IN THE FAIR WORK COMMISSION

IN THE MATTER OF –

FOUR YEARLY REVIEW OF MODERN AWARDS

REAL ESTATE INDUSTRY AWARD 2010

AM 2016/6

RRESSA SUMISSION IN REPLY TO EMPLOYER SUBMISSIONS IN RELATION TO THE ABOVE MATTER

1. The common submissions by all employers in relation to RRESSA's claims relate to the following;

   (a) Opposition to increases in minimum award wages for all classifications of the award. REEF and QREIO jointly also take issue with RRESSA right to pursue award wage increases for classifications under the award other than for salespersons'.

   (b) Opposition to RRESSA claims to have the debiting of unpaid authorised vendor advertising, superannuation contributions and long service leave entitlements, from a salespersons' commission, incentives or bonus payments being proscribed under the award.

   (c) REEFWA also opposes RRESSA claim to lift the minimum income threshold test to determine a salespersons' eligibility to be employed as a commission only employee to 160% of the award minimum.

2. All employer organisations oppose APSA application re commission only salespersons having their commission payments subject to a minimum payment of the minimum award wage for each 6 months of their employment.

RRESSA Wages Claim

3. The employer opposition to RRESSA claim to increase all award wages, is based on;

   (i) That as RESSA and APSA had agreed to the making of a consent award in 2009 that like the "law of the Medes and Persians ", the award wage once set remains immutable, except where a party can show that there has been a significant change to the work value of the employees bound by the award, since the making of the award in 2009.

(ii) That RRESSA has not provided probative evidence for an increase in award wages, based on significant increases in the work value of employees bound by the award.

(iii) That RRESSA claim to increase the award minimum wage for employees would act as a disincentive to perform their work. We refer to the witness statement of Mr Geoffrey White Acting CEO Real Estate Institute of Victoria Ltd (REIV), paragraph 10 where in part he states," *The industry is driven by employee desire to earn additional remuneration (in excess of the Award rates of pay), via commissions, bonuses and incentive payments. These payments are reward based and increasing the minimum rates under the award diminishes the impact, and has the capacity to undermine the incentive and reward based structure that underpins this industry".*

In short the Dickensian view of the master / servant relationship of," keep the workers lean and hungry" to get the best out of them!

4. The fact is that not one of the employers' submissions or witness statements contradict or challenge the evidence of any of RRESSA's 4 witnesses who have given direct evidence as to the work value of real estate salespersons or property managers. Nor has any employer challenged or contradicted the comparison of the work value carried out by employees under the real estate award 2010(REA) and the clerical and administrative employees of those same employers bound by the Clerks (Private Sector) Award 2010, which can be measured by comparing the duties and responsibilities carried out by the respective employees and which are defined in both awards.

The employers do not challenge RRESSA's evidence or submissions with respect to the fact that in no jurisdiction has there ever been a work value case undertaken with respect to the work of persons covered by the current award. Nor has there ever been the application of the minimum rates adjustment principle which was adopted by all jurisdictions between 1990 and 2005 with respect to employees covered by the current award.

The MRA principle was introduced by the former Australian Industrial Relations Commission in 1989 and into all other jurisdictions for a very good reason. In the 1990's the centralised wage fixing system that had hitherto applied in Australia since 1904 was undergoing a major transformation, whereby the centralised system was being broken down to allow for enterprise bargaining, where wage increases in one industry or company could not flow by arbitrated decisions of the AIRC to other similar workers, working in other industries or even the same industry.

Therefore the AIRC after hearing all viewpoints from various Governments, ACTU and major employer associations determined that for those employees, who because of their type of employment or size of their employer would be unlikely to be able to negotiate an enterprise agreement on an equal footing with their employer and therefore reliant on their award minima, that they should as a matter of equity have access to the MRA to form the basis of a relevant and fair safety net award.

In light of the above, the employers' complaints that RRESSA wage claims lack probative evidence are nonsense.

5. Whilst the FWC FB Preliminary Jurisdictional Issues decision of 17th March 2014 [2014] FWCFB 1788, stated at paragraph 24 that the FWC will, "*proceed on the basis that prima facie the modern award being reviewed achieved the modern award objective at the time that it was made",* the Full Bench also referred to a number of other sections of the Act.

