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Kennedy, Melissa Nicole

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**‘Wage theft’ in Australia: Victoria, the case for
criminalisation?**

Melissa Nicole Kennedy

ORCID ID: 0009-0001-3007-6255

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Abstract

Since 2015, where a series of high-profile underpayment scandals were publicised in the media, growing public awareness and increased scrutiny has led to numerous government inquiries and consultations on wage theft and the operation of Australia's workplace relations framework. One key recommendation that arose in the reports in different state and federal jurisdictions was for the introduction of criminal sanctions for deliberate instances of wage theft. This thesis examines criminalisation as a legal response to the growing awareness of widespread underpayment and non-compliance with minimum labour standards protecting wages and other conditions. Criminal wage theft offences have been justified as a regulatory tool to achieve compliance, but the reports have not focused on what characteristics of wage theft suggest criminality from a moral basis. This thesis addresses a research gap regarding criminal wage theft offences by focusing on theoretical justifications for enlisting the criminal law, rather than viewing criminalisation as a solution to a labour law issue.

Until 2020 the criminal law had not been used to expressly target breaches of employee entitlements relating to pay and other related conditions. The enactment of the Victorian *Wage Theft Act 2020* (Vic) marked a significant development in Australia, where for the first time criminal law was used as a legal response to widespread underpayment and non-compliance with laws governing minimum wage entitlements and other related conditions. Since then, other jurisdictions including Queensland and the Commonwealth have enacted criminal wage theft offences.

This thesis focuses on identifying and critiquing the subject matter of the *Wage Theft Act 2020* (Vic) to assess whether certain types of wage underpayments or similar outcomes have characteristics that make the criminal law a justifiable response based on the broader criminalisation goals including a moral justification. The thesis focuses on the offences that target 'dishonest withholding of employee entitlements', as those offences are novel, cover previously non-criminal conduct, and capture offending that is most clearly connected to common understanding of what is caught by the term wage theft. To examine the offences, I adopt Professor Stuart Green's analytical framework from *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* to analyse the Victorian wage theft offences. That framework relies on theoretical justifications that connect criminalisation to moral wrongfulness and harmfulness to enable an assessment of a

newly enacted or proposed offence. I closely examine the Victorian wage theft offences, including identifying the key elements and the areas of ambiguity in statutory drafting, and explain the impact of the ambiguities on my analysis of the subject matter of the offences. I then use Green's framework to identify who the offences target, the categories of harm connected to the offences, and the extent to which the specific offending violates moral norms. By weighing up the three elements in Green's framework, I critique the offence and identify the extent to which the criminal wage theft offences are an appropriate instance of criminalisation.

Declaration

This is to certify that:

- (i) The thesis comprises only my original work towards the degree of Doctor of Philosophy.
- (ii) Due acknowledgment has been made in the text to all other materials used.
- (iii) The thesis is fewer than 100,000 words in length, exclusive of tables, bibliographies and appendices.

Melissa Nicole Kennedy

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Chapter 1: Introduction—Methods and Literature for Examining the Criminalisation of ‘Wage Theft’

1.1 Introduction

In 2018, the Victorian Labor Government made an election promise to criminalise ‘wage theft’.¹ Criminalisation as a legal response to the wage theft problem drew my attention because it marked a significant shift in legal approaches to regulating minimum labour standards in Australia, with Victoria the first Australian jurisdiction to commit to the introduction of criminal wage theft offences. The Victorian election promise occurred in the context of broader policy discussion in which governments across state, federal and territory jurisdictions were considering potential reform processes to combat growing discontentment about the levels of non-compliance with minimum labour standards.² The growing awareness of the issue was connected to persistent reports of underpayment scandals affecting vulnerable workers and to calls by union activists for reform.³ At the time of deciding to commence doctoral studies, it seemed more likely than not that a jurisdiction in Australia would enact legislation that included criminal sanctions for wage theft. As it turned out, three jurisdictions criminalised wage theft during the course of this doctorate.

In this thesis, I examine the key offences contained in the *Wage Theft Act 2020* (Vic) (*‘Wage Theft Act’*),⁴ as one example of Australia’s approach to making wage theft a crime. Section 6 categorises certain types of underpayments and other types of ‘withholdings’ of employee entitlements as offences in order to criminalise wage theft. The *Wage Theft Act* also contains two other key sections that criminalise certain types of dishonest record-keeping breaches that are intended by employers to make the discovery of wage underpayments more difficult.⁵ In this thesis, I examine the s 6 dishonest withholding of employee entitlement offences, as those offences are novel and capture the type of subject matter that is most readily associated with wage theft.⁶ By contrast,

¹ Daniel Andrews, ‘Dodgy Employers to Face Jail for Wage Theft’ (Media Release, 26 May 2018).

² For further discussion of the reform context, see Section 2.2.

³ See James C Murphy, Katie Lovelock and Emily Foley, ‘Agenda Setting, Framing and Wage Theft in Australia’ (2024) *Australian Journal of Political Science*: DOI: 10.1080/10361146.2024.2359086: 1–18, 6–7 (‘Agenda Setting’).

⁴ I examine the *Wage Theft Act 2020* (Vic), as at 10 February 2025. All discussion of the offences and references to the Wage Inspectorate Victoria reflect the law at that date.

⁵ *Wage Theft Act* ss 7–8. See discussion of the implementation of the Act, in Section 2.3.

⁶ Consistent with rule 3.1.4 of the *Australian Guide to Legal Citation* (Melbourne University Law Review Association, 4th ed, 2018), I use the abbreviations ‘s’ and ‘ss’ to mean ‘section’ and ‘sections’ when discussing legislative provisions. The term is only written out in full when it begins a sentence. I have also

the record-keeping offences seek to reinforce existing obligations. The record-keeping offences overlap with already criminalised conduct with the inclusion in the *Wage Theft Act* enabling the labour regulator, Wage Inspectorate Victoria to be responsible for investigations and prosecutions where they arise in the context of the wage theft offences.

My key research question is as follows:

Is there a theoretically informed justification for Victoria's criminalisation of certain kinds of wage theft?

Victoria is the first jurisdiction in Australia to have enacted criminal offences for breaches relating to minimum labour standards applicable to wages and other employee entitlements. Soon after, Queensland introduced amendments to its *Criminal Code Act 1899* (Qld), which expanded the definition of the existing offence of theft to include certain types of underpayments of employment entitlements.⁷ In December 2023, the Federal Government passed legislation that included amendments to enact criminal offences to operate alongside the federal enforcement system.⁸

The term wage theft has obtained wide use to describe non-compliance with minimum labour entitlements, regardless of fault elements or the intended effect of the conduct. The term is used broadly (and often imprecisely) to capture various instances of worker underpayment or non-attribution of entitlements. Wage theft includes paying employees a lower amount than their rate of pay, withholding overtime payments, failing to make superannuation contributions and not attributing leave. It has also been extended to include certain employment practices, such as sham contracting and unlawful deductions. Noting the potentially vast definition that could capture a very broad range of workplace exploitation, I limit my analysis to the type of examples that are caught by the offences in the *Wage Theft Act*, rather than the broader spectrum of workplace exploitation that could be relevant. For example, forced labour and slavery-like offences contained in sch 1 of the *Criminal Code Act 1995* (Cth) ('*Commonwealth Criminal Code*') are likely to capture underpayments of entitlements, but the offences target a range of other distinct

followed other rules in the *Australian Guide to Legal Citation*, including following rule 1.5.2 relating introducing quotations and rule 1.5.4 directing authors to not to change spelling in quotations.

⁷ *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) item 4, amending *Criminal Cod Act 1899* (Qld) s 391.

⁸ *Fair Work Act 2009* (Cth) s 327A. The new federal criminal offence commenced on 1 January 2025: see Section 2.2.3.5.

behaviours that seek to dehumanise and commodify the victim, which are of a different character than the core offences relating to pay and conditions.⁹

This thesis examines the criminalisation of wage theft by situating the offences in the context of broader literature relating to criminalisation theory.¹⁰ In criminal law literature, claims have been made that there are ‘too many criminal offences’ leading to ‘overcriminalisation’ and a dilution of the criminal law’s goals.¹¹ Overcriminalisation has also led to what some academics describe as the blurring of distinctions between criminal sanctions and punishment versus civil penalties and other remedies.¹² This context has led to academic literature that has sought to determine the criminal law’s proper limits. I explore the normative theoretical basis for criminalising and investigate the conditions that may provide limits to criminalisation justifications.¹³ The wage theft offences also occur at the intersection between the criminal law and labour law: the two disciplines often have different objectives.¹⁴ In enacting wage offences, the criminal law is being called to protect employees from their employers who have breached their pay obligations. The statutory context in which minimum labour laws are justified and already formalised informs the broader principles and assumptions for justifying governmental intervention for wage underpayments and policy basis for the protection of those standards.¹⁵ I connect the fields because the legal response to criminalise wage theft was driven by concerns about the adequacy of the regulatory approach under labour law, which includes civil penalties for contraventions of minimum labour standards.

Criminalising wage theft in Australia is a novel response, as the criminal law has not been previously enlisted to ‘protect’ the receipt of wage entitlements. I seek to evaluate and critique the specific content of the offences, as set out in the Victorian statute, to assess the extent to which the character of offending demonstrates criminality. The context of criminal wage theft at the intersections between the criminal law and labour law has created an opportunity to explore the tensions between the objectives of the criminal law

⁹ I compare forced labour and slavery-like offences with criminal wage theft offences in Section 8.2.3.3.

¹⁰ See Section 1.2.1.

¹¹ Stuart P Green, ‘Why it’s a Crime to Tear the Tag off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses’ (1997) 46(1) *Emory Law Journal* 1533 (‘Regulatory Offenses’); Douglas Husak, *Overcriminalization: The Limits of the Criminal Law* (Oxford University Press, 2008) (‘Overcriminalization’).

¹² John C Coffee Jr, ‘Paradigms Lost: The Blurring of the Criminal and Civil Law Models— and What Can Be Done about It’ (1992) 101(8) *Yale Law Journal* 1875.

¹³ See Tess Hardy, John Howe and Melissa Kennedy, ‘Criminal Liability for “Wage Theft”: A Regulatory Panacea?’ (2021) 47(1) *Monash University Law Review* 174, 182–7 (‘Criminal Liability’).

¹⁴ See Section 1.2.2.

¹⁵ See Section 1.2.3.

and the broader goals of labour law in the context of minimum labour regulation. The decision to introduce criminal sanctions for certain types of wage theft raises a host of issues. One key issue—and the focus of this thesis—is assessing whether the type of wage theft caught by the newly enacted criminal offence provisions is supported by criminalisation theoretical approaches.¹⁶ The process of evaluating whether to make a certain act or omission a crime differs from the question of when and how the offences should be enforced, as well as from the type of punishment that should be enacted.¹⁷ This thesis does not focus on the use of criminalisation as part of a broader regulatory system geared at securing compliance. It also does not focus on the likely instrumental effects of the criminal sanctions on instances of underpayment, nor does it attempt to measure the effectiveness of introducing criminal offences in achieving a reduction in underpayments. This thesis focuses primarily on the aspect of assessing whether the types of wage theft caught by the recent Victorian offences justify legislative intervention in creating new criminal offences.

As I set out in detail in Section 1.3, the method I use in this thesis is to engage in a theoretically informed doctrinal analysis of the offences to evaluate the criminalisation process that has led to criminal wage theft offences. I rely on Stuart Green’s analytical framework to assess the moral content of criminal offences.¹⁸

To date, an examination of the character of wage theft and behaviours that the offences are seeking to criminalise has not been conducted in Australia, which has led to gaps in the literature. The approach adopted in this thesis identifies a research gap and aims to shift the focus away from the ready assumption that the criminalisation of this specific subject matter is justified as a regulatory tool to achieve compliance. Instead, as a first step, I aim to consider whether certain types of wage underpayments or similar outcomes have characteristics that make the criminal law a justifiable response based on the broader goals of criminalisation that also consider a moral justification. Such an approach is desirable because it takes the criminalisation process away from the broader politicisation of worker exploitation and the language of wage theft to examine what the offences are targeting, and whether, at least from a moral perspective, the offending can be justified

¹⁶ See discussion at Section 1.2.1.

¹⁷ Bernard Harcourt, ‘Joel Feinberg on Crime and Punishment: Exploring the Relationship Between the Moral Limits of the Criminal Law and The Expressive Function of Punishment’ (2001) 5 *Buffalo Criminal Law Review* 145, 168 (‘Feinberg on Crime and Punishment’).

¹⁸ Stuart Green, *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* (Oxford University Press, 2006) (‘*Lying, Cheating and Stealing*’).

with criminal treatment rather than some other legal response that does not carry the same morally loaded stigma and punishment.

In this introductory chapter, I present the key literature that informs my position in Section 1.2. Then, in Section 1.3, I describe the method I use and introduce Green's analytical framework. Last, I explain the thesis structure in Section 1.4.

1.2 Contextualising the Thesis in the Broader Literature on Minimum Labour Standards Regulation

This thesis focuses on the criminalisation of wage theft by examining whether the type of offences caught by the Victorian *Wage Theft Act* meets the threshold at which the criminal law should intervene. This focus distinguishes my approach from that of the dominant literature that has emerged in the Australian context, which has considered the criminalisation of wage theft through a compliance and regulatory focus.¹⁹ Although some studies have examined the offences, their approach has been to primarily focus on criminalisation as part of the broader regulatory context, rather than on whether there is a theoretical justification for the subject matter to be treated as a crime with reference to its 'moral content'.²⁰ There are some recent studies on wage theft criminalisation that provide different perspectives from a compliance and regulatory focus. For example, in one study media reporting is analysed to identify changes of framing of wage theft in media that enabled politicians across the political spectrum to put criminal wage theft on the legislative agenda, and in another study, criminologists interviewed workers in the hospitality industry to assess the perception of wage theft as a crime.²¹

¹⁹ See Tess Hardy, 'Criminalisation of Wage Theft under the Fair Work Act: A New Dawn for Deterrence?' 2024 37(2) *Australian Journal of Labour Law* 218, 239–41 ('A New Dawn for Deterrence?'); Irene Nikoloudakis and Stephen Ranieri, 'Criminalising "Wage Theft" in Australia: a Proposed Regulatory Model' (2023) 46(4) *University of New South Wales Law Journal* 1134 ('A Proposed Regulatory Model'); Joachim Dietrich and Matthew Raj, 'Criminalising "Wage Theft" in Australia: Property, Stealing, and Other Concepts' (2021) 45 *Criminal Law Journal* 218 ('Property, Stealing, and Other Concepts'); Hardy, Howe and Kennedy, 'Criminal Liability' (n 13); Mark Lewis, 'Criminalising Wage Theft—Some Observations on Deterrence, Enforcement and Compliance' (2020) 48(6) *Australian Business Law Review* 51 ('Deterrence, Enforcement and Compliance').

²⁰ See Hardy, Howe and Kennedy, 'Criminal Liability' (n 13). Cf Dietrich and Raj, 'Property, Stealing, and Other Concepts' (n 19).

²¹ See Murphy, Lovelock and Foley, 'Agenda Setting' (n 3); Emma Ferris and Stuart Ross, 'Decaffeinated Resistance: Social Constructions of Wage Theft in Melbourne's Hospitality Industry' (2023) 56(1) *Journal of Criminology* 42 ('Hospitality Industry'). See also Paul Leighton, 'No Criminology of Wage Theft: Revisiting "Workplace Theft" To Expose Capitalist Exploitation' in Steven Bittle et al (eds), *Revisiting Crimes of the Powerful: Marxism, Crime and Deviance* (Routledge, 2018) 188.

In recent times, an increasing stream of academic literature has identified widespread non-compliance with minimum labour standards, both within Australia and internationally.²² This breadth of non-compliance affecting workers in many different sectors has led to an issue described as a ‘crisis of enforceability’²³ or an ‘enforcement gap’.²⁴ The crisis arises where the specific protections and enforcement mechanisms designed to respond to non-compliance have been ineffective at stemming the instances of breaches. In addition, in recent times, the terminology of wage theft has been enlisted to describe instances of underpayments according to minimum labour standards and has gradually become the mainstream terminology for any such example, regardless of the mental elements or circumstances in which the underpayment occurred.²⁵ Hence, a wide range of literature, both within Australia and internationally, has focused on identifying actions that can be taken to improve compliance. For example, many studies have focused on the regulatory methods of labour inspectorates and the enlistment of trade unions or other actors to reduce non-compliance.²⁶ Others have contemplated how criminalisation of wage theft may operate as part of a wage enforcement system.²⁷ A range of studies have also sought to examine the specific characteristics of groups who are affected by wage underpayments, such as low-paid workers in horticulture.²⁸ The approaches have

²² Frances Flanagan and Stephen Clibborn, ‘Non-Enforcement of Minimum Wage Laws and the Shifting Protective Subject of Labour Law in Australia: A New Province for Law and Order?’ (2023) 45(3) *Sydney Law Review* 337 (‘Shifting Protective Subject’); Stephen Clibborn and Chris F Wright, ‘Employer Theft of Temporary Migrant Workers’ Wages in Australia: Why Has the State Failed to Act?’ (2018) 29(2) *Economic and Labour Relations Review* 207 (‘Employer Theft’).

²³ Flanagan and Clibborn, ‘Shifting Protective Subject’ (n 22) 340.

²⁴ Leah F Vosko (ed), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (Toronto University Press, 2020).

²⁵ See Murphy, Lovelock and Foley, ‘Agenda Setting’ (n 3) 6–7. See also Sarah Green, ‘Wage Theft as a Legal Concept’ in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 134, 134 (‘Wage Theft’).

²⁶ See, eg, Tess Hardy, Sean Cooney and John Howe, ‘A Balancing Act: The Difficulties of Detecting Labour Violations and the Implications for Employer Compliance and Deterrence’ (2023) 36(1) *Australian Journal of Labour Law* 1; Ingrid Landau and John Howe, ‘Trade Union Ambivalence toward Enforcement of Employment Standards as an Organizing Strategy’ (2016) 17(1) *Theoretical Inquiries in Law* 201; Tess Hardy and John Howe, ‘Out of the Shadows and into the Spotlight: The Sweeping Evolution of Employment Standards Enforcement in Australia’ in Leah F Vosko (ed), *Closing the Enforcement Gap: Improving Employment Standards Protections for People in Precarious Jobs* (University of Toronto Press, 2020) 221 (‘Out of the Shadows’); Tess Hardy, ‘Trivial to Troubling: The Evolution of Enforcement under the Fair Work Act’ (2020) 33(1) *Australian Journal of Labour Law* 87; John Howe, Tess Hardy and Sean Cooney, ‘The Transformation of Enforcement of Minimum Employment Standards in Australia: A Review of the FWO’s Activities from 2006–2012’ (Research Report, Centre for Employment and Labour Relations Law, University of Melbourne, 2014).

²⁷ See Hardy, Howe and Kennedy, ‘Criminal Liability’ (n 13); Keelia Fitzpatrick, ‘Wage Theft and Young Workers’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do About It* (University of Adelaide Press, 2018) 173 (‘Wage Theft and Young Workers’).

²⁸ Laurie Berg and Bassina Farbenblum, ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’ (Research Report, Migrant Worker Justice Initiative, November 2017) (‘National Temporary Migrant Work Survey’); Bassina Farbenblum and Laurie Berg, ‘Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia’ (Research Report, Migrant Worker Justice Initiative, October 2018) (‘Wage Theft in Silence’).

largely been tied to the industrial relations context in which the underpayments have occurred.

1.2.1 Literature on Criminalisation

The first task of the thesis is to ground the boundaries of examination in the vast academic literature that relates to the criminal law and criminalisation.

As Lacey identifies, assessing

criminalisation as a pattern or outcome and criminalisation as a practice are susceptible of different kinds of inquiry: full-blown normative inquiry, of the ‘ideal theory’ genre; normative/explanatory inquiry of the ‘middle level normative theory’ genre; socio-legal analysis exploring the current patterns of practice and outcome; historical/explanatory work exploring the origins and trajectory of those practices and of their framing ideas.²⁹

Thus, there are a range of approaches that may inform the analysis of the criminalising process and the resultant or proposed offence.

In addressing whether to criminalise wage theft, I draw on criminalisation theory, which is a body of academic work that seeks to provide a normative basis for criminalisation.³⁰ As David Brown observes, in recent decades, ‘[c]riminal law scholarship is enjoying a renaissance in normative theory, evident in a growing list of publications from leading scholars’ to theorise and develop a normative theory for criminalisation—such as elucidating a set of general principles on which ‘criminalisation and criminal law might — indeed should — be based’.³¹ The purpose of this normative theory is to assess in a

²⁹ Nicola Lacey, ‘Historicising Criminalisation: Conceptual and Empirical Issues’ (2009) 72(6) *Modern Law Review* 936, 943 (‘Historicising Criminalisation’).

³⁰ See, eg, R A Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010); R A Duff et al (eds), *The Structures of the Criminal Law* (Oxford University Press, 2011); R A Duff et al (eds), *The Constitution of the Criminal Law* (Oxford University Press, 2013); R A Duff et al (eds), *Criminalization: The Political Morality of the Criminal Law* (Oxford University Press, 2014); R A Duff, *The Realm of Criminal Law* (Oxford University Press, 2018) (‘*Realm of Criminal Law*’); Victor Tadros, *Wrongs and Crimes* (Oxford University Press, 2016); Lindsay Farmer, *Making the Modern Criminal Law: Criminalization and Civil Order* (Oxford University Press, 2016); Andrew Simester and Andreas von Hirsch, *Crimes, Harms and Wrongs: On the Principles of Criminalisation* (Oxford University Press, 2011) (‘*Crimes, Harms and Wrongs*’).

³¹ David Brown, ‘Criminalisation and Normative Theory’ (2013) 25(2) *Current Issues in Criminal Law* 605, 605. See also Lacey, ‘Historicising Criminalisation’ (n 29) 936–9.

top-down study the reliance on governments on criminal law as a regulatory tool towards imposing some ‘logic’ on its use.³²

The exact definition of ‘criminalisation’ and the scope of the literature is contested. As Nicola Lacey observes: ‘On the face of it, the concept of criminalisation is hugely encompassing: it could swallow up almost every theoretically interesting question about criminal law, criminal responsibility, criminal justice and punishment’.³³ For instance, Lacey draws attention to different criminal law aspects that could be connected to the broader issue of criminalisation,

the assumptions, ideologies, ambitions and interests underlying criminal legislation, or the political promises of such legislation; those which inform citizens’ decisions to report crime; those informing policing and prosecution decision-making, along with patterns of policing, prosecution and plea-bargaining; the contours of criminal law doctrine and of criminal legislation; the practices of judges and magistrates both in applying criminal law to particular offenders and in sentencing them; the practices of officials in the penal system; even the impact of social attitudes and the inevitable economic costs, the personal ruptures and the knock-on social effects which accompany punishment. all of these, and more, contribute to our understanding of the social and political phenomena of ‘criminalisation’.³⁴

I focus on criminal law doctrine and legislation rather than these broader aspects of criminalisation that Lacey identifies.

The first broad question that must be answered for the purposes of the thesis is ‘What is criminalisation?’. To aid and characterise the different elements that relate to the broad concept of criminalisation, Lacey distinguishes different aspects in a conceptual ‘simple diagram’ to distinguish between formal and substantive criminalisation.³⁵ I replicate the diagram here (see Figure 1.1).

³² Luke McNamara, ‘Criminalisation Research in Australia: Building a Foundation for Normative Theorising and Principled Law Reform’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 33, 37.

³³ Lacey, ‘Historicising Criminalisation’ (n 29) 942.

³⁴ Ibid.

³⁵ Ibid 943.

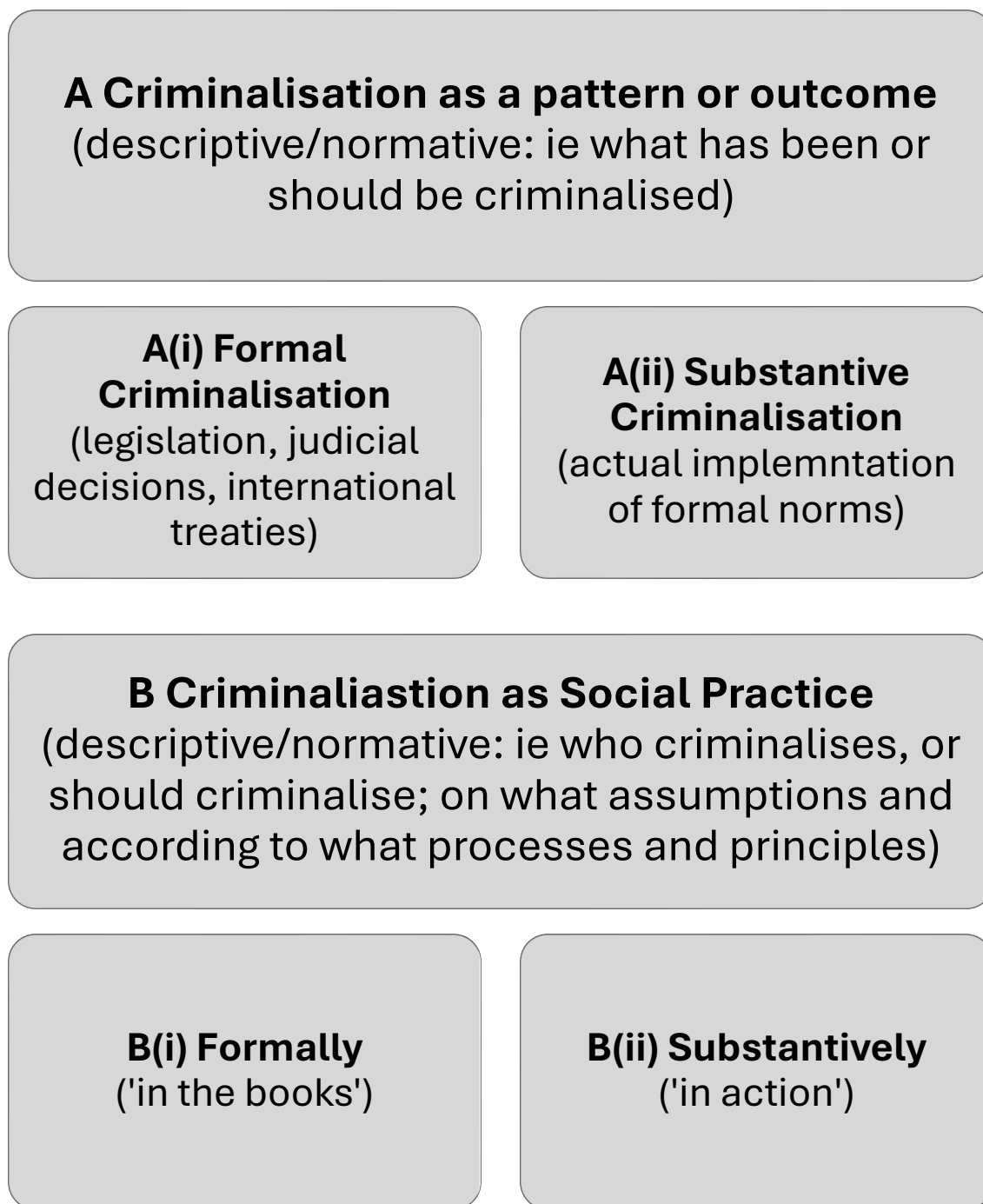


Figure 1.1: Lacey’s ‘Simple Diagram’ of Criminalisation³⁶

In this thesis, I focus on ‘formal criminalisation’ by examining the Victorian wage theft offences that were prescribed in the *Wage Theft Act* (ie a crime ‘on the books’).³⁷ This

³⁶ Ibid.

³⁷ Paul Gordon McGorery, ‘Creating Psychological Harm: A Criminal Offence?’ (PhD Thesis, Deakin University, 2020) 167 (‘Psychological Harm’).

approach contrasts with that of studies focusing on substantive criminalisation: ‘putting laws in practice’.³⁸ I focus on examining behaviours that the Victorian legislators decided to criminalise by referring to the *Wage Theft Act* and explanatory materials. My approach is informed by literature that seeks to offer ways to answer the following question: Should certain behaviours or acts be made a crime?³⁹ Legislators have choices relating to what is in fact criminalised. In evaluating whether to criminalise wage theft, it is necessary to also consider the assumptions relating to the justifications and processes for determining that wage underpayments breach statutory duties relating to pay obligations. That is, it is necessary to evaluate the broader context in which the criminalisation process takes place.

A topic of discussion in criminalisation debates is the different justifications for permitting criminal law intervention. One commonly used justification is to connect criminalisation to the obligations of citizens and the state in a liberal democratic society. In such societies, there is presumption favouring the liberty of individuals to the greatest extent possible.⁴⁰ Only when the state or its citizens are threatened is it permissible for the state to use coercive action (including with criminal sanctions).⁴¹ Criminalisation, in theory, is regarded as a last resort.⁴² Criminalisation refers to ‘a process of institutionalising societal norms that, if violated, might attract penal sanctions’.⁴³

The next broad question relates to assessing the criteria to determine ‘*How* should we decide what should be criminalised?’.⁴⁴ In discussions on the criminal law, a key philosophical and normative debate centres around identifying the moral limits of this law. That is, at what point should behaviour or conduct be treated criminally, or are those breaches more appropriately dealt with through other legal mechanisms, such as contract, tort or other legal remedy?⁴⁵ The specific approach to assessing this tipping ‘point’ or ‘moral limit’ is subject to significant debate in legal and philosophical approaches.

Traditionally, this issue has been linked to the Hart–Devlin debate.⁴⁶ This debate arose in the context of the Wolfenden Committee’s recommendation to decriminalise male

³⁸ Ibid.

³⁹ Paul McGorrrery, ‘The Philosophy of Criminalisation: A Review of Duff et al’s Criminalisation Series’ (2018) 12 *Criminal, Law and Philosophy* 185, 186 (‘Philosophy of Criminalisation’).

⁴⁰ McGorrrery, ‘Psychological Harm’ (n 37) 170.

⁴¹ Ibid.

⁴² Ibid 171. See also Douglas Husak, ‘The Criminal Law as Last Resort’ (2004) 24(2) *Oxford Journal of Legal Studies* 207.

⁴³ McGorrrery, ‘Philosophy of Criminalisation’ (n 39) 187.

⁴⁴ Ibid 198.

⁴⁵ Harcourt, ‘Feinberg on Crime and Punishment’ (n 17) 170.

⁴⁶ HLA Hart, *Law, Liberty and Morality* (Stanford University Press, 1963); Patrick Devlin, *The Enforcement of Morals* (Oxford University Press, 1965).

homosexual activities.⁴⁷ Devlin viewed the law as having a role in enforcing morality (legal moralism), whereas Hart conceived the law as not having a role unless it caused harm to others. McGorrery summarises that

in the past, authors have primarily tried to answer this question [of what should be criminalised] within the context of the Hart-Devlin debate. That is, some have argued that we should decide questions of criminalisation by reference to JS Mill's harm principle, while others have argued that community standards of wrongfulness are actually the best gauge for justifiable criminalisation (legal moralism).⁴⁸

Depending on which view is preferred, scholarly approaches seek to rely on moral philosophy by reference to concepts such as 'harmfulness' and 'moral wrongfulness' to assess whether something should be considered a crime. Scholars have debated the relative importance of 'harmfulness' and 'moral wrongfulness' in assessing whether to criminalise. Duff et al note that 'the harm principle has been applied to the criminal law in particular, and has been typically opposed not (or not only) to paternalistic legislation or coercion, but to legal moralism—the view that what justifies criminalizing conduct is moral wrongfulness'.⁴⁹ McGorrery identifies that 'modern legal theorists now almost universally accept that the Hart–Devlin debate was a distraction; in truth, the harm principle and legal moralism should usually be blended so that both harmfulness and wrongfulness together will (usually) be required for a criminal offence to be justifiable'.⁵⁰ That is one reason why I adopt Green's analytical approach, which includes both harmfulness and moral wrongfulness, as independent but related concepts, to guide the analysis of offences.⁵¹

1.2.2 Intersection between Criminal Law and Labour Law: A Growing Development

The thesis occurs at the intersection between the criminal law and labour law. In recent times, there has been growing attention in academic scholarship on the interactions between these different legal approaches. A key contribution to the discussion on this

⁴⁷ Peter Cane, 'Taking Law Seriously: Starting Points of the Hart/Devlin Debate' (2006) 10 *Journal of Ethics* 21.

⁴⁸ McGorrery, 'Philosophy of Criminalisation' (n 39) 198.

⁴⁹ R A Duff et al, 'Introduction: The Boundaries of the Criminal Law' in R A Duff et al (eds), *The Boundaries of the Criminal Law* (Oxford University Press, 2010) 1, 16.

⁵⁰ McGorrery, 'Psychological Harm' (n 37) 183, citing RA Duff, 'Towards a Modest Legal Moralism' (2013) 8 *Criminal Law and Philosophy* 217; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 30); Husak, *Overcriminalization* (n 9); Andreas von Hirsch, 'Harm and Wrongdoing in Criminalisation Theory' (2014) 8(1) *Criminal Law and Philosophy* 245 ('Harm and Wrongdoing').

⁵¹ Stuart Green's framework is further explained in Chapter 4.

intersection is made in Bogg et al's edited collection, *Criminality at Work*.⁵² The 26 chapters in this book cover many topics, including 'wage theft, disclosure obligations, exploitation, workplace harassment, human rights violations, and the public regulation of sex work'.⁵³ Sarah Green's chapter in this collection argues that wage theft is better conceived as a type of fraud rather than theft because the kinds of employment practices associated with wage theft are not a good match for the doctrinal requirements of the theft offence in the United Kingdom ('UK').⁵⁴ I address this issue in more detail in Section 7.3.2.

A key aspect of the edited collection is the attempt in the chapters to determine the areas of labour law that are not a good match with the criminal law and the areas in which the enlistment of the criminal law achieves positive outcomes.⁵⁵ Rosado Marzán observes that 'one could argue that criminal law and labour law inhabit "separate spheres" or "hostile worlds". They are two different areas of law with distinct principles and purposes. The former law disciplines workers, while the latter one protects them'.⁵⁶ The collection seeks to draw on the growing use of the criminal law in the labour context to understand the intersection between the two legal approaches more comprehensively. Bogg and Freedland suggest that from the perspective of labour lawyers, public wrong justifications for criminalisation should be aligned with traditional labour law goals, such as protecting workers.⁵⁷ As criminal wage theft offences are devised in this context, the rationales informing labour law protection are important in understanding the purposes of the creation of the offence.

In Bogg and Freedland's introduction to their edited collection, they suggest that one of its purposes is to try to answer the following queries:

should we identify the category of 'labour wrongs as public wrongs' as a basis for reasonable legislative choices to criminalize labour wrongs? And on what basis should

⁵² Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020).

⁵³ Alan Bogg and Mark Freedland, 'Criminality at Work: A Framework for Discussion' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 3, 13 ('Criminality at Work: A Framework').

⁵⁴ Sarah Green, 'Wage Theft' (n 25) 150.

⁵⁵ César F Rosado Marzán, 'Better Matches: An American Sociolegal View of Criminality at Work' (2021) 37 (2–3) *International Journal of Comparative Labour Law and Industrial Relations* 301, 304 ('Better Matches').

⁵⁶ *Ibid* 305 (citations omitted).

⁵⁷ Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 30. Rosado Marzán, 'Better Matches' (n 55) 312.

we opt for criminal law rather than private law, statutory rights enforced in the civil courts and tribunals, or professional regulation.⁵⁸

I am informed by the observations of Bogg and Freedland that, at least from a labour law perspective, public wrongs are likely linked to whether the law is intended to serve a protective function in a way that is consistent with the broader principles of labour law.⁵⁹ The rationales for labour law are intended to assist in understanding the broader context in which criminalisation calls were made. This context is important, given that the decision to criminalise was made in the context of broader concerns relating to the efficacy of minimum wage enforcement and issues with non-compliance. As discussed in Section 1.3 below, identifying the values of labour law is important in understanding the context in which I conduct this doctrinal analysis.

Nicola Lacey, in her foreword to the *Criminality at Work* collection, argues that the various approaches justifying criminal law intervention in labour law settings conceive of the criminal law as offering a ‘worker-protective’ function.⁶⁰ Historically, the criminal law has been used a tool of repression against labour. For example, in Australia, ‘servants’ who breached their obligations to their ‘masters’ could face criminal consequences and punishment under the legislation applicable to masters and servants.⁶¹ In Australia, the criminal law could be used to secure compliance with obligations in the event that ‘servants’ disobeyed their legal duties to their ‘masters’ under this legislation that applied in Australia from colonial times, with prosecutions still occurring well into the 1960s.⁶² Under this legislation, workers could be imprisoned for misconduct or absenteeism.⁶³ In contrast, lawmakers are now increasingly enacting criminal offences geared at protecting labour against capital.⁶⁴ Eric Tucker describes the use of the criminal law to protect

⁵⁸ Bogg and Freedland, ‘Criminality at Work: A Framework’ (n 53) 31–2.

⁵⁹ See Section 1.2.3 for discussion of labour law rationales for minimum labour standards.

⁶⁰ Nicola Lacey, ‘Foreword’ in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) v, vi (‘Foreword’).

⁶¹ See, eg, *Masters and Servants Act 1864* (Vic). See also Miles Goodwin, ‘The Great Wage Robbery: Enforcement of Minimum Labour Standards in Australia’ (PhD Thesis, University of New South Wales, 2003) 79–81; Adrian Merritt, ‘The Historical Role of Law in the Regulation of Employment—Abstentionist or Interventionist’ (1982) 1(1) *Australian Journal of Law & Society* 56 (‘Abstentionist or Interventionist’).

⁶² Merritt, ‘Abstentionist or Interventionist’ (n 61) 84 n 9.

⁶³ *Ibid* 61.

⁶⁴ See Eugene Schofield-Georgeson, ‘The Emergence of Coercive Federal Australian Labour Law, 1901–2020’ (2022) 64(1) *Journal of Industrial Relations* 51, 53, Schofield-Georgeson defines capital as describing: ‘share-holders, companies and their representatives, in the form of employers, ‘masters’ and managers or those responsible for directing how work is to be performed’: at 60. Schofield-Georgeson defines labour as describing: ‘trade unions, individual workers, ‘servants’ and those responsible for the direct performance of work’: at 60.

workers as ‘using the master’s tools against the master’.⁶⁵ This historical tension is a challenge, at least from a labour lawyer’s perspective, in conceptualising the role of the criminal law to enforce labour-related rights. As Lacey identifies:

Criminal law claims to be a form of justice, rather than merely of state power, and hence to have the potential to temper unequal power relations, and to counter forms of oppression and unfairness. This claim, central to the legitimation of modern criminal law, has much plausibility, when we consider that the least powerful are the most vulnerable to the harms caused by crime. Hence the promise of ‘worker-protective’ criminal laws.⁶⁶

However, Lacey expresses concern about shifting to criminalised systems, given that those who labour law seeks to protect include vulnerable workers and others in society who may already be disproportionately affected by the criminal justice system. Lacey also observes that the ‘the power-redistributive efforts of criminal law have, at best, modest success, while at worst, they can be counterproductive’.⁶⁷ Further, ‘[c]riminal law is, after all the creature of the same state which has presided over inequalities of power’.⁶⁸ This framing reflects the broad concerns expressed about extending the criminal law to be used to protect breaches of labour conditions.

In the *Criminality at Work* collection, authors have drawn on the same type of criminalisation theory argumentation that is presented in Section 1.2.1. In the introductory chapter to the collection, Bogg and Freedland draw on the work of Antony Duff, a leading voice in the criminalisation theory debates. Duff identifies that criminalised wrongs should engage

some aspect of the polity’s civil order, in which the polity therefore has in principle the standing to intervene. We must argue that such conduct is, when seen in the context of the polity’s civil order, wrongful, which is also to argue that we have reason to call those who engage in it to formal, public, censorial (and potentially punitive) account.⁶⁹

Usefully, Bogg and Freedland explain that ‘labour law is composed of a structure of statutory rights identified by the polity as elements of a common decent work for all, and

⁶⁵ Eric Tucker, ‘When Wage Theft Was a Crime in Canada, 1935–1955: The Challenge of Using the Master’s Tools Against the Master’ (2017) 54 *Osgoode Hall Law Journal* 933 (‘Master’s Tools Against the Master’).

⁶⁶ Lacey, ‘Foreword’ (n 60) vi.

⁶⁷ *Ibid.*

⁶⁸ *Ibid.* See also Tucker, ‘Master’s Tools Against the Master’ (n 65) 956–7.

⁶⁹ Duff, *Realm of Criminal Law* (n 30) 333, quoted in Bogg and Freedland, ‘Criminality at Work: A Framework’ (n 53) 10.

which might constitute a category of criminalizable public wrongs'.⁷⁰ Therefore, the main objective is to assess when the criminal law has a role to play in an area that relates to these statutory rights. As Bogg and Freedland argue:

Given those possible alternatives, the legislator must have good reason to respond through the modalities of the criminal law, which involves a specific kind of public response: one that involves an authoritative determination of guilt, the public calling of an offender to account, public censuring of the wrongdoing, and the imposition of punishment. This does not provide a scientific formula through which decisions on criminalization can be cranked out mechanistically. Its application requires judgement and political deliberation.⁷¹

Further, Bogg and Freedland suggest that in examining whether the criminal law can play a role in an area that is traditionally part of labour law,

the traditional formulation of worker-protective labour law provides a very useful rule of thumb for assessing new instances of proposed criminalization. Briefly stated, this identifies the function of labour law as being to regulate and equalize the inequality of power between an employer and an individual worker. Where criminalization is seeking to further this goal, by assisting the weaker party, the regulation is likely to have a presumptive legitimacy from the labour law perspective. By contrast, where criminalization impedes the goal, for example, where the criminal law has the purpose or effect of intensifying the subordination of the weaker party, we regard such legislation as presumptively illegitimate.⁷²

I consider labour law goals in assessing the extent to which the offences reflect subject matter that labour law seeks to protect.

1.2.3 Labour Law Rationales for Minimum Labour Standards and Statutory Protections

To help guide the discussion in my examination of the *Wage Theft Act*, I introduce some of the different ways of conceptualising the purposes of labour laws. Given that wage theft offences are new crimes occurring in a labour law context, I consider it necessary to identify the labour law purposes for protecting the subject matter. I examine those principles because they inform an understanding of why minimum labour standards are

⁷⁰ Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 11.

⁷¹ Ibid 16.

⁷² Ibid 30.

justified from a labour perspective as deserving of protection, as the rationales informed the policy developments in relation to labour law. Bogg and Freedland write that understanding the purposes of the statutory rights is vital to help inform whether breaches can be found to be public wrongs.⁷³ In order to evaluate whether the Victorian criminal offences reflect society's values, I now turn to the general articulated labour law purposes on minimum labour standards.

