Australian Industry Group

Senate Education and Employment References Committee

Wage Theft Inquiry

April 2026

Introduction

1. The Australian Industry Group thanks the Senate Education and Employment References Committee for the opportunity to make this submission to its inquiry into 'wage theft'.

2. The term of reference for this inquiry is to consider "*The extent to which the wage theft framework under the Fair Work Act 2009 (**FW Act**), and the operation of subsection 327A(1), has led to a decrease in the incidence of wage theft in Australia, and any other related matter*".

3. The Australian Industry Group represents employers across all sectors of the Australian economy, including manufacturing, construction, defence, resources, transport, retail, education, professional services, health, and the broader care economy. Our members employ millions of Australians and operate across workplaces of all sizes and in all jurisdictions. The operation of the FW Act and amendments to that legislation has direct, practical, and ongoing consequences for their capacity to employ, invest, do business, innovate, and grow.

4. This inquiry refers to the criminal offence of "*failing to pay certain amounts as required*", introduced in Part 14 of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (now Subdivision B of Division 2 of Part 2-9 of the FW Act; sections 327A, 327B and 327C).

5. Consistent with the Terms of Reference, this submission is directed to the criminal offence. It does not approach this inquiry as a wider review of compliance with awards, agreements, and the FW Act, nor (for example) as a review of civil penalties or of the work of the Fair Work Ombudsman (**FWO**) save in regard to the FWO's role in relation to the criminal offence of failing to pay certain amounts as required.

The Closing Loopholes Review

6. The Australian Industry Group's perspectives on workplace relations compliance have most recently been provided in our submission to the independent statutory review into the operation of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (the **Closing Loophole Review**).

7. The Closing Loopholes Review remains underway, and is directed to:

   a. Consider whether the operation of the amendments is appropriate and effective.

   b. Identify any unintended consequences of the amendments.

   c. Consider whether further amendments to the FW Act, or any other legislation, are necessary to improve the operation of the amendments or rectify any unintended consequences that are identified.

8. The Closing Loopholes Review is to provide preliminary findings and draft recommendations to the Minister for Employment and Workplace Relations on or before 15 May 2026, which will be published for stakeholder comment. A final Report is to be delivered to the Minister on or before 15 June 2026 and is expected to be released publicly shortly thereafter.

9. It is regrettable that two inquiries have been convened in parallel, and that both the independent review and this inquiry have effectively been directed to examine the same provisions simultaneously.[1]

Understanding Workplace Relations Compliance in 2026

10. The Closing Loopholes Acts made various changes to the FW Act regarding compliance. In introducing these changes, the then Minister for Employment and Workplace Relations, the Hon Tony Burke MP, characterised non-compliance with wages obligations as a 'loophole' to be closed.[2]

11. Employers do not agree with the characterisation that the pre-Closing Loopholes inspection, enforcement, and compliance system under the FW Act was subject to 'loopholes' given the significant increases in maximum financial penalties and changes to the serious contraventions threshold which preceded the amendments, strengthened FWO powers, significant additional funding of the national industrial inspectorate, and the FWO's efforts to continuously improve its effectiveness.

12. The Australian Industry Group has urged the Closing Loopholes Review to approach the consideration of compliance measures as an opportunity to identify and propose measures beyond ever increasing penalties and affording new rights to unions or inspectors. We have stressed the importance of addressing the fundamental drivers of non-compliance, and in particular unintentional underpayments.

13. This should include:

    a. Acknowledging that maximum civil penalties were already set at levels which would existentially threaten a significant proportion of employing organisations following significant increases in maximum fines under the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

    b. Recognising that the maximum financial penalties are already sufficiently high to discourage most intentional underpayments and considering whether the new regime (following the Closing Loopholes amendments to the FW Act) will rectify the problems of non-compliance.

    c. Considering the extent to which unintentional underpayments and regulatory non-compliance arise as a result of complex, ambiguous, or outdated employment obligations.

14. Our workplace relations system is failing when private and public sector organisations are genuinely committed to complying with the law and invest considerable time, effort, and resources to do so, but nonetheless find themselves non-compliant, often due to errors in applying detailed, contestable or obscure legislative, award or agreement obligations.

