Submission

to

Queensland Education, Employment and Small Business Committee

Inquiry into Wage Theft in Queensland

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1. INTRODUCTION

1.1 This submission is made in response to the Queensland Education, Employment and Small Business Committee's Inquiry into Wage Theft in Queensland.

1.2 Contributors to the submission are as follows:

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1.3 The above staff members are available for further discussion and comment as required.

1.4 For the purposes of this submission, we have adopted the definition of 'wage theft' put forward by the Queensland Office of Industrial Relations in their briefing report to the Inquiry. In particular, we understand the term 'wage theft' to refer to circumstances where an employer has failed to provide their employees with the full wage or salary to which they are entitled, including benefits such as the superannuation guarantee. More specifically, we have assumed that 'wage theft' may arise in a variety of forms and in respect of a range of entitlements arising under statute and/or relevant industrial instruments, including: underpayment or non-payment of the basic rates of pay, leave entitlements, termination and redundancy pay, unpaid hours, trials or internships, unpaid penalty rates and allowances, underpayment or non-payment of superannuation entitlements, unreasonable deductions or cash-back arrangements and/or deliberate misclassification of the employee as an independent contractor.

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

2.1 While there is no concrete or comprehensive data on the breadth and extent of wage theft in Australia, there is a growing body of evidence which suggests that employer non-compliance with minimum employment standards is not so much an anomaly, as a norm.[1] While employer non-compliance with wage and hour regulation is not necessarily a new issue,[2] it is one that

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

[2] For historical assessments of employer non-compliance with employment standards, see: Miles Goodwin and Glenda Maconachie, 'Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95' (2007) 49(4) *Journal of Industrial Relations* 523; Glenda Maconachie and Miles Goodwin, 'Employer Evasion of Workers' Entitlements 1986-1995: Why, What and Whose? (2010) 52(4) *Journal of Industrial Relations* 419; Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (The Law Book Co, 1994); Lucy Nelms, Peter Nicholson and Troy Wheatley, 'Employees Earning Below the Federal Minimum Wage: Review of Data, Characteristics and Potential Explanatory Factors' (Research Report 3/2011,

appears to be growing both in prominence and in prevalence, especially with respect to certain segments of the labour market.

2.2 It appears that there may be a range of factors contributing to the current enforcement crisis, including declining levels of unionisation and increasing numbers of vulnerable workers in the labour market. For example, while complaints data is a somewhat flawed indicator of compliance levels, the Office of the Fair Work Ombudsman (***FWO***) has nevertheless reported that the proportion of 'disputes' resolved by the federal workplace regulator involving visa holders (which make up approximately 6 percent of the total Australian workforce) has increased from around 5 percent of dispute forms lodged in 2011/12 to 18 percent in 2016/17.[3]

2.3 A recent survey of over 4000 temporary migrant workers residing in Australia further revealed that almost one third of those surveyed were paid less than half of the minimum wage and almost one half were paid below their legal entitlement.[4] Regulatory concerns have also been raised in respect to young workers. The FWO has observed that while young workers make up around 15 percent of the national workforce, they account for around 28 percent of the dispute forms the FWO receives.[5] Again, this has been confirmed by way of independent research of young workers which confirmed that this group are highly susceptible to exploitative working conditions.[6]

2.4 Similar to broad trends identified in overseas jurisdictions, there is now mounting evidence in Australia to suggest that where vulnerable workers are employed in high risk, fragmented sectors, poor compliance outcomes are likely to abound.[7] More specifically, patterns of wage

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Fair Work Australia, January 2011); Sandra Cockfield el al, 'Assessing the Impact of Employment Regulation on the Low-Paid in Victoria' (2011) 22(2) *Economic and Labour Relations Review* 131.

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

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

[5] FWO, Annual Report 2016/17, 20.

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

[7] The problem of wage theft, the deliberate exploitation of vulnerable workers, and the 'fissuring' of employment arrangements, are all issues that policy-makers, scholars and governments in various jurisdictions are seeking to grapple with, including in the UK (see, eg, Matthew Taylor, *Good Work: The Taylor Review of Modern Working Practices* (July 2017); David Metcalf, *United Kingdom Labour Market Enforcement Strategy 2018/19* (Report, May 2018); Catherine Barnard, Amy Ludlow and Sarah Fraser Butlin, 'Beyond Employment Tribunals: Enforcement of Employment Rights by EU-8 Migrant Workers' (2018) 47(2) *Industrial Law Journal* 226), the US (see, eg, David Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One

theft have been found to be especially prevalent in hospitality and food services, and especially severe in the horticulture industry: sectors which are all prominent in Queensland.[8] Further, it appears that certain business models, such as labour hire arrangements and franchising, appear to be predisposed to high levels of non-compliance. For example, the FWO has observed that 'the most serious examples of exploitation often involve vulnerable migrant workers employed for an operator who is part of a much bigger supply chain or network.'[9] Similarly, a Queensland Parliamentary Committee recently found that low pay rates and non-payment of superannuation was particularly prevalent in the labour hire sector.[10]