RRESSA in particular relies on*, s 3 – Objects of the Act, (b) "ensuring a guaranteed safety net of fair relevant and enforceable minimum terms and conditions through the NES, modern awards and national wage orders". Section 134 (1) (a) " relative living standards and the needs of the low paid; and (e) the principle of equal remuneration for work of equal or comparable value; s 284 – The minimum wage objective in particular 284 (1) (c) relative living standards and the needs of the low paid; and (d) the principle of equal remuneration for work of equal or comparable value", s 577 Performance and Functions etc, by the FWC,, " The FWC must perform its functions and exercise its powers in a manner that: (a) is fair and just" . s 578 Matters the FWC must take into account in performing functions etc, "In performing functions or exercising powers, in relation to a matter, under a part of this Act (including this part) the FWC must take into account: (a) the objects of this Act, and any objects of the part of this Act; and (b) equity, good conscience and the merits of the matter".*

6. Whilst the Full Bench decision of 17th March 2014 says that prima facie the Commission will work on the basis that the coming into force of the modern awards under review met the modern awards objective at the time, the Act itself does not state that at all. Section 156 (3) states ;
"*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"* and

s. 156 (4) states;
"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."

7. RRESSA accepts the decision and rationale of the FWCFB of 17th March 2014 decision and subsequent decisions of various Full Benches which have dealt with reviewing modern awards, the inescapable fact remains that the FWC has all of the powers under the Act, to make right any injustices that become known to the Commission when reviewing a modern

award and taking corrective action, otherwise much of the sections of the Act referred to in the Full Bench decision of 17th March 2014 would have no work to do!

In the REA under review it is not only within the power of the Commission to Act as has been put forward by RRESSA, it has an absolute duty to act,(s. 577 (a)). The employees under the REA have never been work valued nor had the significant benefit of having had the minimum rates adjustment principle applied. RRESSA claim before the Full Bench is for it to award wages for the classifications in the award based on the work value of those employees. This will be the first time ever that that the work and responsibilities of those employees will have had the benefit of a work value case.

As the Full Bench of the FWC said, in its *Equal Remuneration Decision 2015 ([2015] FWC FB 8200*, in relation to the regulation of minimum wages pursuant to the Fair Work Act, being founded upon the mechanism of the national minimum wage order and modern awards and after citing the minimum wage objective at s 284 (1) of the Act, stated the following;

"*The fundamental feature of the minimum wage objective is the requirement to establish and maintain "a safety net of fair minimum wages". We consider, in the context of modern awards establishing minimum rates for various classifications differentiated by occupation, trade, calling, skill and / or experience, that a necessary element of the statutory requirement for " fair minimum wages" is that the level of those wages bears a proper relationship to the value of the work performed by the workers in question. (My emphasis).There are two textual indicators which strongly support this conclusion. Firstly, s. 284 (1) itself, in paragraph (d), requires the principle of "equal remuneration for work of equal or comparable value" to be taken into account in setting fair minimum wages. This suggests that the setting of equal minimum wages for work of equal or comparable value in modern awards was intended to occur so far as it could be achieved in balance with the other matters required to be taken into account under s 284 (1).(my emphasis). Secondly, s135 provides that one of the only three circumstances in which modern award minimum wages may be varied under part 2 -3 (that is , outside the Annual Wage Review) is if the Commission is satisfied " that the variation is justified by work value reasons". Section 156 (3) provides that such an adjustment for work value reasons may occur as part of the four yearly reviews of modern awards, and s. 157 (2) provides that it may occur outside of the four yearly reviews and annual wage adjustments if it is necessary to achieve the modern awards objective. The expression "work value reasons" is defined in s. 156 (4) 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.
(c) the conditions under which the work is done. (at paragraph 272)

The provisions identified above, taken together, confirm the centrality of work value in establishing minimum wages in modern awards. (At paragraph 273) (My emphasis).
The modern awards regime in the FWA therefore involves the establishment of minimum wages which take into account work value. 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 that classification – that is that the work is undervalued by the modern award – then an application may be made to the Commission in the circumstances prescribed by ss. 156 (3) or 157 (2) by an employer, employee or organisation covered by the relevant modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award, to vary that modern award to rectify the perceived "undervaluation". (At paragraph 274)(My emphasis)

