

**Colin
Biggers
& Paisley**

HR Highlights Series.

Wage theft: A new year and new powers
Adam Foster



ABC Australian Broadcasting Corporation

Employers guilty of wage theft facing prospect of 10 years in jail and million-dollar fines

Employers caught having deliberately underpaid workers could face jail time, under new laws the federal government is proposing.

2 Sept 2023



CT The Canberra Times

Canberra massage parlour million dollar wage theft penalty

Federal Court orders back pay for Filipino employees underpaid nearly \$1 million by Foot and Thai Massage in Belconnen.

2 weeks ago



News / National

Staggering figure Australian workers are losing to wage theft

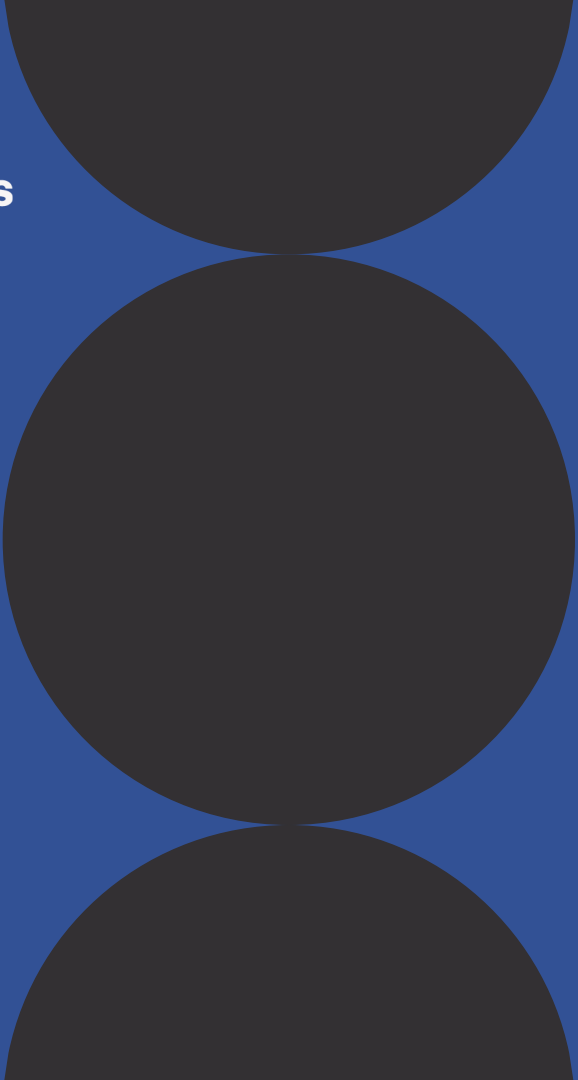


By 9News Staff

7:40pm Mar 22, 2024

Wage theft has reached epidemic proportions. No worker should ever have their wages stolen, yet it is a widespread and increasingly commonplace occurrence

ACTU Submission to Commonwealth Parliament dated 6 March 2020



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Wage theft - what is it?

Wage theft - what is it?

Section 327A(1) of the *Fair Work Act 2009* (Cth) sets out four elements of the new offence:

1. The employer is required to pay an amount to, on behalf of, or for the benefit of, an employee under the FW Act, a fair work instrument, or a transitional instrument;
2. The required amount is not an excluded amount;
3. The employer engages in conduct; and
4. The conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

Then and now ...

Serious contravention was when a court found that the:

- Person or business *knew* they were contravening an obligation under workplace laws
- Contravention was *part of a systematic pattern* of conduct affecting one or more people.

vs

A serious contravention can happen where there has been a 'knowing or reckless' contravention.

Exceptions

These provisions don't apply to certain employees for:

- Superannuation contributions
- Payment for taking long service leave payments
- Payment for taking leave connected with being the victim of a crime
- Payment for taking jury duty leave or for emergency services duties.

