



## **S.156 – Four Yearly Review of Modern awards**

### **Submissions in respect to Transitional Provisions of Modern award IN FAIR WORK COMMISSION**

**FWA Matter No.: AM2016/6**

**Award: Real Estate Industry Award 2010 (MA 000 106)**

1. The following submissions are provided on behalf of the Real Estate Employers' Federation of Western Australia (REEFWA).
2. These submissions expand on REEFWA's position as outlined in its letter to Hampton C dated 31 August 2015.
3. REEFWA is an organisation of employers in the real estate industry in Western Australia whose members are covered by this modern award. Members of REEFWA are granted reciprocal membership of the Chamber of Commerce and Industry, Western Australia, a registered organisation of employers.
4. In early 2015, the Registered Real Estate Salespersons' Association (RRESA) filed an application to amend the Award.
5. Following this application, the major parties to this Award participated in discussions throughout 2015, the result of which were reduced in writing, to a Heads of Agreement which reduced the issues that were in disagreement between the parties and as a result the subject of this arbitration.
6. On 30<sup>th</sup> November 2015, the Australian Property Services Association (APSA), filed an application to amend the Award by requiring employers of commission only salespersons to 'top up' the remuneration of those employees whereby they have not earned at least the minimum wage within a 6 month period.
7. REEFWA vehemently objects to the variation of the award proposed by APSA and except those provisions outlined in the Heads of Agreement where it has explicitly agreed, to the application filed by RRESA..

## Legislative Framework

8. The *Fair Work Act 2009* compels the Fair Work Commission to conduct a four yearly review of modern awards and relevantly for our purposes, in that review may make one or more determinations varying modern awards.<sup>1</sup>
9. S.134 of the *Fair Work Act 2009*, sets out the objective for modern awards, being to “*provide a fair and relevant minimum safety net of terms and conditions*” and requires the Commission, when deciding what are fair and relevant safety net of conditions, to take into account certain factors specified in s.134(1).
10. S.134 (1) of the *Fair Work Act 2009* states;
  - (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.*
11. Terms in a modern award may only be included in the award to the extent necessary to achieve the modern awards objective.<sup>2</sup>
12. Subdivision D of Division 3 of Part 2-3 of the *Fair Work Act 2009*, outlines the terms that must not be included in modern awards none of which is relevant for the purposes of these submissions.
13. Subdivision C of Division 3 of Part 2-3 of the *Fair Work Act 2009*, outlines the terms that must be included in modern awards being;

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<sup>1</sup> S.156 of the *Fair Work Act 2009*

<sup>2</sup> S.138 of the *Fair Work Act 2009*

- (a) Coverage terms<sup>3</sup>
- (b) Flexibility terms<sup>4</sup>
- (c) Dispute Settlement terms<sup>5</sup>
- (d) Terms setting out ordinary hours of work<sup>6</sup>
- (e) Terms setting the base and full rate of pay for pieceworkers<sup>7</sup>
- (f) Terms providing for the automatic variation of allowances<sup>8</sup>
- (g) Terms regarding superannuation contributions<sup>9</sup>

**14.** Subdivision B of Division 3 of Part 2-3 of the *Fair Work Act 2009* outlines the terms that may be included in modern awards being;

- (a) General terms about
  - (i) minimum wages
  - (ii) types of employment
  - (iii) arrangements for when work is performed
  - (iv) overtime rates
  - (v) penalty rates for shift workers, weekend/public holiday work and unsocial, irregular or unpredictable hours
  - (vi) annualised wage arrangements that;
    - Have regard to the specific patterns of work in the industry
    - Provide alternatives to the separate payment of cash entitlements
    - Include safeguards to ensure employees are not disadvantaged
  - (vii) allowances
  - (viii) leave, leave loadings and leave arrangements
  - (ix) superannuation
  - (x) consultation, representation and dispute settlement<sup>10</sup>
- (b) Outworker terms<sup>11</sup>
- (c) Industry Specific redundancy schemes<sup>12</sup>

