

TASMANIAN INDUSTRIAL COMMISSION

Industrial Relations Act 1984

T No. 4636 of 1993

IN THE MATTER OF an application by
the Australian Municipal,
Administrative, Clerical and
Services Union to vary the Estate
Agents Award

re car and telephone allowance

COMMISSIONER GOZZI

HOBART, 28 April 1994
continued from 19/4/94

TRANSCRIPT OF PROCEEDINGS

Unedited

COMMISSIONER GOZZI: Any changes in appearances, please.

MR CLEGG: None from this side, Mr Commissioner.

MR CLUES: No changes.

COMMISSIONER GOZZI: You were appearing with?

MR CLUES: I'm not appearing with anybody.

COMMISSIONER GOZZI: You were last time.

MR CLUES: I was last time.

COMMISSIONER GOZZI: So, isn't that a change?

MR CLUES: You're too fast for me, Mr Commissioner. When I last appeared before the commission Mr Andrew Edwards appeared with me. On this occasion he does not.

COMMISSIONER GOZZI: Right. Just for the record.

MR CLUES: Thank you.

COMMISSIONER GOZZI: Yes. Alright, Mr Clues. I think you are to continue, aren't you, Mr Clues?

MR CLUES: Yes, Mr Commissioner.

Mr Commissioner, when this matter was adjourned on the 19.4.1994 I had just completed my submission as to why the application by AMASCU for a car allowance should be rejected by this commission, and upon conclusion of that submission the commission asked me the question, 'In light of the flaws that I had identified what, if anything, was preventing the commission from supplementing the union's claim with an allowance of its own design?'

Before addressing that question specifically I would just like to provide a brief summary of what those flaws were that I identified.

The first flaw was basically that the application would apply to all employees covered by Division B, including scholarship holders, and we do not believe that that can be justified in light of the fact that these people spend approximately 10 weeks in actual training courses and are not active participants within the industry.

COMMISSIONER GOZZI: I thought the scholarship holders were squared away, Mr Clues, weren't they?

MR CLUES: No, they weren't squared away in that the application before the commission -

COMMISSIONER GOZZI: But the claim was amended on the 19 April '94 along the lines that these allowances are not intended to apply to scholarship holders.

MR CLUES: Okay. What I would say then to the commission is, prior to that adjustment, which arose out of our submission, the application did have application to all employees, and in that regard was flawed. And, as a result of that observation, that amendment has been made.

I would submit then that the claim is still fundamentally flawed in a number of other areas, which I don't believe have been rectified, and the second of those is that the claim has no regard for whether the employee is already supplied with a vehicle or whether he does not have a vehicle.

It simply demands a minimum payment of \$225.00 per week per employee engaged under that division.

The third is that the claim has no regard for the number of kilometres actually travelled by the employee.

Under the claim the employee will receive \$225.00 regardless of whether they travel 400 kilometres a week or if they travel none.

The fourth flaw is that the claim makes no reference to any accountability. Under this claim, the union's claim, the employer has no ability to require a standard of proof.

There is no mention of a log book, odometer readings. The employee can essentially allege that he or she has driven any number of kilometres and then there is no standard required to justify those kilometres.

The fifth flaw is that the claim provides for a flat rate allowance of a minimum payment of \$225.00 a week. It has no regard for the variables associated with the operation of a vehicle.

The payment of \$225.00 a week is due under this claim regardless of the size of the engine that the person has in their vehicle, the age of the vehicle, the type of petrol it uses, or the normal fluctuation of petrol prices.

The sixth, and most important flaw, actually goes to the amount of the claim.

The union stated in support of its submission that the \$225.00 is based on what it could cost to run a Holden Berlina for 15,000 kilometres using rates provided by the RACT.

It is clearly evident from TCCI Exhibit 6 that the figures were not drawn from the RACT figures. A Holden Berlina driving 15,000 kilometres, owned privately equates to only \$147.98 for a new to 5 years and only \$80.85 after 5 years.

Even under the business ownership section of the RACT document the union's claim bears no relationship. A Holden Berlina doing 15,000 kilometres owned by a business would cost \$268.98, but that takes into account fringe benefits tax and a turnover of the vehicle every 3 years, neither of which are realistic in the case of private ownership as fringe benefits tax doesn't apply and most private owners don't have the ability to turn a vehicle over every 3 years.

For the union to state on transcript that the claim is based on figures by the RACT is blatantly wrong. There is no resemblance at all.

A private vehicle, according to RACT, driven 15,000 kilometres a year and of a Holden Berlina standard costs \$147.98 not \$225.00 plus 35 cents for each kilometre after 400.

COMMISSIONER GOZZI: Mr Clues, just to interrupt you there. I understand what you are saying to me about the RACT figures, but it is a fact that the claim is supported by RACT figures. Isn't your argument one that the figures have been used wrongly? I mean, the figures are there, aren't they in the exhibit that you proceed - TCCI.Exhibit 6?

MR CLUES: I can't see them, Mr Commissioner.

COMMISSIONER GOZZI: Well, aren't the figures of 268.98 there?

MR CLUES: Yes.

COMMISSIONER GOZZI: And, so what's you're - what are you really saying to me?

MR CLUES: Well, what I am saying to you is that the union are claiming \$225.00 and under business usage they are saying that the rate for a Holden Berlina would be 268.98.

COMMISSIONER GOZZI: Right.

MR CLUES: Well, there is a difference there of the way I calculate it of some \$40.00.

So, even if you use the business figures they are not the same as those adopted by the union.

COMMISSIONER GOZZI: But to get 225, wasn't that explained on the basis of ASU.4? And ASU.4 clearly shows a figure of 268.98 total average cost per week, as I read it, anyway.

And, notwithstanding that, the claim has been reduced to 225, but ASU.4 relies on the RACT figures as the base.

MR CLUES: But the RACT figures, you can't -

COMMISSIONER GOZZI: As I read it.

MR CLUES: What I am saying is, that the union cannot say that their claim is supported by the RACT.

COMMISSIONER GOZZI: No, well you're questioning - that's the point I want to make - aren't you questioning the use of the figures as opposed to the correctness or otherwise of the figures? You are saying that the union views the figures from the RACT incorrectly, aren't you?

MR CLUES: That's correct.

COMMISSIONER GOZZI: Yes.

MR CLUES: Yes. What I am saying is that the union cannot say that \$225.00 is advocated by the RACT as being the appropriate reimbursement for somebody who owns a private vehicle.

COMMISSIONER GOZZI: Well they haven't done that, though, have they? I mean - have you got ASU.4 there?

MR CLUES: Somewhere in this. I would have to find it.

COMMISSIONER GOZZI: Yes. You see, as I understand it what they have done is to say, okay, the 72.28 cents per kilometre arises from the 93.25 cents, which is the total average cents per kilometre, and less 20.97 cents which reduces the RACT figure, the 93.25, to 72.28, and that reduction of 20.97 is in respect of deprivation for fringe benefits tax and FBT parking which - well, no, I am not sure now; 20.97, I am sorry, is the fringe benefits tax of 18.65, and the fringe benefits tax on parking of 2.32, which is 20.97 cents.

And so what the union have done in their claim have used the RACT figures. Now you might argue about the usage, and I am just picking you up that you have said they haven't used the RACT figures. That's what you have said. And I said they have used the RACT figures figure for figure and to arrive at \$225.00 what they have done is to reduce the RACT figures, if you like, by deducting 18.65 cents for the fringe benefits tax, 23.32 cents for the fringe benefits tax on parking, which then reduced the 93.25 cents, which is in Exhibit TCCI.6, by 20.97 to come up with 72.28 cents per kilometre multiplied by 15,000 kilometres which comes to over a 48-week period \$225.87.

So the RACT figures have been used. You said that they weren't used. They certainly have been used, but I think you

are saying to me when you say they haven't been used - and it is a question I am asking - are you saying they have not used the figures or are you saying they have used the figures incorrectly?