These laws also don't apply to employers who:

- Unintentionally underpay their employees, or
- Pay incorrect amounts by mistake.

Current state of play

Non-criminal conduct

From 27 February 2024, employers (other than small businesses) face a penalty of the greater of:

- 1,500 penalty units (\$469,500), previously 300 penalty units or \$93,900; or
- Three times the amount of the penalty.

For serious underpayments, the maximum penalty for employers (who are not small businesses) is the greater of:

- 15,000 penalty units (\$4,695,000), up from 3,000 penalty units or \$939,000; or
- Three times the amount of any associated underpayment.

Criminal conduct

From 1 January 2025, the consequence for wage theft depends on who is guilty.

If a **corporation** engages in wage theft, then it could be fined greater of either:

- \$7,825,000; or
- If the court can figure out the value of the underpayment - three times that amount.

If an **individual** engages in wage theft, then:

- They could face up to 10 years imprisonment; or
- Be fined the greater of either:
 - \$1,565,000; or
 - if the court can figure out the value of the underpayment - three times that amount.

Compliance

Compliance Notice

FWO has the power to issue compliance notices to employers requiring the employer to:

- Calculate the underpayment amount owed to an employee
- Pay the amount owed to the employee.

Courts are also empowered to order employers (who have been issued with a compliance notice) to comply, either wholly or partly, with its terms.

Small business compliance

1. A Voluntary Small Business Wage Compliance Code (Voluntary Code) will be established.
2. Compliance with the Voluntary Code means a small business won't be criminally prosecuted if they underpay their employees.
3. The Voluntary Code is in the process of being developed.

More information about the Voluntary Code and how it operates is still to come.

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**What can we
expect?**

Queensland

On 10 September 2020, the Queensland Parliament expanded the offences of stealing and fraud under its Criminal Code to include specific offences relating to wage theft which is defined as:

"... deliberate intentional behaviour leading to under or non-payment of [employment] entitlements."

The wage theft provisions in Queensland do not apply to workers whose employment is governed by the Fair Work Act 2009, meaning the wage theft laws effectively apply only to Queensland State and Local Government employees.

Queensland

The Queensland Criminal Code at Section 391 ('Definition of stealing') includes ***deliberate, intentional behaviour*** leading to under or non-payment of entitlements as a criminal offence. This could include where deliberate wage theft occurs through:

- Unpaid hours or underpaid hours
- Unpaid penalty rates
- Unreasonable deductions
- Unpaid superannuation
- Withholding entitlements
- Underpayment through intentionally misclassifying a worker including wrong award, wrong classification, or by 'sham contracting' and the misuse of Australian Business Numbers (ABN)
- Authorised deductions that have not been applied as agreed.

Victoria

On 1 July 2021, under the Wage Theft Act 2020 (Vic), it became a crime for an employer in Victoria to:

- Deliberately and dishonestly underpay employees
- Deliberately and dishonestly withhold wages, superannuation or other employee entitlements
- Falsify employee entitlement records to gain a financial advantage; and
- Avoid keeping employee entitlement records to gain a financial advantage.

Powers of the wage inspectorate extend to long service leave and child licencing regime

- On 5 March 2024, the Victorian Government announced it would repeal the wage theft offences.



News 29 November

Restaurant and officer to face criminal charges under Victorian wage theft laws in an Australian first

Wage Inspectorate Victoria has filed 94 criminal charges in the Magistrates Court of Victoria against a Macedon restaurant and its officer.

News 26 October

Wage Inspectorate takes action against NAB

The Wage Inspectorate has filed charges in the Magistrates' Court of Victoria against National Australia Bank Limited alleging the bank contravened s9...

News 14 July

Coles underpays over 4,000 workers almost \$700k, fined in court for "systemic failure"

Over 4,000 former Coles workers in Victoria were underpaid almost \$700,000 in hard-earned long service leave entitlements, a Wage Inspectorate Victori...

