

EXPLANATORY STATEMENT

Issued by the authority of the Minister for Employment and Workplace Relations

Fair Work Act 2009

Voluntary Small Business Wage Compliance Code Declaration 2024

AUTHORITY

The *Fair Work Act 2009* (Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

Subsection 327B(1) of the Fair Work Act, inserted by item 220 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Amending Act), provides that the Minister for Employment and Workplace Relations (Minister) may, by legislative instrument, declare a Voluntary Small Business Wage Compliance Code (Code).

The power for the Minister to declare the Code in subsection 327B(1) is broadly framed. However, items 213 to 222 of the Amending Act, which includes a new criminal offence for failing to pay certain amounts of wages and other entitlements to, on behalf of, or for the benefit of an employee, do not commence unless the Minister declares the Code. Pursuant to section 4 of the *Acts Interpretation Act 1901*, the Minister's power to declare the Code may be exercised before the relevant provisions of the Amending Act have commenced, as if commencement had already occurred.

The *Voluntary Small Business Wage Compliance Code Declaration 2024* (the instrument) is subject to ordinary disallowance and sunseting processes set out in the *Legislation Act 2003*. Further consideration will be given as to whether the instrument should be exempt from sunseting, for consistency with similar instruments.

PURPOSE AND OPERATION

The purpose of the instrument is to enact a Code under new section 327B of the Fair Work Act.

The Amending Act introduces new provisions that set out the criminal offence for failing to pay certain amounts of wages and other entitlements, which applies to intentional conduct (new section 327A of the Fair Work Act) and, as a precondition to the commencement of the offence, enable the Minister to declare a Code (new section 327B).

If the Fair Work Ombudsman (FWO) is satisfied that a small business has complied with the Code in relation to a failure to pay an applicable amount, the FWO must not refer the employer's conduct to the Director of Public Prosecutions or the Australian Federal Police for potential criminal prosecution under the new offence. The FWO must give the employer written notice of such a decision. For the purposes of the Code, a small business employer means an employer covered by the Fair Work Act with fewer than 15 employees, as defined in section 23 of the Fair Work Act.

A small business employer will have complied with the Code if they did not intend to underpay their employee(s), having regard to relevant matters such as those set out in the Code. The Code provides non-exhaustive examples of the actions that a small business employer can take, and the sources from which a small business employer may obtain information or advice, to demonstrate that they did not intend to underpay an employee's wages or entitlements.

The matters set out in the Code have been designed to afford the flexibility to accommodate various business arrangements and circumstances. This will ensure that, even in circumstances where a small business employer had no prior knowledge of the Code, the FWO can look broadly at the efforts made by the small business employer to determine whether it is satisfied that the employer complied with the Code. This includes, for example, whether the employer has not yet fully rectified an underpayment because they are still in the process of working through how to correctly calculate the amount owing. Compliance with the Code does not require a small business employer to demonstrate all the possible actions described in the Code, so that an employer who has acted in good faith is not inadvertently found to be non-compliant with the Code merely because they failed to 'tick a box'.

The Code outlines behaviours that are reasonable or to be expected from employers who do not intend to underpay their employees, while recognising the possibility of unforeseen circumstances in which an unintended underpayment may nevertheless arise. As such, the Code does not require employers to take any actions beyond those that are reasonable or to be expected to comply with their existing obligations to pay their employees their lawful entitlements.

REGULATORY IMPACT

The Office of Impact Analysis (OIA) assessed that a detailed impact analysis was not required for the instrument as it is unlikely to have more than a minor regulatory impact (OIA reference OIA24-08230).

COMMENCEMENT

The instrument commences on 1 January 2025.