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<sup>3</sup> S.143 of the *Fair Work Act 2009*

<sup>4</sup> S.144 of the *Fair Work Act 2009*

<sup>5</sup> S.146 of the *Fair Work Act 2009*

<sup>6</sup> S.147 of the *Fair Work Act 2009*

<sup>7</sup> S.148 of the *Fair Work Act 2009*

<sup>8</sup> S.149 of the *Fair Work Act 2009*

<sup>9</sup> S.149A-D of the *Fair Work Act 2009*

<sup>10</sup> S.139(1) of the *Fair Work Act 2009*

<sup>11</sup> S.140 of the *Fair Work Act 2009*

<sup>12</sup> S.141 of the *Fair Work Act 2009*

(d) Incidental or machinery terms<sup>13</sup>

15. Incidental terms are those which are;

(a) “*incidental to a term that is permitted or required to be in the modern award;*” and

(b) “*essential for the purpose of making a particular term operate in a practical way*”.<sup>14</sup>

16. REEFWA respectfully submits that the definition of an incidental term as outlined above requires that the incidental term must be “incidental” to a term of the award that is either permitted by virtue of s.139(1) or required by virtue of Subdivision C to be in the modern award.

17. Therefore, for the award to be varied to include the provisions sought by RRESA and APSA, these provisions must be directly about the list of matters in s.139(1) to the extent necessary to achieve a fair and minimum safety net or be incidental to the list of matters that may be permitted or terms that must be permitted and that their inclusion must meet the modern awards objective.

#### Onus on Unions to demonstrate their proposed variations are required

18. In its statement of 17 March 2014, this Full Bench observed

*“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.”*

19. REEFWA respectfully submits that varying the award to include the proposed changes, are proposals that involve significant change and not changes that are self-evident. This submission is based upon the fact that the variations would significantly alter the status quo of employment relations within the real estate industry.

20. Therefore, it is submitted that the onus is on both RRESA and APSA to demonstrate that the proposed changes are supported by probative evidence demonstrating what has occurred since this Award was created that make it necessary for the proposed changes to be included in the award to address the legislative provisions outlined above (ie the transitional provisions are terms relating directly to one or more of the list of matters contained in S.139(1) or are incidental terms to a term that is permitted or required to be included.

21. In REEFWA’s view, neither RRESA nor APSA have successfully discharged this onus.

#### Minimum Income Threshold Amount

22. The proposed changes by RRESA to clause 16.3 involve two components. The first is to change the process by which a potential commission only employee’s previous remuneration is assessed. The second is to increase the threshold amount required for employees to qualify as a commission only employee to the equivalent of 160%.

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<sup>13</sup> S.142 of the *Fair Work Act 2009*

