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The Real Estate Employers' Federation

Fact Sheet 03

Commission Only
Employment Fact Sheet

Commission Only Employment

CAN ANYONE BE EMPLOYED ON A COMMISSION ONLY BASIS?

No. In order to employ an employee on a commission only basis, the following criteria must be satisfied:

- The employee must be engaged as either a Property Sales Representative or a Property Sales Supervisor under the Award. The employee cannot be engaged as a casual, junior, a Property Sales Associate or a trainee;
- The employee must agree in writing to be remunerated on a commission only basis, and have a written agreement that sets out the basis upon which commission is to be calculated;
- The employee must have either a real estate agent's licence or be registered or permitted to perform the duties of a real estate salesperson under real estate law (certificate of registration in NSW);
- The employee must have been employed as a real estate salesperson for an aggregate period of at least 12 months in the five years prior to entering into the commission only arrangement;
- The employee must be at least 21 years of age; and
- The employee must be able to demonstrate that they would satisfy the Minimum Income Threshold Test (the "MITT") as outlined below. However, an employee that has operated their own real estate business within the last five years will not have to satisfy the MITT.

WHAT IS THE MITT?

The MITT limits the application of commission only employment to employees who can demonstrate from past sales experience an ability to earn remuneration by way of commission at least equal to the minimum annual award wage prescribed by the Award (the "Annual Award Wage"). The Annual Award Wage is the minimum weekly wage for the employee's classification multiplied by 52.14. You should note however, that this does not mean the employee is entitled to a minimum salary – it is simply a test to

determine if the employee can be engaged on a commission only basis.

The MITT is calculated over any 12 month period in the last 5 years and for this reason the employee's most successful 12 months would be selected. To calculate the MITT you will need information concerning the employee's sales in the selected 12 month period. In this regard, you are entitled to rely on any evidence supplied by the employee provided that the employee supplies you with a statutory declaration confirming the accuracy of the information.

HOW DO I CALCULATE THE MITT?

The following step-by-step guide shows how to calculate the MITT:

- Calculate the gross commission for **each** real estate sale or commercial leasing transaction effected by the employee in the chosen 12 month period. You then deduct from each transaction:
 - GST;
 - Any conjunction agent fees (if applicable); and
 - 10% of the remaining amount after (i) and (ii) have been deducted; then
- After (a) has been calculated for each transaction, add up the total amount from all transactions during the 12 month period; then
- Multiply the result of (b) by 35%; and
- If the answer for (c) is greater than the Annual Award Wage, or, where you are electing not to pay allowances, at least 110% of the Annual Award Wage, then the MITT is satisfied and the employee can be employed on a commission only basis.

IF THE EMPLOYEE SATISFIES THE MITT, WHAT IS THE MINIMUM PERCENTAGE OF COMMISSION THAT I HAVE TO PAY UNDER THE AWARD?

The Award requires you to pay the employee at least 35% of the employer's net commission (gross commission minus GST, conjunction agent fees and 10% of the remaining amount) for each sale or commercial leasing transaction for which the employee is responsible.

This Fact Sheet provides information about the employment of a salesperson on a "commission only" basis under the *Real Estate Industry Award 2010* (the "Award"). The new commission only structure set out in the Award replaces the *Real Estate Agents' (Commission Only) Australian Pay and Classification Scale* which has been in operation since October 2007.

WHAT IF TWO OR MORE EMPLOYEES ARE RESPONSIBLE FOR A SALES OR COMMERCIAL LEASING TRANSACTION?

In any real estate office there will undoubtedly be situations where two or more employees are involved in a sales transaction or commercial leasing transaction. In such situations, each employee is entitled to at least 35% of each 'component' of the transaction.

Below is an example of how the commission for sales or commercial leasing components would operate in practice:

Jim and Bob are commission only salespeople working for ABC Real Estate. Jim listed a property under an exclusive agency agreement, and Bob sold the property. As a result, the office has been paid \$12,222.23 commission from the vendor. There were no conjunction agent's fees for this sale.

