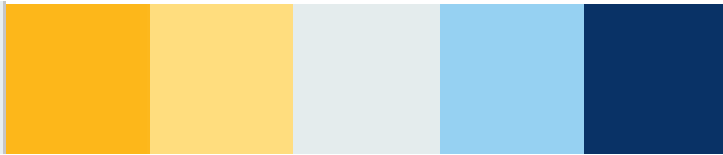


A guide to cooperation agreements



Who is this guide for?

This guide is for any employer or individual concerned they may be liable for the criminal offence of intentionally underpaying employees and want to:

- ▶ positively engage with the Fair Work Ombudsman (FWO) and agree to enable remedying the effects of their conduct, and
- ▶ receive protection from criminal prosecution where the FWO agrees to enter into a cooperation agreement.

This guide is not for the underpayment of independent contractors or regulated workers (e.g. certain workers in the gig economy and road transport industry). The criminal underpayment offence does not cover these types of workers. More information about regulated workers and independent contractor can be found on our website.¹

This guide is also not for anyone involved in unintentional conduct that resulted in the underpayment of an employee. For the reporting of unintentional underpayments to the FWO, see our Compliance and Enforcement Policy.²

Small business employers (those with less than 15 employees) should consider whether they have complied with the Voluntary Small Business Wage Compliance Code (the Code). The Code and a supporting guide to paying employees correctly can be found on our website.³ Small business employers who we are satisfied have complied with the Code will receive protection from criminal prosecution without needing to enter into a cooperation agreement.

What's included in this guide?

This guide offers practical advice and case studies to help you understand:

- ▶ the criminal offence of intentionally underpaying employees
- ▶ what cooperation agreements are and their benefits
- ▶ how to engage with the FWO to receive protection from criminal prosecution
- ▶ what the FWO will consider in deciding whether to enter into a cooperation agreement
- ▶ the standard terms of cooperation agreements
- ▶ the potential consequences of failing to comply with a cooperation agreement
- ▶ the role of the Commonwealth Director of Public Prosecutions (CDPP).

Find out about accessing independent legal advice on our website.⁴

To stay up to date and be notified about changes to workplace laws, [subscribe to our email updates](#).⁵

What is the criminal underpayment offence?

The criminal offence for the intentional underpayment of employee entitlements by an employer in the *Fair Work Act 2009* (Cth) (FW Act) commenced on 1 January 2025 (criminal underpayment offence).

The criminal underpayment offence must be proved beyond reasonable doubt, which is a higher

¹ <https://www.fairwork.gov.au/regulated-workers>; <https://www.fairwork.gov.au/contractors>

² <http://www.fairwork.gov.au/compliance-and-enforcement>

³ <https://www.fairwork.gov.au/vsbwwc>

⁴ <https://www.fairwork.gov.au/tools-and-resources/other-workplace-relations-help/legal-help>

⁵ <https://www.fairwork.gov.au/emailupdates>

standard of proof than applies to other breaches of the FW Act.

The FWO will be responsible for investigations of the criminal underpayment offence. We will only refer conduct to the CDPP if we have gathered sufficient evidence to prove that an offence has been committed. Conduct may be referred to the Australian Federal Police (AFP) if we believe the matter requires further investigative assistance. Referral for prosecution will generally be reserved for the most serious conduct, including where there is a greater need for specific or general deterrence than civil litigation by the FWO.

The FWO itself does not prosecute these offences. If there is sufficient evidence, the FWO will refer evidence to the CDPP who holds the independent authority to commence prosecutions.⁶

Employers commit a criminal underpayment offence under section 327A of the FW Act if they:

- ▶ are required to pay an amount to an employee (such as wages), or an amount on behalf of, or for, the benefit of an employee (such as superannuation), under the FW Act, a fair work instrument or a transitional instrument (being a 'required amount'), and
- ▶ intentionally engage in conduct (by doing or not doing something) that intentionally results in a failure to pay that required amount in full on or before the day the amount is due for payment.

Awards and enterprise agreements set minimum pay rates that employees must be paid.

Employees who aren't covered by an award or enterprise agreement are entitled to the national minimum wage as a minimum. A 'required amount' for the criminal underpayment offence only includes the minimum pay rates that an employee must be paid. The criminal underpayment offence does not apply to any additional amounts an employer agrees to pay in the employee's contract of employment (including safety net contractual entitlements).

Certain employers and payments not covered

The criminal underpayment offence does not cover certain employers and their employees in relation to amounts other than wages, specifically: superannuation, long service leave, paid leave for victims of crime, and paid leave for jury or emergency services duties.⁷ Broadly, the employees (and their employers) this exclusion applies to are:

- ▶ employees in New South Wales, South Australia, Queensland, Tasmania and Victoria who are employed by sole traders, partnerships, other unincorporated entities, or non-trading corporations
- ▶ most Victorian state government employees
- ▶ Tasmanian local government employees.⁸

⁶ <https://www.cdpp.gov.au/>

⁷ FW Act s.327A(2)

⁸ Excluded employers and employees are those covered by sections 30C and 30D, or 30M and 30N of the FW Act

What does this mean for covered employers?

A corporate or Commonwealth government employer covered by the criminal underpayment offence will have engaged in intentional conduct if it expressly, tacitly, or impliedly authorised or permitted the commission of the offence.

Where the actions or inaction of employees, agents or officers of the employer results in the required amount not being paid to one or more employees, and those employees, agents or officers are acting within the actual or apparent scope of their employment, this is taken to be action attributable to the employer.

We recognise that most employers try to do the right thing.

The criminal underpayment offence is for **intentional underpayments**.