In this regard, a great deal of literature seeks to theorise the purposes of labour law.⁷⁴ Guy Davidov identifies that labour law academics have identified a range of values and interests that can be used to justify its intervention.⁷⁵ Davidov considers some different views that regard labour law as tied to 'workplace democracy, redistribution, dignity, social inclusion, stability, efficiency, human freedom, capabilities, emancipation, and social equality'.⁷⁶ Similarly, Hugh Collins, Gillian Lester and Virginia Mantouvalou explain: 'One of labour law's key tasks is to provide a countervailing force against the powers of owners of business organisations in support of workers, who, because they have nothing to sell but their labour, suffer from an inherent weakness of bargaining power that can lead to exploitation.'⁷⁷ They also identify that labour law has other tasks 'ranging from protection of the dignity and liberty of workers to the basic task of the facilitation of the cooperation needed for an advanced division of labour in a market economy'.⁷⁸ Given the potential scope of rationales, I focus on three commonly referred to general purposes for enlisting minimum labour standards,⁷⁹ before addressing literature discussing the extent to which Australia's *Fair Work Act 2009* (Cth) ('*Fair Work Act*') diverges from these purposes.⁸⁰

⁷³ Ibid 11.

⁷⁴ See, eg, edited collections including, Guy Davidov and Brian Langille (eds), *Idea of Labour Law* (Oxford University Press, 2011); Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law* (Hart Publishing, 2006); Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018).

⁷⁵ Guy Davidov, *A Purposive Approach to Labour Law* (Oxford University Press, 2016) Ch 4 ('*A Purposive Approach*').

⁷⁶ Ibid.

⁷⁷ Hugh Collins, Gillian Lester and Virginia Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 1, 2.

⁷⁸ Ibid.

⁷⁹ David Cabrelli and Rebecca Zahn, 'Civic Republican Political Theory' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 104, 105–9 ('Civic Republican Political Theory').

⁸⁰ Flanagan and Clibborn, 'Shifting Protective Subject' (n 22).

- *Labour law is intended to address disparities in bargaining power between capital and labour*

A traditional justification for permitting labour law intervention is based on the idea that labour law is designed to act as a tool to manage disparities in bargaining power between low-paid workers and their employers.⁸¹ Otto Kahn-Freund, a leading voice in labour regulation theory, stated that a key purpose of labour law is to act ‘to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’.⁸² The specific rationale emphasises the contractual relationship between the employer and the worker.⁸³ It permits state intervention in private contracts to temper the effects of the disparity.⁸⁴ Cabrelli and Zahn identify that the focus on labour law as ‘correcting the inequality of bargaining power inherent within the employment relationship’ is the ‘classic account for regulatory intervention’ in labour relations.⁸⁵ Andrew Stewart et al in *Creighton & Stewart’s Labour Law*, explain that the purpose may be considered as follows:

in a capitalistic economic society, most workers find it difficult, if not impossible, to deal on anything like an equal footing with those who wish to purchase their labour. It conceives labour law as having a *protective* function: the state’s objective must be to enact laws which will relieve employees from some of the consequences of their relative lack of power.⁸⁶

- *Labour law is intended to provide social equality by protecting workers ‘against the economic logic of the commodification of labour’⁸⁷*

The second traditional rationale for permitting labour law interventions is connected to the emphasis of labour law as having a role in ‘the redistribution of wealth, resources, and power away from the employer to the employee’.⁸⁸ Hugh Collins argues that ‘the principal aim of labour law is to steer towards a particular conception of social justice, such as more egalitarian society, and the norms of labour law are required primarily for

⁸¹ Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 104.

⁸² Otto Kahn-Freund, ‘Labour and the Law’ in Paul Davies and Mark Freedland (eds) (Stevens & Sons, 3rd ed, 1983) 18 (‘Labour and the Law’).

⁸³ Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 104.

⁸⁴ Ibid 104–6

⁸⁵ Ibid 105.

⁸⁶ Andrew Stewart et al, *Creighton & Stewart’s Labour Law* (Federation Press, 7th ed, 2025) 6 (emphasis in original) (citations omitted) (‘Labour Law’).

⁸⁷ Hugh Collins, *Employment Law* (Oxford University Press, 2nd ed, 2010) 5, cited in Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 106.

⁸⁸ Collins, *Employment Law* (n 87) 5.

the instrumental purpose of securing that goal’.⁸⁹ Further, Collins states: ‘Employment law ... regulates employment relations for two principal purposes: to ensure that they function successfully as market transactions, and at the same time, to protect workers against the economic logic of the commodification of labour.’⁹⁰ Cabrelli and Zahn describe this view as ‘treat[ing] employment laws as state-sanctioned norms that seek to promote social equality or equal autonomy, ie rules motivated by the desire to avoid social inequality and to ensure parity of status and power so that the employee and employer are afforded an equivalent degree of regard and deference in the workplace and by wider society’.⁹¹ Such an approach recognises the social utility in protecting workers against labour forces and in ensuring that they receive minimum level protections in terms of wages and related conditions.

- *Labour law is intended to correct labour market inefficiencies*

A third traditional rationale for labour law is based on market efficiency. Cabrelli and Zahn describe that labour market efficiency justifications are based on the idea that ‘governments treat one of the principal objectives of labour law to be labour market regulation for the benefit of all members of society; and that such a regulatory set of techniques does not necessarily impose costs, since it can correct imperfections in the labour market and enhance overall efficiency’.⁹² Collins describes the justifications as based on

appeals to efficiency or welfare considerations, in order to justify rules that address market failures caused by transaction costs and asymmetric information, problems arising in the governance of contracts of employment such as coercion and opportunism, and more generally the desirability of promoting productive efficiency and competitiveness through a well-coordinated and flexible division of labour.⁹³

As Cabrelli and Zahn identify, ‘[t]he basic argument is that social rights conferred by labour laws are, and ought to be, market-constituting and serve to set the basic rules of the game for a well-functioning and efficient labour market’.⁹⁴

⁸⁹ Ibid.

⁹⁰ Ibid.

⁹¹ Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 107.

⁹² Ibid 104–6.

⁹³ Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 137, quoted in Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 107.

⁹⁴ Cabrelli and Zahn, ‘Civic Republican Political Theory’ (n 79) 108.

- *Application of general principles in Australian context*

I now turn to two sources to examine the type of labour law principles that are supported by the legislation that primarily governs industrial relations in Australia.

Australia's Productivity Commission identified principles similar to the three justifications discussed earlier in this section in its review of the *Fair Work Act*.⁹⁵ In its 2015 report on Australia's workplace relations framework, the Productivity Commission presented certain factors relevant to minimum standard protections. It noted that 'inequality of bargaining power is a pervasive concept in workplace relations policy'.⁹⁶ It defined bargaining power as 'the relative costs to parties from withdrawing from an impending contract'.⁹⁷ It identified certain factors that influence a competitive labour market⁹⁸ and create an imbalance that affects the ability of the labour market to set minimum wages without governmental intervention. These factors are

- power imbalances, such as information asymmetries (eg the employee not knowing the extent of competition for positions, the average remuneration and certain aspects of the working environment) and search costs (eg the cost to search for a new job or job sectors); the Productivity Commission claimed that these largely favour the employer in the absence of regulation;⁹⁹
- impediments to individuals entering and exiting the market (eg lack of sufficient non-labour income, savings or access to sufficient safety nets);¹⁰⁰
- barriers that limit the mobility of labour between segments of the labour market (eg relocation costs, family circumstances and personal factors);¹⁰¹ and
- employers that wield substantial purchasing power in the labour market (ie monopsonists who control an industry or sector of the market, thereby having significant influence on wages and conditions if not kept in check).¹⁰²

In the context of minimum labour standards, the Productivity Commission states: 'A regulated floor of minimum conditions limits the extent to which employers can use any superior bargaining power to obtain lower wage outcomes. Minimum employment

⁹⁵ Productivity Commission, *Workplace Relations Framework* (Inquiry Report, 2015).

⁹⁶ Ibid 1137.

⁹⁷ Ibid 1138.

⁹⁸ For a definition of a competitive labour market see, *ibid*: at 1139.

⁹⁹ Ibid 1141.

¹⁰⁰ Ibid 1137, 1142–4.

¹⁰¹ Ibid 1144.

¹⁰² Ibid 1145. See also Iain Campbell and Sara Charlesworth, 'The National Employment Standards: An Assessment' (2020) 33(1) *Australian Journal of Labour Law* 36, 38.

conditions also help reduce the information asymmetries and transaction costs that give rise to bargaining imbalances'.¹⁰³ The Productivity Commission connects the protective function of labour law to the promotion and achievement of economic efficiency and broader productivity goals.

- *Refinement of rationales for minimum standard protections to reflect current approach*

Frances Flanagan and Stephen Clibborn recently examined the purposes of Australian labour law by contrasting two distinct historical periods to review the rationales for minimum labour standard protection in Australia, including 'who' this law protects and 'why', and 'how' it intends to achieve this outcome.¹⁰⁴ This approach seeks to review specific goals in the current legislation, rather than applying a universal, a-historical examination of labour law goals.¹⁰⁵

In their article, Flanagan and Clibborn compare the values and articulated goals of minimum labour standard protection in the early period of the Australian Federation, by referring to the judgment in *Ex Parte HV McKay* ('*Harvester*') in 1907, with how the law applies in 2022 in relation to minimum wage protections since the adoption of the *Fair Work Act* in 2009.¹⁰⁶ In Section 2.2.2, I expand in further detail how minimum standard protections for labour operate in Australia. For now, the purpose of this section is to recognise the types of values that are protected by the law.

Flanagan and Clibborn begin by considering the values espoused by the significant *Harvester* judgment from 1907. In that decision, Higgins J set a 'living wage' in relation to federal awards in the arbitration context. Higgins J determined that 'fair and reasonable remuneration' means wages that employees 'cannot get by the ordinary system of individual bargaining with employers'.¹⁰⁷ Fair and reasonable remuneration is defined as 'the normal needs of the average employee, regarded as a human being living in a civilised community' to live in 'frugal comfort'.¹⁰⁸ The average employee was regarded as male, adult and white, who would provide for their household and family.¹⁰⁹ This case

¹⁰³ Productivity Commission, *Workplace Relations Framework* (n 95) 1147.

¹⁰⁴ Flanagan and Clibborn, 'Shifting Protective Subject' (n 22) 345, citing Ruth Dukes, 'Identifying the Purposes of Labor Law: Discussion of Guy Davidov's A Purposive Approach to Labour Law' (2017) 16(1) *Jerusalem Review of Legal Studies* 52.

¹⁰⁵ Flanagan and Clibborn, 'Shifting Protective Subject' (n 22) 340.

¹⁰⁶ *Ibid*, citing *Ex Parte HV McKay* (1907) 2 CAR 1 ('*Harvester*').

¹⁰⁷ *Ibid* 3.

¹⁰⁸ *Ibid* 1.

¹⁰⁹ Flanagan and Clibborn, 'Shifting Protective Subject' (n 22) 348.

is frequently included in introductory courses on labour law as an explanation of how Australian labour law protections developed.

Then, Flanagan and Clibborn compare this context with the operation of the *Fair Work Act*. They observe that in the current period, the justifications for minimum standards in the *Fair Work Act* are ‘only partially justified in terms of worker protection’.¹¹⁰ Flanagan and Clibborn note that

the current minimum wage safety net requires the [Fair Work Commission] to simultaneously consider human needs on a qualified basis (such as ‘social inclusion’), and economic indicia (‘the performance and competitiveness of the national economy, including productivity, business competitiveness and viability, inflation and employment growth’).¹¹¹

The social inclusion factors in the *Fair Work Act* include ‘increas[ing] workplace participation’ and intervening in the interests of ‘the low paid’.¹¹² The Fair Work Commission, when setting minimum wages and setting wages in awards, is required to consider a broad range of factors to justify those figures.

Flanagan and Clibborn observe the following characteristics of the current protection methods:

The wage minima of the contemporary period, ... are framed as a ‘safety net’, a set of measures which are not addressed to meeting the needs of employees as a totality, but rather to ameliorating potential harms and disutilities experienced by particular sub-groups of workers and/or particular elements of working life. Simultaneously, the regulation of wage minima entrenches particular economic values that are applied at the national and enterprise levels and sets these criteria in implicit opposition to employer-focused criteria, against which they must be ‘balanced’.¹¹³

The dual protections—the protection of the reputations and of the interests of employers who abide by the rules—are balanced with the protective functions for employees who have vulnerabilities. This is a significant distinction from the promotion of a living wage framed in the earlier conceptions of minimum wage protections in Australia. It suggests that the broad purposes of labour law have been narrowed in application and now protect

¹¹⁰ Ibid 356.

¹¹¹ Ibid 359, citing *Fair Work Act* s 284(1)(a).

¹¹² Flanagan and Clibborn, ‘Shifting Protective Subject’ (n 22) 341–2.

¹¹³ Ibid 368.

the interests of employers as well as workers. This context is helpful to understanding the specific justifications and purposes of the protective functions covered by the definition of ‘employee entitlements’ that arise in the *Wage Theft Act*.¹¹⁴

1.3 Methodology: Theoretically Informed Doctrinal Analysis

To answer the research question, I adopt a theory-informed doctrinal analysis. I use Stuart Green’s analytical framework to assess the Victorian wage theft offences.¹¹⁵

Doctrinal research is a traditional method of analysing law. Terry Hutchinson and Nigel Duncan describe doctrinal research as a type of legal scholarship that ‘provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between rules, explains areas of difficulty and perhaps predicts future developments’.¹¹⁶ Similarly, Jason Varuhas identifies ‘[t]he basic question with which doctrinal scholarship is concerned as: “What is the law?”’¹¹⁷ Doctrinal research aims to ‘to state what the law is and to understand the law on its own terms’.¹¹⁸ It seeks to ‘identify and understand the body of practices and ideas that emerge from recognized legal materials’.¹¹⁹ The authoritative legal resources in Australian domestic law include case judgments and legislation.¹²⁰ Other sources such as commentary on law and legislative materials may also be used as a tool to interpret the laws.

Varuhas identifies four types of doctrinal methods, namely,

- ‘description, which may for example involve summarizing a case’;
- ‘derivation, which involves distilling legal propositions from legal materials’;
- ‘systematization, which involves organization of interconnected legal propositions into categories, which form part of a wider system’; and
- ‘interpretivism, which involves interrogating normative justifications which explain legal propositions or categories, and refining one’s account of those legal phenomena by reference to those justifications’.¹²¹

¹¹⁴ *Wage Theft Act* s 3 (‘Definition of ‘Employee Entitlements’).

¹¹⁵ For discussion of framework, see Chapter 4.

¹¹⁶ Terry Hutchinson and Nigel Duncan, ‘Defining and Describing What We Do: Doctrinal Legal Research’ (2012) 17(1) *Deakin Law Review* 83, 101.

¹¹⁷ Jason NE Varuhas, ‘Mapping Doctrinal Methods’ in Paul Daly and Joe Tomlinson (eds), *Researching Public Law in Common Law Systems* (Edward Elgar, 2023) 70, 70 (‘Mapping Doctrinal Methods’).

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.* 71.

¹²⁰ *Ibid.*

¹²¹ *Ibid.* 70.

In this thesis, I adopt an approach that involves interpretivism, which builds on the other three other methods involving description, derivations and systemisation. Varuhas states:

Interpretivism adds an explicit theoretical dimension to more traditional methods of derivation and systematization. Such approach involves explicit interrogation of the normative justification for particular propositions or fields, and refinement of one's account of those propositions or fields by reference to that justification. Here doctrinal method merges with explanatory theory. One is simultaneously offering an exposition of, and normative justification for, a legal phenomenon.¹²²

The approach I adopt involves using interpretivism to apply a doctrinally grounded theory for evaluating the newly enacted criminal laws. Before applying the framework that I use to analyse the offences, I use the three earlier methods to assess what the law is, as follows:

- Description: I describe the specific legal source—the legislation.
- Derivation: I draw on established legal principles and approaches to statutory interpretation to distil the legal propositions.
- Systematisation: I consider how the offences are influenced by the overlapping fields of the criminal law and labour law in subject matter.

Then, I interpret the offences by using a theoretical framework that is intended to enable me to review and rationalise the law through a framework connected to moral justification.¹²³ In adopting a framework that draws on normative principles, I ground my analysis in an established approach to evaluate the offence provisions. As Varuhas notes, 'a theoretical piece can offer "a more concise exercise in cartography" which "establish[es] paths and perimeters" for thinking and reasoning. A theoretical piece can, within a few pages, inform the reader of the gist of a field and its core features; that is, it provides a normatively-grounded analytical framework'.¹²⁴ I use Green's analytical framework to map out the law and to test the extent to which the law as designed meets the framework's requirements. This approach enables me to review and assess the law, to understand the extent to which it is consistent with the goals and assumptions underpinning Green's framework, when evaluating the Victorian wage theft offences.

¹²² Ibid 91.

¹²³ Ibid 88–9.

¹²⁴ Ibid 92, quoting Carol Harlow, 'Changing the Mindset: The Place of Theory in English Administrative Law' (1994) 14 *Oxford Journal of Legal Studies* 419, 430.

Varuhas identifies ‘three core aspects of interpretive method: pre-interpretation, fit, and justification’.¹²⁵ The ‘pre-interpretation’ stage involves identifying and describing the legal phenomenon that is to be interpreted.¹²⁶ For doctrinal research, this stage involves ‘develop[ing] a working understanding of a proposition or field’.¹²⁷ For this thesis, it involves describing and understanding the scope of the criminal offences contained in the Victorian *Wage Theft Act* that seek to criminalise certain kinds of dishonest withholdings of employee entitlements. In my exploration of the criminal wage theft laws, I start by unpacking and analysing the legal materials by seeking to assess how a court would likely interpret the offences. I review reported cases and legislation; commentary on the law; and legislative materials, such as parliamentary materials and explanatory memoranda that frame the enactment of the laws. I also consider a range of governmental reports from several jurisdictions that seek to contextualise the position of the criminal law in the broader reform agenda. In addition, I review academic commentary, such as scholarly books, journals and other sources. The context of the enactment is also supported through reference to media sources, such as news articles and media reports.

Varuhas describes the next stage as assessing whether the account fits. In other words, does the framework fit the material that is to be examined? As Varuhas says: ‘It must fit with an account of the normal, proper or received body of legal practices, which are referable back to legal materials and recognizable and plausible in the eyes of the interpretive community. In this way fit is a threshold requirement for the success of an interpretive account.’¹²⁸ As Green’s account requires a degree of abstraction to assess the offences on a generalised account (eg how are the offences likely to operate generally, versus how the offences might apply to an individualised case), the framework fits my goal of assessing the criminal wage theft offences and its moral content rather than considering how they would apply to a specific person or a specific context in which underpayments frequently occur.

The final stage is to assess whether the account of the laws can be justified by the framework presented. In the context of Green’s analytical framework, he presents a legal account that relies on an aspect of criminal theory that is connected to Joel Feinberg’s account of criminalisation and involves a moral justification for permitting criminal

¹²⁵ Varuhas, ‘Mapping Doctrinal Methods’ (n 117) 70.

¹²⁶ Ibid 97, quoting Ronald Dworkin, *Law’s Empire* (Fontana, 1986) 65–6.

¹²⁷ Varuhas, ‘Mapping Doctrinal Methods’ (n 117) 97.

¹²⁸ Ibid 98.

intervention.¹²⁹ In Chapter 4, I consider the criteria that Green adopts to ground his analytical framework, which has three parts that relate to the application of three elements, that is,

1. the mental state of the actor as prescribed by statute,
2. the social harmfulness of the action and
3. the moral wrongfulness of the conduct.¹³⁰

In Section 4.3.2, I consider Green's justification and theoretical assumptions that grounds the framework. Green connects his framework to the broader criminalisation discourses and overarching normative debates about the limits of the criminal law.

Varuhas recognises that: 'Developing a theoretical frame for understanding the law is one of the distinctive contributions legal scholars can make to legal knowledge, that no other group is equipped to make. Such work is thus an opportunity for the legal academy to demonstrate its unique value in society.'¹³¹ As a legal scholar engaging in an analysis of the criminal wage theft offences, through this thesis I offer an insight into what the law is trying to criminalise and characterise the offending, rather than focusing on instrumental objectives and outcomes in the broader industrial relations context. This is a different approach to analysing the criminalisation of violations of wage and hour regulation from the approaches adopted in other studies, which have largely focused on criminalisation as a regulatory tool.¹³²

1.4 Thesis Structure

In this chapter, I have situated the thesis within criminalisation literature and explained the relevance of labour law concepts to assessing the wage theft crimes. I have also introduced the method I adopt in this thesis.

In the following chapters in Part I of the thesis, I set out the policy background that has led to criminal wage theft offences, present the key doctrinal aspects of the offences and explain the relevance of Green's framework to my thesis:

¹²⁹ Joel Feinberg, *Harm to Others* (Oxford University Press, 1984).

¹³⁰ Green, *Lying, Cheating and Stealing* (n 18) 4, 30, 34, 39.

¹³¹ Varuhas, 'Mapping Doctrinal Methods' (n 117) 90–1.

¹³² See, eg, Nikoloudakis and Ranieri, 'A Proposed Regulatory Model' (n 19); Hardy, Howe and Kennedy, 'Criminal Liability' (n 13).

- Chapter 2 provides an overview of the policy context that has led to the criminalisation of wage theft in Victoria and other jurisdictions in Australia. I also address why my analysis of the Victorian offences that were recently repealed remains a valuable contribution for examining wage theft criminalisation in Australia, as well as in other jurisdictions.¹³³
- Chapter 3 describes the key doctrinal elements of the offences, including the key legal concepts present in the offence structures. I provide extracts of the main statutory provisions, including the s 6 criminal offence in Appendix A. I also consider the impact of attribution methods on the offences, given their significance to the offence structure and the *Wage Theft Act*.
- Chapter 4 seeks to explain and justify the use of Green’s framework to support my examination of the offences. I introduce Green’s theoretical assumptions.

In Part II of the thesis, I apply Green’s framework to Victoria’s criminal wage theft offences. In Chapters 5–7, I apply Green’s framework, including the tests that he describes, to help identify relevant aspects of the offences for analysis:

- Chapter 5 addresses Green’s first element—by examining the mental elements in the offence structure and what they reveal about who is the targeted offender and the characteristics of their fault requirements.
- Chapter 6 addresses Green’s second element—by examining whether the offences are connected to harms, that is, significant or lasting setbacks to interests.
- Chapter 7 addresses Green’s third element—by examining whether the offending would violate moral norms and thus demonstrate moral wrongfulness.

In Part III, I provide conclusions.

In Chapter 8, I weigh up the three elements in the framework to provide an account of the degree to which Green’s method determines that the Victorian wage theft offences are an appropriate instance of criminalisation.

I conclude that yes, for some of the subject matter that is caught by the Victorian wage theft offences, Green’s framework can support a moral basis to permit criminal intervention; however, I go on to conclude the scope of the offences— caused by the

¹³³ Recently, the *Wage Theft Amendment Act 2025* (Vic) was enacted. This Act seeks to repeal the Victorian wage theft offences. The amendments will commence on 2 April 2026, unless proclaimed an earlier date: at s 2.

legislative choice to define ‘employee entitlements’ as including minimum labour entitlements (such as minimum wages and related conditions) and also to agreements to pay above the minimum standards— impacts the success of the framework’s fit for supporting criminalisation for all the types of examples caught by the offences.¹³⁴ I also identify other aspects of the offences that are unclear such that key elements of the offences could be interpreted in different ways, such as how common law assumptions about intentionality would apply to the terms ‘withholding of employee entitlements’, impacting the role of dishonesty in the offence structure.

I argue that of the specific tests Green identifies to assess whether a crime violates moral norms, his tests for assessing violations norms against cheating and disobedience best fit the Victorian wage theft offences.

The cheating analysis assists in pinpointing the ‘public wrong’ where the offence captures employers who intentionally obtain an advantage over their low-paid employees by not following the rules established in relation to pay and related minimum conditions to cheat the employee out of their full entitlements and thereby gain an advantage by using their labour at a lower rate of remuneration than the employer is obliged to pay. This causes direct harms to the employee and their families connected to the failure to receive the full amount of the wage and related entitlements relative to what they were legally entitled to receive.

The disobedience analysis emphasises the purpose of the law in protecting societal values and in accepting that low-paid employees should receive fair remuneration to ensure they receive minimum workplace protections relating to pay and conditions. The failure to meet the obligations connected to minimum standards in statute, as well as in industrial instruments, undermines the protections. It directly harms governmental interests, such as impacting on the capacity of governments to collect tax revenue connected to income, and may also increase reliance on supports to fill the gaps caused by wage theft.

However, I consider that where the offence captures agreements that are not connected to the labour law logic relating to minimum standards, the framework becomes less supportive of criminalisation (eg the closer the subject matter is to criminalising contractual breaches). The same labour law rationales that support protecting low-paid employees lose significance when applied to a high-paid employee, given the likelihood

¹³⁴ See discussion of ‘employee entitlements’ in Section 3.4.1.1.

of a lower disparity in bargaining power in respect to the employer and less need to rely on the protective rationales of labour law. The subject matter classes have different characteristics, with only the failure to meet minimum labour standards obligations relating to pay and other similar conditions ordinarily considered as a type of wage theft. There is ambiguity in setting a monetary limit in such a way that it does not arbitrarily cut off certain employees who may still benefit from protections, such as those connected to overtime and leave. Refining the offence structure to exclude some high-paid individuals, such as by setting a limit, perhaps in line with the high-income threshold tests adopted in the law of unfair dismissal, would work towards remedying the breadth of subject matter to operating well beyond the types of payments mentioned in the legislative materials accompanying the *Wage Theft Bill 2020 (Vic)*.

In Chapter 9, I draw together my conclusions across the thesis. I offer some thoughts as to potential avenues for future research that address whether there are any limiting principles that legislators should contemplate before criminalising wage theft. I address that moral considerations are not the only matters for legislators to contemplate when making choices about criminalisation, rather than to instead use a different legal or non-legal response. I also tie my discussion back to questions raised on the place of criminalisation in the labour law context. Lastly, I contemplate the impact of the recent enactment of the *Wage Theft Amendment Act 2025 (Vic)* which seeks to repeal the Victorian wage theft offences and how my analysis might differ when applied to the newly enacted criminal wage theft offence in s 327A of the *Fair Work Act*.

Part I:
Background Concepts

Chapter 2: Policy Developments that led to the Criminalisation of ‘Wage Theft’ in Australia

2.1 Introduction

As observed in the 2022 report of the Senate Economics References Committee, titled *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees’ Remuneration*:

With increasing public scrutiny following numerous high-profile cases, wage theft and the operation of the Australian workplace relations framework has ... become the focus of numerous government inquiries, reviews, and consultations in recent years, both at a federal and state level, with significant and wide-ranging recommendations for reform.

These inquiries, alongside an increasing evidence base and plethora of media investigations, suggest that non-compliance with Australia’s minimum employment laws has become pervasive, as well as ‘endemic’ in certain sectors, and they highlight the need for government action.¹³⁵

It is against this background of inquiries and reform agendas that I seek to contextualise the policy developments that led to the criminalisation of certain types of wage theft in Victoria, Queensland and recently in the federal jurisdiction. My thesis focuses on the Victorian offences, but examining the broader policy developments is necessary to understand the interactions and tensions between the Victorian and the federal developments. I explain the reforms in the context of the national labour regulation system governed by the *Fair Work Act* and how various state, territory and federal inquiries, and different recommendations and reform processes, are related.

In this chapter, I present the policy developments that led to criminalisation of wage theft in Australian jurisdictions in Section 2.2. In Section 2.3, I address the specific developments around the *Wage Theft Act*, which is the focus of my thesis. In Section 2.4, I explain the importance of my examination of the Victorian offences in the context of recent legislative developments.

¹³⁵ Senate Economics References Committee, Parliament of Australia, *Systemic, Sustained and Shameful: Unlawful Underpayment of Employees’ Remuneration* (Report, March 2022) 6 (*2022 Senate Report: Systemic, Sustained and Shameful*).

2.2 Criminalisation of ‘Wage Theft’ in Australia: Policy Directions

An important part of the background to the shift to criminalisation of wage theft in Australia, is Australia’s national system of labour regulation. This background is important to explain why state jurisdictions, including Victoria, introduced criminal offences for wage theft, rather than seek to increase civil penalties. The states no longer have a significant role in setting labour standards in Australia. I also describe the broader reform background, noting that various reform processes and inquiries have occurred simultaneously in different state and federal jurisdictions.

2.2.1 Current Labour Regulation System

For the first century of Australia’s federal and state-based legal system after Federation in 1901, the states were largely responsible for regulating labour standards, aided by federal conciliation and arbitration powers in relation to ‘interstate disputes’ about pay and labour conditions.¹³⁶ Unions had a major role in standard setting and enforcement.¹³⁷ This understanding was upended in the early 2000s by significant national legislative reforms that sought to rely on a different constitutional power to regulate industrial relations: the corporations power in the *Constitution*.¹³⁸ In Australia, the Federal Government has powers to legislate over matters expressly provided for in s 51 of the *Constitution*. In contrast, the states have broader legislative powers over subject matter. In 2005, the Howard-led Coalition Government introduced the *Workplace Relations Amendment (Work Choices) Act 2005* (‘*Work Choices*’).¹³⁹ The introduction of these laws was contested by states and key unions because it reduced the role of states in setting labour regulations, including over pay and other related conditions.¹⁴⁰ In the landmark High Court decision on *Work Choices*, the laws were upheld, thus expanding the role of the Federal Government in relation to industrial relations. The result of this decision is that industrial regulation and labour standard setting has largely shifted from the states to

¹³⁶ *Australian Constitution* s 51(xxxv) provides that the Commonwealth has: ‘power to make laws for the Commonwealth with respect to ... conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’. See generally Laura Bennett, *Making Labour Law in Australia: Industrial Relations, Politics and Law* (Law Book Co, 1994).

¹³⁷ Miles Goodwin and Glenda Maconachie, ‘Unpaid Entitlement Recovery in the Federal Industrial Relations System: Strategy and Outcomes 1952–95’ 49(4) *Journal of Industrial Relations* 523.

¹³⁸ *Australian Constitution* s 51(xx).

¹³⁹ See Andrew Stewart, ‘Testing the Boundaries: Towards a National System of Labour Regulation’ in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 19 (‘Testing the Boundaries’).

¹⁴⁰ *New South Wales v Commonwealth* (2006) 229 CLR 1.

be predominately administered in the federal jurisdiction through a national system of industrial relations.¹⁴¹

The approach to regulating employment conditions through a federally administered system has continued in the *Fair Work Act*, which is now the current major piece of legislation governing industrial relations in Australia.¹⁴² These events have significantly limited the extent to which states can legislate over terms and conditions of employment. Many states, including Victoria, also referred broader subject matter powers over other employers who were not corporations to the Commonwealth to aid a national system of regulation of labour-related issues.¹⁴³ This choice to refer subject matter powers to the Commonwealth has limited the type of legislative responses that states can take to address wage theft.

This context is important background for understanding the issues raised in the High Court challenge to the Victorian offences in *Rehmat & Mehar Pty Ltd v Hortle*, which will be discussed in Section 2.3.2.

2.2.2 Minimum Labour Standards in Australia

Before addressing the developments linked to criminalisation, I set out how minimum labour standards are protected in Australia. The *Fair Work Act* covers a range of topics and includes provisions relating to terms and conditions of employment.¹⁴⁴ Minimum labour standards for employees are largely regulated by the *Fair Work Act*. It includes the 11 National Employment Standards¹⁴⁵ and supports the minimum standard obligations owed in industrial instruments, such as modern awards or enterprise agreements, and in individual employment agreements. The minimum standards imposed by the National Employment Standards are protected as the minimum entitlements for employees and must not be overridden by modern awards, enterprise agreements or individual agreements.¹⁴⁶ The types of minimum standard obligations that are supported by the *Fair*

¹⁴¹ Stewart, 'Testing the Boundaries' (n 139).

¹⁴² Andrew Stewart and Anthony Forsyth, 'The Journey from Work Choices to Fair Work' in Anthony Forsyth and Andrew Stewart (eds), *Fair Work: The New Workplace Laws and the Work Choices Legacy* (Federation Press, 2009) 1, 6–13.

¹⁴³ See, eg, *Fair Work (Commonwealth Powers) Act 2009* (Vic).

¹⁴⁴ *Fair Work Act* s 5.

¹⁴⁵ The National Employment Standards includes obligations relating to: maximum weekly hours; requests for flexible working arrangements; casual conversion; parental leave and related entitlements; annual leave; personal/carer's leave, compassionate leave and paid family and domestic violence leave; community service leave; long service leave; public holidays; notice of termination and redundancy pay; the provision of the Fair Work Information Statement and Casual Employment Information Statement: s 61(2).

¹⁴⁶ *Fair Work Act* s 55.

Work Act include requirements for minimum rates of pay, leave entitlements and casual loadings, and loadings for work that occurs on weekends, at night or on public holidays, for example. The *Fair Work Act* also creates record-keeping obligations, including provisions that prescribe the information that must be recorded in employee records and pay slips, and includes provisions to prohibit ‘false and misleading’ record-keeping practices in relation to the employee records and pay slips.¹⁴⁷

The *Fair Work Act* contains civil remedy powers, including the capacity to seek court-ordered penalties for contraventions and recoupment orders, which may be used in the event of breaches of minimum labour standards, including breaches of the National Employment Standards contained in the *Fair Work Act*, and other minimum labour obligations owed in industrial instruments, such as awards and enterprise bargaining agreements and individual contractual agreements.¹⁴⁸ The *Fair Work Act* distinguishes between contraventions and serious contraventions for breaches, and it applies higher penalties for serious contraventions. To satisfy the contravention provisions, mental elements are not relevant to evaluating liability. If the conduct is non-compliant with an obligation and is included in the table in s 539 of the *Fair Work Act* that deems it a civil remedy provision, then it satisfies the contravention requirements. In contrast, serious contravention provisions have knowledge requirements—that is, the employer must either ‘knowingly’ or ‘recklessly’ contravene the provision.¹⁴⁹ In the Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, it was said that the additional category of serious contraventions, were justified as a response to ‘concerns that civil penalties under the *Fair Work Act* are currently too low to effectively deter unscrupulous employers who exploit vulnerable workers because the costs associated with being caught are seen as an acceptable cost of doing business’.¹⁵⁰ The *Fair Work Act* also contains various provisions to attribute liability to employers, who are often corporations,¹⁵¹ and to key individuals who are ‘involved in’ the contravention.¹⁵² Such attribution provisions are common in federal statutes.

The *Fair Work Act* also establishes the Fair Work Ombudsman (‘FWO’) as a federal labour inspectorate. The FWO has the standing to investigate and bring civil proceedings

¹⁴⁷ *Fair Work Act* ss 535–6.

¹⁴⁸ *Ibid* ss 545–6, 549.

¹⁴⁹ *Ibid* s 557A, amended by *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) sch 1 items 146–8.

¹⁵⁰ Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 (Cth) ii.

¹⁵¹ *Fair Work Act* s 793.

¹⁵² *Ibid* s 550.

in relation to contraventions of civil remedy provisions contained in the *Fair Work Act*. The FWO is not the only body or person who can bring legal proceedings for breaches. For example, individuals who are affected by contraventions, and others such as unions, may also have express statutory authority to bring civil proceedings to seek civil remedies in relation to contraventions of the minimum labour standards, including court-ordered penalties.¹⁵³ The FWO also has various other regulatory options, including issuing warnings and compliance notices, as well as the power to enter into enforceable undertakings, in relation to suspected underpayments or other contraventions of the *Fair Work Act*.¹⁵⁴

When the Victorian offences were introduced, there were no criminal offences operating in relation to the regulation and enforcement of terms and conditions of employment in the federal system.¹⁵⁵ However, on 7 December 2023, the Federal Labor Government secured the passage of new criminal offences to occur alongside federal enforcement, as well as increased penalties for other contraventions.¹⁵⁶ The offences commenced on 1 January 2025.¹⁵⁷

2.2.3 Policy Debates That Led to the Criminal Offences Category for ‘Wage Theft’

In this section, I provide an overview of the policy discussions and reform processes that led to the introduction of criminal offences targeting certain types of underpayments and non-compliance with minimum employment standards in state jurisdictions, despite labour standards largely being protected by federal industrial law for the majority of employees in Australia. I focus in this discussion on the actions of the government in the reform process. I will also contextualise the broader policy context, including the process that led the current Federal Labor Government to introduce criminal sanctions into the *Fair Work Act* in 2023.

¹⁵³ See *ibid* s 539(2).

¹⁵⁴ See Hardy and Howe ‘Out of the Shadows’ (n 26) 221, 222–37.

¹⁵⁵ Prior to the enactment of the federal criminal offence in 2023, criminal legal provisions were found in the *Fair Work Act* for ‘matters such as contempt of court, unlawful strike activity or failure to abide by orders of the federal Tribunal’ but were not expressly provided for contraventions of employment standards: Hardy, Howe and Kennedy, ‘Criminal Liability’ (n 13) 178.

¹⁵⁶ *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) sch 1 item 220, inserting *Fair Work Act* s 327A.

¹⁵⁷ Emilia Terzon, ‘Australian Bosses on Notice as “Deliberate” Wage Theft becomes a Crime’, *ABC News*, (30 December 2024).

2.2.3.1 Media Reports on Underpayment Scandals

The year 2015 is considered by many who examine wage theft in Australia as a key turning point in debate since it is the year in which two investigative media reports conducted jointly by ABC's *Four Corners* and the Fairfax newspapers exposed the widespread exploitation of largely migrant workers through deliberate underpayments.¹⁵⁸ The first program, 'Slaving Away', revealed significant exploitation of migrant workers in the horticulture and meat processing industries. These reports showed that workers were being underpaid, verbally harassed by their employers and housed in inadequate accommodation, with many workers obliged by their employers to have an amount of wages deducted to pay for the accommodation.¹⁵⁹ The second program, '7-Eleven: The Price of Convenience', revealed a model of underpayment in the 7-Eleven franchise networks, which largely affected international students and migrant workers.¹⁶⁰ The reports showed a culture of deliberately creating false records of hours of work and pay for those working in convenience stores and systemic underpayments of entitlements to workers.¹⁶¹ There was evidence of 'cashback' schemes in which employees were forced to return an amount of their earnings to the employer after their wages had been paid in full.¹⁶² As Murphy, Lovelock and Foley describe, these stories led to a series of investigative journalist reports that mobilised public attention:

After Adele Ferguson's 7-Eleven exposé, more newsrooms put top investigators on what became a kind of wage theft 'beat', resulting in new scandals. Even in the early days, before fully adopting the 'theft' phrase, most of these stories employed the theft narrative: they identified victims to empathise with, and villainous bosses to revile (indeed, allies of these 'villains' complained about exactly this). Increasingly they did adopt the actual phrase, and as they did, the media bandwagoning grew more intense. The frame helped drive this attention because, compared to subject-less, emotion-less 'underpayment', it had high drama, and rendered complex workplace conflicts as digestible, sensational stories.¹⁶³

¹⁵⁸ See, eg, Clibborn and Wright, 'Employer Theft' (n 22) 211; Murphy, Lovelock and Foley, 'Agenda Setting' (n 3) 5–6.

¹⁵⁹ 'Slaving Away', *Four Corners* (Australian Broadcasting Corporation, 4 May 2015).

¹⁶⁰ Adele Ferguson and Sarah Danckert, 'Revealed: How 7-Eleven Is Ripping Off Its Workers', *Sydney Morning Herald* (31 August 2015); '7-Eleven: The Price of Convenience', *Four Corners* (Australian Broadcasting Corporation, 31 August 2015).

¹⁶¹ See Fair Work Ombudsman, *Inquiry into 7-Eleven* (Report, 2016) ('*Inquiry into 7-Eleven*').

¹⁶² *Ibid* 59–60.

¹⁶³ Murphy, Lovelock and Foley, 'Agenda Setting' (n 3) 10 (citations omitted).

Murphy, Lovelock and Foley also connect the media interest to the growth in union activism on wage theft and, in turn, the decision for the Labor Party in opposition to use stories of wage theft to challenge the Morrison Coalition Government's industrial relations agenda.¹⁶⁴

At first, the scandals appeared to show widespread problems in traditionally blue-collar industries, such as hospitality, cleaning services, horticulture and retail.¹⁶⁵ Reporting of wage theft scandals in newspapers and other media sources became a common occurrence, with many employers admitting to non-compliance with wage entitlements and other instances in which non-compliance was exposed through investigations and court proceedings.¹⁶⁶ In early 2020, reporters from the *Sydney Morning Herald* in their explainer on wage theft identified several examples that had been reported, including underpayments in franchise networks, such as '7-Eleven, Caltex, Domino's Pizza, Pizza Hut, Retail Food Group'; restaurants, including those operated by George Calombaris, Neil Perry and Heston Blumenthal; and supermarkets.¹⁶⁷ Murphy, Lovelock and Foley argue that the public response to the underpayments by Calombaris's MADE Establishment Group, and the public dismay at an enforceable undertaking after an investigation of the establishment, led to a shift in the uptake in the use of the term wage theft, including by Federal Coalition politicians who had been reluctant to adopt the language previously.¹⁶⁸

Beyond the initial context, recent media pieces have revealed non-compliance with minimum entitlements in a range of large entities, including

- large scale underpayments of casual employees in Australian universities because of work expectations not factored into pay, for example, unpaid student consultations and insufficient time allowed for marking student assessments;¹⁶⁹

¹⁶⁴ Ibid.

¹⁶⁵ Adele Ferguson and Ben Schneiders, 'Underpayment as Business Model: What is Wage Theft?', *Sydney Morning Herald* (18 February 2020) ('What is Wage Theft').

¹⁶⁶ For a non-scholarly account of the investigations and underpayment scandals, see Ben Schneiders, *Hard Labour: Wage Theft in the Age of Inequality* (Scribe, 2022). Schneiders was one of the investigative journalists involved in the two key 2015 *Four Corners* reports.

¹⁶⁷ Ferguson and Schneiders, 'What is Wage Theft?' (n 165).

¹⁶⁸ Murphy, Lovelock and Foley, 'Agenda Setting' (n 3) 8–9. See also Stephen Clibborn, 'Australian Industrial Relations in 2019: The Year Wage Theft Went Mainstream' (2020) 62(3) *Journal of Industrial Relations* 331, 337.

¹⁶⁹ Angus Thompson, 'Universities on Workplace Watchdog's Wage Theft Priority List', *Age* (21 June 2022); David Marin-Guzman, 'University Wage Theft Tops \$159m: Union Tally', *Australian Financial Review* (5 December 2023).

