. It still equals the same.

PN1660

VICE PRESIDENT HATCHER: On my maths it's the same number.

PN1661

MR CLARKE: Yes. It just makes it simpler.

PN1662

VICE PRESIDENT HATCHER: But just to make it a bit simpler. All right. The second proposition is whether in respect of commission only sales persons there should be a requirement that on an annual basis their gross income be reviewed

and if that review reveals that their income is below the award minimum wage on an annualised basis that they cannot continue to be paid under the commission only system. That's the second proposition. And the third proposition is whether the award in relation to commission only sales persons should contain something in their nature of an objective statement that would say something to this effect, that the purpose of the commission only payment system is to enable the average competent sales person to earn at least 15 per cent in excess of the minimum weekly wage rate on an annualised basis.

PN1663

MR CLARKE: Sorry, your Honour, could you just run that last one past me?

PN1664

VICE PRESIDENT HATCHER: Yes. It's that the proposition is whether the award, in relation to the commission only payment system, should contain something in the nature of an objective statement, that is, a statement of the objective of the payment system, which might say something to this effect, that is, the object is to enable the average competent sales person to earn at least 15 per cent in excess of the minimum weekly rate of pay on an annualised basis.

PN1665

MR CLARKE: And that was 15 per cent of the - - -

PN1666

VICE PRESIDENT HATCHER: Of the minimum award rate calculated annually. So the parties understand what those propositions are?

PN1667

MR CLARKE: Yes, your Honour.

PN1668

MR FARRELL: Yes.

PN1669

MR WARREN: Yes, thank you.

PN1670

MR TRACEY: Yes, thank you, your Honour.

PN1671

VICE PRESIDENT HATCHER: All right. Well, if there's nothing further, we'll now adjourn and we'll resume to receive final submissions at 10 am, and we will vacate the Thursday hearing date.

ADJOURNED UNTIL WEDNESDAY, 23 NOVEMBER 2016 [1.01 PM]

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