MR CLUES: I would say that they have used the figures to develop a formula that they believe in their own mind is justified, but I would suggest that if they wish to come along to this commission and say as they did in their preliminary proceedings that their claim is supported by the RACT, I believe that that is wrong.

If they wanted to say that their figures are supported by the RACT the RACT have done all the calculations precisely as to what it would cost someone who privately owns a vehicle for 15,000 kilometres, using a Holden Berlina, just as Mr Clegg has done, and they are saying it is \$147.00.

So, what I would suggest is, the formula that the RACT - the formula that the union have used - is not in accordance with that adopted by the RACT and, therefore, it is wrong to come along to this commission today and say that their claim is supported by the RACT because it is simply not.

COMMISSIONER GOZZI: Alright, we will leave that, thank you.

MR CLUES: Before -

COMMISSIONER GOZZI: Just before you do move on, and I am not sure whether I did it previously or not, but your TCCI Exhibit Booklet numbered as it is from TCCI.1 through to TCCI Exhibit 11, those exhibits are - the numbering of those exhibits - are endorsed by me and adopted, the numbering is adopted. Okay?

MR CLUES: Thank you.

COMMISSIONER GOZZI: So we will take them all as endorsed and adopted in that format.

MR CLUES: Thank you.

Before moving off that point I would indicate also at this point in time that we don't accept at any point in time that by the union coming up with their own formula that it is appropriate to use a Holden Berlina, a 6 cylinder luxury car, as a standard by which to develop an allowance.

The latter six flaws are each significant and I would suggest render -

COMMISSIONER GOZZI: I am sorry, just on the Berlina, you have made your observation about that, what about the other vehicle relied upon in Exhibit ASU.4 which is the Magna Executive 2.6 auto sedan?

MR CLUES: They haven't adopted that, though, in relation to working out their 225.

COMMISSIONER GOZZI: No, that's been rounded down to \$200 a week again on the basis of the fringe benefits tax adjustments.

MR CLUES: That's right. The fact of the matter is the claim that the commission is being asked to endorse is based on a Holden Berlina, and we would suggest that a 6 cylinder luxury car is not an appropriate standard by which to base a claim for the industry.

I don't own a Holden Berlina, and I certainly wouldn't consider myself to be, you know, earning an average wage. It is a luxury vehicle and I don't believe it is appropriate.

I will leave that up to the commission to determine, but for our submission we are indicating that to base a claim based on what it costs to run a Holden Berlina is unjustified.

COMMISSIONER GOZZI: What do most people in the industry drive, a variety of vehicles, do they?

MR CLUES: Oh, I imagine there'd be a vast majority. I think if people have a genuine concern about the cost of petrol they would be more likely to get around in a Daihatsu Charade or a Barina or something of that status as opposed to going up to a large six cylinder engine which obviously doesn't have anywhere near the fuel efficiency.

The latter six flaws are each significant and I would suggest render the union's claim unworkable. The question the commissioner left me with upon conclusion of the last appearance was essentially if the commission rejects the union's application based on the flaws that I've identified why shouldn't it simply come up with an allowance that it deems appropriate.

Now this is a question to which I've given much thought since the adjournment. Whilst I've spent time identifying the flaws in the claim our case goes far beyond those technicalities. We've spent literally hundreds of man hours ascertaining the views of the industry both from sales people and managers alike. And I would submit just as we have gone to much effort to combat the claim by the union, if the commission were to substitute the union's claim with an allowance of its own design natural justice would demand that we are told what the commission envisages as being an appropriate allowance and given an appropriate opportunity to present argument against that particular claim.

Secondly, I would submit that if the commission were to substitute any claim with a claim of its own design -

COMMISSIONER GOZZI: Well not a claim, a decision. You're not saying the commission is confined to either accepting or rejecting the amount of money here, are you?

MR CLUES: No, I'm not. I believe you have a wider scope than that. All that I would ask is just as we have spent literally hundreds of man hours fighting this claim because we are very fearful for the results that it would have in the industry, if the commission were to deem it appropriate to come up with a claim of its own - I mean, a decision of its own design and allow a quantum that it believes is appropriate then we must be given the opportunity to put our case as to why that quantum is either acceptable or unacceptable.

And I don't believe that it would be appropriate simply to substitute the union's claim with an allowance of your own design. And I say that with all due respect but I believe that natural justice would demand that we are given the opportunity to go out and assess the views of our members and even conduct a similar exercise to that which we have in this particular matter. And I don't mean any disrespect when I say that, Mr Commissioner.

COMMISSIONER GOZZI: Oh no, I realise that.

MR CLUES: The third point that I would argue is that the survey that we have conducted would clearly indicate that there is no support for any allowance of any quantum. The comments of the industry are clear. They're not just talking about the \$225.00 or the \$10.00 a week; they're talking about any increase in fixed costs and the effect that will have on the commission rate. They are talking about the fact that these allowances of any quantum are available under the tax rebate system and they're indicating that they believe that the award now strikes the balance that was previously missing.

So the third point that I would raise is that we don't believe that there is a mandate for change that would justify the commission substituting the union's claim with a decision that would initiate a quantum of money of its own design, if the commission pleases, on that point.

The survey that we have received has had overwhelming response 255 responses from employees and 86 managers or directors. The survey revealed that almost a unanimous opposition to the claim by managers and a massive 82.8 per cent of employees opposed the claim. Reading the employees' and the employers' comments it reveals very clearly there is a majority of opposition to a vehicle allowance or a telephone allowance of any description.

The survey comments were cogent and well founded and they went to such issues as I've indicated: the erosion of the commission system, the fact that good sales people will end up supporting non performers, the combination of the commission and the tax rebates provide an equitable reimbursement system at this point in time and that the existing system works well and that they believe no further reforms were necessary.

We believe that the survey provided a current insight into the views of the people in the real estate industry of Tasmania. We therefore rely on this survey to urge the commission not to introduce any allowance for telephone or vehicles as it is clearly evident that there is an overwhelming opposition to the current claim. We believe that it would be inadvisable for the commission to simply introduce allowances into the industry without first having engaged - without having first gauged the level of support for such a variation by employees, the level of support or opposition by employers, the effect of introducing an additional fixed cost to the level of commission but, most importantly, providing the parties that are before you here today with an opportunity to argue as to the merits of any such draft variation designed by the commission. And we would suggest to do otherwise would be a denial of natural justice.

COMMISSIONER GOZZI: Mr Clues, one aspect that troubles me a bit about the heavy emphasis you're putting on the survey is that why don't we determine all claims by doing the poll out in the industry to see whether or not it's supported or not. I mean, how does that type of approach and reliance on survey information sit with what maybe the merits of the claim?

MR CLUES: Right. What I would say to that, Mr Commissioner, is that we have - a claim arises usually from a union because it believes it is driven by its membership, that the membership wants something that is currently lacking.

Now what I would suggest is in this particular case, that representation by the union is representing a minority of people in the industry and that their views are not supported by the majority in the industry. I would suggest that it is not in the public -

COMMISSIONER GOZZI: Does that impact on the merit of the claim though do you think - one way or the other?

MR CLUES: I believe it does in terms of the fact that when one considers the merits of a claim you have to consider what the public interest is and I would suggest that it is not in the public interest to do something that is not in accordance with the wishes of the majority of people in the industry to whom that claim is going to affect.

COMMISSIONER GOZZI: Alright, well let's look at the public interest in the context of the - the survey, and I just want to talk about the survey. Obviously it was a comprehensive survey. Now are you going to specifically address the public interest at some stage?

MR CLUES: I was going to talk in terms of the fact that I don't believe that you should make changes to an industry where the industry does not want those changes to exist.

COMMISSIONER GOZZI: But - okay - now I understand what you're saying and I'm just wondering how that consideration in the context of an exposed and fully developed argument, how that weighs against what may be the emerging merits of an argument one way or the other. I mean how do you take that into account? I mean you can take it into account in considering the public interest I suppose - the impact on employment, the impact on the industry and other circumstances and so on.

