

Submission

to

Senate Standing Committees on Economics

Unlawful Underpayment of Employees' Remuneration

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1. Introduction

- 1.1. This submission is made in response to the Senate Standing Committees on Economics' Inquiry into Unlawful Underpayment of Employees' Remuneration.
- 1.2. The author of this submission is Ms Melissa Kennedy, Research Assistant at the Melbourne School of Government; PhD Candidate at Melbourne Law School. Ms Kennedy is a PhD student whose thesis is specifically looking at the criminalisation of wage theft as part of a regulatory response in the Australian context.
- 1.3. This submission briefly responds to Term of Reference (f) 'the most effective means of recovering unpaid entitlements and deterring wage and superannuation theft, including changes to the existing legal framework that would assist with recovery and deterrence'.
- 1.4. As my focus of my PhD is criminalisation, I will mostly limit my discussion to this topic.
- 1.5. I acknowledge previous submissions made to different government inquiries co-authored with Dr Tess Hardy and Professor John Howe with some ideas, particularly those in Part 2, developed from the conclusions reached in those submissions.¹
- 1.6. For broader approaches looking at civil enforcement, see publications by Hardy, Howe and Cooney,² as well as submissions made by Hardy, Kennedy and Howe to other inquiries into 'wage theft' in Australia.³ Parts 2 and 3 of the Hardy and Kennedy, *Submission to the Wage Theft Inquiry in Western Australia* provide a background to the problem of 'wage theft' in Australia and an overview of the regulatory challenges, which help place the question of criminalisation in the broader context.⁴
- 1.7. In our submission to Western Australia Department of Mines, Industry Regulation and Safety, we noted that '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'.⁵

¹ Tess Hardy and Melissa Kennedy, Submission to Western Australia Department of Mines, Industry Regulation and Safety, *Inquiry into Wage Theft in Western Australia* (2019); Tess Hardy, Melissa Kennedy and John Howe, Submission to Queensland Education, Employment and Small Business Committee, *Inquiry into Wage Theft in Queensland* (2018).

² See, eg, John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards: A Review of the FWO's Activities from 2006-2012*, CELRL Research Report, 2014; 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; Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

³ Tess Hardy and Melissa Kennedy, Submission to Western Australia Department of Mines, Industry Regulation and Safety, *Inquiry into Wage Theft in Western Australia* (2019); Tess Hardy, Melissa Kennedy and John Howe, Submission to Queensland Education, Employment and Small Business Committee, *Inquiry into Wage Theft in Queensland* (2018).

⁴ Tess Hardy was responsible for writing these parts of our submission to the Inquiry into Wage Theft in Western Australia: Hardy and Kennedy, above n 1.

⁵ Senate Education and Employment References Committee, Parliament of Australia, Corporate Avoidance of the Fair Work Act (2017); Senate Education and Employment References Committee, A

- 1.8. The terminology in this area is a significant issue, as it can be used broadly to capture deliberate underpayments 'in a variety of forms and in respect of a range of entitlements arising under statute and/or relevant industrial instruments, including: underpayment or non-payment of the basic rates of pay, leave entitlements, termination and redundancy pay, unpaid hours, trials or internships, unpaid penalty rates and allowances, underpayment or non-payment of superannuation entitlements, unreasonable deductions or cash-back arrangements and/or deliberate misclassification of the employee as an independent contractor'.⁶ Or it may refer to the systematic and deliberate underpayment of wages and entitlements to a worker.⁷
- 1.9. In the Attorney General's Discussion Paper, it was noted that 'wage theft' is used as an umbrella term to describe the underpayment of wages and other statutory entitlements, there are two significant distinctions between conduct captured by the terminology:
- a) 'employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified; and
 - b) employers that knowingly underpay, or otherwise exploit, employees'.⁸
- Therefore there is needs to be a clear line drawn to assess what conduct is criminal or not.

2. Criminalisation⁹

- 2.1. In principle, I agree with the recommendation in the *Migrant Worker's Taskforce Report* to criminalise underpayments of workers for the most serious and 'clear, deliberate and systematic' cases of wage theft.¹⁰ However, criminalisation does not come without challenges.
- 2.2. However, an obvious hurdle is to what extent should criminal sanction be prioritised over recovery of monies owed. And if the priority is the latter, can the scheme be designed to

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); Queensland 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* (2018); Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (2019) (Recommendation 6).

⁶ Tess Hardy, Melissa Kennedy and John Howe, Submission to Queensland Education, Employment and Small Business Committee, *Inquiry into Wage Theft in Queensland* (2018) [1.4].

⁷ Western Australia Department of Mines, Industry Regulation, *Terms of Reference* (2018).

⁸ Attorney-General's Department, *Improving Protections of Employers' Wage and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper (2019) 6.

