

THE AUSTRALASIAN MEAT INDUSTRY EMPLOYEES' UNION

(Queensland Branch)

ABN 68 929 349 791



Branch Secretary
MATTHEW JOURNEAUX

Level 1, 39 Lytton Road, East Brisbane Qld 4169, Australia
Telephone: (07) 3217 3766
Facsimile: (07) 3217 4462
Email: admin@amieuqld.asn.au
Website: www.amieuqld.asn.au

29 July 2020

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

Dear Committee Secretary,

Re: Submissions of the AMIEU in relation to the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020*

I am writing to provide the Education, Employment and Small Business Committee with the views of the AMIEU regarding the proposed changes to legislation arising from the Committee's 2018 inquiry into wage theft.

The Australasian Meat Industry Employees' Union represents employees in the meat industry, including the meat processing, meat manufacturing, meat retailing, and poultry processing sectors. The AMIEU has seen, over the past decade, increasing use made by employers of large numbers of temporary migrant workers, typically by way of labour hire arrangements. Such arrangements provide unscrupulous operators with an effective vehicle for wage theft, combined with a workforce that is vulnerable to exploitation. Some such operations provide clear examples of wage theft, in that they operate on a business model, the profitability of which depends upon paying employees less than their legal entitlements.

The AMIEU participated in the hearings conducted by the committee in the course of the Wage Theft Inquiry, and supports the Government's decision to enact legislative change as part of its overall response to the issue.

The AMIEU is, of course, also an affiliate of the Queensland Council of Unions. The AMIEU is aware that the Queensland Council of Unions is preparing submissions in relation to the proposed legislative changes also. Representatives of the AMIEU were involved in discussions with the QCU regarding the content of those submissions, and is aware generally of their tenor.

Accordingly, the AMIEU would like to endorse the submissions made by the QCU to the Committee, as well as make some brief additional observations about the proposed legislative response.

Regional Offices

Rockhampton:

178 Quay Street
Rockhampton Q 4700
Telephone: (07) 4922 4336
Facsimile: (07) 4922 5984
Email: [REDACTED]

The Criminal Code: Wage Theft Offences

One element of the proposed legislative response has been to amend the Queensland Criminal Code to treat “wage theft” as a form of stealing.

Section 391 of the Code currently defines the offence of stealing. If amended in the manner proposed by the *Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020*, Section 391 will read as follows:

391 STEALING

- (1) A person who fraudulently takes anything capable of being stolen, or fraudulently converts to the person’s own use or to the use of any other person anything capable of being stolen, is said to steal that thing.
- (2) A person who takes or converts anything capable of being stolen is deemed to do so fraudulently if the person does so with any of the following intents, that is to say—
- (a) an intent to permanently deprive the owner of the thing of it;
 - (b) an intent to permanently deprive any person who has any special property in the thing of such property;
 - (c) an intent to use the thing as a pledge or security;
 - (d) an intent to part with it on a condition as to its return which the person taking or converting it may be unable to perform;
 - (e) an intent to deal with it in such a manner that it can not be returned in the condition in which it was at the time of the taking or conversion;
 - (f) in the case of money—an intent to use it at the will of the person who takes or converts it, although the person may intend to afterwards repay the amount to the owner.

(2AA) deleted

(2A) A person who has taken possession of anything capable of being stolen in such circumstances that the thing thereupon is not identifiable is deemed to have taken or converted the thing fraudulently notwithstanding that the property in the thing has passed to the person if, at the time the person transports the thing away, the person has not discharged or made arrangements with the owner or previous owner of the thing for discharging the person’s indebtedness in respect of the thing.

(2B) The presumption provided for by *subsection (2A)* is rebuttable.

(3) The taking or conversion may be fraudulent, although it is effected without secrecy or attempt at concealment.

(4) In the case of conversion, it is immaterial whether the thing converted is taken for the purpose of conversion, or whether it is at the time of the conversion in the possession of the person who converts it.

(4A) It is also immaterial that the person who converts the property is the holder of a power of attorney for the disposition of it, or is otherwise authorised to dispose of the property.

(5) When a thing converted has been lost by the owner and found by the person who converts it, the conversion is not deemed to be fraudulent if at the time of the conversion the person taking or converting the thing does not know who is the owner, and believes, on reasonable grounds, that the owner can not be discovered.

(6) The act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise actually deals with it by some physical act.

(6A) For stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee—

- (a) the amount is a thing that is capable of being stolen; and
- (b) subsection (6) does not apply; and
- (c) the amount is converted to the person's own use when—
 - (i) the amount becomes, under an Act, industrial instrument or agreement, payable to the employee or to the other person on behalf of the employee; and
 - (ii) the amount is not paid.

