



Australian Higher Education Industrial Association (AHEIA)

Senate inquiry into the operation of the wage theft provisions in the Fair Work Act 2009 (FW Act), including subsection 327A(1).

6 May 2026

About AHEIA

The Australian Higher Education Industrial Association (AHEIA) is the employer association for the Australian higher education sector. Most of Australia's public and private Universities are members of AHEIA.

AHEIA provides advice, advocacy and strategic support to its member institutions across enterprise bargaining, workplace relations, employment law, and regulatory compliance. AHEIA works closely with government, regulators and sector stakeholders to support a fair, balanced and effective workplace relations framework for the higher education sector.

1. Introduction

AHEIA welcomes the opportunity to provide a submission to the Senate inquiry into the operation of the wage theft provisions in the *Fair Work Act 2009* (FW Act), including subsection 327A(1).

2. Executive Summary

- AHEIA welcomed the inclusion of criminal wage theft provisions in the FW Act, as well as relevant State jurisdictions. Deliberate and intentional underpayment of Australian workers should properly be a criminal offence.
- AHEIA works with its members, and with the Fair Work Ombudsman, to ensure the highest degree of wage compliance possible within the sector. In this context, it should be noted that Australian universities are large employers who are covered by some of the most complex enterprise agreement provisions in the country.
- The criminal wage theft provisions in the FW Act are appropriately constructed to target intentional and dishonest conduct and should not be expanded or diluted.
- There is no basis whatsoever to the claim by the NTEU in this inquiry, to the Senate and previously in the media that any underpayments identified in the higher education sector amount to wage theft as defined in the FW

Act and/or any relevant state jurisdiction. The vast majority of Australian universities have self-reported wage compliance issues to the FWO, and AHEIA and our members have worked co-operatively with the regulator to rectify any underpayments and put systems in place to ensure future compliance. Compliance issues have also involved overpayments, which no university has sought to recover.

- The characterisation of these underpayments as “wage theft”, including claims that such conduct is embedded within university operating models, is patently false. AHEIA is concerned that the NTEU would make such a baseless and highly inflammatory claim in circumstances where the FWO, AHEIA and the NTEU have been working constructively together in the Higher Education Reference Group for a considerable length of time and where much progress has been made by consensus.
- The FWO’s own submission to this inquiry confirms the intended institutional design of the criminal underpayment framework. The FWO states that it is “*primarily responsible for investigating the Offence*” and will refer matters to the Commonwealth DPP to commence proceedings. The CDPP, as a separate statutory agency and prosecution service, then independently considers whether there is sufficient evidence and whether prosecution is in the public interest, consistently with the Prosecution Policy of the Commonwealth. The AFP may also be engaged where appropriate, including where further investigative assistance is required. This model contains two important safeguards: first, investigation and referral by the independent workplace regulator; and secondly, independent prosecutorial assessment by the CDPP¹.
- The current enforcement model for investigating and referring matters to the CDPP remains appropriate and should be preserved².
- We strongly oppose the NTEU’s proposal to allow unions to investigate and refer alleged wage theft matters directly to the CDPP or AFP³. Unions can play an important role in raising concerns, supporting employees and providing information to the FWO. However, they are not

¹ Office of the Fair Work Ombudsman, Submission 8 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (22 April 2026) 4.

² *ibid* 1, 4.

³ National Tertiary Education Union, Submission 10 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (23 April 2026) 1, 10 [3(a)], [24]–[25].



independent regulators. Direct union referrals would bypass the FWO's role in assessing evidence, seriousness and the public interest, and could allow criminal referral processes to be used in industrial disputes and campaigns. In support of this concern, we note their record of mischaracterisation in the media and before the Senate of instances of underpayment as wage theft.

- We also oppose any automatic award of civil penalties to be paid to unions⁴. Penalties should always remain a matter of discretion for the Court, based on the merits of each case, proportionality, deterrence and the public interest. An automatic payment rule would create a distorted financial incentive for unions and could undermine confidence in the fairness and independence of the enforcement system. In short, it will propagate poor governance practices.
- The root cause of underpayments in the sector lies in the complexity and ambiguity in enterprise agreements and awards and the uncertainty this causes, not deliberate conduct. Recent cases demonstrates that even courts and regulators encounter significant difficulty in interpreting these provisions to determine the entitlements owing to employees⁵.
- Long term resolution of underpayments will require simplification of enterprise agreements. Legislative reform including ensuring that the Fair Work Commission has clear and effective arbitral capacity to resolve intractable matters where necessary and not be constrained in doing so by s270A will also be required. AHEIA will continue to support its members realise these enabling reforms.

3. s327A appropriately targets intentional conduct

AHEIA considers that the criminal wage theft provisions introduced into the FW Act are, appropriately calibrated.

Section 327A⁶ establishes a criminal offence requiring proof beyond reasonable doubt that:

⁴ Ibid 1–2, 10–11 [3(b)], [26].

