

Criminal Wage Theft

Employer Guide



Australian
Chamber of Commerce
and Industry



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1. Introduction

Commenced: 1 January 2025

Highlights

- The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* has introduced a new criminal offence in relation to certain types of intentional wage and entitlement underpayments into the Fair Work Act (**FW Act**).
- The offence applies to conduct occurring on or after 1 January 2025, but liability may include patterns of conduct that began before this date if they continue after the provisions commenced.
- The new criminal offence of wage theft applies to intentional conduct and is aimed at addressing deliberate underpayment practices. Its intention is not to capture inadvertent errors or genuine mistakes.
- Companies can be held criminally liable for the actions of their boards, senior managers, or as a result of having a corporate culture of non-compliance with workplace wage and entitlement laws. Individuals, including directors, managers, or payroll personnel, may also face charges for related criminal offences such as complicity, incitement, or conspiracy.
- The introduction of a criminal wage theft offence represents a significant escalation of the legal framework pertaining to wage compliance, introducing criminal penalties, including fines and imprisonment to deter deliberate underpayment practices.
- It underscores the importance of employers implementing robust payroll systems, fostering a culture of compliance, and taking immediate corrective actions if issues arise to avoid the risk of prosecution.
- The FW Act also now contains two important safe harbour provisions which are designed to protect employers from criminal prosecution for unintentional underpayments if they have taken proactive steps to comply with their obligations and to notify and cooperate with the Fair Work Ombudsman (**FWO**). These provisions include the Voluntary Small Business Wage Compliance Code for small businesses and Cooperation Agreements for all employers, which offer limited immunity if employers demonstrate good faith efforts to pay employees correctly, self-report issues, and take corrective actions when underpayments occur.
- This guide provides employers with a detailed overview of the new wage theft offence and related offences, details of the safe harbour provisions and how to access them, practical insights, tips, and resources to understand and navigate this change, reduce the risk of criminal liability, and ensure compliance under the FW Act.

What do employers need to know?

- 1.1 While this guide sets out detailed information about the new criminal wage theft offence and related changes, at a high level it is important that businesses understand:
 - a. The introduction of criminal penalties for underpayments signals a major shift in accountability for employers. Over recent years, many large employers have identified significant pay discrepancies, including underpayments. Since 1 January 2025, some employers can now face severe criminal consequences for failing to pay employees correctly. Importantly, liability can extend to patterns of conduct that began before this date if intent is established and the conduct continues after the commencement of the legislation.
 - b. Non-compliance with the obligation to pay employees correctly can result in fines up to \$8.25 million for corporations and up to 10 years of imprisonment for individuals.¹ In addition to financial penalties, the reputational damage and loss of employee trust as a result of a criminal conviction for 'wage theft' is likely to have long-term impacts on a business.

¹ At the time of publication. Penalties are subject to change.

- c. The offence of wage theft applies not only to employers but also to individuals who are involved, including directors, senior managers, and payroll staff. Related criminal offences such as attempt, incitement, conspiracy, and complicity can expose individuals and organisations to additional liability, even if they do not directly commit the offence.
- d. Employers ought to take proactive preventative steps as a result of the new criminal wage theft offence to avoid the risk of serious legal and operational consequences. Compliance is not optional, and Australian businesses should act urgently to ensure they are fully compliant with the legal framework in order to reduce their risk of criminal liability
- e. Taking proactive steps to ensure compliance with wage and entitlement laws is the most effective method for employers to avoid criminal liability. This should include increased scrutiny of their payroll and compliance practices, ensuring they are maintaining accurate records, staying informed and up to date, establishing communication channels, responding to inquiries, seeking specialist advice where necessary and rectifying any identified issues promptly.
- f. While many employers will already have strong payroll compliance programs in place, the onset of new wage theft laws should encourage all businesses to review and update their practices to ensure they are sufficiently robust to avoid liability and the risk of civil penalties.

Using this Guide

- 1.2 This guide is intended to help employers navigate these recent changes and offer practical advice for complying with new obligations. It is important that employers familiarise themselves with these changes, particularly given the potential ramifications of not complying with the changes, including the threat of criminal liability and imprisonment.
- 1.3 The guide should serve as a starting point for understanding. Further advice should always be sought for the resolution of specific issues.
- 1.4 The guidance in this document was finalised on 6 January 2025 and may be subject to future revision.
- 1.5 Like most parts of the FW Act, the introduction of the new criminal wage theft offence applies to '*national system employers*' and '*national system employees*'. This means that the new laws will not apply to employers that fall outside of the Fair Work system (e.g. those covered by State industrial relations laws in a State that has not referred its industrial relations powers to the Commonwealth).
- 1.6 The Closing Loopholes changes also extend criminal liability for wage theft to the Commonwealth as if it were a body corporate in certain circumstances. As this guide is prepared for private sector employers, this change is not expressly covered in this guide. For further detail on this change can be found in new sections 794A to 794D of the FW Act.

Further Guidance

The Fair Work Ombudsman, Website, [Criminalising wage underpayments and other issues](#), Updated 16 December 2024.

Attorney General's Department, [The Commonwealth Criminal Code: A guide for practitioners](#), Attorney General's Department, Canberra, 2002.

[Criminal Code Act 1995 \(Cth\)](#).

[Crimes Act 1914 \(Cth\)](#).

2. The criminal ‘wage theft’ offence

Overview

- 2.1 The obligation for employers to pay their employees correctly is not new. However, since 1 January 2025, if an employer **intentionally** fails to pay an employee, including by way of late payment, they and any persons involved in the underpayment can be subject to criminal prosecution, including up to 10 years jail time.
- 2.2 The new criminal offence operates alongside the existing civil offences in the FW Act related to breaching minimum pay, award and/or enterprise agreement obligations.
- 2.3 The following section sets out who is covered by the new criminal wage theft offence laws and what behaviour is specially captured by the new criminal offence.

What is the criminal offence?

- 2.4 The criminal offence of wage theft is comprised of the following elements:
 - a. The employer is required to pay an amount to an employee under the FW Act (e.g. wages, super, entitlements) or a Fair Work instrument (e.g. modern award, enterprise agreement) and the amount is not an excluded payment (**Payment Owed**);
 - b. The employer intentionally engages in conduct;
 - c. That results in the Payment Owed not being paid to the employee in full on or before the day it is due to be paid.²
- 2.5 The fault element attributed to the first element is ‘absolute liability’.³ This means that the prosecution is not required to prove fault or intent, i.e. consideration that the employer was not aware of the Payment Owed is irrelevant. If a requirement for the employer to pay an amount to an employee is established, the first element will be satisfied.
- 2.6 For the second and third elements, the fault element is ‘intention’.⁴ The prosecution will be required to prove that the employer engaged in conduct, and that the employer intended to engage in that conduct. Additionally, the prosecution will be required to demonstrate a causal relationship between the employer’s conduct and a failure to pay an employee the Payment Owed, as well as proving that employer, through their conduct, intended not to pay the employee the Payment Owed.
- 2.7 All three elements must be proven to establish that a criminal offence has been committed. The sections that follow below break down the elements of the offence of wage theft, dealing first with the requirement for the employer to pay an amount to an employee, and then combining the last two elements relating to the employer’s intentional engagement in conduct resulting in the Payment Owed not being paid to the employee in full on or before the day it is due to be paid.
- 2.8 Importantly, the standard of proof for a criminal offence is higher than matters before the Fair Work Commission (**FWC**). The prosecution must prove beyond a reasonable doubt that the offence has occurred,⁵ which is a significantly higher threshold than the balance of probabilities standard adopted by the FWC, or any Court in matters that are not criminal in nature.

2 FW Act, s 327A(1).

3 FW Act, s 327A(3)(a).

4 FW Act, s 327A(3)(b).

5 Criminal Code Act 1995 (Cth) s 5.2. FW Act s793(3A).



Backdated liability for patterns of underpayment prior to 1 January 2025

The new criminal wage theft offence provisions apply prospectively. This means that the conduct an employer intentionally engages in that results in the Payment Owed not being paid to the employee must occur on or after 1 January 2025, when the criminal wage theft offence provisions commenced, for the offence to apply.⁶

However, conduct that occurred prior to 1 January 2025 may form part of a course of conduct that continues beyond 1 January 2025 and will not prevent an employer from being found criminally liable for wage theft (see sections 4.40 to 4.43 in the guide for more information on a course of conduct and its impact on sentencing).

The employer is required to pay an amount to an employee

- 2.9 The first requirement for an employer to be found to have engaged in criminal wage theft is that there must be a requirement to pay an amount to an employee, such as wages, superannuation or other entitlements (e.g. penalty rates, overtime, allowances). For the purposes of this guide we have referred to this required amount as the 'Payment Owed'.
- 2.10 For this element to be satisfied, the prosecution must prove that an employer was 'required' to pay an amount under the FW Act, a modern award, enterprise agreement, a workplace determination or FWC order.
- 2.11 As the prosecution does not need to prove fault or intent of an employer to satisfy this element, there is no ability for an employer to raise the defence of reasonable mistake of fact on the basis that the employer turned their mind to the existence of facts and be under a mistaken but reasonable belief about those facts.⁷ This is because the employer's mental state is not relevant for this element of the offence.
- 2.12 A 'Payment Owed' includes wages, entitlements, and other monetary benefits that an employer is required to pay to, on behalf of, or for the benefit of, an employee under the FW Act, modern awards, enterprise agreements, a workplace determination or FWC order.⁸
- 2.13 A 'Payment Owed' includes superannuation contributions that an employer is required to pay to an employee.⁹
- 2.14 Importantly, as a 'Payment Owed' to an employee must arise under the FW Act, modern awards, enterprise agreements, a workplace determination or FWC order, an employer cannot commit criminal wage theft solely because they have failed to pay an amount they are required to pay where that requirement only exists under a common law contract of employment. For example, a bonus payment linked to KPI performance that is included only in an employment contract would not be covered by the new wage theft offence.¹⁰
- 2.15 A 'Payment Owed' can include an amount deducted from an amount payable to an employee, so long as it is compliant with the permitted deductions clause in the FW Act.¹¹ For example, if a modern award specifies a weekly base rate of \$1,000 for a full-time employee, and the employer has been properly authorised by the employee to deduct \$100 per week for parking fees (or salary sacrifice, etc.) then the 'Payment Owed' would be \$900.¹²

Excluded payments

- 2.16 There are limited circumstances where the criminal wage theft offence won't apply to a particular payment because it is expressly excluded under the new wage theft offence in the FW Act.
- 2.17 In order for a payment to be excluded, it must apply to the following types of employees:
- Employees in New South Wales, South Australia, Queensland, Tasmania and Victoria who are employed by sole traders, partnerships, other unincorporated entities, or non-trading corporations;
 - Most Victorian state government employees; and
 - Tasmanian local government employees.¹³

6 FW Act, s 98.

7 Criminal Code Act 1995 (Cth) s 9.2.

8 FW Act, s 327A(1)(a).

9 FW Act, s 237A(2).

10 This is different to Wage Theft in Victoria which includes failing to pay an amount under 'laws, contracts and agreements'; Wage Theft Act 2020 (Vic), s 3.

11 FW Act, s 324.

12 Closing Loopholes Bill Explanatory Memorandum at 881.

13 The new offence does not include certain payment made by parties who are only national system employers due to a state's referral of powers to the Commonwealth for the purposes of paragraph 51(xxxvii) of the Constitution.

- 2.18 An employer of any of the above employees can be criminally prosecuted for the intentional underpayment of wages and entitlements but cannot be prosecuted for any of the following specific types of underpayments, known as the 'excluded payments':
- Superannuation contributions;
 - Long service leave under State or Territory legislation;
 - Payment for taking paid leave that the employee was entitled to take by reason of being a victim of crime; and
 - Payment for taking paid leave that the employee was entitled to take because the employee attended for service on a jury, or for emergency services duties.¹⁴

Example — Sole trader in Victoria underpays an employee's wage and super

Jason runs a small plumbing business in Victoria. His ABN is registered as a sole trader. He has recently hired his first employee, Daniel, who is 18 and has just finished school. Jason pays Daniel a flat rate of \$10 per hour because he knows Daniel doesn't have much experience so he probably doesn't know how much he should be paid, and this saves Jason money on Daniel's wages and super.

Six months later, Daniel discovers that Jason should have been paying higher wages and super. He contacts the FWO to seek help for underpaid wages and super.

If Jason's actions are found to be intentional, he could face criminal prosecution for the underpayment of Daniel's wages. However, due to the fact Jason is a sole trader in Victoria, he cannot be criminally charged for the underpayment of Daniel's super because the criminal offence does not cover super payments by Victorian sole traders.

Jason may instead face civil penalties for underpayment of super under the compulsory superannuation guarantee. The Australian Taxation Office is the primary enforcement agency for the compulsory superannuation guarantee.¹⁵

The employer intentionally 'engages in conduct' which results in the Payment Owed not being paid to the employee in full on or before the day it is due to be paid

- 2.19 The second and third elements that must be satisfied for conduct to amount to the criminal offence are:
- The employer must have intentionally engaged in conduct
 - Which results in a failure to pay the 'Payment Owed' to the employee in full on or before the day it is due for payment.
- 2.20 These two elements of the criminal wage theft offence are best looked at together.

'Engages in Conduct'

- 2.21 'Conduct' is defined in section 12 of the FW Act to include an omission. That is to say that where an employer intentionally does not perform an action with the intention of failing to pay an employee the Payment Owed, they will still satisfy the conduct element. For example, an employer who fails to adjust an employee's wages in line with modern award increase but is aware of the modern award increase will likely satisfy this element.¹⁶
- 2.22 Conduct can be attributed to a company (as opposed to an individual) where it is engaged in by an employee, agent or officer of the company acting within the actual or apparent scope of their employment.
- Whilst the term '*agent*' is not defined, it may be interpreted broadly to include any individuals who are authorised by the company to 'act in some way'.¹⁷
- 2.23 The term 'engages in conduct' is constructed broadly, meaning that it need not be confined to a singular act, and may involve establishing that a course of conduct has occurred. If more than one act has contributed to the employer's failure to pay, but those actions form a course of conduct, the prosecution is not required to demonstrate the intention behind each individual act. It will be sufficient for the prosecution to demonstrate that the course of conduct more broadly was undertaken with the intention of not paying an employee the Payment Owed.

¹⁴ FW Act s 327A(1)(b)(ii).

¹⁵ Example extracted from the Fair Work Ombudsman's, Guide to paying employees correctly and the Voluntary Small Business Wage Compliance Code, 2.

¹⁶ Criminal Code s 12.2.

¹⁷ Attorney General's Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General's Department, Canberra, 2002, 295.

Intention

- 2.24 It is not enough that the employer simply ‘engages in conduct’ that results in the Payment Owed not being made on or before it is due. To have committed the criminal offence of wage theft, the employer must meet the fault element by:
- Intentionally engaging in the conduct (meant to do something); and
 - Intending that their conduct would result in a failure to pay the employee the Payment Owed in full on or before the day it was due.
- 2.25 Underpayments that are accidental, inadvertent, or based on a genuine mistake are not intended to be caught by the new criminal wage theft offence.¹⁸ Accordingly, in cases where an employer underpays an employee as a result of a genuine mistake, this may provide a basis for the employer to deny they had the required ‘intention’ to have committed the wage theft offence. A lack of intention, however, does not mean that employer will avoid civil prosecution.

Example — ‘Intentionally’ underpaying’

A failure to make the required payment because an employer genuinely misclassifies an employee and pays them an hourly rate of \$25 per hour instead of \$30 per hour (for the correct classification) which results in a failure to pay the ‘Payment Owed’ (\$30 per hour) to an employee would not be caught by the offence, as it would not be intentional.

If, however, an employer paid an employee \$10 per hour, knowing it was below the minimum wage, the resulting failure to pay the ‘Payment Owed’ (whatever it may be) would be intentional, and caught by the provision, even if the employer did not know exactly how much under the minimum wage the \$10 payments were.

