

Submission

to

Western Australia Department of Mines, Industry Regulation and Safety

Inquiry into Wage Theft in Western Australia

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1. INTRODUCTION

- 1.1 This submission is made in response to the Western Australia Department of Mines, Industry Regulation and Safety Inquiry into Wage Theft in Western Australia
- 1.2 Contributors to the submission are as follows:
 - a) Dr Tess Hardy, Co-Director of the Centre for Employment and Labour Relations Law at the Melbourne Law School; and
 - b) Ms Melissa Kennedy, Research Assistant at the Melbourne School of Government; PhD Candidate at the Melbourne Law School.
- 1.3 For the purposes of this submission, we have adopted the definition of ‘wage theft’ adopted in the Terms of Reference: that is, ‘[w]age theft is the systematic and deliberate underpayment of wages and entitlements to a worker’.
- 1.4 The definition of ‘wage theft’ is important as it has implications for analysis of the extent and breadth of the problem, as well as the subsequent assessment of which regulatory responses are most appropriate and effective. For example, enhanced information and educational initiatives directed towards employers are likely to be somewhat futile in relation to firms who are systematically seeking to avoid their legal obligations and evade enforcement efforts.

2. WAGE THEFT IN AUSTRALIA: AN OVERVIEW OF THE PROBLEM

- 2.1 While there is no concrete or comprehensive data on the breadth and extent of wage theft in Australia, there is a growing body of evidence which suggests that employer non-compliance with minimum employment standards is not so much an anomaly, as a norm.¹ While employer non-compliance with wage and hour regulation is not necessarily a new issue,² it is one that appears to be growing both in prominence and in prevalence, especially with respect to certain segments of the labour market.
- 2.2 Further, even where there is some data on the incidence of ‘wage theft’, this data does not typically delineate between deliberate and unintentional forms of employer non-compliance

¹ Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (2017); Senate Education and Employment References Committee, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (2016); Senate Economics References Committee, *Superbad – Wage Theft and Non-Compliance with the Superannuation Guarantee* (2017); Anthony Forsyth, *Victorian Inquiry into Labour Hire and Insecure Work – Final Report* (2016).

² For historical assessments of employer non-compliance with employment standards, see: Miles Goodwin and Glenda Maconachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95’ (2007) 49(4) *Journal of Industrial Relations* 523; Glenda Maconachie and Miles Goodwin, ‘Employer Evasion of Workers’ Entitlements 1986-1995: Why, What and Whose?’ (2010) 52(4) *Journal of Industrial Relations* 419; Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Co, 1994); Lucy Nelms, Peter Nicholson and Troy Wheatley, ‘Employees Earning Below the Federal Minimum Wage: Review of Data, Characteristics and Potential Explanatory Factors’ (Research Report 3/2011, Fair Work Australia, January 2011); Sandra Cockfield et al, ‘Assessing the Impact of Employment Regulation on the Low-Paid in Victoria’ (2011) 22(2) *Economic and Labour Relations Review* 131.

with workplace laws. Such survey instruments and reports have incorporated a broader definition than the one adopted in this Inquiry.³ Further, in many of these studies, researchers have assumed that employees fall within the national system of workplace relations under the *Fair Work Act 2009* (Cth). As such, it is necessary to tread with caution when reviewing the figures quoted in our submission, particularly when seeking to make an assessment of the extent of the problem at a state level.

- 2.3 It appears that there may be a range of factors contributing to the current enforcement crisis, including declining levels of unionisation and increasing numbers of vulnerable workers in the labour market. For example, while complaints data is a somewhat flawed indicator of compliance levels, the Office of the Fair Work Ombudsman (**FWO**) has nevertheless reported that the proportion of ‘disputes’ resolved by the federal workplace regulator involving visa holders (which make up approximately 6 percent of the total Australian workforce) has increased from around 5 percent of dispute forms lodged in 2011/12 to 18 percent in 2016/17.⁴
- 2.4 A recent survey of over 4000 temporary migrant workers residing in Australia further revealed that almost one third of those surveyed were paid less than half of the minimum wage and almost one half were paid below their legal entitlement.⁵ Regulatory concerns have also been raised in respect to young workers. The FWO has observed that while young workers make up around 15 percent of the national workforce, they account for around 28 percent of the dispute forms the FWO receives.⁶ Again, this has been confirmed by way of independent research of young workers which confirmed that this group are highly susceptible to exploitative working conditions.⁷
- 2.5 Similar to broad trends identified in overseas jurisdictions, there is now mounting evidence in Australia to suggest that where vulnerable workers are employed in high risk, fragmented sectors, poor compliance outcomes are likely to abound.⁸ More specifically, patterns of wage

³ For a broader definition, see Submission No 50 to Queensland Education, Employment and Small Business Committee *Inquiry into Wage Theft in Queensland* [1.4].

⁴ Fair Work Ombudsman, Annual Report 2016/17, 18. See also Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program*, 2; and Stephen Clibborn, ‘Multiple Frames of Reference: Why International Student Workers in Australia Tolerate Underpayment’ (2018) *Economic and Industrial Democracy* (forthcoming).