- underpayments due to wrongly calculated deductions of annual leave entitlements for employees at BHP;¹⁷⁰
- underpayments due to the incorrect calculation of entitlements for terminated staff at the Reserve Bank of Australia;¹⁷¹
- underpayments of law graduates at large commercial law firms, due to long hours resulting in salary payments that fell below the award rates despite higher base rates of pay in their employment agreements;¹⁷² and
- underpayment of workers on individual agreements whose rates of pay fell below the rates in the enterprise agreement at the Commonwealth Bank of Australia.¹⁷³

The reporting demonstrated that payroll non-compliance issues were not limited to any particular sector, industry or category of worker, instead, that they were much more widespread.

2.2.3.2 State, Territory and Federal Government Inquiries into Underpayments

At the federal level, Senate Committees have investigated a broad range of acts of underpayments and non-compliance with workplace obligations, including

- the exploitation of temporary work visa holders,¹⁷⁴
- corporate avoidance of the *Fair Work Act*,¹⁷⁵
- wage theft and non-compliance with the superannuation guarantee,¹⁷⁶
- the exploitation of general and specialist cleaners working in retail chains as employees of contracting or subcontracting cleaning companies¹⁷⁷ and

¹⁷⁰ Peter Ker and David Marin-Guzman, 'BHP Admits to \$430m in Underpayments Over More Than a Decade', *Australian Financial Review* (1 June 2023).

¹⁷¹ "'Beggars Belief': Reserve Bank Apologises for Underpaying Staff", *Australian Financial Review* (17 April 2023).

¹⁷² Hannah Wootton and David Marin-Guzman, 'Woolies' Law Firm Underpaid its Own Staff', *Australian Financial Review* (20 January 2020).

¹⁷³ David Marin-Guzman, 'CBA 'Knowingly' Underpaid Staff \$16m in Mass Use of Individual Agreements', *Australian Financial Review* (11 October 2021).

¹⁷⁴ Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, March 2016)

¹⁷⁵ Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act 2009* (Report, September 2017) ('*2017 Senate Report: Corporate Avoidance of the Fair Work Act*').

¹⁷⁶ Senate Economics References Committee, Parliament of Australia, *Superbad: Wage Theft and Non-Compliance of the Superannuation Guarantee* (Report, May 2017) ('*2017 Senate Report: Superbad*').

¹⁷⁷ Senate Education and Employment References Committee, Parliament of Australia, *Wage Theft? What Wage Theft?! The Exploitation of General and Specialist Cleaners Working in Retail Chains for Contracting or Subcontracting Cleaning Companies* (Report, November 2018).

- the unlawful underpayment of employees' remuneration.¹⁷⁸

The Senate Economics References Committee's 2022 report, *Systemic, Sustained and Shameful* was the output of an investigation that began in 2019 but was delayed because of the COVID-19 pandemic.¹⁷⁹ It sought to investigate the causes of wage theft and identify the effects of underpayment on victims and the broader community.¹⁸⁰ It also proposed recommendations to improve the legislative framework in order to reduce instances of underpayments. Some key recommendations for reform included the criminalisation of wage theft, increased penalties under the civil regime, the inclusion of the superannuation guarantee in the National Employment Standards and the introduction of a national labour hire scheme.¹⁸¹

Alongside Senate Committees, other key federal investigations and consultations have investigated related issues.¹⁸² One key inquiry was the Migrant Worker Taskforce that was announced on 19 May 2016. The Federal Government engaged Allan Fels and David Cousins to conduct a review of migrant worker exploitation which were the focus of the initial scandals reported at 7-Eleven and in horticulture.¹⁸³ The 2019 *Migrant Workers' Taskforce Report* by Allan Fels and David Cousins is significant because it recommended criminalising wage theft at the federal level.¹⁸⁴ They identified that 'a series of underpayment cases ... have created a growing perception that the current regulatory model is unable to tackle serious and systemic underpayments of workers'.¹⁸⁵ Fels and Cousins recommended '[t]he introduction of criminal sanctions [as it] would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe'.¹⁸⁶ In 2019, when the *Migrant Workers' Taskforce Report* was published, Kelly O'Dwyer (the then Coalition Industrial Relations Minister) gave in principle support for the recommendations made

¹⁷⁸ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135).

¹⁷⁹ Ibid 1.

¹⁸⁰ Ibid 3.

¹⁸¹ Ibid ix–xii, ch 5.

¹⁸² See, eg, *Migrant Workers' Taskforce Report* (March 2019); *Black Economy Taskforce* (Final Report, October 2017).

¹⁸³ See Department of Employment and Workplace Relations, *Migrant Workers' Taskforce—Terms of Reference* (Web Page, 14 December 2022) <<https://www.dewr.gov.au/migrant-workers-taskforce/resources/migrant-workers-taskforce-terms-reference>>.

¹⁸⁴ *Migrant Workers' Taskforce* (n 181) 9–12. See also Allan Fels and David Cousins, 'The Migrant Workers' Taskforce and Australian Government's Response to Migrant Worker Wage Exploitation' (2019) 84 *Journal of Australian Political Economy* 13.

¹⁸⁵ *Migrant Workers' Taskforce* (n 181) 87.

¹⁸⁶ Ibid. See *Black Economy Taskforce* (n 182) which recommends criminalising 'the worse offences' in relation to the shadow economy: at 176.

by Fels and Cousins, including their recommendation for the criminalisation of certain conduct.¹⁸⁷ This report remained relevant and was cited as forming part of the Albanese Government’s justification for introducing various amendments aimed at protecting employee entitlements (discussed in Section 2.2.3.5 below).¹⁸⁸

2.2.3.3 Failed Attempt by Former Coalition Government to Introduce Criminal Wage Theft Offences

The issue of the criminalisation of wage theft was subsequently discussed as a policy reform at the federal level. In 2019 and 2020, the Attorney-General’s Department sought public consultation on aspects of the operation of the *Fair Work Act* to inform a package of industrial relations reforms, including on seeking feedback on the possibility of adopting criminal sanctions for certain types of breaches.¹⁸⁹ The manner in which criminalisation was to occur was a specific topic about which feedback was sought as part of the consultation process.¹⁹⁰ The issue of enforcement and compliance was also a topic of discussion in roundtables on industrial relations, which saw members of industry groups, unions and employer associations meet to discuss potential industrial reforms prior to the introduction of the Morrison Government’s reform Bill, the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (Cth), commonly known as the ‘Omnibus Bill’.¹⁹¹ The unamended Bill introduced criminal sanctions for certain types of wage theft.¹⁹² It contained an offence targeting an employer who ‘dishonestly engages in a systematic pattern of underpaying one or more employees’.¹⁹³ The Bill required that the court, when considering whether the employer engaged in a systematic pattern of underpaying one or more employees, was to also have regard to other considerations, including ‘the number of underpayments’; ‘the period over

¹⁸⁷ Attorney-General’s Department (Cth), ‘Australian Government Response: Report of the Migrant Workers’ Taskforce’ (Media Release, 7 March 2019) 2–3.

¹⁸⁸ Tony Burke, ‘Albanese Labor Government to Criminalise Wage Theft’ (Media Release, 3 September 2023).

¹⁸⁹ Attorney-General’s Department (Cth), ‘Improving Protections of Employees’ Wages and Entitlements: Strengthening Penalties for Non-Compliance’ (Discussion Paper, 19 September 2019) (‘Strengthening Penalties for Non-Compliance’); Attorney-General’s Department (Cth), ‘Submissions Invited on Wage Theft Criminalisation’ (Media Release, 19 September 2019).

¹⁹⁰ See Melissa Kennedy, Submission to the Attorney-General’s Department (Cth) on *Discussion Paper Improving Protections of Employees’ Wage and Entitlements: Strengthening Penalties for Non-Compliance* (2019).

¹⁹¹ Christian Porter, ‘Memberships of IR Working Groups Announced’ (Media Release, 11 June 2020).

¹⁹² The ‘Omnibus Bill’ was the shorthand name for the Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020. See generally Andrew Stewart et al, ‘The (Omni)bus that Broke Down: Changes to Casual Employment and the Remnants of the Coalition’s Industrial Relations Agenda (2021) 34 *Australian Journal of Labour Law* 132.

¹⁹³ Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020 (Cth) sch 5 item 46 (‘Omnibus Bill’), inserting *Fair Work Act* s 324B.

which the underpayments occurred'; 'the number of employees affected by the underpayments'; 'the employer's response, or failure to respond, to any complaints made about the underpayments'; and whether the employer failed to comply with the *Fair Work Act* requirements concerning employee records or payslips.¹⁹⁴ As Hardy, Howe and Kennedy observe, the proposed offence in the 2020 'Omnibus Bill' overlapped significantly with the conduct that would be caught by the 'serious contravention' civil penalty provisions in the *Fair Work Act*.¹⁹⁵ The amendments that included criminalisation were abandoned during the process of negotiating the passage of the 'Omnibus Bill' in the Senate, resulting in the then Coalition Federal Government not introducing federally targeted criminal sanctions.¹⁹⁶ As Murphy, Foley and Lovelock explain, '[t]he Bill's other, more controversial and pro-employer provisions, saw the Senate crossbench remove many sections; the Coalition, robbed of its 'balancing' pro-employer provisions, in turn cut wage theft criminalisation from the package'.¹⁹⁷ Most of the measures in the Bill were abandoned, and only reforms relating to casual worker conditions were retained.¹⁹⁸

2.2.3.4 Introduction of State-Based Criminal Offences in Victoria and Queensland

At the same time as investigations and reform processes were occurring at the federal level, various state and territory jurisdictions were also considering the issue of wage theft. As part of these investigations, state governments sought submissions to the inquiries about the state-based responses that could be enacted to combat underpayments. Specific inquiries occurred in Victoria, Queensland, Western Australia, South Australia and Northern Territory.¹⁹⁹ The inquiries discussed a range of issues, including identifying the sources of underpayments, and also identified possible legislative reforms to tackle the problem. The criminalisation of certain types of wage theft was considered in all these state and territory jurisdictions as a possible measure.

¹⁹⁴ Ibid sch 5 item 46, inserting FW Act s 324B(5).

¹⁹⁵ Hardy, Howe and Kennedy, 'Criminal Liability' (n 13) 207.

¹⁹⁶ Paul Karp, 'Coalition Abandons Crackdown on Wage Theft as Senate passes Gutted Industrial Relations Bill', *The Guardian* (18 March 2021) ('Coalition Abandons Crackdown on Wage Theft').

¹⁹⁷ Murphy, Lovelock and Foley, 'Agenda Setting' (n 3) 9.

¹⁹⁸ Karp, 'Coalition Abandons Crackdown on Wage Theft' (n 196).

¹⁹⁹ Queensland Education, Employment and Small Business Committee, Parliament of Queensland, *A Fair Day's Pay for a Fair Day's Work? Exposing the True Cost of Wage Theft in Queensland* (Report, November 2018) ('*Wage Theft in Queensland*'); Tony Beech, *Inquiry into Wage Theft in Western Australia* (Final Report, June 2019) ('*Inquiry into Wage Theft in Western Australia*'); Select Committee on Wage Theft in South Australia, Parliament of South Australia, *Interim Report on Wage Theft in South Australia* (Report, 21 July 2020); Northern Territory Law Reform Committee, *Report on Wage Theft* (Report 48, January 2023).

In June 2020, Victoria enacted the *Wage Theft Act*, which commenced operation in July 2021. This was the first piece of legislation in Australia to introduce criminal offences relating to underpayments of employee entitlements, or conduct associated with wage theft.²⁰⁰ Soon after the Victorian Act was enacted, in September 2020 Queensland adopted legislation introducing criminal sanctions for certain offences structured as amendments to provisions in the *Criminal Code Act 1899* (Qld), relating to stealing and fraud.²⁰¹ Alongside the criminal law recommendations, other examples of state-led responses include the introduction of a labour hire industry registration scheme in Victoria,²⁰² and the expansion of state-based recovery mechanisms for the recovery of unpaid entitlements.²⁰³ The inquiry reports also recommended changes that could occur at the federal level to bolster the regulatory powers of the *Fair Work Act*.²⁰⁴

2.2.3.5 Recent Federal Criminal Law Developments Leading to Federal Criminal Wage Theft Offence

The Albanese Labor Government made an election commitment to legislate all the recommendations of the *Migrant Workers' Taskforce Report*, including the promise to criminalise certain kinds of wage theft.²⁰⁵ This taskforce report was previously endorsed by the Coalition Government.²⁰⁶ In early 2023, the Department of Employment and Workplace Relations sought feedback on the structure of the criminal offences in a Consultation Paper for public comment on the proposed offence structures.²⁰⁷ Unlike the previously proposed federal offence which included dishonesty as an element of the offence, the paper included three offence structures for discussion: the first option of knowledge-based offences, the second option of recklessness-based offences or the third

²⁰⁰ Hardy, Howe and Kennedy, 'Criminal Liability' (n 13) 176.

²⁰¹ *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld) items 4, 6. See *Criminal Code Act 1899* (Qld) ss 391(6A); 398(16) ('stealing by employers'). For an examination of the offences in Queensland, see Dietrich and Raj, 'Property, Stealing, and Other Concepts' (n 19).

²⁰² *Victorian Inquiry into the Labour Hire Industry and Insecure Work* (Final Report, 31 August 2016).

²⁰³ See, eg, Queensland Education, Employment and Small Business Committee, *Wage Theft in Queensland* (n 209) (Recommendation 8) 135.

²⁰⁴ See, eg, *Inquiry into Wage Theft in Western Australia* (n 198) (Recommendation 26) 167–8.

²⁰⁵ Australian Labor Party, *Secure Australian Jobs* (Web Page) <https://web.archive.org/web/20230515000000*/https://www.alp.org.au/policies/secure-australian-jobs> archived 18 June 2023.

²⁰⁶ See discussion of the *Migrant Workers' Taskforce Report* in Section 2.2.3.3.

²⁰⁷ Department of Employment and Workplace Relations, 'Compliance and Enforcement: Criminalising Wage Theft' (Web Page, 28 June 2023) <<https://www.dewr.gov.au/2023-workplace-reform-consultations/consultations/compliance-and-enforcement-criminalising-wage-theft>>; Department of Employment and Workplace Relations, 'Criminalising Wage Underpayments and Reforming Civil Penalties in the Fair Work Act 2009' (Consultation Paper, April 2023) ('Criminalising Wage Underpayments'). See also Melissa Kennedy, Submission to Department of Employment and Workplace Relations on *Consultation on Workplace Reform* (30 March 2023).

option, a combination of tiered knowledge-based and recklessness-based offences.²⁰⁸ That paper set out the offences as follows:

Option 1: Knowledge-based wage underpayment offence only

The offence would cover employers who **know** they are not paying an employee the amount to which that employee is entitled.

Option 2: Recklessness-based wage underpayment offence only

The offence would cover employers who are **aware of a substantial risk** that they are not paying an employee the amount to which that employee is entitled and proceed even though it is **unjustifiable to take that risk**.

Option 3: Tiered approach

Two offences would be inserted into the Fair Work Act: a **knowledge-based wage underpayment offence** and a **recklessness-based wage underpayment offence**. There could be different penalties applicable to each offence, reflecting a more graduated approach to criminal culpability.²⁰⁹

The Consultation Paper also indicated an intention to ensure that the criminal offences would have different legislative requirements compared with the ‘serious contravention’ provision in the *Fair Work Act*.²¹⁰ The paper did not offer any reasons as to why dishonesty was not an option for the offence.

On 4 September 2023, the Labor Government introduced the Fair Work Legislation Amendment (Closing Loopholes) Bill 2023. The Bill included a wide range of measures, including increased penalties for civil breaches of the *Fair Work Act* and the introduction of a criminal offence for certain types of wage theft. The offence was intended to ‘criminalise intentional wage theft’.²¹¹

The new offence finds its expression in s 327A of the *Fair Work Act*. An employer will commit an offence if they

- ‘are required to pay an amount to an employee (such as wages), or an amount on behalf of or for the benefit of an employee (such as superannuation), under the FW

²⁰⁸ Department of Employment and Workplace Relations, ‘Criminalising Wage Underpayments’ (n 207) 5.

²⁰⁹ Ibid (emphasis in the original).

²¹⁰ Ibid 12–13.

²¹¹ Explanatory Memorandum, Fair Work Legislation Amendment (Closing Loopholes) Bill 2023, 7.

Act, a fair work instrument or a transitional instrument (being a ‘required amount’), and

- intentionally engage in conduct (by doing or not doing something) that intentionally results in a failure to pay that required amount in full on or before the day the amount is due for payment’.²¹²

On 7 December 2023, it was advised that the Labor Party had obtained enough crossbench support to split the original Bill into two, with the first Bill including the amendments criminalising wage underpayments.²¹³ The Bill passed the Senate and the House of Representatives endorsed the amendments on the same day.²¹⁴ The then Employment and Workplace Relations Minister, Tony Burke, stated in a media release: ‘It means it will finally be a criminal offence for an employer to steal from a worker’s pay, closing a long-standing loophole that created unfair competition for the vast majority of businesses that do the right thing.’²¹⁵

2.3 Introduction of the *Wage Theft Act 2020* (Vic)

I now turn to the specific context of the introduction of the Victorian *Wage Theft Act*, which contains the offences I examine in this thesis.

On 26 May 2018, the Andrews Government pledged to make wage theft a criminal offence, as part of its re-election bid.²¹⁶ This policy was also recommended by the Victorian Legislative Assembly Penalty Rates and Fair Pay Select Committee in its report, *Inquiry into Penalty Rates and Fair Pay*.²¹⁷ This inquiry was established to examine ‘the impact on Victorians of the Fair Work Commission’s decision in 2017 to reduce penalty rates in the hospitality, fast food, retail and pharmacy sectors’.²¹⁸ In the media release announcing the policy to criminalise wage theft, Premier Daniel Andrews said: ‘Every worker has the right to get a fair day’s pay for a fair day’s work—the simple fact is underpaying workers is theft and it’s time it’s treated like that in our laws.’²¹⁹ The language of theft and stealing continued in later materials after the Andrews Government

²¹² Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 20. I address the federal offence further in Section 9.4.

²¹³ Paul Karp, ‘Labor’s Same-Job, Same-Pay Laws Pass Parliament after Deal with Lambie and Pocock’, *Guardian* (7 December 2023).

²¹⁴ *Ibid.*

²¹⁵ Tony Burke, ‘Closing Loopholes’ (Media Release, 7 December 2023).

²¹⁶ Andrews, ‘Dodgy Employers to Face Jail for Wage Theft’ (n 1).

²¹⁷ Penalty Rates and Fair Pay Select Committee, Parliament of Victoria, *Inquiry into Penalty Rates and Fair Pay* (July 2018) (Recommendation 6) 46.

²¹⁸ *Ibid.* vii.

²¹⁹ Andrews, ‘Dodgy Employers to Face Jail for Wage Theft’ (n 1).

was successfully re-elected. For instance, in the Second Reading Speech that introduced the Wage Theft Bill 2020 to Parliament for debate, Victorian Attorney-General Jill Hennessey explained that the purpose of the Bill was to ‘create new wage theft offences, targeting employers who steal pay and other employee entitlements, or engage in efforts to obscure wage theft through dishonest record keeping practices’.²²⁰ The reforms were explicitly introduced to target a perceived gap in the federal regulation of the employee entitlements. In the Second Reading Speech, the government emphasised that the criminal sanctions were intended to fill a gap, as the civil penalties at the federal level ‘do not provide a strong enough deterrent to prevent wage theft’.²²¹

Despite the use of the term ‘theft’ in the title of the Act, as the ‘*Wage Theft Act*’, and of the term ‘steal’ in the Second Reading Speech,²²² the actual offence relating to the non-payment or incomplete payment of employee entitlements is worded as a ‘dishonest withholding of employee entitlements’. The specific wording of the s 6 offence that relates to ‘withholding’ does not contain any reference to theft or stealing,²²³ which are both terms that have long been defined and used in the *Crimes Act 1958* (Vic). The *Wage Theft Act*, while utilising the popular rhetoric of ‘theft’ to describe the conduct, relies on separate statutory definitions to demarcate the offences, rather than adopting legal concepts commonly associated with theft or stealing. I treat them as newly enacted offences in my analysis and conduct statutory interpretation based on the text of the offences, instead of treating the offences as a form of theft.²²⁴

2.3.1 Structure of the Act

The *Wage Theft Act* creates ‘offences relating to the theft of employee entitlements and the keeping of records relating to employee entitlements’, establishes Wage Inspectorate Victoria and sets out the functions and purposes of the inspectorate.²²⁵ As explained in Section 3.4.1, the term ‘employee entitlement’ includes obligations relating to minimum standards that are supported by the *Fair Work Act*, including obligations owed in the National Employment Standards, industrial instruments such as awards and enterprise agreements, and the record-keeping obligations set out in the *Fair Work Act*, and accompanying legislation. Wage Inspectorate Victoria is a specialised enforcement

²²⁰ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097.

²²¹ *Ibid.*

²²² *Ibid.*

²²³ *Wage Theft Act* s 6(1).

²²⁴ See Section 3.2 for discussion of statutory interpretation principles for criminal offences.

²²⁵ *Wage Theft Act* s 1(a)–(c).

agency responsible for the enforcement and investigation of offences contained in the *Wage Theft Act*. The inspectorate also administers other Victorian labour law acts.²²⁶ The agency has a range of functions, including investigating the ‘wage theft offences’, bringing criminal proceedings, collaborating with other agencies, including with the Director of Public Prosecutions in Victoria in criminal prosecutions, and sharing information with other enforcement and investigation bodies, such as the FWO (a federally based labour inspectorate) and the Australian Tax Office.²²⁷ The Wage Inspectorate Victoria also has educative functions to promote the awareness of obligations in order to assist in improving compliance with them. The specific Compliance and Enforcement Policy is provided on the website of the inspectorate, which aids an assessment of when it will prosecute for offences.²²⁸

2.3.2 First Criminal Charges Brought under the Victorian Act

In late November 2022, Wage Inspectorate Victoria brought its first criminal charges in the Magistrates’ Court for offences under the *Wage Theft Act*.²²⁹ The charges were brought against Rehmat & Mehar Pty Ltd (trading as The Macedon Lounge) and its officer, Gaurav Setia for ‘dishonestly withholding over \$7,000 in employee entitlements, including wages, penalty rates and superannuation, in relation to four young former staff members’.²³⁰ The charges relate to alleged dishonest withholding of entitlement offences pursuant to ss 6(1), 6(7) of the *Wage Theft Act* in relation to the employer company and its officer. The relevant sources of the entitlements are clauses in the *Restaurant Industry Award 2020*.

In February 2023, the two parties charged under the *Wage Theft Act* sought declaratory relief in the High Court of Australia that the charges and the investigations undertaken by Wage Inspectorate Victoria be declared invalid on the basis that the relevant provisions were inoperative, as a result of s 109 of the *Constitution*, because of inconsistency with the *Fair Work Act*. Robert Hortle, the Commissioner of Wage Inspectorate Victoria, was named as the defendant. In the event of a constitutional inconsistency between state and federal law, the effect of s 109 is that the state law is rendered inoperative to the extent

²²⁶ *Child Employment Act 2003* (Vic); *Long Service Leave Act 2018* (Vic); *Owner Drivers and Forestry Contractors Act 2005* (Vic).

²²⁷ See, eg, *Wage Theft Act* s 20.

²²⁸ Wage Inspectorate Victoria, *Compliance and Enforcement Policy* (September 2021).

²²⁹ Wage Inspectorate Victoria, ‘Restaurant and Officer to Face Criminal Charges under Victorian Wage Theft Laws in an Australian First’ (Media Release, 29 November 2022).

²³⁰ *Ibid.*

of the inconsistency. In court documents dated 15 March 2023, the parties alleged that the powers are invalid as the *Fair Work Act* ‘intends to be (and is) an exhaustive statement of law to apply to national system employers and national system employees concerning the terms and conditions of the FW Act, and the system of administration, inspection, and enforcement of those terms and conditions’.²³¹ The parties also alleged that the *Wage Theft Act* ‘alters, impairs, detracts or directly collides with the FW’s Act’s system of administration, inspection, and enforcement of terms and conditions afforded under the FW Act’.²³²

On 22 May 2023, Gordon J ordered that the matter be heard by the full court in the High Court’s original jurisdiction to hear constitutional matters. From that date until 27 November 2023, the matter was proceeding on the basis that it would be heard by the full court at a two-day hearing set for 5 to 6 December 2023. The parties, including the named applicants (Mr Setia and his company) and the defendant, Mr Hortle, who held the office as the Commissioner of Wage Inspectorate of Victoria, as well as interveners who included the Attorney-Generals of Northern Territory, South Australia, Queensland, New South Wales and Victoria, had followed court-ordered deadlines for filing court materials.²³³

On 27 November 2023, the defendant made an application to have the matter dismissed from the High Court on the basis that with the charges withdrawn, there was no longer a ‘matter’ that could be considered by the court.²³⁴ In that application, it is stated that Wage Inspectorate Victoria decided to withdraw all the charges on 15 November 2023.²³⁵ On 23 November 2023, Mr Hortle in his capacity as the Commissioner of Wage Inspectorate Victoria provided Mr Setia and the company (the plaintiffs in the High Court) with an undertaking that there would be no filing of further charges brought by Wage Inspectorate Victoria and that any information obtained during the investigation by the agency ‘would not be provided to any other investigative or prosecutorial bodies, including the FWO, the Commonwealth Director of Public Prosecutions, the Victorian Director of Public Prosecutions, Victoria Police or the Australian Federal Police’.²³⁶ On 24 November 2023,

²³¹ *Rehmat & Mehar Pty Ltd*, ‘Submission in Support of Application for Directions’, Submission in *Rehmat & Mehar Pty Ltd v Hortle*, M16/2023, 15 March 2023.

²³² *Ibid.*

²³³ High Court of Australia, Case M16/2023 (Web Page) <https://www.hcourt.gov.au/cases/case_m16-2023>.

²³⁴ Hortle, ‘Notice of Constitutional Matter’, Submission in *Rehmat & Mehar Pty Ltd v Hortle*, M16/2023, 27 November 2023.

²³⁵ *Ibid* [7].

²³⁶ *Ibid* [8].

the Magistrate’s Court of Victoria granted leave for all changes to be withdrawn and struck out, with the undertaking annexed to the court file.²³⁷ This ended the criminal charges against Mr Setia and Rehmat & Mehar Pty Ltd.²³⁸

On 1 December 2023, Gageler CJ ordered that the two days of hearings that had been set for 5 and 6 December be vacated owing to developments arising in relation to the original charges.²³⁹ New deadlines for submissions of documents were set to assess whether there remained ‘a matter’ that permitted the continuation of the proceedings in the High Court. In submissions, the plaintiffs (Mr Setia and Rehmat & Mehar Pty Ltd) argued that the lawfulness of the Victoria charges and the investigation directly relates to the question of whether Wage Inspectorate Victoria engaged in tortious conduct causing the plaintiffs damages owing to an invalid investigation.²⁴⁰ The plaintiffs argued in the High Court that the constitutional issues remained live questions on the basis they related to the assessment of any damages that may arise on the basis of unlawful investigation and exercise of warrants against the plaintiffs.²⁴¹ On 18 January 2024, the High Court challenge was discontinued, perhaps because a settlement agreement was reached between the parties.²⁴²

David Marin-Guzman, a journalist who writes for the *Australian Financial Review*, reported: ‘The Macedon Lounge case was the first, and remains the only, wage prosecution under the Victorian laws’.²⁴³ He observed: ‘At the time [Victoria chose to enact the offences], the government was criticised by the opposition and legal experts for wasting millions of dollars on laws that would be made redundant by upcoming federal laws or otherwise rendered unconstitutional.’²⁴⁴ Mr Setia faced a maximum penalty of jail for ‘\$7,265 in alleged underpayments’, as well as a significant fine.²⁴⁵ The Macedon Lounge business closed on 31 January 2023, the company made backpay to the

²³⁷ Ibid [9].

²³⁸ David Marin-Guzmann, ‘Landmark Wage Theft Case Collapses’, *Australian Financial Review* (1 December 2023).

²³⁹ *Rehmat v Hortle* [2023] HCATrans 177 (1 December 2023).

²⁴⁰ Rehmat & Mehar Pty Ltd, ‘Plaintiff’s Submission in Response to the Defendant’s Application’, Submission in *Rehmat & Mehar Pty Ltd v Hortle*, 30 November 2023.

²⁴¹ Ibid.

²⁴² High Court of Australia, Case M16/2023 (Web Page) <https://www.hcourt.gov.au/cases/case_m16-2023>.

²⁴³ Marin-Guzmann, ‘Landmark Wage Theft Case Collapses’ (n 238).

²⁴⁴ Ibid.

²⁴⁵ Ibid.

employees on 23 April 2023, and Mr Setia and his business faced criminal charges for a period of a year before the charges were dropped.²⁴⁶

A High Court challenge to the validity of the Victorian scheme was predicted by many from the outset of the calls to criminalise wage theft in a state jurisdiction.²⁴⁷ In light of the decision to drop the charges against Mr Setia and the company, Macedon Lounge, it is possible that both Victoria and Queensland might choose to repeal their statutory provisions on wage theft, which would result in the new federal offences being the only targeted relevant criminal offences for underpayments.²⁴⁸

On 14 December 2023, Victorian Premier Jacinta Allen announced that the Victorian government intended to repeal the Victorian offences. Allen stated: ‘Now that the bill has been passed by Federal Parliament, the Commonwealth legislation in practical terms overtakes the Victorian wage theft scheme and we therefore intend to repeal the Victorian offences to avoid uncertainty for the community and businesses.’²⁴⁹ The *Wage Theft Amendment Act 2025* (Vic) gave effect to the Victorian government’s decision to repeal the offences and associated compliance and enforcement functions, following the commencement of the Commonwealth offences.²⁵⁰ The *Wage Theft Amendment Act 2025* (Vic) received Royal Assent on 2 September 2025. The amendments repealing the Victorian wage theft offences will commence on 2 April 2026, unless proclaimed at an earlier date.

2.4 The Consequences of the Repeal of Victoria’s Wage Theft Offences for This Thesis

My analysis of the Victorian offences remains useful to those who are seeking to understand the merits or otherwise of Victoria’s particular form of criminalisation of wage theft. The recent repeal of the offences does not diminish that impact of my analysis,

²⁴⁶ Rehmat & Mehar Pty Ltd, ‘Plaintiff’s Submission in Response to the Defendant’s Application’ Submission in *Rehmat & Mehar Pty Ltd v Hortle*, 30 November 2023 [19] fn 7.

²⁴⁷ See, eg, Tess Hardy and Melissa Kennedy, Submission to Department of Mines, Industry Regulation and Safety, Parliament of Western Australia, *Inquiry into Wage Theft in Western Australia* (2019) 10–11; Melissa Kennedy, Submission to Victorian Government on *Consultation Paper on the Wage Theft Bill 2020* (2020); Matthew Minucci, ‘An Overview of Wage Theft Offences in Victoria’ (Seminar Paper, Law Institute of Victoria, 26 February 2021).

²⁴⁸ Other general state criminal offences, such as obtaining financial advantage by deception, or conspiracy to defraud, remain available.

²⁴⁹ Jacinta Allen, ‘Commonwealth Follows Victoria’s Lead on Wage Theft’ (Media Release, 14 December 2023).

²⁵⁰ Parliament of Victoria, *Parliamentary Debates*, Legislative Assembly, 2 April 2025, 1404.

which is relevant in the Australian context and other countries who are seeking to criminalise wage theft.²⁵¹

Green justifies the framework I adopt as he views the concept of ‘moral desert as a side constraint on whatever other rationale exists for imposing criminal sanctions (such as some version of consequentialism)’.²⁵² This approach requires a step back from the ready assumption that criminalisation is justified as a regulatory tool to achieve compliance to instead consider what the offence structure is actually capturing, whether it can be supported by theoretical justifications for criminalisation that connect to moral concepts in the terms of the Victorian offences were drafted.

Green’s framework is helpful for analysing criminal offences beyond the immediate Victorian context. The approach I adopt in the thesis could be used to examine other criminal wage theft offences (or similar offences) that occur in other Australian and international common law jurisdictions. In Australia, the newly enacted criminal offence in s 327A of the *Fair Work Act* would be the most obvious offence to examine, particularly given the significance of federal legislation in labour regulation in Australia and the choice to include the offence to operate alongside civil enforcement mechanisms, which can include court ordered civil penalties for breaches. Looking internationally, New Zealand has recently enacted legislation amending its *Crimes Act 1961* (NZ) to insert a wage theft offence that deems the intentional failure of employer to pay, without reasonable excuse, a type of theft.²⁵³ A close examination of the Victorian offences through Green’s framework demonstrates a way to critically analyse any new wage theft offences to assess the degree to which those offences are supported from a moral perspective. It also offers a way to examine other novel offences. The use of Green’s framework to study the Victorian wage theft offences operates as test of concept. It allows me to test whether Green’s framework is fit for examining criminal wage theft. The conclusions that I reach about the Victorian wage theft offences could be compared with other similar offences to enable better mapping of what could be considered criminal (from a moral perspective) about wage theft and may also be applied to other offences.

²⁵¹ *Wage Theft Amendment Act 2025* (Vic).

²⁵² Stuart P Green, *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age* (Harvard University Press, 2012) 71 (‘*Theft Law*’).

²⁵³ *Crimes Act 1961* (NZ) s 220AA inserted by *Crimes (Theft by Employer) Amendment Act 2025* (NZ) item 5. The *Crimes (Theft by Employer) Amendment Act 2025* (NZ) also inserts this offence into the definition of ‘crime involving dishonesty’ in s 2(1) of the *Crimes Act 1961* (NZ), even though dishonesty is not an element of the offence.

2.5 Chapter Summary

In this chapter, I have tracked the policy development process that led to the criminalisation of wage theft in Victoria. I have also explained why the analysis of the Victorian offences through Green's framework remains a valuable case study for understanding criminal wage theft, despite the repeal of the wage theft offences in Victoria.

This chapter has presented the policy context that led to the enactment of the Victorian offences and the very recent introduction of federal-based criminal wage theft offences. I have explained the policy directions, including by contextualising the state, territory and federal tensions over the creation of the laws that include criminal wage theft offences. I have focused on the legislative reform processes, rather than on broader explanations for wage theft, including, for example, identifying the drivers for non-compliance, or the workers who are most affected by underpayments.

In the next chapter, I closely examine the statutory requirements of the *Wage Theft Act*, including identifying the key elements of the offence that assist in my application of Green's framework in Part II and Chapter 8 of the thesis.

Chapter 3: The *Wage Theft Act 2020* (Vic) Offences

3.1 Introduction

In this chapter, I consider the requirements of the key employee entitlement offences contained in the *Wage Theft Act*,²⁵⁴ namely, the s 6 dishonest withholding of employee entitlement offences.²⁵⁵ The s 6 offences are novel in operation and scope. The s 6 offences also cover subject matter that is more ordinarily thought of when contemplating wage theft. I use my findings in this chapter regarding the elements to guide my application of Stuart Green’s analytical framework to those offences.²⁵⁶ The approach I take of closely analysing the specific offences to discern the key elements is consistent with the approach Green takes as a precursor to applying his framework to specific criminal offences—as discerning what the offences cover and how they likely operate is a necessary step in the analytical process adopted in the framework to analyse criminal offences.

The specific elements of the Victorian wage theft offences have not directly been considered or interpreted by judicial authority. I use this chapter to consider how the offences would likely be interpreted. I note that a range of statutory ambiguities affect the success of my analysis in later sections of the thesis. To aid the analysis in the chapter, I attempt to ascertain the types of issues that may arise in relation to establishing the charges by considering a factual scenario that arose in the Federal Court of Australia in relation to contraventions of the *Fair Work Act*.²⁵⁷ From the facts of the case, I contemplate the issues that may arise in the interpretation of key elements of the offences, including areas of uncertainty in application.

3.2 Criminal Law Offences: Principles of Interpretation

Since, as indicated in the previous section, the interpretation of the Victorian wage theft offences has not received judicial guidance,²⁵⁸ I apply the general rules of criminal law

²⁵⁴ I extract key provisions of the *Wage Theft Act* in Appendix A. The *Wage Theft Act* also includes two record-keeping offences: ss 7(1), (2) (dishonest falsification of employee record offences) and ss 8(1), (2) (dishonest failure to keep employee record offences).

²⁵⁵ *Wage Theft Act* (Vic) ss 6(1), (7).

²⁵⁶ For an overview of the framework, see Chapter 4.

²⁵⁷ *Fair Work Ombudsman v DTF World Square Pty Ltd* (in liq) [No 3] [2023] FCA 201 (‘*DTF World Square Pty Ltd*’).

²⁵⁸ The Victorian Parliament has recently repealed the offences: *Wage Theft Amendment Act 2025* (Vic). See discussion Section 2.4.

statutory interpretation to discern how a court is likely to view the elements of the offences.

The application of statutory interpretation principles is key to understanding criminal offences, as most criminal offences are found in statute. As Jeremy Gans writes, ‘statutory interpretation is the core skill required to study contemporary criminal law’.²⁵⁹ Criminal statutory interpretation involves a combination of general principles of statutory interpretation, modified by specific presumptions that are found in relation to criminal statutes.²⁶⁰ In Australia, the general statutory principles are guided by various High Court judicial statements, such that statutory interpretation involves the consideration of three factors: ‘the statutory text, context and purpose’.²⁶¹ For criminal offence provisions, the key guide is the specific language of the statute. As Nettle J observes, ‘[t]he safest guide is the language of the legislation and the requirement for clarity in the framing of criminal provisions’.²⁶² However, the context of words and purpose of the statute assist in understanding the ‘legal meaning’.²⁶³ In the event of ambiguity, and as a last resort, the statute is interpreted in favour of the accused.²⁶⁴ Other important presumptions include the presumption that statutorily prescribed offences include a requirement for mens rea (ie ‘a guilty mind’) rather than strict or absolute liability.²⁶⁵

Next, I present some specific examples of how criminal statutory interpretation principles may help guide the resolution of the key elements of the relevant criminal offence. As Gans writes:

The meaning of a difficult word in an offence provision may be resolved (or highlighted) by the application of a relevant rule of responsibility to that word (for example, a word requiring the court to make a moral judgment, such as indecency, or dishonesty, or exploitation, is less problematic if the accompanying fault element requires an awareness of the possibility of that moral judgment).²⁶⁶

²⁵⁹ Jeremy Gans, ‘Teaching Criminal Law as Statutory Interpretation’ in Kris Gledhill and Ben Livings (eds), *The Teaching of Criminal Law: The Pedagogical Imperatives* (Routledge, 2017) 93, 93 (‘Teaching Criminal Law’).

²⁶⁰ See generally Julian R Murphy, ‘Criminal Statutory Interpretation’ (Foley’s List CPD, February 2021).

²⁶¹ *Comcare v Martin* (2016) 258 CLR 467, 479 [42]. For an overview of statutory interpretation principles, see Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019).

²⁶² *R v Holliday* (2017) 260 CLR 650 [83] (Nettle J)

²⁶³ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 [78].

²⁶⁴ Murphy, ‘Criminal Statutory Interpretation’ (n 260) 16–17, citing *Aubrey v The Queen* (2017) 260 CLR 305 [39]; *Beckwith v The Queen* (1976) 135 CLR 569, 576.

²⁶⁵ See, eg, *Sherras v De Rutzen* [1895] 1 QB 918, 921, approved in *Cameron v Holt* (1980) 142 CLR 342. See also *He Kaw Teh v The Queen* (1985) 157 CLR 523, 528–30.

²⁶⁶ Jeremy Gans, ‘Teaching Criminal Law’ (n 259) 94.

All offences examined in this chapter use the standard of dishonesty as a key element in the offence structure, with the Act providing some guidance about the meaning of the term. Gans also observes that

the question of how to apply a general concept of criminal responsibility to a difficult offence provision may involve considering whether the offence provision should be interpreted so as to be receptive (or non-receptive) to the application of that concept (for example, the application of the rule that liability for omissions depends on a legal duty to act may influence how a word that potentially carries an open-ended obligation to act is read).²⁶⁷

The concept of legal duty is relevant in assessing the offence structure if the offences criminalise offending that relates to omissions. The wage theft offences target legal duties relating to legal obligations to pay employees according to their legally protected minimum labour entitlements or another pay rate agreed between employer and employee that is above the minimum standards.

In addition to the statutory interpretation presumptions, I conduct ‘elemental analysis’ to identify the structure of the offences and key requirements. To establish criminal liability, the prosecution is usually required to prove each element of an offence to the criminal standard of proof.²⁶⁸ In this regard, I am guided by the approach taken by Australian criminal law academics, Julia Quilter and Luke McNamara.²⁶⁹ Quilter and McNamara ‘set out a methodological approach for construing the elements for statutory offences generally’ that is guided by the High Court decision of *He Kaw Teh v The Queen*, and the separate judgment of Brennan J in that case.²⁷⁰ The approach involves the examination of offences by ‘identifying the relevant actus reus (prohibited conduct or physical elements) and mens rea (fault or mental elements), if any’, considering relevant case law that helps interpret the wording of the statute and concluding ‘as to how the elements should be construed’.²⁷¹ The context of Quilter and McNamara, as investigating New South Wales criminal law, is consistent with Victorian criminal law, as both are common law criminal

²⁶⁷ Ibid.

²⁶⁸ *Lee v The Queen* (2014) 253 CLR 455 [32].

²⁶⁹ Julia Quilter and Luke McNamara, ‘Time to Define “The Cornerstone of Public Order Legislation”: The Elements of Offensive Conduct and Language under the *Summary Offences Act 1988* (NSW)’ (2013) 36(2) *UNSW Law Journal* 534 (‘Time to Define’).

²⁷⁰ Ibid 547. See *He Kaw Teh v The Queen* (1985) 157 CLR 523.

²⁷¹ Quilter and McNamara, ‘Time to Define’ (n 269) 547.

jurisdictions, with a combination of case law and statute operating to prescribe the criminal law.

3.3 Case Example: *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq)* [No 3]

To assist with my analysis of the key elements of the wage theft offences, I introduce the key facts from a civil case: *Fair Work Ombudsman v DTF World Square Pty Ltd (in liq)* [No 3] (*DTF World Square Pty Ltd*) relating to contraventions of the *Fair Work Act*.²⁷² There is significant subject matter overlap, as that case concerned underpayments of wages and other breaches of employee entitlements and false record-keeping practices.²⁷³ The adoption of the facts from *DTF World Square Pty Ltd* is intended to help provide guidance on how the Victorian offences could operate, as the subject matter and the description of events reflect the types of underpayments that could be captured by s 6 offences in the *Wage Theft Act*.

