

Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020

Explanatory Notes

Short title

The short title of the Bill is the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020.

Policy objectives and the reasons for them

The Queensland Parliamentary Education, Employment and Small Business Committee (the Committee) conducted an inquiry into wage theft in Queensland and tabled its report *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (the Report) on 16 November 2018. The Committee found that wage theft is endemic across Queensland, affecting 437,000 workers and costing them approximately \$1.22 billion in wages and \$1.12 billion in unpaid superannuation each year.

The Committee heard accounts of wage theft as well as deliberate action by employers to frustrate employees' attempts to recover their entitlements. The Committee found affected workers, especially temporary migrants and young people, are poorly informed about avenues for reclaiming their wages, and that efforts to recover wages were made difficult or otherwise were unsupported by an under-resourced federal regulator, the Fair Work Ombudsman.

Concerns were raised of employers engaging in wage theft to lower their operating costs, increase profits and gain advantage over competitors with little fear of being caught. In some instances, the conduct of employers '*...was of such a systemic nature it was included in the employers' business model*'. In addition to exploiting workers, these practices harm businesses complying with legislative requirements by driving down prices impacting competition.

In the Report, the Committee handed down 17 recommendations to combat wage theft, of which six were for the Queensland Government to action, including two recommendations that require legislative amendments.

The objective of the Bill is to implement the underlying policy intent of Recommendation 8 (*Simple, quick and low-cost wage recovery process for workers*) and Recommendation 15 (*Criminalisation of wage theft*) of the Report.

Recommendation 8

The committee recommends the Queensland Government review and take actions available to it, to ensure that wage recovery processes for Queensland workers are simple, quick and low-cost. This should include further investigation of the following options:

- a) *establishing a dedicated industrial division within the Queensland Magistrates Court, in line with the example in Victoria;*
- b) *investigating the inclusion of the Queensland Industrial Relations Commission or Industrial Court as an eligible state court under the Fair Work Act 2009 (Cwth);*
- c) *reviewing relevant forms and processes to ensure the legal process is simple and user friendly for workers and their representatives; and*
- d) *waiving or reducing current court filing fees for wage theft matters.*

Recommendation 15

The committee recommends the Queensland Government legislate to make wage theft a criminal offence, where the conduct is proven to be deliberate or reckless.

Achievement of policy objectives

The Bill achieves its objective of implementing the underlying policy intent of recommendations 8 and 15 of the Report by:

- (i) enabling the prosecution of wage theft as stealing under the Criminal Code;
- (ii) increasing the maximum penalties in the Criminal Code for the offences of stealing and fraud relating to wage theft; and
- (iii) facilitating the Industrial Magistrates Court's jurisdiction for wage recovery matters, including the small claims wage recovery procedure for matters of not more than \$20,000 under section 548 of the *Fair Work Act 2009* (Cwth) (FW Act).

Alternative ways of achieving policy objectives

There are no alternative means of achieving the policy objectives other than by legislative reform.

In response to Recommendation 8b), the inclusion of the Queensland Industrial Relations Commission (QIRC) or the Industrial Court of Queensland (the Industrial Court) as eligible state courts, has been investigated. Both the QIRC and the Industrial Court, in their current form, are considered unsuitable for conferral of jurisdiction for FW Act wage recovery for the following reasons:

- the Industrial Court does not constitute an eligible Court for the purposes of the FW Act; and
- the QIRC is constitutionally precluded from being recognised as an eligible court (for the purposes of Commonwealth legislation) as it exercises administrative functions.

The Bill seeks to satisfy the objective for a simple, low cost wage recovery process for workers by facilitating use of the small claims wage recovery procedure in the FW Act through the Industrial Magistrates Court.

The response to recommendations 8c) and 8d) does not require legislative reform.

Estimated cost for government implementation

Amending the existing stealing offence in the Criminal Code to allow for prosecution of wage theft is not expected to have a significant impact on government given the application of other existing offences, including fraud under section 408C of the Criminal Code, to such conduct. Any impacts will be met from existing resource allocations.

The costs associated with the amendments relating to wage claims is unknown. While the number of claims lodged is expected to increase with additional awareness and a simpler process, other proposed administrative improvements to streamline claims, including improved forms, are expected to result in simpler lodgement processes and a more timely process for those claims that do proceed to hearing. The amendments to provide for criminal prosecution of conduct constituting wage theft may also have a deterrent effect on underpayment and reduce the number of civil claims. Whether there is an increase in cases before the Industrial Magistrates Court and that increase is offset by these efficiencies will be monitored.

