Article Information

Authors: Emily Haar, Erin McCarthy, Joseph Hyde
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Webinar Q&As: 2024 'Beat the Clock' Series: Substantive Law | Underpayment or wage theft? Understanding compliance with the Fair Work Act, criminalisation and the proposed safe harbour provisions

Piper Alderman provides the Answers in response to Questions received during our Beat the Clock' Series: Substantive Law | Underpayment or wage theft? webinar on 20 February 2024.

To view the recording of the on demand webinar, please register here.

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1. Will the criminal "wage theft" provisions have application to conduct that occurred or self-reported prior to the commencement of the provisions (currently looking to be 1 January 2025)?

The new provisions are not retrospective in nature. This means that conduct occurring prior to the commencement of the provisions cannot be prosecuted as a criminal offence (though may be subject to civil penalty proceedings under the existing provisions).

2. Will the "wage theft" or civil underpayment provisions apply in circumstances where an employee has an annualised salary, or where employees work additional hours?

Potentially. If an annualised salary is not sufficient, in each pay period, to cover off on all entitlements (such as loadings, penalty rates etc) owed in that pay period, such as if significant additional hours have been worked, an underpayment may arise. It is important that when these provisions are used (such as pursuant to an Award clause or as a matter of contract), organisations regularly check that what they are paying is sufficient, and monitor any significant overtime periods in case there may be a need to provide additional remuneration for work that may not have been initially contemplated when setting the annualised salary.

3. Will these provisions apply to Australians employed by Australian businesses that work from another country?

This will depend on whether there is a sufficient connection to Australia such that the *Fair Work Act 2009* (Cth) has application. Specific, individual advice may be necessary.

4. Could a failure to pay annual leave loading under an Award constitute wage theft or a civil underpayment?

Potentially. Much will depend on the individual arrangements in place for the employee (such as whether they are subject to an annualised salary or contractual offset that "covers" leave loading entitlements), and the particular Award or Enterprise Agreement that might apply to their employment.

5. What are some examples of "intentional" conduct? Many examples involve employers not following protocols, misclassifying, miscalculating, or genuinely making mistakes. Does the legislation only apply where an employer overtly elects to not pay certain amounts?

The criminal wage theft provisions use the Commonwealth criminal definitions of intention, which, in the case of "conduct" means that the person intends to engage in that conduct, and in the case of a "result" means that the person "*means to*

bring it about or is aware that it will occur in the ordinary course of events".

The Explanatory Memorandum confirms that for a criminal offence of wage theft to be proven, the prosecution will need to prove beyond reasonable doubt that the defendant *intentionally* engaged in the relevant conduct, and that they intended that their conduct would result in a failure to pay the required amount in full when due. The Explanatory Memorandum notes that if the person is aware that an underpayment will occur in the ordinary course of events, that "result" component will be proven.

Underpayments caused by accidental or inadvertent conduct or genuine mistakes are not intended to be caught by the criminal provisions.

Where there is a genuine question of interpretation or application (e.g. whether someone is entitled to a particular allowance, how a loading provision is meant to work, or if there is a dispute as to whether an employee has been misclassified), it may be more difficult to prove that the necessary criminal intention was present.

"Intention" on behalf of a corporate entity will be subject to the provisions in the Commonwealth Criminal Code concerning corporate criminal responsibility.

6. Where an employer undertakes a "better off overall" review for its staff, would those materials be discoverable in the course of a Fair Work Ombudsman investigation?

Legal professional privilege cannot be "retro-fitted". If the materials have not been created for the dominant purpose of legal advice, or for use in current or anticipated legal proceedings, the documents will not be exempt from disclosure on the basis of legal professional privilege.

7. Could third parties, such as payroll providers be subject to liability for underpayments?

There have already been successful *civil* penalty proceedings brought against third party payroll providers under the existing accessorial liability provisions in the *Fair Work Act 2009* (Cth).

Whether a third party can be considered sufficiently "involved" to also be found liable will very much depend on the individual circumstances, including the particular knowledge and role of the third party. For a discussion of one of the first such cases in 2017, see our Insight here: Ezy as 123? More like section 550!

8. If unions attend the workplace to investigate underpayment-related contraventions, are they required to provide prior notice of their attendance?

When exercising a right to enter premises to investigate a suspected contravention of the FW Act or a workplace instrument, a union official must normally give at least 24 hours' notice. That requirement can be waived under section 519 of the *Fair Work Act 2009* (Cth) where the Fair Work Commission is persuaded that relevant evidence might be concealed or destroyed.

From 1 July 2024, as a result of the changes in the Closing Loopholes No 2 Act, such exemptions will be able to be granted where the Commission is satisfied that the suspected contraventions involve the underpayment of members of the official's union. But all other conditions and requirements for exercising a right of entry will remain, including limits on access to employment records.

As a safeguard, where the exemption is misused, the Commission will also be empowered to restrict the future issue of exemption certificates to particular permit holders or their union, or to impose conditions on future entry permits.

9. What are some practical tips for businesses when a union official or Fair Work Ombudsman inspector does attend the site?

Having a written checklist or plan is a practical way that staff who may come into contact with union officials or Fair Work Ombudsman staff can be comfortable that they are following the correct processes when such a visit occurs. Training staff who may be the first people contacted during such a visit to understand what they need to do is another way to ensure your team is as prepared as they can be.