15. Determining a rate of pay should be a straightforward exercise, but for many employers, including larger organisations, it is not. A rate of pay may be determined by reference to not only multiple sources of legal obligations, but also the application of multiple provisions in industrial instruments that interact to set monetary entitlements, (e.g. loadings, allowances, and penalty rates).

[1] Noting that the Senate passed the Fair Work Legislation Amendment (Closing Loopholes) Act 2023 to include provisions requiring the independent review (s.4).
[2] The Hon Tony Burke MP (Watson—Minister for Employment and Workplace Relations, Minister for the Arts and Leader of the House) Second Reading Speech, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, 4 September 2023.

16. In other words, calculating a rate of pay can involve calculating multiple pay points depending on the hours worked and applicable conditions.

17. The ABC, leading global charities, our universities, major employers, and even the Department of Employment and Workplace Relations (**DEWR**) are unlikely to have sought to deliberately deprive their employees, yet each has been become embroiled in high profile and significant underpayments. For each high-profile underpayment matter, there will be far more smaller organisations equally endeavouring to do the right thing and not being able to reliably do so despite their best efforts.

18. Added to this is the fact that awards have been under a process of continual review by the Fair Work Commission (**FWC**) to address ambiguities, uncertainties, anomalies and errors in award terms (the modernisation and simplification processes). The Australian Industry Group has been and continues to be a lead registered organisation representing employers in these matters.

19. It is relevant that clauses in such awards nonetheless continue to be identified as ambiguous or uncertain in contexts where employers are being pursued for alleged non-compliance with their content (sometimes even on the basis of misguided interpretations from the FWO or unions). We note in this respect, by way of a vivid example, a recent determination by a Full Bench of the FWC that the terms of the *Social, Community, Home Care and Disability Services Award 2010* pertaining to payment of sleepover arrangements were uncertain and ambiguous in the context of application made by the Australian Industry Group seeking to argue that they should be varied on that basis.[3]

20. It should also be noted that this Full Bench decision followed the Federal Court effectively rejecting the FWO's interpretation of those provisions (and the Full Federal Court's subsequent dismissal of the FWO's appeal against that decision).[4] This also occurred in a context where, we understand, the FWO has reportedly undertaken significant compliance activities in relation to enforcement of those ambiguous award terms likely on the basis of what is, on current authority, an incorrect (though no doubt earnestly held) interpretation[5]. We understand that many employers have adopted the FWO's erroneous interpretation of the SCHADS[6] Award 'sleepover provisions' for fear of being exposed to crippling penalties and underpayment claims if they did not. This example demonstrates the risk of only addressing compliance challenges through imposing ever increasing penalties.

21. Laws which cannot reliably be navigated and complied with where an organisation genuinely endeavours to do so need to be urgently reviewed. There seems a substantial opportunity to ensure the substance, clarity and execution of the law better encourages and supports compliance, which cannot be secured by sanctions and policing alone. This Review is an opportunity to genuinely engage with what leads to underpayments, and whether the criminalisation of a subset of non-compliant activities will likely be an effective or fair solution to the problem.

22. Framing widespread underpayments as arising from compliance loopholes misses the bigger picture of what drives a substantial proportion of non-compliance. It also overlooks the fact that there are ambiguities and uncertainties in workplace relations laws.

23. **Structural changes to the law need to be considered in order to ensure that our system is actually realistically able to be complied with by all employers.**

[3] [2025] FWCFB 292 and [2026] FWCFB 79.
[4] Jats Joint Pty Ltd v Fair Work Ombudsman [2025] FCA 743 (8 July 2025) and Fair Work Ombudsman v Jats Joint Pty Ltd [2026] FCAFC 25 (20 March 2026).
[5] FWO — Pay for sleepovers in the Social, Community, Home Care and Disability Services Industry Award. We note that the three applications referred to by the FWO have now been resolved: Decision [2026] FWCFB 79.
[6] Social, Community, Home Care and Disability Services Industry Award 2010

Wage Theft

Summary of Amendments

24. Part 14 of the first of the two Closing Loopholes Acts[7]:

a. Created a new criminal offence for a national system employer that intentionally engages in conduct (either acting or omitting to act) which results, as intended by the employer, in a failure to pay an employee's full required amount (on behalf of or for the benefit of the employee) on or before the day when the required amount is due for payment (**Wage Theft Offence**).

