

# CRIMINAL LIABILITY FOR ‘WAGE THEFT’: A REGULATORY PANACEA?

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*In response to concerns over the growing problem of ‘wage theft’, the federal government, as well as various state governments, have committed to introducing criminal sanctions for underpayment contraventions. While policymakers and the public have largely assumed that criminal sanctions will address a perceived deterrence gap and promote employer compliance with basic employment standards, there has been far less scholarly appraisal of how this regulatory shift might shape enforcement decisions and affect compliance outcomes. Drawing on literature from criminology, as well as regulation and governance, this article evaluates a range of conceptual justifications put forward in support of criminalising certain forms of wage theft. It also considers key practical issues which may arise in a dual track system where both criminal and civil sanctions are available for the same or similar contraventions. This article concludes with some suggestions on how criminal offences might be framed in the federal system so as to optimise employer compliance and reduce regulatory tensions.*

## I INTRODUCTION

There is mounting evidence that many workers have experienced serious and systemic underpayment of basic employment entitlements, notwithstanding the

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efforts of the Office of the Fair Work Ombudsman ('FWO') over the past decade.<sup>1</sup> 'Wage theft' has been uncovered in high-profile businesses, such as 7-Eleven, Domino's Pizza, Woolworths and the well-known restaurant empire formerly owned and operated by the celebrity chef, George Calombaris.<sup>2</sup> The economic recession resulting from the COVID-19 crisis is likely to further exacerbate these pre-existing problems.<sup>3</sup>

The term 'wage theft' was first coined in the United States ('US'),<sup>4</sup> where wilful breach of wage and hours regulation constitutes a criminal offence.<sup>5</sup> More generally, 'wage theft' has been used to label a range of unscrupulous employer practices from sham contracting to unlawful deductions. The range of practices captured by the term 'wage theft' is potentially quite varied; however, the outcome for affected employees is somewhat similar — that is, 'each deprives the victims of what is lawfully due to them as remuneration for their labour'.<sup>6</sup>

- 1 There have been numerous inquiries at both federal and state level, which have examined various issues relating to 'wage theft' and 'insecure work', either across the labour market or in specific sectors: see, eg, Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act 2009* (Report, September 2017); Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016); Senate Economics References Committee, Parliament of Australia, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee* (Report, May 2017); *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, 31 August 2016); Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (Report, November 2018); *Report of the Migrant Workers Taskforce* (Report, March 2019) ('Taskforce Report').
- 2 '7-Eleven: The Price of Convenience', Four Corners (Australian Broadcasting Corporation, 2015); Fair Work Ombudsman, *A Report of the Fair Work Ombudsman's Inquiry into 7-Eleven: Identifying and Addressing the Drivers of Non-Compliance in the 7-Eleven Network* (Report, April 2016); David Marin-Guzman, 'Domino's Pizza under Investigation over Underpayment Claims', *The Australian Financial Review* (online, 3 February 2017) <<https://www.afr.com/policy/economy/dominos-pizza-under-investigation-over-underpayment-claims-20170203-gu4wz4>>; Cameron Houston, Chris Vedelago and Hanna Mills Turbet, 'George Calombaris Underpayment Scandal Blows Out to \$7.8 Million', *The Age* (online, 18 July 2019) <<https://www.theage.com.au/national/victoria/george-calombaris-underpayment-scandal-blows-out-to-7-8m-20190718-p5289u.html>>; Dominic Powell, 'Woolworths Underpayments Blow Out to \$390 Million; 1350 Jobs to Go', *The Sydney Morning Herald* (online, 23 June 2020) <<https://www.smh.com.au/business/companies/woolworths-underpayments-blow-out-to-390-million-flags-redundancies-20200623-p55582.html>>.
- 3 Tess Hardy, 'What Now for Wage Theft? Enforcement of Employment Rights and Entitlements in a Time of Crisis', *Labour Law Down Under* (Blog Post, 22 April 2020) <<https://labourlawdownunder.com.au/?p=829>>.
- 4 See, eg, Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid — and What We Can Do about It* (New Press, 2008).
- 5 *Fair Labor Standards Act of 1938*, 29 USC § 216(a) (2018) provides for criminal prosecution for wilful violations of federal wage and hour laws. A conviction can result in a fine of not more than \$10,000, imprisonment of up to six months, or both (albeit imprisonment is only available upon the second conviction).
- 6 Sarah Green, 'Wage Theft as a Legal Concept' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 134, 134.

The use of the term ‘wage theft’ in the Australian context is increasingly popular but is somewhat misplaced in that it suggests that underpayment entails a level of criminality. In actual fact, failure to comply with minimum wages prescribed by the *Fair Work Act 2009* (Cth) (*‘FW Act’*), or a term of an industrial instrument made under that Act, is solely treated as a breach of a civil remedy provision under the federal law.<sup>7</sup> Up until June 2020, breach of employment standards regulation did not constitute a criminal offence in any Australian jurisdiction — Commonwealth or state. However, this longstanding position is now in a state of great flux.

In June 2020 and September 2020 respectively, the Victorian and Queensland governments passed legislation introducing criminal sanctions for wage theft offences.<sup>8</sup> It also initially looked like the Western Australian government would follow a similar regulatory path.<sup>9</sup> However, it remains possible that these state developments may be superseded by law reform in the federal sphere. In particular, following the *Report of the Migrant Workers’ Taskforce* (*‘Taskforce Report’*),<sup>10</sup> and an extensive consultation process undertaken by the Attorney-General’s Department (*‘AGD’*),<sup>11</sup> the Coalition government introduced the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (Cth) (*‘Omnibus Bill’*). Amongst other matters, this Bill included a new criminal offence where an employer ‘dishonestly engages in a systematic pattern of underpaying one or more employees’.<sup>12</sup> Ultimately, and somewhat unexpectedly,

7 Section 549 of the *Fair Work Act 2009* (Cth) (*‘FW Act’*) expressly states that breach of a civil remedy provision is not a criminal offence.

8 *Wage Theft Act 2020* (Vic) (*‘Wage Theft Act’*); *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld). The Victorian Act received royal assent in June 2020 but was not operational as an offence until 1 July 2021. The Queensland Act received royal assent in September 2020. In addition to the criminal offence directed at dishonest withholding of employee entitlements, the Victorian Act also contains two separate offences concerned with record-keeping. These record-keeping offences are important, but raise some distinctive conceptual issues which are beyond the scope of this immediate article.

9 The Beech *Inquiry into Wage Theft in Western Australia* advised, in Recommendation 21, that ‘in principle, a criminal sanction should be considered by the State Government for the most serious cases of systematic and deliberate underpayment of wages and entitlements in Western Australia’: *Inquiry into Wage Theft in Western Australia* (Final Report, June 2019) 150; Department of Mines, Industry Regulation and Safety (WA), ‘Proposed Government Response to the Inquiry into Wage Theft in Western Australia’ (Media Release, 6 December 2019). See also Select Committee on Wage Theft in South Australia, Parliament of South Australia, *Interim Report of the Select Committee on Wage Theft in South Australia* (Report, 21 July 2020).

10 Attorney-General’s Department (Cth), ‘Australian Government Response: Report of the Migrant Workers’ Taskforce’ (Media Release, 7 March 2019) 2–3 (*‘Government Response to the Taskforce Report’*). This promise was made in response to Recommendation 6 of the *Taskforce Report* (n 1) 88.

11 Attorney-General’s Department (Cth), ‘Improving Protections of Employees’ Wages and Entitlements: Strengthening Penalties for Non-Compliance’ (Discussion Paper, 19 September 2019) (*‘AGD Discussion Paper’*); Attorney-General’s Department (Cth), ‘Submissions Invited on Wage Theft Criminalisation’ (Media Release, 19 September 2019).

12 Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (Cth) sch 5 item 46 (*‘Omnibus Bill’*), inserting *FW Act* (n 7) s 324B. An employer convicted under this offence would face a maximum penalty of \$5.55 million (for bodies corporate), or \$1.11

at the time of completion of this article, the criminal offence provisions were withdrawn by the Coalition Government following chaotic negotiations in the Australian Senate over passage of the Bill. During this same period, and running alongside the various wage theft inquiries, the Australian Law Reform Commission ('ALRC') conducted an inquiry into corporate criminal responsibility under federal laws, including the *FW Act*.<sup>13</sup>

Although there has been a sustained push to introduce criminal sanctions in the context of employment standards regulation, and there is now political commitment to do so, there has been limited scholarly consideration of the relevant regulatory consequences of such a move. As Jennifer Collins observes: 'principled decision-making between regulatory channels is a key and under-theorized juncture in appraising criminalization arguments about exploitation in work relations'.<sup>14</sup> This article is directed at addressing some of the key issues arising at this juncture.<sup>15</sup>

The focus of our article is on the federal civil enforcement system under the *FW Act* and its interactions with criminal sanctions. This is linked to the fact that the majority of workers are covered by the *FW Act* and fall within the national system of workplace relations regulation. While we refer to a number of state developments in passing, we avoid sustained discussion of the state initiatives, as this raises the complex constitutional questions that go beyond the scope of this article.<sup>16</sup> Instead, we analyse the more foundational question of whether the introduction of criminal sanctions for underpayment contraventions in federal law is conceptually robust and likely to achieve the stated policy objectives, such as the delivery of greater deterrence and the promotion of more sustained compliance. We also consider some of the potential pitfalls associated with a 'dual track' system where both criminal and civil sanctions are available for the same or similar contraventions.

million or four years imprisonment (for individuals): at sub-s (1); Attorney-General (Cth), *Notice of Indexation of the Penalty Unit Amount* (1 July 2020) ('*Notice of Indexation*').

- 13 The Attorney-General commissioned the ALRC to conduct a review of corporate criminal responsibility under pt 2.5 of the *Criminal Code Act 1995* (Cth) ('*Criminal Code*'): see Australian Law Reform Commission, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) ('*ALRC 2019*'); Australian Law Reform Commission, *Corporate Criminal Responsibility* (Final Report No 136, April 2020) ('*ALRC 2020*').
- 14 Jennifer Collins, 'Exploitation at Work: Beyond a "Criminalization" or "Regulatory Alternatives" Dichotomy' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 97, 110 ('Exploitation at Work').
- 15 There are many complex regulatory issues that lie at the intersection between labour law and criminal law. This article will touch on but a few. For more extensive analysis, see generally Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020).
- 16 For a cursory discussion of the constitutional issues, see Tess Hardy and Melissa Kennedy, Submission to Department of Mines, Industry Regulation and Safety (WA), *Inquiry into Wage Theft in Western Australia* (2019) 10–11 [5.1]–[5.4]. See also Matthew Minucci, 'An Overview of Wage Theft Offences in Victoria' (Seminar Paper, Law Institute of Victoria, 26 February 2021).

We begin our analysis by reviewing the current enforcement regime under the *FW Act* and considering the common justifications for introducing criminal liability for breach of employment standards. We then evaluate these justifications against conceptual considerations drawn from criminology and regulation and governance literature, as well as the practical issues which should be considered in the implementation of such an approach. Much of this analysis is broadly directed at the question of whether criminalisation of underpayment contraventions is the most appropriate or effective vehicle for addressing systemic ‘wage theft’.<sup>17</sup>

We ultimately accept that the introduction of criminal liability is justified from a moral and regulatory perspective. However, in reaching this conclusion, we are also keen to ensure that criminal sanctions are integrated into the existing regulatory framework so as to optimise employer compliance and reduce regulatory resistance. In putting forward some suggestions about the shape of possible reform, we take account of key issues identified in the existing literature, as well as the ALRC’s recent review of the principles for designating criminal offences and civil penalty provisions in the regulation of corporations across different regulatory regimes in Australia.<sup>18</sup>

## II THE CURRENT ENFORCEMENT REGIME AND ITS PERCEIVED WEAKNESSES

In this section, we review the current approach to securing compliance under the *FW Act*, and outline the key criticisms of that regime, including calls for the introduction of criminal liability. For the most part of last century, the federal Australian labour relations system predominantly provided civil remedies for breach of awards and other industrial instruments.<sup>19</sup> Criminal penalties have been generally, but not exclusively, reserved for matters such as contempt of court, unlawful strike activity or failure to abide by orders of the federal Tribunal.<sup>20</sup> The civil bent of the industrial relations system stands in contrast to work health and

17 Sarah Green (n 6) 135.

18 *ALRC 2020* (n 13).

