HERBERT SMITH FREEHILLS

DECIPHERING THE COMPLEX WORLD OF UNDERPAYMENT OF WAGES: COMPLIANCE AND ENFORCEMENT

01 December 2020 | Australia
Legal Briefings – By **Mike Gonski and Rommo Pandit**

There have been a number of recent examples of large Australian corporates disclosing that members of their workforce have been underpaid, demonstrating the challenges faced by employers in complying with a complicated system of Australian employment laws. We empathise with our clients in this respect – it simply cannot be that all such companies are intentionally not complying with their obligations, or engaging in 'wage theft'. Indeed, more often than not, there are extensive overpayments that are also made, due to the same unintentional errors.

Even when an employer detects and addresses 'innocent' non-compliance, they are not immune from prosecution.

This seems to at least be acknowledged by the Minister of Industrial Relations' working group as an issue. As stated in our article which kicked off this series, the ACTU Secretary was quoted as saying that one of the few areas of consensus among the working group relates to employers receiving immunity from penalties where underpayments are shown to result from innocent errors and are immediately rectified.

In this article, we discuss our experience and potential changes in relation to:

1. **Compliance:** compliance with employment laws remains a challenge even for the most

sophisticated employers, particularly in the context of award-covered employees; and

2. **Enforcement:** we discuss here our experience with the Fair Work Ombudsman (**FWO**) and the uncertainty facing our clients when determining whether to engage with, or self-disclose to, FWO.

COMPLIANCE

We previously discussed the complexity of the modern award system in Australia, and the steps that have been taken to simplify it over time. Notwithstanding that this system is somewhat simpler than it once was, it is still enormously complex, and often results in outcomes that appear to be somewhat arbitrary.

In a post-COVID world, with employees increasingly working from home and outside the traditional span of 9 to 5, the issue of compliance is likely to be magnified, with employers needing to balance their strict legal obligations (and ability to pay in line with industrial instruments) with an increased demand for flexibility.

We think it is fair to say that, as an employer, at the very least it should be clear what modern award(s) cover you and your employees – however, there are cases that demonstrate that even such a basic and essential matter can become a very technical and nuanced exercise (for example, in the context of assessing whether an enterprise agreement passes the 'better off overall test'). It is no surprise that employers have continued to struggle to ensure that employees are paid appropriately.

The ACTU Secretary has stated that one of the few areas of consensus among the IR working group was that small businesses should be subsidised to install payroll software to prevent underpayments – although this would certainly assist those employers, it does not address the issues above where there are flaws in the rules underpinning the software.

From our perspective, helpful change in the space needs to be directed at ensuring there is a 'source of certainty' for employers who are seeking to do the right thing. Although phrases such as 'wage theft' are commonly thrown around to describe the actions of many Australian employers, our experience is that this is a misleading description. In most cases, we have found that non-compliance is inadvertent, often arising from matters such as different interpretations of ambiguous provisions in a modern award or pay rules not historically having been integrated into payroll software.

Some steps that could go towards this include:

1. **the development of technology that provides appropriate rates and penalties payable under modern awards that can be provided to payroll software**

providers.

Ideally, this would be supported by endorsement from the Fair Work Commission (**FWC**) and give comfort to employers that they would not be prosecuted if they pay employees in accordance with the endorsed approach (there would necessarily need to be limits and exclusions to this, for example, for improper use);

1. **a simple process that could be invoked by a party, whereby a relevant authority can make rulings on matters giving rise to uncertainty**.

Currently, there are relatively limited ways to achieve similar outcomes (for example, the ability of the FWC to deal with certain disputes arising in relation to modern awards or enterprise agreements), but these are not necessarily suited to address the particular issue above.

Consideration would need to be given to who is the appropriate authority for making such determinations – it may be that the FWC is in the best position to interpret the awards given its role in drafting them (noting limitations on its powers, as it is not a court). Our hesitation with providing FWO the power to make rulings on these types of matters is that doing so does not sit comfortably with their statutory role as regulator, even when there is ambiguity in the interpretation of an instrument.

ENFORCEMENT

Relatively recent changes were made to the *Fair Work Act 2009* (Cth) that created "serious contraventions" (being those where persons knowingly contravened their obligations as part of a systemic pattern of conduct) and imposed significantly increased penalties for such contraventions. However, as stated above, our predominant client experience would not fall into this category of breach – the reality is that most employers want to do the right thing.

Expectation for employers to undertake self-reporting

From an enforcement perspective, our experience with the FWO has been mixed. As a general rule, there is no obligation to self-report to FWO and, on one hand, FWO purports to take a practical approach to self-reporting.

1. FWO, in its publically available compliance and enforcement policy,[1] states that **isolated payroll errors** which result in underpayments over a short period of time do ***not*** need

to be actively reported, provided employees are informed about the underpayment, the underpayment is remediated and changes are implemented to ensure that errors do not occur again.

2. Otherwise, FWO's expectation seems to be that employers should self-report non-compliance. However, self-reporting, of itself, does not provide any guarantees to employers that FWO will not seek to prosecute. As a general proposition, if an employer self-reports and cooperates with FWO, FWO may not seek to prosecute (or may be less inclined to do so).

However, such cooperation often takes the form of agreeing an enforceable undertaking (**EU**) with FWO – the challenge for employers here is that, if FWO seeks to impose onerous obligations on the employer under an EU, and the employer does not wish to agree to the terms of the EU proposed by FWO, there is a risk that this could result in FWO taking a more aggressive approach to that employer.

WHAT DOES THIS MEAN FOR EMPLOYERS?

The result of the above is that the question of whether an employer self-discloses can become a predominantly commercial decision, rather than a legal one (noting there may be other reasons why employers are required to disclose, for example, pursuant to immediately disclosure obligations pursuant to the ASX Listing Rules). The practical reality is that, where an employer remediates but does not self-disclose, at least one employee is likely to raise the matter with FWO or their union, but some employers may opt not to self-disclose.

In light of the above, a potential area for change is to further encourage employers to self-report by providing them with comfort that self-reporting would not result in prosecution against them. The scope of this 'immunity' would need to be further developed, but we see some key matters for consideration being as follows:

1. Presumably, the immunity would only be granted in situations where employers remediate any non-compliance that is discovered.

2. There may need to be a process for confirming that the employer has appropriately identified and quantified non-compliance. Options in this respect may include:

- requiring the employer to independently verify their approach. This could be satisfied by them engaging external advisers to undertake or verify a compliance review (although

experience suggests that this, of itself, is unlikely to provide the required level of comfort expected from FWO); or

- empowering a body to conciliate or make binding decisions regarding the correct approach to remediation. In relation to conciliation, this may already be occurring in practice through informal means (that is, through employer engagement with FWO). Otherwise, as set out above, we would expect that the FWC is the right body to make binding decisions – in this respect, their jurisdiction in relation to these types of issues could be enlivened by agreement between the relevant parties (being FWO and the employer).

3. There would need to be exceptions to the immunity. A seemingly clear example of such an exception is where the employer has engaged in intentional or dishonest non-compliance.

We think that the changes referred to in this article would be sensible ones to make. We hope to receive further visibility in the upcoming weeks as to whether or not they will be introduced and, in the event that they are, the form and scope of any such changes.

ENDNOTES

1. https://www.fairwork.gov.au/ArticleDocuments/725/compliance-and-enforcement-policy.pdf.aspx

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KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.

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