

This is an extract from the exposure draft published on 11 July 2017. It is a marked up copy of clause 9 demonstrating the provisional views in [\[2017\] FWCFB 3543](#).

DRAFT

9. Commission, bonus or incentive payments

9.1 Payment by wages with commission, bonus or incentive payments

- (a) Where the employer and the employee agree that, in addition to the minimum weekly wage, the employee will be entitled to a portion of the commission paid to the employer, then any method of calculation or any formula for calculating the amount of commission that will be payable to the employee must be evidenced in a written agreement between the employer and the employee.
- (b) Where it has been agreed between the employer and the employee that the employee will be entitled to a bonus or an incentive payment (as opposed to commission under clause 9.1(a)) particulars of the bonus or incentive payment entitlement must be evidenced in a written agreement between the employer and the employee.

9.2 Written agreements generally

- ~~(a) Once a written agreement has been made with respect to clauses 9.1 and 9.7, any subsequent agreement to vary the employee's commission, bonus or incentive payment arrangements must be evidenced in a further written agreement between the employer and the employee. Provided that where an employee agrees to a change in his or her commission, bonus or incentive arrangement, the employee will be entitled to receive sales commission, bonus or incentive payments calculated in accordance with the written agreement (whether made under this clause or clause 9.1) which was in force on the date the contract for sale or lease of property became legally enforceable~~
- ~~(b) A signed copy of every written agreement regarding commission, bonus or incentive payment arrangements must be provided by the employer to the employee.~~
- (a) Once a written agreement has been made with as provided for in clause 9.1 – Payment by wages with commission, bonus or incentive payments or clause 9.7 – Commission only employment, any subsequent agreement to vary the employee's commission, bonus or incentive payment arrangements must be evidenced in a further written agreement between the employer and the employee.
- (b) Where an employee agrees with the employer to a change in his or her commission, bonus or incentive arrangement, the employee will be entitled to receive sales commission, bonus or incentive payments calculated in accordance with the written agreement (whether made under this clause or clause 9.1) which was in force on the date the contract for sale or lease of property became legally enforceable. Provided that in circumstances where a non-commission-only employee is changing to a commission-only agreement, then the commission-only agreement must not include any accountability the employee may have had under the commission agreement which was in force immediately prior to the commission-only agreement becoming operative.
- (c) A signed copy of every written agreement regarding commission, bonus or incentive payment arrangements must be provided by the employer to the employee.

9.3 Account to employee

The employer must account to the employee in written form for any commission, bonus or incentive payment-based entitlement as it becomes due and payable in accordance with the terms of any written agreement.

9.4 Entitlements after employment ends

~~(a) The employee is entitled to be credited with a portion of the commission paid to the employer, incentive payments or bonuses calculated in accordance with a written agreement, for any transaction where:~~

~~(i) there was an existing legally enforceable contract either:~~

- ~~• before the cessation of the employee's employment;~~
- ~~• if the employer gave notice to the employee, during the notice period;~~

~~or~~

- ~~• if the employer asked the employee to waive the notice period and the employee agrees, during the notice period to which the employee would have been otherwise entitled; and~~

~~(ii) the employer is paid commission by the client in respect of the existing legally enforceable contract referred to in clause 9.4(a)(i); and~~

~~(iii) the commission payment referred to in clause 9.4(a)(ii) is cleared into the employer's bank account.~~

~~(b) Unless the written agreement specifies otherwise, the portion of the commission referred to in clause 9.4(a) must be the same as that with which the employee would have been entitled to be credited if employment had continued.~~

(a) Following cessation of employment, the employee is entitled to be credited with a portion of the commission, incentive payments or bonuses calculated in accordance with the terms of the written agreement made pursuant to clauses 9.1 or 9.7 of the Award, but only in the following circumstances:

(i) where the employee's employment is terminated for reason of the employee's serious misconduct, there was a legally enforceable contract in place for the sale or lease of the property before the cessation date of the employee's employment; or

(ii) where the employee is terminated for any other reason, there was a legally enforceable contract in place for the sale or lease of the property prior to the expiration date of the exclusive agency period.

For the purpose of this sub-clause, "exclusive agency period" means the period for which the employer has the exclusive right to sell or lease a property under the executed and valid agency agreement that was in effect at the time the employee's employment ceased. There is no entitlement under this clause where the property for sale or lease has been listed other than on an exclusive agency basis.

(b) Unless the written agreement made either under clause 9.1 or 9.7 of this Award specifies otherwise, the portion of the commission, incentive payments or bonuses referred to in clause 9.4(a) must be the same as that with which the employee would have been entitled to be credited if their employment had continued.

- (c) Any entitlement to commission, incentive payments or bonuses calculated under this sub-clause only arises once the employer is paid commission by the client in respect of the sale or lease of the property to which the legally enforceable contract relates and the commission payment is cleared into the employer's bank account.

