

Submission

to

Attorney-General's Department

***Discussion Paper: Improving Protections of Employees' Wage and Entitlements:
Strengthening Penalties for Non-Compliance'***

Ms Melissa Kennedy

Melbourne Law School/Melbourne School of Government

1. Introduction

- 1.1. This submission is made in response to the Attorney-General's Department's Discussion Paper: 'Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance'.
- 1.2. The author of this submission is Ms Melissa Kennedy, Research Assistant at the Melbourne School of Government; PhD Candidate at Melbourne Law School. Ms Kennedy is a PhD student whose thesis is specifically looking at the criminalisation of wage theft as part of a regulatory response in the Australian context.
- 1.3. The focus of this submission is on Part II of the Discussion Paper on Criminal Sanctions.
 - a) Part 2 focuses on general criminalisation issues;
 - b) Part 3 responds to the discussion questions; and
 - c) Part 4 concludes and provides a recommendation that notwithstanding the serious practical challenges and the doubts in relation to deterrence effect, criminalisation is appropriate as part of a regulatory framework at Federal level.
- 1.4. I acknowledge previous submissions made to different government inquiries co-authored with Dr Tess Hardy and Professor John Howe, with some ideas, particularly those in Part 2, developed from the conclusions reached in those submissions.¹
- 1.5. For broader approaches looking at civil enforcement, see publications by Hardy, Howe and Cooney,² as well as submissions made by Hardy, Kennedy and Howe to other inquiries into wage theft in Australia.³ Parts 2 and 3 of the Hardy and Kennedy, Submission to the Wage Theft Inquiry in Western Australia provide a background to the problem of wage theft in Australia and an overview of the regulatory challenges, which help place the question of criminalisation in the broader context.⁴
- 1.6. One theory that is relevant to conceptualisation criminal sanctions is via responsive regulation.⁵ Criminalisation occurs at the apex of a pyramid of sanctions available to a

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

² See, eg, John Howe, Tess Hardy and Sean Cooney, *The Transformation of Enforcement of Minimum Employment Standards: A Review of the FWO's Activities from 2006-2012*, CELRL Research Report, 2014; Tess Hardy, John Howe and Sean Cooney, 'Less Energetic but More Enlightened? Exploring the Fair Work Ombudsman's Use of Litigation in Regulatory Enforcement' (2013) 35 *Sydney Law Review* 565; Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

³ Hardy and Kennedy, above n 1; Hardy, Kennedy and Howe, above n 1.

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

⁵ Ian Ayres and John Braithwaite, *Responsive Regulation Transcending the Deregulation Debate* (Oxford University Press, 1992).

regulator, premised on the idea that higher sanctions (including criminal sanctions) have a deterrence effect when lessor responses fail, and cooperation is not possible⁶ Other theories focus on strategic enforcement – ie how best to allocate limited prosecutorial resources to achieve the greatest level of compliance.⁷

1.7. For the purposes of this submission, I adopt the definitions in the Discussion Paper that while ‘wage theft’ is used as an umbrella term to describe the underpayment of wages and other statutory entitlements, there are two significant distinctions between conduct captured by the terminology:

- a) ‘employers that have made genuinely unintentional mistakes, for instance due to the complexity of the industrial relations system, which have led to miscalculations and underpayments, but are rectified once identified; and
- b) employers that knowingly underpay, or otherwise exploit, employees’.⁸

1.8. An objective of this Discussion Paper is to assess where the ‘line [can be drawn] between serious underpayments that are still appropriately dealt with in a civil law context and those most serious matters that — because of the scale, or repetitious nature, or state of knowledge — are appropriately dealt with in a criminal law context’.⁹

2. Criminal Sanctions¹⁰

2.1. In principle, I agree with the recommendation in the *Migrant Worker’s Taskforce Report* to criminalise underpayments of workers for the most serious and ‘clear, deliberate and systematic’ cases of wage theft.¹¹ However, criminalisation does not come without challenges.

General Justifications for Criminalising Wage Theft

2.2. It has been a long-standing principle that the criminal law has no place in the industrial context.¹² One justification for criminalisation is based on the moral wrongfulness of the crime.¹³ By classifying underpayment of wages as a type of theft, the conduct attracts

⁶ Ibid. See generally 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) 25 *Sydney Law Review* 565.

