

22 April 2026

Committee Secretariat
Senate Education and Employment References Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Email via: eec.sen@aph.gov.au

Dear Committee Secretariat

Thank you for the opportunity to make a submission to the Senate's Education and Employment References Committee (**Committee**) Inquiry into Wage Theft (**Inquiry**). This submission outlines the role of the Office of the Fair Work Ombudsman (**FWO**) in relation to the criminal offence for the intentional underpayment of employee wages and entitlements, including work undertaken by the FWO to implement the new criminal jurisdiction. It also provides an overview of the FWO's work in addressing underpayments more broadly within its statutory framework since the agency's establishment in 2009.

Role of the FWO

The FWO is an independent statutory office established by the *Fair Work Act 2009* (Cth) (**Fair Work Act**). It comprises the Fair Work Ombudsman (as the Accountable Authority), Fair Work Inspectors and staff. The FWO's functions as the national workplace relations regulator are set out in section 682 of the Fair Work Act and include:

- promoting harmonious, productive and cooperative workplace relations in Australia
- promoting compliance with the Fair Work Act, including by providing education, assistance and advice to employers, employees, regulated workers, regulated businesses and other persons in a road transport contractual chain, outworkers, outworker entities and organisations
- inquiring into and investigating alleged breaches of the Fair Work Act
- taking appropriate enforcement action, including by commencing civil court proceedings or referring matters to relevant bodies for potential criminal prosecution, and
- publishing a compliance and enforcement policy.

The FWO's strategic enforcement model

To effectively achieve its statutory functions and vision of 'working for fairer workplaces', the FWO utilises a strategic enforcement model, reflected in the FWO's publicly available [Compliance and Enforcement Policy](#) and [Statement of Intent](#).

The model comprises three main responses to allegations, evidence and suspected instances of non-compliance. It recognises that non-compliance exists along a continuum - from inadvertent or unintentional

breaches at one end to egregious and deliberate conduct at the other. In the majority of cases, the FWO encourages voluntary compliance through advice, education and dispute assistance services. This approach supports workers and employers to understand their legal obligations, communicate effectively, and make informed choices to remediate inadvertent non-compliance. Where appropriate, the FWO may adopt a guided compliance approach, requiring duty holders to take certain steps to rectify non-compliance.

Enforced compliance is reserved for the most serious and systemic contraventions. In such cases and where it is in the public interest, the FWO may commence civil proceedings to seek financial penalties. More recently, the FWO may also consider referring matters to relevant bodies for potential criminal prosecution. A key purpose of enforced compliance is to address and deter serious forms of non-compliance and promote compliance with workplace laws more generally.

The FWO's graduated approach is based on strategic enforcement principles and ensures enforcement tools, including litigation, are primarily used when cooperative or voluntary approaches have failed or are inappropriate. Strategic enforcement enables the FWO to redress serious and systemic issues through activities that address the root causes of non-compliance and have an ongoing impact at sector levels.

Working collaboratively and constructively with workplace community stakeholders is also key to the FWO's regulatory approach. The FWO actively advances tripartism through its Advisory Group and reference groups comprised of employer organisations and unions, to expand the agency's reach and optimise efforts to promote harmonious, cooperative and compliant workplaces. The FWO also undertakes parallel regulation with other Commonwealth, State and Territory regulators in areas of shared responsibility to detect and address non-compliance with workplace laws. Building a culture of compliance with the Fair Work Act is a collective effort, and the FWO relies on information and intelligence about potential non-compliance with workplace laws from a range of sources, including unions, employer organisations, other government regulators, parliamentarians, the media, and members of the public to inform its work.

This regulatory context informs the approach the FWO adopts to addressing 'wage theft', including how the agency calibrates its regulatory response across the full continuum of non-compliance.

What is 'wage theft'?

'Wage theft' is a commonly used term that generally describes conduct that results in workers not receiving the full wages and entitlements they are legally entitled to be paid. While the Inquiry uses the term, it is not a defined concept in the Fair Work Act and does not have a single, settled meaning across the community.¹

In practice, the term 'wage theft' is often applied broadly to a range of underpayment scenarios, from accidental or inadvertent errors (including genuine mistakes about award coverage, classification, or payroll systems) through to serious, systemic and deliberate conduct. This makes it difficult to measure the prevalence or impact of 'wage theft' using a single metric and reinforces the need for a proportionate regulatory response from the FWO that can address non-compliance across this continuum.

