

CLOSING LOOPHOLES: WAGE THEFT – A NEW CRIMINAL OFFENCE

From 1 January 2025 employers who intentionally underpay their staff will face criminal charges as a result of changes in the law brought about by the Fair Work Legislation Amendment (Closing Loopholes) Act 2023. In this article we discuss this new offence, how employers might prepare for this change and manage any risk.

As discussed in our previous articles (see [here](#)), the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 (the **Act**), extensively amends the Fair Work Act 2009 (Cth) (the **FW Act**). One such amendment is the creation of a new offence which criminalises wage theft.

We discussed the relevant provisions of the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth) in our article of October 2023 (see [here](#)). The Bill was passed by the Federal Parliament in February 2024 and this update discusses the law as enacted.

'Wage theft' as a new criminal offence

Under section 327A of the FW Act¹, an employer commits an offence if it engages in intentional conduct which results in wage theft, namely the employer fails to pay a **'required amount'** to an employee in full, on or before the date that the required amount is due to be paid.

A 'required amount' includes the wages, allowances, superannuation contributions and leave entitlements which are owed to the employee.

Section 327A comes into force on 1 January 2025 and does not have retrospective effect, meaning that it will only apply to conduct which occurs **after** it becomes operational.

If an employer engages in wage theft prior 1 January 2025, and continues to engage in this conduct after the new offence becomes law, they will not be subject to the new criminal offence set out in section 327A. However, the employer could be held liable under the existing **civil penalty regime** which is set out in the FW Act².

The employer's intentions

To prove the wage theft offence set out in section 327A of the FW Act, the prosecution must establish the 'fault element' of intention: the prosecutor must demonstrate **beyond reasonable doubt** that the employer intentionally engaged in the conduct complained of and intended that their conduct would result in a failure to make a required payment to the employee in full on or before the day when the required amount was due to be paid.

The language used in section 327A, and the requirement to show intent, makes it clear that criminal liability will not attach if the conduct is accidental, unintentional, or based on a genuine mistake. Accordingly, an employer who accidentally miscalculates an employee's wages or superannuation benefits would not be guilty of wage theft under section 327A.

¹ Inserted by section 220 of the Act.

² Section 539 of the FW Act.

However, if the employer becomes aware of a mistake or miscalculation and **continues** to underpay its employees that might then constitute wage theft. For example, if an employee raises a suspected underpayment with their employer, and upon auditing its records the employer determines it has in fact underpaid the employee, the employer may contravene section 327A if they continue to underpay the employee.

Penalties

Proceedings in respect of an offence committed under section 327A may be commenced by the Director of Public Prosecutions or the Australian Federal Police within **6 years** of the commission of the offence.

The Act has substantially increased the available civil penalties for serious contraventions of the FW Act. These enhanced penalties apply to the new wage theft offence and include:

Individuals	Corporate Entities
<ul style="list-style-type: none"> imprisonment for up to 10 years a fine of up to 5,000 penalty units (\$1,565,000)³ if the court can determine the underpayment, the greater of 3 times the amount of the underpayment and a fine up to \$1,565,000 	<ul style="list-style-type: none"> a fine of up to 25,000 penalty units (\$7,825,000)⁴ if the court can determine the underpayment, the greater of 3 times the amount of the underpayment and a fine up to \$7,825,000.

Self-reporting: a 'safe harbour' for small businesses and individuals

Historically, it was common for employers to voluntarily self-report their non-compliance with the FW Act to the FWO.

The new regime encourages self-reporting and employers who engage in wage theft may be able to take advantage of a 'safe harbour' and avoid criminal penalties if they self-report and:

- Small businesses - comply with the **Voluntary Small Business Wage Compliance Code**
- Other businesses - enter into a '**cooperation agreement**' with the Fair Work Ombudsman (**FWO**)

The code and the cooperation agreement regime were both created by the Act to incentivise employers to agree to cooperate with the FWO through the threat of criminal charges.

Suggested action points

<p>Update policies and employee records</p> <ul style="list-style-type: none"> Review and update classifications to ensure that employees are being paid their correct entitlements. Implement systems to ensure that the appropriate Award or Agreement is determined for each employee upon commencement of their employment. Ensure that salaried employees are, and continue to be, correctly remunerated and that their salary covers all minimum entitlements (e.g., overtime).
<p>Regularly review payslips and payroll systems</p> <ul style="list-style-type: none"> Review payroll systems to ensure that employees are being paid correctly and to identify potential underpayments. Implement and maintain procedures to ensure that payroll systems are regularly updated with any changes to employee entitlements.
<p>Educate key stakeholders</p> <ul style="list-style-type: none"> Educate key staff members and management on the measures which are to be implemented and the importance of raising any possible wage underpayment issues through the appropriate channels.
<p>Adopt the Small Business Voluntary Compliance Code (if applicable)</p>

³ (\$1,565,000 as at April 2024.)

⁴ (\$7,825,000 as at April 2024.)

- Adopt the Small Business Voluntary Compliance Code
- Ensure that all key stakeholders understand why the Code is important to your business and how to achieve compliance.

If in doubt - seek legal advice

- If an employer is concerned that they may have intentionally engaged in conduct constituting wage theft, we recommend that they seek legal advice on how to best navigate the issue.

Key takeaways

To avoid significant fines, and potential imprisonment, employers should not intentionally underpay their employees.

If an employer becomes aware that they are underpaying employees, they should immediately take action to address this issue and make any necessary payments to the affected employees and get advice on whether they should self-report to the FWO.

Get in touch

This article provides a high level overview of the newly created wage theft offence. For more information, or if you would like advice about how your business can prepare for the changes which have been brought about by the FW Act, please contact the authors of this article or your usual HFW contact(s).

You can read our previous updates on recent amendments to the FW Act here:

- [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#)
- [Criminalising Wage Theft – the 2023 Bill](#)
- [Regulated Labour Hire Reforms](#)
- [New Delegates' Rights Provisions](#)
- [An Employee's Right to Disconnect](#)

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