Meeting New and Emerging Compliance Obligations

Concurrent Session Paper

ANNUAL PIR CONFERENCE

13 – 14 AUGUST 2024

OVERVIEW

This paper provides background for the Concurrent Session of Ai Group's 2024 PIR Conference on 'Meeting New and Emerging Compliance Obligations'.

This paper is organised into three (3) parts:

Part 1: New Obligations

Amendments to the *Fair Work Act 2009* (Cth) (**Fair Work Act**) in 2022, 2023 and 2024, have added to or changed employment obligations including:

- The new **right to disconnect**
- New rights for **union delegates**, and changes to **right of entry**
- Changes to the treatment of requests for flexible working arrangements / **the right to request**
- Changes regarding **pay secrecy**
- Changes to **unpaid parental leave**
- Changes to **family and domestic violence leave**
- Changes to **anti-discrimination** provisions

Part 2: New and Increased Compliance Measures

Part 3: Emerging Obligations

Various developments are also underway that may create further new and extended obligations under **Modern Awards**.

These will be interactive sessions, giving members an opportunity to openly canvass areas of concern and consideration for their workplace. However, participants may also wish to consider the potential points for discussion identified throughout this paper.

PART 1: NEW OBLIGATIONS

RIGHT TO DISCONNECT

From 26 August 2024 for medium and large businesses (26 August 2025 for small businesses) an employee will have the right to:

- Refuse to monitor, read or respond to contact (or attempted contact) from an employer outside of the employee's working hours, unless that refusal is unreasonable.
- Similarly refuse to monitor, read or respond to work-related contact (or attempted contact) from "a third party", which is likely to include clients, coworkers etc. The employee's refusal must also not be unreasonable in these circumstances.

The right to disconnect is a 'workplace right' under the general protections in the Fair Work Act, meaning that if an employer takes action against an employee and one of the reasons for doing so is because of the employee's right to disconnect, such action may be unlawful.

WHEN IS A REFUSAL TO CONNECT UNREASONABLE?

The Fair Work Act provides a non-exhaustive list of matters the Fair Work Commission (**FWC**) will consider in determining whether an employee's refusal to monitor, read or respond to out of hours contact is reasonable or unreasonable, including:

- The reason for the contact or attempted contact.
- How the contact is made or attempted, and the level of disruption to the employee.
- The extent to which the employee is paid (or otherwise compensated in non-monetary

ways):

- To remain available to perform work during the period concerned; or
- For working additional hours outside their ordinary hours. This is likely to lead to litigation to clarify situations in which on-call allowances are paid and call back arrangements apply under awards and agreements.

- The nature of the employee's role and level of responsibility.
- The employee's personal circumstances (e.g., family or caring responsibilities). This may give rise to difficulties associated with whether an employer knows of an employee's family circumstances and obligations, and what an employer can be expected to know, particularly given that an employee's personal circumstances may change over time.

An employee's refusal to monitor, read or respond to contact will be unreasonable if the contact by the employer or third party is required under law, such as to meet WHS obligations.

DISPUTES

There is a process for an employee, employer or their representative to take a dispute about the right to disconnect to the FWC because the employee has refused to monitor, read or respond to contact or attempted contact and:

- the employer reasonably believes that the refusal is unreasonable; or
- the employer has asserted that the refusal is unreasonable, and the employee reasonably believes the refusal is not unreasonable; or
- the parties have another dispute relating to the right to disconnect.

However, before making an application for a dispute to be resolved by the FWC, the parties must have tried to resolve the dispute at the workplace level through discussions.

The FWC can only make an order in relation to such a dispute if it is satisfied that:

- An employee has unreasonably refused to monitor, read or respond to contact or attempted contact and there is a risk the employee will continue to do so.
- An employee's refusal is not unreasonable and there is a risk the employer will take disciplinary action or continue to require the employee to monitor, read or respond to contact outside of their working hours despite the employee's refusal to do so.

The FWC may make any order it considers appropriate (except to impose a penalty) to prevent:

- the employee from continuing to unreasonably refuse to monitor, read or respond to employer or third party (e.g. client or perhaps co-worker) contact (or attempted contact); or
- the employer from taking disciplinary action or continuing to require the employee to monitor, read or respond to contact (or attempted contact).

If a person subject to an order contravenes its terms, a penalty of up to 60 penalty units may be imposed (currently $18,780 for an individual or $93,900 for a corporation).

The FWC may dismiss an application for right to disconnect orders if it considers the application:

- Is not made in accordance with the Fair Work Act.
- Is frivolous or vexatious.
- Might relate to Australia's defence or national security, or existing or future covert or international operations.
- Has no reasonable prospects of success.

Proceedings can be commenced or continued under WHS laws in relation to particular

conduct despite an application also being made in relation to the right to disconnect.