MR CLUES: It's not just a viewpoint, Mr Commissioner, the - we haven't just asked people to express a view in terms of saying yes or no and then present you with a percentage - we've gone to - the biggest part of the survey was getting people to actually provide reasons for why they did not want the survey.

Now I would suggest that the public interest arguments lie there in terms of the fundamental merits of the case. People are saying that if a fixed cost is introduced then it will decrease their commissions and they don't want a situation where everybody is on an equal base because that does not provide the motivation for high performers. It is the level of commission that allows good performers to earn good money and that is the thrust of many of the comments in there.

The other part which goes to merit is the fact that these people do not believe that they are being denied anything under the current system; they believe the current level of commission earnings coupled with the tax rebates that exist provide adequate reimbursement and an adequate income for people in the industry. You then have the other merits to the case which simply go to the fact they believe that the current structure of the award is such that it doesn't warrant any further change. I believe that when we indicate the views of the industry - and I say that it is against the public interest, that is intermeshed with the merits of the case and that the whole basis of our application that is before the commission is essentially founded on those reasons that have been provided by both employers and employees.

So when we talk about the viewpoints and the wishes of the industry there is substance behind those wishes and they go to

the merit and the merit is such things as the erosion of commission.

COMMISSIONER GOZZI: What would be the impact on employment?

MR CLUES: Within this document it wasn't a question that we actually asked, but through the comments and reading of the document of the employers have indicated that they will either have to shed staff or that they will have to reduce commission. Many employees have made comments that they don't anticipate that they will be able to be gainfully employed if such a cost was burdened upon their employer. They recognise the economic reality are forcing an extra \$225 a minimum for each salesperson plus an extra \$10 a week minimum and if the average number of kilometres is anything to be gauged, I believe the figure is more around the - gives a figure more around the 688 taking into account the minimum wage.

So you're substantially talking about anything up to 150% increase in your fixed costs which obviously is going to impact dramatically on your ability to employ people.

Now the union make no bar about that fact; they indicate that they would welcome a reduction in the number of employees in the industry, but I believe that it is a - I believe it is wrong for a union to be advocating a reduction in the number of employees in the industry. It sort of goes against the grain. I mean, yes they have a select number of people who are members who would like to see less competition in the industry but the fact of the matter is we're operating in a free market and the level of labour that exists within the market has found its own balance. We've seen through documentation that people are still entering into the industry so there's still an incentive there for people to enter into it and the market will find its balance - it has done for the last 35 years without intervention and I believe it will continue to do so.

COMMISSIONER GOZZI: Thank you.

MR CLUES: Mr Commissioner, that basically concludes my submission in terms of addressing that specific question that you asked at the conclusion of our last proceedings. Before turning to the telephone allowance I wish to return to that article that was submitted by the ASU titled 'The Dynamics of the Nineties' by David Pillings. The commission -

COMMISSIONER GOZZI: Let me just - is that ASU.5?

MR CLUES: I don't have it here with me. It may well be.

COMMISSIONER GOZZI: Well just let me have a look. I think - I think it is.

MR CLEGG: ASU.5 it is.

COMMISSIONER GOZZI: ASU.5. Yes. Okay.

MR CLUES: The commission appeared to give that document some weight in light of the fact that it identified an average salary for salespeople around \$19,000. This seemed to be unrepresentative of the Tasmanian real estate industry and accordingly during the luncheon adjournment on that particular day we found a survey conducted by the REIT of 94 Tasmanian officers was showed that the average income was in fact around \$27,447 even after taking off the top 20% of salespeople.

Likewise a survey by the professional franchise here in Tasmania indicated that their average income was also round the \$27,000 mark, at \$26,888 again after taking off the top 20% of sales people.

Given the difference between our proposed average of \$27,000 and that of \$19,000 purported by the union, we actually went to the effort during this adjournment period of contacting Mr David Pillings to ascertain where these figures came from and I'd like to tender an exhibit for the benefit of the commission.

COMMISSIONER GOZZI: I'm not sure what we're up to with you, Mr Clues - I think it's TCCI.14.

MR CLUES: I believe that is correct.

COMMISSIONER GOZZI: Right. TCCI.14.

MR CLUES: Mr Commissioner, Mr Ken Buntain contacted David Pillings and if you can turn to the second page you'll see the original facsimile - the one on the front is the typed version of the original so that it would be easier for the commission to read.

COMMISSIONER GOZZI: Right - yes, thank you.

MR CLUES: It's - as you can see it's a fax to Mr Ken Buntain from David Pilling and it's dated 20/4/1994 which was 2 days after our last hearing.

COMMISSIONER GOZZI: Right.

MR CLUES: And if I can now turn to the front because his writing is a little bit scrawly -

COMMISSIONER GOZZI: Mm.

MR CLUES: - it reads:

Transcript of Facsimile from David Pilling Systems Revolution.

Regarding the average earnings of Australian real estate sales people published in "The Dynamics of the '90", I make the following comments

1. That article was written over two years ago and was based on statistics even more historical than that.

2. The statistic is Australia wide not a Tasmanian statistic and therefore takes into account states that do not pay retainers (commission only) which drag the averages down enormously, namely Queensland West Aust.

3. It takes into account all people who enter the industry irrespective of the length of time they stay in the job. If it were possible to obtain the average of the people who have stayed in for longer than 1 year I would expect the average to increase considerably.

(signed) David Pilling

Mr Commissioner, given that we have supplied the commission with two documents that showed the average earnings is considerably higher - around the \$27,000 - and the comments of Mr David Pilling we would urge the commission to place very little weight on the evidence that has been submitted in this document by AMACSU.

COMMISSIONER GOZZI: So - yes - so just in the context of the article in ASU.5, the information there would be - see the article is written over 2 years ago so that meant - means - that it was written - it's dated March '93 - does that mean it was written about - in 1991 sometime?

MR CLUES: Yes, I'd suggest it was.

COMMISSIONER GOZZI: Yes. And the information relied upon was even more historical than that.

MR CLUES: That's correct.

COMMISSIONER GOZZI: So pre 1991?

MR CLUES: That's right. So by the author's own admission the document doesn't carry a lot of weight in 1994.

COMMISSIONER GOZZI: Alright, thank you, Mr Clues.

MR CLUES: Thank you. I would now return to essentially the merits of the case, and that is, to address the issue of telephone allowance.

COMMISSIONER GOZZI: Right.

MR CLUES: The arguments in relation to this claim are very similar to those raised in relation to the car allowance and hence I shall endeavour to keep my arguments concise.

COMMISSIONER GOZZI: That's nice.

MR CLUES: The first issue goes to that of cost. The claim for \$10 a week will compound the cost of employee - employing - employees significantly especially when considered alongside the car allowance. Where today an employee can expect to pay an average outlay of \$325 per week, the union application would have that blow to \$560 assuming the employee travels less than 400 kilometres a week. Given the average number of kilometres travelled is actually 795 kilometres a week, the effect of the additional \$10 will take the average pay out to \$698.25 thus rendering the average employee in the real estate industry with a relativity close to that of 170% of a normal tradesperson, say, under the Metal Industry Award. The claim as can be seen is structured to have a significant multiplier effect and the \$10 phone allowance simply compounds that.

As with the car allowance the telephone allowance has comparative flaws. The first, very predictable is that it applies to all classifications of Division B including that of scholarship holders and trainee real estate agents. Clearly, such classifications of work would not incur significant telephone accounts at home pertaining to work. As stated before the scholarship holders spend 10 weeks at training courses and therefore it is questionable how any business related calls would be incurred during this period.

COMMISSIONER GOZZI: Again I'll just point out that the claim was amended in respect to scholarship holders.

MR CLUES: Yes, Mr Commissioner.