⁷ David Weil, *The Fissured Workplace: Why Work Became So Bad for So Many and What Can Be Done to Improve It* (Harvard University Press, 2014).

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

⁹ Ibid 4.

¹⁰ In particular, I would like to thank Tess Hardy for her assistance with development of the ideas raised in this point in previous co-authored submissions: see especially Hardy and Kennedy, above n 1, 5.

¹¹ Alan Fels and David Cousins, *Migrant Worker’s Taskforce Report* (Recommendation 6).

¹² Andy Hall, R Johnstone and Alexa Ridgeway, *Reflection on Reforms: Developing Criminal Accountability for Industrial Deaths* (National Research Centre for Occupational Health and Safety, April 2004)

¹³ Stuart Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 45.

additional moral condemnation because the community associates the idea of stealing, dishonesty and theft as a wrong against society and deserving of punishment. In light of the fact that wage theft often harms vulnerable workers, including temporary migrant workers and young people, use of this terminology may be seen as attractive as it captures the significant harm associated with the conduct and the reality that underpayment of wages takes away money that an employee is entitled to by law.¹⁴

- 2.3. Another justification for criminal punishment is that it will increase specific and general deterrence as the threat of imprisonment, or the imposition of a significant criminal penalty will make people change their behaviour to avoid the risk of punishment. The Discussion Paper suggests: 'The potential of criminal penalties for wage underpayment and employee exploitation is expected to enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct'.¹⁵ A strong justification frequently raised for criminalisation is that the threat of a criminal sanction will reduce non-compliant behaviour in a manner not achieved through the civil regulatory system.¹⁶
- 2.4. Along with retribution and punishment, deterrence is another of the main goals of criminalisation.¹⁷

Issues for Consideration

- 2.5. Classical deterrence theory recognises that individuals are deterred from breaking the law if they perceive a likelihood of detection is high and calculate that the potential gains are not worth the risk of being sanctioned.¹⁸ It is presumed by supporters of a criminalisation approach to non-compliance that the risk of punishment, including imprisonment, will swing the balance away from the harmful behaviour. Indeed, there is some recent empirical evidence emerging from the United States which suggests that 'laws that most dramatically increased punitive damages saw the greatest declines in the incidence of minimum wage violations'.¹⁹

¹⁴ Young Workers Centre, *The Great Wage Rip Off* (May 2017) 12.

¹⁵ Attorney-General's Department, *Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper (2019) 11.

¹⁶ However, empirical research by way of industry sector interviews conducted by Howe and Hardy on deterrence in the civil enforcement context did not show a significant connection between FWO enforcement actions and changes to business behaviour. Indeed, knowledge of the penalties appeared to lower the deterrence value for those businesses surveyed: Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39 *Sydney Law Review* 471.

¹⁷ Australian Law Reform Commission, *Same Time, Same Crime: Sentencing of Federal Offenders*, ALRC Report 103, 2016, 54; Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23 *Law and Contemporary Problems* 401; N Walker, *Punishment, Danger and Stigma: The Morality of Criminal Justice* (Barnes & Noble, 1980).

¹⁸ Christine Parker and Viebke Lehmann Nielson, 'How Much Does It Hurt? How Australian Business Think About the Costs and Gains of Compliance and Noncompliance with the Trade Practices Act' (2008) 32 *Melbourne University Law Review* 554, 562.

¹⁹ Daniel Galvin, 'Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance' (2016) 14 *Perspectives on Politics* 324, 326.

- 2.6. However, this evidence must be weighed against a number of other studies which find that, even when business calculations are made, individuals do not generally adopt a rational analysis about the costs of being caught (or not) when making a decision to gain an advantage.²⁰ Indeed, a review of the literature on criminalisation in the wider compliance context suggests that the link between criminalisation and deterrence as a compliance strategy is relatively faint. The main reason for the weak compliance effects of criminalisation is related to low prosecution rates. Empirical research in this area suggests that enhanced compliance is more closely linked to rates of prosecution rather than to the type of penalty.²¹ Prosecuting criminal offences is very resource intensive, particularly because of the high standard of proof and evidentiary burden. This means that very few prosecutions are successful. In the US, Robinson and Darley reported that in 2004 only 1.3 per cent of criminal offences committed resulted in conviction and punishment.²²
- 2.7. Further to this, in those jurisdictions where underpayment contraventions already constitute a criminal offence,²³ the data suggests that prosecutions of non-compliant employers are ‘extremely rare’²⁴ and only used when employers and other duty holders defy the authority of state inspectors by disobeying compliance orders. For example, in Ontario, Canada, recent research has confirmed that there have been no criminal prosecutions in response to an employer or director violating an employee’s rights to be paid in a minimum wage.²⁵ Similarly, in the United Kingdom, criminal prosecution is available in respect of a range of offences under various employment-related statutes, but remains ‘an underutilised intervention in the enforcement arena’.²⁶ For example,

