

Submission to the Senate Inquiry into Wage Theft

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1. Thank you for the opportunity to make this submission. We are academics with expertise in the field of labour law at Melbourne Law School, where we are members of the Centre for Employment and Labour Relations Law (CELRL).
2. We have been researching the enforcement of employment standards in Australia for more than sixteen years. Along with other research, we are currently engaged in a research project investigating the impact of the Fair Work Ombudsman's use of administrative sanctions and civil litigation which is funded by the Office of the Fair Work Ombudsman (FWO). Associate Professor Hardy is also engaged in an Australian Research Council Linkage Grant (LP250100337) with the FWO in relation to its current tripartite initiative.¹ We have also written extensively – via submissions and articles – on deterrence and the criminalisation of wage theft.²

Scope of Inquiry and Clarification of Terminology

3. We note that the terms of reference of this inquiry are stated to be as follows:

The extent to which the wage theft framework under the Fair Work Act 2009, 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.

4. We note that the term 'wage theft' is not defined in the FW Act and lacks a settled meaning. It is unclear whether this inquiry is directed primarily, if not exclusively, at deliberate, intentional and/or dishonest underpayment,³ or whether it is concerned with underpayment contraventions more generally, regardless of whether this occurs on a deliberate or inadvertent basis.

¹ This research project is being conducted with Associate Professor Stephen Clibborn (University of Sydney) and Professor Joel Cutcher-Gershenfeld (Brandeis University).

² See, eg, Tess Hardy, *Criminalisation of Wage Theft under the Fair Work Act: A New Dawn for Deterrence?* (2024) 37 *Australian Journal of Labour Law* 218; Tess Hardy 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) 37 *International Journal of Comparative Labour Law and Industrial Relations* 133; Tess Hardy, John Howe and Melissa Kennedy, 'Criminal Liability for 'Wage Theft': A Regulatory Panacea?' (2021) 47(1) *Monash Law Review* 174; and Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

³ The term 'underpayment' is used in this submission to refer to any form of non-payment or underpayment of wages and monetary benefits to which an employee is legally entitled under work-related legislation, an industrial instrument or an employment contract. See Senate Economic References Committee, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration*, Parliament of Australia, Canberra, 2022 [1.27].

5. It is also not clear whether this inquiry is solely interested in the operation and impact of the criminal wage theft offence which was introduced as part of the Closing Loopholes reforms,⁴ or the ‘wage theft framework’ more generally (which is understood to mean other statutory provisions of the FW Act relating to compliance and enforcement).⁵ This is significant given that the criminal offence set down in s 327A does not operate in isolation from other provisions in the Act, including provisions allowing the FWO, and others, to bring pecuniary penalty proceedings, issue administrative sanctions and exercise statutory powers.
6. It is important to recognise that while the criminal ‘wage theft’ offence has attracted much attention, other significant reforms to the compliance and enforcement framework were introduced as a result of the Closing Loopholes reforms. This includes a revised definition of ‘serious contravention’⁶ which allows for higher maximum penalties to be imposed where a person has knowingly or recklessly contravened relevant civil remedy provisions. Maximum penalties have also been increased by a factor of five for ‘selected civil remedy contraventions’.⁷ This makes it virtually impossible to isolate the causative effect of s 327A in relation to the ‘incidence of wage theft’ from other relevant statutory provisions.

Impact of Wage Theft Framework on Incidence of Wage Theft

7. It is notoriously difficult, if not impossible, to accurately measure the ‘incidence of wage theft’. There are multiple reasons for this data deficit. Some of the more egregious conduct is the most difficult to detect.⁸ There is no comprehensive database that captures the minimum monetary entitlements owing to employees under statute, modern awards or enterprise agreements. Even where an underpayment has been identified via a complaint database or independent surveys, the data does not generally reveal the knowledge or intention of the alleged wrongdoer.
8. Certainly, there is a growing evidence base that wage underpayment, and other contraventions of monetary obligations, continues to be a significant problem in Australia.⁹ This was confirmed by the recent study conducted by the CELRL on underpayment of young workers in Australia.¹⁰ We note, however, that the survey

⁴ FW Act, s 327A.

⁵ FW Act, Chapter 4.

⁶ FW Act, s 557A.

⁷ FW Act, s 546(2AA). These higher penalties may generally be involved in response to breaches of the National Employment Standards, award and agreement obligations, payslip and record-keeping obligations and compliance notice requirements.

⁸ Tess Hardy, ‘Detection and Enforcement of Work Law Violations’ in Guy Davidov et al (eds) *The Oxford Handbook of the Law of Work* (OUP, 2024).

⁹ See Rebecca Thistleton, *Unfinished Business: The Ongoing Battle Against Wage Theft* (McKell Institute Victoria, 2023); Brendan Coates et al, *Short-Changed: How to Stop the Exploitation of Migrant Workers in Australia* (Grattan Institute, 2023).

