NORTHERN TERRITORY LAW REFORM COMMITTEE

REPORT ON WAGE THEFT

Report 48

January 2023

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ABBREVIATIONS

Australian Constitution	*Commonwealth of Australia Constitution Act* (Cth)
DCLS	Darwin Community Legal Service
Committee	Northern Territory Law Reform Committee
CPSU	Community and Public Sector Union
FCA	Federal Court of Australia
FCCA	Federal Circuit Court of Australia
FWA	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
FWO	Office of the Fair Work Ombudsman
LHA	Labour-hire Agencies
LHE	Labour-hire Employees
NTCAT	Northern Territory Civil and Administrative Tribunal
NTG	Northern Territory Government
NTWWC	NT Working Women’s Centre
SDA	Shop, Distributive and Allied Employees Union
UWU	United Worker’s Union
WTA	*Wage Theft Act 2020* (Vic)
Work Choices	*Workplace Relations Amendment (Work Choices) Act 2005* (Cth)

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RECOMMENDATIONS

Recommendation 1 – The jurisdiction of the Northern Territory Local Court should be expanded to include an Employment Division, possibly within the Work Health Court structure. A small claims procedure for non-payment and underpayment of wages or benefits consistent with the small claims provisions in the FWA should also be developed by the Local Court.

Recommendation 2 – Legislation to criminalise deliberate, intentional behaviour leading to the unlawful non-payment or under-payment of employee entitlements should be enacted. The Northern Territory Government should wait for a reasonable time to ascertain whether the Australian Government will enact such legislation.

Recommendation 3 – If the Australian Government does not pass legislation criminalising wage theft within a reasonable time, and subject to a legal opinion by the Solicitor General for the Northern Territory on the validity of such legislation, the Northern Territory Government should pass legislation to criminalise deliberate, intentional behaviour leading to the unlawful non-payment or under-payment of employee entitlements. Such legislation should be modelled, to the extent possible, on sections 391 and 398 of the *Criminal Code 1899* (Qld).

Recommendation 4 – If the Northern Territory Government passes legislation criminalising wage theft pursuant to Recommendation 3, a Wage Theft Inspectorate and Commissioner modelled on the Part 3 of the *Wage Theft Act 2020* (Vic), with investigative powers modelled on Part 4 of the *Wage Theft Act 2020* (Vic), should be established.

Recommendation 5 – The Northern Territory Government should collaborate with the Australian Government to secure recurrent funding to organisations which provide legal assistance and advice to vulnerable workers about wage theft.

Chapter 1 – Introduction to the Inquiry

[1.1] Introduction

On 2 August 2022, the Honourable Chansey Paech, Attorney General and Minister for Justice, asked the Northern Territory Law Reform Committee (the 'Committee') to investigate, examine and report on possible law reform to wage theft in the Northern Territory. The Terms of Reference requested that the Committee consider the following matters, having regard to the *Fair Work Act 2009* (Cth) ('FWA') and sections 109 and 122 of the *Commonwealth of Australia Constitution Act* (Cth) ('*Australian Constitution*'):

1. whether the FWA adequately covers the possibility of or undertaking of the practice commonly referred to as wage theft;
2. if not, whether the Northern Territory has the legislative capacity to intervene in the practice, including, but not limited to, criminal or civil sanctions;
3. if the Committee determines that the Northern Territory does have such capacity to intervene, of what such legislative intervention might consist;
4. if the Committee concludes that the Northern Territory does not have the legislative capacity to intervene in the practice, whether there are any other Territory based initiatives that are recommended to deal with the practice of wage theft in the Territory.

The Committee was asked to conduct relevant consultations and to provide its report to the Attorney-General and Minister for Justice by 31 January 2023.

[1.2] Wage Theft Defined

While there is no universally accepted definition of wage theft, it can broadly be defined as paying workers less than that to which the worker is entitled under Australia's workplace relations system.[1] The Australian Senate Economics References Committee concluded that:

> Wage theft is characterised by non- or underpayment of wages, penalty rates, meals and other loadings, allowances, overtime, time off in lieu … and, most importantly from a whole of economy point of view, superannuation, as no superannuation becomes a liability to future taxpayers covering pension payments.[2]

The Senate Economics Reference Committee noted that "the most blatant form of deliberate wage theft is non-payment; that is, workers are simply not paid any wages at all".[3] Other forms of underpayment of wages include:[4]

- non or underpayment of allowances and additional rates – the most common form of deliberate underpayment, including non-payment or underpayment of overtime, casual loadings, and penalty rates;

[1] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [1.27].
[2] Ibid, [1.32].
[3] Ibid, [1.62].
[4] Ibid, [1.63].

- payment below the minimum wage or applicable award rate;
- misclassification – workers are paid at permanent, part time rates instead of casual rates; workers are misclassified as trainees so they can be paid at a lower rate; or workers are paid at one level of the award but expected to complete duties at a higher level which would attract a higher pay rate;
- falsification of records – in some cases employers have falsified the number of hours worked by employees to misrepresent them being paid at higher rates of pay than they were actually paid;
- cash-in-hand employment – characterised by lack of employment paperwork, no payslips, and no employer income statement, below minimum rates, and lack of superannuation;
- expectation to complete unpaid work – for example, by working additional time to set up or close down a job, to attend training, to complete administrative tasks, where insufficient time has been allowed for work to be completed, travel time where this is integral to the work, and where staff have not been permitted to take rest breaks to which they are entitled….;
- excessive unpaid trials – where workers must complete unreasonable unpaid work, including internships and placements, to gain experience and/or employment;
- cashbacks and payments to employers – where workers are paid but employers demand a proportion of the payment back; for example, for uniforms, food, transport, visas, accommodation, till shortages, or as security….;
- non-payment of superannuation …;
- end of employment – workers can lose unpaid wages when they are made redundant, a business ceases, or where insolvency is used strategically (‘phoenixing’) to avoid payments to workers;
- ‘sham’ contracting arrangements – where workers are required to register as a business with an ABN, although by all practical criteria they are an employee ….

In consultations conducted during this inquiry, examples of non-payment of wages in the Northern Territory falling into all of the categories noted above were provided to the Committee. The outcomes of the consultations are discussed in greater detail in Chapter 4.

[1.3] Current Regulatory Framework

In 2006, the Commonwealth government passed the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (‘Work Choices’). Utilising the corporations’ power in the *Australian Constitution*, the Commonwealth expanded “its industrial relations jurisdiction to cover all trading corporations in the private sector (excluding not-for-profits)”.[5] In 2009, the Work Choices legislation was repealed and replaced with the FWA. All states and territories, other than Western Australia, subsequently “referred their residual private sector powers to the Commonwealth to avoid ambiguity for workers, creating a national

[5] Queensland Parliament Education, Employment and Small Business Committee, *A fair day’s pay for a fair day’s work? Exposing the true cost of wage theft in Queensland* (Report 9, 2018) 9.

system".[6] The extent to which state and territory industrial laws are excluded is set out in the FWA, Part 1-3, Division 2.

In the Northern Territory, private sector employees and employers are generally covered by the FWA.[7] With respect to the public sector, the *Northern Territory (Self-Government) Act 1978* (Cth), section 53(6)(b), allows the Northern Territory to make,

> a law conferring a power on the Public Service Commissioner of the Territory, on a body established by enactment, or on the holder of an office established by an enactment, to make determinations by way of the fixing of terms and conditions of employment of persons employed in the Public Service of the Territory or employed by that body or by the holder of that office, as the case may be.

Legislation has been enacted pursuant to the power conferred in section 55(6)(b), the most relevant for the purposes of this inquiry being the *Public Sector Employment and Management Act 1993* (NT).

[1.4] Overview of the Report

The report is divided into five chapters. Chapter 1 outlines the inquiry terms of reference, defines what is meant by the term wage theft for the purposes of the inquiry, outlines the legislative framework and provides information about the law reform process. Chapter 2 discusses Commonwealth and state legislative responses to wage theft. In Chapter 3, the constitutional validity of proposed Territory wage theft laws is addressed. In Chapter 4, an overview of views expressed by stakeholders to the Committee in consultations and submissions is provided. Chapter 5 contains the Committee's recommendations for reform.

