



Wage-Setting Decision 6/2007

On 3 August 2007 we, Ian Harper (Chairman), and Hugh Armstrong, Patrick McClure, Mike O'Hagan, and Judith Sloan (Commissioners), together constituting the Australian Fair Pay Commission, acting pursuant to the powers conferred on the Australian Fair Pay Commission by section 214(1) of the *Workplace Relations Act 1996* make the following decision to be known as Australian Fair Pay Commission Wage-Setting Decision 6/2007.

Commencement of decision

This wage-setting decision commences on 1 October 2007.

A Determination of a new Australian Pay and Classification Scale

A1 Determination of a new Australian Pay and Classification Scale for commission only real estate salespersons

- (1) Pursuant to subsection 214(1) of the *Workplace Relations Act 1996*, the Commission determines a new Australian Pay and Classification Scale known as the 'Real Estate Agents' (Commission Only) Australian Pay and Classification Scale', [2007] APCS 3.
- (2) The Real Estate Agents' (Commission Only) Australian Pay and Classification Scale consists of the content set out in Schedule A to this decision.

B Reasons for decision

B1 Reasons for this wage-setting decision

The reasons for this wage-setting decision are set out in Schedule B to this decision.

On 3 August 2007 we, Ian Harper (Chairman), and Hugh Armstrong, Patrick McClure, Mike O'Hagan, and Judith Sloan (Commissioners), together constituting the Australian Fair Pay Commission, make this decision to be known as Australian Fair Pay Commission Wage-Setting Decision 6/2007.

A handwritten signature in blue ink that reads "Ian R. Harper" followed by a long horizontal flourish.

Ian R. Harper
Chairman

A handwritten signature in blue ink that reads "Hugh Armstrong" followed by a small dot.

Hugh Armstrong
Commissioner

A handwritten signature in blue ink that reads "Patrick McClure" followed by a flourish.

Patrick McClure, AO
Commissioner

A handwritten signature in blue ink that reads "Mike O'Hagan" followed by a flourish.

Mike O'Hagan
Commissioner

A handwritten signature in blue ink that reads "Judith Sloan" followed by a flourish.

Judith Sloan
Commissioner

Schedule A

The content of this Schedule is set out on pages 4, 5 and 6 of this publication.

[2007] APCS 3

Real Estate Agents' (Commission Only) Australian Pay and Classification Scale

1. Title and Pay Scale number

Real Estate Agents' (Commission Only) Australian Pay and Classification Scale, [2007] APCS 3.

2. Commencement

This Pay Scale comes into operation on 1 October 2007, in accordance with the Australian Fair Pay Commission's Wage-Setting Decision 6/2007.

3. Definitions

In this Pay Scale:

completed sales transaction means the settlement of the sale of property. This may be determined by the completion of a contract for the sale of property.

conjunction agent means a real estate agent invited by the principal real estate agent holding the sales agency agreement to assist in selling the property and to receive a share of the principal real estate agent's commission.

employer's gross commission means the commission the employer is entitled to receive from the client/vendor in relation to a completed sales transaction.

employer's net commission means the employer's gross commission minus:

- (i) any portion of the employer's gross commission paid to a conjunction agent; and
- (ii) any applicable GST on the employer's gross commission; and
- (iii) 10% of the amount remaining after the above amounts have been subtracted.

Pay Scale means Australian Pay and Classification Scale.

property means land (either improved or unimproved) irrespective of size, buildings (whether built or to be built), homes (including project homes, volume homes and packages of land and home) (whether built or to be built), businesses, retirement villas, units, or time shares.

sales transactions involving an agency relationship means sales transactions where the employer receives payment from the client/vendor for the sale of the vendor's property.

selling includes, but is not limited to, the activities of:

- (i) listing, sourcing, securing or managing a client's/vendor's property for sale on behalf of the employer;
- (ii) managing the sale process, finding a buyer, executing a sale contract or dealing with all matters connected with settlement or completion of a sales transaction.

4. Coverage

This Pay Scale covers an employee who:

- (a) is an 'employee' within the meaning of subsection 5(1) of the *Workplace Relations Act 1996*; and
- (b) is engaged as a real estate agent or to perform the functions of a real estate agent; and
- (c) has been issued with a real estate agent's license or is registered or qualified to perform the duties of a real estate agent by the relevant regulatory authority in the State or Territory in which the employee is employed; and
- (d) has agreed with his or her employer, in writing, to be remunerated on a commission only basis (and that agreement is in force); and
- (e) is capable of being classified under a classification contained in this Pay Scale; and
- (f) has agreed with his or her employer, in writing, to be classified under a classification contained in this Pay Scale (and that agreement is in force);

but does **not** cover an employee who:

- (g) is under 21 years of age; or
- (h) is engaged as a casual employee; or
- (i) is subject to a training arrangement; or
- (j) would, but for this Pay Scale, be otherwise covered by the preserved Pay Scale derived from the *Clerical and Salaried Staffs' (Agribusiness) Award 1999* [FED].