(7) In this section—

Act includes an Act of another State or the Commonwealth.

industrial instrument means—

- (a) an industrial instrument under the *Industrial Relations Act 2016*, schedule 5; or
- (b) a fair work instrument under the *Fair Work Act 2009* (Cwlth).

special property, in a thing, includes—

- (a) a charge or lien on the thing; and
- (b) a right arising from or dependent on holding possession of the thing, whether by the person entitled to the right or by another person for the other person's benefit; and
- (c) a right of an employee, in relation to the performance of work by the employee—
 - (i) to be paid the thing; or
 - (ii) to have the thing paid to another person on behalf of the employee.

"owner" includes the owner, any part owner, or any person having possession or control of, or a special property in, the thing in question.

The AMIEU is concerned that the amendment to the definition is unnecessarily awkward and that such awkwardness may produce difficulties for the proper interpretation of the legislation and for the efficient prosecution of offences. Some of this awkwardness arises from the fact that "wage theft" arises essentially from an omission rather than a positive act. The use of the passive voice in paragraph 391(6A)(c) is also problematic.

In the amended form of Section 391, subsection (6A) defines the amount of an employee's wages or entitlements as a thing capable of being stolen, and identifies the circumstances in which the "amount" is deemed to have been converted to "the person's" own use. It is not clear who "the person" is subparagraph (6A)(c). Presumably, the intention is that the "person" who converts the amount is the person who had the obligation to pay the amount to employee (i.e. the employer), but (6A) fails to make this clear. Interpretation is not helped by the fact that the word "person" is used in different senses in paragraph 6(A), and deeming conversion in passive terms ("the amount is not paid"). In other words, subsection (6A) deems the amount to be converted, but does not deem who it is that converts it, for the purpose of subsection (2).

It may be that subsection (2A) is sufficient to establish that the employer has (fraudulently) converted the amount owed to an employee. However, even the language of that provision is problematic – it is difficult to reconcile the concept of "taking possession" of an "amount" as opposed to say, money, or even, an incorporeal "right."

There seems to be further ambiguity in the definition of special property. Special property in a thing (in this case, the relevant "thing" is the "amount" owed to an employee) is defined to include:

- (c) a right of an employee, in relation to the performance of work by the employee—
 - (i) to be paid the thing; or
 - (ii) to have the thing paid to another person on behalf of the employee

The above defines special property in a thing as a right, "in relation to the performance of work by the employee." It is not clear that this definition would include all of an employee's entitlements an employee might receive in the course of their employment. For instance, it is arguable whether the entitlement to various forms of leave payments are rights "in relation to the performance of work." While the entitlements might accrue on the basis of the employee having worked for the employer for a specified period of time (service), the payments themselves are not paid to the employee for performing work, but for other reasons.

Much of the difficulty identified above appears to have arisen from trying to make the offence of "wage theft" fit within the existing concept of stealing. Wage theft certainly is analogous to stealing in some respects, but not others, just as it shares some similarities with fraud/misappropriation type offences. The AMIEU is concerned that, if the offence is not clearly defined, then it is unlikely to have deterrent effect, nor is it likely to be vigorously pursued by investigative processes, much less prosecutors.

The AMIEU believes it would be a preferable approach to create a separate offence provision dealing specifically with "wage theft" (as per the approach taken in Victoria, for instance). Such an offence provision could precisely delineate the elements of the offence, how it was committed and any specific degree of intention/recklessness required for there to be criminal responsibility.

Significance of Wage Theft Offences

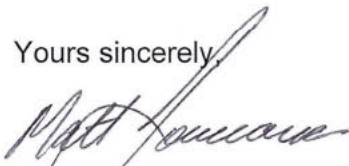
The AMIEU has a particular interest in the development of an offence of "wage theft." The AMIEU understands, and agrees with, the importance of a fast and efficient wage recovery system, and endorses the position of the QCU in that regard.

However, the AMIEU notes that such wage recovery processes are often moot for many of the migrant workers who are employed under temporary visas in the meat industry. By the time many of them learn that they have been systematically underpaid and exploited, it is often only a short time before they are due to return home. Once the migrant workers have returned overseas, it often becomes very difficult to pursue litigation on their behalf in Australia. Even where it is possible, to do so would generally require the migrant worker to return for any hearing that was

being conducted, with the attendant expense often making litigation a pointless exercise for them. Unscrupulous labour hire companies and other employers in the meat industry are well aware of these limitations.

In industries such as the meat industry, simplified, fast-tracked wage recovery systems will not be an effective deterrent to wage theft where large groups of migrant workers are involved. Where wage theft occurs, the employers responsible will be content to reimburse the handful of workers who are able to raise and resolve complaints while they are still in Australia, content that they will retain the benefits of their exploitation from the bulk of their employees. In these situations, the AMIEU believes that the threat of criminal sanction is likely to be the only effective deterrent to such conduct.

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Matt Journeaux', written over a horizontal line.

Matthew Journeaux
Secretary
Queensland Branch
Australasian Meat Industry Employees' Union