[1.5] The Law Reform Process

The Committee is an independent, volunteer, non-statutory body established to advise the Attorney-General and Minister for Justice on law reform in the Northern Territory. Such advice is provided by way of a report. Past reports of the Committee can be found on the Department of the Attorney-General and Justice website.[8]

The members of the Committee are noted at the front of this report. It is the role of the Committee to make recommendations for reform of the law. Implementation of the Committee's recommendations is a matter for the Northern Territory Government ('NTG').

The conduct of consultations is carried out, and an initial draft of the report is prepared, by a sub-committee of the full Committee. The sub-committee with carriage of this reference consisted of the following members:

- Emeritus Professor Les McCrimmon (President)
- Ms Peggy Cheong;
- Mr Peter Shoyer.

[6] Ibid. See also *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth).
[7] Fair Work Ombudsman at www.fairwork.gov.au/about-us/legislation/the-fair-work-system.
[8] NT Law Reform Committee publications at https://justice.nt.gov.au/law-reform-reviews/published-reports-outcomes-and-historical-consultations/nt-law-reform-committee-publications.

The initial report prepared by the sub-committee then must be approved by the full Committee before submission to the Attorney-General and Minister for Justice.

In this inquiry, the sub-committee consulted with a number of relevant professionals, unions, employer organisations and agencies. A list of those with whom the sub-committee consulted and those who provided a written submission to the Committee is set out in Chapter 4.

Chapter 2 – Commonwealth and State Legislative Responses to Wage Theft

[2.1] Introduction

In this chapter, Commonwealth and state legislation dealing with the issue of wage theft will be canvassed. As has been noted in Chapter 1, the FWA established a national workplace relations system. It is estimated that eighty-seven "percent of employees across the country [are] covered by the national system".[9]

The FWA,

> establishes a safety net comprising the national minimum wage, workplace protections, and nationally applicable awards for specific industries and occupations, as well as establishing agencies responsible for the regulation of the system. The national framework also includes a civil penalty regime designed to ensure compliance.[10]

Whether the civil penalty regime in the FWA successfully ensures compliance is a major focus of this inquiry. Two states, Queensland and Victoria, have made the underpayment of wages a criminal offence carrying a maximum penalty of ten (10) years in prison.[11] New South Wales, while not proposing to criminalise the underpayment of wages, has introduced the Tax Administration Amendment (Combating Wage Theft) Bill 2021 (NSW), which uses tax legislation to impose, inter alia, additional civil penalties for wage theft. The South Australian government has signalled that it intends to circulate for discussion in early 2023 a draft bill to criminalise the persistent and deliberate underpayment of workers.[12] The Western Australia government, in response to the *Inquiry into Wage Theft in Western Australia* report (June 2019), committed to considering whether wage theft should be criminalised.[13] The relevant department of the Government of Western Australia has confirmed to the Committee that consideration will be given to the issue of wage theft once the scope and nature of the Commonwealth Government's proposed amendments to the FWA are known.[14]

[2.2] The National Workplace Relations System

The Office of the Fair Work Ombudsman (the 'FWO') and the Fair Work Commission (the 'FWC') are the key regulatory bodies with responsibility for the administration of the

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[9] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [3.4].
[10] Ibid, [3.2].
[11] *Criminal Code 1899* (Qld), sections 391, 398; *Wage Theft Act 2020* (Vic), s 6.
[12] Email from the Office of the Hon Kyam Maher MLC to the Northern Territory Law Reform Committee dated 8 December 2022. See also Mellor Olsson, *Labor Government to reform South Australia's employment laws* (23 March 2022) at www.molawyers.com.au/news-events/news/labor-government-to-reform-south-australias-employment-laws.
[13] Hon Bill Johnston MLA, Media Statement – McGowan Government announces actions to combat wage theft (6 December 2019) at www.mediastatements.wa.gov.au/Pages/McGowan/2019/12/McGowan-Government-announces-actions-to-combat-wage-theft.aspx.
[14] Email from C Breuder, WA Department of Mines, Industry Regulation and Safety to the Committee dated 12 December 2022.

national workplace relations system.[15] The Federal Court of Australia (the 'FCA') and the Federal Circuit Court of Australia (the 'FCCA') are the courts with primary jurisdiction for matters arising under the national workplace relations system.[16] "Since 1 July 2009, all matters that fall under the jurisdiction of the [FWA] can be heard in the Fair Work Division of the [FCCA]".[17] Of primary importance to workers seeking to recover unpaid wages is the small claims process in the FCCA. Under section 548 of the FWA, a party can ask that an application for compensation be dealt with as a small claim in the Fair Work Division of the FCCA provided the claim is for $20,000[18] or less and falls within the entitlements mentioned in section 548(1A) of the FWA. In addition, if the dispute between the worker and employer relates to the conversion of casual employment to full-time or part-time employment as described in section 548(1B) of the FWA, an application can be made for the matter to be heard as a small claim.[19]

The FCCA claims that,

> [t]he small claims process is more informal than most court proceedings and is usually conducted without lawyers (unless the Court gives leave to be represented). The small claims process aims so settle disputes quickly and fairly, with minimum expense to the parties. Matters are usually resolved with only one hearing.[20]

Whether the small claims process achieves these objectives is discussed in greater detail in Chapter 4.

The FWO is the independent statutory agency established under the FWA with responsibility for promoting and monitoring compliance with Australia's workplace laws.[21] The functions of the FWO are to:[22]

- Provide education, assistance, advice and guidance to employers, employees, outworkers, outworker entities and organisations.
- Promote and monitor compliance with workplace laws.
- Inquire into breaches of the FW Act.
- Take appropriate enforcement action.
- Perform our statutory functions efficiently, effectively, economically and ethically.

[15] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [3.5].
[16] Ibid, [3.18]-[3.20].
[17] Ibid, [3.20]
[18] This amount will increase to $100,000 once the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth), cl 651, becomes law.
[19] Generally see: Federal Circuit and Family Court of Australia, Fair work: Small claims, at www.fcfcoa.gov.au/gfl/fairwork-small-claims.
[20] Ibid.
[21] While, historically, the Australian Building and Construction Commission ('ABCC') had responsibility for enforcing the *Fair Work Act 2009* (Cth) in relation to the commercial building and construction industry, from 10 November 2022, the ABCC's role has been transferred to the Fair Work Ombudsman: www.abcc.gov.au.
[22] Fair Work Ombudsman website at: www.fairwork.gov.au/sites/default/files/migration/725/fwo-purpose.pdf.

To ensure compliance with the FWA, the FWO has a range of statutory compliance powers[23] set out in both the FWA and the *Fair Work Regulations 2009* (Cth). In practice, the FWO attempts to,

> address the issue of underpayments through tailored education and assisted dispute resolution, with the intent of resolving workplace issues and returning monies owed to employees quickly. This approach also enables the FWO to focus its resources on matters deemed more serious, warranting general and specific deterrence.[24]

If the FWO decides not to pursue a matter, or the matter cannot be resolved through mediation, the only option available to workers in the Northern Territory is to commence proceedings in the FCCA, or in the Local or Supreme Court.

Underpayment of wages is a civil offence under the FWA.[25] The civil remedies available for non-compliance with workplace laws are set out in Chapter 4, Part 4.1, of the FWA. The maximum penalties, the person or organisation to whom the penalties apply, and the courts with jurisdiction to apply the penalties are set out in section 539 of the FWA. The contravention of a civil remedy provision in the FWA is not a criminal offence.[26]

In its review of unlawful underpayment of employees' wages, the Australian Senate Economics References Committee concluded in March 2022:

> A review of the evidence suggests that the current regime is not functioning as well as it could, as demonstrated by the high and increasing levels of wage theft – which [is] systemic in some sectors.[27]

Based on our own research and consultations,[28] the Committee agrees with this conclusion. The underpayment of wages in many sectors, particularly those that are low paid, is significant. The FWO has neither the monetary nor human resources to address the issue effectively. This is discussed in greater detail in Chapter 4.

