



Compliance and enforcement: Criminalising wage theft

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* amends the *Fair Work Act 2009* (the Act) to introduce a criminal offence for intentional underpayment of employees' wages and certain entitlements.

What has changed?

Criminalising wage theft

The offence will apply to employers who intentionally engage in conduct that results in the underpayment of their employees. It will apply to employee entitlements under the Act or a fair work instrument (such as a modern award or enterprise agreement), but not to solely contractual entitlements.

The offence will cover intentional underpayments of superannuation contributions where they are required by the Act, a fair work instrument or a transitional instrument, to the extent of the Commonwealth's legislative power. All employers will still be required to comply with their superannuation obligations under taxation law and industrial instruments.

The wage theft offence will carry a maximum of 10 years' imprisonment, and/or a maximum fine of the greater of:

- 3 times the amount of the underpayment, if the court can determine that amount, or
- for an individual: 5,000 penalty units (\$1,565,000); or for a body corporate: 25,000 penalty units (\$7,825,000).

Where an employer is found guilty of committing 2 or more offences that arose out of a course of conduct, for the purposes of sentencing the person will be taken to be guilty of a single offence.

The Fair Work Ombudsman (FWO) will be primarily responsible for investigating the new criminal offence. The FWO will then refer matters to the Commonwealth Director of Public Prosecutions or the Australian Federal Police for consideration, and prosecution where appropriate.

Extension of liability

Liability of bodies corporate: The default provisions in Part 2.5 of the Commonwealth Criminal Code will provide for the criminal liability of bodies corporate.

Officer liability (as accessories): Default provisions in the Commonwealth Criminal Code will apply to extend liability to ancillary offenders.

Crown liability: To ensure the Government meets its election commitment to be a model employer, the Act provides for liability for the wage theft offence to be extended to the Commonwealth Government in its role as an employer (but not other Australian Governments).

Safe haven

The amendments will provide pathways to encourage employers to self-disclose conduct which may amount to the commission of a wage theft offence – for example, the intentional underpayment of their workers. In return, employers would not be referred by the FWO for criminal prosecution for wage theft. These pathways include:

- A Voluntary Small Business Wage Compliance Code (the Code) will be developed by government in partnership with employer and employee groups. Evidence of compliance with the Code will ensure that the FWO will not refer conduct for criminal prosecution.
- The option for the FWO to enter into a cooperation agreement with a person, if the person discloses that they have engaged in conduct that may amount to the commission of the wage theft offence. The FWO may agree not to refer the conduct for prosecution, after assessing the employer against a non-exhaustive list of factors.

The FWO may still take non-punitive action (such as issuing a compliance notice that workers be re-paid), or it may take civil action, if that is appropriate. An employee or employer organisation may also take civil action in relation to a contravention.

What do these changes mean?

Honest mistakes or miscalculations will not be caught by the wage theft offence.

Employers who intentionally underpay their workers will be liable for a criminal offence, with the potential for serious penalties, including imprisonment.

The Code will provide reassurance for small business employers who may have inadvertently underpaid a worker, and have tried to comply with their obligations.

Cooperation agreements may be available where a person has self-reported a possible commission of the offence to the FWO. Before entering into an agreement, the FWO must consider certain factors, including the nature and gravity of the conduct, and whether the person has been cooperating with the FWO. Where an agreement is entered into, the FWO must not refer that conduct for prosecution.

When will these changes come into effect?

The wage theft offence will apply to intentional underpayments that occur after the offence commences. The offence will commence on the later of 1 January 2025, or the day after the Voluntary Small Business Wage Compliance Code is first declared by the Minister for Employment and Workplace Relations. The offence will not commence if the Code is not declared.

For more information on the Closing Loopholes legislation, visit: <https://www.dewr.gov.au/workplace-relations>