In terms of intentionality, authorisation or permission to commit the criminal underpayment offence can be established by proving that:

- ▶ the board of directors or body that exercises the executive authority of the employer intentionally engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence
- ▶ a 'high managerial agent' of the employer intentionally engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence and the employer cannot prove that it exercised appropriate diligence to prevent their conduct
- ▶ a corporate culture existed within the employer that directed, encouraged, tolerated or led to non-compliance with the contravened law; or the corporation failed to create and maintain a corporate culture requiring compliance with the FW Act.

A high managerial agent of an employer is an employee, agent or officer of the entity whose conduct may fairly be assumed to represent the corporation's policy because of the level of responsibility of their duties.

The corporate culture of an employer means an attitude, policy, rule, course of conduct or practice existing within the employer's business generally, or in the part of the business where the underpayment of employee entitlements happens.

Example: Construction company intentionally fails to pay employee's entitlement to weekend penalty rates, overtime and casual loading

Fatima is employed as a bitumen worker on a casual basis to work weekdays and weekends on a road construction site. The Building and Construction General On-site Award covers and applies to Fatima's work, and sets her minimum entitlements, including ordinary hourly rates, weekend penalty rates, overtime and casual loading.

Instead of paying these entitlements, the employer has paid Fatima a flat hourly rate of \$25.00 for all hours worked, regardless of the day of the week or number of hours worked.

Fatima asked her employer about her hourly rate. The employer told Fatima that they know about her minimum entitlements under the award, but to save costs and keep the business in operation, they can only afford to pay her a lower, hourly flat rate.

The employer intentionally engaged in conduct that intentionally resulted in Fatima being underpaid. This would be an offence.

Example: Hotel unintentionally underpays employee following employee's progression to a new classification level

John works in a restaurant in a large hotel. The hotel is covered by the Hospitality Industry (General) Award.

John hasn't worked in hospitality before. When he started at the hotel, John was classified at the Introductory level, the lowest level in the award. The award provides that an Introductory level employee moves to level 1 after 3 months. After 3 months, John's manager assesses his competency. John's manager determines that he has the skills to progress to the next level.

John's new classification is level 1. This means he is working as a food and beverage attendant grade 1. However, John's manager forgot to tell the hotel's payroll team of John's new classification level, and so John has not been paid the correct rates under the award. John raised this with his union delegate, who confirmed that John is not receiving the correct rates under his new classification. John's union delegate assisted John to raise this with his manager and the hotel's payroll officer.

On realising the error, the payroll officer promptly increased John's minimum wages, back paid the difference and implemented internal audit measures to prevent similar oversights in the future.

The employer did not intentionally engage in conduct that resulted in John being underpaid. This conduct alone would not be an offence.

Individuals and other corporate entities

In addition to employers, other persons (including individuals or other corporate entities) can also be prosecuted under 'related offence provisions' for their conduct in the following ways:

- ▶ attempting to commit the offence
- ▶ aiding, abetting, counselling or procuring the commission of the offence by another person
- ▶ inciting (i.e. urging) the commission of the offence
- ▶ entering into an agreement with two or more persons to commit the offence

(known as a 'related offence').⁹

⁹ FW Act s.12 (definition of 'related offence provision'). See further section 6 of the *Crimes Act 1914* (Cth) and Part 2.4 of the *Criminal Code 1995* (Cth)

Example: Officers involved in intentional underpayment by aged care provider

Eric works as an operations manager for an aged care provider and reports to the deputy manager, George.

As part of the annual wage review, the Fair Work Commission recently increased the minimum weekly wages for aged care employees covered by the Aged Care Award. When reviewing the annual operating budget, Eric and George express concern that paying the recent increase to the aged care employees would decrease the business's profits.

To avoid an increase to operational costs and a reduction in profits, Eric advises George that the business should not pay the increase to the minimum weekly wage to the business's employees. George agrees with this proposal and directs Eric not to increase the aged care employees' weekly wages.

Eric and George intentionally engaged in conduct that resulted in the business underpaying its aged care employees. Due to Eric and George's conduct, this would be an offence by the aged care provider as the employer. Eric and George would also each have committed a related offence.

What are the penalties?

Maximum penalties for committing each criminal underpayment offence or related offence are:

	Individual	Corporate or Commonwealth
Term of imprisonment	Not more than 10 years	-
If the underpayment amount can be calculated	Greater of 3 times the underpayment amount and 5,000 penalty units (\$1.65 million)	Greater of 3 times the underpayment amount and 25,000 penalty units (\$8.25 million)
If the underpayment amount cannot be calculated	5,000 penalty units (\$1.65 million)	25,000 penalty units (\$8.25 million) ¹⁰
<i>As of 1 January 2025, the value of one penalty unit is \$330. This may be subject to change for future periods.</i>		

When determining the applicable penalties for a person found guilty of the criminal underpayment offence or related offence, the Court will take into account factors such as:

- ▶ the nature and circumstances of the offence
- ▶ the personal circumstances of any victim of the offence
- ▶ any injury, loss or damage resulting from the offence
- ▶ any victim impact statement from any victim of the offence
- ▶ the degree to which the person has cooperated with law enforcement agencies (including the FWO) in the investigation of the offence or of other offences
- ▶ if the person has pleaded guilty to the charge in respect of the offence:
 - that fact
 - the timing of the plea, and

¹⁰ FW Act s.327A(6)-(7)

- the degree to which that fact and the timing of the plea resulted in any benefit to the community, or any victim of, or witness to, the offence
- ▶ the degree to which the person has shown contrition for the offence:
 - by taking action to make reparation for any injury, loss or damage resulting from the offence, or
 - in any other manner
- ▶ the deterrent effect that any sentence or order under consideration may have on the person and other persons
- ▶ the need to ensure that the person is adequately punished for the offence
- ▶ the character, antecedents (i.e. criminal record), age, means and physical or mental condition of the person.¹¹

The Court will only sentence a person to imprisonment if it is satisfied that no other sentence is appropriate in all the circumstances of the case.¹²

Positively engaging with us and committing to enabling the remedying of the effects of underpayments by entering a cooperation agreement is a pathway to avoiding criminal penalties.