5. Classification

Commission only real estate salespersons undertaking sales transactions involving an agency relationship

- (1) The *commission only real estate salespersons undertaking sales transactions involving an agency relationship* classification applies to an employee who:
 - (a) has agreed with his or her employer, in writing, to be classified as a commission only real estate salesperson undertaking sales transactions involving an agency relationship (and that agreement is in force); and
 - (b) has been employed in the real estate industry to perform sales transactions involving an agency relationship for at least 12 months prior to entering the above agreement; and
 - (c) if the rates of pay set out in clause 6 had applied (to the employee's sales transactions involving an agency relationship) in any single 12 month period in the 5 years immediately before entering into the agreement referred to in paragraph 5(1)(a) - the employee would have been entitled to be paid an amount at least equal to what the employee was entitled to be paid under section 182 of the *Workplace Relations Act 1996* (for work performed as a real estate agent) for the 12 months immediately before entering into that agreement.

- (2) For paragraph 5(1)(c), subclause 6(2) is to be applied on the basis that an agreement was in force specifying that each employee responsible for selling a property would be paid an equal share of 35% of the employer's net commission resulting from a completed sales transaction.

6. Rates of Pay

Commission only real estate salespersons undertaking sales transactions involving an agency relationship

- (1) Subject to subclause (2), where an employee is responsible for selling a property - the employee must be paid at least 35% of the employer's net commission resulting from the completed sales transaction.
- (2) Where:
 - (a) two or more employees, whether they are covered by this Pay Scale or not, are responsible for selling a property; and
 - (b) each employee has agreed with his or her employer, in writing, as to the proportion of the employer's net commission each employee responsible for selling that property is entitled to; and
 - (c) each agreement specifies that the employees responsible for selling a property are to be paid, in aggregate, at least 35% of the employer's net commission resulting from the completed sales transaction;

then each employee covered by this Pay Scale must be paid at least the agreed amount.

- (3) For the avoidance of doubt, where the requirements set out in paragraphs (b) and (c) of subclause 6(2) are not met in relation to an employee responsible for selling a property, that employee must be paid the rate specified in subclause 6(1).
- (4) An employee is entitled to the rates of pay in subclauses 6(1) or 6(2) in relation to a completed sales transaction occurring after the employee's employment has ended if:
 - (a) the employee was responsible for the selling of a property; and
 - (b) contracts for the sale of the property have been executed or exchanged before the employee's employment ended.

7. Frequency of payment

Commission only real estate salespersons undertaking sales transactions involving an agency relationship

- (1) An employee must be paid no later than 30 days after the employer has become entitled to receive payment from the client/vendor in relation to the relevant completed sales transaction.

Schedule B

Reasons for Wage-Setting Decision 6/2007

The Australian Fair Pay Commission (Commission) announced on 31 March 2007 a review of minimum wage arrangements in the real estate sector.

As part of this review, the Commission considered:

- the merits of creating a new Australian Pay and Classification Scale (Pay Scale) or adjusting preserved Pay Scales for the real estate sector to provide basic piece rates of pay; and
- appropriate basic piece rates for the real estate sector.

Scope of the review

The Commission requested that submissions to the review address:

- the desirability, or otherwise, of setting basic piece rates for the sector; and
- appropriate basic piece rates for the sector including:
 - justifications for any suggested rates;
 - consideration of an ‘employee of average capacity’; and
 - compliance with pre-Work Choices wage guarantees.

The Commission also requested that submissions take account of its objective in performing its wage-setting function to promote economic prosperity, having regard to:

- the capacity for the unemployed and low paid to obtain and remain in employment;
- employment and competitiveness across the economy; and
- providing a safety net for the low paid.

Several matters were deemed to be outside the scope of the Commission’s review. These matters relate to:

- employee entitlements other than wages, for example, annual or personal leave;
- independent contractors;
- workplace agreements; and
- the enforcement of industrial instruments.

The legislation

Amendments to the *Workplace Relations Act 1996* (WR Act), most notably the *Workplace Relations Amendment (Work Choices) Act 2005* (Work Choices), have made a number of changes to the setting of minimum wages in Australia.

Minimum wages for employees covered by the federal system are no longer included in awards.¹ They are now contained in Pay Scales and form part of

¹ Except for employees bound by ‘transitional awards’ under Schedule 6 to the WR Act (although these are not ‘awards’ for the purposes of Part 10). Transitional awards operate for a period of 5 years from 27 March 2006

the Australian Fair Pay and Conditions Standard. Pay Scales may be determined, adjusted or revoked by the Commission.