9.5 Disputes

If there is a dispute between the employer and the employee as to whether all or any part of the commission is due to an employee pursuant to clauses 9.1 or 9.7, the matter will be dealt with in accordance with clause 21—Dispute resolution.

9.6 Calculation of NES entitlements

~~(a) Any commission entitlement calculated in accordance with a commission-only agreement may also allow for annual leave and personal carer's leave or any other entitlements under the NES to be paid in advance. Provided that the monetary component for each of those entitlements must always be in addition to the minimum commission-only rate.~~

- (a) Commission-only employees will be paid for periods of leave to which they are entitled under the NES, at the time that the leave is taken, at no less than the employee's base rate of pay. Any commission-only entitlement calculated in accordance with a commission-only agreement may provide for a monetary component for the payment of leave to be accumulated in advance, provided that the monetary component is paid at the time that the employee takes the leave and that the monetary component for each type of leave entitlement must always be in addition to the minimum commission-only rate.

- (b) Any inclusions as referred to in clause 9.6(a) must be clearly set out in a written agreement.

- (c) The base rate of pay in relation to entitlements under the NES for an employee, who is paid on a commission-only basis, is the minimum wage in clause 8.1 for the employee's classification level.

- (d) The full rate of pay in relation to entitlements under the NES for an employee, who is paid on a commission-only basis, is:

- (i) the minimum wage in clause 8 for the employee's classification level; or
- (ii) the employee's average weekly remuneration over the 12 months (or, if the employee has been employed less than 12 months, that period) immediately prior to when the full rate of pay is to be calculated,

whichever is the greater.

9.7 Commission-only employment

~~(a) Subject to clause 9.7(b), an employee engaged in a property sales classification may agree with the employer to be paid on a commission-only basis. Such an employee is considered a pieceworker, and is referred to in this award (and within the real estate industry) as a commission-only employee.~~

~~(b) Minimum requirements for commission-only employment~~

Exposure draft – Real Estate Industry Award 2015

~~A person may only be a commission only employee when all of the following conditions have been satisfied:~~

- ~~(i) — the employee has agreed in writing with the employer to be remunerated on a commission only basis and has entered into a written agreement (commission only agreement) with the employer that sets out the basis upon which the entitlement to commission will be calculated;~~
- ~~(ii) — the employee has been issued with a real estate agent’s licence or is registered or permitted to perform the duties of a real estate salesperson under real estate law;~~
- ~~(iii) — the employee has been engaged as a real estate salesperson (with any licensed real estate agent) or was an active licensed real estate agent for an aggregate period of at least 12 months in the five years immediately prior to entering into the commission only agreement;~~
- ~~(iv) — the employee is at least 21 years of age;~~
- ~~(v) — the employee is not engaged as a casual, a junior, a property sales associate or a trainee; and~~
- ~~(vi) — the employee can demonstrate (with the present or any past employer) that they had achieved the minimum income threshold in clause 9.7(c). Provided that the minimum income threshold will not need to have been achieved if the employee has operated their own real estate business within the last five years.~~

~~(c) — **Minimum income threshold**~~

- ~~(i) — The minimum income threshold has been achieved if (and only if) the employee can establish that, if the lowest rate of commission to be applied under the commission only agreement had been applied to the employee’s real estate sales or commercial leasing transactions in any single 12 month period in the five years immediately prior to entering into the commission only agreement, the employee would have been entitled to be paid the following amount:
 - ~~• — if the employee was not required to incur the costs of supplying and running a motor vehicle and/or the costs of supplying and using a mobile telephone, an amount at least equal to the employee’s wage specified in clause 8, calculated as an annual amount, based on the minimum weekly wage for the employee’s classification; or~~
 - ~~• — if the employee was required to incur the costs of supplying and running a motor vehicle and/or the costs of supplying and using a mobile telephone, an amount at least equal to 110% of the employee’s wage specified in clause 8, calculated as an annual amount, based on the minimum weekly wage for the employee’s classification.~~~~
- ~~(ii) — The employer is entitled to rely on any data supplied by the employee from any past employer for the purpose of determining if the minimum income threshold has been achieved, provided that the employee provides the employer with a statutory declaration about the accuracy of such data.~~

(a) Agreement to enter into commission-only employment arrangements

An employee engaged in a property sales classification (other than a casual employee) may agree with the employer to be paid on a commission-only basis. Such an employee is considered a pieceworker and is referred to in this award (and within the real estate industry) as a commission only employee. An employee paid on a commission-only basis must not be engaged as a casual employee.

(b) Objective of commission-only employment

The objective of commission only employment arrangements is to provide a mechanism by which a salesperson who meets the requirements set out below should achieve remuneration of 125% or more of the annualised minimum wage that an employee working in the same property sales classification under this award would be entitled to be paid.

(c) Minimum requirements for commission-only employment

A person may only enter into an agreement to be a commission-only employee when all of the following conditions have been satisfied.