19 For an historical overview of enforcement of minimum employment standards in the federal system, see Adrian Merritt, ‘The Historical Role of Law in the Regulation of Employment: Abstentionist or Interventionist?’ (1982) 1(1) *Australian Journal of Law and Society* 56; 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; Arie Freiberg and RC McCallum, ‘The Enforcement of Federal Awards: Civil or Criminal Penalties?’ (1979) 7(3) *Australian Business Law Review* 246. See also *Gapes v Commercial Bank of Australia Ltd* (1979) 27 ALR 87.

20 There are currently 18 different offences in the *FW Act*: Australian Law Reform Commission, *Corporate Criminal Responsibility: Appendices A–L* (Discussion Paper No 87, November 2019) app F. One such offence relates to ‘corrupting benefits’. The *FW Act* was amended in 2017 so that it is now an offence to give, receive or solicit a corrupting benefit: *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth) sch 1 item 3, inserting *FW Act* (n 7) s 536D. Further, criminal penalties also apply in other legislation which have some link to the regulation of work (such as the provisions of the *Criminal Code* that prohibit slavery, servitude, forced labour, deceptive recruiting, and debt bondage: see *Criminal Code* (n 13) div 270).

safety regulation, which has always been embedded in the criminal justice system in Australia.<sup>21</sup>

Under the *FW Act*, the earlier, disjointed enforcement mechanisms under federal and state legislation were rationalised and expanded into a more coherent and relatively comprehensive federal civil remedy regime.<sup>22</sup> The Act sets down a 'safety net' for employees, which may be derived from the National Employment Standards, modern awards or enterprise agreements, amongst other possible sources.<sup>23</sup> The Act provides that most employer obligations are 'civil remedy provisions'.<sup>24</sup> Part 4-1 sets out a broadly uniform procedure for enforcement of these civil remedy provisions. A wide suite of court orders is available for breach of such provisions, albeit they are all generally civil in nature. Orders include, but are not limited to, injunctions, reinstatement, compensation and pecuniary penalties.<sup>25</sup> A range of parties, including a Fair Work Inspector, an employee organisation, and an employee, have standing to bring proceedings in respect of contraventions of civil remedy provisions relating to breaches of employment standards.<sup>26</sup> While trade unions are becoming more active in this space,<sup>27</sup> in the past decade, the vast bulk of formal enforcement proceedings have been initiated by the FWO.<sup>28</sup> In addition, over this same period, the FWO has directed enormous time and resources towards promoting employer compliance more generally — for

- 21 See Richard Johnstone, 'Work Health and Safety and the Criminal Law in Australia' (2013) 11(2) *Policy and Practice in Health and Safety* 25. Cf Richard Johnstone, 'Decriminalization of Health and Safety at Work in Australia' in Theo Nichols and David Walters (eds), *Safety or Profit? International Studies in Governance, Change, and the Work Environment* (Baywood, 2013) 113.
- 22 This consolidation arguably started with the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) which had the effect of instigating a federal takeover of state-based industrial relations systems: see Andrew Stewart, 'Testing the Boundaries: Towards a National System of Labour Regulation' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 19.
- 23 *FW Act* (n 7) s 3(b). In addition, employment rights and entitlements may also be derived from the applicable employment contract, a workplace determination, a national minimum wage order and other provisions of the *FW Act* (and accompanying regulations).
- 24 *Ibid* s 539.
- 25 *Ibid* ss 545–6.
- 26 *Ibid* s 539(2). Employers and employer organisations also have standing to bring proceedings in relation to key civil remedy provisions, such as breach of a term of a modern award under s 50, but are unlikely to initiate proceedings in relation to an underpayment matter. An anomalous omission is that employee organisations do not have standing to bring proceedings in relation to employee records and payroll obligations: at s 539(2) item 29.
- 27 Ingrid Landau and John Howe, 'Trade Union Ambivalence toward Enforcement of Employment Standards as an Organizing Strategy' (2016) 17(1) *Theoretical Inquiries in Law* 201; Tess Hardy and John Howe, 'Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia' in Leah F Vosko (ed), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020) 221 ('Out of the Shadows and into the Spotlight').
- 28 See Tess Hardy, 'Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act' (2020) 33(1) *Australian Journal of Labour Law* 87, 103–5 ('Trivial to Troubling'); Ingrid Landau et al, 'Trade Unions and the Enforcement of Minimum Employment Standards in Australia' (Research Report, Centre for Employment and Labour Relations Law, The University of Melbourne, January 2014).

example, via education campaigns, targeted audits, inspections, inquiries and voluntary agreements.<sup>29</sup>

Notwithstanding the FWO's efforts over the past decade, a series of serious underpayment scandals involving major Australian businesses, a wave of government inquiries and a surge in research concerned with the plight of temporary migrant workers have led to a growing perception that the current system is fundamentally flawed.<sup>30</sup> Much of this commentary has argued that the FWO's enforcement activities have been insufficient to deter employer noncompliance, and the amounts recovered by the FWO are only a small fraction of the estimated total underpayment amount.<sup>31</sup> In its defence, the FWO pointed to a number of legal hurdles in the *FW Act* that were hindering its capacity to effectively address widespread underpayment.<sup>32</sup>

Combined, these various concerns led to the passage of substantial statutory amendments via the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).<sup>33</sup> This amending legislation was expressly designed to address 'concerns that civil penalties under the *Fair Work Act* are currently too low 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'.<sup>34</sup>

- 29 See generally John Howe, Tess Hardy and Sean Cooney, 'The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO's Activities from 2006–2012' (Research Report, Centre for Employment and Labour Relations Law, The University of Melbourne, 2014).
- 30 See above nn 1–2. See also Laurie Berg and Bassina Farbenblum, 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey' (Research Report, Migrant Worker Justice Initiative, November 2017); Bassina Farbenblum and Laurie Berg, 'Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia' (Research Report, Migrant Worker Justice Initiative, October 2018); Alexander Reilly et al, 'International Students and the Fair Work Ombudsman' (Research Paper No 78/2017, The University of Adelaide, March 2017).
- 31 Stephen Clibborn and Chris F Wright, 'Employer Theft of Temporary Migrant Workers' Wages in Australia: Why Has the State Failed to Act?' (2018) 29(2) *Economic and Labour Relations Review* 207, 213. See also Farbenblum and Berg (n 30).
- 32 Fair Work Ombudsman, Submission No 4 to Senate Standing Committee on Education and Employment Legislation, Parliament of Australia, *Inquiry into the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* (6 April 2017) 12, 18.
- 33 Other critical changes introduced by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) include the introduction of extended liability for franchisors and holdings companies in respect of contraventions committed by their franchisees and subsidiaries respectively, shifting the onus of proof to employers where there has been a failure to keep or maintain employment records or issue payslips, and providing the FWO with enhanced investigative powers: see at sch 1 pts 2, 8. For further discussion of this legislation, see Michael Rawling and Eugene Schofield-Georgeson, 'Industrial Legislation in Australia in 2017' (2018) 60(3) *Journal of Industrial Relations* 378.
- 34 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) ii ('Explanatory Memorandum: Protecting Vulnerable Workers').

In a bid to provide 'an effective deterrent to potential wrongdoers',<sup>35</sup> the Act now provides that 'serious contraventions' will attract a maximum penalty that is 10 times the previous maximum penalty amounts.<sup>36</sup> In order for a contravention of a civil remedy provision to be classified as 'serious' and attract the higher scale of penalties, two elements must be satisfied. First, a 'person' must have 'knowingly contravened' the provision.<sup>37</sup> Second, the person's conduct constituting the contravention must be part of a 'systematic pattern of conduct'.<sup>38</sup> The AGD has observed that the civil penalties that apply in respect of 'serious contraventions' have 'sought to capture the deterrent and punishment objectives that have historically been reserved for criminal sanctions'.<sup>39</sup>

Despite the introduction of these tougher sanctions, critics have continued to argue that the changes to the *FW Act*'s civil penalty regime did not go far enough to punish wage theft and deter future exploitation. With underpayment cases continuing to be uncovered, many in the community and the media argued that criminal sanctions were the most, if not the only, effective way to curb wage theft in Australia.<sup>40</sup> For example, the Young Workers Centre in Victoria argued that criminalisation 'generates a deterrent effect, which is vital in preventing wage theft from occurring in the first place'.<sup>41</sup> Along similar lines, the *Taskforce Report* asserted that the addition of

criminal sanctions to the current suite of enforcement tools for very serious contraventions, such as deliberate recidivists, may have some additional deterrence effect beyond that expected from increasing civil penalties. ... The introduction of criminal sanctions would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe.<sup>42</sup>

The argument that deliberate and egregious exploitation of workers should be punished by criminal liability has great popular appeal. However, there are a number of conceptual and practical issues that need to be worked through to assess whether it is likely to be an *effective* — as opposed to a symbolic — addition to

35 Ibid.

36 Ibid 3. Each 'serious contravention' attracts a maximum penalty of \$666,000 for a corporation and \$133,200 for an individual: see *FW Act* (n 7) ss 539(2), 546(2); *Notice of Indexation* (n 12).

37 *FW Act* (n 7) s 557A(1)(a).

38 Ibid s 557A(1)(b).

39 'AGD Discussion Paper' (n 11) 11.

40 See, eg, Editorial, 'Criminal Penalties for Wage Theft Are Long Overdue', *The Age* (online, 31 October 2019) <<https://www.theage.com.au/business/workplace/criminal-penalties-for-wage-theft-are-overdue-20191031-p536d3.html>>; Editorial, 'Now for Tough National Laws on Wage Theft', *The Age* (online, 17 June 2020) <<https://www.theage.com.au/national/victoria/now-for-tough-national-laws-on-wage-theft-20200617-p553d9.html>>. See also Young Workers Centre, *Criminalising Wage Theft* (Briefing, May 2018) 12; Keelia Fitzpatrick, 'Wage Theft and Young Workers' in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do about It* (University of Adelaide Press, 2018) 173.

41 Young Workers Centre (n 40) 12.

42 *Taskforce Report* (n 1) 87.



Australia's employment standards enforcement regime. Before we examine some of these issues, in the following section we consider the justifications for introducing criminal liability in relation to breach of employment standards. In the subsequent sections, we survey some of the challenges which may arise with the introduction of such a regime.

### III CONCEPTUAL JUSTIFICATIONS FOR THE INTRODUCTION OF CRIMINAL LIABILITY

The preceding sketch of the federal system of workplace relations regulation in Australia, and recent government inquiries and political developments, reveal that there is a strong rhetorical push towards criminalisation of underpayment contraventions. However, as Collins notes:

While there may be justification for civil law and/or regulatory measures and criminal law measures it is of critical importance that criminalization should not be seen as inevitable. The politicization of the issue of legal characterization of exploitation must be resisted.<sup>43</sup>

We now turn to key normative justifications and concepts drawn from criminal law and regulatory theories to consider when it may be legitimate or appropriate to criminalise conduct, such as unlawful noncompliance with statutory employment rights.<sup>44</sup>

In criminal law, there is a tension between those who justify criminal law on the basis of a 'moral' wrongdoing, and those who see criminal law as having a 'consequentialist or effects-driven model' which is focused more on the instrumental or regulatory nature of criminal sanctions.<sup>45</sup>

43 Collins, 'Exploitation at Work' (n 14) 108 (emphasis in original).

44 David Cabrelli, 'Using Criminal Law to Enforce Statutory Employment Rights' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 53, 57.

45 Caron Beaton-Wells and Ariel Ezrachi, 'Criminalising Cartels: Why Critical Studies?' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 3, 6. Beaton-Wells and Ezrachi, at n 16, cite the following sources as representing some of the extensive debate on the limits of moral and consequentialist approaches to criminal law conceptualisations: Henry M Hart Jr, 'The Aims of the Criminal Law' (1958) 23(3) *Law and Contemporary Problems* 401; Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965); Joel Feinberg, *The Moral Limits of the Criminal Law* (Oxford University Press, 1984–88) vols 1–4; John C Coffee Jr, 'Paradigms Lost: The Blurring of the Criminal and Civil Law Models — and What Can Be Done about It' (1992) 101(8) *Yale Law Journal* 1875 ('Paradigms Lost'); John C Coffee Jr, 'Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law' (1991) 71(2) *Boston University Law Review* 193; Michael S Moore, 'The Independent Moral Significance of Wrongdoing' (1994) 5 *Journal of Contemporary Legal Issues* 237; Paul H Robinson and John M Darley, 'The Utility of Desert' (1997) 91(2) *Northwestern University Law Review* 453; Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005). See also chapter contributions generally in RA Duff and Stuart P Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011); Andrew Ashworth and Lucia Zedner, 'Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure, and Sanctions' (2008) 2(1) *Criminal Law and Philosophy* 21; *ALRC 2019* (n 13) 43–6.