It matters little as to why the parties to the REA did not pursue a work value/ minimum rates adjustment in 3 State Jurisdictions that had awards in the real estate industry in the years prior to the introduction of Work Choices in 2006 or in the making of the modern award in 2009. As the REIV submission noted at paragraph 48, in reference to the 2009 consent modern award, the then submission of the Australian Council of Trade Unions concerning the work value of the proposed award classifications was, "*Whilst the ACTU believes that a proper work value assessment should be undertaken for all classifications in the award we recognise that this is unlikely to be undertaken in the time available....*". The important fact is the FWC now has before it a work value claim permitted under s. 156 (3) of the Act and if it finds that the employees bound by the award classifications have been "undervalued", then it must set it right so as to establish a fair and relevant safety net award.

The FWC FB has before it the un contradicted evidence from RRESSA witnesses, drawn from SA, NSW and Qsld, as to the nature of the work, skill and responsibility required and the conditions under which the work is performed, by employees covered by the REA. Not one employer witness, drawn from Victoria, WA, NSW, and SA have given any evidence that takes issue with the evidence of RRESSA's witnesses with respect to the work, skill, responsibility and conditions under which their employees work is performed.

8. An argument put by the employers (refer to submission of REIV, paragraphs 50 - 53) that commissions, bonuses and incentives are "the bedrock of the real estate industry)" and therefore the award rate should be viewed in that light. The employers offer no probative evidence as to the extent of the commission payments that the industry offer their staff, (not just sales staff) or the quantum that is paid or what the true value of the commission share really is, once shed of the various debits, such as the weekly wage, car allowances, advertising / marketing costs, long service, annual leave, carers leave etc.

There are many employees in Australia, who in addition to their minimum safety net award wage, are offered various incentives, commissions, bonuses, built in over award payments, etc, e.g. Shop assistants, bank employees, commercial travellers, vehicle sales persons,

beauticians, financial services staff in general such as insurance sales persons, superannuation providers, financial advisers and the list goes on. The existence of such commissions or bonuses etc has not been a factor in determining the work value of the safety net award minimum wages that underpins those employees' conditions of employment.

9. The employers' submission also argues, such as in paragraph 22 of REEF submission opposing RRESSA's wages claim that the minimum qualification requirements to become a salesperson various between jurisdictions are different and less onerous for some more than others. Whilst true, it nonetheless ignores that real estate salespersons', whatever the minimum qualifications that are required, have to have the ability to source their own stock to sell, from vendors who are entrusting those salespersons' with their most valuable asset in the vast majority of cases, and be able to secure the best price that can be achieved and do so in an ethical and technically competent manner.

Yet REEF maintains that the current award rate of pay of $713.30 p.w., which equates to 91.06% of the tradespersons C10 rate, is appropriate on strictly work value grounds. Whilst ignoring that the receptionist / clerical worker in the same office as the salesperson, performs work (with no minimum qualifications required), which has been work valued by various arbitral tribunals as being not less than the value of the same tradesperson, i.e. 100% (level 2 year 1).

A salesperson covered by the Commercial Sales Award has a minimum award rate of $785.30 p.w. or 100.25% of the C10 rate. That salesperson does not, under their award have to hold any formal qualifications to be paid that minimum award rate. That salesperson does not need to source their own stock in order to work for their employer and is paid in addition in many instances, commission, bonuses, or incentives in excess of the award minimum rate of pay.

Such arguments as the above by the employers do not stand up in the light of the most cursory examination of the evidence before the Full Bench.

10. REEF in its submission at paragraphs 7 – 12, calls on the Full Bench to dismiss those parts of RRESSA's wage claims as they relate to classifications in the award which do not fall within its constitutional coverage, in effect everyone but salespersons.

RRESSA rejects REEF's submission and refers the Full Bench to the statements of the FWC Full Bench in its Equal Remuneration Decision which has been quoted at paragraph 7, page 5 above. The quote which is also underlined makes it clear that any employer, employee or organisation covered by the relevant modern award, or an organisation that is entitled to represent the industrial interests of one or more employers or employees covered by the modern award, has the right to seek to vary a modern award to rectify any perceived under valuation.