⁵ For example - NTEU v Monash University (No 2) [2025] FCA 728 (discussed below)

⁶ Section 327A, Fair Work Act 2009, also see Office of the Fair Work Ombudsman, Submission 8 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (22 April 2026) 4



- an employer intentionally engaged in conduct; and
- intended that the conduct would result in a failure to pay a required amount in full and on time.

As the *Revised Explanatory Memorandum to the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* makes clear, the offence is directed at deliberate and dishonest conduct⁷. It does not extend to underpayments arising from error, inadvertence, or genuine disputes about the correct interpretation of industrial instruments.

This distinction is fundamental. It ensures that the most serious sanctions in the nation’s workplace relations system are reserved for conduct that is properly characterised as criminal, while preserving appropriate regulatory responses for compliance errors and disputes.

4. Mischaracterisation of underpayments in higher education

AHEIA is concerned by the way in which underpayments in the higher education sector have been characterised by the NTEU’s submission to this inquiry and previously in the public domain⁸.

In particular, the NTEU has asserted that “wage theft” is “built-in” to university operating models and has repeatedly described underpayments in the sector as “wage theft”⁹. This characterisation is both inaccurate and unfair.

It reflects a fundamental conflation of two distinct concepts:

- criminal wage theft, which requires intentional and dishonest conduct; and
- underpayments, which may arise from error, complexity, or contested interpretation.

There is no credible evidence provided by the NTEU that supports their claim that Universities are engaging in deliberate or systemic conduct designed to

⁷ See Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* 33 [182-183] and Revised Explanatory Memorandum to the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fems%2Fr7072_ems_63e58127-2cdd-4b6c-8248-fdd8a3389e30%22 36 at [200 – 201]

⁸ National Tertiary Education Union, Submission 10 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (23 April 2026).

⁹ *Ibid*, 1, 3–4 [1], [6]–[9]



underpay employees.

To the contrary, underpayment where it has occurred is characterised by:

- self-identification by Universities of issues through internal audit processes;
- proactive self-reporting to the FWO; and
- full and prompt remediation of affected employees.

Further, despite extensive regulatory engagement with the sector, there has been no indication from the FWO to AHEIA at any time, that any conduct with any of AHEIA's member universities approaches anywhere near the criminal threshold, or that a referral to the Commonwealth Director of Public Prosecutions (CDPP) is warranted.

These matters are therefore properly characterised as compliance issues arising from complexity and interpretation not criminal conduct.

It is time for all parties, including unions and members of parliament, to stop recklessly using the term "wage theft" in respect of Australia's higher education system. Factually, this assertion is utterly unfounded. The continued unjustified attacks on the sector, create significant psychosocial hazards for the teams of people across the sector attempting to administer a system that is fundamentally broken.

5. Root causes of underpayments in the sector

AHEIA has consistently identified the underlying drivers of underpayments in higher education.

These include:

- highly complex enterprise agreements, often running to hundreds of pages and containing interdependent provisions;
- legacy award provisions and descriptors, particularly in relation to casual academic work;
- contested interpretations of industrial instruments, including matters that have required judicial determination; and
- administrative and systems challenges associated with applying complex rules across large, decentralised organisations.

These issues are not indicative of deliberate conduct. Rather, they reflect the operation of a highly complex and, in some respects, outdated IR framework.



6. Sector response: accountability and continuous improvement

Attention is drawn to the Senate by AHEIA to the extent of effort and resourcing that universities and their dedicated HR and Payroll and IT teams in particular have directed towards addressing underpayments.

The sector has invested an enormous amount of time and money to prioritise wage compliance efforts to produce a robust framework to properly address underpayments issues.

Across the sector, institutions have:

- undertaken large-scale payroll audits to identify historical issues;
- invested significantly in systems, governance and compliance frameworks;
- implemented structured payroll remediation programs aligned with FWO guidance;
- embedded enhanced internal controls and assurance processes; and
- engaged constructively with the FWO and unions to improve compliance outcomes.

This reflects a sector that is actively working to improve wage accuracy and compliance, not one seeking to avoid its obligations.

7. The importance of preserving the current enforcement model

The FWO's own submission confirms the intended institutional design of the criminal underpayment framework. The FWO states that it is “[p]rimarily responsible for investigating the Offence..”¹⁰ and will refer matters to the Commonwealth Director of Public Prosecutions (**CDPP**) to commence proceedings¹¹. The CDPP, as a separate statutory agency and prosecution service, then independently considers whether there is sufficient evidence and whether prosecution is in the public interest, consistently with the Prosecution Policy of the Commonwealth. The Australian Federal Police (**AFP**) may also be engaged by the FWO where appropriate, including where further investigative assistance is required¹².

¹⁰ Office of the Fair Work Ombudsman, Submission 8 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (22 April 2026) 4.

¹¹ *ibid*

¹² *ibid*



This model contains two important safeguards: first, investigation and referral by the independent workplace regulator; and secondly, independent prosecutorial assessment by the CDPP.

AHEIA strongly supports the current enforcement framework under which:

- the FWO investigates potential contraventions; and
- refers matters to the CDPP only where there is sufficient evidence to meet the criminal threshold.

Maintaining this model is critical to ensuring that the criminal wage theft provisions are applied consistently, proportionately and in accordance with their intended purpose.