Equally, if an employer purposefully falsified time and wage records to avoid paying penalty rates and allowances this would be intentional, and caught by the wage theft offence, even if the employer did not know exactly how much they were meant to pay in penalty rates to the employee.

When will criminal responsibility be attributed to a company — ‘Intention’ of a body corporate

- 2.26 Wage theft will arise where an employer intentionally engages in conduct that results in their failure to pay an amount due to an employee. Therefore when it comes to a corporation being criminally liable for wage theft it is necessary that there is some modification or adaption in proving ‘intention’.
- 2.27 Intention will be attributed to a company if the company ‘*expressly, tacitly or impliedly authorises or permits the commission of an offence*’.¹⁹
- 2.28 A company may ‘*expressly, tacitly or impliedly authorise or permit*’ the commission of the wage theft offence if it is proved that:
- The board of directors or body that exercises the executive authority of the employer intentionally engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the wage theft offence; or
 - A ‘high managerial agent’ of the employer intentionally engaged in the conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence and the employer cannot prove that it exercised appropriate diligence to prevent their conduct; or
 - A corporate culture existed in the company that directed, encouraged, tolerated or led to non-compliance with the wage theft offence provision; or
 - The company failed to create and maintain a corporate culture that required compliance with the FW Act and/or workplace instruments (modern awards and enterprise agreements etc.).²⁰

18 Closing Loopholes No 1 Bill, Explanatory memorandum, (n 5) [190].

19 Criminal Code Act 1995 (Cth) s 12.3.

20 Ibid

Boards and High Managerial Agents

- 2.29 The “board of directors” is the body (by whatever name called) exercising the executive authority of the company.²¹
- 2.30 “High managerial agents” are employees, agents or officers of a company “with duties of such responsibility that his or her conduct may fairly be assumed to represent the company’s policy.”²²
- 2.31 Where a board of directors or high managerial agent intentionally engages in conduct resulting in the underpayment of an employee, this behaviour can be attributed to the company.
- 2.32 There is an important distinction however between conduct of the board of directors and high managerial agents which can be attributed to the company.
- Any criminal activity undertaken by the board is automatically attributed to the company.
 - Conversely, where a high managerial agent engages in conduct with the intention of underpaying an employee, it is *presumed* that this behaviour is attributed to the company.²³

This presumption can be rebutted, and a company can avoid criminal liability if it can prove that appropriate measures were taken to restrain the criminal conduct of the high managerial agent.²⁴ This is known as the due diligence defence.



“[The inclusion of the due diligence defence] is a safeguard to exonerate corporations in situations where a renegade senior officer has committed or authorised illegal conduct despite precautions taken by the board to prevent such behaviour. It thus alleviates the problems associated with the common law doctrine in situations where the directing minds of the company are in conflict.”

T Woolf, Criminal Law Journal²⁵

- 2.33 In underpayment cases involving senior managers and key-decision makers in payroll and HR departments, it is anticipated that it will be relatively easy for courts to associate their conduct with that of the employer. In other cases, it may be more difficult and a question of fact as to whether an individual is a “high managerial agent” and therefore whether their conduct should be taken into account to establish if there was intent on the employer’s part to withhold monies due to an employee. This will likely involve an analysis of an individual’s duties and delegations and whether appropriate measures can be shown to have been taken to restrain the high managerial agent from behaving in a manner that lead to the underpayment.

‘Corporate culture’

- 2.34 The ‘corporate culture’ provisions establish that a company may be found to have the necessary ‘intention’ to have engaged in conduct which resulted in the underpayment of an employee without the requirement to establish any actions or fault on the part of any individual or the board or a high managerial agent.
- 2.35 ‘Corporate culture’ is defined as being an attitude, policy, rule or practice existing in a corporation generally or in the part of the corporation where the relevant offence was committed.²⁶
- 2.36 Effectively this definition allows for intention to be demonstrated through the existence of a corporate culture of non-compliance, or of failure to maintain a corporate culture of compliance which allowed for the underpayment to occur.
- 2.37 It has commonly been referred to as “what people do when no one is watching” and what is “tolerated” within a company.



“... whatever it [corporate culture] actually means, it must transcend simply putting in place expensive “systems”; or it must be more than persons, whose titles include terms such as “governance” and “compliance”, declaiming platitudes.

Justice Lee, *ASIC v AMP Financial Planning Pty Ltd (No2)* [2020] FCA 69

21 Criminal Code Act 1995 (Cth) 12.3(6).

22 Criminal Code Act 1995 (Cth) 12.3(6).

23 Attorney General’s Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General’s Department, Canberra, 2002, 317.

24 Criminal Code Act 1995 (Cth) 12.3(3).

25 Woolf, ‘The Criminal Code Act 1995 (Cth): Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21 Criminal Law Journal 257, 261.

26 Criminal Code Act 1995 (Cth) 12.3(6).

- 2.38 Of course, policies of non-compliance may be overt in cases where a senior employee has authorised past breaches of the law, leading to an expectation that future breaches will be overlooked or tolerated. It can also however be tacit or implied through the unwritten rules of the corporation and things like the reasonably founded views of ordinary employees on the attitude of management to compliance.²⁷
- 2.39 When it comes to corporate criminal responsibility, a failure to create and maintain a corporate culture that requires compliance may demonstrate intent.²⁸ This means that some types of conduct, which on their face might seem negligent rather than intentional, could potentially be viewed as wage theft under the new laws.
- 2.40 For example, consistent and systematic failure to conduct payroll compliance checks to avoid the detection of underpayments could be construed as a corporate culture of non-compliance and therefore intentional wage theft.
- 2.41 Further, failing to keep payroll systems up to date for changes in law or after the identification of discrepancies, could also be evidence of a failure to maintain compliance, and therefore may amount to intention.
- 2.42 In addition, companies should be aware that the way they respond to wage discrepancies and enquiries will be relevant to their corporate culture for the purposes of assessing corporate intention under the new wage theft offence, as will how the company supports and resources its payroll function. This means depending on the circumstances some employers may have difficulty in avoiding liability on the basis of a corporate culture where:
- a. They become aware of an underpayment but there are significant delays in rectifying the error; or
 - b. They do not rectify a known underpayment to the satisfaction of the FWO.

Distinguishing between 'intention' and 'recklessness'

- 2.43 An employer will 'intend' an underpayment to occur, if they meant to cause the employee to be underpaid. If an employer realised that an underpayment was certain to follow their conduct, this will also be treated as intentional. However, if an employer merely takes a conscious and unjustified risk that an underpayment might occur, the employer may have been reckless with respect to an underpayment occurring, but it was not 'intended' as is required under the wage theft offence.²⁹

Further guidance

The Fair Work Ombudsman, Website, [Criminalising wage underpayments and other issues](#), Updated 16 December 2024.

Attorney General's Department, [The Commonwealth Criminal Code: A guide for practitioners](#), Attorney General's Department, Canberra, 2002.

[Criminal Code Act 1995 \(Cth\)](#).

[Crimes Act 1914 \(Cth\)](#).

27 Attorney General's Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General's Department, Canberra, 2002, 319.

28 Criminal Code Act 1995 (Cth) 12.3(2)(d).

29 The Commonwealth Criminal Code, A Guide for Practitioners, Commonwealth Attorney-General's Department, page 57.

3. Related criminal offences

Overview

- 3.1 It's not just business owners, boards and high managerial agents who can be prosecuted for criminal underpayments. Other people involved in an underpayment can also be held criminally responsible through other 'related criminal offences'. This could include, for example, payroll managers or accountants in the business where their conduct contributes to or supports the outcome of an intentional underpayment.
- 3.2 These related offences exist in criminal law³⁰ and are taken to be a related offence under the FW Act to the extent that they relate to an offence against the FW Act (including the criminal wage theft offence).³¹ These include:
- Attempt:** A person who attempts to commit the criminal wage theft offence commits an offence;
 - Complicity and common purpose:** A person who aids, abets, counsels, or procures the commission of criminal wage theft by an employer, will commit an offence;
 - Commission by proxy (agent):** A person who has the relevant intention and procures the conduct of another person that would have constituted wage theft if the procurer had engaged in it will commit an offence;
 - Incitement:** A person who urges the commission of criminal wage theft will commit an offence; and
 - Conspiracy:** A person who conspires with another person (including a company) to commit criminal wage theft will commit an offence (and it is as if the criminal offence has been committed).
- 3.3 Each of these related criminal offences are set out in further detail in this chapter.

Attempt

- 3.4 A person who attempts to commit wage theft commits an offence.³²
- 3.5 For a person to be found guilty of attempting to commit wage theft, the person's conduct must be more than merely preparatory,³³ a person must have intended to commit wage theft (even if in effect they do not). This means they must have aimed to engaged in conduct which would have resulted in an employee being underpaid.
- 3.6 A person can still be found guilty of attempted wage theft even if committing the offence of wage theft by their behaviour is impossible, so long as the person intentionally acted or failed to act in a certain way in the belief that it would result in a failure to pay an amount owed to an employee/s in full on or before the day it is due for payment.³⁴
- 3.7 Whilst a person can still be found guilty of attempted wage theft even if they did not actually commit the offence of wage theft, a person cannot be found guilty of both 'attempted' wage theft and actual wage theft.³⁵
- 3.8 The penalty for attempted wage theft is the same as for the offence of wage theft.

30 Crimes Act 1914 (Cth).

31 Section 6 of the Crimes Act 1914 (Cth); A provision of Pt 2.4 of the Criminal Code Act 1995 (Cth).

32 Criminal Code Act 1995 (Cth) s 11.1.

33 Attorney General's Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General's Department, Canberra, 2002, 236.

34 *Ibid.*

35 *Ibid.*

Example — ‘Attempted’ wage theft

The senior manager deliberately excludes overtime hours worked by employees from their payroll calculations and alters timesheets to reduce the recorded hours worked, knowing this will result in employees being underpaid in order to meet budget. However, before payroll is processed, a staff member in the payroll department flags the discrepancy and escalates the issue. As a result, the altered timesheets are corrected, and employees are paid their full entitlements.

While the offence was not completed, the senior manager’s actions could still attract criminal liability for attempted criminal wage theft, as the act of attempting to underpay employees by altering timesheets and excluding overtime hours constitutes conduct that is “*more than merely preparatory*”.

Complicity and common purpose (Accessory/Accomplice)

- 3.9 When a person is intentionally involved in aiding, abetting, counselling or procuring the commission of criminal wage theft, they are taken to have committed wage theft through the offence of complicity and common purpose. In colloquial terms this is essentially the offence of being an accessory or accomplice to the wage theft offence.³⁶
- 3.10 This offence also encompasses circumstances where multiple individuals have divided the elements of the offence between them, each performing a part. These individuals are referred to as ‘joint principals’. For example, one person decides on the strategy to cut wages, the other adjusts the employee’s classification and the last alters their details in payroll knowing it will result in underpayments.
- 3.11 To impose liability against a person for complicity and common purpose, the prosecution must show that ‘knowing all the essential facts which made what was done a crime, the person *intentionally* aided, abetted, counselled or procured the acts of the principal offender (e.g. the company)’.³⁷
- 3.12 Unlike the related offence of attempt, incitement and conspiracy, complicity is not an independent offence. The accessory/accomplice is convicted of the same wage theft offence as the principal offender and is liable to the same penalty as the principal.³⁸
- 3.13 Liability as an accomplice/accessory can be avoided if a person acting with complicity and common purpose makes a timely and effective withdrawal from the criminal enterprise with the principal offender before the offence is committed.

Example — Complicity and common purpose

A logistics company contracts a labour hire provider to supply warehouse workers. To cut costs, the company’s general manager suggests that it will only engage the labour hire provider if it can pay the workers a flat hourly rate that does not include penalties or overtime entitlements under the applicable award. The labour hire provider’s operations manager agrees to the arrangement and informs his workers that they will only be getting paid a flat rate with no overtime pay or penalties for this job.

The logistics company ‘aids, abets and procures the commission of the wage theft offence’ with the labour hire provider by instructing them to adopt unlawful pay practices in order to engage in business together. The labour hire provider directly carries out the underpayments, knowing the arrangement breaches workplace laws. Both parties act with a shared intent to underpay workers as part of a cost-saving agreement, demonstrating a common purpose to commit wage theft. Both the logistics company and the labour hire provider can be prosecuted for wage theft.

36 Criminal Code Act 1995 (Cth), s 11.2.

37 *Giorgianni v R* (1985) 156 CLR 473.

38 Attorney General’s Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General’s Department, Canberra, 2002, 236.

Commission by proxy (agent)

- 3.14 The related offence of 'commission by proxy' occurs when a person commits an offence indirectly by using another person (or agent) to perform the act that constitutes the offence.³⁹ This concept is grounded in the idea that individuals should not be able to avoid criminal responsibility simply because they used another party to carry out a criminal act e.g. wage theft, on their behalf.
- 3.15 The person who commissions the offence must either direct, instruct, or cause another person (the proxy/agent) to commit the offence of wage theft and must *intend* for the proxy/agent to commit wage theft.
- 3.16 The proxy/agent may or may not be aware that their actions are part of the criminal act of wage theft.
- 3.17 The penalty for the commission of wage theft by proxy is the same as for the offence of wage theft.

Example — 'Commission by proxy'

A company's director instructs a supervisor to reduce employees' recorded hours in the payroll system, knowing this will result in underpayment of wages. The supervisor follows the directive, unaware that this action constitutes wage theft.

The director is the principal offender because they intended to commit the offence and used the supervisor as their agent. The supervisor, as the agent, may not be held liable if they acted without the knowledge or intent to commit the offence. The offence is complete because the employees were underpaid due to the director's instructions.

Incitement

- 3.18 The offence of incitement applies when a person (including a company) encourages, incites, or urges another person to commit wage theft.⁴⁰
- 3.19 The offence of incitement is complete once the urging occurs, regardless of whether the urged person acts on the incitement and actually commits wage theft.
- 3.20 The person inciting must *intend* that the other person commits the offence of wage theft by urging them to commit wage theft. Incitement requires a specific intent to bring about the commission of the offence of wage theft. Incitement does not extend to instances of recklessness with respect to the effects which speech or other communication might have in providing an incentive or essential information for the commission of wage theft.
- 3.21 A company can incite the commission of a wage theft by an agent (employee, manager, officer).
- 3.22 Though incitement is a preparatory offence, akin to attempt, there is no impediment to conviction of incitement in circumstances where the offence of wage theft has not actually been committed.⁴¹
- 3.23 Unlike attempt and conspiracy, incitement is not punishable with the same severity as the principal offence of wage theft. The penalty for incitement of wage theft is up to 5 years imprisonment.

Example — 'Incitement' to commit wage theft

A retail business owner instructs a store manager to reduce employees recorded working hours in the company's rostering system to stay within the store's monthly budget. The owner emphasises that employees should not be paid for time spent cleaning the store after closing or setting up displays before opening, stating that such tasks being unpaid "goes with the job" and that recording those hours would "hurt the business financially."

The store manager, feeling pressured, does not implement the instruction and instead raises the issue with the company's accountant.

The owner's directive constitutes urging the manager to engage in conduct that would result in underpayment, specifically instructing the manager to commit wage theft. The owner intended for the manager to act on this instruction, satisfying the intent requirement of incitement. The offence of incitement is complete once the urging occurs, it does not matter that the manager did not actually carry out the instruction.

39 Criminal Code Act 1995 (Cth) s 11.2A.

40 Criminal Code Act 1995 (Cth) s 11.4.

41 Attorney General's Department, *The Commonwealth Criminal Code: A guide for practitioners*, Attorney General's Department, Canberra, 2002, 271.