What are cooperation agreements?

Cooperation agreements provide protection from potential criminal prosecution if you have engaged in conduct that amounts to a potential offence or related offence. We will decide whether to enter into a cooperation agreement. When deciding whether to enter into a cooperation agreement, we will consider the following matters:

- ▶ whether you have made a voluntary, frank and complete disclosure of the conduct
- ▶ the nature and level of detail of your disclosure in relation to the conduct
- ▶ whether you have cooperated with us in relation to the conduct
- ▶ our assessment of your commitment to continued cooperation in relation to the conduct, including by providing us with comprehensive information to enable us to assess whether your actions and approach to remedying the effects of the conduct are effective
- ▶ the nature and gravity of your conduct
- ▶ the circumstances in which the conduct occurred, and
- ▶ your history of compliance with the FW Act.

Where appropriate, we will also consider whether you have meaningfully engaged with the impacted parties, and their representatives, to explain and address the conduct (see 'What will the FWO consider when deciding whether to enter into a cooperation agreement?' on page 16).

A cooperation agreement is a written agreement between the FWO and a person (i.e. an individual, corporate entity or Commonwealth agency). The agreement covers specified conduct engaged in by the person that amounts to a potential offence or related offence. A cooperation agreement also includes terms that require the person to take positive steps to enable the remedying of the effects of their conduct and ensure future compliance.

Cooperation agreements:

- ▶ promote positive engagement and cooperation with us
- ▶ address intentional underpayments without the need for a criminal prosecution
- ▶ in appropriate circumstances, provide us with information that can be used to investigate other persons who may have committed an offence or a related offence.

¹¹ See further Division 2 of Part IB (Sentencing, Imprisonment and Release of Federal Offenders) of the *Crimes Act 1914* (Cth)

¹² Section 17A(1) of the *Crimes Act 1914* (Cth)

What a cooperation agreement provides protection from

The use of cooperation agreements recognises that not all conduct potentially amounting to a criminal underpayment offence or a related offence must result in a referral to the CDPP for consideration of prosecution.

While a cooperation agreement is in force between the FWO and a person, the FWO must **not** refer conduct that is the subject of the agreement to the CDPP or AFP for consideration of criminal prosecution.¹³

Cooperation agreements provide an opportunity for you to avoid referral for prosecution where you can demonstrate positive cooperation with us and a willingness to remedy the effects of your conduct. This means that you can avoid the recording of a conviction of an offence and related consequences (such as having a criminal record), a criminal penalty and/or term of imprisonment, and the other costs that may be incurred in relation to a prosecution (e.g. legal or other costs).

What a cooperation agreement does **not** provide protection from

If you enter into a cooperation agreement, you may still face civil action by persons who can bring proceedings under the FW Act in relation to the same conduct. This includes the FWO, an affected employee, or a union.

We may commence civil penalty proceedings, issue a compliance notice to you or accept an enforceable undertaking in relation to the conduct covered by the cooperation agreement. An enforceable undertaking or compliance notice will have no effect to the extent that it is inconsistent with a cooperation agreement.¹⁴

We may use information voluntarily provided at Stage 2 of the cooperation agreement process in relation to any investigation, or in any civil penalty or criminal proceedings against you and/or others (see 'How do I enter into a cooperation agreement?' on page 12).

Our approach to determining whether we will conduct further investigations or take any other compliance or enforcement steps in relation to the conduct will depend on the circumstances of the specific matter. Further information on our approach to compliance and enforcement can be found in our Compliance and Enforcement Policy.¹⁵ In appropriate circumstances, we may also accept an enforceable undertaking in relation to a breach of a civil remedy provision relating to the same conduct.¹⁶ While an enforceable undertaking is in place, it offers protection from us commencing civil proceedings.

If civil proceedings are commenced, the fact that you have entered a cooperation agreement with the FWO in relation to the conduct would likely be considered a mitigating factor when determining any civil penalty.

¹³ FW Act s.717A(1)

¹⁴ FW Act s.717G(2)

¹⁵ <https://www.fairwork.gov.au/compliance-and-enforcement>

¹⁶ FW Act s.715. Where a cooperation agreement is in force in relation to particular conduct, the FWO may also accept an enforceable undertaking; however, an enforceable undertaking has no effect to the extent that it is inconsistent with the cooperation agreement. FW Act s.717G

The cooperation agreement process

Who can enter into a cooperation agreement?

The FWO can enter into a cooperation agreement with a person who has engaged in conduct that may amount to a potential offence or related offence that occurred on or after 1 January 2025. A person includes a corporate entity, a Commonwealth entity, or individual (i.e. a natural person).¹⁷

Where a course of conduct occurs before and continued on or after 1 January 2025, only the conduct that has occurred on or after 1 January 2025 can be the subject of a cooperation agreement.¹⁸

Example: Bank intentionally underpaid Saturday penalty rates to bank tellers before and after 1 January 2025

An enterprise agreement covers and applies to a bank operating in New South Wales and its employees. The enterprise agreement requires bank tellers to be paid a penalty rate for hours worked on Saturdays. The bank intentionally failed to pay the penalty rate to its bank tellers working on Saturdays from 1 October 2024 until 26 January 2025. A cooperation agreement can only apply to underpayments from 1 January to 26 January 2025, because the offence does not apply to conduct before 1 January 2025.

Note: The bank also committed a 'serious contravention' under section 557A of the FW Act for knowingly contravening a civil remedy provision prior to 1 January 2025, which could result in civil penalties.

Each cooperation agreement is entered into between us and **one party only** (i.e. an individual or an entity). Where several individuals or corporate entities may have been involved in conduct amounting to a potential offence or related offence, separate cooperation agreements may be entered into with different persons relating to the same or similar conduct.

A cooperation agreement gives protection from referral to the CDPP or AFP only for the specific person who is the party to the agreement.