The claim for telephone allowance provides for no accountability and no standard of proof, therefore an employee will receive \$10 per week regardless of whether they make one call or whether they make 100 calls in relation to work and the employer has no address to question the validity of the payment. Any claim for expenditure should be supported with evidence or a standard of proof especially in relation to telephone calls where comprehensive bills are sent by telecom. The third area of criticism is that the claim for telephone allowance gives no consideration to the issue of equity by basing the remuneration on a fixed flat rate as opposed to actual expenditure. The flat rate has no science or reason.

Mr Clegg has produced no evidence as to why \$10 is the magical figure. It is just a figure that has plucked out of the air. As a result of this notional figure of \$10, it bears no relevance to the real cost of employees for telephone expenditure. I refer the commission again to the summary of the survey at TCCI exhibit 5, question to employees. You'll find that on the second page of the survey at the bottom.

COMMISSIONER GOZZI: TCCI.5 - right.

MR CLUES: The question was asked: What is the average cost of telephone calls per week made from your personal telephone in performance of your duties for the agency? The answer is \$19.10.

Clearly the average expenditure for business related calls from home by employees is nearly double that requested by the union. The figure of \$19.10 is an average. Some employees expend up to 30 to \$40 a week whilst others spend one or \$2 per week and others don't spend anything - they just simply use the phone that is available at work. This would indicate that some may be more active or simply choose to use the facilities at work in lieu of those at home. Whatever the case what is very clear is that the union's claim for \$10 is not consistent with the real expenditure and demonstrates that the figure was arrived at without regard for what really happens in the industry.

Given the variety of expenditure revealed by the survey it is a nonsense to claim that \$10 a week will provide an equitable reimbursement of expenditure. Clearly for some employees the amount of \$10 will be excessive and for the average salesperson it would be about half of that which would be required.

The deficiencies of this claim are almost identical to those of the car allowance, namely, the claim has no accountability, has been derived at without real regard for the expenditure within the industry and makes no provision for the variances that may exist between how different salespeople conduct themselves within the industry.

Instead, the claim states that all employees under this section shall be entitled to \$10 as that is what has been perceived by the union as being a fair thing. Instead of a reimbursement based on actual expenditure by employees in the industry, again one cannot help but wonder why this claim has been made when the Australian taxation system is designed to reimburse such expenditures without any of the latter deficiencies. To that end I turn the commission's attention to TCCI exhibit 9.

As detailed on the cover page, TCCI exhibit 9 is an extract from the Federal Tax Reporter re telephone and telex expenses and I read from - after the first paragraph where it talks about calls charges:

The costs of telephone and telex calls are properly deductible where made in the course of carrying on a business. An employee may be able to deduct the cost of calls made from a home telephone where they are made in the course of his or her employment. In fact the Commissioner concedes that the costs of calls are allowable to employees required to telephone the employees on a regular basis (Taxation Ruling IT85). But for an employee, a composite bill representing the costs of both business and private calls is allowable only to the extent of the business calls. The Commissioner will not allow a deduction for additional costs incurred in maintaining a "silent" telephone number, even where, for example, a police officer, politician or judge maintains a silent number to protect his or her family from threatening calls (Taxation Determination TD 93.115 [public ruling]).

The substantiation rules (sec 82KT onwards) should be noted, although the Commissioner has the discretion to allow a deduction without detailed proof of actual expenditure incurred or respective usage. If the Commissioner declines to allow a deduction, or if the taxpayer is dissatisfied with the amount of the deduction allowed, and the taxpayer seeks to establish on a review that the assessment is excessive, proof (on the civil standard of proof) then becomes a statutory necessity under -

- a various number of sections which I won't read out.

Over the page there's specific reference to what happens in relation to a particular salesperson and they've stated this particular case and it appears in the second column near the top as 59 - Salesman.

A car salesman was required to make and receive work-related phone calls at his residence. He claimed a deduction for two-thirds of the cost of metered calls and two-thirds of the rental. Held. by majority of No.1 Board, claim allowed since essential character of the expenses was a business one.

Unlike the deficiencies associated with the union's claim the system established by the Australian Tax Office has a number of redeeming features. First, the deduction is based on the actual cost, not a perceived cost and hence those individuals that do incur more than \$10.00 expenditure a week are able to make such deductions. We believe this is a far more equitable system.

2) there is accountability under the system offered by the Australian Tax Office in that if the tax office doubts the level of expenditure they can require a standard of proof. There is not any standard of proof or accountability under the union's claims.

It's hard to understand in light of the existence of such a system why the union would put up a claim that is such a poor substitute for that that already exists. Again those sentiments are voiced by the industry in the survey and I refer the commission to question 3 which was directed to employees.

COMMISSIONER GOZZI: That was TCCI -

MR CLUES: Exhibit 5, commissioner.

COMMISSIONER GOZZI: Look, I really appreciate you doing these exhibits in this form but it would be handy to have the numbers tagged on the outside.

MR CLUES: I've made my own copy that way, Mr Commissioner, but I didn't afford you of the same benefit.

COMMISSIONER GOZZI: Well you lose half a point for that, Mr Clues.

MR CLUES: No, I do apologise. It is difficult flicking through the document.

COMMISSIONER GOZZI: Remember they used to take presentation into account when they used to mark papers Now where are we, exhibit TCCI.5.

MR CLUES: That's correct.

COMMISSIONER GOZZI: Here we go, second page?

MR CLUES: You'll find this actually on the third page.

COMMISSIONER GOZZI: On the third page.

MR CLUES: And it's question 3.

COMMISSIONER GOZZI: Right.

MR CLUES: And it states:

Having regard for the response from the agency in Question 4 would you wish the claim for telephone allowance to be pursued?

And the answer is that 86.7 said 'No', they would not. Now the reasons will be read shortly. But likewise in question 6 to employers 90 per cent do not currently pay a separate amount to employees for telephone and again their views will be read shortly.

Now with the commission's permission I wish to turn to TCCI exhibit 10 where the views of the employers and the employees have again been quoted and categorised according to those for, against and neutral to the claim.

COMMISSIONER GOZZI: So we're starting at 10.1.

MR CLUES: That is correct. We do have some time available today. Does the commission wish me to read through each of these or will the commission peruse this at its own leisure?

COMMISSIONER GOZZI: Oh look, if you want to - I'm happy to peruse it when I review all the material but if you just want to highlight some representative comments, that's fine.

MR CLUES: Okay. Well what I'll do, rather than in any way pick out selective comments I'll read the first half a dozen in each section and hopefully they will be representative.

In relation to those employees who actually are in favour of the claim it was said:

At present I perform most calls from the office. However, should the above situation arise (mandatory mobile phones), costs incurred would be potentially huge.

The majority of my business is transacted on my 018 number.

COMMISSIONER GOZZI: Well what's that mean? Oh right, so they're in favour - yes, sorry. Yes, okay.

MR CLUES: Yes, all of these people are in favour of the claim made by Mr Clegg.

COMMISSIONER GOZZI: Yes, right.

MR CLUES: The third one was :

I think this allowance should be paid - exclusive of any commission arrangements. When you consider

a salesperson has a quiet settlement month and gets paid \$325 gross - and from that has to pay \$35-45 for phone and \$50 for fuel - take out tax and you are poverty stricken!

The next one:

Should be some allowance paid.

Disappointed, see then our commission structure would be lowered in response to a successful claim.

There is no doubt that almost all my car phone calls are business related and a fair percentage of home ones also. By claiming them as a tax deduction only, I am only recovering part of the cost incurred, whereas if I made them all from the office, there would be no cost to me.

That's one page. I just note the difference. There's one page there of people in favour. If we then have a look at the employees against. And I will just read half a dozen comments from the top.

I also do not want to jeopardise myself out of a job, by placing my employer into a position where he can't afford to keep salespeople on.