CONSULTATION

The FWO consulted member organisations of the National Workplace Relations Consultative Council, member organisations of the FWO's Advisory Group, and organisations nominated by the FWO's Advisory Group on the development of the Code, including on a policy consultation paper and a draft of the Code. The Department of Employment and Workplace Relations consulted the Australian Small Business Family Enterprise Ombudsman, state and territory government officials under the *Intergovernmental Agreement for a National Workplace Relations System for the Private Sector*, and the Committee on Industrial Legislation on a further draft of the Code.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Voluntary Small Business Wage Compliance Code Declaration 2024

The *Voluntary Small Business Wage Compliance Code Declaration 2024* (the instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Fair Work Act 2009* (the Fair Work Act) provides a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

The purpose of the instrument is to enact a Voluntary Small Business Wage Compliance Code (Code) under new section 327B of the Fair Work Act. If the Fair Work Ombudsman (FWO) is satisfied that a small business employer has complied with the Code in relation to a failure to pay certain amounts to, on behalf of, or for the benefit of an employee, the FWO must not refer the employer's conduct to the Director of Public Prosecutions or the Australian Federal Police for potential criminal prosecution under the new offence. A small business employer will have complied with the Code if they did not intend to underpay their employee(s), having regard to relevant matters such as those set out in the Code.

Human rights implications

The instrument engages the right to:

- an effective remedy under Article 2(3) of the International Covenant on Civil and Political Rights (ICCPR); and
- the enjoyment of just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic Social and Cultural Rights (ICESCR).

Right to an effective remedy

Article 2(3) of the ICCPR provides the right to an effective remedy for persons who have suffered human rights violations, such as a violation of the right to enjoyment of just and favourable conditions of work. The United Nations Human Rights Committee has stated that the right to an effective remedy encompasses an obligation to bring to justice perpetrators of human rights abuses and also to provide appropriate reparation to the persons who have suffered human rights abuses.

The instrument positively engages the right to an effective remedy. It has been designed to encourage employer compliance with workplace obligations from the outset, while ensuring that effective remedies remain available where an employee has been underpaid.

Where a small business employer has complied with the Code and has not intended to deprive an employee of their lawful entitlements, it is appropriate that the employer can seek assurance that they will not be referred for criminal prosecution. Regardless of whether assurance is granted under the Code:

- conduct leading to an underpayment may still be subject to regulatory action (including civil penalties under the Fair Work Act's civil penalty regime); and
- small business employers will be required to remediate any known underpayments so that the affected employee can receive their full entitlements.

Right to work and rights in work

Article 6 of the ICESCR requires the State Parties to the Covenant to recognise the right to work and to take appropriate steps to safeguard this right. The United Nations Committee on Economic, Social and Cultural Rights has stated that the right to work in Article 6(1) encompasses the need to provide the worker with just and favourable conditions of work. Article 7 of the ICESCR requires the State Parties to the Covenant to recognise the right of everyone to the enjoyment of just and favourable working conditions.

Underpayment and non-payment of wages have continued to feature across many Australian workplaces and the introduction of a new criminal offence for intentional underpayments strengthens the compliance and enforcement framework under the Fair Work Act and provides general and specific deterrence. The instrument supports the right to work and rights in work by ensuring that the new criminal offence commences, noting that the criminal offence will not commence unless and until the instrument is first declared. The instrument further supports the right to work and rights in work by recognising the unique needs of small business employers by setting out actions they can take which, if followed, demonstrate their intention to remain compliant with their obligation to correctly pay employees. In this way, the instrument promotes the rights to work and to just and favourable conditions of work by improving compliance with the relevant workplace laws across Australian businesses of all sizes.

Conclusion

The instrument is compatible with human rights because it advances the protection and enjoyment of human rights.

The Hon. Murray Watt, Minister for Employment and Workplace Relations

VOLUNTARY SMALL BUSINESS WAGE COMPLIANCE CODE DECLARATION
2024

EXPLANATION OF PROVISIONS

Preamble

1. The preamble sets out the broader context in which the Voluntary Small Business Wage Compliance Code (Code) will operate.
2. In particular, as a general statement, the preamble reiterates that the Fair Work Ombudsman (FWO) encourages all employers, including small business employers, to make genuine attempts to comply with workplace obligations, recognising that this promotes harmonious, productive and cooperative workplaces, reduces disputes and minimises the need for back pay. The Preamble further outlines that the Code provides non-exhaustive examples of efforts that a small business employer can make, and reliable sources from which a small business employer may obtain information, to correctly pay full entitlements for their employees.