The FWO (the federal labour inspectorate) brought legal proceedings in the Federal Court of Australia relating to alleged underpayment of workers and false records at dumpling restaurants at the Din Tai Fung Dumpling chain, which ran restaurants in Sydney and Melbourne.²⁷⁴

In a media statement prior to the hearing, the FWO stated that the restaurants ‘underpaid a combined 17 employees \$157,025’.²⁷⁵ The FWO alleged that ‘individual underpayments allegedly ranged from \$2,165 to \$50,588’.²⁷⁶ The underpaid employees ‘included cooks, waiters, a dishwasher and restaurant managers. Most were visa holders from Indonesia and China, mainly on student or employer-sponsored visas. The four full-time employees were sponsored by DTF World Square Pty Ltd. Ten workers were under 26 at the start of their alleged underpayment period’.²⁷⁷

Record-Keeping Breaches²⁷⁸

The employer kept two sets of ‘books’ of hours worked. The false records differed from the actual hours worked. The rates of pay were calculated using false records, with the records ‘understating hours worked and including false rates of pay for casual employees’.²⁷⁹ The

²⁷² [2023] FCA 201.

²⁷³ See overview of minimum labour standards in Australia in Section 2.2.2.

²⁷⁴ Fair Work Ombudsman, ‘Taiwanese Restaurant Operators in Court (Media Statement, 20 August 2020).

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

²⁷⁷ *Ibid.*

²⁷⁸ See *DTF World Square Pty Ltd* [2023] FCA 201 [98]–[100], [129]–[134], [148]–[151].

²⁷⁹ Fair Work Ombudsman, ‘Taiwanese Restaurant Operators in Court’ (n 274).

employees on occasion received cash payments, which were not included on the employee records. The employer required them to record their time using a fingerprint scanner. However, the payroll officer was directed to calculate pay with a maximum number of hours worked that did not reflect the actual time worked by the employees.²⁸⁰ That is, the fingerprint scanner recordings were not used to calculate hours worked to provide accurate wages to the employees.

Employee Entitlement Breaches²⁸¹

The employees were not paid in accordance with the requirements of the *Restaurant Industry Award 2010*, resulting in underpayments. The FWO alleged that ‘the flat hourly rates paid to 13 casual workers and fortnightly salaries paid to four full-time staff did not meet various entitlements including minimum rates for ordinary hours, penalty rates for weekend, public holiday and evening hours, and overtime rates owed’.²⁸² Casual employees were not paid casual loadings.

Findings regarding the Human Resources (HR) Manager

One of the managers discussed in the case was the HR Manager. Katzmann J observed that ‘it is readily apparent that [HR Manager] did not simply act as a conduit’.²⁸³ The HR Manager gave directions to a payroll officer to make both accurate and inaccurate records of pay, to not include cash payments on pay slips and to only record a set period of hours per fortnight in the payroll system.²⁸⁴ The HR Manager was also aware of the non-compliance with the obligations under the Award and that those entitlements were not paid to the employees.

I envisage that this is the type of case that could be investigated as a criminal proceeding, noting that a finding of liability in a civil context would not necessarily mean that the specific case would be suitable for criminal prosecutions. The standard of proof, evidentiary burdens and investigative processes for criminal proceedings differ from those for civil proceedings.

²⁸⁰ *DTF World Square Pty Ltd* [2023] FCA 201 [284].

²⁸¹ *Ibid* [154]–[207].

²⁸² Fair Work Ombudsman, ‘Taiwanese Restaurant Operators in Court’ (n 274).

²⁸³ *DTF World Square Pty Ltd* [2023] FCA 201 [287].

²⁸⁴ *Ibid* [277]–[287].

3.4 Dishonest Withholding of Employee Entitlement Offences

An employer could be charged under s 6(1)(a) of the Act, with the dishonest withholding of employee entitlements.

- 6 Dishonest withholding of employee entitlements
- (1) An employer must not dishonestly—
- (a) withhold the whole or part of an employee entitlement owed by the employer to an 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 an employee and that other person does so.

In the next section, I closely examine the elements of the s 6(1)(a).

Before proceeding to that analysis, including identifying areas of statutory ambiguity, I offer a high-level summary of the elements in the below text box.

Section 6(1)(a) creates an offence for an employer to dishonestly withhold employee entitlements from an employee.

The prosecution must prove beyond reasonable doubt each of these elements to establish liability to establish the offence.²⁸⁵

Actus reus (physical elements)

- An employer withholds employee entitlements if they engage in an act (such as causing an unlawful deductions) or an omission (such as the failure to pay owed wages, or the failure to attribute a certain type of leave).²⁸⁶
- The employer's acts or omissions that led to the withholding must be voluntary.²⁸⁷

Mens rea (fault elements)

²⁸⁵ *Evidence Act 2008* (Vic) s 141(1).

²⁸⁶ See Sections 3.4.1.1 and 3.4.1.2.

²⁸⁷ See Section 3.4.1.3.

- The employer must have intended the acts or omissions that resulted in the withholding of the entitlement.²⁸⁸
- The employer must be aware of the obligations relating to employee entitlements.²⁸⁹
- The employer must withhold the employee entitlements dishonestly. Dishonest is defined in the Act as dishonest ‘according to the standards of a reasonable person’.²⁹⁰

Statutory Defence of Due Diligence

- If the employer exercises due diligence to pay or attribute the employee entitlements to the employee, but the payments are nevertheless withheld, the employer may be able to establish a defence.²⁹¹
- For the statutory defence, the employer has an evidentiary burden to adduce evidence that suggests a reasonable possibility of the facts that suggest the exception exists.²⁹² The employer must prove on the balance of probabilities that they had exercised due diligence to establish the defence.²⁹³

After addressing the core elements of s 6(1)(a), I also consider how the Act operates to extend liability. In that discussion, I also consider how s 6(1)(b) operates to create a primary offence for employers who ‘authorise or permit’ withholdings of employee entitlements.

I now turn to my close analysis of the offences. For the s 6(1)(a) offences, there are two distinct issues, and in my analysis below, I separate the first question, ‘Did the employer withhold employee entitlements?’, from the second question, ‘Did such withholdings of employee entitlements breach the standard of dishonesty as prescribed by the statute?’.

²⁸⁸ See Section 3.4.1.4.

²⁸⁹ See Section 3.4.1.5.

²⁹⁰ See Section 3.4.2.

²⁹¹ See Section 3.4.3. Dishonesty is a hybrid element, as it requires assessment of knowledge, intention or belief attached to specific acts or omissions.

²⁹² *Criminal Procedure Act 2009* (Vic) s 72(1).

²⁹³ *Evidence Act 2008* (Vic) s 141(2).

3.4.1 Did the Employer Withhold Employee Entitlements?

3.4.1.1 Definition of Employee Entitlements

The *Wage Theft Act* provides a clear statutory definition of ‘employee entitlements’. The definition has three aspects.

According to s 3 of the *Wage Theft Act*, employee entitlements means, ‘an amount payable ... or any other benefit payable or attributable by an employer to or in respect of an employee, including wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation’ in accordance with the ‘relevant laws, contracts and agreements’.²⁹⁴ Key sources of employee entitlements include individual employment agreements, enterprise agreements, awards and the minimum standards prescribed in the National Employment Standards in the *Fair Work Act*.²⁹⁵ The definition also contemplates other sources of entitlements, such as the obligation for employers to remit superannuation to an employees’ superannuation fund and Victoria-specific legislation, such as the entitlements to receive long service leave in the *Long Service Leave Act 2018 (Vic)*.²⁹⁶

In the case example presented in Section 3.3, the relevant source of law for the pay rates is the *Restaurant Industry Award 2010*—a modern award. A modern award is a federal industrial instrument that sets the minimum standards for specific industries and occupations.²⁹⁷ An award establishes terms such as the pay rates for different classifications of workers, provides guidance as to how to calculate loadings, including casual loadings and penalty rates, and outlines other entitlements. Awards are tied to specific industries and the standards are overseen by the Fair Work Commission, which has powers to amend the specific terms and rates of pay.

The definition of employee entitlement in the *Wage Theft Act* also provides that if the agreement is lower than minimum standards, the minimum entitlement is regarded as the applicable minimum entitlement rate rather than the lower amount agreed between the employer and employee.²⁹⁸ Hence, it will be relevant to consider the rates agreed between

²⁹⁴ *Wage Theft Act* s 3 (definition of ‘employee entitlements’).

²⁹⁵ For a discussion of sources of employment obligations in Australia, see Stewart et al, *Labour Law* (n 84).

²⁹⁶ Explanatory Memorandum, *Wage Theft Bill 2020 (Vic)* 2.

²⁹⁷ Fair Work Ombudsman, *Modern Awards (Web Page)* <<https://www.fairwork.gov.au/tools-and-resources/fact-sheets/minimum-workplace-entitlements/modern-awards>>.

²⁹⁸ *Wage Theft Act* s 3(b).

the employer and the employee, as well as the other sources of entitlements, such as the sources above that prescribe statutory minima or other applicable industrial instruments, such as awards or enterprise agreements.

The definition of employee entitlement also establishes that where the employer and employee agree on a rate that is higher than minimum standards, that higher rate is regarded as the applicable minimum entitlement rate to apply to that employee.²⁹⁹ Practically, this means that a person could agree to pay someone higher than the standard pay. For example, an employer may agree to pay a per hour rate of \$100 versus a statutory minimum rate of, for example, \$25 for standard work hours in that role—and will still be caught by the criminal wage theft offences if all elements of the offence are satisfied and the pay is less than the agreed rate of \$100 per hour, notwithstanding it is a sum that is above the statutory minimum entitlement.

3.4.1.2 Definition of ‘Withhold Employee Entitlements’

A key aspect of the offence is resolving the meaning of ‘withhold employee entitlements’.

The *Macquarie Dictionary* defines ‘withhold’ as

1. ‘to hold back; restrain or check’; and
2. ‘to refrain from giving or granting: *to withhold payment*’.³⁰⁰

The meaning is modified by statute, which largely supports the dictionary meaning but clarifies that the meaning of ‘withhold’ is intended to be broadly interpreted. The extended definition in the Act can include both acts (eg unlawful deductions), as well as omissions. The Second Reading Speech also suggests that the definition of ‘withholding’ is intended to capture practices including, “cashback” arrangements, unlawful deductions, “sham contracting” and illegal “phoenixing”.³⁰¹

²⁹⁹ Ibid s 3(c).

³⁰⁰ *Macquarie Dictionary* (Online at 29 March 2025) ‘withhold’.

³⁰¹ See Explanatory Memorandum, Wage Theft Bill 2020 (Vic) 4. Cashback arrangements occur when an employee ‘is required to pay back a portion of their wages to their employer’: at 4. Sham contracting occurs when an ‘employer who misrepresents an employment relationship as an independent contract to avoid paying the entitlements owed’: at 4. Unlawful deductions involve an employer ‘taking money out of an employee’s pay’ when it is not authorised under law: Fair Work Ombudsman, *Deducting Pay* (Web Page, 6 October 2025) <<https://www.fairwork.gov.au/pay-and-wages/deductions-and-related-issues/deducting-pay>>. Illegal phoenix activity occurs ‘when a company is liquidated, wound up or abandoned to avoid paying its debts’: Australian Tax Office, *Illegal Phoenix Activity* (Web Page, 19 February 2025) <<https://www.ato.gov.au/about-ato/tax-avoidance/the-fight-against-tax-crime/our-focus/illegal-phoenix-activity>>.

Section 3(1) of the *Wage Theft Act* defines ‘withhold’ to mean: ‘fail[ure] to pay, distribute or attribute or otherwise deprive, whether directly or indirectly’. The definition includes:

- (a) the failure to pay, distribute or attribute to a third party;
- (b) the making of an unlawful deduction or requiring the payment of an unlawful fee or other charge; and
- (c) the requiring of the payment of an amount to the employer from the employee entitlements.

An example of withholding of employee entitlements could include the failure to pay the minimum pay classifications for certain workers according to the classifications in the award, the failure to pay various loadings, including penalty rates for weekends and public holidays, and casual worker designation and the failure to pay for all hours worked. The case example in Section 3.3, about the dumpling restaurant, includes examples of withholdings of entitlements, for example, not paying casual loadings or overtime to relevant employees.

The definition of employee entitlement also applies to individual contracts agreed between the employer and employee. A key limit to the scope of the offences is that the offences only apply to an employment relationship.³⁰² This excludes its operation to different categories of workers, such as independent contractors. The irony is that the *Wage Theft Act* would apply to high a profile sportsperson who plays in a prominent Australian Football League team who is engaged as an employee on an annualised employment contract of \$1 million per year. If the employer refuses to pay the sportsperson the agreed amount or chooses to instead pay a different amount (eg \$800,000), then the subject matter could be caught by the Victorian offences. There is no monetary value limit in the Act that operates to limit the potential breadth of subject matter in the offences.

3.4.1.3 Voluntary Withholding of Employee Entitlements

For an offender to be charged with an offence, they must have engaged voluntarily in the physical acts that constitute an offence.³⁰³ Likewise for s 6(1) to be engaged, the

³⁰² For a discussion of employment relationship in Australia see, Stewart et al, *Labour Law* (n 86) Ch 8.

³⁰³ Quilter and McNamara, ‘Time to Define’ (n 269) 549.

withholding of employee entitlements must be done voluntarily. The assessment of voluntariness is largely a factual consideration.

Voluntariness, in the criminal law, aims to ensure that there is a connection between the defendant and the various acts, omissions, or state of affairs that relate to the commission of an offence.³⁰⁴ Voluntariness is used to tie the offender to the offending. The specific test is regarded as an assessment of ‘whether the physical acts engaged are the product of the alleged offender’s will, assessed at, a high level of generality’.³⁰⁵ The assessment of voluntariness does not consider intent, fault or other motivations for the offending. The withholding definition includes both acts (eg unlawful deductions), as well as omissions (eg failure to attribute a certain type of leave to an employee). For an omission to be regarded as voluntary, the person must be capable of performing the act that they omit to do.³⁰⁶

3.4.1.3.1 Payment Processes

The context of ‘withholdings’ of employee entitlements will likely involve a factual consideration of payment processes, including internet banking and automated payment processes. For many employers, payroll processes occur as part of automated processes that use online banking and software to pay employees their wages.

- Scenario 1

A payroll officer manually enters a value in pay records (which is incorrect).

The failure to input correct hours into a payroll process by a conscious choice to enter a different value would demonstrate voluntariness. The act of consciously inputting records relates to the willed and conscious actions to withhold entitlements (in contrast to a typo or slip that causes the input).

- Scenario 2

An employee did not receive payments in a payroll cycle, because the automated electronic transfer system failed. There was an internet network outage at the employees’ bank. Once it

³⁰⁴ *Ryan v The Queen* (1967) 121 CLR 205, 245–6.

³⁰⁵ Jeremy Gans, *Modern Criminal Laws* (Cambridge University Press, 2nd ed, 2017) 103.

³⁰⁶ Judicial College of Victoria, *Victorian Criminal Charge Book* (online at 29 March 2025) ‘7.1.1 Voluntariness’.

was confirmed that the amount was not received, the payroll officer manually transferred the amount from the employer's bank account to the employee's account.

In this hypothetical scenario, an employee was not paid their wages owing to a banking system error that prevented the completion of an electronic transfer to the employee. This situation is a type of involuntary withholding. The 'withholding'—ie the complete failure to pay the wages—that occurred was outside the payroll officer's control. The payroll officer had taken steps to transfer the wages, but owing to a banking system issue the funds did not transfer to the employee. The failure of the employee to receive any payment was beyond the control of the employer and related to external circumstances relating to the internet banking system. The failure to pay was not voluntary. This can be distinguished from a controllable problem, such as where the employer did not conduct practical, regular checks on the system that would have picked up the issue. As addressed in my discussion below, errors in automated systems may be voluntary if deliberately enabled.

3.4.1.3.2 Counter-Examples Where Payroll Process Issues Affect Voluntariness

A common issue for payroll in employment contexts is the reliance on automated processes. If the employer uses such a process, it would be necessary to examine what steps they took to pay the employee and whether there are any acts or omissions that led to the payment issue. In the first example, *DTF World Square Pty Ltd*, the withholding was linked to the input of data by the payroll officer. In contrast, in the second example, the withholding was caused by an internet banking issue that prevented payment. To assess the circumstances of payroll processing, it would be necessary to consider whether the problem was due to input errors, such as incorrect bank account numbers, or as in the first example, owing to the manual alterations of hours. The example of incorrect input where it was a typo would be regarded as involuntary, but the manual alteration of hours to a new value would be voluntary. More difficult issues arise in assessing voluntariness in circumstances where the payroll software has made incorrect calculations: For example, does an employer have an obligation to audit the payroll to check for discrepancies or can it rely on the software calculations to avoid any suggestion of connection to underpayments through the legal concept of voluntariness? Similarly, if an employer is notified of errors in pay calculations, does the failure to fix the payroll software result in a voluntary withholding? And if so, at what point? These are unresolved issues that a court would need to address because the issue is one of the offender's

capacities, which in turn is a question of degree and has not been the subject of much case law. In Victoria, there is an evidentiary presumption of voluntariness. However, where there is evidence relating to voluntariness that suggests that there may be doubt, the trial judge will give a jury direction to explain what must be shown to establish voluntariness in relation to a key feature of an offence. In the examples in this paragraph, the relationship between the actions of the employer or its employee and the payroll software would need to be examined. It is likely that the longer the issues go unrectified, the more likely the omission will be deemed voluntary because of an obligation to rectify the payroll error. The issue turns on details such as assessing the point at which errors caused by software will be regarded as a human omission because of the failure to rectify and the application of a value-judgment test by a court about the capability or will of the employer.

There may also be issues with the process of payment of wages owing to circumstances affecting key individuals. For example, if a key employee is incapacitated because of illness, the payroll may not be processed, resulting in a delay in payments. The failure to pay would be involuntary, as the employer is unable to put into effect the payments. In addition to these issues, questions arise as to the point at which a withholding occurs—for example, if an employer is just lazy, bad at managing their financial affairs and forgets that a certain day is payday, does that result in an involuntary failure to pay employee entitlements? Similarly, such questions arise if a business-related matter (eg an urgent meeting) causes a delay, such that other matters had to be attended to, preventing timely pay. If the withholding is a day late, does this change the assessment of withholding as being voluntary? These are factual issues that would need to be contemplated by the trier-of-fact for assessing whether the ‘withholding’ would satisfy the voluntary requirements. In these examples, the employer does not make payment owing to a range of circumstances. The voluntariness point relates to the employer’s actions. The example of incapacitation and emergency can be contrasted to laziness, as other matters outside the employer’s control have affected payment. It is likely that the length of the delay may be related to the assessment of voluntariness.

Contentious issues may also arise in relation to cash flow issues. If an employer is unable to pay because they did not receive funds owed to them by another person, then there may be circumstances that the payroll processes could have been run, but the funds were not available to be transferred to the employees, which contributed to the withholding. Similarly, cash flow may mean that funds simply had not been moved to the correct

account, which caused a delay. The assessment of voluntariness would need to involve asking whether the cash flow problem itself was the result of the employer's will (eg a conscious decision to take a risk) and whether it was something the employer was capable of avoiding (eg by practically available steps to manage the risk of a shortfall, such as overdraft insurance). These are value judgments. For example, different outcomes resulted in two immigration cases in New Zealand where visitors who overstayed their visas were charged with an offence. On appeal, two contrasting results occurred: a conviction was quashed for a woman who overstayed her visa due to airlines refusing to transport her while she was at an advanced state of pregnancy; however, a conviction was upheld where a traveller to New Zealand did not leave enough funds to buy a ticket to leave the country.³⁰⁷

3.4.1.4 Intentional Withholding of Employee Entitlements

The offence seeks to criminalise certain types of withholdings of employee entitlements. It is generally assumed in the criminal law that where there is a term that relates to a type of offending, there is an intention to do that offending 'unless the offence provision expressly or implicitly provides otherwise'.³⁰⁸ In the definition of 'withholding' that I presented above, the key terms include the 'fail[ure] to pay, distribute or attribute or otherwise deprive, whether directly or indirectly'.³⁰⁹ Terms such as 'failure to pay' are likely to be interpreted as carrying an intentional requirement. However, statute is unclear as to whether the prosecution is required to prove:

- (a) that the accused actually paid what they intended to pay (ie an intention to pay a flat rate of \$20); or
- (b) that the accused intended to pay the employee less than the minimum amount required by law (eg an intention to pay below the minimum rate of pay in an award).

The intention to pay the rate they paid differs significantly from the intention to pay less than the minimum amount required by law. The statute is ambiguous as to which approach is preferred. If the first approach is favoured, the potential scope of the offence is likely to cover situations that may seem to be more of the character of inadvertence or

³⁰⁷ Gans, *Modern Criminal Laws* (n 305) 113, citing *Finau v Department of Labour* [1984] 2 NZLR 396; *Tifaga v Department of Labour* [1980] 2 NZLR 235.

³⁰⁸ Gans, *Modern Criminal Laws* (n 305) 101.

³⁰⁹ *Wage Theft Act* s 3(1) (definition of 'withhold').

failure to understand the obligation, rather than deliberate underpayments. If so, the dishonesty element may play an important role in distinguishing the types of intentional withholdings to delimit the type of withholdings that will be caught by the offence structure.

In this part, I address the question of intent, whereas in in Section 3.4.1.5, I address whether knowledge or another degree of awareness of entitlements is required.

- Scenario 1

An HR Manager directs the payroll officer to follow a maximum pay formula and to ignore the actual time data taken from a fingerprint scanner. The employee did not receive pay for hours worked or any overtime. The amount the employee received was less than what they would receive if they were paid according to their minimum entitlements.

In this scenario, the HR Manager has directed the payroll officer to pay according to a maximum pay formula. The number of hours the payroll officer uses to calculate pay rates differs from the number in the fingerprint scanner data. Hence, the wages are calculated according to data that differ from the actual hours worked, which constitutes a withholding that results in lower wages than the amounts to which the employees were entitled, as well as a lack of payment for overtime. In this example, the HR Manager intended to pay the employee at a rate different from their entitlements. This would demonstrate the first type of intention: the accused intended to pay what was actually paid. Further information would be needed to establish that the HR Manager intended to pay less than the actual minimum amount required by law. For example, evidence that an HR Manager was keeping a separate set of books for the regulator to hide the amount actually paid would help demonstrate an intention to pay less than the amount required by law.

- Scenario 2

An employer deducts \$100 from an employee's wages for an unpaid meal. The employer made the deduction from the waiter as the customer left the restaurant before the bill had been finalised. The employer had no legal entitlement to deduct that amount.

In this example, the employer took \$100 from wages—but did not have the legal entitlement to make the deduction. The employer intended to withhold that amount to cover the loss from the unpaid meal. If the employer is only required to intend to make

the deduction, then, this would demonstrate intent. However, if the intention requirements are an intent to underpay the entitlements, the prosecution would also be required to demonstrate that the employer intended to deprive the employee of their full entitlements. It is likely in such an instance that the mental element of intent would depend on whether or not the employer knew that such a deduction was unlawful.

- Scenario 3

An HR Manager directs their payroll officer to pay an employee at a rate that is the incorrect classification in the *Restaurant Industry Award*, which results in a rate lower than the one to which the employee is legally entitled. The HR Manager made an error in classifying the worker.

In this example, the accused's actions have resulted in payment at a lower rate than the statutory minimum. It appears that the accused intended to pay a certain value. However, it also appears that the HR Manager made an error in determining the classification. It is likely that if the employer was required to intend to underpay, then the employer would not have intended to withhold the entitlements. However, if intention means intent to pay what was paid, it is likely that the withholding would be regarded as intentional.

3.4.1.5 Knowledge of Obligations in Relation to Employee Entitlements

The next issue to consider is whether knowledge is a necessary mental element to establish in relation to the withholding. Brennan J in *He Kaw Teh v The Queen* distinguished requirements for integral versus attendant circumstances.³¹⁰ As Quilter and McNamara observe, 'Brennan J held that where a circumstance is integral to the act, there is a strong presumption that the relevant mens rea will be intent or knowledge. By contrast, where the circumstance is attendant, it may be that a lesser mental state applies'.³¹¹

Brennan J describes integral circumstances as 'the circumstances that are an integral part of the action and which give it its character'.³¹² There must be knowledge of integral circumstances. In contrast, Brennan J describes attendant circumstances as 'circumstances that are attendant upon but not an integral part of the act'.³¹³ In such

³¹⁰ (1985) 157 CLR 523.

³¹¹ Quilter and McNamara, 'Time to Define' (n 269) 551

³¹² *He Kaw Teh v The Queen* (1985) 157 CLR 523, 571.

³¹³ *Ibid* 570-1.

circumstances, a lesser mental state applies. Quilter and McNamara suggest that the following questions can help assess the relevant character:

In our view, the key question can be put as follows: is the circumstance in question essential to giving the conduct in question its criminal character? If yes, the circumstance is integral. If no, the circumstance is attendant. Or to put it another way: is it meaningful to talk of the conduct being criminal in the absence of the said circumstance? If no, the circumstance is integral. If yes, the circumstance is attendant.³¹⁴

If I apply this approach to the s 6 offence, it is likely that the withholding of employee entitlements is an integral circumstance requiring knowledge. However, it may be possible to argue that the character of the offence is linked to dishonesty instead. If so, a lower level of fault may be permissible such that an awareness of the risk that a withholding might take place could be sufficient. A standard of recklessness could apply. This issue is not resolved via the statute.

It remains open to a court to decide that the withholding is a type of attendant or integral circumstances. Depending on which approach is favoured, that interpretation will impact on the role of dishonesty in the offence structure in ascribing criminal responsibility. In Section 5.4.2, I address how the two possible interpretations impact on the role of dishonesty defining the characteristics of the offender.³¹⁵

In the criminal law, the degree of knowledge does not typically have to be a specific awareness of the legal scheme governing the obligation. In the context of the withholding offences, the relevant knowledge would likely be that the person knew that what was being withheld was required to be paid to the employee. That is because the specific obligation is tied to the withholding of the employee entitlements.

This view is supported by judicial consideration of other offences in case law. In the context of the illegal migration of non-Australian citizens by boat (referred to as ‘people smuggling’ in the case), a key interpretation issue to resolve the meaning of s 233C of the *Migration Act 1958* (Cth) was whether the people smuggler must know that the intended

³¹⁴ Quilter and McNamara, ‘Time to Define’ (n 269) 551.

³¹⁵ As I consider that both interpretations are open to a court, I discuss both interpretations in Section 5.4.2. I do so as my analysis shifts depending on which interpretation I engage with. I consider, applying both interpretations is desirable given the statutory ambiguities.

destination was Australia.³¹⁶ The Victorian Court of Appeal held that ‘Parliament intended to criminalise conduct knowingly directed at the conveyance of persons to, or their entry into, Australia’.³¹⁷ Gans observes that consequently, the prosecution would be required to prove that the particular people smuggler understood (or was aware of a substantial risk) that the particular island (in that case, Christmas Island) towards which the boat was headed was part of Australia.³¹⁸ Other case law has also considered the degree of knowledge that is required relating to drug trafficking offences. For those offences, courts have found that the knowledge requirement can be satisfied if the accused has knowledge that a drug is cocaine, but that there is no requirement for the prosecution to prove that the person knew that a particular drug was a controlled substance.³¹⁹

Assuming the withholding of employee entitlements is an integral circumstance, then knowledge requirements are likely required. In the context of the s 6 offences, it is likely that an approach similar to that adopted by the courts in the drug trafficking cases referenced above would be adopted. A court may require that an employer would need to be aware of their pay obligations to an employee—but it is unlikely that a court would require that the employer had knowledge of the specific source of law or calculation method of entitlements that was required by law. It is also likely that the knowledge requirement will require that the employer had knowledge of pay obligations and the resulting shortfall, and that pay would differ depending on the hours that employees worked and their employment status.

However, if a court holds that the withholding be interpreted as an attendant circumstance in the offence, a standard of recklessness may instead apply. If that is the case, recklessness could suffice to those, for example, who have misunderstood or not properly read the award or other source obligation, those who failed to investigate problems in their payroll systems where they had notice of errors, or those who otherwise ignored the payroll systems and the application of those systems to calculate wages and other entitlements. If such a standard applied, the degree of knowledge required would be similar to laziness or inadvertence.

³¹⁶ Gans, *Modern Criminal Laws* (n 305) 174–5. See Duncan Wallace, ‘Case Note: Migrant Smuggling, Criminal Fault and the Legal Status of Australia: *PJ v The Queen* (2013) 39(1) *Monash University Law Review* 246 (*PJ v The Queen*).

³¹⁷ *PJ v The Queen* (2012) VSCA 146 [46].

³¹⁸ Gans, *Modern Criminal Laws* (n 305) 174–5.

³¹⁹ See Wallace, ‘*PJ v The Queen*’ (n 316) 276, discussing *Ostrowski v Palmer* (2004) 218 CLR 493.

The issue of the standard of knowledge has already proven to be challenging in relation to the requirements of knowledge that are required by the *Fair Work Act*. In the civil penalty context in which courts have contemplated knowledge requirements for attributing liability through the civil accessory provisions for an employer's contravention (see, eg s 550 of the *Fair Work Act*), there are two approaches. Section 550(1) is the key provision that enables a person 'who is involved in a contravention' to also be held liable. Section 550(2) prescribes the only circumstances in which a person may be involved, which include the aiding and abetting and knowingly concerned subsections.

The issue of the standard of knowledge arose in the *DTF World Square Pty Ltd* liability judgment discussed in Section 3.3. In that case, the requisite degree of knowledge about obligations relating to pay and conditions was a legal issue that Katzmann J sought to resolve. Although a civil judgment, the case illustrates the different ways knowledge could apply in relation to minimum standard contraventions. In the liability judgment, Katzmann J considered the line of conflicting Federal Court of Australia authorities that had contemplated the degree of knowledge of obligations that was needed to establish that a person knew 'the essential matters which make the contravention'.³²⁰ The tension relates to whether the employer must be aware that a particular award (or other source of entitlements) applies to specific employees, or whether merely being aware of the circumstances in which the conduct took place is sufficient to establish knowledge. The first approach requires the accessory to know 'that the particular award that was contravened applied to the relevant employees'.³²¹ The second approach is that 'an accessory must know what rates are being paid but need not know that the rates which were paid were below the rates prescribed by the applicable award, since an accessory does not have to appreciate that the conduct is unlawful'.³²² This example does not have any direct influence on how a criminal court may choose to interpret the requirement, but nevertheless, it is a useful example of potential different approaches to interpreting what

³²⁰ See *DTF World Square Pty Ltd* [2023] FCA 201 [250]–[267].

³²¹ *Ibid* [258], citing *Potter v Fair Work Ombudsman* [2014] FCA 187 [80]–[81]; *Fair Work Ombudsman v Al Hilfi* [2012] FCA 1166 [44].

³²² *DTF World Square Pty Ltd* [2023] FCA 201 [260], citing *Fair Work Ombudsman v Grouped Property Service Ltd* [2016] FCA 1034 [1019] (Katzmann J). See also *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 [188], [194]. This approach is likely to be applied in future cases due to how the High Court has applied knowledge to establish accessory liability: *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 419 ALR 30.

must be known in relation to entitlements and the obligations owed in different legal sources.

3.4.2 Was the ‘Withholding of Employee Entitlements’ Dishonest, according to the Standard in the Act?

In this section, I examine how dishonesty operates in the offence.

3.4.2.1 *The Legal Test for Assessing the Standard of Dishonesty*

In all three of the employee entitlement offences in the *Wage Theft Act*, the term ‘dishonestly’ is an important element in the offence structure. According to s 6(1)(a), the employer ‘must not dishonestly’ withhold the employee entitlements. In s 6(11), dishonesty is defined as dishonest ‘according to the standards of a reasonable person’.

Australia has multiple tests for assessing dishonesty.³²³ The common law test for assessing dishonesty was established in *Peters v The Queen* (‘*Peters*’).³²⁴ Alex Steel identifies that the test from *Peters* to assess dishonesty applies unless statute explicitly distinguishes the test, which is a question of statutory interpretation.³²⁵ In *Macleod v the Queen*,³²⁶ the High Court held that the approach in *Peters* was relevant in assessing the standard of dishonesty in state fraud offences. Steel notes that ‘the courts have over time come to accept that the *Peters* test is binding on them as a result of the national common law’ in almost all cases.³²⁷ The test for dishonesty used in the *Crimes Act 1958* (Vic) for fraud offences, has been interpreted as a ‘special case’ and imposes a statute specific meaning.³²⁸

As the definition of dishonesty in the *Wage Theft Act* defines dishonesty in a way that mostly resembles *Peters*, I apply the common law test articulated in *Peters* to interpret the statutory definition of dishonesty.³²⁹

³²³ For an overview of dishonesty in Australia, see Alex Steel, ‘Dishonesty Outside of England and Wales: *Ivey* in International Comparison’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook 2017-2018*, (Appellate Press, 2019) 341 (‘*Ivey* in International Comparison’); Alex Steel, ‘Describing Dishonest Means: The Implications of Seeing “Dishonesty” As a Course of Conduct of Mental Element and the Parallels with Indecency’ (2010) 31 *Adelaide Law Review* 7 (‘Describing Dishonest Means’).

³²⁴ 192 CLR 493 (‘*Peters*’).

³²⁵ Steel, ‘*Ivey* in International Comparison’ (n 323) 344, citing *SAJ v The Queen* (2012) 36 VR 435.

³²⁶ (2003) 214 CLR 230.

³²⁷ Steel, ‘*Ivey* in International Comparison’ (n 323) 371.

³²⁸ *R v Salvo* [1980] VR 401; *R v Brow* [1981] VR 783, 788.

³²⁹ See, eg, *Spies v The Queen* (2000) 201 CLR 603; *Macleod v The Queen* (2003) 214 CLR 230; *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89.

The key case that establishes the common law test in Australia is *Peters*. Steel describes that the majority in *Peters* ‘saw dishonesty as a characterisation of a defendant’s acts and accompanying state of mind, a characterisation that was objectively determined’.³³⁰ The common law test for dishonesty requires ‘an objective test in the sense that the defendant can be found to be dishonest “judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards”’.³³¹

In *Peters*, McHugh J states:

the question of whether those means are dishonest will ordinarily involve other questions concerning the state of mind of the defendants at the time of the agreement — the intention, knowledge or state of belief that is to accompany their acts or omissions. ... The beliefs of the accused persons as to whether they thought they were acting honestly are irrelevant.³³²

According to McHugh J, factors that suggest dishonesty include evidence that the person ‘intended to prejudice another person’s right or interest or performance of public duty by: making or taking advantage of representations or promises which they knew were false or would not be carried out; concealing facts which they had a duty to disclose; or engaging in conduct which they had no right to engage in’.³³³

In the later High Court judgment of *Macleod v The Queen*, McHugh J summarises the three steps necessary to assess whether conduct is dishonest, as follows:

- ‘(a) identify the knowledge, belief or intent which is said to render the relevant conduct dishonest; and
- (b) instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest; and
- (c) direct the jury that, in determining whether the conduct of the accused was dishonest, the standard is that of ordinary, decent people’.³³⁴

³³⁰ Steel, ‘Ivey in International Comparison’ (n 323) 366.

³³¹ Ibid 369, quoting *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 203 CLR 89 [173].

³³² *Peters* (1998) 192 CLR 493, 530 (McHugh JJ).

³³³ Ibid.

³³⁴ *Macleod v The Queen* (2003) 214 CLR 230, 256.

3.4.2.2 Assessing Who is the ‘Reasonable Person’ as Described in the Statute

There is one key factor in the formulation of dishonesty in the *Wage Theft Act* that distinguishes it from the approach adopted in *Peters*—the Act references ‘standard of a reasonable person’³³⁵ rather than the standard of ‘ordinary decent people’ as in *Peters*.

The Explanatory Memorandum notes that the standard ‘is an objective assessment and displaces the subjective assessment of the accused’s state of mind’.³³⁶ That is, there is no requirement to demonstrate that the specific accused knew that their withholding was dishonest.³³⁷ However, as dishonesty requires recourse to an offender’s knowledge, belief or intent in relation to the ‘dishonest withholding’, it is likely that some degree of knowledge of labour entitlements will be necessary to demonstrate dishonesty.

In contrast, *Peters* uses the standard of ‘ordinary decent people’ to assess dishonesty. It is possible that the different requirement of ‘reasonable person’ may result in a different hypothetical person to adjudge compared with the ‘ordinary decent people’.

Section 6(2) of the *Wage Theft Act* modifies the test of dishonesty to require juries or courts to disregard an employer’s consent to a withholding if the effect is that the withholding ‘reduces the employee entitlement to less than the minimum amount or benefit required under the relevant laws’. The Explanatory Memorandum justifies this modification of dishonesty as an employee may be induced to agree to an amount below the minimum entitlements ‘through scenarios such as their lack of bargaining power or threats’.³³⁸ This element is consistent with the position applicable in the case of awards and industrial instruments, where it is not possible to agree to below minimum entitlements even if an employee ‘genuinely consented to the arrangement’.³³⁹

I address an example of employers in the hospitality industry to compare potential outcomes based on different evaluative standards. Although I look at the specific example of hospitality, my discussion of who the reasonable person might be for the test of dishonesty has broader relevance.

³³⁵ *Wage Theft Act* s 6(11).

³³⁶ Explanatory Memorandum, Wage Theft Bill 2020, 8.

³³⁷ Cf ‘*Feely/Ghosh* Test’: *R v Feely* [1973] QB 530 (CA); *R v Ghosh* [1982] QB 1053.

³³⁸ Explanatory Memorandum, Wage Theft Bill 2020, 8.

³³⁹ Stewart et al, *Labour Law* (n 84) 338, citing *Attorney-General’s Department v Warren* (2022) 292 FCR 498 [35].

- Scenario 1

An employer in the hospitality industry regularly underpays their professional chefs, including not paying for every hour worked and not paying overtime, leave of other entitlements.

I consider in this section how an employer might be judged by contemplating different interpretations of the reasonable person in context of underpayments in the hospitality industry.

- *Interpretation 1: the impact of industry norms of 'underpayments' in hospitality industry*

In commentary on the hospitality industry, wage theft is described as a 'norm' that is widespread.³⁴⁰ In adjudging dishonesty, the normalised culture of underpayments and unpaid overtime could form part of the assessment of dishonesty.³⁴¹ In this section, I consider whether the 'reasonable person' would defer to, or adopt, industry norms in assessing dishonesty.

Richard Robinson and Matthew Brenner examined views held by chefs in professional kitchens to assess the reasons for the widespread industry acceptance of wage theft. The authors conducted interviews with a total of 82 'mature chefs and training chefs in Australia' in different locations.³⁴² One finding from the interviews relates to the experiences of wage theft in the industry. Robinson and Brenner observe that the interviewed chefs expected underpayments of entitlements as 'the realities of industry'.³⁴³ In discussing wage theft in the hospitality industry, including 'unpaid overtime, award rate breaches, rostering and human resource violations, salary abuses and unpaid additional benefits', the authors report on reasons for accepting the work despite the known conditions of underpayment.³⁴⁴ The responses included statements that wage theft 'was an almost expected outcome of working in a professional kitchen' and that exploitation was accepted as 'the violation was often necessary in ensuring the financial survival of their employer in a competitive market environment'.³⁴⁵ Workers may choose

³⁴⁰ See, eg, Richard NS Robinson and Matthew L Brenner, 'Wage Theft in Professional Kitchens: Connected or Complicit?' (2021) 11(1) *Hospitality & Society* 87 ('Professional Kitchens').

³⁴¹ See, eg, Richard Robinson and Matthew Brenner, 'All these Celebrity Restaurant Wage-Theft Scandals Point to an Industry Norm', *Conversation* (10 February 2020) ('Restaurant Wage-Theft Scandals'). See also Robinson and Brenner, 'Professional Kitchens' (n 340) 101; Ferris and Ross, 'Hospitality Industry' (n 19) 49–51.

³⁴² Robinson and Brenner, 'Professional Kitchens' (n 340) 91.

³⁴³ *Ibid* 93.

³⁴⁴ *Ibid* 99.

³⁴⁵ *Ibid* 100.

to work in the environment as they were motivated by the ‘desire to work in an environment that they felt would further their skills and strengthen their resume’.³⁴⁶

The ordinary decent person might contemplate that underpayments in the hospitality context are not dishonest, as the practices are well known in the industry. This person might be more sanguine about industry practices and consider the broader motivations of the employer and worker. The interview responses that Robinson and Brenner report suggest that professional chefs may be willing to accept positions despite their awareness of industry non-compliance because of perceived career advancement opportunities and the prestige of working in certain workplaces.

The meaning of dishonesty references ‘a reasonable person’. In contrast to the ordinary decent person, a reasonable person might have more utopian expectations about compliance and not accept that industry norms modify the standard to reflect expectations. Indeed, the reasonable person might consider the fact that s 6(2) of the *Wage Theft Act* expressly requires them not to include in their evaluation of reasonableness any evidence of an employee’s consent to receive below minimum standards, as supporting this position. A reasonable person may be compliance-orientated such that they expect that payment of wages and other entitlements below minimum entitlements are violation of the law despite these industrial expectations and evidence of widespread non-compliance.

- *Interpretation 2: The employer in the hospitality industry may be held to a higher standard than readily expected in the industry because of other expectations*

The imposition of the standard of ‘reasonable’ may have the effect that industry norms are not determinative in the assessment of dishonesty, but rather other expectations are imposed.

For example, following an investigation by the Fair Work Ombudsmen into MAde Establishment Group, the restaurants connected to the celebrity chef, George Calombaris, it was found that their self-disclosure of underpayments totalling \$2.6m was in fact \$7.8m in underpayments.³⁴⁷ The widespread negative media reporting and identification of other

³⁴⁶ Ibid.

³⁴⁷ Murphy, Lovelock and Foley, ‘Agenda Setting’ (n 3) 8. See also ‘George Calombaris’s MAde Establishment Underpaid Workers \$7.8 Million, *ABC News* (18 July 2019).

high-profile examples in hospitality suggest that, at least at the time of these reports,³⁴⁸ that celebratory chefs underpaying their staff was considered unacceptable.

A reasonable person assessing wage underpayments in the hospitality industry may determine that the employer should pay their employees their entitlements despite common practices of underpayment because it is the right thing to do.

I now turn to other issues relating to dishonesty.