⁹ In particular, I would like to thank Tess Hardy for her assistance with development of the ideas raised in this point in previous co-authored submissions: see especially Hardy and Kennedy, above n 1, 5.

¹⁰ Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (Recommendation 6).

enable cost recovery at the same time as a criminal case or would that be prejudicial in at trial

General Justifications for Criminalising Wage Theft

- 2.3. It has been a long-standing principle that the criminal law has no place in the industrial context.¹¹ One justification for criminalisation is based on the moral wrongfulness of the crime.¹² 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.¹³
- 2.4. 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 make people change their behaviour to avoid the risk of punishment. The Discussion Paper suggests: 'The potential of criminal penalties for wage underpayment and employee exploitation is expected to enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct'.¹⁴ A strong justification frequently raised for criminalisation is that the threat of a criminal sanction will reduce non-compliant behaviour in a manner not achieved through the civil regulatory system.¹⁵
- 2.5. Along with retribution and punishment, deterrence is another of the main goals of criminalisation.¹⁶

Issues for Consideration

- 2.6. 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

¹¹ 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)

¹² Stuart Green, Lying, *Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 45.

¹³ Young Workers Centre, *The Great Wage Rip Off* (May 2017) 12.

¹⁴ Attorney-General's Department, *Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper (2019) 11.

¹⁵ However, empirical research by way of industry sector interviews conducted by Howe and Hardy on deterrence in the civil enforcement context did not show a significant connection between FWO enforcement actions and changes to business behaviour. Indeed, knowledge of the penalties appeared to lower the deterrence value for those businesses surveyed: 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.

¹⁶ Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, ALRC Report 103, 2016, 54; 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).

are not worth the risk of being sanctioned.¹⁷ It is presumed by supporters of a criminalisation approach to non-compliance 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.'¹⁸

- 2.7. 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.¹⁹ 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.²⁰ 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.²¹
- 2.8. Further to this, in those jurisdictions where underpayment contraventions already constitute a criminal offence,²² the data suggests that prosecutions of non-compliant

¹⁷ 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.

¹⁸ Daniel Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14 *Perspectives on Politics* 324, 326.

¹⁹ Parker and Nielson, above n 13.

²⁰ Paul R Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 183.

²¹ *Ibid* 188.

²² 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 Hall Law Journal* 933. Similarly, the Fair Labor Standards Act of 1938 29 USC § 203 provides for criminal prosecution for wilful 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).

employers are 'extremely rare'²³ 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.²⁴ 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'.²⁵ For example, since the introduction of the National Minimum Wage Act 1998 (which came into force in April 1999), there have only been 14 National Minimum Wage prosecutions.²⁶

- 2.9. 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,²⁷ and are personally liable for fines.²⁸ 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 criminal liability.²⁹ Criminal sanctions are arguably of lesser value in the context of corporate crime given that a jail term — which is perceived as 'the most stigmatic and greatest deterrent'³⁰ — cannot be imposed against corporations. However, it is likely that through accessorial liability principles or operation of general criminal principles through Part 2.5 of the *Criminal Code* that imprisonment will be made available for individuals.³¹

²³ Eric Tucker et al, 'Carrying Little Sticks: Is There a "Deterrence Gap" in Employment Standards Enforcement in Ontario Canada' (2019) 35 *International Journal of Comparative Labour Law* 1, 26.

²⁴ Ibid.

²⁵ David Metcalf, Director of Labour Market Enforcement, 'United Kingdom Labour Market Enforcement Annual Report 2017/18' (March 2019) 19.

²⁶ 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'.

²⁷ Corporations Act 2001 (Cth) s 206B.

²⁸ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190, 216–17 [116].

²⁹ 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).

³⁰ Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 430.

³¹ Note this is subject to an Australian Law Reform Commission inquiry, with significant criticism of the operation of Part 2.5. To review more comprehensively see, Melissa Kennedy Submission to Attorney-General's Department Discussion Paper: Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance'. [3.18]-[3.20] 24.

- 2.10. 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 (eg 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.
- 2.11. The FWO already has an enforcement policy for selecting which civil cases it decides to take to court, so it is likely criminal sanctions only will be relevant in particularly egregious examples of when the FWO could have taken civil enforcement action using the *Fair Work Amendment (Protective Vulnerable Workers Act) 2017* (Cth) provisions.³² The purpose of these provisions was to 'deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.³³ This appears to be a similar rationale as annunciated for criminalisation and there currently has been insufficient test cases to assess whether the methods are working.
- 2.12. A coherent policy will need to be developed to assess what type of conduct should attract civil versus criminal proceedings,³⁴ and in what circumstances. Significantly due to prosecutorial discretion and resourcing limitations, there is the possibility for inconsistency between cases of similar magnitude. Therefore, it is necessary to determine in what circumstances criminal sanctions are appropriate and how they differ the penalties currently available under the PVW Act. It is also essential to develop a rationale for why criminal sanctions should be prioritised over the serious contravention provisions in the PVW Act due to the likely overlap.

