



DECISION

Fair Work Act 2009

s.156 - 4 yearly review of modern awards

4 yearly review of modern awards – Real Estate Industry Award 2010 (AM2016/6)

VICE PRESIDENT HATCHER
DEPUTY PRESIDENT ASBURY
COMMISSIONER GREGORY

SYDNEY, 6 JULY 2017

Four yearly review of modern awards – Real Estate Industry Award 2010.

1. INTRODUCTION AND BACKGROUND

[1] As part of the conduct of the 4 yearly review of the *Real Estate Industry Award 2010*¹ (the REI Award) an exposure draft was published on 18 December 2015. A further exposure draft was published on 29 April 2016 incorporating changes agreed by interested parties at a conference on 21 April 2016. Arising from submissions made by interested parties in relation to the exposure drafts, a number of issues in contest were identified and referred to this Full Bench for Determination.

[2] The interested parties are the Registered Real Estate Salespersons' Association of South Australia (RRESSA); Real Estate Employers' Federation (REEF); Queensland Real Estate Industrial Organisation of Employers (QREIOE); Real Estate Employees' Federation of Western Australia (REEFWA); Real Estate Institute of Victoria (REIV); Real Estate Employers' Federation South Australia and Northern Territory (REEFSA and NT); and Australian Property Services Association (APSA).

[3] Directions were issued on 30 May 2016 requiring REEF to file in the Commission a document setting out the variations to the REI Award identifying:

- a) The agreed technical changes;
- b) The agreed substantive changes; and
- c) The remaining disputed substantive changes (including identification of the party/ies applying for each change.

That document is referred to in this Decision as the Amended Exposure Draft. Where necessary, reference is also made to the current version of the REI Award.

2. DISPUTED SUBSTANTIVE CHANGES

2.1 RRESSA

[4] The disputed substantive changes proposed by RRESAA are as follows:

- Increases to minimum award wages in clause 8 of the REI Award on the basis that employees under the REI Award did not have access to minimum rates adjustments prior to the making of the REI Award to recognise the value of the work compared to equivalent classifications in the *Clerks Private Sector Award 2010* and the *Manufacturing and Associated Industries Award 2010*;
- Amendment to the Minimum Income Threshold Amount (MITA) for commission-only employment (clause 16.3 in the REI Award and clause 9.7(c) in the Amended Exposure Draft) by inserting the amount of \$57,948.80 (based on the current award rate for a Property Sales Representative annualised plus an amount of 60%) and a note that for the purposes of the MITA the “total gross income” is calculated as 160% of the annualised minimum award wage for an adult Property Sales Representative prescribed by the REI Award;
- Deletion of clauses which provide for commission-only agreements to allow for annual leave, personal carers’ leave or any other entitlement under the National Employment Standards (NES) to be paid in advance (clauses 17.5(a) and (b) in the REI Award and clauses 9.6(a) and (b) in the Amended Exposure Draft); and
- A new sub-clause 9.2(d) – as set out in the Amended Exposure Draft – prohibiting written agreements from containing provisions for debiting of any amount relating to vendor advertising and marketing expenses or long service leave entitlements under State and Territory legislation, from commission, bonus or incentive entitlements.

2.2 APSA

[5] APSA supported the proposal advanced by RRESSA for increases to minimum wages on work value grounds. APSA also proposed to insert a new clause (clause 9.7(e) in the Amended Exposure Draft) which provides that where an employee is engaged on a commission-only basis, either full time, part time or casual and does not in each six month period of employment earn the equivalent of the REI Award wage, then the employer shall be required to pay the employee the difference between the REI Award wage and the commission earnings. Further, APSA proposed that the MITA is not permitted to be pro-rated for casual or part-time employees.

[6] All employer parties with the exception of REEFWA supported the amendment proposed by RRESSA to the MITA but on the basis that the 160% threshold was calculated with reference to the current minimum rate for Property Sales Representatives in the REI Award. All employer parties opposed the minimum wage increases and other amendments sought by RRESSA and APSA.

2.3 Full Bench proposals for consideration by parties

[7] The parties were asked to make submissions in relation to whether provisions of the REI Award dealing with payment in advance for NES leave entitlements are consistent with the NES in light of the Decision of a Full Bench of the Commission in *Canavan Building Pty Ltd* [2014] FWCFB 3202. Those provisions are found in clause 9.6(a) of the Amended Exposure Draft (clause 17.5(a) of the current REI Award).

[8] During the course of the hearing, the Full Bench also put a number of alternative proposals to the parties for consideration as follows:

- Whether the commission-only system should be clarified so that instead of employees receiving 35% of employer's net commission the REI Award would provide "in all circumstances a commission-only sales person must receive a minimum of 31.5% of the employer's gross commission" and that the REI Award require that written agreements entered for commission-only employment must provide accordingly;²
- Whether the REI Award should provide that the gross income of commission-only employees be reviewed annually and that if that income falls below the award minimum wage on an annualised basis the employee cannot continue to be paid under the commission-only system";³ and
- In relation to the commission-only employment should there be a provision in the REI Award stating that the objective of the commission-only payment system "is to enable the average competent sales person to earn at least 15% (or some other appropriate amount) in excess of the minimum weekly rate of pay on an annualised basis."⁴

3. EVIDENCE AND SUBMISSIONS

3.1 Witnesses

[9] The following persons gave evidence on behalf of RRESSA/APSA:

- Mr Ralph Desmond Clarke, Industrial Relations Advisor to the RRESSA;⁵
- Mr Nathan Fox, RRESSA Vice President and Licensed Real Estate Manager and Land Agent in South Australia;⁶
- Ms Lynn Masson-Forbes, President of RRESSA and Licensed Real Estate Agent in South Australia;⁷
- Mrs Raffaella Bell, Property Manager and member of the NSW Branch Committee of APSA;⁸ and
- Mr Thomas Clark French, Secretary of the Queensland Branch of APSA.⁹

[10] Mr Lewocki on behalf of APSA sought to tender statements from Mr Michael Freeland, Mr Michael Szuladinski and Mr Stephen Finch, who were not available for cross-examination. Mr Farrell on behalf of REEFWA and Mr Warren on behalf of REEF and QREIOE objected to the admission of the statements. The statements were admitted on the basis that neither Mr Farrell nor Mr Warren held instructions that would enable them to challenge to the veracity of the contents of the statements and subject to any submissions any party may make in relation to weight or relevance. It was also noted with respect to the admission of the statements that the witnesses did not have any knowledge of the real estate industry in Western Australia.¹⁰

[11] Evidence for REEFWA was given by:

- Mr Peter Kuhne, Director/Principal, Peter Kuhne Real Estate;¹¹ and

- Mr Mark Whiteman, Western Australian Chief Executive Officer, Ray White Group.¹²

[12] REEF/QREIOE called evidence from Mrs Danielle Andrews, Education and Training Manager, Real Estate Institute of New South Wales. REEF SA and NT called evidence from:

- Mark Ian Burns, Director of One Earth Designs Pty Ltd t/a LJ Hooker Blackwood;¹³
- Ms Nella Kikianis, General Manager of Pak Property Pty Ltd t/a Ray White Semaphore;¹⁴ and
- Mr Andrew Harvey, Director of Salisbury Real Estate Pty Ltd t/a Raine and Horne Salisbury.¹⁵

[13] Evidence for REIV was given by:

- Mr Geoffrey Robert White, Acting Chief Executive Officer, REIV;¹⁶ and
- Ms Sascha Louise McDonald Cook, Principal Advisor, Services Industry Advisory Group.¹⁷

3.2 Claim for increases in minimum wages

[14] In relation to the claim for an increase to minimum wages in the REI Award, Mr Clarke gave evidence about the establishment of the classification structure in the *Clerks Private Sector Award 2010* (the CPS Award) and predecessor State clerical award and the minimum rates adjustments process which had been undertaken in a range of awards in 1989 prior to the making of modern awards.

[15] Mr Clarke also highlighted that until 1 January 2010, the only non-clerical employees in the real estate industry covered by any award were in South Australia (salespersons only); New South Wales (salespersons and property managers); and in Queensland (salespersons and property managers). There was no award coverage for non-clerical employees in Western Australia, Victoria, Tasmania or the Territories.

[16] Mr Clarke stated that there were no minimum rates adjustments made to any of the State real estate awards which were the predecessor awards to the REI Award. Mr Clarke also stated that he has accessed the archived files of the South Australian and New South Wales Industrial Commissions and there is no evidence of any work value consideration of the awards covering the real estate industry by those tribunals prior to the making of the REI Award.

[17] Mr Clarke pointed to the fact that the skills and competencies of a Level 2 Clerk in all State clerical awards have been found to be equivalent to the C10 trades level in the predecessor awards to the *Manufacturing and Associated Industries Award* (MAI Award) and this relativity is reflected in the classification structure in the CPS Award so that the rate for an employee classified under the CPS Award as Level 2 – Year 1 is the same as the rate for a C10 Engineering/Manufacturing Tradesperson – Level 1 under the MAI Award. Mr Clarke asserted that the work and responsibilities of property sales persons is equivalent to at least those of a Level 2 Clerk.

[18] Mr Clarke also stated that at the time of making the REI Award, there had not been a work value case undertaken with respect to non-clerical employees, in particular property

salespersons, property managers and strata title managers. According to Mr Clarke, when the REI Award was made the wage rates for each classification were based on applying the highest rate of pay in each of the three States where there was award coverage to all States and Territories, with a three year phasing in period. There had been no minimum rates adjustments in any State awards, whereby classifications were compared with work of comparable value in other minimum rates awards relative to the base tradespersons rate.

[19] Mr Clarke also provided a comparison of minimum wage rates for sales staff in other modern awards with the minimum wage rate of \$713.20 per week for a Property Sales Representative under the REI Award as follows and asserted that this comparison evidences that rates for Property Sales Representatives are out of kilter:

- Banking and Finance Award Level 2 - \$783.30 per week;
- Clerks Private Sector Award Level 2 Year 1 - \$783.30 per week;
- Commercial Sales Award - \$785.30 per week;
- Vehicle Industry Repair Services and Retail Award Salesperson +6 months service - \$743.30 per week; and
- General Retail Award Level 1 Shop Assistant - \$738.80 per week.

