



# **Education, Employment and Small Business Committee – Inquiry Into Wage Theft in Queensland**

## **Criminalisation of Wage Theft In Queensland Submissions – Hall Payne Lawyers**

**30 July 2018**

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## 1. Introduction

1. Wage theft is systematic across the private sector and, in short, is inadequately addressed by our legislature.
2. Wage theft is so prevalent in some industries it can properly be described as an integral part of the business model, with the remote risk of detection and the widely understood weak regulatory response considered an acceptable premium for the immediate positive increase in profits and competitive advantage it provides.
3. A worker's wages and condition are, for most workers, governed by industrial instruments such as modern awards or enterprise agreements and the National Employment Standards. The contract of employment sits along side these statutory conditions, regulating matters otherwise not covered or in excess of the conditions they prescribe.
4. The *Fair Work Act 2009* (Cth) provides for a range of 'civil offences' relating to statutory and industrial instrument entitlements, including:
  - (a) section 44(1) provides that a contravention of a National Employment Standard is a civil remedy provision:

**44 Contravening the National Employment Standards**  
*(1) An employer must not contravene a provision of the National Employment Standards.*  
*Note: This subsection is a civil remedy provision (see Part 4-1).*
  - (b) section 45 provides that a contravention of a modern award is a civil remedy provision:

**45 Contravening a modern award**  
*A person must not contravene a term of a modern award.*  
*Note 1: This section is a civil remedy provision (see Part 4-1).*  
*Note 2: A person does not contravene a term of a modern award unless the award applies to the person: see subsection 46(1).*
  - (c) section 50 provides that a contravention of an enterprise agreement is a civil remedy provision:

**50 Contravening an enterprise agreement**  
*A person must not contravene a term of an enterprise agreement.*  
*Note 1: This section is a civil remedy provision (see Part 4-1).*  
*Note 2: A person does not contravene a term of an enterprise agreement unless the agreement applies to the person: see subsection 51(1).*
5. Relevantly, the maximum penalty for each separate contravention of such provisions:
  - (a) 600 penalty units, being \$126,000.00,<sup>1</sup> for a serious contravention; and
  - (b) 60 penalty units, being \$12,600.00,<sup>2</sup> otherwise.
6. Proceedings for the recovery of unpaid wages and entitlements, including safety-net contractual entitlements,<sup>3</sup> and penalties for contraventions, can be commenced in the Federal Court of Australia, Federal Circuit Court of Australia or eligible state or territory courts. In Queensland, eligible courts are the District Court and the Magistrates Court.<sup>4</sup>
7. For an employee, not covered by an award, who has entered into an employment contract with their employer, Part 5A of the *Magistrates Court Act 1921* (Qld) also offers a cause of action for breach of employment contract.
8. We have, by way of example, considered the conduct that arose in *Fair Work Ombudsman v Bishnu Laxmi Gensha Trading Pty Ltd & Ors* [2018] FCCA 487 which involved contraventions of

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<sup>1</sup> *Crimes Act 1914* (Cth) s 4AA.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Fair Work Act 2009* (Cth) s 551.

<sup>4</sup> *Fair Work Act 2009* (Cth) s 12.

civil remedy provisions of the Fair Work Act in Queensland, where an employer located in Brisbane had underpaid two employees \$7,708.84 and \$5,133.69 respectively:

- (a) it was relevantly noted by Judge Vasta that the:
  - (i) business falsely recorded a training session that occurred between the dates of 30 January and 8 February 2018, and it was falsely recorded by the company in an attempt to justify non-payment of wages during the period;
  - (ii) records were false as they did not show the correct commencement date for the two employees; and
  - (iii) employees were provided payslips once and they did not comply with the criteria outlined within the *Fair Work Regulations 2009* (Cth), as there was no nominated superannuation account nominated in the payslip;
- (b) contraventions included a failure to keep employee records, failure to ensure that records were not false and misleading; and
- (c) the following penalties were imposed:
  - (i) on the employer – pecuniary penalty of \$97,000.00;
  - (ii) on the shareholder and director of the employer for their involvement in failing to comply with a compliance notice – pecuniary penalty of \$4,625.00;
  - (iii) on the shareholder and director of the employer for their involvement in failure to keep employee records – pecuniary penalty of \$10,600.00; and
  - (iv) on the business manager of the employer for their involvement in failing to ensure that records were not false and misleading – pecuniary penalty of \$8,000.00.

9. The Senate Standing Committees on Education and Employment in respect of Corporate Avoidance of the Fair Work Act, considered the state of underpayment of wages in our employment system and concluded:<sup>5</sup>

**Committee view**

6.48 *On the basis of evidence presented, the committee concludes that underpayment of wages is a far bigger problem than isolated non-compliance or inadvertent oversight. In some sectors, such as the hospitality industry and jobs involving workers on temporary visas, wage theft is rampant.*

...

**Penalties for non-compliance**

6.55 *There are few tangible disincentives in place for employers considering underpaying their staff. Penalties are low in comparison to the money wrongly retained by underpaying staff, and there appears to be a propensity to attribute underpayment to oversight, rather than deliberate theft.*

6.56 *The evidence certainly suggests that some employers might be underpaying workers in the knowledge that penalties are small.*

(emphasis added)

10. Evidently, the penalties imposed for wage theft are not acting as a deterrent and there is evidence that employers are intentionally underpaying workers. The risk of prosecution by the FWO is remote and often when a regulator does become involved, prosecution is the last resort.<sup>6</sup>
11. It is also acknowledged that there is a significant amount of effort that often goes to concealing the wage theft from employees, unions and the Fair Work Ombudsman that is treated leniently under the *Fair Work Act*. See for example *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301, *Fair Work Ombudsman v JS Top Pty Ltd & Anor* [2017] FCCA 1689 and *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137.