Further, the Australian Senate Economics References Committee was advised by those with whom it consulted that "there are significant barriers to recovering unpaid wages for victims, particularly those engaged in a 'David and Goliath' contest with large, well-resourced corporate entities".[29] It noted that the barriers to redress included:[30]

- **lack of awareness or education** – in relation to their entitlements. Where workers are aware of their entitlements, they may not know how to progress a claim. Contractors, young people and migrants are especially at risk;

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[23] Generally, see, Fair Work Ombudsman, Compliance and Enforcement Policy, available at: www.fairwork.gov.au/about-us/our-role-and-purpose.
[24] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [3.58].
[25] *Fair Work Act 2009* (Cth) ss 45, 50, 293.
[26] *Fair Work Act 2009* (Cth), s 549.
[27] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [3.68].
[28] CPSU, *Consultation*; United Worker's Union, *Consultation*; Shine Lawyers, *Consultation*; NT Working Women's Centre, *Consultation*; Darwin Community Legal Service, *Consultation*.
[29] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [3.71].
[30] Ibid.

- **lack of confidence** – may impede workers from taking action because they believe it is too onerous, the amount of unpaid wages is insignificant, pessimism about the outcome, or because of their ability to navigate complex rules and procedures;
- **mistrust and fear of reprisals** – of workers may mistrust regulators or unions, fear reprisals from their employers including loss of hours or jobs required for subsistence, 'blocklisting', or immigration consequences;
- **insufficient evidence** – workers paid in cash or subject to record falsification may have insufficient evidence to take action;
- **high costs** – 'prohibitive' costs including small claims fees, court filing fees, and lawyers may prevent workers seeking redress;
- **low small claims threshold** – currently capped at $20,000, denying access to redress through this avenue to some claimants;[31]
- **inability to recover costs** – small claimants are unable to recover costs, with the added disadvantage that offending employers are not subject to penalties, and costs are unable to be recovered by a lead applicant and class members unless the proceeding was instituted vexatiously, without reasonable cause, or in another special circumstance – making it less feasible to commence a private action through class proceedings relating to underpayment;
- **inability to take action** – temporary migrant workers may have insufficient time to initiate action because of time limits on their visa; or workers have [no] employer to take action against [as] it has gone into liquidation or bankruptcy; or individual workers are unable to take broader action because of the short-term nature of their appointment and inability to organise;
- **requirement for mutual consent** – consent is required from both parties to enable arbitration actions with the [FWC]. Actions are restricted to interpretation and are exclusive of back payment or enforcement; and
- **restriction to current employees** – disputes may only be heard by the [FWC] in relation to current, not ex-, employees, limiting claims and potentially perpetuating exploitative arrangements.

With the exception to barriers to redress in the FWC, similar issues were raised in consultations with stakeholders conducted by the Committee. In particular, the barriers to redress faced by low paid workers, often on student or work visas, was raised repeatedly in consultations with the Committee.

[31] The increase in the small claims threshold to $100,000 as stipulated in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth), cl 651, will address this barrier.

Chapter 3 – The Constitutional Validity of Wage Theft Laws

[3.1] Introduction

The employment law landscape in Australia has for many years been a jurisdictional patchwork, with the Commonwealth, states and territories exercising varying powers. Given that, as was noted in Chapter 2, the Commonwealth established a national workplace relations system, the question arises as to whether any proposed wage theft laws would be constitutionally valid.

[3.2] Commonwealth powers

The Commonwealth's power to make laws is established and limited by the *Australian Constitution*. Many heads of Commonwealth power are listed in section 51 of the *Australian Constitution*. There is a specific reference to industrial laws in section 51(xxxv), but it is limited to, "Conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State".

More recently, the Commonwealth has relied on the "corporations" head of power in section 51(xx), to make laws in relation to employment matters extending to corporations, which employ the great majority of Australian workers. Subsequently a number of states have referred employment-related powers to the Commonwealth but retained powers in relation to state, and in some cases, local government employees.

For the Northern Territory, however, there is no relevant constitutional limit on the power of the Commonwealth, as the *Australian Constitution* gives the Commonwealth the power to make laws in respect of territories (section 122).

[3.3] Territory powers

The Northern Territory Legislative Assembly has broad powers to make laws for the peace, order and good government of the Territory (section 6 of the *Northern Territory (Self-Government) Act 1978* (Cth)). However, there are limitations on its capacity to make laws stipulated in that Act and due to the nature of its status as a territory of the Commonwealth.

These limitations give rise to a number of questions as to the constitutional capacity of the Northern Territory to pass employment-related laws because such laws may either be expressly excluded by, or inconsistent with, Commonwealth laws.[32]

[32] Brief discussions of potential constitutional limitations on other Australian jurisdictions in this context can be found at: Beech T, *Inquiry into Wage Theft in Western Australia*, 2019, pages 146-147. https://www.commerce.wa.gov.au/sites/default/files/atoms/files/report_of_the_inquiry_into_wage_theft_0.pdf
Education, Employment and Small Business Committee of the Queensland Parliament, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland,* 2018, page 173. https://documents.parliament.qld.gov.au/tp/2018/5618T1921.pdf
Hardy T, Kennedy M & Howe J, Submission 50 to Education, Employment and Small Business Committee of the Queensland Parliament, Inquiry into Wage Theft in Queensland, 2018, at paragraphs 3.7-3.9. https://documents.parliament.qld.gov.au/com/EESBC-92D1/RN956PIQ-E396/submissions/00000050.pdf.

[3.4] Fair Work Act

The current core Commonwealth law with respect to employment is the FWA. It provides a comprehensive scheme for setting and enforcing terms and conditions of employment. It specifically limits the powers of states and territories to make industrial laws:

> **26 Act excludes State or Territory industrial laws**
>
> (1) This Act is intended to apply to the exclusion of all State or Territory industrial laws so far as they would otherwise apply in relation to a national system employee or a national system employer.
>
> (2) A ***State or Territory industrial law*** is:
>
> (a) a general State industrial law; or
>
> (b) an Act of a State or Territory that applies to employment generally and has one or more of the following as its main purpose or one or more of its main purposes:
>
> (i) regulating workplace relations (including industrial matters, industrial activity, collective bargaining, industrial disputes and industrial action);
>
> (ii) providing for the establishment or enforcement of terms and conditions of employment;
>
> (iii) providing for the making and enforcement of agreements (including individual agreements and collective agreements), and other industrial instruments or orders, determining terms and conditions of employment;
>
> (iv) prohibiting conduct relating to a person's membership or non-membership of an industrial association;
>
> (v) providing for rights and remedies connected with the termination of employment;
>
> (vi) providing for rights and remedies connected with conduct that adversely affects an employee in his or her employment; or
>
> (c) a law of a State or Territory that applies to employment generally and deals with leave (other than long service leave or leave for victims of crime); or
>
> (d) a law of a State or Territory providing for a court or tribunal constituted by a law of the State or Territory to make an order in relation to equal remuneration for work of equal or comparable value; or
>
> (e) a law of a State or Territory providing for the variation or setting aside of rights and obligations arising under a contract of employment, or another arrangement for employment, that a court or tribunal finds is unfair; or
>
> (f) a law of a State or Territory that entitles a representative of a trade union to enter premises; or
>
> (g) an instrument made under a law described in paragraph (a), (b), (c), (d), (e) or (f), so far as the instrument is of a legislative character; or
>
> (h) either of the following:

(i) a law that is a law of a State or Territory;

(ii) an instrument of a legislative character made under such a law;

that is prescribed by the regulations.

(3) Each of the following is a ***general State industrial law***:

(a) the *Industrial Relations Act 1996* of New South Wales;

(b) the *Industrial Relations Act 1999* of Queensland;

(c) the *Industrial Relations Act 1979* of Western Australia;

(d) the *Fair Work Act 1994* of South Australia;

(e) the *Industrial Relations Act 1984* of Tasmania.

(4) A law or an Act of a State or Territory ***applies to employment generally*** if it applies (subject to constitutional limitations) to:

(a) all employers and employees in the State or Territory; or

(b) all employers and employees in the State or Territory except those identified (by reference to a class or otherwise) by a law of the State or Territory.

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

Significantly, this only excludes laws that can be characterised as 'industrial laws' (although that term is defined at some length and with considerable breadth in sections 26(2) to (4)).

