



Small Business Assistance & Advisory Service

Fair Work Overview

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Contents

Does the Fair Work Act 2009 Apply to my Business?	2
Checklist	3
What type of employer are you?	3
The National Employment Standards (NES)	5
1. MAXIMUM WEEKLY HOURS OF WORK	5
CASE STUDY: Dismissing an employee for refusing to work overtime	5
2. REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS	6
3. PARENTAL LEAVE	6
4. ANNUAL LEAVE	7
5. PERSONAL/CARER'S LEAVE	7
6. COMMUNITY SERVICE LEAVE.....	7
7. LONG SERVICE LEAVE	8
8. PUBLIC HOLIDAYS.....	8
9. NOTICE OF TERMINATION AND REDUNDANCY PAY	8
10. FAIR WORK INFORMATION STATEMENT	9
Modern Awards	10
Determining Modern Award Coverage.....	10
Guarantee of Annual Earnings	11
Employers Obligations – Record Keeping	12
Employee Records.....	12
Pay Slips	13
Fair Work Commission Outcome Examples	14
Employee or Independent Contractor – FWC.....	15

Does the Fair Work Act 2009 Apply to my Business?

The coverage of the Fair Work Act is not universal and will depend on several factors including state referred powers and organisation type.

It is more likely than not that the Fair Work Act will apply to your business, particularly if you are a private sector business. To help you determine this, please see the checklist below.

The coverage of the Fair Work Act is not universal; because the Commonwealth Parliament's powers are limited to legislating on matters that the Parliament has under the Constitution. The Fair Work Act has been enacted in such a way that it has as broad a degree of constitutional power as possible. It picks up most employers by using its "corporations' power" — that is, its power to regulate the activities of corporations. As most employers are corporations, the Fair Work Act applies to most employers.

Other kinds of employers are picked up by referrals of State legislative power, with all states other than Western Australia referring its legislative power to the Commonwealth, meaning the Fair Work Act applies to employers and employees in each State (subject to minor exceptions relating mainly to public service employers).

Employees in Territories (internal and two external Territories) are also covered by the Fair Work Act together with certain flight crew, maritime and waterside workers.

Even if an employer is not an employer mentioned above (known as a "national system employer") the Fair Work Act can still apply to an employer if the employer employs employees in Australia. It can only do so to a limited extent using the external affairs powers.

Checklist

The Fair Work Act is the primary piece of workplace relations legislation in Australia which establishes various rights and obligations on parties to an employment relationship and will apply differently depending on various business attributes.

The following questionnaire can assist in working out the extent to which the Fair Work Act 2009 (Cth) applies to your business.

If you are still having difficulty determining this after using the checklist below, [contact us](#).

WHAT KIND OF EMPLOYER ARE YOU?

What type of employer are you?

- 1) Are you a private sector employer (including a not-for-profit organisation, partnership and sole trader) employing employees in the Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania or Victoria?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 2
- 2) Are you a trading or financial company incorporated under the Corporations Act 2001 (Cth) or another piece of legislation (i.e., a constitutional corporation) that employs employees in any State or Territory? (Usually Pty Ltd or Ltd companies **see note** below on Constitutional Corporations).
 - a) If “yes”, **go to 8**
 - b) If “no” go to 3
- 3) Are you a body incorporated in a Territory?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 4
- 4) Are you an employer of employees who carry out activities in connection with a Territory of Australia (including Christmas Island and the Territory of Cocos (Keeling) Islands)?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 5
- 5) Are you an employer of employees who are engaged in interstate trade or commerce as flight crew, maritime workers or waterside workers?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 6
- 6) Are you a public sector employer in any State other than Western Australia?
 - a) If “yes”, **go to 9**
 - b) If “no” go to 7
- 7) Do you employ employees in Australia other than a type of employer mentioned above?
 - a) If “yes”, **go to 10**
 - b) If “no”, go to 11

Application of the Fair Work Act

- 8) You are a national system employer. **The Fair Work Act applies** to you and your employees.