AWARD CLAUSE

The Fair Work Commission is required to insert a right to disconnect term into modern awards by 26 August 2024. This process is ongoing at the time of drafting this paper, following the Commission issuing a draft 'Employee right to disconnect term' on 11 July 2024. The draft term / clause appears at **Attachment A**.

Under consideration is a clause (and scope for award-specific variations to that clause) that would confer an additional protection on employees by prohibiting an employer from directly or indirectly preventing an employee from exercising their right to disconnect under the Fair Work Act.

The clause would clarify that this additional protection does not prevent an employer from requiring employees to monitor, read or respond to contacts outside of the employee's working hours where the employee is paid a stand-by allowance under the award, and is being contacted to notify them of the requirement to attend or perform work.

An employer would also not be prevented from making or attempting contact for the purpose of emergency roster changes or recall to work, where the award provides for these things.

In both cases, the contact would be required to be made in accordance with the usual arrangements for such notification.

GUIDELINES

The FWC will also issue written guidelines on the operation of the right to disconnect. However, no date has been set for the issuing of these supporting guidelines, with the Commission recently stating that:

> *"The Commission considers that it will be in a better position to make guidelines once it has dealt with at least some disputes concerning the operation of the right since this will allow it to have some understanding of the practical issues for which guidance may be required."*

MORE INFORMATION

Ai Group has produced detailed resources on the right to disconnect and has published a video discussing key aspects of the legislative changes.

Discussion Questions – Right to Disconnect

1. Do members have particular concerns regarding the foreshadowed commencement of the right to disconnect on their operations or their broader capacity to be in contact with their people when they need to?
2. Are there particular concerns for particular roles, scenarios etc?
3. How are members preparing for the new right in workplace policies and procedures? Are you providing training or instruction to supervisors and team leaders?

UNION RIGHTS – WORKPLACE DELEGATES

A workplace delegate, or shop steward, is an employee (or regulated worker from 26 August 2024) appointed or elected by other union members in their workplace to represent them on workplace relations matters relevant to their particular workplace.

From 15 December 2023, workplace delegates have a new enforceable right to represent the industrial interests of union members (and other employees eligible to be members) including in disputes with their employer.

This right to representation is facilitated or supported by new entitlements for delegates to:

- **Reasonable communication** with members, and any other persons eligible to be members, in relation to their industrial interests.
- **Reasonable access** to the workplace facilities where the enterprise is being carried

on.

- **Reasonable paid time**, during normal working hours, for the purposes of attending related training (except for small business employers, which have less than 15 employees).

In determining what is 'reasonable', regard will be had to the size and nature of the enterprise, the resources of the employer and the facilities available at the workplace.

NEW GENERAL PROTECTION FOR WORKPLACE DELEGATES

A workplace delegate is entitled to specific protections and their employer is prohibited from:

- Unreasonably:
    - failing or refusing to deal with the workplace delegate.
    - hindering, obstructing or preventing the exercise of the rights of the workplace delegate.
- Knowingly or recklessly making a false or misleading representation to a delegate.

The burden of proving that the employer's conduct was not unreasonable lies with the employer. This means that if a workplace delegate establishes that an employer failed or refused to deal with them, or hindered, obstructed or prevented the exercise of their rights, the burden would be shifted to an employer to prove the reasonableness of their actions.

The protections apply when the employee is acting in the capacity of a workplace delegate and not otherwise. The Explanatory Memorandum accompanying the amendments indicates that this means employers will still be able to undertake reasonable management action, carried out in a lawful way, against employees who are workplace delegates.

These protections do not apply in respect to conduct required by or under a Commonwealth, State or Territory law. For example, action taken to ensure health and safety of workers at work, may not be subject to restriction even if it impacts on a delegate's activities.

DELEGATES' RIGHTS TERMS IN AWARDS AND AGREEMENTS

Since 1 July 2024, all modern awards and new enterprise agreements (and new workplace determinations) must include a delegates' rights term or clause.

If an employer complies with the delegates' rights term in an award or agreement, they will be taken to have complied with the obligation under the Fair Work Act relating to reasonable communication with union members and eligible members; reasonable access to the workplace and workplace facilities, and reasonable access to paid time for relevant training.

The FWC has determined a model clause on delegates' rights (see **Attachment B**) and inserted it into 155 industry, occupational and enterprise awards.

Under the standard clause:

- The delegate must:
    - notify the employer of their election or appointment to the position of workplace delegate in writing;
    - provide satisfactory supporting evidence if requested by the employer confirming that election or appointment, and
    - notify the employer when they cease to be a delegate.
- There are rights of representation in relation to a series of listed matters, including in bargaining, disputes, disciplinary matters, and consultation matters. However, a workplace delegate may only represent an eligible employee or regulated worker if that person agrees to be represented by the workplace delegate.
- Delegates have rights of reasonable communication with other employees (or regulated workers) during working hours or work breaks, or before or after work. However, employers do not have to provide a workplace delegate with the person's contact details.