[20] Evidence in support of RRESSA's proposed increase to minimum wage rates in the REI Award was also given by the Association's President, Ms Lynn Masson-Forbes.¹⁸ Ms Masson-Forbes gave evidence about the skills and responsibilities of Residential Property Salespersons, Property Managers and Strata Title Managers. Those skills and responsibilities encompass interpersonal skills, negotiation skills, market research, use of technology, advice about marketing and advertising of property, knowledge of and compliance with legislation and legal matters, reference and finance checking as well as administrative duties.

[21] Evidence about the skills and responsibilities of commercial property salespersons was given by Mr Nathan Fox, Vice President of RRESSA in support of the increases. Mr Fox said that commercial salespersons were required to learn the square meterage value of land, costs of building various properties and the return that would be received together with relevant GST implications. Mr Fox also said that in his experience it is necessary for salespersons to have qualifications as a valuer or necessary work experience. Salespersons are also required to have an understanding of contract law and in South Australia are permitted to complete contracts for the sale of land and residential property.

[22] Evidence about the skills and responsibilities of property managers was given by Ms Raffaella Bell on behalf of RRESSA. Ms Bell said that duties of property managers include handling money and dealing with trust accounts and payment of accounts for properties managed including rates, fees, insurance, maintenance and repair work. Property managers are also involved in the selection of tenants and reference checking. Further, they are required to deal with legal matters such as the eviction of tenants and appearances before tribunals dealing with tenancy disputes when required. Property managers are required to have high levels of interpersonal skills and organise maintenance tradespeople. They are also required to have an understanding of legislation dealing with the rights of landlords and tenants. Property managers are on call seven days a week and 24 hours a day if there is a fault with a property. The management of rent rolls undertaken by property managers provides a steady income for real estate agencies and are an important part of an employer's business.

[23] In its submission in support of its proposed increase to minimum wage rates in the REI Award, RRESSA stressed that the REI Award has not been the subject of minimum rates adjustments arising under the August 1989 National Wage Case Decision and traced the history of the minimum rates adjustment process. RRESSA submitted that for the REI Award to be a fair and relevant minimum safety net award it must be able to access the minimum rates adjustment principle.

[24] RRESSA submitted that given the evidence about work value given by its witnesses with respect to the skills and responsibilities of property salespersons and other classifications in the REI Award, it is a compelling argument for the Commission to exercise its powers under the *Fair Work Act 2009* (FW Act) to remedy this inequity and create a stable, fair and just minimum rates award in accordance with the object of the FW Act, the modern award objective and the minimum wage objective.

[25] RRESSA further submitted that the economic impact on employers of the wage increases that it seeks should be minimal given the potential absorption of over award payments in the industry via commissions, bonuses and other incentive payments payable to salespersons and employees in other classifications under the REI Award. RRESSA also asserted that the employers in the real estate industry have had the benefit of a very flexible award with work being performed on any seven days of the week, no penalty rates for weekend work or after normal business hours. Overtime payments are not generally made to sales staff and property managers have limited rights to payment for callouts or standing by. Further, employers have had the benefit for the last 25 years of not having to pay minimum rates adjustments other than to clerical staff.

[26] In support of the submission for the increases to minimum wage rates, RRESSA referred to the Decision of a Full Bench of the Commission in the Four Yearly Review of the *Fire Fighting Industry Award 2010*,¹⁹ where the contention that there must be a change in circumstances such that a modern award is not meeting the modern awards objective to enliven the Commission's jurisdiction to vary the award, was rejected.²⁰ RRESSA also pointed to the statement of the Full Bench in that case to the effect that s.156 of the FW Act requires that each modern award is reviewed in its own right and in the review the Commission may vary a modern award in whatever terms it considers appropriate, subject to its obligation to accord interested parties procedural fairness and the application of other relevant statutory provisions.²¹

[27] By reference to the relativities in the CPS Award, RRESSA contended that the relativities for classifications in the REI Award should be consistent with those currently in the CPS Award based on the Property Sales Representative classification being equivalent to classification Level 2 Year 1 in the CPS Award as follows:

- Property Sales Associate – first 6 months – 91.31% (CPS Award Level 1, 1st year);
- Property Sales Associate – after 6 months – 95.88% (CPS Award Level 1, 2nd year);
- Property Sales Person – 100% (CPS Award Level 2, 1st year);
- Property Sales Supervisor – 115.41% (CPS Award Level 5);
- Property Management Associate – 95.88% (CPS Award Level 1, 2nd year);
- Property Management Representative – 105.62% (CPS Award Level 3);
- Strata/Community Title Management Associate – 95.88% (CPS Award Level 1, 2nd year);

- Strata/Community Title Management Representative – 105.62% (CPS Award Level 3); and
- Strata/Community Title Management Supervisor – 115.41% (CPS Award Level 5)

[28] In oral submissions Mr Clarke on behalf of RRESSA said that the relativities had been calculated by reference to the difference between the dollar value of the wage rates for each level above and below the Level 2, 1st year classification rate in the CPS Award. In response to questions from the Full Bench, Mr Clarke said that given the quantum of over award payments in the real estate industry, as evidenced by the witnesses for the employer parties, it would not be necessary to phase in the increases sought by RRESSA if the Full Bench decided to grant the application. Mr Clarke also submitted that employers have had a 25 year period where there have been no minimum rates adjustments, but accepted that employees have waited for a considerable period and a few weeks to phase in the increases would not cause an issue.

[29] The application by RRESSA for increases to the minimum wages in the REI Award is opposed by REEFA, REEF/QREIO, REIV and REEF SA and NT. The evidence in opposition to the claim for increases in minimum wages was essentially to the effect that there had been no significant change to the work performed by real estate agents since the REI Award was made in 2009 and a significant wage increase was not justified on work value grounds or that the increase would be a disincentive for employees to maximise their income by earning commissions.

[30] Mrs Danielle Andrews' statement was tendered by REEF/QEIRO without objection and set out information about the regulation of the real estate industry and the qualifications required of real estate sales representatives. Mrs Andrews said that registration and licensing outcomes for real estate sales representatives are specifically related to Australian Qualifications Framework Levels 4 and 5. Mrs Andrews also stated that for NSW, Queensland and Victoria, which in combination make up approximately 80% of the real estate industry, sales representatives are required to complete less than 30% of a Certificate IV in Property, as an entry level requirement.

[31] Mr White said in his evidence for REIV that the fundamentals of work in the real estate industry have not changed and the key aspects of nurturing clients, listing, selling and auctions remain the same. What has evolved is the manner in which the client and prospective client engagement occurs through advancements in technology which have increased capacity to communicate with clients. Mr White also said that increasing minimum wage rates in the REI Award has the capacity to undermine the incentive and reward based remuneration structure that underpins the industry. According to Mr White, technological developments have assisted the industry by increasing the opportunity for employees to earn greater incentive and reward based remuneration which has been evidenced by increasing commission rates over time.

[32] Mr White also gave evidence that the qualification required to be an agent's representative (a salesperson or property manager) is three units of competence towards a Certificate IV course. According to Mr White, there is no requirement for an employee to have high level qualifications to work in a sales or property management capacity. Under cross-examination, Mr White generally agreed with the description of the role and responsibilities of a Property Salesperson as detailed in the evidence of RRESSA's witnesses.

[33] Mr White said that it was not his evidence that the lower the award wage, the greater the incentive for a salesperson to try and make a living, but maintained that when an employer is structuring an employment agreement, the base award rate will be taken into consideration in determining the payment for each sale made. Mr White agreed that it could be the case that the increase sought by RRESSA would be absorbed under the debit credit system by which salespersons are paid depending on the terms of their agreement with the employer in relation to commission. Further, Mr White agreed that clerical employees working in real estate offices are not required to hold any of the units of competency required of a Real Estate Salesperson or Property Manager.

[34] Ms Cook said that in her experience few employees covered by the REI Award are engaged solely pursuant to the minimum entitlements under the REI Award. There are a limited number of employers who rely only on the REI Award. Rather they have in place incentive based structures which incorporate those minimum entitlements and are enhanced by above-award payments which are provided through commissions, bonuses and incentives. It was Ms Cook's observation that employees in negotiations with their employer are seeking increasingly higher commission rates rather than higher minimum wages as the basis for their remuneration. Ms Cook also noted that employees are commonly engaged in accordance with commission rates that are in excess of the prescribed minima set out in the REI Award.

[35] Ms Kikianis gave evidence on behalf of REEF SA and NT, and said that there have been no significant changes to the requirements to practice as a Real Estate Salesperson since 2009 and there are currently no qualification requirements to practice as a property manager in South Australia. Skills required include marketing, effective negotiation and general office duties. These skills are generally learned on the job and ongoing training should be provided at office and head office level. The responsibilities of Property Salespersons are to act legally and ethically in the best interests of the vendor. Property managers are responsible for acting legally and ethically and in the best interests of the landlord.

[36] Ms Kikianis also said that there have been significant advances in technology which have streamlined the administrative functions of a salesperson or property manager resulting in a reduction of administrative tasks. The increase in social media activity has improved direct sales and marketing activities to clients for both property sales and property management resulting in less travel and less time taken to undertake tasks. Based on Ms Kikianis' experience, there have been no significant net additions to work requirements in sales or property management since the establishment of the REI Award.

[37] Mr Harvey said that the qualifications required to be a licenced real estate salesperson are approximately 60 hours of schooling whereby one learns the basics of contract law, document preparation and real estate sales practices. There is no licence requirement, qualification or education required to be a property manager, however most employers would require and expect their property manager to have completed a Certificate 3 in Property Management which can be achieved with approximately 20 hours schooling. The qualifications and experience required have not changed since 2009. Once a salesperson or property manager completes initial education, there is no requirement to attend further education and skills are learned on the job. Mr Harvey also said that there have been no significant changes in the responsibilities of these positions since 2009 and technology has streamlined work practices and lessened the burden on these employees. Further, Mr Harvey said that based on his experience and knowledge there have been no significant net additions

to work requirements for sales or property managers since the establishment of the REI Award.