Part 1—Preliminary

Section 1 – Name

3. This section provides that the title of the instrument is the *Voluntary Small Business Wage Compliance Code Declaration 2024* (Instrument).

Section 2 – Commencement

4. The table in this section sets out when the provisions of the Instrument commence.
5. The note to subsection 2(1) highlights that the table only relates to the provisions of this Instrument as originally made. The table will not be amended to deal with any later amendments of the Instrument.
6. Subsection 2(2) provides that any information in column 3 of the table is not part of the Instrument. Column 3 allows for the insertion of relevant dates and details. Information may be inserted in this column, or information in it may be edited, in any published version of this Instrument.
7. The Code applies in relation to the same conduct to which the criminal offence applies, noting that conduct cannot be referred by the FWO to the Commonwealth Director of Public Prosecutions (CDPP) or the Australian Federal Police (AFP) for possible prosecution where the FWO is satisfied that the Code has been complied with. The application provision at clause 98 of Schedule 1 to the *Fair Work Act 2009* (Act) provides that the new criminal offence at section 327A of the Act applies only in relation to conduct that occurs after commencement of the offence, which includes conduct that occurs after commencement that is part of a course of conduct that began before commencement.

Section 3 – Authority

8. This section specifies that the Instrument is made under subsection 327B(1) of the Act.

9. Section 327B of the Act will commence on the later of 1 January 2025 or the day after the Minister first declares the Code. In these circumstances, the Instrument is made in reliance on section 4 of the *Acts Interpretation Act 1901*.

Section 4 – Definitions

10. This section provides the following three specific definitions for the Instrument.
- The first new definition provides that ‘Act’ means the *Fair Work Act 2009*.
 - A definition of ‘applicable amount’ sets out that this term means an amount that an employer is required to pay as mentioned in paragraph 327A(1)(a) of the Act and is not covered by subsection 327A(2) of the Act. Broadly, this refers to amounts that may be subject to the new criminal offence in section 327A of the Act. This ensures that the terms of the Code refer to the same types of amounts as the new criminal offence to which the Code relates.
 - The final definition provides that ‘code’ means the Voluntary Small Business Wage Compliance Code that is provided for in Part 2 of the Instrument.

Section 5 – Simplified outline

11. This section provides for the simplified outline, which summarises the specific context, effect and role of the Code, as well as providing an example of a matter that may be relevant to assessing whether a failure to pay an applicable amount was intentional.
12. The simplified outline has been included to assist readers to understand the substantive provisions in the Instrument. The simplified outline is not intended to be comprehensive, and readers should rely on the substantive provisions in the Instrument.
13. The simplified outline notes that if a small business employer fails to pay an applicable amount (such as an amount payable under the Act or a fair work instrument) to, on behalf of, or for the benefit of, an employee, a range of civil and criminal enforcement actions may be taken. Fair work instrument is defined in section 12 of the Act, and means a modern award, an enterprise agreement, a workplace determination or a Fair Work Commission (FWC) order. To assist readers, it also clarifies that a small business employer is, broadly, an employer that is covered by the Act and that employs fewer than 15 employees (as defined in section 23 of the Act).
14. Civil action can include accepting an enforceable undertaking, giving a compliance notice or applying for an order for a civil penalty. Notes 1 and 2 to the simplified outline assist by directing the reader to the relevant provisions of the Act that provide more information about these civil actions.
15. To provide context to the operation of the Code, the simplified outline broadly explains the operation of the new criminal offence in the Act. A small business employer may commit a criminal offence against subsection 327A(1) of the Act if:
- the employer is required to pay an applicable amount (as defined in section 4 above) to, on behalf of, or for the benefit of, an employee; and
 - the employer intentionally engages in conduct; and

