



Voluntary Small Business Wage Compliance Code Declaration 2024

I, Murray Watt, Minister for Employment and Workplace Relations, make the following declaration.

Dated 6 December 2024

Murray Watt
Minister for Employment and Workplace Relations

Contents

Part 1—Preliminary	1
1 Name	1
2 Commencement.....	1
3 Authority	1
4 Definitions.....	1
5 Simplified outline.....	2
Part 2—Voluntary Small Business Wage Compliance Code	4
6 Failure to pay an applicable amount must not be intentional.....	4
7 Ascertaining correct pay rates and entitlements.....	4
8 Staying up to date with obligations	5
9 Reliable sources of information or advice.....	5
10 Taking steps to rectify the failure to pay the applicable amount	6
11 Other circumstances relating to the failure to pay the applicable amount and how the employer became aware of the failure.....	6

Preamble

The Fair Work Ombudsman 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 Voluntary Small Business Wage Compliance Code in this instrument 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

1 Name

This instrument is the *Voluntary Small Business Wage Compliance Code Declaration 2024*.

2 Commencement

- (1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	1 January 2025.	1 January 2025

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

- (2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsection 327B(1) of the *Fair Work Act 2009*.

4 Definitions

In this instrument:

Act means the *Fair Work Act 2009*.

applicable amount means an amount that:

Section 5

- (a) an employer is required to pay as mentioned in paragraph 327A(1)(a) of the Act; and
- (b) is not covered by subsection 327A(2) of the Act.

code means the Voluntary Small Business Wage Compliance Code in Part 2.

5 Simplified outline

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. Broadly, a small business employer is one that is covered by the Act and that employs fewer than 15 employees.

Civil action under the Act can include accepting an enforceable undertaking, giving a compliance notice or applying for an order for a civil penalty.

A small business employer may commit a criminal offence against subsection 327A(1) of the Act if:

- (a) the employer is required to pay an applicable amount to, on behalf of, or for the benefit of, an employee; and
- (b) the employer intentionally engages in conduct; and
- (c) 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.

However, if the Fair Work Ombudsman is satisfied that a small business employer complied with the code in relation to a failure to pay an applicable amount, the Fair Work Ombudsman must not refer any conduct that resulted in the failure to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence against that subsection.

Additionally, if the Fair Work Ombudsman is so satisfied, the Fair Work Ombudsman must not enter into a cooperation agreement with the small business employer that covers any such conduct.

If the small business employer has complied with the code, the Fair Work Ombudsman, and others, may still take civil action in relation to the conduct.

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.

An example of a matter that may be relevant to assessing whether the failure to pay the applicable amount was intentional is 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 Fair Work Ombudsman.

Note 1: For information about enforceable undertakings and compliance notices, see Subdivision DD of Division 3 of Part 5-2 of the Act.

Section 5

- Note 2: For information about orders for civil penalties, and other civil remedies, see Division 2 of Part 4-1 of the Act.
- Note 3: For information about cooperation agreements (which relate to conduct that a person has self-reported to the Fair Work Ombudsman), see Subdivision DE of Division 3 of Part 5-2 of the Act.

Section 6

Part 2—Voluntary Small Business Wage Compliance Code

6 Failure to pay an applicable amount must not be intentional

- (1) 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.

Note: A small business employer will have complied with this code if the failure to pay the applicable amount was not intentional, having regard to relevant matters such as those set out in this section.

- (2) Without limiting the matters to be considered in assessing whether the failure to pay the applicable amount was intentional for the purposes of this code, subsections (3) and (4) set out matters that may be relevant to that assessment.

Action by employer that may indicate the failure to pay the applicable amount is not intentional

- (3) Relevant matters may include whether the employer has done any or all of the following:
- (a) made reasonable efforts to ascertain correct rates of pay and entitlements for the employee;
 - (b) made reasonable efforts to stay up to date with the employer's obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee;
 - (c) considered and relied on information about the employee that the employer reasonably believed was accurate (such as the employee's role, duties, classification, relevant qualifications, age, hours of work and location of work) in relation to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee;
 - (d) 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;
 - (e) provided information that the employer reasonably believed was accurate in seeking that information or advice;
 - (f) taken reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure;
 - (g) cooperated with any relevant inquiry or investigation by the Fair Work Ombudsman after becoming aware of the failure to pay the applicable amount.