b. Created a 'related offence' which can impose liability on other persons for that failure to pay, either as an accessory after the fact or in circumstances where criminal liability is extended to other persons. For example, a related offence will be committed by a person if they:

i. Assist the employer, who has, to their knowledge, committed the Wage Theft Offence, in order to enable them to escape punishment of the Wage Theft Offence (Accessory after the fact).

ii. Attempt to commit the Wage Theft Offence (Attempt).

iii. Aid, abet, counsel, or procure the commission of the Wage Theft Offence by the employer (Complicity and Common Purpose).

iv. 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 in certain circumstances (Joint Commission).

v. Have the relevant intention and procures 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 (Commission by Proxy).

vi. Urge the commission of the Wage Theft Offence (Incitement).

vii. Conspire with another person to commit the Criminal Offence (and it is as if the Criminal Offence has been committed) (Conspiracy).

c. Imposed a maximum penalty for an individual of up to 10 years' imprisonment or the greater of 5,000 penalty units or three times the underpayment amount (if the underpayment amount can be determined).

d. Imposed a maximum penalty for a body corporate of up to the greater of 25,000 penalty units or three times the underpayment amount (if the underpayment amount can be determined).

e. Empowered the Australian Federal Police (**AFP**) and the Commonwealth Director of Public Prosecutions (**CDPP**) to commence criminal proceedings.

[7] Fair Work Legislation Amendment (Closing Loopholes) Act 2023

f. Provided a limited 'safe harbour' for employers through the operation of 'cooperation agreements' which, when in operation, preclude the FWO from referring the relevant conduct to the AFP or CDPP for criminal prosecution. However, the 'safe harbour' applies only in relation to the criminal offence, such that the FWO and its inspectors may still however utilise its civil enforcement options - for example, instituting or continuing civil proceedings, enforceable undertakings and notices.

g. Empowered the Minister to create a Voluntary Small Business Wage Compliance Code (**Code**) (which was declared on 16 December 2024 and commenced on 1 January 2025).

h. Where the FWO is satisfied a 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 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 to pay.

25. Part 14 of Schedule 1 of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* commenced on 1 January 2025.

Analysis

Complex and highly burdensome system for employee entitlements

26. In considering the Wage Theft Offence, it is of vital importance to have regard to the real-world context in which this criminal offence applies.

27. Modern awards set minimum terms and conditions for national system employees in particular industries or occupations and may have terms that are ancillary or supplementary to the National Employment Standards (**NES**) in the FW Act. Together with the NES, modern awards provide a minimum safety net of terms and conditions.

28. There are currently more than 120 different modern awards and each of these awards has several clauses providing for various different employee entitlements. It is common for an employer to be subject to multiple awards in relation to different employees. Employers may also have enterprise agreements that are tailored to their enterprise, and which may apply to some or all of their employees. Enterprise agreements are generally approved by the FWC on the basis that they place the employees in a better overall position as compared to the applicable modern award.

29. Employers must also pay entitlements derived through legislation, including but not limited to compulsory superannuation guarantee amounts, NES entitlements and long service leave entitlements. This adds further complexity.

30. The combination of modern awards, enterprise agreements and legislated entitlements brings about a highly complex and difficult to comply with set of payment rules, with the interpretation of particular entitlements often being contested on the basis that they are ambiguous or uncertain.[8] The prevalence of competing interpretations is most keenly observed in the FWC's administration of Australia's modern award system.

[8] For example: Application by the Australian Industry Group [2025] FWCFB 292 and Jewell v Magnium Australia Pty Ltd (No 2) [2025] FedCFamC2G 676.

31. The Australian Industry Group was the lead registered organisation representing employers in the FWC's four-yearly review of modern awards. These FWC proceedings continued for more than 8 years, during which time countless arguments were considered about the correct interpretation of many different award provisions across Australia's 120 or so modern awards. Numerous ambiguities, uncertainties, anomalies and errors in the terms of awards were addressed through this process and there is little doubt that a range of further problems still exist in the system.