[38] In its written submissions, REEF/QREIO contended that the increases sought by RRESSA are substantial and encompass all classifications in the REI Award. It is contended that RRESSA is only entitled under its registered rules to admit as members, employees who are either employed as salespersons or registered as managers of the employing entity under South Australian legislation. RRESSA is not entitled to enrol as members Property Managers or Strata Community Title Managers, and the Commission ought to dismiss that part of RRESSA's application for wage increases that extends to these classifications. In oral submissions to the Commission, Mr Warren for REEF/QREIO recognised the position of the Commission, its responsibility under the FW Act to review all modern awards and to look at the matters that have been brought before it.

[39] In relation to RRESSA's evidence in support of the increases to minimum wages, REEF/QREIO submitted that it was limited both in substance and geographic area. In this regard, the South Australian Real Estate Industry represented a very small proportion of the industry nationwide (some 5% based on statistics in a report tendered by Mr Clarke) compared to the combined real estate business in Queensland and New South Wales which represent 64% of the industry nationwide. Not only did RRESSA represent a very small proportion of the industry, the material it relied on to substantiate the case for work value increases across all classifications fell well short of what could be described as: "*probative evidence properly directed to demonstrating the facts supporting the proposed variations*".²² Reference was also made to the broader scope of work for Agents or Sales Representatives in Western Australia and South Australia than in other States.

[40] REEF/QREIO also submitted that the REI Award was made by consent of the parties and it is implicit that at the time the REI Award was made, it was consistent with the modern awards objective. The Commission should not be satisfied that there is any warrant for an increase in wage rates on work value grounds on the basis of evidence from only three persons solely referring to South Australia. Reference was also made to the evidence of Ms Andrews which indicates that the entry level training requirements in the real estate industry are minimal in Victoria and New South Wales which represent over 50% of the real estate industry. Currently the relativity of the Property Sales Representative to the C10 rate in the MAI Award is between the C12 (87.4%) and the C11 (92.4%) rates. On the sparse evidence before the Commission, no increase warranted, either on work value grounds, or to align with standardised rates and qualifications in that Award.

[41] In oral submissions Mr Warren for REEF/QREIO contended that it would be more appropriate to align Property Sales Representatives under the REI Award with sales representatives under the *General Retail Industry Award 2010* (Retail Award). Furthermore, it is contended that it is not appropriate to align a Property Sales Representatives with the C10 level and at best the proper alignment should be between C12 and C11.

[42] REIV in its submission also referred to the Full Bench Decision in the Four Yearly Review of the *Fire Fighting Industry Award 2010*, and while accepting that the decision establishes that it is not necessary for RRESSA to establish that there has been a change in circumstances since 2010, the fact that there has not been such a change militates against the minimum increases sought by RRESSA being granted. REIV also submitted that, consistent with that Decision, the change proposed by RRESSA in terms of increases to minimum wage

rates is significant and must be supported by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

[43] REIV also referred to s.156(3) of the FW Act which provides that in a four yearly review of modern awards the Commission may make a determination varying minimum wages only if the Commission is satisfied that the variation is justified by work value reasons. REIV submits that in the present case there is insufficient evidence about the work undertaken by real estate agents compared to clerical work and that RRESSA has not established that the clerical industry is a relevant comparator. It was not sufficient for RRESSA to simply assert that a real estate agent does work that is more valuable than that of a clerical or retail employee. REIV submitted that the Commission cannot be satisfied under s.156(3) of the FW Act of a jurisdictional fact – that a variation to wages is justified on work value grounds – much less the significant increase claimed by RRESSA.

[44] Further, REIV submitted that South Australia and Western Australia are unique in terms of obligations and requirements of the job of a real estate agent and that to base a work value case on evidence that relates only to South Australia is not a compelling basis to increase wages nationally.

[45] In its written submissions, REEF SA and NT argued that in 2009 the REI Award was put before the Commission as a consent award. The minimum wage rates as they currently stand should not be considered to be inadequate simply because the parties at the time of the making of the REI Award consented to it. Any increase in minimum wages on work value grounds should be based on merit and strong supporting evidence. In 2009 when the REI Award was made, all parties considered that the NSW NAPSA was the most appropriate wage level for a salesperson. Nothing of note has occurred since that time that would warrant a wage increase.

[46] With reference to s.156 of the FW Act, REEF SA and NT submitted that there has been little or no change in work value to satisfy the relevant tests and the nature of work in the real estate industry and the skills and responsibilities of employees in the industry have not seen any change or net addition of work.

3.3 Commission-only Minimum Income Threshold

[47] RRESSA sought an amendment to the MITA provision with respect to entry into commission-only employment in clause 9.7(c) of the Amended Exposure Draft (clause 16.3 of the current REI Award). RRESSA's proposed amendment was that the threshold for entry into commission-only arrangements be gross earnings of at least \$57,948.80 in any continuous 12 month period in the three years immediately preceding the employee entering into a commission-only arrangement. The amount claimed by RRESSA was based on the current minimum weekly rate in the REI Award calculated as an annual salary plus an additional 60%. RRESSA also sought the addition of a note to clause 9.7(c) of the Amended Exposure Draft (clause 16.3 of the current Award) stating that for the purpose of the clause the "total gross income" is calculated as 160% of the annualised minimum award wage for an adult Property Sales Representative prescribed in clause 8 of the Award.

[48] REEF SA and NT supported RRESSA's application to increase the minimum income threshold to 160% of the minimum adult wage for an adult Property Sales Representative. However, if the minimum wage was subjected to a work value increase, then REEF SA and

NT reserved its right to argue for a lower percentage as a basis for calculating the MITA. REEF and QREIOE supported the 160% threshold for entry into commission-only employment regardless of the quantum of the REI Award rate for real estate salespersons.

[49] REEFWA opposed the increase to the percentage used to calculate whether employees have met the MITA for the purpose of qualifying as a commission-only employee and submitted that the agreement of the other employer parties did not absolve the onus on RRESSA to demonstrate the necessity of the proposal through probative evidence. REEFWA submitted that there was no evidence that real estate salespersons have struggled to make a living after qualifying as commission-only employees. On the other hand, evidence had been adduced from Mr Whiteman and Mr Kuhne to establish that this proposal will have a negative effect on the labour market in Western Australia.

[50] REEFWA's submissions as advanced by Mr Farrell were based on an interpretation of current REI Award provisions in relation to the MITA to the effect that the five year minimum qualifying period operates prospectively so that once an employee has qualified for commission-only employment the employee can remain as a commission-only employee for a further four year period. REEFWA submitted that if this is the case, then the employee could remain on very little income for a period of four years. REEFWA also contended that in 2009 when the REI Award was made by consent, it was agreed that 110% was an appropriate threshold for entry into commission-only employment and that nothing had changed since that time to justify a further increase to the threshold. In response to a question from the Full Bench, Mr Farrell agreed that there are currently real estate salespersons in Western Australia employed on a commission-only basis, who earn more than the current threshold of 110% but less than the proposed 160%.

3.4 Commission-only employees – payment in advance for NES leave entitlements

[51] In the Exposure Draft of the REI Award the parties were asked to comment on whether clause 9.6(a) of the REI Award is consistent with the NES in light of the Decision of a Full Bench of the Commission in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (*Canavan*).

[52] RRESSA proposed the deletion of clauses 17.5(a) and (b) of the REI Award (clauses 9.6(a) and (b) of the Amended Exposure Draft) which allow for annual leave, personal carers' leave and other entitlements under the NES to be paid in advance. According to RRESSA, the proposed amendment will bring the REI Award into line with the decision of a Full Bench of the Commission in *Canavan* and the decision of Justice Gray in *CFMEU v Jeld-Wen Glass Australia Pty Ltd*.²³ According to RRESSA the practice in the real estate industry is that commission-only salespersons have their NES leave entitlements paid in advance via their share of the employer's commission. This practice distorts the purpose of leave entitlements as commission-only salespersons do not take leave because they are not paid when they are absent. Not only does the clause in question not conform to the NES, it acts as a positive disincentive for employees to use their leave as and when required and undermines the minimum standards expressed in the NES.

[53] REEF accepted that *Canavan* established a principle that enterprise agreements cannot authorise pre-payment of annual leave in advance, because such payment is contrary to the the FW Act, and does not seek to challenge that principle. However REEF stated that there are an unknown number of commission-only employees – which may be relatively large – who are

currently employed under written agreements which provide for a portion of commission in excess of the commission-only rate to be paid in advance of annual leave, paid personal/carers' leave or any other NES entitlements in reliance on the current REI Award provisions. If the Commission decided to amend the REI Award by removing the provisions which have authorised these agreements, there would be significant disruptions for these employees and their employers. In this event, REEF proposed a "grandfathering arrangement".

[54] REEF detailed the history of the provisions and submitted that it is relevant that they only apply to commission-only salespersons who are pieceworkers as defined in clause 9.7(a) of the Amended Exposure Draft. Therefore, commission-only employees who are correctly classified under the REI Award, are pieceworkers for the purposes of the FW Act. REEF also pointed to the fact that in the Minister's final consolidated Award Modernisation Request to the Australian Industrial Relations Commission, it stated that the NES apply to pieceworkers and rely on modern awards to set out rules relating to the payment of NES entitlements based on ordinary hours of work for pieceworkers. Further, the Award Modernisation Request stated that in modernising awards, the Commission must have regard to whether it is appropriate to include a payment rule in relation to a pieceworker employee with respect to paid leave or paid absence under the NES.

[55] In a statement of 22 May 2009, the Award Modernisation Full Bench considered the position under awards where there was provision for establishment of a piecework rate but no provision for the minimum payment based on time work or for the application of ordinary hours. The Full Bench observed that in such cases, an averaging approach may be appropriate in calculating paid leave or that another possibility is to include a component in the piecework rate referable to paid leave. The current provisions of the REI Award dealing with this matter were determined by the Full Bench following conferences of the parties and consideration of the provision in an exposure draft of the REI Award.