- the conduct results, as intended by the employer, in a failure to pay the applicable amount in full on or before the day it is due for payment.
16. If the FWO is satisfied that a small business employer complied with the Code in relation to a failure to pay an applicable amount, the FWO must not refer any conduct that resulted in the failure to the CDPP or the AFP for action in relation to a possible offence against subsection 327A(1) of the Act. In addition, the FWO must not enter into a cooperation agreement with the small business employer that covers the conduct. Note 3 to the simplified outline assists by directing the reader to the relevant provisions of the Act that provide more information about cooperation agreements.
 17. The simplified outline reminds readers that even where the FWO is satisfied that a small business employer has complied with the Code, civil action may still be taken in relation to the conduct by the FWO or others.
 18. A small business employer will have complied with the Code if the failure to pay the applicable amount was not intentional, having regard to relevant matters such as those set out in the Code. The simplified outline includes one example of a matter that may be relevant to this assessment, being whether the small business employer sought information or advice from reliable sources such as guidance materials for small business employers published by a relevant industrial association of employers or employees, another relevant professional body, or the FWO.

Part 2—Voluntary Small Business Wage Compliance Code

Section 6 – Failure to pay an applicable amount must not be intentional

19. Subsection 6(1) sets out the substantive conduct rule for the Code which, if the FWO is satisfied a small business employer has complied with, will mean that the small business employer will not be referred for prosecution by the FWO. The conduct rule provides that a failure by a small business employer to pay an applicable amount to, on behalf of, or for the benefit of, an employee must not be intentional. A note to this subsection clarifies that this means a small business employer will have complied with the Code if the failure to pay was not intentional, having regard to relevant matters such as those set out in section 6.
20. Subsection 6(2) provides that, without limiting the matters to be considered in assessing whether the failure to pay an applicable amount was intentional for the purposes of the Code, subsections (3) and (4) set out matters that may be relevant to that assessment. That is, the Code does not outline a complete list of matters to consider, rather the matters set out in subsections (3) and (4) offer guidance as to the types of matters that may be relevant.
21. Subsection 6(3) outlines actions by a small business employer that are relevant matters that may indicate whether a failure to pay an applicable amount was not intentional. The intent is to afford small business employers the opportunity to demonstrate efforts they have made to correctly pay an employee’s entitlements, having regard to their particular circumstances. A single action by a small business employer may be relevant to more than one matter. Importantly, no specific matter is determinative, and not all matters are required to demonstrate compliance with the Code, noting that particular matters may not be relevant in every situation. The weight given to each matter will depend on the specific circumstances of each case, and whether a small business employer has complied with the

Code will not be determined merely by the number of matters present (for example, one or two matters may hold significant weight for the employer's particular situation).

22. Paragraph 6(3)(a) provides that a relevant matter may include whether the small business employer made reasonable efforts to ascertain correct rates of pay and entitlements for the employee. Further guidance in relation to what such reasonable efforts may be is detailed in section 7.
23. Paragraph 6(3)(b) provides that a relevant matter may include whether the small business employer made reasonable efforts to remain up to date with their obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee. Further guidance in relation to what such reasonable efforts may be is detailed in section 8.
24. Paragraph 6(3)(c) provides that a relevant matter may include whether the small business employer considered and relied on information about the employee that the employer reasonably believed was accurate in relation to the payment of applicable amounts to, on behalf of, or for the benefit of the employee. This information could include, as is relevant, the employee's role, duties, classification, relevant qualifications, age, hours of work, and location of work, or any other relevant information, such as progression through pay increments in an applicable modern award. For example, this matter will weigh against compliance with the Code if an employer relied on information they knew to be incorrect or misleading about the employee's duties to determine a lower rate of pay than would apply if they had relied on accurate information.
25. Paragraph 6(3)(d) provides that a relevant matter may include whether the small business employer sought information or advice from reliable sources in relation to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee. Importantly, in demonstrating that they have taken this action, a small business employer will not be expected to have independently verified the accuracy of the information or advice they have received. Rather, this matter goes to whether they sought such information or advice to assist them in correctly paying employee entitlements, and whether they did so from a reliable source. Further guidance in relation to the kinds of sources of information or advice that are reliable is detailed in section 9.
26. As noted above, actions taken by employers could be relevant to more than one factor, and it is likely that actions taken in accordance with paragraph 6(3)(d) could also demonstrate other matters. For example, seeking information or advice from a reliable source could go towards reasonable efforts to ascertain correct rates of pay and entitlements under paragraph 6(3)(a). This matter could also be relevant to making reasonable efforts to remain up to date with obligations relating to pay and entitlements under paragraph 6(3)(b) (such as by seeking specific advice, or subscribing for updates or newsletters about changes in workplace laws), or taking reasonable steps to rectify a failure to pay an applicable amount under paragraph 6(3)(f).
27. Paragraph 6(3)(e) provides that a relevant matter may include whether the small business employer, in seeking information or advice from a reliable source, provided information that the employer reasonably believed was accurate. For example, this matter may weigh against compliance with the Code if, in seeking information or advice from a reliable source, the small business employer deliberately provided incorrect or misleading information to elicit advice or information that would lead to lower rates of pay or entitlements.