2.5 In the wake of the notorious 7-Eleven case, and the series of scandals that followed, various stakeholders, including federal and state governments, trade unions, community groups and the general public, appear to now appreciate wage theft is a pressing problem in Australia. Indeed, the Australian Council of Trade Unions has recently described wage theft as a 'business model'.[11] At the same time, there is a growing awareness of the fact that effectively addressing these issues may not necessarily be straightforward.

3. KEY REGULATORY CHALLENGES

3.1 First, the legislative framework in Australia – both at federal and state levels – is largely founded on the premise that there is a binary employment relationship in existence. This effectively positions the direct employer as the primary wrongdoer. As we have pointed out in previous submissions and articles, this presents a number of problems from a compliance and enforcement perspective.[12] It may be that employment conditions and pay rates are being

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Academic's Journey in Organisational Change' (2018) 60(3) *Journal of Industrial Relations* 437) and in Canada (see, eg, Leah Vosko et al, 'The Compliance Model of Employment Standards Enforcement: An Evidence-Based Assessment of its Efficacy in Instances of Wage Theft' (2017) 48(3) *Industrial Relations Journal* 256.

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

[9] FWO, Annual Report 2016/17, 21.

[10] Parliamentary Finance and Administration Committee, *Inquiry into the Practices of the Labour Hire Industry in Queensland* (Parliament of Queensland, 2016).

[11] Australian Unions, *Wage Theft – The New Model for Big Business* (2018) <https://www.australianunions.org.au/wage_theft_factsheet>.

[12] See Tess Hardy, Submission No 62 to Senate Education and Employment References Committee, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, September 2015; Tess Hardy, Submission No 24 to Senate Economics References Committee, *Inquiry into the Impact of Non-Payment of the Superannuation Guarantee*, February 2017; Andrew Stewart and Tess Hardy, Submission to Senate Education and Employment References Committee Inquiry into the Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies, July 2018. See also Tess Hardy, 'Good Call: Extending Liability for Employment

determined or shaped by more powerful entities beyond the employer (as a result of outsourcing, subcontracting, labour hire, franchising etc). Moreover, the ensuing fragmentation of working arrangements into loosely connected networks blurs lines of responsibility for ensuring compliance with employment standards.

3.2 A second, and related issue, is that the effectiveness of civil remedy litigation is severely compromised by the fact that the relevant employer entity is often put into liquidation or deregistered prior to the final determination of court proceedings. While enforcement litigation, and the imposition of pecuniary penalties, is ostensibly designed to provide redress and deliver deterrence, these objectives are foiled by the fact that the direct employer can easily arrange their affairs so as to render themselves 'judgment-proof'.

3.3 Further, targeting the direct employer may not be particularly productive where it is another person – such as a lead firm – which may be potentially driving the non-compliant behaviour (e.g. through calling for competitive tenders and setting a contract price that does not allow sufficient funds for employment-related entitlements etc).[13] Recent reforms to the *Fair Work Act 2009* (Cth) (**FW Act**) have been specifically aimed at tackling this last issue – that is, by introducing new provisions which make a 'responsible franchisor entity' or 'holding company' liable for contraventions committed by their franchisees or subsidiaries respectively.[14] However, as we have noted, there are many business networks and organisational forms, such as labour hire arrangements and supply chains, which fall outside these new laws. This effectively means that lead firms in these arrangements are largely insulated from this form of legal accountability.

3.4 Third, the sanctions available under the current regulatory framework may not be sufficiently strong to deter deliberate wrongdoing on the part of employers. As we have pointed out in separate research, the theory of responsive regulation, and the concept of the enforcement pyramid, is premised on the assumption that at the pyramid's apex there is a sanction which is powerful enough to deter even the most egregious or reckless offender.[15] We note that the maximum penalty amount has recently been increased to unprecedented levels in respect of 'serious contraventions' of the FW Act.[16] The ten-fold increase in maximum penalties appears

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Contraventions Beyond the Direct Employer' in Ron Levy et al (eds) *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017); and Tess Hardy, 'Who Should Be Held Liable for Workplace Contraventions and on What Basis?' (2016) 29 Australian Journal of Labour Law 78.