Further, there are some matters in respect of which state and territory powers to make laws are not restricted (FWA, section 27). These include laws that deal with non-excluded matters or rights and remedies incidental to non-excluded matters, which are listed in section 27(2):

(2) The ***non-excluded matters*** are as follows:

(a) superannuation;

(b) workers compensation;

(c) occupational health and safety;

(d) matters relating to outworkers (within the ordinary meaning of the term);

(e) child labour;

(f) training arrangements, except in relation to terms and conditions of employment to the extent that those terms and conditions are provided for by the National Employment Standards or may be included in a modern award;

(g) long service leave, except in relation to an employee who is entitled under Division 9 of Part 2-2 to long service leave;

(h) leave for victims of crime;

(i) attendance for service on a jury, or for emergency service duties;

Note: See also section 112 for employee entitlements in relation to engaging in eligible community service activities.

(j) declaration, prescription or substitution of public holidays, except in relation to the rights and obligations of an employee or employer in relation to public holidays;

(k) the following matters relating to provision of essential services or to situations of emergency:

  (i) directions to perform work (including to perform work at a particular time or place, or in a particular way);

  (ii) directions not to perform work (including not to perform work at a particular time or place, or in a particular way);

(l) regulation of any of the following:

  (i) employee associations;

  (ii) employer associations;

  (iii) members of employee associations or of employer associations;

(m) workplace surveillance;

(n) business trading hours;

(o) claims for enforcement of contracts of employment, except so far as the law in question provides for a matter to which paragraph 26(2)(e) applies;

(p) any other matters prescribed by the regulations.

[3.5] NT Self-Government Act

The *Northern Territory (Self-Government) Act 1978* (Cth) also touches on the powers of the Northern Territory Legislative Assembly to make laws with respect to employment-related matters. Section 53 of that Act relevantly provides:

> (5) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of a law conferring on any court, tribunal, board, body, person or other authority any power in relation to the hearing and determining of disputes, claims or matters relating to terms and conditions of employment.
>
> (6) Subsection (5) does not prevent the making of:
>
> (a) a law conferring the power to make determinations by way of the ascertainment of rights or obligations conferred or imposed on persons by law; or
>
> (b) a law conferring power on the Public Service Commissioner of the Territory, on a body established by enactment, or on the holder of an office established by enactment, to make determinations by way of the fixing of terms and conditions of employment of persons employed in the Public Service of the Territory or employed by that body or by the holder of that office, as the case may be.
>
> Note: See section 40 of the Fair Work Act 2009 and regulations made under subsection (2) of that section for the interaction between determinations

> made under paragraph (6)(b) of this section and fair work instruments (within the meaning of that Act).

It appears the intention of those provisions is generally to preclude the establishment of a separate Northern Territory scheme for setting terms and conditions of employment but not to preclude laws relating to determination of a dispute regarding failure to provide entitlements in line with such terms and conditions.

Subsections (5) and (6) are in their original form and predate the FWA. However, while other parts of section 53 were amended by legislation passed for implementation of the FWA,[33] those subsections were not amended.

The words "relating to" in subsection (5) give a relatively broad meaning to the limitation. However, while the subsection would encompass a limitation on conferral of jurisdiction on a court to resolve relevant civil disputes (as modified by subsection (6)), it would be a further step to interpret them as excluding the power of the Legislative Assembly to create a criminal offence that might ultimately be subject to consideration by a court.

[3.6] Scope for a separate enforcement process

[3.6.1] Express exclusion

There is a strong argument that any attempt by the NT Legislative Assembly to legislate a divergent process for addressing disputes about terms and conditions of employment (for example, creating a new tribunal or a new tribunal function) would run counter to section 26 of the FWA. Any prospect that section 53(6) of the *Northern Territory (Self-Government) Act 1978* (Cth) provides a basis for such action would have to be viewed with caution.

[3.6.2] Indirect inconsistency

Section 109 of the *Australian Constitution* provides, "When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid". A majority of the High Court in *Work Health Authority v Outback Ballooning Pty Ltd* [2019] HCA 2; 266 CLR 428, made the following comments on inconsistency (or more accurately, repugnancy) in a Territory context (at [30]):

> The NT WHS Act is a law of the Northern Territory Legislative Assembly. The Legislative Assembly derives its legislative power from s 6 of the *Northern Territory (Self-Government) Act 1978* (Cth), which is enacted under s 122 of the *Constitution*. The terms of s 109 of the *Constitution* are not addressed to the relationship between laws of the Commonwealth and those enacted by the legislatures of the Territories. The subordinate status of a Territory law has the result that where it is inconsistent with a Commonwealth law the Commonwealth law will prevail. It is not necessary in this case to further consider the effect of the inconsistency on a Territory law. There is no dispute that cases concerning s 109 inconsistency may be applied by analogy to a case involving a Territory law.

Inconsistency may be either direct or indirect. In the latter case, inconsistency may be established if it can be shown that the Commonwealth legislation is intended to 'cover the field' in relation to a particular subject.

[33] *Fair Work (State Referral and Consequential and Other Amendments) Act 2009* (Cth).

As noted, the FWA sets out a comprehensive scheme with respect to most employment matters. This statement has even more force with respect to territories, as section 122 of the *Australian Constitution* means there are no residual areas where the Commonwealth lacks jurisdiction and the effective scope of the Act is at its broadest.

Given its breadth, there is a strong argument that, in the absence of a direct inconsistency, the FWA is intended to 'cover the field', particularly in relation to a mechanism for individuals to enforce employment terms and conditions.

The FWA contemplates a measure of state and territory involvement in enforcement of terms and conditions of employment by providing jurisdiction for eligible state and territory courts to conduct proceedings to resolve individual disputes about a large range of settled entitlements.[34] It also provides a range of specific and limited exceptions (see section 27(2) of the FWA, set out above). It can be said to closely prescribe the level of state and territory involvement in employment matters, and so could be argued to evince an intention to 'cover the field' in respect of individual enforcement mechanisms.

While it is not a matter for this Committee to express a concluded view, quite apart from the practical limitations on a small jurisdiction, there would be substantial constitutional issues regarding whether a new and different mechanism for enforcement (such as a new tribunal or new tribunal function) would be effectively precluded due to inconsistency with Commonwealth legislation.

[3.7] Scope for a wage theft offence

Turning to consider whether the NT Legislative Assembly has power to pass a law that would criminalise wage theft, there are also potential constitutional issues.

[3.7.1] Express exclusion

The power of the NT Legislative Assembly to make laws for the peace, order and good government of the Territory under section 6 of the *Northern Territory (Self-Government) Act 1978* (Cth) clearly extends to creation of criminal offences.

The FWA does not expressly exclude states and territories from creating such a new criminal offence. However, it does preclude states and territories from making an industrial law that provides for the establishment or enforcement of terms and conditions of employment (section 26(2)(b)(ii) and (iii) of the FWA).

On a broad reading, this might extend to all mechanisms that have the aim of enforcing terms and conditions of employment. No one would doubt that a law making it an offence to speed is intended as an enforcement mechanism. Likewise, creation of a criminal offence of wage theft could fairly be said to have, as one of its purposes, the enforcement of the terms and conditions of employment.

It is, however, arguable that an amendment that merely incorporates an additional offence into existing criminal provisions or widens the scope of an existing criminal offence would not be caught as an 'industrial law' under the FWA.[35] Noting that some

[34] One example is the Fair Work jurisdiction of the ACT Magistrates Court, which provides the option of a Fair Work Small Claims process: https://www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/fair-work-jurisdiction.

[35] See discussion of constitutional points in Hall Payne Lawyers, Submission 27 to Queensland Education, Employment and Small Business Committee of the Queensland Parliament, Inquiry into Wage Theft in Queensland, 2018, at paragraphs 18-30. https://documents.parliament.qld.gov.au/com/EESBC-92D1/RN956PIQ-E396/submissions/00000027.pdf

jurisdictions have already passed laws that make wage theft an offence, as discussed in Chapter 2, there is a reasonable prospect that a Territory-legislated wage theft offence would not be found to be directly precluded by section 26 of the FWA.