²⁰ Parker and Nielson, above n 13.

²¹ Paul R Robinson and John M Darley, ‘Does Criminal Law Deter? A Behavioral Science Investigation’ (2004) 24 *Oxford Journal of Legal Studies* 173, 183.

²² Ibid 188.

²³ For example, the Employment Standards Act (2000), which prescribes minimum wages and hours regulation in Ontario, Canada, makes it offence to contravene the act or its regulations, or to fail to comply with an order or direction issued by an inspector. Individuals are liable to be fined up to CAD 50,000 or imprisoned up to 12 months. Corporations are liable to be fined up to CAD 100,000 for a first offence, CAD 250,000 for a second offence and CAD 500,000 for a third or subsequent offence. Offences under the ESA are prosecuted under Part III of the Provincial Offences Act. In addition, under the federal Criminal Code of Canada (1985), it is a criminal offence to intentionally falsify an employment record by any means. See Eric Tucker, ‘When Wage Theft Was a Crime in Canada, 1935-1955: The Challenge of Using the Master’s Tools Against the Master’ (2017) 54 *Osgoode Hall Law Journal* 933. Similarly, the Fair Labor Standards Act of 1938 29 USC § 203 provides for criminal prosecution for wilful violations of federal wage and hour laws. A conviction can result in a fine of not more than \$10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).

²⁴ Eric Tucker et al, ‘Carrying Little Sticks: Is There a “Deterrence Gap” in Employment Standards Enforcement in Ontario Canada’ (2019) 35 *International Journal of Comparative Labour Law* 1, 26.

²⁵ Ibid.

²⁶ David Metcalf, Director of Labour Market Enforcement, ‘United Kingdom Labour Market Enforcement Annual Report 2017/18’ (March 2019) 19.

since the introduction of the National Minimum Wage Act 1998 (which came into force in April 1999), there have only been 14 National Minimum Wage prosecutions.²⁷

- 2.8. Even so, criminalisation impacts employers in a manner differently to civil penalties. For instance, criminalisation carries the risk of deprivation of liberty and serious reputational damage for business and individuals. Further, convicted individuals are generally prohibited from holding directorships of corporations,²⁸ and are personally liable for fines.²⁹ However, some commentators have suggested that the prospect of imprisonment generates only a small deterrence effect and certainly not deterrence at the levels suggested by supporters of a criminal liability.³⁰ Criminal sanctions are arguably of lesser value in the context of corporate crime given that a jail term — which is perceived as ‘the most stigmatic and greatest deterrent’³¹ — cannot be imposed against corporations. However, it is likely that through accessorial liability principles or operation of general criminal principles through Part 2.5 of the *Criminal Code* that imprisonment will be made available for individuals.
- 2.9. It is arguable that some of the justifications for criminalising wage theft, which were summarised above, are more difficult to maintain in relation to entities or persons that are less directly connected with the crime that has been committed, even though they may have contributed or benefited in an indirect way (eg lead firms in supply chains, host companies in labour hire arrangements or franchisors in franchise networks). It is certain that proving the involvement of these lead firms may be far more difficult where a criminal burden of proof applies.