32. The Australian Industry Group, as a national employer association, devotes significant resources and services to assist employers in understanding Australia's workplace relations system such that relevant minimum rates of pay can be properly identified. It is one of our core services to members. We receive thousands of calls from employers annually seeking advice on the correct payment of wages as they relate to competing modern award coverage, classification structures, the application of loadings to irregular hours of work and the interpretation of enterprise agreements. This is not to mention the calculation of long service leave and other leave or monetary entitlements.

33. Adding to these significant difficulties are the problems and challenges associated with ensuring that a payroll system is adapted to complex rules and operational changes. If a payroll system fails to apply 'correct' interpretations employee entitlements could be misclassified resulting in the payment of incorrect amounts, an outcome that is not accurately described as 'intentional' but may be determined to be so for the purposes of this offence.[9]

34. It is relevant that even the FWO states:

> "*Underpayments often happen because of a mistake or payroll error*".[10].
>
> "*Not knowing what to pay staff can be a common problem for employers*".[11]

35. Further compounding this acknowledged difficulty is the current state of law where employers are not permitted to offset above-award salaries against award entitlements on an annual basis. Employers also face unrealistic and onerous record-keeping requirements that are out of step with contemporary working arrangements.[12]

36. Indeed (and unfairly so), a contractual off-set arrangement will be an underpayment for the purposes of the wage theft offence[13] if it pays less than minimum award entitlements in a single pay period, even if the employee is over a year (or other mutually agreed period) paid significantly more than what they would otherwise receive under the applicable award and were provided with significant and beneficial flexibility in the way they work.[14]

37. The scale of the FWO's recent civil-based underpayment compliance activity underscores the difficulties employers face in navigating an opaque, unclear and highly complex system in their ongoing quest to pay employees correctly.

[9] Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd [2025] FCA 1092 (5 September 2025).
[10] https://www.fairwork.gov.au/workplace-problems/common-workplace-problems/i-think-ive-underpaid-my-employee
[11] https://www.fairwork.gov.au/workplace-problems/common-workplace-problems/im-not-sure-what-to-pay-my-employees
[12] https://www.australianindustrygroup.com.au/news/media-centre/2025/risks-to-salaried-employment-across-economy-to-flow-from-federal-court-decision/
[13] Paragraph 994, Revised Explanatory Memorandum: https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7072
[14] Fair Work Ombudsman v Woolworths Group Limited; Fair Work Ombudsman v Coles Supermarkets Australia Pty Ltd; Baker v Woolworths Group Limited; Pabalan v Coles Supermarkets Australia Pty Ltd [2025] FCA 1092 (5 September 2025)

38. For example, in 2024-25, the FWO recovered more than $358 million for more than 294,000 workers, secured $23.7 million in court penalties and filed 73 new litigations. Over the last five years, more than $2 billion in back-payments have been made to workers.[15]

39. Having a criminal offence directed to wage underpayments in the current overly complex workplace relations environment fails to recognise the insurmountable difficulties faced by employers, including because pay obligations are inherently multi-layered and technically contingent on ongoing updates and legal interpretation. Criminalising outcomes that inevitably flow from this substantial complexity creates a significant risk of blurring the line between deliberate wage theft and compliance error and ultimately undermines the coherence of an offence that has been designed to turn on 'intentionality'.

40. The Australian Industry Group has asked the current Closing Loopholes Review to consider repealing the Wage Theft Offence, pending a rationalisation and simplification of the workplace relations system, particularly in relation to employee entitlements / award obligations. We ask this Committee to recommend the same.

Application of Criminal Code

41. The wage theft offence was introduced on the basis that it would only apply to "intentional conduct".[16] According to the FWO, "*this doesn't include honest mistakes*".[17]

42. Consistent with this approach:

    a. Absolute liability applies to paragraphs (1)(a) and (b) — see section 6.2 of the Criminal Code; and

    b. The fault element for paragraphs (1)(c) and (d) **is intention** — see section 5.2 of the Criminal Code.

43. Based on this policy approach, inadvertent, non-intentional or even negligent errors should not be subject to prosecution as a Wage Theft Offence.