In that regard, we note that the Commonwealth Government has committed to introduce a criminal offence of wage theft but, in doing so, has indicated that it will preserve offences already implemented.[36] Depending on the precise nature of such an offence and the means of preservation, this would be likely to provide express recognition that would mean such offences are valid. However, there would be an obvious risk in relying on the promise of subsequent Commonwealth legislation to validate or affirm a Territory offence.

Section 53(5) of the *Northern Territory (Self-Government) Act 1978* (Cth) precludes, "the making of a law conferring on any court, tribunal, board, body, person or other authority any power in relation to the hearing and determining of disputes, claims or matters relating to terms and conditions of employment." Section 53(6) permits the making of, "a law conferring the power to make determinations by way of the ascertainment of rights or obligations conferred or imposed on persons by law". As discussed above, neither provision immediately lends itself to an interpretation that would include the power to create a criminal offence concerning wage theft, but that would bear review in any constitutional considerations.

[3.7.2] Indirect inconsistency

There is also a broader question as to whether inconsistency with the Commonwealth legislative scheme in the FWA would operate to exclude a Territory offence in this field. Inconsistency with the Commonwealth legislative scheme might arise in two ways. The FWA may already 'cover the field' in relation to enforcement options. It provides a broad range of enforcement options, including civil remedies such as pecuniary penalty orders (see sections 539, 545 and 546). It provides for a higher level of penalty orders for serious contraventions of civil remedy provisions (section 557A). It does not currently include a criminal offence of wage theft. However, the existence of these other options for enforcement could be interpreted as evincing an intention by the Parliament to set a complete range of effective enforcement measures, without resort to criminal offences.

Alternatively, at such stage as the Commonwealth does introduce a criminal offence of wage theft, there may be issues around whether a corresponding Territory offence, with substantially overlapping scope and potentially distinct penalties can stand in the face of the Commonwealth offence. A Commonwealth offence would, of itself, not necessarily negate a Territory offence provision but may well raise complicated constitutional questions. However, as noted above, if, in introducing a wage theft offence, the Commonwealth preserves offences in other jurisdictions, this may well provide express recognition that would overcome any concerns with regard to inconsistency.

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[36] Letter from the Hon J Chalmers MP, Cth Treasurer, to the Hon C Peach MLA, NT Attorney General and Minister for Justice, dated 29 November 2022, in which it was stated, "the Government's federal wage theft laws will not override existing state and territory laws where the currently operate". See also: Australian Labor Party statement, *Labor will Criminalise Wage Theft* (13 May 2021), "*An Albanese Labor Government will legislate to criminalise wage theft. … We will not undercut or undermine existing State and Territory laws where they currently operate.*" https://parlinfo.aph.gov.au/parlInfo/download/library/partypol/7965323/upload_binary/7965323.pdf;fileType=application%2Fpdf#search=%22library/partypol/7965323%22.

As with individual mechanisms for enforcement, there would be constitutional issues regarding whether a wage theft offence would be effectively precluded due to inconsistency with Commonwealth legislation.

[3.8] Conclusion

In brief there would be significant constitutional issues with the Northern Territory attempting to develop a system of enforcement outside the existing FWA structure. They would not prevent it from providing specific measures for implementation of the FWA scheme in an eligible court, such as the Local Court.

There are also potential constitutional issues with introduction of a Territory-legislated criminal offence of wage theft. While the issues have been noted in deliberations in other jurisdictions, they have not been treated as a bar to creation of offences in those jurisdictions. The indication that the Commonwealth is likely to introduce a criminal offence of wage theft and that its introduction will recognise and preserve offences in Australian jurisdictions, may provide a level of comfort in this regard, if and when such legislation has commenced. It would be appropriate, however, for the NT Government to seek the advice of a constitutional law expert before proceeding.

Chapter 4 – What We Heard

[4.1] Introduction

In the Terms of Reference for the inquiry, the Committee was directed to "consult with relevant professionals and agencies in both the Territory and other jurisdictions". While our ability to consult was limited by the fact that the Committee is made up of volunteers with an Executive Officer assigned to the Committee on an 'as needed' basis, we did consult with the following organisations and agencies:

- Community and Public Sector Union ('CPSU');
- United Worker's Union ('UWU');
- NT Cattlemen's Association;
- Hospitality NT;
- Office of the Commissioner for Public Employment;
- Shine Lawyers;
- Shop, Distributive and Allied Employees Union ('SDA');
- NT Working Women's Centre (NTWWC);
- Cth Department of Employment and Workplace Relations;
- Darwin Community Legal Service (DCLS).

We also consulted with the Attorney-General's Department in South Australia and Western Australia regarding their respective governments' consideration of criminalising wage theft. Finally, we received submissions from the NTWWC, Scanlon Williams and the DCLS.

[4.2] Scope of the Consultations

While the consultations tended to be wide-ranging, focus was placed on the following questions.

- What constitutes wage theft?
- Is the regime established under the FWA working adequately to identify and prevent wage theft in the Northern Territory?
- What gaps, if any, exist in the current regulatory regime to identify and prevent wage theft?
- What strategies work best to educate workers and employers about pay entitlements?
- Who should be responsible for educating workers and employers about pay entitlements?
- Is the current civil penalty regime in the FWA sufficient to deter employers from engaging in wage theft?
- Is the current system for resolving disputes relating to wage theft sufficient?

[4.3] What we heard

[4.3.1] Overview

Generally, those with whom we consulted agreed with the working definition of wage theft adopted by the Committee, which is discussed in Chapter 1. There was general, but not unanimous, agreement that the current regime established under the FWA to identify and prevent wage theft was not working adequately. In particular, it was noted that low skilled workers, workers in low paying jobs, workers employed in the gig economy, migrant workers, and international students and others on visas, were particularly vulnerable to wage theft in the Northern Territory. Finally, many stakeholders mentioned that the use of labour-hire companies and sham contracting made it difficult for employees to access the protections of the FWA.

This is consistent with the findings of the Australian Senate Economics and References Committee which noted:

> Deliberate underpayment is usually rife in industries which are labour intensive, have a high proportion of unskilled workers, and in which insecure employment arrangements are common. Often these industries have low levels of union membership, and they tend to employ a high proportion of workers on temporary visas, or undocumented migrants. They also lend themselves to fragmented value chains which make it possible to obscure who profits from underpayments; for example, labour supply arrangements featuring outsourcing, subcontracting, or labour hire operators, or platform or on-demand work.[37]

[4.3.2] Recovery of unpaid wages and entitlements

Many stakeholders mentioned that there were obstacles to the recovery of unpaid wages and superannuation in the Northern Territory, particularly for the class of workers noted above. In the Northern Territory, general small claims matters are dealt with in the Northern Territory Civil and Administrative Tribunal ('NTCAT'), which tends to be more 'user friendly' and cost effective for self-represented litigants. NTCAT, however, is not an "eligible State or Territory court" within the meaning of section 12 of the FWA. Consequently, wage recovery claims must be pursued either through the FCCA or through the Local Court or, less frequently, the Supreme Court. Given that both the Local Court and the Supreme Court are 'cost' jurisdictions with significant filing fees, they are often seen as inappropriate jurisdictions in which to prosecute claims for relatively small sums of money. In addition, it was observed that most Local Court judges do not have experience with the national workplace relations system.

While the FCCA, as discussed in Chapter 2, does have a small claims process, initiating claims in the FCCA was seen by many to be both difficult and time consuming, particularly for self-represented employees. An example of the challenges workers face was provided by the NTWWC in a written submission to the inquiry.

Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [1.47].