In *Peters*, the position adopted by the leading judgment is that dishonesty need not be defined by the judge in the form of a jury direction. Dishonesty is a concept for the jury or court to interpret.³⁴⁹ In *Peters*, Toohey and Gaudron JJ observed that

in most cases where honesty is in issue, the real question is whether an act was done with knowledge or belief of some specific thing or with some specific intent, not whether it is properly characterised as dishonest. To take a simple example: there is ordinarily no question whether the making of a false statement with intent to deprive another of his property is dishonest. Rather, the question is usually whether the statement was made with knowledge of its falsity and with intent to deprive. Of course, there may be unusual cases in which there is a question whether an act done with knowledge of some matter or with some particular intention is dishonest. Thus, for example, there may be a real question whether it is dishonest, in the ordinary sense, for a person to make a false statement with intent to obtain stolen property from a thief and return it to its true owner.³⁵⁰

The judge's summing up should identify relevant mental states to consider, eg a mistake about entitlements, or a plan to repay, or a belief that the underpayment would prevent bankruptcy. However, in assessing whether the 'withholdings of employee standards' are dishonest, the juror or court will use their own judgment to assess whether the withholdings are dishonest.

The degree of dishonesty that the factfinder would assess would require consideration of what occurred and what it suggested about the employer's state of mind. For example, dishonesty would be more readily found in circumstances in which there was evidence that the accused intended to cheat their workers, such as by creating fake records, threatening to fire an employee or deliberately lying about the entitlements to the worker.

³⁴⁸ Robinson and Brenner, 'Restaurant Wage-Theft Scandals' (n 341).

³⁴⁹ Steel, 'Describing Dishonest Means' (n 323) 21 fn 79.

³⁵⁰ *Peters* (1998) 192 CLR 493, 503-4.

In the dumpling restaurant example (discussed in Section 3.3), the employer had created two sets of books: one accurately reflecting the time worked, but another false set of records was used to determine how much pay employees actually received. In contrast, evidence of a setback, such as an issue with cash flow, may suggest that the underpayments were not dishonest, but the unpaid amount was due to circumstances outside the accused's control. Similarly, if an employer has tried their best to pay, but has nevertheless misinterpreted the applicable source of entitlements, then there may be no evidence of dishonesty. In Section 3.4.1.4, I compared an intention to pay the amount that was paid versus the intention to underpay as being possible ways the structure of the offence could be interpreted by a court, when applying the common law assumptions relating to implied intentionality to 'withholding employee entitlements'. If intent was assessed as intent to pay what was paid, then dishonesty would assist the employer to not be caught by the offence. More difficult judgments may involve assessing dishonesty when there may be evidence that an employer was, for example, not making timely full payments owing to cash flow issues, but there may also be evidence that they had always compensated for the shortfall over time. The length of time, the circumstances of the withholding, and the type of cash flow issues, may weigh into how a reasonable person would evaluate the withholding, including whether the employer had been up front with their employees. If an employee agreed to the withholding consent would not be relevant as s 6(2) excludes that from being contemplated in assessing dishonesty. Ultimately, dishonesty would be assessed by juries or courts with reference to the employer's state of mind, what occurred and other circumstances to assess whether the underpayment was indeed dishonest according to the standards of a reasonable person.

3.4.3 Due Diligence as a Statutory Defence

The defence of due diligence operates in two contexts. The first is that due diligence operates in relation to s 6. Section 6(5) provides a due diligence defence to protect a finding against an employer or officer of any criminal liability where, if 'before the alleged offence ... [the employer] exercised due diligence to pay or attribute the employee entitlements to the employee'.³⁵¹ The second is that due diligence operates to prevent liability where an employer or officer dishonestly authorises or permits expressly or impliedly another person to withhold employee entitlements owed by the employer and that other person does withhold those payments.³⁵² In my analysis so far, I have focused

³⁵¹ *Wage Theft Act* s 6(5).

³⁵² *Ibid* ss 6(1)–(2).

on an employer withholding the entitlements; however s 6(1)(b) also creates primary liability for an employer who ‘authorises or permits’ the withholding. I expand on the mechanics of the attribution methods in Section 3.5. Due diligence may operate as a defence to prevent attribution of liability which otherwise could have been connected to the employer or officer.

The term ‘due diligence’ is not defined in the *Wage Theft Act*. The Explanatory Memorandum of the Wage Theft Bill suggests that relevant factors to take into account include whether ‘an employer took reasonable steps that are reflective of the size and nature of the employer’.³⁵³ Section 6(6) further clarifies that the failure to comply with a requirement of a regulator is evidence that ‘not all reasonable steps’ were taken to ‘pay or attribute’ the entitlements to the employee.

The concept of ‘due diligence’ is commonly included in Australia as a statutory defence.³⁵⁴ As the *Wage Theft Act* does not define ‘due diligence’, guidance must be taken from other contexts. One commonly referenced example is the case of *Universal Telecasters (Qld) Ltd v Guthrie*, which relates to a due diligence requirement in s 85 of the *Trade Practices Act 1974* (Cth).³⁵⁵ In that case, it was noted that due diligence as a concept is not defined, but creates a positive duty on the employer to ‘lay down a proper system to provide against contravention of the Act and that it had provided adequate supervision to ensure the system was properly carried out’.³⁵⁶ Guidance as to what a proper system is for a particular employer or officer will depend on the facts.

The *Fair Work Act* incorporates the concept of due diligence (but through use of ‘reasonable steps’) as a statutory defence to assess whether to hold responsible franchisors and holding companies liable in relation to contraventions that occur in a franchise network or by corporate groups.³⁵⁷ In this context, responsible franchisors and holding companies have financial interests and influence over the business operations of others in the franchise network or company structure. Section 558B of the *Fair Work Act* includes factors to consider in assessing whether reasonable steps were taken to prevent responsible franchisors or holdings companies being held liable for contraventions of

³⁵³ Explanatory Memorandum, Wage Theft Bill 2020 (Vic) 7.

³⁵⁴ Gans, *Modern Criminal Laws* (n 305) 159.

³⁵⁵ Australian Law Reform Commission, *Corporate Criminal Responsibility* (Report 136, 2020) 259 fn 198 (‘*Corporate Criminal Responsibility*’).

³⁵⁶ *Universal Telecasters (Qld) Ltd v Guthrie* (1978) 18 ALR 531, 534.

³⁵⁷ Tess Hardy, ‘Good Call: Extending Liability for Employment Contraventions Beyond the Direct Employer’ in Ron Levy et al (eds), *New Directions for Law in Australia: Essays in Contemporary Law Reform* (ANU Press, 2017) 71, 81 (‘Extending Liability’).

franchise entities or a subsidiary company.³⁵⁸ To assess whether ‘reasonable steps were taken’, the factors that are relevant include the size and resources of the body corporate, the degree of control over the conduct that led to the contravention, the steps taken to inform the employer of relevant obligations under the *Fair Work Act*, including those relating to minimum entitlements, and any systems for assessing compliance.³⁵⁹

The concept of due diligence is also used in the work health and safety context. In relation to officers, this concept as it relates to their duties is further elaborated in s 27(5) of the *Work Health and Safety Act 2011* (Cth), and in other jurisdictions which have adopted the model work health and safety laws. In that sub-section, a range of conduct that would demonstrate that reasonable steps were taken include demonstrating that the officer had ‘up to date knowledge of work health and safety matters’; an ‘understanding of the nature of the operations of the business’, including the general hazards and risks; the provision of ‘appropriate resources or processes’ to minimise risks to health and safety; the existence of processes for compliance; the existence of risk management processes to detect and respond to risk; and verification processes to ensure resources and compliance processes exist.³⁶⁰ In essence, the expansion of the meaning of ‘due diligence’ is intended to ensure that officers actively work to ensure that the workplace is safe to prevent individual liability in the event of a breach of work health and safety laws. The provision is intended to promote the objects of the Act, including protecting workers and other persons and promoting active monitoring, review and awareness of safety advice for workplace hazards.

Beyond these contexts, the obligation for an employer to take reasonable steps is increasingly used in the workplace context. Recent legislative amendments in the *Sex Discrimination Act 1984* (Cth), *Fair Work Act* and work health and safety laws have sought to harmonise a positive duty on employers and officers to take positive steps to prevent harassment and sex discrimination. For example, ‘s 47C of the *Sex Discrimination Act 1986* requires employers and other duty holders to “take reasonable and proportionate measures to eliminate, as far as possible” five different types of conduct that are unlawful under the [*Sex Discrimination Act*]: sex discrimination in work, sexual harassment and sex-based harassment in connection with work, conduct in respect of

³⁵⁸ *Fair Work Act* s 558A.

³⁵⁹ *Ibid* s 558A(4). See also Hardy, ‘Extending Liability’ (n 357) 81–2.

³⁶⁰ See Comcare, *Guidance for Officers in Exercising Due Diligence* (2015) 7–8.

hostile workplace environments and victimisation’.³⁶¹ This suggests a growing expectation in Australia that references to due diligence or reasonableness will be applied similarly across different statutory schemes, and will involve consideration of the systems and factual circumstances that apply to specific employment contexts.

Therefore, it is likely that due diligence in the *Wage Theft Act* will operate in a similar way to these contexts. To assess due diligence, relevant factors will include what steps the employer took to reduce the chance of withholdings of employee entitlements. For example, if a large employer regularly conducts audits, has a dedicated payroll team, and regularly keeps up with workplace law developments then due diligence may make it possible to prevent the actions of a rogue HR Manager— who decides to change the pay for an employee they dislike— being attributed to the employer.

3.5 Attribution of Liability Methods in the *Wage Theft Act*

Green’s monograph describes the ‘diffuseness of responsibility’ as a common characteristic of white-collar crime because liability is often imposed on abstract entities, where a variety of people may have control of decision levels.³⁶² The specific wage theft context has characteristics similar to more traditional white-collar crime contexts as the offences target the employer—which may be an abstract entity—and relies on doctrines established in that context to attribute blame. Often, employment business structures have multiple levels of management who do not always have complete oversight over the decisions or directions that affect individual employees. Green observes that decision-making and implementation of policy may involve conduct ‘shared among boards of directors, shareholders, top and mid-level managers, and ground-level employees’.³⁶³ Elise Bant observes that in corporate entities, corporate responsibility relates to ‘activities ... typically shared between multiple departments, employees and agents (including corporate agents), and where those who hold pertinent knowledge or intention may be significantly separated from that conduct by corporate structures and time’.³⁶⁴ The degree to which such observation applies depends on the characteristics of the employer. For example, a small business may be completely run by a key individual who has oversight over all the logistics and manages pay obligations. In contrast, a large enterprise, such as

³⁶¹ Belinda Smith, ‘Respect@Work Amendments: A Positive Reframing of Australia’s Sexual Harassment Laws’ (2023) 36(2) *Australian Journal of Labour Law* 145, 161.

³⁶² Green, *Lying, Cheating and Stealing* (n 18) 26.

³⁶³ Stuart Green, ‘Moral Ambiguity in White Collar Criminal Law’ (2004) 18 *Notre Dame Journal of Legal Ethics and Public Policy* 501, 510 (‘Moral Ambiguity’).

³⁶⁴ Elise Bant, ‘Culpable Corporate Minds’ (2021) 48(2) *UWA Law Review* 352, 360.

a supermarket will have complex operational structures, and it is unlikely that any individual will have knowledge of all key factors relating to pay obligations.

Green suggests that the diffuseness of responsibility has implications on findings of moral culpability and observes that

a significant amount of white-collar crime *is* committed by abstract entities such as corporations, partnerships, non-profit associations, and governmental agencies. Exactly how *mens rea* should properly be ascribed to such entities (or, indeed, *whether* such entities should even be viewed as capable of forming *mens rea*) raises a host of complex and interesting questions...³⁶⁵

Green did not elaborate on the specific legal and moral issues, because of limitations of scope in his monograph; that is, the specific rationales and justifications for imposing corporate liability and attribution methods extend well beyond the material that he could consider in his monograph. I similarly seek only to canvass the issues as they arise in the *Wage Theft Act*, as they raise a range of difficult legal and moral questions relating to the purposes of corporate criminal liability doctrines, which are beyond the scope of my core inquiry. I note that there is contestation as to whether the models of attribution appropriately recognise the complexity of the actors who engage in the activities that constitute the whole crime. Nevertheless, given the structure of the *Wage Theft Act*, it is necessary to contemplate how liability is attributed to key individuals and different types of employers.

3.5.1 Attribution Methods in the *Wage Theft Act*

The *Wage Theft Act* grapples with the conceptual challenges of attributing liability to different kinds of employers and their key employees in a wide variety of employment business structures by using a range of statutory modifications and general principles of law. In this part, I provide a short overview of the methods for attribution that are provided in the Act. In Appendix A, I extract key provisions from the *Wage Theft Act*, including the statutory modifications that work to attribute the conduct and state of mind held by different individuals in a range of employment structures to satisfy the elements of these novel offences.

³⁶⁵ Green, *Lying, Cheating and Stealing* (n 18) 33

3.5.1.1 Primary Liability

The Act creates primary liability for both the employer and its officers through separate, but largely overlapping, offences. The definition of employer is not limited to individual or human employers. However, the *Wage Theft Act* only applies to employment relationships, rather than to contractors. Section 3(1) of the *Wage Theft Act* defines ‘employer’ to mean ‘a natural person, body corporate, partnership, unincorporated association or other entity that employs or has employed another person’. The legal characteristics of entities affect the ease of holding individuals and the employer criminally liable. For example, a body corporate includes abstract entities, such as the corporation. A corporation is regarded as a legal person and can enter into contracts, including to employ workers.³⁶⁶

In addition to providing specific approaches to tie liability to the employer, the Act contemplates individual liability for officers. The definition of officer is enough broad to ensure that those who make decisions relating to employment are caught by the provisions. Section 3(1)(a) defines ‘officer’ to mean the commonly understood definition of officer, as defined in s 9 of the *Corporations Act 2001* (Cth). However, it also includes extended definitions for different types of employers, including ‘a member of the board of directors’, a partner in a partnership, ‘a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity’ or ‘a person who has the capacity to affect significantly the entity’s financial standing’. Officers may be held primarily liable (eg s 6(7)). However, officers may also be deemed liable for the offences of a body corporate (eg s 13).

The offences also create primary liability that extends to circumstances in which the employer or officer has ‘authorised or permitted’ the offending (eg the withholding of employee entitlements). The Act includes statutory guidance as to the circumstances under which different kinds of employers, as well as their officers, would be regarded to have authorised or permitted the offending. The Act details concepts that rely on corporate criminal liability principles to achieve this objective. The concept of ‘authorisation or permission’ and how they are evoked in criminal offences are complicated.

³⁶⁶ See, eg, *Salmon v Salmon* [1897] AC 22, 51.

In my discussion of the s 6 offences in Section 3.4, I focused on s 6(1)(a), which addresses an employer who dishonestly withholds employee entitlements. The specific offence structures include the concept of ‘authorisation or permission’ to allow for attribution beyond the direct involvement of an employer or officer, thus incorporating concepts of corporate criminal liability into the provisions. This concept is included to extend liability for both employers and officers. For example, s 6(1)(b) makes it an offence for an employer to dishonestly ‘authorise or permit, expressly or impliedly, another person to withhold the whole or part of an employee entitlement owed by the employer to an employee and that other person does so’. Section 6(3) then provides guidance as to how ‘authorisation or permission’ may occur for employers. The methods are set out in s 6(3), as follows:

- (a) ‘proving that the employer or an officer of the employer gave that authorisation or permission, whether expressly or impliedly;
- (b) in the case of an employer that is a body corporate, proving that the employer’s board of directors gave that authorisation or permission, whether expressly or impliedly;
- (c) in the case of an employer that is not a natural person, proving that a corporate culture existed within the employer that directed, encouraged, tolerated or led to the relevant conduct being carried out.’

For employers, the ‘authorisation or permission’ concept results in the inclusion of various corporate criminal law concepts. For example, the concept of vicarious liability is clearly contemplated in sub-s (a) of s 6(3) in operation to officers. Further, the concept of ‘corporate culture’ in sub-s (c) connects the employer to the offending through doctrines relating to the organisational responsibility of a firm for various systems that promote such offending, which is a challenged area in academic discourse. These are established approaches for using the extended corporate crime doctrines to connect an employer to the actions of their employees and others in order to create criminal liability for a firm. The various corporate models of fault focus on different legal concepts to attribute liability to the corporation: some base it on vicarious liability, holding the firm responsible for the actions and mental states of its human agents acting under authority; others base it on identification theory, which attributes liability based on the conduct and state of mind of key individuals who are the directing mind and will; yet others base it on

the organisational blameworthiness of the firm itself by considering the firm as having the capacity to be held liable based on concepts such as corporate culture.³⁶⁷

The specific manner in which those doctrines operate and the extent to which they are regarded as approaches that are permissible are the subject of academic debate.³⁶⁸ Michael Legg, Olivia Dixon and Stephen Spiers summarise some of the theoretical difficulties associated with criminal liability in an organisational setting, including, ‘how corporate liability might be determined; what sanctions are likely to be most effective against corporations; how mainstream criminal law offences interact with other offences under discreet legislation, and in what circumstances, if any individuals ought to be criminally liable’.³⁶⁹ Imposing fault on corporations is ‘fraught with difficulty’, as the models for assessing culpability are built on ‘human-centric’ notions of fault.³⁷⁰ Bant observes that ‘this human-centric model fails to address the complexities of dealing with modern corporate defendants, where the corporation has no natural “mind” and the knowledge of its human agents is often dissipated through complex, decentralised structures and reporting lines’.³⁷¹ The specific context of those debates and how they apply to the *Wage Theft Act* would require analysis that would take the thesis well beyond the goal of examining the specific offence provisions. The inclusion of various methods of imposing or attributing liability to offenders reflects the broader objectives of the *Wage Theft Act* to target many different types of employers and to avoid the issue of being prevented from attributing liability based on the organisational structure. In the various reports and inquiries into wage theft, the specific use of different corporate structures to avoid pay obligations is noted.³⁷² To address the complexity of attribution in corporations, Bant recommends a new way to rationalise corporate liability: system intentionality. Bant argues that

the essential proposition is that corporations *manifest* their intentions through the systems of conduct that they adopt and operate, both in the sense that any system reveals the corporate intention and in the sense that it *embodies* or *instantiates* that intention. Another way of putting this is to say that corporations think through their

³⁶⁷ See Australian Law Reform Commission, *Corporate Criminal Responsibility* (n 355) 140–8.

³⁶⁸ See, eg, Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023)

³⁶⁹ Michael Legg, Olivia Dixon and Stephen Spiers, *Corporate Misconduct & White-Collar Crime in Australia: Regulation, Investigation & Enforcement* (Thomson Reuters, 2022) 5–6 fn 24.

³⁷⁰ Bant, ‘Culpable Criminal Corporate Minds’ (n 364) 354.

³⁷¹ Ibid 358, citing Cristina de Maglie, ‘Models of Corporate Criminal Liability in Comparative Law’ (2005) 4(3) *Washington University Global Studies Review* 547, 559–60.

³⁷² See, eg, *2017 Senate Report: Corporate Avoidance of the Fair Work Act* (n 175); *2022 Senate Report: Systemic, Sustained and Shameful* (n 135) 3.

systems— and so assessment and characterisation of the system enables us to know the corporate state of mind.³⁷³

Adopting Bant’s approach to analysing evidence demonstrating corporate fault in the case of *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*, Gordon J of the High Court stated the following:

Evidence of a system of conduct can be both internal and external to the corporation. Internally it may include employee testimony, internal scripts, remuneration or promotion criteria, complaint processes and scripts, audit outcomes, and default settings on automated programs. Externally it may include patterns of harm to an identified class of customer, communications, incentives and disincentives provided to a target market, and user experiences. Those lists are not exhaustive.³⁷⁴

These kinds of factors could be relevant to applying corporate liability principles as required in the *Wage Theft Act*. For example, in assessing the circumstances of underpayments, relevant internal factors to be assessed could include the managers’ directions to staff, the information that the firm gains during audits, the automated payment systems and pressure, if any, from the managing board to ignore workplace laws on pay and employee conditions. External factors to be assessed could include whether the firm is competing against other non-compliant firms and the extent to which they are directed by senior management to achieve the same profit margins as other firms.

3.5.1.2 Statutory Modifications

The Act also includes statutory modifications of attribution of liability to reflect the different employer structures. The statutory definition of employer in the Act is broad— it defines an employer as ‘a natural person, body corporate, partnership, unincorporated association or other entity that employs or has employed another person’.³⁷⁵ The Act contains various statutory modifications of attribution that are adapted to the different types of contemplated employers. Key provisions include ss 10–11, which relate to body corporates; s 14, which applies to partnerships; s 15, to unincorporated associations; s 16, to the Crown; and s 17, to public authorities. Section 12 expands on the factors that are relevant to contemplate when evaluating the corporate culture of body corporates. Section

³⁷³ Elise Bant, ‘Systems Intentionality: Theory and Practice’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183, 187.

³⁷⁴ *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 419 ALR 30 [110].

³⁷⁵ *Wage Theft Act* s 3(1) (definition of ‘employer’).

13 also creates a deeming provision for holding officers responsible for their employer's actions. The inclusion of 'due diligence' is intended to operate as a defence to prevent attribution where the officer takes sufficient action to prevent the withholdings, but it nevertheless occurs.

The *Wage Theft Act* also extends the definition of 'employee entitlement offences' to include offences relating to conspiracy, incitement and attempt, as well as intimidation or reprisals relating to a criminal investigation or criminal proceeding that are connected to the criminal wage theft offences in s 6.³⁷⁶ These various methods for establishing liability have the potential to cast the net very widely. These approaches may also capture various people beyond officers, such as other employees, as well as third parties who aid the offending, such as an auditor or third-party payroll agency. An employee who assists the employer could also be held criminally responsible; for example, an individual who agrees to take a payment that is less than the standard payment could arguably also be caught by the definitions. Prosecutorial discretion may need to be exercised to limit the types of employees who could theoretically be prosecuted in order to ensure coherency in operation.

3.5.2 Attribution of Liability and Dishonesty

The concept of 'dishonesty' is difficult to apply in relation to an abstract entity, such as a legally constructed abstract entity, as the entity itself cannot have subjective awareness of its behaviour. Yet many of the employers who could be caught by the *Wage Theft Act* will likely be corporate entities. In a different legal context, the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry examined allegations of corporate misconduct by financial service providers.³⁷⁷ In that Royal Commission, examples emerged relating to 'fees-for-no service' where client fees were automatically deducted even if no service was provided, or financial service providers levied fees against deceased persons.³⁷⁸ Bant contemplated the types of regulatory enforcement action that could be taken in such circumstances, including provisions that required regulators to establish dishonesty to demonstrate misconduct.³⁷⁹ For example, s

³⁷⁶ See further ss 321 (conspiracy), 321G (incitement) or 321 (attempt) of the *Crimes Act 1958* (Vic). See also s 257(1) of the *Crimes Act 1958* (Vic) (intimidation or reprisals).

³⁷⁷ See *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 2019).

³⁷⁸ *Ibid* vol 1, 150–1.

³⁷⁸ Bant, 'Culpable Corporate Minds' (n 364) 362, citing *Corporations Act* s 1401G.

³⁷⁹ Bant, 'Culpable Corporate Minds' (n 364) 361–2.

1401G of the *Corporations Act 2001* (Cth) provides that: ‘A person must not, in the course of carrying on a financial services business in this jurisdiction, engage in dishonest conduct in relation to a financial product or financial service’. Bant identifies that regulators have hurdles establishing dishonesty, as for various breaches relating to the financial service providers, there was no human engagement in deducting fees as they were carried out by automated processes.³⁸⁰ The fact that automated systems impose fees on consumers creates evidentiary challenges in holding that a firm acted dishonestly in relation to the charge.³⁸¹ Bant draws attention to issues that arise in corporate entities, including in relation to attributing fault for conduct that occurs as a result of ‘automated processes to carry out core activities, such as payment and accounting systems’.³⁸² Bant questions who is the person to investigate for identifying

the requisite intent. Is it the programmer— who may be very small and uninformed cog in the corporate wheel? Or is it the manager who oversaw the implementation of the automated process? Or the person managing the process inputs, such as key customer data, decisions about pricing, or the management of risk associated with individual customers?³⁸³

I now turn back to the subject matter of the *Wage Theft Act*. As discussed in Section 3.4.3, many pay processes are overseen by automated systems. It is likely that the same types of issues described in relation to assessing whether an entity has acted dishonestly in relation to automated fees in the financial services industry are also likely to arise when a firm uses automated pay processes. In assessing dishonesty, issues arise as to who is required to be ‘dishonest’ to demonstrate that the employer— who may be an abstract entity— has satisfied the dishonesty requirements that is a key component of the offence structure. The attribution methods mentioned earlier in this chapter may operate to attribute aspects of what humans have done or failed to do to the abstract entity. However, it is not clear whether s 11 of the *Wage Theft Act* will operate to attribute dishonesty to a corporation. In a chapter in Bant’s edited collection on corporate liability, Jeremy Gans considered how dishonesty might operate in relation to corporate employers. Gans examined a Supreme Court of Tasmania case in which a fisherman and his employer,

³⁸⁰ Ibid 363.

³⁸¹ Ibid.

³⁸² Ibid 360.

³⁸³ Ibid.

Mures Fishing Pty Ltd, were charged under a federal dishonesty offence.³⁸⁴ The case included discussion of federal attribution provisions that could be used to attribute liability to the corporate employer. The prosecution failed because Blow CJ assessed that no prosecutor could successfully prove that the skipper was dishonest and satisfy the requirements for the corporate criminal responsibility doctrine. In a short note in the chapter, Gans contemplated how the unpublished judgment might apply to the Victorian wage theft offences. Gans argues:

Unlike the offence Mures Fishing was charged with, dishonesty is not central to this offence. Rather, it is only included to exclude some arguably acceptable scenarios—accidental withholdings, or brief changes to manage a cash-flow difficulty or the like—from this new form of criminality. But the prosecution nevertheless still have to prove the element of dishonesty, including where, as will often be the case, the employer is a corporation.³⁸⁵

Gans observes that s 11, which attributes the ‘knowledge or intention of, or a belief held by’ an employee to a body corporate, does not expressly provide for an employee’s dishonesty. Gans observes that

unless an alternative statutory provision for vicarious liability for the crimes of ‘officers’ (not other employees) applies, or Blow CJ’s approach is distinguished or discarded in Victoria’s courts, a corporation can’t be prosecuted for wage theft in Victoria. That would, of course, be an astonishing gap in the State’s landmark new law.³⁸⁶

Gans considered that s 10 could still operate to attribute an officer’s offence to a body corporate unless the body corporate can demonstrate that it exercised due diligence to prevent that offence. The operation of dishonesty as an element to the offence is difficult to resolve in isolation due to the unresolved interpretation questions— but the interpretive issues are amplified when applying elements of dishonesty to abstract entities.

3.6 Chapter Summary

In this chapter, I have sought to identify key considerations for tackling the statutory interpretation of the offences, including identifying areas of ambiguity in their elements.

³⁸⁴ Jeremy Gans, ‘Can Corporations Be Dishonest?’ in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 273. Mr Potter and his employer were charged under s 135.1(7) of the *Commonwealth Criminal Code*.

³⁸⁵ Gans, ‘Can Corporations Be Dishonest?’ (n 384) 289–90.

³⁸⁶ *Ibid* 290.

In the next chapter, I introduce Green's framework and explain why the subject matter of the Victorian criminal wage theft offences suggests 'moral ambiguity', which Green regards as an important justification in the analytical framework that he developed to evaluate the key elements that newly enacted offences or proposed offences are trying to criminalise. In Part II of the thesis, I apply Stuart Green's framework to the s 6 dishonest withholding of employee entitlement offences.

I have also introduced some of the complexities that arise because of the offence structure that relies on different attribution methodologies. I have also briefly considered how these elements would apply as part of the attribution methods available to capture various types of employers and individual officers with different levels of knowledge or awareness of the offending. For example, s 13 operates to deem officers responsible for their employer's actions. In some instances, an officer may not have done enough to rely on the defence of due diligence because they relied on the actions of others. This provision may lead to circumstances where an officer is held criminally liable for a wage theft offence despite not being dishonest, or intending to withhold employee entitlements, or having knowledge that the withholdings occurred. This suggests that a further avenue of inquiry that is beyond the scope of this thesis is to assess the extent to which attributing liability in wage theft offences through attribution methods satisfactorily captures blameworthiness.

Chapter 4: Analytical Framework

4.1 Introduction

This chapter explains the specific elements that form part of Stuart Green's three-part framework to assess to the 'underlying moral content' of criminal offences.³⁸⁷

I identify Green's framework as helpful as the subject matter of the criminal wage theft offences suggests 'moral ambiguity', in circumstances in which conduct may ordinarily not be regarded as criminal in nature.³⁸⁸ In broad terms, I explain the relevance of the analytical framework to my examination of the Victorian criminal wage theft offences. I use the framework to guide the structuring in Part II of the thesis, discussing each element in a separate chapter. I then turn to the specific theoretical assumptions that Green relies on to justify the framework. In Part III, I weigh up the elements to form an overall conclusion in Chapter 8.

4.2 Rationales for Using Green's Framework for This Thesis

Green's framework has been selected because it is designed to analyse and describe the moral content of newly devised criminal offences where the offences target offending that has traditionally not subject to criminal law treatment. The s 6 offences in the *Wage Theft Act* introduce criminal offences for conduct that at the time of enactment in 2020 had not previously been treated as subject to criminal sanctioning in Australia.

According to Green, his framework is most useful to assess the moral content of criminalised conduct when a 'moral ambiguity' may be present.³⁸⁹ Green developed the analytical framework in the context of 'white-collar crime'. Green defines this crime to reflect the family resemblance between the crimes he specifically examines in his monograph.³⁹⁰ These crimes include 'perjury, fraud, false statements, obstruction of justice, bribery, extortion and blackmail, insider trading, tax evasion, and certain regulatory offenses'.³⁹¹

³⁸⁷ Green, *Lying, Cheating and Stealing* (n 18) 6.

³⁸⁸ *Ibid* 23–9.

³⁸⁹ For further detail as to the concept of 'moral ambiguity', see Green, 'Moral Ambiguity' (n 363). This is also considered in Green, *Lying, Cheating and Stealing* (n 18) 1, 23–6.

³⁹⁰ *Ibid* 19–20.

³⁹¹ *Ibid*.

I consider that there are various aspects of the analysis and approach adopted throughout Green's framework, which are moulded to a 'white-collar context', that lend themselves well to considering the criminalisation of conduct by employers and officers in a workplace setting owing to some similarities in the context and intended purposes of the criminalisation. The wage theft offences involve a variety of actors in a workplace, including managers, directors and abstract entities similar to the actors Green identifies in a business context. The offences target employers and officers for their dishonest failure to meet obligations relating to rates of wages and other conditions. However, due to the diffuseness of responsibility, attribution methods must apply to connect liability. I also compare the harms and wrongs of tax evasion (an offence Green himself evaluates through his framework) with my findings in Section 8.2.3.2, as I identify similarities that help me to weigh up the Victorian wage theft offences.³⁹²

Green identifies that there are three main areas of moral ambiguity that relate to white-collar crime.³⁹³ I consider that the criminalisation of wage theft engages and evoke each of these forms of moral ambiguity. I note that there are some contextual differences between wage theft offences and the type of crimes that Green examines in his core monograph. The wage theft offences occur in a labour regulation context and are linked to securing standards for employees. It is not possible to examine these offences without contemplating the labour law context in which the legal response was developed. As a result, other factors, and specific characteristics of protections occurring in the labour law context, will also be considered when assessing the moral character of the conduct through Green's framework. I have considered some of the goals of minimum labour standard protections in Section 1.2.3. However, I regard the approach Green adopts in identifying moral ambiguities provides useful guidance and I balance the separate considerations in my analysis.

The first ground of moral ambiguity arises because of overlaps between existing legal regulatory systems and the newly enacted criminal law. Green argues that if conduct may be treated either through the criminal law or through civil penalties, it creates a moral ambiguity as there may be inconsistent treatment of conduct as criminal or not.³⁹⁴ That is, it may be difficult to ascertain a clear rationale for determining which conduct should be

³⁹² See, eg, Stuart P Green, 'Tax Evasion as Crime' in Monica Bhandri (ed), *Philosophical Foundations of Tax Law* (Oxford University Press, 2017) 57 ('Tax Evasion as Crime'); Stuart P Green, "What is Wrong with Tax Evasion?" (2009) 9 *Houston Business and Tax Law Journal* 221 ('Wrong with Tax Evasion?').

³⁹³ Green, *Lying, Cheating and Stealing* (n 18) 24–6.

³⁹⁴ *Ibid* 24.

treated as a criminal offence, or which conduct should be regarded as unlawful through civil regulation and statutory rights, or private enforcement action (eg a remedy for a breach of contract).

The ‘wage theft offences’ in Victoria occur in a context in which elements of the offences capture conduct that is a breach of the existing civil regulatory structures that impose civil remedies and penalties for breach, such as in relation to the *Fair Work Act*, or the legislation that creates legal entitlements relating to superannuation and other types of leave from different sources. At the time of enactment, there were no criminal offences in the *Fair Work Act*. The offences in the *Wage Theft Act* cover the dishonest withholding offences as well as the record-keeping offences. This creates the potential of the offending to be caught by separate criminal and civil enforcement systems operating to capture the same or similar conduct, but operating in different jurisdictions. At the time the *Wage Theft Act* was enacted this was position in the Victorian state jurisdiction and the Commonwealth federal jurisdiction. The likely different treatment for an employer creates a moral ambiguity issue as it must assess whether the conduct should be caught by the criminal law when the law has not traditionally criminalised the conduct, and when different offenders may receive different legal treatment for the same or similar conduct. A further issue that arises is the need to provide a theoretical or conceptual justification as to why certain conduct may be criminalised, when other breaches are not subject to potential criminal treatment. These schemes are not designed to work conjunctively as part of a regulatory enforcement pyramid or other dual-track enforcement systems, as in different jurisdictions.³⁹⁵ This separate operation of regimes may result in inconsistent outcomes in relation to the same or similar conduct. This may create ‘an uncertainty that raises important, and often troubling, questions about the law’s legitimacy, coherence, and authority’.³⁹⁶

The second moral ambiguity is that in some cases of white-collar crime, there may be grey areas between serious criminal conduct that involves bribery or extortion at one end, to conduct that may be described as ‘horse-trading’ or ‘back scratching’ in politics or business.³⁹⁷ This ambiguity requires an examination to determine the margins of criminality and where the conduct lies on spectrum of wrongdoing. For example, certain conduct may be regarded as clearly morally dubious and analogous to cheating, whereas

³⁹⁵ For a discussion of regulatory issues, see Hardy, Howe and Kennedy, ‘Criminal Liability’ (n 13).

³⁹⁶ Green, *Lying, Cheating and Stealing* (n 1816) 1.

³⁹⁷ *Ibid* 24.

other conduct may cause someone to gain an economic or social advantage without any clear designation of harm. Green draws attention to the pursuit of legitimate business dealings that may result in gaining an advantage versus non-permissible dealings.³⁹⁸

The second ground for moral ambiguity arises as there is a broad range of behaviour that may constitute wage theft with different levels of seriousness attached to the conduct. Colloquially, the term ‘wage theft’ captures a very broad range of conduct and is much wider than the conduct caught by the specific *Wage Theft Act*. However, even within the specifics of the conduct resulting in underpayments, there is significant variance as to deliberateness. For example, underpayments of entitlements may be part of a broader scheme to underpay workers, with cover-ups including the production of false documents and records intended to deceive employees and regulators about their non-compliance with standards on the one hand, to underpayments caused by errors of the application of awards and or pay loadings by adopting a flat rate that misses certain entitlements. Through focus groups and interviews with hospitality workers that sought to examine their views of wage theft, Emma Ferris and Stuart Ross noted that many of the hospitality workers interviewed saw areas of grey.³⁹⁹ One respondent discussed that at their job, there was an expectation to clock into work five minutes early.⁴⁰⁰ The shades of grey between the most serious offending to the less serious examples raise questions about the coherence of the law. These also raise an ambiguity about distinguishing the different types of conduct and degrees of moral wrongdoing associated with the full scope of conduct. The extent to which these issues apply to the specific offence structure may be resolved by examining the scope of conduct caught by the definitional elements of the statute. This thesis seeks to use Green’s framework to inform that examination process.

The third moral ambiguity that Green identifies are cases in which there are concerns about whether the conduct should be regarded as criminal at all. Green states that ‘there are some white-collar and regulatory offenses that are controversial even at their core’.⁴⁰¹ Green regards that for some crimes ‘the problem is one of “sticky norms”—where there exists a gap between what the law regards as morally wrongful and what a significant segment of society views as such’.⁴⁰² In this part, Green gives the examples of the criminalising of ‘trivial offences’, such as selling liquor without a licence, as being one

³⁹⁸ Ibid.

³⁹⁹ Ferris and Ross, ‘Hospitality Industry’ (n 19) 51.

⁴⁰⁰ Ibid.

⁴⁰¹ Green, *Lying, Cheating and Stealing* (n 18) 24, citing Dan M Kahan, ‘Gentle Nudges vs Hard Shoves’: Solving the Sticky Norms Problem’ (2000) 67(3) *University of Chicago Law Review* 607.

⁴⁰² Green, *Lying, Cheating and Stealing* (n 18) 24.

example where there may be debate regarding the criminality of the breach.⁴⁰³ The offence may result in a criminal fine— but the conduct itself may not be regarded as having the same type of moral obliquity as traditional offences that cause harm to a person. Similarly, Green provides the example of intellectual property infringements as raising potential issues.⁴⁰⁴ He observes that not all members of the community would regard copyright infringement as being of the type of conduct that should be treated as criminal.⁴⁰⁵ He also considers that certain scholars regard some economic crimes, such as insider trading, as being difficult to justify as a crime because the criminalised conduct does not significantly differ from conduct regarded as lawful.⁴⁰⁶ The moral ambiguity is linked to the different community views about whether the conduct has the moral characteristics of conduct that should be treated as a crime.

The third ground for moral ambiguity relates to the fact that certain types of wage theft conduct may be regarded as being technical in character, such as contraventions occurring without deliberateness or necessity to show fault. This raises issues regarding the community acceptance of criminalisation and whether the description of the conduct as wage theft is ‘fair labelling’.⁴⁰⁷ In criminal law literature, crimes have traditionally been distinguished through the Latin terminology of ‘*mala in se*’ and ‘*mala prohibita*’ as a binary distinction. *Mala in se* translates to ‘wrongs in themselves’, and *mala prohibita* translates to ‘wrongs prohibited by law’. *Mala in se* crimes traditionally include offences such as murder or rape, which society has regarded as inherently wrong.⁴⁰⁸ In contrast, *mala prohibita* offences are regarded as crimes because the legislators have chosen to make them a crime by creating a criminal offence in statute.⁴⁰⁹ The terminology is mentioned frequently in the academic literature that contemplates the question of criminalisation and the limits. Green rejects the sharp distinction between the two types of offences, suggesting instead that there is overlap between both elements in all offences.⁴¹⁰ Green argues that the more similar a crime is to a *malum prohibita* crime, the more difficult it is to find a moral basis for criminalisation.⁴¹¹ Nevertheless, the extent to

⁴⁰³ Ibid 25.

⁴⁰⁴ Ibid.

⁴⁰⁵ Ibid.

⁴⁰⁶ Ibid.

⁴⁰⁷ Ibid 46–7. See also James Chalmers and Fiona Leverick, ‘Fair Labelling in Criminal Law’ (2008) 71 *Modern Law Review* 217 (‘Fair Labelling’).

⁴⁰⁸ Green, *Lying, Cheating and Stealing* (n 18) 24–5.

⁴⁰⁹ Ibid.

⁴¹⁰ Stuart Green ‘The Conceptual Utility of *Malum Prohibitum*’ (2016) 55 *Dialogue* 33 (‘Conceptual Utility’).

⁴¹¹ Green, *Lying, Cheating and Stealing* (n 18) 351; Green, *Theft Law* (n 252) 103.

which wage theft offences may be regarded as crimes only because a statute has defined them as such raises issues about moral ambiguity and a broader question about whether the breaches should be crimes at all.⁴¹² Some concerns may be alleviated by legislative drafting, including about fault elements and scope. Green identifies that there may be moral ambiguities in those cases where in which the conduct is traditionally not regarded as justifying criminal intervention, because breaches may be regarded as trivial.⁴¹³ The debates on criminalising wage theft have sought to distinguish types by analogising deliberate and dishonest underpayments to stealing from a till, to suggest a similar character to the established crime of theft. Similarly, careless mistakes, such as misidentifying the relevant source of law or accidentally inputting wrong data, can be distinguished from a scheme that also involves fraudulent record keeping and attempts to ‘cook the books’ to avoid detection. Green’s framework assists by offering an approach to examine closely the structure of the offences in the statute to contemplate whether the subject matter of the offences is of the character that suggests a criminal law justification.

4.3 Overview of Stuart Green’s Analytical Framework

Before addressing its specific elements in detail, I provide an overview of Green’s framework. Throughout this chapter, I rely on Green’s own articulations of the framework for precision in terminology to describe the elements and to accurately capture Green’s justifications for creating his framework.

Stuart Green is a legal academic based in the United States (‘US’), whose work focuses on criminal legal theory and criminalisation. Green uses examples primarily from the US criminal legal context, with references made to the general principles set out in the American Modern Penal Code.⁴¹⁴ Green’s academic work is described as ‘explor[ing] the underlying moral content of the criminal law. He is especially concerned with the question of criminalization— what kinds of behavior are justifiably punished, and why. His books and articles have focused in particular on the moral limits of theft, white collar crime, homicide, and a wide range of sexual offenses’.⁴¹⁵

⁴¹² I consider further the application of the distinctions between *mala in se* and *mala prohibita* in my discussion of the norm against disobedience in Section 7.4.2.

⁴¹³ Green, *Lying, Cheating and Stealing* (n 18) 24–6.

⁴¹⁴ Paul H Robinson and Markus D Dubber, ‘The American Model Penal Code: A Brief Overview’ (2007) 10(3) *New Criminal Law Review* 319 (‘American Model Penal Code’).

⁴¹⁵ Rutgers Law School, ‘Stuart Green’ (Web Page) <<https://law.rutgers.edu/stuart-green>>. See, eg, Green, *Lying, Cheating and Stealing* (n 18); Green, *Theft Law* (n 252); Stuart Green, *Criminalizing Sex: A Unified Liberal Theory* (Oxford University Press, 2020).

