# Offer of Guarantee of Annual Earnings

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## Contacting the Victorian Chamber of Commerce and Industry

The Victorian Chamber’s team of experienced workplace relations advisors can assist members with a range of employment, human resources and industrial relations issues.

Our experienced workplace relations consultants can also provide assistance to both members and non-members on a range of more complex matters for a fee-for-service. The consultants can, among other things, provide training to employees, conduct investigations and provide representation at proceedings at the Fair Work Commission.

For assistance or more information, please contact the Workplace Relations Advice Line on (03) 8662 5222.

Disclaimer

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**General Information**

**What is a Guarantee and what is its effect?**

The Guarantee represents a commitment by the employer to pay the employee no less than an amount that exceeds a ‘high income threshold’ during a ‘Guarantee Period’ and in exchange for that Guarantee, the relevant modern award that covers the employee ceases to apply

The main effect of a Guarantee is that the award which previously covered the employee will cease to apply. This means that the employer will no longer have to comply with the terms of the award and can merely provide the employee with the terms and conditions offered to the employee in their contract of employment. For example, if an award covered employee has a Guarantee, they will not be entitled to overtime, penalty rates and other disabilities provided for under the award unless the entitlement is contained in their contract of employment

One significant point that employers should note in using a Guarantee is that while the Guarantee means the award no longer applies to the employee, the award still technically 'covers' the employee for the purposes of providing them with access to the unfair dismissals regime only. That is, the Guarantee does not create a jurisdictional barrier to the employee pursuing an unfair dismissal claim against an employer

**To whom can I offer a Guarantee?**

A Guarantee can only be offered to employees who are covered by a modern award and earn more than the 'high income threshold'. Importantly, an employee’s earnings must exceed the high income threshold at all times while the Guarantee is in place. If it does not, then the Guarantee will not operate and the award will again begin to apply to the employee.

A part-time employee may also be offered the Guarantee on the basis that if they did work full time, their earnings would exceed the high income threshold.

The Guarantee can be offered to prospective employees. If this occurs, the Guarantee does not become operative until person becomes the employee of the employer.

The Guarantee cannot be offered to an employee who is covered by an enterprise agreement, or agreements made prior to the Fair Work Act 2009 (Cth), such as an Australian Workplace Agreement or Individual Transitional Employment Agreement. If an employee is offered a Guarantee and later becomes covered by an enterprise agreement, then the Guarantee will cease to operate

**How do I determine if the employee earns more than the ‘high income threshold’?**

The amount of the ‘high income threshold’ is set by the Fair Work Act.

From 1 July 2020, the high income threshold increased to $153,600. The ‘high income threshold’ is increased annually in accordance with the Fair Work Regulations 2009. Therefore, Employers seeking to enter into a guarantee of annual earnings with an employee or a prospective employee need to ensure that they are paying in accordance with the annual increase to the ‘high income threshold’.

Not all components of remuneration are considered ‘earnings’ for the purposes of the Guarantee. The following items are included in the calculation of the ‘high income threshold’:

salary;

* amounts applied or dealt with in any way on the employee’s behalf or as the employee directs (e.g. salary sacrifice amounts)
* the agreed value of non-monetary benefits;

employer superannuation contributions which exceed the statutory superannuation guarantee rate.

Importantly, payments which cannot be determined in advance such as discretionary bonuses or incentives will not count towards the ‘high income threshold’, nor will statutory employer superannuation guarantee contributions.

**The Guarantee Period — what is the minimum term that a Guarantee can be offered?**

A Guarantee cannot be offered for less than the ‘Guarantee Period’. A Guarantee Period must be for 12 months or more. However, if an employee is employed for a period which is less than 12 months, for example on a fixed term basis, the Guarantee Period can be for that lesser period.

If the Guarantee is offered for less than 12 months, an employer must ensure that the employee’s remuneration would exceed the high income threshold if the employee had actually worked for a period of 12 months.

**How do I enter into a Guarantee?**

To enter into a Guarantee, the employer must offer the Guarantee to an employee in writing and the employee must agree to accept it. No more than 14 days can elapse from the date the Guarantee is offered to the employee and the employee agrees to accept it, and:

the day the employee commences employment; or

a day on which the employer and employee agree to vary the employee’s terms and conditions of employment.

Either before or at the time of entering into the written Guarantee, the employer is also required to notify the employee in writing that the modern award that previously applied to the employee will not apply to the employment during any period that the remuneration paid to the employee exceeds the high income threshold.

***Record keeping***

Employers should also be aware that they must retain a copy of the signed Guarantee for their records.

**Insert on** **[BUSINESS NAME] Letterhead**

**[INSERT DATE]**

**[INSERT FIRST AND LAST NAME OF EMPLOYEE]**

**[INSERT ADDRESS OF EMPLOYEE]**

Dear **[INSERT NAME]**,

**Re: Guarantee of Annual Earnings**

Effective from the date you sign this letter, **[INSERT COMPANY NAME] (‘****[INSERT COMPANY SHORT NAME]’)** undertakes to pay you **[$INSERT AMOUNT OF ANNUAL EARNINGS (BEFORE TAX) FOR THE GUARANTEED PERIOD]** per annum.

That amount represents, **[INSERT COMPANY NAME]** guarantee of annual earnings (*‘the Guarantee’*) to you in relation to the performance of your work from, **[INSERT DATE]** and, **[INSERT DATE]**.

If you accept the Guarantee, no award will apply to your employment because of the amount of remuneration (excluding superannuation) you will receive. In addition, for so long as your remuneration (excluding superannuation) exceeds the ‘high income threshold’ as defined in the *Fair Work Act 2009 (Cth)* (‘*the Act’*), an award will not apply to you.

The Guarantee will no longer apply if an enterprise agreements starts to cover you or if **[INSERT COMPANY NAME]** revokes this Guarantee with your agreement.

If your employment ends, you will be paid a pro-rata amount of the annual rate of earnings for that part of the Guarantee period that you worked. In addition, the Guarantee amount will be reduced by any period that you are on unpaid leave, during periods of industrial action or in any other circumstances provided for in the Act. To be clear, you will not be paid in those circumstances.

If you agree to accept the terms outlined in this letter, would you please sign this letter in the space below and return it to me by **[INSERT DATE].**

We confirm that the balance of your terms and conditions as set out in your contract dated **[INSERT DATE]** remain unchanged.

If you have any questions, please contact me on **[INSERT PHONE NUMBER].**

Yours faithfully,

**[INSERT COMPANY NAME]**

**[ADD SIGNATORY OF LETTER]**

**[ADD POSITION TITLE OF SIGNATORY]**

**Employee’s acceptance**

I, **[INSERT EMPLOYEES NAME]**, agree:

to the terms outlined in this letter; and

that all other terms and conditions of my employment remain unchanged.

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| **[Insert employees name]** | **Date** |