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- 9) You are a national system employer provided you fall within the scope of referral of State power (subject to constitutional limitations). If you do not, then go to 10.
- 10) You are not a national system employer. However, the Fair Work Act does apply in relation to the following matters:
 - a) General protections applications (Part 3–1 of the Fair Work Act);
 - b) Right of entry provisions (Part 3–4 of the Fair Work Act);
 - c) National Employment Standards in relation to parental leave and notice of termination of employment (Part 6–3 of the Fair Work Act);
 - d) Unlawful termination (Part 6–4 of the Fair Work Act)
- 11) The Fair Work Act does not apply to your business.

Note: Constitutional Powers

Constitutional corporations are defined in [Section 12 of the Fair Work Act 2009 \(Cth\)](#) and in paragraph 51 (xx) of the Commonwealth Constitution, and they include:

- A business incorporated outside of Australia which conducts business inside Australia;
- A trading corporation formed in Australia; and
- A financial corporation formed in Australia.

The National Employment Standards (NES)

The NES comprises of ten (10) minimum standards which apply to most employers within the Australian workplace relations system.

1. MAXIMUM WEEKLY HOURS OF WORK

The NES provides an entitlement for full-time employees to refuse to work additional hours in excess of 38 a week, if those additional hours are not reasonable. Factors that must be taken into account when deciding whether additional hours are reasonable include:

- any risk to the employee's health and safety;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for, or a level of remuneration that reflects an expectation of, working the additional hours;
- notice by the employer of a request or requirement to work additional hours;
- usual patterns of work in the industry;
- notice by the employee of an intention to refuse the additional hours; and
- nature of the employee's role and level of responsibility.

Averaging of hours is used when an employee's actual hours vary from week to week. The employee's hours are then averaged to determine compliance with restrictions on the maximum ordinary hours. This will also be a relevant factor in deciding whether additional hours above the 38-hour standard are reasonable.

Modern awards or enterprise agreements may include terms that allow for the averaging of hours over a specified period. Employees not covered by an award or an agreement may agree in writing with their employers to average their weekly hours over a period of 6 months or less.

CASE STUDY: Dismissing an employee for refusing to work overtime

If you dismiss an employee for refusing to work additional hours, the employee could challenge the dismissal as a contravention of the general protections' provisions in the FW Act.

In [Brown v Premier Pet \(\(2012\) FMCA 1089\)](#) an employee refused an employer's request to work 3 additional hours of overtime on a non-trading day every 7 to 10 days. The employee was dismissed and made a general protections claim, arguing that the reason for the dismissal was because he had exercised a workplace right, namely his entitlement to refuse to work unreasonable hours in addition to 38 a week.

The Court had to determine whether the employer had demonstrated that the requirement of the employee to work the additional hours was reasonable. The Court said that the following factors were relevant in concluding that the employer had not established reasonableness:

- the employee's personal circumstances, namely that he was required to assist his mother who lived at his home, he was involved in conducting his own businesses as an internet retailer and needed time to devote to that business, and the fact that he did not wish to work more than 38 hours a week because of the impact this would have on his bankruptcy situation;
- the employer's refusal to negotiate the issue with employee; and
- the employer's failure to provide evidence of the total amount of overtime that the employee was required to work.

The lesson from this case is that before an employer disciplines or dismisses an employee for refusing to work overtime, it needs to prove that it was not unreasonable to require the employee to work those hours. The employer also needs to be prepared to consult the employee and listen to his or her objections about the requirement to work the overtime before seeking to discipline the employee for not meeting it.

2. REQUEST FOR FLEXIBLE WORKING ARRANGEMENTS

An employee has the right to request flexible working hours from his/her employer in the following circumstances:

- The employee is a parent or has a responsibility for the care of a child of school age or younger;
- The employee is a carer;
- The employee has a disability;
- The employee is aged 55 or older; and/or
- The employee is experiencing family violence or provides care or support to a family member experiencing family violence.

The employer can only decline the request on 'reasonable business grounds'. If a business ground is relied upon for refusing the request, the question of whether it is reasonable involves a balancing of the cost of accommodating the request (if any), the employer's ability to reorganise work arrangements to accommodate the request, and any detrimental effect on the operation of the business.

An employee is not entitled to request a flexible working arrangement unless he/she has completed at least 12 months of continuous service with the employer.