⁵ More specifically, 30% of survey participants earned \$12 per hour or less (the prescribed minimum wage for a casual employee at the relevant time was \$22.13 per hour). In addition, 46% of participants earned \$15 per hour. See Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017). For other recent evidence which seeks to measure and explore the problem of wage theft, see Stephen Clibborn and Chris Wright, ‘Employer Theft of Temporary Migrant Workers’ Wages in Australia: Why has the State Failed to Act?’ (2018) 29(2) *The Economic and Labour Relations Review* 207; Unions NSW, ‘Lighting Up the Black Market: Enforcing Minimum Wages’ (Report, 2017); Fiona Macdonald, Eleanor Bentham and Jenny Malone, ‘Wage Theft, Underpayment and Unpaid Work in Marketised Social Care’ (2018) 29(1) *Economic and Labour Relations Review* 80.

⁶ FWO, Annual Report 2016/17, 20.

⁷ A survey of 1000 young workers based in Victoria found that 1 in 5 were not receiving the minimum wage. Young Workers Centre, *The Great Wage Rip Off* (Report, May 2017).

⁸ The problem of wage theft, the deliberate exploitation of vulnerable workers, and the ‘fissuring’ of employment arrangements, are all issues that policy-makers, scholars and governments in various jurisdictions

theft have been found to be especially prevalent in hospitality and food services, and especially severe in the horticulture industry.⁹ Further, it appears that certain business models, such as labour hire arrangements and franchising, appear to be predisposed to high levels of non-compliance. For example, the FWO has observed that ‘the most serious examples of exploitation often involve vulnerable migrant workers employed for an operator who is part of a much bigger supply chain or network.’¹⁰

2.6 In the wake of the notorious 7-Eleven case, and the series of scandals that followed, various stakeholders, including federal and state governments, trade unions, community groups and the general public, appear to now appreciate wage theft is a pressing problem in Australia. In our view, wage theft poses a significant threat to the wellbeing of Australian workers and their families.¹¹ It also leads to an uneven playing field for businesses which are seeking to comply with their legal obligations and may have adverse, suppressive effects on the wider economy.¹² At the same time, there is a growing awareness of the fact that effectively addressing these issues may not necessarily be straightforward.

3. KEY REGULATORY CHALLENGES

3.1 First, the legislative framework in Australia – both at federal and state levels – is largely founded on the premise that there is a binary employment relationship in existence. This effectively

are seeking to grapple with, including in the UK (see, eg, Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017); David Metcalf, *United Kingdom Labour Market Enforcement Strategy 2018/19* (Report, May 2018); Catherine Barnard, Amy Ludlow and Sarah Fraser Butlin, ‘Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers’ (2018) 47(2) *Industrial Law Journal* 226), the US (see, eg, David Weil, ‘Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic’s Journey in Organisational Change’ (2018) 60(3) *Journal of Industrial Relations* 437) and in Canada (see, eg, Leah Vosko et al, ‘The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of its Efficacy in Instances of Wage Theft’ (2017) 48(3) *Industrial Relations Journal* 256).

⁹ For example, the FWO found that while the hospitality industry only employs around 7 per cent of Australia’s workforce, it had the highest number of workplace ‘disputes’. It was also the industry with the highest number of anonymous reports received (17 percent), infringement notices issued (39 percent) and court actions commenced (2 percent). FWO, Annual Report 2016/17, 20-21. See generally Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017); Elsa Underhill and Malcolm Rimmer, ‘Layered Vulnerability: Temporary Migrants in Australian Horticulture’ (2016) 58(5) *Journal of Industrial Relations* 608; Joanna Howe et al, *Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry* (Research Report for Horticulture Innovation Australia, 2017).

¹⁰ FWO, Annual Report 2016/17, 21.

¹¹ Empirical studies have further shown that where this safety net is compromised – because of precarious working conditions, underemployment or non-compliance with wage and hour regulation – this may exacerbate pre-existing inequalities and generate poorer health outcomes, including through higher levels of stress. See, eg, Rajiv Bhatia et al, ‘Protecting Labor Rights: Roles for Public Health’ (2013) 128 *Public Health Reports* 39; and Meredith Minkler et al, ‘Wage Theft as a Neglected Public Health Problem: An Overview and Case Study from San Francisco’s Chinatown District’ (2014) 104 *American Journal of Public Health* 1011.

¹² See generally Tess Hardy and Andrew Stewart (2018) ‘What’s Causing the Wages Slowdown’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, 2018) 57-70.

positions the direct employer as the primary wrongdoer. As we have pointed out in previous submissions and articles, this presents a number of problems from a compliance and enforcement perspective.¹³ It may be that employment conditions and pay rates are being determined or shaped by more powerful entities beyond the employer (as a result of outsourcing, subcontracting, labour hire, franchising etc). Moreover, the ensuing fragmentation of working arrangements into loosely connected networks blurs lines of responsibility for ensuring compliance with employment standards.

