



Australian Government
Department of Employment
and Workplace Relations

Wage theft inquiry

Submission from the Department of
Employment and Workplace Relations to the
Senate Education and Employment
References Committee

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Introduction

The Department of Employment and Workplace Relations acknowledges the Traditional Custodians of Country throughout Australia and their connections to land, sea and community. We pay our respects to their Elders past and present and extend that respect to all Aboriginal and Torres Strait Islander peoples today.

The Department of Employment and Workplace Relations welcomes the opportunity to make a submission to the Senate Education and Employment References Committee inquiry into the extent to which the wage theft framework under the *Fair Work Act 2009* (Fair Work Act), and the operation of subsection 327A(1) has led to a decrease in the incidence of wage theft in Australia.

This submission provides information about the criminal wage theft offence and the Fair Work Act's civil remedy framework, which form part of the graduated enforcement framework designed to address the full spectrum of non-compliance with workplace obligations including wage underpayment.

Legislating a criminal wage theft offence was part of the Australian Government's Secure Australian Jobs Plan and this reform, along with other amendments to strengthen the compliance and enforcement framework, were part of the package of measures introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Closing Loopholes Act) and the *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Closing Loopholes No. 2 Act).

The department notes an independent statutory review of the Closing Loopholes Acts is currently underway, which includes consideration of the new wage theft offence. The review will report to the Minister for Workplace Relations and Employment by 15 June 2026. The review invited public submissions. 75 submissions have been published on the [review's webpage](#), and the review has held 8 roundtables with a range of stakeholders, including employer and employee organisations.

Overview

The Fair Work Act, which is the primary legislation for Australia's workplace relations system, provides a compliance and enforcement framework to address breaches of the Fair Work Act, including wage underpayments. It contains a range of civil remedies including civil penalties and now criminal penalties with the introduction of a criminal offence for intentional underpayment of wages and entitlements (wage theft offence).¹ The Office of the Fair Work Ombudsman (FWO) is the responsible statutory agency to promote and monitor compliance with workplace laws, inquire into and investigate breaches and take appropriate enforcement action.² The Fair Work Act provides the FWO with a graduated compliance and enforcement framework designed to deter, prevent and address a range of non-compliance with workplace obligations, including wage theft.

¹ Sections 539 and 327A of the Fair Work Act.

² Section 682 of the Fair Work Act.

Criminal wage theft offence

The government introduced the new offence to provide a greater deterrent and response to employers who intentionally underpay their workers, with the potential for serious penalties, including imprisonment. The aim of the offence is to encourage compliance. While intended to be used as a last resort for the most serious offending, these criminal penalties will make businesses think more carefully about meeting their workplace obligations and provides general and specific deterrence. The new offence was designed to complement the civil remedy framework which is available to address other forms of underpayment or non-compliance including genuine mistakes.

Several inquiries, including the Migrant Workers' Taskforce³ and the Senate inquiry into Unlawful Underpayment of Employees' Remuneration (UUER inquiry),⁴ recommended the introduction of a criminal offence for wage theft. These inquiries noted the difficulty in quantifying the extent of underpayments but highlighted significant underpayment cases across a broad range of industries, and the extent of non-compliance with the Fair Work Act in making their recommendations. The UUER inquiry cited various sources to indicate that underpayments affected thousands of workers, costing them billions of dollars every year.⁵

Operation of the wage theft offence

The general principles of criminal responsibility are set out in the Commonwealth Criminal Code.

The primary operative provisions for the wage theft offence are at sections 327A to 327C of the Fair Work Act:

- Subsection 327A(1) criminalises intentional wage theft and outlines a range of conduct that would constitute an offence, including failure to pay the required amount to an employee. This also extends to unlawful requirements to spend or repay money (subsection 327A(4)).
- The offence only captures intentional underpayments. It does not apply where the underpayment is accidental, inadvertent or based on a genuine mistake by an employer. Intention is the relevant fault element and the prosecution will need to prove that the employer's conduct was intentional, and that the intended result was that an employee was underpaid.
- Section 327B makes provision for the Voluntary Small Business Wage Compliance Code, which provides a pathway to encourage small business employers to self-disclose underpayments to the FWO. This is explained in more detail below.
- Section 327C specifies how proceedings for the offences may be commenced. In addition to employers, other persons (including individuals or other corporate entities) can also be prosecuted under 'related offence provisions' for their conduct.

³ Migrant Workers' Taskforce, [Report of the Migrant Workers Taskforce](#), March 2019, Recommendation 6, p10.

⁴ Economic References Committee (ERC), [Systemic, sustained and shameful](#), March 2022, Recommendation 1, p ix.

⁵ ERC, [Systemic, sustained and shameful](#), March 2022, p 8.

Application

The wage theft offence applies to intentional underpayments occurring on or after 1 January 2025. The wage theft offence generally covers intentional underpayments of employee entitlements under the Fair Work Act or a fair work instrument (such as a modern award or enterprise agreement).

Some exceptions apply, consistent with the existing limitations on the states' referral of powers to the Commonwealth that is relied on for the Fair Work Act generally. The states' referral of powers to the Commonwealth relevantly excludes superannuation, long service leave, paid leave that the employee was entitled to take by reason of being a victim of crime, and paid leave that the employee was entitled to take because the employee attended for service on a jury, or for emergency services duties.

Liability of bodies corporate and accessories

A body corporate may be held liable for a wage theft offence based on the actions of its employees and/or agents or officers acting within their authority (via default provisions in Part 2.5 of the Schedule to the *Criminal Code Act 1995* (the Criminal Code)). Officers of bodies corporate (including directors) can also be liable for wage underpayment as ancillary offenders, where there is sufficient culpability (Part 2.4 of the Criminal Code and section 6 of the *Crimes Act 1914*).