3. PARENTAL LEAVE

Full-time and part-time employees who have completed 12 months of continuous service, as well as casual employees who work on a regular and systematic basis over a 12-month period, can take unpaid parental leave.

An employee is able to take up to 12 months' parental leave to enable him/her to undertake the primary care of their child. A couple of employees may each take up to 12 months consecutively. Alternatively, one parent can request up to 12 months' additional leave, taking their total entitlement to two years, which his/her employer will only be able to refuse on reasonable business grounds.

An employee returning from parental leave is entitled to return to the position he/she held before going on leave or, where that position no longer exists, to a position comparable in pay and status.

4. ANNUAL LEAVE

Permanent employees are entitled to 4 weeks' paid annual leave for each year of service. This is pro-rated for part-time employees.

Shift workers are entitled to 5 weeks paid annual leave. A shift worker is one defined as such under a modern award or enterprise agreement, or if award/agreement free, falls within the definition of shift worker in the FW Act (s 87(3)).

Annual leave accrues progressively during periods of "service" in accordance with "ordinary hours of work".

"Service" includes all periods of employment other than periods of unpaid leave, unpaid absence (other than community service leave) and unauthorised leave.

"Ordinary hours of work", for an employee to whom an award of enterprise agreement applies, are the ordinary hours set out in the award or agreement. Ordinary hours of work for an award/agreement free employee are the hours agreed as such between the employer and employee. If not agreed they will be 38 hours per week for full-time employees or in the case of other employees, the lesser of 38 hours or the employee's usual weekly hours of work.

Employees on annual leave are entitled to pay at their "base rate of pay". This is the rate of pay payable to the employee for his or her ordinary hours of work, but not including incentive-based payments and bonuses, loadings, monetary allowances, overtime or penalty rates or any other separately identifiable amounts.

5. PERSONAL/CARER'S LEAVE

Employees are entitled to 10-days' paid personal/carer's leave for each year of service. Leave accrues progressively according to an employee's 'ordinary hours of work' and accumulates from year to year.

Employees are also entitled to two days of paid compassionate leave (such as for the death or serious illness of a family or household member) and two days of unpaid carer's leave if paid carer's leave has been exhausted. This entitlement extends to casual employees.

6. COMMUNITY SERVICE LEAVE

Employees are entitled to unpaid leave to undertake eligible community service activities such as jury service and emergency service duties. Employers must provide make-up payments for full time and part time employees undertaking jury service for a period of up to 10 days. Make-up pay is the difference between what an employee was paid for jury service and the employee's base rate of pay for their ordinary hours of work for the period of jury service.

There are notice and evidence requirements that must be met by an employee for them to take this leave.

7. LONG SERVICE LEAVE

Under the FW Act, the long service leave obligations contained in a pre-modernised award (such as the Metal Industry Award) still apply for employers that employ workers who were covered by the pre-modernised award on 31 December 2009, or joined the employer on or after 1 January 2010 but would have been covered by the pre-modernised award if they had been employed before that date.

8. PUBLIC HOLIDAYS

Employees are entitled to be absent from work on prescribed public holidays. The NES provide for the following public holidays:

- Christmas Day, Boxing Day, New Year's Day, Australia Day, Anzac Day, Queens Birthday, Good Friday and Easter Monday.

An employee who is absent from work on a public holiday is entitled to payment at their base rate of pay for the ordinary hours that would have been worked.

An employer may make a reasonable request for an employee to work on a public holiday. However, an employee may refuse to work if they have reasonable grounds.

Factors that will be relevant in deciding whether a request or refusal to work is reasonable include:

- the nature of the workplace, including operational requirements, and the nature of the employee's work;
- the employee's personal circumstances, including family responsibilities;
- whether the employee could reasonably expect a request to work on a public holiday;
- whether the employee is entitled to overtime, penalty rates or other compensation for working on the holiday;
- the amount of advance notice by the employer making the request; and
- the amount of advance notice by the employee refusing the request.

If an employee works on a public holiday they may be entitled to penalty rates or other compensation set out in a modern award, enterprise agreement or contract of employment.