Multi-Faceted Regulatory Response

- 2.10. The above section focused on some of the limitations of the criminalisation of wage theft. In our submission to Western Australia, Hardy and Kennedy acknowledged that criminalising wage theft is unlikely to provide ‘any kind of magic bullet which can tame or sanitise business’,³² we also appreciate that this distinctive sanction has significant

²⁷ Ibid. Section 31(1) of the *National Minimum Wage Act 1998* (UK) provides that: ‘If an employer of a worker who qualifies for the national minimum wage refuses or wilfully neglects to remunerate the worker for any pay reference period at a rate which is at least equal to the national minimum wage, that employer is guilty of an offence’. Section 31(8) further provides that in any proceedings for an offence under s 31(10), ‘it shall be a defence for the person charged to prove that he exercised all due diligence and took all reasonable precautions to secure that the provisions of the Act ... were complied with by himself and by any person under his control’.

²⁸ Corporations Act 2001 (Cth) s 206B.

²⁹ *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2018) 351 ALR 190, 216–17 [116].

³⁰ Donald Ritchie, Sentencing Advisory Council, *Sentencing Matters: Does Imprisonment Deter: A Review of the Evidence* (April 2011) 10. See also Andrew von Hirsch et al, *Criminal Deterrence and Sentencing Severity* (Hart, 1999).

³¹ Arie Frieberg, *Regulation in Australia* (Federation Press, 2017) 430.

³² Steve Tombs and David Whyte, ‘The Myths and Realities of Deterrence in Workplace Safety Regulation’ (2013) 53 *British Journal of Criminology* 746.

symbolic value and may deliver important practical benefits. The exact practical benefits cannot be assessed without an empirical study if and when criminal sanctions are introduced.

- 2.11. However, if criminal laws are adopted, as we concluded in our submission,³³ we strongly believe that it should be accompanied by a suite of other lesser sanctions (such as administrative fines, notices, enforceable undertakings and civil penalties) and be reserved for the most serious cases of wage theft.

Practical Drafting Considerations

- 2.12. It is also necessary for legislators to consider whether a specialist authority (such as a division within the FWO) should be responsible for prosecuting criminal breaches of the FW Act including provisions in awards and enterprise agreements, or whether the FWO will refer investigatory powers to the Commonwealth Department of Public Prosecutions (CDPP). As a general criminal law principle, unless worded to the contrary any person has the power to bring a criminal claim against another.³⁴ However, the CDPP has the power to request a stay of proceedings and to take over prosecutorial control.³⁵ Therefore, any legislation that is introduced should be specific if a specialised inspectorate (FWO) is tasked with prosecutions, or if the CDPP is the body responsible for criminal prosecutions with investigations via police.

- 2.13. From a practical perspective, it would be important to assess whether, due to the complexities of the employment system and current award system, that a specialised team at the regulator should be used. This team is likely have a detailed understanding of underpayments and the FW Act, rather than the CDPP or police who do not have current skills in prosecuting or litigation employment law issues. This would also avoid 'double investigations' by the police/CDPP and the FWO, as avoid the risk of unsustainability of criminal convictions due to procedural protections afforded to accused persons.

- 2.14. Criminal prosecutions have higher evidentiary thresholds, as well specific evidentiary rules including complex regimes governing admissibility of evidence in criminal trials and the procedural steps required to be conducted during an investigation, such as giving warnings against self-incrimination.³⁶ This may impact on the ability for the FWO to rely on evidence gained during investigations. These rights are intended to recognise the rights of the accused to protect their own interests in criminal investigations and

³³ Hardy and Kennedy, above n 1.

³⁴ *Crimes Act 1914* (Cth) s 13.

³⁵ *Ibid* s 9(3). See also Commonwealth Department of Public Prosecutions, *Prosecution Policy of The Commonwealth Guidelines For The Making Of Decisions In The Prosecution Process* (2019)

³⁶ *Evidence Act 1995* (Cth)

proceedings.³⁷ It would be worth considering how other regulators such as ASIC respond to these challenges, what investigatory powers such bodies have and what is required before they institute proceedings.

3. Responses to Discussion Questions

- 3.1. In the next section, I respond to specific discussion questions raised in the Discussion Paper.

In what circumstances should underpayment of wages attract criminal penalties?