- 3.2 A second, and related issue, is that the effectiveness of civil remedy litigation is severely compromised by the fact that the relevant employer entity is often put into liquidation or deregistered prior to the final determination of court proceedings. While enforcement litigation, and the imposition of pecuniary penalties, is ostensibly designed to provide redress and deliver deterrence, these objectives are foiled by the fact that the direct employer can easily arrange their affairs so as to render themselves ‘judgment-proof’.
- 3.3 Further, targeting the direct employer may not be particularly productive where it is another person – such as a lead firm – which may be potentially driving the non-compliant behaviour (e.g. through calling for competitive tenders and setting a contract price that does not allow sufficient funds for employment-related entitlements etc).¹⁴ Recent reforms to the *Fair Work Act 2009* (Cth) (**FW Act**) have been specifically aimed at tackling this last issue – that is, by introducing new provisions which make a ‘responsible franchisor entity’ or ‘holding company’ liable for contraventions committed by their franchisees or subsidiaries respectively.¹⁵ However, as we have noted, there are many business networks and organisational forms, such as labour hire arrangements and supply chains, which fall outside these new laws. This

¹³ See Tess Hardy, Submission No 62 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, September 2015; Tess Hardy, Submission No 24 to Senate Economics References Committee, *Inquiry into the Impact of Non-Payment of the Superannuation Guarantee*, February 2017; Andrew Stewart and Tess Hardy, Submission to Senate Education and Employment References Committee Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies, July 2018. See also Tess Hardy, ‘Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer’ in Ron Levy et al (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017); and Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’ (2016) 29 *Australian Journal of Labour Law* 78.

¹⁴ See, eg, *Fair Work Ombudsman v South Jin Pty Ltd* [2015] FCA 1456; *Fair Work Ombudsman v First Group of Companies Pty Ltd & Ors* [2018] FCCA 1228.

¹⁵ This liability is not automatic and only arises in prescribed circumstances (e.g. where it can be shown that: 1) the responsible franchisor entity knew, or could reasonably be expected to have known, that the same or similar contravention would occur; and 2) the responsible franchisor entity failed to take reasonable steps to prevent such contravention). FW Act, s 558B. For further discussion of these reforms, see Tess Hardy, ‘Shifting Risk and Shirking Responsibility? The Challenge of Upholding Employment Standards Regulation within Franchise Networks’ (2019) *Australian Journal of Labour Law* (forthcoming). For reflection on how these reforms compare to developments in other jurisdictions, see Tess Hardy, ‘Big Brands, Big Responsibilities? An Examination of Franchisor Accountability for Employment Contraventions in the United States, Canada, and Australia’ (2019) 40 *Comparative Labor Law & Policy Journal* 285.

effectively means that lead firms in these arrangements are largely insulated from this form of legal accountability.

- 3.4 Third, the sanctions available under the current regulatory framework may not be sufficiently strong to deter deliberate wrongdoing on the part of employers. As we have pointed out in separate research, the theory of responsive regulation, and the concept of the enforcement pyramid, is premised on the assumption that at the pyramid's apex there is a sanction which is powerful enough to deter even the most egregious or reckless offender.¹⁶ Similarly, the model of strategic enforcement, identifies deterrence as a central pillar of an effective enforcement strategy.¹⁷
- 3.5 We note that the maximum penalty amount has recently been increased to unprecedented levels in respect of 'serious contraventions' of the FW Act.¹⁸ The ten-fold increase in maximum penalties appears to be specifically directed at addressing concerns that civil penalties under the FW Act were insufficient to 'effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.¹⁹ These issues are potentially magnified at the state level given that the maximum penalties available under the *Industrial Relations Act 1979* (WA) for relevant underpayment contraventions are set at a very low level (particularly in comparison to the maximum penalties available at the federal level).
- 3.6 Moreover, the underlying premise of the new provisions of the FW Act reflect a common assumption shared by policymakers and regulators: that higher sanctions will mean greater deterrence and, in turn, improved compliance.²⁰ However, recent survey research undertaken to explore the deterrence-effects of the FWO's enforcement activities, including civil remedy litigation, reveals that the relationship between higher penalties and perceptions of deterrence is not clear-cut.²¹ Rather, we found that businesses often could not recall the target or amount of the penalty and could not therefore weight this up against the costs associated with compliance.
- 3.7 In short, the idea that the majority of firms were rational and calculative, and adjusted their compliance behaviour accordingly, did not necessarily hold. The lack of knowledge and

¹⁶ Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565.

¹⁷ See David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

¹⁸ FW Act, s 557A. In particular, the maximum civil penalty proposed for a 'serious contravention' of the FW Act has been increased to 600 penalty units for individuals (\$126 000) and 3000 penalty units for bodies corporate (\$630 000).

¹⁹ Statement of Compatibility with Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) 2.

²⁰ Christine Parker and Vibeke Lehmann Nielsen, 'Deterrence and the Impact of Calculative Thinking on Business Compliance with Competition and Consumer Regulation' (2011) 56(2) *The Antitrust Bulletin* 377.

²¹ 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.

awareness about the quantum of fines may also be a product of the fact that civil penalties in this area have historically been quite low and there is little capacity to seek criminal sanctions in this jurisdiction unlike other spheres of corporate and work regulation.²² Previous studies suggest that harsher sanctions against egregious offenders have the power to penetrate the corporate consciousness in a way that lesser penalties may not.²³ Whether the introduction of criminal sanctions will achieve what civil penalties cannot is yet to be resolved and is likely to need further empirical testing (if and when criminal sanctions are introduced at a state or federal level).