Pay Scales include certain wage and wage-related provisions, including provisions that specify:

- classification-based wages, including basic periodic rates and basic piece rates of pay;
- frequency of payment requirements;
- casual loadings; and
- the coverage of the Pay Scale.²

The following pay components remain in awards³ and are not included in Pay Scales:

- incentive-based payments and bonuses;
- annual leave loadings;
- monetary allowances;
- loadings for working overtime or for shift work; and
- penalty rates.

The Commission's power to determine new Pay Scales does not cover the inclusion of these types of entitlements.

Submissions to the Commission's 2006 wage review raised issues regarding a range of historical piece rates or commission-based payments in awards. Several submissions called for the Commission to create new Pay Scales for piece rate workers.

In Wage-Setting Decision 1/2006, the Commission stated:

Despite what appears to be a relatively small proportion of preserved Pay Scales that establish basic piece rate Pay Scales, their operation appears diverse, reflecting industry-specific circumstances, and the historical methods of adjustment appear obscure. There is some evidence of previously award-free employees whose informal or common law remuneration arrangements reflected basic piece rate pay practices.

The introduction of the standard FMW, the legislative definition of basic piece rates and the interaction of allowable award matters and Pay Scales with pre-reform wage instrument 'piece rate' provisions raise complex issues. As part of its future inquiries, the Commission will further consider the option of new basic piece rate Pay Scales.⁴

and cover employees of employers who were covered by federal awards before 27 March 2006 but who are not constitutional corporations or otherwise 'employers' within the meaning of section 6(1) of the WR Act.

² Note that this is not an exhaustive list of what is or may be included in a Pay Scale.

³ As well as notional agreements preserving State awards.

⁴ AFPC, *Wage-Setting Decision and Reasons for Decision*, Commonwealth of Australia, October 2006. p. 130 (reported at 157 IR 127 at 229).

What are piece rates?

Section 178 of the WR Act defines a 'piece rate of pay' as:

... a rate of pay that is expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked).

And defines a 'basic piece rate of pay' as a basic piece rate:

... other than a piece rate of pay that is payable, as an incentive-based payment or bonus, in addition to a basic periodic rate of pay.

This means that where a piece rate, including commission arrangements, operate in conjunction with a basic periodic rate of pay, such as a retainer, the piece rate is deemed to be an allowable award matter and is not included in the Pay Scale.

The Award Review Taskforce made a similar observation:

Prior to the commencement of Work Choices ... a number of awards had clauses where employees could be paid according to their output and these were deemed 'piece workers.' However the WR Act now defines a piece rate as a rate of pay that is expressed as a rate for a quantifiable output or task. Where a rate is payable in addition to a basic periodic rate of pay this is considered an incentive-based payment or bonus and is an allowable award matter.⁵

Legislative parameters

The WR Act allows the Commission to make new Pay Scales (subsection 214(1)) containing piece rates or adjust Pay Scales (subsection 216(1)) to include piece rates. It also imposes specific restrictions and obligations on the Commission if it decides to do so.⁶

Section 191 of the WR Act

Section 191 of the WR Act applies if the Commission exercises its powers to adjust or create Pay Scales and:

- (1)(b) either or both of the following...apply in relation to a particular employee who will be affected by the exercise of the power:
 - (i) immediately after the exercise of the power takes effect, there will, under section 182, be guaranteed basic piece rates of pay for the employee;
 - (ii) immediately after the reform commencement (and after any relevant adjustments mentioned in sections 209 to 212 took effect), there would, under section 182, have been guaranteed basic piece rates of pay for the employee if the employee had at that time been in his or her current circumstances of employment.

⁵ Australian Government Award Review Taskforce, *Award Review Taskforce Final Report on Rationalisation of Wage and Classification Structures*, July 2006, p. 50, para. 177.

⁶ See in particular Subdivision E of Division 2, Part 7 of the WR Act.

Thus section 191 applies if a Pay Scale is to be made or adjusted and there was previously and/or there will, immediately after the exercise of power, be a piece rate of pay guaranteed for that employee.

Subsection 191(2) then provides that:

The AFPC must exercise the power in a way that it considers will not result in an employee of average capacity, after the exercise of the power takes effect, being entitled to less basic pay per week than he or she would have been entitled to because of this Division immediately after the reform commencement if the employee had at that time been in his or her current circumstances of employment.