28. Paragraph 6(3)(f) provides that a relevant matter may include whether the small business employer took reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure. Reasonable steps to rectify a failure to pay an applicable amount can go towards demonstrating compliance with the Code because a small business employer that did not intend to underpay their employee's entitlements is more likely to make reasonable efforts to ensure their employee receives their full entitlements and that such a failure does not occur again in future. Further guidance in relation to the kinds of reasonable steps an employer may take is detailed in section 10.
29. Paragraph 6(3)(g) provides that a relevant matter may include whether the small business employer cooperated with any relevant inquiry or investigation by the FWO after becoming aware of the failure to pay the applicable amount. For example, this matter may weigh against compliance with the Code if a small business employer has not cooperated in good faith with the FWO in relation to an inquiry or investigation and is not constructively engaging with addressing any underlying issue which led to the underpayment.
30. Subsection 6(4) provides that relevant matters may include any other circumstances relating to the failure to pay the applicable amount or how the small business employer became aware of the failure. Further guidance in relation to the sorts of other circumstances that may be relevant is detailed in section 11.
31. Importantly, as noted above, the design of section 6 means that the Code has the flexibility to accommodate the various different business arrangements and circumstances that may arise for any particular small business employer. This ensures that, even in circumstances where a small business employer had no prior knowledge of the Code, the FWO can look broadly at the efforts made by the employer to determine whether it is satisfied that the employer complied with the Code. In this way, the Code's flexibility will avoid a situation where a small business employer who has acted in good faith is inadvertently found not to have complied with the Code merely because they did not take a particular action described in the Code.

Section 7 – Ascertaining correct pay rates and entitlements

32. This section provides further guidance as to the types of matters that may demonstrate whether a small business employer has made reasonable efforts to ascertain correct rates of pay and entitlements for the employee for the purposes of paragraph 6(3)(a). The matters listed are not exhaustive, and other actions an employer has taken to ascertain correct rates of pay and entitlements may also be relevant.
33. Paragraph 7(a) provides that a matter to be considered is whether the small business employer referred to any modern award or other relevant instrument that applies to the employee. A note to section 7 clarifies that other relevant instruments could include another type of fair work instrument or a transitional instrument as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*. Fair work instrument is defined in section 12 of the Act to mean a modern award, an enterprise agreement, a workplace determination, or an FWC order (which includes a national minimum wage order).
34. Paragraph 7(b) provides that a matter to be considered is whether the small business employer referred to any other rights that apply to the employee under the Act relating to the payment of an applicable amount, for example entitlements under the National

Employment Standards, such as payment required under section 90 of the Act with respect to paid annual leave.

35. Paragraph 7(c) provides that a matter to be considered is whether the small business employer considered the nature of the enterprise. Enterprise is defined in section 12 of the Act to mean a business, activity, project or undertaking. The nature of an employer's enterprise can be relevant to, for example, determining whether an instrument such as a modern award applies to the employer and employee.
36. Paragraphs 7(d) and (e) provide that matters to be considered are whether the small business employer considered the employee's role and duties, and the correct classification of the employee's role. In particular, an employee's role and duties can be relevant to, for example, determining whether an instrument such as a modern award applies to the employee, and to determining the employee's correct classification under an applicable instrument.
37. Paragraph 7(f) provides that a matter to be considered is whether the small business employer considered any of the following that apply in relation to the employee: minimum rates of pay, loadings or allowances, penalty rates or overtime, any other separately identifiable amounts (such as bonuses or additional payments), and other requirements relating to rates of pay for the employee, such as annualised wages or piece rates. This could include, for example, if an applicable modern award provides that certain entitlements cannot be included in an annualised wage arrangement, or if an applicable modern award requires periodic reconciliations of piece rates against hourly rates. In considering any of these entitlements that may apply to an employee, the employee's hours of work may be relevant – for example, their hours of work may determine whether and how much overtime an employee is entitled to, or whether any penalty rates apply.