¹⁰ John Howe and Tom Dillon, *Overworked and Underpaid: The Wages Crisis Facing Young Workers in Australia*, Centre for Employment and Labour Relations Law, 2025.

which underpinned this study was conducted in 2024, before the criminal offence for wage theft came into effect on 1 January 2025. Further, the survey did not measure the incidence of wage theft across the Australian economy.

9. Given the absence of any reliable baseline data measuring the incidence of wage theft prior to the commencement of the criminal wage theft offence, it is not possible to determine whether the criminal wage theft offence has led to any decrease in the incidence of wage theft. Even if it could be established that there has been a decline in the incidence of underpayment contraventions, it is not possible to attribute this drop to the criminal wage theft offence given that it was not introduced, and does not operate, in a regulatory vacuum. Corporate compliance is a complex, dynamic process which may shift according to changes in personnel, the broader socio-economic environment and a range of regulatory interventions.

Drivers of Non-Compliance and Deterrence

10. The primary justification for introducing criminal sanctions, as well as higher civil penalties, in response to wage underpayment is the notion that this will aid in deterrence.¹¹ It is assumed that greater deterrence will automatically lead to enhanced compliance.¹² In line with this classical conception of deterrence, the Explanatory Memorandum to the Closing Loopholes Bill noted that:

*Criminalising wage theft will further deter deliberate underpayments, and higher civil pecuniary penalties for contraventions involving worker exploitation would help promote a robust ‘compliance culture’ in relation to workplace laws across Australian businesses.*¹³

11. While deterrence – via criminal sanctions or otherwise – is one way in which to promote corporate compliance, its potential and effect is often overstated and frequently misunderstood.¹⁴ There is a growing body of empirical studies in a range of different fields which have questioned many assumptions that underpin orthodox deterrence theory.¹⁵ For example, it is evident that not every regulated actor is motivated by rational objectives or calculative decision-making. Instead, many studies have found that compliance (or non-compliance) may be driven or perpetuated by a range of different drivers.¹⁶ These may include social norms,

¹¹ See, eg, Gary S Becker, ‘Crime and Punishment: An Economic Approach’ (1968) 2 *Journal of Political Economy* 169.

¹² Hardy ‘Digging into Deterrence’ (n 2).

¹³ Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), Parliament of Australia, 2022-2023.

¹⁴ ALRC, *Corporate Criminal Responsibility* (Discussion Paper No 87, 2019) (‘ALRC 2019’). See also Natalie Schell-Busey et al, ‘What Works: A Systematic Review of Corporate Crime Deterrence’ (2016) 15 *Criminology & Public Policy* 387.

¹⁵ Benjamin van Rooij, Malouke Kiuper and Alex Piquero, ‘How Legal Punishment Affects Crime: An Integrated Understanding of the Law’s Punitive Behavioural Mechanisms’ (2025) 21 *Annual Review of Law and Social Science* 509.

¹⁶ Christine Parker and Vibeke Nielsen, ‘Compliance: 14 Questions’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press 2017) 217–32; Stephen Clibborn and Sally Hanna-

normative concerns and issues relating to knowledge and capacity, such as a lack of awareness of the relevant laws, or an absence of necessary resources to support accurate compliance.¹⁷

12. We sought to deepen our understanding of compliance and deterrence in the context of underpayment matters in a recent survey that we designed and commissioned.¹⁸ The primary purpose of the 2025 survey was to investigate business awareness of, and responses to, FWO enforcement activities including proactive activities and inspection campaigns, enforceable undertakings and civil penalty litigation in select industries, namely horticulture and cafes/restaurants. We conducted a similar survey in 2015.¹⁹
13. In the 2025 survey, we asked respondents in the two select industries about what action they took on becoming aware of FWO enforcement activities. The most common response was that, upon becoming aware of the FWO's targeted campaign, enforceable undertaking and/or civil remedy litigation, the business had reviewed its systems to ensure compliance (48%). In addition, more than a quarter of surveyed businesses (28%) had reported that they changed their procedures to ensure compliance with wage obligations. A similar proportion of businesses (27%) sought external advice from a legal or HR professional.
14. We also asked businesses which factors were most important in encouraging changes to compliance procedures. Almost 90% of businesses identified reputational concerns as an important factor. Around two-thirds of surveyed businesses identified the following factors as either important or extremely important in prompting changes to their compliance procedures:
 - a. A sense that changes in the law were a positive development that employer should willingly comply with (68%);
 - b. Direct contact with the FWO (66%);
 - c. Additional penalties for serious contraventions (64%);
 - d. Introduction of criminal penalties for wage theft (62%);
 - e. Pressure from the business' employees (61%).