Small business employers (those with less than 15 employees) should first consider whether they have complied with the Code.¹⁹ Find more information on the Code and our supporting guide on our website.²⁰ If we are satisfied that a small business employer has complied with the Code, we cannot refer the conduct to the CDPP or AFP, and the employer will not require a cooperation agreement.²¹ If we are not satisfied that a small business employer has complied with the Code, then we may consider a cooperation agreement.

We will not enter into a cooperation agreement with a person who has unintentionally underpaid an employee. We encourage employers to self-report unintentional underpayments that have occurred over a period of 12 months or more (or involve broad and/or systemic non-compliance) and to cooperate with us, as explained in our Compliance and Enforcement Policy. OBJ

¹⁷ FW Act s.717A(1)

¹⁸ FW Act Schedule 1, Part 15, Division 5, s.98

¹⁹ FW Act s.327B(1)

²⁰ <https://www.fairwork.gov.au/vsbwcc>

²¹ FW Act s.327B(2)(a). The FWO must not enter into a cooperation agreement where the FWO is satisfied that a small business employer complied with the Code: s.327B(2)(b)



What should I do if I was involved in intentional underpayments, but my employer won't report the intentional underpayments?

We encourage employers to report underpayments to the FWO. We also encourage employees to report underpayments to their employers and/or to seek the assistance of employee representatives, where applicable. However, if you are concerned you were involved in the underpayment of an employee that may have been intentional, and your employer has decided not to report this, you can report the conduct yourself.

Remember: Cooperation agreements can be made with individuals involved in the conduct, not just employers.

When should I report conduct to the FWO?

We recommend reporting conduct that may amount to a potential offence or related offence to us as soon as you become aware of it.

Indications of intentional underpayment may not be known or only become apparent after an employer has initially self-reported underpayments to us, such as during a payroll audit or remediation program relating to unintentional underpayments. In those circumstances, we encourage reporting this to us as soon as you become aware.

Example: Company acquires olive oil business and identifies intentional conduct

XYZ Limited acquired an olive oil company.

Following the acquisition of the company, XYZ Limited's internal auditors conduct a review of the employment records of the olive oil company. The internal auditors identify that employees covered by the Horticulture Award had not been paid applicable overtime rates for previous harvest periods by the previous owner of the company. Following the guidance in the FWO's Compliance and Enforcement Policy, XYZ Limited self-reports the underpayments to the FWO.

During the remediation program, XYZ Limited identified business records that potentially show the previous owner intentionally not paying overtime rates during harvest period. XYZ Limited raises this with the FWO and reports the new information.

In the circumstances and following consideration of relevant matters, the FWO decides to enter into a cooperation agreement with XYZ Limited regarding the historical underpayments.

Where two or more people report to us in relation to the same conduct, we will have regard to the timing of these reports when deciding whether to enter into a cooperation agreement with those who were not the first to report. Reporting conduct after another person does not preclude a cooperation agreement being entered into with us; however, it may be relevant to our assessment of whether to enter a cooperation agreement and how full and frank the person's later disclosure is.



The timing of your report to the FWO may be important where multiple people may have been involved in conduct amounting to a potential offence or related offence.

Example: Company acquires olive oil business and identifies intentional conduct – continued

A month after the FWO enters into a cooperation agreement with XYZ Limited, the FWO interviews a former officer of the olive oil company regarding their potential involvement in the underpayments. The former officer makes a voluntary, frank and complete disclosure of their involvement in the intentional underpayments and commits to cooperating with the FWO's investigation. In consultation with the CDPP, the FWO decides to enter into a cooperation agreement with the former officer.

Six months after the FWO commenced an investigation into the previous owner of the olive oil company, the FWO has gathered sufficient evidence to refer a brief to the CDPP regarding the conduct of the previous owner. On becoming aware of the investigation, the previous owner sought to report their conduct to the FWO. The previous owner disclosed that underpayments occurred but maintained that it was not intentional. The previous owner was also not willing to provide any further information or remedy the effects of the conduct that occurred under their ownership. On consideration of the available evidence, and the previous owner's attitude towards their conduct, the FWO decides not to enter into a cooperation agreement with the previous owner.

How do I enter into a cooperation agreement?

There are two stages to how we decide whether to enter into a cooperation agreement with a person:

1. an **eligibility stage**, to determine whether you are eligible for a cooperation agreement and if a cooperation agreement is necessary, and
2. an **assessment stage**, during which you will be expected to voluntarily provide further information, and potentially records and/or witness statements to substantiate the information, which we will then consider. If we agree to enter a cooperation agreement after considering this information, we will finalise the terms of the agreement with you.

A cooperation agreement can be considered at any time, including during or following the completion of an investigation, either at our initiation or your request. Where this occurs, and you would like to be considered for a cooperation agreement, you will proceed immediately to Stage 2: Assessment.