Consistency with fundamental legislative principles

The Bill is generally consistent with fundamental legislative principles set out in the *Legislative Standards Act 1992*. Potential breaches are addressed below.

Clauses 5 and 6 in the Bill introduce higher maximum penalties for offences of stealing and fraud by employers and engage the fundamental legislative principle that legislation must have sufficient regard to the rights and liberties of individuals under section 4(2)(a) of the *Legislative Standards Act 1992*. Fundamental legislative principles provide that penalties should be proportionate, consistent with other penalties in the legislation and be appropriate to the offence. The increase in the maximum penalties for stealing and fraud offences is warranted in light of the seriousness and prevalence of wage theft as identified by the Committee.

Consultation

The Committee's inquiry into wage theft in 2018 included wide consultation with unions, employer organisations and industry groups, law firms, community organisations and academics.

Further targeted consultation was undertaken with key stakeholders, including the Bar Association of Queensland, Legal Aid Queensland and the Queensland Law Society, during drafting of the Bill and feedback received has been taken into account in finalising the Bill.

Consistency with legislation of other jurisdictions

The Bill is specific to the State of Queensland. However, some other jurisdictions have introduced similar reforms.

Commonwealth

The FW Act provides for wage recovery mechanisms and process for federal system workers. The FW Act provides that eligible State courts (as well as federal courts) may deal with certain FW Act matters including wage recovery claims. In Queensland, these eligible courts are the Magistrates Court established under the *Magistrates Courts Act 1921* (MC Act), and also the Industrial Magistrates Court established under the *Industrial Relations Act 2016* (IR Act). The amendments in the Bill will facilitate the jurisdiction of the Industrial Magistrates under the FW Act.

Victoria

On 16 June 2020, the Victorian Parliament passed the *Wage Theft Act 2020* (the Vic Act). The provisions of the Vic Act will commence on 1 July 2021, if not previously commenced by proclamation. The Vic Act will create three new statutory offences:

- i. dishonest withholding of employee entitlements;
- ii. falsification of employee entitlement records in order to obtain financial advantage for any person, or to prevent exposure of an offence; and
- iii. failure to keep employee entitlement records in order to obtain financial advantage or to prevent exposure of an offence.

Each of the three offences covers an employer; a company officer permitting, expressly or implicitly, another person to carry out the offence and will also apply to an associated person (such as a franchisor or head contractor) who 'intentionally assists' in the offence. Each offence attracts a maximum penalty of \$991,320 for corporations, or 10 years' imprisonment for individuals. This is consistent with the penalty for theft under the *Crimes Act 1958* (Vic).

Australian Capital Territory

The Australian Capital Territory (ACT) Government passed the *Courts (Fair Work and Work Safety) Legislation Amendment Act 2019* (ACT) (the ACT Courts FW Act). The ACT Courts FW Act will amend the *Magistrates Court Act 1930* (ACT) on a day fixed by the Minister by written notice or 12 months from 10 October 2019. The amendments will clarify the ACT Magistrates Court's (ACTMC) jurisdiction to hear fair work matters to be heard in the industrial court within the ACTMC; and amongst other things, provide for compulsory mediation for all fair work matters; enable officials of industrial associations to represent parties in fair work small claims matters; and introduce an objects clause that provides for the timely, inexpensive and informal resolution of fair work claims in the ACTMC.

Western Australia

The Western Australian (WA) Government held an Inquiry into Wage Theft in Western Australia (the WA Inquiry) in 2019. The report of the WA Inquiry was released on 6 December 2019 recommending consideration of the introduction of criminal penalties for serious and deliberate instances of wage theft, including equivalent measures to any federal criminal penalties introduced into the FW Act to provide consistent treatment for wage theft occurring in the non-referred WA industrial relations system.

On 25 June 2020, the WA Industrial Relations Minister Mr Bill Johnston introduced the Industrial Relations Legislation Amendment Bill 2020 (WA) which includes stronger compliance and enforcement provisions to address wage theft, based on the FW Act 'serious contravention' provisions introduced in 2017, as well as stronger inspectorial powers.

Notes on provisions

Part 1

Clause 1 sets out the short title of the Act which will be the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020*.