Conspiracy

- 3.24 The offence of conspiracy occurs when two or more individuals agree to commit wage theft. This agreement can be explicit or implicit, but it must involve a shared understanding of the plan.⁴²
- 3.25 A person and at least one other party to the agreement must intend that the offence of wage theft will be committed. Mere knowledge of, or association with, a plan to commit wage theft is insufficient; there must be active agreement and intent by at least two parties.
- 3.26 At least one party must commit an overt act to advance the agreement. This act demonstrates a commitment to carrying out the plan and does not have to be unlawful by itself but must be linked to the conspiracy.
- 3.27 Companies can be held liable for conspiracy when the required elements of the offence are met through the actions or decisions of individuals acting on behalf of the company.
- 3.28 A person cannot be found guilty of conspiracy if, before the commission of an overt act pursuant to the agreement to commit wage theft, they withdrew from the agreement and took all reasonable steps to prevent the commission of the wage theft offence.
- 3.29 The penalty for conspiracy to commit wage theft is the same as for offence of wage theft.

Example — ‘Conspiracy’ to commit wage theft

A company’s CEO and operations manager agree with a contractor to falsify timesheets to underpay workers engaged through the contractor. They plan to report fewer hours worked to reduce costs, and the contractor agrees to submit false invoices reflecting the reduced hours. The operations manager takes the first overt act by preparing falsified records.

The company can be liable for conspiracy because its high managerial agents (CEO and operations manager) have agreed with the contractor to commit wage theft. In falsifying of the records the operations manager has performed an overt act in furtherance of the conspiracy to underpay workers.

Common Questions

Are related criminal offences to wage theft the same or different from the civil offences related to wage and entitlement underpayments?

- 3.30 Different. Under the civil offence provisions for underpayment in the FW Act, a person may have secondary or extended liability imposed on them if they are ‘involved in’ a contravention via the standalone accessorial liability provisions which apply to a person who ‘*aids, abets, counsels, induces, procures, conspires with others to effect, or were knowingly concerned in or party to the contravention*’.⁴³ This specific standalone offence of ‘accessorial liability’ in the FW Act does not apply to the criminal offence under the FW Act including wage theft.

Further guidance

The Fair Work Ombudsman, Website, [Criminalising wage underpayments and other issues](#), Updated 16 December 2024.

Attorney General’s Department, [The Commonwealth Criminal Code: A guide for practitioners](#), Attorney General’s Department, Canberra, 2002.

[Criminal Code Act 1995 \(Cth\)](#).

[Crimes Act 1914 \(Cth\)](#).

42 Criminal Code Act 1995 (Cth) s 11.5.

43 FW Act, s 550.

4. Investigations, prosecutions, sentencing & penalties

- 4.1 As the criminal wage theft offence sits within the broader Commonwealth criminal framework, including the Crimes Act and Criminal Code, it triggers the criminal process, including guaranteed criminal process rights for accused persons.
- 4.2 The following chapter outlines the criminal framework so far as it applies to the new wage theft offence in the FW Act.

Investigations

- 4.3 The FWO has responsibility for investigating suspected wage theft offences.
- 4.4 FWO Inspectors have access to a number of statutory compliance powers related to their investigatory functions which they can utilise to investigate suspected wage theft offences. FWO Inspectors have the power to:
 - a. Enter premises if they reasonably believe that the FW Act or a Fair Work instrument (award or enterprise agreement) applies to work being performed at the premises or that records or documents relevant to compliance purposes are on the premises;⁴⁴
 - b. Whilst on a work premises inspect any work, process or object, conduct interviews, require a person to produce records or documents, and make copies of documents;⁴⁵
 - c. Compel the production of any record or document relevant to the investigation within a specified time;⁴⁶
 - d. Apply for a FWO Notice which may require a person to provide information, produce document/s or attend and answer questions;⁴⁷
 - e. Issue compliance notices which require a person to take specific action to remedy a contravention and/or produce reasonable evidence of compliance;⁴⁸ and
 - f. Accept a written undertaking (enforceable undertaking) from a person in relation to a contravention.⁴⁹
- 4.5 Where the Fair Work Regulations or another legislative instrument confers power upon FWO Inspectors, their compliance powers (see above) can also be used for the purposes of that provision of the Act.⁵⁰
- 4.6 When deciding whether to undertake or continue an investigation the FWO will consider and apply the following factors:⁵¹
 - a. **Assessment of the allegation:**
 - Is the issue an isolated instance or part of a pattern of behaviour?
 - Is the allegation reliable/credible?
 - How significant is the alleged non-compliance?
 - Has the non-compliance been validated?
 - What is the scale and impact of the alleged non-compliance?
 - When is it alleged to have occurred and over what period of time?
 - Is the non-compliance still occurring?
 - Do the allegations indicate a system-wide non-compliance?

44 FW Act, s 708(1).

45 FW Act, s 709.

46 FW Act, s 712.

47 FW Act, s 712AA.

48 FW Act, s 716(2).

49 FW Act, s 715.

50 FW Act, s 706(1)(c) & (d).

51 Fair Work Ombudsman, Compliance and Enforcement Policy, January 2025, page 5.

b. **Duty holders (e.g. the employers):**

- Is the conduct deliberate and/or repeated breaches?
- What is their attitude to cooperating with the FWO?
- Have they meaningfully engaged with the impacted employees and their representatives (if any)?
- What is their preparedness to rectify any wrongdoing including working with employer organisations and other advisors?
- Are there any other outstanding non-compliance issues?
- What is the likelihood they will remain non-compliant?
- Do they understand their obligations?
- Is there a significant power imbalance between the duty holder and the employee/s?

c. **Context:**

- Is there a significant impact on a particular cohort of employees or community that warrants the FWO seeking the imposition of financial penalties?
- Does the FWO need to ensure a strong deterrence message is conveyed to the public?
- Has the underpayment impacted employees in a priority area?
- Is another regulator, employer organisation, or union involved?
- Would it be an effective and efficient use of FWO resources?
- What is the likely impact if the FWO does not act in response to the concern?
- What is the likelihood of reliable evidence being available, including witnesses prepared to 'go on the record'?

4.7 There are a range of outcomes that may occur because of, during or in the process of the FWO finalising an investigation. These include:

- Findings letter:** correspondence detailing the findings and outcome of an investigation (e.g. no contraventions, insufficient evidence to sustain a finding that a contravention occurred but may also caution or recommend steps to ensure compliance).
- Contravention letter:** a formal letter which informs a person of their failure to comply, requires them to take specified actions to rectify the failure within a specified period and to notify the FWO of actions taken, and advises the person of what actions the FWO may take if they fail to comply.
- Compliance notice:** a non-punitive mechanism allowing the FWO to address alleged contraventions of the FW Act instead of commencing court proceedings if they believe an employer contravened the FW Act, modern award, or enterprise agreement. The notice requires specified action to remedy the direct effects of the contraventions, including calculating and repaying any underpayments, and/or requiring the person to produce reasonable evidence of compliance.⁵² A compliance notice can be challenged in court if an employer believes they have not engaged in the contravention.⁵³ An employer who complies with a compliance notice is not taken to have admitted the contraventions, or to have been found to have committed the contraventions.⁵⁴

Where an employer complies with a compliance notice, the FWO is unable to commence court proceedings for the contraventions that are the subject of the notice.⁵⁵ If an employer fails to comply with a compliance notice and does not have a reasonable excuse, a court may impose penalties of up to \$19,800 for an individual, \$99,000 for a small business employer, or \$495,000 for a non-small business employer.⁵⁶

- Infringement notice:** if the FWO believes there has been one or more contraventions of the FW Act or the FW Regulations in relation to record-keeping, pay slip or job advertisement obligations, they may issue an infringement notice.⁵⁷ An infringement notice requires the person to pay a penalty for committing the contravention and can be issued up to 12 months after the contravention occurred.⁵⁸ An employer who complies with an infringement notice is not taken to have admitted to the contravention.⁵⁹

Where a person complies with an infringement notice, the FWO is unable to commence court proceedings against the employer for those contraventions.⁶⁰

52 FW Act s 716(2).

53 FW Act s 717.

54 FW Act s 716(4B).

55 FW Act s 716(4A).

56 FW Act s 539, 546; Crimes Act s 4AA.

57 FW Regulations, reg 4.03 & 4.04.

58 FW Regulations, reg 4.04(2).

59 FW Regulations, reg 4.09.

60 FW Regulations, reg 4.09.

- e. **Enforceable undertaking:** if the FWO forms a reasonable belief that a person has contravened the FW Act, the FWO may accept a written undertaking from the employer in relation to the contravention. Enforceable undertakings typically operate for a period of 2–3 years and are published on the FWO’s website.

The FWO cannot commence civil proceedings against an employer for contraventions for which they have given an enforceable undertaking.⁶¹ However, an employer fails to comply with any of the terms of the enforceable undertaking, the FWO may commence civil proceedings in court to seek orders directing the person to comply, for compensation, or for any other appropriate order.⁶² This also does not prevent an affected employee or union bringing civil proceedings for the conduct subject to the enforceable undertaking.

- f. **Civil litigation:** generally reserved for those contraventions that are serious, significant and/or systemic in nature, or otherwise in circumstances where there is sufficient evidence and it would be in the public interest.⁶³ In deciding whether to litigate, the FWO will consider the reasonable prospects of success, the public interest and the impact on its resources and costs.



Changes to the privilege against self-incrimination

The FW Act generally provides that if an individual produces a document or record, that record or document is not admissible in evidence in a criminal proceeding, other than in limited circumstances, for example, where it is produced under a FWO notice.⁶⁴

With the introduction of the criminal wage theft offence in the FW Act, the Closing Loopholes Bill has amended this protection against self-incrimination significantly for the purposes of the new offence.

The immunity protection has been amended such that employee records required to be kept under the FW Act for 7 years⁶⁵ and pay slips are no longer covered. This means that these employee records and copies of pay slips produced by an individual (i.e. not body corporates) to the FWO in response to its compulsive powers to provide information and documents can now be used as evidence against an employer as evidence of the criminal wage theft offence.⁶⁶

Prosecutions

The FWO’s role in prosecutions

- 4.8 The FWO has responsibility for investigating wage theft offences and referring matters for litigation to the Commonwealth Director of Public Prosecutions (DPP) and/or the Australian Federal Police (AFP) who are responsible for prosecuting both for the criminal wage theft offence and related offences under the FW Act.
- 4.9 The FWO is precluded from referring conduct that resulted in an underpayment to the DPP or AFP if:
- The conduct was engaged in by a small business employer (less than 15 employees) who has complied with the **Voluntary Small Business Wage Compliance Code (the Code)** to the satisfaction of the FWO (see Chapter 5 on the Code), or
 - A **Cooperation Agreement** is in force between the FWO and a person relating to the alleged criminal wage theft (see Chapter 6 on Cooperation Agreements).
- 4.10 Importantly, employers must be aware that the FWO is not precluded from commencing civil penalty proceedings for conduct that resulted in an underpayment even where the Code has been satisfied or a Cooperation Agreement is in place.⁶⁷ Additionally, compliance with the Code or being party to a Cooperation Agreement does not preclude the AFP from investigating a complaint of wage theft made by any other person, it merely prevents referral by the FWO.

61 FW Act s 715(4).

62 FW Act s 715(6)&(7).

63 Fair Work Ombudsman, Compliance and Enforcement Policy, January 2025, page 15.

64 FW Act s713(2)&(3) & 713A.

65 See FW Act s 535.

66 FW Act s713 & 713A.

67 FWO Compliance and Enforcement Policy, January 2025, page 3.

When will the FWO refer a matter for prosecution?

- 4.11 In accordance with the FWO's compliance and enforcement policy, the FWO takes a graduated approach based on strategic enforcement principles and only uses enforcement when other cooperative approaches have failed or are inappropriate.
- 4.12 Conduct will only be referred by the FWO to the DPP or AFP if it considers that it has gathered sufficient evidence to prove that a criminal underpayment offence or related offence has been committed.⁶⁸ In deciding whether to refer a matter, the FWO will also consider the following public interest factors:
- The nature, seriousness, and circumstances of the alleged contravention;
 - The characteristics of the employer alleged to have committed the contraventions (e.g. compliance history, sophistication and financial position, behaviour towards the FWO, steps taken to prevent future contraventions);
 - Characteristics of the employees affected by the alleged contraventions (e.g. vulnerable, ability to commence own proceedings);
 - Impact of the alleged contravention;
 - Impact of litigation on general and specific deterrence;
 - Effect of litigation (e.g. suitability, efficacy and availability of other enforcement mechanisms, likely outcome if contraventions are found to have occurred, whether the outcome would be unduly harsh or oppressive); and
 - Administration of justice/integrity of the system (e.g. passage of time since contravention, likely length and cost of litigation, whether necessary to maintain public confidence).
- 4.13 Referrals will generally be reserved for the most serious conduct, including where there is a greater need for specific or general deterrence than civil litigation.⁶⁹ Unlike civil litigation, the FWO will not refer a matter solely for the purpose of clarifying the law (e.g. the interpretation of an entitlement in a fair work instrument).⁷⁰
- 4.14 Generally, conduct will be referred by the FWO to the DPP. Conduct may, however, be referred to the AFP where the FWO considers that the matter requires further investigative assistance.⁷¹ Given the limited resources of both the FWO and the DPP/AFP it is likely that we will see the FWO being strategic and measured in its referral of matters for prosecution. For example, by focusing on the protection of vulnerable workers including those in sectors with high levels of non-compliance such as cleaning, security, and hospitality.

Who can decide to bring a prosecution against an employer for wage theft and when can a prosecution be brought?

- 4.15 The DPP and/or the AFP are responsible for deciding whether to prosecute an employer for criminal wage theft under the FW Act.
- 4.16 Whilst the FWO is prevented from referring matters for prosecution if an employer has complied with the Code or has entered into a Cooperation Agreement with the FWO, there is nothing preventing a different third party referring a matter to the DPP or AFP for prosecution or the DPP/AFP acting on its own initiative. As the DPP/AFP are themselves not prevented from prosecuting an employer notwithstanding compliance with the Code and/or a Cooperation Agreement being in place.
- 4.17 Prosecutions must be commenced by the DPP or the AFP within six years after the commission of the offence (the underpayment or conduct involving a related offence occurs).⁷²

Is the DPP/AFP legally obliged to prosecute?

- 4.18 The DPP/AFP are not legally obliged to prosecute criminal wrongdoing, however, they are likely to do so where sufficient evidence of criminality exists, and it is in the public interest to do so.

68 FWO Compliance and Enforcement Policy, January 2025, page 20.

69 Ibid.

70 Ibid.

71 Ibid.

72 FW Act s 327C(2).

What will the DPP/AFP consider when deciding whether to prosecute an employer for criminal wage theft?

- 4.19 The DPP or AFP must be satisfied of the following two things before they commence a prosecution for wage theft:
- there is sufficient evidence to prosecute the case; and
 - it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.⁷³
- 4.20 As wage theft is a criminal offence, the level of proof that must be met, is 'beyond reasonable doubt'. This is a higher standard of proof than applies to other civil breaches of the FW Act.
- 4.21 In determining whether there is sufficient evidence to prosecute a case the DPP must be satisfied that there is clear evidence of the elements of the wage theft offence (see Chapter 2) and a reasonable prospect of obtaining a conviction. The existence of a clear case alone is not sufficient.⁷⁴
- 4.22 They must also consider matters such as the availability, competence and credibility of witnesses, their likely effect on the arbiter of fact, the admissibility of any alleged confession or other evidence, any lines of defence open to the alleged offender/s and any other factors that could affect the likelihood of a conviction.⁷⁵
- 4.23 The decision to prosecute must be made impartially and must not be influenced by any inappropriate reference to race, religion, sex, national origin or political association. The decision to prosecute also must not be influenced by any political advantage or disadvantage to the Government.⁷⁶
- 4.24 From a practical perspective, as the DPP has a target of 90% prosecutions resulting in a finding of guilt, we anticipate that (at least initially) they are more likely to pursue cases which provide a very high likelihood of successful conviction, as opposed to those with more difficult or complex facts and evidence.⁷⁷

Do unions have any involvement in criminal prosecutions?

