CRIMINALISING 'WAGE THEFT' IN AUSTRALIA: A PROPOSED REGULATORY MODEL

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'Wage theft' is widespread in the Australian labour market, including 'deliberate wage theft' which occurs when an employer deliberately deprives an employee of their monetary employee entitlements. In 2020, Victoria and Queensland were the first Australian jurisdictions to criminalise this conduct. This article discusses how deliberate wage theft became criminalised in these states before undertaking a comparative analysis of both regimes. This analysis reveals that the Victorian model is significantly more advanced than the Queensland counterpart in terms of its ability to deter deliberate wage theft. The final substantive Part provides the first framework within the academic literature on how this conduct ought to be criminalised. It contends that a federal offence is required that criminalises deliberate wage theft. The offence must be enacted within a legislative regime that understands the common context in which this offending occurs and must be backed by robust enforcement and suitable civil recovery mechanisms.

I INTRODUCTION

Since 2015, numerous media exposés, academic studies and government investigations have revealed that wage theft is widespread in the Australian labour market.[1] 'Wage theft' is the underpayment or non-payment of wages or

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1 See, eg, Nick McKenzie et al, 'Fruits of their Labour: Investigation into Exploitation of Migrant Fruit Picking Workers in Australia', *Sydney Morning Herald* (online, 2016) <https://www.smh.com.au/interactive/2016/fruit-picking-investigation/>; Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016) ('*A National Disgrace*'); Fair Work Ombudsman, *Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program* (Report, October 2016); Elsa Underhill and Malcolm Rimmer, 'Layered Vulnerability: Temporary Migrants in Australian Horticulture' (2016) 58(5) *Journal of Industrial Relations* 608 <https://doi.org/10.1177/0022185615600510>; Iain Campbell, Martina Boese and Joo-Cheong Tham, 'Inhospitable Workplaces? International Students and Paid Work in Food Services' (2016) 51(3) *Australian Journal of Social Issues* 279 <https://doi.org/10.1002/j.1839-4655.2016.tb01232.x>.

other monetary entitlements owed by an employer to an employee. It includes unlawful wage deductions, the failure to make mandatory contributions to pension or superannuation funds, and the misrepresentation of the employment relationship to avoid the provision of employee entitlements (so-called 'sham contracting').[2] For some employers, wage theft is the result of genuine mistakes in that these employers are unaware of, or do not understand, their obligations under the applicable industrial regulation. For others, wage theft is the result of 'employer opportunism, if not deliberate malfeasance'[3] and is often accompanied by a clandestine production of false employee records.[4] This article refers to 'wage theft' as an umbrella term to encapsulate *all* types of underpayment or non-payment of employee entitlements (regardless of whether they are deliberate, a result of a genuine mistake or any other reason), and the term 'deliberate wage theft' as a subset category where the employer *deliberately* deprives the employee of their wages or other monetary employee entitlements. Use of the term 'deliberate wage theft' in this sense, and carving it out as a subset of the umbrella term, is an approach that has been adopted in recent government inquiries.[5]

Since 2016 the Federal Government has attempted to deter deliberate wage theft, primarily through the enactment of various statutory reforms which increased civil penalties for contraventions of the *Fair Work Act 2009* (Cth) ('*FW Act*').[6] Several states as well as the Australian Capital Territory also introduced civil licensing regimes in the labour hire sector which created barriers to entry for labour hire companies to assist in eliminating rogue operators within the industry.[7] Underpinning these reforms was the traditional assumption that 'civil, rather than criminal, proceedings ought to guarantee the vindication of employment rights',[8]

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2 Education, Employment and Small Business Committee, Parliament of Queensland, *A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland* (Report No 9, 56th Parliament, November 2018) 22.

3 Joshua Healy, Andreas Pekarek and Ray Fells, 'The Belated Return of an Australian Living Wage: Reworking "A Fair Go" for the 21st Century' in Tony Dobbins and Peter Prowse (eds), *The Living Wage: Advancing a Global Movement* (Routledge, 2021) 162, 172 <https://doi.org/10.4324/9781003054078-15>.

4 See, eg, Amit Sarwal, 'Brisbane's "Riddhi Siddhi" Fined More than $200k for Wage-Theft and Submitting False Records', *The Australia Today* (online, 23 June 2022) <https://www.theaustraliatoday.com.au/brisbanes-riddhi-siddhi-fined-more-than-200k-for-wage-theft-and-submitting-false-records/>; Jenny Noyes, 'Sydney Restaurant Allegedly Underpaid Worker on 457 Visa $150,000', *The Sydney Morning Herald* (online, 3 October 2019) <https://www.smh.com.au/business/workplace/sydney-restaurant-allegedly-underpaid-worker-on-457-visa-150-000-20191003-p52x81.html>.

5 See, eg, Attorney-General's Department (Cth), 'Improving Protections of Employees' Wages and Entitlements: Strengthening Penalties for Non-compliance' (Discussion Paper, September 2019) 2 ('Improving Protections of Employees' Wages and Entitlements'); Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees' Remuneration* (Report, March 2022) 4 [1.17], 7 [1.29], 11 [1.47], 15 [1.62] ('*Systemic, Sustained and Shameful*').

6 *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

7 *Labour Hire Licensing Act 2020* (ACT); *Labour Hire Licensing Act 2017* (Qld); *Labour Hire Licensing Act 2017* (SA); *Labour Hire Licensing Act 2018* (Vic).

8 David Cabrelli, 'Using Criminal Law to Enforce Statutory Employment Rights' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 53, 53 <https://doi.org/10.1093/oso/9780198836995.003.0003>.

and this position has historically attracted bipartisanship support.[9] Nevertheless, recent times have also seen Australia increasingly enact 'penal, punitive and coercive' industrial legislation against employers.[10] The criminalisation of deliberate wage theft is one prominent example of such reform and forms the focus of this article.[11]

In particular, the year 2020 saw Victoria and Queensland become the first Australian jurisdictions to criminalise deliberate wage theft. In Victoria this was achieved through the enactment of the *Wage Theft Act 2020* (Vic) ('*Wage Theft Act*') which makes it a criminal offence for an employer to dishonestly withhold from an employee their wages or other employee entitlements, or to engage in dishonest employment recordkeeping practices. The Act also establishes a statutory authority to investigate and prosecute these offences which are punishable by imprisonment. By contrast, the Queensland model is predominately the product of amendments made by the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) ('*Queensland Amendment Act*') which broadened the pre-existing offence of stealing in the *Criminal Code 1899* (Qld) ('*Code*') in an attempt to encapsulate deliberate wage theft, increased the maximum penalty for fraud where the offender is a past or present employer of the victim, and reformed the *Industrial Relations Act 2016* (Qld) ('*IR Act*') to improve access to wage recovery mechanisms. This occurred against the background of the Morrison Government introducing reforms as part of the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) ('Omnibus Bill') which sought to criminalise deliberate wage theft, but these clauses were ultimately withdrawn from the Bill.[12]

The recent work of Tess Hardy, John Howe and Melissa Kennedy forms an important contribution to the current debate on the criminalisation of deliberate wage theft by providing an analysis of these previous reforms that once formed part of the Omnibus Bill.[13] Their key focus, however, is on explaining how the criminalisation of deliberate wage theft is justified both morally and from a regulatory perspective, and bringing to light some conceptual and practical issues that might arise if criminal liability for deliberate wage theft is introduced at the federal level. This is an important focus, but it is not ours. Rather, our focus is to propose the first framework within the academic literature on how deliberate wage theft *ought* to be criminalised in Australia. We discuss the drafting of this

9 Migrant Workers' Taskforce, Parliament of Australia, *Report of the Migrant Workers' Taskforce* (Report, 7 March 2019) 87 ('*Migrant Workers' Taskforce Report*').

10 Eugene Schofield-Georgeson, 'The Emergence of Coercive Federal Australian Labour Law, 1901–2020' (2022) 64(1) *Journal of Industrial Relations* 52, 53 <https://doi.org/10.1177/00221856211003921>. For example, criminal liability for breaches of work, health, and safety duties has been a longstanding feature of workplace relations law in Australia.

11 This article considers developments in the criminalisation of deliberate wage theft in Australia up until 1 July 2023.

12 Paul Karp, 'Coalition Abandons Crackdown on Wage Theft as Senate Passes Gutted Industrial Relations Bill', *The Guardian* (online, 18 March 2021) <https://www.theguardian.com/australia-news/2021/mar/18/coalition-abandons-crackdown-on-wage-theft-as-senate-passes-gutted-industrial-relations-bill>.

13 Tess Hardy, John Howe and Melissa Kennedy, 'Criminal Liability for "Wage Theft": A Regulatory Panacea?' (2021) 47(1) *Monash University Law Review* 174.

regime and its enforcement and how it must include suitable redress mechanisms. The framework is underpinned not by an analysis of the clauses of the Omnibus Bill, but by a comparative analysis of the state models over two years since their inception to determine what lessons can be learnt from both. But we make two further observations. The first is that this article comes at a critical point in time. As the Albanese Government has pledged to criminalise deliberate wage theft,[14] and review current civil wage recovery mechanisms in the *FW Act*,[15] robust debate in this area is needed to assist in the design, enforcement and implementation of national reform, and to continue to inform any *future* developments to this regime. The second is that, to date, there has been scant attention in the literature on the importance of including recovery mechanisms as part of criminal wage theft regimes. It is well accepted that any argument about criminalisation is undermined from the outset if there is a lack of clarity about the state's obligations to provide victims suitable redress.[16]

Against this background, this article is structured as follows. In Part II we provide an overview of how deliberate wage theft became criminalised in Victoria and Queensland against the backdrop of Australia's regulatory attempts to combat the exploitation of workers more generally. In Part III we undertake a comparative analysis of the Victorian and Queensland models revealing an array of differences between the two, including in terms of the physical and fault elements of the offences, penalties, wage recovery and enforcement mechanisms. This analysis reveals that the Victorian regime is significantly more advanced than its Queensland counterpart in terms of its potential to deter deliberate wage theft and, as a corollary, improve compliance with workplace laws. In Part IV, we explain the two justifications for criminalising deliberate wage theft in Australia in order to ground our analysis in the final substantive Part on how it ought to be criminalised. In particular, in Part V, we contend that a carefully drafted federal offence is required that criminalises deliberate wage theft (rather than attempting to subsume or 'fit' this conduct within a pre-existing offence), and that such an offence must be enacted within a legal regime that understands the common context in which deliberate wage theft offending occurs. However, if federal lawmakers are serious about combatting this egregious workplace practice, then criminalisation must be accompanied by robust enforcement and suitable civil recovery mechanisms that empower workers who seek to recover their unpaid entitlements.

14 'Criminalise Wage Theft', *Anthony Albanese PM* (Web Page, 11 November 2021) <https://anthonyalbanese.com.au/media-centre/criminalise-wage-theft>.

15 Department of Employment and Workplace Relations (Cth), 'Compliance and Enforcement: Amending the *Fair Work Act* Small Claims Procedure' (Information Sheet, 7 December 2022).

16 Virginia Mantouvalou, 'The UK *Modern Slavery Act 2015* Three Years On' (2018) 81(6) *Modern Law Review* 1017, 1035 <https://doi.org/10.1111/1468-2230.12377>; Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] (3) *Criminal Law Review* 169, 172.

II HOW DELIBERATE WAGE THEFT BECAME CRIMINALISED

Wage theft and other forms of non-compliance with Australia's workplace laws have been the subject of sustained media attention and government inquiries since 2015.[17] That year saw Pandora's box open when the ABC's *Four Corners* program unearthed the rampant exploitation of temporary migrant workers in the horticulture and meat processing sectors.[18] Labour hire contractors operating in the black economy would supply these migrants to farms and factories where they were harassed, underpaid and housed in substandard accommodation. Later that year, a joint exposé by Fairfax Media and *Four Corners* found that the business model of the $1.5 billion franchise 7-Eleven relied on the deliberate wage theft of its casualised workforce.[19] To sustain its non-compliance with workplace laws, franchisees would deliberately produce false employment records of the hours worked and amounts paid to employees, many of whom were international students.[20] The 7-Eleven saga became an infamous example of how unscrupulous employers can commit deliberate breaches of their recordkeeping obligations, but it was not an isolated incident.[21] By the end of 2015, for example, of the 50 cases in which the Fair Work Ombudsman ('FWO') decided to seek civil penalties, nearly a third related to allegations of false or misleading records.[22]

At an anecdotal level, 2016 would see media exposés, academic studies and government investigations expose systemic levels of wage theft in industries heavily reliant on a low-skilled and casualised workforce, such as the horticulture, hospitality, food processing, franchising and cleaning sectors.[23] Again, temporary migrant workers, including international students, working holiday makers and undocumented workers, were the main targets of wage theft.[24] A 2016 study of 4,322 temporary migrants revealed that almost a third earned $12 per hour or less, nearly half the applicable minimum wage rate.[25] Another study, conducted by United Voice, found that of the 200 international students surveyed, a quarter received less than $10 an hour and 76% did not receive penalties for weekend or

17 *Systemic, Sustained and Shameful* (n 5) 5 [1.21].