There is no point pursuing an allowance for telephone calls if commission was to be reduced accordingly. However there is no doubt to maximise your chance of long term success in this industry a mobile phone is essential as it enables you to spend less time in the office and more time outside. Perhaps an allowance could be considered based on results. In most instances I would expect telephone and running a vehicle costs to be proportionate to income.

Having only been employed in this field for 10 weeks I find it difficult to answer these questions because in 12 months time I hope to find myself a lot busier with a larger clientele list to work with. Also once things improve and my trial period is over I believe a mobile phone to be a necessary piece of equipment which would be used greater than a home phone.

Current tax deductible system effective.

While there is no set standard and compulsory rate of commission such pursuance would gain nothing:

(a) I believe it will diminish current commissions.

(b) Leave the system open a rort.

(c) Is totally unjustifiable.

(d) Is unfair on company by way of FBT and non tax claim.

Commission based payment should be retained.

It is probably easier to claim against tax annually than to try to justify a claim against a payment.

Suggest things remain as they are.

Any change in allowances generally result in attempts to equalise commissions paid and this is usually reflected in less income.

So on and so on.

.... for the commission there is then one, two, three, four, five, six - 6-1/2 pages of comments saying they don't support the claim versus three quarters of a page of employees who say they do.

Then there is the section of comments by employees neutral to the claim. And this takes up about a quarter of a page. The comments go to:

Couldn't give a dam.

All phone cost are put through my company records.

As much as it seems a good idea it becomes a catch 22. Working on "commission only" it would have to be adjusted into a higher payment of commission.

As I am only new in this industry I feel I can't comment as yet.

Blah, blah, blah. They're all just very neutral comments. Then you come to the employers. And this appears as 10.4.

COMMISSIONER GOZZI:

MR CLUES: Right.

COMMISSIONER GOZZI: - just there in that

MR CLUES: I think the commission when it does review the evidence, and hopefully you will peruse this document, you will find a lot of interesting comments in there as to the views of the industry, what they think about various things.

In relation to employers there was nobody supporting so we skipped that section. If we go straight to employers against and it says:

Any increase in allowances will mean a decrease in the commission percentage paid.

If this goes ahead, it will be an administrative nightmare by reducing commission to with a similar reduction as the extra allowances. Worse is that salespeople have to spend the allowances on cars and phone and the bottom line is they might end up with more expensive cars and less money in the pocket to spend on other things.

In Tasmania we pay one of the highest commissions to sales staff taking into account our level of fees, number of sales etc. This accordingly takes account of all their expenses. Should an additional amount be paid, it, by virtue of economic viability, would have to result in an adjustment to the commission structure.

Our company believe that its current commission paid to salespeople adequately compensates for use of their own telephones.

Salespeople in effect run their own business within our business structure. They claim their own taxation benefits dependent on their level of income. I do not believe they are interested in allowances, but interested in commission. Leave the Real Estate Industry open and competitive for highly motivated and enthusiastic people. These people don't want allowances.

Another impost on overheads would cause serious consideration of commission earnings.

Most calls are made from office and any payment would mean a drop in percentage in commission earned.

Where does this end? Pens, pencils, shoes, stockings (for women) and the list could go on.

COMMISSIONER GOZZI: What's the brackets for?

MR CLUES: For women. I guess he had a pause there and hoped that it wouldn't be for men. Maybe he wanted to ensure there wouldn't be a claim for stockings for men.

Again I have successfully been in this industry for 20 years and feel that fuel and phone allowance is just like another bureaucratic job for someone to monitor and implement when it has worked without a hitch for as I said - 20 years.

Any increase in the fixed cost of employing a salesperson will result in an increase in expectation of employers of their performance and a decrease in tolerance towards lower performers. Bottom line - less jobs.

Fairer under our system.

Staff are aware that private phone usage for the earning of commission is their cost, and that they can claim that cost as part of their expense in earning commission. I do not charge them for their private calls from the office, and they are encouraged to work back and use company phones if they do not wish to use theirs.

And it goes on. And again I note there's one, two, three, four - 4-1/2 pages of comments by the employers against. Employers neutral to the claim:

If I had to pay a telephone allowance this would be OK by me. I would obviously have to decrease commission percentages because these have been struck assuming salespeople were paying their own costs for telephone etc.

It doesn't matter which way it is paid to sales staff. Their share will be decided on the total gross amount they receive either by way of allowances plus a % of commission or just flat rate of commission.

Whatever allowance is paid an adjustment to commission payable will be made.

A telephone allowance would affect commission earnings.

A telephone allowance would affect commission earnings.

\$10 per week personal use is probably the correct figure.

So probably there's one that's saying its okay.

Commission paid to sales staff is 50%. Should claims for telephone and car expenses be successful I suggest the commission rate may drop back to 40% or less.

Would be prepared to consider making some allowance for phone calls from private phone although I am of the view that sales consultants should consider themselves self employed and pay these expenses from earnings as in other related industries.

So there you have comments of a few employers who are fairly neutral to the claim. And over the page we did find an employer here who was in support of it. It says:

An agreement was reached at a meeting of all sales consultants that an amount of \$10 per week was a fair allowance to be paid by the company towards private telephone and mobile telephone calls for business purposes. It should also be considered that the company installs car phone for all sales consultants at the company's expense.

That should probably have been under the employees. It doesn't sound like a comment from employers.

MR CLEGG: Actually I think I can tell you who the employer is even.

MR CLUES: What you think that is from an employer?

MR CLEGG: I know it is. I've seen his employment - you know, his letter of

MR CLUES: Oh well, we have one employer who supports Mr Clegg and we have 4-1/2 pages of people who say they don't.

As I said, I would urge the commission to review those comments as they really do provide a very good insight into what the industry is thinking and why they've taken the position that they have. And as I've said on a number of occasions, these are not the comments of ill informed people, their comments are cogent, well formed and, I must say, well written.

And the fact that these people have taken the time and effort to respond to the survey indicates that they obviously feel very strongly about the issue. We are very pleased with the response that we have had and I believe that that should be considered.

The comments of the 86.7 per cent of employees who do not wish the claim to be pursued, as I've said, are sound and cogent

and their views are in line with those of employers who have provided a resounding rejection to the claim.

Mr Commissioner, having detailed my arguments that specifically relate to each claim, I shall now turn to the arguments that are common to both claims. The first and probably the most significant is the ramifications these claims have on the commission system within the industry.

I refer the commission to question 1, in 4 addressed to employers contained within TCCI -

COMMISSIONER GOZZI: See, one of the problems with all this is that the survey material is fine - and I think quite rightly be taken to present and paint a picture of what people are thinking about the various components of the claim. To go to the full extent, I think, that you want to go with the survey and be all persuasive and so on, what opportunity do I have in the context of - or does the union have, for instance, in the context of having people here in the witness box to be asked about their views?

MR CLUES: What I would say to that, Mr Commissioner, is this. We had the opportunity, as you say, to present whatever evidence we wished to this commission in order to oppose this claim. Now we have chosen to do a survey. The reason we've done a survey is that we believe it will give a far more representative view than that of a few witnesses. We could have trundled up here half a dozen employers and found maybe a dozen employees to say: Do you want the claim? Mr Clegg could have likewise gone out and then got his half a dozen members or his dozen members and trundled them up as well.

COMMISSIONER GOZZI: Yes, but you're reading into the answers views that you draw from those answers and that's fine, you can do that. But there is no opportunity to test the views that you're expressing by anybody.

MR CLUES: Okay. What I would say to that is, Mr Commissioner, that this is the standard of evidence that we're putting up to you and, you're right, we are placing very heavy weight on this. What we'd ask you to consider is to balance the evidence that we have put to you which is a comprehensive survey of over 255 employees, 86 employers against what Mr Clegg has put up to you in support of the claim.