News 19 October

Finance firm faces maximum penalty of more than \$3m over alleged non-payment

Wage Inspectorate Victoria has commenced a prosecution against Premium Capital Finance Pty Ltd, alleging the company contravened Victoria's long servi...

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Accessory liability

Accessorial liability

Section 550 - *Fair Work Act 2009* (Cth)

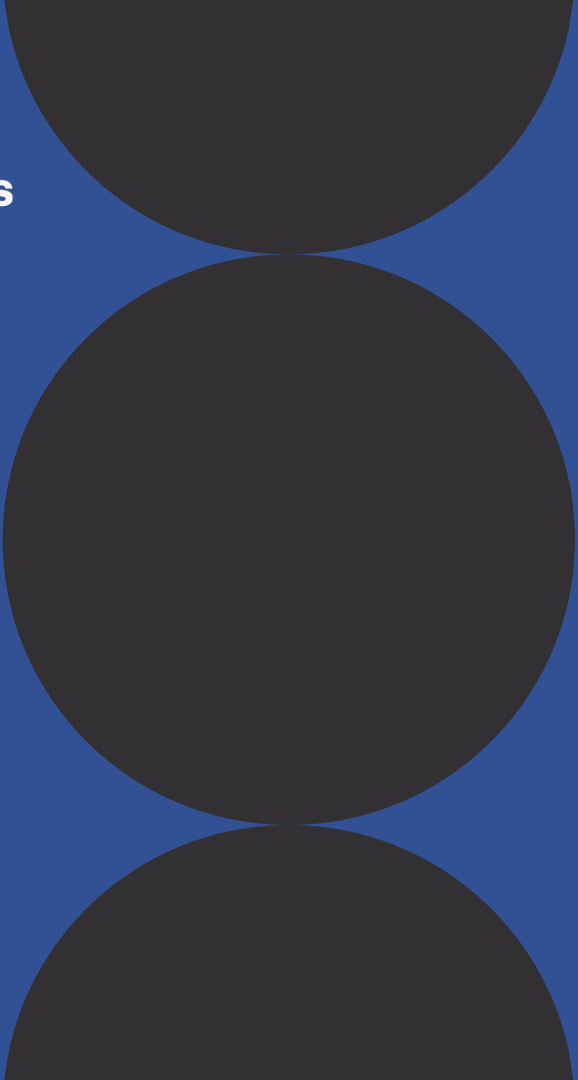
A person has aided, abetted, counselled or procured the contravention; induced the contravention; were knowingly concerned in the contravention or conspired with others to effect the contravention.

An 'involved' person can be liable for penalties for their involvement in the contravention and, in some circumstances, for any unpaid employment entitlements.

Section 558B - *Fair Work Act 2009* (Cth)

New provisions to hold franchisors and holding companies liable for breaches of workplace laws in their networks unless they can show they took reasonable steps to prevent the contraventions.

Fair Work Ombudsman v Foot & Thai Massage Pty Ltd (in liquidation) (No 8) [2024] FCA 483



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Practical considerations





There are new workplace laws as part of the Closing Loopholes changes. Our timeline provides an overview of the changes. It will help you understand what the changes are and when they start. Find more detailed information at fairwork.gov.au/additional-closing-loopholes



Please note this is only a summary timeline of the Closing Loopholes changes.

For more detailed information, read our news article: [Closing Loopholes: Further Fair Work Act changes](#).

Identification	Administration
Will it impact the organisation?	Ensuring the law is understood
From when will the changes commence?	Review payroll configurations
To whom will it apply? - Workforce - Management	Review salary arrangements and work performed by employees
How long will it take to implement changes? - A new policy? - Consultation? - Augmented HR system - Cost of implementation - Training for the workforce	- standard wording to ensure consistency of response Conduct a full audit or sample audit under the cover of legal professional privilege Clear decision making trees

Presenter



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Thank you.

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