- There are various obligations upon employers to provide delegates with reasonable access to facilities, rooms, noticeboards, Wi-Fi, stationery and resources. However, this only applies if a workplace has such facilities, where it is practical to provide access to the delegate at the time or in the manner sought, or where the employer themselves does not have access at the premises which it can extend to the delegate after taking reasonable steps.

Also under the standard clause:

- Employers must:
    - provide delegates with paid time off for training (up to 5 days initially, then at least 1 day per year thereafter) but is not obliged to provide paid time off to more than 1 delegate per 50 employees; and
    - advise the delegate whether their application for paid time to attend training has been approved or not approved at least 2 weeks prior to the training dates – and approval cannot be unreasonably withheld.
- The delegate must:
    - give the employer at least 5 weeks' notice (unless otherwise agreed) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider;
    - if the employee requests, provide an outline of the training content; and
    - within 7 days after the day the training ends, provide the employer with evidence that would satisfy a reasonable person of their attendance at the training.

There are also obligations on delegates to:

- Comply with their duties and obligations as an employee.

- Comply with reasonable workplace policies and procedures, codes of conduct and requirements in relation to WHS and the acceptable use of ICT resources.
- Not hinder, obstruct or prevent the normal performance of work.
- Not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association, including as to whether they agree (or not) to the workplace delegate representing them in relation to their industrial interests.

As stated above, eligible employees (and regulated workers) are not required to be represented by a delegate without their agreement, and delegates will not have access to a person's contact details. The model or standard award clause also preserves and applies any more favourable delegates' rights provisions which may be included in particular awards.

The model award term will be reviewed after 12 months, 'to deal with any issues which arise with respect to its operation, generally or in relation to individual modern awards'.

Enterprise Agreements

Enterprise agreements put to a vote after 1 July 2024 must include a delegates' rights term which is at least as favourable as the model award term.

Under section 205A of the Fair Work Act, if, when the agreement is approved, the delegates' rights term is less favourable than the delegates' rights term in one or more modern awards that cover the workplace delegates, the term in the enterprise agreement has no effect, and the most favourable term of those in the modern awards is taken to be a term of the enterprise agreement.

If a delegates' rights term in a modern award is taken to be a term of the enterprise agreement because of section 205A of the Act, the FWC must note in its decision to approve the agreement that the term is included in the agreement.

MORE INFORMATION

Ai Group has produced a detailed resource on the workplace delegate changes.

Discussion Questions – Workplace Delegates / Shop Stewards

4. To what extent do you expect these amendments will change your dealings with / approaches to workplace delegates in your workplaces?

5. Have you changed policies and procedures or your training of or instructions to line managers for their dealings with workplace delegates?

6. Do you foresee problems or challenges around requirements to: (a) not unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate, (b) not unreasonably fail to deal with a delegate or (c) not knowingly or recklessly make a false or misleading representation to a workplace delegate?

7. What, if any, concerns arise from enhanced rights to paid delegates' training and access to facilities (e.g. access to wi-fi, offices, vehicles etc)?

8. Are you facing claims from unions for additional or extended delegates rights under enterprise agreements, above the new award standard?

9. Some employers have had difficulties responding to conduct and performance issues for employees who are delegates; in particular, establishing they are responding to legitimate employment issues rather than an employee's union activities. How commonly does this arise, and what new issues or concerns do you foresee in managing delegates in their capacities as your employees following these changes?

10. Do you foresee more employees seeking to be delegates following these changes?

UNION RIGHTS – RIGHT OF ENTRY

MORE SCOPE FOR UN-NOTIFIED ENTRY

From 1 July 2024 there are new rules for right of entry permits and exemption certificates. Unions can apply for an exemption certificate from the FWC to waive the standard 24 hours' notice requirement for entry to a workplace in circumstances of suspected underpayments.

These changes are said to be motivated by enhancing the role of union officials in investigating and responding to underpayments. Un-notified or unexpected entry will now be permitted where the union has applied for an exemption certificate and the FWC:

- is satisfied that the suspected contravention (giving rise to the entry) involves the underpayment of wages or other monetary entitlement of a union member who performs work on the premises; and
- reasonably believes that giving advance notice of the entry would hinder an effective investigation into the suspected contravention or contravention.

The Fair Work Commission will also have the power to put conditions on right of entry permits and exemption certificates to ensure they are used appropriately.

HEALTH AND SAFETY REPRESENTATIVES

Also, the requirement for a union official to hold a Fair Work entry permit when entering workplaces at the request of (and to assist) a Health and Safety Representative (HSR) was removed effective 15 December 2023.