Clause 2 provides that parts 3 to 5 of the Bill, which facilitate the Industrial Magistrates Court jurisdiction for wage recovery matters by amending the *Industrial Relations Act 2016* (IR Act), the *Magistrates Courts Act 1921* (MC Act) and making minor amendment to the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act), will commence on a date set by proclamation. The remaining parts of the Bill, including Part 2 containing the amendments to the Criminal Code, commence on assent.

Part 2 Amendment of Criminal Code

Clause 3 provides that this part amends the Criminal Code.

Clause 4 amends section 391 (Definition of *stealing*) to omit existing section 391(2AA) which contains a definition of 'special property' and inserts new section 391(6A) into the Criminal Code. New section 391(6A) provides that for stealing that is a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee is a thing capable of being stolen.

New section 391(6A) also provides for stealing that is a failure to pay an employee or another person on behalf of the employee, that section 391(6), which provides that the act of stealing is not complete until the person taking or converting the thing actually moves it or otherwise actually deals with it by some physical act, does not apply and the amount is converted to the person's own use when the amount becomes payable to the employee or to the other person on behalf of the employee under an Act, industrial instrument or agreement, and the amount is not paid.

Section 391(7) is amended to insert definitions of the terms 'Act' and 'industrial instrument'. An 'industrial instrument' includes 'fair work instruments' such as modern awards and enterprise bargaining agreements under the FW Act and 'industrial instruments' including modern awards and certified agreements under the IR Act. 'Agreement' has its usual meaning and includes contracts, agreements between parties and agreements enforceable by law.

An amount payable to an employee or other person, in relation to the performance of work by the employee, is not defined in the Bill but is intended to capture a broad range of payments and entitlements, including:

- unpaid hours or underpayment of hours;
- unpaid penalty rates;
- unreasonable deductions;
- unpaid superannuation;
- withholding entitlements;
- underpayment through intentionally misclassifying a worker including wrong award, wrong classification or by 'sham contracting' and the misuse of Australian Business Numbers; and
- authorised deductions that have not been applied as agreed.

Clause 4 also amends section 391(7) of the Criminal Code to include a new definition of 'special property'. This amended definition includes a right by the employee, in relation to the performance of work by the employee, to be paid the thing or to have the thing paid to another person on behalf of the employee. This amendment ensures such conduct is captured by the deeming provision in section 391(2)(b) of the Criminal Code.

Clause 5 amends section 398 (Punishment of stealing) to insert an item in relation to *Punishments in special cases*. New item 16 provides that the maximum penalty for stealing by an employer is 10 years imprisonment. This maximum penalty is equivalent to the maximum penalty for stealing as a clerk or servant under section 398 Punishment in special cases, subclause 6.

Clause 6 amends the offence of fraud in section 408C(2) to insert new paragraph (e) to provide that the offender is liable to 14 years imprisonment if the offender is or was an employer of the victim. This maximum penalty is equivalent to the maximum penalty under section 408C(2)(b) where the offender is an employee of the victim.

Part 3 Amendment of Industrial Relations Act 2016

Clause 7 provides that this part amends the IR Act.

Clause 8 provides that the provisions of the IR Act in chapter 11, part 3, division 4 about civil remedies under the FW Act, chapter 4, part 4-1 apply to Fair Work system employees and employers.

Clause 9 inserts new division 4 (Fair work claims) into Part 3 of Chapter 11 to provide for the efficient exercise of jurisdiction of the Industrial Magistrates Court to perform functions as an eligible court under the FW Act. These provisions will also enable a worker to access the small claim procedure under the FW Act that simplifies the recovery process for workers.

New section 507A in Subdivision 1 (Preliminary) sets out that the division's purpose is to provide for the timely, inexpensive and informal resolution of fair work claims in an Industrial Magistrates Court. The section includes notes referencing section 539 of the FW Act, which confers powers on eligible state courts, including Magistrates Courts, for the purpose of civil remedy provisions, and chapter 4, part 4-1 of the FW Act and section 79 of the *Judiciary Act 1903* (Cwth), which concerns the practice and procedure of the Industrial Magistrates Court when exercising jurisdiction under the FW Act.

New section 507B provides definitions for division 4, including for a 'fair work claim' and 'civil remedy provision'.

New Subdivision 2 (Conciliation) contains conciliation clauses for fair work claims.