18 'Slaving Away', *Four Corners* (Australian Broadcasting Corporation, 4 May 2015) <https://www.abc.net.au/news/2015-05-04/slaving-away-promo/6437876>.

19 '7-Eleven: The Price of Convenience', *Four Corners* (Australian Broadcasting Corporation, 30 August 2015) <https://www.abc.net.au/4corners/7-eleven-promo/6729716>.

20 Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016) 32.

21 See, eg, *Fair Work Ombudsman v JS Top Pty Ltd* [2017] FCCA 1689; *Fair Work Ombudsman v Amritsaria Four Pty Ltd* [2016] FCCA 968; *Fair Work Ombudsman v Mai Pty Ltd* [2016] FCCA 1481; *Fair Work Ombudsman v Hiyi Pty Ltd* [2016] FCCA 1634.

22 Natalie James and Janine Webster, 'Regulation of Work and Workplaces: The Fair Work Ombudsman's Role in the Development of Workplace Law' (Speech, Australian Labour Law Association National Conference, 4 November 2016) 4 <https://www.fairwork.gov.au/sites/default/files/migration/764/speech-to-australian-labour-law-association-4-november-2016.pdf>.

23 See above n 1.

24 Ibid.

25 Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Report, November 2017) 5 <https://doi.org/10.2139/ssrn.3140071>.

night work.[26] In its seminal 2016 report, tellingly entitled, *A National Disgrace: The Exploitation of Temporary Work Visa Holders*, the Senate Education and Employment References Committee ('SEERC') described how some employers would deliberately undercut the wages of migrant workers as part of their business model in an attempt to gain an advantage over competitors.[27] This mounting evidence of wage theft, and particularly deliberate wage theft, ultimately fuelled calls for law reform.

As a response to these calls, the Federal Liberal Government introduced two key measures as part of its 2016 policy to protect vulnerable workers. The first was the establishment of the Migrant Workers' Taskforce in October 2016 which was charged with formulating 'improvements in law, law enforcement and investigation' to better identify and rectify migrant worker exploitation.[28] The second was the passage of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). Among other things, the Act increased the *FW Act*'s maximum civil penalties tenfold for 'serious' contraventions, defined to mean where the person knowingly contravened a civil remedy provision and the person's conduct was part of a systematic pattern of conduct relating to one or more persons.[29] The aim of these reforms was to deter deliberate wage theft because by this point in time, under the existing FW regime, '[s]ome unscrupulous employers view[ed] non-compliance as a business model and [did] not fear being caught out for their behaviours, or consider[ed] penalties associated with their breaches of the law an acceptable cost of doing business'.[30]

Meanwhile, by 2017, the Victorian, Queensland and South Australian Labor Governments introduced labour hire licensing legislation aimed at addressing deliberate wage theft, and other forms of exploitation, which affected labour hire workers, particularly temporary migrant workers.[31] Anthony Forsyth's seminal inquiry into the Victorian labour hire industry a year prior had found that 'rogue' operators existed within the industry whose 'activities frequently involve[d] breaches of applicable workplace and safety legislation, [and] award obligations'.[32] In all three States, the new labour hire regimes prescribed that only businesses who could demonstrate compliance with employment laws would be permitted to provide labour hire services, and required that host businesses utilise only licensed

26 *A National Disgrace* (n 1) 203 [8.11].

27 Ibid 120 [4.95]–[4.96], 234 [8.153]–[8.155].

28 'Migrant Workers' Taskforce', *Department of Employment and Workplace Relations* (Web Page) <https://www.dewr.gov.au/migrant-workers-taskforce>.

29 *Fair Work Act 2009* (Cth) s 557A(1) ('*FW Act*').

30 Fair Work Ombudsman, Submission No 4 to Senate Standing Committees on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (6 April 2017) 7.

31 *Labour Hire Licensing Act 2017* (Qld); *Labour Hire Licensing Act 2017* (SA); *Labour Hire Licensing Act 2018* (Vic). Victoria was the last of these three States to pass its labour hire licensing regime, enacting it in June 2018.

32 Anthony Forsyth, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, 31 August 2016) 17.

labour hire providers.[33] Whilst the Victorian regime imposed only civil fines for contraventions of its prohibitions of operating unlicensed or using unlicensed providers, the Queensland and South Australian legislation deployed a combination of both civil and criminal penalties.[34]

Pausing at this juncture, whilst once assumed that deliberate wage theft could only be ascribed to a few rogue operators, by 2017 it was evident that it was a conscious business strategy adopted by many employers. As the SEERC emphatically stated in its 2017 report on corporate avoidance of the *FW Act*:

> The committee is not persuaded by arguments suggesting that underpayment is usually the result of oversight, or that the law is too complex for employers to understand. While genuine errors do occur, these tend not to consistently favour the pecuniary interests of one side only – employees may be mistakenly underpaid or overpaid. As the committee did not receive any evidence suggesting that thousands of vulnerable workers have been enjoying millions of dollars' worth of accidental overpayment it is not convinced that the levels of underpayment are due to 'administrative errors'.[35]

However, practical limitations of the regulatory measures introduced to deter deliberate wage theft were already coming to light. These included difficulties in proving 'serious contraventions' of the *FW Act* for the maximum tenfold civil penalties to apply,[36] and the potential for unscrupulous labour hire operators to avoid supplying workers in states with labour hire licensing regimes in order to remain unregulated.[37] Despite these impediments, the criminalisation of any forms of wage theft did not feature in the Federal Government's policy platform at this point in time. Brendan O'Connor, a Labor employment spokesman, had contended that 'industrial relations should be in the civil law realm' and '[i]f the states think they need to change their criminal law then that's a matter for the states'.[38] Former Liberal Workplace Minister, Craig Laundy, expressed similar views stating that the underpayment of wages should not result in 'throwing people in jail'.[39]

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33 Anthony Forsyth, 'Regulating Australia's "Gangmasters" through Labour Hire Licensing' (2019) 47(3) *Federal Law Review* 469, 470 <https://doi.org/10.1177/0067205X19856504>.

34 *Labour Hire Licensing Act 2017* (Qld) ss 10(1), 11(1); *Labour Hire Licensing Act 2017* (SA) ss 10(1), 11(1); *Labour Hire Licensing Act 2018* (Vic) ss 13, 15(1), 94(1)–(2) items 1 and 3.

35 Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act 2009* (Report, 6 September 2017) 72 [6.65].

36 Stephen Clibborn and Chris F Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29(2) *Economic and Labour Relations Review* 207, 217 <https://doi.org/10.1177/1035304618765906>.

37 Gangmasters Licensing Authority, Submission No 15 to Industrial Relations Victoria, Department of Economic Development, Jobs, Transport and Resources, *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (24 November 2015) 8; Recruitment & Consulting Services Association, Submission to Economic and Finance Committee, Parliament of South Australia, *Inquiry into the Labour Hire Industry* (July 2015) 5.

38 Anna Patty and Noel Towell, 'Pressure Mounts on Federal Labor to Pledge to Criminalise Wage Theft', *The Sydney Morning Herald* (online, 25 May 2018) <https://www.smh.com.au/business/workplace/pressure-mounts-on-federal-labor-to-pledge-to-criminalise-wage-theft-20180525-p4zhjj.html>.

39 Noel Towell, 'Labor Vows to Jail Bosses over Workplace Deaths', *The Canberra Times* (online, 26 May 2018) <https://www.canberratimes.com.au/story/6017056/labor-vows-to-jail-bosses-over-workplace-deaths/>. As Stephen Clibborn hypothesises, this united position 'may have reflected a concern that introducing criminal sanctions to industrial relations would set a precedent, easing the way for future additional workplace crimes applying to union officials or employees': see Stephen Clibborn, 'Australian

It was against this federal political landscape that the Victorian and Queensland Governments decided to criminalise deliberate wage theft. In May 2018, the Andrews Government confirmed its intention to make deliberate wage theft a crime in Victoria.[40] In particular, the Victorian Penalty Rates and Fair Pay Select Committee had recommended that a new criminal offence for dishonestly underpaying wages or entitlements be introduced, which was based on the assumption that 'the prospect of a custodial sentence would be a more effective deterrent than financial penalties'.[41] The Victorian Government supported this recommendation in full.[42] In March 2020, the Wage Theft Bill 2020 (Vic) was introduced in the Legislative Assembly and was passed in June later that year. The *Wage Theft Act* now makes it a criminal offence in Victoria for an employer to dishonestly withhold from an employee their wages or other employee entitlements, or to engage in dishonest employment recordkeeping practices.[43] In the second reading speech of the Bill, the Attorney-General noted the potential deterrent effect of the laws and that they would be enforced by a specialised statutory body.[44] In September 2020, reforms were passed to Queensland's criminal *Code*. The amendments broadened the pre-existing offence of 'stealing' within the *Code* in an attempt to capture the fraudulent failure of an employer to pay an employee an amount payable in relation to the employee's performance of work.[45] These reforms were coupled with the introduction of 'timely, inexpensive and informal' civil wage recovery mechanisms within the *IR Act* for employees who had been underpaid.[46] Consistent with the Victorian model, Queensland's Education, Employment and Small Business Committee had recommended the criminalisation of deliberate wage theft on the basis that it would 'reflect the seriousness of wage theft and signal Parliament's intention to provide a deterrent to those employers who deliberately underpay and take advantage of their workers'.[47]

Industrial Relations in 2019: The Year Wage Theft Went Mainstream' (2020) 62(3) *Journal of Industrial Relations* 331, 332–3 <https://doi.org/10.1177/0022185620913889>.

40 Premier of Victoria, 'Dodgy Employers to Face Jail for Wage Theft' (Media Release, 26 May 2018) <https://www.premier.vic.gov.au/dodgy-employers-face-jail-wage-theft>.

41 Legislative Assembly Penalty Rates and Fair Select Committee, Parliament of Victoria, *Inquiry into Penalty Rates and Fair Pay* (Final Report, July 2018) 46.

42 Victorian Government, *Inquiry into Penalty Rates and Fair Pay: Government Response* (Report, 20 September 2018) 4.

43 *Wage Theft Act 2020* (Vic) ss 6–8 ('*Wage Theft Act*').

44 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097 (Jill Hennessy, Attorney-General).

45 *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) item 4 ('*Queensland Amendment Act*'), inserting *Criminal Code 1899* (Qld) s 391(6A) ('*Code*').

46 Explanatory Notes, Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Qld) 6; *Queensland Amendment Act* (n 45) pt 3 item 9.

47 Education, Employment and Small Business Committee, Parliament of Queensland, *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020* (Report No 35, August 2020) 5 ('*Report No 35*'). See also Queensland, *Parliamentary Debates*, Legislative Assembly, 15 July 2020, 1628 (Grace Grace, Minister for Education and Minister for Industrial Relations).

South Australia has also pledged to criminalise deliberate wage theft;[48] in the Northern Territory, the Law Reform Committee has recommended that the Northern Territory Government consider criminalising deliberate wage theft if such an offence is not introduced at the federal level 'within a reasonable time',[49] while other Australian jurisdictions have deferred to the Commonwealth to address the issue.[50] Notably, '[t]o better deter non-compliance' with workplace laws,[51] the Morrison Government had introduced reforms as part of the Omnibus Bill which sought to make it a federal criminal offence for an employer to 'dishonestly engage in a systematic pattern of underpaying one or more employees'[52] and which would attract a maximum penalty of four years' imprisonment.[53] 'Dishonest' was defined to mean conduct that was 'dishonest according to the standards of ordinary people' (the objective element) and 'known by the defendant to be dishonest according to the standards of ordinary people' (the subjective element).[54] However, the Coalition government unexpectedly withdrew these clauses in March 2021. Nevertheless, the Albanese Government has pledged to criminalise deliberate wage theft,[55] with a recent Senate inquiry also recommending criminalisation.[56] The Federal Government also consulted with relevant stakeholders on how wage theft ought to be criminalised, including what mechanisms are required to increase 'detection for wage underpayment'.[57] This consultation occurred alongside the government's separate review of wage recovery mechanisms in the *FW Act*.[58]

This completes our overview of how deliberate wage theft became criminalised in Australia. In what follows, we provide a comparative analysis of the Victorian and Queensland regimes to determine how they criminalise deliberate wage theft. This is necessary in order to determine what lessons can be learnt from both which will assist in the development and implementation of national reform.

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48 South Australian Labor, 'Industrial Relations: For the Future' (Policy Brochure, 2021) 11 <https://uploads-ssl.webflow.com/612f07247ff286d66d81fe5c/61f9fccfeb83c84acbfb31ae_2021-Policy-Industrial%20Relations-low%20(1).pdf>.