This means a union official is able to enter a workplace to provide assistance as requested by an HSR, regardless of whether the official has an entry permit under the Fair Work Act. This includes circumstances where the official has lost their entry permit due inappropriate or unlawful conduct.

Union officials entering to assist an HSR must:

- comply with reasonable directions from employers relating to WHS;

- not intentionally hinder or obstruct any person or otherwise act in an improper manner;
- not misrepresent rights that the official may exercise as an HSR's assistant; and
- not use or disclose information or documents obtained as an HSR's assistant for an unauthorised purpose.

Employers and occupiers must not refuse or unduly delay entry or intentionally hinder or obstruct an official who is assisting an HSR.

MORE INFORMATION

Ai Group has produced detailed resources on the recent right of entry changes, and the earlier changes relating to health and safety representatives.

Discussion Questions – Right of Entry

11. Whilst these are recent changes, have members observed any changes of behaviour or attitudes from union officials in relation to entry to workplaces?
12. What are members current key concerns regarding union entry to worksites, and how, if at all, do they relate to the matters addressed in the recent amendments?

RIGHT TO REQUEST FLEXIBLE WORK ARRANGEMENTS

The National Employment Standards (NES) allow eligible employees to request flexible work arrangements, which can only be refused on reasonable business grounds. Eligibility previously focussed on employees with disability, parental or caring responsibilities, and those over 55. Common forms of flexible work include part time work, flexible start and finish times and working from home. From 6 June 2023 this right to request changed, as follows.

EXPANDED GROUNDS TO REQUEST FLEXIBILITY

The circumstances in which an employee may request flexible working arrangements were expanded to include (a) employees experiencing family or domestic violence (or where a member of an employee's immediate family or household is experiencing family or domestic violence, and (b) employees who are pregnant.

NEW PROCEDURAL OBLIGATIONS

An employer will only be permitted to refuse an eligible employee's request if:

- They have discussed the request with the employee;
- They have genuinely tried to reach agreement / accommodate the employee's circumstances and not reached any agreement;
- They have had regard for the consequences of the refusal on the employee; and
- There are reasonable business grounds for the refusal.

REFUSING REQUESTS

The employer is required to provide a written response to the employee within 21 days of the employee's request for flexible / changed hours of work.

Where a request is to be refused, employers are required to provide a more detailed explanation. An employer refusing a request must identify in its written notice to the employee:

- The reasons for the refusal.
- The business grounds for refusal and how those grounds apply to the request.
- Any changes in working arrangements that would accommodate the employee's circumstances that the employer would be willing to make; or that there are no such changes.
- The employee's rights to take a dispute to the FWC, including the capacity to seek

arbitration in relation to the employer's refusal of the request or other non-compliance in relation to this entitlement.

The amendments to the Fair Work Act retained "**reasonable business grounds**" as a basis on which an employer can refuse a request for flexible work.

DISPUTES

The FWC is able to arbitrate disputes, including where employers do not respond to requests, or refuse an employee's requested flexibility. This can include determining that the grounds relied upon to refuse the request were not reasonable business grounds. This includes the Commission being able to order an employer to grant an employee's request.

MORE INFORMATION

Ai Group has produced detailed resources on the right to request changes. This entitlement is also discussed in our concurrent session on Diversity, Equity and Inclusion in detail and members can read more about this in that concurrent session paper.

Discussion Questions – Flexible Work Requests

13. Have these amendments changed the way your organisation responds (or will respond) to requests for flexible work arrangements?

14. Do you feel less able to negotiate or refuse employee requests for flexibility even where they would have negative impacts on other employees, customers, productivity or efficiency following these changes? How are you managing this?

15. What impact do you see the enhanced right to request having on working from home in your organisation, and your management of the balance between working at your premises and employees working from home?

PAY SECRECY

On 7 December 2022, the Fair Work Act was amended to:

- Include new **workplace right** (within the meaning of the general protections provisions in the Fair Work Act) which permits an employee to:
    - disclose their remuneration (or any terms and conditions that are reasonably necessary to determine remuneration outcomes) to anyone, or not to do so.
    - ask any other employee (including employees of a different employer or a former employee) about their remuneration (or any terms and conditions that are reasonably necessary to determine remuneration outcomes);
- Provide that a term of a contract of employment (or fair work instrument) has **no effect** to the extent that it would be inconsistent with the pay secrecy right;
- Include a **prohibition** on pay secrecy clauses in new contracts of employment and other written agreements.

THE WORKPLACE RIGHT

What does the workplace right mean?

Employers cannot take adverse action against an employee because he or she exercised, or did not exercise, the right to disclose (or not disclose) or to ask (or not ask) another employee about their remuneration (or any terms and conditions that are reasonably necessary to determine remuneration outcomes).