- 4.25 No, unions are not empowered to play any regulatory or prosecutorial role in relation to the wage theft offence. They are not authorised to undertake criminal investigations, however, may bring conduct suspected of amounting to criminal wage theft to the attention of the AFP or FWO for their investigation. It will be the prerogative of the FWO or the AFP whether an investigation is commenced.

Who can be charged with criminal wage theft?

- 4.26 The criminal wage theft offence can only be committed by an employer (being a national system employer under the FW Act). This can either be a body corporate or a natural person depending on the business structure of the employer.
- 4.27 Individuals who are involved in the commission of wage theft offences (e.g. a person who aids, abets, counsels or procured the commission of an offence by another person) may also be charged under the new provisions (see Chapter 3 for Related Offences).⁷⁸



Double jeopardy

Double jeopardy is the criminal law principle that prevents an individual from being tried for the same offence after being acquitted or convicted. The rule was created to ensure that people who are found not guilty of a crime will not be charged over the same allegations in the future.

Section 552 of the FW Act protects against criminal/civil double jeopardy in the FW Act context, if a person has been convicted of an offence constituting conduct that is substantially the same as the conduct constituting the criminal offence.

The double jeopardy provision in the FW Act also protects an accused person (such as an employer, business or individual) while criminal proceedings are on foot, by staying any related civil proceeding where a penalty is being sought against the person.⁷⁹

It is, however, important to note that this double jeopardy protection does not operate in reverse, meaning criminal proceedings may be commenced against a person for conduct that is substantially the same as conduct which lead to a finding that an employer had breached a civil remedy provision of the FW Act.⁸⁰

73 Prosecution Policy of the Commonwealth.

74 Ibid.

75 Ibid.

76 Ibid.

77 Commonwealth Department of Public Prosecutions, Prosecution Performance Indicators.

78 Criminal Code 1995 (Cth), section 11.2.

79 FW Act s 553.

80 FW Act s 554.

Where are wage theft cases heard?

- 4.28 Wage theft cases are heard in the Federal Court.⁸¹
- 4.29 As a company is an artificial entity, there will be a number of differences between a criminal proceeding involving a natural person and one involving a body corporate. For example:
- A corporation cannot give, or be required to give, evidence as a witness except through its officers; and
 - A corporation does not have the benefit of the privilege against self-incrimination. Therefore, a corporation must comply with a lawful order or requirement to produce documents or information even though to do so might incriminate the corporation.
- 4.30 There is no need to convict an individual perpetrator (person) to be able to prosecute a company.
- 4.31 If an individual perpetrator is prosecuted along with a company, the criminal action against the company is usually (but not always) conducted as a separate proceeding.

Penalties which a court can order for a wage theft offence*	
Individuals	Body Corporates
A term of imprisonment of not more than 10 years OR A maximum fine of: <ul style="list-style-type: none"> \$1.65 million (5,000 penalty units) OR 3 times the underpayment amount (if it can be determined). OR Both a term of imprisonment and fine (as above).	A maximum fine of: <ul style="list-style-type: none"> \$8.25 million (25,000 penalty units) OR <ul style="list-style-type: none"> 3 times the underpayment amount (if it can be determined).

*As of 1 January 2025, the value of one penalty unit is \$330. This may be subject to change in the future.

Overview

- 4.32 Wage theft is punishable on conviction with a fine for body corporates, and a term of imprisonment of not more than 10 years or a fine for individuals.⁸²
- 4.33 As most employers are corporations, this means most individuals will only face 'jail time' if they are prosecuted under the related offences (see Chapter 3).
- 4.34 Unlike other applicable penalties under the FW Act for underpayments, the penalty amount for a wage theft offence is not tied to the number of contraventions.
- 4.35 The maximum fine available depends on whether the Federal Court can determine the 'underpayment amount'.⁸³ This refers to the Payment Owed, or the difference between the Payment Owed and any amount the employer actually paid to, on behalf of, or for the benefit of, the employee.⁸⁴
- 4.36 Where the Federal Court can determine the underpayment amount, the maximum fine that can be ordered is the greater of three times the underpayment amount and 5,000 penalty units (currently equal to \$1.65 million) for an individual or 25,000 penalty units (currently equal to \$8.25 million) for a body corporate. If the Federal Court cannot determine the underpayment amount, then only up to the maximum fine can be awarded. These fines are the highest penalty now available under the FW Act.
- 4.37 Where an employer is convicted of a criminal wage theft offence, imprisonment is the only non-monetary sanction available to the court. For example, courts are not able to issue adverse publicity orders, disqualification orders, etc. which are available to courts or regulators in other jurisdictions.
- 4.38 When it comes to monetary sanctions, it is not clear whether any over-award payments under a contract of employment can be 'set-off' against any underpayment amount, in order to reduce the amount and/or reduce any applicable penalty. This is particularly relevant considering that a Payment Owed must fall under a FW Act, a modern award, enterprise agreement, a workplace determination or FWC order. It is unclear how payments made exceeding obligations under those instruments may be considered when determining the underpayment amount. It is anticipated that this will likely be the subject of any early criminal wage theft cases and decisions dealing with penalties.⁸⁵

81 FW Act s 562.

82 FW Act, ss 327A(5) & (6).

83 FW Act, s 327A(6).

84 FW Act, s327A(7).

85 *Workpac v Rossato* [2020] FCAFC 84. *CFMEU v Fremantle Port Authority* [2024] FCA 848.

- 4.39 Finally, the civil remedy provisions under the FW Act give the court the discretion to order that a penalty (or part thereof) be paid to employee victim/s (or the Commonwealth and/or other organisations). This is not available under the new criminal offence of wage theft.⁸⁶ Meaning where an employee has been underpaid, and that underpayment has not been rectified at the time a person or corporation is found guilty of a wage theft offence, the employee will need to recover any unpaid wages and/or entitlements via a court order for reparations,⁸⁷ a civil claim for compensation under the *Proceeds of Crime Act 2002* (Cth), or under the civil remedy regime under the FW Act including via the small claims jurisdiction.⁸⁸

Course of conduct

- 4.40 The new criminal wage theft offence establishes a 'course of conduct' sentencing rule, which is similar to the rule which applies in the context of sentencing for civil contraventions.⁸⁹
- 4.41 The course of conduct sentencing rule provides that if a person is found guilty of committing two or more offences (the aggregated offences) and the aggregated offences arose out of a course of conduct by the person, then the person is taken for sentencing purposes to have been found guilty of a single offence.
- 4.42 The explanatory memorandum to the Closing Loopholes Bill explains that the intention of this rule is that a 'course of conduct' may occur in relation to groups of employees who have been underpaid in the same manner over time, not just in relation to a single employee.⁹⁰
- 4.43 The 'course of conduct' sentencing rule also has an effect on calculating penalties based on the underpayment amount. If multiple offences are grouped and penalised as a single offence under the sentencing rule, then the corresponding underpayments are also combined for purposes of applying these penalties.

Sentencing

Overview



- 4.44 The *Crimes Act 1914* is the source for sentencing of the new criminal wage theft offence.
- 4.45 The overarching obligation of sentencing for a criminal act under Commonwealth laws is that the sentence *"must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence"*.⁹¹
- 4.46 The court must give proper weight to considerations of general deterrence, specific deterrence, denunciation and adequate (that is, proportionate) punishment.⁹²
- 4.47 Importantly, imprisonment is a sentence of last resort, with the court prevented from giving a sentence of imprisonment *"unless the court, after having considered all other available sentences, is satisfied that no other sentence is appropriate in all the circumstances of the case"*.⁹³

Factors the court will take into account when sentencing:

- 4.48 When determining the applicable penalties for a person found guilty of the criminal wage theft or related offence, the Court will take into account factors such as:
- The nature and circumstances of the offence;
 - The personal circumstances of any victim of the offence;
 - Any injury, loss or damage resulting from the offence;
 - Any victim impact statement from any victim of the offence;
 - The degree to which the person has cooperated with law enforcement agencies (including the FWO) in the investigation of the offence or of other offences;
 - If the person has pleaded guilty to the charge in respect of the offence;

86 FW Act s 546.

87 Crimes Act 1914, s 21B.

88 FW Act Part 4-1, Division 2 and s 548.

89 See FW Act s 557.

90 Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, Explanatory Memorandum.

91 Crimes Act s 16A(1).

92 Crimes Act 1914 s 16A(1) & (2).

93 Crimes Act 1914 s 17A(1).

- g. The degree to which the person has shown contrition for the offence;
- h. The deterrent effect that any sentence or order under consideration may have on the person and other persons;
- i. The need to ensure that the person is adequately punished for the offence; and
- j. The character, antecedents (i.e. criminal record), age, means and physical or mental condition of the person.⁹⁴

Dealing with a wage theft offence summarily

- 4.49 As the maximum penalty for the criminal wage theft offence under the FW Act does not exceed 10 years imprisonment, the offence may be dealt with summarily with the consent of both the prosecutor and the defendant.⁹⁵ A case determined summarily is one that is heard in the Magistrates Court, rather than before a Judge or Jury. It means the matter is resolved in a more streamlined, less formal setting.
- 4.50 If a wage theft offence is heard summarily, there is also a lower limit on the penalty which may be imposed, being 2 years imprisonment or a fine not exceeding \$13,200 (120 penalty units). However, this limit is not to be treated, for sentencing purposes, as the equivalent of a maximum penalty.

Discount for pleading guilty

- 4.51 A court may impose a lesser sentence because a person pleads guilty.
- 4.52 In particular, the fact and timing of a guilty plea, including any resulting benefit to the victims can be taken into account in sentencing where a person is found to have committed a criminal offence including the criminal offence of wage theft.⁹⁶

Other potential sanctions that can be imposed on an employer

- 4.53 The court can also make an order for an offender to make reparation to any person, by way of money payment or otherwise, 'in respect of any loss suffered by the person as a direct result of the offence'.⁹⁷ In a wage theft case, this may include an order for an employer to make payments to an employee for the amount of any underpayment still unpaid.
- 4.54 Depending on the circumstances an employer may also be penalised under the *Proceeds of Crime Act 2002* (Cth) which establishes a scheme for confiscating 'proceeds' of crime.
- 4.55 More serious cases of wage theft could also lead to a company being wound up by a court order under the *Corporations Act*.⁹⁸

Further guidance

The Fair Work Ombudsman, [Compliance and Enforcement Policy](#).

Commonwealth Director of Public Prosecutions, [Sentencing of federal offence in Australia: a guide for practitioners](#), July 2024.

Commonwealth Director of Public Prosecutions, [Prosecution Policy of the Commonwealth](#), 24 February 2021.

[Crimes Act 1914](#).

94 Crimes Act 1914, Division 2 of Part IB (Sentencing, Imprisonment and Release of Federal Offenders) 1914 (Cth)

95 Crimes Act 1914, s 4J.

96 Crimes Act, s 16A(2)(g).

97 Crimes Act 1914, s 21B.

98 Corporations Act 2001 (Cth), s 416.

5. 'Safe harbour' — Voluntary Small Business Wage Compliance Code

- 5.1 A distinguishing feature of the new Commonwealth criminal wage theft offence is the inclusion of what are called 'safe harbour' provisions. These provisions seek to encourage employers to 'self-report' to the FWO by providing a degree of protection for businesses that do so.
- 5.2 The safe harbour provisions effectively provide a narrow window in which a business can gain some protection from criminal liability under the new wage theft laws, if they can demonstrate that the underpayment was a genuine mistake, not intentional, and that they have taken certain steps both before an underpayment has occurred and after becoming aware of an underpayment to comply with the law.
- 5.3 Under the FW Act there are two types of 'safe harbour' provisions:
 - a. The Voluntary Small Business Wage Compliance Code⁹⁹ (**the Code**) — only available for small business employers (covered in this Chapter); and
 - b. A Cooperation Agreement — for all employers (see Chapter 6).



Whilst the 'safe harbour' protections can provide some additional security for business against the new criminal wage theft offence, they do not shield an employer from civil prosecution.

Voluntary Small Business Wage Compliance Code

Overview

- 5.4 The Code works by providing small business employers with a framework to avoid referral for prosecution by the FWO for underpayments that occur unintentionally.
- 5.5 The Code was declared by the Minister for Employment and Workplace Relations on 6 December 2024 (a copy of the Code is set out at the end of this guide from page 48).¹⁰⁰
- 5.6 The Code only applies to small businesses.



Who is a 'small business employer'?

The Code only applies to 'small business', which, for the purposes of the FW Act, is defined as an employer with fewer than 15 employees.¹⁰¹ This is the total number of individuals employed by the business, not the full-time equivalent number. For the purpose of calculating the number of employees, associated entities are taken to be one entity. This can include employees who are:

- full time and part time; and
- casual employees only if they are employed on a regular and systematic basis (similar roster or pattern each time) with a reasonable expectation of ongoing employment.

An employer must be considered a small business at the time the underpayment occurred.

If an employer has since grown to more than 15 employees, it can still access the protection of the Code so long as the underpayment occurred when the employer had less than 15 employees and was therefore a small business.

99 FW Act, s 327B(1) provides that the Minister for Employment and Workplace Relations may, by legislative instrument, declare a Voluntary Small Business Wage Compliance Code.

100 Ibid. The Code is a legislative instrument and is therefore subject to ordinary disallowance and sunseting processes set out in the Legislation Act 2003.

101 FW Act, s 23.

- 5.7 Where the FWO is satisfied that a small business employer has complied with the Code it cannot refer that employer to the AFP or CDPP for criminal prosecution.
- 5.8 A small business employer will comply with the Code if it can demonstrate it did not intend to underpay their employees. This will be assessed by looking at several actions set out in the Code.
- 5.9 It is important that small business employers are aware that the actions set out in the Code are not a checklist. This means a small business employer does not need to show that they have done all the actions listed in the Code in order to have complied with the Code. Nor is there one action that must be met in order to achieve compliance. Rather the Code works by identifying various actions a small business can take to demonstrate that it has acted in good faith and that any failure to pay employees correctly was not intentional.
- 5.10 Compliance with the Code is determined by the FWO on a case-by-case basis, with the FWO making a holistic assessment of the conduct and the business' particular circumstances to assess whether the Code has been satisfied. Accordingly, there is no guarantee of immunity and in some cases, it may be uncertain whether an employer has met the Code's expectations until the FWO has completed its assessment.



"A small business employer will comply with the Code if they don't intend to underpay their employees. This will be assessed by looking at several factors. These factors aren't new to compliant employers, instead they're steps many already take as part of good business practice."