- 3.2. Criminal sanctions should be reserved for the most serious cases of wage theft and be used as part of a multi-faceted regulatory response.
- 3.3. The FWO already has an enforcement policy for selecting which civil cases it decides to take to court, so it is likely criminal sanctions only will be relevant in particularly egregious examples of when the FWO could have taken civil enforcement action using the *Fair Work Amendment (Protective Vulnerable Workers Act) 2017* (Cth) provisions.³⁸ The purpose of these provisions was to ‘deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business’.³⁹ This appears to be a similar rationale as adopted for criminalisation.
- 3.4. A coherent policy will need to be developed to assess what type of conduct should attract civil versus criminal proceedings,⁴⁰ and in what circumstances. Significantly due to prosecutorial discretion and resourcing limitations, there is the possibility for inconsistency between cases of similar magnitude. Therefore, it is necessary to determine in what circumstances criminal sanctions are appropriate and how they differ the penalties currently available under the PVW Act. It is also essential to develop a rationale for why criminal sanctions should be prioritised over the serious contravention provisions in the PVW Act.
- 3.5. Relevant factors to determining whether to criminalise conduct include the nature and seriousness of the offending, the scale of the offending, the monetary value of lost wages and what systems were in place by the relevant firm to enable underpayment. It is likely that some of the cases that are being litigated under the PVW Act may have

³⁷ See, eg, Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 425; Arie Freiberg and Pat O’Malley, ‘State Intervention and Civil Offense’ (1984) 18 *Law & Society Review* 373.

³⁸ FWO, *Compliance and Enforcement Policy* (2019) 9-12.

³⁹ Statement of Compatibility with Human Rights, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) 2.

⁴⁰ Note there is a substantial amount of literature on blurring of distinctions and lack of clear rationales for criminalising conduct as opposed to using civil penalties: see, eg, D Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007); Marco Bagaric, ‘The “Civil-isation of the Criminal Law” (2001) 25 *Criminal Law Journal* 184, 184–5, cited in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia*, Report No 95 (2002) 112.

been appropriately brought under criminal provisions due to the knowledge of the employer, a systematic pattern of offending and seriousness of the offending.⁴¹

- 3.6. However, if the conduct is the result of inadvertence and lack of knowledge of legal requirements, then a criminal sanction should not be utilised.

What consideration/weight should be given to the whether an underpayment was part of a systematic pattern of conduct and whether it was dishonest?

- 3.7. Considerable weight should be given factors relating the systematic pattern of conduct as they suggest that the business involved was trying to obtain an advantage and was trying to flout the rules. The type of factors in the PVW Act could also be relevant to a criminal sanction. The difficulty that legislators will need to resolve is to what extent conduct should be appropriately dealt with the criminal sanctions or more appropriately through civil sanctions using s 557A of the FW Act which creates the serious contravention provisions. It is likely that there will be an overlap between conduct that could be captured by the PVW Act or via the criminal law.
- 3.8. Dishonesty as an element is also important because this suggests that an advantage was being taken by the employer and a denial of minimum statutory entitlements.⁴² However, the relevant conduct of taking of entitlements should most appropriately be regarded as a type of fraud.⁴³ There is a body of case law that applies to fraud in the corporate context which is a more accurate reflection of the conduct than 'theft' as implied by the terminology 'wage theft'.
- 3.9. From a practical perspective, it is also necessary to recognise that unlike ordinary theft (such as shoplifting) where something is taken, wage theft involves the failure to make payments of a statutory entitlement, so despite the attractiveness of calling underpayment of entitlements as 'wage theft', the use of the word 'theft' in any legislative draft is unlikely to be the most appropriate technical legal description. It would be necessary to draft the legislation in a manner to avoid confusion and avoid requirements for judges and juries to utilise unhelpful case law on guiding application of criminal principles. Instead, the focus could be on the lack of provision of a payment in the form of wages for a rendered service (and misleading statements made in that context, for example failure to inform (or deliberate misinformation) to a worker of their statutory minimum entitlements or representing at time of employment that award rates would not apply to them)) and guidance should be taken from the obtaining financial advantage by

⁴¹ FW Act s 557A.

⁴² See, eg, Alex Steel, 'The Meanings of Dishonest in Theft' (2009) 38 *Common Law World Review* 103; Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31 *University of New South Wales Law Journal* 712.

⁴³ See, eg, *Criminal Code* ss 134.1-135.

deception/fraud case law. It may be appropriate to change relevant provisions to include an extended definition of fraud to cover this conduct.

What kind of fault elements should apply?