The first model tends to focus on retributive justice, that is, punishment should be rendered proportionately to a crime's seriousness and the harm caused on the basis that it is morally just to do so ('just deserts' theory).<sup>46</sup> The second model is founded on utilitarian objectives which suggests that the law has the effect of promoting community welfare and crime prevention.<sup>47</sup> For example, the objectives of deterrence, incapacitation and rehabilitation fit under this latter category. Specific deterrence focuses on deterring a particular individual from committing crimes in the future, while general deterrence attempts to deter the broader community from committing similar offences. Rehabilitation focuses on changing the behaviour of offenders to prevent future crime, whereas incapacitation aims to protect the community from the risk of harm to their safety from offenders prior to rehabilitation.<sup>48</sup>

We examine these two broad approaches to justification for criminal liability — the moral justification and the instrumental or regulatory justification — in more detail below, but note here that they are not mutually exclusive and often overlap.<sup>49</sup> Both types of approaches are reflected in the arguments which have been used by advocates seeking to justify the introduction of criminal sanctions for the underpayment of workers. For example, various think tanks and community groups have argued that the underpayment of workers is inherently criminal. In other words, underpayment is as morally wrongful as stealing or theft of property (and should be punished accordingly).<sup>50</sup> Second, it has also been argued, in submissions and more generally, that the imposition of criminal sanctions for breach of employment standards would be more effective in punishing and deterring serious noncompliance than civil penalties.<sup>51</sup> These conventional justifications were relied upon by the AGD as part of its industrial relations consultation process. In its discussion paper canvassing submissions concerning improvement of sanctions under the *FW Act*, the AGD noted:

Criminal sanctions are generally reserved for the most serious misconduct, with the intention of ensuring just punishment for the misconduct, protecting the community by denouncing such conduct, specifically deterring the offender from ever repeating the conduct and generally deterring others from potentially engaging in such conduct, and promoting rehabilitation of the offender.<sup>52</sup>

46 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, April 2006) 133–4 [4.1]–[4.5].

47 *Ibid* 133 [4.2].

48 *Ibid* 136–8 [4.12]–[4.17].

49 Vicky Comino, *Australia's 'Company Law Watchdog': ASIC and Corporate Regulation* (Lawbook, 2015) 274.

50 Young Workers Centre (n 40) 12. See also Sarah Green (n 6).

51 Young Workers Centre (n 40) 12; 'Criminal Penalties for Wage Theft Are Long Overdue' (n 40). See also Caley Otter, 'Wage Theft Bill 2020: Bill Brief' (Research Note No 4, Parliamentary Library and Information Service, Parliament of Victoria, May 2020).

52 'AGD Discussion Paper' (n 11) 10 (citations omitted).

The next two sections will unpick the underlying theoretical basis for these claims. Later sections will interrogate whether there is any evidentiary support in relation to such claims.

### **A Moral Justifications**

Traditional dishonesty offences such as theft and fraud are regarded as criminal because they involve deceit and/or dishonesty.<sup>53</sup> Many criminal law theorists approach criminal law from the perspective that the criminal law's purpose is to recognise moral wrongdoing and to attach punishment accordingly.<sup>54</sup> However, the defining features of what is (or is not) 'moral' are heavily contested in many legal and philosophical debates.<sup>55</sup> Some, such as Stuart Green, argue that criminal sanctions may be justified where the conduct is, in and of itself, deserving of punishment and denunciation.<sup>56</sup> In other words, criminal law censures conduct that is viewed as impermissible to society and operates as a 'formal and solemn pronouncement of the moral condemnation of the community'.<sup>57</sup>

In this article, we principally adopt Green's framework to analyse whether a criminal offence relating to unlawful underpayment can be justified from a moral perspective.<sup>58</sup> Green's approach to analysing white-collar crime through the lens of theft, dishonesty and stealing suggests that conduct that is most similar to these traditional crimes is more likely to be justifiable as an offence in a corporate context than conduct which does not contain these elements. Green applies a three-part test to justify criminalisation of white-collar crime by reference to:

- a) the culpability of the actor (ie does the perpetrator have an appropriate mental element?);
- b) the social harmfulness of the action (ie what impact does the conduct have on the community?); and

53 See, eg, Alex Steel, 'The Meanings of Dishonesty in Theft' (2009) 38(2) *Common Law World Review* 103; Alex Steel, 'The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft' (2008) 31(3) *University of New South Wales Law Journal* 712. It is worth noting that the *Wage Theft Act* (n 8) includes 'dishonesty' as an element of its offence: at s 6.

54 Moral philosophy as an approach to considering criminal law is a topic that has received much criticism and is subject to scholarly debate: see, eg, AP Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011); Feinberg (n 45) vol 1; Larry Alexander and Kimberly Kessler Ferzan, *Crime and Culpability: A Theory of Criminal Law* (Cambridge University Press, 2009).

55 See, eg, Simester and von Hirsch (n 54); Feinberg (n 45); Alexander and Ferzan (n 54).

56 Stuart P Green, *Lying, Cheating, and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) 45. See also RA Duff, *The Realm of Criminal Law* (Oxford University Press, 2018) 333.

57 Hart Jr (n 45) 405.

58 Others have developed analytical frameworks that reflect, to a greater or lesser extent, many of these same underlying principles: see, eg, Duff (n 56) ch 6; Collins, 'Exploitation at Work' (n 14) 99–103.

c) moral wrongfulness (ie does it violate moral norms in society?).<sup>59</sup>

We now apply these three principles to test whether criminal offences can be justified in relation to employer contraventions of minimum employment standards in Australia. First, if the underpayment occurs as a result of deliberate conduct on the part of the employer, rather than by way of an accidental miscalculation of entitlements, then it is likely that the first limb of Green's test will be satisfied. The second element — that of social harmfulness — is also likely to be met given that even a modest underpayment has the potential to harm the welfare, economic prosperity and security of workers and their families. The adverse social effects of any such underpayment are likely to be more pronounced with respect to vulnerable, low-paid workers.<sup>60</sup> Thirdly, if we assume that the safety net set out in the *FW Act* (and related instruments) represents the relevant societal norm, then failure to comply with these standards suggests that the conduct is morally wrongful, particularly where the underpayment is a product of deliberate action rather than inadvertent oversight. David Cabrelli has recently weighed in on this issue noting that

if a society places weight on the dignity of workers and the capacity of wage controls to generate redistributive results, there is a strong case to be made for the proposition that a polity's values will be breached where the earning capacity of some of the workforce is squeezed by the employer so that they struggle to meet their basic needs. In such a context, the deprivation of a wage floor would strike at the society's shared values and be wrongful.<sup>61</sup>

However, the moral justifications for criminalising underpayment contraventions begin to fall away where the underpayment has been committed on an accidental basis or where the contravention is relatively trivial or technical in nature. It has been argued that it would be patently unfair to pronounce that an employer has engaged in egregious or reprehensible conduct when there is little evidence to support such a position.<sup>62</sup> In this regard, Anthony Duff notes that criminalisation of conduct can be justified as an appropriate response to legal wrongs where such offences are 'narrowly tailored towards a significant aspect of the common good, and impose only reasonable burdens on those whose conduct they constrain'.<sup>63</sup> This general position is reflected in the AGD's discussion paper on sanctions, where it is stated: 'Central to the concept of criminality are the notions of

59 Stuart P Green (n 56) 30–3, 34–9, 39–47.

60 In the United Kingdom context, Bogg and Freedland similarly observe that '[t]he payment of a living wage may be understood as contributing to the common good of a labour market providing valuable opportunities for decent work': Alan Bogg and Mark Freedland, 'Criminality at Work: A Framework for Discussion' in Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 3, 10.

61 Cabrelli (n 44) 60 (citations omitted).

62 Collins, 'Exploitation at Work' (n 14) 109, quoting James Edwards, 'Book Review: Crimes, Harms and Wrongs' [2012] 1 *Criminal Law Review* 75, 75.

63 Duff (n 56) 320–1.

identifying the most serious types of wrongdoing, where there can be demonstrated individual culpability and the criminal intention for the wrongful actions.’<sup>64</sup>

It is quite possible that many of the cases that are currently being brought before the courts under the civil remedy regime of the *FW Act* could satisfy the relevant elements set out in Green’s framework and the principles laid out by others, such as Duff. For example, in a recent case involving systemic underpayment of migrant workers at a chain of sushi stores, Flick J commented that

[t]his is a case about greed and the exploitation of the vulnerable. Those in a position to ruthlessly take advantage of others pursued their goal of seeking to achieve greater profits at the expense of employees. In doing so, a great number of false documents were deliberately and repeatedly created with a view to concealing the fraud being perpetrated. Lies were told to cover up the wrongdoing. It was only when the ‘*game was up*’ that those responsible admitted their misdeeds.<sup>65</sup>

One of the fundamental conceptual difficulties in this area is that even where one can identify that the wrong is public in the sense of ‘engaging the polity’s civil order’, there are alternative regulatory responses available that may be legitimate and justified, including: doing nothing; engaging in educative or preventative activities; applying restorative justice principles; or imposing civil penalties.<sup>66</sup> In this regard, Alan Bogg and Mark Freedland argue that

[g]iven those possible alternatives, the legislator must have good reason to respond through the modalities of the criminal law, which involves a specific kind of public response: one that involves an authoritative determination of guilt, the public calling of an offender to account, public censuring of the wrongdoing, and the imposition of punishment. This does not provide a scientific formula through which decisions on criminalization can be cranked out mechanistically. Its application requires judgement and political deliberation.<sup>67</sup>

This is not a benign issue. Some have raised concerns that introducing criminal sanctions in relation to the same subject matter that is governed by civil penalties will harm the overall objectives of criminal law.<sup>68</sup> For example, Douglas Husak argues that the over-criminalisation of offences may mean that perpetrators are not aware that they are committing an offence. It can also have the effect of creating petty interactions with law enforcement officials which may frustrate and reduce respect for the legal system,<sup>69</sup> thereby undermining the rule of law in a

64 ‘AGD Discussion Paper’ (n 11) 10.

65 *Fair Work Ombudsman v HSCC Pty Ltd* [2020] FCA 655, [1] (emphasis in original).

66 Bogg and Freedland (n 60) 16, citing Duff (n 56) 280–92.

67 Bogg and Freedland (n 60) 16 (citations omitted).

68 Mirko Bagaric, ‘The “Civil-isation” of the Criminal Law’ (2001) 25(4) *Criminal Law Journal* 184, 184–5 (‘Civil-isation’), quoted in Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, December 2002) 112 (‘ALRC 2002’).

69 Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2007) 11–12.

'monumental' way.<sup>70</sup> To address such concerns John Coffee Jr suggests that the criminal distinction should be reserved for conduct that is deserving of 'social condemnation', while civil sanctions should be reserved for 'a more utilitarian function of discouraging, or placing a cost on, undesirable behaviour and rewarding desirable behaviour'.<sup>71</sup>

## **B Regulatory and Instrumental Justifications**

In addition to the moral justifications for criminalising certain wrongs, a second broad justification for extending or imposing criminal liability relates to its instrumental or regulatory function — that is, the capacity of the criminal law to promote community welfare, control conduct, deliver deterrence and bring about a desired change in compliance behaviour.<sup>72</sup>

This section will first survey key arguments concerned with the deterrent effects of criminal sanctions, before considering how criminal sanctions fit within two specific models of enforcement, namely responsive regulation and strategic enforcement.

### **1 Deterrence**

One of the main justifications for introducing criminal sanctions is the common assumption, articulated in the AGD's discussion paper, that adding criminal sanctions will 'send a strong and unambiguous message to employers that they cannot get away with exploiting vulnerable employees' and will 'enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct'.<sup>73</sup> Along similar lines, the ALRC final report identifies that both civil and criminal sanctions are designed to deliver deterrence. However, the ALRC also acknowledges that, when appropriately deployed, the criminal law can have 'additional deterrent force' due to the expressive effects of the regulatory intervention, the personal stigma attached to conviction and the greater capacity for criminal sanctions to cause reputational and financial loss.<sup>74</sup>

Classical deterrence theory posits that individuals are deterred from breaking the law if they perceive that the likelihood of detection is high and calculate that the

70 Ibid 28. See generally at ch 1.

71 *ALRC 2002* (n 68) 116, citing Coffee Jr, 'Paradigms Lost' (n 45). See also Bagaric, 'Civil-isation' (n 68) 189.