4.3.1 Summary of Green's Analytical Framework

To assess 'the moral content' of criminalised conduct (or proposed crimes), Green developed an analytical framework that requires the assessment of three elements. This approach is chiefly set out in Green's 2006 key monograph: *Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime* ('*Lying, Cheating and Stealing*').⁴¹⁶ The three elements may be summarised as:

1. the mental state of the actor as prescribed by statute,
2. the social harmfulness of the action and
3. the moral wrongfulness of the conduct.⁴¹⁷

Green argues that these three elements should be expected in any criminal offence.⁴¹⁸ However, these elements are intended to guide analysis, rather than as required elements to justify criminalisation. Indeed, Green states:

I offer no argument that such elements comprise a set of necessary and sufficient conditions for criminalization (although the lack of any such element should at least put such status into question). Rather, I intend to use this three-part framework as an analytical framework for describing white-collar crime's moral complexity.⁴¹⁹

Beaton-Wells summarises that in a particular, Green 'argues that it is not a proper use of the criminal law to sanction harms that are not also wrongful'.⁴²⁰ In his monograph on theft law, Green notes that there are other issues to contemplate when considering whether to introduce criminal offences by posing many other questions to consider as part of the broader criminalisation question.⁴²¹ These issues include weighing up the cost of criminalising and its likely effects, as well as assessing whether criminalisation is warranted in a particular instance.⁴²² At the conclusion of the thesis in Chapter 9, I consider the broader factors that Green identifies, which may influence the decision-making process for criminalisation.

⁴¹⁶ See Green, *Lying, Cheating and Stealing* (n 18) 21–2.

⁴¹⁷ *Ibid* 4, 30, 34, 39. See also Green, 'Regulatory Offenses' (n 11) 1547–54.

⁴¹⁸ Green, *Lying, Cheating and Stealing* (n 18) 30.

⁴¹⁹ *Ibid* 30.

⁴²⁰ Caron Beaton-Wells, 'Capturing the Criminality of Hard Core Cartels: The Australian Proposal' (2007) 31(3) *Melbourne University Law Review* 675, 678 ('Hard Core Cartels').

⁴²¹ Green, *Theft Law* (n 252) 5–6.

⁴²² *Ibid* 6.

The three elements are set out in the framework as distinct concepts.⁴²³ Green acknowledges that there are significant layers of overlap between each of the elements,⁴²⁴ but he regards each element as raising separate moral considerations that are to be evaluated separately. Hence, Green considers that '[a]lthough moral wrongfulness, harmfulness, and mens rea frequently overlap, the concepts are analytically distinct'.⁴²⁵ In my thesis, I have retained this structure of separating the elements to analyse the offences.

4.3.2 Green's Theoretical Justifications and Assumptions

Green focuses on a moral justification for permitting criminalisation. Indeed, he asserts that the criminal law should not punish a perpetrator who 'does *not* deserve punishment'⁴²⁶ and that '[a]ssessing the moral content of criminal law is ... an essential step to assessing its likely effectiveness'.⁴²⁷

Green explains the justifications for adopting this structure in *Lying, Cheating and Stealing*.⁴²⁸ In summary, Green argues that the criminal law should be reserved for conduct that 'deserves' criminal treatment. That is, there should be a moral basis for criminalising conduct. He suggests that conduct that is merely harmful lacks a sufficient moral justification for criminalisation.⁴²⁹ Green created his framework in *Lying, Cheating and Stealing* because he wanted to determine whether morally ambiguous offences should be criminalised. That is, the answer as to whether the conduct should be regarded as 'morally dubious' is not always clearly present. His monograph focuses on certain types of 'white-collar crime', but his framework has broader application to other crimes.⁴³⁰

In this thesis, Green's three-part analytical framework is adopted to assess the 'underlying moral content' of criminalised conduct.⁴³¹ Green views his project 'primarily as an exercise in descriptive moral theory, rather than in saying why, as a normative matter, we *should* refrain from lying or cheating or stealing. Nor am I much concerned with the meta-ethical task of describing the foundations of the moral system within which such norms

⁴²³ Green, *Lying, Cheating and Stealing* (n 18) 38.

⁴²⁴ *Ibid* 72.

⁴²⁵ *Ibid* 39.

⁴²⁶ *Ibid*.

⁴²⁷ *Ibid* 22.

⁴²⁸ *Ibid*.

⁴²⁹ *Ibid* 40.

⁴³⁰ I expand on Green's use of 'white-collar crime' in Section 4.3.3.

⁴³¹ Green, *Lying, Cheating and Stealing* (n 18) 6.

exist'.⁴³² Green views the framework as a tool to 'describe and analyse' the moral content of crime by analysing the specific statutory context in which the offence arises. It is not intended to be 'prescriptive'.⁴³³ However, it does enable analysis of where 'doctrine has gone astray'.⁴³⁴ Beaton-Wells summarises Green's framework as operating as 'a tripartite framework for identifying and mapping the moral content' of conduct.⁴³⁵ The approach adopts aspects of normative criminalisation debates to create a practical tool for assessing whether legislators should make something a crime. As Lacey describes, this framework is a middle-level theory of criminalisation.⁴³⁶ Such theory 'begins with an analysis of the law as it is, to draw out the principles that explain it'.⁴³⁷ This is consistent with Green's view that his monograph, *Lying, Cheating and Stealing* 'does not purport to offer a foundational theory of either moral philosophy or criminal law'.⁴³⁸

Green's theoretical justification for assessing the moral content of crimes is connected to retributivist theories of punishment.⁴³⁹ He views a moral justification for criminalisation as essential for using the criminal law to sanction certain behaviour.⁴⁴⁰ In *Thirteen Ways to Steal a Bicycle: Theft Law in the Information Age*, Green usefully summarises his approach to incorporating moral concepts into an analysis of criminal offences. In his approach, he incorporates elements of two theories of punishment—consequentialism and retributivism—to guide the development of his framework.⁴⁴¹ Green summarises the concepts as follows: 'Consequentialism seeks to justify punishment on the basis of the good consequences that would flow from it. Retributivism can be understood as a theory that imposes punishment on the offender because he "deserves" it.'⁴⁴² In *Lying, Cheating and Stealing*, Green adds that 'the core notion [of retributivism] is that punishment is justified when it is deserved, and that criminals deserve punishment when they are morally at fault'.⁴⁴³ The concept of moral blameworthiness is a key component of his framework. He explains that he uses the concept of 'moral desert as a side constraint on whatever other rationale exists for imposing criminal sanctions (such as some version of

⁴³² Ibid 4.

⁴³³ Ibid 6.

⁴³⁴ Ibid.

⁴³⁵ Beaton-Wells, 'Hard Core Cartels' (n 420) 678.

⁴³⁶ Lacey, 'Historicising Criminalisation' (n 29) 943.

⁴³⁷ Adam Slavny, *Wrongs, Harms, and Compensation: Paying for our Mistakes* (Oxford University Press, 2023) 12–13.

⁴³⁸ Green, *Lying, Cheating and Stealing* (n 18) 6.

⁴³⁹ Ibid 21–3.

⁴⁴⁰ Ibid 21.

⁴⁴¹ Green, *Theft Law* (n 252) 70.

⁴⁴² Ibid 70–1.

⁴⁴³ Green, *Lying, Cheating and Stealing* (n 18) 21–2.

consequentialism)'.⁴⁴⁴ The key argument he uses to justify the incorporation of retributive elements in assessing sanctioning is that 'society should *not* punish those who are not blameworthy'.⁴⁴⁵ The justification for sanctioning through the criminal law linked to retribution is a key component of his theoretical framework, but it is tied to other theoretical justifications for criminalising conduct.⁴⁴⁶ In justifying the theoretical foundations for his framework, Green states that 'retribution, in one form or another, is a necessary, if not sufficient, goal of the criminal law'.⁴⁴⁷ Instead, [Green] hope[s] to show merely that all three kinds of elements are relevant to determining whether an actor's conduct should be regarded as blameworthy'.⁴⁴⁸ The fact that he leaves scope for using other rationales to justify criminalisation alongside the moral basis reveals that the decision to criminalise involves complex decision-making factors for legislators to consider when introducing new criminal offences. I return to other factors that link to criminalisation in Chapter 9.

4.3.3 Broader Application of Green's Framework

Green's framework is developed in the context of 'white-collar crime'. He identifies that his use of 'white-collar crime' is a non-technical definition and that it is a 'deeply contested term' across disciplines.⁴⁴⁹ His terminology is linked to the context of his discussion, rather than a specific dominant legal, sociological or criminological approach to defining the crimes.⁴⁵⁰ Some relevant characteristics that Alex Steel observes in Green's discussion on 'white-collar crimes' is that there is 'a reduced role for mens rea; a more abstract and diffuse form of harm caused by the activity; and a wrongfulness that consists in a breaching of everyday norms that are generally accepted by society'.⁴⁵¹ In *Lying, Cheating and Stealing*, Green defines white-collar crime to reflect the family resemblance between the crimes he specifically identifies in his work. He states: 'The main purpose of this book is to explore the moral content of a specific collection of interesting, but mostly under-theorized, crimes: perjury, fraud, false statements, obstruction of justice, bribery, extortion and blackmail, insider trading, tax evasion, and

⁴⁴⁴ Green, *Theft Law* (n 252) 71.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ Green, *Lying, Cheating and Stealing* (n 18) 22.

⁴⁴⁷ *Ibid.*

⁴⁴⁸ Green, *Theft Law* (n 252) 72.

⁴⁴⁹ Green, *Lying, Cheating and Stealing* (n 18) 4, 9.

⁴⁵⁰ *Ibid* Ch 2.

⁴⁵¹ Alex Steel, 'Lying, Cheating and Stealing: A Moral Theory of White-Collar Crime Stuart P Green' (2006) 29 *UNSW Law Journal* 349, 349–50.

certain regulatory offenses.’⁴⁵² He ‘uses the term “white-collar crime” as a kind of shorthand to refer to the crimes contained on this list’.⁴⁵³ Many of these crimes relate to financial conduct, but also to conduct that manipulates circumstances or positions of power or influence, including the obstruction of justice, insider trading and perjury. Green acknowledges the definitional challenges in utilising the term ‘white-collar crime’ but dismisses those challenges on the basis that it allows a broad consideration of similar characteristics in a range of contexts, which enables the application of his framework to those offences as part of his monograph.

As a starting point, Green describes regulatory crimes by reference to subject matter. He lists penal statutes, including ‘the environment, product and workplace safety, labor, banking’.⁴⁵⁴ Green regards these as ‘regulatory crimes’, as they are intended to operate in a specific statutory context and may have the effect of introducing criminal sanctions in a broader legislative scheme to regulate, for example, the banking industry.⁴⁵⁵

Green also identifies that the types of harms and wrongs that can be connected to regulatory offences vary considerably between different offences.⁴⁵⁶ For example, endangering lives in a workplace due to workplace hazards is of a different character to engaging in an activity without a licence, such as driving unlicensed. Green identifies that some ‘regulatory violations involve harms and wrongs that are similar to those we saw in connection with other white-collar crimes’ he examines in monograph.⁴⁵⁷ For example, he considers ‘tax evasion, insider trading, and certain kinds of false statements could all qualify as regulatory crimes’.⁴⁵⁸ In contrast, some ‘regulatory crime that only exists because ‘penal statutes that make it a crime to engage in prohibited conduct, subject to regulation, that would not be viewed as entailing significant moral wrongfulness independent of its prohibition’.⁴⁵⁹ For example, a prohibition to fish at a certain lake.

Green observes that although the framework is designed with ‘white-collar offenses in mind, it is a framework that could potentially be applicable to other kinds of criminal

⁴⁵² Green, *Lying, Cheating and Stealing* (n 18) 19–20.

⁴⁵³ *Ibid.*

⁴⁵⁴ *Ibid.* 249.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ *Ibid.*

⁴⁵⁷ *Ibid.*

⁴⁵⁸ *Ibid.*

⁴⁵⁹ *Ibid.*

offences as well'.⁴⁶⁰ I now consider how the framework has been applied to other contexts, drawing on the application of Green's framework to criminal cartel offences.

4.3.3.1 The Application of Green's Framework to Criminal Cartel Offences

Stuart Green's analytical framework has been used to examine criminal cartel provisions in various jurisdictions, including in Australia and the United Kingdom ('UK'), and possible criminalisation in the European Union.⁴⁶¹ Caron Beaton-Wells and Peter Whelan used Green's framework to consider criminal cartel offences in competition law. Both authors analyse criminal cartel offences by adopting Green's framework to assist them in determining the extent to which the offences reflect a moral basis for criminalisation. Their approach enables them to critique the proposed offences and demonstrates how the framework may aid reforms or the refinement of legislation to better reflect a moral basis for criminalisation. I consider that their use of Green's framework aids their success at analysing the criminality of the proposed criminal cartel offences.

Whelan defines cartel activity as 'as the making or implementing of an anticompetitive agreement, concerted practice or arrangement by competitors to fix prices, make rigged bids, establish output restrictions or divide markets by allocating customers, suppliers, territories or lines of commerce'.⁴⁶² Cartels are regarded as a breach of competition law on the basis that they harm competition.⁴⁶³ In examining whether certain types of cartels should be criminalised, various rationales are evoked, including instrumental justifications based on concepts such as deterrence, as well as moral justifications.⁴⁶⁴ Both Caron Beaton-Wells and Peter Whelan consider Green's framework helpful in examining the extent to which there may be a moral basis to criminalise cartel conduct.⁴⁶⁵

Beaton-Wells and Whelan use Green's framework to engage in a theory-informed doctrinal analysis of proposed criminal offences.⁴⁶⁶ Beaton-Wells uses the framework to examine a proposed offence structure for cartel offences in Australia in order to identify issues with the offence and suggests areas in which legislators should engage in further

⁴⁶⁰ Ibid 4.

⁴⁶¹ See Peter Whelan, 'Cartel Criminalization and the Challenge of Moral Wrongfulness' (2013) 33(3) *Oxford Journal of Legal Studies* 535, 540 ('Cartel Criminalization'); Beaton-Wells, 'Hard Core Cartels' (n 420); Angus MacCulloch, 'The Cartel Offence: Defining an Appropriate "Moral Space"' (2012) 8(1) *European Competition Journal* 73.

⁴⁶² Whelan, 'Cartel Criminalization' (n 461) 535.

⁴⁶³ Ibid.

⁴⁶⁴ Ibid 537–8.

⁴⁶⁵ Beaton-Wells, 'Hard Core Cartels' (n 420).

⁴⁶⁶ See Section 1.3 for discussion of a similar method.

thought to ensure that the conduct can be distinguished from civil regulatory prohibitions on conduct that attracts civil penalties.⁴⁶⁷ Whelan uses Green's framework to examine whether the proposed criminalised conduct fits the elements of Green's moral wrongfulness framework, by fulfilling the specific tests Green develops to apply to the norm against cheating, stealing and deception.⁴⁶⁸ Similarly to Beaton-Wells, Whelan regards Green's framework as useful for assessing whether the proposed criminal conduct has attributes that suggest a moral basis for permitting criminalisation, and regards Green's approach as a useful tool to frame that discussion in the context of cartel conduct and to guide discussion on proposed offences.

Caron Beaton-Wells adopts Green's framework to examine cartel conduct ahead of reforms in Australia that criminalised certain types of cartel conduct.⁴⁶⁹ She uses Green's framework to identify arguable limits to conduct that may be regarded as potentially criminal, with recourse to Green's elements to suggest potential issues with mapping and designing criminal offences for the conduct. She identifies that there is a question 'as to how, at the level of legislative prescription, the offence of cartel conduct may be designed to capture explicitly or implicitly the moral reprehensibility generally associated with criminal behaviour'.⁴⁷⁰ She regards Green's element of 'moral wrongfulness' as 'of substantial assistance in tackling the moral debate surrounding the criminalisation of cartels and, in particular, in identifying the source(s) of moral wrongfulness in such activity'.⁴⁷¹ Beaton-Wells applies Green's framework by considering the three elements to consider the extent to which certain types of conduct could suggest a moral basis for criminalisation. After considering the elements, she recommends areas that legislative drafters should consider to ensure that 'conduct that is sufficiently culpable, harmful and wrongful is caught by the offence'.⁴⁷² In relation to the first element, (which she calls 'culpability', reflecting that Green referred to the first element as such in his earlier iteration of the framework),⁴⁷³ she regards that fault elements and the framing of specific defences may be used to distinguish the offences from 'otherwise corresponding civil prohibition'.⁴⁷⁴ In relation to harmfulness, Beaton-Wells argues that an element acknowledging harm should be inbuilt into the offence structure, rather than left to

⁴⁶⁷ Beaton-Wells, 'Hard Core Cartels' (n 420).

⁴⁶⁸ Whelan, 'Cartel Criminalization' (n 461).

⁴⁶⁹ Beaton-Wells, 'Hard Core Cartels' (n 420).

⁴⁷⁰ *Ibid* 676.

⁴⁷¹ *Ibid* 678.

⁴⁷² *Ibid* 701.

⁴⁷³ Green, 'Regulatory Offenses' (n 11) 1547–54.

⁴⁷⁴ Beaton-Wells, 'Hard Core Cartels' (n 420) 701.

assessment at sentencing, as reflecting a moral rationale to treat the conduct as a criminal offence.⁴⁷⁵ In relation to wrongfulness, Beaton-Wells reflects on the need to distinguish the conduct from one that otherwise would be caught by the civil offences. She criticises the need to include the element of ‘dishonestly obtaining a gain’, as the definition likely has broad application to most kinds of cartel conduct, such that the inclusion of the term has limited utility in shaping what is caught by the offence.⁴⁷⁶ Instead, she considers that assessing whether the framing of the offences corresponds to Green’s norm-based approaches may suggest a moral basis.⁴⁷⁷ Beaton-Wells uses the framework to assist in critiquing the criminal law proposals and to suggest areas that need further refinement before any specific criminal offences are introduced, to ensure that reforms can be rationalised as capturing a moral basis for criminalising certain classes of conduct. This approach demonstrates how she has used Green’s framework to engage in a critical analysis of the proposed offences, offering refinements to help better capture the criminality of the proposed offence.

Peter Whelan examines the moral justification for criminalisation by applying Green’s framework to cartel conduct by focusing on Green’s third element, relating to moral wrongfulness. In his article, Whelan focuses on three of the moral norms that Green considers in his monograph.⁴⁷⁸ These are applying the norm against stealing, deception and cheating, with reference to the specific tests that Green articulates. In doing so, Whelan identifies that Green’s method enables an analytical structure for assessing whether there is a moral basis to criminalise the conduct, which is not conduct that has the typical characteristics of conduct that is criminalised. Whelan identifies that ‘[f]or Green, conduct may constitute a “moral wrong” if it is in violation of a pre-existing moral norm, such as that prohibiting stealing, deception or cheating’.⁴⁷⁹ Whelan further states ‘Green’s treatment of moral wrongfulness is particularly useful for present purposes, ie determining the moral quality of a particular type of conduct which may at first glance seem innocuous or morally neutral’.⁴⁸⁰ Whelan additionally enhances Green’s framework by clearly setting out his analysis through a systematic framework.⁴⁸¹ That is, for the

⁴⁷⁵ Ibid 702.

⁴⁷⁶ Ibid 702–3.

⁴⁷⁷ Ibid 698–701.

⁴⁷⁸ Whelan, ‘Cartel Criminalization’ (n 461) 539.

⁴⁷⁹ Ibid.

⁴⁸⁰ Ibid.

⁴⁸¹ See 4.4.4 for further discussion of this approach.

norms against cheating, stealing and deception, he identifies steps to help guide the analysis and provides additional clarity to how to apply those norms to other offences.

In examining the conduct through the various norms and tests Green has established, Whelan suggests there are several challenges linked to devising criminal sanctions that are conceptually supported by the theories relying on ‘moral wrongfulness’ and competing goals linked to concepts such as deterrence, depending on the scope of the subject matter of conduct covered by criminal cartel offences.⁴⁸² One norm that Whelan applies to cartel activity is the norm against stealing. Whelan links the victims of the cartel activity to rights to not pay an increased price during collusion and artificial competition (ie a cartel overcharge). Whelan observes that ‘even if the relevant rights to the overcharge are created, there is a further limitation of the conceptualization of cartel activity as stealing: due to the requirement of a fundamental violation of these rights, only the actual implementation of a cartel agreement will be captured’.⁴⁸³ Then, he critiques the subject matter of the cartel offences through reference to the competing goals between deterrence and retribution. Whelan observes that despite assumptions in economic deterrence theory, not all cartelists act rationally. He adds that to resolve this issue, it would be necessary to include intentionality requirements to define the offence.⁴⁸⁴ He argues that to ‘a cartel offence that captures “moral wrongfulness”, one could add one or more of the relevant intentions to the definitional elements of the proposed offence. But doing so impacts negatively on deterrence: due to the additional definitional elements’ requiring of proof, *ceteris paribus*, for a given amount of resources fewer successful prosecutions will be achieved’.⁴⁸⁵

This above explanation is helpful to my own analysis as it demonstrates how other academics have used Green’s framework to analyse newly enacted or proposed criminal offences. It demonstrates that the approach has been accepted as a useful way to examine novel offences and demonstrates a proof of concept for my own analysis of Green’s offences.

⁴⁸² Whelan, ‘Cartel Criminalization’ (n 461) 559–61.

⁴⁸³ Ibid.

⁴⁸⁴ Ibid 660–1.

⁴⁸⁵ Ibid.

4.4 The Specific Elements in Green's Framework

In this section, I provide details of the requirements of each element in Green's analytical framework. I closely adopt Green's language in this part.

Then, in Section 4.4.4 identify the refinements I make to Green's framework to take into account the Australian criminal law context. I also explain how I draw on Whelan's elaboration of Green's framework by adopting a systematic framework to provide additional explanation of Green's moral norms that assists in analysing moral wrongfulness.

After addressing each element in turn, in Table 4.1, I provide a summary of the key steps involved for each element, before providing guidance in how to weigh up the elements to form a conclusion as whether offences are an appropriate instance of criminalisation.

4.4.1 Element 1: Mental State

Green describes the first element in his framework as an assessment of mental elements. Green states that '*mens rea*, in the elemental sense in which it will be used here, constitutes the mental state required in the definition of an offense or with which a criminal act is committed, such as intent, knowledge, recklessness, or negligence'.⁴⁸⁶ Green observes that an assessment of the mental elements is necessary in 'determining the extent to which an act entails fault and is therefore deserving of punishment'.⁴⁸⁷ Green observes that elements such as dishonesty that are common in the Australian and UK contexts

are frequently spoken of as elements of *mens rea*. There is in my view no real harm in doing so, but within the analytical framework that is being developed here, in which *mens rea* is used to refer, narrowly, to a specific mental element with which a prohibited act must be performed, it is more appropriate to deal with such elements in the context of moral wrongfulness.⁴⁸⁸

In an Australian criminal law context, such an approach would be inconsistent with how mental elements are construed. Alex Steel argues that despite the complexity of the tests adopted by the Australian High Court in *Peters* in the majority judgments,⁴⁸⁹ dishonesty

⁴⁸⁶ Green, *Theft Law* (n 252) 72; Green, *Lying, Cheating and Stealing* (n 18) 30–3.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ Green, *Theft Law* (n 252) 86.

⁴⁸⁹ *Peters* (1998) 192 CLR 493.

‘is best seen as a mental element, or at the least as a compound concept that contains distinct mental and physical elements’.⁴⁹⁰ Unlike Green, I consider that dishonesty must be considered both in my discussion of the first and third elements of Green’s framework. I consider that resolving statutory ambiguities relating to the role of the standard of dishonesty in the s 6 offence structure is essential to understanding the fault elements connected to ‘withholding employee entitlements’ such that it would not be possible to consider and evaluate a person’s mental state without considering dishonesty as part of the first element.

In Chapter 5, in which I apply Green’s first element to the Victorian offences, I focus on the mental element requirements by reference to the statutory context and words in the statute, rather than contemplating how the offences may apply to any specific known offender or class of offenders. In explaining the distinction between individual culpability, which focuses on a known particular defender, and the approach that Green adopts, he emphasises that the focus is on ‘crime types’. In his book on theft law, he states:

Assuming that punishment for theft (like every other crime) is properly imposed only if the offender is morally blameworthy, the question is how and when such blameworthiness occurs. My primary focus is not on the culpability of individual offenders committing specific acts of theft—crime tokens—but rather on the degree to which particular kinds of conduct—crime types—can be said to entail moral fault. The latter inquiry is a kind of generalization about criminal conduct, similar to the sort of inquiry that a legislature makes (or ought to make) in determining whether a certain kind of conduct justifies criminal penalties, and, if so, what kind and what amount. The question is, in effect, to what extent the sort of defendant who commits theft can be said *on average*, or *typically*, to be at fault. In such an assessment, it is normal to assume that no applicable exculpatory conditions, such as mistake, duress, or justification, apply; and the individual motivations or personal histories of particular defendants who commit such acts are not ordinarily a concern.⁴⁹¹

Green’s first element focuses on assessing the general characteristics of the offence via a close examination of the structure and the element requirements, rather than evaluating the broader context in which a specific offence occurs. For example, the broader explanations for why a person engages in wage underpayment are not relevant to the

⁴⁹⁰ Steel, ‘Describing Dishonest Means’ (n 323) 8.

⁴⁹¹ Green, *Theft Law* (n 252) 72.

assessment of who, as a generalised offender, could be caught by the offences by reference to the offence elements. This idea of assessing who may be the ‘average’ or ‘typical’ offender by reference to the statute is a more familiar process in criminal law examinations than in labour law ones. In the criminal law context, the detailed analysis of the crime structure is a common method to analyse the scope of offences and crime. In labour law and adjacent disciplines, it is more common to analyse why underpayments occur in a particular industry or sector or seem to affect a particular type of worker more frequently, rather than focus on key terminology and statutory definitions. For example, Bassina Farbenblum and Laurie Berg from the Migrant Justice Institute have published research reports and academic publications tracking the experience of workplace exploitation affecting temporary migrant workers, including workers in the agriculture industry.⁴⁹² For my purposes, I focus primarily on the statute and terminology as a starting point to assess the target of the crime, rather than broader contextual factors that may enable exploitation or underpayments. The terminology of ‘average’ or ‘typical’ may also be in tension with the requirements of the *Wage Theft Act* that impose a standard of dishonesty. Nevertheless, I see value in identifying and discussing the mental element requirements as a first step in examining that the generalised characteristics of ‘who’ will likely be caught by the offence provisions. Such an approach is consistent with the first element of Green’s framework and is important in understanding the specific requirements of the offences.

Green also draws out further observations about mental elements in *Lying, Cheating and Stealing*. He makes some observations about the distinct patterns of usage of mental elements in white-collar offences to assist in an analysis of the offences designed in a workplace context. Green observes:

Some white-collar crimes, particularly in the regulatory area, require a significantly lower level of mens rea than traditionally required by the criminal law, while in other white-collar crimes the requirement of mens rea is so important that it is in fact the only thing that distinguishes the conduct criminalized from conduct that is not otherwise considered criminal.⁴⁹³

⁴⁹² See, eg, Berg and Farbenblum, ‘National Temporary Migrant Worker Survey’ (n 28); Farbenblum and Berg, ‘Wage Theft in Silence’ (n 28).

⁴⁹³ Green, *Lying, Cheating and Stealing* (n 18) 31.

Identifying whether the mental elements of the offences examined suggest the first or second of these requirements may influence a finding about the degree of moral fault generally required by them.

Green also observes that for conduct occurring in a ‘white-collar’ context, there is a greater degree of ‘diffuseness’ of responsibility because of the manner in which liability is ascribed to different entities.⁴⁹⁴ He largely does not address the issue in his monograph,⁴⁹⁵ but the structure of the offences I examine in this thesis requires further consideration of attribution methodology and ascription to understand the offences. In his monograph, Green notes:

that a significant amount of white-collar crime *is* committed by abstract entities such as corporations, partnerships, non-profit associations, and governmental agencies. Exactly how *mens rea* should properly be ascribed to such entities (or, indeed, *whether* such entities should even be viewed as capable of forming *mens rea*) raises a host of complex and interesting questions that lie beyond the scope of this work.⁴⁹⁶

In contrast to Green, given the significance of the attribution methods and their impact on assessing ‘who’ might be caught by the provisions, I incorporate a discussion of attribution in Section 3.5. In that section, I canvass some conceptual issues relating to holding abstract entities morally liable for criminalised conduct, but those theoretical issues are not the main focus of the discussion in this thesis.

4.4.2 Element 2: Harmfulness

Green’s second element focuses on harmfulness. He defines harmfulness as ‘the degree to which a criminal act causes (or risks causing) harm’.⁴⁹⁷ He adopts Joel Feinberg’s definition of harm,⁴⁹⁸ which requires that there is ‘some relatively lasting or significant setback to a person’s interests. An interest, in turn, is something in which a person has a stake’.⁴⁹⁹ Green also requires ‘that the harm caused by criminal acts is “public” in a way that the criminal law considers relevant—ie that it is the sort of harm that somehow properly concerns the community as a whole, rather than just individual citizens within

⁴⁹⁴ Ibid 26.

⁴⁹⁵ Ibid 33.

⁴⁹⁶ Ibid.

⁴⁹⁷ Ibid 34.

⁴⁹⁸ Ibid, citing Feinberg, *Harm to Others* (n 129) 36–7.

⁴⁹⁹ Feinberg, *Harm to Others* (n 129) 36–7.

such community'.⁵⁰⁰ For a harm to be considered public, the moral wrongfulness element (the third element of Green's framework) must also be established.

The approach undertaken to analyse harmfulness involves balancing and applying the key definitions that Green adopts based primarily on the work of Joel Feinberg. In my application of this element, I am guided by the definitions Green adopts—but, largely, the process involves identifying interests and discussing types of interferences. In Chapter 8, where I weigh up the elements together, I present findings as to whether the harms identified are supported by the moral wrongfulness element to suggest a 'public wrong', which includes harms that affect the public in some way.

Green expands on Feinberg's definition of interests to include discussions about individual interests, the collective interests of society and governmental interests.⁵⁰¹ Some relevant interests that Green or Feinberg have considered include the following in a non-exhaustive list, but it should be clarified that the mere existence of an interest of the types referenced below does not necessarily mean that an interference should result in criminal protection:

- *Individual interests*

Feinberg introduces the concept of 'welfare interests' as being individual interests that are the 'bare minima' for 'achieving and maintaining [a] minimum level of physical and mental health, material resources, economic assets, and political liberty that is necessary if we are to have any chance of achieving our higher good or well-being, as determined by our more ulterior goals'.⁵⁰²

Feinberg argues that welfare interests are the type of interests that the law seeks to protect. However, the mere fact that welfare interests are affected does not necessarily mean that a criminal law response is warranted. I expand on how these welfare interests have been protected by the criminal law in some instances, in Section 6.3.1.1. Other remedies, such as contractual damages, could be afforded instead.

Feinberg lists the welfare interests as:

- 'physical health and vigor';

⁵⁰⁰ Green, *Lying, Cheating and Stealing* (n 18) 34.

⁵⁰¹ Green, 'Regulatory Offenses' (n 11) 1550.

⁵⁰² Feinberg, *Harm to Others* (n 129) 57.

- ‘the absence of obsessive pain’;
- ‘the absence of grotesque disfigurement’;
- ‘intellectual competence’;
- ‘emotional stability’;
- ‘economic sufficiency’;
- ‘tolerable environment’; and
- ‘minimal political liberty’.⁵⁰³

- *Public interests*

Green identifies that public interests that relate to different ‘collectives’ could be affected. Green identifies interests ‘to clean environment; safe food, drugs and consumer products; effective national security; and fair and efficient markets’.⁵⁰⁴

- *Governmental interests as morally indefensible conduct*

Green identifies that the interests of government could be affected. These include interests that are ‘generated in the very activities of governing’⁵⁰⁵ and the interference of which ‘endanger ... the operation of government systems in which efficient normal functioning we all have a stake’.⁵⁰⁶

Specific examples of governmental interests include an interest in the collection of taxation;⁵⁰⁷ fair elections; accurate information in a population census; and a functioning legal system.

After interests are identified, it is necessary to consider whether there is an interference with an interest. Green refers to other statements of what it is meant to include: the ‘disruption or interference’,⁵⁰⁸ a ‘violation’⁵⁰⁹, or ‘the negation, endangering, or destruction’ of an interest.⁵¹⁰ These words are intended to help clarify what is meant when an interest is affected but overlap considerably.

⁵⁰³ Ibid 60.

⁵⁰⁴ Green, ‘Regulatory Offenses’ (n 11) 1550.

⁵⁰⁵ Feinberg, *Harm to Others* (n 129) 62.

⁵⁰⁶ Ibid.

⁵⁰⁷ Green, ‘Regulatory Offenses’ (n 11) 1550.

⁵⁰⁸ Jean Hampton, ‘Correcting Harms Versus Righting Wrongs: The Goal of Retribution’ (1992) 39 *UCLA Law Review* 1659, 1662 (‘The Goal of Retribution’).

⁵⁰⁹ Hyman Gross, *A Theory of Criminal Justice* (Oxford University Press, 1979) 115 (‘*Criminal Justice*’).

⁵¹⁰ Joshua Dressler, *Understanding Criminal Law* (Matthew Bender, 2nd ed, 1995) 96 (‘*Understanding Criminal Law*’).

The assessment of an interference, then, requires a consideration of whether it constitutes a setback. Feinberg defines a setback as ‘morally indefensible conduct that not only set back the victim’s interest, but also violates [their] right’.⁵¹¹ Feinberg then defines a lasting or significant setback to include a ‘thwarting, setting back or defeating an interest’ to justify a designation of a setback to an interest as causing harm.⁵¹² Many of these definitions overlap. However, the process of identifying harms and contemplating who may be affected by the interferences is helpful in contemplating the impact of the subject matter of the offences.

4.4.3 Element 3: Moral Wrongfulness

According to Green, ‘[t]he third element of moral content in criminal offenses—moral wrongfulness—refers to the violation of a moral norm that occurs when a criminal act is committed’.⁵¹³ In his book on theft law, Green describes this element as reflecting ‘the extent to which the act involves the violation of a freestanding moral norm, rule, right, or duty’.⁵¹⁴ Green explains that in the context of white-collar crime, the moral wrongfulness is significant for distinguishing what may otherwise be lawful conduct.⁵¹⁵ Green argues:

whether a harmful act is also wrongful has particular significance in the realm of white-collar crime, where harms caused by conduct that is unlawful are often indistinguishable from harms caused by conduct that is lawful. For example, the harms caused by unlawful price fixing, insider trading, and fraud, on the one hand, and lawful (if ruinous) competition, on the other, are virtually the same: loss of money, a business, a job, market share.⁵¹⁶

Green approaches the examination of moral wrongfulness by first identifying whether moral norms are violated by the offending conduct and then identifying whether that conduct is analogous to other offending and established crimes to result in a benchmark comparison of relative ‘moral wrongfulness’. This enables an evaluation of whether criminal intervention is relevant.⁵¹⁷

⁵¹¹ Feinberg, *Harm to Others* (n 129) 215.

⁵¹² Green, *Lying, Cheating and Stealing* (n 18) 33.

⁵¹³ *Ibid* 39.

⁵¹⁴ Green, *Theft Law* (n 252) 72.

⁵¹⁵ Green, *Lying, Cheating and Stealing* (n 18) 40.

⁵¹⁶ *Ibid*.

⁵¹⁷ *Ibid* 39; Green, *Theft Law* (n 252) 6.

Green explains how he chooses the norms that form part of the discussion in relation to white-collar crimes. Green states that his approach to assessing moral wrongfulness

consists of examining a collection of everyday, but nevertheless powerful, moral norms—specifically, the norm against cheating, deception, coercion, exploitation, disloyalty, promise-breaking, and disobedience. My goal is to show how such familiar concepts, properly understood and clearly articulated, inform and help shape a collection of key white-collar crimes. Indeed, it is the very ‘everyday-ness’ of such norms that helps explain the difficulties we encounter in distinguishing between white collar crime and lawful, if aggressive, kinds of behavior.⁵¹⁸

Green further justifies this approach for selecting norms to consider alongside specific crimes by stating:

Such an approach has several advantages over the generalized rights-based approach mentioned earlier. Unlike rights, which can be maddeningly abstract (‘nonsense upon stilts,’ in Bentham’s memorable phrase), the norms that I will be describing are fairly concrete. Although there will be significant disagreement over the precise content and application of such norms, almost every civilized person will have some rudimentary understanding that it is morally wrong, at least in certain core cases, to lie, cheat, steal, coerce, exploit, break promises, and the like. Moreover, such an approach is more suggestive of the richly nuanced way people actually think about the content of their moral lives. Even people who have never had occasion to read a single page of moral philosophy are capable of making remarkably fine-grained distinctions about, say, what properly constitutes cheating or stealing.⁵¹⁹

In Section 7.3.2, I use Green’s tests to explain why the norm against stealing does not apply to the wage theft offences. This is because despite the terminology of wage theft, the subject matter usually is not of the legal character that can be regarded as theft. I explain the conceptual challenges with analogising the conduct as theft, given the linguistic associations that are made between ‘theft’ and the nomenclature of the offences constituting ‘wage theft’.

4.4.4 Refinements to Green’s Framework for an Australian Criminal Law Context

In my application of Green’s framework to the Victorian offences, I draw on Whelan’s systematic framework which provides elaboration and refinements to the tests for

⁵¹⁸ Green, *Lying, Cheating and Stealing* (n 18) 45.

⁵¹⁹ *Ibid.*

analysing moral norms. I draw on the specific additional steps Whelan identifies to guide my analysis of the Victorian wage theft offences in Chapter 7. For moral norms that Whelan did not specifically consider, I approached my analysis of those moral norms as a process involving steps, in the spirit of Whelan's refinements of Green's framework.

In Australia dishonesty is a relatively common element in criminal offences. I consider it is necessary to analysis the element in both my application of moral wrongfulness (ie Green's third element), as well as in understanding who the criminal offences target, which given statutory ambiguities, marks its central role in my analysis in Chapter 5, identifying the offender 'at fault' (ie Green's first element).

4.4.4.1 Refinements to Green's Framework Drawing on Whelan's Systematic Framework

In Whelan's article on the criminal cartel offences, he enhances Green's framework by offering a systematic framework for his analysis of the cartel offences through the norms against stealing, cheating and deception. Whelan identifies separate steps for analysing the framework which enhances the useability for framework for analysing moral wrongfulness.

In Chapter 7 I rely on Whelan's restatement of some moral norms to guide my analysis of the Victorian criminal wage theft offences. For example, in Section 7.3.2, when applying the norm against stealing to the s 6 wage theft offences, I draw on the four elements Whelan identifies as relevant for the norm against stealing analysis. This approach provides additional clarity to Green's framing of the norm against stealing.

In Section 7.4.1 I also draw on Whelan's analysis of the norm against cheating, including drawing on the literature Whelan relies on to interpret Green's tests for this norm.

4.4.4.2 Refinements to the First Element to Reflect Australian Criminal Law

Mitchell Berman queries the justification of Green for including 'mental elements' as a separate element, given its prominence in his third element of his framework. Berman, an American criminal law academic contemporary of Green, acknowledges discussions with Green on an earlier draft of his monograph. Berman questions the 'utility of, and justification of' the inclusion of 'mens rea' as a separate element in Green's three-part framework.⁵²⁰ Berman expresses confusion as to Green's justification for separating the

⁵²⁰ Mitchell N Berman, 'On the Moral Structure of White-Collar Crime' (2007) 5 *Ohio State Journal of Criminal Law* 302, 308 ('Moral Structure').

elements and states: ‘I am not sure why mens rea (in, recall, the elemental sense) and moral wrongfulness ought to be conceived as separate elements given that, on Green’s own telling, the conventional norms of moral wrongfulness themselves contain detailed specifications of the mental states that must be present for the norms to be violated’.⁵²¹

I agree with Berman that the mental element discussion is also vital as part of the third element. However, I have separated my analysis of dishonesty and interaction with unresolved statutory ambiguities relating to integral and attendant circumstances, as Chapter 5 (Green’s first element) enables me to explore the effects of the statutory ambiguity issues on identifying the offender and allows for fruitful discussion of dishonesty.

The approach I take of considering the choice of ‘dishonesty’ as a mental element is also consistent with the work of both Whelan and Beaton-Wells in their application of Green’s framework to the proposed criminal cartel offences in Australia and the UK. These authors consider the suitability of the inclusion of dishonesty as an element in their discussion of the cartel offences in the two different criminal law contexts. I regard this approach as important, particularly in the Australian context where dishonesty is a hybrid concept and the wage theft offences include an unusual definition of dishonesty. A close analysis of the impact of dishonesty in shaping the offence is an essential step to understand the purpose of the offences, and is distinct from the analysis of dishonesty that occurs in my discussion of the third element, including in relation to the norm against cheating in Section 7.4.1.

4.4.5 Summary of Green’s Framework

In Table 4.1, I summarise the key steps involved in applying Green’s framework, including setting out the specific requirements of each element, adopting Green’s language as much as possible.

I explain that after analysing the elements separately, the framework requires the elements to be weighed up together to form a conclusion as to the ‘moral content’ of the offence.

⁵²¹ Ibid 314.

I also note that in later work Green introduces a range of limiting principles that can help guide whether to consider something as a crime or to treat it with reference to other legal or non-legal interventions.⁵²²

The structure of the framework guides the structure of Part II of the thesis—each of the three elements is considered in separate chapter. In Chapter 8, I weigh up the findings.

Table 4.1: Summary of Steps Involved in Applying Green’s Framework

The Three Elements		
Mental State	Harmfulness	Moral Wrongfulness
<p>Identify the mental elements contained in the specific statute or proposed offence structure;</p> <p>Consider in general terms, what is the mental state needed to establish the offence;</p> <p>Identify the influence of any defences or other factors on the required mental elements of the offence.</p>	<p>Identify the precise conduct that is criminalised;</p> <p>Identify an ‘interest’ that may be affected;</p> <p>Identify the relevant interference with an ‘interest’;</p> <p>Assess whether the interest has been ‘set back’⁵²³;</p> <p>Assess whether the ‘set back’ occurs in a lasting or significant way.</p>	<p>Identify relevant moral norms according to Green’s specific terminology;</p> <p>Apply the specific tests set out by Green to identify whether the captured conduct fits Green’s moral norm formulation;</p> <p>Analogise the offence with other already established criminal offences.</p>
<p>Weighing up process to reach a general conclusion as to the ‘moral content’ of the offence</p>		
<p>After considering the three elements separately, conclude generally as to the extent to which the offence satisfies Green’s framework to consider whether the elements suggest a moral justification for criminalisation.</p> <p>Assess whether the harms can be considered ‘public’, including by reference to their ‘moral wrongfulness’.</p> <p>Consider the degree of likely satisfaction of the elements.</p> <p>Identify any areas of overlap between the established regulation and the offences to identify any legislative issues that need clarification or amendment to point more effectively to a moral basis for criminalisation.</p> <p>In later work, Green also identifies limiting principles that can help guide whether to consider something as a crime or to treat it with reference to other legal or non-legal interventions.⁵²⁴</p>		

⁵²² Green, *Theft Law* (n 252) 5, 140.

⁵²³ As discussed below, Feinberg defines a setback as a ‘morally indefensible conduct that not only set back the victim’s interest, but also violates [their] right’: Feinberg, *Harm to Others* (n 129127) 215.