Commission Only Salespersons – Minimum Income Threshold

11. Only the Western Australian Employers oppose RRESSA's claim for the minimum income threshold (MIT) be amended to provide for a threshold of 160% of the award minimum rate of pay for a property salesperson. (Also certain other qualifying amendments).

The reasons for RRESSA seeking the variation to the award is summarised in my own witness statement to the FWC at paragraph 7, Mr Nathan Fox at paragraph 10 of his witness statement, Mrs Lynn Masson –Forbes at paragraphs 13 – 16 of her witness statement and Mr Tom French at paragraph 9 of his witness statement.

12. The WA employers' opposition to an increase in the MIT is summarised in the evidence of their witnesses, Mr Peter Kuhne at paragraphs 37 – 41 of his statement and Mr Mark Whiteman at paragraphs 15 – 25 of his statement.

In essence the WA employers argue that the MIT must be kept lower than the one sought by RRESSA because otherwise they will not be able to employ more commission only salespersons as the existing ones exit the industry for any reason. They submit that the current threshold of 110% of the minimum award pay rate for a property salesperson is sufficient, i.e. $40,800.76 to qualify (amongst other criteria) to be employed as a commission only salesperson, an employee who for all intents and purposes of the award then becomes "award free", no minimum wage, responsible for sourcing their own stock to sell and incurring hours spent without reward and costs incurred in running their own motor vehicle and mobile phone/ tablet and subject to irregular pattern of payment, depending upon when sales are finally achieved and settlement occurs.

The WA employers' do not address the rationale of the Australian Fair Pay Commission decision in 2007 to allow the employment of commission only salespersons. It was only to be offered to a salesperson that had a track record of being a successful salesperson, or as the *REIV stated in its submission at paragraph 78,"Commission – only arrangements are only available to experienced employees with proven results". And at paragraph 77 of their submission REIV states in relation to RRESSAs' claim for a MIT of 160% of the minimum award wage that it was".....an additional and reasonable benchmark for assessing an employee's likely ability to work on a commission only basis".*

RRESSAs' claim for 160% MIT, factors in matters such as the commission - only salesperson loses all rights to be paid a minimum safety net award minimum wage, the loss of any allowances under the award (whilst meeting those expenses such as running their own motor vehicle), paid overtime, and in addition faces payment for work performed on an irregular basis, i.e. as and when properties are not only sold but have been settled. The

selling or leasing of property is subject to many external factors outside of the employee's control, e.g. the state of the market, interest rates, availability of housing credit, political issues such as greater control over investor owners of property and the like. Hence the need to ensure as far as practicable, that only proven sales staff with a good track record in selling properties should be employed on a commission only basis.

13. In so far as APSA claim for a "top up" of wages should a commission only salesperson earn less than the minimum wage in each 6 monthly period of employment, RRESSA's stance is that it supports the agreement reached between it and all employer parties (except for REEFWA) with respect to the future employment of commission only salespersons.

    In the absence of that agreement, RRESSA would have sought the removal of commission – only as a form of remuneration in the industry for many of the reasons and evidence put forward by APSA in their "top up" application. Indeed should the FWC believe that the 160% MIT put forward should not be granted and that a lower threshold should apply, RRESSA would argue that the whole basis for allowing commission only remuneration should be opened up.

    The real estate industry is the only piece work industry (as regards commission – only salespersons) in Australia that allows a worker ,to in effect work for nothing, no matter what the hours worked or when and incur expenses in conducting the employers' business without reimbursement of any kind. As seen from the witness statements put forward by APSA, employees have been employed as commission only salespersons who have not qualified even under the very low bar set in the current award.

    It is RRESSAs' view that by raising the MIT to 160% of the minimum wage and making the definitions in the award far clearer for all concerned as to the prerequisite criteria that has to be met before employing staff on a commission - only basis, the industry is put on notice, that if abuses of the nature outlined in the evidence shown by APSA and RRESSA continues, then at the next 4 yearly review of this award, employers should be aware that the issue of whether or not commission - only employment should continue as a feature of this industry, will be raised.

14. Debiting of vendor authorised advertising/ marketing expenses, long service leave and employer superannuation contributions from an employee's share of Commission.