72 Arie Freiberg, *Regulation in Australia* (Federation Press, 2017) 423; Nicola Lacey, 'Criminalization as Regulation: The Role of Criminal Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 144, 144. For consideration in the labour law context, see Bogg et al (eds) (n 15).

73 'AGD Discussion Paper' (n 11) 11.

74 *ALRC 2020* (n 13) 182 [5.42].

potential gains of the wrongdoing are not worth the risk of being sanctioned.<sup>75</sup> This cost/benefit analysis assumes that would-be offenders assess the risks of expected penalty with the risk of being caught.<sup>76</sup>

However, orthodox deterrence theory has been the subject of many critiques over the years. For example, studies have shown that not every person is motivated by rational objectives or calculative decision-making. Rather, individuals often have imperfect knowledge of the law and its consequences. In addition, they may have bounded willpower and cognitive biases, which can lead to the perception that the offending will lead to higher short term benefits, not future penalties.<sup>77</sup> Many studies have also found that unlawful conduct may be driven or perpetuated by a multitude of drivers.<sup>78</sup> This may at least in part explain why there is a lack of empirical evidence to support the contention that the imposition of significant financial penalties and criminal sanctions deters other businesses from being noncompliant.<sup>79</sup> We return to this issue in Part IV below, but suffice to say, deterrence, and the rightful place of the criminal law, remains a contested concept within the broader regulation and governance literature.<sup>80</sup>

75 See, eg, Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) *Journal of Political Economy* 169. See also Christine Parker and Vibeke Lehmann Nielsen, 'How Much Does It Hurt? How Australian Businesses Think about the Costs and Gains of Compliance and Noncompliance with the *Trade Practices Act*' (2008) 32(2) *Melbourne University Law Review* 554, 562.

76 *ALRC 2019* (n 13) 202. See also Robert A Kagan and John T Scholz, 'The "Criminology of the Corporation" and Regulatory Enforcement Strategies' in Keith Hawkins and John M Thomas (eds), *Enforcing Regulation* (Kluwer-Nijhoff Publishing, 1983) 67, who describe firms that are '[m]otivated entirely by profit-seeking' as 'amoral calculators': at 67 (emphasis omitted). However, in addition to 'amoral calculators', Kagan and Scholz also identify two further business stereotypes, 'political citizens' and 'organizationally incompetent', suggesting a complexity to the operation of deterrence theory in practice given the different motivations between the various groups: at 67–8 (emphasis omitted).

77 Donald Ritchie, Sentencing Advisory Council, *Sentencing Matters: Does Imprisonment Deter?* (Report, April 2011) 8–11. See also Toni Makkai and John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31(4) *Journal of Research in Crime and Delinquency* 347.

78 See Kevin Purse and Jillian Dorrian, 'Deterrence and Enforcement of Occupational Health and Safety Law' (2011) 27(1) *International Journal of Comparative Labour Law and Industrial Relations* 23, 24; John C Coffee Jr, "'No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79(3) *Michigan Law Review* 386, 393–4; Ritchie (n 77) 8–10. For a discussion of the focus on messaging on deterrence in the criminalising cartel context, see Christine Parker, 'Criminal Cartel Sanctions and Compliance: The Gap between Rhetoric and Reality' in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 239 ('Criminal Cartel Sanctions and Compliance').

79 Beaton-Wells and Ezrachi (n 45) 21. See also Mirko Bagaric and Theo Alexander, '(Marginal) General Deterrence Doesn't Work: And What It Means for Sentencing' (2011) 35(5) *Criminal Law Journal* 269; Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26(3) *Australian Tax Forum* 511; Parker, 'Criminal Cartel Sanctions and Compliance' (n 78).

80 For an overview of some of the most influential regulatory theories, including smart regulation, meta-regulation, risk-based regulation and others, see generally Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017).

In the wake of this contestation, various theories have been developed about the optimal design of regulatory regimes and approaches to bring about compliance with regulatory objectives. This section will briefly survey two specific theories — responsive regulation and strategic enforcement — which have been highly influential in relation to the FWO's practices and processes over the past decade and are particularly relevant in the context of this article.<sup>81</sup>

## 2 Responsive Regulation

Responsive regulation is an empirically based theory developed by Ian Ayres and John Braithwaite,<sup>82</sup> which has had a deep influence in how regulation is conceptualised by regulators, policymakers and lawyers alike.<sup>83</sup> In developing this idealised model of regulation more than 25 years ago, Ayres and Braithwaite questioned the assumption that firms can be motivated to comply through the deterrent effect of penal sanctions alone.<sup>84</sup> They argued that the limited funding of regulators means that they will 'rarely have the resources to detect, prove, and punish cheating with sufficient consistency for it to be economically rational not to cheat'.<sup>85</sup>

Instead of assuming that compliance behaviour is shaped only by calculative concerns, the model of responsive regulation is premised on the idea that compliance motivations are pluralistic and diverse. In light of this, Ayres and Braithwaite advanced the idea of a regulatory enforcement pyramid — the most renowned feature of responsive regulation.<sup>86</sup> The pyramidal model of enforcement works on the basis that criminal sanctions should be used as a mechanism of last resort, only when other less coercive measures, such as persuasive techniques, discursive resolutions or civil mechanisms, fail to secure compliance.<sup>87</sup> Indeed, the AGD has explicitly acknowledged that providing criminal offences as 'part of a suite of enforcement options available to a regulator', but reserving such offences 'for the most serious and culpable cases of non-compliance', is 'consistent with theories of responsive regulation and the "regulatory pyramid"'.<sup>88</sup>

81 See Hardy, 'Trivial to Troubling' (n 28).

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

83 Vibeke Lehmann Nielsen and Christine Parker, 'Testing Responsive Regulation in Regulatory Enforcement' (2009) 3(4) *Regulation and Governance* 376, 377–8. For a paper outlining enforcement pyramids across a range of Australian and overseas agencies, see Charlotte Wood et al, 'Applications of Responsive Regulatory Theory in Australia and Overseas' (Occasional Paper No 15, Regulatory Institutions Network, Australian National University, June 2010).

84 Ayres and Braithwaite (n 82) 96.

85 *Ibid*, citing Charles A Moore, 'Taming the Giant Corporation? Some Cautionary Remarks on the Deterrability of Corporate Crime' (1987) 33(2) *Crime and Delinquency* 379.

86 But see Peter Mascini, 'Why Was the Enforcement Pyramid So Influential? And What Price Was Paid?' (2013) 7(1) *Regulation and Governance* 48.

87 Julia Black, 'Managing Discretion' (Conference Paper, Penalties: Policy, Principles and Practice in Government Regulation, Australian Law Reform Commission, June 2001) 18–19.

88 'AGD Discussion Paper' (n 11) 10.



Although the theory of responsive regulation has been hugely popular, the prioritisation of cooperation over coercion has not been without critics.<sup>89</sup> Some have identified that the ‘tit-for-tat’ approach to compliance and enforcement is best suited to organisations with which the regulator has regular interactions, but is generally ill-equipped to deal with situations where inspections are less intense or less frequent,<sup>90</sup> or where regulatees’ behaviour is not driven by the regulator’s interventions, but by corporate cultures or economic pressures.<sup>91</sup> Neil Gunningham and Darren Sinclair have cautioned that an escalating regulatory response may not be appropriate

where there is only one chance to influence the behaviour in question (for example, because small employers can only very rarely be inspected), [in these circumstances] a more interventionist first response may be justified, particularly if the risk involved is high.<sup>92</sup>

In the context of employment standards regulation more specifically, Leah Vosko, John Grundy and Mark Thomas contend that while responsive regulation, and related theories of new governance, broadly aim

to extend social protections to workers ... those failing to retain a sufficient role for state institutions and ‘hard law’ mechanisms neglect to adequately account for the power dynamics of the employment relationship, and thereby threaten to entrench regulatory degradation.<sup>93</sup>

In a recent analysis of the use of criminal liability under a responsive regulation model,<sup>94</sup> Braithwaite has again emphasised the importance of the strategic and restrained use of criminal prosecution in combination with a range of other regulatory tools. He argues that regulators must be careful to ‘deploy the mix’ of available regulatory tools ‘dynamically’ to ensure that the most important tools, such as criminal prosecution, are ‘not blunted through overuse’.<sup>95</sup>

89 See, eg, Salo V Coslovsky, ‘Relational Regulation in the Brazilian Ministério Público: The Organizational Basis of Regulatory Responsiveness’ (2011) 5(1) *Regulation and Governance* 70, 71; Robert Baldwin and Julia Black, ‘Really Responsive Regulation’ (2008) 71(1) *Modern Law Review* 59, 62–4.

90 See generally John Braithwaite, ‘Relational Republican Regulation’ (2013) 7(1) *Regulation and Governance* 124; Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999) 123–9. Cf John Braithwaite and Seung-Hun Hong, ‘The Iteration Deficit in Responsive Regulation: Are Regulatory Ambassadors an Answer?’ (2015) 9(1) *Regulation and Governance* 16, 17.

91 Baldwin and Black (n 89) 62–3.

92 Neil Gunningham and Darren Sinclair, ‘Smart Regulation’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 133, 139.

93 Leah F Vosko, John Grundy and Mark P Thomas, ‘Challenging New Governance: Evaluating New Approaches to Employment Standards Enforcement in Common Law Jurisdictions’ (2016) 37(2) *Economic and Industrial Democracy* 373, 375.

94 John Braithwaite, ‘Regulatory Mix, Collective Efficacy, and Crimes of the Powerful’ (2020) 1(1) *Journal of White Collar and Corporate Crime* 62.

95 *Ibid* 69.

### 3 Strategic Enforcement

A more recent, and contrasting, regulatory model is that of strategic enforcement — an approach developed by US economist, David Weil. Strategic enforcement is broadly framed around four central principles, namely: prioritisation; deterrence; sustainability; and systemic effects.<sup>96</sup>

Although Weil acknowledges that there is a range of compliance motivations, he argues that the deterrent impact of regulatory interventions is critical to achieving compliance and should be factored into the planning, implementation and evaluation of all regulatory activities.<sup>97</sup> Weil's emphasis on deterrence, as opposed to more accommodative techniques, is one of the most notable departures from the responsive regulation model.

While deterrence is a central element of the strategic enforcement model, the need for, and the pursuit of, criminal sanctions for wage and hour violations does not feature heavily. Rather, Weil argues that the concept of deterrence should be framed around shaping an actor's perception of risk. Changing the overall compliance calculus can be best achieved through deployment of multiple mechanisms, including proactive inspections, the use of enforcement tools and strategic communications.<sup>98</sup>

In the strategic enforcement model, deterrent-based mechanisms draw power not just from the sanction itself, but from the business and reputational costs which flow from the relevant regulatory intervention.<sup>99</sup> The conceptualisation of deterrence in the strategic enforcement model stands in contrast to the notion of deterrence generally adopted in responsive regulation. The pyramidal model of enforcement is arguably more focused on the particular sanction which is being deployed and its likely effect on the individual firm with whom the regulator is interacting (otherwise known as specific deterrence). In comparison, strategic enforcement tends to focus more on the regulatory position and power of the actor being targeted and the likely 'ripple effects' of the relevant intervention (which falls within the broader rubric of 'general deterrence').<sup>100</sup>

96 David Weil, *Improving Workplace Conditions through Strategic Enforcement: A Report to the Wage and Hour Division* (Report, May 2010) ('*Improving Workplace Conditions*'). More recently, Weil has refined the strategic enforcement model, breaking it down into eight key elements: David Weil, 'Creating a Strategic Enforcement Approach to Address Wage Theft: One Academic's Journey in Organizational Change' (2018) 60(3) *Journal of Industrial Relations* 437 ('*Creating a Strategic Enforcement Approach*'). These elements are: 1) moving from a reactive to a proactive approach; 2) setting industry priorities; 3) using all enforcement tools; 4) outreach with employers; 5) outreach with workers; 6) strategic communications; 7) regulatory agreements; and 8) evaluation, performance monitoring and continuing improvement.

97 Weil, *Improving Workplace Conditions* (n 96) 16.

98 Weil, '*Creating a Strategic Enforcement Approach*' (n 96) 438.

99 *ALRC 2020* (n 13) 182 [5.42].

100 See Roberto Pires, 'Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil' (2008) 147(2–3) *International Labour Review* 199, 223.