9. NOTICE OF TERMINATION AND REDUNDANCY PAY

An employer must only terminate an employee's employment in writing. An employer must not terminate an employee's employment unless they have given the employee the necessary period of notice, or unless they have paid the employee an amount of salary in lieu of that notice. Notice payments will be at an employee's full rate of pay, including loadings, monetary allowances, penalty rates and other relevant amounts. The prescribed minimum period of notice is:

- one week for employees with up to one year's service;
- two weeks for one to three years' service;
- three weeks for three to five years' service, and

- four weeks for more than five years' service.

Employees over the age of 45 with at least two years' continuous service at the time of termination will be entitled to an additional one week's notice.

If termination is a consequence of redundancy, the employer must make redundancy payments to an employee calculated according to the following scale. Pay is calculated according to the employee's base rate of pay for ordinary hours of work excluding loadings, monetary allowances, penalty rates and other identifiable amounts. The period of time the employee is entitled to will be based on the length of an employee's continuous service immediately prior to termination.

- at least 1 year, but less than 2 years – 4 weeks' pay;
- at least 2 years, but less than 3 years – 6 weeks' pay;
- at least 3 years, but less than 4 years – 7 weeks' pay;
- at least 4 years, but less than 5 years – 8 weeks' pay;
- at least 5 years, but less than 6 years – 10 weeks' pay;
- at least 6 years, but less than 7 years – 11 weeks' pay;
- at least 7 years, but less than 8 years – 13 weeks' pay;
- at least 8 years, but less than 9 years – 14 weeks' pay;
- at least 9 years, but less than 10 years – 16 weeks' pay; or
- at least 10 years – 12 weeks' pay.

Service prior to 1 January 2010 will not be counted in calculating NES redundancy pay, unless the employee concerned had a pre-existing legal entitlement to redundancy pay as of 31 December 2009.

Redundancy payments may not be required in certain circumstances such as an incapacity to pay or where the employee has been provided with acceptable alternative employment.

Small businesses employing fewer than 15 employees will be exempt from making redundancy payments.

10. FAIR WORK INFORMATION STATEMENT

Employers are required to give new employees a [Fair Work Information Statement](#) as soon as practicable after they start work.

Modern Awards

[Modern awards](#) are legal instruments which set out minimum conditions of employment for industries and occupations and regulate how employers and employees interact.

Some 122 modern awards cover particular industries or occupations (or both) prescribing minimum conditions in areas of work classifications, wage rates, allowances, penalties, loadings, working hours, rostering, consultation, superannuation and other matters.

Modern awards will not ordinarily deal with a matter dealt with under the NES. A modern award cannot exclude any provision of the NES. However, a modern award can provide ancillary or incidental detail in relation to the operation of an entitlement under the NES, but only to the extent that the term is not detrimental in any respect, when compared to the NES.

A modern award may include industry-specific detail about matters in the NES. It may also supplement the NES.

The NES provides that particular types of provisions are able to be included in modern awards even though they might otherwise be inconsistent with the NES. Modern awards may include provisions dealing with these issues. For instance, the NES allows, but does not require, modern awards to include terms that:

- provide for loadings to be paid to school-based trainees and school-based apprentices in lieu of certain entitlements;
- enable the averaging of hours of work over a specified period; or
- provide for the cashing out of paid annual leave by an employee, provided that certain conditions are met.

Determining Modern Award Coverage

The following is a guideline to assist employers in determining whether their employees are covered by a modern award or not.

Step 1: [Click here](#) and follow the instructions to find the relevant award. This will provide various options to identify an award covering employees in your business.

Step 2: Take note of the coverage, definitions and classifications clauses of awards. This will assist in determining whether your employees are covered by the award or not. Generally, the industry type will be canvassed in the coverage clause and defined further in the definitions clause. The classification clause (sometimes called Schedule B or otherwise) sets out the common duties, responsibilities and levels of employees who are employed under the award. It is useful to compare these against your employee's position description to determine the appropriate level and coverage.

Step 3: If you are still confused [contact us](#) for guidance.

Please note: You may need to pay different employees under different awards. For example: if you own a construction company, your trades people are likely to be covered by the Building and Construction Award, whilst your office staff are likely to be covered by the Clerks Award.