⁵²⁴ Green, *Theft Law* (n 252) 5, 140. These factors are considered in Section 9.2.1.

4.5 Chapter Summary

In this chapter, I have introduced Green's analytical framework to aid the application of the framework to the criminal wage theft offences. This chapter has explained why the framework is relevant to the offences in the *Wage Theft Act*. The justification for using Green's framework is linked to the fact that the offences are 'morally ambiguous'. The extreme ends of underpayments may be clear—but it is more difficult to ascertain the degree of wrongfulness for more marginal cases. A further issue is assessing whether the drafting of the offences resolves the moral ambiguity by clearly capturing types of wage theft that merit criminalisation, from a moral perspective. Further, I provide an overview of Green's analytical framework, as well as some details of the requirements of each element of this model.

Part II:
Application of Green's Framework to the Victorian Wage
Theft Offences

Chapter 5: Element 1—Identifying the ‘Offender’ at Fault

5.1 Introduction

This chapter addresses the first element in Green’s framework. He states: ‘*mens rea*, in the elemental sense in which it will be used here, constitutes the mental state required in the definition of an offense or with which a criminal act is committed, such as intent, knowledge, recklessness, or negligence’.⁵²⁵ The stated purpose of the first element is to help determine the ‘extent to which an act entails fault and is therefore deserving of punishment’.⁵²⁶ Green observes that elements such as dishonesty that are common in the Australian and UK contexts

are frequently spoken of as elements of *mens rea*. There is in my view no real harm in doing so, but within the analytical framework that is being developed here, in which *mens rea* is used to refer, narrowly, to a specific mental element with which a prohibited act must be performed, it is more appropriate to deal with such elements in the context of moral wrongfulness.⁵²⁷

As I have stated in Section 4.3, Green refers to the mental elements contained in the general principles set out in the American Modern Penal Code to guide his discussion.⁵²⁸ Dishonesty, as a separate legal concept, is not readily adopted in the US.⁵²⁹ In this chapter, I diverge from Green’s discussion of excluding dishonesty from the first element, as to do so would be inconsistent with how fault elements are construed in the Australian context. Alex Steel argues that despite the complexity of the tests adopted by the Australian High Court in *Peters* in the majority judgments,⁵³⁰ dishonesty ‘is best seen as a mental element, or at the least as a compound concept that contains distinct mental and physical elements’.⁵³¹ In addition, including dishonesty in my discussion in this chapter enables me to consider the effect of the statutory drafting and choice to include dishonesty, noting the legislative ambiguity issues with the drafting that I have already discussed in Chapter 3 where I closely examine the elements of the offence by engaging in statutory interpretation. The standard of dishonesty and its operation is relevant to both my application of Green’s first element in this chapter and the application of the third

⁵²⁵ Green, *Theft Law* (n 252) 72; Green, *Lying, Cheating and Stealing* (n 18) 30–3.

⁵²⁶ Green, *Lying, Cheating and Stealing* (n 18) 31.

⁵²⁷ Green, *Theft Law* (n 252) 86.

⁵²⁸ Robinson and Dubber, ‘American Model Penal Code’ (n 414).

⁵²⁹ Green, *Theft Law* (n 252) 110.

⁵³⁰ *Peters* (1998) 192 CLR 493.

⁵³¹ Steel, ‘Describing Dishonest Means’ (n 323) 8.

element (moral wrongfulness) to the s 6 wage theft offences. In this chapter, I describe dishonesty as a mental element, but I note that dishonesty is a hybrid element, as it requires assessment of knowledge, intention or belief attached to a specific act or omission.

In this chapter, I address the key mental elements in the offences to assess who will be the likely ‘offenders’ caught by the s 6 offences. I also consider how the attribution of liability mechanisms will likely operate in the offence structure.

5.2 Purposes of the First Element

I interpret the role of the first element in Green’s framework to be that of helping to provide a sense of the general characteristics of the offender who would be caught by the offence provisions. The discussion of the first element also enables me to test the legislative drafting to contemplate potential ambiguities that may affect the identification of these characteristics. I consider the operation of dishonesty in the offence structure in characterising the offending, before also contemplating the broader circumstances under which attribution methods operate in the Act cast the net widely to reflect that many employers will be abstract entities, or include individuals who have incomplete knowledge or awareness of the wage withholdings.

In Green’s key monograph *Lying, Cheating and Stealing*, he provides some preliminary guidance as to conclusions that may be reached about mental element requirements, including drawing out generalised features of ‘white-collar’ criminal offences.⁵³² For example, he suggests that offences that require intention suggest more individual culpability than elements that require mental elements other than intent (eg, recklessness) by an offender.⁵³³ Green further observes distinguishing features of fault in corporate criminal offences, as well as notes that owing to diffuseness of liability, criminal liability may be imposed in circumstances in which ‘the blame we attribute to an individual actor within the organization in which [they] work[] may be less than the blame we attribute to an individual actor committing an equally serious street crime on [the actor’s] own’.⁵³⁴ I use this chapter to consider the effect of the statutory modifications of attribution

⁵³² See Section 4.3.2 for discussion of Green’s use of ‘white-collar crime’, as a descriptive term to capture the offences he examines in Green, *Lying, Cheating and Stealing* (n 18).

⁵³³ See further discussion of mental elements in Section 4.4.1.

⁵³⁴ Green, ‘Moral Ambiguity’ (n 363) 510.

principles to contemplate the degree of ‘blame’ that could be attached to individual actors who may be regarded as offenders.

5.3 Policy Statements Identifying Characteristics of Targeted ‘Offenders’

Before addressing the technical aspects of the Victorian offences, including the types of ‘offenders’ the statute targets, I consider how policymakers in both the Victorian and the federal context have characterised employers who underpay their employees. It is necessary to do so given the identified ambiguities in the statutory provisions, the fact that there are no court decisions that interpret the legislation. As such, it is the case that more than usual recourse to preliminary materials is necessary.

In justifying the introduction of criminal wage theft offences, proponents have often drawn attention to the different treatment between a worker in a shop who could be held criminally liable for stealing money from a till versus the absence of an equivalent offence for an employer who deliberately underpays their workers.⁵³⁵ The analogising of wage underpayment to stealing from a till is ever-present in how the Victorian lawmakers characterised wage theft in policy statements and legislative materials connected to introducing criminal sanctions.

On 19 March 2020, the then Attorney-General, the Hon Jill Hennessey, introduced the Wage Theft Bill to the Victorian Legislative Assembly. In the Second Reading Speech, the Bill was introduced as follows:

This Bill sends a strong message to employers that stealing the lawful entitlements of your employees will not be tolerated and significant penalties, including jail terms, can be imposed on those who do. This Bill makes it clear that theft is theft, and that just because it was committed by an employer does not make it any less of a crime.⁵³⁶

The same connection between theft and stealing from the till and the conduct of the employer is drawn in the federal context. In a 2023 address to the Australian Press Club, in which he explained the key legislative amendments in the broader ‘Closing the

⁵³⁵ See, eg, Young Workers Centre, *Criminalising Wage Theft* (May 2018) 12; Fitzpatrick, ‘Wage Theft and Young Workers’ (n 27).

⁵³⁶ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097.

Loopholes' legislative reform package, the then Employment and Workplace Relations Minister, the Hon Tony Burke, drew the same analogy to stealing money from a till:

Take any shop, for example. The employer and the employee both have access to each other's money. The employee has access to the employer's money through the till. The employer has access to the worker's money through the wages. It is and should be a criminal offence for the worker to be taking money from the till. But it is not a criminal offence, in most of Australia, for the employer to be taking money from the wages.⁵³⁷

In the same speech, Burke further observed:

Most underpayments are not wage theft. Most underpayments are a mistake. Sometimes, there can be issues of recklessness and things like that. But often, there's just an honest mistake that's been made, and we don't want to catch any of that with the criminal law. But where someone has that same intention that the worker would have when they take money from the till, the criminal law needs to be available there as well.⁵³⁸

Francis Flanagan and Stephen Clibborn, who identify that the *Fair Work Act* includes protections for vulnerable workers as well as for employers argue:

Despite the technical framing of wage minima considerations under the *Fair Work Act*, a sense of moral distinction between 'good' and 'bad' employers, and a notion that it is proper for minimum wage laws to protect and foster the former and sanction the latter has become apparent in recent commentary by Commonwealth and state actors reflecting on enforcement matters.⁵³⁹

This observation is marked in how policymakers have distinguished between different categories of employers who underpay their employees. In Section 1.2.3, I explained how Flanagan and Clibborn compare the general articulated values in labour law protections that focus on the worker, to the focus of the protections in the *Fair Work Act*. Flanagan and Clibborn observe that the protections balance regulating and enforcing non-compliance with the minimum wage protections include balancing the objective of protecting the vulnerabilities of individual 'low-paid' workers with maintaining the reputation of employers who have been acting 'honestly'.⁵⁴⁰ The authors describe how policymakers have sought to create 'a sense of moral distinction between "good" and

⁵³⁷ Tony Burke, 'Closing the Loopholes Bill' (Speech, National Press Club, 31 August 2023).

⁵³⁸ Ibid.

⁵³⁹ Flanagan and Clibborn, 'Shifting Protective Subject' (n 22) 360–1.

⁵⁴⁰ Ibid 370.

“bad” employers, and a notion that it is proper for minimum wage laws to protect and foster the former and sanction the latter’.⁵⁴¹ In distinguishing deliberate underpayments, the responses protect “good” employers who may inadvertently underpay wages’ while ‘punishing only “bad” employers who do so deliberately’.⁵⁴² The Federal Attorney-General’s Department relied on a similar characterisation in its discussion paper on strengthening penalties for non-compliance: ‘The overwhelming majority of employers who are trying to do the right thing are competing against those that underpay or exploit workers. The Government considers it unacceptable that there is a persistence of underpayment and exploitation behaviours by a small number of employers.’⁵⁴³

The same kind of rationale was observed in the framing of the *Wage Theft Act*. In Victoria, the Andrews Labor Government marked the commencement of the new criminal wage theft laws in 2021, by observing that the newly enacted offences target the ‘dishonest conduct by employers who are seeking to deliberately avoid their lawful responsibilities’.⁵⁴⁴ The Victorian Government stated: ‘Employers who make honest mistakes or who exercise due diligence in paying wages and employee entitlements are not guilty of wage theft offences’.⁵⁴⁵ In Section 3.4.3, I considered the scope of the offences through statutory interpretation and explained that the incorporation of the due diligence requirement in the offence structure operates as a statutory defence that can operate to prevent the attribution of liability where an employer exercised due diligence, but they nevertheless could be caught by the offence provisions owing to the operation of the *Wage Theft Act*.

In 2023, Minister Burke observed that in addition to deliberate non-compliant employers, there is also a category of offenders ‘who were reckless to the extent of really not making an effort to do the proper checks and they had the capacity to do so’.⁵⁴⁶ This assertion reveals that policymakers are aware that the circumstances in which wage underpayments occur may not exist in a binary.⁵⁴⁷

The challenge for policymakers and legislators in designing legislation to achieve the stated policy goals is that the courts are guided by the text of the statute to assess the

⁵⁴¹ Ibid 360.

⁵⁴² Ibid 368.

⁵⁴³ Attorney-General’s Department, ‘Strengthening Penalties for Non-Compliance’ (n 189) 2.

⁵⁴⁴ Tim Pallas, ‘Wage Theft Now a Crime in Victoria’ (Media Release, 1 July 2021).

⁵⁴⁵ Ibid.

⁵⁴⁶ Tony Burke, ‘Address: National Press Club’ (Speech, National Press Club, 1 February 2023).

⁵⁴⁷ Flanagan and Clibborn, ‘Shifting Protective Subject’ (n 22) 361.

scope of offences and who they cover. Legislative history, including pre-enactment statements can be a guide to legislative purpose,⁵⁴⁸ but clear statutory drafting is essential to avoid ambiguities. In the next section, I examine the implications of the fault requirements included in the s 6 offences and the extent to which drafting choices influence the scope of the subject matter, to consider whether the offences do capture the kind of offenders that these policy statements suggest.

5.4 The Mental Elements

In Australian criminal law, there is a ‘starting position ... that it is unfair to subject people to criminal liability unless they are blameworthy’.⁵⁴⁹ As Mirko Bagaric observes, ‘there is a strong connection between culpability and criminal responsibility. This is reflected in the second broad component of a crime: mens rea, a Latin expression that means ‘bad or guilty mind’.⁵⁵⁰ Further, Bagaric observes: ‘Culpability requires personal fault and this generally requires subjective wrongdoing in the form of actual awareness by the offender that the *actus reus* of the offence which he or she has performed is wrong. More commonly the *mens rea* component can consist of either intention or recklessness.’⁵⁵¹

In criminal law, it is generally required that ‘before an accused can be convicted of a criminal offence the prosecution authorities must prove beyond reasonable doubt that the prohibited act or omission (*actus reus*) coincided in law and time with a culpable state of mind (*mens rea*)’.⁵⁵² There is a general assumption that intention ‘is the most culpable mental state’.⁵⁵³ Yet, despite this, academic commentary demonstrates that ‘[w]hat constitutes an intention to commit a criminal offence has proven to be a notoriously difficult concept to define’.⁵⁵⁴

In Section 3.4, I examined the criminal wage theft offences in the *Wage Theft Act*, identifying a range of ambiguities that influence how the offence would target an offender. The difficulties in assessing the statutory requirements and the meaning of ‘intent’ are evident in the statutory ambiguities that are apparent in establishing the intent or degree of knowledge or awareness that is required in relation to the employer

⁵⁴⁸ *Interpretation of Legislation Act 1984* (Vic) s 35(b).

⁵⁴⁹ Mirko Bagaric, ‘Australia’ in Alan Reed et al (eds), *Fault in Criminal Law: A Research Companion* (Routledge, 2023) 189, 190.

⁵⁵⁰ *Ibid.*

⁵⁵¹ *Ibid.*

⁵⁵² Gerard Coffey, ‘Codifying the Meaning of “Intention” in the Criminal Law’ (2009) 73 *Journal of Criminal Law* 394, 394.

⁵⁵³ *Ibid.*

⁵⁵⁴ *Ibid.*

withholding employee entitlements. Different interpretations of intent in relation to withholding and different possible ways to conceptualise the degree of knowledge or awareness that an employer is required to have in relation to employee entitlement obligations affect the scope of the offence and the assessment of who the potential offender is that will be caught by the provision. In addition, the offence structure includes the element of ‘dishonesty’, which plays a role in defining the offender and the types of withholdings of employee entitlements that will be caught by the offence structure.

In that chapter, I explained that there are a range of statutory drafting ambiguities, particularly in relation to what mental elements are tied to the ‘withholding of employee entitlement’, that could result in very different understandings of the role of dishonesty in the offence structure. In this part of the chapter, I consider the impact of these statutory ambiguities on the scope of the offences and the different possible ways in which the standard of dishonesty may operate in the offence structure. After analysing that interaction, I consider the drafting choice to include the standard of dishonesty as opposed to other fault elements.

5.4.1 Recap of Drafting Ambiguities in the s 6 Offences

There are areas of ambiguity in the drafting, particularly in relation to the elements connected to ‘withholding of employee entitlement’. Hence, the s 6 offences will result in very different scopes of operation and operate to target different types of withholdings, depending on a court’s interpretation of the elements. The Victorian offences have now been repealed, so no court interpretation has happened, but the statutory ambiguities are still relevant to Green’s analysis.

In Section 3.4.1, I identified that the definition ‘withholdings of employee entitlements’ includes terms such as ‘failure to pay’, and that these terms are likely to be interpreted as carrying an intentional requirement due to common law guidance on interpreting criminal offences.⁵⁵⁵ However it is unclear as to which interpretation the prosecution is required to prove due to uncertainty as to how the common law presumption applies to this statute. Notably, there are two ways to interpret intent in relation to the ‘failure to pay’.

⁵⁵⁵ Quilter and McNamara, ‘Time to Define’ (n 269) 547, citing *He Kaw Teh v The Queen* (1985) 157 CLR 523.

	Interpretation 1	Interpretation 2
Intent:	The accused intended to pay the employee what was actually paid.	The accused intended to pay the employee less than the minimum amount required by law.

I also identified that there is ambiguity as to whether the circumstances relating to the ‘withholdings’ would be regarded as ‘integral’ or ‘attendant’. Depending on how the requirement is interpreted, there is ambiguity as to whether the employer is required to have knowledge (and to what degree) or whether recklessness about pay obligations would need to be proved. For example, this could result in these three interpretations.

	Interpretation 1	Interpretation 2	Interpretation 3
Awareness:	The accused is aware that the employer had knowledge of the specific source of law or calculation method of entitlements that was required by law.	The accused is aware of their pay obligations to the employee and that the rate of pay may differ depending on the hours of work and the employment status of an employee.	The accused is reckless as to their pay obligations, including mistaken interpretations of the source of law, and fails to investigate pay obligations and to check or audit the payroll system.

Depending on how these elements are resolved, it will affect the role of dishonesty in the offence structure in ascribing criminal responsibility. Further, depending on how the ambiguities are resolved, the role of dishonesty has different degrees of significance in defining the characteristics of the offender.

5.4.2 The Role of Dishonesty Element in the Offence Structure

Before addressing how dishonesty operates as an element, I consider how the criminal law invokes dishonesty as a standard that must be present to prove that the defendant committed an offence. Dishonesty is an evaluative standard. As Horder describes, ‘evaluative (“objective”) judgments are the means by which a fault-focused association between the defendant’s behaviour and the wrongful conduct is brought about later *by the judgment of others* (judge or jury), rather than by the defendant him or herself in virtue or what he or she intended’.⁵⁵⁶

⁵⁵⁶ Jeremy Horder, *Ashworth’s Principles of Criminal Law* (Oxford University Press, 9th ed, 2019) 175.

The concept of ‘dishonesty’ is connected to both philosophy and moral psychology.⁵⁵⁷ Gardner describes standards in the criminal law as ‘standards left largely in their natural unruly form, inviting the rule-applier to make a raw moral judgment about the defendant’s action, or at least some aspects of the defendant’s action, in the course of applying a legal rule’.⁵⁵⁸

In Green’s monograph testing the limits of theft law, he contemplates the role of dishonesty as an element of theft offences in jurisdictions such as the UK and Australia and observes that

the term dishonesty seems a useful one for distinguishing between those appropriations that should count as stealing and those that should not, particularly when the term is compared to the alternatives. Unlike unlawfully, the term dishonesty is not based exclusively on law; and unlike fraudulently, it does not connote any overly narrow sense of deceit or duplicity. Dishonesty connotes a lack of honesty, probity, or integrity; a thievishness. It exists as a free-standing concept of morality. As such, it offers an appropriate label for the wrongful element in stealing.⁵⁵⁹

In Steel’s chapter tracing the different tests and approaches to criminal dishonesty in Canada, New Zealand and Australia, he observes: ‘The strongest theme that emerges from this chapter is the inability of courts and Parliaments to consistently agree on an approach to dishonesty because of competing understandings of the basis and role of the criminal law.’⁵⁶⁰ Steel observes that

‘dishonesty’, rather than being a difficult concept, is instead one that lays bare an unresolved controversy in the philosophy of the law itself. That is, the question of whether there are any pre-legal moral or ethical bases to criminalisation and the related question of whether dishonesty should be a basis of distinguishing criminal from non-criminal behaviour.⁵⁶¹

⁵⁵⁷ See, eg, Alex Barber, ‘Lying, Misleading, and Dishonesty’ (2020) 24 *Journal of Ethics* 141; Nina Mazar, On Amir and Dan Ariely, ‘The Dishonesty of Honest People: A Theory of Self-Concept Maintenance’ 45 *Journal of Marketing Research*: DOI: <<https://doi.org/10.1509/jmkr.45.6.633>>: 633–44; Nina Mazar and Dan Ariely, ‘Dishonesty in Everyday Life and Its Policy Implications’ (2006) 25 *Journal of Public Policy & Marketing* 117.

⁵⁵⁸ John Gardner, ‘Ordinary Decent Honesty’ in Daniel Clarry (ed), *UK Supreme Court Yearbook 2017-2018* (Appellate Press, 2019) 290, 294.

⁵⁵⁹ Green, *Theft Law* (n 252) 111 (Citations omitted).

⁵⁶⁰ Steel, ‘*Ivey* in International Comparison’ (n 323) 345.

⁵⁶¹ *Ibid.* On the question of dishonesty as pre-legal moral or ethical basis, Steel cites Richard Tur, ‘Dishonesty and the Jury’ in A Phillips Griffiths (ed), *Philosophy and Practice* (Cambridge University Press, 1985) 75. On dishonesty and the criminal law, Steel cites Alex Steel, ‘The Harms and Wrongs of Stealing: The Harm Principle and Dishonesty in Theft’ (2008) 31(3) *UNSW Law Journal* 712 (‘Harms and

As Lady Hale wrote extrajudicially after the *Ivey v Genting Casinos* decision,⁵⁶² dishonesty is a moral question that is left to triers-of-fact to resolve. Lady Hale explains:

The big issue is whether we should be asking juries and magistrates to answer such moral questions—is it not the job of the law to do so and the job of the jury or magistrates to decide what the facts are and whether they fit the law? But I doubt very much whether this is a matter which the Supreme Court could solve—even supposing that it ever got the opportunity of doing so, which seems unlikely. It must be a matter for Parliament.⁵⁶³

Some criticisms of a standard of dishonesty in criminal law emerge, including the risk of inconsistent decisions based on different jurors interpreting an offence and a lack of shared understanding among them about the meaning of dishonesty.⁵⁶⁴ Nevertheless, dishonesty is the chosen standard that is included in Victoria’s wage offence structure. Thus, it is necessary to consider how the element operates in the offence structure to evaluate how it is likely to operate, noting that the standard requires triers-of-fact to evaluate the offending by reference to the standard of dishonesty that is set out in the Act. According to s 6(1)(a), the employer ‘must not dishonestly’ withhold the employee entitlements. In s 6(11), dishonesty is defined as dishonest ‘according to the standards of a reasonable person’. I explained in Section 3.4.2 that this standard would likely operate in accordance with the approach adopted by the High Court case of *Peters*.⁵⁶⁵

I note that Stuart Green’s approach to assessing morality is linked to dishonesty as something that the community intuitively understands. The shift from ‘ordinary decent people’ as used in *Peters* may be less suited to Green’s approach because the term ‘reasonable person’ is hypothetical and emotionless. It may impose standard different to an ordinary community understanding of dishonesty. I addressed possible interpretations of dishonesty as the standard of the ‘reasonable person’ versus the standard of the ‘ordinary decent person’ in Section 3.4.2.2.

Wrongs of Stealing’), responding to Andrew P Simester and G Robert Sullivan, ‘On the Nature and Rationale of Property Offences’ in R A Duff and Stuart Green (eds), *Define Crimes: Essays on the Special Part of Criminal Law* (Oxford University Press, 2005) 168 (‘Property Offences’).

⁵⁶² *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.

⁵⁶³ Baroness Hale, ‘Dishonesty’ in Daniel Clarry (ed), *The UK Supreme Court Yearbook 2017–2018*, (Appellate Press, 2019) 243, 255 (‘Dishonesty’).

⁵⁶⁴ *Ibid* 253–4, citing Edward Griew, ‘Dishonesty: The Objections to *Feely* and *Ghosh*’ [1985] *Criminal Law Review* 341.

⁵⁶⁵ *Peters* (1998) 192 CLR 493.

5.4.2.1 *The Positive and Negative Role of Dishonesty in Offence Structures*

In 1999, the UK Law Commission produced a consultation report, *Legislating the Criminal Code: Fraud and Deception*, that sought to examine whether a general offence of fraud should be introduced in the UK.⁵⁶⁶ The report also examined other offences in the UK to consider the scope of the law. To explain the role of dishonesty in offence structures, the Law Commission explained that dishonesty could operate in a positive or negative way.

Dishonesty may work as a positive element in an offence. For example, as the Law Commission explains,

where dishonesty is the main determinant of liability, it acts as a *positive* element in the offence. The conduct requirements of such an offence are very general, and occur frequently in commerce or indeed in everyday life. Thus dishonesty ‘does all the work’ in such offences. It turns what would otherwise not be even *prima facie* unlawful (say, making a gain or causing prejudice) into a crime.⁵⁶⁷

Alex Steel explains that after the High Court decision in the *Peters* case, the standard of dishonesty operates as a positive element in the offence of conspiracy to defraud (the offence examined in that case). In that offence

the elements of the offence involve an agreement, and an intention to do something that prejudices or places at risk another’s legal or economic interests by means that are dishonest. The only thing that makes these elements amount to a crime is if they are infused with dishonesty. Absent that, it is perfectly legal to agree to intend to adversely affect another’s interests. It is the stuff of competition and commerce. In such a crime dishonesty is a positive element and ‘does all the work’.⁵⁶⁸

Dishonesty may work as a negative element in an offence. The Law Commission explains:

Dishonesty may also feature, as an ‘element’, in offences in which the conduct requirements are much more substantial. In such offences, the conduct requirements describe conduct which may be considered *prima facie* criminal (subject, of course, to

⁵⁶⁶ United Kingdom Law Commission, *Legislating the Criminal Code: Fraud and Deception* (Consultation Paper No 155, 1999) 1 (*‘Fraud and Deception’*).

⁵⁶⁷ *Ibid* 30.

⁵⁶⁸ Alex Steel, ‘The Appropriate Test for Dishonesty’ (2000) 24 *Criminal Law Journal* 46, 58 (*‘Test for Dishonesty’*).

the proof of mental elements). The requirement of dishonesty, though in form an element of the offence which must be proved like any other, in effect provides the defendant with a defence. It operates primarily to *exempt* from criminal liability conduct which one would prima facie expect to be criminal — for example, obtaining property by deception with the intention of permanently depriving the owner of it. In these cases we refer to it as a *negative* element.⁵⁶⁹

Alex Steel describes a similar approach occurring in Australia and notes that in Australia,

most offences involve a large number of elements which in themselves suggest criminality. As the Commission notes, obtaining by deception is a clear example of this. Having proved deception the practical reality is that, although the onus remains on the prosecution to prove dishonesty, the accused will be found guilty unless they can successfully maintain a defence argument of honest belief or intention.⁵⁷⁰

The Law Commission compares how the positive/negative element operates in relation to theft compared with obtaining property by deception offences and explains:

The distinction can be illustrated by the role of dishonesty in theft, in which dishonesty fulfils a positive function, and obtaining by deception, where it does not. When a person selects a newspaper to buy at a newsagent's, he or she has committed all the elements of theft save for dishonesty. On the other hand, obtaining property by deception is something that one would naturally expect to be criminal. It is so rare for such conduct not to be wrong that dishonesty hardly does any work at all in the latter offence.⁵⁷¹

In a later section of the report, the Commission provides the example of a novel offence to explain how the positive use of dishonesty may operate to shape the character of an offence. The example it uses is 'an offence to cause loss by dishonest conduct which is wrongful as a matter of civil law'.⁵⁷² It uses the example of failure to pay a debt as an example of a civil wrong that would require an element of dishonesty to do a great deal of work in an offence structure because it is not something that will ordinarily be treated as dishonest, and it argues that

the failure to pay a debt on the due date may be wrongful in one sense, but it is not the sort of conduct that one would expect to be prima facie criminal. The obtaining of benefits by deception is nearly always dishonest; the late payment of debts usually is

⁵⁶⁹ *Fraud and Deception* (n 566) 31.

⁵⁷⁰ Steel, 'Test for Dishonesty' (n 568) 58.

⁵⁷¹ *Fraud and Deception* (n 566) 31.

⁵⁷² *Ibid* 49.

not. An offence under which the latter could be criminal, if it were regarded as dishonest, would therefore place almost as much reliance on the requirement of dishonesty as would an offence of ‘dishonestly causing loss’.⁵⁷³

The Australian Industry Group, in early consultations across different jurisdictions on legal responses to wage theft, rejected the calls to criminalise wage theft and suggested that to do so would be akin to criminalising an employer for an unpaid debt.⁵⁷⁴

Steel argues that in Australia, the term dishonesty is used in a positive sense in a range of offences. For example, he identifies that it is

used to separate criminal from non-criminal behaviour in areas far beyond theft. Offences now use ‘dishonestly’ as a key element in offences as disparate as bribery of jurors, corrupt workplace benefits, defining spam emails, eligibility to hold a power of attorney, grounds for disciplining motor traders, and when audits may be imposed on estate agents.⁵⁷⁵ What is significant about these offences is the complete lack of any indication in the offence as to specific acts that are prohibited. All three offences fall across a range of lawful and everyday activities. In fact, it is impossible to engage in any transaction at all without falling within the actus reus. Practically no one can arrange their affairs to prevent themselves from committing the actus reus. In the words of the Law Commission ‘dishonesty does all the work’.⁵⁷⁶ Thus, the only basis for criminalisation is a test of dishonesty. These offences are therefore in essence a requirement to act honestly in all dealings.⁵⁷⁷

I now seek to consider the extent to which the Victorian offences include dishonesty in a positive or negative way.

5.4.2.2 Application of the Positive versus Negative Type of Dishonesty to the Victorian Wage Theft Offences

The Victorian wage theft offences criminalise the dishonest breaches of already established legal obligations relating to pay and other related entitlements. The offences are novel, as failure to pay wages has not traditionally been treated as a criminal offence. In such an offence, the elements of the offence structure operate to distinguish the

⁵⁷³ Ibid.

⁵⁷⁴ See, eg, Australian Industry Group, Submission to Department of Mines, Industry Regulation and Safety (WA), *Inquiry into Wage Theft in Western Australia* (27 March 2019) 4.

⁵⁷⁵ Steel, ‘Ivey in International Comparison’ (n 323) 376 (citations omitted).

⁵⁷⁶ Ibid 377, citing *Fraud and Deception* (n 566) 30.

⁵⁷⁷ Steel, ‘Ivey in International Comparison’ (n 323) 376–7.

offences from breaches that could be subject to other remedies, including civil remedies, instead of being subject to criminal treatment. A distinction might be that the failure to pay may in some instances be characterised as dishonest. In this section, I consider how the element of dishonesty operates in connection with the other elements in the offence to characterise the offending.

As already outlined in this chapter and in Chapter 3, there are significant unresolved legislative ambiguities in the s 6 offences, which mean it is unclear whether dishonesty operates as a positive element to shape the scope of the offence, or alternatively, whether it operates in a negative role to limit the offence scope. How the offences are ultimately interpreted has significant effects on the scope of offences and the extent to which the employer must know about the content of their legal duties.

In this section, I seek to explain the distinctions and how that affects who is the target of the offences.

- *Interpretation 1: Dishonesty is a positive element in the offence structure*

The first way to interpret the offences is to require an intention to pay the amount that the employer in fact did and only some knowledge of the obligations, or recklessness about the payment obligations.

If the withholding of employee entitlement offences captures an employer who intended to pay their employee the amount that they in fact did, and they only require some level of knowledge about the pay obligations, or even require that the employer is reckless about the source of obligations, then dishonesty will have a significant role in demarcating the boundaries between criminal and non-criminal ‘withholdings’ of employee entitlements. The standard of dishonesty in such an offence would have a significant role in distinguishing conduct that is a breach of contract (eg the late payment of wages) and a type of breach that would be covered by a criminal law withholding. The trier-of-fact would be required to examine the circumstances in which the late payment of wages occurred to assess whether it occurred dishonestly.

This interpretation may have the unintended consequence that there could be a very large number of withholdings of employee entitlements that could be caught by the offence if the trier-of-fact were satisfied that the withholding occurred dishonestly. For example, the Victorian offence may be able to capture an employer who intended to pay their employee \$25 per hour at a flat rate, while also being aware that they were obliged to pay

the employee leave and other entitlements, but failed to realise that the \$25 amount did not cover all the employee entitlements. The employer's conduct could be considered dishonest if they had notice of pay issues, such as industry notifications advising about a common practice of making errors with leave and loading, or if they were advised by an employee about concerns relating to pay. However, if they were unaware that the amount they paid might not cover the full entitlements, then dishonesty may not be found. Depending on the broader circumstances, the operation of dishonesty as a positive element would be required to distinguish this conduct as a mistaken underpayment that is in breach of other pay obligations from one that could be caught by the criminal offence.

For *Peters* style dishonesty, which does not require the employee to have been aware that their conduct was dishonest, there is a risk that the accused will not always know whether others will view their actions as dishonest until after the assessment is complete, resulting in unexpected outcomes for employers who may have an odd sense of honesty. This is particularly so if the offence structure is interpreted to broadly apply to many examples of underpayment of employee entitlements. Steel observes that the test in *Peters* operates so that

a belief at the time of acting that one is acting honestly is no basis for exculpation. Because dishonesty is a characterisation defined by a judge or jury after the event there is no way a defendant can ever know whether their behaviour is lawful — even if that characterisation of dishonesty includes the state of mind of the defendant at the time.⁵⁷⁸

As Steel observes when dishonesty operates in such a way it may lead to limited predictability. Steel observes:

Dishonesty, if it is an objective standard, is one based on a jury's or magistrate's understanding of what community attitudes to honesty are. As such, there is limited predictability as to the scope of the offence. It is this unpredictability of the application of dishonesty in individual circumstances that has led to repeated calls for it to be only used as a negative element in offences. That is, that other external elements define the offence as *prima facie* criminal and then lack of dishonesty can be used to exculpate the accused. However, without such additional external elements, any activity that results in a benefit or a detriment can amount to an offence if post-fact the jury or magistrate considers that the activity is dishonest.⁵⁷⁹

⁵⁷⁸ Ibid 377.

⁵⁷⁹ Alex Steel, 'General Fraud Offences in Australia' (Research Paper No 55, School of Law, University of New South Wales 2007) 16.

Such an interpretation of how dishonesty operates in the offence structure could result in uncertainty and unpredictability in outcomes for offenders. It also does not resolve the issue of attempting to create greater clarity about the ‘grey areas’ that arise with wage theft and may continue to suggest that offences are ‘morally ambiguous’ as the distinctions between what is criminally treated or not is unclear.⁵⁸⁰

- *Interpretation 2: Dishonesty is a negative element in the offence structure*

The second way to interpret the offences is that to be criminally liable for withholding employee entitlements, the employer must be aware that they are paying below the minimum amount required by law.

In the second example, there is a greater subjective knowledge requirement and more intentional aspects. If more precise knowledge of obligations and an intention to pay less than the required entitlement are needed, then it is likely that what is caught by the offence may typically be of a dishonest character, such that the standard of dishonesty has a limited role in shaping the offence structure. If such an interpretation is favoured by the courts, then dishonesty will play a less significant role in shaping criminality. Instead, if it were determined that the employer did not act dishonestly, then they could be excused from the wage withholding offence. If the offence structure requires knowledge of the legal entitlement sources and an intent to withhold entitlements to affect the obligations and knowingly pay or attribute less than the entitlements, the element of dishonesty is likely to have a less important role in the offence, as the intentional withholding requirement is already likely going to capture conduct that would possibly be problematic and involve more subjective awareness from the employer. Dishonesty could still play a role in shaping the scope of the offence, for example, the standard of dishonesty would operate to assess whether minor late payments were dishonest because of a cash flow problem, or a belief that some underpayments will be cancelled out by other overpayments.

This interpretation may create a very high bar before the criminal law could attach to the withholdings. Such an interpretation is limited by intent and knowledge such that the employer would be required to have very specific knowledge of legal obligations and source, as well as an intent to pay below the employees’ entitlement, which indicates that the dishonesty element has less role to play in marking the structure of the offence. This

⁵⁸⁰ See discussion of moral ambiguity in relation to the Victorian wage theft offences in Section 4.2.

approach would highlight the requirement for ‘deliberateness’ as being a key aspect of the offence structure and make it more analogous to the idea of ‘taking from a till’ that legislators in different jurisdictions introduced as a justification for the offences. In such a circumstance, dishonesty would operate to exclude circumstances in which there are accidental withholdings or a delay caused by a cash flow issue that makes the failure to pay not dishonest. This appears to be consistent with the policy statements.

It could create an unintended consequence that an employer who is lazy may be able to demonstrate that they did not know what they were paying was below what they were required to pay such that they could not be criminally liable. The offence could operate such that even if the employer represented to their employee that they knew what they were doing with pay, they could credibly claim they thought they were meeting their obligations. The effect of this may be that the offence structure creates a perverse incentive for employers to take less care in understanding their obligations to avoid criminal liability. Given the offence also includes due diligence and is conceived in a way that seeks to promote compliance concepts, this would be an unfortunate result of the offence structure. I note that there is also the potential that if the same conduct were examined by reference to the original source of law, for example, the *Fair Work Act*, there may be other legal mechanisms, including civil penalties for breach, that would instead operate. However, these issues are not directly relevant to examining the Victorian offence structure and the specific types of offenders that the offence targets. This is particularly the case as the Victorian offences were designed to operate separately from the civil compliance framework already operating through the *Fair Work Act*.

- *Impact of the ambiguities on the scope of offences*

For the example that uses dishonesty in a positive way, dishonesty will be a key element in distinguishing the types of withholdings to be regarded as criminal from those that are just a breach of the employer’s duties, which may be subject to a remedy through another source of laws, including through civil proceedings. In contrast, the second interpretation favours demonstrating that an employer had knowledge and intention relating to specific withholding of obligations and knowledge of key sources of entitlements. In such examples, dishonesty is likely to have a less important role in distinguishing the types of withholdings, as there will likely be limited circumstances in which such deliberate underpayments will not also be dishonest.

The uncertainty in determining the most likely interpretation that would be favoured by a court in applying the offence, means that the result of Green's analysis may vary, and as such, my discussion in evaluating the offences through the framework, requires the incorporation of discussion of both options.

5.4.3 Other Statutory Choices

For many general fraud offences, 'deception' is a key element. In Victoria, deception is a key element in the 'obtaining financial advantage by deception' offences. In that offence, the scope of the offending is linked to the concept of deception. In s 81(4) of the *Crimes Act 1958* (Vic), deception is defined as meaning 'any deception (whether deliberate or reckless) by words or conduct as to fact or as to law, including a deception as to the present intentions of the person using the deception or any other person'. The victim is also required to believe the false representation that results in the obtaining of the advantage. This offence also includes as an element the requirement to demonstrate 'dishonesty', but according to a narrow definition of 'dishonesty' which is linked to the claim of right.⁵⁸¹

In the Law Commission Consultation Paper, the authors note: 'In practice, it may be difficult to disentangle effectively the elements of deception and dishonesty. Many jurors may think that deception is necessarily dishonest.'⁵⁸² They provide an example of deception in which the accused claimed a housing benefit that she was entitled to but made false claims about the source of the funds to her landlords. The Law Commission suggests 'the defendant might have argued that, because she was entitled to the benefit, "though the deception may be dishonest, the obtaining is not"; but she did not argue this. Presumably the distinction between deception and dishonesty was either overlooked or felt to be too nice to put before the jury'.⁵⁸³ It is likely that factors that demonstrate deception could be relied on to help evaluate dishonesty. It is possible that in evaluating dishonesty, there will be aspects of deception that influence the assessment of what occurred, but proof of deception would not need to be shown. The s 6 wage theft offences do not include 'deception' as an element. Instead, the offences would capture circumstances in which the victim (ie the employee) is aware that they are not receiving their full entitlements. This choice means that employers who are upfront to their employees that they are not paying the minimum entitlements can still be caught by the

⁵⁸¹ *Salvo v The Queen* [1980] VR 401.

⁵⁸² *Fraud and Deception* (n 566) 90.

⁵⁸³ *Ibid*, citing 'Talbot' [1995] *Criminal Law Review* 396.

offences. This is further supported by the inclusion in the offence of a provision that states that an agreement between the employee and the employer for the employee to receive less than the minimum entitlements is irrelevant in assessing whether the offence structure is satisfied.⁵⁸⁴ The terms are related but they are different concepts. By not requiring deception to occur, the specific effect on the employee in relation to what was said about the pay obligations is not regarded as a key aspect of the offence structure and the offence is not specifically targeting lies and false representations.

The choice of using the element of dishonesty in the offence structure operates to characterise the type of offending as dishonest. An offender who is caught by the offence is a dishonest wage thief, rather than a reckless (or other mental element) wage thief. As Green suggests: ‘Dishonesty connotes a lack of honesty, probity, or integrity; a thievishness’.⁵⁸⁵ In the new federal offence in s 327A of the *Fair Work Act*, there is no reference to a standard of dishonesty. The Explanatory Memorandum states that the new criminal offence relates to ‘intentional conduct’.⁵⁸⁶ The offence includes unusual elements for a criminal offence by reference to the ‘required amount’ under laws. The extent to which it achieves this objective of only capturing intentional conduct is unclear.⁵⁸⁷ I consider the idea of ‘a dishonest wage thief’ is helpful to distinguish the offence from other kinds of statutory breaches involving non-compliance with minimum labour standards or other breaches of employee entitlements that are subject to other non-criminal responses.

5.5 Chapter Summary

In this chapter, I have addressed the implications of the mental element requirements as shaping the targeted offender. I have contemplated the role of dishonesty in the offence structure as either shaping who could be caught or alternatively, as operating in a limiting role. In particular, I have identified that the depending on how a court interprets the common law intentionality requirements in relation to the ‘withholding of employee entitlements’, the meaning of ‘dishonest’ will differ in who the offence targets.

⁵⁸⁴ *Wage Theft Act* s 6(2) excludes consent to a lower amount as being considered as part of the element of dishonesty.

⁵⁸⁵ Green, *Theft Law* (n 252) 111 (Citations omitted).

⁵⁸⁶ Explanatory Memorandum, *Fair Work Act Legislation (Closing Loopholes) Bill 2023 (Cth)*, 8. In shaping the offence, s 327A(3) specifies that absolute liability applies to s 327A(1)(a)–(b) and the fault element for paragraphs (1)(c)–(d) is intention.

⁵⁸⁷ See further discussion of the newly enacted federal offence in Section 9.4.

- Interpretation 1: If intention is interpreted as an intent to pay what the employer paid, dishonesty will have a more significant role in determining scope of the offence, ie dishonesty ‘does all the work’.⁵⁸⁸ For example, dishonesty could operate to distinguish an employer who genuinely was mistaken about the rate of pay from another employer who had notice of pay discrepancies but took no action to check the issue.
- Interpretation 2: If intention is interpreted as an intent to underpay, then dishonesty will likely work to limit operation, such as distinguishing a minor delay in payment due to a cash flow issue from a deliberate and dishonest intention of an employer to pay below the minimum entitlements.

The impact of these different interpretations on the application of Green’s framework is considered further in my application, but is particularly significant to the analysis of the norm against cheating discussed below at Section 7.4.1.

⁵⁸⁸ *Fraud and Deception* (n 566) 30.