- 3.8 A fourth, and final, challenge in devising an effective regulatory response, particularly at the state level, is that employment standards in the private sector are largely governed by federal laws, including the FW Act.²⁴ For example, section 26 of the FW Act expressly provides that the provisions of that Act apply to the exclusion of all state or territory industrial laws, including laws that provide for the *establishment* or *enforcement* of terms and conditions of employment.²⁵ However, we also acknowledge that, in Western Australia, a sizeable proportion of businesses and employees fall outside the coverage of the *Fair Work Act 2009* (Cth) (including state public sector employees, and employees who are engaged by non-constitutional corporations).²⁶ In comparison to other states in Australia, Western Australia's state-based industrial relations system, including the applicable workplace relations laws,²⁷ as well as state-based regulatory agencies and tribunals, such as Wageline, the WA Industrial Relations Commission and the WA Industrial Magistrates Court, have a greater role to play in this jurisdiction than in others.
- 3.9 Generally-speaking, it has been assumed that compliance and enforcement functions in respect of standards set by the FW Act (or instruments made under this Act) are generally vested in the federal workplace regulator and the imposition of civil remedies, including pecuniary penalties, is a task largely assigned to federal courts.²⁸
- 3.10 Constitutional limitations clearly make it more difficult for state governments to influence regulatory outcomes in this context. However, given the enormity of the task at hand, and the

²² For example, breach of s 76 of the *Competition and Consumer Act 2010* (Cth) triggers maximum civil penalties of \$500,000 for an individual and over \$10 million for a body corporate (as well as criminal penalties of \$360,000 or 10 years' imprisonment for an individual).

²³ Neil Gunningham, Robert A Kagan and Dorothy Thornton, *Shades of Green: Business, Regulation, and Environment* (Stanford University Press, 2003).

²⁴ The FW Act applies primarily to national system employers and their employees: FW Act, s 14.

²⁵ FW Act, s 26(2)(b)(ii).

²⁶ Non-constitutional corporations generally include: sole traders, unincorporated partnerships, unincorporated trust arrangements and any incorporated associations or not-for-profit bodies that are not trading or financial corporations.

²⁷ Most notably, the *Industrial Relations Act 1979* (WA) and the *Long Service Leave Act 1958* (WA).

²⁸ Albeit the FW Act does allow state courts to hear matters arising under this legislation in prescribed circumstances. FW Act, Ch 4, Pt 4-2.

fact that the FWO and trade unions have limited resources, it is important that state governments seek to positively contribute to combatting the problem of wage theft.

4. POSSIBLE STATE INITIATIVES

4.1 In this section, we outline some initiatives that could be undertaken at the state level. We further acknowledge that some of the initiatives canvassed below may be the subject of constitutional challenge or federal statutory override in the future. Nonetheless, we do not believe that the risk of such actions are sufficient reasons for the Western Australian Government not to act.

4.2 In our view, there are a number of areas where the Western Australian Government could potentially take additional steps to stem wage theft and address some of the adverse effects of this conduct at the state level:

- a) Increasing the resources that are directed towards state-based services and inspectorates, such as Wageline.²⁹ Similar to recent steps taken in Victoria,³⁰ additional funding of the state-based inspectorate would allow the body to more fully engage in a range of education-based and/or proactive initiatives in relation to employees engaged by non-constitutional corporations, matters falling squarely within the state jurisdiction (such as long service leave), as well as employment-related entitlements arising under federal laws.³¹ This is particularly critical in rural and regional areas where federal labour inspectors are thin on the ground. It would also be beneficial to develop formal information-sharing and collaborative arrangements with other state and federal agencies working in this area, including the FWO.
- b) Broadening the suite of sanctions that are available to state-based inspectors, which are currently very limited under the *Industrial Relations Act 1979* (WA). For example, the tools available to industrial inspectors may be strengthened by introducing statutory powers to: issue infringement notices (administrative sanctions for prescribed contraventions); issue compliance notices (or orders to pay); or enter into enforceable undertakings.³²

²⁹ *Industrial Relations Act 1979* (WA) s 7.

³⁰ The Victorian Government has recently launched the Victorian Wage Inspectorate housed within the Department of Economic Development, Jobs, Transport and Resources and committed \$22 million in initial funding. See 'Victoria's Wage Inspectorate Begins Operations', *Workplace Express*, 31 July 2018.

³¹ We note that the Private Sector Labour Relations Division of the Department of Mines, Industry Regulation and Safety has already undertaken a number of proactive compliance campaigns, including amongst horse-riding schools and nail salons falling in the state industrial relations system. See Department of Mines, Industry Regulation and Safety, *Proactive Compliance Campaigns*, 29 January 2019 (<https://www.commerce.wa.gov.au/labour-relations/proactive-compliance-campaigns>).

³² We note that the Migrant Workers' Taskforce has recommended that the federal Government consider whether certain administrative sanctions, such as infringement notices and compliance notices, are fit for purpose. See Allan Fels and David Cousins, *Report of the Migrant Workers' Taskforce*, Australian Government (March 2019) ('Migrant Workers' Taskforce Report').