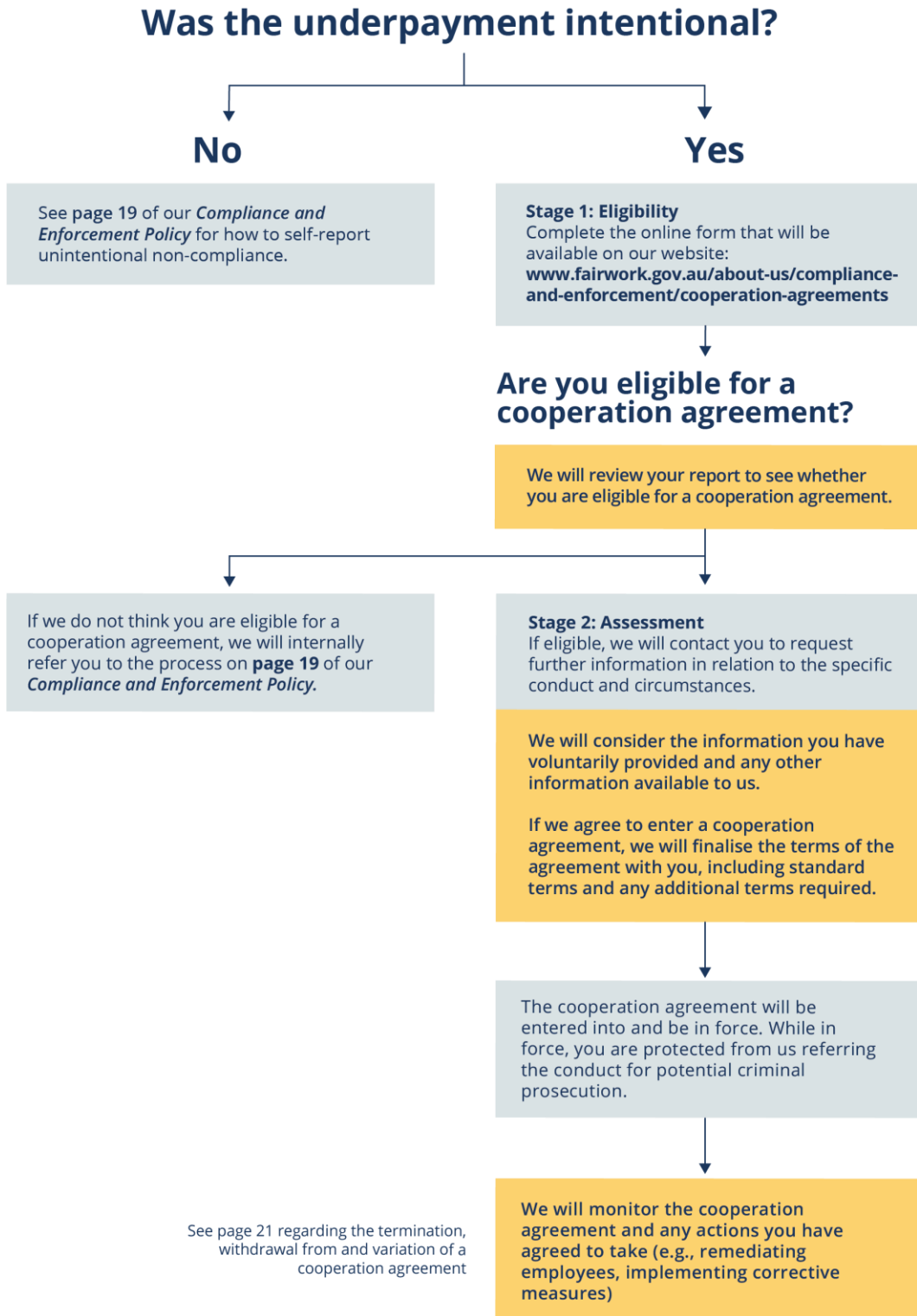


Providing information in support of seeking a cooperation agreement at Stage 1 or Stage 2 does not guarantee that a cooperation agreement will be made.

You are encouraged to seek independent legal advice before voluntarily reporting to us that you may have committed an offence or related offence and before entering a cooperation agreement. You can have a legal representative attend any FWO interviews you may have as part of the process. You should carefully consider your choice of lawyer, as your lawyer must be able to maintain confidentiality and must not have any conflict of interest. Difficulties with maintaining confidentiality and a conflict of interest may arise, for example, if a lawyer represents more than one person who is being examined in relation to the same investigation. Employer in-house lawyers or other representatives may also have a conflict of interest. To preserve the integrity of an investigation and potential evidence we may engage in discussions with you about the independence of your lawyer.

Cooperation agreement process flowchart

Note: The Cooperation Agreement process is for employers and anyone who may have been involved in an offence. If you are an employee and think that you may have been intentionally underpaid, please see our website for ways on how we can assist: www.fairwork.gov.au



Stage 1: Eligibility

- ▶ A link to an online form will be available on the FWO’s website.²² Please email cooperationagreements@fwo.gov.au for a copy of the form.
- ▶ The online form contains questions to assist you to voluntarily provide us with information to consider whether you are eligible for a cooperation agreement (see ‘Who can enter into a cooperation agreement’ on page 9).
- ▶ Where a corporate entity is seeking to report on behalf of people (for example, multiple related entities or individuals), a separate form must be completed for each person.
- ▶ You will not be requested to provide documents or records at this stage.
- ▶ If you are not eligible or we don’t believe a cooperation agreement is necessary based on the available information (e.g. because it does not disclose a potential offence or related offence), you will be told.
- ▶ If we believe you are eligible for a cooperation agreement, you will proceed to the second stage.



Information voluntarily provided at Stage 1 will not be used by the FWO directly as evidence against you in any civil proceedings for contravention of a civil remedy provision of the FW Act, or as part of any brief of evidence referred to the CDPP for criminal prosecution for an offence or related offence relating to the conduct being reported. We may still choose to investigate any offence, related offence, or contravention of a civil remedy provision of the FW Act following the provision of information at Stage 1 in relation to the conduct.



The reporting of a potential offence or related offence by a corporate entity or the Commonwealth must be made by a person with authorisation to act on behalf of the corporate entity or Commonwealth agency. You will be asked to confirm this in the form.