    The employers submissions in opposition to RRESSA claim are based on the following;

    (a) The proposed clause is not allowable under the FWA re s. 138 as not being necessary, and
    (b) As commission payments are ,"over award payments" the contents of such arrangements should be left under common law employment contracts and not be included in the award, and

(c) The proposed award variation would impinge on the rights of the employer and employee to negotiate "mutually beneficial "over award employment arrangements by reducing the party's flexibility.

15. RRESSA disputes each of the above contentions of the employers.

Unpaid Vendor Authorised Advertising/ Marketing Expenses.

Dealing with unpaid vendor authorised advertising/ marketing expenses, the employers do not disagree with RRESSA evidence that when a property salesperson has a vendor sign up with their agency, via a Sales Agency Agreement (SAA), that, that agreement is legally binding on the employer and the vendor. The salesperson is not a party to the contract.

Also in the SAA the vendor and the agent stipulate in writing what amounts in advertising /marketing costs the vendor has agreed to meet. It is whatever the policy is of the employer that dictates whether the vendor has to pay the advertising/ marketing expenses up front or on an as invoiced basis, during the period of the SAA, or await the sale and settlement of the property and recoup the agreed advertising/ marketing expenses at that time. The salesperson has no say over that policy.

There is no disagreement from the employers that when a vendor refuses to pay their agreed advertising/ marketing expenses, that is usually the result of the property not being sold or settled and some vendor's feel aggrieved and refuse to pay their legal obligations to the agent. Again the employers submissions do not disagree with that given by RRESSA that the decision as to whether the employer pursues the defaulting vendor for the monies owed is also solely at the discretion of the employer, the salesperson has no say over the matter, nor is there any disagreement that the salesperson has no legal right of recovery against a defaulting vendor as they are not a party to the SAA. The employers further do not disagree with RRESSA's evidence that employers can and do frequently charge defaulting vendor advertising/ marketing expenses against the commission share of the salesperson concerned.

No where do the employers, in either their evidence or submissions express a view as to whether such behaviour by an employer is ethical, or justified on the merits.

To claim as they do, that such practices are not unlawful strains credulity in the above circumstances and ignores s.324 (2) (a) and 324 (3). Permission by the employee to debit their commission statement must specify the amount of the deduction and any variation to that amount must also be in writing. In addition s.324 (1) (a) states that the authority of the employee to allow any deductions"...*is principally for the employee's benefit*". Given the wording of the debits allowed to be deducted from a salespersons commission in employment agreements are broadly worded and no amounts are specified and, as the amounts involved with each defaulting vendor varies, (the employee would be required to

sign an authority separately on each occasion it arose), it is difficult to see how such a deduction could be lawful under s 324.

Even then ss.325 and 326 of the FWA make it clear that whether it is part of a contract of employment or allowed under the modern award it would have no effect where the deduction is for the benefit of the employer or a third party, (the vendor) and is unreasonable in the circumstances.

RRESSA maintains its position that as all employment agreements are required to be in writing at the time of the agreement being entered into (clauses 15.1 and 16.2(a) of the award), the employment agreement and its contents must not be in conflict with the Act and therefore at the instant of the employment agreement coming into force the terms of the Act apply as a minimum.

REIV's submission at their paragraph 69, supports RRESSA position, in that they say that the debiting of unpaid vendor authorised advertising and marketing expenses is allowed under s. 324 (1) (c),"*the deduction is authorised by or under a modern award or an FWC order".* This was stated after referring to the modern award clause 15.1 which requires a written agreement between the parties with respect to any share the employee has to an employer's commission and therefore the agreement must be subject to the terms of the FWA 2009.

16. Debiting of Long Service Leave and Superannuation contributions from Commission

The employers have not dealt with the following issues in their opposition, they are;

(a) Both long service leave and employer superannuation contributions are the direct result of beneficial legislation from either the State or Territory Governments with respect to Long Service Leave and the Federal Parliament in so far as employer superannuation contributions.

RRESSA's evidence that employees in the industry are reluctant to take long service leave as leave, has not been contradicted by the employers, nor the reasons given for that reluctance, i.e. it is seen in the case of long service leave that the value of its entitlements are effectively negated or rendered illusory. That is particularly so in respect of commission – only sales staff.

