

# Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024 – Wage Underpayments and Wage Theft Summary

The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* introduce major changes to the *Fair Work Act 2009*.

This Summary provides an overview of the changes related to wage underpayments and the introduction of the new criminal wage theft offence.

Employers who require additional information are encouraged to [seek advice from Ai Group](#). Please call our Workplace Advice Line on **1300 55 66 77** for further assistance.

## Background

This Summary deals with the key changes made to the *Fair Work Act 2009* (**FW Act**) by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (**Closing Loopholes Act**) and *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024* (**Closing Loopholes (No. 2) Act**) in the following areas:

- [A new criminal offence for intentional wage theft.](#)
- [An amended definition of a ‘serious contravention.’](#)
- [Increased civil penalties for certain employers;](#)
- [Clarification on the content and enforcement of compliance notices;](#)
- [Expanded union rights of entry to investigate suspected underpayment-related contraventions;](#)

## Criminal wage theft offence

These provisions commence on the later of 1 January 2025, or the date on which the Minister declares a Voluntary Small Business Wage Compliance Code. If the Code is not declared, they do not commence.

### What is wage theft?

For there to be a wage theft offence, the person must *intend* that their act or omission will result in a failure to pay the required amount, or be aware that this is the likely result of their act or omission.

As wage theft is a criminal offence, the criminal standard of proof applies, meaning that a prosecutor will need to prove, beyond reasonable doubt, that:

- the employer intentionally engaged in the conduct (the act or omission); and
- the employer intended that the conduct would result in the failure to pay the required amount on or before the day when it was due for payment.

The wage theft offence is not intended to capture employers who inadvertently underpay staff.

### Related offences

A 'related offence', to a wage theft offence, could impose liability on employees (e.g. managers), officers or agents of employers. A 'related offence' will be committed by a person if they:

- assist the employer who has, to their knowledge, committed the wage theft offence, to enable them to escape punishment for the wage theft offence;
- attempt to commit the wage theft offence;
- aid, abet, counsel, or procure the commission of the wage theft offence by the employer;
- enter into an agreement to commit the wage theft offence with the employer and the wage theft offence is committed in accordance with that agreement;
- have the relevant intention, and procure the conduct of another person that would have constituted the wage theft offence on the part of the procurer if the procurer had engaged in it;
- urge the commission of the wage theft offence; or
- conspire with another person to commit the criminal offence.

For example, an employee or officer of an employer who creates false and misleading employee records or provides false and misleading pay slips to the FWO may commit a related offence, where they have knowledge that the employer has committed a wage theft offence and in circumstances where such records were created for the purposes of enabling the employer to avoid the detection or escape punishment for the wage theft offence.

### Corporate criminal responsibility

A body corporate employer can be held liable for the conduct of its employees, agents or officers that amounts to a wage theft offence and/or a related offence, in certain circumstances.

### Proceedings and punishment for conviction

Although the Fair Work Ombudsman (**FWO**) will be responsible for investigating potential contraventions of wage theft offences, criminal proceedings may only be commenced by the Commonwealth Director of Public Prosecutions (**CDPP**) or the Australian Federal Police (**AFP**).

A wage theft offence or a related offence is punishable by imprisonment and / or a fine:

For individuals, the maximum penalties will be either or both of the following:

- imprisonment of up to 10 years;

- the greater of 3 times the amount of the underpayment and 5,000 penalty units (currently \$1,565,000).

Maximum penalties for bodies corporate that engage in wage theft will be the greater of three times the underpayment amount and 25,000 penalty units (currently \$7,825,000).

### Cooperation agreements

If an employer identifies underpayments within its workplace, it can seek 'safe harbour' from potential criminal prosecution by reporting the matters to the FWO. The FWO may then decide to enter into a written 'cooperation agreement' with the employer.

When deciding to enter into a cooperation agreement, the FWO will have regard to:

- whether the person has made a voluntary, frank and complete disclosure of the conduct;
- whether the person has cooperated with the FWO;
- the FWO's assessment of the person's commitment to continued cooperation;
- the nature and gravity of the conduct; and
- the circumstances in which the conduct occurred.

The FWO will publish guidelines relating to the circumstances it will consider when deciding whether to enter into cooperation agreements by 14 June 2024. The guidelines will be available on the [FWO website](#).

### The Voluntary Small Business Wage Compliance Code

The Minister can declare a Voluntary Small Business Wage Compliance Code (**Code**). The Code will apply to small businesses employing fewer than 15 employees.