<sup>14</sup> S.142(1) of the *Fair Work Act 2009*

23. As outlined above, the onus is on RRESA to demonstrate, by probative evidence, that since this Award was created in 2010, it is necessary for both of these components be included in the award and that their inclusion will meet the modern award objective.
24. In 2015 and 2016, REEFWA participated in discussions that occurred regarding the proposed changes to this Award that are subject to this hearing, including this issue.
25. As a part of these discussions, it was agreed by all parties that the process of determining whether a salesperson qualified as being able to be employed as commission only contained in 16.3 was convoluted, confusing and not straightforward.
26. REEFWA agrees that employers have found it very difficult to determine whether or not a prospective salesperson has met the required test as currently outlined in clause 16.3 and this is demonstrated in both the witness statements of Peter Kuhne and Mark Whiteman.
27. REEFWA agrees that there is evidence that demonstrates the necessity of including the component of RRESA's proposal to change the test in order to qualify as a commission only employee is applied in clause 16.3.
28. Furthermore, REEFWA submits by making the test by which the prior remuneration of a salesperson is assessed to determine if they qualify for commission only employment easier, it reduces the regulatory burden on employers and as such, meets the modern awards objective.
29. However, the same cannot be said of the second component of RRESA's proposed change to clause 16.3, that of increasing the minimum threshold income to 160% of the minimum wage.
30. Currently, clause 16.3 requires real estate salespersons to have earned 110% of the minimum wage in commissions in a 12 month period when applying the minimum commission amount (35%) to their real estate sales in order to qualify as a commission only employee, provided that the other criteria in clause 16 are met.
31. REEFWA recognises that other employer groups do not object to the increase in the amount a real estate salesperson must make in commissions in order to qualify as a commission only salesperson.
32. However, this agreement by other parties does not dissolve the onus on RRESA, as the proposing party, to demonstrate the necessity of this proposal, through probative evidence.
33. There is no evidence adduced, never mind on a national level, whereby real estate salespersons, who have qualified to be employed as commission only salespersons, have then struggled to survive and earn a living.
34. RRESA have merely only relied on its own submissions that in its own view, it is necessary for this threshold to be increased.
35. On the other hand, evidence has been adduced, via the witness statements of Peter Kuhne and Mark Whiteman, of the negative effective this proposal will have on the labour market in Western Australia. S.134(10) of the *Fair Work Act 2009* requires the Commission to have regard to costs of employment and the effect that any proposed inclusion to an award will have on employment in the industry.
36. Whilst it is acknowledged that Mr Kuhne and Mr Whiteman's evidence only relate to Western Australia, REEFWA points out that this is irrelevant as the onus is not on REEFWA to demonstrate that the proposed increase of the income threshold is not appropriate, the onus is in fact on RRESA to demonstrate the proposed increase is necessary.

**37.** For that reason, REEFWA submits that RRESA's proposal to increase the minimum income threshold not be allowed.

'Top Up' of Commission Only Saleperson's wages

**38.** The comments made above in regard to the onus being on the proposer of any changes to the award to demonstrate their necessity also apply to APSA's proposed variation.

**39.** APSA have failed to discharge this onus.

**40.** REEFWA submit that in order for APSA to demonstrate that their proposed variation to the award requiring employers to top up commission only salespersons who do not earn at least the minimum wage in commissions within a six month period, they must provide probative evidence that there is a widespread issue, throughout Australia, of commission only salespersons, having qualified under the award in order to be employed as a commission only salesperson, not earning commissions equal to the minimum wage.

**41.** APSA have failed to do so. The witnesses APSA have put forward should not have been employed as commission only as they did not qualify, at the time of their employment, to be a commission only salesperson.

**42.** REEFWA submits that it is self evident that the intention of clause 16 being included in the Award is to require employers wishing to engage commission only salespersons, demonstrate that these employees have a history of demonstrating that they are able to earn enough remuneration in order to survive.

**43.** The witnesses that have given evidence in support of APSA's application did not have this history. If their evidence is accepted as being correct, their employers have breached the award in engaging them as commission only salespersons. There are remedies available within the *Fair Work Act 2009* to address breaches of the Award. It is not necessary to amend the Award to deal with these situations.

**44.** On the other hand, there is evidence demonstrating that the proposed variation will have a devastating effect on employment within the real estate industry in Western Australia.

**45.** Approximately 80% of real estate salespersons in Western Australia are employed on a commission only basis. There are reasons behind this and benefits to both employers and real estate salespersons.

**46.** Mr Kuhne provided evidence that there has been a decline in salespersons within the industry in Western Australia since January 2015. This time period coincides with the introduction, for the first time in Western Australia, of annual leave loading and the mobile phone and vehicle allowances. It is not hard to extrapolate the effect of employment, should APSA's proposal be accepted.

