



## **AUSTRALIA'S WAGE THEFT EPIDEMIC: INSURANCE FOR WAGE THEFT FINES - WILL THAT TOO SOON BE PROHIBITED?**

The systematic and deliberate underpayment of wages and entitlements to workers (known broadly as "wage theft") is endemic in Australia.

The issue came to national prominence through a joint investigation in 2015 of the 7 Eleven franchise by ABC's *Four Corners* program and Fairfax media, which revealed dishonest bookkeeping, black mail and mass underpayment of the convenience stores' workforce.

It was perhaps the first big corporate scandal to expose the extent of underpayment in Australia.

Since the 2015 *Four Corners* investigation, numerous high profile underpayment cases have been revealed, including Dominos, Caltex, Wesfarmers, Qantas, Coles, Bunnings, Grill'd, Spotlight, the Commonwealth Bank, the Woolworths Group, Michael Hill Jewellers and most recently the National Australia Bank with its disclosure of underpayments in the vicinity of \$128 million.

And the wage theft phenomenon is not limited to the private sector. In recent years the ABC has been forced to set aside \$23 million to address the underpayment of up to 2,500 casual staff over a six-year period. Organisations in the not-for-profit sector have also been implicated. In 2019, World Vision Australia admitted to underpaying around 250 staff \$8.9 million and in 2018, the Australian Red Cross was also found to have underpaid staff \$20 million. The National Tertiary Education Union has also drawn attention to employee underpayment in the tertiary education sector.

These high-profile cases which cut across a wide variety of industry sectors have highlighted the sheer scale and severity of the wage theft epidemic which continues to plague Australia and unfortunately targets some of Australia's most vulnerable workers.

The FWO reported this year that it had recovered more than \$123 million in unpaid wages for more than 25,000 workers, with the fast food, restaurants and cafes sector continuing to have the highest number of claims and disputes; this was up from \$42.2 million recovered in 2018/2019.

### **What is Wage Theft?**

Wage theft is the colloquial term that describes under- or non-payment of minimum wages and entitlements that are rightfully owed to a worker.



Wage theft is a complex phenomenon and it can take a variety of forms.

A common wage theft practice engaged in by employers is where employers pay a base hourly rate that is below the relevant award or minimum wage base rate, ignoring obligations to pay penalty rates for hours worked in the evenings, on weekends or on public holidays.

Failing to comply with obligations to pay overtime rates or other incentive-based payments, bonuses or loadings also constitutes wage theft.

Other practices include failing to pay superannuation entitlements.

Wage theft can also be perpetrated through the misuse of ABNs, sham contracting, cash-in hand payments, employers having reference to the wrong industrial instrument, employees being misclassified under a modern award, employers mandating trial or training periods without pay, or 'off-the-clock' violations, where staff are required to work beyond their scheduled or clocked-off finishing time.

## **Why is Wage Theft so prevalent?**

Why is it that such well-resourced companies like Woolworths, Bunnings, Caltex and Qantas have got it so wrong? Is it that underpayments easily come about or is it more that there is the need for ongoing vigilance in ensuring strict compliance?

Whilst some companies are no doubt making deliberate decisions to underpay wages (for example through illegal cash-in-hand payments and agreeing a salary without regard to minimum Award rates or other entitlements such as penalty rates), the reality is that most underpayments are inadvertent.

Complexity of award arrangements and a lack of education resources for business owners are arguably the key drivers of award non-compliance.

## **What is being done to address the issue?**

The extent of non-compliance by employers perhaps suggests that there are profound problems with the enforcement of wage laws in Australia. Maybe it is a case of employers perceiving that the risk of getting caught and facing any significant consequences for their non-compliance are so low that they are undeterred to stop their unlawful behaviour.

At both State and Commonwealth level, steps are now being taken to combat the rising wage theft epidemic and impose harsher penalties on employers and individuals deemed to be committing (or being an accessory to) wage theft.

However, the pervasiveness of wage theft in Australia suggests that the regime of civil penalties (monetary fines) to ensure employer compliance with minimum wage obligations is not effective.