<sup>5</sup> Footnotes omitted.

<sup>6</sup> See further the Fair Work Ombudsman Litigation Policy

12. To combat the spread of wage theft in Queensland, which is undermining our system of industrial relations, proper deterrents need to be introduced. We are of the view that:
- (a) the intentional, or reckless, failure of an employer to pay the entitlements of an employee; and
  - (b) the intentional concealing or falsification of employee records,
- should be the subject of criminal sanction under Schedule 1 of the *Criminal Code Act 1899* (Qld) (**'Criminal Code'**).
13. The absence of such an offence is particularly unjust when consideration is given to the sanction imposed upon employees if they steal the property of their employer. Section 398 of the Criminal Code relevantly makes it an offence punishable by a maximum of 5 years imprisonment for a person '*who steals anything capable of being stolen*'. However, if this occurs in the context of employment, the maximum penalty is 10 years.
14. The two proposals will be dealt with separately.

## 2. Enacting Law

15. It is presently open for the State Government to explore the criminalisation of wage theft in Queensland. This is a unique proposition as there is no criminal offence for wage theft in Australia.<sup>7</sup>
16. There is little in the way of international examples, however, in both Boulder, Colorado and Seattle, Washington underpayment of wages is enforced by the respective police departments indicating criminality.
17. The Queensland Legislature is provided the power to legislate in relation to crime – see *Constitution of Queensland Act 2001* (Qld):

**8 Law-making power**

*The Constitution Act 1867, section 2 provides for law-making power in Queensland. ...*

...

*2 Legislative Assembly constituted*

*Within the said Colony of Queensland Her Majesty shall have power by and with the advice and consent of the said Assembly to make laws for the peace welfare and good government of the colony in all cases whatsoever.*

(emphasis added)

, and the *Australia Act 1986* (Cth):

**2 Legislative powers of Parliaments of States**

*(1) It is hereby declared and enacted that the legislative powers of the Parliament of each State include full power to make laws for the peace, order and good government of that State that have extra-territorial operation.*

*(2) It is hereby further declared and enacted that the legislative powers of the Parliament of each State include all legislative powers that the Parliament of the United Kingdom might have exercised before the commencement of this Act for the peace, order and good government of that State but nothing in this subsection confers on a State any capacity that the State did not have immediately before the commencement of this Act to engage in relations with countries outside Australia.*

(emphasis added)

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<sup>7</sup> However, both the Victorian and New South Wales Labor Governments have promised to criminalise wage theft whilst in office. This was consistent in South Australia, until the Labor Government moved into opposition.

18. There is, relevantly, no prohibition on the Queensland Legislature in enacting a criminal offence in respect of wage theft. However, where a law of a State is inconsistent with a law of the Commonwealth it is invalid - see section 109 of the Constitution:

***Inconsistency of laws***

*When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.*

19. There must be, for section 109 to apply, two valid laws providing for the same subject matter. That is, Queensland must enact a valid law that is inconsistent with a law of the Commonwealth.
20. A potential inconsistency would arise in either:
- (a) the Criminal Code and the *Criminal Code Act 1995* (Cth) ('**Cth Criminal Code**'); or
  - (b) the Criminal Code and the civil remedy provisions of the *Fair Work Act* dealing with underpayment or non-payment of wages.
21. Whilst there is significant authority on the types of inconsistency that may arise (see **Appendix 1**), of particular note is *Momcilovic v The Queen*,<sup>8</sup> where Crennan and Kiefel JJ said at 637:<sup>9</sup>

*Inconsistency in the relevant sense does not arise merely because of the co-existence of two laws capable of simultaneous obedience or because of the existence of differences between them. Further, the fact that a Commonwealth law and a State law "impose different penalties for the same conduct does not necessarily mean that the laws are inconsistent." What is required in every case is that the two laws being compared be construed so as to determine their operation, as a matter of construction, and, in particular, so as to determine whether the Commonwealth's coverage of the subject matter is complete, exhaustive or exclusive.*

(emphasis added)

22. Criminal sanctions imposed by the Criminal Code would not give rise to an inconsistency with the Cth Criminal Code which is, relevantly, silent on the matter. Whilst the Cth Criminal Code does refer to theft or fraud, the application is limited to circumstances where the victim is the Commonwealth and, consequently, it is unlikely that the Cth Criminal Code has 'covered the field' in that regard.
23. The *Fair Work Act*, however, expressly deals with the subject matter by the potential imposition of civil remedy by a private applicant.
24. Relevantly, section 26 of the *Fair Work Act* suggests that the Commonwealth has 'covered the field' with respect to industrial relations:

**26 Act excludes State or Territory industrial laws**

- (1) *This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.*
- (2) A State or Territory industrial law is:
  - a. a general State industrial law; or
  - b. an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
    - i. regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
    - ii. providing for the establishment or enforcement of terms and conditions of employment;
    - iii. providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
    - iv. prohibiting conduct relating to a person's membership or non-membership of an industrial association;
    - v. providing for rights and remedies connected with the termination of employment;

<sup>8</sup> (2011) 245 CLR 1.

<sup>9</sup> In *Momcilovic*, the accused tried to argue that s109 prevented Victorian drug legislation from operating because the Commonwealth Criminal Code provided less harsh penalties for the same conduct.