In other words, instead of concentrating only on the compliance posture of the individual employer at the time an inspection takes place, Weil advocates for an approach whereby enforcement effects are measured and judged on the basis of their capacity to permanently alter ‘system-wide incentives for compliance’.<sup>101</sup>

In order to reduce recidivism, increase the ‘ripple effects’ of each regulatory intervention and entrench sustained employer compliance, Weil contends that regulatory agencies should focus on enhancing deterrence at the industry and geographic levels.<sup>102</sup> Labour inspectorates need to build and act on ‘a deep understanding of how industries and sectors operate and how those dynamics affect workplace outcomes generally and employment vulnerability in particular’.<sup>103</sup> In Weil’s view, the deterrent element grows in importance in relation to those sectors, which have a high number of vulnerable workers and which display ‘fissured’ characteristics — that is, where the responsibility for ensuring compliance and minimising risk has been shifted from lead firms to smaller, subordinate businesses through sub-contracting, labour hire or franchising arrangements.<sup>104</sup>

In summary, criminal liability arguably has a role to play under the responsive regulation model, particularly when it is used in a hierarchical manner as part of a broader regulatory mix. There is perhaps a weaker case for criminal liability under strategic enforcement given that its focus is on leveraging lead firms to deliver deterrence and promote compliance by clever and sensitive deployment of proactive inspections and strategic communication, amongst other mechanisms.

#### **IV PRACTICAL CONSIDERATIONS CONCERNING THE INTRODUCTION OF CRIMINAL LIABILITY FOR WAGE THEFT**

Even if it is accepted that there are valid moral and regulatory justifications for introducing criminal liability for wage theft, there remain a number of practical issues that may emerge with the introduction of criminal sanctions in relation to underpayment contraventions. Much of the current debate has been consumed with the enactment of laws allowing for the imposition of criminal sanctions. So far, there has been much less emphasis placed on how criminal law measures will be designed, interpreted, and enforced in practice, even though this is an essential element of any ‘principled system of criminalization’.<sup>105</sup> As Collins has observed: ‘Matters of procedure and prosecutorial policy — “the everyday practices of

101 Weil, *Improving Workplace Conditions* (n 96) 16.

102 Ibid 81.

103 David Weil, ‘Rethinking the Regulation of Vulnerable Work in the USA: A Sector-Based Approach’ (2009) 51(3) *Journal of Industrial Relations* 411, 426, citing Mark Bray and Peter Waring, ‘The (Continuing) Importance of Industry Studies in Industrial Relations’ (2009) 51(5) *Journal of Industrial Relations* 617.

104 Weil, *Improving Workplace Conditions* (n 96) 9–10, 20–2, 24–6.

105 Collins, ‘Exploitation at Work’ (n 14) 109.

criminalization” — shape the substantive criminal law and keenly determine the effects of criminalization on vulnerable workers.<sup>106</sup>

In light of the importance of enforcement processes, this section will briefly touch on some of the most pressing practical issues that may emerge with the introduction of criminal sanctions in relation to underpayment contraventions.

### A Key Elements of the Criminal Offence

Historically, in the development of criminal law, a distinction has often been drawn between crimes which are *mala in se* and those which are *mala prohibita*. The notion of *mala in se* has generally been associated with crimes that are regarded as inherently wrongful regardless of their legal status, such as murder and rape. In relation to *mala in se* crimes, satisfying the requirement of mens rea (or a guilty state of mind) is often a necessary prerequisite. Another feature of *mala in se* criminalisation is that the ‘wrongs which it identifies and acts upon are essentially personal and inter-personal: they are the wrongful conduct of human beings’.<sup>107</sup>

In comparison, the concept of *mala prohibita* relates to crimes which may not be viewed as wrongful but for the fact that they have been designated as such by law, such as operating a business without a requisite licence.<sup>108</sup> In relation to *mala prohibita* crimes, the state of mind of the wrongdoer is largely irrelevant and the relevant wrongs are far less personalised. Instead, offences ‘may be articulated which are more institutional and structural in their nature’.<sup>109</sup>

While the division between these two categories of crime may have some normative and analytical utility in some circumstances, it can also have the effect of perpetuating the notion that wrongs committed by corporations in the work context are not ‘real’ crimes and should not attract the stigma and public censure that accompanies criminal punishment. As Bogg and Freedland point out, this can be rather unhelpful given that ‘effective enforcement of basic labour standards for all workers, perhaps through *mala prohibita* crimes’ may be preferable to ‘selective criminalization of the most egregious forms of labour exploitation through *mala in se* crimes’.<sup>110</sup>

The characterisation of any new criminal offence for underpayment in Australia — and the relevant fault element of such an offence — is crucial and contested. Some previous inquiries have suggested that it should be premised on a requirement of deliberateness or recklessness; other schemes, such as that recently enacted in

106 Ibid 111, citing Andrew Ashworth, ‘Positive Duties, Regulation and the Criminal Sanction’ (2017) 133 (October) *Law Quarterly Review* 606.

107 Bogg and Freedland (n 60) 9.

108 Ibid 8, citing Duff (n 56) 20–1.

109 Bogg and Freedland (n 60) 9.

110 Ibid 30.

Victoria, impose a separate requirement of dishonesty.<sup>111</sup> However, at this point, no government — at either state or federal level — appears to be considering the introduction of criminal sanctions for inadvertent contraventions, such as underpayments arising through administrative errors.

However, in its submission to the AGD’s consultation over sanctions under the *FW Act*, the Australian Council of Trade Unions (‘ACTU’) argued that there should be strict criminal liability for any contraventions of ‘remuneration related obligations’ under awards or enterprise agreements, subject only to the regulator’s own enforcement policies, and a defence of mistake of fact, or possibly due diligence.<sup>112</sup> They suggest that in addition, there should be a higher criminal sanction for conduct that is intentional, reckless or dishonest.<sup>113</sup> The ACTU’s submission recommends removing the ‘serious contraventions’ threshold for higher civil penalties, instead arguing that all breaches of remuneration related obligations should attract a maximum civil penalty that is double the current penalty for breach of the serious contravention provisions.<sup>114</sup>

These recommendations would leave the responsible regulator with a broad discretion subject to their own assessment of the seriousness of breaches, and likelihood of success in bringing criminal or civil action. While this offers flexibility in determination of the sanction most appropriate to the circumstances, previous studies suggest that discretion may not be exercised in a manner likely to have the most strategic impact on noncompliance.<sup>115</sup> This is an issue we return to below.

The proposed s 324B of the Omnibus Bill eschewed the ACTU’s suggested approach and departed from the Victorian model. Instead, to attract criminal liability, it is necessary to satisfy two essential elements: the underpayment must be committed 1) dishonestly; and 2) as part of a ‘systematic pattern of underpaying one or more employees’.<sup>116</sup> It was proposed that this criminal regime would operate alongside the existing civil penalty provisions for serious contraventions. This had the potential to confuse the relationship between the criminal offences and the civil penalty provisions of the *FW Act*. We address these tensions in Part V below.

111 *Wage Theft Act* (n 8) s 6.

112 Australian Council of Trade Unions, Submission to Attorney-General’s Department (Cth), *Improving Protections of Employees’ Wages and Entitlements: Strengthening Penalties for Non-Compliance* (25 October 2019) 3, 27–9.

113 *Ibid* 29.

114 *Ibid* 15–16.

115 See, eg, Michelle Welsh, ‘Civil Penalties and Responsive Regulation: The Gap between Theory and Practice’ (2009) 33(3) *Melbourne University Law Review* 908.

116 Omnibus Bill (n 12) sch 5 item 46, inserting *FW Act* (n 7) s 324B.

## B Detection Challenges

It is also conceivable that the existence of criminal liability may impact on the ability to effectively detect breaches of minimum labour standards in the first place. For a start, the threat of criminal liability may dampen the willingness or likelihood of employers to self-report their wrongdoing to the regulator. Rather than cooperate with the regulator, it may prompt employers to engage in evasion and obfuscation which may hinder the investigation and the subsequent prosecution. It is critical that any criminal offence be framed in such a way to avoid these unintended and undesirable consequences. To mitigate against these potentially adverse outcomes, a due diligence defence — such as that introduced in Victoria<sup>117</sup> — may promote compliance behaviours that best promote and sustain compliance. In addition, corporate self-disclosure may be encouraged if it is introduced as an express factor to be considered by courts at the point of sentencing.<sup>118</sup>

Criminalisation of underpayment contraventions may also have a disquieting effect on workers by magnifying existing complaint barriers. These issues are likely to be particularly pronounced for temporary migrant workers who may rightfully fear immigration and personal reprisals associated with reporting underpayments.<sup>119</sup> In this respect, Collins argues that there is 'tension in using the criminal law's censuring and preventive functions in relation to exploitation in work relations because of its potential to produce counter-productive effects for vulnerable workers'.<sup>120</sup> Further, the introduction of criminal liability may further weaken the role of trade unions in monitoring underpayment and taking action on behalf of vulnerable workers in relation to noncompliance. Historically, the role of monitoring and actioning noncompliance was integral to the central role of unions in setting and overseeing wages and conditions.<sup>121</sup> The introduction of criminal liability for wage theft will be a further extension of an individualised model of employment rights, largely enforced by the state.

Further, recent research suggests that many workers are reluctant to raise underpayment concerns with the regulator because they believe that redress will ultimately be limited, if it comes at all.<sup>122</sup> It is likely that the threat of criminal

117 *Wage Theft Act* (n 8) ss 6(4)–(5).

118 Proposal 13 of *ALRC 2019* (n 13) 205.

119 Collins, 'Exploitation at Work' (n 14) 107, citing Virginia Mantouvalou, 'The Right to Non-Exploitative Work' in Virginia Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart Publishing, 2014) 39, 51.

120 Collins, 'Exploitation at Work' (n 14) 104.

121 See Landau and Howe (n 27); Hardy and Howe, 'Out of the Shadows and into the Spotlight' (n 27).

122 Farbenblum and Berg (n 30).

sanctions, with its focus on punishment rather than compensation, will further hamper detection (and recovery) efforts.<sup>123</sup>

### C Prosecution Challenges

There are a number of practical issues that may make prosecuting criminal sanctions especially difficult in the context of underpayment matters.

#### 1 Criminal Standard of Proof

Generally speaking, in criminal cases, the prosecution must prove the guilt of an accused beyond reasonable doubt.<sup>124</sup> To this end, it is necessary to prove every element of the offence to the criminal standard. For example, the proposed criminal offence under the Omnibus Bill would have required the FWO to prove, beyond reasonable doubt,<sup>125</sup> that a) the employer had underpaid one or more employees (physical element);<sup>126</sup> and b) the employer had engaged in this conduct dishonestly and as part of a systematic pattern<sup>127</sup> (fault element). The Bill also sought to amend the definition of ‘dishonest’ in s 12 of the *FW Act* to mean ‘dishonest according to the standards of ordinary people’ and ‘known by the defendant’ to be so.<sup>128</sup> This was intended to ensure that conduct which is not intentional, including if it is ‘accidental, inadvertent or otherwise a genuine mistake’,<sup>129</sup> was not caught by the criminal offence. However, as Mark Lewis points out, this two-limb test for dishonesty may have introduced a subjective fault element, making the prosecution potentially more complex and more likely to fail.<sup>130</sup>

These evidentiary challenges are even greater where there is an absence of documentary evidence, or limited testimony in support of the prosecution’s case.<sup>131</sup> In criminal matters, there are likely to be fewer evidentiary presumptions that

123 Some of the same concerns have been raised in the context of modern slavery reforms: see Ingrid Landau and Shelley Marshall, ‘Should Australia Be Embracing the Modern Slavery Model of Regulation?’ (2018) 46(2) *Federal Law Review* 313.

124 *Momcilovic v The Queen* (2011) 245 CLR 1, 51 [54] (French CJ). However, it is important to note that increasingly reversal of onus provisions are adopted where the accused has an onus on the balance of probabilities to disprove an element of an offence: Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws* (Final Report No 129, December 2015) ch 9.

125 See *Criminal Code* (n 13) pt 2.6.

126 Omnibus Bill (n 12) sch 5 item 46, inserting *FW Act* (n 7) ss 324B(2), (3).

127 Subsection (5) of the proposed s 324B sets out the factors that the court may have regard to in determining whether the employer engaged ‘in a systematic pattern of underpaying one or more employees’. Subsection (6) provides that this set of factors is non-exhaustive.