> An is a [culturally and linguistically diverse] woman on a working holiday visa. An could not write in English and had limited spoken English. She had worked in a café in a small NT town for several months, seven days most weeks and was paid a flat hourly rate. She was owed wages when she resigned, around $7,000 based on this flat rate, which she managed to claim from her former employer herself but contacted NTWWC when someone told her about penalty rates. An asked for assistance to establish her entitlements under the correct Modern Award, calculate the extent of the underpayment and strategise how she could be paid the money owed. NTWWC and An established she was owed about $6,000 in underpaid wages. NTWWC wrote to the former employer and asked that payment be made. This did not occur so NTWWC supported An to prepare the paperwork and submit it [to] the Federal Circuit Court, under the small claims jurisdiction. This is an online process, challenging even for our organisation to navigate. An could not have done this herself – she did not write English and had limited spoken English. The court made arrangements for an interpreter to be present at the proceeding. The Court found An was owed the money she claimed however the employer then declared bankruptcy so she never received her money.[38]

This case study illustrates not only the difficulties a worker can face when accessing the FCCA small claims process, but also the important role played by legal aid and other not-for-profit organisations in assisting workers to recover unpaid wages. The funding challenges faced by this sector is well known.

[4.3.3] Criminalisation of wage theft

There was general agreement among stakeholders that, should the NTG consider the criminalisation of wage theft, it should apply only to deliberate acts of an employer, not to negligent acts or acts based on a genuine misunderstanding of the employee's entitlements. Underpayment based on negligence or misunderstanding, it was noted, is already covered by the civil penalty provisions in the FWA.

While there was general, but not unanimous, support for the criminalisation of deliberate wage theft, stakeholders stressed that the uniformity of criminal provisions across jurisdictions was important. Employer organisations in particular noted that employers should not be subject to inconsistent federal, state and territory criminal laws.

It was also noted that, while the criminalisation of wage theft may act as an incentive to employers not to deliberately underpay employees, making it easier for employees to recover unpaid wages, entitlements and superannuation should be the main focus of reform. It was repeatedly stressed that employees need better access to recovery mechanisms, particularly given the constitutional impediments in the FWA to instigating proceedings in tribunals rather than courts.

[4.3.4] Labour-hire arrangements and phoenix activity

The impact of the use of labour-hire arrangements on the ability of workers to ensure that they are not underpaid was also raised during consultations. While not used

[38] NT Working Women's Centre, *Submission* (October 2022).

extensively in the Northern Territory,[39] such arrangements are often employed for some of the Territory's most vulnerable workers such as low paid administration services, tourism, fruit picking and other forms of manual labour. In a research paper provided to the inquiry by the DCLS, Scanlon Williams noted:

> [T]here is no specific statutory regulation of LHAs [labour-hire agencies] or protection for LHEs [labour-hire employees] in the NT. Given the high degree of nationwide non-compliance with applicable workplace laws, these legislative gaps inadvertently incentivise mistreatment of LHEs in the NT, which is now the only jurisdiction in Australia 'without some form of regulation touching upon [labour-hire]'.[40]

The Committee was told that phoenixing is another mechanism used by some employers to avoid the payment of wages and entitlements to workers in the Northern Territory. Phoenix activity is:

> the deliberate and systematic liquidation of a corporate trading entity which occurs with the fraudulent or illegal intention to:
>
> - avoid tax and other liabilities, such as employee entitlements;
> - continue the operation and profit taking of the business through another trading entity.[41]

A number of stakeholders recommended that consideration be given to ways in which the corporate veil could be pierced to ensure that company directors engaged in phoenixing activity are accountable for the payment of company wages and entitlements.

[4.3.5] Education of employees and employers

There was general agreement among those with whom we consulted that more needed to be done to educate both employees and employers about the national workplace relations system. Small business owners in particular were identified as requiring more information about the complexities of workplace laws, including penalty rates, leave loadings, superannuation and overtime. Further, the categories of employees noted at [4.3.1] above require targeted information about their entitlements in the workplaces in which they are employed.

It was noted that, while the FWO does engage in education about the national workplace relations system, the lack of a permanent Fair Work Commissioner in the Northern Territory impacts on the effectiveness of education efforts. The absence of the

[39] Scanlon Williams notes that "available information suggests that in 2020 in the NT there were between 500 and 2600 LHEs [labour-hire employees] registered with around 37 NT-based LHAs [labour-hire agencies]. This suggests that LHEs constitute between 0.48% and, at upper estimates, 2.47% of the approximately 105,100 employees counted in the NT labour force": S Williams, 'Not Very Far From Modern Slavery? Labour-Hire in the Northern Territory (ANU Law Internship Research Paper, 25 October 2021) 3-4.

[40] Ibid, 5, citing *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, August 2016) 229.

[41] PWC, *Phoenix activity: Sizing the problem and matching solutions* (Report to the Fair Work Ombudsman, June 2012) ii.

permanent Fair Work Commissioner also has an adverse impact on enforcement of national workplace relations laws.

While both unions and employer organisations engage in information campaigns for their members, those employers and workers who do not belong to such organisations miss out. Even if an employer or worker is a member of such organisations, it is often difficult for them to keep up with changes to awards and payrates due to isolation and the remote location of some workplaces.

Further, the funding to other organisations that provide advice to low paid and migrant workers about their entitlements, such as the DCLS and the NTWWC, is often intermittent. This makes it difficult to engage in effective, long-term, education programs to some of the most vulnerable workers in the Northern Territory.

Finally, it was noted that one of the statutory functions of the Wage Inspectorate Victoria was "to inform, educate and assist people in relation to their rights and obligations"[42] under the *Wage Theft Act 2020* (Vic). Such a body has the potential to improve the understanding of both employees and employers regarding the national workplace relations system. Given that the legislation only came into force on 1 July 2021, it was noted that it is too early to evaluate whether it has achieved its educational goals.

[4.4] Conclusion

While the criminalisation of wage theft was seen as desirable by most stakeholders with whom we consulted, it was stressed to the Committee that the most pressing issues were the recovery of unpaid wages and the education of workers and employers regarding worker's entitlements and employer responsibilities. Further, it was noted that, even if wage theft was criminalised in the Territory, it is questionable whether the police and Director of Public Prosecutions have the skills necessary to navigate the complexities of the national workplace relations system. To be an effective deterrent, prosecutions under any criminal provisions implemented to address wage theft must occur and be successful.

[42] *Wage Theft Act 2020* (Vic) s 20(1)(a).

Chapter 5 – Recommendations for Reform

[5.1] Introduction

There is no question that the non-payment and underpayment of wages is a serious issue in the Northern Territory, particularly for many workers in the lowest paying jobs. The legislative capacity of the Northern Territory to intervene in the practice of wage theft, however, is limited. First, the FWA creates a national industrial relations system. For the majority of workers in the Northern Territory, the resolution of disputes regarding the underpayment of wages falls within the legislative purview of the Australian government. Secondly, with the exceptions noted in section 53(6), the *Northern Territory (Self-Government) Act 1978* (Cth) stipulates in section 53(5) that:

> The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of a law conferring on any court, tribunal, board, person or other authority any power in relation to the hearing and determining of disputes, claims or matters relating to terms and conditions of employment.[43]

While the Terms of Reference for this inquiry direct the Committee to "investigate, examine and report on possible law reform in relation to wage theft in the Northern Territory", the Committee has not interpreted this direction as encompassing recommendations for reform of the FWA, FWO or FWC. Such reform is a matter for the Commonwealth Government, which the Committee notes is currently conducting a comprehensive review of the national industrial relations system. Further, federal and state parliamentary committees have already provided numerous recommendations for reform of the national system.[44] It is likely that Committee recommendations directed to the Commonwealth government or Commonwealth government departments and agencies would have very little effect. Consequently, the recommendations made in this report will focus on reform within the jurisdiction of the NTG and other Northern Territory related entities.

[5.2] Improving the recovery of unpaid wages and entitlements

The issues with the current recovery process in the FCCA has been identified by both stakeholders in this inquiry as identified in Chapter 4, and by other law reform bodies. For example, the Queensland Parliament Education, Employment and Small Business Committee noted in its 2018 report:[45]

> Accessibility to, and delays in, the court process are clearly a significant barrier to workers' recovery of unpaid entitlements resulting from wage theft. …

[43] The scope of this section is discussed in Chapter 3.

[44] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022); Parliament of South Australia, *Final Report of the Select Committee on Wage Theft in South Australia* (November 2021); Government of Western Australia, *Inquiry into Wage Theft in Western Australia* (June 2019) Rec 26; 56th Parliament Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (Report No 9, November 2018).

[45] Parliament Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (Report 9, November 2018) 134.