49 Northern Territory Law Reform Committee, *Report on Wage Theft* (Report No 48, January 2023) 27 <https://justice.nt.gov.au/__data/assets/pdf_file/0013/1211143/wage-theft-report-2023.PDF>.

50 Caley Otter, 'Wage Theft Bill 2020: Bill Brief' (Research Note No 4, Parliamentary Library and Information Service, Parliament of Victoria, May 2020) 1.

51 Explanatory Memorandum, Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (Cth) iv.

52 Ibid 77 [407].

53 Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021 (Cth) item 46 (as presented and read for the first time in the House of Representatives).

54 Ibid item 42.

55 'Labor Will Criminalise Wage Theft', *Anthony Albanese PM* (Web Page, 13 May 2021) <https://anthonyalbanese.com.au/media-centre/labor-will-criminalise-wage-theft-13-may-2021>; Tony Burke, 'The Year Ahead' (Speech, National Press Club, 1 February 2023) <https://ministers.dewr.gov.au/burke/address-national-press-club>.

56 *Systemic, Sustained and Shameful* (n 5) 138 [6.9].

57 'Compliance and Enforcement: Criminalising Wage Theft', *Department of Employment and Workplace Relations (Cth)* (Web Page, 28 June 2023) <https://www.dewr.gov.au/item-03>.

58 Department of Employment and Workplace Relations (n 15).

III HOW DELIBERATE WAGE THEFT IS CRIMINALISED IN VICTORIA AND QUEENSLAND

Whilst the Victorian and Queensland models both seek to deter deliberate wage theft, how the two regimes have been drafted to achieve this differs remarkably. As previously noted, Victoria's *Wage Theft Act* creates novel deliberate wage theft and recordkeeping offences, collectively referred to as 'employee entitlement offences', which carry maximum penalties of 10 years' imprisonment. The Act also establishes a new statutory body corporate, the Wage Inspectorate Victoria ('the Inspectorate'), which is conferred educational, investigative and prosecutorial functions. Queensland's model follows a very different course by amending the pre-existing offence of stealing in an attempt to encapsulate deliberate wage theft. It also relies on other pre-existing offences within the *Code*, such as the crimes of fraud and the fraudulent falsification of records, as will be explained below. Whilst there were no associated legislative amendments to establish a specialised enforcement body, the Queensland Industrial Magistrates Court and Commission have been conferred jurisdiction to hear civil wage recovery claims. However, in analysing the Victorian and Queensland legislative regimes, we exclude from our consideration any potential constitutional implications following their enactment.[59]

The recent work of Joachim Dietrich and Matthew Raj provides an important conceptual and practical analysis of the physical and fault elements of the offences that criminalise deliberate wage theft under the Victorian and Queensland regimes, including the types of offenders who may commit these offences.[60] However, by focusing only on this punitive aspect of the schemes, one cannot fully discern what (if any) mechanisms the legislatures have implemented to deter deliberate wage theft, how the regimes facilitate the detection of deliberate wage theft, and whether mechanisms are in place to assist wage recovery. Put simply, narrowing the focus on the drafting of the offences that criminalise deliberate wage theft means that a complete picture cannot be obtained of the design and enforcement of the regimes. A more holistic approach to the analysis of each scheme is necessary to gain a better sense of their policy and practical implications, including their predicted effectiveness in terms of deterring deliberate wage theft.

Our analysis undertakes this holistic approach to the examination of the two regimes, over two years since their inception. This is not to say it is an exhaustive analysis of every aspect of the schemes, given the complexity of each. But our analysis focuses not only on the drafting of the deliberate wage theft offences,

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59 At the time of writing, the Victorian Inspectorate has, for the first time, filed 94 charges in the Magistrates' Court of Victoria against a Macedon restaurant and its officer alleging that each has committed offences contrary to the *Wage Theft Act* (n 43). Proceedings have since commenced in the High Court with the plaintiffs (the Macedon restaurant and its officer) contending that the state *Wage Theft Act* is inconsistent with the federal *FW Act* and thus invalid by operation of section 109 of the *Constitution*. On 22 May 2023, the demurrer was referred to the Full Court of the High Court for hearing: see *Rehmat & Mehar Pty Ltd v Hortle* (High Court of Australia, M16/2023, commenced 22 May 2023).

60 Joachim Dietrich and Matthew Raj, 'Criminalising "Wage Theft" in Australia: Property, Stealing, and Other Concepts' (2021) 45(4) *Criminal Law Journal* 218.

but also the criminal complicity provisions, ancillary recordkeeping offences, the enforcement mechanisms and the wage recovery mechanisms. It is only by adopting this holistic analytical approach that it becomes apparent that the Victorian regime is significantly more advanced than its Queensland counterpart in terms of its ability to deter deliberate wage theft and, as a corollary, improve workplace compliance with labour laws and standards.

A The Legislative Frameworks

An obvious point of difference between the two models is that Victoria's provisions are housed within standalone legislation whereas Queensland's are the result of amendments to its *Code*. This difference is likely, in part, because Queensland's criminal law is intended to be stated almost exclusively within its *Code* (based on the original Griffith model),[61] whereas Victoria is a so-called 'common law jurisdiction' as it contains a mixture of common law and statutory offences.[62]

Victoria's *Wage Theft Act* appears to hold greater symbolic worth as standalone legislation can signal the priority that a government has given to a societal issue as well as express Parliament's condemnation of the conduct that the Act criminalises.[63] Equally, the Victorian regime may assist to sharpen society's awareness and knowledge of the deliberate wage theft offences by bringing them to the forefront whereas the amendments made to the offence of stealing in Queensland are buried deep within its *Code*.[64] Indeed, one of the express functions of the Inspectorate is to 'inform … [and] educate … people in relation to their rights and obligations' under the *Wage Theft Act*.[65] Victoria's regime, then, appears to offer more educative value, both in substance and in form, than that provided by the Queensland model.

B Physical Elements

In addition to diverging legislative schemes, the drafting of the deliberate wage theft offences in the Victorian and Queensland models differs significantly. In Victoria, the deliberate wage theft offences are found in sections 6(1) and (7) of the *Wage Theft Act*. They provide that an employer and its officers must not dishonestly:

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61 Dean Wells, '"The Griffith Code": Then and Now' (1993) 3(2) *Griffith Law Review* 205; Andrew Hemming, 'When a Code Is a Code' (2010) 15(1) *Deakin Law Review* 65, 66 <https://doi.org/10.21153/dlr2010vol15no1art117>. However, there had been (albeit few) instances where some standalone Acts prescribe criminal offences that are separate to the *Code*: see, eg, *Domestic and Family Violence Protection Act 2012* (Qld).

62 Simon Bronitt, 'The Criminal Law in Australia' (Research Paper No 09-25, ANU College of Law, 2009) 2.

63 The symbolic value of standalone acts has been recognised in various contexts including in the enactment of modern slavery and anti-vilification laws: see, eg, Mark Zirnsak et al, Submission No 199 to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia, *Inquiry into Establishing a Modern Slavery Act* (2017) 74–5 <http://fecca.org.au/wp-content/uploads/2017/05/Modern-Slavery-Act-submission.pdf>; Legal and Social Issues Committee, Legislative Assembly, Parliament of Victoria, *Inquiry into Anti-Vilification Protections* (Final Report, March 2021) 129.

64 The offence of stealing is found in section 398 of the *Code* which contains over 700 provisions.

65 *Wage Theft Act* (n 43) s 20(1)(a).

> (a) withhold the whole or part of an employee entitlement owed by the employer to an employee; or
> (b) authorise or permit, expressly or impliedly, another person to withhold the whole or part of an employee entitlement owed by the employer to an employee and that other person does so.

'Officers' are individuals who hold high-level positions within the organisation, such as directors.[66] 'Employee entitlement' is broadly defined to mean 'an amount payable by an employer to or in respect of an employee, or any other benefit payable' in accordance with the relevant laws, contracts or agreements, and includes not only wages and salaries but allowances and gratuities, attribution of leave and superannuation.[67] Notably, the *Wage Theft Act* also includes a 'due diligence' defence which provides that an employer or officer cannot be found guilty of a deliberate wage theft offence contrary to sections 6(1) or (7) if they can prove that 'before the alleged offence, the employer [or officer] had exercised due diligence to pay or attribute the employee entitlements to the employee'.[68]

The Queensland model takes a very different approach by relying on the pre-existing offence of stealing in section 398 of the *Code* to criminalise deliberate wage theft. By way of background, to be liable for stealing in Queensland, a person must fraudulently either take or convert any 'thing' capable of being stolen.[69] Section 390 clarifies that only property that is 'moveable' or 'capable of being made moveable' is a 'thing' capable of being stolen, whilst section 391(6) requires the offender to have engaged in some sort of 'physical dealing' in the 'thing' in order for the act of stealing to be complete.

However, in an attempt to subsume deliberate wage theft within the offence of stealing, the *Queensland Amendment Act* amended section 391. In particular, a new section 391(6A) was inserted which (a) provides that an amount payable to an employee in relation to the performance of work is a 'thing' capable of being stolen; (b) dispenses with the requirement in section 391(6) that there must a 'physical dealing' of the 'thing' (ie, the amount payable) when it comes to deliberate wage theft (since it is purely passive conduct – the *failure* to pay an amount); and (c) deems the failure to pay the amount to the employee when it becomes payable an act of conversion.[70] Put simply, the physical elements of the offence of stealing are made out when an amount in relation to the employee's performance of work becomes payable and is not paid.

Curiously, the *Queensland Amendment Act* also extended the list of aggravated fraud offences under section 408C of the *Code* that are subject to a higher maximum penalty of imprisonment of 14 years (rather than the maximum five years' imprisonment for a basic offence) to include fraud committed by a past or present employer of the victim. Presumably, the Queensland Parliament considered the offence of fraud adequate enough to encapsulate deliberate wage theft without

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66 Ibid s 3(1).
67 Ibid.
68 Ibid ss 6(5), (10).
69 *Code* (n 45) s 391(1).
70 'Conversion' is traditionally defined as dealing with the thing in a manner that is inconsistent with the rights of the owner: see *R v Angus* [2000] QCA 29, [15] (Pincus JA).

requiring amendment given that it encompasses dishonestly gaining an advantage or benefit for any person or dishonestly causing a detriment to any person.[71]

Whilst we provide a detailed analysis in Part V on how a deliberate wage theft offence ought to be drafted, we note at this juncture that there are problems with utilising the offences of stealing and fraud to criminalise deliberate wage theft as these offences fail to encapsulate the essence of this conduct. Put differently, the conduct of deliberate wage theft does not 'fit' easily within the physical elements of these offences. To provide one example, we have seen how the Queensland *Code*, in order to subsume deliberate wage theft within section 398, had to expressly dispense with a hallmark requirement of stealing, namely that the victim's property must be moved or dealt with by some *physical* act. The Victorian regime, by contrast, attempts to overcome these issues by enacting deliberate wage theft offences that have their own unique physical elements. Further, the Victorian model also utilises a due diligence defence which may assist in enhancing compliance-based behaviour.[72] This directs the criminal court to undertake a fact-sensitive analysis by having to consider an array of compliance-related factors, including the size of the employer's business, the action taken by the alleged offender, and any processes that were put in place in an attempt to ensure that employees received their pay.[73] Thus, understanding that these factors will be relevant to the court in deciding whether or not an alleged offender is guilty of deliberate wage theft may deter liability-avoidance behaviours which can make it difficult to detect the occurrence of deliberate wage theft.[74]

C Fault Elements

We now turn to the fault elements of the deliberate wage theft offences. In Victoria, many acquisitive offences found in part 1 division 2 of the *Crimes Act 1958* (Vic), such as theft and obtaining property by deception, contain the fault element of dishonesty. In part 1 division 2 of that Act dishonesty is defined in the 'special sense' to mean that the accused must have acted without the belief that he or she had, in all the circumstances, a legal right to deprive the victim of the property.[75] Put simply, dishonesty is taken to mean that 'the accused acted without any claim of legal right'.[76] Whilst dishonesty also forms a fundamental ingredient in finding criminal liability under the *Wage Theft Act* it departs from the standard

71 *Code* (n 45) ss 408C(1)(d)–(e).

72 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) 71, 82 <https://doi.org/10.22459/NDLA.09.2017.05> ('Good Call').

73 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1098 (Jill Hennessy, Attorney-General).

74 Andrew Stewart et al, Submission No 56 to the Senate Standing Committees on Education and Employment, Parliament of Australia, *Inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 [Provisions]* (5 February 2021) 58 ('Inquiry Submission'); Hardy, 'Good Call' (n 72) 82.

75 *R v Salvo* [1980] VR 401, 435 (Fullagar J).