Stage 2: Assessment

- ▶ At this stage, we will contact you to request further information in relation to the specific conduct and circumstances (see ‘What will the FWO consider when deciding whether to enter into a cooperation agreement?’ on page 16).
- ▶ We may ask you to voluntarily give us records and/or participate in interviews to substantiate the information you have provided.
- ▶ You will be given the opportunity to provide submissions, if you want to, to inform our consideration of whether to enter into a cooperation agreement.
- ▶ We will consider the information you have voluntarily provided and any other information available to, or obtained by, us. In appropriate circumstances, this may include verifying factual information provided to us with third parties, such as impacted employees, their representatives or other entities.
- ▶ Once we have undertaken our consideration process and agree to enter a cooperation agreement, we will finalise the terms of the agreement with you, including standard terms and any additional terms required (see ‘What are the standard terms of a cooperation agreement?’ on page 19).
- ▶ Where the terms of an agreement are reached between us and you, you may then enter into the cooperation agreement.
- ▶ Where either party decides not to proceed to enter into a cooperation agreement at any stage during this Stage of the process, you are encouraged to continue cooperating with us in relation to the conduct reported and the action to remedy the effects of the conduct. Your conduct, and cooperation, will be considered by us in accordance with our Compliance and Enforcement Policy.²³

²² <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/cooperation-agreements>

²³ <https://www.fairwork.gov.au/compliance-and-enforcement>



Information voluntarily provided at Stage 2 can be used by the FWO in relation to an investigation or as evidence against you and/or others in civil proceedings, or in criminal proceedings if a cooperation agreement is not entered into in Stage 2 or if a cooperation agreement is made but later terminated or withdrawn.

Any exceptions to this will be provided on a case-by-case basis.

The FWO may also refer the information to other government agencies who may investigate and commence enforcement proceedings regarding the potential contravention of laws that they administer, where it is appropriate to do so in accordance with sections 682(e) and 718 of the FW Act.



The FWO will generally require you (and your legal representative and any other third-party advisers) to keep your report to the FWO, and any further information or records you voluntarily provide, confidential unless you are legally required to disclose this information or have our written consent.

Confidentiality protects the integrity of the investigation and the information you have provided and helps to ensure that evidence is not fabricated or destroyed where the conduct involves multiple persons.

Confidentiality can ensure that other persons who may have committed an offence or related offence in relation to the same or similar conduct do not become aware of the FWO's investigation prematurely. Depending on the circumstances of the matter, the FWO may need to obtain further information relating to the conduct from third parties, including to verify information provided by you during Stage 1 and Stage 2 or to inform the FWO's consideration of the statutory requirements for a cooperation agreement. To preserve the integrity of an investigation, the FWO will generally not disclose to third parties that you have made a self-report and that the FWO is considering whether to enter into a cooperation agreement.



You may be liable to a civil penalty under the FW Act if you knowingly or recklessly give false or misleading information or produce false or misleading documents to the FWO in the Stage 1 – Eligibility or Stage 2 – Assessment process. It is also a serious offence under the *Criminal Code 1995* (Cth).

The FWO may terminate a cooperation agreement if it is satisfied that you have provided false or misleading information or omitted any matter or thing without which the information is misleading.

What will the FWO consider when deciding whether to enter into a cooperation agreement?

We will assess each matter on a case-by-case basis.

When deciding to enter a cooperation agreement, we **must** have regard to a non-exhaustive list of matters set out in the FW Act.²⁴ These matters and how the FWO will have regard to them are listed below.

Whether in the FWO's view, the person has made a voluntary, frank and complete disclosure of the conduct

When forming this view, we will expect:

- ▶ disclosure of the conduct will be promptly updated and corrected when needed, and
- ▶ complete details of the conduct to be given to us, not limited to whether or not it is information we have asked for in specific questions.

The nature and level of detail of the voluntary disclosure in relation to the conduct

We expect these details to include:

- ▶ the periods during which the conduct occurred
- ▶ a description of how the conduct occurred
- ▶ who participated in and who had knowledge of the conduct
- ▶ any measures taken to conceal the conduct
- ▶ a description of relevant documents available, their source and where they are held
- ▶ other persons who may provide information about the conduct
- ▶ the nature of the underpayment amount
- ▶ any attitude, policy, rule, course of conduct or practice existing within the entity or in the part of the entity where the relevant conduct occurred that may have resulted in the conduct.

Information and documents will be voluntarily provided by the person to us. It is not expected that a person will request for conditions to be imposed on the use of the information or documents.

Whether in the FWO's view the person has cooperated with the FWO in relation to the conduct

When forming this view, we will consider whether the person has:

- ▶ provided ongoing, full cooperation during any investigation or has held back or delayed giving information at any time
- ▶ complied with any time periods requested by us, using their best endeavours to preserve and provide voluntary information and documents
- ▶ explained the employer's or other relevant IT systems and equipment to the best of the person's knowledge
- ▶ been available to respond to queries and attend interviews with us.

The FWO's assessment of the person's commitment to continued cooperation in relation to the conduct, including by way of providing the FWO with comprehensive information to enable the effectiveness of the person's actions and approach to remedying the effects of the conduct to be assessed

When making this assessment, we will assess if the person:

²⁴ FW Act s.717B(2)

- ▶ if the employer, has repaid, or will agree as part of a cooperation agreement to repay, the underpayment amount, interest and any other compensation to affected employees
- ▶ if not the employer, how the person will assist so that such payments can occur
- ▶ is and remains willing to periodically report to us regarding what action is occurring so that the action does not reoccur
- ▶ if requested to, agrees to keep the report of the conduct to us confidential and is in fact doing so, including by entering into a confidentiality undertaking.

The nature and gravity of the conduct

When having regard to the nature and gravity of the conduct, we will consider:

- ▶ how long the conduct occurred or if it is still occurring
- ▶ the amount of the underpayment
- ▶ how many employees were affected by the conduct and any vulnerability of the impacted employees
- ▶ the extent of the conduct within the employer's operations
- ▶ if the conduct involved any threats, inducements or coercion of persons (e.g. to accept the underpayment or to participate in the intentional underpayments)
- ▶ if the conduct was part of the business model and/or a calculated strategy
- ▶ other potential offences that may have been committed in association with the conduct (e.g. provision of false records, money laundering or taxation offences).