What can be disclosed or enquired about

Employees can disclose (or not) or enquire (or not) information about 'remuneration'. This is a broader concept than 'salary' or 'wages' and likely includes salary or wages, superannuation contributions, bonuses, free board and meals, the value of any private usage of a company-

provided vehicle and non-pecuniary benefits.

The new workplace right extends to disclosure of other terms and conditions of employment that are reasonably necessary to determine remuneration outcomes. For example, this includes terms and conditions relating to:

- Salary and wages.
- Information about whether the employee or their employer makes additional superannuation contributions.
- Salary sacrifice arrangements.
- Bonuses, incentive plans, commission arrangements and share plans.
- The employee's roster arrangements, noting that an employee may be entitled to different pay rates across different hours and days of work.
- Relevant details of an individual flexibility.
- Whether the employee's remuneration is intended to accommodate an amount to offset minimum entitlements under a modern award or enterprise agreement.

What about third party information?

However, the workplace right does not extend to:

- Disclosing *another* employee's remuneration or conditions.
- Enquiring with one employee about the remuneration and other conditions of *another* employee or person.

Making false representations is also prohibited

An employer is prohibited from making false representations about pay secrecy (or other workplace rights).

For example, they are prohibited from representing to a new employee that they had no right to disclose their remuneration to their colleagues or ask their colleagues about the remuneration they received from the employer.

INCONSISTENT PROVISIONS ARE OF NO EFFECT

As set out above, any terms in a contract entered into or varied on or after 7 December 2022 that are inconsistent with the new rights have no effect, and employers cannot rely on them, including to discipline an employee. Inconsistent terms in a contract entered into before that date continue to operate, until the contract is varied.

PROHIBITION

Employers are prohibited from entering into written contracts inconsistent with the new workplace rights relating to disclosure of remuneration and other conditions.

This prohibition took effect after 7 June 2023 in relation to contracts of employment entered into from 7 December 2022. The purpose of the delayed commencement was to ensure employers had sufficient time to arrange compliance with the provision.

The effect of this was that:

- An employer does not contravene the prohibition if they entered into an employment contract that contained a pay secrecy clause before 7 December 2022.
- Where an employer entered into a new contract of employment with a pay secrecy term at any point during the six-month period between 7 December 2022 and 7 June 2023 but failed to remove the relevant pay secrecy term by the end of 7 June 2023, the employer contravened the prohibition.

Significant financial penalties apply for contravening this prohibition – 60 penalty units, or if it is a serious contravention, 600 penalty units.

MORE INFORMATION

Ai Group has produced detailed resources on the pay secrecy changes.

Discussion Questions – Pay Secrecy

16. Have you taken steps to ensure that new contracts of employment do not contain prohibited and unenforceable pay secrecy provisions?

17. Has there been any take up of the right to ask co-workers about their pay? Is this well received or has there been problems?

18. Do you think there is awareness of the concurrent right to refuse to answer? Have there been any issues with that?

19. Is this something members are addressing in workplace policies and procedures, or in training / briefing line managers?

UNPAID PARENTAL LEAVE

Flexibility – UPL

The *Fair Work Amendment (Protecting Employee Entitlements) Act 2023* amended the Fair Work Act to increase flexibility in relation to unpaid parental leave (UPL) as set out below:

- Employees can:
  - take up to 100 days of flexible UPL (or a higher number prescribed by regulation) – this was previously 30 days;
  - commence flexible UPL at any time in the 24 months following the birth or placement of their child; and
  - take flexible UPL before and after a period of continuous UPL (or just take flexible UPL).
- The provisions relating to "employee couples" were removed. All eligible employees can take up to 12 months' UPL and request a further 12 months, regardless of how

much UPL their spouse or partner takes.

- The concept of "concurrent leave" was removed. This means couples may take UPL at the same time and without limitation.
- Pregnant employees may take flexible UPL in the six weeks prior to the expected date of birth of their child.

Responding to requests to extend to extensions of UPL and resolving disputes

The *Fair Work Amendment (Secure Jobs Better Pay) Act 2022* amended the Fair Work Act to impose more onerous obligations on employers in the following ways:

- Employers have additional obligations when responding to a request to extend a period of unpaid parental leave beyond 12 months.
- Parties can access a new statutory dispute resolution mechanism in the FW Act for the resolution of disputes regarding unpaid parental leave extension requests under the NES in the Fair Work Commission.

MORE INFORMATION

Ai Group has produced explanatory materials for members on the unpaid parental leave changes and a Timeline for employees eligible for UPL, including up to 100 days of flexible UPL.

Discussion Questions – Parental Leave

20. Are the recent amendments leading to more requests for UPL?
21. Is this manageable, and what (if any) impacts is it having on operations, workplace cultures and disputation? How do you intend to manage any additional or extended use of such leave?