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

[14] This liability is not automatic and only arises in prescribed circumstances (e.g. where it can be shown that: 1) the responsible franchisor entity knew, or could reasonably be expected to have known, that the same or similar contravention would occur; and 2) the responsible franchisor entity failed to take reasonable steps to prevent such contravention). FW Act, s 558B.

[15] 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.

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

to be specifically directed at addressing concerns that civil penalties under the FW Act were insufficient to 'effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business'.[17]

3.5 The underlying premise of these new provisions reflects a common assumption shared by policymakers and regulators: that higher sanctions will mean greater deterrence and, in turn, improved compliance.[18] However, recent survey research undertaken to explore the deterrence-effects of the FWO's enforcement activities, including civil remedy litigation, reveals that the relationship between higher penalties and perceptions of deterrence is not clear-cut.[19] Rather, we found that businesses often could not recall the target or amount of the penalty and could not therefore weight this up against the costs associated with compliance.

3.6 In short, the idea that the majority of firms were rational and calculative, and adjusted their compliance behaviour accordingly, did not necessarily hold. The lack of knowledge and awareness about the quantum of fines may also be a product of the fact that civil penalties in this area have historically been quite low and there is little capacity to seek criminal sanctions in this jurisdiction unlike other spheres of corporate and work regulation.[20] Previous studies suggest that harsher sanctions against egregious offenders have the power to penetrate the corporate consciousness in a way that lesser penalties may not.[21] Whether the introduction of criminal sanctions will achieve what civil penalties cannot is yet to be resolved and is likely to need further empirical testing (if and when criminal sanctions are introduced).

3.7 A fourth, and final, challenge in devising an effective regulatory response, particularly at the state level, is that employment standards in the private sector are largely governed by federal laws, including the FW Act and the *Superannuation Guarantee (Administration) Act 1992* (Cth).[22] For example, section 26 of the FW Act expressly provides that the provisions of that Act apply to the exclusion of all state or territory industrial laws, including laws that provide for the *establishment* or *enforcement* of terms and conditions of employment.[23]

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

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

[19] 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.

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

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

[22] The FW Act applies primarily to national system employers and their employees: FW Act, s 14. This legislation generally covers all private sector employees in Queensland (with all public sector employees still governed by the state industrial relations system).

[23] FW Act, s 26(2)(b)(ii).

3.8 Generally-speaking, it has been assumed that compliance and enforcement functions in respect of standards set by the FW Act (or instruments made under this Act) are generally vested in the federal workplace regulator and the imposition of civil remedies, including pecuniary penalties, is a task largely assigned to federal courts.[24] In relation to the superannuation guarantee, the Australian Tax Office exercises somewhat of a monopoly on enforcement of these provisions, albeit the FWO, unions and employees continue to have the authority to enforce superannuation entitlements if they arise under a federal industrial instrument or an express term of the relevant employment contract.[25]

3.9 Constitutional limitations clearly make it more difficult for state governments to influence regulatory outcomes in this context. However, given the enormity of the task at hand, and the fact that the FWO and trade unions have limited resources, it is important that state governments seek to positively contribute to combatting the problem of wage theft. Indeed, the recent introduction of labour hire licensing laws in Queensland, and other select states, provides a good illustration of the way in which states can intervene in ways that strengthen the overall regulatory apparatus and potentially provide a platform for further reform.[26]

4. POSSIBLE STATE INITIATVES

4.1 In this section, we outline some initiatives that could be undertaken at the state level. In this submission, we have not directly addressed any reforms that would generally require federal intervention. We further acknowledge that some of the initiatives canvassed below may be the subject of constitutional challenge or federal statutory override in the future. Nonetheless, we do not believe that the risk of such actions are sufficient reasons for the Queensland Government not to act.

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

a) Increasing the resources that are directed towards the state-based inspectorate, namely the Office of Industrial Relations. Similar to recent steps taken in Victoria, additional funding of the state inspectorate would allow the body to engage in a range of education-based and/or proactive initiatives in relation to matters falling squarely within the state

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

[25] For further discussion of the challenges of enforcing superannuation entitlements, see Helen Anderson and Tess Hardy, 'Superannuation Guarantee Contributions as a Tax: The Case for Reincarnation over Reform' (2018) *Australian Tax Forum* (forthcoming); Helen Anderson and Tess Hardy, 'Who Should be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37(1) *UNSW Law Journal* 162.