If a Code is declared and the FWO is satisfied that the small business employer has complied with the Code in relation to a failure to pay a required amount, the FWO must not:

- refer the conduct which resulted in the failure to the CDPP or the AFP for prosecution; or
- enter into a cooperation agreement with the employer that covers any conduct that resulted in the failure.

However, compliance with the Code does not prevent:

- a Fair Work Inspector instituting or continuing civil proceedings in relation to the conduct;
- the FWO accepting an enforceable undertaking in relation to the conduct;
- a Fair Work Inspector giving a compliance notice in relation to the conduct; or
- the exercising of any other power or function a Fair Work Inspector or the FWO may have in relation to the conduct.

### Amended definition of a 'serious contravention'

These provisions commenced on 27 February 2024.

Under the FW Act, a civil penalty of 10 times the maximum penalty can be imposed by a court if there is a 'serious contravention' of certain civil remedy provisions. For example, if the maximum penalty for a relevant civil remedy provision was 60 penalty units, the maximum penalty would be increased to 600 penalty units – which, for a body

corporate, would be an increase from \$93,900 to \$939,000. (See also the additional uplift which may apply if the contravention relates to a ‘selected civil remedy provision’).

The definition of a ‘serious contravention’ has been broadened. It is no longer necessary for there to be a systematic pattern of conduct relating to one or more persons. Instead, a contravention is now a ‘serious contravention’ if either:

- the person **knowingly** contravenes the provision; **or**
- The person was **reckless** as to whether the contravention would occur.

A person is **reckless** as to whether a contravention would occur if:

- the person is aware of a substantial risk that the contravention would occur; and
- having regard to the circumstances known to the person, it is unjustifiable to take the risk.

For example, if an employer failed to pay an employee the full amount payable to the employee in relation to the performance of work as required under the FW Act, it will be a serious contravention if:

- the employer knowingly does not pay the employee in full; or
- is reckless as to whether the failure would occur.

In this example, it will be a serious contravention even if the employer does not know the exact amount of the underpayment.

## Increased penalties for breaches of selected civil remedy provisions

These provisions commenced on 27 February 2024.

### Five-fold increase to maximum penalties for selected civil remedy provisions

A relevant court, on application, may order a person to pay a pecuniary penalty that the court considers appropriate up to a specified maximum amount if the court is satisfied that the person has contravened a civil remedy provision in the FW Act.

The specified maximum amounts for selected civil remedy provisions have been **increased five-fold** for a body corporate employer. This increase does not apply to an individual or small business employer (i.e. an employer with less than 15 employees).

The new maximum penalties that may be imposed on body corporate employers (except for individuals and small business employers) for contraventions of some of the relevant civil remedy provisions are set out in the table below. As at 1 July 2024, one penalty unit is **\$313**.

Civil remedy provisions – section of FW Act	Topic	Maximum penalty (in penalty units)	Current maximum penalty (\$) for a body corporate (other than a small business employer or individual)
44	Contravening the National Employment Standards	<ul style="list-style-type: none"> <li>• For a serious contravention — 15,000 penalty units; or</li> <li>• otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>• \$4,695,000</li> <li>• \$469,500</li> </ul>
45	Contravening a modern award	<ul style="list-style-type: none"> <li>• For a serious contravention — 15,000 penalty units; or</li> <li>• otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>• \$4,695,000</li> <li>• \$469,500</li> </ul>

50	Contravening an enterprise agreement	<ul style="list-style-type: none"> <li>For a serious contravention — 15,000 penalty units; or</li> <li>otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>\$4,695,000</li> <li>\$469,500</li> </ul>
323(1), (3)	Method and frequency of payment	<ul style="list-style-type: none"> <li>For a serious contravention — 15,000 penalty units; or</li> <li>otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>\$4,695,000</li> <li>\$469,500</li> </ul>
357(1), 358 and 359	Sham arrangements	1,500 penalty units	\$469,500
535(1)-(2), (4)	Employer obligations in relation to employee records	<ul style="list-style-type: none"> <li>For a serious contravention — 15,000 penalty units; or</li> <li>otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>\$4,695,000</li> <li>\$469,500</li> </ul>
536(1)-(3)	Employer obligations in relation to pay slips	<ul style="list-style-type: none"> <li>For a serious contravention — 15,000 penalty units; or</li> <li>otherwise—1,500 penalty units</li> </ul>	<ul style="list-style-type: none"> <li>\$4,695,000</li> <li>\$469,500</li> </ul>
536AA(1)-(2)	Employer obligations in advertising pay	1,500 penalty units	\$469,500
558B(1)-(2)	Franchisor/holding company responsibilities	1,500 penalty units	\$469,500
712(3)	Person fails to produce records or documents in respect to a Fair Work Inspector notice	1,500 penalty units	\$469,500
716(5)	Compliance notice	1,500 penalty units	\$469,500