76 See Judicial College of Victoria, 'Victorian Criminal Charge Book' (Bench Book) ch 7.5.1, [67] and the cases cited therein.

of dishonesty applied in part 1 division 2 of the *Crimes Act 1958* (Vic). Instead, for the purposes of the employee entitlement offences, dishonesty is defined to mean 'dishonest according to the standards of a reasonable person' which is an objective test.[77] No separate requirement exists that the defendant must have appreciated that what he or she has done is dishonest according to the standards of a reasonable person.[78] As a consequence, a defendant employer cannot escape liability simply by asserting that they subjectively believed that underpaying employees was an acceptable (and lawful) business practice (for example because they are aware of other employers engaging in this conduct). In addition, the Victorian model includes provisions that deem corporate employers (without requiring proof of fault) liable for employee entitlement offences that have been committed by their officers,[79] and their knowledge or intention or a particular belief held is also attributed to the corporate employer so long as the officer is acting within the scope of their employment.[80]

In Queensland, for the offence of stealing to be made out under section 398 of the *Code*, the taking or conversion must have been done so 'fraudulently'. A person who takes or converts property is deemed to do so 'fraudulently' if he or she does so with any one of the intents specified in subsections 391(2)(a)–(f),[81] which relevantly includes 'an intent to permanently deprive the owner of the thing of it'.[82] For the purposes of the *Code*, 'intent' is equated to 'purpose' in that a person intends a result if they mean to produce it.[83] An 'owner' is defined to include a person who has special property in the 'thing' in question. The definition of 'special property', in turn, was amended by the *Queensland Amendment Act* to include a right of an employee, in relation to their performance of work, to be paid the 'thing'.[84] What this means is that the employee owns the amount payable (which is a 'thing' capable of being stolen) so long as the employee has a right to be paid the amount in relation to the performance of their work.

Proving the requisite fault element under the Queensland regime may become an exercise fraught with difficulty. In part, this is because it would be rare for an employer to withhold an amount payable to an employee for the purpose of

77 *Wage Theft Act* (n 43) ss 6(11), 7(7), 8(7). See also Explanatory Memorandum, Wage Theft Bill 2020 (Vic) 8.

78 Cf the test for dishonesty enunciated in *R v Ghosh* [1982] QB 1053 ('*Ghosh*') which required the defendant to have appreciated that their conduct was dishonest by the ordinary standards of the reasonable person. The *Ghosh* test was subsequently disapproved in *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 and *Barton v The Queen* [2021] QB 685. In Australia the *Ghosh* test was also disavowed by the High Court in *Peters v The Queen* (1998) 192 CLR 493. A former Chief Justice of the High Court, writing extra-curially, also commented, '[b]eing morally obtuse is not an advantage': see Chief Justice Murray Gleeson, 'Australia's Contribution to the Common Law' (2008) 82 *Australian Law Journal* 247, 249.

79 *Wage Theft Act* (n 43) s 10(1).

80 Ibid s 11(1).

81 *R v White* (2002) 135 A Crim R 346, 348 [8] (McPherson JA).

82 *Code* (n 45) s 391(2)(a).

83 *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [14] (Kiefel, Bell and Keane JJ). See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 369 [16] (Kiefel CJ, Nettle and Gordon JJ). The terms 'intent' or 'intention' have been said to bear the same meaning wherever they appear in the *Code*: see *R v Reid* [2006] 1 Qd R 64, 94 [95] (Chesterman J).

84 *Code* (n 45) s 391(7).

permanently *depriving* the employee of the amount. Rather, the unscrupulous employer will usually do so for the purpose of gaining a *benefit* (financial or otherwise), but with the knowledge or foresight that the employee will thereby be deprived as a secondary or ancillary consequence.[85] Nevertheless, we concede that an employer's knowledge or foresight that an employee's entitlements will not be paid as an 'inevitable' or 'virtually certain' consequence of gaining a financial benefit will likely constitute probative *evidence* of an intent to permanently deprive within the meaning of section 391(2)(a) of the *Code*.[86]

Further, establishing the fault elements on the part of an employer who is a company will require application of the principles of corporate criminal responsibility. Within the context of deliberate wage theft offending, it will be necessary to prove that the person who was the 'directing mind and will' of the company, when committing the physical elements, held the requisite mental element. However, in the context of modern corporate defendants, this will be difficult to prove as the 'knowledge of its human agents is often dissipated through complex structures and reporting lines',[87] making it difficult for the prosecution to obtain this evidence.[88] In an attempt to overcome some of these difficulties, we have seen that the Victorian model includes deeming and attribution provisions, which we discuss in more detail in Part III(E), but it is notable that the Queensland regime has made no attempt to include provisions that will assist the prosecution in proving the necessary fault element.

D Recordkeeping Offences

The Victorian model includes not only deliberate wage theft offences but also criminalises dishonest recordkeeping practices. In particular, Victoria's recordkeeping offences are found in sections 7 and 8 of the *Wage Theft Act*. They criminalise employers and their officers who falsify, or fail to keep, an employee entitlement record[89] with a view to dishonestly: (a) '[obtain] a financial advantage for the employer or another'; or (b) '[prevent] the exposure of a financial advantage'.[90] Whilst 'financial advantage' is not defined in the *Wage Theft Act*, it would include the failure to pay wages, allowances, overtime and penalty rates, or any unlawful deductions, as all would place an employer in a more favourable

85 A similar argument has been advanced, more generally, in the context of stealing contrary to section 398 of the *Code*: see Eric Colvin, John McKechnie and Elizabeth Greene, *Criminal Law in Queensland and Western Australia: Cases and Commentary* (LexisNexis Butterworths, 9th ed, 2021) 70–1 [4.12].

86 *Zaburoni v The Queen* (2016) 256 CLR 482, 490 [15] (Kiefel, Bell and Keane JJ); *Smith v The Queen* (2017) 259 CLR 291, 319–20 [57] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ), citing *Peters v The Queen* (1998) 192 CLR 493, 521–2 [68] (McHugh J, Gummow J agreeing at 533 [93]); *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 369 [16] (Kiefel CJ, Nettle and Gordon JJ).

87 Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352, 354.

88 Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) 159 [4.118].

89 An 'employee entitlement record' is defined simply as 'a record of an employee entitlement': see *Wage Theft Act* (n 43) s 3(1).

90 Ibid ss 7(1)–(2), 8(1)–(2).

financial position had the conduct not occurred.[91] That an employee may not have suffered any financial disadvantage is irrelevant for conviction purposes, though it may operate as a mitigating factor in sentencing.

The Queensland model takes a different approach as it does not create new recordkeeping offences. Instead, it appears to rely on pre-existing provisions within the *Code* regarding the fraudulent concealment or falsification of records.[92] The offence of 'fraudulent falsification of records' in section 430 of the *Code* is one example. The roots of section 430 can be traced to 1900 when its predecessor was enacted to protect the interests of employers only; criminalising servants who fraudulently destroyed or falsified their employers' books, accounts and the like.[93] In its current form, section 430 provides that a person, with an intent to defraud, commits an offence with respect to a record if they: make a false entry in a record; omit to make an entry in a record; give any certificate or information that is false in a material particular; falsify, destroy, alter or damage a record; or produce or make use of a record knowing the record is false in a material particular. However, section 430 does not appear to criminalise the common unscrupulous recordkeeping practice of *failing to keep* an employee record given that the conduct section 430 criminalises presupposes the *existence* of a record.[94]

Thus the Queensland model, in relying on these archaic and ill-suited provisions within the *Code*, fails to recognise that deliberate wage theft is commonly accompanied not only by the falsification of employee documents but the *failure* to keep such records.[95] The Victorian model, by contrast, in enacting statutory offences that criminalise this conduct, understands how failing to maintain these records disempowers employees to enforce workplace rights, whilst simultaneously empowers unscrupulous employers, by making it difficult for a court to determine what an employee was entitled to and the amount he or she has been paid.[96]

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91 In *Taylor v The Queen* (2019) 59 VR 163, in considering the offence of obtaining financial advantage by deception under section 82 of the *Crimes Act 1958* (Vic), the Victorian Court of Appeal observed that a 'financial advantage occurs where a person is put in a favourable or superior economic, monetary or commercial position – a situation where the financial aspect is more beneficial than another': at 190 [99] (Priest and Beach JJA). See also *Fisher v Bennett* (1987) 85 FLR 469, 472 (Miles CJ); *R v Oettinger* [2014] ACTSC 47, 15 [72] (Murrell CJ).

92 See, eg, the following provisions in the *Code*: ss 399 (fraudulent concealment of particular documents), 430 (fraudulent falsification of records) and 499 (falsification of registers). The extrinsic materials available suggest that the Parliament considered these pre-existing offences would suffice: see Education, Employment and Small Business Committee, *Report No 35* (n 47) 17; Education, Employment and Small Business Committee, 'Inquiry into the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020' (Government Publication, 24 July 2020) 5 [31], 6–7 [38]–[41] <https://documents.parliament.qld.gov.au/committees/EESBC/2020/CCOLAB2020/bp-24Jul2020-ccolab.pdf>.

93 *R v Cushion; Ex parte DPP (Cth)* [1997] QCA 380.

94 Cf the stance taken in Education, Employment and Small Business Committee, *Report No 35* (n 47) 6: 'the offence of "fraudulent falsification of records" may … apply to a failure of an employer to keep employee records'.

95 Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1098 (Jill Hennessy, Attorney-General).

96 *Fair Work Ombudsman v Hess* [2021] FCCA 1883, [31] (Jarrett J); *Fair Work Ombudsman v C & H Entertainment Pty Ltd* [2021] FedCFamC2G 5, [23] (Burchardt J).

E Criminal Complicity

We now turn to discuss how a natural person or body corporate may be criminally liable as an accessory or 'secondary offender'; that is, those who ought to be treated as having personally committed a deliberate wage theft offence for having intentionally assisted or encouraged a principal offender.

Queensland's and Victoria's accessorial liability provisions are found within the *Code* and the *Crimes Act 1958* (Vic) respectively. In Queensland, only employers can commit deliberate wage theft as a principal offender contrary to section 398 of the *Code*. As Dietrich and Raj explain, '[t]his is because no one else can be said to have failed to pay the amount the employer was obligated to pay'.[97] The prosecution must rely on the general accessorial liability provisions within the *Code* in relation to non-employer parties. For example, under sections 7(1)(b)–(d) of the *Code*,[98] non-employer parties will only be taken to have committed stealing in the deliberate wage theft sense, such that they will be prosecuted as principal offenders, if they: acted with the purpose of enabling or aiding the employer to commit the offence; or in fact aided, counselled or procured the employer to commit the offence.[99] By contrast, under sections 323–4 of the *Crimes Act 1958* (Vic), a person will be taken to have committed an employee entitlement offence if they intentionally 'assist', 'encourage' or 'direct' the principal offender, with the operation of these terms likely to be a question of fact.[100] Pursuant to section 9 of the *Wage Theft Act*, a person who is not an officer of the employer cannot be liable as an accessory if they were acting under the employer's direction.

However, what appears most unique to the Victorian model in terms of criminal complicity is the inclusion of the attribution and deeming provisions alluded to in Part III(C). Whilst the *Wage Theft Act* contains specific attribution provisions for a range of employers with different business structures,[101] our focus is on corporate employers since it is mainly incorporated employers who commit deliberate wage theft.[102] Where an officer of a body corporate commits an employee entitlement

97 Dietrich and Raj (n 60) 226–7. This is to be contrasted with the Victorian model where officers of the employer can contravene the wage theft and recordkeeping provisions as principal offenders.

98 There are also other sections in the *Code* that are relevant to establishing accessorial liability such as section 10 (accessories after the fact).

99 These words are to be given their ordinary meaning: *Attorney-General's Reference [No 1 of 1975] v The Queen* [1975] QB 773, 779 (Lord Widgery CJ). To 'aid' is to assist or help the principal offender to commit the act constituting the offence, while to 'counsel' is to urge or advise the principal offender: *R v Morant* [2019] 2 Qd R 501, 506–7 [20] (Davis J). 'Procure', by contrast, connotes successful persuasion to do something, and is more than mere encouragement: *MKP Management Pty Ltd v Shire of Kalamunda* (2020) 56 WAR 56, 71–3 [94]–[95] (Buss P, Mazza and Vaughan JJA). Whilst each word bears a different meaning, 'all the words … are … instances of one general idea, that the person charged … is in some way linked in purpose with the person actually committing the crime, and is by his words or conduct doing something to bring about, or rendering more likely, such commission': *R v Russell* [1933] VLR 59, 66–7 (Cussen ACJ).

100 Thomson Reuters, *Criminal Law, Investigation and Procedure Victoria* (at 18 April 2023) [GPOCL.5040]; Stephen Ranieri, 'Accessories and the *Fair Work Act*: Section 550 and an Individual's "Involvement" in a Contravention' (2018) 31(2) *Australian Journal of Labour Law* 180, 186–7.

101 For example, deeming provisions have been enacted with respect to partnerships and partners, and unincorporated associations: see *Wage Theft Act* (n 43) ss 13–15.