[56] REEF proposes an amended clause 9.6(a) in the following terms:

"9.6(a)(i)

From (insert date of variation) existing written agreements for commission-only employees which provide for a commission component in excess of the minimum commission-only rate, ("**excess commission**") to be paid in advance of annual leave, paid personal/carers' leave or any other NES entitlement(s), will from (insert date of variation) operate on the basis that any excess commission paid is permitted to be deducted from any future annual leave, paid personal/carers' leave or any other NES entitlement(s) which become due and payable after an amount of excess commission has been paid.

9.6(a)(ii)

For the avoidance of doubt, the authorisation in clause 9.6(a)(i) above does not apply to any employee who was:

- not employed on a commission-only basis on or before (insert date of variation); or
- employed on a commission-only basis on or before (insert date of variation), but whose written agreement on (insert date of variation) did not provide for

excess commission to be paid in advance of annual leave, paid personal/carers leave or other NES entitlements.”

[57] REEF submitted that s.324(1)(c) of the FW Act provides jurisdiction for the Commission to insert its proposed amended clause 9.(6)(a) into the REI Award because it expressly allows for permitted deductions contained in a modern award to be made from amounts which are payable to an employee under s.323(1) of the FW Act provided that the deductions do not contravene ss.325 or 326 of the FW Act. Moreover, the statutory note 2(e) to s.323(1) of the FW Act makes it clear that leave payments are one of the payments that must be paid in accordance with s.323(1) of the FW Act. It therefore follows that s.324 of the FW Act permits a modern award to contain a term allowing for permitted deductions to be made from leave payments.

[58] REEF pointed to the fact that most modern awards contain a term allowing for a “permitted deduction” from termination pay in circumstances where an employee fails to work out the required notice of termination. Such termination pay may include annual leave which would otherwise have been paid out on termination of employment. REEF also points to s.55(2) of the FW Act as a source of power to vary the REI Award in the manner it proposes. REEF submitted that the proposed clause will operate to enable NES entitlements paid to a commission-only employee through the agreed excess commission rate, to be an authorised deduction pursuant to s.324(1)(c) of the FW Act from the NES entitlement as it becomes due and payable. The calculation and reconciliation of NES entitlements at the time they are due to be paid will not offend the principle set out by the Full Bench in *Canavan*. REEF submitted that if adopted, its proposed variation would:

- Be limited to existing commission-only employees who already have written agreements that rely on clause 17.5(a) of the REI Award as at the date the clause is varied;
- Avoid any potential inconsistency with the NES, the FW Act or the decision of the Full Bench in *Canavan*;
- Help to avoid or minimise industrial disputation or confusing arising from the abolition of clause 9.6(a) of the Amended Exposure Draft because of the consequential effects on the contracts of employment of commission-only employees;
- Operate with a limited life; and
- Help promote “*harmonious and co-operative workplace relations*” in accordance with s.577(d) of the FW Act.

[59] In response to a question from the Commission, Mr Warren agreed that it was REEF’s case that on any model – whether commission-only or debit/credit – where employees take annual leave, they will be paid for that leave at the REI Award base rate of pay when they take the leave. Mr Warren also said that if there is an over award arrangement between the parties to allow for the debiting of that payment against commission or arrangement, then that is a matter for the parties. Further, Mr Warren reiterated the submission that *Canavan* did not deal with pieceworkers.

3.5 Commission-only employees – deductions from commission

[60] RRESSA sought an amendment to the REI Award by inserting a new sub-clause that prohibits any provisions permitting the debiting from an employee’s

commission/bonus/incentive entitlements any amounts relating to vendor marketing and/or advertising expenses and entitlements to long service leave under State or Territory legislation or superannuation payments made pursuant to clause 11 of the REI Award.

[61] RRESSA argued that the debiting of vendor advertising/marketing expenses against an employee's commission is unlawful under s.323 and ss.324-326 of the FW Act and that a term of an employment agreement allowing for such a deduction is a breach of the FW Act. In relation to superannuation, RRESSA submitted that when employer superannuation contributions are debited against employee commissions, the overall value of over award payments for employees is diminished and employees are effectively paying for the employer's superannuation responsibilities. The amendment sought by RRESSA in this regard would make the true value of the employee's share of the commission more transparent and if the amendment was accepted, the employer could either negotiate a new commission rate by adjusting the amount of the commission rate down by the amount of Superannuation Guarantee Contributions or pay the Superannuation Guarantee Contributions on top of the existing commission rate that the employee receives.

[62] In relation to long service leave, RRESSA submitted that the effect of debiting long service leave entitlements against commission is that employees do not take long service leave. RRESSA submitted that in South Australian employment agreements, long service leave is said to be included as wages/salary or that it can be set off against commissions paid to the employee. In a recent decision of Industrial Magistrate Ardlie in South Australia dealing with a 2008 collective agreement, it was found that long service leave entitlements could not be described as wages or salary. RRESSA submitted that this decision has far reaching consequences for a number of employers who have similarly worded employment agreements.

[63] In relation to this matter, REEF and QREIOE submitted that the current provisions of the REI Award in relation to commission found in clause 15 (clause 9.7 of the Amended Exposure Draft) recognise the position that employers and employees may agree to a method of payment of sales commissions in addition to the minimum weekly wage prescribed by the REI Award and that such agreements must be evidenced in writing. By their nature, such payments are over award payments. The current award makes no prescription, nor could it, for the quantum the employee will receive as an over award payment or how it is to be calculated.

[64] RRESSA submitted that the Commission should not attempt to regulate in any way the nature of over award payments that may be made to real estate salespersons. While the Commission may prescribe in an award that over award payments must be evidenced in writing, it was not empowered to prescribe the content of those payments. This was consistent with the observations of a Full Bench of the Commission in *Re 4 Yearly Review of Modern Awards*²⁴ where it was emphasised that modern awards are part of the minimum safety net of terms and conditions and it is not the function of such minimum safety net to regulate the interaction between minimum award entitlements and over award payments. The Full Bench in that case further observed that such matters are adequately dealt with in the common law principles of set off and should be left to individual employers and employees to determine.

3.6 APSA Proposals

[65] APSA proposed that the minimum income threshold referred to in clause 97(c)(1) of the Amended Exposure Draft would not be pro-rated for part time or casual employees. No

evidence or submissions were advanced in relation to this claim. APSA also proposed to insert a new clause to provide that where an employee is engaged on a commission-only basis, either full time, part time or casual, and does not in each six month period of employment earn the equivalent of the REI Award wage, then the employer will be required to pay the employee the difference between the award wage and the commission earnings.

[66] In support of this claim APSA pointed to complaints received over many years from employees who have been informed that their employer can no longer afford to pay wages and that they would be required to work on commission-only. According to APSA these employees were informed that failure to agree to commission-only employment will result in termination of employment or closure of the employer's office. Members of APSA had also been advised by employers to obtain an ABN to work as a contractor on commission-only.

[67] APSA asserted that the REI Award is one of the most flexible awards of the Commission, whereby salespersons are rostered to work weekends without payment of weekend penalty rates and in excess of 38 hours per week without overtime payments. Such employees are not guaranteed a wage and can work for many months without receiving remuneration. APSA further asserted that there are many employees working on commission-only arrangements who have not qualified with respect to the MITA. The application made by RRESSA to increase the MITA amount to 160% if approved, would not address the issue of employees not achieving the minimum award wage once employed on a commission-only basis.

[68] The employer parties generally opposed APSA's proposal. REEF and QREIOE submitted that the agreement with RRESSA to increase the MITA to a total gross income calculated at 160% of the annualised minimum REI Award wage for an adult Property Sales Representative and the compression of the qualifying period to any 12 months within the three years immediately preceding entering into the commission-only payment system, presents a practical and workable system which will adequately safeguard employees entering into a commission-only arrangement. It was further submitted that APSA's claim could have the practical effect of providing commission-only employees with the opportunity to "double dip" by earning significant commission payments in one period and without the employer being able to offset those payments in another period when the employer is required to "top up" the employee's earnings.

4. CONSIDERATION

4.1 Legislation

[69] Section 134(1) of the FW Act requires the Commission to ensure that modern awards meet the modern awards objective. Section 134(2)(a) requires the modern award objective to be applied to all of the Commission's functions and powers under Pt. 3-4 of the FW Act which necessarily includes the conduct of the 4 yearly review of each modern award required by s. 134 of the FW Act. That section provides:

134 The modern awards objective

What is the modern awards objective?

(1) The FWC must ensure that modern awards, together with the National Employment Standards, provide a fair and relevant minimum safety net of terms and conditions, taking into account:

- (a) relative living standards and the needs of the low paid; and
- (b) the need to encourage collective bargaining; and
- (c) the need to promote social inclusion through increased workforce participation; and
- (d) the need to promote flexible modern work practices and the efficient and productive performance of work; and
- (da) the need to provide additional remuneration for:
 - (i) employees working overtime; or
 - (ii) employees working unsocial, irregular or unpredictable hours; or
 - (iii) employees working on weekends or public holidays; or
 - (iv) employees working shifts; and
- (e) the principle of equal remuneration for work of equal or comparable value; and
- (f) the likely impact of any exercise of modern award powers on business, including on productivity, employment costs and the regulatory burden; and
- (g) the need to ensure a simple, easy to understand, stable and sustainable modern award system for Australia that avoids unnecessary overlap of modern awards; and
- (h) the likely impact of any exercise of modern award powers on employment growth, inflation and the sustainability, performance and competitiveness of the national economy.

This is the **modern awards objective**.

When does the modern awards objective apply?

- (2) The modern awards objective applies to the performance or exercise of the FWC's modern award powers, which are:
- (a) the FWC's functions or powers under this Part; and
 - (b) the FWC's functions or powers under Part 2-6, so far as they relate to modern award minimum wages.

Note: The FWC must also take into account the objects of this Act and any other applicable provisions. For example, if the FWC is setting, varying or revoking modern award minimum wages, the minimum wages objective also applies (see section 284).

[70] In relation to modern award minimum wages, s.135 of the FW Act provides as follows:

135 Special provisions relating to modern award minimum wages

(1) Modern award minimum wages cannot be varied under this Part except as follows:

(a) modern award minimum wages can be varied if the FWC is satisfied that the variation is justified by work value reasons (see subsections 156(3) and 157(2));

(b) modern award minimum wages can be varied under section 160 (which deals with variation to remove ambiguities or correct errors) or section 161 (which deals with variation on referral by the Australian Human Rights Commission).