Fair Work Ombudsman, Anna Booth

- 5.11 Where the FWO is satisfied that an underpayment was not intentional, the employer will not be referred for criminal prosecution. This protection extends to any persons involved in the underpayment, including business directors, managers, payroll employees etc. who may have been involved in the unintentional underpayment.
- 5.12 The Code outlines behaviours that are reasonable or to be expected from employers who do not intend to underpay their employees, while recognising the possibility of unforeseen circumstances in which an unintended underpayment may nevertheless arise. As such, the Code does not require employers to take any actions beyond those that are reasonable or to be expected to comply with their existing obligations to pay their employees their lawful entitlements.¹⁰²

The specific compliance actions set out in the Code

- 5.13 A small business employer will have complied with the Code if the failure to pay the employee/s was not intentional.
- 5.14 Intentional conduct includes:
 - a. Taking an action, such as paying less than an employee's minimum entitlements, on purpose
 - b. Failing to take an action, such as not paying an employee, on purpose.
- 5.15 The Code provides non-exhaustive guidance as to the types of actions that may be relevant in assessing whether the underpayment was intentional. The FWO may consider any information provided by the employer even if it is not included in the list.
- 5.16 A single action by a small business employer may be relevant to more than one matter. Importantly, no specific action is definitive, and not all actions are required to demonstrate compliance with the Code, noting that particular actions may not be relevant in every situation.
- 5.17 The weight given to each action will depend on the specific circumstances of each case, and whether a small business employer has complied with the Code will not be determined merely by the number of actions demonstrated (for example, one or two actions may hold significant weight for the employer's particular situation).
- 5.18 The FWO will assess whether an employer underpayment was intentional or not by having regard to the following eight actions set out in the Code:

102 Voluntary Small Business Wage Compliance Code Declaration 2024, Explanatory Statement, 2.

Action by employers that may indicate the underpayment was not intentional

#	Action	Body Corporates
1	The employer made genuine and reasonable efforts to educate itself on its payment obligation (e.g. work out correct pay rates and entitlements for the employee).	<p>This may include:</p> <ul style="list-style-type: none"> - Checking any applicable modern award or enterprise agreement, confirming that the National Minimum Wage Order applies or any entitlement under the National Employment Standards; - Considering the employee's role and duties to ensure the correct classification; - Checking whether any loadings, allowances, penalty rates, overtime or additional payments apply; - Checking annualised salary arrangements; and - Seeking information or advice from a reliable source (e.g. employer association, lawyer) to ascertain correct rates of pay and entitlements.
2	<p>The employer made reasonable efforts to stay up to date with changes to their obligations relating to employee payments and benefits.</p> <p>*Note: small business employers are not required or expected to monitor, read or interpret legislative amendments or case law.¹⁰³</p>	<p>This may include:</p> <ul style="list-style-type: none"> - Subscribing to FWO, FWC or employer association email updates to stay up to date on changes to any relevant awards including pay rate increase; - Subscribing to newsletters from reliable sources (e.g. employer association, lawyer, Fair Work Commission); and - Efforts to stay up to date with any changes to the employee's circumstances, such as changes to the employee's role, duties, classification, relevant qualifications, age, hours of work or location of work (e.g. staying across employee birthdays or new qualifications that may impact their classifications and corresponding rates of pay).
3	The employer checked, considered and relied on information about the employee that the employer reasonably believed was accurate in relation to paying wages and/or entitlements.	<p>This may include relying on accurate information about the employee when checking they've been classified correctly based on their role and duties, or that they're being paid correctly for their age or any other relevant information, such as progression through pay increments in an applicable modern award.</p> <p>Where an employer has relied on information, they know to be incorrect or misleading about the employee's duties to determine a lower rate of pay this will weight toward the underpayment being intentional and <u>against</u> compliance with the Code.</p>
4	The employer sought information or advice from a reliable source about paying employee entitlements correctly.	<p>This may include seeking advice from an employer association, lawyer, payroll processing services, the FWO (including its website and resources), or the FWC (including its website and resources).</p> <p>A small business employer will not be expected to have independently verified the accuracy of any information or advice received from these reliable sources.</p>
5	The employer provided information when seeking information or advice that the employer reasonably believed was accurate.	<p>This includes making sure to give correct information about an employee like their classification and age when seeking information or advice.</p> <p>Where inaccurate or misleading information is deliberately provided to elicit advice or information that would lead to lower rates of pay and/or entitlements this will weight toward the underpayment being intentional and <u>against</u> compliance with the Code.</p>

103 Voluntary Small Business Wage Compliance Code Declaration 2024, Explanatory Statement, 10.

Action by employers that may indicate the underpayment was not intentional

6	The employer has taken steps to fix the underpayment after becoming aware of it.	<p>A small business employer that did not intend to underpay their employee's entitlements is more likely to make reasonable efforts to ensure their employee receives their full entitlements and that such a failure does not occur again in future. Therefore, this may include:</p> <ul style="list-style-type: none"> - Repaying an amount as soon as possible (taking into account practical constraints such as difficulties quantifying the amount owed or if there would be unreasonable impacts on the employer solvency); and - Taking steps to prevent the same issue from happening again such as seeking information or advice from reliable sources and taking steps to remedy any mistakes or deficiencies in the employer systems (e.g. upgrading payroll software).
7	The employer cooperated with any inquiry or investigation that the FWO conducted into the underpayment	<p>This may include:</p> <ul style="list-style-type: none"> - Responding to the FWO's call and emails; - Engaging with the FWO through the inquiry or investigation as needed; and - Constructively engaging with the FWO to address any underlying issue which led to the underpayment.
8	Any other actions that might be relevant (e.g. what led to the underpayment or how the employer became aware of the underpayment).	<p>The following are all examples of other actions/circumstances that may weigh towards an underpayment not being intentional:</p> <ul style="list-style-type: none"> - A failure that arose from a mistake or error in payroll process or by a financial institution (e.g. bank); - A failure that arose because an employee did not submit their timesheet on time; - An error that arose because of ambiguity or competing interpretations (so long as they are reasonable); - An error that is identified as a result of an employer's proactive quarterly business audit of their payroll compliance; - An error identified by a union (provided the employer rectified the failure promptly); and - Evidence of actions taken which reduced or stopped any further failure to pay a required amount.

Common Questions

How does a small business gain the protection of the Code?

- 5.19 A small business employer will automatically gain the protection of the Code if the FWO is satisfied that the small business employer has complied with the Code. This may involve the FWO requesting information from the small business employer if it is aware of an underpayment. The small business employer may also request that the FWO assess its compliance with the Code if it is self-reporting an underpayment.

How does a small business show the FWO that they have complied with the Code?

- 5.20 The FWO assesses each small business case on a case-by-case basis, using any information it has gathered and/or been provided to determine if the business has complied with the Code. This could include employee records, contracts, pay slips, audits, information relied upon etc.

What happens if the FWO finds that a small business has complied with the Code?

- 5.21 If the FWO is satisfied that a small business has complied with the Code in relation to an underpayment, the FWO must not refer the employer's conduct to the DPP or the AFP for potential criminal prosecution under the new offence.
- 5.22 Compliance with the Code also means the FWO cannot enter into a Cooperation Agreement with the employer. (For more information on Cooperation Agreements, see Chapter 6)

What happens if the FWO finds that a small business has not complied with the Code? Will non-compliance automatically result in referral for criminal prosecution?

- 5.23 No, it depends on the circumstances of the case. The FWO may investigate and determine any appropriate enforcement outcome in accordance with its Compliance and Enforcement Policy. This may include commencing civil litigation or referring the employer's conduct to the DPP or AFP who will decide whether to prosecute.
- 5.24 However, the FWO has indicated that if businesses demonstrates a willingness to cooperate and fix any issues the FWO may instead consider a Cooperation Agreement (see Chapter 6) keeping it from referring the employer from criminal prosecution.¹⁰⁴

How will an employer know if they have complied with the Code?

- 5.25 When the FWO has decided if the Code has been complied with or not, the small business employer will be served with written notice of the decision about whether they had or hadn't satisfied the Code.¹⁰⁵

104 Wage theft: Voluntary code tells small businesses how to stay compliant and avoid prosecution, Smart Company, 17 December 2024.

105 Voluntary Small Business Wage Compliance Code Declaration 2024, Explanatory Statement, 1.

If an employer has complied with the Code, are they protected from civil penalties?

- 5.26 No. The Code is only an effective shield against criminal prosecution.
- 5.27 Whilst accessing the protections of the Code prevents a business from being charged under the criminal offence, the FWO may still seek civil penalties against a small business underpaying employee wages and/or entitlements, regardless of compliance with the Code.
- 5.28 Civil action includes a range of different non-criminal methods for dealing with breaches of workplace laws. For example, it can include the FWO issuing an employer with a Compliance Notice or accepting an Enforceable Undertaking. It can also include an employer being penalised or fined by a court. For more information of civil penalties see the FWO's webpage on [Litigation](#).



“Even if an employer has complied with the Code, civil actions such as issuing a compliance notice or an enforceable undertaking may still be taken and civil penalties may still apply.”

Fair Work Ombudsman, Anna Booth

Can a FWO finding that an employer has not complied with the Code be challenged?

- 5.29 Yes, but only through a judicial review process. This means that only a court or judge can review the FWO decision.
- 5.30 If this occurs it is best that you urgently seek legal advice around how to do this.

Does the Code limit any of the FWO's powers or functions (including its inspectors)?

- 5.31 No, the Code does not affect any of the FWO's powers or function, or the powers of its inspectors.

Further guidance

- 5.32 The Fair Work Ombudsman's [Guide to paying employees correctly and the Voluntary Small Business Wage Compliance Code](#).
- 5.33 [Voluntary Small Business Wage Compliance Code](#).

6. 'Safe harbour' — Cooperation Agreements

Overview

- 6.1 The second 'safe harbour' is to enter a Cooperation Agreement, which will offer a degree of protection for a person (such as an employer, business or individual) that has self-reported an underpayment to the FWO. The effect of a Cooperation Agreement is that the FWO cannot refer conduct engaged in by the person who is a party to the Cooperation Agreement to the DPP or the AFP for criminal prosecution while the Cooperation Agreement is in force.
- 6.2 The FWO will only enter into a cooperation agreement with an individual (e.g. an employer, a company, an individual) who has '*intentionally*' underpaid an employee. It will not enter into a cooperation agreement with a person who has '*unintentionally*' underpaid an employee.
- 6.3 It is important to be aware, however, that entering into a Cooperation Agreement does not prevent any of the following:
 - a. The FWO using information voluntarily provided during the cooperation agreement process in relation to any investigation, or in any civil penalty or criminal proceedings against you and/or others;¹⁰⁶
 - b. A FWO inspector from instituting or continuing civil proceedings in relation to the conduct;¹⁰⁷
 - c. The FWO from entering into an enforceable undertaking, issuing a compliance notice or exercising a compliance power during the life of the agreement;
 - d. The FWO referring another person to the DPP or the AFP for prosecution, as a result of conduct they have engaged in which the FWO becomes aware of as a result of the self-reporting;¹⁰⁸ or
 - e. A third party (individual, union, class action) initiating civil remedy proceedings in relation to the conduct which is the subject of the Cooperation Agreement.
- 6.4 Therefore, in essence, a Cooperation Agreement is analogous to the Enforceable Undertakings currently used by the FWO in civil penalty proceedings, but they only relate to resolving the issue of criminal liability.
- 6.5 In practice, Cooperation Agreements may also be used by the FWO to secure the cooperation of individual persons who might be privy to evidence that would assist in proving wage theft offences against an employer or senior director of an employer in a manner not dissimilar to immunity agreements used by other regulators such as the Australian Competition and Consumer Commission (**ACCC**).

Example — Request for Cooperation Agreement

A national retail chain was facing financial difficulties during a downturn. To cut costs, a regional manager, Sarah, deliberately altered rosters to avoid paying casual loading and weekend penalty rates owed to employees under the company's enterprise agreement.

When senior management conducts an internal audit, they discover Sarah's actions and realise employees have been underpaid. The company immediately begins calculating the amounts owed and plans to reimburse affected staff. However, they are concerned about the risk of criminal prosecution for the underpayments.

The company contacts the FWO, explains the situation, and demonstrates their commitment to rectifying the underpayments. They also outline their plans to implement stronger payroll and compliance systems. To address the issue cooperatively, they request to enter into a Cooperation Agreement with the FWO.

106 The Fair Work Ombudsman, Guide to cooperation agreements, page 8.

107 FW Act, s 717A(2)(a).

108 FW Act, s 717A(2)(b).

Entering into a cooperation agreement

Who can enter into a Cooperation Agreement?

- 6.6 The FWO can enter into a Cooperation Agreement with a person (e.g. company, individual) who has engaged in conduct that may amount to a potential offence or related offence that occurred on or after 1 January 2025.¹⁰⁹
- 6.7 A Cooperation Agreement can only be entered into with one party and the FWO (i.e. a company or an individual), with the agreement only providing protection for the one specific party that is subject to the agreement. Where several individuals or companies may have been involved in conduct amounting to a potential offence or related offence, separate Cooperation Agreements may be entered into with each relating to the same or similar conduct.¹¹⁰
- 6.8 Where a course of conduct occurs before and continues or after 1 January 2025, only the conduct that has occurred on or after 1 January 2025 can be the subject of a Cooperation Agreement.¹¹¹

When can a Cooperation Agreement be entered into?

- 6.9 A Cooperation Agreement can be considered at any time, including during, or following the completion of an investigation, either at the initiative of the FWO or at a person's request.

Does a person (e.g. company, individual) have to be the first to report a potential underpayment to the FWO in order to be considered for a Cooperation Agreement?

- 6.10 No. Reporting conduct after another person does not preclude a Cooperation Agreement being entered into with the FWO; however, it may be relevant to the FWO's assessment of whether to enter into a Cooperation Agreement and how full and frank the person's later disclosure is.¹¹²
- 6.11 Further, where two or more people report to the FWO in relation to the same conduct, the FWO will have regard to the timing of each report when deciding whether to enter into a Cooperation Agreement with those who were not the first to report.

109 FW Act, s 717A(1).

110 The Fair Work Ombudsman, Guide to cooperation agreements, page 9.

111 FW Act Schedule 1, Part 15, Division 5, s.98.

112 The Fair Work Ombudsman, Guide to cooperation agreements, page 10.

FWO Example — Timing of reported conduct and entering into a Cooperation Agreement

XYZ Limited acquired an olive oil company.

Following the acquisition of the company, XYZ Limited's internal auditors conduct a review of the employment records of the olive oil company. The internal auditors identify that employees covered by the Horticulture Award had not been paid applicable overtime rates for previous harvest periods by the previous owner of the company. XYZ Limited self-reports the underpayments to the FWO.

During the remediation program, XYZ Limited identified business records that potentially show the previous owner intentionally not paying overtime rates during harvest period. XYZ Limited raises this with the FWO and reports the new information. In the circumstances and following consideration of relevant matters, the FWO decides to enter into a cooperation agreement with XYZ Limited regarding the historical underpayments

A month after the FWO enters into a cooperation agreement with XYZ Limited, the FWO interviews a former officer of the olive oil company regarding their potential involvement in the underpayments. The former officer makes a voluntary, frank and complete disclosure of their involvement in the intentional underpayments and commits to cooperating with the FWO's investigation. In consultation with the DPP, the FWO decides to enter into a cooperation agreement with the former officer.

Six months after the FWO commenced an investigation into the previous owner of the olive oil company, the FWO has gathered sufficient evidence to refer a brief to the DPP regarding the conduct of the previous owner. On becoming aware of the investigation, the previous owner sought to report their conduct to the FWO. The previous owner disclosed that underpayments occurred but maintained that it was not intentional. The previous owner was also not willing to provide any further information or remedy the effects of the conduct that occurred under their ownership. On consideration of the available evidence, and the previous owner's attitude towards their conduct, the FWO decides not to enter into a Cooperation Agreement with the previous owner, leaving the previous owner vulnerable to criminal prosecution for their conduct.

Example reproduced from the Fair Work Ombudsman Guide to Cooperation Agreements pages 10 & 11.

Should a small business employer first look to show compliance with the Code or to enter a Cooperation Agreement?

- 6.12 A small business should first seek to demonstrate their compliance with the Code. The FWO will only consider entering a Cooperation Agreement with a small business employer once it is satisfied that it has not complied with the Code.

How does a person request to enter a Cooperation Agreement with the FWO?

- 6.13 A Cooperation Agreement can either be at the FWO initiative or at a person's request.
- 6.14 If a person wishes to request a Cooperation Agreement they must first complete an online form to self-report an actual or potential offence or related offence. The form will be available on the FWO website: <https://www.fairwork.gov.au/about-us/compliance-and-enforcement/cooperation-agreements>. Note:
- This is not yet available online at the time of publication of this guide.
 - A separate form must be completed for each person seeking to report and enter into a cooperation agreement (e.g. a company and multiple individuals).
 - If a person is reporting on behalf of a company or corporate entity, then they must have authority to do so on behalf of the company or corporate entity. The person will need to confirm this authority when completing the online form.
- 6.15 Once a person completes the online form, the FWO will review the form to check whether the person is eligible for a Cooperation Agreement and if a Cooperation Agreement is necessary. A person is only eligible to enter into a Cooperation Agreement for *'intentional'* underpayments.
- If a person *is not* eligible** — the person will be told by the FWO they are ineligible and referred to the process for reporting unintentional non-compliance.
 - If a person *is* eligible** — the FWO will commence their assessment phase by contacting the person to request they provide further information, which may include providing records and/or witness statements, and participation in interviews in relation to the specific conduct and circumstances.