AHEIA would strongly oppose any proposal to permit third parties, including unions, to refer matters directly to the CDPP in a manner that bypasses the FWO or which included incentive payment features to Unions.

The FWO, as the independent statutory regulator properly:

- applies the statutory threshold;
- assesses evidence objectively; and
- provides clear guidance to all parties regarding referral expectations¹³.

By contrast, AHEIA is concerned that a partisan actor may conflate non-compliant but non-criminal conduct with the criminal offence of wage theft.

That risk is not hypothetical. As outlined above, the NTEU consistently mis-characterises underpayments arising from error, ambiguity or contested interpretation as “wage theft”.

Allowing direct referral pathways would risk inappropriate escalation of matters that do not meet the statutory test, undermining the integrity and credibility of the framework.

Preserving the FWO’s primary responsibility in referrals is therefore essential to good governance and the principles of natural justice and procedural fairness and is in the public interest.

8. Addressing complexity and ambiguity through enterprise bargaining

To sustainably reduce the incidence of underpayments, it is necessary to

¹³ Office of the Fair Work Ombudsman, Submission 8 to the Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into Wage Theft* (22 April 2026) 1, 4.



address both the complexity and ambiguity within the sector's industrial arrangements.

AHEIA will continue to work with its members to:

- simplify and modernise enterprise agreement provisions;
- improve the usability and transparency of Enterprise Agreements as wage-setting tools.

Recent litigation underscores the extent of these issues.

In *NTEU v Monash University (No 2) [2025] FCA 728*, the Federal Court was required to interpret enterprise agreement provisions governing casual academic work by reference to their text, context and practical operation. The dispute illustrates the difficulty of applying those provisions in practice. In the related Fair Work Commission proceedings, Deputy President Bell found that various key provisions were ambiguous and uncertain, although ultimately the Commission declined to vary the agreement¹⁴.

These matters demonstrate that even courts and regulators are required to navigate provisions that are inherently complex and, at times, ambiguous. This case serves to reinforce that the **primary driver of underpayments within the higher education system is structural complexity and interpretive difficulty—not deliberate or intentional conduct.**

Separately, AHEIA has identified that limitations within the current legislative framework, including those affecting the Fair Work Commission's capacity to resolve matters through arbitration in the context of intractable bargaining, may constrain the ability of parties to address legacy provisions contributing to that complexity.

AHEIA calls on the NTEU, in the current round of enterprise bargaining, to engage constructively with employers to:

- reduce unnecessary complexity in agreements; and
- support reforms that improve wage accuracy and compliance outcomes.

Simplification is a shared responsibility. It is not achievable unilaterally.

AHEIA also calls on the Government to progress reforms to the enterprise bargaining framework to support the making of fair, simple and clear enterprise agreements, including ensuring that the Fair Work Commission has an effective arbitral capacity to resolve intractable matters where necessary.

¹⁴ *Monash University v National Tertiary Education Industry Union* [2023] FWCFB 181 3[6]



9. Conclusion

The criminal wage theft provisions in the FW Act are appropriately constructed to target deliberate and dishonest conduct and require no amendment.

There is no evidence that underpayments in higher education meet or come anywhere close to that threshold. The sector has an established, consistent pattern of self-identification, self-reporting and remediation of underpayment issues arising from complex and ambiguous industrial frameworks.

Characterising these matters as “wage theft” misrepresents both the legal framework and the conduct of universities. It risks diminishing the seriousness of genuinely criminal conduct and undermining informed policy development.

Recommendations

AHEIA recommends that the Committee:

1. Preserve (unamended) the current criminal underpayment framework, including s 327A of the FW Act.
2. FWO remain primarily responsible for investigating suspected contraventions of s 327A and determining whether referral to the CDPP or AFP is appropriate. The CDPP should remain responsible for the independent prosecutorial decision. This maintains the necessary separation between industrial advocacy, regulatory investigation and criminal prosecution.
3. Reject outright any proposal to allow unions or other industrial parties to directly refer alleged wage theft matters to the CDPP or AFP.
4. Reject outright any proposal for automatic payment of civil penalties to applicant unions. Direct referral rights and financial incentives would risk distorting enforcement priorities, encouraging strategic use of the criminal framework in industrial disputes, and undermining confidence that enforcement decisions are made independently, proportionately and in the public interest.
5. Maintain a clear distinction between intentional criminal conduct and compliance error, preserving the FWO’s central role in enforcement, and



avoiding amendments to s 327A or its supporting framework that would weaken those safeguards.

6. Encourage key industry stakeholders during the upcoming bargaining round to collegiately bargain to simplify industrial arrangements, reduce ambiguity and uncertainty in enterprise agreement provisions, and support sustainable improvements in payroll compliance and wage accuracy.
7. Recommend the repeal of s 270A of the FW Act, which limits the Fair Work Commission's arbitral powers in making intractable bargaining workplace determinations. Section 270A in its current construction may impede the Commission's ability to address legacy clause complexity, ambiguity and uncertainty in enterprise agreements.