¹ T Hardy, 'Criminalisation of Wage Theft under the Fair Work Act: A New Dawn for Deterrence?' *Australian Journal of Labour Law*, 2024, 37(2), 218 – 241.

While recent reforms have added a criminal offence targeted at the most egregious and intentional underpayment of wages and entitlements, the FWO's work has long focused on addressing underpayments using the full range of tools available in the civil compliance framework in the Fair Work Act.

The FWO's historical work addressing underpayments of wages and entitlements

Since its establishment in 2009, the FWO has recovered in excess of \$2.6 billion in unpaid wages and entitlements for more than 1.4 million workers nationwide. Over this period, the FWO has used the civil compliance framework in the Fair Work Act extensively to address wage underpayments and deter non-compliance. As of 31 December 2025, the FWO had filed over 950 litigations, entered into more than 280 enforceable undertakings, issued over 13,500 compliance notices and secured more than \$92 million in court ordered penalties.

Over the past five years, the FWO has increasingly seen many larger corporates, not-for-profits and other businesses self-report underpayments, with issues spanning multiple years and involving large numbers of employees. This has included significant and well-publicised underpayments, often described in the media under the umbrella of 'wage theft', although in most instances the conduct pre-dates the new criminal offence and would not meet the requisite level of criminal intent. These underpayments have involved some of Australia's largest and most well-known businesses and have resulted in the FWO entering into significant enforceable undertakings and securing large court-ordered penalties.² In 2024-25, the FWO received 162 self-reports, an average of 3.1 per week. In the first half of 2025-26, the number of businesses coming forward has increased to 91, or 3.5 per week, which is tracking towards almost double the number of self-reports received in 2021-22 when 92 businesses came forward, an average of 1.8 per week. The continued high volume of self-reports indicates that businesses are actively seeking to identify and fix issues and supports the FWO's proposition that the majority of businesses want to make things right when mistakes happen.³ The FWO's observation is that the existence of the new criminal offence appears to be encouraging some businesses to take active steps to increase compliance (even in the absence of identified concerns), self-report underpayments to the FWO and put practices in place to prevent underpayments from reoccurring.

The FWO publicises enforceable undertaking and civil litigation outcomes to ensure they act as an ongoing deterrent against intentional wrongdoing and raise awareness around the importance of implementing sound compliance practices.⁴

The compliance framework in the Fair Work Act has undergone numerous legislative amendments since its commencement which have enhanced the mechanisms available to the FWO to address and deter non-compliance with workplace laws. In addition to the introduction of the criminal offence for the intentional underpayment of wages and entitlements, other recent changes have included:

² For example, see D Marin-Guzman, '[Court whacks CBA with record \\$10m fine for wage theft](#)', Australian Financial Review, 15 February 2024, accessed 21 April 2026; B Schneiders, '[Crown under investigation for wage theft](#)', The Sydney Morning Herald, 28 February 2021, accessed 21 April 2026.

³ For context, the FWO has assisted in the recovery of over \$1.9 billion for workers through self-reported wage underpayments since the agency's establishment in 2009.

⁴ For example, see '[FWO secures record \\$10.34 million penalties against Commonwealth Bank and CommSec](#)', '[Westpac signs Enforceable Undertaking after underpaying \\$50 million](#)', '[Optus Retail signs Enforceable Undertaking](#)' and '[Record penalties of \\$15.3 million for exploitation of migrant workers at sushi outlets](#)'.

- a significant increase in civil penalties for certain civil remedy contraventions, including breaches of the National Employment Standards and modern awards
- a lowered threshold of ‘recklessness’ for ‘serious contraventions’, and
- a strengthening of penalties for a failure to comply with a compliance notice.⁵

The criminalisation of intentional underpayments

Section 327A of the Fair Work Act commenced operation on 1 January 2025 as part of the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* and established a criminal offence for the intentional underpayment of wages or entitlements by employers and individuals (**Offence**).

The Offence only applies to intentional underpayments from 1 January 2025, including where they are part of a course of conduct that started before the provisions took effect and continued post 1 January 2025. The Offence does not apply where underpayments are accidental, inadvertent or based on a genuine mistake by an employer.

In addition, there are two ‘safe harbour’ mechanisms in relation to the Offence:

- the Voluntary Small Business Wage Compliance Code (**the Code**) is a legislative instrument developed by the FWO under the Fair Work Act that provides assurances for small businesses that have unintentionally underpaid their workers.
- the FWO may enter into a cooperation agreement with an employer, business or individual who has told the FWO that they have engaged in conduct that may constitute the Offence.