**47.** Therefore, REEFWA submits that APSA's application be dismissed.

Filed on behalf of the Real Estate Employers' Federation of WA by  
Stephen Farrell  
Senior Employee Relations Consultant  
Chamber of Commerce and Industry of WA  
28 September 2016



## **S.156 – Four Yearly Review of Modern awards**

### **Witness Statement of PETER KUHNE**

#### **IN FAIR WORK COMMISSION**

#### **FWA Matter No.: AM2016/6**

I, Peter Kuhne, Director/Principal, Peter Kuhne Real Estate make the following statement

1. I am currently the Director and Principal of Peter Kuhne Real Estate, an agency licensed in Western Australia.
2. I entered the real estate industry as a sales representative employee at Max Comben Real Estate in April 1990.
3. In August 1996, after obtaining my triennial certificate and real estate license that enabled me to run a real estate office in Western Australia, I was employed as a Licensee and Sales Manager.
4. At that point in time, I was managing 10 sales persons and 5 administration staff.
5. On 1<sup>st</sup> January 1998 I started my own real estate business, initially as a franchisee with Elders for ten years and then commencing trading as an independent agency under the name of Peter Kuhne Real Estate.
6. Whilst operating my own real estate agencies, I have employed up to eight sales persons and five property managers at the highest. I currently employ four sales persons, two on a commission only basis and two who are paid a retainer and then commission on top of that for real estate sales.
7. I am the President of the Real Estate Employers Federation of Western Australia (REEFWA), having been elected as a member of the management committee in 2011 and then as President in 2014.
8. I have been a member of the Real Estate Institute of Western Australia (REIWA) since 1990 and over that period of time have consistently participated in its activities.
9. I have been the President of REEFWA for two years.

**10.** I am well respected in the real estate industry in Western Australia and due to my work with REEFWA and REIWA, I have a strong knowledge of what is happening in the industry.

### REEFWA

- 11.** REEFWA is an organisation of employers in the real estate industry in Western Australia whose members are covered by this modern award. Members of REEFWA are granted reciprocal membership of the Chamber of Commerce and Industry, Western Australia (CCI), an organisation of employers.
- 12.** REEFWA has approximately 450 real estate employer members.
- 13.** REEFWA's charter is to;
- a) Promote, protect, preserve and represent by a lawful means the industrial interest of its members; and
  - b) Provide advice and guidance and to assist any member who shall be in an industrial matter or dispute or otherwise merit such assistance.
- 14.** In addition, REEFWA purchase the services of senior and experienced employee relations consultants from CCI and as a result have commissioned the production of template contracts of employment that are fully compliant with the award and employment legislation for its members to download from its website to use for their employees.
- 15.** By downloading and using the template contracts of employment, REEFWA members are assisted in complying with their obligations under the award and employment legislation.
- 16.** This service is highly valued by REEFWA members and is a significant reason for its members to join REEFWA.
- 17.** There has not been any member of REEFWA and to the best of my knowledge any real estate employer in Western Australia, who has been successfully prosecuted for breaches of the *Real Estate Industry Award 2010*.

### Real Estate Industry in Western Australia

- 18.** As a member of REIWA and having access to their data, I am aware that there are approximately 1100 licensed real estate agencies in Western Australia.
- 19.** Prior to this award, sales people in the real estate industry were commission only and were award free.
- 20.** Prior to the introduction of the amendments to the *Workplace Relations Act 1996*, which were commonly known as Work choices, no employment legislation applied to real estate sales people. Due to the sales people being employed on a 'commission only' basis, the *Minimum Conditions of Employment Act 1993 (WA)* did not apply to them.
- 21.** This award was implemented in 2010. Pursuant to the transitional arrangements of the award, until 31 December 2014, no motor vehicle allowance or mobile phone allowance or annual leave loading was payable to retainer/commission sales persons or property managers in Western Australia.



22. As a member of REIWA and having access to their data, I am aware that the amount of licensed sales persons and property managers in Western Australia at the below dates were;

<b>DATE</b>	<b>SALESPERSONS</b>	<b>PROPERTY MANAGERS</b>
30 January 2015	4041	2040
2 February 2016	3915	2157
30 May 2016	3907	2236
31 August 2016	3854	2256

23. Following a survey conducted of REEFWA members and data provided to me by REIWA, it is my estimate that approximately 80% of real estate sales persons are employed on 'commission only' arrangements as defined under the award.