- 6.16 During the FWO's assessment stage, a person being assessed by the FWO will be given the opportunity to provide submissions supporting the Cooperation Agreement, which will be considered by the FWO in making its determination.



Information provided during the FWO's assessment

Employers need to be aware that information voluntarily provided to the FWO to assist in its assessment can be used by the FWO in relation to an investigation or as evidence against you and/or others in civil proceedings, or in criminal proceedings if a Cooperation Agreement is not entered into or if a Cooperation Agreement is made but later terminated or withdrawn.

The FWO may also refer the information to other government agencies who may investigate and commence enforcement proceedings regarding the potential contravention of laws that they administer.¹¹³

A person may be liable to a civil penalty under the FW Act if they knowingly or recklessly give false or misleading information or produce false or misleading documents to the FWO in its consideration of a Cooperation Agreement. It is also a serious offence under the *Criminal Code 1995* (Cth).

- 6.17 If the FWO agrees to enter a Cooperation Agreement, the terms will be finalised with the person (including standard terms and any addition terms required).
- 6.18 Once a person enters a Cooperation Agreement, the FWO will monitor its compliance and any action the person has agreed to take (e.g. remediating employees, implementing corrective measures etc.).

What will the FWO consider when deciding whether to enter into a Cooperation Agreement?

- 6.19 The FWO will assess each person on a case-by-case basis.
- 6.20 In determining whether to enter into a Cooperation Agreement with a person the FWO **MUST** have regard to the following matters set out in the FW Act:
- Whether, in the FWO's view, the person (e.g. company, director) has made a voluntary, frank and complete disclosure of the conduct (to the extent of the person's knowledge at the time of the disclosure);



The FWO expects disclosure of the conduct will be promptly updated and corrected when needed and complete details of the conduct will be given to it, not limited to whether it is information the FWO has asked for in specific questions.¹¹⁴

- The nature and level of detail of the disclosure;



The FWO expects these details to include:

- The periods during which the conduct occurred,
- A description of how the conduct occurred,
- Who participated in and had knowledge of the conduct,
- Any measures taken to conceal the conduct,
- A description of relevant documents available,
- Their source and where they are held,
- Other persons who may provide information about the conduct,
- The nature of the underpayment amount,
- Any attitude, policy, rule, course of conduct or practice existing within the entity or in the part of the entity where the relevant conduct occurred that may have resulted in the conduct.¹¹⁵

Information and documents must be voluntarily provided without conditions to the FWO.¹¹⁶

113 FW Act, s 682(e) & 718.

114 The Fair Work Ombudsman, Guide to cooperation agreements, page 16.

115 Ibid.

116 Ibid.

- c. Whether, in the FWO's view, the person has cooperated with the FWO in relation to the conduct, including the provision of comprehensive information enabling the FWO to assess the effectiveness of the person's actions and approach to remedying the effects of the conduct;



When forming this view the FWO will consider whether the person has:

- Provided ongoing, full cooperation during any investigation or has held back or delayed giving information at any time;
- Complied with any time periods established by the FWO, using their best endeavours to preserve and provide voluntary information and documents;
- Explained the employer's or other relevant IT systems and equipment to the best of the person's knowledge; and
- Been available to respond to queries and attend interviews with the FWO.¹¹⁷

- d. The FWO's assessment of the person's commitment to continued cooperation;



This includes providing the FWO with comprehensive information that enables an assessment of the effectiveness of the person's actions and approach to remedying the effects of the conduct.

When making this assessment the FWO will assess:

- If the person is an employer, whether they have repaid, or will agree as part of a cooperation agreement to repay, the underpayment amount, interest and any other compensation to affected employees;
- If the person is not an employer, how they will assist to ensure the underpayment is remedied;
- If the person is and remains willing to periodically report to the FWO regarding what action is occurring;
- If the person has kept the matter confidential (if requested to by the FWO).

- e. The nature and gravity of any conduct;



In making this assessment the FWO will consider:

- The length of time the conduct occurred, or if it is still occurring,
- The amount of the underpayment,
- How many employees were impacted and whether those employees might be categorised as vulnerable (e.g. migrant workers, minors, etc.),
- The extent of the conduct within the employer's operations,
- Whether the conduct involved any threats, inducements or coercion,
- Whether the conduct was part of the business model and/or a calculated strategy, and
- Any other potential offences that may have been committed in association with the conduct (e.g. provision of false records, money laundering or taxation offences).

117 *ibid.*

- f. The circumstances in which the conduct occurred;



The FWO will consider:

- The conduct of the conduct,
- Any reasons for the conduct,
- Who may have benefits from the conduct,
- If the person caused the conduct, induced, or coerced others to participate in the conduct, or was induced or coerced by another person in relation to the conduct,
- The extent of awareness or approval of the conduct in the business,
- The extent of policies, practices or attitudes in the business that directed, encouraged tolerated or may have led to the offence or related offence, and
- If and how the conduct was concealed.

- g. The person's history of compliance with the FW Act;



This factor is intended to be construed broadly and may include but is not limited to:

- Whether there has been past compliance with enforcement tools such as compliance notices,
- The resolution or settlement of industrial disputes relating to similar or related conduct, including any admissions made).

- h. Any other matters prescribed by the *Fair Work Regulations 2009* (Cth) (**FW Regulations**).¹¹⁸



As at the time of publication of this guide there are no regulations that prescribe any other matters the FWO must consider.

- 6.21 In addition to the matters the FWO must take into consideration, the FWO **MAY** also consider the following:¹¹⁹
- a. Whether the person has meaningfully engaged with the impacted parties, and/or their representatives (e.g. unions), to explain and address the conduct (where appropriate).
 - b. Whether the FWO was already in possession of evidence at the time of the person's report to the FWO that is likely to establish an offence or related offence in relation to the reported conduct.
 - c. Whether another person has already reported the conduct to the FWO and whether there is already a cooperation agreement between the FWO and that other person.
 - d. Whether the person has ceased the conduct and promptly reported the conduct, and the reason for any delays in reporting the conduct to the FWO.
 - e. If measures have been implemented to prevent the conduct from continuing or reoccurring.
 - f. The person's criminal record.

Should I request a Cooperation Agreement from the FWO?

- 6.22 Prior to making such a request, employers are strongly encouraged to seek independent legal advice as requesting a Cooperation Agreement indicates that you believe you may have committed a criminal offence or related offence.
- 6.23 A person (e.g. company, individual) can also have a legal representative attend any FWO interviews you may have as part of the process.

¹¹⁸ FW Act s717B(2)(a)-(g). Fair Work Ombudsman, Compliance and Enforcement Policy, January 2025, Page 21.

¹¹⁹ The Fair Work Ombudsman, Guide to cooperation agreements, page 18.

Contents of a Cooperation Agreement

- 6.24 There are currently no requirements for what a Cooperation Agreement must contain. The FW Regulations may prescribe matters in relation to the content of Cooperation Agreement in the future.
- 6.25 The FWO however expects that Cooperation Agreements will include the following terms:¹²⁰
- a. **Acknowledgment** — that the party has provided frank, complete and honest disclosure of their conduct, that the party has read the agreement, entered into the agreement voluntarily, without any duress, and has received or been provided with the opportunity to obtain independent legal advice.
 - b. **FWO termination** — the FWO may terminate the agreement if it discovers new evidence of criminal conduct that the person knew about or suspected at the time it entered into the cooperation agreement
 - c. **Explanation** — of the conduct, circumstances, steps taken to remedy the effects of the conduct and the party's engagement and cooperation with the FWO to the date of the agreement.
 - d. **Admission** — in relation to the conduct and a requirement that no statements be made that are inconsistent with the admissions and content of the cooperation agreement.
 - e. **Review and remediation (for employers)** (if not yet done) — for impacted employees, including interest and consultation with employees and any representatives.
 - f. **Independent audit (for employers)** (if not yet done) — for compliance with the FW Act.
 - g. **Media releases, website notices/notification and apology to employees (for employers)** (if not yet done) — in a form and wording to be agreed with the FWO and annexed to the agreement. If an investigation into others involved is still ongoing the term may instead require a confidentiality agreement.
 - h. **Corporate Governance Procedures (for employers)** (if not yet done) — be reviewed to ensure the board of directors or governing body is appropriately notified of compliance and any breach of the FW Act, including regular reporting, as well as steps to be taken to improve internal processes.
 - i. **Training** — mandatory training in relation to compliance with the FW Act, where the agreement is with an employer this will apply to managers, HR, recruitment and payroll.
 - j. **Ongoing provision of information to the FWO** — to enable the FWO to assess the effectiveness of actions and approach to remedying the effects of the conduct for a specified period, including letters of assurance regarding compliance with the actions required to be taken under the agreement.
 - k. **Information or records obtained by the FWO may be used if the Cooperation Agreement is terminated or withdrawn** — in civil or criminal proceedings.
 - l. **Expiry** — the Cooperation Agreement will typically expire 6 years after the conduct that is the subject of the agreement ended (with the date to be specified).¹²¹ A Cooperation Agreement may conclude prior to the expiry where it is terminated by the FWO, or the person withdraws from the Cooperations Agreement with the FWO's consent.
- 6.26 The FWO may include additional terms depending on the conduct and circumstances of the matter.

Termination, withdrawal from and variation of a Cooperation Agreement

Can a Cooperation Agreement be varied?

- 6.27 A Cooperation Agreement may be varied at any time by mutual consent (both the FWO and the other party).¹²² Any variation must be in writing.
- 6.28 If a party wishes to vary a Cooperation Agreement, the FWO expects that an explanation and reasons will be set out in writing.¹²³

120 The Fair Work Ombudsman, Guide to cooperation agreements, page 19.

121 FW Act s 327C(2).

122 FW Act s 717F.

123 The Fair Work Ombudsman, Guide to cooperation agreements, page 22.

Can a party withdraw from a Cooperation Agreement after it is entered into to?

- 6.29 Yes, but only with the consent of the FWO.
- 6.30 If a party wishes to withdraw from a Cooperation Agreement, the FWO expects that an explanation and reasons will be set out in writing.¹²⁴

How can a Cooperation Agreement be terminated after it is entered into?

- 6.31 Only the FWO can terminate a Cooperation Agreement. If a party wishes to terminate an agreement, they can only do so by withdrawing from the agreement with the FWO's consent (see 6.37 above).
- 6.32 For the FWO to terminate a Cooperation Agreement unilaterally, the FWO **must** be satisfied that the following grounds exist:
- a. The person has contravened a term of the Cooperation Agreement;
 - b. The person has given information or produced a document that is false or misleading or omits any matter or thing without which the information is misleading (regardless of when this occurred) (for example, by withholding a document from the FWO and the omission of this document makes the information provided misleading); or
 - c. Any other ground prescribed by the FW Regulations.¹²⁵ As at the time of publication of this guide there are no regulations which prescribe another method of termination.
- 6.33 Alternatively, if the FWO is satisfied that one of the above grounds exists to terminate a Cooperation Agreement, the FWO can instead apply to the Courts for any order the Court considers appropriate, including the following:
- a. An order directing the person to comply with a term of the Cooperation Agreement, or to give or produce correct and complete information or documents;
 - b. An order awarding compensation for loss that a person has suffered because of matters constituting the ground for terminating the Cooperation Agreement; or
 - c. Any other order that the Court considers appropriate.¹²⁶
- 6.34 Generally, the FWO will not terminate a Cooperation Agreement if the party subject to it has tried to comply to the best of their ability.¹²⁷
- 6.35 The FWO may also provide a party with cautions before terminating a cooperation agreement to provide the person with the opportunity to address the FWO's concerns.¹²⁸

How does a Cooperation Agreement interact with enforceable undertakings and compliance notices?

- 6.36 The FWO can still accept enforceable undertakings, give compliance notices or use any other power or function of the FWO or the FWO inspectors in relation to the same conduct covered in a Cooperation Agreement.
- 6.37 However, an enforceable undertaking and/or compliance notice has no effect to the extent that an action specified in the undertaking or notice is inconsistent with a Cooperation Agreement (regardless of when the undertaking or notice was agreed to or given).

Further guidance

The Fair Work Ombudsman, [Guide to cooperation agreements](#).

The Fair Work Ombudsman, [Compliance and Enforcement Policy](#).

The Fair Work Ombudsman, [Website, Cooperation Agreements](#).

124 Ibid.

125 FW Act s717D(1).

126 FW Act s 717D(2)&(3).

127 The Fair Work Ombudsman, Guide to cooperation agreements, page 21.

128 Ibid.

7. Interaction with state wage theft Offences

Overview

- 7.1 Wage theft is already a criminal offence in Victoria and Queensland. Whilst a number of other states around Australia have publicly indicated an interest in criminalising wage theft, until 1 January 2025, employers outside of Victoria and Queensland faced no risk of criminal sanction for deliberate underpayments.
- 7.2 Following the federal development introducing a Commonwealth criminal offence into the FW Act, other state plans have been largely paused or ceased.
- 7.3 Whilst both Victoria and Queensland's wage theft legislation still remain, as a result of the introduction and commencement of the wage theft offence under the FW Act, they have, in effect been overridden/superseded.
- 7.4 The new criminal wage theft offence is therefore now the single channel for seeking criminal sanction for intentional underpayments in Australia.

8. Avoiding wage theft offences

Overview

- 8.1 Headlines about the underpayment of workers' entitlements in Australia have been impossible to ignore in recent years, with the FWO recovering nearly \$1 billion in unpaid wages and entitlements over the past two financial years alone.
- 8.2 While most employers strive to pay their employees correctly at all times, mistakes can and do happen. These errors can range from minor, isolated incidents to significant and widespread issues, with estimates from PwC suggesting:
 - a. As much as \$1.35 billion in wages are believed to be underpaid each year; and
 - b. Up to 13% of the total workforce is incorrectly paid, with that figure as high as 21% in higher-risk sectors such as hospitality, retail, healthcare and food services.¹²⁹
- 8.3 Although the new offence of wage theft and its related provisions may imply that underpayment stems from widespread fraudulent behaviour by employers, our experience indicates otherwise. For the vast majority of employers, underpayments are typically the result of inadvertent payroll mistakes or errors. They nonetheless create significant risk and liability.
- 8.4 Prosecutions under the new wage theft laws will involve a thorough examination of an employer's policies, practices, and procedures. This scrutiny will extend to the actions and oversight of the board and high-level managerial personnel, emphasising the need for robust internal controls.
- 8.5 With the consequences of non-compliance now more severe than ever, taking proactive steps is essential. Early action can help mitigate potential future liabilities and enable employers to access the safe harbour provisions where applicable.
- 8.6 Irrespective of whether a company or organisation employs one person or 10,000 people, it's now more important than ever to place a high priority on reviewing your processes, controls and risks related to payroll to ensuring all employees are receiving their lawful wages and entitlement.
- 8.7 The following section of the guide provides key resources to assist employers in ensuring compliance with pay and entitlement obligations while avoiding criminal liability for wage theft:
 - a. **Seven top tips for avoiding wage theft and paying employees correctly** — practical compliance steps that employers should take to ensure they meet their obligations and avoid underpayment.
 - b. **Common mistakes to be aware of** — a list of common errors that employers often make, which can lead to wage theft or compliance issues.
 - c. **Compliance Checklist** — a tool to help employers assess whether they are taking appropriate steps to pay employees correctly, keep required records, and avoid violations under the new wage theft offence provisions in the FW Act.