FAMILY AND DOMESTIC VIOLENCE LEAVE

The National Employment Standards were amended in late 2022 to give all employees an entitlement to up to 10 days of paid family and domestic violence leave per year.

This entitlement does not accumulate from year to year. It is accessed in full by part-time and casual employees and, unlike other types of leave under the National Employment Standards, is not pro-rated.

The definition of 'family and domestic violence' was extended to include conduct of a current or former intimate partner of an employee or of a member of their household.

The new provisions were operative from 1 February 2023 (1 August 2023 for small businesses). Subsequent amendments in early 2023 changed the information requirements for payslips in relation to Family and Domestic Violence Leave.

Ai Group has produced detailed resources on Paid Family and Domestic Violence Leave and Payslips.

ANTI DISCRIMINATION

From 7 December 2022, the Fair Work Act was amended to include gender identity, intersex status and breastfeeding in its list of protected attributes.

This flows through to various parts of the Act, including provisions dealing with discriminatory terms in agreements and awards and the general protections.

PART 2: COMPLIANCE CHANGES

NEW CRIMINAL OFFENCE FOR INTENTIONAL WAGE THEFT

On the later of 1 January 2025, or the date on which the Minister declares a Voluntary Small Business Wage Compliance Code , certain types of underpayments will be a criminal offence

at the national level for the first time.

For an employer to have committed the new wage theft criminal offence, he or she must **intend** that their act or omission will result in a failure to pay the amount required under an award or agreement 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.

PENALTIES

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

- Imprisonment of up to 10 years.
- A fine equivalent to the greater of 3 times the amount of the underpayment or 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 value of the underpayment or 25,000 penalty units (currently $7,825,000).

PROCEEDINGS AND PUNISHMENT FOR CONVICTION

The Fair Work Ombudsman will be responsible for investigating potential wage theft offences. Criminal proceedings will be brought by the Commonwealth Director of Public Prosecutions (CDPP) or the Australian Federal Police (AFP).

RELATED OFFENCES

Various 'related offences' to the wage theft offence may impose criminal liabilities on employees, officers or agents of employers where they aid, abet, counsel, or procure the commission of the wage theft offence by an employer, seek to assist the employer in escaping punishment, or conspire with the employer to commit the 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.

SAFE HAVEN

The new criminal wage theft amendments provide pathways to encourage employers to self-disclose underpayments which may amount to the commission of a wage theft offence such as an intentional underpayment of employees. In return, employers would not be referred by the FWO for criminal prosecution for wage theft.

These 'safe haven' pathways include:

- A Voluntary Small Business Wage Compliance Code, compliance with which will ensure that the FWO will not refer potential criminal underpayment conduct by a small business for criminal prosecution.
- An option for the FWO to enter into a Cooperation Agreement with an employer, if the employer discloses that they have engaged in conduct that may amount to the commission of the wage theft offence. The FWO may agree not to refer the conduct for prosecution, after assessing the employer against a non-exhaustive list of factors, such as:
    - Whether employer makes a of voluntary, frank, and complete disclosure.
    - Whether the employer is cooperating with the FWO, and the FWO's assessment of their commitment to continued cooperation.

- The nature and gravity of the conduct, and the circumstances in which it occurred.
- The employer's history of compliance with the Fair Work Act.

The FWO may still take non-punitive action (such as issuing a compliance notice that workers be re-paid), or it may take civil action, if that is appropriate (i.e. seeking fines). A trade union may also take civil action in relation to a contravention.

EVEN HIGHER FINES FOR CONTRAVENING CERTAIN CIVIL REMEDY PROVISIONS

An increase in fines

From February 2024:

- 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).
- There will also be higher maximum fines for breaching compliance notices issued by the FWO.

Where contraventions relate to underpayments

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 or, not at all, if the wage theft provisions do not commence.

Serious contraventions

The scope of when a contravention is determined to be a serious contravention, which can attract 10 times the maximum penalty, 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 an award, agreement or the Fair Work Act; 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 Fair Work 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

MORE INFORMATION

Ai Group has produced detailed resources on the compliance changes.

Discussion Questions – Compliance

22. Have you changed policies and practices in light of the increased compliance obligations and new liabilities or were risks of underpayment an area you were already actively addressing prior to the amendments of 2023 and 2024? What actions are you taking?

23. Have any new issues or concerns been raised by the compliance changes passed in 2023 and 2024?

PART 3 – EMERGING OBLIGATIONS

In addition to the various recent changes in employment obligations set out in Part 1 (and enforced as set out in Part 2), there are indications of further possible changes to employment obligations through both (a) the award system and (b) campaigns and public discussion.

