



CIRCULAR TO DEPARTMENTS AND AUTHORITIES NO. 3 OF 2012

**RECOVERY AND PREVENTION OF OVERPAYMENTS AND UNDERPAYMENTS**

This Circular replaces the *Recovery and Prevention of Overpayments Policy Statement* issued in December 2002.

Many industrial instruments now incorporate recovery and prevention of over and under payment clauses that contain provisions on how to manage and resolve these payments. Public sector agencies must comply with awards and agreements where these apply.

This Circular and the attached Guidelines for Public Sector Agencies have been developed to assist agencies in the recovery and management of incorrect payments of remuneration. Agencies can use this Circular as a guide in developing their own internal policies and procedures in managing these types of payments.

Agencies are also encouraged to be proactive in preventing overpayments and underpayments from occurring. Employers who maintain sound record keeping practices are less likely to overpay or underpay their employees and more likely to avoid breaching the relevant legislation.

Please contact your labour relations adviser for further advice on this Circular.

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28 February 2012

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## GUIDELINES FOR PUBLIC SECTOR AGENCIES

### 1. INTRODUCTION

This Circular provides general guidance to all agencies on the recovery of overpayments and underpayments made to employees. When considering this issue, agencies should first refer to applicable awards and agreements to identify whether the issue of recovery is dealt with in those instruments. Whatever is stated in these instruments on this issue must be adhered to in relation to the process that should be followed for recovery.

### 2. PREVENTION OF OVERPAYMENTS AND UNDERPAYMENTS

Employers have an obligation under both the *Industrial Relations Act 1979* and *Minimum Conditions of Employment Act 1993* to ensure proper employment records are kept for each employee. This includes the requirement to record all entitlements owed to or accrued by an employee under the provisions of an industrial instrument.

Contravention of the record keeping provisions of either Act may result in the employer incurring a penalty. There have been instances where recovery of overpayments has not been granted in circumstances where public sector employers have failed to keep good employment records.

Employers who maintain sound record keeping practices are less likely to overpay or underpay their employees and more likely to avoid breaching the legislation.

### 3. RECOVERY OF OVERPAYMENTS

#### 3.1 Obligations on public sector employers

Agencies may only pay employees in accordance with applicable agreements and awards, taking into account the requirements of the *Minimum Conditions of Employment Act 1993*.

Where an overpayment occurs, agencies have an implied obligation under the *Financial Management Act 2006* to account for public monies. Employers also have an obligation to maintain proper standards of financial management and accounting under Section 7 of the *Public Sector Management Act 1994*.

#### 3.2 Employees must agree to repayments

Section 17D of the *Minimum Conditions of Employment Act 1993* provides that employers may only make deductions from an employee's pay if:

- a) the deduction is authorised by the employee in writing;
- b) the employer is authorised to do so under an industrial instrument, including agreements, awards or contracts of employment; or
- c) the employer is authorised by a court order or under another law.

#### 3.3 Recovery of overpayments – statutory limitations

Public sector employers are not subject to limitation periods in relation to recovery of overpayment claims which accrued prior to 15 November 2005. The *Limitation Act 1935* does not bind the Crown except where expressly provided, and remains in force and continues to apply to causes of action which accrued prior to the introduction of the *Limitation Act 2005* (2005 Act).

The 2005 Act expressly binds the Crown except in limited circumstances and only applies to causes of action accrued after its commencement day. This means that public sector employers are now subject to six year limitation periods for recovery of overpayments claims which accrue on or after 15 November 2005.

The date a cause of action accrues in relation to an overpayment is the date on which the overpayment was made. Any limitation period will run from the date on which the overpayment was made rather than the date the overpayment was discovered.

### **3.4 Method of recovery**

Agencies should check any applicable awards and agreements to ascertain whether the recovery of overpayments is dealt with in those instruments. If the recovery of overpayments is to be pursued, the method of recovery stated in the relevant industrial instrument must be followed.

In the absence of such a clause, the most appropriate method of organising repayments is to reach agreement between the employer and employee. This could result in a lump sum repayment, or a repayment occurring over several instalments. Employers should ensure they are consistent in their approach and treatment of affected employees when pursuing an overpayment.

All agencies are encouraged to implement a policy and/or procedures dealing with overpayments and recovery and should consider including:

- a) a requirement to inform employees as soon as practicable of an overpayment, the nature of the error and process of recovery;
- b) steps to be taken to recover overpayments in a timely manner;
- c) negotiation of the timing and level of repayments with employees;
- d) any statutory limitation periods relating to the claim; and
- e) provision for dispute resolution when agreement cannot be reached.

In determining how repayments should be made, employers should consider the following factors:

- a) the amount of the overpayment;
- b) whether the overpayment occurred once or over a period of time; and
- c) the employee's personal circumstances, including their financial situation.

If resolution cannot be achieved following the process above, agencies should consider seeking legal advice on how to recover the debt in the appropriate forum.

### **3.5 Obligations to recover the debt**

There is a general requirement for employers to make all reasonable efforts to recover an overpayment, including those made to employees who are no longer working for their agency. Treasurer's Instruction 807 provides guidance regarding how agencies may recover such debts.

However, there is scope for a public sector employer to decide that in the circumstances it is not in its best interests to recover the overpayment. It may be appropriate to pursue a write-off action where it is considered improbable or uneconomical to recover the overpayment. Such actions are subject to section 48 of the *Financial Management Act 2006* and Treasurer's Instruction 807.

#### **4. RECOVERY OF UNDERPAYMENTS**

Employees have an enforceable legal right to be paid correctly in accordance with the provisions of their agreement, award or contract of employment. Underpayments should be corrected as soon as possible once the error has been identified.

Employees have the ability to pursue underpayments in the Industrial Magistrate's Court as provided for under sections 83 and 83A of the *Industrial Relations Act 1979*. Employees are only able to recover underpayments relating to a period no more than six years prior to the commencement of proceedings in the Industrial Magistrate's Court for enforcement of an industrial instrument.

#### **5. FURTHER ADVICE**

Agencies should contact their Labour Relations Adviser at the Department of Commerce Labour Relations Public Sector Directorate for further advice or clarification regarding the process of recovering overpayments and underpayments.