- 3.10. Consistent with the Migrant Worker's Taskforce's Recommendation 6,⁴⁴ criminalisation could occur as part of a broader response to underpayment of workers and be reserved for 'deliberate and systematic' underpayments.
- 3.11. The physical element of the offence would be relatively straightforward to establish if it can be shown that the employer has been paid at a rate lower than their entitlements under for instance an award or enterprise agreement. For example, banking records could be compared with rates of payments to assess whether the worker was in fact paid less than their award or enterprise agreement. However, this becomes difficult to establish in the cash economy when payments are not properly documented.⁴⁵
- 3.12. The relevant fault elements that seem most appropriate are 'deliberateness' and 'intention'. However, it may also be appropriate to use a lesser fault element of 'recklessness' depending on the seriousness of the complaint.
- 3.13. I agree with the Discussion Paper that it would not be appropriate for legislative drafting to capture unintentional mistakes or miscalculations.⁴⁶ A practical evidentiary issue that is likely to arise is assertions by businesses that they made a mistake about rates in an award and then for prosecutors to be required to prove fault to the criminal standard of proof.

Should the Criminal Code [see the Schedule to the Criminal Code Act 1995 (Cth)] be applied in relation to accessorial liability and corporate criminal responsibility?

- 3.14. This question raises two issues. The first is whether it would be appropriate for a criminal offence to be incorporated into the *Criminal Code* or whether it should be placed in the FW Act.
- 3.15. One reason to include it in the FW Act it may be appropriate to include the provisions in the FW Act to ensure that all relevant laws relating to underpayment of statutory entitlements are located in one place and easily accessible. The FW Act already contains certain provisions that pre-empt the incorporation of criminal terms into the FW Act.⁴⁷

⁴⁴ Alan Fels and David Cousins, *Migrant Worker's Taskforce Report* (2019) (Recommendation 6).

⁴⁵ See Treasury, *Black Economy Taskforce Report* (2019).

⁴⁶ Attorney-General's Department, *Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper (2019) 12.

⁴⁷ See FW Act s 552–5.

- 3.16. Notwithstanding the issue of placement, the *Criminal Code* principles apply to Commonwealth offences unless they are expressly displaced.⁴⁸ As such, no matter where the offence is located, the *Criminal Code* principles related to attribution of liability are applicable.
- 3.17. The second question relates to attribution of liability. Attributing liability in a corporate context is notoriously difficult and controversial. The Australian Law Reform Commission is currently investigating the corporate liability principles set out in the *Commonwealth Criminal Code*.⁴⁹
- 3.18. The principles in Part 2.5 of the *Criminal Code* attributing liability in circumstances where there are 'complex corporate structure, geographically dispersed operations and diffused management chains' is may be more effective establishing fault by assessing corporate culture and failures to maintain appropriate systems, as well as aggregating conduct to employees, agents or officers.⁵⁰ It would be significantly easier for courts to attribute liability for a corporate culture of non-compliance, rather than to attach to a particular individual, as unless an individual is in control of the business, for example, as the sole shareholder and involved in the day to day running of business, it will likely be difficult to establish the necessary fault elements, requiring recourse to other principles of criminal law to attribute blame.
- 3.19. However, the availability of this kind of attribution prioritises collective responsibility over individual responsibility, which is subject to academic debates and criticisms.⁵¹ Caution must be exercised in determining which officers and senior management are caught by the criminal principles and the scope of criminal liability provisions given the seriousness associated with attributing criminal liability to accessorial directors or officers.
- 3.20. In addition, it is also relevant to consider how accessorial liability principles have been applied in other case law in the criminal context,⁵² as well as how they have been applied to provisions in s 550 of FW Act.⁵³ The relevance of the FW Act will depend on where the offences are located.

⁴⁸ Attorney-General's Department, *The Commonwealth Criminal Code: A Guide for Practitioners* (March 2002) 3. See also *Commonwealth Criminal Code* ss 2.1-2.2.

⁴⁹ Attorney-General's Department, *Improving Protections of Employees' Wage and Entitlements: Strengthening Penalties for Non-Compliance*, Discussion Paper (2019) 12. For explanation of tests (although law used dated), see Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002).