102 Dietrich and Raj (n 60) 218.

offence, then the body corporate is deemed to have committed the offence as well.[103] The relevant conduct of the officer, as well as their knowledge or intention or a particular belief held, is also attributed to the body corporate provided the officer is acting within the scope of their employment.[104] Where a body corporate commits an employee entitlement offence, each of its officers is deemed to have committed the offence.[105]

The Victorian deeming provisions will likely play an important role in determining who is liable for deliberate wage theft offending *within* a body corporate as in these circumstances it is often difficult to determine who should bear responsibility as an accessory. For example, it can be difficult to identify the precise agents who contributed to the corporate wrongdoing (particularly if multiple officers are involved) as well as the respective role each officer played in the events or activities leading to the commission of the offence.[106] It can also be difficult to attribute liability to the body corporate, particularly if it has a complex corporate structure, its operations are geographically dispersed, or there are diffuse management chains.[107] However, the Victorian deeming provisions will have a lesser role to play in the context of deliberate wage theft occurring within fragmented corporate structures, such as supply chains, corporate groups and franchising arrangements, as the deeming provisions do not address the attribution of liability *between* body corporates. In this regard, further thought is required on how 'lead firms' could be attributed liability for contraventions of employment standards occurring within their supply chain, corporate group or franchising network, particularly in circumstances where there is evidence that the lead firm's business practices contributed to the offending by, for example, exerting downward pressure to reduce labour costs.

Nevertheless, the deeming provisions as they stand still make the Victorian model better crafted than its Queensland counterpart when it comes to criminal complicity. It is notable that the Queensland model does not include any specific deeming provisions regarding attribution of liability, and instead opted to rely solely on its archaic accessorial liability provisions within the *Code* which are difficult to implement in practice.[108] This deficit in the Queensland model will make it difficult to establish criminal complicity of deliberate wage theft offending in the corporate context.

F Penalties

Whether prosecuted as principals or accessories, deliberate wage theft offenders are liable to the same maximum penalties. In Victoria, the employee entitlement

103 *Wage Theft Act* (n 43) s 10(1).
104 Ibid s 11(1).
105 Ibid s 13(1).
106 James McConvill and Mirko Bagaric, 'Criminal Responsibility Based on Complicity among Corporate Officers' (2004) 16(2) *Australian Journal of Corporate Law* 1, 8, 12. See also New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Issues Paper No 20, 2001) 16 [2.11].
107 'Improving Protections of Employees' Wages and Entitlements' (n 5) 12.
108 Dietrich and Raj (n 60).

offences carry maximum penalties of 6,000 penalty units for body corporates, and 10 years' imprisonment for natural persons.[109] This mirrors the maximum penalties of imprisonment for other acquisitive offences in Victoria including theft, burglary and obtaining property (or a financial advantage) by deception.[110] However, this is not to imply that sentences imposed for deliberate wage theft will mirror the range of sentences generally imposed for theft and the like. To invite such a comparison would be unhelpful to the sentencing court given the relatively narrow circumstances in which deliberate wage theft can take place compared to the vast conduct that other acquisitive crimes may comprise.

In Queensland, whilst the general offence of stealing in section 398 is punishable by a maximum period of five years' imprisonment,[111] the offence of stealing in circumstances of deliberate wage theft has been prescribed as a special case, 'in recognition of the special relationship of trust between an employer and [employee]',[112] and is punishable by a maximum period of 10 years' imprisonment for natural persons. For corporate offenders, a court may impose a fine of an unlimited amount.[113] Notably, as the Queensland model presupposes that the offence of fraud encapsulates deliberate wage theft, section 408C(2)(e) was inserted in the *Code* to make a defendant who has committed fraud liable to a maximum penalty of 14 years' imprisonment if they are a past or present employer of the victim.

Thus, that custodial penalties are prescribed speaks strongly of the ostensible seriousness of deliberate wage theft, and the moral culpability of those who commit it, given that imprisonment is the greatest penalty that can be imposed.[114]

G Enforcement Mechanisms

It is one thing to introduce penalties for deliberate wage theft but quite another to enforce the laws in practice. In an attempt to achieve the latter, the Victorian *Wage Theft Act* established the Inspectorate: an independent statutory authority with educational, investigative and prosecutorial functions in relation to employee entitlement offences.[115] This includes commencing criminal proceedings against alleged deliberate wage theft or recordkeeping offenders following consultation with the Director of Public Prosecutions,[116] and appointing inspectors to investigate alleged employee entitlement offences by entering premises, examining and seizing

109 *Wage Theft Act* (n 43) ss 6(1), (7), 7(1)–(2), 8(1)–(2).

110 *Crimes Act 1958* (Vic) ss 74(1), 76(3), 81(1), 82(1).

111 *Code* (n 45) s 398(1).

112 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 July 2020, 1628 (Grace Grace, Minister for Education and Minister for Industrial Relations).

113 *Penalties and Sentences Act 1992* (Qld) ss 181A(1)–(2).

114 Martin G Hinton, 'Sentencing the Multiple Murderer' (2020) 39(2) *University of Tasmania Law Review* 150, 154.

115 *Wage Theft Act* (n 43) ss 19–20. The Inspectorate is also responsible for enforcing Victoria's child employment laws, long service leave entitlements and 'owner driver, forestry contractor, hirer and freight broker obligations': see 'About the Wage Inspectorate', *State Government of Victoria* (Web Page, 29 June 2023) <https://www.vic.gov.au/about-wage-inspectorate>.

116 'Wage Inspectorate Victoria's Compliance and Enforcement Policy', *State Government of Victoria* (Web Page, 1 July 2023) <https://www.vic.gov.au/wage-inspectorate-victorias-compliance-and-enforcement-policy>.

documents, and requiring persons on the premises to answer any questions.[117] In the exercise of its functions, the Inspectorate relies both on preventative measures (namely, 'information, education and early intervention to prevent breaches') and victims to self-report suspected deliberate wage theft.[118] Its guiding regulatory principles include '[placing] our resources where we can deliver the greatest impact' and working with an array of stakeholders, such as unions, government, employer organisations and community groups, 'to develop and design compliance interventions'.[119]

The *Wage Theft Act* also contains non-criminal enforcement provisions. Where an employee entitlement offence has been committed, the Inspectorate may accept an undertaking from the alleged offender that no further employee entitlement offence will be committed.[120] Provided there is no further breach, the enforceable undertaking bars the Inspectorate from commencing criminal proceedings,[121] but if there is non-compliance, the Inspectorate may commence criminal proceedings against the alleged offender.[122]

By contrast, the Queensland model does not establish an independent statutory body to investigate and prosecute deliberate wage theft. Nor does it contain non-criminal enforcement mechanisms such as an enforceable undertaking regime. Instead, it was thought that enforcement could be undertaken by 'existing resource allocations',[123] namely the Queensland Police Service ('QPS'). Queenslanders who suspect they have been subjected to deliberate wage theft are invited to supply comprehensive information and evidence to the QPS. This includes providing a summary of the allegations, underpayment calculations and a list of potential witnesses.[124] However, employees are first invited to report allegations of deliberate wage theft to other regulators, such as the Queensland Office of Industrial Relations, the Australian Taxation Office or the FWO – none of whom prosecute deliberate wage theft offending.[125]

Whilst we delve into an analysis in Part V of this article regarding what constitutes adequate enforcement, we note at this juncture that the Victorian enforcement mechanisms, particularly as they include a specialised statutory authority to enforce the *Wage Theft Act*, are far more advanced than the Queensland model which has merely relied upon usual law enforcement processes. The lack of robust enforcement as part of the Queensland model is one of the most significant deficits of the regime.

117 See *Wage Theft Act* (n 43) pt 4.
118 Ibid.
119 Ibid.
120 Ibid s 63(2).
121 Ibid s 64.
122 Ibid s 65(3).
123 Explanatory Notes, Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020 (Qld) 2.
124 Queensland Police Service, 'Wage Theft Report' (Form, 2020) <https://www.police.qld.gov.au/sites/default/files/2021-10/Wage-Theft-Report-form.pdf>.
125 Ibid 9.

H Wage Recovery

The Queensland model not only aims to criminalise deliberate wage theft and enforce these laws through the QPS. Its cognate purpose is to facilitate 'timely, inexpensive and informal resolution' of unpaid wages claims.[126] The *Queensland Amendment Act* amended the *IR Act* to allow employees who seek the recovery of unpaid employee entitlements to make 'fair work claims' and 'unpaid amount claims'.[127] Whereas fair work claims are made in the Industrial Magistrates Court by employees whose employment is covered by the federal industrial relations system, unpaid amount claims are filed either in an Industrial Magistrates Court or Commission by state public sector and local government employees. For the purposes of the following discussion, the claims are collectively referred to as 'underpayment claims'.

There are no filing fees for underpayment claims,[128] and the Industrial Magistrates Court and Commission are not bound by the rules of evidence for prescribed monetary amounts.[129] The Registrar has a discretion to refer underpayment claims to conciliation to narrow the issues in dispute or achieve early resolution of the matter, and parties cannot be legally represented unless leave is granted.[130] Participating in conciliation is voluntary.

Conversely, when the Bill that ultimately became the *Wage Theft Act* was introduced into the Victorian Parliament, its drafters conceded that it was 'not intended to directly support the recovery of an employee's entitlements'.[131] Nevertheless, the ability of the Inspectorate to accept an enforceable undertaking from a deliberate wage theft offender may be used as a wage recovery mechanism, as one of the conditions of the undertaking could be that relevant employees receive their unpaid entitlements. Further, the *Wage Theft Act* amended section 84 of the *Sentencing Act 1991* (Vic) to allow employees or the Inspectorate to apply to the court to recover unpaid employee entitlements following a person being found guilty of an employee entitlement offence.[132] This means that section 84 confers on victim employees and the Inspectorate a right to apply for a restitution order against an offender as part of the sentencing process.

However, unlike civil wage recovery mechanisms, restitution order provisions in existing penal legislation are far from adequate in terms of being able to provide suitable redress to victims of deliberate wage theft, essentially constituting a mere backdoor mechanism in attempting to afford victims some form of monetary relief. The Victorian context has shown that the ability of a victim to make an application

126 *Industrial Relations Act 2016* (Qld) s 547A ('*IR Act*')..

127 *Queensland Amendment Act* (n 45) item 9, inserting *Industrial Relations Act 2016* (Qld) div 4; *Queensland Amendment Act* (n 45) item 14, inserting *Industrial Relations Act 2016* (Qld) div 5A.

128 Queensland Industrial Relations Commission, 'Wage Recovery Process in the Queensland Industrial Relations Commission; Industrial Magistrates Court of Queensland; and Magistrates Court of Queensland' (Bench Book, 1 July 2023) 54.

129 *IR Act* (n 126) s 531; *FW Act* (n 29) s 548.

130 *IR Act* (n 126) ss 530(1)(g)–(h). See, eg, *Modong v Hamad Group Pty Ltd* [2022] QIRC 452.

131 Victoria, *Parliamentary Debates*, Legislative Council, 16 June 2020, 1954 (Gayle Tierney, Minister for Training and Skills and Minister for Higher Education).

132 *Wage Theft Act* (n 43) s 82; *Sentencing Act 1991* (Vic) ss 84(4A)–(4B).

for restitution is restricted by the occurrence of at least two future contingencies. The first is that the relevant authority needs to prosecute the offender and this could be a very lengthy process, in some cases occurring years after the relevant events in question. The second is that the offender's guilt must be proved beyond reasonable doubt which is a much higher threshold to satisfy than the standard of proof that applies in civil wage recovery proceedings, namely the balance of probabilities. However, even if these two contingencies are satisfied, restitution orders remain at the court's discretion and are intended only to be made in straightforward evidentiary cases, where the facts relevant to the making of a restitution order appear sufficiently from the evidence tendered in the criminal proceedings.[133] In cases of deliberate wage theft, this may prove difficult as underpayment claims often give rise to contested factual matters,[134] which may create a barrier to an employee's application for restitution succeeding. Nevertheless, following the passage of the *Wage Theft Act*, the Victorian Government invested $9.6 million over a four-year term to establish 'an early intervention fast-track model for resolving unpaid entitlement claims' in the Industrial Division of the Victorian Magistrates' Court.[135] The model is broadly reminiscent of Queensland's wage recovery mechanisms as the Victorian wage recovery process involves conciliation before a judicial registrar with industrial relations experience to encourage early resolution,[136] and if the matter does not resolve it proceeds to hearing and determination.[137] Self-represented litigants are also assisted by a 'self-represented litigant coordinator' who acts as a central point of contact in providing assistance regarding the legal process.[138]

I Summary

Our comparison of the Victorian and Queensland models is not intended to be an exhaustive analysis, but it reveals an array of differences between the regimes and how they have been implemented over two years since their inception. The analysis reveals that whilst the Victorian regime is not without its flaws, it is significantly more advanced than its Queensland counterpart in terms of its deliberate wage theft and recordkeeping offences, criminal complicity provisions and enforcement mechanisms, and, more broadly, its potential to deter deliberate wage theft and provide greater educative value. Nevertheless, these state models ought to be empirically tested to determine their effectiveness in deterring deliberate wage theft as the empirical findings will likely inform the design and enforcement of other regulatory regimes, including at the federal level, that criminalise this conduct.[139]

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133 *Sentencing Act 1991* (Vic) s 84(7); *R v Nousis* (2004) 8 VR 381, 384 [12] (Callaway JA).