- c) Amending relevant WA industrial relations laws to allow for sanctions, including civil penalties, to be imposed against persons other than the employer where they have had some relevant involvement in the contravention (e.g. directors, senior managers, lead firms etc).
- d) Increasing the maximum civil penalties that are available for breach of an entitlement arising under a relevant state statute, state award or other industrial instrument applicable within the state system.³³ We note that the maximum penalties that are available within the state industrial relations system are well below the quantum set within the federal system.³⁴
- e) Introducing criminal sanctions in respect of wage theft occurring within the state industrial relations system (i.e. underpayment contraventions affecting employees who fall outside the coverage of the FW Act).³⁵
- f) Introducing a labour hire licensing regime in WA – either in high-risk sectors or more generally.³⁶
- g) Providing additional funding to relevant community organisations, such as the Employment Law Centre of WA (ELCWA), which provides free employment law advice, education, advocacy, representation, information and referrals to vulnerable, non-unionised workers in Western Australia. Providing additional funding to ELCWA would be hugely valuable, especially for those workers who have been underpaid and require additional support to seek legal redress through the small claims process, or otherwise.
- h) Reforming state-based tribunal and court processes to enhance access to justice and provide more effective avenues for redress. For example, the government might wish to consider reducing the fees that apply when lodging an application in the WA Industrial Magistrates’ Court or revising the costs rules (to enable recovery of legal costs for applicants seeking rectification of underpayment through the court system).³⁷

4.3 We further expand on some of the regulatory advantages and risks associated with criminalisation of wage theft below.

³³ We note that under section 83(4) of the *Industrial Relations Act 1979* (WA) prescribes a maximum penalty of \$2000 (in the case of an employer, organisation or association) and \$500 (in any other case). Section 83E of the *Industrial Relations Act 1979* (WA) also provides that if a person contravenes a civil penalty provision, an industrial magistrate’s court may impose a maximum penalty of \$5000 (in the case of an employer, organisation or association) and \$1000 (in any other case).

³⁴ As at March 2019, the maximum penalty for contravention of most civil remedy provisions in the FW Act is \$63,000 (for corporations) and (\$12,600 (for individuals). Where the contravention is deemed to be a ‘serious contravention’ under s 557A, the maximum penalty is increased by a factor of 10.

³⁵ Further discussion of criminalisation of ‘wage theft’ is set out in Section 5 below.

³⁶ See, eg, *Labour Hire Licensing Act 2017* (Qld) and *Labour Hire Licensing Act 2018* (Vic). While introduction of state-based labour hire licensing regimes has been a positive development in many respects, we believe that ultimately a national-based licensing system is a preferable regulatory solution (see Section 7 below).

³⁷ There is a general bar against costs orders applicable in the industrial relations sphere. See *Industrial Relations Act 1979* (WA), s 83C.

5. CRIMINALISATION OF WAGE THEFT

- 5.1 Presently, state governments in a number of jurisdictions are considering introducing laws to criminalise wage theft.³⁸ For example, in Victoria, the Labor Government has pledged that it will introduce new criminal offences and sanctions relating specifically to wage theft.³⁹ The Victorian proposal raises a number of constitutional issues – most notably, it is quite possible that the introduction of a ‘wage theft’ offence under a state law for contravention of federal law will face a constitutional challenge based on s 109 of the Constitution.
- 5.2 More specifically, a state law that applies to constitutional corporations could be challenged on the basis that federal laws contained within the FW Act already ‘cover the field’,⁴⁰ resulting in any attempts by the states to regulate industrial relations as being ruled inconsistent with the federal scheme and held to be invalid and inoperative.⁴¹ In particular, as noted earlier, section 26 of the FW Act provides that the federal Act is ‘intended to apply to the exclusion of all State and Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.’⁴² The definition of ‘State or Territory Industrial Law’ is stated to include any State or Territory Act, which provides, as one or more of its main purposes, ‘for the establishment or enforcement of terms and conditions of employment’.⁴³ While this provision has not yet been authoritatively tested, it is likely that the broad scope of section 26 of the FW Act means that the FW Act’s civil remedy regime, which is currently used to enforce all provisions relating to underpayment of national system employees, would apply to the exclusion of a state enforcement regime which seeks to similarly provide, albeit by way of criminal sanctions, the enforcement of terms and conditions of employment.
- 5.3 In addition to section 26, section 30 provides a broad note that Div 2 is not a ‘complete statement’ in the circumstances that the FW Act prevails over state laws, which suggests that the federal government intended to cover the field. Typically, the law provides that where there is both punitive state and federal law over the same subject matter, the punitive federal law

³⁸ For instance, in Queensland the Education, Employment and Small Business Committee recommended that the Queensland Government criminalise wage theft ‘where conduct is proven to be deliberate or reckless’: Queensland Parliamentary Committee, Education, Employment and Small Business Committee, ‘A Fair Day’s Pay for a Fair Day’s Work? Exposing the True Cost of Wage Theft in Queensland’ (Report No 9, November 2018) Recommendation 15.