We're asking for the status quo; he's asking for a change. The onus of proof really should lie on the union in this matter but we have seen no evidence from them to suggest that there is any support for this claim. We had an adjournment of over 2 months in which, Mr Commissioner, you believed, I believed, the industry believed that we were going to have witnesses up here from Mr Clegg saying that they support this claim. We do not have to provide any evidence to this

commission. We could have simply relied on the union making out their case. We would suggest we've done far more than that. We've gone to the effort of developing a standard of proof that we believe should justify opposing this claim. But I believe, as you've said, our evidence can't be cross examined but that has to be weighed up against a union that has run their claim - and they've run it now - having had the opportunity, having been urged to present witnesses have failed to do so. Now one has to question why that has been the case.

Now I can put my own interpretation on it but I will allow the commission to do that. But at the end of the day when one balances up the evidence and the facts the reality is the only evidence that the commission has before it is that by our argument opposing the claim. There is no evidence by the union indicating any support for the claim or, for that matter, as to how the claim has been derived. We've produced evidence saying not only is the claim not supported but it's fundamentally wrong in terms of how it's been calculated.

COMMISSIONER GOZZI: Is this evidence or material?

MR CLUES: I would suggest this is evidence, the survey is evidence. We had some discussion when I was last before you as to evidence and I'm not a legal practitioner; I'm not aware of what constitutes evidence but I believe that if I tender a survey which has been conducted in the manner that it has, then it should be given the weight of evidence. If the commissioner has a criteria that I'm unaware of then I would gladly be -

COMMISSIONER GOZZI: I think that's a fair statement to make. Where do you want to refer me to - question 4 where?

MR CLUES: I'd like to refer the commission to two questions. They were directed -

COMMISSIONER GOZZI: Yes, what exhibit number is that?

MR CLUES: I apologise. To the survey -

COMMISSIONER GOZZI: 10.4?

MR CLUES: No, it's exhibit 5.

COMMISSIONER GOZZI: Oh, exhibit 5.

MR CLUES: As I said, commissioner, what I will now endeavour to do is run through the arguments I believe are common to both claims, having addressed each claim individually. And the first and probably the most important is the ramifications of these claims on the commission system that I would submit is the life blood of this industry. And to that end I refer

you to question 1 and 4 that were directed to the employers, to find out what's going to happen to the commission system in their view.

COMMISSIONER GOZZI: One and four?

MR CLUES: Yes.

COMMISSIONER GOZZI: In TCCI.5?

MR CLUES: That's correct.

COMMISSIONER GOZZI: That's a summation of the survey?

MR CLUES: Yes.

COMMISSIONER GOZZI: Right, so -

MR CLUES: Now question 1 on car allowance asks this question. It says:

Does your agency pay a sum of money separate to commission earnings to compensate for use of private vehicle by employees for business?

And the answer is that 90 per cent of them do not pay a separate amount of money to that which they pay through commission earnings.

Question 4 then asks:

If the agency were required to pay the car allowance claimed would this affect the level of commission earnings paid or any other terms of the contract?

And the answer is 97.6 per cent said: Yes, this would affect the level of commission earnings.

Those two questions are interlinked. The first asks: Are you paying a separate amount of money or are you simply paying commission, and assuming that that covers the expense. The second says: If you get lumbered with an expense on top of the commission earnings is that going to affect your level of commission earnings, and 97.6 per cent have said: Yes.

COMMISSIONER GOZZI: Who sets the commission earnings in the first place, the level of commission earnings?

MR CLUES: Each employer sets their own level of commissions and this is what I was talking about in terms of market forces. If an employer believes that he can attract good quality sales people for 30 per cent commission then that's what he'll pay. If he thinks he'll get a higher calibre by

paying 50 per cent then that's what he'll pay. Market forces show that in reality most employers are offering around 40 per cent. That's what the market will stand. That is the market will attract people at 40 per cent and the employer can afford to pay at 40 per cent, just your basic principles of supply and demand and 40 per cent is the -

COMMISSIONER GOZZI: That's 40 per cent of the 2.7 or whatever it is?

MR CLUES: That is correct.

COMMISSIONER GOZZI: What's the figure - and who sets the 2.7? If you go back to ASU - ASU.5 -

MR CLUES: I've just been informed by Mr Buntain that it's deregulated now. There was a time when it was set and I assume that it was set by the Auctioneers and Estate Agents Council. That is now deregulated. And just as the 40 per cent is driven by market forces, so is the 2.7. So again it's free market forces determining what the level of the split will be and what proportion will go to the sales person who actually makes the sale. So it's purely market driven. There is no regulation.

COMMISSIONER GOZZI: Since when?

MR BUNTAIN: 1991 I think it was.

COMMISSIONER GOZZI: 1991, thank you. Right, okay, questions 1 and 4.

MR CLUES: Yes. I'd now - that deals with the car allowance.

COMMISSIONER GOZZI: Mm.

MR CLUES: To find a similar analysis with telephone allowance, and I draw the commission's attention to questions 6 and 9 which are of a similar vein. And it says again:

Does your agency pay a sum of money separate to commission earnings to compensate for use of private telephone by employees for business?

And again 90 per cent say: No, they do not provide a separate amount of money beyond that paid through commission earnings. If you then have a look at question 9 it says:

If the agency were required to pay the telephone allowance claimed would this affect the level of commission earnings paid or any other terms of the contract?

And again 97.5 per cent: Yes, if we're forced to increase fixed costs we will adjust the level of commission earnings proportionately.

COMMISSIONER GOZZI: Have the 10 per cent that pay the allowance adjusted their commission proportionately?

MR CLUES: It's - they're not - the 2 per percentages don't need to be representative. What -

COMMISSIONER GOZZI: I know, but - I know they don't need to necessarily relate to each other -

MR CLUES: Yes.

COMMISSIONER GOZZI: - but if the 100 per cent sample was the same answering both questions I'm not sure whether it would have been or not. Presumably they may have been. I'm just interested whether or not those that pay telephone allowance, the 10 per cent that pay the amount of money for telephone allowance, have they adjusted their commission that they pay to their employees to take account of the payment that they make in respect of telephone allowance?

MR CLUES: I would assume that anybody who is offering a package, whether it be an allowance plus a level of commission earnings will again have to find that balance within the market. There's no point offering \$20.00 a week extra through a telephone allowance if you can't afford to sustain the same level of commission earnings.

COMMISSIONER GOZZI: Oh yes, look, the point is that in respect to the car allowance eight agencies presumably pay some sort of car allowance.

MR CLUES: Yes.

COMMISSIONER GOZZI: And 10 - sorry, eight agencies pay some sort of telephone allowance.

MR CLUES: Mm.

COMMISSIONER GOZZI: And in respect to those small numbers of agencies in respect to the survey, have they to your knowledge adjusted their commissions to take into account the fact that they do pay these various allowances?

MR CLUES: I don't know the answer. That wasn't a question that I asked and hence -

COMMISSIONER GOZZI: I mean, 73 per cent or 73, 90 per cent - sorry, in the case of telephone allowances 97.5 per cent say

that they would - that it would affect the level of commission earnings.

MR CLUES: Yes. What I think we can conclude from that is that even those people who do pay an allowance, the allowance that they're currently paying maybe less than that is being demanded by the union. Especially in relation to vehicle allowance, I doubt very much that anyone is paying to the level that is being demanded by the union and hence when they look at it they say: Okay, I'm paying an allowance at the moment and I'm not adjusting commission. But if I'm forced to pay the amount that is being argued by the union, yes I will adjust commission because it represents a real increase in my fixed costs.

And that's why I'd suggest the percentage is higher for those who say, yes, if the union's claim is successful I will be adjusting it, as opposed to the percentage of people who are saying, yes, we are paying something at this point in time.

COMMISSIONER GOZZI: Yes. Look, at question 7 under the telephone allowance heading

MR CLUES: Yes.

COMMISSIONER GOZZI: Now it says:

If you have answered "yes" to Question One -

Should that be question 1 or question 6?

MR CLUES: It should be question - you're right it should be question 6.

COMMISSIONER GOZZI: So out of the eight agencies that pay some sort of telephone allowance, they pay an average of \$10.00 a week.