New section 507C clarifies the process that applies if a person has started a proceeding for a fair work claim in an Industrial Magistrates Court. This includes that the registrar may refer a fair work claim to conciliation; that this must be done as soon as practicable, and before an Industrial Magistrates Court hears the claim, and should preferably be done before a party to a claim files a defence to a claim. All these measures are to encourage conciliation in the first instance and to do so in a way that allows parties to go to conciliation without having to incur costs seeking legal representation or preparing a defence. If any party does not wish to participate in conciliation, they must notify the registrar of that fact as soon as practicable and before a conciliation conference starts. Again, this is intended to facilitate low cost conciliation of matters as much as possible, while allowing for parties to not go to conciliation where they have no intention of participating in the process. The purposes of conciliation are set out in new section 507C(6) and are to reach agreement on all matters or as many matters as possible, reduce the scope of matters at issue between the parties (for example, the parties may be able to agree on the industrial instrument or the period of employment), and achieve a timely, cost-effective, proportionate and agreed resolution of the fair work claim if possible. After a matter is referred to conciliation, the conciliator appointed must start to conciliate the claim as soon as practicable.

New section 507D provides that industrial commissioners are conciliators for fair work claims.

New section 507E sets out the procedures for a conciliation process. Under this section the conciliator decides a process to be used. It also empowers the registrar to give directions about a procedure to be used for a conciliation process.

New section 507F imposes a requirement upon conciliators to file a certificate, in the form required under the rules, about the conciliation process. This must be filed with the registrar as soon as practicable after the process is finished. This section provides detail on when a conciliation process is finished, that is if the parties agree on a resolution of all or part of the fair work claim, or the conciliator decides the conciliation process is finished (for example, if the parties are at an impasse).

New section 507G applies if in conciliation the parties agree on a resolution of all or part of a fair work claim and requires the agreement to be written down and signed by or for each party. It is a matter for the parties as to what they agree to, for example they may reach agreement about matters (no longer in dispute or resolved) and may agree on matters that are still at issue and include these in the agreement.

New section 507H provides the authority for a person to apply to an Industrial Magistrates Court for an order to give effect to an agreement reached through the conciliation process after the conciliator has filed the certificate referred to in section 507F with the registrar. This section also empowers an Industrial Magistrate Court to make any order the court considers appropriate to give effect to the agreement.

New section 507I provides that evidence of anything done or said or an admission made, during a conciliation process is admissible at the hearing of the claim or in another civil proceeding only if all the parties consent. Subsection (2) notes that a civil proceeding for this section does not include a civil proceeding founded on fraud alleged to be connected with, or to have happened during, the conciliation process.

New Subdivision 3 (Other provision) contains another provision relevant to the fair work small claim procedures. New section 507J provides that a party may be represented in an Industrial Magistrates Court by an official of an industrial association, as defined in subsection (2) by reference to the FW Act.

Clause 10 amends section 511 of the IR Act which deals with functions of the Industrial Registry to include acting as the registry for, and provides administrative support to, each Industrial Magistrates Court in relation to fair work claims under part 3, division 4. It is not intended that the Industrial Registry acts as the registry for the Industrial Magistrates Court for matters other than those specified under this clause.

Clause 11 amends the definition of 'proceedings' under section 529(2) of the IR Act to include conciliations conducted under provisions inserted into the IR Act by the Bill. This definition applies for the legal representation provisions of the IR Act.

Clause 12 amends section 530(1) of the IR Act which deals with legal representation for proceedings to clarify arrangements where the Industrial Magistrates Court may give leave for legal representation. This clause also inserts a new subclause (g) in section 530(1) to provide that a person may be legally represented in a proceeding before a conciliator with the leave of the conciliator.

The definition of proceedings under section 530(7) is amended in this clause to include as a proceeding, conciliations conducted under provisions dealing with fair work claims and claims for unpaid amounts inserted into the IR Act by the Bill.

Clause 13 amends section 531 of the IR Act to prescribe when rules of evidence do not apply for proceedings conducted by the Commission or the Industrial Magistrates Court for IR Act claims.

Clause 14 inserts a new division 5A into Part 5 of Chapter 11 of the IR Act (Conciliation of unpaid amount claims) to provide for a conciliation process for wage recovery claims for state workers.

New section 547A sets out the purpose of the division which is to provide for the timely, inexpensive and informal resolution of claims for unpaid amounts in the commission or an

Industrial Magistrates Court. This new division applies to claims by state workers as opposed to claims under the FW Act.