³⁹ In particular, the Victorian Labor Government has proposed that employers who deliberately withhold wages, superannuation or other employee entitlements, falsify employment records, or fail to keep employment records will face fines of up to \$190,284 for individuals, \$951,420 for corporations and up to 10 years’ imprisonment. Victorian Labor Government, ‘Dodgy Employers to Face Jail for Wage Theft’ (26 May 2018) <<https://www.premier.vic.gov.au/dodgy-employers-to-face-jail-for-wage-theft/>>.

⁴⁰ *Ex Parte McLean* (1930) 43 CLR 472, 483 (Dixon J).

⁴¹ Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 4th ed, 2018) 311.

⁴² FW Act s 26(1).

⁴³ *Ibid.*

will prevail.⁴⁴ This is unless specific provisions in the respective statutory schemes exist to allow both criminal and civil sanctions.⁴⁵

5.4 To avoid the constitutional hurdles identified above, Western Australia may consider limiting the operation of state-based criminalisation offences to non-constitutional corporations and public sector employers falling with the state system.

5.5 Moreover, the Morrison federal Government has recently indicated an ‘in principle’ intention to adopt various recommendations of the Migrant Workers’ Taskforce, including a recommendation that it criminalise wage theft at a federal level.⁴⁶ It is unclear at this stage as to whether such reforms will be implemented via amendment to the *Commonwealth Criminal Code* or the FW Act.⁴⁷ In any event, it is understood that the underlying rationale for these proposed laws is that ‘by adding criminal sanctions to the suite of penalties available to regulators for the most egregious forms of workplace conduct, the [federal] Government is sending a strong and unambiguous message to those employers who think they can get away with the exploitation of vulnerable employees.’⁴⁸

General Justifications for Criminalising Wage Theft

5.6 It has been a long-standing principle that the criminal law has no place in the industrial context.⁴⁹ One justification for criminalisation is based on the moral wrongfulness of the crime.⁵⁰ By classifying underpayment of wages as a type of theft, the conduct attracts additional moral condemnation because the community associates the idea of stealing, dishonesty and theft as a wrong against society and deserving of punishment. In light of the fact that wage theft often harms vulnerable workers, including temporary migrant workers and young people, use of this terminology may be seen as attractive as it captures the significant harm associated with the conduct and the reality that underpayment of wages takes away money that an employee is entitled to by law.

5.7 Another justification for criminal punishment is that it will increase specific and general deterrence as the threat of imprisonment or the imposition of a significant criminal penalty will

⁴⁴ *Viskauskas v Niland* (1983) 153 CLR 280, 293.

⁴⁵ For example, there was an express saving provision in the (now repealed) *Trade Practices Act 1974* (Cth), which was introduced to permit state-based competition and consumer laws co-existing with federal regulation in the same area. *R v Credit Tribunal; Ex parte General Motors Acceptance Corp* (1977) 137 CLR 545, 563 (Mason J). See *Trade Practices Act 1974 s 75* (version as at 1976).

⁴⁶ Australian Government, *Australian Government Response: Report of the Migrant Workers’ Taskforce* (March 2019) 3. This promise was made in response to the Migrant Workers’ Taskforce Report, above n 32, Recommendation 6.

⁴⁷ Criminal Code Act 1995 (Cth) sch 2 (‘*Criminal Code*’).

⁴⁸ Australian Government, *Australian Government Response: Report of the Migrant Workers’ Taskforce* (March 2019) 3.

⁴⁹ Andy Hall, R Johnstone and Alexa Ridgeway, *Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths* (National Research Centre for Occupational Health and Safety, April 2004).

⁵⁰ See, eg, Stuart Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 45.

make people change their behaviour to avoid the risk of punishment. Along with retribution and punishment, deterrence is another of the main goals of criminalisation.⁵¹

Issues for Consideration

- 5.8 Classical deterrence theory recognises that individuals are deterred from breaking the law if they perceive a likelihood of detection is high and calculate that the potential gains are not worth the risk of being sanctioned.⁵² It is presumed by supporters of a criminalisation model that the risk of punishment, including imprisonment, will swing the balance away from the harmful behaviour. Indeed, there is some recent empirical evidence emerging from the United States which suggests that 'laws that most dramatically increased punitive damages saw the greatest declines in the incidence of minimum wage violations.'⁵³
- 5.9 However, this evidence must be weighed against a number of other studies which find that, even when business calculations are made, individuals do not generally adopt a rational analysis about the costs of being caught (or not) when making a decision to gain an advantage.⁵⁴ Indeed, a review of the literature on criminalisation in the wider compliance context suggests that the link between criminalisation and deterrence as a compliance strategy is relatively faint. The main reason for the weak compliance effects of criminalisation is related to low prosecution rates. Empirical research in this area suggests that enhanced compliance is more closely linked to rates of prosecution rather than to the type of penalty.⁵⁵ Prosecuting criminal offences is very resource intensive, particularly because of the high standard of proof and evidentiary burden. This means that very few prosecutions are successful. In the US, Robinson and Darley reported that in 2004 only 1.3 per cent of criminal offences committed resulted in conviction and punishment.⁵⁶
- 5.10 More specifically, in those jurisdictions where underpayment contraventions already constitute a criminal offence,⁵⁷ the data suggests that prosecutions of non-compliant employers are

⁵¹ Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401; N Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes & Noble, 1980).

