

SYSTEMIC AND SHAMEFUL: EXPANDED CRIMINAL SANCTIONS ON THE HORIZON FOR AUSTRALIAN FIRMS ENGAGING IN WAGE THEFT?

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Legal Briefings - By **Drew Pearson, Greta Morand and Adrian Rook**

Senate committee report puts tougher measures against employers underpaying wages back on the agenda

On 30 March 2022, the Senate Economics References Committee (the **Committee**) tabled its provocatively titled '[Systemic, sustained and shameful: unlawful underpayment of employees' remuneration](#)' report (the **Report**). The Report follows the Committee's work since November 2019 examining the causes, extent, and effects of unlawful non-payment or underpayment of employees' remuneration by employers, and measures that can be taken to address this issue.

The publication of the Report is timely, with the underpayment of employee wages and other entitlements currently in sharp focus within the media and political milieu - several high profile underpayment litigations commenced by the Fair Work Ombudsman have attracted significant media attention of recent times and wages (and wage theft) have also been a key theme on the agenda of both major parties in the lead up to the federal election.

So what does the Report recommend, and what reform can we expect in this space following the federal election?

RECOMMENDATIONS

The Report contains 19 specific recommendations for reform at a federal level to increase sanctions against employers who engage in non-payment or underpayment of wages and superannuation, as well as enhanced protections to employees who engage in lawful activity to prevent wage theft. Notably, the Report recommends amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) to criminalise “wage theft” (which is not itself defined in the Report)¹ and introduce increased civil penalties and offences for employers who engage in related conduct.

At a high level, the recommendations can be best summarised as falling within the following broad themes:

- **Creating new offences:** For example, the creation of a Commonwealth criminal offence relating to ‘wage theft’, the creation of an offence in relation to advertising positions for less than the lawful minimum wage, creating an offence in relation to the provision of false information to a right of entry permit holder and amendments to the *Competition and Consumer Act 2010* to incorporate wage theft as an anti-competitive practice.
- **Increasing penalties under current laws:** Such as increases to civil penalty provisions of the FW Act and company director disqualifications where companies are found to be ‘*using Superannuation Guarantee payments or wages to trade while otherwise insolvent*’.
- **Increasing regulatory focus:** Expanding the roles of the Fair Work Ombudsman, the Australian Securities and Investments Commission and the Australian Tax Office to regulate non-compliance with minimum wages and superannuation payments.
- **Providing greater access to claims:** Establishing a dedicated small claims tribunal to sit within the Fair Work Commission, intended to provide a quick and easy mechanism to allow employees to make underpayment claims.
- **Changes to government practices:** Ensuring that the Australian Government acts as a “model procurer” by ensuring government procurement powers are used to support suppliers who engage in good labour practices and ensuring that the Australian Government and Commonwealth funded organisations do not engage in wage theft or related practices.
- **Specific changes to assist migrant workers:** Such as extending the Fair Entitlements Guarantee to temporary migrant workers, allowing migrant workers with ongoing legal claims to remain in Australia and creating a firewall between the Fair Work Ombudsman and the Department of Home Affairs.

Whilst the Report recommendations are robust and are certain to result in increased scrutiny in the wage theft and underpayment space, there are a couple of notable gaps. First, the lead report does not define 'wage theft' and takes an approach which, at times, conflates the notion of wage theft with underpayments (which occur due to innocent mistakes), and even the lawful payment of wages (such as where expired industrial instruments set the applicable rates).

This is erroneous – it cannot be that all employers who have underpaid employees are intentionally not complying with their legal obligations or engaging in 'wage theft'. On the contrary, many employers who we have engaged with on this issue have underpaid wages and entitlements unknowingly despite having robust compliance systems in place and upon discovery of the issues have taken immediate active steps to rectify and remediate.

This lack of definition exposes a flaw in the recommendations as currently drafted – if non-payment or underpayment of wages occurs as the result of innocent mistakes, any deterrent effect of new criminal and increased civil sanctions is unlikely to address the issue whilst creating considerable consternation amongst businesses and business leaders.

We also note that absent from the Report is any recommendation that would require businesses to take proactive steps to resolve issues before they arise, such as the ability to apply for a private determination regarding the application of an industrial instrument² or imposing a positive obligation on employers to undertake regular wage compliance audits.

PLATFORM FOR REFORM

A short dissenting report was tabled by two Liberal Party Senators, containing criticisms limited to an alleged failure of the Report to address existing measures implemented by the current Government that it says adequately address the issue underlying the recommendations, and criticism that the recommendations are too vague or broad and further consideration would need to be paid to how the recommendations would work in practice.

However, despite the dissenting report and the flaws noted above, we consider it likely that many of the recommendations of the Report will be adopted regardless of the result of the upcoming federal election.

Both major parties have previously floated the introduction of criminal sanctions for wage theft. The Coalition's Omnibus Bill introduced in 2021 sought to impose tougher penalties on companies that systematically underpay their employees by introducing a criminal offence of "dishonestly" engaging in such practice (most of the Omnibus Bill, including this reform, was abandoned however the Coalition has [recently confirmed](#) that it will seek to revive these reforms if re-elected). Labor has also promised to legislate to make wage theft a criminal offence if successful at the Federal Election, as part of its [Secure Australian Jobs Plan](#).

Given the general appetite for reform in this space across the political spectrum, we anticipate that many other recommendations of the Committee will be seen as largely uncontroversial and adopted (in some form) in the near future. Other recommendations, such as the introduction of a cheaper and quicker small claims jurisdiction, may be more contentious (particularly given the scope for increased pressure on an already inundated tribunal and the inevitable burden on employers in responding to an influx of underpayment related small claims). Further information in relation these more complex recommendations, particularly in relation to the operational and funding model of such a body, will be required.

In any case, based on reports and commentary from the major parties in the lead up to the federal election, we expect to see a continued focus and further reform in the underpayment and wage theft space following the election - regardless of the result on election night.

1. Currently, Victoria and Queensland are the only states to have criminalised wage theft.
2. Which we have previously highlighted as a potential solution - see: [Deciphering the Complex World Of Underpayment Of Wages: Compliance And Enforcement](#)

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