44. However, in an apparent contravention of this policy approach, under section 12.3(1) of the Criminal Code, '**intention**' may be **attributed** to a body corporate employer if it '*expressly, tacitly or impliedly authorised or permitted the offence*'.[18] Such an authorisation or permission may be established by proving any of the following:

    a. That the body corporate's board of directors intentionally or knowingly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence (section 12.3(2)(a));

[15] https://www.fairwork.gov.au/newsroom/media-releases/2025-media-releases/october-2025/20251029-annual-report-2024-25-media-release
[16] Revised Explanatory Memorandum, page 2.
[17] https://www.fairwork.gov.au/about-us/workplace-laws/legislation-changes/closing-loopholes/criminalising-wage-underpayments-and-other-issues
[18] https://www.ag.gov.au/crime/publications/commonwealth-criminal-code-guide-practitioners-draft/part-25-corporate-criminal-responsibility/division-12/123-fault-elements-other-negligence

b. That a high managerial agent of the body corporate (e.g., board of directors, CEO or CFO or other responsible person) intentionally or knowingly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, unless the body corporate proves that it has undertaken due diligence to prevent the conduct, authorisation or permission (section 12.3(2)(b));

c. That a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision. (A 'corporate culture' means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities have taken place) (section 12.3(2)(c)); or

d. That the body corporate failed to create and maintain a corporate culture requiring compliance with the relevant provision which has been contravened (section 12.3(2)(d)).

45. The Attorney General acknowledges that these imputation rules "*go well beyond the familiar*"[19] in the case of 'corporate culture' because fault can be imputed where the corporation:

a. Has a corporate culture that directs, encourages, tolerates or led to non-compliance[20]; or

b. Fails to create and maintain a culture that required compliance[21].

46. 'Corporate culture' for this purpose is defined broadly to include "*an attitude, policy, rule, course of conduct or practice' in the corporation generally or in the relevant part of it.*[22]

47. A due diligence defence is provided but only in respect of the high managerial pathway in section 12.3(2)(b) and where the corporation is able to prove it exercised due diligence to prevent the conduct, authorisation or permission. However, this defence does not appear to apply to prevent the imputations contained in the corporate culture pathways in sections 12.3(2)(c) or (2)(d).

48. The Attorney General provides guidance on the meaning of due diligence, including that a failure to undertake due diligence may be evidenced by the fact that the conduct was substantially attributable to:

a. Inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers.

b. A failure in training.

c. A failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.[23]

49. This means liability for a corporate employer for the Wage Theft Offence in terms of the high managerial pathway largely depends on whether it had adequate governance, payroll controls, training, auditing and escalation pathways.

[19] Ibid
[20] Ibid
[21] ibid
[22] Ibid
[23] Ibid

50. This systems-based focus is inconsistent with the stated object of the criminal offence and its intention-focused drafting. Instead, it appears to instead inappropriately provide for negligence-based culpability framework.

51. While the Australian Industry Group acknowledges the Government's desire to promote wage compliance, it is essential to ensure that the intent of the provision is better captured in relation to the corporate attribution framework. Importantly, the link between 'intention' and deliberate authorisation should be tightened and the due diligence framework should be extended so that any culture-based attribution does not operate as a back door negligence standard.

52. This could be achieved by additionally requiring proof of intention through board/high managerial authorisation when considering if an organisation has or does not have a compliant corporate culture.

53. Alternatively, if culture-based attribution remains available as a basis to impute intention, a clear due-diligence offence should also be applied to sections 12.3(2)(c) and (d) so that corporations making genuine attempts to build and maintain compliance systems are not treated as having an 'intended" underpayment if the culture is deficient despite their best endeavours.

Application of the offence to late payments

54. Section 327A is unfortunately drafted so broadly that it captures not only deliberate non-payment, but also intentional late payment.

55. This drafting creates a significant compliance and governance problem for employers. It blurs the boundary between genuinely criminal conduct through the deliberate permanent withholding of entitlements, as compared to operational timing failures that might occur when wages that are delayed for a short period while funds clear.

56. Put simply, this outcome occurs because the statutory trigger is not "never paid" but is instead "not paid by the due date."

57. This extension to 'intentional late payments' is particularly problematic because the policy narrative of "wage theft" is conceptually anchored in larceny.

58. The concept of larceny in Australian criminal law is classically concerned with permanent deprivation, **not a temporary interference or delay**.