134 Stewart et al, 'Inquiry Submission' (n 74) 55.

135 'Wage Theft', *Engage Victoria* (Web Page) <https://engage.vic.gov.au/wage-theft>; Jaclyn Symes, 'Fairer, More Responsive Justice for All Victorians' (Media Release, Premier of Victoria, 20 May 2021) <https://www.premier.vic.gov.au/fairer-more-responsive-justice-all-victorians>.

136 Public Accounts and Estimates Committee, Parliament of Victoria, '2022–23 Budget Estimates General Questionnaire: Court Services Victoria' (Questionnaire, 4 May 2022) 9–10 ('2022–23 Budget Estimates').

137 Magistrates' Court of Victoria, *Annual Report 2020–21* (Report, 2021) 20 <https://www.mcv.vic.gov.au/sites/default/files/2021-11/Annual%20Report_20-21_0.pdf>.

138 '2022–23 Budget Estimates' (n 136) 12.

139 Hardy, Howe and Kennedy (n 13) 178, 202–4.

IV THE JUSTIFICATIONS FOR CRIMINALISING DELIBERATE WAGE THEFT IN AUSTRALIA

Whilst not the primary focus of this article, it is important to explain the two justifications for criminalising deliberate wage theft in Australia in order to ground our analysis in Part V on how it *ought* to be criminalised (ie, what features should form part of a legislative regime criminalising this conduct). In our view, criminalisation is justified from both a moral and instrumental perspective.[140]

Deliberate wage theft is wrongful conduct that warrants blame as it involves the exploitation of the power imbalance which is inherent in the employment relationship. This can be contrasted to underpayments that are the result of genuine mistakes where there is no culpability and thus fall outside the realm of the criminal law. The criminal law can be used to communicate that deliberate wage theft is culpable conduct because of its unique expressive power; the criminal law has the 'power to embrace concepts such as retribution and convey societal denunciation and condemnation'.[141] For example, the very act of criminalising deliberate wage theft will declare to the public that from the state's perspective, this conduct is wrongful and should not be tolerated.[142] Receiving a conviction and sentence for deliberate wage theft will also express disapprobation.[143] A conviction will serve to label the employer a 'criminal', announcing to society that they have been found beyond reasonable doubt to have deliberately deprived an employee of their wages or other employee entitlements. Punishment will express the moral condemnation of the community and the gravity of the crime.[144] All other things being equal, the more serious the deliberate wage theft, the more severe the punishment will be.

These features of the criminal law do not form part of the civil penalty regime in the *FW Act*. The civil penalty regime exists primarily, if not solely, to deter contraventions of the Act and is not constrained by notions of the criminal law, such as retribution.[145] Accordingly, the expressive power of the criminal law, which exists in all stages of its operation (the act of criminalisation itself, conviction and sentencing), is required to give an amplified effect beyond that which the civil penalty regime can provide.[146] In this way, a regime criminalising deliberate wage theft is intended to supplement the civil penalty regime rather than override it.

From a regulatory or utilitarian perspective, criminalisation can deter unscrupulous employers from engaging in such conduct and bringing about a

140 See also ibid 203–4, 211. Cf Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case' (2013) 1(1) *Journal of Antitrust Enforcement* 198, 216 <https://doi.org/10.1093/jaenfo/jns009>.

141 Australian Law Reform Commission (n 88) 197.

142 AP Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Bloomsbury Publishing, 2014) 5.

143 Ibid.

144 Australian Law Reform Commission (n 88) 332.

145 *Australian Building and Construction Commissioner v Pattinson* (2022) 274 CLR 450, 457–9 [9]–[10], [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ) ('*Pattinson*').

146 Australian Law Reform Commission (n 88) 197.

desired change in compliance.[147] Admittedly, the civil penalty regime in the *FW Act* is also a state regulatory tool that exists to deter deliberate wage theft.[148] However, the fact that deliberate wage theft is widespread in the Australian labour market, as explained in Part II, suggests that it has not been an effective deterrent in and of itself. This regime imposes civil penalties. The criminal law punishes through sentences of imprisonment and fines which infringe upon fundamental interests, such as individual liberty and reputation.[149] The presence of these draconian consequences means that criminalisation can have an 'additional deterrence effect beyond that expected from increasing civil penalties'.[150] However, as will be explained in this next Part, to have a deterrent effect, the criminal law will need to be effectively enforced in practice.

V HOW DELIBERATE WAGE THEFT OUGHT TO BE CRIMINALISED IN AUSTRALIA

The current debate in this area has thus far been consumed with the foundational question of whether the criminalisation of deliberate wage theft is justified.[151] The terrain that we now traverse is how deliberate wage theft *ought* to be criminalised. It represents our attempt to respond to the increasing calls that in the context of the criminalisation of wage theft, greater emphasis is required 'on how criminal law measures will be designed, interpreted, and enforced in practice'.[152] Accordingly, in this Part, we propose the first framework within the academic literature on how deliberate wage theft ought to be criminalised in Australia. We discuss the drafting of this regime and its enforcement and how it must include suitable redress mechanisms. In particular, we contend that a carefully drafted federal offence is required that criminalises deliberate wage theft (rather than attempting to subsume or 'fit' deliberate wage theft within a pre-existing offence), and that such an offence should be enacted within a legal framework that understands the common context in which deliberate wage theft offending occurs. However, if lawmakers are serious about combatting this exploitative practice, then criminalisation must be accompanied by robust enforcement and suitable civil recovery mechanisms that empower exploited workers who seek to recover their unpaid entitlements.

A A Novel Federal Offence Criminalising Deliberate Wage Theft

As the comparative analysis in Part III reveals, the Queensland model assumes that deliberate wage theft can be criminalised through pre-existing offences such

147 Simester and von Hirsch (n 142) ch 1.

148 *Pattinson* (n 145) 457 [9], 459 [15] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ). See also the second reading speech for the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017: Commonwealth, *Parliamentary Debates*, House of Representatives, 1 March 2017, 1873 (Peter Dutton).

149 Kenneth J Arenson, Mirko Bagaric and Peter Gillies, *Australian Criminal Law in Common Law Jurisdictions: Cases and Materials* (Oxford University Press, 4th ed, 2014) 5.

150 *Migrant Workers' Taskforce Report* (n 9) 87.

151 See, eg, Hardy, Howe and Kennedy (n 13) 192.

152 Ibid.

as stealing, theft or fraud. But there lies an inherent danger with this approach. The danger here is that pre-existing offences may fail to capture adequately the exploitative wrong at the heart of deliberate wage theft which, in our view, is the exploitation of the power imbalance inherent within the employment relationship.

Let us interrogate the offence of theft as an example. Why has it been assumed a compelling candidate for censuring deliberate wage theft? From a theoretical perspective, theft involves ousting the victim from a pre-existing relationship with their property.[153] In more practical parlance, it involves the appropriation of the victim's property, whether by taking or conversion, with the intent to deprive the victim thereof. Determining what constitutes the victim's property is essential before considering the other elements of the offence. But in cases of deliberate wage theft, difficulty arises in determining what the employee's property is given that the funds owed have never been transferred to the employee and may not even exist in circumstances of insolvency. As Sarah Green appositely writes, 'there is an important forensic difference between saying "that is mine; give it to me" and "I performed services for you; you pay me what they are worth"'.[154] However, even if the funds owed, or perhaps the right to be paid those funds when they fall due, amount to 'property', a question lingers over how there can be an 'appropriation' of this property given that appropriation traditionally requires a *physical dealing* with the goods in a manner inconsistent with the victim's rights.[155] As explained earlier, deliberate wage theft is merely *passive* conduct because it is the *failure* to pay an employee their entitlements.

Rather than distorting preconceived notions of 'property' and 'appropriation' inherent within theft and stealing,[156] some commentators have turned to the offence of fraud as a more appropriate candidate for criminalising deliberate wage theft.[157] However, the breadth and depth of this statutory offence means that it carries its own challenges. In particular, the array of behaviours that may be encompassed by 'fraud'[158] may mean that the exploitative wrong inherent in deliberate wage theft will be buried within a general offence too broad in scope. This will present difficulties in terms of fair labelling as it would not distinguish acts of deliberate wage theft from other types of 'fraud'.[159] Further, the offence of fraud would be

153 Sarah Green, 'Wage Theft as a Legal Concept' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 134, 136 <https://doi.org/10.1093/oso/9780198836995.003.0007>; Michelle O'Sullivan, 'The Expansion of Wage Theft Legislation in Common Law Countries: Should Ireland Be Next?' (2023) 52(2) *Industrial Law Journal* 342, 348 <https://doi.org/10.1093/indlaw/dwac019>.

154 Green (n 153) 136.

155 *R v Stevens* [2016] 1 Qd R 70, 73 [10] (Muir JA), quoting *R v Angus* [2000] QCA 29, [16] (Pincus JA).

156 Dietrich and Raj (n 60) 226.

157 Ibid.

158 Nicholas Lord, Cecilia Juliana Flores Elizondo and Jon Spencer, 'The Dynamics of Food Fraud: The Interactions between Criminal Opportunity and Market (Dys)functionality in Legitimate Business' (2017) 17(5) *Criminology and Criminal Justice* 605, 608 <https://doi.org/10.1177/1748895816684539>.

159 As Andrew Ashworth and Jeremy Horder emphasise, the purpose of fair labelling is to ensure that 'distinctions between kinds of offences and degrees of wrongdoing are respected and signaled by the law, and that offences are subdivided and labelled so as to represent fairly the nature and magnitude of the law breaking': Andrew Ashworth and Jeremy Horder, *Principles of Criminal Law* (Oxford University Press, 7th ed, 2013) 77.

limited in its ability to serve strong educative and symbolic functions when it comes to deliberate wage theft by not being able to appropriately communicate the nature of the offending and the Parliament's condemnation of this conduct.[160]

In our view, as deliberate wage theft has a distinct theoretical and practical character, there should be a novel approach to its criminalisation. As a starting point, this should include the creation of a specific, standalone statutory offence that criminalises deliberate wage theft which has its own unique physical and fault elements. Such an offence is required at the federal level. This recognises that deliberate wage theft is a problem that exists across the country and will assist in maintaining consistency throughout the Commonwealth (from the investigation of an alleged offence through to the sentencing of a convicted offender). Further, a national approach will avoid the vexed legal issues related to the constitutional validity of state laws criminalising deliberate wage theft.[161] We agree with the views of Hardy, Howe and Kennedy that federal laws criminalising deliberate wage theft must be drafted carefully to ensure there is a distinction between an offence that would attract a criminal penalty and conduct that would contravene the civil penalty provisions in the *FW Act*.[162] The level of culpability required is likely to be one of the foundational differences between the two.[163]

Adding yet another offence to the ever-growing federal statute book of the criminal law may, at first blush, be objectionable, 'with the preferred approach being the use of fewer "overarching offences of general application"'.[164] But if the 'mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework' a new offence is warranted.[165] A 2019 discussion paper released by the Attorney-General's Department emphasised that central to the criminal law in Australia 'are the notions of identifying the most serious types of wrongdoing, where there can be demonstrated culpability and the criminal intention for the wrongful actions'.[166] This reflects the common law principle that there must be a close correlation between moral culpability and criminal responsibility.[167] Following this logic, we do not suggest that all types of wage

160 The symbolic and educative functions of standalone offences have been recognised in the context of other proposed crimes: see, eg, Alastair P Campbell, *Independent Review of Hate Crime Legislation in Scotland* (Final Report, May 2018) 85 (racial harassment); Joseph Lelliott, Phylicia Lim and Maeve Lu, 'Dousing Threats and the Criminal Law in Queensland: Do We Need a New Offence?' (2021) 46(4) *Alternative Law Journal* 282, 286 <https://doi.org/10.1177/1037969X211029961> (dousing threats).

161 Andrew Stewart et al, 'The (Omni)bus That Broke Down: Changes to Casual Employment and the Remnants of the Coalition's Industrial Relations Agenda' (2021) 34(3) *Australian Journal of Labour Law* 132, 164–5; Mark Lewis, 'Criminalising Wage Theft: Some Observations on Deterrence, Enforcement and Compliance' (2020) 48(6) *Australian Business Law Review* 512, 522.

162 Hardy, Howe and Kennedy (n 13) 210. See also 'Improving Protections of Employees' Wages and Entitlements' (n 5) 13.

163 Attorney-General's Department, *A Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* (Report, 2011) 12–14.

164 Lelliott, Lim and Lu (n 160) 285 (citations omitted).

165 Australian Law Reform Commission, *Family Violence: A National Legal Response* (Final Report No 114, October 2010) vol 1, 587.