The *Fair Work Act 2009* (Cth) (**FW Act**) and enforcement activities carried out by the Fair Work Ombudsman do not appear to be driving compliance or deterring employers from engaging in breaches of the FW Act or curbing the wage theft epidemic.

Perhaps inspiration should be drawn from the approaches recently implemented by Queensland and Victoria.

Wage theft is now a crime in Queensland, punishable by up to ten years in prison. An employer will be criminally liable if it wilfully or deliberately fails to pay an employee. It is intended that a broad range of non-payments will be captured, including underpayment of hours, unpaid penalty rates and unpaid superannuation entitlements. A director or other senior officer of a



company (or any other person, for example a company's external accountant) may also be liable for wage theft committed by a company if it can be shown that they were an accessory to the commission of the offence.

Victoria, too, has enacted legislation which establishes a range of criminal offences associated with the underpayment of wages and other benefits and the falsification of records pertaining to employee entitlements. These laws are likely to come into effect no later than 1 July 2021. Successful prosecutions of wage theft offences will result in the imposition of penalties of up to \$991,320 for bodies corporate or up to ten years imprisonment for individuals.

Most recently, the Western Australian government has also committed to considering whether wage theft should be criminalised. It is likely that criminal sanctions for wage theft will be introduced in Western Australia in some form in the new year.

### **Will employers be able to insure themselves against wage theft in the future?**

It is useful at this point to consider the new work health and safety laws recently passed in Western Australia, enshrined in the *Work Health and Safety Act 2020 (WHS Act)*.

Section 272A of the WHS Act will prevent insurance companies from indemnifying persons who are liable to pay fines for an offence committed under the new work health and safety laws.

Essentially this means that businesses in Western Australia can no longer take out insurance to cover fines which can run to hundreds of thousands of dollars for breaches of the WHS Act and directors and employees will no longer have the comfort of insurance or an indemnity from the business for any fines imposed on them personally.

Given the lack of enforcement of the existing wage theft laws and the increased penalties failing to act as a genuine deterrent, it is easy to envisage similar legislation being introduced prohibiting insurance and indemnity arrangements for wage theft.

Without the safety net of insurance, many businesses will be powerless to prevent the crippling implications of having to pay the staggering penalties. As a risk class that may no longer be guaranteed insurance, now more than ever it is critical for businesses to take a proactive risk management approach to wage theft.

### **What can employers do?**

It is incumbent on businesses to take a proactive approach to minimising risk and exposure to wage theft.

Now more than ever, it is critical that employers proactively review their payroll systems on a regular basis and keep up to date with the changes to applicable modern awards and the legislation in respect of minimum wages and entitlements to overtime and penalty rates and allowances.

To ensure ongoing compliance, businesses should:

- understand the award coverage of all employees – including whether employees are covered by a modern award or whether they are award free – especially in light of the

recent amendments made to the *Miscellaneous Award 2020*, effectively extending the scope of the *Miscellaneous Award*;

- if an employee is covered by a modern award, consider the recent annualised salary changes and undertake regular reviews of annualised salary arrangements to ensure that employees are receiving at least the award minimum taking into account their actual hours of work and the projected hours used when setting rates of pay;
- undertake regular periodic reviews of modern award classifications and job descriptions and pay rates. Given the 1.75% increase to minimum rates of pay in Group 2 Awards as at 1 November 2020 (see our October article), it is therefore timely, for businesses to conduct an audit to ensure that workers on annual salary arrangements are being paid sufficiently and rates of pay align with the award increase of 1.75%;
- ensure that all employment contracts are up to date and attend to any necessary amendments; and
- keep accurate records, including time and wages records such as timesheets and leave records - this documentary evidence will be critical if you have the misfortune of being investigated by the FWO.

Please reach out to Kate Walawski, Partner in Employment and Workplace Relations or Martin Fletcher, Solicitor in Employment and Workplace Relations if you are unsure regarding your business' existing levels of compliance and want to mitigate against existing or future risk and exposure for your business and you personally.

For further information or assistance contact Murfett Legal on [+61 8 9388 3100](tel:+61893883100).

Note: The above is a summary for general information purposes only. It is not intended to be comprehensive or constitute legal advice. You should seek formal legal or other professional advice in relation to your particular circumstances before relying on the content of this article.

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