Both Jim and Bob receive the minimum 35% commission for each component of a sales transaction for which they were responsible, as set out in the table below:

	Open Agency	Exclusive (including Continuing Agency)	Auction (including Continuing Agency)
Listing the property	30%	60%	50%
Selling the property	70%	40%	50%
Totals	100%	100%	100%

Based on the above figures, Jim would be entitled to 35% of the 60% listing component, and Bob would be entitled to 35% of the 40% selling component, calculated as follows:

Formula = gross commission less GST less conjunction agent fees less 10% of the remaining amount

Gross commission	\$12,222.23
Less GST	(\$1,111.11) (calc = \$12,222.23/110 x 10)
Subtotal	\$11,111.12
Less conjunction agent's fees	\$0.00
Subtotal	\$11,111.12
Less 10% of the remaining amount	(\$1,111.11) (calc = \$11,111.12 x 0.1)
Total	\$10,000.00 net commission

Jim's commission entitlement

\$10,000.00 multiplied by 60% listing component equals \$6,000.00.

\$6,000.00 multiplied by 35% commission equals \$2,100.00.

Jim is entitled to \$2,100.00 (less appropriate taxation) for listing the property.

Bob's commission entitlement

\$10,000.00 multiplied by 40% selling component equals \$4,000.00.

\$4,000.00 multiplied by 35% commission equals \$1,400.00.

Bob is entitled to \$1,400.00 (less appropriate taxation) for selling the property.



IS A COMMISSION ONLY EMPLOYEE STILL ENTITLED TO SUPERANNUATION?

Yes, a commission only employee is still entitled to have their superannuation contribution paid to their nominated superannuation fund. This must be **in addition** to the minimum commission only rate.

DO I STILL HAVE TO PAY A COMMISSION ONLY EMPLOYEE A MOTOR VEHICLE AND MOBILE TELEPHONE ALLOWANCE?

As discussed above, when calculating the MITT, if the employee can demonstrate earnings in a 12 month period that are at least 110% of the Annual Award Wage, you can require the employee to cover their own motor vehicle and mobile telephone costs. If this is not the case, and you require your employee to use their motor vehicle and/ or mobile telephone for work purposes, you will have to pay the employee the appropriate allowance/s.

DOES A COMMISSION ONLY EMPLOYEE STILL ACCRUE THEIR ENTITLEMENTS SUCH AS ANNUAL LEAVE AND PERSONAL/ CARER'S LEAVE?

Yes, a commission only employee still accrues all their entitlements under the National Employment Standards (the "NES") in the same manner as any other full time or part time employee (i.e. 20 days of annual leave and 10 days of personal/ carer's leave per annum for full time employees; or a pro rata of these amounts for part time employees). For further information on leave entitlements in the NES, please refer to REEF's 'Leave Entitlements' Fact Sheet.

There are two options in relation to the actual payment of NES entitlements:

- Pay the commission only employee at least the minimum 35% commission rate, and then pay any NES entitlement at the rate of pay outlined in the Award i.e. annual leave, personal/ carer's leave and public holidays are paid at the base rate of pay; notice of termination is paid at the full rate of pay (as defined in the Award), and long service leave is paid in accordance with the Long Service Leave Act 1955 (NSW). For example, if a commission only employee is classified as a Property Sales Representative under the Award and the pay rate for this classification is \$578.36 per week; then they would be paid \$578.36 for taking one week of personal/carer's leave. It is important to note that this amount CANNOT be debited or deducted from any commission; or
- A new provision under the Award makes it legal to pay a commission only employee for their NES entitlements in advance of their accrual. This is discussed in further detail opposite.



I HAVE NEGOTIATED A HIGHER RATE OF COMMISSION WITH MY SALESPERSON; CAN I ATTRIBUTE SOME OF THIS COMMISSION TO LEAVE ENTITLEMENTS AND SUPERANNUATION?