New section 547B provides definitions for new division 5A of *industrial tribunal* and *unpaid amount claim*. An industrial tribunal for these IR Act claims is ‘the magistrate’ (the Industrial Magistrates Court) or the QIRC, and that the term *unpaid amount claim* refers an IR Act claim that may be made by application under existing IR Act sections 379, 386, 396 or 476.

New section 547C sets out the conciliation process that applies if a person has started a proceeding for an IR Act unpaid amount claim in the QIRC or the Industrial Magistrates Court. This includes that the registrar may refer the parties to the claim to conciliation; that this must be done as soon as practicable, and must be done before the industrial tribunal (QIRC or Industrial Magistrates Court) hears the claim, and should preferably be done before a party to a claim files a defence to a claim. All these measures are to encourage conciliation in the first instance and to do so in a way that allows parties to go to conciliation without having to incur costs seeking legal representation or preparing a defence. If any party does not wish to participate in conciliation, they must notify the registrar of that fact as soon as practicable and before any conciliation conference starts. Again, this is intended to facilitate low cost conciliation of matters, while allowing for parties to not go to conciliation where they have no intention of participating in the process. The steps to be taken by the registrar if a party does not wish to proceed to conciliation are set out at 547C(5). The purposes of conciliation are set out at 547C(6); these are to reach agreement on all matters or as many matters as possible, reduce the scope of matters at issue between the parties (for example, the parties may be able to agree on the industrial instrument or the period of employment), and achieve a timely, cost-effective, proportionate and agreed resolution of the unpaid amount claim if possible. After a matter is referred to conciliation, the conciliator appointed must start to conciliate the claim as soon as practicable.

New section 547D provides that industrial commissioners are conciliators for unpaid amount claims.

New section 547E sets out the procedures for a conciliation process. Under this section the conciliator decides a process to be used. Subclause (2) empowers the registrar to give directions about a procedure to be used for a conciliation process.

New section 547F imposes a requirement upon conciliators to file a certificate, in the form required under the rules, about the conciliation process. This must be filed with the registrar, as soon as practicable after the process is finished. This section provides detail on when a process is finished: that is, if the parties agree on a resolution of all or part of the unpaid amount claim, or the conciliator decides the conciliation process is finished.

New section 547G sets out the requirements for conciliation agreements if in conciliation the parties agree on a resolution of all or part of an unpaid amount claim and requires the agreement to be written down and signed by or for each party.

New section 547H provides the authority for a party to apply to the industrial tribunal, as defined, for an order to give effect to an agreement reached through the conciliation process after the conciliator has filed the certificate referred to in section 547F with the industrial registrar. This section also empowers the industrial tribunal to make any order it considers appropriate in the circumstances.

New section 547I clarifies that subject to agreement by all parties, evidence or an admission made during a conciliation process is admissible at the hearing of the claim or in another civil proceeding. Subsection (2) notes that a civil proceeding for this section does not include a civil proceeding founded on fraud alleged to be connected with, or to have happened during, the conciliation process.

Clause 15 inserts a new Part 5 into Chapter 18 (Transitional provisions for the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020*) to make provision for transitional arrangements.

New section 1091 inserts a transitional provision into the IR Act to clarify that the Fair Work Claims division of the IR Act only applies to proceedings that are started after commencement of the Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020.

New section 1092 inserts a transitional provision into the IR Act to clarify that Division 5A only applies to unpaid amount claim proceedings that are started after commencement of the Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020.

Clause 16 amends the Dictionary in schedule 5 to include definitions for terms included in the IR Act by the Bill.

Part 4 Amendment of Magistrates Courts Act 1921

Clause 17 provides that this part amends the MC Act.

Clause 18 amends section 42B to provide that the processes for employment claims as set out in Part 5A does not have application to claims under section 539 of the FW Act.

Clause 19 inserts new section 62 into the Act to provide that if before commencement of the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020*, a claim under section 539 the FW Act was started under Part 5A, that Part, as in force immediately before commencement, continues to apply in relation to the claim.

Part 5 Amendment of Queensland Civil and Administrative Tribunal Act 2009

Clause 20 provides that this part amends the QCAT Act.

Clause 21 amends the definition of 'minor civil dispute' in the Dictionary in Schedule 3 to clarify that a claim to recover a debt or liquidated demand of money, with or without interest, of up to the prescribed amount does not include a claim under section 539 of the FW Act. A note is included which refers to the conferral of jurisdiction under the FW Act on eligible State or Territory courts, including Magistrates Courts and Industrial Magistrates Courts, in relation to the contravention of civil remedy provisions.