MR CLUES: That's correct.

COMMISSIONER GOZZI: So could I amend your exhibit?

MR CLUES: Yes, you can.

COMMISSIONER GOZZI: Question 6. Right. And again out of the eight agencies that pay a car allowance, on average they pay \$35.00 a week.

MR CLUES: That's right.

COMMISSIONER GOZZI: Okay.

MR CLUES: In relation to both allowances 97.5 per cent of employees indicated they would reduce the level of commission

earnings in order to cover the fixed cost, if these claims were successful. These sentiments were voiced in no uncertain terms in the comments of employers in the survey.

The greatest concern of employees in their comments was the erosion of the commission system and the apparent irrelevance of the claim in light of the tax rebate and existing level of commissions which they believe covers such expenditure. It is clearly evident from the statistics and the comments that the vast majority of employers and employees do not want to see the commission system eroded. One only needs to read the comments of employees and the employers in the survey to see that the union's application has a minority of support.

The words that were repeated again and again by both employers and employees was that this is an incentive based industry where good sales people can earn good money due to a reasonably high level of commission paid on sales. If the level of commission is eroded and substituted with a higher fixed cost to the employer the system begins to fail because good performers begin to subsidise the not-so-good performers and the incentive to sell is diminished as the rewards of high commission have been eroded.

The vast majority of employers and employees do not want to see the existing system change. The comments support the proposition that the award restructuring process completed in July of 1993 has struck a balance that can be accommodated by both sides, and this claim will tip the balance.

This concept of maintaining the incentive system is crucial to employers and employees alike. I have difficulty therefore accepting there is any justification for placing such a system in jeopardy when it is alleged that the intent of the claim is to reimburse expenses which are adequately reimbursed under the Commonwealth taxation legislation and the existing level of commission earnings.

Why would any party seek to place an additional burden on employers of a minimum of \$235.00 a week and a more realistic average increase of \$363.00 in light of the actual kilometres travelled. It's ludicrous to place such a burden on employers when the reimbursements via tax and the higher commission systems exist.

The survey indicates that the taxation system is heavily used by employees as a legitimate means of recouping their expenses. And to that end I turn your attention to the exhibit. If we look at the comments by employees - it's exhibit 5 - it says in relation to question 2 to employees on the second page - sorry, the third page:

Do you claim telephone expenditure for taxation?

Ninety point three per cent said: Yes, I do. Likewise do your car allowance on tax - if we have a look at question 6:

Do you claim travelling expenses arising from use of private vehicles for taxation?

Ninety six per cent of the employees said, yes, I do.

So of the employee responses 90.3 per cent indicated they claim telephone expenditure from the Australian Tax Office and 96 per cent say they claim vehicle expenditure associated with travelling, from the tax office. The slightly lesser proportion of tax claims for phone are largely attributable to the fact that employees who make so few calls as not to warrant the claim in their view, although the claim could be considered as there is no minimum level set by the ATO.

The desire to continue to use the expenditure of travel and phone as a legitimate tax deduction was evident in the numerous comments provided by employees where they indicated on numerous occasions throughout that they find it a useful tax deduction, that they prefer to make it as a tax deduction and the reason is because it actually reduces their taxable income. It is a benefit, it is one of the few expenditures that they can actually claim.

Again, I ask the question why would anyone want to disturb the status quo of a commission system and where the Australian Commonwealth Government has a tax legislation that provides for legitimate and equitable relief for employees at no cost to the employers and substitute that with the system that it very - that has very little support, no mandate, is full of flaws and will in no uncertain terms erode the commission system that is the very fabric of this industry.

If I might diverge slightly before concluding my submission, I would at this point in time refer the commission to what the situation is in other states, and I refer the commission to the final exhibit within my exhibit booklet - TCCI exhibit 11.

What I had the REIT do was have a ring around all the other states and find out what the situation is, and here is a summary provided by the REIT:

Queensland	No award
Northern Territory	No award
Australian Capital Territory	No award
New South Wales	
. Real Estate Industry (State) Award 1992	

- . Current award has locomotion, telephone and mobile telephone allowance.
- . Current allowances were included by consent
- . Award expires at the end of 1994
- . When union makes next claim the REINSW is very likely to submit a counter claim to decrease the locomotion allowance.

Victoria

- . Award made redundant by Employment Relations Act 1993 (1 March)
- . Current employees could elect to remain under the Award or negotiate individual agreement
- . Current employees negotiating an individual agreement must not be paid less than they were when the award was in operation.
- . The Award specified a locomotion allowance of (\$115 per week)
- . The REIV have prepared a standard 'Individual Employment Agreement', reference is made in a sample agreement to a locomotion allowance (no amount is recommended)

Western Australia

- . No award covering sales consultants
- . Standard employment agreement developed by REIWA and RESAWA
- . Agreement specifies sales consultant to provide and pay expenses related to car and after hours telephone service
- . Either agent/sales consultant may be responsible for mobile radio receiver supply and costs
- . REIWA consider that the majority of sales representative would not have such a contract in place

South Australia

- . Registered Sales Persons Award 1982
- . Locomotion allowance included by consent

Mr Commissioner, the only states which pay a locomotion allowance are New South Wales and South Australia and in both states the award variations were by way of consent between the parties for reasons best known to themselves and I would contend that the process of implementing such allowances has been very remote throughout Australia and certainly not a prevailing trend.

I now wish to provide some concluding remarks which I assure the commission will be brief.

The claims by the unions for telephone and car allowance have a significant cost to employers. The survey would suggest an average sales person would become entitled to approximately \$688 per week. The amounts derived at for car allowance have been erroneously calculated using the cost of a vehicle by a company and then modified to a formula that still escapes me. The additional 35 per - cents - per kilometre after 400 kilometres is not - is not a proposition supported by the RACT or any other reliable source and it's basis eludes us.

Likewise, the amount of \$10 seems to have been plucked out of the air and no evidence has been put to the commission to support where it has been derived from, and based on our survey it would indicate that it is about half of what is actually required if a reimbursement under this system were to be adopted as opposed to that which current exist over the taxation system.

It has also been stated that the REIT and the TCCI have concerns about the application of the claims to all employees including scholarship holders. I recognise that this has been rectified and I say no more.

The claim provides for no accountability to the employer for the actual expenditure but rather relies on a perceived cost which as seems fundamentally flawed. The greatest concern of all however is the fact that the claim were it - if it were successful would mean that 97% of employers would reduce the level of commission to cover the fixed cost. The necessity to do so was recognised by both sides and opposition to the erosion of the commission system was voiced loud and clear. The vast majority of the industry do not want these claims to proceed.

In the case of employees, oppositions to the claims were between 82.8% and 86.7%. The sheer level of opposition was demonstrated by the enormous response from the employees in the industry whereby 255 took the time and effort to fill out

our survey. And they didn't just fill in figures, they gave sound, cogent reasons.

Likewise 86 - 86 managers and directors also took the time out to fill out this survey. Such is the feeling within the industry in relation to this claim. The fact is, the industry does not want the status quo disturbed and there is no mandate that has been put by the union to suggest such a claim is warranted. And why should there be when the alleged purpose of the claim is to reimburse expenses? And yet there exists an equitable system of reimbursement through the commissions and through the taxation legislation, a system that currently exists, is accessed by up to 96% of employees in relation to vehicles and I think 90-something percent in relation to car allowance, so it's regularly used; a system that has none of the flaws that I've identified in relation to the union's claim going to accountability, the quantum and the actual level of commission in terms of reimbursing actual expenditure versus the perceived allowance that the union have put forward.

A tax system that does not incur enormous fixed costs to the employer and this is a significant point. The taxation system doesn't cost the employer one cent, where the reimbursement of expenses system put up by the union is going to have a significant cost to the employer - and as I've indicated costs in the order of 150% increase on what they're currently paying - a system that has existed in this industry for many years, a tax system which is utilised extensively by employees. For all the reasons outlined in today's proceedings and on the 18th of this month, we would urge this commission to reject the application in its totality on the grounds that I've identified and that it is contrary to the interests of the real estate industry of Tasmania and against the wishes of those in the industry - employers and employees alike. If the commission pleases.