- vi. *providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or*
  - c. *a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or*
  - d. *a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or*
  - e. *a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or*
  - f. *a law of a State or Territory that entitles a representative of a trade union to enter premises;*  
*or*
  - g. *an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or*
  - h. *either of the following:*
    - i. *a law that is a law of a State or Territory;*
    - ii. *an instrument of a legislative character made under such a law;**that is prescribed by the regulations.*
- (3) *Each of the following is a general State industrial law :*
- a. *the Industrial Relations Act 1996 of New South Wales;*
  - b. *the Industrial Relations Act 1999 of Queensland;*
  - c. *the Industrial Relations Act 1979 of Western Australia;*
  - d. *the Fair Work Act 1994 of South Australia;*
  - e. *the Industrial Relations Act 1984 of Tasmania.*
- (4) *A law or an Act of a State or Territory applies to employment generally if it applies (subject to constitutional limitations) to:*
- a. *all employers and employees in the State or Territory; or*
  - b. *all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.*

*For this purpose, it does not matter whether or not the law also applies to other persons, or whether or not an exercise of a power under the law affects all the persons to whom the law applies.*

(emphasis added)

25. There are, however, a number of strong arguments against a constitutional challenge under section 109.
26. Firstly, determining whether there is an inconsistency depends on the categorisation of a criminal wage theft provision as an 'industrial law' within the definition provided by section 26. In our view:
- (a) arguably, a criminal wage theft provision would be a law '*providing for the ... enforcement of terms and conditions of employment*' – see section 26(2)(b)(ii);
  - (b) contextually, this would mean that existing laws providing greater maximum penalties for theft or larceny by servants are also unconstitutional, because the aggravating factor in those crimes is the employment relationship;
  - (c) however, this argument is heavily outweighed by the observation that a crime is an offence not only against an individual victim but also against the state and is prosecuted as such, whereas a breach of the Fair Work Act or a contract of employment is a fundamentally private matter between two parties;
  - (d) this distinction is important because the wording of section 26(2)(b) depends on the 'main purpose' of the impugned law;
  - (e) a criminal law may apply to employment generally but its 'main purpose' can most easily be gleaned from sentencing legislation;

- (f) for example section 9 of the *Penalties and Sentences Act 1992* (Qld) shows that the individual employment relationship is only potentially contemplated in part by subsection (e), so it can scarcely be said to be the ‘main purpose’:

**9 Sentencing guidelines**

- (1) *The only purposes for which sentences may be imposed on an offender are—*
- (a) *to punish the offender to an extent or in a way that is just in all the circumstances; or*
  - (b) *to provide conditions in the court’s order that the court considers will help the offender to be rehabilitated; or*
  - (c) *to deter the offender or other persons from committing the same or a similar offence; or*
  - (d) *to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved; or*
  - (e) *to protect the Queensland community from the offender; or*
  - (f) *a combination of 2 or more of the purposes mentioned in paragraphs (a) to (e).*

27. Secondly and relatedly, it is not clear from the construction of the provisions of the rest of the Act that the Commonwealth legislature intended to exclude the operation of any State criminal laws. There are only a few criminal offence provisions under the *Fair Work Act* (relating to registered organisations and to the giving, receiving or soliciting corrupting benefits), the following provisions evince a clear parliamentary intention for the Act to operate alongside the criminal law:
- (a) section 552 prohibits a court from imposing a civil penalty where the same conduct has given rise to a criminal conviction;
  - (b) section 553 stays proceedings pending the resolution of criminal proceedings in relation to the same conduct;
  - (c) section 554 allows criminal proceedings to occur despite the existence of orders in relation to contravention of civil offence provisions in relation to the same conduct; and
  - (d) section 555 provides that evidence given in proceedings for a pecuniary penalty is not admissible in criminal proceedings.
28. In the absence of direct inconsistency, a constitutional challenge would have to show that a criminal law is captured by the definition at section 26 of the *Fair Work Act*.
29. Failing that, it would have to show that the provisions of the *Fair Work Act* as a whole demonstrate an intention<sup>10</sup> by the Commonwealth to exhaustively legislate with respect to employment matters even to the exclusion of criminal law.
30. In our submission, such arguments have very limited prospects of success and cannot rationally or sensibly be described as legitimate reasons for not legislating to criminalise wage theft.

### 3. Criminal Offences – Wage Theft

31. The Criminal Code provides for offences relating to property, being:
- (a) stealing and like offences; and
  - (b) offences analogous to stealing.
32. Consistently, the proposed offence for wage theft could fall within an offence relating to property.
33. Section 398 of the Criminal Code provides for the offence of stealing:

**398 Punishment of stealing**

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<sup>10</sup> Consider however dicta by Heydon J in *Momcilovic* at 474 that the words of s109 make no mention of parliament’s “intention”; thus it is a matter of construing the provisions of the Commonwealth Act and assessing its depth, breadth and detail to determine whether it objectively excludes any state legislation. If this is the case then the words of s26 alone are not enough to “cover the field” and so the constitutional case against wage theft criminalisation is weaker.



- (1) *Any person who steals anything capable of being stolen is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 5 years.*
- (2) *The Penalties and Sentences Act 1992, section 161Q states a circumstance of aggravation for an offence against this section.*
- (3) *An indictment charging an offence against this section with the circumstance of aggravation stated in the Penalties and Sentences Act 1992, section 161Q may not be presented without the consent of a Crown Law Officer.*

...