The Explanatory Memorandum to the Bill that became Work Choices states that:

This provision [subsection 191(2)] deals with situations where the [Commission] makes or adjusts [a Pay Scale] basic piece rate of pay for an employee (whether or not that employee was [a Pay Scale] piece rate employee prior to the [Commission's] decision taking effect) or adjusts [a Pay Scale] so that an employee who was [a Pay Scale] piece rate employee immediately before the decision is paid a basic periodic rate of pay immediately after the [Commission's] decision takes effect.⁷

and that:

The inclusion of this concept [employee of average capacity] would enable basic piece rates of pay to be converted into a basic periodic rate of pay or vice versa for the purposes of making comparisons under this Subdivision. For example, if the [Commission] adjusts [a Pay Scale] so that an employee that was [a Pay Scale] piece rate employee at reform commencement becomes entitled to a guaranteed basic periodic rate of pay after the [Commission] decision takes effect, the [Commission] must set that basic periodic rate of pay at a level that it considers would not be less than [a Pay Scale] piece rate employee of average capacity in the same circumstances as the employee would have received as basic pay immediately after reform commencement.⁸

Applying section 191 of the WR Act

Where section 191 applies, subsection 191(2) requires that the Commission exercise its power in a way it 'considers' will not result in an 'employee of average capacity' being entitled to less basic pay per week.

The Commission has applied the term 'employee of average capacity' according to its ordinary meaning. While the Commission notes that the term 'employee/worker of average capacity' has been used in awards for many years, the Commission has not been able to find any judicial consideration of this term. Thus what is 'average' will be a matter of fact and evidence for each class of employee.

The restrictions imposed on the Commission by subsection 191(2) are discussed below in relation to the two broad categories of pre-Work Choices arrangements that apply to real estate salespersons.

⁷ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, p. 91, para. 385.

⁸ Explanatory Memorandum, Workplace Relations Amendment (Work Choices) Bill 2005, p. 91, para. 388.

Award free employees

Award free employees brought into the Work Choices system are, from 27 March 2006, covered by the standard Federal Minimum Wage (FMW).⁹

Award free employees who were paid wholly by commission are subject to the Australian Fair Pay and Conditions Standard (Standard) and guaranteed the standard FMW.

For a previously award free employee, any new piece rate (commission-only) Pay Scale arrangement would need to at least equate to the standard FMW (or other appropriate minimum rate as at reform commencement) per hour worked for an employee of average capacity over a week.

Employees covered by awards or other pre-reform wage instruments

If awards that existed prior to reform commencement provided for piece rate or commission-only pay arrangements, these are preserved as piece rates in Pay Scales derived from those awards.

Some awards that existed prior to reform commencement allowed salespeople to opt-out of the hourly award rates of pay by entering into an agreement with their employer. These types of opt-out agreements are preserved under Work Choices.

However, these agreements only apply to the individual employee where the option was exercised prior to reform commencement. The arrangements that facilitate the making of opt-out agreements do not form part of the preserved Pay Scale.

Any new or adjusted piece rate (commission-only) Pay Scale would need to provide an employee of average capacity with at least the basic pay per week that he or she would have been entitled to under the preserved Pay Scale as at reform commencement.

Commission-only pay arrangements

Submissions received as part of the Commission's review of wages in the real estate sector identify that, in much of Australia, the commission-only method of remuneration is well accepted and widely adopted by the real estate sector.¹⁰ The Small Business Union/ADL Software suggest that:

It has been industry practice, for one hundred or more years, for one of the primary mechanisms of remuneration in the Real Estate industry to be "Commission Only" for the sales people involved in selling vendor's [sic] properties.¹¹

The Combined Real Estate Industry Group (REIG) submission highlights that:

⁹ Award free employees' are employees that were not, as at 27 March 2006, covered by a preserved Pay Scale.

¹⁰ For example, REIG, *Real Estate Industry Piece Rate Submission*, May 2007, p. 6.

¹¹ Small Business Union/ ADL Software, *Second submission for minimum wage levels in the Real Estate Industry for "Commission Only" sales personnel*, May 2007, p. 2.

Real estate businesses operate in an environment where income is determined in accordance with results. Income is not generated unless the real estate business and its employees successfully execute sales and/or leasing transactions. It follows that the industry's nature is best described as "incentive driven".¹²

Further, the Real Estate Institute of Australia (REIA) submission states that:

According to the Australian Bureau of Statistics publication *Real Estate Services 2002-03*, Australian real estate agencies derive, on average, 73.3% of business income from commissions arising from property sales. Clearly, the fortunes of real estate agencies are heavily depend[ent] upon the performance of their sales staff...