128 Omnibus Bill (n 12) sch 5 item 42.

129 Explanatory Memorandum, Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (Cth) 80 [428] (‘Explanatory Memorandum: Omnibus Bill’).

130 Mark Lewis, ‘Criminalising Wage Theft: Some Observations on Deterrence, Enforcement and Compliance’ (2020) 48(6) *Australian Business Law Review* 512, 530.

131 Cabrelli (n 44) 64.

favour the underpaid employee (or their representative), such as a reversal of the burden of proof. Combined, these circumstances may make it extremely tough to prove an offence given that the requisite knowledge and evidence 'is often located in the corporate structure such that it may be particularly difficult for the prosecution to obtain'.<sup>132</sup>

Furthermore, criminal trials into allegations of corporate wrongdoing often involve long delays. This may not only erode the strength of the evidence given that documents may go missing and memories may fade, but can ultimately lead to fewer successful prosecutions.<sup>133</sup> There are, however, mixed views on whether conviction rates are the critical measure of regulatory effectiveness, or whether the investigatory and prosecution process is sufficient to achieve key policy objectives.<sup>134</sup>

## **2 Architecture of Prosecution System**

One of the most significant limitations — at least with respect to those jurisdictions which already have criminal offences for corporate wrongdoing — relates to the architecture of the prosecution system. Depending on the legislative scheme, it is possible that many different inspectors across separate federal and state agencies may be involved in investigating underpayments matters, preparing court briefs and prosecuting offences, including the federal or state police, the relevant Director of Public Prosecutions ('DPP') and/or the relevant regulatory authority. This can lead to duplication, contestation, conflict and confusion for all parties involved and can undermine the relevant objectives of the legislative scheme.<sup>135</sup> In the Australian context, the ALRC found that there are often many administrative barriers which prevent effective joint operations by regulators, including limits on information-sharing and delegation powers.<sup>136</sup> The prosecution pathways between different federal and state agencies clearly need to be addressed if wage theft laws are enacted in multiple jurisdictions. The relationship between various federal agencies was not clearly delineated in the Omnibus Bill and these tensions may potentially arise if the provisions are revived. For example, while the FWO was granted express prosecutorial power in the Bill, it also provided that the DPP could institute proceedings for an offence.<sup>137</sup> The Bill also authorised the Australian Federal Police to investigate a possible substantive offence against the proposed s 324B, alongside and separate to the FWO.<sup>138</sup>

132 ALRC 2020 (n 13) 159 [4.118].

133 Ibid 44 [1.64].

134 See, eg, Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful' (n 94) 62, 66–7.

135 See generally ALRC 2019 (n 13).

136 ALRC 2020 (n 13) 44 [1.66].

137 Omnibus Bill (n 12) sch 5 item 46, inserting *FW Act* (n 7) s 324C.

138 Explanatory Memorandum: Omnibus Bill (n 129) 82 [438].



### 3 Willingness to Initiate Prosecutions

The mere existence of criminal sanctions in a statute does not necessarily equate to widespread use or enforcement of those offences. Whether criminal offences are applied, ultimately depends on the willingness of prosecutors to charge offenders and seek criminal sanctions. In general, prosecutors have a wide discretion to initiate prosecutions by assessing whether it is in the public interest to do so. Where law enforcement authorities, such as police or the DPP, are authorised to bring prosecutions for white-collar crimes, such as wage theft, there may be resistance or reluctance to prepare or pursue briefs due to a perception that such matters are ‘not really criminal’ and certainly not worth the expenditure of precious and limited resources. As Cabrelli has noted, there is often a common perception that ‘the costs of criminal enforcement may be too high and criminalization may be disproportionate in light of the magnitude and extent of the wrong’.<sup>139</sup> This issue appears to have played out in the United Kingdom. In that jurisdiction, there is growing evidence of widescale wage theft. Yet, since the introduction of the *National Minimum Wage Act 1998* (UK), there have only been 14 prosecutions.<sup>140</sup> Catherine Barnard and Sarah Fraser Butlin observe that in the United Kingdom:

[W]e are left with a picture of considerable and growing criminalization when one considers the ‘law on the books’. But when one considers ‘law in practice’, there is little enforcement taking place. Although deterrence cannot be measured by enforcement statistics, the very limited level of enforcement tends to suggest that in truth the criminalization of labour law breaches is simply ineffective political signalling: politically it can be said that labour law breaches are being taken seriously but little is done in practice.<sup>141</sup>

Similar trends have been identified here. While there has been an explosion in the number of criminal offences enacted in federal legislation, there have been very few prosecutions of corporations under these provisions.<sup>142</sup>

In circumstances where criminal enforcement processes trump civil channels, it is possible that individual rights to take remedial action may be stymied by ‘compelling them to relinquish their private control of enforcement and hand it over to the state’.<sup>143</sup> While this may relieve the applicant of the burden and expense of pursuing the matter, it also means that control over the enforcement process, and the decision about whether to take action, is devolved to the state. Even where the state takes criminal action, it is possible that plea bargaining may ensue — a negotiation process which may not necessarily involve the person who was originally subject to the wrongdoing. This may not only ‘engender a negative

139 Cabrelli (n 44) 64.

140 David Metcalf, *United Kingdom Labour Market Enforcement Strategy 2018/19* (Report, May 2018) 14–15, 24.

141 Catherine Barnard and Sarah Fraser Butlin, ‘Where Criminal Law Meets Labour Law: The Effectiveness of Criminal Sanctions to Enforce Labour Rights’ in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 70, 93.

142 *ALRC 2020* (n 13) 35 [1.27].

143 Cabrelli (n 44) 64.

perception towards any role for state enforcement',<sup>144</sup> it may undermine, rather than reinforce, employer motivations to comply.

#### 4 Attribution of Liability

Criminal law has been traditionally conceived in terms of the liability of natural persons. The imposition of criminal liability with respect to corporations in the context of wage underpayment raises a number of complex issues. In this respect, we note that the criminal offence proposed under the Omnibus Bill applied to 'an employer' — which is most likely to be a corporation rather than an individual, particularly in the federal workplace relations system.<sup>145</sup>

For a start, corporate liability can be seen as detracting attention away from the individuals who make choices that are regarded as criminal. There are arguments that criminal liability should have an individualistic focus on those who directly engage in the misconduct, rather than their employing firm.<sup>146</sup> Conversely, there are arguments that corporate criminal liability recognises that companies are more than aggregates of their employees and their standards reflect a collective decision to not comply with the law.<sup>147</sup>

For example, individuals may be subjected to imprisonment, but corporations cannot be deprived of their freedom and liberty via a gaol term. Even where regulators have achieved theoretical success in penalising corporations, this may not have the desired impact on future corporate compliance. Some studies have found that fines

no matter how large, do not guarantee that corporate offenders will respond by revising their internal operating procedures or physical protection devices in such a way as adequately to guard against repetition of the offence. The response may be simply to write a cheque in payment of the fine.<sup>148</sup>

The attribution of liability is a complicated issue that will vary depending on what model of enforcement is ultimately adopted by legislators.<sup>149</sup> For example, attribution to a corporation can occur through accessorial liability, vicarious

144 Ibid.

145 This relates to constitutional issues which go well beyond the scope of this article: see generally Andrew Stewart et al, *Creighton and Stewart's Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) ch 6.

146 Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 4. See, eg, Bruce Coleman, 'Is Corporate Criminal Liability Really Necessary?' (1975) 29(4) *Southwestern Law Journal* 908, 922. See also Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993); James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Cambridge University Press, 2003).

147 Clough and Mulhern (n 146) 4–5, citing William H Jarvis, 'Corporate Criminal Liability: "Legal Agnosticism"' (1961) 1 *Western Law Review* 1, 10–21.

148 Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13(1) *University of New South Wales Law Journal* 1, 8.

149 *ALRC 2019* (n 13) ch 5.

liability, the identification doctrine,<sup>150</sup> or through statutory schemes, such as pt 2.5 of the *Criminal Code Act 1995* (Cth) for corporate culture failings.<sup>151</sup> The Omnibus Bill proposed to rely on the existing attribution principles in s 793 of the *FW Act*.<sup>152</sup> Regardless of which model is adopted, attributing liability to a corporation is undoubtedly difficult in practice, particularly in ‘cases involving large organisations with complex corporate structures, geographically dispersed operations and diffuse management chains’.<sup>153</sup>

Individuals or third party firms may also be held to account through accessorial liability or complicity principles.<sup>154</sup> The evidence required to prove each of these approaches is different, and it is beyond the scope of this article to consider each in detail. However, cases already determined under the *FW Act* in the civil jurisdiction signal that there are likely to be significant problems in establishing that the relevant knowledge or intention elements are satisfied, especially in relation to third party corporations, such as lead firms in supply chains, host companies in labour hire arrangements or franchisors in franchise networks.<sup>155</sup> This makes it more challenging to adopt a strategic enforcement model, which is geared towards leveraging the resources of lead firms through the threat of legal liability. It is also likely to raise concerns from a moral or ethics perspective, given that the further away the accused is from the offending, the weaker the justifications for utilising criminal sanctions against that particular actor.

## V DISCUSSION

In the previous sections, we have examined a number of conceptual and practical considerations to be taken into account when assessing the introduction of criminal liability for wage theft at the federal level. In this penultimate section, we will discuss what we see as the three key challenges to be resolved if criminal liability is to be introduced in a manner which is both conceptually robust and likely to be effective in addressing wage theft. First, we consider the tension between the moral

150 Ibid 106–11. See also New South Wales Law Reform Commission, *Sentencing: Corporate Offenders* (Report No 102, June 2003) 19. These are known as the identification doctrine and the attribution doctrine: at 19–21. See also Jonathan Clough, ‘Improving the Effectiveness of Corporate Criminal Liability: Old Challenges in a Transnational World’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 163, 165–6.

151 *Criminal Code* (n 13) pt 2.5 div 12. See also Tahnee Woolf, ‘The Criminal Code Act 1995 (Cth): Towards a Realist Vision of Corporate Criminal Liability’ (1997) 21(5) *Criminal Law Journal* 257; Clough and Mulhern (n 146) ch 4.

152 See Note 3 to the proposed s 324B: Omnibus Bill (n 12) sch 5 item 46.

153 ‘AGD Discussion Paper’ (n 11) 12.

154 The Omnibus Bill (n 12) proposes (see Note 2 to proposed s 324B) that ancillary liability for the criminal offence will be determined under pt 2.4 of the *Criminal Code* (n 13) (extensions of criminal responsibility) or s 6 of the *Crimes Act 1914* (Cth) (accessory after the fact): at sch 5 item 46.

155 See generally Tess Hardy, ‘Who Should Be Held Liable for Workplace Contraventions and on What Basis?’ (2016) 29(1) *Australian Journal of Labour Law* 78.

justifications for criminalisation of certain conduct, as opposed to the strategic or regulatory approaches which are focused on promoting compliance. Second, we expand on some of the broader socio-legal literature concerned with deterrence and consider the role and value of sanctions in this context. Third, we analyse the intersection between civil contraventions and criminal offences and the regulatory issues this presents.

### **A Tensions between a Moral and Regulatory Perspective**

As noted earlier, the push for criminal sanctions in the context of underpayments has generally been justified on two bases: 1) wage theft is inherently criminal and should be treated as such (moral justification); and 2) criminal sanctions are critical for delivering deterrence (regulatory justification). These two claims are commonly recited whenever a new criminal offence is up for debate.<sup>156</sup> However, there is some tension between these two rhetorical claims, which must be disentangled in theory and reconciled in practice.

In particular, a case involving unlawful conduct which is morally reprehensible and therefore the most deserving of criminal sanction is not necessarily viewed as such from a regulatory perspective. It is arguable that the pyramidal model of enforcement does not easily account for such a case if it is the first time that the regulator has had any encounter with the wrongdoer. Rather, the enforcement pyramid suggests that a lower order intervention should be used in these initial interactions.

Similarly, a strategic enforcement perspective sheds a different light on the most effective or appropriate mechanism to promote compliance. It is quite possible that a case may present itself to a regulator which does not involve the same degree of egregious conduct, but is more appealing from a strategic point of view. For example, it may provide an 'opportunity to transform an industry pattern of conduct that was normally hard to prove, but easy to prove in this particular case'.<sup>157</sup>

In other words, cases which may be morally repugnant and worthy of criminal sanctions on an individual basis may be non-strategic in that they represent an inefficient use of resources, may not result in a successful prosecution and may lead to little structural change.<sup>158</sup> While criminal sanctions carry important symbolic power, Collins argues that criminalisation 'is, and should continue to be seen as, limited in addressing the root of power dynamics which may lead to exploitation'.<sup>159</sup> Bogg and Freedland similarly observe that:

156 See, eg, Beaton-Wells and Ezrachi (n 45) 5.

157 Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful' (n 94) 70.