Yes. Changes brought about by the new Award mean that you can pay an employee some of their NES entitlements in advance of their accrual e.g. annual leave, public holidays, personal/carer's leave, and notice of termination. Employer's can also attribute a percentage of commission towards the employee's superannuation entitlement.

In practice, this means that the employer can attribute a percentage of the commission above the minimum rate of 35% towards the employee's NES entitlements (and superannuation) in an 'all up rate' ("All Up Rate"), and then reconcile the amount paid towards the NES entitlements against the appropriate rate of pay each time the employee is due to be paid for an NES entitlement (i.e. at the base or full rate of pay as discussed above). In this regard, employers need to ensure that the amount attributed in advance as part of an All Up Rate is equal to or greater than the amount the employee would receive under the appropriate rate of pay. In the rare instance that there is a shortfall, the employer would have to 'top up' the payment.

HOW DO I IMPLEMENT AN ALL UP RATE ARRANGEMENT?

REEF has prepared a commission only Employment Agreement that gives the option of an All Up Rate which incorporates the Base Commission rate (35%), NES entitlements and Superannuation. The most common request from our members is for a total commission of 50%, apportioned in accordance with the table below:

Base Commission	NES Entitlements	Superannuation	TOTAL
35%	10.87%	4.13%	50%

With this 50% All Up Rate arrangement, the employee would receive 45.87% of the employer's net commission (35% Base Commission + 10.87% NES Entitlements), and 4.13% of the employer's net commission would be sent to the superannuation fund (4.13% is 9% of the Base Commission and NES Entitlements, thereby satisfying the superannuation guarantee).

Please contact one of REEF's Workplace Relations Advisers for advice on alternative total commission figures.

Below is an example of how the commission calculation for an All Up Rate would operate in practice:

Michael is a commission only salesperson working for Top Real Estate Services. Michael has listed a property under an exclusive agency agreement. Following the sale of the property, the office has been paid \$12,222.23 commission from the vendor. There were no conjunction agent's fees for this sale.

Michael is entitled to receive an 'all-up rate' of 50% total commission (as apportioned in accordance with the table above) for each component of a sales transaction for which he was responsible, as set out in the table below:

	Open Agency	Exclusive (including Continuing Agency)	Auction (including Continuing Agency)
Listing the property	30%	60%	50%
Selling the property	70%	40%	50%
Totals	100%	100%	100%

Based on the above figures, Michael would be entitled to an All Up Rate of 50% of the 60% listing component, calculated as follows:

Formula= gross commission less GST less conjunction agent fees less 10% of the remaining amount

Gross commission	\$12,222.23
Less GST	(\$1,111.11) (calc = \$12,222.23/110 x 10)
Subtotal	\$11,111.12
Less conjunction agent's fees	\$0.00
Subtotal	\$11,111.12
Less 10% of the remaining amount	(\$1,111.11) (calc = \$11,111.12 x 0.1)
Total	\$10,000.00 net commission

Michael's commission entitlement and breakdown of payment: \$10,000.00 multiplied by 60% listing component equals \$6,000.00.

\$6,000.00 multiplied by 50% equals \$3,000.00, apportioned in accordance with the table below:

Base Commission	NES Entitlements	Superannuation	TOTAL
35% = \$2,100.00	10.87% = \$652.20	4.13% = \$247.80	50% = \$3,000.00

Based on the above example, the employee would receive the Base Commission plus the NES Entitlements less appropriate taxation (\$2,100.00 + \$652.20= \$2,752.20, less appropriate taxation). The Superannuation amount of \$247.80 would be sent to the employee's superannuation fund.

DO I NEED TO SHOW THE BREAK-UP OF THE ALL UP RATE ON A PAYSリップ?

Yes. You will need to demonstrate on your pay slip that the amounts you have attributed to the Base Commission, NES Entitlements and Superannuation have been paid.

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based on your own particular circumstances
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