

24 April 2026

Senator Maria Kovacic
Chair
Senate Education and Employment References Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

By email: eec.sen@aph.gov.au

Dear Chair

Inquiry into wage theft

1. The Law Council of Australia welcomes the opportunity to contribute to the Senate Education and Employment References Committee (**Senate Committee**) inquiry into wage theft. This submission has been prepared with the assistance of the Industrial Law Committee of the Law Council's Federal Dispute Resolution Section.
2. The Law Council's comments below relate to several matters initially outlined in the Law Council's October 2023 submission about the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023 (2023 Bill)*.¹ These matters remain outstanding despite the passage of the Bill.²
3. The Law Council suggests that the Senate Committee seek to clarify the operation of the *Fair Work Act 2009* (Cth) (**FW Act**) in relation to the intended operation of the provisions outlined below.

Application of wage theft offence to failure to pay contractual entitlements

4. Under section 327A of the FW Act, an employer commits an offence where they are required to pay an amount under 'this Act' and they intentionally engage in conduct that results in a failure to pay the required amount (the **wage theft offence**).
5. Section 323 of the FW Act has been held to require the payment of entitlements (including entitlements to bonuses and commissions) under, among other things, a

¹ Law Council of Australia, Submission to the Senate Education and Employment Legislation Committee, Parliament of Australia, [Fair Work Legislation Amendment \(Closing Loopholes\) Bill 2023](#) (27 October 2023) [41]-[46].

² The *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) received Royal Assent on 14 December 2023.

contract of employment.³ Thus, pursuant to section 323, the wage theft offence would appear to apply to a failure to pay contractual entitlements. The Law Council suggests that the Senate Committee seek to clarify this position.⁴

Limitation periods and continuing offences:

6. Subsection 327C(2) of the FW Act provides that proceedings for the wage theft offence may be commenced ‘within six years after the commission of the offence’. However, there is a significant body of authority, beginning in 1923 with *Jones v Lorne Saw Mills Pty Ltd*,⁵ that has considered whether a failure to pay an amount gives rise to a continuing offence for as long as the amount remains unpaid, which has the effect of postponing the commencement of the limitation period until the amount is paid. These authorities were surveyed in 2018 in *Joseph v Worthington*.⁶
7. It is unclear whether the wage theft offence is intended to be such a provision. The offence relevantly applies where an employer ‘engages in conduct’ and the conduct ‘results in a failure to pay the required amount ... in full on or before the day when the required amount is due for payment’.⁷ It is unclear whether a continuing failure to pay *after* ‘the day when the required amount is due for payment’ is capable of amounting to such conduct.
8. We submit that the Senate Committee should consider whether subsection 327C(2) of the FW Act ought to be amended to provide greater clarity to the commencement of the limitation period.

Referrals, investigations and prosecutions

9. The FW Act provides a framework for the making of cooperation agreements between the Fair Work Ombudsman (**FWO**) and a person who has self-reported to the FWO the possible commission of an offence, or at least the physical elements of an offence. This is intended to provide the person with a ‘safe harbour’ from potential criminal prosecution relating to possible commission of wage theft where they self-report and a cooperation agreement is in place.
10. Under subsection 327B(2) of the FW Act, the FWO is prohibited from referring relevant conduct to the Director of Public Prosecutions or the Australian Federal Police for action in relation to a possible offence against subsection 327A(1) if the FWO is satisfied that a small business employer complied with the Voluntary Small Business Wage Compliance Code. Under subsection 717A(1), the FWO is

³ *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307, [142]; *Association of Professional Engineers, Scientists and Managers Australia v Wollongong Coal Ltd* [2014] FCA 878, [28]-[36]; *Leggett v Hawkesbury Race Cub Limited (No 3)* [2021] FCA 1658, [66], [154]. See also, more recently, *Australian Rail, Tram and Bus Industry Union v Pacific National Executive Services Pty Ltd* [2025] NSWIC 3 at [27]-[63]. The broader approach adopted in these cases was endorsed, by way of *obiter*, in *Australian Workers’ Union v UGL Resources (Contracting) Pty Ltd* [2025] FCAFC 107 at [79]-[82].

⁴ In other Australian jurisdictions, including Victoria and Queensland, wage theft offences are understood to cover a failure to pay contractual entitlements. See *Wage Theft Act 2020* (Vic) s 3(1) (definition of ‘employee entitlement’); and *Criminal Code Act 1899* (Qld) s 391(6A)(c)(i).

⁵ [1923] VLR 58.

⁶ [2018] VSCA 102 [45]-[77].

⁷ *Fair Work Act 2009* (Cth) s 327A(1)(d).

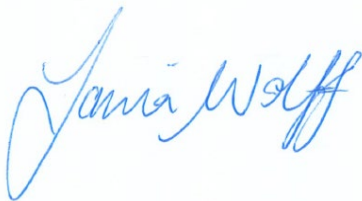
prohibited from making a referral where a cooperation agreement is in force between the FWO and a person.

11. These provisions give rise to two queries. First, even where the FWO is prohibited from making a referral, there would not appear to be any restriction on another person (such as an employee or union) from making a referral. Second, even where the FWO is prohibited from making a referral, there would appear to be no restriction on the DPP or the AFP commencing proceedings for a wage theft offence. In the Law Council's view, it would be desirable to clarify the operation of these provisions and whether the safe harbour provides the intended level of protection from prosecution.

Contact

12. Please contact John Farrell, Executive Policy Lawyer, [REDACTED], [REDACTED], if you require further information or clarification.

Yours sincerely



Tania Wolff
President