> Further, the committee noted the difficulties in navigating the court process, particularly in regard to the structure of court forms and the cost of filing fees.
>
> While the committee noted that filing fees under the small claims process were significantly less than filing fees for other matters heard by the Federal Circuit Court, the cost can still be unaffordable to workers who are already financially impacted by unpaid entitlements.

The Committee acknowledges that the Australian Government is taking steps to improve the small claims process in the FCCA. In the recent tranche of reforms to the FWA, the small claims limit has been increased to $100,000.[46] Further, the Committee was advised that an allocation in the budget for an additional FCCA judge has been made to accommodate the increase in the small claims cap, and that additional budget measures will be part of the ongoing review into the FWA.[47] Whether the additional resourcing will have a significant impact on access to the FCCA small claims process in the Northern Territory remains to be seen.

In the Northern Territory, small claims matters are dealt with in a cost effective and efficient way by the NTCAT. Unfortunately, for the reasons outlined in detail in Chapter 3, the use of NTCAT to handle the non-payment or underpayment of wages is barred by the FWA.[48]

It is the Committee's view that, with appropriate changes, the Local Court could deal effectively with FWA matters. The changes, detailed below, are required for two reasons. First, while the Local Court qualifies as an "eligible State or Territory court" within the meaning of sections 545 and 12 of the FWA, currently the vast majority of the Local Court's substantial workload is devoted to criminal law matters. The expertise of judges required to deal with underpayment of wages under the national industrial relations system would need to be developed. Secondly, the Local Court no longer has a small claims jurisdiction, which means that the processes necessary to provide efficient and low-cost determinations of wage disputes would have to be developed.

Notwithstanding these limitations, the Local Court enjoys a significant advantage over the FCCA. It has a permanent physical presence in the Northern Territory's larger population centres. Further, it has a permanent, if periodic, physical presence in a number of regional and remote centres in the Territory. From an access to justice perspective, therefore, the Local Court enjoys a significant advantage over the FCCA. The FCCA, by contrast, only sits in Darwin and, on circuit, in Alice Springs. Further, documents cannot be filed in Alice Springs.[49]

To handle cases relating to the underpayment of wages, it is the Committee's view that an Employment Division should be established within the Local Court, possibly within the existing Work Health Court structure. Industrial courts, or industrial divisions of a court, exist in a number of Australian jurisdictions to deal with employment related

[46] the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* (Cth), cl 651.
[47] Department of Employment and Workplace Relations, *Consultation*.
[48] *Fair Work Act 2009* (Cth) s 12, ss 545(3) and (3A).
[49] See: www.fcfcoa.gov.au/court-locations/NT/Alice Springs.

claims.[50] The Committee notes that the Northern Territory Local Court currently deals with some employment related claims, such as matters arising under the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT), in its Work Health Court. Whether the jurisdiction of this court could be expanded to include a small claims procedure for non-payment and underpayment of wage claims, or whether a separate Employment Division within the Local Court should be established, is a matter for the Local Court. The Committee is cognisant of the fact that the effective recovery of unpaid wages was a significant issue identified by stakeholders in this inquiry. Unfortunately, the legislative barriers to effective enforcement outlined in Chapter 3 means that the most effective mechanism to improve recovery, the NTCAT small claims procedure, is unavailable to workers in the Northern Territory. Consequently, the best alternative is to establish an Employment Division within the Local Court, possibly within the Work Health Court. Whichever alternative is chosen, a small claims procedure consistent with the small claims provisions in the FWA will need to be established. The establishment of such a pathway will give those impacted by the non-payment or underpayment of wages and benefits an alternative to the FCCA small claims procedure. Of course, litigants will still have recourse to the FCCA should they chose to utilise that option.

Naturally, a more prominent wage recovery jurisdiction for the Local Court would require additional resources for establishment, training and ongoing operations.

Recommendation 1 – The jurisdiction of the Northern Territory Local Court should be expanded to include an Employment Division, possibly within the Work Health Court structure. A small claims procedure for non-payment and underpayment of wages or benefits consistent with the small claims provisions in the FWA should also be developed by the Local Court.

[5.3] Criminalisation of wage theft

Criminalisation of wage theft at a federal level is on the legislative agenda of the Australian Government but, to date, has not been enacted. In December 2020, the former Australian Government introduced the Fair Work Amendment (Supporting Australian Jobs and Economic Recovery) Bill 2020 which contained, inter alia, a "new criminal offence for an employer who dishonestly engaged in a systemic pattern of underpaying one or more employees".[51] The criminal provision would override any similar state or territory law.[52] The offence was removed from the Bill prior to the legislation being passed.[53]

The criminalisation of wage theft was an election promise of the Labor Party before the 2022 federal election. In the first tranche of amendments to the FWA contained in the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth), passed in December 2022, the criminalisation of wage theft was not included. The Committee was

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[50] Magistrates' Court of Victoria Industrial Division; Industrial Court and Industrial Magistrates Court of Queensland; Industrial Magistrates Court of Western Australia; Industrial Court of the Australian Capital Territory; South Australian Employment Court.
[51] Australian Senate Economics References Committee, *Systemic, sustained and shameful: Unlawful underpayment of employees' remuneration* (Commonwealth of Australia, March 2022) [5.68].
[52] Ibid.
[53] Ibid.

advised by the Commonwealth Department of Employment and Workplace Relations ('DEWR') that the criminalisation of wage theft will be included in further amendments to the FWA, however, the nature and scope of the proposed criminal provisions are not yet known. Representatives of DEWR did note that any new criminal provisions are not intended to override any similar criminal law passed by the states or territories, a fact which was subsequently confirmed by the Commonwealth Treasurer.[54]

Both Victoria and Queensland have passed legislation to criminalise wage theft. Victoria passed separate legislation, the *Wage Theft Act 2020* (Vic) ('WTA'), whereas Queensland included wage theft in the *Criminal Code 1899* (Qld) offence of stealing.

The WTA came into force on 1 July 2021. Section 6(1) of the Act provides:

> (1) An employer must not dishonestly –
>
> (a) withhold he whole or part of an employee entitlement owed by the employer to the employee; or
>
> (b) authorise or permit, expressly or impliedly, another person to withhold the whole or part of an employee entitlement owed by the employer to the employee and that other person does so.
>
> Penalty: In the case of a body corporate, 6000 penalty units;[55]
>
> In any other case, level 5 imprisonment (10 years maximum).

The word 'employer' is defined in section 3 of the WTA to mean, "a natural person, body corporate, partnership, unincorporated association or other entity that employs or has employed another person". The Act also criminalises the falsification of an employee entitlement record and the failure to keep an employee entitlement record. Both offences carry a maximum penalty of 10 years imprisonment or a 6000-penalty unit fine in the case of a body corporate.

If a body corporate commits an offence under the WTA, "each officer of the body corporate must be taken to have also committed the offence and may be prosecuted and found guilty of the offence".[56] This ensures that the person conducting the business or undertaking cannot hide behind the corporate veil to avoid liability. Criminal liability for wage theft offences also applies to partnerships and partners,[57] and to the management committee and officers of unincorporated associations.[58] Finally, proceedings can be brought against a responsible agency of the Crown for an employee entitlement offence.[59]

The WTA also establishes the Wage Inspectorate Victoria and a Commissioner of the Wage Inspectorate Victoria. The functions of the Wage Inspectorate Victoria are set out in section 20 of the WTA. In particular, the Inspectorate has public education, investigation and enforcement functions. It is the body that brings criminal proceedings

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[54] Letter from the Hon J Chalmers MP, Cth Treasurer, to the Hon C Peach MLA, NT Attorney General and Minister for Justice, dated 29 November 2022.

[55] Currently, 6000 penalty units equates to $1,090,440 Australian dollars: www.vic.gov.au/victorias-wage-theft-laws.

[56] *Wage Theft Act 2020* (Vic) s 13(1).

[57] *Wage Theft Act 2020* (Vic) s 14.

[58] *Wage Theft Act 2020* (Vic) s 15.

[59] *Wage Theft Act 2020* (Vic) s 16.

in relation to employee entitlement offences and works with the Office of Public Prosecutions in the prosecution of such offences. It also provides advice to relevant Victorian Government Ministers on the issues falling within the scope of the WTA.