#### Peter Kuhne Real Estate Employees

24. I currently employ four sales persons, two on a commission only basis and two who are paid the minimum wages for sales persons under the award and then commission on top of that for real estate sales.
25. In addition, I employ two property managers.
26. It has always been my practise to pay commission only sales persons a higher commission for real estate sales then those sales persons who are not.
27. The reason for this is that as a real estate business, I am totally reliant on the salesperson's ability to convince vendors to list their properties with my business in order to have stock to sell and therefore derive income.

#### Minimum Income Threshold Amount

28. In 2015 and 2016, I participated in discussions that occurred regarding the proposed changes to this Award that were being sought by the Real Estate Salespersons' Association (RESA).
29. As a part of these discussions, it was agreed by all parties that the process of determining whether a salesperson qualified as being able to be employed as commission only contained in 16.3 was convoluted, confusing and not straightforward.
30. As an employer, I have found it very difficult to determine whether or not a prospective salesperson had met the required test. Therefore, I support the proposed change to the way that the test in order to qualify as a commission only employee is applied.
31. However, I am opposed to the proposed increase of the minimum threshold amount that a salesperson must earn to qualify as a commission only employee to 160% of the minimum wage.
32. As stated above, I am totally reliant on the salesperson's ability to convince vendors to list their properties with my business in order to have stock to sell and therefore derive income.

- 33.** Two of my salespersons employees are employed on a commission-only basis and two do not qualify and therefore are paid a retainer of the minimum wage plus applicable allowances and commission on properties that they sell.
- 34.** I am obliged to pay the two employees that are salespersons at least on a monthly basis;
- The minimum wage (currently \$713.20 per week) plus;
  - A Motor Vehicle allowance, if required to use their own vehicle, which most sales persons are required to do plus;
  - A mobile phone allowance if required to use their own phone, which most sales persons are required to do
- 35.** In addition, these employees accrue annual leave from the first day that they commence work and I am obliged to pay annual leave loading when they take that leave.
- 36.** These entitlements are required to be paid even if the employees are not successful in selling any properties which is the only way my business derives income.
- 37.** The above factual scenario means, in hiring these salespersons, I have taken on a risk of approximately \$41,000 per year per employee, should that employee not be successful in obtaining listings and selling properties.
- 38.** If this proposal was accepted by the Fair Work Commission, these salespersons will need to earn approximately an extra \$18,000 in commission, in order to qualify as commission only salesperson which is a considerable amount.
- 39.** Furthermore, the risk in hiring unqualified salespersons will increase dramatically which will make it less palatable for me to hire people new to the real estate industry.
- 40.** This in turn, will mean that as time goes by, the pool of qualified commission only salespersons will diminish as qualified salespersons leaving the industry, will not be replaced in the same quantity by newly qualified salespersons. The flow on effect for this will be that future potential commission only sales persons that I may wish to engage, will have greater leverage to insist on higher commissions for their sales, resulting in greater costs to employers.
- 41.** If this occurs, I will have no choice but to increase my fees I charge to vendors.
- 42.** I am also opposed to the proposal that the Australia Property Services Association has made to amend the Award by requiring an employer to top up the remuneration of a commission only employee where that employee has not earned at least the minimum wage for a six month period..
- 43.** A significant reason why commission only employment is suitable for the real estate industry is that the industry is performance based.
- 44.** It is acknowledged that there are benefits for me as an employer to hire commission only employees. There is little risk as commission only employees are only remunerated when they sell properties, through which my business then receives income.
- 45.** As a former commission only salesperson, I know from experience that there are benefits to employees in being engaged on a commission only basis. Most importantly for me, there was no limit on the potential for me to earn remuneration.
- 46.** Should the proposal be accepted by the Fair Work Commission, it will have strong consequences on employment for me as a real estate employer.