The safe harbour mechanisms only operate in relation to possible criminal prosecution. The FWO is not prevented from taking other enforcement action in relation to an underpayment, such as commencing civil penalty litigation or entering into an enforceable undertaking, if one of the safe harbour mechanisms is relied upon.

The FWO is primarily responsible for investigating the Offence and will refer matters to the Commonwealth Director of Public Prosecutions (**CDPP**) to commence proceedings. The CDPP, as a separate statutory agency and prosecution service, will then independently consider if there is sufficient evidence to prove the offence and it is in the public interest to commence a prosecution (in line with the *Prosecution Policy of the Commonwealth*). Matters may also be referred to the Australian Federal Police (**AFP**) as appropriate, such as where further investigative assistance is required. The FWO’s Compliance and Enforcement Policy outlines the public interest factors which are considered by the FWO when determining whether a referral for potential criminal prosecution may be appropriate, such as the nature, seriousness and circumstances of the alleged conduct.

Funding for the Offence

As part of the 2023-2024 Mid-Year Economic and Fiscal Outlook, the Government confirmed funding of \$55 million over four years from 2023–24 (and \$12.5 million per year ongoing) to support the introduction of the Offence. This funding includes \$49.5 million (including capital funding of \$8.3 million) over four years (\$11.0

⁵ See, [Fair Work Legislation Amendment \(Closing Loopholes\) Act 2023](#).

million per year ongoing) for the FWO to undertake the investigatory functions for the Offence and operate technology systems to undertake investigations to a criminal standard. The funding supports:

- specially trained Fair Work Inspectors who undertake criminal investigations, which must be segregated from civil investigations
- evidence management staff to manage the collection, chain of custody and analysis of physical and digital evidence, and prosecution disclosure requirements
- legal support
- expert forensic technology and data analysis
- calculations support to determine underpayment amounts
- investigation costs related to witnesses (for example, transcription and translation), evidence gathering and execution of search warrants, including travel
- technology operating costs associated with a secure protected environment to host case management, handling, processing, analysis and storage of evidence in accordance with criminal investigation standards, and
- ongoing costs associated with staffing, equipment and property.

Implementing the Offence

The FWO established its Criminal Investigations Branch to prepare for and support the implementation of the new criminal jurisdiction, and to lead the criminal investigation function on an ongoing basis.

The shift from being a solely civil to a dual track (civil and criminal) regulator and integration of the new criminal jurisdiction into the FWO's ongoing operations required (and continues to require) a significant uplift in systems, processes and capability to support successful criminal offence referrals and potential prosecution by the CDPP.

To implement the new jurisdiction, the FWO has:

- made capital investment in physical infrastructure for management of evidence (physical and digital) to a criminal standard (for example, building secure evidence rooms that comply with relevant Australian Security Intelligence Organisation Technical Notes, FWO and Department of Employment and Workplace Relations security requirements)
- progressed development, building and maintenance of a case management system and secure platform that meets the requirements for criminal investigations and referrals
- made the operational investment required to conduct criminal investigations, including procurement of evidence-handling hardware such as specialist IT devices, and ongoing costs associated with conducting interviews and searches (for example, development of search warrant kits, travel and translation costs)
- established inter-agency arrangements, including with the AFP and the CDPP to support criminal investigations activities and referrals
- entered arrangements for forensic services with Services Australia with associated service fees
- reviewed and updated existing internal policies and processes and developed new internal processes and policies to address specific new requirements under the criminal jurisdiction
- rolled out mandatory training to all staff, and additional targeted training to all Fair Work Inspectors

- developed, through tripartite consultation, the mechanisms that provide safe harbour from criminal prosecution (that is, the Code and cooperation agreements) and resources and guidance on these safe harbour mechanisms for the workplace community, and
- updated the Compliance and Enforcement Policy and the FWO's broader suite of advice and resources to include the criminal jurisdiction and ensure the regulated community understands the Offence.

As at 31 December 2025, the budgeted Average Staffing Level for the Criminal Investigations Branch was 16.7. Staff were recruited to the Branch across multiple recruitment rounds during the last quarter of 2024, with onboarding occurring over late 2024 and the beginning of 2025. The Branch is resourced with Fair Work Inspectors and staff who have skills and experience in supporting and undertaking criminal investigations, evidence management and project delivery.