Liability was also extended to the Commonwealth Government in its role as an employer (but not to other Australian governments).

Penalties

The wage theft offence carries a maximum of 10 years' imprisonment for individuals, and/or a maximum fine of the greater of:

- 3 times the amount of the underpayment, if the court can determine that amount, or
- for an individual: 5,000 penalty units (\$1,650,000); or for a body corporate: 25,000 penalty units (\$8,250,000).⁶

Where an employer is found guilty of committing 2 or more offences that arose out of a course of conduct, for the purposes of sentencing, the person will be taken to be guilty of a single offence (subsection 327A(8)).

Safe haven

The Fair Work Act provides pathways to encourage employers to self-disclose underpayments to the FWO. If certain requirements are met, the FWO must not refer employers for criminal prosecution for wage theft. These pathways include:

- Compliance with the **Voluntary Small Business Wage Compliance Code**. If a small business employer can satisfy the FWO that they have complied with the Code by evidencing that an underpayment was not intentional, the FWO must not refer that underpayment for criminal prosecution. The FWO will assess this by looking at several factors such as the small business

⁶ The value of a Commonwealth penalty unit (currently \$330) is scheduled to be increased on 1 July 2026, with the amount to be determined at the time this submission was made.

taking reasonable steps to work out correct pay rates and entitlements or making a reasonable effort to stay up to date with changes to their obligations, including in workplace laws.⁷

- Entry into a **cooperation agreement** with the FWO. While in force, the FWO must not refer conduct subject to a cooperation agreement for criminal prosecution and the agreement would generally require the underpayments to be rectified. The FWO has published guidance material about cooperation agreements, also developed through a tripartite consultative process with unions and employer associations.

The FWO may still exercise other compliance powers (such as issuing a compliance notice that underpayments be rectified), or it may take civil action, if appropriate. Affected employees and employee organisations may also take civil action to address underpayments.

The FWO's role in addressing wage theft and underpayments

The FWO as the national workplace regulator has a range of functions including:

- providing education, assistance, advice and guidance to employers, employees, regulated workers, regulated businesses, persons in a road transport contractual chain, outworkers, outworker entities and organisations
- promoting and monitoring compliance with workplace laws
- inquiring into and investigating breaches of the Fair Work Act
- taking appropriate enforcement action
- performing its statutory functions efficiently, effectively, economically and ethically.

In relation to the wage theft criminal offence, the FWO is responsible for investigations and will refer matters to the Commonwealth Director of Public Prosecutions (CDPP) or the Australian Federal Police for consideration and prosecution where appropriate. Following an investigation, a matter will be referred to the CDPP if the FWO considers there is sufficient evidence to prove the offence and a prosecution is in the public interest, having regard to the considerations outlined in the FWO's Compliance and Enforcement Policy.

The FWO was provided \$49.5 million over 4 years from 2023-24 to undertake its new role as the investigatory agency for the wage theft offence. The FWO has established a new dedicated unit to undertake its criminal investigations, established new technology and business processes and policies and staff training to support this new function, and supported development of the Voluntary Small Business Code, including consultations with stakeholders.

In addition to the wage theft offence, the FWO has a range of powers to investigate allegations of wage underpayments and pursue a range of civil remedies under the Fair Work Act,⁸ including commencing litigation. This is relevant to considering the broader framework to address wage underpayment which can range from inadvertent through to serious and systemic underpayments, and wage theft.

A civil remedy provision enables an affected party, such as the FWO or an employee, to apply to a court for an order against the alleged wrong-doer when the provision is contravened. This includes pecuniary penalty orders, which provide for a civil penalty to be paid to the Commonwealth or, where

⁷ Subsection 6(3) of the *Voluntary Small Business Wage Compliance Code Declaration 2024*.

⁸ Subsection 539(2) of the Fair Work Act.

appropriate, for the penalty to be redirected to an impacted party, including organisations. Higher civil penalties apply for ‘serious contraventions’: when a court finds that a person/business knew they were contravening an obligation under workplace laws or were reckless as to whether the contravention would occur.⁹

The FWO provides an update on its annual performance in its Annual Report. In 2024-25, the FWO recovered more than \$358 million in unpaid wages for more than 249,000 workers, commenced 73 civil litigations, and secured its largest ever total court-ordered penalty of \$15.3 million for the former operators of Sushi Bay outlets in New South Wales, Darwin and Canberra for deliberately underpaying 163 workers more than \$650,000.¹⁰

Closing Loopholes amendments to the civil remedy provisions

The criminal wage theft offence was introduced alongside amendments to strengthen the Fair Work Act’s civil remedy provisions to address underpayments. The Closing Loopholes No. 2 Act included amendments that:

- increased the maximum civil penalty for a contravention related to an underpayment for a non-small business employer
- introduced a new threshold for ‘serious contraventions’ of the Fair Work Act: now a serious contravention can be found where there has been a ‘knowing or reckless’ contravention instead of the previous threshold of ‘knowing and systematic’
- increased penalties for non-compliance with a compliance notice.

These amendments to civil remedy provisions were introduced as part of the government’s election commitment to implement the recommendations of the Migrant Workers’ Taskforce Report (2019) to address the prevalence of underpayments and align penalties with business and consumer law frameworks.

Alongside the criminal wage theft offence, these amended civil penalty measures form a graduated enforcement framework to address the full spectrum of non-compliance with workplace obligations.

⁹ For example, breaches of the National Employment Standards, a modern award or an enterprise agreement, or unlawful deductions – refer to section 557A of the Fair Work Act.

¹⁰ FWO, *Annual Report 2024-25*, p xii.