- 47.** There are many reasons why commission only employees can have a weak six month period where they do not earn at least the minimum wage due to factors under their control. For example, commission only employees may decide to have a long overseas vacation or decide to study full time. Under APSA's proposal, should an employee have a strong six month period where they earn commissions far in excess of the minimum wage and then decide to go overseas for a long break or study in order to change careers, which results in them not earning the minimum wage, the employer is still required to top up their remuneration even though it was the employee's choice not to earn the minimum wage.
- 48.** Furthermore, should the proposal be implemented, the risk of hiring employees to employers also significantly increases. In order to mitigate those risks, employers will be required to resort to lowering commission rates for employees and/or increasing fees to the consumer.

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Peter Kuhne



## **S.156 – Four Yearly Review of Modern awards**

### **Witness Statement of MARK WHITEMAN**

#### **IN FAIR WORK COMMISSION**

#### **FWA Matter No.: AM2016/6**

I, Mark Whiteman, make the following statement

1. I am currently the Western Australian Chief Executive Officer (CEO), at Ray White Group.
2. I entered the real estate industry as a sales representative employee at Mair and Co Maylands in 1989.
3. I then transitioned to be the licensee at Ray White (Whiteman & Associates) where I managed both the sales and property management parts of the business.
4. In 2001, I moved to the Ray White corporate office where I was the Associate Director in the NSW office.
5. I became the CEO of the WA business in 2002.
6. In Western Australia there are 51 Ray White offices, most of whom are franchisees, all of whom have employees. In total approximately 650 salespersons, administration staff and property managers. Approximately 200 of these are sales persons.
7. I would estimate that approximately 80% of these sales persons are employed on a commission-only basis.
8. As the CEO, I am responsible for:
  - Supporting the Principals of franchisees with hiring decisions, facilitating sales training, mentoring principals and assisting them to make their businesses become as profitable as possible
  - Managing the franchise agreements
  - Pushing out corporate initiatives, such as sales programs, to the franchise network

- Mediating disputes between Ray White franchisees
  - Recruiting franchisees
9. A key component of the WA Ray White franchise agreements is that franchisees must ensure that they comply with industrial instruments and employment legislation governing the employment of employees. We regularly audit franchisees upon the receipt of complaints from employees. Where non-compliance is found, we require the franchisee to rectify the issue within a short time period. If this is not done, the franchise agreement may be terminated.
10. The WA Ray White corporate office is a member of the Real Estate Employers Federation of Western Australia (REEFWA) and has been since January 1989. I regularly engage the REEFWA employee relations consultants to speak to franchisees and Ray White principals about their employment obligations.

Applications to amend the *Real Estate Industry Award 2010*

11. I am aware that the Registered Real Estate Salesperson's Association has made an application to amend the award by, amongst others, changing current clause 16.3 to increase the minimum threshold amount that a salesperson must earn to 160% of the minimum wage.
12. I am concerned about this proposal and its possible effects on the industry and the people in it.
13. As stated above, approximately 80% of Ray White salespersons are employed on a commission-only basis.
14. Real Estate employers only receive income when their businesses sell properties for clients who then pay them a commission. Until the property is sold and settled, the employer receives no income from that transaction.
15. Prior to selling a property, our franchisees, as "the employer" requires a client to engage the employer's business to sell the property on behalf of the client; a process known as a listing. As a result, the real estate employer has no 'stock' available to see until clients list their property with that business.
16. Therefore, the employer is solely reliant on its employees' performance in;
- Winning the client to list their property with the business and then;
  - Selling that property.
17. A salesperson, except for a commission only salesperson, whilst getting settled into the industry and obtaining listings, is entitled to be paid at least on a monthly basis:
- The minimum wage (currently \$713.20 per week); plus
  - A Motor Vehicle allowance, if required to use their own vehicle, which most sales persons are required to do; plus
  - A mobile phone allowance if required to use their own phone, which most sales persons are required to do.
18. In addition, the employee accrues annual leave from the first day that they commence work, plus are entitled to be paid annual leave loading when they take that leave.