Advice, education and communication activities developed to support the commencement of the criminal jurisdiction

The FWO has also undertaken significant work to educate the community about the Offence to contribute to its deterrent effect. This has included a multi-channel communications campaign, website content, presentations and the development of tailored guidance materials and resources.

Alongside legislative development of the Code, the FWO developed the *Guide to paying employees correctly and the Voluntary Small Business Wage Compliance Code* to help small businesses take steps to pay their employees correctly and to understand and access the protections of the Code. The guide was informed by a tripartite consultation process with National Workplace Relations Consultative Council members, the FWO's Advisory Group,⁶ the Young Workers Centre and the Australian Small Business and Family Enterprise Ombudsman.

The FWO's comprehensive educational materials are available at fairwork.gov.au to assist the workplace community to understand its approach to the new criminal jurisdiction. Between 1 July 2024 and 31 December 2025, users engaged with the FWO's website, accessing:

- the [Criminal prosecution](#) webpage more than 38,700 times
- the [Cooperation agreements](#) webpage more than 4,000 times
- the [Voluntary Small Business Wage Compliance Code](#) webpage more than 43,000 times
- the [Guide to paying employees correctly and the Voluntary Small Business Wage Compliance Code](#) more than 14,000 times, and
- news articles about the commencement of the new criminal underpayment laws more than 40,000 times.

On 1 January 2025, the FWO launched a communications campaign to raise awareness of the new laws and promote its educational materials. The campaign ran across audio streaming platforms and social media channels (that is, Facebook, Instagram and LinkedIn) and generated significant coverage with a total 15.47

⁶ The Advisory Group is the FWO's core consultative and collaborative mechanism for workplace relations matters of strategic importance. Members include the Australian Chamber of Commerce and Industry, the Australian Council of Trade Unions, the Australian Industry Group, the Business Council of Australia, and the Council of Small Business Organisations Australia.

million impressions. While it targeted all workplace participants, there was a particular focus on small business in relation to the Code and the FWO's educational guidance materials.

Additional promotion has also been undertaken through the FWO's social media channels, email updates to subscribers and the FWO's Employer Newsletter. The FWO continues to raise awareness and understanding of the criminal provisions with presentations to industry associations, businesses, law firms and community legal centres, as well as through a range of other forums including community engagement and dedicated webinars.

Snapshot of investigative work underway

It is approximately 15 months since the FWO's Criminal Investigations Branch was established and the FWO is steadily progressing criminal investigations and assessing new matters for investigation, using the procedures and frameworks developed to support the Offence.

Since 1 January 2025, the Criminal Investigations Branch has assessed 39 matters and commenced 4 investigations into suspected criminal conduct as defined in the Offence. Matters have been both proactively identified and referred from internal and external channels. Currently, the FWO has 3 ongoing operations investigating suspected criminal conduct as defined in the Offence, and 7 matters under assessment to consider progression to criminal investigation. Matters under assessment generally involve undertaking initial investigative activities to determine whether it is appropriate for a matter to proceed as a criminal investigation, in accordance with the FWO's Compliance and Enforcement Policy.

The initial assessment of potential criminal matters is undertaken with a high degree of care and scrutiny. It is typically a detailed and methodical process that may involve the collation and analysis of internal holdings and open-source intelligence, requesting information from other government departments, preliminary evidence gathering through Notices to Produce, and targeted engagement with witnesses. These steps are undertaken to ensure that a decision to progress a matter to criminal investigation is informed, proportionate, and in line with the FWO's Compliance and Enforcement Policy and strategic priorities. Matters not considered appropriate for criminal investigation may be referred internally within the FWO, with the Criminal Investigations Branch providing relevant evidence and analysis to assist with potential civil enforcement options.

The FWO has not yet made any referrals to the CDPP or AFP in relation to the Offence. The duration of an investigation depends on a wide range of factors, including complexity, available evidence and legal considerations. Criminal investigations of the Offence are likely to involve:

- workers who have limited access to documentary evidence (such as employment contracts and payslips)
- complex schemes designed to avoid detection and identification of evidence required to prove intent
- numerous affected workers and may also involve complex business structures
- reliance on coordinated assistance from third parties (for instance, assistance from the AFP to execute search warrants and Services Australia for digital forensic support in seizure and analysis of evidence), and
- potential victims from vulnerable cohorts, who may require support during evidence gathering stages, including where they do not speak proficient English and require the assistance of interpreters.