Guarantee of Annual Earnings

Guarantees of annual earnings are arrangements to prevent modern awards from applying to high income employees by agreement between employers and employees, provided certain requirements are met.

Employers can put in place arrangements to prevent a modern award from applying to high income employees. A high-income employee is an employee earning above the high-income threshold. The high-income threshold is generally adjusted 1 July each year and is currently \$148,700 for full-time employees (pro rata for part time or casual employees).

In calculating whether an employee's earnings exceed the high-income threshold, an employer should include wages, salary sacrifice benefits and other payments which are guaranteed or determined in advance, but exclude compulsory superannuation contributions, commissions, incentive-based payments, bonuses and overtime payments.

An employer may implement this arrangement by guaranteeing payment to the employee of a certain level of earnings over a period of 12 months or more.

The guarantee must be in writing and include a statement that the award will not apply to the employee whilst they are subject to the guarantee.

In the case of new employees, the guarantee must be signed by the employee within 14 days of the employee commencing employment. In the case of existing employees, it must be signed by the employee within 14 days of the employee's terms and conditions of employment being varied (for example, after receiving a pay increase).

While a guarantee is in operation, modern awards will not apply to the employee. However, the NES and other FW Act provisions, including unfair dismissal laws will still apply (s 330 of Fair Work Act).

Please note: An employee covered by an Enterprise Agreement cannot enter a guarantee of annual earnings.

Employers Obligations – Record Keeping

The information herein only applies to employers which are covered by the national system.

The information concerns the employer obligations in relation to employee records and pay slips set out in the [Fair Work Regulations 2009 \(Cth\) \(Regs\)](#).

Employee Records

The Regulations require that employee records must be legible, in English and a form that is readily accessible to a Fair Work Ombudsman inspector.

The Regulations also require that employers keep records in respect of each employee regarding the following:

- the name of the employer and the employee and the nature of their employment (e.g. part-time, full-time, permanent, temporary or casual), the date on which the employment commenced and after 1 January 2010, the Australian Business Number of the employer;
- pay, specifically the following:
 - the rate of remuneration paid to the employee;
 - the gross and net amounts paid to the employee;
 - any deductions made from the gross amount paid to the employee;
 - if the employee is a casual or irregular part-time employee who is guaranteed a rate of pay set by reference to a period of time worked, the record must set out the hours worked by the employee;
 - if the employee is entitled to be paid an incentive-based payment, a bonus, a loading, a penalty rate, another monetary allowance or separately identifiable entitlement, the record must set out details of the payment, bonus, loading, rate, allowance or entitlement;
- overtime hours, including the number of overtime hours and when the employee starts and ceases working overtime;
- any arrangement to average the employee's hours of work;
- the amount of leave that an employee takes and the balance remaining, any agreement regarding cashing out of annual leave;
- superannuation contributions;
- individual flexibility arrangements and guarantees of annual earnings; and
- termination of employment (where applicable). In particular, the record must specify whether the employment
 - was terminated by consent, notice or summarily and the name of the person who acted to terminate the employer.

There are also obligations on old employers and new employers in transfer of business situations. In particular, the old employer must transfer to the new employer each employee record concerning a transferring employee. If an employee of the old employer becomes an employee of the new employer after the transfer but before the expiry of three months, the new employer must ask the old employer for the employee records and the old employer must comply.

Employers must make copies of employee records available for inspection and copying upon the request of an employee or former employee to whom the record relates. The employer has three (3) business days within which to make the copy available after receiving the request or must post a copy of the record to the employee within 14 days after receiving the request. If the records are not kept at the premises where the employee works or worked, the employer must comply with the request as soon as practicable. Further, the employer must advise the employee where the records are kept, if the employee asks. An employee also has the right to interview the employer or an employer representative about an employee record that has or will be made.

An employer must ensure that a record that the employer is required to keep is not false or misleading to the employer's knowledge.

An employer must correct a record that the employer is required to keep as soon as the employer becomes aware that it contains an error. If an employee record is corrected, the employer must make a notation on the record of the nature of the corrected error and the correction.

An employer must not alter an employee record, other than as permitted under the Regs or allow any other person to do so. If a person knows that an employee record is false or misleading, the person may not make use of that entry.