34. Those things capable of being stolen are set out in section 390:

**390 Things capable of being stolen**

*Anything that is the property of any person is capable of being stolen if it is—*

- (a) *moveable; or*
- (b) *capable of being made moveable, even if it is made moveable in order to steal it.*

35. There is a notable difference between the definition of things capable of being stolen and those entitlements under an industrial instrument

36. Whilst it is trite law that money is capable of being stolen, the issue becomes more complex when it is an entitlement to be paid the correct wage.

37. For wage theft to fall within the offence of stealing, significant amendment would be required to ensure that the definitions capture the conduct of an employer in respect of not paying, or underpaying, entitlements.

38. Section 408C of the Criminal Code provides for the offence of fraud:

**408C Fraud**

(1) *A person who dishonestly—*

- (a) *applies to his or her own use or to the use of any person—*
  - (i) *property belonging to another; or*
  - (ii) *property belonging to the person, or which is in the person's possession, either solely or jointly with another person, subject to a trust, direction or condition or on account of any other person; or*
- (b) *obtains property from any person; or*
- (c) *induces any person to deliver property to any person; or*
- (d) *gains a benefit or advantage, pecuniary or otherwise, for any person; or*
- (e) *causes a detriment, pecuniary or otherwise, to any person; or*
- (f) *induces any person to do any act which the person is lawfully entitled to abstain from doing;*  
*or*
- (g) *induces any person to abstain from doing any act which that person is lawfully entitled to do;*  
*or*
- (h) *makes off, knowing that payment on the spot is required or expected for any property lawfully supplied or returned or for any service lawfully provided, without having paid and with intent to avoid payment;*  
*commits the crime of fraud.*

*Maximum penalty—5 years imprisonment.*

39. A similar issue arises in respect of fraud, where it is not clear whether dishonest actions constituting fraud would relate to the failure to pay entitlements under an industrial instrument.

40. In any event, there would be significant difficulty in justifying to the Queensland Police Service that wage theft falls within an offence under the Criminal Code and that it is not an employment matter to be dealt with under the *Fair Work Act*.

41. It would, therefore, be preferable to introduce a new provision or, alternatively and with significant amendment, an aggravation of fraud or stealing, that deals exclusively with a criminal sanction for wage theft.

42. We submit that the preferable option is for a new offence be introduced in Chapter 37, Offences analogous to stealing, where the intentional or reckless conduct can be adequately punished.

## 4. Underlying Concepts – Wage Theft

### 4.1. Fault Elements

43. In our submission, only the egregious, deliberate and/or reckless conduct of an employer be the subject of criminal sanction. That is, mistaken conduct or reasonable conduct should not be prosecuted, however, such conduct may still be subject to pecuniary penalty under the *Fair Work Act*.
44. Intentional conduct should be the more serious charge. Where intention to cause a particular result is expressly declared to be an element of the offence, the result intended to be caused must be established beyond a reasonable doubt. Practically, this may not be difficult to establish as a number of Fair Work Ombudsman prosecutions have successfully established intentional conduct.<sup>11</sup>
45. The concept of ‘recklessness’ is not expressly provided as a fault element of the Criminal Code, however it can be identified as falling in the definition of ‘wilfully’.<sup>12</sup>
46. Putting the terminology to one side, reckless conduct should be an alternative charge, where the result intended to be caused cannot be established without a reasonable doubt, however, it can be established that an offender acted with knowledge that the prohibited conduct is a probable result of the offender’s actions.<sup>13</sup>
47. ‘Recklessness’ is not defined in the Criminal Code however, as the result is not intended, it can be contrasted to an offence where intention is an express element. For the conduct to be ‘reckless’ the intention of the employer will be immaterial.<sup>14</sup>
48. A criminal sanction will, unless otherwise stated, be subject to the defence of ‘mistake of fact’ provided by section 24 of the Criminal Code:

**24 Mistake of fact**

- (1) *A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.*
- (2) *The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.*

49. This defence should not be excluded, and whilst this may excuse an offender from criminal responsibility, they may still be liable under the *Fair Work Act*.

### 4.2. The Defendant

50. Employers that may be criminally liable under the new offences include, inter alia, a sole trader, a partnership, company or government department and those that commit an offence.
51. As a significant proportion of employers are corporations, determining the most appropriate defendant can be complex. For example, questions may arise as to whether the body corporate and/or the senior officers of the body corporate should be subject to criminal prosecution.
52. There are relevantly two options to ensure that the appropriate defendant faces criminal sanction:
- (a) Option 1 – define ‘Employer’ and ‘Senior Officer’ consistently with the *Work Health and Safety Act 2011* (Qld); or

<sup>11</sup> *Fair Work Ombudsman v NSH North Pty Ltd trading as New Shanghai Charlestown* [2017] FCA 1301; *Fair Work Ombudsman v Phua & Foo Pty Ltd* [2018] FCA 137; *Fair Work Ombudsman v JS Top Pty Ltd & Anor* [2017] FCCA 1689.

<sup>12</sup> *R v Lockwood; Ex parte Attorney-General (Qld)* [1981] Qd R 209.

<sup>13</sup> See for example *Zaburoni v R* (2016) 330 ALR 49.

<sup>14</sup> *Criminal Code Act 1899* (Qld) Sch 1, s 23(2).

- (b) Option 2 – retain the definition of person, which includes a body corporate, and allow senior officers to be charged for their separate involvement in the conduct.