158 Ibid.

159 Jennifer Collins, 'Exploitation of Persons and the Limits of the Criminal Law' [2017] (3) *Criminal Law Review* 169, 170.

The modalities of the criminal justice process are directed at the determination of innocence or guilt, the attribution of blame and censure, and the imposition of punishment. In its focus on the culpability of individual agents, this might obscure the cultural, economic, and regulatory vectors that create the conditions for vulnerability to abusive treatment, exploitation, and so forth. By contrast, labour law has been more attuned to these structural determinants ... For example, labour lawyers have been devoting increasing care and sophistication to conceptualize the notion of the employer in an institutional and structural way.<sup>160</sup>

The insights from regulatory theory generally, and labour law more specifically, are important to bear in mind when framing any criminal offence for wage theft. These developments reveal the importance of resisting the urge to personalise the relevant norm by focusing on individualised notions of fault, capacity, choice and responsibility.<sup>161</sup> Rather, in order to secure effective and enduring structural change, it may be necessary to engage in ‘greater experimentation with approaches to criminal responsibility based upon corporate or organizational attribution’.<sup>162</sup> However, Collins cautions against justifying criminal sanctions on the basis of effectiveness and efficiency alone. Instead, she emphasises that the ‘*appropriateness*’ of the criminal offence, relative to other regulatory alternatives, must continue to be scrutinised and justified.<sup>163</sup>

## **B Deterrence**

As noted earlier, it is assumed by many that criminal sanctions will not only increase specific and general deterrence, but it will also automatically lead to enhanced employer compliance with workplace laws. In the abstract, the idea that the threat of incarceration will deter other potential offenders from engaging in similar conduct appears reasonable.<sup>164</sup> This assumption is supported, at least in part, by one of the few studies which has specifically sought to analyse the deterrence effect of different regulatory mechanisms in the context of employment standards regulation. In a comparative review of state-based wage theft legislation across the US, Daniel Galvin found that ‘the laws that most dramatically increased punitive damages saw the greatest declines in the incidence of minimum wage violations while other types of wage-theft laws did not appear to have any effect’.<sup>165</sup> However, Galvin also cautioned that strengthened penalties alone would not necessarily result in enhanced employer compliance with minimum wage laws if adequate levels of enforcement remained absent.<sup>166</sup> In a similar vein, Jennifer Lee and Annie Smith observe: ‘Creating or enhancing penalties on the books will

160 Bogg and Freedland (n 60) 11.

161 Ibid.

162 Ibid 31.

163 Collins, ‘Exploitation at Work’ (n 14) 113 (emphasis in original).

164 Bagaric and Alexander (n 79) 269.

165 Daniel J Galvin, ‘Deterring Wage Theft: Alt-Labor, State Politics, and the Policy Determinants of Minimum Wage Compliance’ (2016) 14(2) *Perspectives on Politics* 324, 326.

166 Ibid 341.

also do little to deter wage theft if agencies lack the resources or political will to engage in enforcement or if employers fail to understand how to comply.<sup>167</sup>

The notion that it is enforcement — rather than mere enactment — which is critical is one supported by research on white-collar crime more generally. For example, Natalie Schell-Busey et al's meta-analysis of corporate crime deterrence found that tougher sanctions on their own do not curb corporate crime.<sup>168</sup> More specifically, in previous empirical research on business awareness of, and responses to, the litigation activities of the FWO, Tess Hardy and John Howe found that 'firms' recollection of the quantum of civil penalties imposed against other employer businesses was generally imprecise and inaccurate'.<sup>169</sup> Most employers were not aware of the cases that the FWO had previously brought in their industry and had even less knowledge of the amount or target of the penalty orders. These findings echo conclusions drawn in previous studies relating to environmental violations,<sup>170</sup> tax evasion<sup>171</sup> and cartel conduct:<sup>172</sup> it is the perceived risk of detection, not the severity of the sanction, that is most likely to enhance deterrence and encourage compliance. In this respect, Mirko Bagaric has argued:

The empirical data conclusively shows that the only deterrent to crime is increasing the perception in people's minds that if they offend they will be caught, as opposed to the severity of the ultimate sanction. The threat of a community based order is just as effective a deterrent as a five-year prison term.<sup>173</sup>

Combined, these studies underline the fact that any 'assertions or projections about the deterrence potential of criminalization should be treated with great caution'.<sup>174</sup> This is especially the case where cases are tried in lower level criminal courts — such as Magistrates' Courts — where written decisions may not be produced and media coverage following a prosecution may be subdued. Moreover, they highlight

167 Jennifer J Lee and Annie Smith, 'Regulating Wage Theft' (2019) 94(2) *Washington Law Review* 759, 762, citing Nicole Hallet, 'The Problem of Wage Theft' (2018) 37(1) *Yale Law and Policy Review* 93, 118–19, and David Weil, 'Crafting a Progressive Workplace Regulatory Policy: Why Enforcement Matters' (2007) 28(2) *Comparative Labor Law and Policy Journal* 125, 129.

168 Natalie Schell-Busey et al, 'What Works? A Systematic Review of Corporate Crime Deterrence' (2016) 15(2) *Criminology and Public Policy* 387, 404.

169 Tess Hardy and John Howe, 'Creating Ripples, Making Waves? Assessing the General Deterrence Effects of Enforcement Activities of the Fair Work Ombudsman' (2017) 39(4) *Sydney Law Review* 471, 496.

170 Dorothy Thornton, Neil A Gunningham and Robert A Kagan, 'General Deterrence and Corporate Environmental Behavior' (2005) 27(2) *Law and Policy* 262.

171 Bagaric, Alexander and Pathinayake (n 79) 511.

172 Caron Beaton-Wells and Christine Parker, 'Justifying Criminal Sanctions for Cartel Conduct: A Hard Case' (2013) 1(1) *Journal of Antitrust Enforcement* 198, 205–6.

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

174 Beaton-Wells and Parker (n 172) 216.

the need to ensure that, where criminal sanctions are enacted, any deterrence effects should be carefully analysed and empirically tested so far as possible.<sup>175</sup>

### **C The Relationship between Civil Contraventions and Criminal Offences**

Perhaps the most challenging issue is how criminal liability is likely to overlap or clash with the existing civil penalty provisions of the *FW Act*, in particular those relating to ‘serious contraventions’.<sup>176</sup>

If the criminal liability provisions from the Omnibus Bill had been enacted, it would have likely led to what the ALRC has described as a ‘dual-track’ regulatory system incorporating both civil penalty provisions and criminal offences.<sup>177</sup> Although in some dual track regulatory systems there is a clear distinction between conduct punishable by civil penalty, and that which attracts criminal liability, in many others the misconduct regulated by civil penalties is ‘virtually identical’ to criminal offences.<sup>178</sup>

Historically, there was a clear distinction in Western legal traditions between criminal and civil liability.<sup>179</sup> Criminal sanctions were administered by the state and intended to punish and deter morally reprehensible behaviour. Civil liability was primarily an avenue for individual citizens to obtain compensation for violation of private interests. However, over time, the increasing role of the state in using regulation to manage behaviour led to a blurring of these distinctions. In particular, over the last 30 years there has been widespread adoption of civil penalty regimes which seek to capture the punishment and deterrence objectives of the criminal law, without the high burden of proof applicable in criminal proceedings, or the stigma associated with imprisonment.<sup>180</sup>

Nevertheless, there are still important distinctions between the two types of regimes. As we noted in Part IV, the choice between a civil penalty or a criminal sanction has a substantial impact on whether a matter is heard to the criminal standard of proof, or to the lower civil standard, and whether a criminal conviction will be recorded.<sup>181</sup> In addition, individuals prosecuted under a criminal regime are

175 Ibid.

176 *FW Act* (n 7) s 557A.

177 Both the *Competition and Consumer Act 2010* (Cth) sch 2 (‘*Australian Consumer Law*’) and the *Corporations Act 2001* (Cth) have been respectively described as having a dual track regulatory system: *ALRC 2019* (n 13) 69–70.

178 *ALRC 2019* (n 13) 69.

179 See generally Kenneth Mann, ‘Punitive Civil Sanctions: The Middleground between Criminal and Civil Law’ (1992) 101(8) *Yale Law Journal* 1795; Karen Yeung, *Securing Compliance: A Principled Approach* (Hart Publishing, 2004) 119–25.

180 For consideration of the advantages of civil over criminal liability in the award enforcement context, see Freiberg and McCallum (n 19) 263–4. For consideration of the reasons behind the increased use of civil penalties more generally, see Freiberg (n 72) 423–4.

181 *Evidence Act 2008* (Vic) ss 140–1.

accorded different procedural protections than those who face a civil penalty hearing.

It has been argued that similarities in the purposes and operation of civil and criminal sanctions as part of the same regulatory system may result in a harmful blurring of distinctions — for example, that the availability of civil remedies is a disincentive for regulators to pursue criminal prosecution.<sup>182</sup> On the other hand, civil penalties are often regarded as quasi-criminal in nature. The significant resources of the state are used by regulators against individuals in a manner similar to a criminal offence, and as such are subject to many of the same safeguards, so that they are not always the less expensive and more effective sanction that they are held out to be.<sup>183</sup>

Most recently, options for reform have been considered by the ALRC in the context of its review of corporate criminal responsibility. Following a review of relevant policy and academic literature, including some of the arguments summarised above, the ALRC proposed that Commonwealth legislation should 'recalibrate' the overall approach to regulation of corporations

so that unlawful conduct is divided into three categories (in descending order of seriousness):

- a) criminal offences;
- b) civil penalty proceeding provisions; and
- c) civil penalty notice provisions. ...

Under this model, the primary form of corporate regulation would be civil rather than criminal.<sup>184</sup>

The ALRC acknowledged that there were legitimate strategic regulation reasons why regulators might prefer to have discretion over selection of the appropriate sanction based on an assessment of the seriousness of conduct in individual cases.<sup>185</sup> However the ALRC concluded that

as a matter of principle, a [civil penalty proceeding] should not address identical conduct to that which would constitute a criminal offence where a corporation is the respondent. If it does, there is no justification for corporate criminal responsibility. Where a criminal offence captures a greater level of wrongdoing (such as by requiring fault elements to be proven beyond reasonable doubt), the existence of dual-track regulation would be consistent with the model proposed.<sup>186</sup>

182 See Mann (n 179); Coffee Jr, 'Paradigms Lost' (n 45); Susan R Klein, 'Redrawing the Criminal-Civil Boundary' (1999) 2(2) *Buffalo Criminal Law Review* 679; Bagaric, 'Civil-isation' (n 68); Husak (n 69).

183 Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37(1) *University of New South Wales Law Journal* 195, 215–16.

184 *ALRC 2019* (n 13) 90–1.

185 *Ibid.* 92.

186 *Ibid.*



In the ALRC's view, although dual track regulation can 'facilitate effective enforcement', the current division between civil penalties and criminal offences in such regimes 'is incoherent', and a more principled division is required.<sup>187</sup> The ALRC argues that an approach which removes overlap between civil penalties and criminal liability for identical conduct will not necessarily undermine the advantages of dual track regulation, but will 'operate as a restraint to ensure ... there is a real need for criminal (rather than civil) regulation of the particular conduct'.<sup>188</sup> The ALRC also suggests that such an approach would be consistent with models like responsive regulation, as both civil penalties and criminal liability will still be available under its proposals.<sup>189</sup>

Having considered the ALRC's position on 'dual track' enforcement, we now return to the introduction of criminal liability in relation to contraventions of the *FW Act* involving wages and other minimum employment conditions, which as we have noted, is explicitly a civil penalty regime.<sup>190</sup>

In its discussion paper canvassing submissions concerning improvement of sanctions under the *FW Act*, the AGD noted: 'Any new criminal offence provision would need to be framed in a manner that is proportionate to the existing "serious contraventions" regime in the *Fair Work Act*.'<sup>191</sup> The AGD further stated that criminal sanctions 'should be reserved for the most serious and culpable forms of workplace misconduct', as distinct from 'unintentional mistakes or miscalculations'.<sup>192</sup> The AGD discussion paper identified fault elements as a critical area where distinctions between criminal offences and civil liability and sanctions should be drawn:

A key consideration for introducing criminal sanctions is determining the precise level at which criminal, rather than civil, penalties are appropriate. Relevant criteria might include the nature of the conduct, the deliberateness of the conduct, the period of time over which it occurred, and whether there has been any dishonesty.<sup>193</sup>

The AGD suggests that it is the fault elements of an offence (intention, knowledge, recklessness or negligence), rather than the physical elements, which would be more challenging to establish:

187 Ibid 92, 93.

188 Ibid 94.

189 Ibid.

190 See *FW Act* (n 7) pt 4-1, which sets out a civil enforcement scheme.

191 'AGD Discussion Paper' (n 11) 13.