The circumstances in which the conduct occurred

When having regard to the circumstances of the conduct, we will consider:

- ▶ the context of the conduct
- ▶ any reasons for the conduct
- ▶ who may have benefited from the conduct
- ▶ if the person caused the conduct, induced or coerced others to participate in the conduct, or was induced or coerced by another person in relation to the conduct
- ▶ the extent of awareness or approval of the conduct in the business
- ▶ the extent of policies, practices or attitudes in the business that directed, encouraged tolerated or may have led to the offence or related offence
- ▶ if and how the conduct was concealed.

The person's history of compliance with the FW Act

This may include:

- ▶ any findings of contravention of the FW Act by the FWO
- ▶ whether there has been past compliance with enforcement tools such as compliance notices
- ▶ findings of contravention or the imposition of civil penalties by a Court in relation to relevant conduct
- ▶ findings or orders of the courts or Fair Work Commission in relation to relevant conduct
- ▶ the resolution or settlement of industrial disputes relating to similar or related conduct, including any admissions made.

Any other matters prescribed by the regulations

As at 1 January 2025, there are no regulations that prescribe any other matters the FWO must consider.

In addition to the matters we **must** have regard to, we **may** have regard to whether:

- ▶ the person has meaningfully engaged with the impacted parties, and their representatives, to explain and address the conduct
- ▶ we are already in possession of evidence at the time of the person's report to the FWO that is likely to establish an offence or related offence in relation to the reported conduct
- ▶ another person has already reported the conduct to us and we have entered a cooperation agreement with that other person
- ▶ whether the person has ceased the conduct and promptly reported the conduct, and the reason for any delays in reporting the conduct to us
- ▶ if measures have been implemented to prevent the conduct from continuing or reoccurring
- ▶ the person's criminal record.

The following case studies provide guidance about how we will apply these factors. They are not prescriptive or exhaustive. The application and weight to be given to the factors will depend on the circumstances of each matter.

Case Study: Employer self-reports conduct

A medium-sized retailer operates multiple stores across Australia. The General Retail Industry Award covers and applies to the retailer and its employees. During a routine internal audit, the retailer's human resources and payroll department identified that store employees in Tasmania were not paid applicable overtime rates, as required under the award.

Following a report to the board of directors, the retailer's directors instructed the human resources and payroll team to immediately investigate the matter to determine the extent of the underpayments and the number of affected people. As part of its review, the retailer identified business records showing that the retail manager for Tasmania, Jasmine, had intentionally directed store managers to falsify employee records and timesheets so that store employees were not recorded as working overtime. The business records showed that Jasmine made this direction to avoid store employees being paid overtime, which would have impacted her operational budgets. The retailer terminated Jasmine's contract of employment.

The retailer reported the conduct to the FWO. The retailer provided detailed information about the underpayments, impacted employees, its remediation plan, and copies of communications with employees and their representatives. The retailer's plan included back-paying wages, reviewing payroll systems, implementing measures to prevent future underpayments, and implementing training for all employees.

Throughout the FWO's investigation, the retailer provided all requested information and documentation promptly and committed to continue to fully cooperate with the FWO as needed. The FWO acknowledged the retailer's proactive approach, cooperation and commitment to rectifying the impact of the underpayments. In consultation with the CDPP, the FWO decides to enter into a cooperation agreement with the retailer and considers whether Jasmine's conduct should be investigated.

What are the standard terms of a cooperation agreement?

We expect that all cooperation agreements will include the following terms:

- ▶ an acknowledgment that you have read the agreement, entered into the agreement voluntarily, without any duress, and have received or been provided with the opportunity to obtain independent legal advice
- ▶ an acknowledgment and agreement that you have provided frank, complete and honest disclosure of your conduct
- ▶ that the FWO may terminate the agreement if we discover new evidence of criminal conduct that you knew about or suspected at the time you entered into the cooperation agreement
- ▶ a comprehensive explanation of the:
 - conduct that is the subject of the agreement, as well as relevant circumstances
 - steps you have taken to remedy the effects of the conduct to the date of the cooperation agreement, and
 - your engagement and cooperation with the FWO to the date of the cooperation agreement
- ▶ admissions in relation to your conduct and a requirement that no statements be made that are inconsistent with the admissions and content of the cooperation agreement
- ▶ for employers (subject to steps already taken):
 - review and remediation of impacted employees, including the payment of interest
 - consultative mechanisms to engage employees and their representatives in the review and remediation and ongoing compliance and workplace consultation
 - independent audits of compliance with the FW Act
 - mandatory training for managers and those undertaking human resources, recruitment and payroll functions regarding compliance with the FW Act
 - media releases, website notices and notification and apology to employees regarding the underpayments, in a form and wording to be agreed with the FWO and annexed to the cooperation agreement (this is subject to any investigation being undertaken by the FWO of another person – in those circumstances, the FWO may require a term of confidentiality regarding the existence of the cooperation agreement and terms of the agreement)
 - requirements that corporate governance procedures be reviewed to ensure that the board of directors or governing body is appropriately notified of compliance with the FW Act and any breaches of the FW Act, including regular reporting on compliance as well as steps to be taken to improve internal processes
- ▶ for individuals who are not employers: mandatory training in relation to compliance with the FW Act
- ▶ the regular provision of comprehensive information to enable the effectiveness of your actions and approach to remedying the effects of the conduct to be assessed for a specified period (to be determined based on the conduct and the circumstances of the matter), including letters of assurance regarding compliance with the actions required to be taken under the cooperation agreement
- ▶ that information or records obtained by the FWO before or during the period the cooperation agreement is in force may be used in civil proceedings, or in criminal proceedings if the agreement is later terminated or withdrawn
- ▶ that the cooperation agreement will expire 6 years after the conduct that is the subject of the agreement ended (with the date to be specified).²⁵

The FWO may expect additional terms to be included depending on the conduct and circumstances of the matter.