I refer the Full Bench to a decision on appeal relating to an appeal against a single member's decision in relation to an unfair dismissal case in the matter of "*Sharon Parsons v Pope Nitschke Pty, [2016] FWCFB 375 (11TH March 2016).* In that matter the appellant was arguing that her resignation from employment as a commission only salesperson was the result of the then employer requiring her to take long service leave at a time not of her choosing and at the rate of pay which she believed should have been paid to her. The appellant was covered by a 2008 collective agreement, the terms of

which are similar to those that are applicable as individual employment agreements in SA/ NT in the real estate industry.

The Full Bench in the above matter found that the dismissal was not at the initiative of the employer, however in relation to the wording of the collective agreement and the description of the debits that were allowed to be debited from any commission share of the appellant, the Full Bench at paragraph 63, states, " *The drafting of the Agreement was highly complex, to the extent that we suspect it would be close to unintelligible to a lay person"* .In relation to the debiting of the long service leave payable to the appellant, the Full Bench said at paragraph 64," *It may be accepted that under this approach the uncomfortable outcome was that the monetary value of long service leave entitlements was effectively negatived or rendered illusory. However that was an outcome which the statutory workplace relations regime at the time the Agreement was entered into permitted and which, we consider, the Agreement clearly intended to achieve."*

Industrial Magistrate Ardlie of the IRCSA, in an underpayment of wages claim by Ms Parsons following the Full Bench dismissal of her unfair dismissal claim and relating to her long service leave entitlements, ruled in favour of Ms Parsons, in his judgement dated 9th June 2016 at [2016] SAIRC 17, (an attachment to RRESSA submission in this matter dated 27th July 2016 paragraphs 61 -73) said, " *The contention that long service leave payments should be regarded as wages/ salary however described, or wages or allowances or entitlements, is beyond the meaning of wage relied upon by the respondent. Wage is described as something paid for work or services or for service rendered. Long Service Leave is about time spent by a worker in employment with the same or a related employer. The reward is for the duration of the employment".*

The above decision of IM Ardlie has been the subject of an appeal by the respondent and the matter has been heard and judgement has yet to be given at the date of writing this response.

(b) The commission share payable to employees, are not over award payments as described by the employer submissions. Over award payments in the Australian context is defined by The New Shorter Oxford Dictionary as," *paid in addition to an agreed or basic wage or salary".* The CCH Macquarie Dictionary Employment and Industrial Relations, defines over award payments as, "*Over award of or relating to a rate of pay which is higher than that awarded by an Industrial Tribunal for a particular job classification",* and "*The difference between the actual rate paid and the award rate when the actual rate exceeds the award rate."* Commission is defined in the same Macquarie dictionary as*," payments often made to sales staff in addition, generally, to their base wage, and usually related to specific measure of performance, such as volume or value of sales".*

The difference in essence between commission and over award payments is that over award payments are usually a pre determined amount of money paid to an employee in excess of the worker's award wage and is paid for all purposes of the employment

contract, e.g. annual leave, long service leave etc. Whereas the commission payment is a variable amount depending upon, in the real estate industry on the volume of and value of the sale or lease of property.

Therefore the argument advanced by employers, such as the REIV at paragraph 68 in its submission, which refers to the Full Bench decision of March 2014 (jurisdictional issues) that, *" It is not the function of such a minimum safety net to regulate the interaction between minimum award entitlements and over award payments. Such matters are adequately dealt with by the Common law principles of set off to which we have referred and should be left to individual employers and employees to determine",* is wrong.

There are no over award payments for sales staff in the industry, purely commission payments of varying amounts and regularity depending upon sales and settlements of property. Therefore it is in the interests of both the employees and the employers, the majority of whom are small businesses, (i.e. less than 15 employees) for the calculation of employee entitlements to made as transparent and comprehensible as possible.

In the case of employer superannuation contributions, not being allowed to be debited from the employee's commission share, again it is about making the payment as transparent and as comprehensible as possible, given the size of the employers' in the industry and the fact there is no structured over award payments for sales staff.

The value of sales staff commission payments have been eroded over time. RRESSA evidence on this point has not been challenged by any employer witness. RRESSA evidence is that since the introduction of the Superannuation Guarantee Charge in the late 1980's commencing at 3% of an employees' gross earnings, the percentage share a salesperson receives of the commission paid to the employer has remained static whilst having the increase in superannuation contributions by the employer under the Superannuation Guarantee (Administration) Act, 1992 increase to 9.5 % currently and later it will rise to 12%.In effect the benefit of the increases to the SGC has been fully absorbed by the employee.