As a result, a poor performing yet experienced salesperson may become an unnecessary business cost if sufficient sales are not made to cover their minimum wage as well as other associated costs borne by the agency such as the provision of training, vehicle, phone and computer. Agencies are therefore likely to terminate the services of any significantly underperforming salesperson attracting a minimum wage. Conversely, if remuneration payments are made solely on the basis of sales performance, the agency may instead choose to retain the services of an under-performing salesperson with both parties anticipating that performance will improve over time with further training and experience or as market conditions improve.

With regard to engaging employees, agencies will of course be more likely to engage salespersons where the risk of failure may be shared between both the agency and the employee after a certain time period.¹³

The REIG submission suggests that the strong reliance on the performance of employee salespersons in the real estate sector is inherent in the nature of the enterprise that real estate agencies undertake:

Unlike almost all other industries, the "stock" for a real estate agency cannot be purchased from a manufacturer, supplier or financial provider – it must be sourced and then procured as a result of the agency's own commercial efforts, or those of its employees.¹⁴

Some submissions propose that the removal of the commission-only arrangements that existed in various jurisdictions, and the requirement to pay a basic periodic rate of pay, appears to have created a scenario where, "if sales representatives fail to perform, there is a significant impact on the viability of the business"¹⁵ and hence their capacity to remain in employment.

Some submissions, however, indicate that commission-only methods of remuneration may be inequitable and lead to employees receiving less than

¹² REIG, *Real Estate Industry Piece Rate Submission*, May 2007, p. 4, para. 2.2. The REIG submission is a joint submission of the Real Estate Employers' Federations of New South Wales and South Australia, the Real Estate Employers' Association of Queensland, the Property Sales Association of Queensland (PSAQ), the Real Estate Association (REA) and is endorsed by Ray White Real Estate, Century 21 Australia, Chesterton International, Raine & Horne (Queensland) and the Real Estate Institute of Australia.

¹³ REIA, *REIA Submission to the AFPC on Minimum Wage Arrangements in the Real Estate Sector*, May 2007, p. 2. This submission is made on behalf of the Real Estate Institute of the Australian Capital Territory, the Real Estate Institute of New South Wales, the Real Estate Institute of the Northern Territory, the Real Estate Institute of Queensland, the Real Estate Institute of South Australia, the Real Estate Institute of Tasmania, the Real Estate Institute of Victoria and the Real Estate Institute of Western Australia.

¹⁴ REIG, *Real Estate Industry Piece Rate Submission*, May 2007, p. 11, para. 5.2.2.

¹⁵ Real Estate Employers' Federation of Western Australia, *Real Estate Sector – Review of Minimum Wage Arrangements*, correspondence to AFPC dated 10 May 2007, p. 2

the minimum basic periodic rate of pay that they would otherwise be entitled to receive for hours worked.¹⁶

The Australian Council of Trade Unions (ACTU) submission, which is supported by the Liquor, Hospitality and Miscellaneous Union (LHMU), notes that:

...the ability of an agent to earn through commissions is dependent on a number of variables outside his or her control. These include:

- a. Access to properties granted by the employer;
- b. The number of other agents with access to the same properties;
- c. The state of the overall property market;
- d. The value of the priorities in the area in which he or she works.

The lack of control of an individual agent over his or her earning ability makes a commission-only pay arrangement inherently unfair.¹⁷

Some individual submissions argue that the real estate industry is “an industry that exploits it[s] workers in the extreme” and that basic periodic rates of pay “stop employers hiring people without any consideration for their financial welfare”.¹⁸ Similarly, Pestana Realty says that:

The current structure in Queensland [that allows remuneration by commission] encourages unethical behaviour. Currently there are many salespeople, especially those working in the large franchise groups, who are only just surviving, living from sale to sale... In fact, many salespeople are paid on a debit/credit system. That is, their portion of the commission they earned is held by the owner [employer] and the sales person is paid a small weekly amount from the total held.¹⁹

The ACTU submits that adequate commission remuneration arrangements are available to real estate salespersons under the current regulatory framework eliminating the need for piece rates:

The Australian Fair Payment Conditions Standard in relation to hours of work allows the standard 38 hour week to be averaged over a 12 month period. Relevant awards also include provision for casual employment.

The flexibility of the hours of work provisions, particularly the 12 month averaging, means that the real estate industry can offset application of the minimum wage against any commissions payable.²⁰

¹⁶ ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission Review of Minimum Wages in the Real Estate Sector*, April 2007, pp. 1-2; LHMU, *2007 review of minimum wage arrangements in the real estate sector*, correspondence to AFPC dated 30 April 2007, p. 1; Pestana Realty, correspondence to AFPC dated 10 April 2007, p. 1; R O'Connell, correspondence to AFPC received 17 April 2007, pp. 1-2.

