

# CRIMINALISING WAGE THEFT - FAIR WORK LEGISLATION AMENDMENT (CLOSING LOOPHOLES) BILL 2023 (CTH) (FW CLH BILL)

The Commonwealth Government has tabled the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth)*. This is the third instalment in the Government's industrial relations reforms, and like the earlier reforms proposes significant changes to the *Fair Work Act 2009 (Cth) (FW Act)*.

The Bill has been referred to the Senate Education and Employment Legislation Committee, which is due to report back on 1 February 2024. There is some uncertainty as to whether the Bill will pass parliament in its current form, however given the significance of the changes, employers should consider how the proposed changes could impact their operations.

In the second of a series of updates, **Jake Reddie**, considers the proposed reforms to criminalising wage theft.

## Current position

At present, at the Commonwealth level the failure by an employer to comply with various pay obligations under a modern award or enterprise agreement, or the Fair Work Act, can result in a court ordering compensation and imposing civil penalties (ie, a fine) on the offending employer. As such proceedings are civil in nature (and not criminal, more on that below):

- the court only needs to be satisfied on the balance of probabilities that the contravening conduct occurred; and
- no one is going to jail for the non-compliance.

At the State level, wage theft is already a criminal offence in Queensland and Victoria. In Queensland, the wage theft offence involves deliberate, intentional behaviour leading to under or non-payment of employment entitlements, with offending employers facing up to 10 years in jail. In Victoria, the wage theft offence involves an employer dishonestly withholding employee entitlements, with the offence attracting a potential penalty of \$1.15 million or up to 10 years imprisonment.

## What will change?

The proposed amendments to the Fair Work Act would make it a criminal offence at the Commonwealth level for an employer to intentionally fail to pay an employee a 'required amount' under the Fair Work Act, a modern award or an enterprise agreement. This means employers around Australia, and not just in Queensland and Victoria, would face the prospect of engaging in a criminal offence where they deliberately fail to pay an employee their entitlements. At this stage, the proposed criminal offence does not cover the failure to pay contractual entitlements, long service leave or superannuation.

If found guilty, the penalty for wage theft could include up to 10 years imprisonment, and / or a fine of up to the greater of:

- three times the amount of the underpayment; or
- \$1.565 million for individuals or \$7.825 million for corporations.

Typically, the Fair Work Ombudsman (**FWO**) is the government body responsible for ensuring compliance with the Fair Work Act, which includes bringing civil claims against employers seeking civil penalties for non-compliance with workplace laws. Should wage theft be criminalised at the Commonwealth level, the prosecution of wage theft offences would be undertaken by the Commonwealth Director of Public Prosecutions (**CDPP**).

The CDPP would need to prove beyond reasonable doubt that the employer intentionally failed to pay an employee the 'required amount' to secure a prosecution. The Explanatory Memorandum accompanying the Bill emphasises that underpayments that are accidental, inadvertent or based on a genuine mistake are not intended to be caught by the new offence.

The Bill also proposes 'safe harbour' provisions from criminal prosecution, which would allow an employer who has possibly committed a wage theft offence to self-disclose these issues to the FWO in an attempt to enter into a 'cooperation agreement' with the FWO. It will be at the discretion of the FWO whether a cooperation agreement is offered to an offending employer. The FWO will consider a range of factors when exercising this discretion including whether the employer has "made a voluntary, frank and complete disclosure of the conduct", whether the employer has cooperated with the FWO, and the employer's history of compliance, etc.

The effect of a cooperation agreement is that the FWO must not refer the conduct covered by the agreement to the CDPP or Australian Federal Police for possible criminal prosecution whilst the agreement is in place. However, a cooperation agreement does not prevent the FWO from instituting civil proceedings against the employer seeking civil penalties for any alleged non-compliance with workplace laws.

## Key take aways

It is essential that employers take pro-active steps to ensure they are complying with all of their obligations regarding employee entitlements.

Employers should consider reviewing their systems and processes, including payroll rules, employee classifications, and time and attendance system set ups, to ensure that they are up to date and are fit for purpose to ensure compliance with employee entitlement obligations and to prevent any employee entitlement offences from occurring.

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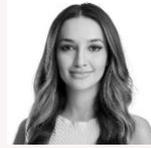


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