

## Division 3—Guarantee of annual earnings

### 328 Employer obligations in relation to guarantee of annual earnings

#### *Employer must comply with guarantee*

- (1) An employer that has given a guarantee of annual earnings to an employee must (subject to any reductions arising from circumstances in which the employer is required or entitled to reduce the employee's earnings) comply with the guarantee during any period during which the employee:

- (a) is a high income employee of the employer; and
- (b) is covered by a modern award that is in operation.

Note 1: Examples of circumstances in which the employer is required or entitled to reduce the employee's earnings are unpaid leave or absence, and periods of industrial action (see Division 9 of Part 3-3).

Note 2: This subsection is a civil remedy provision (see Part 4-1).

#### *Employer must comply with guarantee for period before termination*

- (2) If:
- (a) the employment of a high income employee is terminated before the end of the guaranteed period; and
  - (b) either or both of the following apply:
    - (i) the employer terminates the employment;
    - (ii) the employee becomes a transferring employee in relation to a transfer of business from the employer to a new employer, and the guarantee of annual earnings has effect under subsection 316(2) as if it had been given to the employee by the new employer; and
  - (c) the employee is covered by a modern award that is in operation at the time of the termination;

the employer must pay earnings to the employee in relation to the part of the guaranteed period before the termination at the annual rate of the guarantee of annual earnings.

Note: This subsection is a civil remedy provision (see Part 4-1).

#### *Employer must give notice of consequences*

- (3) Before or at the time of giving a guarantee of annual earnings to an employee covered by a modern award that is in operation, an employer must notify the employee in writing that a modern award will not apply to the employee during any period during which the annual rate of the guarantee of annual earnings exceeds the high income threshold.

Note: This subsection is a civil remedy provision (see Part 4-1).

### 329 High income employee

- (1) A full-time employee is a **high income employee** of an employer at a time if:
- (a) the employee has a guarantee of annual earnings for the guaranteed period; and
  - (b) the time occurs during the period; and

- (c) the annual rate of the guarantee of annual earnings exceeds the high income threshold at that time.
- (2) An employee other than a full-time employee is a ***high-income employee*** of an employer at a time if:
  - (a) the employee has a guarantee of annual earnings for the guaranteed period; and
  - (b) the time occurs during the period; and
  - (c) the annual rate of the guarantee of annual earnings would have exceeded the high income threshold at that time if the employee were employed on a full-time basis at the same rate of earnings.
- (3) To avoid doubt, the employee does not have a guarantee of annual earnings for the guaranteed period if the employer revokes the guarantee of annual earnings with the employee's agreement.

### **330 Guarantee of annual earnings and annual rate of guarantee**

- (1) An undertaking given by an employer to an employee is a ***guarantee of annual earnings*** if:
  - (a) the employee is covered by a modern award that is in operation; and
  - (b) the undertaking is an undertaking in writing to pay the employee an amount of earnings in relation to the performance of work during a period of 12 months or more; and
  - (c) the employee agrees to accept the undertaking, and agrees with the amount of the earnings; and
  - (d) the undertaking and the employee's agreement are given before the start of the period, and within 14 days after:
    - (i) the day the employee is employed; or
    - (ii) a day on which the employer and employee agree to vary the terms and conditions of the employee's employment; and
  - (e) an enterprise agreement does not apply to the employee's employment at the start of the period.
- (2) However, if:
  - (a) an employee is employed for a period shorter than 12 months; or
  - (b) an employee will perform duties of a particular kind for a period shorter than 12 months;
 the undertaking may be given for that shorter period.
- (3) The ***annual rate*** of the guarantee of annual earnings is the annual rate of the earnings covered by the undertaking.

### **331 Guaranteed period**

The ***guaranteed period*** for a guarantee of annual earnings is the period that:

- (a) starts at the start of the period of the undertaking that is the guarantee of annual earnings; and
- (b) ends at the earliest of the following:
  - (i) the end of that period;
  - (ii) an enterprise agreement starting to apply to the employment of the employee;
  - (iii) the employer revoking the guarantee of annual earnings with the employee's agreement.

### 332 Earnings

- (1) An employee's *earnings* include:
  - (a) the employee's wages; and
  - (b) amounts applied or dealt with in any way on the employee's behalf or as the employee directs; and
  - (c) the agreed money value of non-monetary benefits; and
  - (d) amounts or benefits prescribed by the regulations.
- (2) However, an employee's *earnings* do not include the following:
  - (a) payments the amount of which cannot be determined in advance;
  - (b) reimbursements;
  - (c) contributions to a superannuation fund to the extent that they are contributions to which subsection (4) applies;
  - (d) amounts prescribed by the regulations.

Note: Some examples of payments covered by paragraph (a) are commissions, incentive-based payments and bonuses, and overtime (unless the overtime is guaranteed).

- (3) *Non-monetary benefits* are benefits other than an entitlement to a payment of money:
  - (a) to which the employee is entitled in return for the performance of work; and
  - (b) for which a reasonable money value has been agreed by the employee and the employer;but does not include a benefit prescribed by the regulations.
- (4) This subsection applies to contributions that the employer makes to a superannuation fund to the extent that one or more of the following applies:
  - (a) the employer would have been liable to pay superannuation guarantee charge under the *Superannuation Guarantee Charge Act 1992* in relation to the person if the amounts had not been so contributed;
  - (b) the employer is required to contribute to the fund for the employee's benefit in relation to a defined benefit interest (within the meaning of section 291-175 of the *Income Tax Assessment Act 1997*) of the employee;
  - (c) the employer is required to contribute to the fund for the employee's benefit under a law of the Commonwealth, a State or a Territory.

### 333 High income threshold

- (1) Subject to this section, the *high income threshold* is the amount prescribed by, or worked out in the manner prescribed by, the regulations.
- (2) A regulation made for the purposes of subsection (1) has no effect to the extent that it would have the effect of reducing the amount of the high income threshold.
- (3) If:

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|  | <ul style="list-style-type: none"><li>(a) in prescribing a manner in which the high income threshold is worked out, regulations made for the purposes of subsection (1) specify a particular matter or state of affairs; and</li><li>(b) as a result of a change in the matter or state of affairs, the amount of the high income threshold worked out in that manner would, but for this subsection, be less than it was on the last occasion on which this subsection did not apply;</li></ul> |
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the *high income threshold* is the amount that it would be if the change had not occurred.

**333A Prospective employees**

- If:
- (a) an employer, or a person who may become an employer, gives to another person an undertaking that would have been a guarantee of annual earnings if the other person had been the employer’s or person’s employee; and
  - (b) the other person subsequently becomes the employer’s or person’s employee; and
  - (c) the undertaking relates to the work that the other person performs for the employer or person;

this Division applies in relation to the undertaking, after the other person becomes the employer’s or person’s employee, as if the other person had been the employer’s or person’s employee at the time the undertaking was given.