[26] It is arguable that the labour hire licensing schemes that have been introduced in various states, including Queensland, Victoria and South Australia, have strengthened the push for such a scheme to be introduced at the federal level. See 'New Federal Labor Plan to Regulate Labour Hire', *Workplace Express*, 17 July 2018. Brendan O'Connor MP, 'Same Job, Same Pay: Time to Tackle Unfair Labour Hire' (Press Release, 17 July 2018).

jurisdiction (such as labour hire, work health and safety and long service leave), as well as employment-related entitlements arising under federal laws.[27] This is particularly critical in rural and regional areas where federal labour inspectors are thin on the ground. It would also be beneficial to develop formal information-sharing and collaborative arrangements with other state and federal agencies working in this area, including the FWO.

b) Providing additional funding to relevant community-based organisations, such as JobWatch, which provides free legal employment advice and assistance to vulnerable workers in Victoria, Tasmania and Queensland. Presently, JobWatch operates a free telephone information and referral service for Queensland workers and offers a range of education and information-based tools. However, unlike the services provided to Victorian-based workers, JobWatch is not in a position to provide legal representation and assistance to disadvantaged workers based in Queensland. Additional funding of JobWatch – or another Queensland-based community legal organisation that provides specialised employment advice and assistance – would be hugely valuable, especially for those workers who have been underpaid and require additional support to seek legal redress through the small claims process, or otherwise.

c) Introducing criminal sanctions in respect of wage theft (e.g. by amending Schedule 1 of the *Criminal Code Act 1899* (Qld));

d) Enhancing Queensland's Procurement Policy so as to better target wage theft issues.

4.3 We expand on some of the regulatory advantages and risks associated with these final two initiatives (criminalisation and procurement) below.

5. CRIMINALISATION OF WAGE THEFT

5.1 Presently, state governments in a number of jurisdictions are considering introducing laws to criminalise wage theft.[28] For example, in Victoria, the Labor Government has pledged, that if elected in November 2018, it will introduce new criminal offences and sanctions relating specifically to wage theft.[29]

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

[28] In addition to the Victorian Labor Government's recent election commitment, the NSW Labor Opposition has also pledged to amend the *Crimes Act 1940* (NSW) to criminalise wage theft if it assumes government following the election on 23 March 2019. As part of this commitment, they propose to introduce a maximum penalty of 14 years imprisonment for deliberate and systematic wage theft.

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

Justifications for Criminalising Wage Theft

5.2 As pointed out in the briefing paper prepared by the Office of Industrial Relations, extending 'criminal liability to contraventions of industrial law … would require justification' given that it has been a long-standing principle that the criminal law has no place in the industrial context.[30] One justification for criminalisation is based on the moral wrongfulness of the crime.[31] By classifying underpayment of wages as a type of theft, the conduct attracts additional moral condemnation because the community associates the idea of stealing, dishonesty and theft as a wrong against society and deserving of punishment. In light of the fact that wage theft often harms vulnerable workers, including temporary migrant workers and young people, use of this terminology may be seen as attractive as it captures the significant harm associated with the conduct and the reality that underpayment of wages takes away money that an employee is entitled to by law.

5.3 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. Along with retribution and punishment, deterrence is another of the main goals of criminalisation.[32]

Issues for Consideration

5.4 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.[33] It is presumed by supporters of a criminalisation model that the risk of punishment, including imprisonment, will swing the balance away from the harmful behaviour. However, even when business calculations are made there is evidence suggesting that individuals do not take a rational analysis about the costs of being caught or not when making the decision to gain an advantage.[34]

5.5 A review of the literature on criminalisation in the compliance context suggests that the link between criminalisation and deterrence as a compliance strategy is low. The main reason for the weak compliance effects of criminalisation is related to low prosecution rates. Empirical

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[30] Citing 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).

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

[32] 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).

[33] 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.

[34] Ibid 249–56.

research in this area suggests that enhanced compliance is more closely linked to rates of prosecution rather than to penalty.[35] 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.[36]

5.6 As such, a model of criminalisation focusing on deterrence may not be adequate to bring about the necessary changes in business behaviour to prevent wage theft from occurring, particularly if this is not accompanied by an increase in inspectorate and prosecution resources.

5.7 Further, introducing criminal sanctions at a state level may have a number of unintended consequences. For example, it is possible that some vulnerable workers, including temporary migrant workers, may be more reluctant to bring matters to the attention of the inspectorate for fear of then being involved in subsequent criminal proceedings.

5.8 It may also complicate the interaction between state and federal enforcement processes and lead to counterproductive compliance behaviour. For instance, in seeking to reduce the risk of potential criminal liability, firms may be even less forthcoming about their wrongdoing and less willing to voluntarily rectify the underpayment and/or commit to proactive monitoring initiatives.