- (i)** The employee and the employer have made a written agreement as provided in clause 9.2 that the employee will be remunerated on a commission-only basis and setting out the sets out the basis upon which the entitlement to commission will be calculated as provide in clause 9.2;
- (ii)** The employee has been issued with a real estate agent's license or is registered or permitted to perform the duties of a real estate salesperson under real estate law;
- (iii)** The employee has been engaged as a Property Sales Representative or a Property Sales Supervisor (with any licensed real estate agent) or was an active licensed real estate agent for at least 12 consecutive months in the 3 years immediately prior to entering into a commission only agreement;
- (iv)** The employee is at least 21 years of age;
- (v)** The employee is not engaged as a casual, a junior, a property sales associate or a trainee; and
- (vi)** For an employee employed on a commission-only basis after [insert date of amendment] the employee can establish (with the present or any past employer) that he or she has achieved the Minimum Income Threshold Amount (MITA) prescribed by clause 9.7(c) (as may be amended from time to time). Provided that, the MITA will not have to be achieved in circumstances where the employee has operated his or her own real estate business within the last 3 years.
- (vii)** An employee who qualified to be employed on a commission only basis under this award prior to [insert date of amendment] will continue to be eligible for commission only employment under the terms of this award as long as the employment with that employer continues, and subject to continuing to meet the MITA as required in clause 9.7(h).

(d) Minimum income threshold amount (MITA)

- (i) For the purpose of entering into commission only employment, the MITA has been achieved if the employee can establish that in any consecutive 12-month period in the 3 years immediately preceding entering into the commission-only agreement, the employee received a salary (including any commission or bonus payments) at least equal to 125% of the employee's classification rate as specified in clause 8 of this Award, calculated as an annual amount, excluding statutory superannuation.
 - (ii) The type of documents that an employer may rely upon to establish that the MITA is satisfied, include but are not limited to:
 - Individual Payment Summary;
 - Pay Slips; and/or
 - Commission statement records or other sales records.
 - (iii) The employer must be satisfied on reasonable grounds that the employee has established that he or she has achieved the MITA within the prescribed time period.
 - (iv) At the request of the employer, the employee will provide the employer with a statutory declaration which declares the accuracy and legitimacy of any documentation provided by the employee under sub-clause (ii) above.
- (e) **The following clauses of this award do not apply to a commission-only employee:**
- (i) clause 5.3(b)—Payment for part-time employment;
 - (ii) **clause 5.4—Casual employees**
 - (iii) clause 8—Minimum wages;
 - (iv) clause 9.1—Payment by wages with commission, bonus or incentive payments
 - (v) clause 10.2 to 10.7—Allowances; and
 - (vi) clause 12.1 and 12.2—Overtime.
- (f) **Minimum commission-only rate**
- ~~(i) The minimum commission-only rate is calculated as 35% of the employer's net commission.~~
 - (i) **The minimum commission-only rate is calculated as 31.5% of the employer's gross commission as defined in Schedule G—Definitions**
 - (ii) Subject to clauses 9.7(e)(iii) and (iv), a commission-only employee is always entitled to at least the minimum commission-only rate for each sales or commercial leasing transaction for which the employee was responsible.
 - (iii) In the situation where:
 - two or more employees are separately responsible for different components of a sales or commercial leasing transaction; and

- the employee portion of the employer’s net commission is to be split amongst the employees according to the component(s) for which the particular employee was responsible,

any commission-only employee responsible for one or more component(s) is entitled to at least the minimum commission-only rate proportionate to the value of each component.

- (iv) With respect to clause 9.7(e)(iii), component(s) may include, but are not limited to:
- commercial leasing of a property;
 - listing a property or business;
 - managing the listing of a property or business;
 - selling a property or business; and/or
 - nurturing a legally-enforceable contract to completion,
- (v) The proportionate value of each component will be as agreed in writing between the employer and the employee.

(g) Where it is agreed that an employee will also be entitled to a portion of the commission paid to the employer greater than the minimum commission-only rate prescribed in clause 9.7(e) then any method of calculation, or any formula for calculating what amount of commission will be payable to the employee in excess of the minimum commission-only rate, must be evidenced in a written agreement between the employer and the employee.

(h) When commission-only arrangements must cease

- (i) The gross income of commission-only employees must be reviewed annually to establish gross income
- (ii) For employees on commission-only arrangements entered into prior to [insert date of amendment] the review must occur no later than 12 months from [insert date of amendment];
- (iii) For employees engaged on commission-only arrangements entered into after [insert date of amendment] the review must occur no later than 12 months from the date those arrangements were entered into.
- (iv) Where the review establishes that the gross income of a commission-only employee for the year under review is less than the MITA as provided in clause 9.7(d) the commission only arrangement must cease.

(i) Resumption of commission only arrangements

Where a commission-only salesperson has ceased to be employed on commission only arrangements because of the operation of clause 9.7(h) of this Award, the three year period for the purpose of assessing whether the employee has achieved the MITA for the purposes of entering into further commission-only arrangements, commences from the date the employee ceased to be a commission only salesperson because of the operation of clause 9.7(i).