17. Powers of the FWC to make the orders sought by RRESSA in respect of the non - debiting of unpaid vendor authorised advertising/ marketing expenses, long service leave & employer superannuation contributions.

    (i) s.138 of the FWA states, "*A modern award may include terms that it is permitted to include, and must include terms that it is required to include, only to the extent necessary to achieve the modern awards objective and (to the extent applicable) the minimum wage objective".*

    (ii) s. 139 of the FWA, Terms that may be included in Modern Awards – General

    139 (1) A modern award may include terms about any of the following matters:

(a)Minimum wages (including wage rates for juniors' employees, employees with a disability and employees to whom training arrangements apply), and:

(i) skill- based classifications and career structures; and

(ii) incentive – based payments, piece rates and bonuses;

(iii) *s.142 of the Act, Incidental and Machinery Terms*

` *142 (1) A modern award may include terms that 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.

Machinery terms
s.142 (2) A modern award may include machinery terms, including formal matters (such as a title, date or table of contents).

RRESSA submits that the FWC has all the powers it needs under the above heads of power to make the award variations sought with respect to the debiting of salespersons share of commission relating to the above matters.

The salespersons commission share of the employer's net commission on the sale or lease of real property is fundamental to the employees' standard of living. It is seen as crucial by employers, (re witness statement of Mr G White at paragraph 10, Mr P Kuhne at paragraphs 24 -27 , Mr P Whiteman paragraphs 16,31,32-34)that a salesperson sells sufficient property to cover their own wage costs and overheads, plus providing the employer with a reasonable return on their investment in the labour of the employee. It is an industry which is driven by the incentive motive of the salesperson and has been acknowledged as such by both RRESSA and all employer witnesses. Therefore in relation to matters that are being subject to being debited against the salespersons share of commission is very much part and parcel of the employees wage and standard of living.

Pursuant to s 139 (1) (ii) the claim made by RRESSA falls within that category of allowable terms of a modern award. The award variation sought by RRESSA pursuant to s.142 (1) & (2) is a term which is incidental, in that it is a term that is permitted or required to be in the award and is essential to give it effect in a practical way and is a machinery term that allows the award to operate in the manner needed to achieve the minimum wage objective s. 134 (1), i.e."*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) – (h) inclusive".

As the Federal Full Court made clear that the broad consideration required by s.134 (1) did not require a finding to be made in relation to each of the identified factors to be taken into account; *National Retail Association v Fair Work Commission [2012] FCA 480. The Full Court at paragraph 109 said, "It is apparent from the terms of s 134 (1) that the factors listed in (a) – (h) are broad considerations which the FWC must take into account in considering whether a modern award meets the objective set by s 134 (1), that is to say, whether it provides a fair and relevant minimum safety net of terms and conditions. The listed factors do not, in themselves, however pose any questions or set any standard against what a modern award could be evaluated. Many of them are broad social objectives....."* and *at paragraph 110 the Full Court stated, "<u>The relevant finding the FWC is called upon to make is that the modern award either achieves or does not achieve the modern awards objective.</u> The NRA's contention that it was necessary for the FWC to have made a finding that the Retail Award failed to satisfy at least one of the s.134 (1) factors must be rejected." (Underlining, my emphasis)*

In summary the Full Bench as constituted, has the power to do as RRESSA has asked with respect to the award variation sought. Its decision in our respectful submission is not one concerning its jurisdictional powers but rather the merits of the evidence and submissions of the respective parties.

A Full Bench of the FWC in a decision involving the 4 year review of the Vehicle Manufacturing, Repair, Services and Retail Award 2010 in their decision of 16th August 2016, [2016] FWCFB 4418, (in relation to the issue of separating the Vehicle Manufacturing part of the award from the rest of the modern award), at paragraph 43 stated in reference to the modern award being complex and difficult to understand," *Although the submissions , supported by some of the witness statements, have contended that the parties understand what the award means, we consider that on its face it is apparent that the VMRSR Award would be difficult for a layperson to navigate and apply in many respects. This must be regarded as a significant detriment in an industry which, on the evidence, contains a very large proportion of small and award - dependent employees".*

RESSA submits that the reasoning of the Vehicle Award FB above is apposite with respect to the evidence before the Full Bench in the real estate industry and award. The evidence of the employment agreements used by the employers are long and complex and in the words of the FWCFB in the Parsons case cited above, were found to be largely unintelligible to the layperson sales employee or employer.