¹⁷ ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission Review of Minimum Wages in the Real Estate Sector*, April 2007, p. 2, paras 11-12; see also LHMU, *2007 Review of Minimum Wage Arrangements in the Real Estate Sector*, 30 April 2007, p. 1.

¹⁸ R O'Connell, correspondence to AFPC received 17 April 2007, pp. 1-2..

¹⁹ Pestana Realty, correspondence to AFPC dated 10 April 2007, p. 1.

²⁰ ACTU, *Australian Council of Trade Unions Submission to the Australian Fair Pay Commission Review of Minimum Wages in the Real Estate Sector*, April 2007, p. 1, paras 6-7.

These types of remuneration arrangements have been identified by the Department of Employment and Workplace Relations (DEWR):

If a new employee is covered by a Pay Scale that guarantees that employee a basic hourly rate – an employer will satisfy the wage guarantee if the commission paid covers the guarantee of payment for the total number of hours worked at the applicable Pay Scale rate.

If a new employee is covered by the FMW – an employer will satisfy the wage guarantee if the commission paid covers the guarantee of payment for the total number of hours worked at the FMW rate.

An employer and employee may agree (in writing) to satisfy the wage guarantee over a period not exceeding 12 months. If the commission received during the agreed period does not satisfy the guaranteed hourly wage, an adjustment at the end of the agreed period is required.²¹

New piece rate proposals

While some submissions suggest appropriate annual rates of pay or levels of piece rates, only the REIG submission proposes a model in which the piece rates are provided.²²

The model outlined in the REIG submission seeks the creation of a new Pay Scale that provides for commission-only remuneration arrangements. It also submits that this Pay Scale be available across the entire Work Choices jurisdiction (that is, in all States and Territories) and cover all employees who meet the five criteria set out below.

The REIG submission proposes that only employees with sufficient experience and who are able to demonstrate that they will receive adequate remuneration under commission-only arrangements should have access to piece rates. The REIG submission proposes access is limited to employees who:

- are appropriately licensed and registered to perform the duties of a real estate salesperson; and
- are employed in real estate sales (residential or non-residential) and/or non-residential leasing; and
- have agreed, in writing, to be remunerated on a piece rate basis; and
- have worked as real estate salespersons for at least 12 months prior to the time of entering into the agreement above; and
- are able to show that over any 12 month period in the five years before the making of the agreement above would have (had the piece rate method applied) earned at least the same amount they were entitled to receive under the applicable preserved Pay Scale or standard FMW (whichever is applicable).

In their model, REIG proposes that three piece rates be created. These piece rates would apply when real estate salespersons complete:

- sales transactions involving an agency relationship,²³

²¹ DEWR, *WorkChoices and employees on commission*, 2007, <<http://www.workchoices.gov.au/ourplan/publications/html/WorkChoicesandemployeesoncommission>>, at 28 May 2007.

²² REIG, Real Estate Industry Piece Rate Submission, May 2007, pp. 19-27.

²³ Where the employer receives payment from the vendor for the sale of the vendor's property.

- sales transactions not involving an agency relationship;²⁴ and
- non-residential leasing transactions.

Evidence considered by the Commission

The Commission considered data relating to each of the three types of piece rate separately.

Sales transactions involving an agency relationship

To demonstrate that the proposed piece rate formula will satisfy subsection 191(2) of the WR Act, the REIG submission uses data obtained from the Best Practice Australasian Residential Sales Department Benchmarks 2006 (the BPARSD 2006 data). The Secretariat has modelled the proposed formula based on the BPARSD 2006 data for both the 'average data' and data for the 'bottom 10 per cent' in Table 1.²⁵

Table B.1: Minimum rates of pay for real estate salespersons and predicted earnings under the proposed piece rate

Jurisdiction prior to 27 March 2006	Minimum hourly rate of pay at 27 March 2006	Minimum weekly rate for average hours worked at 27 March 2006 ²⁶	Minimum hourly rate of pay at 1 October 2007	Minimum weekly rate for average hours worked at 1 October 2007 ²⁷	Using BPARSD 2006 data applied to proposed piece rate method - for "average" data	Using BPARSD 2006 data applied to proposed piece rate method - for "bottom 10%" data
NSW	\$13.21	\$505.94	\$14.65	\$561.09	\$907.11	\$720.29
VIC	\$12.75	\$497.25	\$13.74	\$535.86	\$907.11	\$720.29
QLD	\$12.33	\$474.71	\$13.74	\$529.00	\$907.11	\$720.29
SA	\$12.30	\$482.16	\$13.74	\$538.61	\$907.11	\$720.29
WA	\$12.75	\$460.28	\$13.74	\$496.02	\$907.11	\$720.29
TAS	\$12.75	\$507.45	\$13.74	\$546.85	\$907.11	\$720.29
NT	\$12.75	\$558.45	\$13.74	\$601.81	\$907.11	\$720.29
ACT	\$12.75	\$552.08	\$13.74	\$594.95	\$907.11	\$720.29

The survey canvasses around 7,500 real estate agencies across Australia. Bestpractice.com.au Pty Ltd distributes the survey form to all previous respondents (about 400 in total) and to about 35,000 additional real estate agents, asking them to forward the survey to their employer. Real estate agencies which respond are offered a free copy of the survey results. Around 240 forms were received in response to the 2006 survey, of which 13 could not be used due to missing data. The survey does not collect any information

²⁴ Where the employer is the vendor, for example property development companies.