MODERN AWARD DEVELOPMENTS

The FWC has examined various matters through its Modern Awards Review 2023–24, considering the implications of new objects of the Fair Work Act relating to:

(a) job security,

(b) the intersection of work and caring responsibilities, and

(c) the ease of using modern awards.

Issues papers were produced, specific awards and sectors considered, and specific proposals advanced by both unions and employers.

On 18 July 2024 the Fair Work Commission reported to the Minister for Workplace Relations. The Commission has decided to take a series of matters forward on its own motion at the end of the Review, in the absence of an agreed consensus between employer groups and unions on how it should proceed. The key issues under consideration are:

- **Part time work**. There is to be a fundamental review of award provisions regulating part-time employment, to proceed in 2025.

  The review is designed to establish standard award regulation of the hours of employment of part-time employees (including the number of hours to be worked, the days upon which work is to be performed, and the starting and finishing times of work), prescribed daily and weekly minimum hours of work, and the circumstances in which (and means by which) working hours may be altered and additional hours worked.

  The objective of the review will be to establish a standard model for part-time employment in place of the variety of provisions currently in modern awards.

  Ai Group will argue that existing part-time employment provisions in awards should be varied to improve access to part time employment, by providing:

  (a) Greater flexibility as to the fixation of employees' ordinary hours of work;

  (b) Greater scope to vary employees' hours of work; and

  (c) The option to agree that the employee will work additional hours at ordinary rates.

- **Working from home, under the Clerks (Private Sector) Award**. The FWC has indicated that it will initiate proceedings regarding the development of a working from home

term designed to (a) facilitate employers and employees making workable arrangements for working at home and (b) remove any existing award impediments to working from home arrangements.

The FWC envisages that the term developed for the Clerks Award may serve as a model for inclusion of a working from home term in other modern awards.

Discussion Questions – Emerging Obligations

24. Where do you see further new and extended obligations being imposed during the next term of Government (most likely 2025-28)? What are you seeing through bargaining claims?

25. What impacts do you foresee additional employment obligations having on your work and workplaces?

ATTACHMENT A – DRAFT RIGHT TO DISCONNECT AWARD CLAUSE

XX. Employee right to disconnect

XX.1 Clause XX provides for the exercise of an employee's right to disconnect set out in section 333M of the Act.

NOTE:

(a) Section 333M provides that, unless it is unreasonable to do so, an employee may refuse to monitor, read or respond to contact, or attempted contact, from:

(1) their employer outside of the employee's working hours,

(2) a third party if the contact or attempted contact relates to, their work and is outside of the employee's working hours,

(b) Section 333M(3) prescribes matters that must be taken into account in determining whether an employee's refusal is unreasonable.

(c) Section 333M(5) provides that an employee's refusal will be unreasonable if the contact or attempted contact is required under a law of the Commonwealth, a State or a Territory.

(d) Sections 333N and 333P provide for procedures for the resolution of disputes about whether an employee's refusal is reasonable and about the operation of section 333M.

XX.2 Clause XX applies from the following dates:

(a) 26 August 2024—for employers that are not small business employers on this date and their employees.

(b) 26 August 2025—for employers that are small business employers on 26 August 2024 and their employees.

XX.3 An employer must not directly or indirectly prevent an employee from exercising their right to disconnect under the Act.

XX.4 Clause XX.3 does not prevent an employer from requiring an employee to monitor, read or respond to contact, or attempted contact, from the employer

outside of the employee's working hours where:

(a) the employee is being paid the stand-by allowance under clause 20.5;

(b) the employer's contact is to notify the employee they are required to attend or perform work; and

(c) the employer's contact is in accordance with the usual arrangements for such notification.

XX.5 Clause XX.3 does not prevent an employer from contacting, or attempting to contact, an employee outside of working hours to notify the employee, in accordance with the usual arrangements for such notification, of:

(a) an emergency roster change under clause 12.3(a)(iii); or

(b) a recall to work under clause 20.4.

ATTACHMENT B - DELEGATES' RIGHTS AWARD CLAUSE

XA. Workplace delegates' rights

XA.1 Clause XA provides for the exercise of the rights of workplace delegates set out in section 350C of the Act.

NOTE: Under section 350C(4) of the Act, the employer is taken to have afforded a workplace delegate the rights mentioned in section 350C(3) if the employer has complied with clause XA.

XA.2 In clause XA:

(a) employer means the employer of the workplace delegate;

(b) delegate's organisation means the employee organisation in accordance with the rules of which the workplace delegate was appointed or elected; and

(c) eligible employees means members and persons eligible to be members of the delegate's organisation who are employed by the employer in the enterprise.

XA.3 Before exercising entitlements under clause XA, a workplace delegate must give the employer written notice of their appointment or election as a workplace delegate. If requested, the workplace delegate must provide the employer with evidence that would satisfy a reasonable person of their appointment or election.

