

## A VISION IN THE WORKPLACE

Hi

Welcome to our Vision in the Workplace

**Our April edition of Vision includes:**

- Important Exceptions to the Unfair Dismissal High Income Threshold; and
- Tackling Wage Underpayment in Australia: An Overview of Proposed Reforms.

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### Important Exceptions to the Unfair Dismissal High Income Threshold



According to s 382 of the *Fair Work Act 2009* (Cth) ('the Act'), those earning more than \$162,000 per annum cannot file an Unfair Dismissal claim with the Fair Work Commission ('FWC'). However, two recent cases have demonstrated a few important exceptions to this rule.

### **Brian Cowan v I.P.C. Pty Ltd [2023]**

In the first case, the FWC rejected an employer's argument that an employee's unfair dismissal claim should be thrown out because his earnings exceeded the high-income threshold by almost \$40,000. The court found that the mechanical superintendent's earnings fell below the high-income cap after excluding his overtime payments and work expenses.

The employer, I.P.C. Pty Ltd, claimed that the superintendent's income came to \$201,000 including his salary, company car use, company phone use, salary sacrifice, and overtime pay, putting him well above the high-income threshold. His contract guaranteed "at least" 40 hours a week, and he earned \$58 an hour and \$63 for overtime, and at times the company paid him a \$80 base rate and \$88 overtime during the Company's shutdown periods. However, working during these shutdown periods was not guaranteed in his contract.

Therefore, it was found that if the value of the superintendent's vehicle use added up to \$14,000, the phone use \$1000, and salary sacrifice \$5,200, his earnings would total \$141,000, which fell well below the threshold.

Consequently, the applicant was allowed to proceed with his unfair dismissal claim.

### **Mr Leneod Lyon v Charles Hull Contracting Co. Pty Ltd [2023]**

The second case involved an applicant, Mr Lyon, who claimed that he was protected from unfair dismissal by the Act because the Building and Construction General On-Site Award ('B & C Award') or the Miscellaneous Award covered him, or that his earnings fell below the cap. Mr Lyon had been promoted to a supervisor position by Charles Hull Contracting Co. Pty Ltd at the Boddington Gold Mine, receiving \$150,000 a year, excluding superannuation, when he was dismissed in June last year. The high-income threshold sat at \$158,500 when the company dismissed him in June 2022.

Commissioner Paul Schneider found that neither of the awards covered the worker. s143(7) of the Act excluded Mr Lyon from coverage by the Miscellaneous Award as the nature of his role was not traditionally covered by awards, and he was excluded from the B&C Award as it does not typically cover supervisors in the civil construction industry.

The commissioner then calculated the worker's use of a car that the company provided to him for work-related and private use. The worker had a roster pattern of eight-days-

on, six-days-off, and travelled 148km from his home to work for each swing cycle.

Commissioner Schneider found that even if the supervisor didn't use the car during his six days off, his private car use would be worth \$10,700, pushing him over the high-income threshold and therefore making Mr Lyon unable to proceed with his unfair dismissal claim.

### **Key takeaways**

The two cases illustrate the importance of accurately calculating employees' earnings to determine whether they are covered by the high-income threshold for unfair dismissal claims. Employers need to be mindful of which payments can be included in calculating an employee's income for this purpose, particularly those that cannot be determined in advance. Employers must also be mindful as to whether employees are using company property such as cars and mobile phones for private use and how this may affect unfair dismissal claims.

As always, employers are encouraged to seek professional legal advice regarding employee entitlements and any potential unfair dismissal claims. If this article raises any questions for you, please do not hesitate to [contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.](#)

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## Tackling Wage Underpayment in Australia: An Overview of Proposed Reforms



## Background

The Albanese Government made a pre-election promise to implement recommendations made by the Migrant Workers' Taskforce to tackle wage underpayment and non-payment. These reforms would see underpaying employers to face fines greater than \$4 million or three times the underpaid sum involved. Individuals such as directors and HR managers would also face penalty charges of up to \$825,000 per breach and potential jail time.

The Department of Employment and Workplace Relations (DEWR) released a report proposed two potential options to deliver the promise of criminalising wage theft without undermining the integrity of current state-based laws. These proposed options are summarised below.

### Option A

Option A proposes to increase the maximum penalty to 1500 penalty units (\$412,500), or 15,000 penalty units (\$4,125,000) for a serious crime. These penalties would apply to conduct including:

- breaching a National Employment Standard;
- breaching a Modern Award;
- breaching a minimum wage order;
- sham contracting;
- unreasonable requirements for workers to make payments from their wages;
- breaches to recordkeeping and payslip requirements;
- failing to deliver on annual earnings guarantee; and
- providing false or misleading information to the FWO.

This Option would also entail changes to the penalties faced by individuals, where the maximum penalty would increase to 300 penalty units (\$82,500) or 3000 penalty units (\$825,000).

For an individual the new maximum penalty would be 300 penalty units (\$82,500) for a minor contravention, or 3000 penalty units (\$825,000) for a serious contravention. The DEWR report also considers that a period of imprisonment may be appropriate for knowledge-based and recklessness-based underpayment offences.

According to the report, this option "is intended to balance enhancing the deterrent impact of maximum penalties with preserving clarity for applicants, respondents and the court when calculating the maximum applicable penalty in each case".

### Option B

Option B proposes to add a new provision to the Fair Work Act that would raise the highest possible penalty for breaking any civil remedy provision related to underpayment. The primary intention is that instead of having to prove the exact amount of the underpayment, it would be enough to show that underpayment occurred. If there was a violation related to underpayment, the maximum penalty would be five times the current limit stated in subsection 539(2) of the Fair Work Act.

Option B seeks to ensure a consistent and comprehensive approach to penalising and deterring underpayments by making higher penalties available if there has been an underpayment, regardless of the specific contravention being alleged in that particular case.

### **Knowledge-based Wage Underpayment**

In addition, the DEWR report is seeking input on whether to make "knowledge-based wage underpayment" offenses the exclusive basis for criminalisation or to establish a specific offense for "reckless-based wage underpayment." The latter option applies to employers who might not deliberately underpay their workers but are aware of a substantial risk that they are not paying them correctly and proceed "even though it is unjustifiable to take that risk".

A third proposed option is to introduce a tiered approach in which both a knowledge-based wage underpayment offence and a recklessness-based wage underpayment offence would be inserted into the Fair Work Act, with distinct graduated penalties assigned to each offense based on the level of culpability.

### **Key Takeaways/Conclusion**

The proposed reforms are expected to improve the enforcement of minimum wage standards and provides an effective deterrent against underpayment of wages. The proposed reforms signal the government's determination to put an end to wage theft and protect the rights of employees.

It is imperative for businesses to review their employment practices and ensure compliance with the proposed reforms to avoid the risk of severe penalties, fines and even imprisonment. If you have any questions about the potential reforms or wage underpayment in general, please do not hesitate to [contact Nick Stevens, Peter Hindeleh, Daphne Klianis or Josh Hoggett.](#)

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