²⁵ REIG, Real Estate Industry Piece Rate Submission, May 2007, p. 14. REIG cites bestpractice.com.au Pty Ltd, *The Best Practice Australasian Residential Sales Department Benchmarks 2006*, 2006.

²⁶ Average hours per week data obtained from ABS, *Labour Force, Australia*, Detailed, Quarterly, Catalogue No. 6291.0.55.003, Canberra: ABS, 2007. The data contains information regarding both full time and part time employees.

²⁷ Average hours per week data obtained from ABS, *Labour Force, Australia*, Detailed, Quarterly, Catalogue No. 6291.0.55.003, Canberra: ABS, 2007. The data contains information regarding both full time and part time employees.

on hours worked but respondents are asked to report staff numbers as full-time equivalents.

The 2006 survey showed strong suburban differences in the performances of real estate agents, with some respondents reporting that they made a loss. Agents in affluent areas tend to do better than those in newer urban areas, where sales are more sensitive to interest rate movements.

It appears from the BPARSD 2006 data that the proposed model would satisfy the Commission's requirements under subsection 191(2) of the WR Act. However, the Commission notes that:

- the data are drawn from a single 12-month period and this may artificially inflate the predicted earnings of real estate salespeople by not accounting for what an average salesperson may earn in an average or lean year;
- the REIG submission identifies that commission-only remuneration fluctuates with the state of the property market and that:

...hard working professional real estate agents make good profits in boom markets and, during the rest of the typical seven to ten year business cycle, make modest profits at best.²⁸

Employee of average capacity

As discussed above, the concept of 'employee of average capacity' has no legislative definition and the Commission has applied the term according to its ordinary meaning.

The information that is available mainly pertains to the 'common sense' understanding of the concept and is more generally applicable to manual piece rate work such as fruit picking.

In some cases piece rates have been informed by evidence such as time and motion studies. In such circumstances, an 'employee of average capacity' has not necessarily meant the arithmetic average for all employees, but rather has emphasised an ability to do the work and experience in undertaking the task.

The following quote, while it considers a quite separate issue, does provide an example of how some previous piece rates were constructed:

The focus of the case is on PBR [payment by results] schemes wherein the individual employee's earnings are determined - subject to a minimum level being guaranteed - by the person's measured output. A version which is typical in the footwear industry is known as an Austral scheme. It involves the use of work-study techniques to determine a standard per-minute output. An employee who operates at this level achieves a 60 unit hour; and an employee who produces ten per cent more achieves a 66 unit hour. The PBR earnings are calculated - subject to what follows - by multiplying each unit by the per-minute wage of an employee who is remunerated on a time-rate basis. An employee whose output is no greater than 60 units per hour receives only the time-rate wage. Austral-type schemes typically require that

²⁸ REIG, *Real Estate Industry Piece Rate Submission*, May 2007, p.5, para. 3.3.

the standard unit of output be set so as to create some expectation of an ability to earn more than the time rate.²⁹

For the purposes of this review, the Commission has considered the concept of an 'employee of average capacity'. In the absence of a legislative definition, the Commission has considered both average data and data for real estate businesses in the bottom 10 per cent of performers as well as the additional experience protections that could be provided to limit the scope of any new piece rates.

Sales transactions not involving an agency relationship and non-residential leasing transactions

The data received by the Commission in relation to these piece rates is not sufficient to assure the Commission that a piece rate formula satisfies the legislative requirements of the WR Act.

Piece rates in the real estate sector

Pre-reform wage instruments operated to regulate the remuneration of employees in the real estate sector prior to the commencement of Work Choices in the following jurisdictions:

- New South Wales;
- Queensland;
- South Australia;
- Western Australia;
- Tasmania; and
- Victoria.³⁰

Prior to 27 March 2006, quite different commission-based remuneration arrangements existed across the various jurisdictions.