### Penalty of up to three times the underpayment amount

If a contravention is associated (whether directly or indirectly) with an underpayment amount, a court will have the power in some circumstances, on application, to impose a maximum penalty the greater of:

- The maximum penalty amount (as set out above); or
- Three times the ‘underpayment amount’** (i.e. the difference between the required amount and the amount actually paid to the employee by the employer).

For example, the failure to pay minimum rates under an applicable modern award is an example of a contravention that *directly* results in an underpayment. A sham contracting misrepresentation, or a failure to keep employee records, are examples of contraventions that may *indirectly* result in an underpayment. The effect of this new provision is that an ‘amount of the underpayment’ penalty may be available in either of these circumstances.

However, this does not apply to small business employers (i.e. an employer with less than 15 employees).

This change will commence at the same time as the new criminal offence for intentional wage theft (see [above](#)).

## Increased penalties for failing to comply with an FWO compliance notice

These provisions commenced on 27 February 2024.

### What is a compliance notice?

A compliance notice can be issued if a Fair Work Inspector reasonably believes that a person has contravened a provision of the National Employment Standards, a term of a modern award or enterprise agreement, or certain other specified contraventions of the FW Act. It is a mechanism for the FWO to address alleged contraventions of the FW Act without initially commencing court proceedings. If a person does not comply, the FWO can apply to a court for an order requiring compliance with the notice and that a penalty be imposed.

### New maximum penalty

The maximum civil penalty amount for a body corporate that fails to comply with a compliance notice has increased to 1,500 penalty units (currently \$469,500). The maximum penalty for an individual or a small business employer (i.e., with less than 15 employees) is 60 penalty units (currently \$18,780).

## Expanded union entry rights to investigate suspected underpayments

These provisions commence on 1 July 2024.

### Amendments

The right of entry provisions in the FW Act have been amended to:

- enable a union official to obtain (in certain circumstances) an exemption certificate from the Fair Work Commission (**FWC**) to waive the minimum 24 hours' notice requirement for entry if the official reasonably suspects a member of the union has been or is being underpaid; and
- empower the FWC to take action in relation to the future issue of such exemption certificates if those rights are misused.

A union official may apply for an exemption certificate without notifying or involving the employer.

### When must the FWC issue an exemption certificate?

The FWC must issue an exemption certificate for an entry to investigate a suspected contravention if:

- the FWC reasonably believes that advance notice of the entry might result in the destruction, concealment or alteration of relevant evidence; or
- the FWC is satisfied that advance notice of the entry would hinder an effective investigation into the suspected contravention/s.

### Obligations of permit holders holding exemption certificates

A permit holder exercising entry without notice because they have an exemption certificate must provide a copy of the exemption certificate to the occupier of the premises and any affected employer either before or as soon as practicable after entering the premises.

Holders of an exemption certificate:

- may only enter workplaces during working hours;
- are restricted to accessing member records;
- must not intentionally hinder or obstruct any other person when exercising rights of entry, or otherwise act in an improper manner;
- must only use information or documents obtained for a purpose related to the investigation or rectifying the suspected underpayment contravention;
- must not enter any part of premises used mainly for residential purposes.

Access to records may also be regulated under the *Privacy Act 1988 (Cth)*.

### Further assistance

Members can contact the Ai Group Workplace Advice Line on 1300 55 66 77 or [workplaceadvice@aigroup.com.au](mailto:workplaceadvice@aigroup.com.au) to discuss any matters arising under the Closing Loopholes Act or any workplace relations issue.

This topic is also dealt with in our [Guide to the Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#) and our [Guide to the Fair Work Legislation Amendment \(Closing Loopholes No. 2\) Act 2023](#).

Members can also access more detailed advice and assistance from Ai Group's national team of workplace lawyers by contacting the Workplace Advice Line (see above) or emailing [info@aigroupworkplacelawyers.com.au](mailto:info@aigroupworkplacelawyers.com.au).