I refer to the witness statement of Ralph Clarke attachments, F, G & I and the attachment of the witness statement of Don Tepper of REEF SA/ NT , which is also attached to R Clarke witness statement , in relation to Full Bench matter AM2014/ 242 re registration of employment agreements - in particular Mr Tepper's evidence at paragraphs 7 -10 inclusive.

Mr Tepper at paragraph 7 says, "*The debit / credit system of commission payment appears to be self – perpetuated in that when a salesperson becomes a real estate employer they simply copy the way they were remunerated when they were a salesperson without fully comprehending the finer details of the debit/ credit system*". At Paragraph 8 Mr Tepper demonstrates, "the *complexity of the debit/ credit system any of the following issues can arise;"* by listing 14 separate questions that need to be addressed, in writing an employment agreement. At Paragraph 9 Mr Tepper says*," It can be seen from the above that in real estate a commission debit/ credit system can become a complicated business. If all this is not reduced to a written agreement then it makes a dispute very difficult to settle because it becomes, "I said" – "He/ she said".*

All of the above evidence clearly establishes the necessity for the FWC to intervene in the manner sought by RRESSA, which meets the Modern Award Objectives (s. 134 (1), the Objects of the Act, s.3, is within the powers of the FWC to so order, ss. 139 & 142, and in accordance with ss. 577 (a) (Functions of the FWC) and 578 (a) & (b) - Matters the FWC must take into account in performing its Functions.

18. In relation to the concerns expressed by REEF SA/ NT in their submission, paragraph 30 which relates to, if RRESSA award variation with respect to non allowable debits affecting current employment agreements and thereby potentially creating problems for employers in renegotiating those agreements, RRESSA respectfully puts the following proposition to the Full Bench ;

    (a) Unpaid vendor authorised advertising/ marketing Expenses.

    RRESSA simply seeks an order with effect from a date of 14 – 28 days after the making of a decision, if any, in favour of RRESSA claim. RRESSA's position is that any employment agreement, entered into prior to the date of the award variation sought, which allows for the debiting of vendor authorised advertising/ marketing expenses, is ultra vires the FWA2009 and that any sales person affected by it can seek a remedy via an underpayment of wages claim.

    The award variation sought by RRESSA simply will make the legal position clear with respect to any new employment agreements entered into from the date the variation comes into force, and does not affect the legal rights of existing employers and employees as at the date prior to the variation coming into force.

    (b) Debiting of Long Service Leave entitlements.

    RRESSA seeks an operative date, again 14 – 28 days from the date of a decision, if any, in favour of RRESSA award variation.

    Again, like with unpaid vendor authorised advertising/ marketing expenses, the sales persons' rights to pursue an underpayment of wages claim with respect to any debiting

of long service leave entitlements, up to the date of the award variation coming into force would remain unchanged and can be pursued before the relevant courts, depending upon the actual wording of the relevant employment agreement with respect to same. However new employment agreements would operate from the date of the award variation order.

(c) Debiting of employer superannuation contributions.

RRESSA again seeks an operative date 14 – 28 days from the date of decision, if any, in favour of RRESSA claims. With respect, RRESSA seeks an award variation in relation to the debiting of employer contributions to an employee's superannuation entitlement , that is similar to the clause in the former Real Estate(SA) Award NAPSA (Refer to attachment "D" of RRESSA witness statement from Mr Nathan Fox - clause 5.5.5 at page 21) which would read as follows;

"As from xyz date an employer must not debit the employer's superannuation contribution from any employer's commission or employee's commission/ incentive/ bonus, providing that any employer who was debiting such contributions prior to XYZ date may reduce the employee's commission/ incentive/ bonus by dividing by a factor of 1.095 of the commission rate. Such an adjustment, if any shall be a one – off adjustment and no further adjustments shall be made".

19. For all of the above reasons and grounds, RRESSA seeks the Full Bench to award its claims in full as outlined in its submission and response to the employers' submissions.

Filed By

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