Osborne, 'The Employer Perspective on Wage Law Non-Compliance: State of the Field and a Framework for a New Understanding' (2023) 62 *Industrial Relations* 411.

¹⁷ Robert A Kagan and John T Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff, 1984) 67, 67.

¹⁸ This survey was conducted by Wallis Market & Social Research on behalf of Melbourne Law School and the FWO. Respondents were drawn from the 'horticulture' and 'cafes and restaurants' sectors. The industries were chosen, in part, because they have routinely been identified as a 'priority sector' by the FWO and have been the subject of focused enforcement activity over several years. There were 570 responses to the survey, of which 395 were completed by Computer Assisted Telephone Interviewing, and 175 were completed online.

¹⁹ See Hardy and Howe 2017 (n 2); John Howe and Tess Hardy, 'Business Responses to Fair Work Ombudsman Compliance Activities' (Centre for Employment and Labour Relations Law, Melbourne Law School, Research Report, January 2017).

15. This finding tends to reinforce key themes emerging in the broader literature on compliance and enforcement. For a start, the introduction of significant penalties – both civil and criminal – can have deterrence effects in and of themselves.²⁰ That said, this finding also suggests that there are many factors that shape compliance behaviour which go far beyond deterrence-based or calculative concerns.
16. Another key finding which emerged from the 2025 survey relates to the perceived risk of detection and penalty on the part of surveyed businesses. When presented with a hypothetical situation where a small business had deliberately underpaid its workers by \$5,000, around half of the respondents agreed that it would be either ‘highly likely’ (43%) or ‘likely’ (16%) that the FWO would find out about the breach. When asked about the chances that a small business deliberately underpaying workers would be fined by a court, almost half the businesses (48%) thought it was highly likely, and a further 19% of businesses thought it was likely. More than half of the survey respondents (54%) thought it was either ‘highly likely’ or ‘likely’ that if a company was found to have underpaid employees, an individual such as a director or HR manager would be fined.
17. This last set of findings is especially important in light of empirical studies of deterrence which suggest that a firm’s assessment of legal risk is not necessarily influenced by the ‘objective severity and subjective fearsomeness of the sanctions imposed’.²¹ Instead, it has been found that it is the belief that duty-holders have of the likelihood and degree of punishment which is crucial in shaping compliance decisions.²²
18. Before examining the elements of the criminal offence in the FW Act in more detail, it is important to recognise that the FWO’s approach – which actively combines a complementary set of practices in a graduated manner – appears to be largely in line with best practice models of enforcement, including responsive regulation and strategic enforcement.²³ Ultimately, however, adopting a regulatory mix, which includes, but is not confined to, criminal prosecution for wage theft, arguably provides the most effective avenue for promoting compliance with minimum employment standards across the Australian economy.

The Criminal Offence in the FW Act

19. The ‘wage theft’ offence in the FW Act, specifically s 327A, was drafted to ensure criminal liability may only be ascribed where it can be proved that the employer has

²⁰ Daniel Galvin, ‘Deterring Wage Theft: Alt-Labour, State Politics and the Policy Determinants of Minimum Wage Compliance’ (2016) 14 *Perspectives on Politics* 324.

²¹ Caron Beaton-Wells and Christine Parker, ‘Justifying Criminal Sanctions for Cartel Conduct: A Hard Case’ (2013) 1 *Journal of Antitrust Enforcement* 198.

²² Sally Simpson, *Corporate Crime, Law and Social Control* (Cambridge University Press, 2002); and Neil Gunningham, ‘Prosecution for OHS Offences: Deterrence or Disincentive’ (2007) 29 *Sydney Law Review* 389.

²³ Daniel Galvin et al, ‘Powers and Practices in Labor Standards Enforcement’ (2026) *Regulation and Governance* 1.

engaged in conduct with the requisite intent.²⁴ The inclusion of this fault element (derived from s 5.2 of the Criminal Code) was designed to ensure that ‘underpayments that are accidental, inadvertent or based on genuine mistake are not caught.’²⁵ The requirement to prove fault to the criminal standard of proof in s 327A is in line with the Attorney-General’s Department guidance on framing Commonwealth offences.²⁶

20. There are a number of novel features of the criminal wage theft offence in s 327A which distinguish it from a civil remedy contravention relating to underpayment. This includes distinctive principles relating to corporate attribution under section 12.3 of the Criminal Code and the way in which liability may be ascribed to persons other than the employer (under the related offence provisions).²⁷
21. In our view, amending the elements of the offence (prior to any judicial consideration of the offence and its application to wage theft) is premature and unjustified.