⁵² Christine Parker and Viebke Lehmann Nielson, 'How Much Does It Hurt? How Australian Business Think About the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32 *Melbourne University Law Review* 554, 562.

⁵³ Daniel Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14(2) *Perspectives on Politics* 324, 326.

⁵⁴ Parker and Nielson, above n 52, 249–56.

⁵⁵ Paul R Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 183.

⁵⁶ *Ibid* 188.

⁵⁷ For example, the Employment Standards Act (2000), which prescribes minimum wages and hours regulation in Ontario, Canada, makes it offence to contravene the act or its regulations, or to fail to comply with an order or direction issues by an inspector. Individuals are liable to be fined up to CAD 50,000 or imprisoned up to 12 months. Corporations are liable to be fined up to CAD 100,000 for a first offence, CAD 250,000 for a second offence and CAD 500,000 for a third or subsequent offence. Offences under the ESA are prosecuted under Part III of the *Provincial Offences Act*. In addition, under the federal *Criminal Code of Canada* (1985), it is a criminal offence to intentionally falsify an employment record by any means. See Eric Tucker, 'When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master's Tools Against the Master' (2017) 54 *Osgoode*

'extremely rare'⁵⁸ and only used when employers and other duty holders defy the authority of state inspectors by disobeying compliance orders. For example, in Ontario, Canada, recent research has confirmed that there have been no criminal prosecutions in response to an employer or director violating an employee's rights to be paid in a minimum wage.⁵⁹ Similarly, in the United Kingdom, criminal prosecution is available in respect of a range of offences under various employment-related statutes, but remains 'an underutilised intervention in the enforcement arena'.⁶⁰ For example, since the introduction of the *National Minimum Wage Act 1998* (which came into force in April 1999), there have only been 14 NMW prosecutions.⁶¹

- 5.11 Even so, criminalisation impacts employers in a manner differently to civil penalties. For instance, criminalisation carries the risk of deprivation of liberty and serious reputational damage for business and individuals. Further, convicted individuals are generally prohibited from holding directorships of corporations,⁶² and are personally liable for fines.⁶³ However, some commentators have suggested that the prospect of imprisonment generates only a small deterrence effect and certainly not deterrence at the levels suggested by supporters of a criminalisation model.⁶⁴ Criminal sanctions are arguably of lesser value in the context of corporate crime given that a gaol term – which is perceived as 'the most stigmatic and greatest deterrent'⁶⁵ – cannot be imposed against corporations.
- 5.12 As such, a model of criminalisation focusing on deterrence may not be adequate to bring about the necessary changes in business behaviour to prevent wage theft from occurring, particularly if this is not accompanied by an increase in inspectorate and prosecution resources.
- 5.13 Further, introducing criminal sanctions at a state level may have a number of unintended consequences. For example, it is possible that some vulnerable workers, including temporary

Hall Law Journal 933. Similarly, the Fair Labor Standards Act of 1938 29 U.S.C. § 203 provides for criminal prosecution for willful violations of federal wage and hour laws. A conviction can result in a fine of not more than \$10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).

⁵⁸ Eric Tucker et al, 'Carrying Little Sticks: Is There a "Deterrence Gap" in Employment Standards Enforcement in Ontario Canada' (2019) 35(1) *International Journal of Comparative Labour Law* 1, 26.

⁵⁹ Ibid.

⁶⁰ David Metcalf, Director of Labour Market Enforcement, 'United Kingdom Labour Market Enforcement Annual Report 2017/18' (March 2019) 19.

⁶¹ Ibid. Section 31(1) of the *National Minimum Wage Act 1998* (UK) provides that: 'If an employer of a worker who qualifies for the national minimum wage refuses or wilfully neglects to remunerate the worker for any pay reference period at a rate which is at least equal to the national minimum wage, that employer is guilty of an offence.' Section 31(8) further provides that in any proceedings for an offence under s 31(10), 'it shall be a defence for the person charged to prove that he exercised all due diligence and took all reasonable precautions to secure that the provisions of the Act...were complied with by himself and by any person under his control.'

⁶² *Corporations Act 2001* (Cth) s 206B.

⁶³ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190, 216–17 [116].

⁶⁴ Donald Ritchie, Sentencing Advisory Council, *Sentencing Matters: Does Imprisonment Deter: A Review of the Evidence* (April 2011) 10. See also Andrew von Hirsch et al, *Criminal Deterrence and Sentencing Severity* (Hart, 1999).

⁶⁵ Arie Frieberg, *Regulation in Australia* (Federation Press, 2017) 430.

migrant workers, may be more reluctant to bring matters to the attention of the inspectorate for fear of then being involved in subsequent criminal proceedings.