Note 1: The main power to vary modern award minimum wages is in annual wage reviews under Part 2–6. Modern award minimum wages can also be set or revoked in annual wage reviews.

Note 2: For the meanings of *modern award minimum wages*, and *setting* and *varying* such wages, see section 284.

(2) In exercising its powers under this Part to set, vary or revoke modern award minimum wages, the FWC must take into account the rate of the national minimum wage as currently set in a national minimum wage order.

[71] Section 156(3) of the Act provides that in a 4 yearly review of modern awards, the FWC may make a determination varying modern award minimum wages only if the FWC is satisfied that the variation of modern award minimum wages is justified by work value reasons. Work value reasons are defined in s. 156(4) of the Act as follows:

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

(a) the nature of the work;

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

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

[72] By virtue of s.139(1)(a)(ii) of the FW Act, a modern award may include terms about incentive based payments, piece rates and bonuses.

[73] Section 148 of the FW Act requires that if a modern award defines or describes employees covered by the award as pieceworkers, the award must include terms specifying or

providing for the determination of base and full rates of pay for those employees for the purposes of the NES. Base and full rates of pay are defined in s.16 and s.18 of the FW Act respectively as follows:

16 Meaning of base rate of pay

General meaning

(1) The base rate of pay of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

(2) Despite subsection (1), if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's base rate of pay, in relation to entitlements under the National Employment Standards, is the base rate of pay referred to in that paragraph:

- (a) a modern award applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
- (b) an enterprise agreement applies to the employee and specifies the employee's base rate of pay for the purposes of the National Employment Standards;
- (c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee's base rate of pay for the purposes of the National Employment Standards.

Meaning for pieceworkers for the purpose of section 206

(3) The regulations may prescribe, or provide for the determination of, the base rate of pay, for the purpose of section 206, of an employee who is a pieceworker. If the regulations do so, the employee's base rate of pay, for the purpose of that section, is as prescribed by, or determined in accordance with, the regulations.

Note: Section 206 deals with an employee's base rate of pay under an enterprise agreement.

18 Meaning of full rate of pay

General meaning

(1) The full rate of pay of a national system employee is the rate of pay payable to the employee, including all the following:

- (a) incentive-based payments and bonuses;
- (b) loadings;
- (c) monetary allowances;
- (d) overtime or penalty rates;
- (e) any other separately identifiable amounts.

Meaning for pieceworkers in relation to entitlements under National Employment Standards

(2) However, if one of the following paragraphs applies to a national system employee who is a pieceworker, the employee's full rate of pay, in relation to entitlements under the National Employment Standards, is the full rate of pay referred to in that paragraph:

- (a) a modern award applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;
- (b) an enterprise agreement applies to the employee and specifies the employee's full rate of pay for the purposes of the National Employment Standards;
- (c) the employee is an award/agreement free employee, and the regulations prescribe, or provide for the determination of, the employee's full rate of pay for the purposes of the National Employment Standards.

[74] The *Fair Work Regulations 2009* insofar as they deal with piecework are not relevant in this case as they relate to award or agreement free or non-national system employees classed as pieceworkers.

[75] Section 151 of the FW Act provides that:

A modern award must not include a term that has no effect because of subsection 326(1) (which deals with unreasonable payments and deductions for the benefit of an employer) or subsection 326(3) (which deals with unreasonable requirements to spend an amount).

[76] Section 155 of the FW Act provides that a modern award must not include terms dealing with long service leave.

4.2 Claim for increase in minimum REI Award wages

[77] In *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues*²⁵ a Full Bench of the Commission observed that:

“[23]The Commission is obliged to ensure that modern awards, together with the NES, provide a fair and relevant minimum safety net taking into account, among other things, the need to ensure a “stable” modern award system (s 134(1)(g)). The need for a “stable” modern award system suggests that a party seeking to vary a modern award in the context of the Review must advance a merit argument in support of the proposed variation. The extent of such an argument will depend on the circumstances. We agree with ABI’s submission that some proposed changes may be self evident and can be determined with little formality. However, where a significant change is proposed it must be supported by a submission which addresses the relevant legislative provisions and be accompanied by probative evidence properly directed to demonstrating the facts supporting the proposed variation.

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

[78] In relation to the interpretation of the term “work value” a Full Bench of the Commission in the *Equal Remuneration Decision* said:²⁶

“If it is considered that the minimum rate for any classification in a modern award does not properly take into account the value of the work performed by employees in the classification – that is, that the work performed by employees is ‘undervalued’ by the modern award – then an application may be made to the Commission in the circumstances prescribed by s. 156(3) or s. 157(2) ...to vary that modern award to rectify the perceived undervaluation.”²⁷

[79] The Full Bench went on in that case to observe that the nature of the work, skill and responsibility required and the conditions under which the work is performed are the principle criteria of work value but that broad judgment is required. The Full Bench also observed that work in which discretionary bonuses make up a significant portion of total remuneration would probably raise special considerations.²⁸

[80] We accept that the classifications in the REI Award have not been the subject of work value consideration and that the wage rates that attach to the classifications were derived from a number of State awards. Accordingly, there can be no implicit assumption that at the time the REI Award was made the classifications and wage rates were consistent with the modern

awards objective. We are also of the view that on a comparison of comparable minimum award rates for classifications in other modern awards which have been the subject of work value consideration it is evident that the classifications in the REI Award are undervalued. It is not relevant that there has been no change to the work performed by Property Sales Representatives. On an objective consideration of the classification definition for a Property Sales Representative the work was undervalued when the REI Award was made and it continues to be so.

[81] This conclusion does not require evidence about the work that is required to be performed by Property Sales Representatives. That work is described in the REI Award and there is no suggestion that Property Sales Representatives do not undertake the role as defined or perform the range of tasks listed in Schedule B at item B.1.2 of that Award as follows:

“B.1.2 Property Sales Representative

(a) Role definition

- (i) A Property Sales Representative is engaged in the listing and/or sale of real property or businesses, either by way of private treaty, auction or tender.
- (ii) The Property Sales Representative may alternatively be responsible for the leasing of commercial, industrial or retail property, or act on behalf of a buyer of real property.

(b) Indicative tasks

The indicative tasks for a Property Sales Representative are as follows:

- (i) Perform market appraisals for sales of real property, businesses or commercial leasing;
- (ii) Use personal initiative, source prospective sellers or buyers of real property or businesses, or prospective property owners or tenants in relation to the leasing of commercial property;
- (iii) Supervise the necessary listing and sales documentation for real property or businesses, or leases or agreements to lease associated with commercial property;
- (iv) Conduct market research and provide marketing advice to customers of the real estate business;
- (v) Conduct negotiations between the prospective buyer and seller of real property or businesses, or between a prospective tenant and the property owner;
- (vi) Conduct inspections with interested parties for real property or businesses that are for sale (including open homes), or commercial property that is for lease;

- (vii) Organise advertising, sign boards, searches, etc;
- (viii) Conduct auction(s) of real property; and
- (ix) Liaise with conveyancers or solicitors involved in the sale or commercial leasing process.”

[82] If evidence is needed, it is provided by the witnesses for RRESSA who gave evidence establishing that Property Sales Representatives undertake at least these tasks and possibly others. That evidence was confirmed by witnesses for the employer parties. As previously noted, the current minimum weekly wage rate for the classification of Property Sales Representative under the REI Award is \$713.20. A simple comparison with the minimum adult wage in the Retail Award – Retail Employee Level 1 – \$738.80 or the CPS Award Level 1 rate of \$715.20, establishes that the minimum weekly award rate for a Property Sales Representative is below the entry level rate for a clerk or a sales assistant with no experience and the undervaluation of that classification is unarguable.

[83] We do not accept that the classification of Retail Employee is an appropriate comparator for the classification of Property Sales Representative. Property Sales Representatives perform tasks which differ considerably from those performed by Retail Employees at least at Levels 1 to 3 of the classification structure in the Retail Award.

[84] In our view, the skills required to be exercised and the indicative tasks performed by Property Sales Representatives align more appropriately with those of the Level 2 employee under the CPS Award. The characteristics of a Level 2 employee under the CPS Award found at B.2.1 are as follows:

“B.2 Level 2

B.2.1 Characteristics

This level caters for the employees who have had sufficient experience and/or training to enable them to carry out their assigned duties under general direction.

Employees at this level are responsible and accountable for their own work which is performed within established guidelines. In some situations detailed instructions may be necessary. This may require the employee to exercise limited judgment and initiative within the range of their skills and knowledge.

The work of these employees may be subject to final checking and as required, progress checking. Such employees may be required to check the work and/or provide guidance to other employees at a lower level and/or provide assistance to less experienced employees at the same level.”

[85] The indicative tasks performed by a Level 2 employee under that Award include:

“B.2.2 Typical duties/skills

Indicative typical duties and skills at this level may include:

- (i) Reception/switchboard duties as in Level 1 and in addition responding to enquiries as appropriate, consistent with the acquired knowledge of the organisation's operations and services, and/or where presentation, and use of interpersonal skills are a key aspect of the position.
- (ii) Operation of computerised radio/telephone equipment, micro personal computer, printing devices attached to personal computer, dictaphone equipment, typewriter.
- (iii) Word processing, e.g. the use of a word processing software package to create, format, edit, correct, print and save text documents, e.g. standard correspondence and business documents.
- (iv) Stenographer/person solely employed to take shorthand and to transcribe by means of appropriate keyboard equipment.
- (v) Copy typing and audio typing.
- (vi) Maintenance of records and/or journals including initial processing and recording relating to the following:
 - reconciliation of accounts to balance;
 - incoming/outgoing cheques;
 - invoices;
 - debit/credit items;
 - payroll data;
 - petty cash imprest system; and
 - letters etc.
- (vii) Computer application involving use of a software package which may include one or more of the following functions:
 - create new files and records;
 - spreadsheet/worksheet;
 - graphics;
 - accounting/payroll file; and
 - following standard procedures and using existing models/fields of information.
- (viii) Arrange routine travel bookings and itineraries, make appointments.
- (ix) Provide general advice and information on the organisation's products and services, e.g. front counter/telephone.
- (x) Call centre customer contact officer grade 1 is employed to:
 - use known routines and procedures;
 - have some accountability for quality of outcomes;
 - receive calls;

- use common call centre technology;
- enter and retrieve data;
- work in a team;
- manage own work under guidance; and
- provide at least one specialised service (sales and advice for products and services, complaints or fault enquiries or data collection surveys).