The FWO is ensuring that these factors are appropriately handled through careful and thorough investigations underpinned by robust investigative processes.

It is not unusual for new penalty regimes to take time to reach the courts, particularly in the criminal context. When compared with civil proceedings, investigations of potential criminal conduct are typically more time and resource-intensive due to the more stringent procedural and evidential requirements. These include identifying and investigating potentially exculpatory evidence, the serious nature of the suspected offending and potential penalties for a defendant, and the higher threshold for a successful criminal prosecution. The existence of statutory use and derivative use immunities in the Fair Work Act, that attach to certain inspector powers and use of evidence, require the FWO to navigate criminal investigations and evidence gathering with care. The FWO must also ensure that persons of interest are afforded the protections of the criminal justice system, while safeguarding the integrity of investigative work so that evidence is admissible in any criminal prosecution initiated by the CDPP. These challenges are common to criminal investigations across a range of regulatory frameworks.

More broadly, it has been the FWO's experience that new civil provisions can also take time to reach the courts. For example, while provisions for serious contraventions under the Fair Work Act took effect on 15 September 2017, the first matter the FWO filed alleging serious contraventions was on 20 May 2019.

The time taken for a matter to reach the courts can be influenced by a number of factors, including identifying a matter where alleged prima facie breaches have occurred post the commencement of relevant provisions, obtaining evidence to satisfy the required evidential thresholds, witness cooperation, and other factors impacting prospects of success and public interest. It is also the FWO's experience that there is often significant effort and investment made in investigating matters that ultimately do not meet the threshold to proceed to court, for reasons specific to the circumstances of each investigation and in accordance with our Compliance and Enforcement Policy. Such matters may be closed or result in other enforcement outcomes.

Against this operational context, the FWO's preliminary observations about the likely deterrent effect of the Offence are set out below.

Impact of the offence on the incidence of 'wage theft'

Quantifying the impact of criminal sanctions on the prevalence of underpayments or 'wage theft' is challenging - not only because of the recency of legislation, but also because, as explored previously in this submission, the term 'wage theft' is often applied to a range of underpayment scenarios.

Data to measure rates of non-compliance with workplace laws in Australia is also not readily available. The compliance framework set out by the Fair Work Act and the FWO's strategic enforcement model are intended to respond to non-compliance that occurs on a continuum, from inadvertent to systemic and deliberate. The FWO responds to all allegations and targets its resources towards the industries and sectors where there is a significant risk or a demonstrated history of systemic non-compliance. Further, a large proportion of the FWO's recoveries in recent years have come from investigations into underpayments self-reported by large corporate entities that reflect cumulative underpayments across multiple years. Given the FWO's focus on high-risk areas, and the extent of self-reported non-compliance, extrapolation of the FWO's data for broader analysis will not be reflective of general non-compliance rates.

The FWO receives thousands of requests for assistance each year, the majority of which relate to wages and entitlements, and is responsible for regulating approximately one million businesses employing workers.⁷ Accordingly, the FWO expects that a graduated strategic enforcement approach, with inadvertent non-compliance remediated through advice, education and dispute assistance and enforced compliance reserved for serious and systemic contraventions, will continue to deliver compliance and enforcement activities that are an effective, ethical and economical use of public resources. The new Offence provides an additional enforced compliance mechanism within the Fair Work Act's compliance framework to address and deter the most egregious and serious forms of conduct that result in an underpayment of a worker's wages or entitlements.

Concluding remarks

The FWO remains steadfastly committed to ensuring that unpaid wages and entitlements are returned to workers as efficiently as possible. As the primary investigative body responsible for investigating possible criminal conduct under the Fair Work Act, the FWO recognises the need to use the full range of powers available to it to address suspected criminal underpayments and deter others from engaging in similar conduct. Our Criminal Investigations Branch is continuing its investigative work as expeditiously as possible to complete investigations to the sufficiency of evidence required to substantiate a criminal offence and referral to the CDPP where appropriate.

I trust that the information in this submission will be of assistance to the Inquiry. The FWO welcomes the opportunity for further engagement with the Inquiry, or to provide any further information or supporting material that may prove helpful. Please contact Mr Anthony Fogarty, Executive Director of Policy, on [REDACTED]

Yours sincerely,

[REDACTED]

Anna Booth
Fair Work Ombudsman

⁷ Australian Bureau of Statistics, (July 2021 – June 2025) [Counts of Australian Businesses, including Entries and Exits](#), ABS Website, accessed 21 April 2026.