In New South Wales, Queensland and South Australia, the applicable pre-reform wage instruments enabled real estate salespersons to make individual agreements to opt out of the basic periodic rates of pay that would otherwise have applied. These agreements provided a means by which commission-only methods of remuneration could be negotiated and often included arrangements to compensate for a loss of conditions. In effect, these agreements are more like individual agreements than statutory minima.

Prior to 27 March 2006, commission-based pay arrangements in Victoria and Tasmania were subject to similar constraints imposed by the current WR Act. Any commission-based pay arrangement had to comply with the basic periodic rate of pay guarantees in those jurisdictions.

In Western Australia, prior to 27 March 2006, there was a pre-reform wage instrument that operated to regulate the remuneration of real estate salespersons, however this instrument exempted employees remunerated solely on a commission, percentage or piece rate basis.

²⁹ AIRC, *Section 113 Application to Vary, Textile Clothing and Footwear Union of Australia*, F0063 Dec 781/96, [AP N2922 (7 August 1996)], p. 1.

³⁰ Note that specific arrangements apply in relation to employees employed in Victoria who fall within the definition of employee contained in section 858 of the WR Act.

There were no pre-reform wage instruments that operated to regulate the remuneration of employees in the real estate sector in the:

- Northern Territory; or
- Australian Capital Territory.

The absence of specific regulation in these jurisdictions allowed real estate salespersons to be remunerated on a commission-only basis.

Pay arrangements have varied across all of the jurisdictions above and, under the WR Act, the Commission cannot wholly re-institute the pre-Work Choices arrangements which were removed.

The Commission is limited in the scope of new commission-based pay arrangements it can introduce. In particular, these limitations reflect the Commission's responsibility to set statutory minimum pay arrangements rather than consider incentive-based pay arrangements and individual case-by-case pay and conditions package arrangements that are more appropriately negotiated through agreements.

The Commission accepts the need for greater flexibility of pay arrangements for employees and employers in the real estate sector as identified in submissions. The Commission has therefore decided to determine a minimum piece rate Pay Scale, consistent with the WR Act, that provides commission-only remuneration arrangements for employees undertaking sales transactions involving an agency relationship.

The Commission is aware that there are factors outside the control of a real estate sales employee in obtaining sales, and that a commission-only arrangement may be unreasonably used by some employers, particularly in relation to the remuneration of inexperienced recruits.

Therefore, in addition to the wage guarantee required by the WR Act, the new piece rate Pay Scale will only be available as an option for employees who have demonstrated sufficient experience and track record to earn commissions in excess of the otherwise applicable minimum basic periodic rates of pay.

The new piece rate Pay Scale will be limited to employees who:

- hold the relevant qualifications and/or are properly registered as real estate agents; and
- have been performing work as real estate agents for at least 12 months; and
- have shown that they are capable, based on their previous sales performance, of earning sufficient income under the commission-only arrangements that are set out in the Pay Scale.

The new piece rate Pay Scale will be prevented from covering employees:

- who are under 21 years of age;
- who are engaged as casual employees;
- to whom training arrangements apply.

In addition, employees must agree to be covered by commission-only arrangements. In the absence of such agreement, a basic periodic rate of pay will apply.

The Commission considers that these protections will ensure the exercise of the Commission's power will not result in an employee of average capacity, including an employee to whom an 'opt-out agreement' applies, being entitled to less basic pay per week than he or she would have been entitled to on 27 March 2006.

The Commission has decided to:

- provide commission-only remuneration arrangements as an option in jurisdictions where a form of commission arrangement was available prior to 27 March 2006; and
- extend the option of commission-only arrangements to real estate salespersons and their employers where this option was not available prior to 27 March 2006.

The piece rate formula will be 35 per cent of the employer's net commission.

The Commission has decided to provide commission-only remuneration arrangements for real estate employees undertaking sales transactions involving an agency relationship based on a formula of 35 per cent of the employer's net commission.

This involves the determination of a new Pay Scale that provides the option of commission-only rates of pay.

The Commission will only provide commission-only arrangements in relation to sales transactions involving agency relationships. It will not provide commission-only arrangements in relation to non-agency sales transactions or non-residential leasing transactions. This reflects the lack of data made available to the Commission regarding piece rates in these latter two cases. The Commission will re-consider establishing piece rates in these additional cases should further data become available and affected parties place a further request before the Commission.

In their submission, the LHMU comments that the manner in which matters are considered by the Commission in the present review "might impact on other workforce sectors, such as hospitality".³¹

The Commission notes this observation and considers that, while the processes adopted in this review will establish a method for conducting future piece rate reviews, its decision in this case establishes no precedent for the outcome of future reviews in this or other industry sectors.

³¹ LHMU, *2007 Review of Minimum wage arrangements in the real estate sector*, correspondence to AFPC dated 30 April 2007, pages 1-2.