⁵⁰ *Criminal Code Act 1995* (Cth) Pt 2.5 Div 12. See also T Woolf, 'The Criminal Code Act 1995 (Cth) — Towards a Realist Vision of Corporate Criminal Liability' (1997) 21 *Criminal Law Journal* 257.

⁵¹ See generally Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) ch 1.

⁵² See, eg *Giorgianni v R* (1985) 156 CLR 473

⁵³ See, eg, *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 [176], citing *Yorke v Lucas* (1984) 158 CLR 661, 667. See also *Fair Work Ombudsman v Hu* [2019] FCAFC 133 [15]. See

3.21. The approach to corporate liability focussing on officers and directors in the Workplace Health and Safety Acts may also be relevant and a different way to manage corporate liability.

What should the maximum penalty be for an individual and for a body corporate?

3.22. The maximum penalty should be a term of imprisonment for an individual, while the maximum penalty for a body corporate should be a significant monetary fine. Imprisonment terms should be proportionate to sentence lengths for fraud offences in other contexts and maximum monetary fines should reflect at least the penalties available in the PVW Act, if not more onerous to make the distinction between civil and criminal enforcement scheme clear.

Are there potential unintended consequences of introducing criminal sanctions for wage underpayment? If so, how might these be avoided?

3.23. Criminal sanctions may complicate interactions between FWO and civil enforcement responses and federal criminal enforcement operations. An unintended consequence, in seeking to reduce the risk of potential criminal liability, firms may be even less forthcoming about their wrongdoing and less willing to voluntarily rectify the underpayment and/or commit to proactive monitoring initiatives with the FWO.

3.24. It is also likely that some vulnerable workers, including temporary migrant workers, may be more reluctant to bring matters to the attention to the FWO for fear of then being involved in subsequent criminal proceedings and associated immigration fears.⁵⁴

3.25. Criminal actions require a higher burden of proof to be successful. This will require increased resources to enable successful prosecutions due to expense associated with conducting investigations (FWO, police and CDPP), as well as cost of criminal proceedings. As such it seems likely that the sanctions will only be used sparingly which may have an impact of the effectiveness of the penalties as acting as deterrent. If there are only very few successful criminal prosecutions, it is unlikely that criminalisation will be the most effective mechanism for deterring would be offenders from underpayments.

Are there other serious types of exploitation that should also attract criminal penalties? If so, what are these and how should they be delivered?

3.26. No comment.

generally Stephen Raineri, 'Accessories and the Fair Work Act — Section 550 and an Individual's 'Involvement' in a Contravention: Is Reform Needed?' (2018) 31 *Australian Journal of Labour Law* 180.

⁵⁴ For a survey that captures immigration and employment consequences fears, see Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Worker Survey* (November 2017).

4. Conclusion

Recommendations

- 4.1. Notwithstanding some very significant practical issues related to criminalisation and serious concerns as to whether criminal laws will have a greater deterrence effect than civil sanctions (particularly the new serious contravention sections in the PVW Act), criminal sanctions are appropriate as:
 - a) it recognises the social harms associated with the underpayment of workers; and
 - b) it could occur as part of multi-faceted regulatory response to the problem of wage theft in Australia.
- 4.2. It is further recommended that prosecutions are the responsibility of the regulator (FWO) to avoid double investigation and to more coherently use criminal sanctions as part of a regulatory toolkit.
- 4.3. It is recommended that if criminal liability is adopted as a response to wage theft, it should occur at Federal level, rather than at state level.
- 4.4. First, it avoids some potential legal challenges. Criminalising 'wage theft' at state level may encounter constitutional hurdles due to inconsistencies with the *Fair Work Act 2009* (Cth) (FW Act) (particularly s 26) and s 109 of the *Constitution*.⁵⁵ However, these same legal hurdles would not exist if the laws are legislated at Federal level (to the extent that this is possible notwithstanding that certain employees are not covered by the National Employment System).⁵⁶
- 4.5. Secondly, criminal liability may be used as part of a multi-faceted regulatory response at Federal level, alongside civil enforcement and lesser administrative sanctions which is more likely to result into a more coherent enforcement regime than having piecemeal state criminal laws on this issue.

⁵⁵ See further Hardy and Kennedy, above n 1, [5.1]-[5.4].

⁵⁶ FW Act Pt 2-2. See particularly Western Australia who has not made the same referrals as other states.