Section 8 – Staying up to date with obligations

38. This section provides further guidance as to the types of matters that may demonstrate whether a small business employer has made reasonable efforts to stay up to date with their obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee for the purposes of paragraph 6(3)(b). Staying up to date with obligations is not a one-time action but an ongoing responsibility for all employers. The matters listed are not exhaustive, and other actions an employer has taken to stay up to date with their obligations may be relevant.
39. Paragraph 8(a) provides that a matter to be considered is the small business employer's reasonable efforts to remain up to date with any changes to applicable legislation and the interpretation of that legislation. This could include changes to the interpretation of legislation arising from case law. However, it is important to note that, to demonstrate this matter, a small business employer would not be required to monitor, read or interpret legislative amendments or case law. For example, a small business employer could demonstrate efforts to remain up to date with changes to legislation or its interpretation by subscribing to relevant updates or newsletters from the FWO or their employer organisation (an action that would also be relevant to paragraph 6(3)(d) and section 9).
40. Paragraph 8(b) provides that a matter to be considered is the small business employer's reasonable efforts to stay up to date with any changes to any modern award or other relevant instrument that applies to the employee, including variations made or approved

by the FWC. A note to section 8 clarifies that other relevant instruments that may be relevant include other fair work instruments or a transitional instrument (as explained in paragraph 33 above). For example, this could include annual changes to minimum rates of pay in modern awards and to the national minimum wage order made as part of the FWC's annual wage review, or changes made by the FWC to the application of a modern award. A small business employer would not be required to necessarily monitor, read or interpret orders of the FWC to demonstrate this matter. Instead, a small business employer could, for instance, subscribe to relevant updates from the FWO, the FWC or their employer organisation.

41. Paragraph 8(c) provides that a matter to be considered is the small business employer's reasonable efforts to remain up to date with any changes to the employee's circumstances. This could include changes to the employee's role, duties, classification, relevant qualifications, age, hours of work or location of work, all of which could impact the employee's correct rate of pay and entitlements. For example, a junior employee's minimum rate of pay in their modern award will generally increase on their birthday, or under some modern awards obtaining certain qualifications, such as a Certificate IV in a relevant skill, can impact an employee's classification and corresponding minimum rate of pay. For this matter, what is relevant is the employer's reasonable efforts to stay up to date with changes to the employee's circumstances – for example, in most circumstances a small business employer would be entitled to assume information provided by the employee is accurate.

Section 9 – Reliable sources of information or advice

42. This section provides further guidance as to the types of reliable sources from which small business employers may seek information or advice for the purposes of paragraph 6(3)(d). The sources listed are not exhaustive, and other sources of information or advice may be a reliable source for this purpose. For example, a small business employer may have engaged an accountant or bookkeeper with expertise in correctly determining employee pay and entitlements.

43. Section 9 provides that reliable sources may include:

- an industrial association of employers or employees (for example, the small business employer's relevant employer organisation), or other relevant professional body (for example, the Council of Small Business Organisations Australia) (paragraph 9(a));
- industrial professionals, such as lawyers or professional industrial consultants who provide relevant workplace relations information and advice (paragraph 9(b));
- payroll processing services (paragraph 9(c));
- the FWO, including the FWO's website and other resources (for example, specific guidance and resources produced by the FWO to assist small business employers to pay their employees correctly) (paragraph 9(d));
- the FWC, including the FWC's website and other resources (paragraph 9(e)).