59. For example, the Judicial Commission of NSW's criminal jury directions state that, to prove larceny, the Crown must prove (among other elements) that the property was taken "*with the intention of permanently depriving the owner of it*", distinguishing that state of mind from merely temporary taking[24].

60. From an employer's perspective, a late payment that is followed by full rectification is a temporary deprivation. It is qualitatively different from conduct aimed at permanent deprivation, yet s 327A collapses both into the same criminal frame by making lateness itself the critical element.

61. It would therefore be appropriate that the criminal offence be confined to intentional permanent deprivation (or its practical equivalent). This would then leave late payment as still being unlawful and subject to significant penalties as a contravention of the relevant civil remedy provisions.

[24] Judicial Commission of New South Wales, Criminal Trial Courts Bench Book, 5-6105: https://www.judcom.nsw.gov.au/publications/benchbks/criminal/larceny.html

62. Confining the offence to circumstances of intentional permanent deprivation would also appropriately align the offence with the Government's and FWO's stated policy intention that the criminal regime targets intentional underpayment (as opposed to mistakes), while avoiding an overly broad interpretation that elevates payroll timing disputes into matters that may inappropriately jail employers.

Lack of evidence to date

63. The Australian Industry Group understands that the following have not occurred between 1 January 2025 and the date of making this submission to the Review:

    a. The referral of any conduct that resulted in the failure to pay (or in late or delayed payment, as addressed above) to the CDPP for investigation and potential prosecution.

    b. The determination of any criminal prosecutions by the courts.

    c. The FWO publicly releasing information on entering into Cooperation Agreements or on the use of the Voluntary Small Business Wage Compliance Code. (The FWO has however released significant guidance materials and application forms[25])

64. It is therefore not yet possible to analyse the operation of the wage theft amendments or to evaluate their appropriateness or effectiveness in statistical or evidential terms.

65. That said, it is clear based on the above analysis and problems arising from highly complex workplace relations requirements, that **changes are necessary**, and that the wage theft amendments should accordingly be repealed in their entirety.

66. Ultimately, it should be recognised that the effectiveness of the wage theft amendments would at no point be able to be evaluated solely based on numbers of prosecutions referred or Cooperation Agreements entered into. A key justification for the introduction of the wage theft offence was the hope that it would act as a disincentive to intentional underpayments. Of course, the goal of any enforcement regime should, primarily, be to promote compliance not merely to punish those that are non-compliant. The assessment of the operation of the wage theft amendments should accordingly be focussed on the extent to which it has resulted in (or can be expected to result in) a tangible improvement in compliance rather than a simplistic measure of how many employers have been prosecuted or imprisoned.

67. The wage theft amendments were also one among a battery of recent / concurrent measures designed to address underpayments, including multiple measures in the Closing Loopholes package (increased civil penalties, changes to serious contraventions, and changes to compliance notices).[26] Simultaneous measures being pursued to address underpayments make it difficult to isolate or assess the veracity and impact of any particular change, including the introduction of the wage theft offence.

68. There is also no way to reliably ascertain the extent to which non-compliance is a product of the kind of intentional behaviour targeted by the new provisions. It cannot seriously be contested that a significant proportion of non-compliance is inadvertent or an inevitable product of what is increasingly viewed by industry as an unworkable workplace relations system.

[25] https://cooperation.fairwork.gov.au/cooperation-agreement-eligibility-form/
[26] Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024, Parts 10, 11 and 12.

69. This not only makes it difficult to assess the extent to which the new provisions are achieving their intended goals, it also calls into the question the utility of focussing on the specific and indefensible wrong of calculated or deliberate underpayments, while ignoring the systematic root causes of non-compliance. The development of measures to genuinely simplify and modernise our workplace relations system would likely make a far more significant contribution to improved compliance that a new penalty regime.

70. A particular issue to be monitored (were the provisions not repealed as recommended) is the application of the offence to late payments, rather than situations in which it is clear (or clearly able to be alleged), that there was no intention to pay or no intention to pay in full. These can be quite different situations, and the causes of late payment can be complex and potentially entirely distinguishable from fact situations that should give rise to a criminal offence. We recommend that any application of the new criminal offence to late payments be flagged as an issue for ongoing monitoring and potential further consideration.

Australian Industry Group