### Option 1

53. It is fortunate that in Queensland, the Legislature has recently enacted industrial manslaughter charges under the *Work Health and Safety Act 2011* (Qld) against both a body corporate and its senior officers and there may be no need to ‘reinvent the wheel’.
54. Relevantly, sections 34C and 34D of the *Work Health and Safety Act 2011* (Qld) provide:

**34C Industrial manslaughter—person conducting business or undertaking**

(1) A person conducting a business or undertaking commits an offence if—

- (a) a worker—
- (i) dies in the course of carrying out work for the business or undertaking; or
  - (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and
- (b) the person’s conduct causes the death of the worker; and
- (c) the person is negligent about causing the death of the worker by the conduct.

Maximum penalty—

- (a) for an individual—20 years imprisonment; or
- (b) for a body corporate—100,000 penalty units.

Note—

See section 244 or 251 in relation to imputing to a body corporate or public authority particular conduct of employees, agents or officers of the body corporate or public authority.

(2) An offence against subsection (1) is a crime.

**34D Industrial manslaughter—senior officer**

(1) A senior officer of a person who carries out a business or undertaking commits an offence if—

- (a) a worker—
- (i) dies in the course of carrying out work for the business or undertaking; or
  - (ii) is injured in the course of carrying out work for the business or undertaking and later dies; and
- (b) the senior officer’s conduct causes the death of the worker; and
- (c) the senior officer is negligent about causing the death of the worker by the conduct.

Maximum penalty—20 years imprisonment.

(2) An offence against subsection (1) is a crime.

55. These provisions adopt the concept of ‘a person conducting a business or undertaking’, which includes, inter alia, a sole trader, a partnership, company, unincorporated association or government department.<sup>15</sup>
56. Whilst it is open for the Queensland Legislature to adopt a similar concept in the Criminal Code, it may not be necessary as the definition of ‘person’ includes a corporation.<sup>16</sup> Whilst this makes corporations personally liable for criminal offences, there may be practical difficulties in establishing corporate criminal responsibility and the fault elements.<sup>17</sup>
57. A proposed criminal sanction could also, similar to section 34D, extend to a senior officer of an employer, where senior officer is defined consistently with section 34A:

**executive officer**, of a corporation, means a person who is concerned with, or takes part in, the corporation’s management, whether or not the person is a director or the person’s position is given the name of executive officer.

**senior officer**, of a person conducting a business or undertaking, means—

- (a) if the person is a corporation—an executive officer of the corporation; or
- (b) otherwise—the holder of an executive position (however described) in relation to the person who makes, or takes part in making, decisions affecting all, or a substantial part, of the person’s functions.

<sup>15</sup> *Work Health and Safety Act 2011* (Qld) s 5.

<sup>16</sup> *Criminal Code Act 1899* (Qld) Sch 1, s 1.

<sup>17</sup> For example, manslaughter charges against corporations under the Criminal Code were largely unsuccessful, which was, in part, the reason that Industrial Manslaughter was introduced in the *Work Health and Safety Act 2011* (Qld).

58. This would allow criminal responsibility (i.e. intention) to be established and would include, for example, persons occupying the following positions:
- (a) a director or secretary of a corporation;
  - (b) Chief Executive Officers;
  - (c) Chief Financial Officers or Chief Operations Officers;
  - (d) General Counsel; and
  - (e) General Managers.<sup>18</sup>
59. These options are not mutually exclusive and, consistently with the *Work Health and Safety Act 2011* (Qld), consideration should be given to including body corporates and/or individuals as defendants to ensure the appropriate person is held accountable. It is important to ensure that, when including corporate criminal responsibility, a monetary penalty is imposed on the body corporate.

### Option 2

60. Alternatively, and consistently with the definition of person in the Criminal Code, there may be no need to create a separate concept of body corporate and senior officers. It is open to consider that senior officers may already be liable to criminal sanctions when they are involved in the conduct constituting the offence.

61. This proposition is based on section 550 of the *Fair Work Act* as follows:

**550 Involvement in contravention treated in same way as actual contravention**

(1) A person who is involved in a contravention of a civil remedy provision is taken to have contravened that provision.

Note: If a person (the **involved person**) is taken under this subsection to have contravened a civil remedy provision, the involved person's contravention may be a serious contravention (see subsection 557A(5A)). Serious contraventions attract higher maximum penalties (see subsection 539(2)).

(2) A person is **involved in** a contravention of a civil remedy provision if, and only if, the person:

- (a) has aided, abetted, counselled or procured the contravention; or
- (b) has induced the contravention, whether by threats or promises or otherwise; or
- (c) has been in any way, by act or omission, directly or indirectly, knowingly concerned in or party to the contravention; or
- (d) has conspired with others to effect the contravention.

62. If liability was extended in this way, the employer (be it either a body corporate or an individual) would be liable to being charged with an offence, along with any senior officers who were involved in the offence, by:

- (a) aiding, counselling or procuring the conduct; or
- (b) inducing the conduct, whether by threats or promises or otherwise; or
- (c) in any way, directly or indirectly, knowingly concerned in or party to the conduct; or
- (d) conspiring with others to effect the contravention.

63. Section 7 of the Criminal Code relevantly provides:

**7 Principal offenders**

(1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—

- (a) every person who actually does the act or makes the omission which constitutes the offence;
- (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
- (c) every person who aids another person in committing the offence;

<sup>18</sup> Workplace Health and Safety, 'The industrial manslaughter offence under Queensland legislation'.