Section 10 – Taking steps to rectify the failure to pay the applicable amount

44. This section provides guidance as to the types of matters that may demonstrate whether a small business employer has taken reasonable steps to rectify a failure to pay an

applicable amount after becoming aware of the failure for the purposes of paragraph 6(3)(f). The matters listed are not exhaustive, and other actions an employer has taken to rectify the failure (including the cause of the failure) may be relevant.

45. Paragraph 10(a) provides that a matter to be considered is any reasonable steps the small business employer took to repay the amount to, on behalf of, or for the benefit of, the employee.
46. If the small business employer has taken any such steps, paragraph 10(b) provides that another matter to be considered is how promptly the employer took those steps after becoming aware of the failure to pay the applicable amount. Taking corrective action to promptly repay the applicable amount can indicate that the small business employer did not intentionally fail to pay the amount. This matter is concerned with reasonable steps the small business employer has taken, such that it may be relevant if the employer is rectifying the failure as promptly as possible taking into consideration practical constraints such as reasonable difficulties to quantify the amount owed, or if there would be unreasonable impacts on the employer's solvency.
47. Paragraph 10(c) provides that a matter to be considered is any reasonable proactive steps the small business employer took to prevent the same issues from arising for that employee or any other employee in the future, such as seeking information or advice from reliable sources (per section 9), and taking steps to remedy any mistakes or deficiencies in the employer's systems. For example, this could include reviewing current systems and processes to identify and implement improvements to prevent the issues from recurring, such as updating or upgrading payroll software programs, payroll processes, or administrative procedures.

Section 11 – Other circumstances relating to the failure to pay the applicable amount and how the employer became aware of the failure

48. This section provides further guidance as to the types of other circumstances relating to the failure to pay an applicable amount and how the employer became aware of the failure that may be relevant for the purposes of subsection 6(4). The circumstances listed are not exhaustive, and other circumstances may be relevant to assessing whether the small business employer intentionally failed to pay the applicable amount. However, a small business employer's actions may weigh against compliance with the Code if the employer took steps to understand their obligations and was made aware that a failure to pay an applicable amount occurred, but subsequently failed to take reasonable steps to meet their obligations or rectify the failure.
49. Paragraph 11(a) provides that a circumstance that may be relevant is whether the failure to pay the applicable amount arose from a mistake or error in payroll processes or by a financial institution. For example, if a small business employer engaged a payroll processing service and provided the necessary and relevant information to that service, but a failure to pay an applicable amount occurred solely due to an error made by the payroll processing service, this indicates that the failure was not intentional. Similarly, a failure to pay an applicable amount occurring solely because of missing information in payroll processes as a result of the employee not submitting their timesheet before payroll is processed, indicates that the failure was not intentional. Mistakes or errors by financial institutions (such as a bank, building society or credit union) that are the only reason an employee failed to receive an applicable amount also indicate that the employer did not intentionally fail to pay the applicable amount.

50. Paragraph 11(b) provides that a circumstance that may be relevant is whether the failure to pay the applicable amount arose because of ambiguity or competing interpretations of obligations in relation to employee pay, and the small business employer took a reasonable but incorrect interpretation, such as a reasonable but incorrect interpretation of a modern award. For example, this could arise if the failure occurred because the small business employer reasonably believed they had correctly interpreted the relevant modern award, but a later decision of a court or tribunal determined that the modern award should be interpreted differently.
51. Paragraph 11(c) provides that another circumstance that may be relevant is how the small business employer identified the failure to pay the applicable amount, for example, because the employer proactively conducted an audit of their payroll compliance.
52. If the small business employer was made aware of the failure to pay the applicable amount by the employee or the employee's representative (such as their union), paragraph 11(d) provides that how the employer responded, and how promptly (if at all) the employer took reasonable steps to rectify the failure as mentioned in paragraph 6(3)(f), may be relevant.
53. Paragraph 11(e) provides that a further circumstance that may be relevant is whether the small business employer minimised the applicable amount they failed to pay because the employer took prompt steps to rectify the failure after becoming aware of it. For example, where a small business employer has demonstrated that they fixed an error in their payroll processes as soon as possible after they became aware of the error and this reduced or stopped any further failure to pay an applicable amount, this may indicate that the failure was not intentional.