Seven top tips for avoiding wage theft and paying employees correctly

Effectively managing compliance and payroll systems is critical in avoiding wage theft and ensuring employees are paid their correct pay and entitlements. Below are several detailed tips and strategies to help employers meet these obligations.

✔ Tip 1: Check your compliance and payroll systems

Prosecuting authorities are very likely to consider whether a company can prove that it has sufficient control mechanisms in place to prevent wrongdoing when considering what action to take (if any) to take against a company for underpayment. The impact of a robust and appropriately tailored compliance system in avoiding investigation, prosecution and fines can be significant. Therefore, to minimise the risk of wage theft, all employers should maintain well-functioning compliance and payroll systems.

- **Don't 'set and forget':** avoid relying solely on automated systems to meet your pay obligations. Payroll accuracy shouldn't be an afterthought — it should be a top priority.
- **Identify issues early:** proactively look for areas of potential underpayment and address them at the earliest opportunity.
- **Conduct payroll due diligence:** the need to conduct thorough payroll due diligence has never been more critical, as this provides the best defence against underpayments occurring, and will assist an employer to access safe harbours or if defending against an allegation of wage theft.
- **Use reliable payroll systems:** ensure your payroll system is well-suited to your business's size, operations, work practices and applicable industrial instruments, with pay rules that are validated by lawyers (where practicable).
- **Address human error risks:** reduce reliance on manual payroll processes, which are more prone to mistakes.
- **Spot-check employee pay:** a very effective way to identify any potential oversights or miscalculations is to do a spot-check by randomly selecting a handful of employees at different levels and in different roles and reviewing their pay for a few pay cycles to see if their wages and conditions comply with the relevant award/enterprise agreement and the FW Act. You should also consider whether a spot check should be conducted externally and/or under legal professional privilege.
- **Audit regularly:** regularly auditing your payroll system and wage calculations can help identify potential discrepancies and prevent wage theft — particularly for flat rate and salary employees. Internal audits should encompass a comprehensive review of employee records, pay rates, award/enterprise agreement compliance, and entitlements. By conducting regular audits, you can proactively address any discrepancies and rectify them promptly. You should also consider whether an audit should be conducted externally and/or under legal professional privilege.



For years now, the Fair Work Ombudsman has been highlighting that large corporate employers need to place a much higher priority on putting systems and processes in place to ensure they pay their employees' full lawful entitlements,"

"Employers cannot put in place systems that prioritise their financial or competitive advantage without also putting in place strong governance to ensure that those systems meet minimum entitlements."

Fair Work Ombudsman, Anna Booth

✔ Tip 2: Stay informed and up to date

It is essential for organisations to be able to show that they are staying informed about changes to awards, legislation, and employment standards relevant to their industry to ensure they remain compliant and avoid errors. Investing in these resources and practices demonstrates to the FWO and others your commitment to compliance and ensures your payroll systems and processes remain accurate and up to date.

- **Monitor changes to workplace laws:** regularly check updates to awards, pay rates, legislation, and employment standards through trusted sources like employer associations, law firms, the FWO and WFC.
- **Subscribe to reliable sources of information:** sign up for email alerts, newsletters, social media updated from employer associations, legal advisors, and government bodies to stay informed about changes affecting your obligations.
- **Track employee changes:** keep up to date with changes to employees' roles, duties, classifications, qualifications, or circumstances (e.g. birthdays or new qualifications) that may impact their pay or entitlements.
- **Use expert support:** engage with employer associations, law firms and other experts to stay on top of compliance requirements and ensure you're aware of any industry-specific changes.

✔ Tip 3: Establish clear communication channels

Effective communication between employers and employees helps prevent wage theft by resolving concerns early.

- **Transparent processes:** create open channels for employees to raise concerns or seek clarification about their wages and entitlements.
- **Encourage dialogue:** promote a culture where managers and employees feel comfortable discussing potential issues, ensuring you can address problems before they escalate.

✔ Tip 4: Have a plan to address issues

Ensure you have a plan for how employees and managers can report compliance issues and how the company/organisation will respond to any queries or incidents related to underpayments so that these can be quickly rectified before they result in a complaint to the FWO or litigation.

- **Reporting and escalation mechanism:** this plan should clearly outline responsibilities within your organisation/company and establish an escalation process so that issues are addressed properly and promptly.
- **Timely resolution:** addressing underpayments immediately and implementing robust systems to prevent future errors will also likely demonstrate good faith if mistakes occur.

✔ Tip 5: Seek professional guidance and advice (if required)

Compliance is too high stakes to be making guesses about employee wages, entitlements, classifications, award and enterprise agreement interpretation etc.

- **Seek expert advice:** if you are unsure about your organisation/companies' current practices, seek advice from a legal or IR specialist to conduct a thorough review.

✓ Tip 6: Check your corporate culture

A company's corporate culture is a critical factor in preventing wage theft, as a non-compliant corporate culture can be evidence of a company's *'intention'* to underpay its employees, a key factor in providing a company has engaged in wage theft.

Corporate culture reflects the attitudes, policies, and practices that guide behaviour within a company (for further detail on corporate culture see section 2.35 of the guide).

To protect your business, fostering a culture of compliance must go beyond surface-level policies or systems — it requires evidence of a genuine commitment to be compliance with wage and entitlement obligations.

- **Evaluate what's tolerated:** regularly assess the unwritten rules and attitudes within your company to ensure they align with compliance expectations. Pay attention to behaviours that might indicate a culture of overlooking breaches, whether explicit or implied, and address them promptly. Remember, corporate culture is reflected in *"what people do when no one is watching"*.
- **Ensure a culture of compliance:** regularly conduct payroll compliance checks and keep payroll systems updated to reflect changes in laws or discrepancies. Consistent failures in these areas can signal a non-compliant corporate culture, which may be viewed as intentional wage theft under the new laws.
- **Evaluate how the business responds to wage issues:** how a company addresses wage discrepancies and employee inquiries reflects its corporate culture. Ensure swift and thorough responses to demonstrate a commitment to compliance, and adequately resource your payroll function to prevent recurring issues.



Having a poor corporate culture towards compliance can result in serious consequences, including facing enforcement action and suffering reputational damage."

Fair Work Ombudsman, Anna Booth

✓ Tip 7: Educate

- **Educate leadership:** ensure your board and senior management recognise the critical importance of compliance. They play a key role in implementing processes, checks, and controls to prevent breaches and ensure employees receive their lawful wages and entitlements.
- **Equip HR and payroll teams:** ensure HR personnel, payroll workers, and employee managers are well-versed in relevant employee regulations, award requirements and wage-related compliance. Provide regular training sessions or access to resources that help them understand the obligations and responsibilities regarding wages and entitlements and stay up to date with any changes.
- **Learn from past mistakes:** if your company has experienced underpayment issues in the past, ensure you understand why these issues occurred and ensure you have put in place processes to prevent repeat incidents.
- **If you are a 'small business employer', understand the Code:** see Chapter 5 of this guide for a detailed explanation of the Voluntary Small Business Wage Compliance Code.

Common mistakes to be aware of

- 8.8 The following are a list of some of the common payroll errors and mistakes that have the potential to create significant underpayment liabilities if left unchecked.
- 8.9 By identifying and addressing these common mistakes, employers can significantly reduce their risk of underpayments and associated liabilities.

Annualised salaries

Key risk: annualised salaries or flat hourly rates can result in underpayments if not carefully managed.

What to watch for:

- a. Ensure the arrangement is permitted under the relevant industrial instrument (e.g. modern award or enterprise agreement).
- b. Verify that the rate is sufficient to cover all minimum entitlements the employee would receive under the instrument, such as overtime, penalties, and allowances.

Part time employees

Key risk: misunderstanding part-time arrangements, particularly regarding hours of work and overtime entitlements, can lead to compliance issues.

What to watch for:

- a. Ensure part-time employees covered by a modern award or enterprise agreement have agreed-upon hours in writing.
- b. Ensure you pay overtime where required to part-time employees who work beyond their agreed hours.

Off the clock work

Key risk: asking employees to perform tasks outside of their rostered hours without pay can create significant legal risk.

What to watch for: tasks such as preparing for work, setting up equipment, or answering emails outside scheduled hours which are often compensable unless covered by reasonable additional hours provisions. Establish clear policies to ensure all work performed outside rostered hours is properly recorded and compensated as required.

Classifying workers

Key risk: incorrectly classifying employees under the wrong level or award can lead to discrepancies in pay and entitlements.

What to watch for: regularly review job roles and duties to ensure they align with the correct classification. Employees' roles often evolve over time, so periodic reassessment is essential.

Overtime

Key risk: misinterpreting or misapplying overtime provisions is a common source of underpayment liability.

What to watch for: overtime clauses often include intricate triggers that differ between industrial instruments. This can include specific hours, timeframes, or conditions under which overtime applies.

Failing to keep accurate records

Key risk: failing to keep accurate and complete records of hours worked, leave balances, and pay rates can result in underpayments and make it harder to defend against claims.

What to watch for:

- a. Ensure timesheets accurately reflect all hours worked, including overtime.
- b. Maintain pay records and entitlements for at least 7 years, as required by the FW Act.

1. Checking an employee's pay rates and entitlements

Have you correctly identified the source of your employees' wages and entitlements (e.g. modern award, enterprise agreement)?



Note: If your employee is not covered by a modern award or enterprise agreement you still must ensure they are being paid at or above the National Minimum Wage Order and are receiving any applicable entitlements under the FW Act e.g. superannuation, annual leave, sick leave etc.

If your employee is covered by a modern award or enterprise agreement, are they classified correctly? E.g. Have you considered the employee's current skill level, role, responsibilities and duties etc.

If your employee is covered by a modern award or enterprise agreement, have you verified that you are paying the employee at least the minimum hourly rate for the employee's classification?

 *Ensure you are looking at the pay rates in the correct / up to date version for the specific time period.*

If the employee is is not covered by a modern award or enterprise agreement or modern award and they being paid at or about the National Minimum Wage Order?

If your employee is covered by a modern award or enterprise agreement, have you checked:

- When overtime applies (e.g. hours worked beyond the ordinary roster or outside of specified times);
- When/if penalty rates apply (e.g. evenings, weekends, public holidays);
- Whether any loadings apply (casual, afternoon, night or weekend shift loadings);
- Whether any allowances for specific situations (e.g. travel, meal breaks) apply to the employee; and
- If you are you required to reimburse the employee for any out-of-pocket employee expenses?

Are you paying the employee all applicable overtime, penalty rates, loadings, allowance, or additional payment required?

Have you correctly identified the employee's breaks (required length and frequency)?

Are meal breaks being provided as required under the award/enterprise agreement, are meal breaks being recorded, and is the employee being paid for any paid breaks and any missed breaks if required under an award/enterprise agreement?

Have you reviewed your employee's leave entitlements (annual, sick, parental, long service etc.) and are you paying all leave at the correct rates (e.g. does leave loading apply)?

Have you checked any information which can affect an employee's pay rates and entitlements is up to date (e.g. age, location, duties, hours of work, relevant qualifications)?




Note: if you use or rely on information which you know to be incorrect or misleading this may give weight to the argument any underpayment which arises was intention and therefore may be wage theft.




If your employee is an apprentice or trainee, do you understand your obligations under their training contract, including minimum pay rates, pay increases, allowances and penalties?

If you are paying your employee an annualised salary, have you verified is it allowed under the applicable modern award or enterprise agreement and under what conditions?

2. Pay slip and record keeping obligations


- Do your pay slips include all information required under the Fair Work Act and Regulation?
To check what your payslips must include see a full list of the requirements [here](#).
- Are you providing employees with their pay slip within one working day of pay day either electronically or hard copy?
- Are you keeping a record of all your employees time and wage records which is accessible, legible, and accurate, including for each employee:
- The pay rate paid to the employee (gross and net).
 - Any deductions from the gross amount paid.
 - Details of any additional payment paid such as loadings, penalties, allowances or bonuses.
 - Any penalty rates or loadings paid for overtime worked, including the number of overtime hours worked and when they start and finish overtime hours.
 - Leave balances and leave taken (if covered by a modern award and your employee takes leave in advance you also have an obligation to keep a copy of the agreement).
 - A copy of any agreement to cash out leave, and the rate of pay paid when the leave was cashed out
 - Superannuation contributions paid (amount, pay period, date and name of super fund).
 - Details of the reason for paying into a super fund (for example a record of the employee's super fund choice and the date they made that choice).
-  *Note: if the Horticulture Award applies to your employees there are additional record keeping obligations regarding piecework you may need to comply with. For further detail see [here](#).*
- Are you keeping a written copy of any individual flexibility agreements under a modern award or enterprise agreement?
- Are you keeping a written copy of any guarantees of annual earnings?

3. Staying informed & up to date

- Do you have a method to stay up to date with changes to your obligations arising from changes to the law, court and FWC decisions which can affect rates of pay and entitlements and changes to modern awards?
-  *E.g. subscribing to email, newsletters and/or social media updates from a reliable source e.g. employer association, law firms, the FWO, the FWC.*
- Do you have a method to keep up to date with periodic pay rate changes under modern awards, enterprise agreements or the National Minimum Wage Order?
-  *E.g. Subscribing to employer association, FWO or FWC email updates to stay up to date on changes to any relevant awards including pay rate increase, checking for updates every July when minimum pay rates increase.*
- Do you have a method to stay up to date with any changes to the employee's circumstances, such as changes to the employee's role, duties, classification, relevant qualifications, age, hours of work or location of work.
-  *E.g. staying across employee birthdays or new qualifications that may impact their classifications and corresponding rates of pay.*

4. Professional guidance and advice


- If you are unsure about your current practices, have you sought advice from an employer association, lawyer, payroll processing services, the FWO (including its website and resources), or the FWC (including its website and resources)?

 *Note: you are not expected to have independently verified the accuracy of any information or advice received from a reliable source.*

- If you sought information or advice, did you provide accurate information about your employee's circumstances (e.g. classification, age, qualifications, duties) and your business to the person you sought advice from?

- Have you put the advice you received into action?

- If you are currently operating on basis of advice you received from a reliable source, is the information you provided about your employee's circumstances (e.g classification, age qualifications, duties) and your business when you sought that advice still accurate and current?

 *Note: if you know the information to now be incorrect and continue to operate on knowing the advice may be inaccurate this may give weight to the argument any underpayment which arises was intention and therefore may be wage theft.*

- Have you maintained a record of any advice received from a reliable source that you are currently relying upon?

5. Past issues

If you have had an underpayment issue in the past, have you addressed it by doing each of the following:

- Back paying the employee/s affected as soon as possible.
- Understanding how the underpayment happened.
- Have you put the advice you received into action?
- Seeking information or advice from reliable sources (e.g. lawyer, employer association, payroll processing service) regarding resolving your underpayment issue and its cause.
- Taking steps to remedy any issues or deficiencies in your company systems and processes that lead to the underpayment (e.g. upgrading payroll software, implementing an audit) so the same issue does not happen again in the future.

9. What to do if you think you have made a mistake in paying your employee?

- 9.1 Uncovering a wage or entitlement underpayment can be daunting, but how you subsequently respond is critical, particularly in avoiding criminal wage theft charges. Taking swift, proactive steps can help protect your business, minimise liabilities, and demonstrate good faith to regulators such as the FWO.