(d) *any person who counsels or procures any other person to commit the offence.*

- (2) *Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.*
- (3) *A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.*
- (4) *Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission.*

(emphasis added)

64. Relevantly, the concept of:

- (a) aiding, counselling or procuring an offence is also provided by section 569 of the Criminal Code:

**569 Accessories**

*A person who counsels or procures another person to commit an offence, or who aids another person in committing an offence, or who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence, or who becomes an accessory after the fact to an offence, may be charged in the same indictment with the principal offender, and may be tried with the principal offender or separately, or may be indicted and tried separately, whether the principal offender has or has not been convicted, or is or is not amenable to justice.*

(emphasis added)

- (b) conspiring with others to commit an offence is also provided by section 541 of the Criminal Code:

**541 Conspiracy to commit crime**

(1) *Any person who conspires with another to commit any crime, or to do any act in any part of the world which if done in Queensland would be a crime, and which is an offence under the laws in force in the place where it is proposed to be done, is guilty of a crime, and is liable, if no other punishment is provided, to imprisonment for 7 years; or, if the greatest punishment to which a person convicted of the crime in question is liable is less than imprisonment for 7 years, then to such lesser punishment.*

(2) *A prosecution for an offence defined in this section shall not be instituted without the consent of the Attorney-General.*

, and do not require further consideration.

65. The Criminal Code, as expected, already provides for the prosecution of those persons involved in the conduct constituting the offence. If it was considered that these provisions of the Criminal Code are wide enough to prosecute the appropriate person (being either the body corporate and/or the individual) there is no need to separate the concepts as per Option 1.

66. It is, however, important to ensure that when including corporate criminal responsibility, a monetary penalty is imposed on the body corporate for example:

*Maximum penalty—*

- (a) *for an individual—20 years imprisonment; or*  
 (b) *for a body corporate—100,000 penalty units.*

67. This concept requires further consideration to ensure that the purpose of the criminal offence, that is punishment and deterrence, is directed to the appropriate defendant.

#### 4.3. Geographical Issues

68. Prosecutions will likely be undertaken in respect of National System Employers that are, potentially, operating nationally (or even internationally).

69. Sections 12 and 13 of the Criminal Code provide:<sup>19</sup>

**12 Application of Code as to offences wholly or partially committed in Queensland**

- (1) *This Code applies to every person who does an act in Queensland or makes an omission in Queensland, which in either case constitutes an offence.*
- (2) *Where acts or omissions occur which, if they all occurred in Queensland, would constitute an offence and any of the acts or omissions occur in Queensland, the person who does the acts or makes the omissions is guilty of an offence of the same kind and is liable to the same punishment as if all the acts or omissions had occurred in Queensland.*
- (3) *Where an event occurs in Queensland caused by an act done or omission made out of Queensland which, if done or made in Queensland, would constitute an offence, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the act or omission had occurred in Queensland.*
- (3A) *It is a defence to prove that the person did not intend that the act or omission should have effect in Queensland.*
- (4) *Where an event occurs out of Queensland caused by an act done or omission made in Queensland, which act or omission would constitute an offence had the event occurred in Queensland, the person who does the act or makes the omission is guilty of an offence of the same kind and is liable to the same punishment as if the event had occurred in Queensland.*
- (5) *This section does not extend to a case where the only material event that occurs in Queensland is the death in Queensland of a person whose death is caused by an act done or an omission made out of Queensland at a time when the person was out of Queensland.*

**13 Offences enabled, aided, procured or counselled by persons out of Queensland**

- (1) *Any person who while out of Queensland—*
  - (a) *does or omits to do an act for the purpose of enabling or aiding another person to commit an offence that is actually committed in Queensland; or*
  - (b) *aids another person in committing an offence that is actually committed in Queensland; or*
  - (c) *counsels or procures another person to commit an offence that is actually committed in Queensland;**is guilty of an offence of the same kind and is liable to the same punishment as if the person had committed the offence in Queensland.*
- (2) *Any person who while out of Queensland procures another to do or omit to do in Queensland an act of such a nature that, if the person had done the act or made the omission in Queensland, the person would have been guilty of an offence is guilty of an offence of the same kind and is liable to the same punishment as if the person had done the act or made the omission in Queensland.*

(emphasis added)

70. The Criminal Code, by operation of section 12 and 13, provides for criminal sanction for events that occur in Queensland caused by an act or omission outside Queensland which, if done in Queensland would constitute an offence. Sections 12 and/or 13 would extend criminal responsibility to an employer who, whilst outside Queensland, fails to pay (including by procuring its Queensland based staff to not pay) the entitlements of an employee in Queensland.

#### 4.4. Penalty

71. There are commonly acknowledged to be five purposes of punishment:<sup>20</sup>

- (a) deterrence;
- (b) incapacitation;
- (c) rehabilitation;
- (d) retribution; and,
- (e) restitution (restorative justice).

<sup>19</sup> We note section 14 of the Criminal Code, however, until the introduction of a criminal offence in another State/Territory it will not apply.

<sup>20</sup> Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (2<sup>nd</sup> ed, Thomson Lawbook Co., 2005) 18-25.

72. As noted above, the offence of stealing in section 398 is aggravated if it occurs in the employment relationship – see section 398:

**6 Stealing by clerks and servants**

*If the offender is a clerk or servant, and the thing stolen is the property of the offender's employer, or came into the possession of the offender on account of the offender's employer, the offender is liable to imprisonment for 10 years.*

(emphasis added)

73. That is, an employee<sup>21</sup> who steals from his or her employer in Queensland is liable to a maximum of 10 years of imprisonment. To put this in perspective, 10 years imprisonment is the equivalent maximum penalty for the following offences:

- (a) using the internet etc. to procure children under 16 – section 218A;
- (b) grooming children under 12 – section 218B(2); and
- (c) assault occasioning bodily harm whilst armed – section 339(3).