3. Multi-Faceted Regulatory Response

- 3.1. The above section focused on some of the limitations of the criminalisation of wage theft. In our submission to Western Australia, Hardy and Kennedy acknowledged that criminalising wage theft is unlikely to provide 'any kind of magic bullet which can tame or sanitise business',³⁵ we also appreciate that this distinctive sanction has significant symbolic value and may deliver important practical benefits. The exact practical benefits

³² FWO, *Compliance and Enforcement Policy* (2019) 9-12.

³³ Statement of Compatibility with Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) 2.

³⁴ Note there is a substantial amount of literature on blurring of distinctions and lack of clear rationales for criminalising conduct as opposed to using civil penalties: see, eg, D Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007); Marco Bagaric, 'The "Civil-isation of the Criminal Law' (2001) 25 *Criminal Law Journal* 184, 184–5, cited in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) 112.

³⁵ Steve Tombs and David Whyte, 'The Myths and Realities of Deterrence in Workplace Safety Regulation' (2013) 53 *British Journal of Criminology* 746.

cannot be assessed without an empirical study if and when criminal sanctions are introduced.

- 3.2. However, if criminal laws are adopted, as we concluded in our submission,³⁶ we 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.
- 3.3. Consistent with the Migrant Worker's Taskforce's Recommendation 6,³⁷ criminalisation could occur as part of a broader response to underpayment of workers and be reserved for 'deliberate and systematic' underpayments.

4. Recommendations

- 4.1. Notwithstanding some very significant practical issues related to criminalisation and serious concerns as to whether criminal laws will have a greater deterrence effect than civil sanctions (particularly the new serious contravention sections in the PVW Act), criminal sanctions are appropriate as:
- a) it recognises the social harms associated with the underpayment of workers; and
 - b) it could occur as part of multi-faceted regulatory response to the problem of wage theft in Australia.
- 4.2. It is further recommended that prosecutions are the responsibility of the regulator (FWO) to avoid double investigation and to more coherently use criminal sanctions as part of a regulatory toolkit.
- 4.3. It is recommended that if criminal liability is adopted as a response to wage theft, it should occur at Federal level, rather than at state level.
- 4.4. First, it avoids some potential legal challenges. Criminalising 'wage theft' at state level may encounter constitutional hurdles due to inconsistencies with the *Fair Work Act 2009* (Cth) (FW Act) (particularly s 26) and s 109 of the *Constitution*.³⁸ However, these same legal hurdles would not exist if the laws are legislated at Federal level (to the extent that this is possible notwithstanding that certain employees are not covered by the National Employment System).³⁹
- 4.5. Secondly, criminal liability may be used as part of a multi-faceted regulatory response at Federal level, alongside civil enforcement and lesser administrative sanctions which is more likely to result into a more coherent enforcement regime than having piecemeal state criminal laws on this issue.

³⁶ Hardy and Kennedy, above n 1.

³⁷ Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (2019) (Recommendation 6).

³⁸ See further Hardy and Kennedy, above n 1, [5.1]-[5.4].

³⁹ FW Act Pt 2-2. See particularly Western Australia who has not made the same referrals as other states.

5. Other mechanisms⁴⁰

5.1. The federal government has a number of options it may choose to take in addition to criminalisation. It may:

- a) Establish a low-cost recovery jurisdiction to reduce the legal hurdles that workers face to recover unpaid wages. Issue may exist due to the Boilermaker's principle that may prevent such a body operating as part of the Fair Work Commission.
- b) Extend liability beyond franchisors and lead firm in supply chains to any person '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'.⁴¹
- c) Reform costs associated with making claims allowing successful complaints to recover costs in underpayment claims.
- d) Provide further funding to the Fair Work Ombudsman to enable more inspectors, as well higher resourcing to prosecute underpayments through litigation strategies as a signalling device.
- e) Coordinate investigations between the Fair Work Ombudsman and the Australian Tax Office to identify payment discrepancies.
- f) Enhance the Federal Government's Procurement Policy to better target those caught by 'wage theft' provisions.
- g) Introduce a national labour hire scheme.⁴²
- h) Strengthen civil sanctions in the FW Act to include higher maximum penalties (perhaps in line with competition and consumer laws which enable penalties up to \$10,000,000, 3 times total value of benefit or 10% of total earnings) and introduce disqualifications orders to prevent those caught engaging in underpayments from holding directorships.

⁴⁰ See Hardy and Kennedy, above n 1, 14. Tess Hardy was primarily responsible for drafting this section in our original submission. See Recommendations: A Fair Day's Pay for A Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland (2018); Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (2019); Tony Beech, *Inquiry into Wage Theft in WA* (2019).

⁴¹ Hardy and Kennedy, above n 1, 14

⁴² Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (2019) Recommendation 14.