Practical Obstacles to Investigation and Prosecution of the Wage Theft Offence in the FW Act

22. Accepting that there are valid moral and instrumental justifications for introducing criminal liability for wage theft,²⁸ there remain several practical issues that need to be navigated by the FWO and the prosecuting authorities in order to bring a successful prosecution under s 327A.
23. First, it is important to recognise that s 327A commenced on 1 January 2025 and has no retrospective effect. This means that the contraventions which fall within the scope of the offence must have taken place since that date. It is to be expected that some time must pass following the introduction of the offence before an underpayment occurs which is of sufficient seriousness and quantum to warrant a criminal investigation and prosecution (as opposed to a civil response). Generally-speaking, criminal sanctions are said to be ‘reserved for contraventions where denunciation and condemnation is required and where the deterrent effect of a civil penalty would be insufficient.’²⁹ Criminal investigations and prosecutions can be shown to have negative or counterproductive effects where the circumstances do not justify state sanction of this type.³⁰ In line with this, under the FWO’s Compliance

²⁴ For further discussion, see Hardy 2024 (n 2).

²⁵ Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (Cth), Parliament of Australia, 2022–2023 ([890].

²⁶ Attorney-General’s Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (2024 Report).

²⁷ Criminal Code ss 11.1-11.5

²⁸ For a critique of deploying criminal law in this context, see Benjamin Levin, ‘Wage Theft Criminalisation’ (2021) 54 *University of California Davis Law Review* 1429; and Stephanie Richard, ‘Against Criminalising Wage Theft: Lessons from the Anti-Trafficking Movement’ (2025) 46(4) *Cardozo Law Review* 1318.

²⁹ ALRC Discussion Paper (n 14) 35.

³⁰ Benjamin van Rooij, Malouke Kiuper and Alex Piquero, ‘How Legal Punishment Affects Crime: An Integrated Understanding of the Law’s Punitive Behavioural Mechanisms’ (2025) 21 *Annual Review of Law and Social Science* 509.

and Enforcement Policy, the regulator reserves pursuit of criminal sanctions ‘for the most serious conduct, including where there is a greater need for specific or general deterrence than civil litigation’.³¹

24. Criminal investigations are often complex and extremely resource-intensive. Investigations into underpayments affecting vulnerable workers are frequently complicated because of fears of employer retribution for speaking out. If the workers do not speak English fluently, or are not literate, investigation resources may be further stretched to ensure that evidence is accurately translated, recorded and explained. Moreover, it is critical that any investigation into a suspected offence is conducted in accordance with the criminal procedural and evidentiary rules to ensure that any evidence which is collected is ultimately admissible.³²
25. Further, it is significant that while the FWO is responsible for undertaking the criminal investigation, it is not ultimately authorised to initiate a criminal prosecution. Rather, the power to prosecute the criminal wage theft offence is reserved to the Commonwealth Director of Public Prosecutions (CDPP) and/or the Australian Federal Police. It is notable that the CDPP has a set of ‘prosecution performance indicators’, which includes a target of 90% for prosecutions resulting in a finding of guilt. One of the reasons behind the CDPP’s KPIs is that bringing unsuccessful prosecutions can delegitimise regulation and ultimately be counterproductive. In considering potential referrals, the FWO needs to ensure it has a strong case which has a good chance of being accepted by the CDPP. That said, in preparing the referral, the FWO must ensure that the evidence in support of the prosecution meets the criminal burden of proof of ‘beyond reasonable doubt’, as distinct from the lower civil burden, ‘on the balance of probabilities’.
26. More generally, where prosecuting authorities, such as the AFP or the CDPP, are authorised to bring prosecutions for white collar crimes, such as wage theft, there may be resistance or reluctance to prepare or pursue briefs due to a perception that such matters are ‘not really criminal’ compared to other crimes and certainly not worth the expenditure of precious and limited resources. As Cabrelli has observed in the UK context, there is often a common perception that ‘the costs of criminal enforcement may be too high and criminalisation may be disproportionate in light of the magnitude and extent of the wrong.’³³ Furthermore, criminal trials into allegations of corporate wrongdoing often involve long delays.³⁴
27. Given the significant increase in civil penalties, and the higher evidentiary burden under the criminal law, the FWO will no doubt be stepping carefully in determining which contraventions warrant the use of criminal sanctions over civil proceedings

³¹ FWO, Compliance and Enforcement Policy, 1 January 2025, 20.

³² Criminal process rights set out in the Crimes Act and Criminal Code apply to investigations of suspected offences under s 327A.

³³ David Cabrelli, ‘Using Criminal Law to Enforce Statutory Employment Rights’ in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 53, 64.

³⁴ Richard (n 28).

(particularly where there is capacity to obtain higher fines and engage in more strategic enforcement in the civil realm).³⁵

28. In the context of the FWO, a small number of criminal investigations (and prosecutions) is not necessarily inappropriate, as long as it is complementary to the overall regulatory mix deployed by the agency.

³⁵ Hardy 2024 (n 2) 241.