74. The underlying concept behind this offence is succinctly explained by McPherson J in *R v Bryant* [2005] QCA 19:

*...[S]tealing by a servant is treated as a serious offence because it involves a breach of fidelity, as well as the use or abuse in defrauding the employer as in this case of opportunities and information which the employment inevitably affords...*

(emphasis added)

75. On the recording of a conviction, his Honour stated, ‘...[P]rospective employers are entitled to know about such matters and to make up their own minds about the risks involved in employing persons who have committed offences of this kind. It is not part of our function as judges to conceal such information from them...’.

76. Fundamentally the rationale set out above underpinning the aggravated offence of ‘stealing by clerks or servants’ is equally applicable, if not even more cogent, in respect of the penalty that should apply to the prospective offence of ‘wage theft’ given:

- (a) there exists a breach of the good faith that is implied in an employment relationship; and
- (b) the power disparity that exists once an employment relationship is on foot, means that the employer is defrauding an employee through reliance on the systemic advantages that the employment relationships affords the employer.

77. It is appropriate in the circumstance to classify the offence of ‘wage theft’ as a serious offence and attach to it a term of imprisonment that adequately reflects the public’s denunciation of such conduct.

78. In terms of the quantum of the penalty, the *Work Health and Safety Act 2011*, may provide guidance as to the desirability and quantum of a corresponding financial penalty for a body corporate guilty of the offence of wage theft.

79. In addition to the penalty for industrial manslaughter (extracted above), the WHS Act provides for significant financial penalties where the PCBU has breached its duties. Relevantly, the penalty that attached to Category 1 offences at section 31 of the WHS Act is as follows:

**31 Reckless conduct—category 1**

(1) A person commits a **category 1 offence** if—

<sup>21</sup> *Criminal Code Act 1899* (Qld) Sch 1, s 1; ‘**clerk and servant** include any person employed for any purpose as or in the capacity of a clerk or servant, or as a collector of money, although temporarily only, or although employed also by other persons than the person alleged to be the person’s employer, or although employed to pay as well as receive money, and any person employed as or in the capacity of a commission agent for the collection or disbursement of money, or in any similar capacity, although the person has no authority from the person’s employer to receive money or other property on the employer’s account.’



- (a) the person has a health and safety duty; and
- (b) the person, without reasonable excuse, engages in conduct that exposes an individual to whom that duty is owed to a risk of death or serious injury or illness; and
- (c) the person is reckless as to the risk to an individual of death or serious injury or illness.

Maximum penalty—

- (a) for an offence committed by an individual, other than as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—3,000 penalty units or 5 years imprisonment; or
- (b) for an offence committed by an individual as a person conducting a business or undertaking or as an officer of a person conducting a business or undertaking—6,000 penalty units or 5 years imprisonment; or
- (c) for an offence committed by a body corporate—30,000 penalty units.

80. Category 1 offences are broadly analogous to the crime of wage theft in terms of the serious consequences of the conduct and the requirement that the defendant possess a certain state of mind – in the case of wage theft, the relevant state of mind is an intention to defraud or a recklessness as to this consequence, while in the case of a category 1 offence it is recklessness as to the risk to the health and safety of an individual.
81. For the purpose of the WHS Act, the value of a penalty unit is fixed to ensure consistency with other jurisdictions who have also adopted the model laws. There is no such justification for fixing the value of a penalty unit in cases involving wage theft.
82. In our submission, there ought be comparable penalties between the offence of stealing as a servant and the offence of wage theft. It would be difficult to argue that employers should be treated less severely than employees for the same conduct.

## 5. Criminal Offence – Employee Records

83. There are two matters that need to be considered:

- (a) firstly, the concealing or falsification of employee records; and
- (b) secondly, the destruction or fabrication of employee records upon being charged under a proposed wage theft offence to ensure there is no evidence.

84. Section 399 of the Criminal Code provides:

**399 FRAUDULENT CONCEALMENT OF PARTICULAR DOCUMENTS**

*A person who, with intent to defraud, conceals the whole or part of—*

- (a) a register or record kept by lawful authority; or
  - (b) a document recording title to property; or
  - (c) a testamentary instrument (whether the testator is living or dead);
- commits a crime.*

*Penalty: Maximum penalty—*

- (i) if the offence is committed in relation to a document recording title to property—3 years imprisonment; or
- (ii) otherwise—14 years imprisonment.

85. Section 430 of the Criminal Code provides:

**430 Fraudulent falsification of records**

*Any person who with intent to defraud—*

- (a) makes a false entry in any record; or
- (b) omits to make an entry in any record; or
- (c) gives any certificate or information that is false in a material particular; or
- (d) in any way falsifies, destroys, alters or damages any record; or
- (e) produces or makes use of any record the person knows is false in a material particular;