Pay Slips

Payslips may be in electronic form or kept in hard copy. Each pay slip must specify the following:

- employer's name;
- the employee's name;
- the period to which the pay slip relates;
- the date on which the payment to which the pay slip relates was made;
- the gross amount of the payment;
- the net amount of the payment;
- any amount paid to the employee that is a bonus, loading, allowance, penalty rate, incentive-based payment
- or other separately identifiable entitlement; and
- the Australian Business Number (if any) of the employer.

If an amount is deducted from the gross amount of the payment, the pay slip must also include the name, or the name and number, of the fund or account into which the deduction was paid.

If the employee is paid at an hourly rate of pay, the pay slip must also include:

- the rate of pay for the employee's ordinary hours (however described);

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- the number of hours in that period for which the employee was employed at that rate; and
- the amount of the payment made at that rate.

If the employee is paid at an annual rate of pay, the pay slip must also include the rate as at the latest date to which the payment relates.

If the employer is required to make superannuation contributions for the benefit of the employee, the pay slip must also include:

- the amount of each contribution that the employer made during the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contribution was made; or
- the amounts of contributions that the employer is liable to make in relation to the period to which the pay slip relates, and the name, or the name and number, of any fund to which the contributions will be made.

Fair Work Commission Outcome Examples

[\[2019\] FCCA 1756](#): The nature of the proceedings were underpayments (such as casual loading, overtime and shift and weekend rates) and failure to issue payslips or keep records. In this case only the director received a penalty of \$39,090.

[\[2019\] FCCA 1425](#): The nature of the proceedings were underpayments (such as minimum rates, minimum daily engagements and various penalty rates) and failure to keep records which resulted in penalties totalling \$203,472 with \$33,912 of this awarded against the director.

Employee or Independent Contractor – FWC

It is important to note, that whilst you need to be careful of the Fair Work distinctions between what constitutes an employee from an independent contractor, the ATO also has a method of determining which is different.

Whilst we endeavour to give some indication here, we do emphasise that in this area it is advisable to obtain some professional advice as the cost of getting it wrong can be devastating to an organisation, and the directors of the organisation, as well as any managers can also be held accountable through assessorial liability.

When a person is performing work or personal services under a contract with another person, it is important to determine whether the worker is an employee or an independent contractor. This will determine a range of significant matters, including:

- the manner in which the Fair Work Act 2009 (Cth) applies to the relationship;
- the extent to which a court or tribunal will recognise the implication of certain terms into the employment contract; and
- the extent to which the principal/employer will be ‘vicariously’ liable for the actions of the worker.

The following image illustrates the considerations the FWC make when determining between an employee or contractor.

Indicator	Employee	Independent Contractor	Indicator	Employee	Independent Contractor
Degree of control over how work is performed	Performs work, under the direction and control of their employer, on an ongoing basis.	Has a high level of control in how the work is done.	Tools and equipment	Tools and equipment are generally provided by the employer, or a tool allowance is provided.	Uses their own tools and equipment (note: alternative arrangements may be made within a contract for services).
Hours of work	Generally works standard or set hours (note: a casual employee's hours may vary from week to week).	Under agreement, decides what hours to work to complete the specific task.	Tax	Has income tax deducted by their employer.	Pays their own tax and GST to the Australian Taxation Office.
Expectation of work	Usually has an ongoing expectation of work (note: some employees may be engaged for a specific task or specific period).	Usually engaged for a specific task.	Method of payment	Paid regularly (for example, weekly/fortnightly/monthly)	Has obtained an ABN and submits an invoice for work completed or is paid at the end of the contract or project.
Risk	Bears no financial risk (this is the responsibility of their employer).	Bears the risk for making a profit or loss on each task. Usually bears responsibility and liability for poor work or injury sustained while performing	Leave	Entitled to receive paid leave (for example, annual leave, personal/carers' leave, long service leave) or receive a loading in lieu of leave entitlements in the	Does not receive paid leave.
Superannuation	Entitled to have superannuation contributions paid into a nominated superannuation fund by their employer.	Pays their own superannuation (note: in some circumstances independent contractors may be entitled to be paid superannuation			