Fixing an underpayment — respond quickly and rectify the error

- 9.2 The approach of an employer upon uncovering an underpayment may be a key factor for the FWO when deciding what action to take in relation to alleged contraventions of workplace laws, with a proactive approach to rectifying underpayments and ongoing payroll compliance viewed favourably by the FWO.
- **Move quickly:** if you discover that you've underpaid your staff, correct any mistakes as soon as possible (taking into account practical constraints such as difficulties quantifying the amount owed or if there would be unreasonable impacts on the employer solvency) by following these steps:
 - a. Determine the period of underpayment (how long was the employee underpaid);
 - b. Calculate the actual amount paid;
 - c. Find out what the employee was entitled to be paid. Calculate this based on the employee's pay rate, the number of hours the employee worked and when;
 - d. Calculate the difference (how much the employee has been underpaid);
 - e. Discuss with the employee and confirm back payment arrangements;
 - f. Make back payment;
 - g. Determine whether additional tax (e.g. payroll tax) or superannuation are also payable; and
 - h. Identify the cause of the error and put systems in place to prevent it from happening again.
 - **Engage experts:** consider engaging external support to ensure that any calculations and rectifications being made are correct (e.g. accountants, lawyers, payroll specialists).

Take steps to avoid other and future underpayment issues.

- **Assess other employees:** undertake a targeted review to fully understand the scope of any potential compliance issues. Simultaneously assess whether any other employees are also affected. If necessary, a full payroll review may also be taken.
- **Engage professional support:** consider seeking expert advice to ensure accurate calculations and compliance with relevant laws and industrial instruments. Employment lawyers or payroll specialists can provide valuable guidance on rectification processes and help implement measures to prevent future mistakes.
- **Implement system improvements:** if you have a confirmed underpayment, you should determine:
 - a. Why it has occurred;
 - b. How it can be rectified; and
 - c. What measures can be implemented going forward to prevent it from happening in the future, such as seeking information or advice from reliable sources and taking steps to remedy any mistakes or deficiencies in your systems (e.g. upgrading payroll software).

Dealing with regulators and authorities

Should I report an underpayment to the FWO?

- 9.3 There is no obligation under the FW Act to report an underpayment you become aware of to the FWO.
- 9.4 According to the FWO's compliance and enforcement policy, isolated, unintentional payroll errors resulting in underpayments over a short period of time (up to 12 months) do not need to be actively reports as long as employees are informed, paid back in full as soon as practicable and changes are implemented to ensure the error isn't repeated.¹³⁰ For broader, historical or repeated unintentional non-compliance the FWO recommends that it be notified.
- 9.5 In addition, the FWO states that it is less likely to take legal action against an employer who self-reports an issue to them, cooperates with the FWO's enquires and fixes the underpayment.¹³¹
- 9.6 Employers should, however, be acutely aware that if the FWO becomes aware of an underpayment, it is not prevented from commencing an investigation or an inquiry or taking other steps, including enforceable undertakings of civil prosecution. The FWO may commence those actions even where an employer has self-reported the issue and all affected employees have been paid back any unpaid entitlements.

Example — Best & Less Pty Ltd

Best & Less, the clothing retailer, self-disclosed \$5.2 million in underpaid wages to the FWO in December 2020 after an internal review identified that the annualised salaries paid to Best & Less' store managers and assistant store managers were insufficient to cover their minimum entitlements under the General Retail Industry Award 2020 in relation to allowances, penalty rates, overtime and annual leave loading.

Despite the large monetary value of the self-disclosure, Best & Less' self-disclosure, cooperation throughout the investigation, paired with its commitment to rectifying the issue and preventing future contraventions, contributed to the FWO accepting that an enforceable undertaking was an appropriate resolution in the circumstances rather than pursuing civil penalties in the courts.

Is a company obliged to proactively cooperate with a FWO investigation/inquiry?

- 9.7 No. There is no 'one size fits all' approach to responding to a FWO investigation/inquiry. Where an employer is the subject of FWO interest, it is free to cooperate on a voluntary basis.
- 9.8 That said, it is generally advisable for employers to endeavour to cooperate with the FWO. Depending on the circumstances, an employer may gain legal and commercial benefits from cooperating with the investigation/inquiry. We recommend that tailored advice be obtained, which is specific to a particular situation.
- 9.9 In determining whether to cooperate with a FWO investigation/inquiry a company should be responsive to the particular circumstances of the investigation, including:
- The nature of the allegations made by the FWO;
 - The intensity of the investigations by the FWO;
 - The stage at which the investigations are at; and
 - Any indication that a referral to the AFP/DPP for criminal proceedings are being contemplated.
- 9.10 A company must, however, comply with any lawful orders or requirements to produce documents or information under the FWO's powers, even if doing so may incriminate the company.
- 9.11 Importantly, employers need to be aware that:
- An employer's willingness to cooperate with any inquiry or investigation will be a relevant factor in determining whether the FWO is willing to enter into a Cooperation Agreement with the employer (see Chapter 6 for further detail); and
 - small business employer cooperation with any inquiry or investigation that the FWO conducts into an underpayment will be relevant in assessing whether the small business has complied with the Code and accordingly whether the underpayment was intentional or not (see Chapter 5 for further detail).¹³²

Note: neither of the above safe harbour incentives shield a company or informant (or related parties) from the FWO bringing civil proceedings against an employer.

¹³⁰ Fair Work Ombudsman, Compliance and Enforcement Policy, January 2025, page 19.

¹³¹ Fair Work Ombudsman, Compliance and Enforcement Policy, January 2025.

¹³² Voluntary Small Business Wage Compliance Code.

- 9.12 If a company decides to cooperate with a FWO inquiry or investigation this cooperation may include things like (amongst other things):
- a. Responding to the FWO's call and emails;
 - b. Engaging with the FWO through the inquiry or investigation as needed; and
 - c. Constructively engaging with the FWO to address any underlying issue which led to the underpayment.

Is a company legally obliged to disclose criminal offences to the prosecution authorities (AFP/DPP)?

- 9.13 It is not a requirement or an offence if a company fails to report a suspicion or knowledge of the wage theft offence. However, if improper conduct has been identified, it may be in the interests of the company to self-report by disclosing and then cooperating with the FWO.
- 9.14 In particular, self-reporting may be treated as a significant public interest factor against prosecution. Also, the DPP Prosecution Policy expressly takes cooperation into account when considering whether to prosecute, the charges to be laid, mode of trial and related issues.
- 9.15 Cooperation will also likely minimise the risk of the AFP exercising its powers of compulsion, for instance by issuing warrants for search and seizure of evidence which can be invasive and resource-intensive for the target company and its personnel.

If criminal proceedings are commenced, you should assess any applicable insurances the company has.

- 9.16 It is possible that statutory liability, management liability and D&O insurance policies may cover defence costs arising from a prosecution of an organisation/company or individual for wage theft.
- 9.17 If the policy wording covers such claims, the company should consider whether existing exclusions would enable the insurer to decline cover (and recover defence costs advanced) in the event of adverse findings by a Court or admissions of guilt.

Further guidance

The Fair Work Ombudsman, Website, [I think I've underpaid my employee](#).

The Fair Work Ombudsman, [Compliance and Enforcement Policy](#).

11. Voluntary Small Business Wage Compliance Code Declaration 2024

I, Murray Watt, Minister for Employment and Workplace Relations, make the following declaration.

Dated 6 December 2024

Murray Watt

Minister for Employment and Workplace Relations

Preamble

The Fair Work Ombudsman encourages all employers, including small business employers, to make genuine attempts to comply with workplace obligations, recognising that this promotes harmonious, productive and cooperative workplaces, reduces disputes and minimises the need for back pay.

The Voluntary Small Business Wage Compliance Code in this instrument provides non exhaustive examples of efforts that a small business employer can make, and reliable sources from which a small business employer may obtain information, to correctly pay full entitlements for their employees.

Part 1 — Preliminary

1 Name

This instrument is the *Voluntary Small Business Wage Compliance Code Declaration 2024*.

2 Commencement

(1) Each provision of this instrument specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. The whole of this instrument	1 January 2025.	1 January 2025

Note: This table relates only to the provisions of this instrument as originally made. It will not be amended to deal with any later amendments of this instrument.

(2) Any information in column 3 of the table is not part of this instrument. Information may be inserted in this column, or information in it may be edited, in any published version of this instrument.

3 Authority

This instrument is made under subsection 327B(1) of the *Fair Work Act 2009*.

4 Definitions

In this instrument:

Act means the *Fair Work Act 2009*.

applicable amount means an amount that:

- (a) an employer is required to pay as mentioned in paragraph 327A(1)(a) of the Act; and
- (b) is not covered by subsection 327A(2) of the Act.

code means the Voluntary Small Business Wage Compliance Code in Part 2.

5 Simplified outline

If a small business employer fails to pay an applicable amount (such as an amount payable under the Act or a fair work instrument) to, on behalf of, or for the benefit of, an employee, a range of civil and criminal enforcement actions may be taken. Broadly, a small business employer is one that is covered by the Act and that employs fewer than 15 employees.

Civil action under the Act can include accepting an enforceable undertaking, giving a compliance notice or applying for an order for a civil penalty.

A small business employer may commit a criminal offence against subsection 327A(1) of the Act if:

- a. The employer is required to pay an applicable amount to, on behalf of, or for the benefit of, an employee; and
- b. The employer intentionally engages in conduct; and
- c. The conduct results, as intended by the employer, in a failure to pay the applicable amount in full on or before the day it is due for payment.

However, if the Fair Work Ombudsman is satisfied that a small business employer complied with the code in relation to a failure to pay an applicable amount, the Fair Work Ombudsman must not refer any conduct that resulted in the failure to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence against that subsection.

Additionally, if the Fair Work Ombudsman is so satisfied, the Fair Work Ombudsman must not enter into a Cooperation Agreement with the small business employer that covers any such conduct.

If the small business employer has complied with the code, the Fair Work Ombudsman, and others, may still take civil action in relation to the conduct.

A small business employer will have complied with the code if the failure to pay the applicable amount was not intentional, having regard to relevant matters such as those set out in the code.

An example of a matter that may be relevant to assessing whether the failure to pay the applicable amount was intentional is whether the small business employer sought information or advice from reliable sources such as guidance materials for small business employers published by a relevant industrial association of employers or employees, another relevant professional body, or the Fair Work Ombudsman.

Note 1: For information about enforceable undertakings and compliance notices, see Subdivision DD of Division 3 of Part 5 2 of the Act.

Note 2: For information about orders for civil penalties, and other civil remedies, see Division 2 of Part 4–1 of the Act.

Note 3: For information about Cooperation Agreements (which relate to conduct that a person has self reported to the Fair Work Ombudsman), see Subdivision DE of Division 3 of Part 5 2 of the Act.

Part 2 — Voluntary Small Business Wage Compliance Code

6 Failure to pay an applicable amount must not be intentional

(1) A failure by a small business employer to pay an applicable amount to, on behalf of, or for the benefit of, an employee must not be intentional.

Note: A small business employer will have complied with this code if the failure to pay the applicable amount was not intentional, having regard to relevant matters such as those set out in this section.

(2) Without limiting the matters to be considered in assessing whether the failure to pay the applicable amount was intentional for the purposes of this code, subsections (3) and (4) set out matters that may be relevant to that assessment.

Action by employer that may indicate the failure to pay the applicable amount is not intentional

- (3) Relevant matters may include whether the employer has done any or all of the following:
- a. Made reasonable efforts to ascertain correct rates of pay and entitlements for the employee;
 - b. Made reasonable efforts to stay up to date with the employer's obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee;
 - c. Considered and relied on information about the employee that the employer reasonably believed was accurate (such as the employee's role, duties, classification, relevant qualifications, age, hours of work and location of work) in relation to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee;
 - d. Sought information or advice from reliable sources in relation to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee;
 - e. Provided information that the employer reasonably believed was accurate in seeking that information or advice;
 - f. Taken reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure;
 - g. Cooperated with any relevant inquiry or investigation by the Fair Work Ombudsman after becoming aware of the failure to pay the applicable amount.

Other circumstances may be relevant

(4) Relevant matters may include any other circumstances relating to the failure to pay the applicable amount or how the employer became aware of the failure.

7 Ascertaining correct pay rates and entitlements

For the purposes of paragraph 6(3)(a), matters to be considered in assessing whether the employer has made reasonable efforts to ascertain correct rates of pay and entitlements for the employee may include, but are not limited to, the following:

- a. Whether the employer referred to any modern award or other relevant instrument that applies to the employee;
- b. Whether the employer referred to any other rights, relating to the payment of an applicable amount, that apply to the employee under the Act;
- c. Whether the employer considered the nature of the enterprise;
- d. Whether the employer considered the role and duties of the employee;
- e. Whether the employer considered the correct classification of the employee's role;
- f. Whether the employer considered any of the following that apply in relation to the employee:
 - i. Minimum rates of pay;
 - ii. Loadings or allowances;
 - iii. Penalty rates or overtime;
 - iv. Any other separately identifiable amounts;
 - v. Any other requirements relating to rates of pay for the employee, such as annualised wages or piece rates.

Note: For the purposes of paragraph (a) of this section, other instruments that may be relevant to ascertaining correct rates of pay and entitlements for the employee include other fair work instruments (such as an enterprise agreement) or a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

8 Staying up to date with obligations

For the purposes of paragraph 6(3)(b), matters to be considered in assessing whether the employer has made reasonable efforts to stay up to date with the employer's obligations relating to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee may include, but are not limited to, the following:

- a. The employer's efforts to stay up to date with any changes to applicable legislation and the interpretation of that legislation;
- b. The employer's efforts to stay up to date with any changes to any modern award or other relevant instrument that applies to the employee, including variations made or approved by the Fair Work Commission;
- c. The employer's efforts to stay up to date with any changes to the employee's circumstances, such as changes to the employee's role, duties, classification, relevant qualifications, age, hours of work or location of work.

Note: For the purposes of paragraph (b) of this section, other instruments that may be relevant to the employer's obligations include other fair work instruments (such as an enterprise agreement) or a transitional instrument (as continued in existence by Schedule 3 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*).

9 Reliable sources of information or advice

For the purposes of paragraph 6(3)(d), reliable sources from which information or advice may be sought, in relation to the payment of applicable amounts to, on behalf of, or for the benefit of, the employee, may include, but are not limited to, the following:

- a. Industrial associations of employers or employees, or other relevant professional bodies;
- b. Industrial professionals, such as lawyers or professional industrial consultants;
- c. Payroll processing services;
- d. The Fair Work Ombudsman, including the Fair Work Ombudsman's website and other resources;
- e. The Fair Work Commission, including the Fair Work Commission's website and other resources.

10 Taking steps to rectify the failure to pay the applicable amount

For the purposes of paragraph 6(3)(f), matters to be considered in assessing whether the employer has taken reasonable steps to rectify the failure to pay the applicable amount after becoming aware of the failure may include, but are not limited to, the following:

- a. Any steps the employer has taken to repay the amount to, on behalf of, or for the benefit of, the employee;
- b. If the employer has taken any such steps — how promptly the employer took those steps after becoming aware of the failure to pay the applicable amount;
- c. Any proactive steps the employer has taken to prevent the same issues from arising in future in relation to any employees, for example, seeking information or advice from reliable sources and taking steps to remedy any mistakes or deficiencies in the employer's systems.

11 Other circumstances relating to the failure to pay the applicable amount and how the employer became aware of the failure

For the purposes of subsection 6(4), other circumstances relating to the failure to pay the applicable amount and how the employer became aware of the failure may include, but are not limited to, the following:

- a. Whether the failure to pay the applicable amount arose from a mistake or error in payroll processes or by a financial institution;
- b. Whether the failure to pay the applicable amount arose because of ambiguity or competing interpretations of obligations in relation to employee pay, and the employer took a reasonable but incorrect interpretation (for example, a reasonable but incorrect interpretation of a modern award);
- c. How the employer became aware of the failure to pay the applicable amount, for example because the employer proactively undertook an audit of their payroll compliance;
- d. If the employer was made aware of the failure to pay the applicable amount by the employee or the employee's representative — how the employer responded to being made aware, and how promptly (if at all) the employer took reasonable steps to rectify the failure as mentioned in paragraph 6(3)(f);
- e. Whether the applicable amount the employer failed to pay was minimised because the employer took prompt steps to rectify the failure after becoming aware of the failure.

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