*commits a crime.*

*Maximum penalty—10 years imprisonment.*

86. Section 499 of the Criminal Code provides:

**499 Falsification of registers**



- (1) Any person who, having the actual custody of any register or record kept by lawful authority, knowingly permits any entry which, in any material particular, is to the person's knowledge false, to be made in the register or record is guilty of a crime, and is liable to imprisonment for 7 years.
- (2) The offender can not be arrested without warrant.
87. *Fair Work Ombudsman v JS Top Pty Ltd & Anor*<sup>22</sup>, is an example of a matter where an employer failed to keep proper records for its employees in order to deliberately underpay them and provide the FWO with a false record to conceal the underpayments made to staff. This is consistent with a number of prosecutions of the Fair Work Ombudsman where employers are intentionally not keeping appropriate records in order to:
- (b) avoid any potential underpayment of wages claim; and
  - (c) construe the records to their favour.<sup>23</sup>
88. When considering making wage theft an offence, it is necessary to also consider making concealment, falsification and/or destruction of employee records an offence. There are strong arguments in favour of making the concealment, falsification and/or destruction of employee records a comparable offence for the following reasons:
- (d) the respective authorities may have difficulty determining whether to charge an employer if there is no evidence, or there is falsified evidence, to rely upon;
  - (e) if the employer knows that there are no criminal consequences (and only potential civil penalties under the *Fair Work Act*) for concealing, destroying or creating false records for their current and former employees, it is possible that they will proceed with the same conduct; and<sup>24</sup>
  - (f) to ensure that the employees are accountable and act in good faith with the 'employer and employee' relationship.
89. The most simple proposition to effect a criminal sanction for the concealment, falsification and/or destruction of employee records is to amend section 399, 430 and 499 of the Criminal Code to include 'employee records'.
90. In so far as defining this term, the *Fair Work Act* should be considered - see section 12, which provides:
- employee record**, in relation to an employee, means:
- (a) something that is an employee record, in relation to the employee, for the purposes of the *Privacy Act 1988*; or
  - (b) in the case of a TCF contract outworker who is taken to be an employee by Division 2 of Part 6-4A of this Act—something that would be an employee record, in relation to the outworker, for the purposes of the *Privacy Act 1988*, if the outworker were an employee for the purposes of that Act.
91. Relevantly, section 6 of the *Privacy Act 1988* (Cth) provides:
- employee record**, in relation to an employee, means a record of personal information relating to the employment of the employee. Examples of personal information relating to the employment of the employee are health information about the employee and personal information about all or any of the following:
- (a) the engagement, training, disciplining or resignation of the employee;
  - (b) the termination of the employment of the employee;
  - (c) the terms and conditions of employment of the employee;
  - (d) the employee's personal and emergency contact details;
  - (e) the employee's performance or conduct;
  - (f) the employee's hours of employment;
  - (g) the employee's salary or wages;

<sup>22</sup> Ibid.

<sup>23</sup> *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd* [2016] FCCA 105; *Fair Work Ombudsman v ECF Pty Ltd* [2014] FCCA 2996; *Fair Work Ombudsman v Civic National Pty Ltd* [2016] FCCA 2459 and *Fair Work Ombudsman v Joban's Trolley Collection Pty Limited & Anor* [2018] FCCA 743.

<sup>24</sup> *Fair Work Ombudsman v JS Top Pty Ltd & Anor* [2017] FCCA 1689

- (h) the employee's membership of a professional or trade association;
- (i) the employee's trade union membership;
- (j) the employee's recreation, long service, sick, personal, maternity, paternity or other leave;
- (k) the employee's taxation, banking or superannuation affairs.

92. It is open for the legislature to adopt the definition of employee record under section 6 of the *Privacy Act 1988* (Cth) by reference, in similar terms to the *Fair Work Act* definition, or to amend the definition to be specific for the Criminal Code.

93. It is not necessary to further amend the Criminal Code as:

- (a) when an employer is charged under the proposed criminal offence, section 129 of the Criminal Code will prevent that employer from 'damaging' evidence that may be needed in a judicial proceeding, i.e. employee records:

**129 Damaging evidence with intent**

*A person who, knowing something is or may be needed in evidence in a judicial proceeding, damages it with intent to stop it being used in evidence commits a misdemeanour.*

*Maximum penalty—7 years imprisonment.*

- (b) where an employer fabricates evidence with the intent to mislead the Courts in a judicial proceeding, and in doing so, does not go so far as 'damaging' evidence, they may be liable for a charge under section 126:

**126 Fabricating evidence**

(1) *Any person who, with intent to mislead any tribunal in any judicial proceeding—*

(a) *fabricates evidence by any means other than perjury or counselling or procuring the commission of perjury; or*

(b) *knowingly makes use of such fabricated evidence; is guilty of a crime, and is liable to imprisonment for 7 years.*

(2) *The offender can not be arrested without warrant.*

## 6. Conclusions

94. In our view, there is no barrier to the Queensland Legislature enacting criminal offences in respect of:

- (a) the intentional or reckless failure of an employer to pay the entitlements of an employee; and
- (b) the intentional concealing or falsification of records relating to wage theft, under the Criminal Code.

95. It is open to the Legislature to amend the Criminal Code offences of stealing or fraud to cover the intentional or reckless failure of an employer to pay the entitlements of an employee, however this requires significant amendment to the provisions and definitions already in place. It would be preferred that a new offence be introduced in Chapter 37, Offences analogous to stealing, where the intentional or reckless conduct can be adequately punished.

96. Upon the introduction of such an offence, sections 399, 430 and 499 of the Criminal Code should be subject to amendment to ensure that employee records are not concealed from those that seek to prosecute wage theft offences (i.e. the employee, their union and regulatory bodies) or falsified. Section 129 and 126 will adequately cover situations where employers destroy or fabricate records upon being charged under a new criminal offence.



John Payne  
Principal  
Hall Payne Lawyers



Luke Forsyth  
Principal  
Hall Payne Lawyers