166 'Improving Protections of Employees' Wages and Entitlements' (n 5) 10.

167 *Mitchell v The King* (2023) 97 ALJR 172, 180 [30] (Kiefel CJ), 182 [46] (Gageler, Gleeson and Jagot JJ); *Clayton v The Queen* (2006) 231 ALR 500, 522–3 [91] (Kirby J).

theft be criminalised, such as underpayments the result of administrative errors or genuine misunderstandings of our industrial laws, instruments or regulations. Rather wage theft that is deliberate should be criminalised. We support robust political and academic debate on whether some form of 'systematic' or 'repeated' pattern of conduct should form part of the physical elements of the offence, as the Omnibus Bill had proposed.[168] Samuel Walpole and Matt Corrigan consider this necessary on the basis that 'what legitimately turns the civil wrong of underpaying wages into criminal conduct is the systematic nature of the misconduct – the development of a business model that routinely underpays employees'.[169] But, as mentioned earlier, it is arguably the *exploitation* of the power imbalance inherent within the employment relationship that is at the heart of deliberate wage theft. In any event, repeated behaviour is a factor that would be taken into account in the exercise of the prosecutorial discretion regarding the decision to prosecute or not to prosecute an alleged offender, with sufficient evidence of systematic conduct tipping the scales in favour of prosecution.

This approach to the enactment of a deliberate wage theft offence, as outlined in the immediately two preceding paragraphs, is essentially that adopted by the Victorian model. But the Victorian model goes further than simply introducing a deliberate wage theft offence because it enacts an entire *regime* that understands the common *context* in which deliberate wage theft offending occurs. For example, the Victorian model – through its inclusion of recordkeeping offences and corporate deeming provisions that address attribution of liability – recognises that deliberate wage theft is often spurred by dishonest recordkeeping practices and perpetuated within body corporate structures. In a similar vein, any federal offence criminalising deliberate wage theft should be enacted within a regulatory framework that addresses the complex web of factors that create vulnerability to this conduct.

B Robust Enforcement

If laws criminalising deliberate wage theft are to be of practical significance, such that they influence activity by deterring deliberate wage theft and enhancing compliance with workplace laws, then they must be accompanied by robust enforcement. In the United States ('US'), a 2016 study conducted by political scientist Daniel Galvin found that state wage laws imposing civil or criminal penalties for minimum wage violations had no effect on reducing minimum wage non-compliance.[170] The only exception were laws that allowed treble damages to be awarded (ie, triple back pay) against contravening employers – these laws had a statistically significant effect on reducing minimum wage violations.[171] Nevertheless,

168 See Part II of this article.

169 Samuel Walpole and Matt Corrigan, 'Fighting the System: New Approaches to Addressing Systematic Corporate Misconduct' (2021) 43(4) *Sydney Law Review* 489, 514.

170 Daniel J Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14(2) *Perspectives on Politics* 324 <https://doi.org/10.1017/S1537592716000050>.

171 Ibid 341.

Galvin also found that increasing criminal penalties alone will not result in higher levels of compliance with minimum wage theft laws if they are not adequately enforced.[172] Whilst one must be cautious in generalising Galvin's findings beyond the US,[173] this study is instructive as it is an empirical study that assesses the deterrent effectiveness of wage theft laws and it has informed the development of Australian scholarship on labour law enforcement.[174] For example, Australian labour law scholar Tess Hardy contends that Galvin's finding of the need for adequate enforcement in the context of deliberate wage theft laws 'is especially important in light of the weight of [other] empirical deterrence research which finds that a firm's assessment of legal risk is influenced less by the "objective severity and subjectiveness fearsomeness of the sanctions imposed", and more by the perceived likelihood of detection and punishment'.[175] Put simply, what matters 'is increasing the perception in people's minds that if they offend they will be caught'.[176]

The FWO has played a pivotal role as Australia's workplace enforcement agency in securing compliance with minimum wage laws under the *FW Act*.[177] This includes establishing a number of targeted campaigns to educate and audit businesses in industries and localities that have a high incidence of deliberate wage theft,[178] entering into enforceable undertakings with employers who are reasonably believed to have contravened the *FW Act*,[179] and initiating court proceedings under the civil penalty regime against employers alleged to have contravened the *FW Act*.[180] As there is no other federal statutory body that has this intricate knowledge and experience of investigating and taking enforcement action against deliberate wage

172 Ibid.

173 Tess Hardy, 'Compliance Defiance: Reviewing the Role of Deterrence in Employment Standards Enforcement' (Conference Paper, Compliance with and Enforcement of Labour Laws: An International Workshop, 16–17 September 2020) 10.

174 Ibid; Tess Hardy, 'Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement' (2021) 37(2) *International Journal of Comparative Labour Law and Industrial Relations* 133 <https://doi.org/10.54648/IJCL2021007> ('Digging into Deterrence'); Hardy, Howe and Kennedy (n 13).

175 Hardy, 'Digging into Deterrence' (n 174) 144 (citations omitted). See also Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39(4) *Sydney Law Review* 471, 491, 498.

176 Mirko Bagaric, 'Abolishing the Crime That Is the Incarceration of White-Collar Offenders' (2017) 41(5) *Criminal Law Journal* 251, 252.

177 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(3) *Sydney Law Review* 565.

178 John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012* (Report, 2014); Glenda Maconachie and Miles Goodwin, 'Transforming the Inspection Blitz: Targeted Campaigns, Enforcement and the Ombudsman' (2010) 21(1) *Labour and Industry* 369 <https://doi.org/10.1080/10301763.2010.10669410>.

179 Rosemary Owens, 'Temporary Labour Migration and Workplace Rights in Australia: Is Effective Enforcement Possible?' in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 393, 401–2; Tess Hardy and John Howe, 'Too Soft or Too Severe? Enforceable Undertakings and the Regulatory Dilemma Facing the Fair Work Ombudsman' (2013) 41(1) *Federal Law Review* 1.

180 *FW Act* (n 29) pt 4-1; *Pattinson* (n 145) 457 [9] (Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ).

theft, and as the vast majority of employers and employees fall within the ambit of the *FW Act*, the FWO should be the main statutory body responsible for investigating and gathering evidence of alleged offences contrary to the new federal regime. In circumstances where the FWO considers that it has gathered sufficient evidence to prove an offence, it should refer the brief to the Commonwealth Director of Public Prosecutions ('CDPP') for assessment and prosecution. This is consistent with the approach undertaken by other federal investigative agencies[181] and accords with longstanding CDPP policy, as enshrined in the *Director of Public Prosecutions Act 1983* (Cth),[182] which provides that 'Commonwealth prosecutions are conducted by the DPP' and that '[t]he DPP does not investigate allegations that offences have been committed'.[183] New teams should be established in the FWO and CDPP which are respectively dedicated to investigating and prosecuting offences contrary to the new federal regime. In what follows, we outline four general principles that should guide these teams in enforcing the new federal regime, although they are not intended to be exhaustive.

The first guiding principle is that enforcement mechanisms must be *specialised*. Deliberate wage theft is a complex legal and socioeconomic phenomenon where employment, criminal, corporate, migration, taxation and other areas of law intersect.[184] Both the CDPP and FWO teams must understand the phenomenon of deliberate wage theft, the precarity of workers commonly subjected to it and the common context in which deliberate wage theft offending occurs. The new FWO team will also need to be upskilled to investigate criminal offences and prepare briefs for the prosecution. For example, certain protections will need to be afforded to accused persons during the investigation process, such as the privilege against self-incrimination,[185] and procedures will need to be complied with, including in relation to obtaining admissions, to ensure that the evidence gathered is admissible in a criminal trial.

Second, limited resources and funding means that enforcement must also be *targeted*. In the context of the new FWO team, targeted enforcement could be achieved by focusing on industries where contraventions are the highest, on contraventions that are the largest (in terms of monetary amount or the number of workers impacted), on workers most likely to experience deliberate wage theft, and on 'repeat offenders' (those who violate the laws on repeated occasions).[186] For offences falling into these categories, the CDPP team is likely to consider it in the

181 See, eg, 'ASIC's Approach to Enforcement', *Australian Securities & Investments Commission* (Web Page, 2 August 2023) <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/asic-s-approach-to-enforcement/>; 'Penalties and Interest', *Australian Taxation Office* (Web Page, 26 September 2018) <https://www.ato.gov.au/Business/Public-business-and-international/Tailored-engagement/penalties-and-interest/>.

182 *Director of Public Prosecutions Act 1983* (Cth) s 6.

183 Commonwealth Director of Public Prosecutions, 'Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process' (Guidelines, July 2021) 8–9 [3.3], 9 [3.6].

184 *Migrant Workers' Taskforce Report* (n 9) 13.

185 In respect of information and document gathering powers currently afforded to Fair Work Inspectors under the *FW Act* (n 29), the privilege of self-incrimination is expressly ousted under section 713(1).

186 See also Hardy, Howe and Cooney (n 177) 586.

public interest to exercise the prosecutorial discretion in favour of prosecuting the alleged offender.

Third, targeted enforcement means that the FWO team should be *proactive* by engaging in early intervention and public education and not solely relying on a complaints-based system. Sole reliance on a complaints-based system to aid detection is flawed and an unreliable predictor of the nature and number of contraventions in any given industry.[187] This is because workers who are most likely to be victims of deliberate wage theft, such as temporary migrant workers, are the least likely to report a contravention, due to a number of factors including lack of awareness about how to recover wages, fear of job loss and immigration consequences, particularly for undocumented workers.[188] Thus, in a purely complaints-based system, an unscrupulous employer has an incentive to hire vulnerable workers because it will decrease their chances of being caught. Recognising these inherent flaws in a sole complaints-based model, the FWO team should rely on its existing coercive investigatory powers to assist in early detection, including its powers to enter premises, conduct interviews and require employment records to be produced.[189]

Finally, effective enforcement requires a *collaborative* approach which involves working closely with multiple third-party agencies 'in identifying inspection targets, undertaking inspections, [and] collecting and analysing data'.[190] This collaborative approach is familiar territory to the FWO; in the past, for example, it engaged in targeted campaigns in the retail, hospitality, horticulture and cleaning sectors, which involved working with industry partners to develop and deliver educational materials in these industries.[191] Third-party groups that the FWO could continue to work with include non-state actors such as unions, worker centres, community groups and employer associations who may be able to assist in identifying possible deliberate wage theft offenders, potential witnesses and documentary evidence to investigate offenders. For example, community groups and unions could facilitate connections between the FWO team and exploited workers, especially vulnerable workers who may be reluctant to meet with government officials. The FWO and

187 Julian Teicher, 'Wage Theft and the Challenges of Regulation: Reinventing an Old Form of Exploitation' in Peter Holland and Chris Brewster (eds), *Contemporary Work and the Future of Employment in Developed Countries* (Routledge, 2020) 50, 62 <https://doi.org/10.4324/9781351034906-4>; Tess Hardy, 'Enrolling Non-State Actors to Improve Compliance with Minimum Employment Standards' (2011) 22(3) *Economic and Labour Relations Review* 117, 121 <https://doi.org/10.1177/103530461102200308> ('Enrolling Non-State Actors').

188 Bassina Farbenblum and Laurie Berg, *Wage Theft in Silence: Why Migrant Workers Do Not Recover their Unpaid Wages in Australia* (Report, Migrant Worker Justice Initiative, October 2018) <https://doi.org/10.2139/ssrn.3289002> ('*Wage Theft in Silence*'); Iain Campbell et al, 'Precarious Work and the Reluctance to Complain: Italian Temporary Migrant Workers in Australia' (2019) 29(1) *Labour and Industry* 98, 101–2 <https://doi.org/10.1080/10301763.2018.1558895>.

189 *FW Act* (n 29) ss 708–9.