COMMISSIONER GOZZI: Thank you, Mr Clues. Mr Clegg?

MR CLEGG: Thank you, Mr Commissioner. Mr Commissioner, before I respond to what Mr Clues has said I would like a copy of the transcript because he's raised a number of issues that I'd like to go into and if the transcript can be made available as soon as possible, I'd be ready within three or 4 days of getting the transcript to proceed again.

COMMISSIONER GOZZI: Well I'm not so sure about that, Mr Clegg. The normal situation is that the party would be in a position to give - have right of reply. I mean -

MR CLEGG: Yes, and I'm - and I'm -

COMMISSIONER GOZZI: - a substantial part of submissions were already made previously and again -

MR CLEGG: There's quite a substantial amount been made this morning too, sir, and I would like -

COMMISSIONER GOZZI: Yes.

MR CLEGG: - I would like the right of having a look at the transcript before I respond.

COMMISSIONER GOZZI: But advocates - I mean that's not part and parcel of the normal procedure. I mean advocates are expected to be on their feet and give a right of reply.

MR CLEGG: Well I spoke to Mr Clues about this morning and I explained to him that I'd be asking - because he said he was going into more detail - I would be looking for - to look at the transcript before I respond to the claims, sir.

COMMISSIONER GOZZI: Well -

MR CLEGG: And I don't think you can really - I don't think that right can be denied me, surely.

COMMISSIONER GOZZI: Oh, I'm sure it can, Mr Clues - there's nothing automatic - oh, Mr Clegg - I'm sure - I mean as far as I'm concerned the commission can certainly deny you that - that right. I mean as I say, advocates ought to be in a position to respond when the other person has gone.

MR CLEGG: Well this has gone over a couple of days, sir, and -

COMMISSIONER GOZZI: I mean you've had the exhibit book -

MR CLEGG: Yes.

COMMISSIONER GOZZI: - you've had all - the only exhibit you haven't really had is one additional exhibit tendered this morning. You've had all the information since goodness knows when. You've had - you've had -

MR CLEGG: So - what I'm asking, sir, is the - to be able to read the transcript before I respond.

COMMISSIONER GOZZI: Well I'm just saying to you - I mean why aren't you prepared to go? I mean you - all the information is contained in the exhibit booklet which you've had since that last hearing day.

MR CLEGG: Sir, I was - there was -

COMMISSIONER GOZZI: Well I mean what sort of information today did Mr Clues put on the record that you weren't aware that he was going to put? I mean he in essence revisited a

substantial number of arguments he placed last time about the flaws.

MR CLEGG: Well, sir -

COMMISSIONER GOZZI: He - he - he asked the - he answered the question which I posed to him on the last occasion. I mean why aren't you prepared to go?

MR CLEGG: Because, sir, I would like to read the transcript at what has been said so I can have a full understanding of what he has said. And it's quite an important -

COMMISSIONER GOZZI: Mr Clegg, my advice to you is that in future you prepared to go, because there's no automaticity about adjournments after a person has made their submissions.

MR CLEGG: Well, sir, I thought I was within my rights to ask for the copy of transcript.

COMMISSIONER GOZZI: Well you can certainly ask. I'm simply -

MR CLEGG: And -

COMMISSIONER GOZZI: - saying there's no automaticity about it. The case was scheduled for completion - you're aware of that - you've had substantially the information - in fact you've had it all except one exhibit. You've been aware of the thrust and nature of submissions made.

MR CLEGG: Well, sir, can I just say to you, my understanding of - on the transcript last time, you weren't - you were questioning Mr Clues' surveys - whether it should be put up as evidence, and now today you're accepting and I would like to go away and get a definition of what evidence - what constitutes evidence for a start, sir.

COMMISSIONER GOZZI: Oh, well look, if you don't know whether or not that's evidence then we're really -

MR CLEGG: Well as Mr -

COMMISSIONER GOZZI: - we're really in a -

MR CLEGG: - well as Mr Clues said, he's not a legal practitioner and I'm not a legal practitioner and I would just like to get it -

COMMISSIONER GOZZI: Well let me put it this way, I have no hesitation in indicating to you that the material is evidence. It's not direct evidence but it's evidence of a form - clearly it is.

MR CLEGG: But, sir, as I said -

COMMISSIONER GOZZI: I mean unless - unless - you know - unless you want to say to me that I should totally disregard the - the - the survey because it's been fabricated or whatever, but it's a matter of weight - it's not direct evidence -

MR CLEGG: No, I -

COMMISSIONER GOZZI: - it's not evidence through the witness box but evidence - evidence nevertheless.

MR CLEGG: Well, sir, as I say to you, I thought I was allowed the right to read the transcript before I responded and I - and I've come along on that basis and that's -

COMMISSIONER GOZZI: Well, look, it's a dangerous practice to fall into not to be able to respond when it is your application; essentially you are confined to it in your right of reply to matters raised -

MR CLEGG: That's right, yes, sir, and that's what I -

COMMISSIONER GOZZI: - by Mr Clues -

MR CLEGG: - yes, yes, yes.

COMMISSIONER GOZZI: - and you should be in a position in the normal course of events - it's not as though we're - you're asking for adjournment to make substantial submissions in reply -

MR CLEGG: No.

COMMISSIONER GOZZI: - in reply to what may have been put previously - you are in right of reply.

MR CLEGG: Yes.

COMMISSIONER GOZZI: And normally - normally in those circumstances the advocate gets up and goes.

Mr Clues, what's your view about the request for adjournment?

MR CLUES: Mr Clegg did call me this morning and indicated that he was going to seek the adjournment and I indicated that I wouldn't be opposing the adjournment but I would indicate that neither am I supporting it - I'll leave that up to the commission to determine. I would indicate that we have concerns in relation to the fact that as you indicate, it's right of reply, it doesn't require a substantial amount of research - we're not going to rehear the matter - all we need to hear is a few brief comments as to what their closing

remarks are in response to my arguments. It's not a rerun of the case; there's no opportunity to introduce any new evidence - it should take about 5 minutes to sum up.

COMMISSIONER GOZZI: Yes, it's - as I say, it's a different situation to what it would normally be. The commission has been lenient again without any real need to be, but the commission has been lenient in the event where a substantive submission is made and the other person still has to make a substantive submission, but in both - in your cases now, you've made your substantive submission, Mr Clegg and Mr Clues has made his substantive submission and really you are confined to right of reply and in those circumstances normally people would go and complete the case. What we're doing now - what you're seeking to do is to introduce another period of adjournment when the commission invariably at - you know - where it's been requested has said, okay, after a substantive submission has been made and somebody's asked for an adjournment then in some cases reluctantly, other cases not so, an adjournment has been granted so that the person could in preparation of their substantive submissions look at the - look at the transcript. But as I point out to you again, we're not in that situation now. In any event you should never take those things as read, Mr - Mr Clegg.

MR CLEGG: In future I won't, sir, but I did speak to Mr Clues this morning and I indicated that to him.

COMMISSIONER GOZZI: Well Mr Clues isn't sitting here yet.

MR CLEGG: No, well I explained that to him this morning, and as he said he didn't indicate any opposition to it. If he had, I would have -

COMMISSIONER GOZZI: Well look, I intend to grant you an adjournment but I must say I'm not thrilled about it.

MR CLEGG: I appreciate that, sir.

COMMISSIONER GOZZI: Alright, we'll go off the record and set a date.

OFF THE RECORD

COMMISSIONER GOZZI: These proceedings - yes - these proceedings are adjourned to 1st June at 10.30 to take your right of reply which will conclude the proceedings. Thank you.

HEARING ADJOURNED