192 Ibid 11, 12. The discussion paper notes that the *Taskforce Report* had recommended that criminal sanctions be introduced for the 'most serious forms of exploitative conduct, such as where that conduct is clear, deliberate and systemic (Recommendation 6)', and that the 'Government's March 2019 response to the *Taskforce Report* [had] accepted this recommendation in principle': at 11, quoting Recommendation 6 of the *Taskforce Report* (n 1) 88 and discussing 'Government Response to the *Taskforce Report*' (n 10).

193 'AGD Discussion Paper' (n 11) 12.

The mental element of an underpayment offence could take multiple different forms. For example, liability could be attached to payments that were withheld intentionally, but could also be attached to payments that were withheld recklessly, or negligently.<sup>194</sup>

As we noted earlier, a particular challenge will be how to reconcile criminal liability and sanctions with the 'serious contravention' provisions of the *FW Act* introduced in 2017. The 'serious contravention' provisions were introduced with a similar goal to that ascribed to the introduction of criminal liability — increasing punishment for more egregious breaches of the *FW Act*, and maximising the deterrence value of sanctions for such breaches.<sup>195</sup> As noted above, s 557A(1) of the Act provides that a serious contravention occurs where a person 'knowingly contravened the provision', and 'the person's conduct constituting the contravention was part of a systematic pattern of conduct relating to one or more other persons'. The legislation sets out circumstances a court may have regard to in determining whether there was a systematic pattern of conduct, including: 'the number of contraventions'; 'the period over which the relevant contraventions occurred'; the number of people 'affected by the relevant contraventions'; 'the person's response, or failure to respond, to any complaints made about the relevant contraventions'; and failing to make or keep employee records or payslips.<sup>196</sup>

However, the relevant amendments to the *FW Act* as set out in the failed Omnibus Bill, would have meant that the statutory scheme was at risk of falling into the trap identified by the ALRC: that is, the misconduct regulated by civil penalties is 'virtually identical' to criminal offences.<sup>197</sup> In particular, the proposed s 324B of the Bill would have made it a criminal offence for an employer to engage in a dishonest and systematic pattern of underpaying one or more employees. In determining whether the employer engaged in a systematic pattern of underpaying one or more employees, s 324B(5) provided that a court may have regard to considerations including: 'the number of underpayments'; 'the period over which the underpayments occurred'; 'the number of employees affected by the underpayments'; 'the employer's response, or failure to respond, to any complaints made about the underpayments'; and whether the employer failed to comply with *FW Act* requirements concerning employee records or payslips.<sup>198</sup>

While the Explanatory Memorandum to the Omnibus Bill suggested that the proposed criminal offence 'invokes a level of seriousness above the current civil penalties regime in the Act for serious contraventions',<sup>199</sup> there appeared to be potential for substantive overlap. While the applicable burden of proof is distinct, the dividing line between dishonest and systematic underpayment attracting a criminal sanction, and knowing and systematic underpayment attracting a civil

194 Ibid.

195 See generally Explanatory Memorandum: Protecting Vulnerable Workers (n 34).

196 *FW Act* (n 7) s 557A(2).

197 *ALRC 2019* (n 13) 69.

198 Omnibus Bill (n 12) sch 5 item 46, inserting *FW Act* (n 7) s 324B(5).

199 Explanatory Memorandum: Omnibus Bill (n 129) 77 [409].

penalty, was far less clear. This may have given rise to the tensions and problems identified in other dual track regulatory systems.

The lack of any clear distinction between conduct attracting criminal as opposed to civil liability may have also presented a challenge for the relevant regulator. Under the Omnibus Bill, the FWO would have had significant discretion to determine which type of sanction was sought and in what circumstances. Studies have shown there are a significant number of issues which will influence regulator discretion, including use of sanctions as part of a regulatory pyramid or alternative model, such as strategic enforcement.<sup>200</sup>

Alternatively, if there was a clearer delineation between conduct leading to civil penalties and that which leads to criminal liability, the regulator may still be faced with a choice about whether to pursue criminal sanctions, but the scope of such discretion is likely to be narrower.

In our view, the inclusion of criminal liability for certain types of contraventions is justified both for its symbolic value in achieving greater moral condemnation of underpayment, and to enhance operation of an enforcement pyramid of different regulatory tools available under the *FW Act*. In other words, it is important that the availability of criminal liability complements rather than confounds existing enforcement options, including civil penalties, in the achievement of more effective enforcement of minimum employment standards under the *FW Act*. As Braithwaite has recently argued: ‘While the criminal label does useful work, it does that work better when combined with a wide range of regulatory tools.’<sup>201</sup>

However, we also heed the ALRC’s warning of the ‘need for clarity [in] the relationship between criminal liability and civil penalties’.<sup>202</sup> Inconsistent operation of the law — which had been a distinct possibility under the Omnibus Bill — may have the effect of undermining confidence in the legal system and the rule of law, undermining the moral condemnation of criminal liability, foiling detection and prosecution efforts and compromising motivations to comply.<sup>203</sup> If criminal liability for underpayment is enacted under the *FW Act*, it should be on the basis of the ALRC proposal for a principled approach to corporate criminal liability. The ALRC’s recommendation as to how this distinction should be drawn is as follows:

**Recommendation 2** Corporate conduct should be regulated primarily by civil regulatory provisions. A criminal offence should be created in respect of a corporation only when:

200 See generally, John Howe, Tess Hardy and Sean Cooney, ‘Mandate, Discretion, and Professionalisation in an Employment Standards Enforcement Agency: An Antipodean Experience’ (2013) 35(1–2) *Law and Policy* 81. In relation to discretion and the regulatory pyramid, see Mascini (n 86); Christine Parker, ‘The “Compliance” Trap: The Moral Message in Responsive Regulatory Enforcement’ (2006) 40(3) *Law and Society Review* 591.

201 Braithwaite, ‘Regulatory Mix, Collective Efficacy, and Crimes of the Powerful’ (n 94) 62.

202 *ALRC 2002* (n 68) 397. See also *ALRC 2019* (n 13) ch 2.

203 *ALRC 2019* (n 13) 40.

- a) denunciation and condemnation of the conduct constituting the offence is warranted;
- b) imposition of the stigma that should attach to criminal offending would be appropriate;
- c) the deterrent characteristics of a civil penalty would be insufficient;
- d) it is justified by the level of potential harm that may occur as a consequence of the conduct; or
- e) it is otherwise in the public interest to prosecute the corporation *itself* for the conduct.<sup>204</sup>

According to the ALRC, any contravention that does not meet these requirements should be designated as a civil regulatory provision. In its initial discussion paper, the ALRC also proposed that repeat or flagrant contraventions of civil penalty provisions should constitute a criminal offence:

**Proposal 5** ... when a corporation has:

- a) been found previously to have contravened a civil penalty proceeding provision or a civil penalty notice provision, and is found to have contravened the provision again; or
- b) contravened a civil penalty proceeding provision or a civil penalty notice provision in such a way as to demonstrate a flouting of or flagrant disregard for the prohibition ...<sup>205</sup>

The ALRC suggested that this particular proposal provided for criminal liability in cases of repeated contraventions where a corporation had previously been found to have breached a civil penalty provision or had a civil penalty notice issued. The second limb does not require previous contraventions, but is instead intended to apply where a corporation 'has contravened a particular civil provision to such a degree of magnitude that its conduct demonstrates contumelious disregard of the relevant prohibition'.<sup>206</sup> This proposal was not adopted as a recommendation by the ALRC, and is not a feature of the criminal offence proposed in the Omnibus Bill, however we believe that it suggests an appropriate response to circumstances where civil penalties have not been a sufficient deterrent.

## VI CONCLUSION

This paper addresses a number of the conceptual and practical issues raised by the proposed introduction of criminal liability for 'wage theft' as an enforcement mechanism under the federal system of labour relations in Australia. The introduction of criminal liability for wage theft in state and federal jurisdictions was also briefly considered.

204 ALRC 2020 (n 13) 13 (emphasis in original).

205 ALRC 2019 (n 13) 101.

206 Ibid 102.

Although there was not sufficient space to engage in a lengthy analysis of the moral justifications for imposing criminal liability in the corporate criminal context, it appears that in principle, the introduction of criminal penalties is justifiable given the significant harms associated with not paying minimum employment entitlements.

While acknowledging critiques of the assumption that criminal liability necessarily increases the general deterrence value of a regulatory regime, we also believe that the introduction of criminal liability is justified as an improvement to the regulatory enforcement framework of the Australian minimum employment standards regime. However, we emphasise that it will be paramount for the criminal liability regime to be carefully designed so that it is complementary to the existing enforcement mechanisms under the *FW Act*. We argue that the provisions should be carefully and clearly drafted to ensure there is a clear distinction between ‘serious contraventions’ which attract higher civil penalties under the existing *FW Act* regime, and conduct which attracts criminal liability. In our view, the offence that had been proposed in the Omnibus Bill did not necessarily achieve this objective.

In addition to clarity in the distinction between criminal liability and civil penalties, it will be important for whoever has jurisdiction over this dual track regulatory system to make active and strategic use of the choice of sanctions available to it. Both the ALRC and the AGD have made reference to criminal sanctions being complementary to civil penalties in a manner consistent with idealised models of enforcement, such as ‘responsive regulation’. In addition to the sanctions pyramid, we would argue that the proper place of criminal prosecutions should be considered in light of the principles of strategic enforcement, which are much more focused on using regulatory levers to change system-wide drivers of compliance. In designing the system, thought should also be given to ensuring that criminal liability provisions are sufficiently utilised by the regulator. As raised in our discussion of practical considerations, neither the moral nor the regulatory justifications for criminal liability are likely to be realised if criminal enforcement rarely takes place, or is otherwise undermined by the difficulties of successful prosecution or the process of plea bargaining.

If criminal liability provisions ever pass into federal law, and the FWO is ultimately given the power to bring criminal proceedings along with other civil sanctions, it will be up to the FWO to develop an effective strategy on how to use the various enforcement tools at its disposal. Although responsive regulation has been influential at the FWO, along with other strategic enforcement models, the agency will nevertheless need to determine how and when criminal liability will be deployed. There will also be a question of whether any additional resources are provided to the FWO and other relevant authorities for the effective implementation of a criminal liability regime.<sup>207</sup> In observing that ‘corporate crime

207 See ‘Operational issues’ section in *ALRC 2002* (n 68) 419. See also Gunningham and Johnstone (n 90) 185–6, discussing the optimal use of prosecution for OHS offences under an enforcement pyramid model. The provision of additional resources to the FWO cannot be assumed — even before any responsibility for criminal prosecution is added, questions have been raised about

deterrence is important, but only when it is embedded in a regulatory mix', Braithwaite has observed that '[t]he main game of corporate crime control is learning how to get this mix right and tuning its sequencing'.<sup>208</sup> The incorrect tuning may result in overuse of resources in securing symbolic criminal liability, at the expense of strategic victories which complement and reinforce the FWO's other regulatory levers.

Finally, if criminal liability is introduced at the federal level, given the various considerations we have outlined in this article, there should be a process established for assessing the manner and pattern of criminal investigation and prosecution, as well as its regulatory impact on workers and business. These findings should also be fed back into the design and implementation of the overarching regulatory regime. Ideally, the federal government should commit to an empirical evaluation of the effectiveness of the criminal liability provisions in curbing employer noncompliance. This will allow policymakers and others to properly assess whether criminal liability is the regulatory panacea that many hope it to be.

whether the FWO is adequately resourced to carry out its existing functions: Stephen Clibborn, 'Australian Industrial Relations in 2019: The Year Wage Theft Went Mainstream' (2020) 62(3) *Journal of Industrial Relations* 331, 334.

208 Braithwaite, 'Regulatory Mix, Collective Efficacy, and Crimes of the Powerful' (n 94) 69.