An employee who holds a Certificate II in Telecommunications (Customer Contact) or equivalent is to be classified at this level when employed to perform the functions defined.”

[86] We note that the Level 2 clerical employee aligns with Level 4 in the Retail Award which also includes indicative tasks such as:

- Management of a defined section or department;
- Stock control; and
- Buying/ordering requiring the exercise of discretion as to price, quantity, quality, etc.

[87] When these comparable classifications in the CPS Award and Retail Awards, which have undergone work value and minimum rates adjustment processes are considered against the Property Sales Representative classification, it is evident that the skills and knowledge of Property Sales Representatives aligns to that exercised by Level 2 employees under the CPS Award.

[88] We do not accept that because Property Sales Representatives receive discretionary bonuses which make up a significant portion of their total remuneration, a lower minimum wage rate than that payable to comparable classifications in other modern awards is justified. In the present case we are not comparing remuneration based on discretionary bonuses with the minimum wage rate paid to comparable employees under a modern award. Rather, the work value exercise we have undertaken is to fix a minimum rate for a classification in the REI Award based on the minimum rate for a comparable classification in the CPS Award. In short, we are comparing apples with apples and not inflating a minimum award rate based on a comparison with the actual rate paid to a class of employees who receive discretionary bonuses.

[89] We are satisfied in principle that there are work value grounds to increase the minimum rate in the REI Award for Property Sales Representatives from \$713.20 per week to \$783.30 – a total increase of \$70.10 per week. We accept that *prima facie* this is a significant increase. However, on the basis of the evidence before us we are satisfied that it will be offset because it will be absorbed into commission, bonus or incentive payments currently paid to a significant number of Property Sales Representatives.

[90] The Property Sales Representative classification is the appropriate benchmark for other classifications in the REI Award. Rather than determining the relativities for the other classifications in that Award, we have decided that the parties should hold further discussions in an attempt to reach agreement on this matter. If agreement cannot be reached between the parties then the matter will be determined by the Full Bench.

[91] Our provisional view, subject to hearing from the parties, is that the increase to the minimum Award rate for Property Sales Representatives should apply in full from 1 January

2018. It should not be assumed that the Full Bench will grant the same operative date for any increases to other classifications in the REI Award resulting from the new relativities. This is because employees in other classifications may not be in receipt of commission, bonuses, incentive or over award payments for the purposes of absorption. The parties should also attempt to agree on appropriate phasing in arrangements for increases to other classifications and if agreement is not reached this matter will also be determined by the Full Bench.

4.3 Minimum Income Threshold Amount and related matters

[92] The current provision of the REI Award in relation to the MITA is as follows:

“16.3 Minimum income threshold

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

(i) if the employee was not required to incur the costs of supplying and running a motor vehicle and/or the costs of supplying and using a mobile telephone, an amount at least equal to the employee’s wage specified in clause 14— Minimum weekly wages, calculated as an annual amount, based on the minimum weekly wage for the employee’s classification; or

(ii) if the employee was required to incur the costs of supplying and running a motor vehicle and/or the costs of supplying and using a mobile telephone, an amount at least equal to 110% of the employee’s wage specified in clause 14— Minimum weekly wages, calculated as an annual amount, based on the minimum weekly wage for the employee’s classification.

(b) The employer is entitled to rely on any data supplied by the employee from any past employer for the purpose of determining if the minimum income threshold has been achieved, provided that the employee provides the employer with a statutory declaration about the accuracy of such data.”

[93] It is common ground that clause 16.3(a)(i) is not relevant to commission-only employment on the basis that commission-only employees generally provide their own vehicles and mobile telephones. The parties have agreed that the five year time frame in the current clause for the purposes of establishing whether there is a twelve month period in which the employee has met the MITA be reduced to three years. This is reflected in clause 9.7(c) of the Amended Exposure Draft. The parties other than REEFWA have also agreed that the percentage above the minimum award rate for the purposes of the MITA should be 160% of the annualised minimum award rate of an adult Property Sales Representative, instead of 110% of the employee’s minimum weekly wage specified in the Award. However, REEF NT and SA has reserved its position to argue for a lower amount than 160% in the event that the Commission grants the work value increase sought by RRESSA. REEFWA maintains that the percentage rate in the MITA clause should remain at 110% of the minimum Award rate for Property Sales Representative.

[94] RRESSA has also proposed that a dollar value be inserted into the MITA provision to establish a threshold for entering into commission-only employment. That dollar value as it appears in the Amended Exposure Draft of the REI Award is an amount of \$57,948.80 based on the existing Award rate of \$713.20 per week annualised plus 60%.

[95] The Full Bench has put a number of proposals to the parties for consideration. Aspects of those proposals impact on the MITA. The Full Bench asked the parties to consider the need for a provision to the effect that the gross income of commission-only employees be reviewed annually and if that income falls below the award minimum wage on an annualised basis, the employee cannot continue to be paid under the commission-only system. The Full Bench also asked the parties to consider whether there should be a provision in the REI Award stating that the objective of the commission-only payment “is to enable the average competent salesperson to earn at least 15% (or some other amount) in excess of the minimum weekly rate of pay on an annualised basis.”

[96] Further, the Full Bench proposed that clause 16.5 of the current Award (clause 9.7(e) of the Amended Exposure Draft) be amended so that a commission only employee must receive 31.5% of the employer’s gross commission rather than the current requirement of 35% of the employer’s net commission.

[97] In response to the Full Bench proposals, REEF tendered a document on 23 November 2016, setting out a draft provision in the following terms:

9.7 Commission-only employment

9.7 (a) The objective of Commission-only employment

- (i) Commission-only employment as provided for under this clause is designed to recognise the unique nature of Australia’s real estate industry, and its practices and procedures. This includes making available remuneration on a commission-only basis to those employees who meet the eligibility requirements under this clause. This remuneration arrangement has been designed, accepted and proven over time to maintain an appropriate safety net for commission-only employees.

The objective of this clause is to provide a mechanism by which a salesperson of at least average ability should be able to achieve remuneration of 115% or more of the annualised minimum wage that an employee working in the same classification under this award would be entitled to be paid if that employee was not employed on a commission-only basis.

- (ii) Where a commission-only employee earns less than the wage rate prescribed for the employee’s award classification in a consecutive 12 month period (excluding any periods of leave without pay or unauthorised absences), the employee will no longer be eligible and will no longer be employed on a commission-only basis for the following 12 month period.

In this clause the term “consecutive 12 month period” means the 12 month period commencing on the date upon which an employee was engaged on a commission-only basis or on the anniversary of the commencement date.

- (iii) In the circumstances prescribed in (ii) above, the written agreement relating to commission-only employment will cease. Provided that the employee will be eligible to receive commission in accordance with the employee’s written commission-only agreement for any property for which there is a legally enforceable contract in place for the sale of a property before the date employment on a commission-only basis ceased.
- (iv) For all hours worked by an employee following the ending of commission-only employment, the employee concerned will be entitled to receive all applicable wages, allowances and loadings under this Award. Further, the employee will be entitled to receive commission in accordance with any subsequent written agreement entered into in accordance with clause 9.1(a) of this Award.

[98] On 6 December 2016 RRESSA sent a submission attaching an amended version of the REEF proposal as follows:

9.7 Commission – only employment

9.7 (a) The objective of Commission – only employment

- (i) The objective of this clause is to provide a mechanism by which a salesperson of at least average ability should be able to achieve remuneration of 115% or more of the annualised minimum wage that an employee working in the same classification under this award would be entitled to be paid if that employee was not employed on a commission – only basis.
- (ii) Where a commission-only employee earns less than 115% of the annualised wage rate prescribed for the employee’s award classification in a consecutive 12 month period (excluding any periods of leave without pay or unauthorised absences), the employee will no longer be eligible and will no longer be employed on a commission–only basis for the following 12 month period

In this clause the term, “consecutive 12 month period” means the 12 month period commencing on the date upon which an employee was engaged on a commission–only basis or on the anniversary of the commencement date.

- (iii) In circumstances prescribed in (ii) above, the written agreement relating to commission–only employment will cease, whilst not affecting the employee’s on–going service with the employer. Provided

that the employee will be eligible to receive commission in accordance with the employee's written commission – only agreement for any property for which there is a legally enforceable contract in place for the sale of a property on, or before the date of the cessation of their employment on a commission – only basis.

- (iv) For all hours worked by an employee, following the date of the cessation of their commission-only remuneration basis, will be entitled to receive all applicable wages, allowances and loadings under this award. Further, the employee will be entitled to receive commission in accordance with any subsequent written agreement entered into in accordance with clause 9.1(a) of this award.

[99] In support of its amendments, RRESSA submitted that award clauses which set the legal minima of the conditions of employment of employees and their employer should state obligations and not rhetoric and accordingly RRESSA does not agree to the first paragraph of the REEF proposal. RRESSA supported the proposal advanced by the Full Bench that if a commission-only employee in a twelve month period earns less in commission than the REI Award minimum wage then the employee could no longer be employed on a commission-only basis. However, RRESSA believes that if the objective of commission is that the average competent salesperson should receive 115% of the minimum REI Award rate for a Property Salesperson then that should be the benchmark as to whether the salesperson should continue to be remunerated on that basis.

[100] The rationale for this proposal is that if a commission-only salesperson has to revert to become a waged employee when their commission payments for the twelve month period is less than the REI Award minimum wage, after taking into account the cost of running a motor vehicle and a mobile telephone plan, the salesperson would be earning less than the minimum wage in the REI Award plus vehicle and telephone allowances.

[101] REEF SA and NT submitted a further proposed amended version of the provision on 7 December 2016 in the following terms:

9.7 (a) Commission-only employment

- (i) Commission-only employment must cease under certain circumstances.
- (ii) Where a commission-only employee at the end of any twelve consecutive month period earns a commission payable rate (pre-tax) that is less than the wage rate prescribed for the employee's award classification, the employee will no longer be eligible to be employed on a commission-only basis for the following twelve month period.