5.9 Finally, it is arguable that some of the justifications for criminalising wage theft, which were summarised above, are more difficult to maintain in relation to entities or persons that are less directly connected with the crime that has been committed, even though they may have contributed or benefited in an indirect way (e.g. lead firms in supply chains, host companies in labour hire arrangements or franchisors in franchise networks). It is certain that proving the involvement of these lead firms may be far more difficult where a criminal burden of proof applies.

6. PROCUREMENT

6.1 Governments have long used their market power as a substantial purchaser of goods and services from the private sector to pursue social policy objectives secondary to the immediate goal of cost-effective government procurement.[37] Indeed, there is an ILO convention and recommendation on the subject of labour-specific criteria in procurement contracts dating from the post-Second World War era: Labour Clauses (Public Contracts) Convention 1949 (No, 94) and Recommendation (No. 84). The Convention and Recommendation provides that public

[35] Paul R Robinson and John M Darley, 'Does Criminal Law Deter? A Behavioral Science Investigation' (2004) 24 *Oxford Journal of Legal Studies* 173, 183.
[36] Ibid 188.
[37] For discussion of the history of the use of procurement to regulate labour standards, see Breen Creighton, 'Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry' (2012) 40(3) *Federal Law Review* 349-384.

authorities entering into contracts which require the employment of workers must include clauses requiring that minimum employment standards are observed, thus preventing competition among bidders for government contracts on the basis of labour costs. In addition, the convention requires that public contracts provide for employment at prevailing wages and conditions, that is, 'hours of work and other conditions that are not less favourable than those established for work of the same character … in the district where the work is carried on' whether by collective agreement, award or legislation.[38]

6.2 The growth in public procurement has only increased the pressure on government to ensure that government contractors are subject to social performance criteria such as the observance of minimum labour standards and progressive employment practices. Where governments purchase goods and services from the private sector using taxpayer funds, it is argued that government should use its purchasing power to ensure that its suppliers follow decent employment practices.[39]

6.3 Australian governments at both federal and state level have previously been active in using public purchasing power to promote social objectives such as local employment creation, achievement of affirmative action targets, and compliance with labour and employment laws, although in a somewhat ad hoc manner.[40]

6.4 There are three stages in the procurement process at which governments can impose minimum standards: qualification, or eligibility to tender for a government contract; the tender assessment process; and the contractual requirements imposed on the successful tenderer.

6.5 We note that the Queensland Government has recently introduced a new procurement policy, which requires that the government take into account a range of economic, environmental and social matters when considering whether the relevant purchase of goods and services represents 'value for money'.[41] While the current policy is an important step forward, and does broadly take into account whether a firm adheres to 'best practice industrial relations', it could be further enhanced. In particular, the policy could be amended to make clear that any contractor or supplier who has deliberately failed to comply with employment laws will not be eligible to apply for government contracts. It could also set out the specific consequences that

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[38] *Convention concerning Labour Clauses in Public Contracts,* ILO Convention No 94, art 2, cl 1. For a more detailed discussion of the ILO Convention, see ibid.

[39] John Howe, 'Government as Industrial Relations Role Model: The Promotion of Collective Bargaining and Workplace Cooperation by Non-Legislative Mechanisms', in Breen Creighton and Anthony Forsyth (eds), *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (2012).

[40] See John Howe, '"Money and Favours": Government Deployment of Wealth as an Instrument of Labour Regulation', in Chris Arup et al (eds) *Labour Law and Labour Market Regulation* (2006). In some cases, procurement policies have been used to achieve other regulatory purposes that are not directed at enhancing worker welfare, such as the *Code for the Tendering and Performance of Building Work 2016* which imposes a wide range of restrictions and conditions on building contractors and building industry participants. Anthony Forsyth, '"Restoring the Rule of Law" through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016' (2018) 40 *Sydney Law Review* 93.

[41] Queensland Government, *Queensland Procurement Policy 2018* (Department of Housing and Public Works, June 2018).

may flow if an existing contractor is found to have engaged in wage theft (i.e. termination of the relevant contract).

6.6 The Queensland Government would need to determine whether these requirements apply to all contractors, or only to larger contracts, and/or contracts in particular industries or types of procurement. There would need to be thought given to implementation of the program, to ensure there is a structure and process for effective assessment of contractor eligibility for the program, and for ongoing monitoring of compliance with the program requirements. [42]

[42] See, for example, the model adopted under the Victorian Government Schools Contract Cleaning Program: John Howe and Ingrid Landau, *Using Public Procurement to Promote Better Labour Standards: A Case Study of the Victorian Government Schools Contract Cleaning Program* (Centre for Employment and Labour Relations Law, University of Melbourne, 2008).