²⁵ FW Act s.327C(2)



A cooperation agreement is in force from the time it is entered into or any later time specified in the agreement, until the earliest of:

- ▶ the expiry date (if any) specified in the agreement
- ▶ the FWO terminating the agreement, or
- ▶ you withdrawing from the agreement with the FWO's consent

(see 'Termination, withdrawal from, and variation of a cooperation agreement').²⁶

The standard expiry date for cooperation agreements will be 6 years from the end of the conduct that is the subject of the agreement. This is the limitation period for a prosecution to be commenced for an offence or related offence or a civil action to be commenced in relation to an underpayment.²⁷

²⁶ FW Act s.717C

²⁷ FW Act s.327C(2), s.544, s.545(5)

Termination, withdrawal from, and variation of a cooperation agreement

The FW Act provides for the termination, withdrawal from, and variation of a cooperation agreement in limited circumstances.

If a cooperation agreement is terminated or you withdraw from the cooperation agreement (with our consent), you will lose the protection of the cooperation agreement and the FWO may refer your conduct to the CDPP or AFP for potential criminal prosecution.

Termination

The FW Act provides that the FWO may terminate a cooperation agreement by written notice at any time, if we are satisfied that you:

- ▶ have contravened a term of the agreement, or
- ▶ provided false or misleading information or documents to the FWO, Fair Work Inspector or FWO staff member in relation to the cooperation agreement before or after entering into the cooperation agreement. This includes omitting any matter or thing without which the information is misleading (for example, by withholding a document from the FWO and the omission of this document makes the information provided misleading).²⁸

A standard term of cooperation agreements is also that we may terminate the agreement if the FWO discovers new evidence of criminal conduct that you knew about, or suspected, at the time you entered into the cooperation agreement.

As an alternative to terminating a cooperation agreement, we may apply to the Federal Court of Australia, Federal Circuit and Family Court of Australia (Division 2) or an eligible State or Territory Court for one or more of the following orders:

- ▶ an order directing you to comply with a term of the cooperation agreement, or to give or produce correct and complete information or documents
- ▶ an order awarding compensation for loss that a person has suffered because of matters constituting the ground for terminating the agreement
- ▶ any other order that the court considers appropriate.²⁹



Generally, the FWO will not terminate the cooperation agreement if you have tried to comply with the cooperation agreement to the best of your ability. The FWO may also provide you with cautions before terminating a cooperation agreement to provide you with the opportunity to address the FWO's concerns.

Withdrawal

You may withdraw from a cooperation agreement, but only with the consent of the FWO.³⁰ We will expect you to set out in writing the reasons for seeking to withdraw from a cooperation agreement.

²⁸ FW Act s.717D(1)

²⁹ FW Act s.717D(2)

³⁰ FW Act s.717E

Variation

The parties to a cooperation agreement may vary the agreement by mutual consent, which must be in writing.³¹ We will expect you to set out in writing the reasons why you want to vary a term of a cooperation agreement.



Prior to terminating a cooperation agreement, withholding consent for you to withdraw from the agreement or refusing to consent to vary an agreement, the FWO will first notify you of the FWO's views and invite you to provide information in writing for the FWO's consideration, explaining why the agreement should not be terminated, the agreement should be varied, or that you should be given consent to withdraw from it.

The role of the CDPP

The FWO investigates whether a person has committed a criminal underpayment offence or related offence. The FWO does not prosecute these offences. If there is sufficient evidence, we refer evidence to the CDPP who holds the independent authority to commence prosecutions.³²

Before entering a cooperation agreement, we may need to consult with the CDPP. This may include determining if there is sufficient evidence to consider prosecuting other persons for a criminal underpayment offence or related offence or whether your conduct should be investigated by the FWO and potentially prosecuted by the CDPP. However, it is the FWO's decision whether to enter a cooperation agreement with you.³³

As an alternative to a cooperation agreement, if you were involved with other persons when you committed the offence (e.g. a related offence) you may offer assistance to the CDPP in relation to a matter referred for prosecution. The CDPP may decide not to prosecute you, limit the charges to be prosecuted and/or support a discounted sentence.³⁴ You are encouraged to obtain independent legal advice about whether you are eligible to obtain a CDPP undertaking or whether a cooperation agreement is more suitable for you. The FWO consults with the CDPP in relation to the acceptance of any undertakings by the CDPP for conduct that may amount to an offence or related offence.

³¹ FW Act s.717F

³² <https://www.cdpp.gov.au/>

³³ FW Act s.717B(2)

³⁴ Section 9 of the *Director of Public Prosecutions Act 1983* (Cth), s16AC of the *Crimes Act 1914* (Cth) and Part 6 of the Prosecution Policy of the Commonwealth. See further the CDPP National Legal Direction <https://www.cdpp.gov.au/publications/undertakings-indemnity-prosecution-and-offers-assistance> (December 2021)

Disclaimer about the information in this guide

We are committed to providing information that you can rely on as set out in our [Customer service charter](#).³⁵ We update our information regularly. We take care to ensure that it is accurate and incorporates changes to information as soon as they come into effect.

The information in this guide is general in nature. You may wish to get independent advice from:

- ▶ a union
- ▶ an employer association
- ▶ a workplace relations professional
- ▶ a lawyer.

CONTACT US

Fair Work online: [fairwork.gov.au](https://www.fairwork.gov.au)

Fair Work Infoline: **13 13 94**

Need language help?

Contact the Translating and Interpreting Service (TIS) on **13 14 50**

Help for people who are deaf or have hearing or speech difficulties

You can contact us through the National Relay Service (NRS).

Select your [preferred access option](#) and give our phone number: **13 13 94**

The Fair Work Ombudsman is committed to providing you with advice that you can rely on. The information contained in this fact sheet is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

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³⁵ <https://www.fairwork.gov.au/about-us/our-role-and-purpose/our-priorities/our-commitment-to-you#>