The first consecutive 12 month period commences as from the operative date of this clause for employees already on commission-only and for other employees from the date the employee starts on commission-only. For avoidance of doubt, a consecutive 12 month period excludes any periods of leave without pay or unauthorised absences but includes periods for any type of payable leave.

- (iii) In circumstances prescribed in paragraph (ii) above, the written agreement relating to commission-only employment will cease and no longer be valid. Provided that the employee will be eligible to receive commission in accordance with the employee's written commission-only agreement for any property for which there is a legally enforceable contract in place for the sale of a property before the date employment on a commission-only basis ceased.

For all hours worked by an employee following the ending of commission-only employment in accordance with this clause, the employee concerned will be entitled to receive all applicable wages, allowances and loadings under this award. Further, the employee will be entitled to receive commission in accordance with any subsequent written agreement entered into in accordance with clause 9.1(a) of the this Award.

- (iv) An employee who must revert to the award minimums under this clause will not be eligible for commission-only again until at least 12 consecutive months has expired and the conditions under this award for being on commission-only have been met.

[102] All parties generally agreed with the Full Bench proposal to amend the minimum commission only rate so that commission-only employees are entitled to 31.5% of the employer's gross commission.

[103] In relation to the amendments proposed by the parties, we make the following observations. All of the proposals are for a new clause 9.7(a) to replace clause 9.7(a) in the Amended Exposure Draft (clause 16.3 of the current REI Award). None of the proposed clauses appears to make reference to commission-only employees being considered to be pieceworkers as is provided in clause 9.7(a) of the Amended Exposure Draft. Further, the proposed clauses refer to a salesperson rather than "*an employee engaged in a property sales classification*" as is the case with the present REI Award provision, which also allows a person in the classification of Property Sales Supervisor to be engaged on commission-only arrangements based on the higher wage rate for such employees.

[104] RRESSA is also proposing that the earnings level necessary to remain on commission-only employment should be 115% of the minimum REI Award rate for a Property Sales Representative while maintaining that the threshold to enter into commission-only employment should be 160% of the minimum Award rate for that classification.

[105] Further, the position of some of the employer parties with respect to the 160% threshold amount for entry into a commission-only arrangement is not clear in light of the fact that we have determined (as set out above) to increase the minimum weekly REI Award rate for the classification of Property Sales Representative by an amount of \$70.10 per week to \$783.30 per week. This means that the threshold amount for entry into commission-only employment would be \$65,212.16 based on the 160% being based on the annualised minimum award wage for a Property Sales Representative that we have determined in principle to grant.

[106] After considering the submissions of the parties on the threshold amount for entry into commission only employment, and in light of the increase we have decided in principle to grant to the minimum REI Award rate for a Property Sales Representative, our provisional

view is that the threshold for entry into commission-only employment should be an amount of 125% above the relevant property sales classification of the employee.

[107] We are also of the view that because the REI Award does not provide for overtime payments for commission-only employees or any restrictions on when hours may be worked, part-time and casual employment concepts are neither useful nor relevant for commission-only employees. The MITA clause that we propose will simply set the MITA at 125% of the relevant weekly wage rate – either the wage rate for a Property Sales Representative or Property Sales Supervisor – and the minimum will apply regardless of the hours worked by the employee.

[108] We have also formed an in-principle view that commission-only employees should not be employed on a casual basis and that the REI Award provision in relation to the MITA should make this clear. If there is a capacity to employ commission-only employees as casuals, then consideration will need to be given to the manner in which the MITA will reflect the casual loading which would be payable to such employees in lieu of leave and other entitlements. The parties should consider these matters and provide their views in relation to them.

[109] Further, we accept the submission of RRESSA in relation to the appropriate level of earnings for an employee to remain on commission-only arrangements. We see no logical basis for the minimum earnings for a commission-only employee to remain on commission-only arrangements, to be less than the MITA. The result would be that a commission-only employee could be required to revert to the award minimum wage rate, and would earn less than that amount when the cost of running a motor vehicle and providing a mobile telephone were taken into account. Accordingly, our in principle view is that the REI Award should be amended to provide that a commission-only employee who does not earn an amount equal to the MITA in any 12 month period, can no longer be employed on a commission-only basis.

[110] We are also of the provisional view that a commission-only salesperson who ceases to be employed on that basis because of a failure to meet the MITA in a 12 month period, should not be prevented from subsequently being engaged on a commission-only arrangement provided that the salesperson meets the MITA at a future point. Our provisional view is that any assessment of whether the former commission-only employee meets the MITA in the future so that the employee can again be employed on commission-only arrangements, should be undertaken over a further three year period commencing no earlier than the point at which the employee ceased to be a commission-only employee. It seems to us that if this was not the case, an employee who had previously achieved the MITA but had been unable to maintain the required level of earnings in the first year would cease to be a commission-only employee, but could then immediately recommence on commission-only arrangements because the employee had met the MITA in an earlier 12 month period in the preceding three years (and had qualified for the commission-only arrangement on that basis).

[111] Draft provisions to this effect will be contained in a further exposure draft of the REI Award for consideration of the parties. Upon publication of the further exposure draft, parties will have an opportunity to make further submissions about the MITA and the provisions for recommencing commission-only arrangements after a period where previous arrangements have ceased because the MITA was not achieved.

4.4 Payment of NES entitlements in advance

[112] The parties have been asked to consider whether clause 9.6(a) of the Amended Exposure Draft (clause 17.5 of the current REI Award) is consistent with the NES in light of the decision of a Full Bench of the Commission in *Canavan*. Clauses 9.6(a) and (b) of the Amended Exposure Draft (clauses 17.5(a) and (b) of the current REI Award) are in the following terms:

- (a) Any commission entitlement calculated in accordance with a commission-only agreement may also allow for annual leave and personal carer's leave to be paid in advance. Provided that the monetary component for each of those entitlements must always be in addition to the minimum commission only rate.
- (b) Any inclusions as referred to in clause 9.6(a) must clearly be set out in a minimum agreement.

[113] Further, clause 13.5 of the Amended Exposure Draft provides as follows:

“13.5 Payment for annual leave

Subject to clause 9.6, payment for annual leave will be made either at the time the employee takes annual leave or on the employee's normal pay day(s) throughout the period of leave.”

NOTE: where an employee is receiving over award payments such that the employee's base rate of pay is higher than the rate specified under the award, the employee is entitled to receive the higher rate while on a period of annual leave (see ss. 16 and 90 of the Act).”

[114] In response to the question as to whether the provisions are consistent with the Full Bench Decision in *Canavan*, RRESSA has sought the deletion of clauses 9.6(a) and (b) in the Amended Exposure Draft. The employer parties opposed this deletion and proposed “grandfathering arrangements” in the event that the Full Bench accepts that the provisions are not consistent with the NES.

[115] In *Canavan* a five member Full Bench of the Commission dealt with the question of whether an enterprise agreement contained provisions which excluded entitlements and provisions of the NES concerning paid leave. The agreement in question provided for annual leave to be paid as a loading on or incorporated into the hourly rate of pay so that rather than being paid when leave was taken, annual leave was notionally paid for in advance as a component of the payment made for work performed. The Full Bench in *Canavan* considered an earlier Full Bench decision where a majority had held that there was no obligation in the NES to make payment for annual leave at a particular time and that employees may be paid for leave at the time it accrues and not receive payment at the time they take the leave without excluding a provision of the NES.

[116] In rejecting that approach the Full Bench in *Canavan* held that there is a temporal connection between the taking of annual leave and the payment for such leave. Therefore an agreement provision requiring that employees were required to fund time off work by way of annual leave excluded the NES provisions by: excluding the entitlement to paid annual leave in s. 87(1) of the FW Act and the requirement for payment in respect of annual leave in s. 90(1) of the FW Act. Further, the Full Bench held that pre-payment of annual leave as provided for in the agreement, constituted cashing out of annual leave in a manner

inconsistent with s.93 of the FW Act with the result that the prohibition in s.92 of the FW Act is excluded. The Full Bench went on to hold that:

“Once it is understood that ‘paid annual leave’ means annual leave accompanied by pay when it is taken, then the prohibition in s. 92 must be understood as prohibiting the making of a payment which would lead to the employee foregoing his or her entitlement to annual leave with pay (unless such cashing out is authorised by s. 93 or s. 94).”

[117] Further, the Full Bench observed that it would probably follow from its reasoning and that of Gray J in *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd*,²⁹ that the provisions of the agreement concerning the prepayment of personal carers leave would also offend s.55(1) of the FW Act.

[118] That section provides that a modern award or enterprise agreement must not exclude the NES or any provision of the NES. The Full Bench Decision in *Canavan* is also applicable to the terms of modern awards. To the extent that the REI Award, by virtue of clauses 17.5(a) and 25.3, allows for payment of annual leave in advance so that the employee is not paid for the leave at the time of taking it, the clause does exclude a provision of the NES.

[119] While it is the case that by virtue of clause 16.1 of the REI Award (clause 9.7(a) of the Amended Exposure Draft) commission-only employees under the REI Award are considered to be pieceworkers, we do not accept that there is a distinction with respect to the operation of the NES provisions in relation to payment for leave on the basis that an employee is a pieceworker. The NES provisions in relation to annual leave apply to employees other than casual employees (s.86) and there is no exclusion for pieceworkers. Employees (including pieceworkers) are entitled to annual leave accruing progressively throughout a year of service (s.87); to take annual leave at agreed times (s.88); and to be paid for annual leave at the employee’s base rate of pay for the employee’s ordinary hours of work during the period of leave (s.90.) By virtue of s.16(2)(a) of the FW Act, if a modern award applies to a pieceworker and defines the base rate of pay for pieceworkers for the purpose of NES entitlements, then that is the base rate of pay for the relevant pieceworkers.