XA.4 An employee who ceases to be a workplace delegate must give written notice to the employer within 14 days.

XA.5 **Right of representation**

A workplace delegate may represent the industrial interests of eligible employees who wish to be represented by the workplace delegate in matters including:

(a) consultation about major workplace change;

(b) consultation about changes to rosters or hours of work;

(c) resolution of disputes;

(d) disciplinary processes;

(e) enterprise bargaining where the workplace delegate has been appointed as a bargaining representative under section 176 of the Act or is assisting the delegate's organisation with enterprise bargaining; and

(f) any process or procedure within an award, enterprise agreement or policy of the employer under which eligible employees are entitled to be represented and which concerns their industrial interests.

XA.6 Entitlement to reasonable communication

(a) A workplace delegate may communicate with eligible employees for the purpose of representing their industrial interests under clause XA.5. This includes discussing membership of the delegate's organisation and representation with eligible employees.

(b) A workplace delegate may communicate with eligible employees during working hours or work breaks, or before or after work.

XA.7 Entitlement to reasonable access to the workplace and workplace facilities

(a) The employer must provide a workplace delegate with access to or use of the following workplace facilities:

(i) a room or area to hold discussions that is fit for purpose, private and accessible by the workplace delegate and eligible employees;

(ii) a physical or electronic noticeboard;

(iii) electronic means of communication ordinarily used in the workplace by the employer to communicate with eligible employees and by eligible employees to communicate with each other, including access to Wi-Fi;

(iv) a lockable filing cabinet or other secure document storage area; and

(v) office facilities and equipment including printers, scanners and photocopiers.

(b) The employer is not required to provide access to or use of a workplace facility under clause XA.7(a) if:

(i) the workplace does not have the facility;

(ii) due to operational requirements, it is impractical to provide access to or use of the facility at the time or in the manner it is sought; or

(iii) the employer does not have access to the facility at the enterprise and is unable to obtain access after taking reasonable steps.

XA.8 Entitlement to reasonable access to training

Unless the employer is a small business employer, the employer must provide a workplace delegate with access to up to 5 days of paid time during normal working hours for initial training and at least one day each subsequent year, to attend training related to representation of the industrial interests of eligible employees, subject to the following conditions:

(a) In each year commencing 1 July, the employer is not required to provide access to paid time for training to more than one workplace delegate per 50 eligible employees.

(b) The number of eligible employees will be determined on the day a delegate requests paid time to attend training, as the number of eligible employees who are:

(i) full-time or part-time employees; or

(ii) regular casual employees.

(c) Payment for a day of paid time during normal working hours is payment of the amount the workplace delegate would have been paid for the hours the workplace delegate would have been rostered or required to work on that day if the delegate had not been absent from work to attend the training.

(d) The workplace delegate must give the employer not less than 5 weeks' notice (unless the employer and delegate agree to a shorter period of notice) of the dates, subject matter, the daily start and finish times of the training, and the name of the training provider.

(e) If requested by the employer, the workplace delegate must provide the employer with an outline of the training content.

(f) The employer must advise the workplace delegate not less than 2 weeks from the day on which the training is scheduled to commence, whether the workplace delegate's access to paid time during normal working hours to attend the training has been approved. Such approval must not be unreasonably withheld.

(g) The workplace delegate must, within 7 days after the day on which the training ends, provide the employer with evidence that would satisfy a reasonable person of their attendance at the training.

XA.9 Exercise of entitlements under clause XA

(a) A workplace delegate's entitlements under clause XA are subject to the conditions that the workplace delegate must, when exercising those entitlements:

(i) comply with their duties and obligations as an employee;

(ii) comply with the reasonable policies and procedures of the employer, including reasonable codes of conduct and requirements in relation to occupational health and safety and acceptable use of ICT resources;

(iii) not hinder, obstruct or prevent the normal performance of work; and

(iv) not hinder, obstruct or prevent eligible employees exercising their rights to freedom of association.

(b) Clause XA does not require the employer to provide a workplace delegate with access to electronic means of communication in a way that provides individual contact details for eligible employees.

(c) Clause XA does not require an eligible employee to be represented by a workplace delegate without the employee's agreement.

NOTE: Under section 350A of the Act, the employer must not:

(a) unreasonably fail or refuse to deal with a workplace delegate; or

(b) knowingly or recklessly make a false or misleading representation to a workplace delegate; or

(c) unreasonably hinder, obstruct or prevent the exercise of the rights of a workplace delegate under the Act or clause XA.

Definitions to be inserted into the definitions clause for each award

employee organisation has the meaning given by section 12 of the Act.

enterprise has the meaning given by section 12 of the Act.

small business employer has the meaning given by section 23 of the Act.

workplace delegate has the meaning given by section 350C(1) of the Act.