The strategic leadership of the Wage Inspectorate Victoria is vested in the Commissioner.[60] The Commissioner holds office for a term not exceeding five years,[61] and is eligible for reappointment.[62]

In Queensland, section 391 of the *Criminal Code 1899* (Qld) encompasses within the offence of stealing deliberate, intentional behaviour leading to the non-payment or the under-payment of employee entitlements.[63] The falsification of an employee entitlement record and the failure to keep an employee entitlement record are not included as offences in the *Criminal Code 1899* (Qld).

It is the Committee's view that legislation to criminalise deliberate, intentional behaviour leading to the unlawful non-payment or under-payment of employee entitlements should be enacted. Whether the Northern Territory should await the promised federal criminal offence, or enact its own legislation to address the issue, must be considered in light of the potential invalidity of such Territory legislation addressed in Chapter 3.

The Committee has concluded that the prudent course would be to ascertain the scope of the Australian Government's amendments to the FWA criminalising wage theft before considering the enactment of Territory legislation. This conclusion is predicated on the assumption that such amendments to the FWA will be enacted within a reasonable time. Should this not occur, and subject to a legal opinion by the Solicitor General for the Northern Territory on the validity of such legislation, the NTG should pass legislation to criminalise wage theft. The legislation should be modelled, to the extent possible, on sections 391 and 398 of the *Criminal Code 1899* (Qld).

Ideally, the criminal offences associated with wage theft should be uniform across jurisdictions. Clearly, as evidenced by the different approaches to wage theft laws in Victoria and Queensland, uniformity of such legislation is not off to a good start in Australia. Such lack of uniformity is unfortunate because it promotes confusion in an already complex area. It is undesirable that employers are subject to different criminal wage theft offences depending on the jurisdiction in which they operate. It is the Committee's view, therefore, that unless criminal legislation passed in another jurisdiction does not address the specific needs of the Northern Territory, there is no need to reinvent the wheel.

The Victorian WTA provides the most comprehensive solution to the issues associated with wage theft raised with the Committee in this inquiry. It comprehensively addresses the criminalisation of wage theft. While the Committee is of the view that the Victorian approach is to be preferred over the Queensland approach, implementation of comparable legislation in the Territory faces the potential constitutional hurdles identified in Chapter 3. Consequently, the Committee has concluded that, should the Commonwealth not pass legislation criminalising wage theft within a reasonable time, a

[60] *Wage Theft Act 2020* (Vic) s 30(2)(a).
[61] *Wage Theft Act 2020* (Vic) s 26(1)(a).
[62] *Wage Theft Act 2020* (Vic) s 26(1)(b).
[63] Generally see: www.oir.qld.gov.au/industrial-relations/wage-theft#crime.

criminal offence of wage theft should be included as an amendment to the offence of stealing in the Criminal Code of the Northern Territory. To the extent possible, such amendment, and the punishment for the offence, should be modelled on section 391 and 398 of the *Criminal Code 1899* (Qld).

To ensure the proper investigation and enforcement of the proposed Territory criminal provision, a wage inspectorate, modelled on the Victorian agency, be established in the Northern Territory. As in Victoria, such an inspectorate's functions should include public education. Whether the Inspectorate is established as a separate agency, or incorporated into an existing agency, for example NT Worksafe, is a matter for the NTG. Whatever form it takes, however, the Inspectorate must be resourced to carry out its functions effectively and properly.

Recommendation 2 – Legislation to criminalise deliberate, intentional behaviour leading to the unlawful non-payment or under-payment of employee entitlements should be enacted. The Northern Territory Government should wait for a reasonable time to ascertain whether the Australian Government will enact such legislation.
Recommendation 3 – If the Australian Government does not pass legislation criminalising wage theft within a reasonable time, and subject to a legal opinion by the Solicitor General for the Northern Territory on the validity of such legislation, the Northern Territory Government should pass legislation to criminalise deliberate, intentional behaviour leading to the unlawful non-payment or under-payment of employee entitlements. Such legislation should be modelled, to the extent possible, on sections 391 and 398 of the *Criminal Code 1899* (Qld).
Recommendation 4 – If the Northern Territory Government passes legislation criminalising wage theft pursuant to Recommendation 3, a Wage Theft Inspectorate and Commissioner modelled on the Part 3 of the *Wage Theft Act 2020* (Vic), with investigative powers modelled on Part 4 of the *Wage Theft Act 2020* (Vic), should be established.

[5.4] Illegal phoenix activity

The Committee notes that legislation to address aspects of illegal phoenix activity has already been enacted at a federal level. In its Inquiry into wage theft in Queensland, the Queensland Parliament Education, Employment and Small Business Committee noted:

> There is no specific offence for illegal phoenix activity, however, other legislative provisions may be used against employers where phoenixing has taken place. This includes section 596AB of the *Corporations Act 2001*, which 'imposes criminal liability on directors who enter arrangements with the intention of depriving employees of their entitlements'.[64]

Another provision that can be used to combat illegal phoenix activity is section 135.4 of the *Criminal Code (*Cth),[65] which deals with conspiracy to defraud the Commonwealth.

[64] 56th Parliament Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (Report No 9, November 2018) 193.
[65] *Criminal Code Act 1995* (Cth), Schedule - The Criminal Code.

The section was used to obtain a successful prosecution of individuals involved in such activity.[66]

Further, other reforms have recently been implemented to combat phoenix activity, including "the introduction of a Director Identification Number (DIN) to provide directors with a unique identification number, allowing for more transparent and easier monitoring of the relationship between individuals and companies".[67]

The Committee's view is that legislative reform to combat illegal phoenix activity is a matter for the Australian Government, not the NTG. The Australian Taxation Office, Australian Securities and Investments Commission and the FWO are better placed and better resourced to address illegal phoenixing, both through legislative reform and through prosecutions under existing legislation.

[5.5] Improving understanding of the national workplace relations system

One of the statutory functions of the wage inspectorate that the Committee has recommended be established should be "to inform, educate and assist people in relation to their rights and obligations".[68] This, it is envisioned, would result in guidance being provided to employers about how to avoid running afoul of the offence incorporated into the NT Criminal Code. Further, it should provide guidance to employees as to what conduct by employers is prohibited by the Code. This, coupled with the information already provided to employers and employees by the FWO, the NTG, employer groups, unions and legal advice bodies, should significantly improve employer and employee understanding of the national workplace relations system.

Critical to the ability of low-paid and migrant employees to enforce their rights not to be underpaid wages and entitlements is the proper resourcing of organisations that provide advice to such employees. In the absence of secure, recurrent funding, such bodies are not able to provide targeted education programs to the Territory's most vulnerable workers. The NTG should collaborate with the Commonwealth to secure recurrent funding to organisations which provide legal assistance and advice to vulnerable workers about wage theft.

Recommendation 5 – The Northern Territory Government should collaborate with the Australian Government to secure recurrent funding to organisations which provide legal assistance and advice to vulnerable workers about wage theft.

[5.6] Conclusion

While wage theft in the Northern Territory is a significant problem, the ability of the Northern Territory to address the issue is legislatively constrained by the *Australian Constitution*, the FWA and the *Northern Territory (Self-government) Act 1978* (Cth). This notwithstanding, the Committee is of the view that the deliberate underpayment of an

[66] Australian Taxation Office, *Cycle ends in jail time for illegal phoenix operators*: www.ato.gov.au/Media-centre/Media-releases/Cycle-ends-in-jail-time-for-illegal-phoenix-operators/. But cf *Heng v The Queen* [2022] SASCA 24.
[67] Ibid, 194.
[68] *Wage Theft Act 2020* (Vic) s 20(1)(a).

employee’s wages should be included in the offence of stealing in the NT Criminal Code if, after a reasonable time, the Australian Government fails to address the issue, and subject to a legal opinion by the Solicitor General for the Northern Territory on the validity of such legislation. Further, a wage inspectorate should be established to assist the police and Director of Public Prosecutions in the investigation, enforcement and prosecution of the Territory offence. Finally, it is critical that the most vulnerable workers have access to legal advice about wage theft and access to additional avenues to enforce legitimate claims.