[120] As previously noted, the base rate of pay for pieceworkers for the purposes of the NES is defined in clause 17.5(c) of the REI Award as the minimum wage for the employee’s classification level. The same provision is found in clause 9.6(c) of the Amended Exposure Draft. Commission-only employees have ordinary hours of work as defined in Part 5 of the REI Award (Part 3 of the Amended Exposure Draft) – 38 hours a week worked on any days, albeit they are not entitled to overtime payments by virtue of clause 16.4 of the REI Award (clause 9.7(d) of the Amended Exposure Draft). The NES provisions in relation to annual leave, as determined in *Canavan* require that commission-only employees are paid for annual leave as prescribed by the REI Award at the time the leave is taken.

[121] To the extent that clause 17.5(a) of the REI Award (clause 9.6(a) of the Amended Exposure Draft) allows annual leave, personal carer’s leave or other NES entitlements to be paid in advance, it is our view that it is not consistent with the NES because the clause authorises the pre-payment of annual leave and gives rise to a circumstance where an employee is not paid for annual leave at the time it is taken. To be consistent with the NES, the clause can only authorise the calculation of commission entitlements so that the employee is paid the base rate of pay under the Award for annual leave and other leave entitlements at

the time they are taken, and the adjustment of commission entitlements to offset any such payments cannot result in the employee earning less than the minimum remuneration required to be paid in order for the employee to remain on commission-only employment.

[122] The evidence before us was that employers are paying commission-only employees at the base rate under the REI Award at the time they take leave entitlements and adjusting commission to offset that payment. Such an adjustment is required to occur with respect to entitlements to commission above the minimum rate established under the REI Award and cannot be offset against the minimum commission-only rate – currently 35% of the employer’s net commission as defined in clause 3.1 of the REI Award.

[123] We are of the view that clause 17.5(a) of the REI Award (clause 9.6(a) of the Amended Exposure Draft) should be redrafted so that it is clear that the clause does not authorise pre-payment of annual leave in a manner that gives rise to a breach of the NES. We do not intend to grant the amendment proposed by REEF to grandfather provisions. To the extent that clause 17.5(a) of the REI Award (clause 9.6(a) of the Amended Exposure Draft) could result in a breach of the NES it is not appropriate to grandfather the provision. Further, there is no evidence of the necessity to do so and such provisions are apt to further confuse parties dealing with an already complex provision.

[124] As previously indicated, we also intend to amend the REI Award, subject to comment from the parties, to:

- Establish a minimum income threshold for the purposes of employees engaged in property sales classifications entering into and remaining on commission-only arrangements;
- Require that commission-only employees are paid for NES leave entitlements at the time of taking leave, at least at the minimum wage for the employee’s classification level, in addition to the minimum income threshold; and
- Amend the provisions in relation to the minimum commission-only rate so that it is calculated by reference to the employer’s gross commission rather than the employer’s net commission.

[125] These amendments will clearly define the minimum entitlements of commission-only employees. Amounts in excess of the minimum commission calculated in accordance with these amended provisions will be over award payments, and we do not think it appropriate to place restrictions on the parties to commission-only agreements that regulate the over award space in the context of the long established regime of commission only employment under the REI Award.

[126] Redrafted provisions to reflect these amendments will be included in a further exposure draft. Upon publication of the further exposure draft, parties will have an opportunity to make further submissions in relation to this matter and to identify any issues in relation to the effect if any on current commission-only agreements.

4.4 Debiting of other amounts from commission

[127] For the reasons set out above, we do not intend to grant RRESSA's claim for a new sub-clause prohibiting debiting of items such as advertising and marketing costs and long service leave entitlements. By virtue of the current provisions of the REI Award, such deductions are made from over award payments, or commission entitlements above the minimum entitlements prescribed by the REI Award. It is not appropriate for a modern award to regulate over award payments.

[128] We are also of the view that other amendments which will be made to the REI Award as a result of the 4 Yearly Review, will address or ameliorate the concerns of RRESSA in relation to this matter. In this regard the REI Award will be amended so that:

- Minimum Award rates will be increased on work value grounds by amounts that are not insignificant thereby reducing the over award margin into which debits can be absorbed;
- Increases in minimum Award rates will also increase the threshold at which employees will be permitted to enter into commission-only arrangements;
- Provisions in relation to the MITA will be tightened; and
- Employees who are unable to earn sufficient income in excess of the minimum Award rate will not be permitted to continue to be employed on the basis of commission-only arrangements.

[129] In particular the amendment proposed by the Full Bench to the minimum commission-only rate will obviate the need for the amendment proposed by RRESSA with respect to debiting of commission. In our view, stipulating the percentage of the employer's gross commission that must be paid to commission-only employees removes the necessity for regulating the kinds of deductions that may be made before the minimum commission for commission-only employees is calculated. Regardless of the nature of deductions made from gross commission by the employer, the employer must pay commission-only employees a minimum of 31.5% of the employer's gross commission.

4.5 APSA proposals

[130] For the same reasons, we are not persuaded to grant the APSA proposal for what is in effect a six monthly "top up" for commission only employees who are unable to earn sufficient income to meet the minimum REI Award rates. Such a provision would fundamentally alter the nature of commission-only employment and is not necessary or desirable in the context of the other amendments which will be made to the REI Award.

5. CONCLUSIONS

[131] In summary we have provisionally determined to:

- (a) Grant the increase claimed by RRESSA to the minimum REI Award rate for Property Sales Representatives to \$783.30 per week with effect from 1 January 2018, subject to the views of the parties in relation to operative date for this increase.

- (b) Provide the parties with a further opportunity to agree on the relativities for other classifications in the REI Award with reference to the new rate for Property Sales Representatives.
- (c) Set the MITA for entry into commission-only employment arrangements at 25% of the minimum REI Award rate for salespersons classifications.
- (d) Insert a provision into the REI Award requiring that the gross income of commission-only salespersons be reviewed annually and that if that income falls below the MITA the employee cannot continue to be employed on a commission-only basis.
- (e) Insert a provision into the REI Award requiring that where an employee who has ceased to be a commission-only salesperson by reason of not meeting the MITA, seeks to subsequently enter into a further commission-only arrangement, the three year period over which an assessment of whether the employee has met the MITA commences no earlier than the date the employee ceased to be a commission-only employee.
- (f) Amend the provisions of the REI Award dealing with the minimum commission-only rate so that it is calculated as 31.5% of the employer's gross commission.
- (g) Amend the provisions of the REI Award with respect to payment for NES leave entitlements to make clear that employees must be paid for leave at the time it is taken at a minimum of the base rate of pay prescribed for the employee's classification under the Award.
- (h) Amend the REI Award to make clear that commission-only employees must not be engaged on a casual basis.

[132] In reaching our provisional views in relation to the matters considered in this Decision and resulting amendments to the REI Award, we have taken into account the modern awards objective of providing a fair and relevant minimum safety net of terms and conditions and are satisfied that the amendments we propose are necessary to meet that objective. In reaching that conclusion we have placed particular weight upon the matters in s.134(d), (f) and (g) of the FW Act, which all favour the making of the amendments. We are also satisfied that the amendments we propose are not inconsistent with the other matters in s.134 of the FW Act that we are required to consider.

[133] A further exposure draft of the REI Award will be released to assist the parties to discuss the outstanding issues. In the event that agreement is not reached between the parties a conference will be convened before Deputy President Asbury to discuss those issues. If necessary the Full Bench will reconvene to conduct a further hearing in relation to them.



VICE PRESIDENT

Appearances:

R.D. Clarke and *N. Fox* for the Registered Real Estate Sales Persons Association of South Australia.

R. Warren of counsel and *G. Paterson* of counsel for the Real Estate Employer's Federation and the Queensland Real Estate Industrial Organisation of Employers.

S. Farrell and *P. Kuhne* for the Real Estate Employees Federal of Western Australia.

J. Tracey of counsel and *O. Pels* for the Real Estate Institute of Victoria.

A. Bisbal for the Real Estate Employees Federation South Australia and Northern Territory.

H. Lewocki for the Australian Property Services Association.

T. French for the Property Services Association - Queensland branch.

Hearing details:

Sydney

21, 22 and 23 November 2016

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¹ MA000106.

² Transcript of 22 November 2016 at PN1658.

³ Transcript of 22 November 2016 at PN1662.

⁴ Transcript of 22 November 2016 at PN1664.

⁵ Witness Statement of Mr Ralph Desmond Clarke – Exhibit 1.

⁶ Witness Statement of Mr Nathan Fox – Exhibit 2.

⁷ Witness Statement of Ms Lynn Masson-Forbes – Exhibit 3.

⁸ Witness Statement of Mrs Raffaella Bell – Exhibit 6.

⁹ Witness Statement of Mr Thomas Clark French – Exhibit 7; Further Witness Statement of Thomas Clark French – Exhibit 8.

¹⁰ Transcript PN686 and PN694: Witness Statement of Mr Michael Freeland – Exhibit 9; Witness Statement of Mr Michael Szuladinski – Exhibit 10; Witness Statement of Mr Stephen Finch – Exhibit 11.

¹¹ Witness Statement of Mr Peter Kuhne – Exhibit 12

¹² Witness Statement of Mr Mark Whiteman – Exhibit 13.

¹³ Witness Statement of Mr Mark Burns – Exhibit 15.

¹⁴ Witness Statement of Ms Nella Kikianis – Exhibit 18.

¹⁵ Witness Statement of Mr Andrew Harvey – Exhibit 19.

¹⁶ Witness Statement of Mr Geoffrey White – Exhibit 16.

¹⁷ Witness Statement of Ms Sascha Cook – Exhibit 17.

¹⁸ Witness Statement of Mrs Lynn-Masson Forbes - Exhibit 3.

¹⁹ [2016] FWCFB 8025.

²⁰ Ibid at [35].

²¹ Ibid at [21].

²² *Re 4 Yearly Review of Modern Awards – Preliminary Jurisdictional Issues* (2014) 241 IR 189 at [23].

²³ [2012] FCA 45; 213 FCR 549; 218 IR 108.

²⁴ [2015] FWCFB 6656.

²⁵ [2014] FWCFB 1788.

²⁶ *United Voice and another* [2015] FWCFB 8200.

²⁷ Ibid at [274].

²⁸ Ibid at [280]-[281].

²⁹ [2012] FCA 45; 213 FCR 549; 218 IR 108.