Other circumstances may be relevant

- (4) Relevant matters may include any other circumstances relating to the failure to pay the applicable amount or how the employer became aware of the failure.

7 Ascertaining correct pay rates and entitlements

For the purposes of paragraph 6(3)(a), matters to be considered in assessing whether the employer has made reasonable efforts to ascertain correct rates of

pay and entitlements for the employee may include, but are not limited to, the following:

- (a) whether the employer referred to any modern award or other relevant instrument that applies to the employee;
- (b) whether the employer referred to any other rights, relating to the payment of an applicable amount, that apply to the employee under the Act;
- (c) whether the employer considered the nature of the enterprise;
- (d) whether the employer considered the role and duties of the employee;
- (e) whether the employer considered the correct classification of the employee's role;
- (f) whether the employer considered any of the following that apply in relation to the employee:
 - (i) minimum rates of pay;
 - (ii) loadings or allowances;
 - (iii) penalty rates or overtime;
 - (iv) any other separately identifiable amounts;
 - (v) any other requirements relating to rates of pay for the employee, such as annualised wages or piece rates.

Note: For the purposes of paragraph (a) of this section, other instruments that may be relevant to ascertaining correct rates of pay and entitlements for the employee include other fair work instruments (such as an enterprise agreement) or a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

8 Staying up to date with obligations

For the purposes of paragraph 6(3)(b), matters to be considered in assessing whether the employer has made reasonable efforts to stay up to date with the employer's obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee may include, but are not limited to, the following:

- (a) the employer's efforts to stay up to date with any changes to applicable legislation and the interpretation of that legislation;
- (b) the employer's 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 Fair Work Commission;
- (c) the employer's efforts to stay up to date with any changes to the employee's circumstances, such as changes to the employee's role, duties, classification, relevant qualifications, age, hours of work or location of work.

Note: For the purposes of paragraph (b) of this section, other instruments that may be relevant to the employer's obligations include other fair work instruments (such as an enterprise agreement) or a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

9 Reliable sources of information or advice

For the purposes of paragraph 6(3)(d), reliable sources from which information or advice may be sought, in relation to the payment of applicable amounts to, on

Section 10

behalf of, or for the benefit of, the employee, may include, but are not limited to, the following:

- (a) industrial associations of employers or employees, or other relevant professional bodies;
- (b) industrial professionals, such as lawyers or professional industrial consultants;
- (c) payroll processing services;
- (d) the Fair Work Ombudsman, including the Fair Work Ombudsman's website and other resources;
- (e) the Fair Work Commission, including the Fair Work Commission's website and other resources.

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

For the purposes of paragraph 6(3)(f), matters to be considered in assessing whether the employer has taken reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure may include, but are not limited to, the following:

- (a) any steps the employer has taken to repay the amount to, on behalf of, or for the benefit of, the employee;
- (b) if the employer has taken any such steps—how promptly the employer took those steps after becoming aware of the failure to pay the applicable amount;
- (c) any proactive steps the employer has taken to prevent the same issues from arising in future in relation to any employees, for example, seeking information or advice from reliable sources and taking steps to remedy any mistakes or deficiencies in the employer's systems.

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

For the purposes of subsection 6(4), other circumstances relating to the failure to pay the applicable amount and how the employer became aware of the failure may include, but are not limited to, the following:

- (a) whether the failure to pay the applicable amount arose from a mistake or error in payroll processes or by a financial institution;
- (b) whether the failure to pay the applicable amount arose because of ambiguity or competing interpretations of obligations in relation to employee pay, and the employer took a reasonable but incorrect interpretation (for example, a reasonable but incorrect interpretation of a modern award);
- (c) how the employer became aware of the failure to pay the applicable amount, for example because the employer proactively undertook an audit of their payroll compliance;
- (d) if the employer was made aware of the failure to pay the applicable amount by the employee or the employee's representative—how the employer responded to being made aware, and how promptly (if at all) the employer took reasonable steps to rectify the failure as mentioned in paragraph 6(3)(f);

- (e) whether the applicable amount the employer failed to pay was minimised because the employer took prompt steps to rectify the failure after becoming aware of the failure.