19. These entitlements are required to be paid even if the employee is not successful in obtaining a listing and whilst the employer receives no income.
20. The above factual scenario means that an employer, when hiring a salesperson who isn't qualified to be engaged as a commission only salesperson, takes on a risk of approximately \$41,000 per year, should that employee not be successful in obtaining listings and selling properties.
21. Whilst I accept that an employer is entitled, provided it does so fairly, to dismiss an employee for poor performance, for legislative as well as cost reasons, new employees need to be trained and given time to be able to successfully perform in the real estate industry.
22. In my experience, new salespersons can take up to six months or more experience before they are able to consistently list and sell properties and at least twelve months or more experience before they are successfully selling enough properties to cover their wages and allowances.
23. If the proposal outlined in item 11 above is accepted by the Fair Work Commission, salespersons wishing to qualify as commission only salespersons will need to produce more sales, putting added pressure on their performance and added risk the employer.
24. Furthermore, the risk to employers, in hiring inexperienced salespersons, increases which will make it less palatable for employers to hire people new to the real estate industry.
25. This in turn, will mean that as time goes by, the pool of qualified/experienced commission only salespersons will diminish as qualified salespersons leave the industry, will not be replaced in the same quantity by newly qualified salespersons. The flow on effect for this may be that commission only sales persons may have less competition which gives consumers less choice.
26. I am also aware that the Australian Property Services Association has made an application to amend the Award by requiring an employer to top up the remuneration of a commission only employee where that employee has not earned at least the minimum wage for a six month period.
27. I am also concerned about this proposal.
28. Commission Only employment has a significantly long history in the real estate industry in Western Australia.
29. Prior to the introduction of the amendments to the *Workplace Relations Act 1996*, which were commonly known as Work choices, no employment legislation applied to real estate salespeople. Due to the sales people being employed on a 'commission only' basis, the *Minimum Conditions of Employment Act 1993* (WA) did not apply to them.
30. Whilst I accept that this has now changed and salespersons must qualify in order to be employed on a commission only basis, as stated above, a substantial majority of Ray White salespersons in WA are employed on a commission only basis.
31. A significant reason why commission only employment is suitable for the real estate industry is that the industry is performance based.
32. It is acknowledged that there are benefits for employers to hire commission only employees. There is less risk to the employer as the employees are only remunerated when they sell properties, whereby the employer receives income. Furthermore, commission only

employment incentivises employees to perform at higher levels in order to earn higher incomes. These incentives in Western Australia are significant.

- 33.** As a former commission only salesperson, I know from experience that there are benefits to employees in being engaged on a commission only basis. Firstly, there is no limit on the potential for the employee to earn more and more remuneration. Secondly, employees have a higher degree of freedom with their time. This is important to commission only sales people who enjoy working hard and then taking extended holidays and using their time flexibly, particularly for their families.
- 34.** I am not aware of any evidence that demonstrates an inability for commission only salespersons to survive on a commission only basis for their employment. In order to qualify (and therefore be engaged as a commission only salesperson) these employees must have demonstrated a capacity to be able to earn enough through commissions to survive.
- 35.** However, should the proposal be accepted by the Fair Work Commission, it may have strong consequences on employment in the real estate industry.
- 36.** There are many reasons why commission only employees might have a weak six month period (i.e. where they do not earn at least the minimum wage) due to factors under their control. For example, commission only employees may decide to have a long overseas vacation or decide to study part or full time or a period. Under APSA's proposal, should an employee have a strong six month period where they earn commissions far in excess of the minimum wage and then decide to go overseas for a long break or study in order to change careers, during which time, they do not earn the minimum wage, the employer would be required to top up their remuneration even though it was the employee's choice not to earn the minimum wage.
- 37.** Furthermore, should the proposal be implemented, the risk to employers of hiring employees also significantly increases. In order to mitigate those risks, employers may be required to resort to lowering commission split rates for employees and/or increasing fees to the consumer.

Mark Whiteman