- 5.14 It may also complicate the interaction between state and federal enforcement processes and lead to counterproductive compliance behaviour. For instance, in seeking to reduce the risk of potential criminal liability, firms may be even less forthcoming about their wrongdoing and less willing to voluntarily rectify the underpayment and/or commit to proactive monitoring initiatives.
- 5.15 Finally, it is arguable that some of the justifications for criminalising wage theft, which were summarised above, are more difficult to maintain in relation to entities or persons that are less directly connected with the crime that has been committed, even though they may have contributed or benefited in an indirect way (e.g. lead firms in supply chains, host companies in labour hire arrangements or franchisors in franchise networks). It is certain that proving the involvement of these lead firms may be far more difficult where a criminal burden of proof applies.

Multi-Faceted Regulatory Response

- 5.16 The above section focused on some of the limitations of a criminalisation model of wage theft. Some of those limitations apply equally whether criminalisation occurs at state or federal level (or indeed, at both levels). While we acknowledge that criminalising wage theft is unlikely to provide ‘any kind of magic bullet which can tame or sanitise business’,⁶⁶ we also appreciate that this distinctive sanction has significant symbolic value and may deliver important practical benefits.
- 5.17 However, if criminal wage theft laws are ultimately adopted, we also strongly believe that it should be accompanied by a suite of other lesser sanctions (such as administrative fines, notices, enforceable undertakings and civil penalties) and be reserved for the most serious cases of wage theft.

6. POSSIBLE FEDERAL INITIATIVES

- 6.1 We note that the Terms of Reference ask that submissions reflect on, and refer to, ‘[w]hether there are strategies and legislative change the Western Australian Government could recommend to the Federal Government to deal with wage theft in the federal jurisdiction.’
- 6.2 In our view, there are wide range of possible options that may be pursued at the federal level given that it does not have to overcome the constitutional limitations of state-based initiatives (as they apply to national system employees). Many of these policy proposals and reforms have

⁶⁶ Steve Tombs and David Whyte, ‘The Myths and Realities of Deterrence in Workplace Safety Regulation’ (2013) 53(5) *The British Journal of Criminology* 746.

been canvassed and considered as part of various government inquiries,⁶⁷ as well as academic research.⁶⁸ In our view, some of the most promising initiatives, include:

- a) Clarifying and broadening the definition of ‘employee’ in the *Fair Work Act 2009* (Cth) and other federal statutes that largely hinge on common law definitions of employment, such as the *Superannuation Guarantee (Administration) Act 1992* (Cth).⁶⁹
- b) Extending liability for prescribed contraventions of civil remedy provisions of the *Fair Work Act 2009* (Cth) to persons beyond the employer (whether an individual or a corporate entity) where the person: i) has a significant degree of influence or control over the employer’s affairs, or over the wages or employment conditions of the relevant employee(s); ii) knew or could reasonably be expected to have known that the contravention (or a contravention of the same or a similar character) would occur; and iii) cannot show that they have taken reasonable steps to prevent a contravention of the same or a similar character.⁷⁰
- c) Introducing a labour hire licensing scheme at the national level.⁷¹
- d) Strengthening the sanctions that are available under the *Fair Work Act 2009* (Cth). This may include raising the maximum civil penalties that are available for certain contraventions; allowing FW Inspectors (or others with legal standing) to impose or seek disqualification orders prohibiting individuals from holding company directorships; and/or expanding the scope of compliance notices that can be issued by Fair Work Inspectors.
- e) Allowing successful complainants to recover their legal costs in underpayment claims (which is presently prevented by a general bar on costs orders in proceedings brought under the *Fair Work Act 2009* (Cth)).
- f) Reforming federal tribunal and court processes so as to provide a more efficient, cost-effective and user-friendly option for recovering underpayment amounts and seeking redress. This might include waiving or reducing court filing fees for underpayment matters or prescribing statutory timeframes for conciliation and determination of matters so as to prevent proceedings from dragging on to the detriment of the underpaid applicant. It might also entail expanding the small claims jurisdiction so as to allow proceedings to be brought against persons other than the employer. This is especially

⁶⁷ Recent and relatively comprehensive inquiries in this area, include: Queensland Parliamentary Committee, Education, Employment and Small Business Committee, ‘A Fair Day’s Pay for a Fair Day’s Work? Exposing the True Cost of Wage Theft in Queensland’ (Report No 9, November 2018); Migrant Workers’ Taskforce Report, above n 32.

⁶⁸ See, eg, Andrew Stewart, Jim Stanford and Tess Hardy, ‘Conclusion: Wages and Inclusive Growth’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds) *The Wages Crisis in Australia: What it is and what to do about it* (University of Adelaide Press, 2018) 277-290; Helen Anderson and Tess Hardy, ‘Superannuation Guarantee Contributions as a Tax: The Case for Reincarnation over Reform’ (2018) 33(3) *Australian Tax Forum* 497; Bassina Farbenblum and Laurie Berg, ‘Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia’ (Report, October 2018).

⁶⁹ See, eg, Stewart, Stanford and Hardy, above n 68.

⁷⁰ For further details of this recommendation, see Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (2018) Recommendation 10.

⁷¹ This is supported, in part, by the findings of the Migrant Workers’ Taskforce. See Migrant Workers’ Taskforce Report, above n 32, Recommendation 14.

important in circumstances where the employer is financially precarious or has been deliberately stripped of assets.