190 Teicher (n 187) 63.

191 Hardy, 'Enrolling Non-State Actors' (n 187) 127.

CDPP teams could also formalise their relationship by outlining in their respective policies the duties and responsibilities of each team vis-à-vis each other.[192]

C Suitable Wage Recovery Mechanisms

A lack of clarity 'about the state's obligations to redress exploitations of persons, [means that] any specific argument for criminalisation is undercut from the outset',[193] even if it is accompanied by robust enforcement. Notwithstanding, the lack of suitable redress for victims of exploitation is a problem documented in several areas of labour regulation where there has been a criminal response.[194] Indeed, in the context of the criminalisation of deliberate wage theft, there is scant attention in the literature on the importance of including redress mechanisms in a criminal regime. And yet recovery mechanisms are essential to providing economic empowerment and a sense of justice to those whose employment rights have been wronged. They are critical to incentivising workers to come forth and report their exploitation. Whilst the primary purpose of recovery mechanisms is to compensate, they also serve an important deterrent effect (whether specific or general)[195] as civil recovery orders can result in monetary and reputational damage to the employer involved, which sends a clear message to both the wrongdoer employer and the community at large that wage theft does not pay.[196]

For reasons explained earlier, restitution orders within existing *penal* legislation do not constitute an appropriate recovery scheme. For the purposes of our proposed framework, appropriate *civil* wage recovery mechanisms are required. As emphasised in the Migrant Workers Taskforce report, '[w]orkers should have ready access to an effective low cost, informal small claims dispute mechanism so that they can take action themselves'.[197] Currently, the *FW Act* primarily seeks to achieve this through the small claims procedure,[198] which forms the focus of this Part of the article. In particular, employees seeking to recover their unpaid entitlements can elect for the proceedings to be dealt with as 'small claims proceedings' in the

192 For an analysis on how co-enforcement agencies in Australia can formalise their relationships, see Eugene Schofield-Georgeson, 'Organisational Co-enforcement in Australia: Trade Unions, Community Legal Centres and the Fair Work Ombudsman' (2022) 35(1) *Australian Journal of Labour Law* 52.

193 Collins (n 16) 172.

194 For example, in the context of the United Kingdom's modern slavery legislation and labour hire licensing regime: see Mantouvalou (n 16); ACL Davies, 'Migrant Workers in Agriculture: A Legal Perspective' in Cathyrn Costello and Mark Freedland (eds), *Migrants at Work* (Oxford University Press, 2014) 93 <https://doi.org/10.1093/acprof:oso/9780198714101.001.0001>.

195 Helen Anderson and John Howe, 'Making Sense of the Compensation Remedy in Cases of Accessorial Liability under the *Fair Work Act*' (2012) 36(2) *Melbourne University Law Review* 335, 340.

196 Similar arguments have been made within the context of compensatory orders made under the *Competition and Consumer Act 2010* (Cth) schedule 2 ('*Australian Consumer Law*'). See Elise Bant and Jeannie Marie Paterson, 'Should Specifically Deterrent or Punitive Remedies Be Made Available to Victims of Misleading Conduct under the *Australian Consumer Law*?' (2019) 25(2) *Torts Law Journal* 99, 100–1. In the tort context, see John CP Goldberg, 'Twentieth-Century Tort Theory' (2003) 91(3) *Georgetown Law Journal* 513, 525 <https://doi.org/10.2139/ssrn.347340>. In the context of seeking compensation under the *FW Act* (n 29), see ibid 342–3.

197 *Migrant Workers' Taskforce Report* (n 9) 7.

198 'Fair Work: Small Claims', *Federal Circuit and Family Court of Australia* (Web Page) <https://www.fcfcoa.gov.au/gfl/fairwork-small-claims> ('Fair Work: Small Claims').

Fair Work Division of the Federal Circuit Court and Family Court or a Magistrates' Court.[199] The aim of the small claims procedure is 'to settle disputes quickly and fairly, with minimum expense to the parties'.[200] In small claims proceedings, the court is not bound by the rules of evidence and may act in an informal manner, without regard to legal forms and technicalities.[201] Parties can only be represented by lawyers with leave of the court which may be subject to conditions, including to ensure that no other party is unfairly prejudiced.[202] The court aims to finalise these matters at the first hearing date.[203] Until recently, small claims proceedings were capped at $20,000[204] but this was increased to $100,000 in addition to reforms that allow the court in small claims proceedings to award filing fees as costs to successful applicants.[205]

However, judges hearing these matters have criticised the small claims procedure for not achieving its objectives in practice as the proceedings are 'extremely resource intense'.[206] They contend that these matters cannot be disposed of expeditiously because of the need to conduct the proceedings in accordance with judicial standards, which requires the claim to be supported by 'some probative basis'[207] and the court to deliver 'a reasoned judgment that addresses the issues in the case'.[208] The case of *Matus v Australia Wide Computer Resources Pty Ltd [No 2]* illustrates some of these practical issues.[209] The case involved a claim for unpaid annual leave entitlements in the amount of $20,000 which was made under the small claims procedure. Nine affidavits were read into evidence and the case raised a number of complex legal and factual issues, including in relation to estoppel, the statutes of limitations Act and accessorial liability which resulted in the Federal Circuit Court delivering a 53-page judgment which totalled over 172,000 words.

There are also significant barriers that temporary migrant workers face in attempting to access the small claims procedure, including a lack of understanding about the legal process, the costs of taking legal action, language barriers and lack of documentary evidence, such as payslips.[210] As a consequence, the overwhelming majority do not initiate small claims proceedings to recover amounts owed, and

199 *FW Act* (n 29) s 548.
200 'Fair Work: Small Claims' (n 198).
201 *FW Act* (n 29) s 548(3).
202 Ibid ss 548(5)–(6).
203 'Fair Work: Small Claims' (n 198).
204 *FW Act* (n 29) s 548(2)(a).
205 *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) sch 1 items 651, 653.
206 *Jones v Groovy Freighters Pty Ltd* (2010) 198 IR 298, 300 [9] (Burnett FM), quoted in *Matus v Australia Wide Computer Resources Pty Ltd [No 2]* [2015] FCCA 2055, [15] (Judge Nicholls) ('*Matus*').
207 *Matus* (n 206) [18] (Judge Nicholls). See also *McShane v Image Bollards Pty Ltd* (2011) 206 IR 239, 241 [7] (Lucev FM); *Glynn v Napoleon Hair & Beauty Pty Ltd* [2011] FMCA 1050, [13] (O'Sullivan FM).
208 *Matus* (n 206) [18] (Judge Nicholls).
209 *Matus* (n 206).
210 Eloise Cox et al, *The Challenge of Recovering Underpaid Wages: Empirical Insights from South-East Monash Legal Service Inc* (Report, 2022) <https://www.smls.com.au/wp-content/uploads/2022/11/Digital-File-Empirical-Insights-Recovering-Underpaid-Wages.pdf?utm_source=twitter&utm_medium=Zoho+Social>.

for those that do, they have little success. The 2016 study of temporary migrants referred to in Part II found that 91% of 2,258 temporary migrants surveyed took no action to recover their unpaid wages despite knowing that they were not receiving their full entitlements.[211] Only one of the temporary migrant workers attempted to recover unpaid wages in court.[212] Similarly, a 2018 case study of the 7-Eleven international student workforce found that none had recovered unpaid wages by filing court proceedings.[213]

The above issues support the calls for the small claims procedure to be urgently reviewed.[214] Whilst some contend that the small claims procedure should be replaced with a small claims tribunal co-located within the Fair Work Commission ('FWC'),[215] others point to the constitutional issues that might arise if the FWC (as an adjudicative body) is determining existing rights, duties and obligations (which is an indicium of judicial power).[216] Determining what the most suitable wage recovery mechanisms are for the *FW Act*, and how they ought to be enforced in practice, is beyond the scope of this article. Our aim is to emphasise the importance of civil recovery mechanisms within the context of a regime criminalising deliberate wage theft and how the current small claims procedure, in its current form, is not the appropriate mechanism as it is not achieving its aim of being a 'faster', 'low-cost' and 'more informal means' of resolving disputes,[217] in some cases inhibiting access to justice for vulnerable workers who have been subjected to wage theft.[218] Nevertheless, in what follows we outline a few reforms to the small claims procedure that would assist in addressing some of these practical issues.

One legislative reform is to make clear that the small claims process is available to a claimant who seeks a compensatory order from a person who was 'involved in' the relevant alleged contravention within the meaning of section 550 of the *FW Act*. As Andrew Stewart et al explain, '[i]t is not uncommon for small claims to be brought against an employer on the brink, or in the midst, of business collapse. Unless the claimant can pursue involved third parties – such as key managers, directors or advisers – the proceeding is likely to be futile and the claimant may walk away empty-handed'.[219] Previous case law suggests that the small claims procedure is not available in such circumstances,[220] but more recent decisions

211 Farbenblum and Berg, *Wage Theft in Silence* (n 188) 20.
212 Ibid 28.
213 Laurie Berg and Bassina Farbenblum, 'Remedies for Migrant Worker Exploitation in Australia: Lessons from the 7-Eleven Wage Repayment Program' (2018) 41(3) *Melbourne University Law Review* 1035, 1050.
214 See, eg, Tess Hardy, Submission No 85 to Standing Committees on Economics, Parliament of Australia, *Unlawful Underpayment of Employees' Remuneration* (February 2020) [38]; *Migrant Workers' Taskforce Report* (n 9) 98.
215 *Systemic, Sustained and Shameful* (n 5) 139 [6.17].
216 Umeya Chaudhuri and Anna Boucher, *The Future of Enforcement for Migrant Workers in Australia: Lessons from Overseas* (Report, March 2021) 20–1.
217 Department of Employment and Workplace Relations (n 15) 1.
218 Cox et al (n 210); Farbenblum and Berg, *Wage Theft in Silence* (n 188) 20, 28.
219 Stewart et al, 'Inquiry Submission' (n 74) 53.
220 *Beer v Lim* [2012] FMCA 494; *Mildren v Gabbusch* [2014] SAIRC 15, [46] (Judge Hannon).

have held that there is nothing preventing the court in small claims proceedings from making a compensatory order against a person in respect of their accessorial liability.[221] This uncertainty needs to be addressed through legislative amendment.

Legislative reform is also required with respect to the court's jurisdiction to award costs. Currently, small claims proceedings are a 'no costs' jurisdiction meaning that each party generally bears their own legal costs irrespective of who the successful party is in the matter. It is only in limited circumstances where the court has a discretion to award costs, such as where the proceedings were instituted vexatiously or without reasonable cause.[222] The fact that migrant workers and other vulnerable workers will need to bear their own costs is a significant disincentive from initiating court proceedings.[223] The recent reforms introduced by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) are insufficient to address this barrier, as the reforms only enable filing fees to be awarded and only to successful applicants (ie, those who actually proceed to a full hearing and receive a judgment in their favour). Those who settle through informal dispute resolution processes or withdraw the proceedings will not be entitled to receive their filing fees since there is no 'successful' claimant in these circumstances.

A preferable costs model is one where, as a general rule, the respondent is liable to pay the claimant's legal costs (including the filing fees) regardless of the outcome of the proceedings. In most cases, the respondent will be the claimant's current or previous employer, but in some cases could be a person who was 'involved in' the relevant contravention (as explained above). Legal costs can include not only representation costs (if leave is granted to be legally represented) but also costs associated with preparing court documents and obtaining legal advice. Legal costs could be limited to those that are 'reasonably' incurred and can be capped to avoid claimants claiming exorbitant costs.

In addition to the above proposed reforms, there will also be practical implications arising from civil recovery mechanisms operating alongside criminal prosecutions of deliberate wage theft. We do not seek to discuss them all. Whilst, ordinarily, protections afforded to an accused in a criminal trial are sufficient to guard against any prejudice that might arise from associated civil proceedings,[224] in some cases a stay of the civil proceedings will be justified pending the outcome of the criminal trial.[225] Nevertheless, the fact of a criminal conviction for deliberate wage theft should be able to be pleaded in support of an associated civil recovery proceeding, but where a criminal prosecution for deliberate wage theft results in an acquittal or a *nolle prosequi* is entered, these outcomes should not prevent a victim from pursuing civil recovery proceedings.

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221 *Nino v Kuksal* (2022) 316 IR 322.

222 *FW Act* (n 29) s 570.

223 *Systemic, Sustained and Shameful* (n 5) 67.

224 This includes the common law rights of the right to silence and the privilege against self-incrimination.

225 See generally *Commissioner of the Australian Federal Police v Zhao* (2015) 255 CLR 46; *Lee v The Queen* (2014) 253 CLR 455; *Strickland (a pseudonym) v DPP (Cth)* (2018) 93 ALJR 1; *Turnbull v Office of Environment and Heritage* (2021) 290 A Crim R 458.

VI CONCLUSION

In this article we have discussed how deliberate wage theft became criminalised in Victoria and Queensland against the backdrop of Australia's attempts to combat the exploitation of workers more generally. We have then undertaken a comparative analysis of both regimes over two years since their inception, ultimately revealing that the Victorian model, whilst not without its flaws, is significantly more advanced than its Queensland counterpart in terms of its ability to deter deliberate wage theft and, as a corollary, improve workplace compliance with labour laws and standards.

But the Victorian model remains state-based legislation. The time is ripe for deliberate wage theft to be criminalised at the federal level. As we have contended, a criminal regime is justified from both a moral and regulatory perspective and it is intended to supplement (rather than override) the existing civil penalty regime within the *FW Act*. A carefully drafted federal offence is required that criminalises deliberate wage theft and such an offence should be enacted within a legal framework that understands the common context in which deliberate wage theft occurs. But if these laws are to have meaning, and if they are to be given the practical significance that they deserve, then they must be accompanied by robust enforcement and suitable civil recovery mechanisms that empower workers whose employment rights have been wronged by deliberate wage theft.