Chapter 6: Element 2—Identifying Harms

6.1 Introduction

In this chapter, I focus on the second element of Green’s framework. Green describes this element as involving an assessment of ‘the social harmfulness of the action’.⁵⁸⁹ In Section 6.2, I discuss the various assumptions Green uses in assessing ‘harmfulness’. As I observe, he defines harmfulness as ‘the degree to which a criminal act causes (or risks causing) harm’.⁵⁹⁰ He adopts Joel Feinberg’s definition of harm.⁵⁹¹ In this chapter, I contextualise Feinberg’s approach to defining ‘harm’ in criminalisation debates. In Section 6.3, I expand on the specific tests Green adopts for assessing harm. Feinberg’s definition for harm requires ‘some relatively lasting or significant setback to a person’s interests. An interest, in turn, is something in which a person has a stake’.⁵⁹² I expand on the key components of the definition and how they apply in the context of the Victorian wage theft offences.

In Section 6.4, I apply the tests to assessing harmfulness to various potential interests affected by conduct caught by the ‘employee entitlement offences’. I structure this part by identifying and analysing a broad range of potential interests that affect the individual, broader communities and governmental interests. In Section 6.5, I provide observations of the implications of the broad range of harms and how this connects to other elements in Green’s analytical framework.

6.2 Use of Harmfulness as an Element in Green’s Analytical Framework

Harmfulness is the second element of Green’s analytical framework. He considers that ‘[a]lthough moral wrongfulness, harmfulness, and mens rea frequently overlap, the concepts are analytically distinct’.⁵⁹³ The harm element is important as it connects to Green’s view that the criminal law should capture ‘public harms’ and not ‘private wrongs’. On public harms, he states ‘that the harm caused by criminal acts is “public” in a way that the criminal law considers relevant—ie that it is the sort of harm that somehow properly concerns the community as a whole, rather than just individual citizens within

⁵⁸⁹ Green, *Lying, Cheating and Stealing* (n 18) 4.

⁵⁹⁰ *Ibid* 34.

⁵⁹¹ *Ibid*, citing Feinberg, *Harm to Others* (n 129) 36–7.

⁵⁹² Feinberg, *Harm to Others* (n 129) 36–7.

⁵⁹³ Green, *Lying, Cheating and Stealing* (n 18) 39.

such community'.⁵⁹⁴ The overlap with the element of wrongfulness will be addressed in Chapter 8 to inform the weighing up of the elements that form part of Green's analytical framework.

6.2.1 Significance of the Harm Principle in Criminal Law

As Green's second element focuses on harmfulness, it is necessary to provide context to the use of harm as a justification for criminal law intervention. There are significant debates in academic literature as to what constitutes the harm principle as applied in a criminal law context.⁵⁹⁵ There have been debates as to whether the harm principle is a valid approach to determine the limits justifying criminal intervention.⁵⁹⁶ This part focuses on the Joel Feinberg conception of the harm principle, as Green adopts Feinberg's definition of harm as the foundation for his second element.

The 'harm principle', first articulated by John Stuart Mill in *On Liberty* in 1859,⁵⁹⁷ is often viewed as the starting point in addressing the concept of harm, as it has informed the development of subsequent perspectives.⁵⁹⁸ The harm principle is the proposition that in a liberal society, in circumstances in which a certain conduct causes harm to others, it may justify state intervention, whether this be through the criminal law or another form of government sanction. Often, Mill's principle is summarised by reference to a key quotation from his manuscript, namely, '[t]hat the only purpose for which power can be rightfully exercised over any number of a civilized community, against his will, is to prevent harm to others'.⁵⁹⁹ Of course, Mill developed a more detailed and nuanced articulation of harm in the manuscript.⁶⁰⁰ As Alex Steel states, Mill 'never consistently articulated a clear idea of what he meant by "harm", and the meaning of the principle seems to have distinctly different nuances in various parts of his work'.⁶⁰¹

⁵⁹⁴ Ibid 34.

⁵⁹⁵ See, eg, Julia Davis, 'The Problem of Harm, its Significance in the Criminal Law, and its Role in Sentencing Law' (PhD Thesis, University of Tasmania, 2004).

⁵⁹⁶ See discussion in Section 6.2.2.

⁵⁹⁷ John Stuart Mill, *On Liberty* (1859) (Penguin, 1973) ('*On Liberty*').

⁵⁹⁸ See, eg, Bernard E Harcourt, 'John Stuart Mill's *On Liberty* (1859)' in Markus Dubber (ed), *Foundational Texts in Modern Criminal Law* Markus Dubber (ed), *Foundational Texts in Modern Criminal Law* (Oxford University Press, 2014) 163. For a general articulation of the harm principle, see John Stanton-Ife, 'The Limits of Law', The Stanford Encyclopedia of Philosophy (Web Page, 29 January 2022) <<https://plato.stanford.edu/archives/spr2022/entries/law-limits/>>.

⁵⁹⁹ Mill, *On Liberty* (n 606) 9.

⁶⁰⁰ See, eg, Bernard E Harcourt, 'From the Harm Principle to Harm Decisionism: Hart, Feinberg, and the Eclipse of Millian Ambiguity' (2015) 36 *Tocqueville Review/La revue Tocqueville* 185, 185–94 ('Harm Decisionism').

⁶⁰¹ Steel, 'Harms and Wrongs of Stealing' (n 561) 713.

More importantly, in order to understand Green's framework, Green relies on Joel Feinberg's definition of harm.⁶⁰² Feinberg was an influential legal philosopher who drew on the work of Mill to provide a defence of the harm principle, and explain how his broadened interpretation of the concept may be used to justify criminalisation in a liberal society.⁶⁰³ In the 1980s, Feinberg produced a significant four-volume treatise, *The Moral Limits of Criminal Law*, in which he justified criminal intervention predominately through the lens of harm.⁶⁰⁴ The first volume, *Harm to Others*, focuses on justifying criminalisation on the basis of the harm principle. The title of this first volume adopts part of Mill's articulation of harm: the phrase 'harm to others'.⁶⁰⁵ Feinberg argues that the harm principle creates a positive obligation to intervene using the criminal law to protect where no other legal approach would be sufficiently protective. Feinberg states that criminal intervention is justified when 'it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values'.⁶⁰⁶ Concepts of proportionality have a role in determining whether a criminal response is justified for a particular conduct.⁶⁰⁷ Feinberg defines harm as representing 'some relatively lasting or significant setback to a person's interests. An interest, in turn, is something in which a person has a stake'.⁶⁰⁸ Green adopts this definition of interests as part of his framework. Feinberg also articulates a slightly different liberal principle to justify criminalisation, known as the offence principle.⁶⁰⁹ Feinberg states that 'a good reason in support of a proposed criminal prohibition is that it is necessary to prevent serious offense (as opposed to injury or harm) of persons other than the actor and would be an effective means to that end if enacted'.⁶¹⁰ As Green relies only on Feinberg's articulation of the harm principle in his framework, I will not discuss the operation of the offence principle further.

Green states that he 'would oppose the use of the criminal law to punish acts that do not satisfy some form of the harm principle. Under the approach taken here, the only proper

⁶⁰² Green, *Lying, Cheating and Stealing* (n 18) 34.

⁶⁰³ Steel, 'Harms and Wrongs of Stealing' (n 561) 714.

⁶⁰⁴ Joel Feinberg, *The Moral Limits of Criminal Law* (Oxford University Press, 1984–88). For a discussion of Feinberg's approach, including some criticisms, see Green, *Lying, Cheating and Stealing* (n 18) 713–18. Steel discusses Duff's criticism of Feinberg's work in this piece: at 718, citing R A Duff, 'Harms and Wrongs' (2001) 5(1) *Buffalo Criminal Law Review* 13, 22–4.

⁶⁰⁵ Mill, *On Liberty* (n 597) 9.

⁶⁰⁶ Feinberg, *Harm to Others* (n 129) 26.

⁶⁰⁷ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 4.

⁶⁰⁸ Green, *Lying, Cheating and Stealing* (n 18) 34, citing Feinberg, *Harm to Others* (n 129) 36–7.

⁶⁰⁹ Feinberg, *Harm to Others* (n 129) 26.

⁶¹⁰ Joel Feinberg, *Harm to Self* (Oxford University Press, 1986) 1.

use of criminal sanctions is to prevent not simply harm, but a certain subset of harms—namely, wrongful harms’.⁶¹¹ Green articulates the importance of harm to his framework as follows:

It is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices. In short, state interference with a citizen’s behavior tends to be morally justified when it is reasonably necessary (that is, when there are reasonable grounds for taking it to be necessary as well as effective) to prevent harm or the unreasonable risk of harm to parties other than the person interfered with.⁶¹²

6.2.2 Weaknesses of the Harm Principle as an Element in Green’s Framework

The harm principle is criticised in the academic literature on the basis that it does not provide clear limits as to relevant harms that should be subject to criminalisation. Indeed, one broad criticism of harmfulness as a justification for criminalisation is that it results in the identification of a large range of harms.⁶¹³ For example, Harcourt criticises the harm principle as ‘effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a critical principle because non-trivial harm arguments permeate the debate.’⁶¹⁴ Harcourt observes that the harm principle itself does not provide an answer to ‘the types of harm, the amounts of harms, and the balance of harms’ that should be subject to criminalisation, nor does it provide a framework to enable a comparison of harms.⁶¹⁵ Feinberg acknowledges this issue and adopts ‘mediating maxims’ as guides to help consider the circumstances in which criminal intervention is justified.⁶¹⁶ These maxims require the following factors to be considered:

1. ‘the greater the *gravity* of a possible harm, the less probable its occurrence need be to justify prohibition of the conduct that threatens to produce it;
2. the greater the *probability* of harm, the less grave the harm need be to justify coercion;

⁶¹¹ Green, *Lying, Cheating and Stealing* (n 18) 44.

⁶¹² *Ibid* 43-4.

⁶¹³ See discussion in Steel, ‘Harms and Wrongs of Stealing’ (n 561) 716–18.

⁶¹⁴ See, eg, Bernard E Harcourt, ‘The Collapse of the Harm Principle’ (1999) 90 *Journal of Criminal Law and Criminology* 109, 188 (‘Collapse of the Harm Principle’). See also Harcourt, ‘Harm Decisionism’ (n 600).

⁶¹⁵ Harcourt, ‘Collapse of the Harm Principle’ (n 614) 188.

⁶¹⁶ Feinberg, *Harm to Others* (n 129) 216.

3. the greater the *magnitude of the risk* of the harm, itself compounded out of gravity and probability, the less reasonable it is to accept the risk;
4. the more *valuable* (useful) the dangerous conduct, both to the actor and to others, the more reasonable it is to take the risk of harmful consequences, and for extremely valuable conduct it is reasonable to run risks up to the point of clear and present danger;
5. the more *reasonable* the risk of harm (the danger), the weaker is the case for prohibiting the conduct that creates it'.⁶¹⁷

Despite this guidance, criticism has been levelled against Feinberg because he does not provide any clear guidance on methods to balance the degree of harm⁶¹⁸ and the implications that the weighing exercise might have on assessing whether legislators should criminalise (rather than adopt a different legal response).

Green responds to the criticism of breadth by requiring harmfulness to be considered alongside the other criteria in his framework. Feinberg claims that for harms to be criminalised, the harm caused must also be wrongful.⁶¹⁹ A consented setback to interest, or harm caused in legitimate competition, may be justifiable despite the resulting setback to interests.⁶²⁰ Other scholars have also considered the need to impose limitations to curtail the otherwise broad application of the harm principle.⁶²¹ Alan Bogg and John Stanton-Ife argue that the harm principle must be considered alongside other principles to allow for the 'criminalisation of wrongfully inflicted harm'.⁶²² Similarly, John Gardner argues that 'the harm principle marks its ... contribution by limiting the types of moral considerations to which the law may have regard in shaping its restrictions'.⁶²³ Green's methodology notes this limitation by putting forward his three-part framework of different elements in order to evaluate whether criminalisation is justifiable on a moral basis.⁶²⁴ For example, in a similar fashion to Feinberg, Green justifies harmfulness by reference to moral wrongfulness.

⁶¹⁷ Ibid 216 (italics in original).

⁶¹⁸ Steel, 'Harms and Wrongs of Stealing' (n 561) 718.

⁶¹⁹ Feinberg, *Harm to Others* (n 129) 34–6.

⁶²⁰ Ibid 35–6.

⁶²¹ See, eg, von Hirsch, 'Harm and Wrongdoing' (n 50) 246; Simester and von Hirsch, *Crimes, Harms and Wrongs* (n 30).

⁶²² Alan L Bogg and John Stanford-Ife, 'Protecting the Vulnerable, Legality, Harm, and Theft' (2003) 23 *Legal Studies* 402, 415.

⁶²³ John Gardner, 'Rationality and the Rule of Law in Offences Against the Person' (1994) 53 *Cambridge Law Journal* 402, 513.

⁶²⁴ Green, *Lying, Cheating and Stealing* (n 18) 44.

6.3 Green's Test for Assessing Harmfulness

This section progresses the analysis by identifying the essential factors in Green's framework to determine whether conduct is harmful, using Feinberg's analysis, as Green does.

Key Definition of Harmfulness

Harmfulness is '[s]ome relatively lasting or significant setback to a person's interests. An interest, in turn, is something in which a person has a stake'⁶²⁵

Feinberg, quoted above, is the core source that Green relies on to define harm. Next, I consider the key elements of the definition.

6.3.1 Interests

According to Feinberg, an interest is 'something in which a person has a stake'.⁶²⁶ He differentiates between personal interests (usually referred to as 'welfare interests')⁶²⁷ and other types of interests. Jethro Lieberman divides these different personal interests into four classes:

1. 'passing wants (eating an ice cream cone)';
2. 'instrumental wants (to get exercise)';
3. 'welfare interests (the congeries of conditions and goods, such as physical health and economic sufficiency, that make it possible for us to achieve our ulterior or ultimate or focal aims)'; and
4. 'focal aims (our ultimate aims, that is, what we see as our good, such as building a dream house, running a restaurant, seeking religious salvation, promoting a cause, raising a family)'.⁶²⁸

Feinberg describes welfare interests as 'the very most important interests a person has, and cry out for protection, for without their fulfilment, a person is lost'.⁶²⁹

⁶²⁵ Ibid, citing Feinberg, *Harm to Others* (n 129) 7.

⁶²⁶ Feinberg, *Harm to Others* (n 129) 33.

⁶²⁷ Ibid 37.

⁶²⁸ Jethro K Lieberman, *Liberalism Undressed* (Oxford University Press, 2012) 49, citing Feinberg, *Harm to Others* (n 129) 31–64.

⁶²⁹ Feinberg, *Harm to Others* (n 129) 37.

Feinberg also describes interests that affect the public more generally, including the collective and the government (classified as ‘public interests’).⁶³⁰ Green adopts a similar approach by examining harms that affect the individual, collective and governmental interests.⁶³¹ By focusing on interests other than just personal interests, Green’s framework enables a broader discussion of effects as they relate to a range of different groups beyond the individual, such as, in the context of labour law, the government, trade unions, employers and the welfare of society more generally.

6.3.1.1 *Individual: Welfare Interests*

Feinberg introduces the concept of ‘welfare interests’ as being individual interests that are the ‘bare minima’ for ‘achieving and maintaining [a] minimum level of physical and mental health, material resources, economic assets, and political liberty that is necessary if we are to have any chance of achieving our higher good or well-being, as determined by our more ulterior goals’.⁶³²

In relation to individuals, Feinberg focuses on ‘welfare interests’ as being the type of interests that should be protected, including by criminal law.⁶³³ He summarises these as having ‘the characteristics of bare minimality, stability and durability’.⁶³⁴ In a table in his manuscript, he summarises welfare interests as interests in, ‘physical health and vigor’; ‘the absence of obsessive pain’; ‘the absence of grotesque disfigurement’; ‘intellectual competence’; ‘emotional stability’; ‘economic sufficiency’; ‘tolerable environment’; and ‘minimal political liberty’.⁶³⁵ In contrast, an interest that a person may have in living a lavish, Epicurean lifestyle is not protected by the criminal law.⁶³⁶ Lieberman describes the ‘welfare interests’ as ‘interests the interference with which might doom our ultimate aims’.⁶³⁷

Green relies on the types of ‘welfare interests’ that reflect Feinberg’s list in explaining the harmfulness element. In particular, Green identifies examples as including, ‘harms to [an] individual’s physical safety and property’.⁶³⁸ He also relies on other authors who also adopt definitions that relate to the terminology of interests. He quotes Hampton, who

⁶³⁰ Ibid 63

⁶³¹ Green, ‘Regulatory Offenses’ (n 11) 1549–50.

⁶³² Feinberg, *Harm to Others* (n 129) 57.

⁶³³ Ibid 37.

⁶³⁴ Ibid 57.

⁶³⁵ Ibid 60. See also: at 37.

⁶³⁶ Lieberman, *Liberalism Undressed* (n 628) 5.

⁶³⁷ Ibid 52.

⁶³⁸ Green, ‘Regulatory Offenses’ (n 11) 1550.

defines harm as, ‘a disruption of or interference in a person’s well-being, including damage to that person’s body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement’.⁶³⁹ Hampton’s conception of interests as they apply to individuals is consistent with Feinberg’s welfare interests.

Feinberg argues that welfare interests are the most vital ones that we ought protect. For example, Feinberg discusses how some welfare interests are legally protected by the criminal law:

Inflictions of harm to one’s bodily or mental health; diminutions of one’s security by the creation of new threats and dangers; reductions of one’s liberty of movement through abduction or false imprisonment; depletions of one’s material resources through larceny, or robbery, or fraud: all attack one’s entire personal well-being, by attacking the welfare interests necessary to it.⁶⁴⁰

6.3.1.2 Collective and Governmental: Public Interests

Feinberg also identifies ‘public interests’ that belong to a ‘larger group, institutions and corporate entities’.⁶⁴¹ Community public interests include ‘public peace, health, security from foreign enemies, and a sound economy’.⁶⁴² Governmental interests include “those generated in the very activities of governing” such as collecting taxes, registering aliens, conscripting an army, customs-inspecting, conducting trials and court hearings, operating prisons’.⁶⁴³ Feinberg links public interests to individuals by linking government operations to an individual’s welfare in ‘public health and economic prosperity’.⁶⁴⁴ He argues that acts that interfere with governmental interests ‘threaten[] direct harm insofar as it endangers the operation of government systems in which efficient normal functioning we all have a stake’.⁶⁴⁵

Green also identifies ‘public interests’, distinguishing between collective interests and those affecting the governmental interests. In relation to collective interests, he identifies rights ‘to [a] clean environment; safe food, drugs and consumer products; effective

⁶³⁹ Hampton, ‘The Goal of Retribution’ (n 508) 1662.

⁶⁴⁰ Feinberg, *Harm to Others* (n 129) 62.

⁶⁴¹ *Ibid.*

⁶⁴² *Ibid.*

⁶⁴³ *Ibid.*

⁶⁴⁴ *Ibid.* 64.

⁶⁴⁵ *Ibid.*

national security; and fair and efficient markets'.⁶⁴⁶ In relation to governmental interests, he identifies harms that cause 'violations of governmental interests— eg 'effective and disorderly operation of the court system and prisons; collection of taxes and customs duties; and registration of aliens and persons eligible for the draft'.⁶⁴⁷ These types of interests reflect the public interests that Feinberg identifies in his chapter.

6.3.2 Setbacks

According to Feinberg, setbacks to interests are necessary for the conduct to be regarded as causing harm. Feinberg elaborates that a setback occurs as 'the consequence of wrongful acts or omissions by others'.⁶⁴⁸ A setback is defined as 'morally indefensible conduct that not only set[s] back the victim's interest, but also violates [their] right'.⁶⁴⁹ Feinberg requires the 'thwarting, setting back or defeating [of] an interest' to justify designation as harmful.⁶⁵⁰ Feinberg states: 'It is only when an interest is thwarted through an invasion by self or others, that its possessor is harmed in a legal sense.'⁶⁵¹ The test to determine whether an interest has been intruded is framed as follows: 'One person harms another in the present sense by invading, and thereby thwarting or setting back, his interest. The test, in turn (as we shall see), of whether such an invasion has in fact set back an interest is whether that interest is in a worse condition than it would otherwise have been in had the invasion not occurred at all.'⁶⁵²

Feinberg identifies a range of terminology to describe different types of intrusions and worsening of interests. The terminology includes words such as violate, invade, impair, set back, defeat, thwart, impede and doom.⁶⁵³ Lieberman explains that the type of conduct that may be regarded as a setback includes that in circumstances in which

a person deprives me of my possessions, physically injures me, or causes me mental distress such that I am in some way incapacitated from doing, even for a time, some of the things that I ordinarily do, or otherwise invades one of my welfare interests, making it impossible or simply more difficult for me to continue a normal life or strive to fulfill

⁶⁴⁶ Green, 'Regulatory Offenses' (n 11) 1550.

⁶⁴⁷ Ibid.

⁶⁴⁸ Feinberg, *Harm to Others* (n 129) 215.

⁶⁴⁹ Ibid.

⁶⁵⁰ Ibid 33.

⁶⁵¹ Ibid 34.

⁶⁵² Ibid.

⁶⁵³ Ibid 51–6.

one of my ulterior interests, even temporarily, then this person has affected my interests sufficiently for the state to enact or invoke a relevant criminal law.⁶⁵⁴

The definition also requires that the setback be ‘relatively lasting or significant’.⁶⁵⁵ As Lieberman explains, Feinberg distinguishes from ‘transitory hurts that do not set back interests’, such as jostling in public, as not being of the type that should be treated by the criminal law.⁶⁵⁶ Feinberg further distinguishes between a setback to interests that occurs as consented to or freely in ‘legitimate competitions’.⁶⁵⁷

Green further quotes other academics who adopt an interest base approach to harm by describing setbacks as an interference with an interest that may further be characterised as a ‘disruption or interference’,⁶⁵⁸ a ‘violation’⁶⁵⁹ or ‘the negation, endangering, or destruction’ of an interest.⁶⁶⁰

Drawing from this discussion, the approach to assess whether conduct is harmful involves five steps, as summarised in Table 6.1.

Table 6.1: Process for Identifying Harmfulness

1. Identify the precise conduct that is criminalised.
2. Identify an ‘interest’ that may be affected.
3. Identify the relevant interference with an ‘interest’.
4. Assess whether the interest has been ‘set back’.
5. Assess whether the ‘setback’ occurs in a lasting or significant way.

6.4 Application of Green’s Harmfulness Element to Criminal Wage Theft Offences

In this part, I apply Green’s tests to consider potential harms that could be linked to the wage theft offences by considering possible interferences with various individual, collective and governmental interests.⁶⁶¹ In doing so, I focus on the subject matter of Victoria’s wage theft offences, rather than on the practices that may be caught by the

⁶⁵⁴ Ibid 53.

⁶⁵⁵ Feinberg, *Harm to Others* (n 129) 7.

⁶⁵⁶ Lieberman, *Liberalism Undressed* (n 628) 54.

⁶⁵⁷ Feinberg, *Harm to Others* (n 129) 36.

⁶⁵⁸ Hampton, ‘The Goal of Retribution’ (n 508) 1662.

⁶⁵⁹ Gross, *Criminal Justice* (n 509) 115.

⁶⁶⁰ Dressler, *Understanding Criminal Law* (n 510) 96.

⁶⁶¹ Green, ‘Regulatory Offenses’ (n 11) 1549–50.

broad social definitions of wage theft.⁶⁶² I draw on a range of sources, including Senate inquiry reports and media, to consider the different types of interests with which wage underpayments may interfere.

6.4.1 Individual Interests

My discussion of how individual interests may be harmed focuses on the specific individual who is employed and their immediate circle of personal connections. In this part, the discussion of harm is localised to the employee. Broader discussions of harms in relation to both collective and governmental interests are presented after this discussion.

6.4.1.1 Interference with 'Economic Stability'

Welfare interests include an interest in economic stability.⁶⁶³ The concept of economic stability is a key issue in relation to the wage theft offences. The specific offences target non-compliance with obligations regarding employee entitlements relating to pay and work conditions and the records of those right to wages and salaries. As the offences target withholdings of entitlements and the records of pay, hours worked and loadings, the offences clearly relate to the employees' economic circumstances.

Feinberg, who Green draws on to frame the discussion of harms, identifies a range of interests connected with economic stability. Feinberg observes that these interests protect 'interests in liberty (the interest in being the person who decides how the accumulated funds are to be spent)'.⁶⁶⁴ Economic stability also protects interests in security, such as by recognising that invasion into financial interests may include force or coercion, or the interferences may occur frequently, affecting a person's economic stability.⁶⁶⁵ Economic stability also protects interests in property and certainty in financial affairs. Feinberg assesses that 'the invasion of any person's financial interests threatens the general security of property, and the orderliness and predictability of financial affairs in which everyone has an interest'.⁶⁶⁶ Next, I consider how these observations about interference with economic stability may be affected by the conduct caught by the subject matter of the offences.

⁶⁶² For a discussion of what is caught by term wage theft see, Sections 1.1 and 7.3.

⁶⁶³ Feinberg, *Harm to Others* (n 129) 60.

⁶⁶⁴ *Ibid* 63.

⁶⁶⁵ *Ibid*.

⁶⁶⁶ *Ibid*.

Criminal wage theft offences relate to a person's interest in 'economic stability'. The interest is broader than merely capturing the failure to receive payments on a regular basis, and includes losses caused by not receiving payments at all. The focus of the offences on receiving less than the full entitlements or on non-payment of employee entitlements is best characterised as an interference with economic stability, as the employee receives less entitlements than they are owed and are unable to make choices relating to how their wages are to be spent, which affects their financial affairs. The impact of this delay may vary, depending on whether the offence captures the failure to meet minimum statutory standards, compared with, for example, the failure to meet the full entitlements of an exceptional performance-based contract, such as for an elite sportsperson on a \$1 million contract of employment or a corporate executive who is on a high salary.⁶⁶⁷ Feinberg observes that certain interests, including the interest in economic stability, extend beyond the protection of interests at minimal levels.⁶⁶⁸ In Feinberg's words: 'Material wealth is the best example [of an interest that is protected beyond minimal levels]. The law of burglary protects not only the pauper who would be ruined by the theft of his welfare check, but also the millionaire for whom a thousand-dollar bill has less utility than a penny for a child.'⁶⁶⁹

The s 6 offences relate to the full or partial withholding of employee entitlements, which include wages, penalty loadings and overtime rates, leave entitlements and superannuation. In most instances, the underpayment or non-payment relates to the non-compliance with the correct rates of pay or the failure to account for loadings and allowances, such that the full amount owed does not reach the employee.⁶⁷⁰ However, in some instances, such as a cashback scheme in which there is a forced transfer of funds, the full amount owed is conveyed to the employee, before the employer requires the employee to withdraw money to hand back to the employer to hide their non-compliance with the obligations.⁶⁷¹ The withholding offences clearly are linked to the economic stability of the employee and their families.

⁶⁶⁷ See discussion of 'employee entitlements' in Section 3.4.1.1.

⁶⁶⁸ Feinberg, *Harm to Others* (n 129) 62–3.

⁶⁶⁹ *Ibid* 63.

⁶⁷⁰ *2022 Senate Report: Systemic, Sustained and Shameful* (n 135) 15.

⁶⁷¹ See, eg, the case study example in the Fair Work Ombudsman's inquiry into the 7-Eleven franchise network discussing cash-back schemes: Fair Work Ombudsman, *Inquiry into 7-Eleven* (n 161) 59.

Drawing on the discussion of Feinberg’s definition of a person’s interests in economic stability which he uses as an umbrella term for broader interests, I note the following ways the interests are affected:

- The interest in liberty is affected as the withholdings affect the individual employee’s ability to spend the funds that they earn and to make choices about their economic wellbeing.
- The interest in security may be affected if the withholdings occur in circumstances that include practices such as cashback schemes or threats that if they do not accept less than their entitlements, they will lose their jobs. This connects to Feinberg’s discussion of coercion and threats.
- The interest in security is also likely affected if the underpayments or non-attribution of entitlements occurs over a sustained period. The underpayment is not a one-off event—or an oversight.
- The interest in property is likely affected if the underpayments occur as a delay in payment (even as a one-off delay), which may affect the predictability of the financial affairs of the employee who does not receive their full employee entitlements.

The employee’s interests in ‘economic stability’ are set back because they receive less than what they are legally entitled to receive. Feinberg suggests that such interest is setback regardless of how small it may be.⁶⁷²

As already noted, such an underpayment interferes with economic stability, as the conduct generally occurs frequently, and affects the certainty of employees and the predictability of financial affairs by denying them access to wages and other employment entitlements. However, underpayments interfere with economic stability even as a one-off event. For low-paid workers, economic consequences caused by a delay in payment may result in a deterioration in their financial ability to support themselves and their families. The 2022 Senate Committee report, *Systemic, Sustained and Shameful* observes: ‘People who are underpaid—particularly low-paid workers—have less money to spend on things they need like “housing, utilities, groceries and other everyday essentials”, little scope to purchase “extras” and luxuries, and less opportunity to plan for the future and save.’⁶⁷³ A financial deficit may affect the ability of a worker to pay for amenities, health care and

⁶⁷² Feinberg, *Harm to Others* (n 129) 63.

⁶⁷³ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135) 33.

living expenses, such as rent and food. The lack of timely payment may affect the employee's ability to access their wages at the time owed, which may cause increased pressures such as the need to work more shifts across different jobs or to struggle to pay for ordinary living costs.⁶⁷⁴ Where the underpayment of wages and other employee entitlements occurs, issues with the remittance of superannuation are also likely to occur.⁶⁷⁵ Employers' failure to follow statutory entitlements, such as the remittance of superannuation to a chosen superannuation fund, directly affects the savings that employees have in retirement.⁶⁷⁶ In turn, this may increase their reliance on social security supports from the government to meet their costs of living and may flow into government reliance in retirement that is not supported by other mechanisms. Missing superannuation payments may also affect eligibility for insurance policies, including disability and income protection insurance, owing to a lack of consistency in payments to the superannuation fund, resulting in the termination of policy entitlements.⁶⁷⁷

The interference results in a 'relatively lasting or significant setback' for low-paid workers, because it has many consequences for a person's financial situation beyond the immediate underpayment. I have already discussed some of the effects of superannuation losses. In addition to those effects, employers' failure to remit superannuation to the employees' superannuation fund negatively harms the latter's retirement funds, and thus, their potential savings for retirement owing to reduced access to the 'compounding effect of superannuation contributions'.⁶⁷⁸ As the Senate's report on the superannuation guarantee in 2017 observes, missing out on superannuation 'robs an employee of the benefits of investment earnings and compound interest'.⁶⁷⁹

There are also costs associated with taking action to recover the unpaid entitlements in the event that the payments are never received or where the entitlements are paid in full late, resulting in lasting setbacks. In relation to the specific underpayment or non-payment of employee entitlements, the employee may seek to recover the amounts owed, such as back payment for unpaid wages, superannuation or other entitlements. However, there are costs such as listing fees and costs of litigation associated with bringing claims in the

⁶⁷⁴ Ibid 35.

⁶⁷⁵ Ibid 38.

⁶⁷⁶ Helen Anderson and Tess Hardy, 'Who Should Be the Super Police? Detection and Recovery of Unremitted Superannuation' (2014) 37 *UNSW Law Journal* 162, 194 ('Who Should Be the Super Police?').

⁶⁷⁷ 2022 *Senate Report: Systemic, Sustained and Shameful* (n 135) 38. Max Mason and Lucy Dean, 'Workers are Owed \$2.1b in Unpaid Superannuation', *Australian Financial Review* (5 August 2023).

⁶⁷⁸ 2022 *Senate Report: Systemic, Sustained and Shameful* (n 135) 38.

⁶⁷⁹ 2017 *Senate Report: Superbad* (n 176) 23.

court to obtain back payment.⁶⁸⁰ There are further costs related to obtaining enforcement of judgment if a court agrees that an underpayment has occurred, and payment is not forthcoming.⁶⁸¹ There may be further issues with recovery due to the status of the employer who may have gone into liquidation or bankruptcy⁶⁸² and limitations on the ability to recover payments from third parties, such as the individual employer who is shielded from liability because of corporate structure.⁶⁸³ The receipt of backpay may also cause lasting issues for the employee—they may be harmed owing to negative tax treatment as backpay is treated as a lump sum.⁶⁸⁴ The effect of the additional income is that despite tax offsets, the lump sum may result in increased income thresholds being met resulting in a higher tax bracket applying to income earned. The 2022 Senate Committee report, *Systemic, Sustained and Shameful* observes that lump sum back payments may affect the tax rate, as well as social security payments, childcare subsidies, Medicare levy and access to a concession health card.⁶⁸⁵ The backpay process has a tax-offset approach in calculating income tax obligations, but nevertheless, there may be effects depending on how the offset is calculated and how that causes increases in the tax rate for the relevant tax. These implications may have broader effects on an individual.

The impact on a wealthy sportsperson or a corporate executive, or indeed a person on the Australian median income, is unlikely to be lasting or significant in the same way as it will be for low-paid workers who are receiving the minimum statutory entitlements. However, the extent of the impact and the degree to which it is ‘relatively lasting or significant’ as a setback will vary, depending on the degree of variation from the agreed amount, the length of the delay and the financial circumstances of the individual who does not receive their agreed amount. Depending on the amount that is underpaid, it may affect a range of choices affecting the management of financial affairs, which could influence the capacity to pay towards a mortgage, other regular expenses and choice expenses such as private school fees or holidays, or making choices about investments, which could still be detrimental to the person’s economic interests. At one extreme, the failure to receive the agreed income may cause extreme financial stress to the employee

⁶⁸⁰ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135) 67.

⁶⁸¹ Enforcement costs include the costs of obtaining the court ordered back payment such as engaging in a sheriff to obtain payment: Sally Brooks, ‘Former Students’ Fight for Unpaid Wages Highlights Loophole in Australia’s Legal System’, *ABC News* (16 May 2022).

⁶⁸² 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135) 67.

⁶⁸³ Sally Brooks, ‘Former Students’ Fight for Unpaid Wages Highlights Loophole in Australia’s Legal System’, *ABC News* (16 May 2022).

⁶⁸⁴ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135) Recommendation 6.

⁶⁸⁵ *Ibid* 37.

such that they are unable to service their mortgage, which will result in the bank exercising its rights to take repossession of the house through a court order. A range of individuals at different pay rates could face a similar effect— suggesting that it is not always easy to distinguish those entitled to the minimum wage from those entitled to higher pay rates in terms of the wage amount as the subject matter. The specific impact and degree will vary based on the financial obligations and lifestyle choices affecting each individual and their close family.

6.4.1.2 Interference with Personal Wellbeing

Welfare interests include interests in ‘personal wellbeing’.⁶⁸⁶ Green quotes Hampton, who defines personal wellbeing as including ‘damage to that person’s body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement’.⁶⁸⁷ Similarly, Feinberg draws attention to how ‘depletions of one’s material resources’ through offences such as theft or fraud ‘attack one’s entire personal well-being, by attacking the welfare interests necessary to it’.⁶⁸⁸ In this section, I exclude interests in economic stability that involve economic loss, as I have already addressed these in Section 6.4.1.1. Instead, I focus on the non-economic effects of underpayments on employees and their families.

The discussion of interests in personal wellbeing in the context of workplace employment entitlements reflects issues discussed by the International Labour Organization (‘ILO’) in relation to its Decent Work Agenda. An objective of the ILO is to promote dignity in the workplace. In the Philadelphia Declaration, a core principle of the ILO is articulated that ‘labour is not a commodity’.⁶⁸⁹ As part of this goal, the ILO promotes ‘decent work’, which is summarised as

work that respects the fundamental rights of the human person as well as the rights of workers in terms of conditions of work safety and remuneration. It also provides an income allowing workers to support themselves and their families ... [it includes]

⁶⁸⁶ Feinberg, *Harm to Others* (n 129) 60.

⁶⁸⁷ Hampton, ‘The Goal of Retribution’ (n 508) 1662.

⁶⁸⁸ Feinberg, *Harm to Others* (n 129) 62.

⁶⁸⁹ *Treaty of Peace between the Allied and Associated Powers and Germany*, signed 28 June 1919, 225 ConTS 188 (entered into force 10 January 1920) Annex I.

respect for the physical and mental integrity of the worker in the exercise of his/her employment.⁶⁹⁰

The connection between employees' entitlements and their physical and mental integrity reflects the approach Feinberg has adopted concerning welfare interests. As there is congruence between the interests identified in relation to welfare interests covering personal wellbeing and the labour goals to promote decent work for workplace participants, in this section, I analyse personal wellbeing by considering labour-specific concerns about decent work and dignity in the workplace.

In Section 1.2.3, I set out some of the justifications made for minimum labour standards as regards wages and other entitlements, such as leave. One justification that ties very clearly to the interest in personal wellbeing is that employment law is intended to ensure that labour rights protect dignity at work. Minimum labour standards recognise that workers should have a maximum working week, with loading providing for working beyond ordinary hours; penalty rates for working late hours, on weekends or on public holidays; and leave entitlements to ensure that workers can rest. Davidov identifies that a minimum wage (and other conditions) may be understood as 'an attempt to ensure respect for human dignity' and to prevent the treatment of humans as commodities.⁶⁹¹ He notes that the concept of dignity in the workplace is regarded by some labour law scholars as a fundamental labour right.⁶⁹² Davidov summarises that dignity in the workplace is regarded as fundamental because work is important to the individual 'not only in economic terms but also in social and psychological terms, respect for one's dignity supports a right to earn a minimum wage through work, rather than be dependent on social security'.⁶⁹³ Failure to receive entitlements harms workers' dignity, as they are forced to undertake additional labour, such as taking on a second job to make ends meet, and are treated as an expendable commodity by their employer. At the extreme end of an exploitation continuum,⁶⁹⁴ failure to receive dignity at work, including pay and other entitlements, may overlap with exploitative practices of forced labour and slavery,

⁶⁹⁰ Committee on Economic, Social and Cultural Rights, *General Comment No 18: The Right to Work (Article 6 of the International Covenant on Economic, Social and Cultural Rights)*, UN ESCOR, 25th sess, Agenda Item 3, UN Doc E/C 12/GC/18 (6 February 2006).

⁶⁹¹ Davidov, *A Purposive Approach* (n 75) 84.

⁶⁹² *Ibid* 59–62.

⁶⁹³ *Ibid* 61.

⁶⁹⁴ See, eg, Sam Scott, *Labour Exploitation and Work-Based Harm* (Polity Press, 2017) 44. See also Anna Boucher, "What Is Exploitation and Workplace Abuse?" A Classification Schema to Understand Exploitative Workplace Behaviour Towards Migrant Workers' (2022) 27(4) *New Political Economy* 629.

whereby an individual has limited rights over their working hours and may have limited to no autonomy over the type of work they can accept.⁶⁹⁵

The effects of underpayments can be linked to causing damage to the physical and mental health of workers. The 2022 Senate Committee report, *Systemic, Sustained and Shameful* states that the effects of underpayments are ‘financial stress with impacts on physical and mental health. Working long hours and/or multiple jobs leaves workers with less time to spend with family and friends and access support networks, exacerbating mental health problems’.⁶⁹⁶ As discussed in relation to the economic costs of underpayments, workers may be required to work multiple jobs to address the shortfall in wages due to underpayments. In this regard, certain US studies have also linked failure to pay minimum wages with negative health consequences, including poor mental health.⁶⁹⁷

6.4.2 Collective Interests

In addition to welfare interests, various ‘public interests’ may be affected by the range of conduct that may be linked to the criminal wage theft offences. Public interests include interests of a ‘larger group, institutions and corporate entities’.⁶⁹⁸ Of the public interests that Feinberg and Green identify as examples, the interests in a ‘sound economy’⁶⁹⁹ and in ‘fair and efficient markets’⁷⁰⁰ are the most relevant to this discussion. In Section 1.2.3, I set out some of the justifications made in support of minimum labour standard protections relating to wages and other conditions. In this section, I assume that there are collective interests in promoting these protections, as the statute and the protections enshrined reflect community values and government aspirations.

The specific collective interests of groups may shift depending on the characteristics of the type of employment, such that there may be a broad range of such interests. The FWO, the federal labour regulator, sets out in their annual reports the priority sectors and issues that they are targeting in their enforcement and compliance activities.⁷⁰¹ The specific

⁶⁹⁵ In Section 8.2.3.3, I consider slavery-like offences in more detail.

⁶⁹⁶ *2022 Senate Report: Systemic, Sustained and Shameful* (n 135) 35.

⁶⁹⁷ See, eg, Rajiv Bhatia et al, ‘Protecting Labor Rights: Roles for Public Health’ (2013) 128 *Public Health Reports* 39; Meredith Minkler et al, ‘Wage Theft as a Neglected Public Health Problem: An Overview and Case Study from San Francisco’s Chinatown District’ (2014) 104 *American Journal of Public Health* 1010; Maria Fernández-Esquer et al, ‘Structural Racism and Immigrant Health: Exploring the Association Between Wage Theft, Mental Health, and Injury among Latino Day Laborers’ (2021) 31 *Ethnicity & Disease* 345, 346–8.

⁶⁹⁸ Feinberg, *Harm to Others* (n 129) 62.

⁶⁹⁹ *Ibid.*

⁷⁰⁰ Green, ‘Regulatory Offenses’ (n 11) 1550.

⁷⁰¹ Fair Work Ombudsman, *Annual Report 2023–2024* (2024) 34.

interests and vulnerabilities of employees will differ depending on the group or sector in which they are employed. In the discussion that follows, I provide two examples of sectors that the FWO targeted during the 2023–2024 financial year.

A key sector that the FWO targets is fast food providers, restaurants and cafes.⁷⁰² In the FWO’s *Annual Report 2023-2024*, it explained that this sector was a target owing ‘to factors including the high proportion of vulnerable workers employed. These workers can be vulnerable to exploitation owing to a lack of awareness of their entitlements or a reluctance to raise concerns with their employer or the OFWO [Office of the Fair Work Ombudsman]’.⁷⁰³

A second area that the FWO has been targeting is non-compliance with wages in the university sector. In 2023, the National Tertiary Education Union reported that at least \$83 million was owed in underpayments to casuals.⁷⁰⁴ In the FWO’s *Annual Report 2023-2024*, universities are deemed a target for investigations and audits. The FWO reports that ‘the sector [is] still be systemically non-compliant— often due to the employment of high numbers of casual workers, ineffective governance, a lack of investment in payroll systems, expertise and auditing, and, in some cases, due to complacency’.⁷⁰⁵

The concept of collective interest could be further broken down into specific workplaces and could include other categories that are not addressed here. For example, other collectives who may be affected by non-compliance with the obligations include unions, employer associations and others who are directly affected by the employment—for example, students in the context of universities and customers in the context of the hospitality sector.

6.4.2.1 Interference with Workers’ Interests

In this section, I consider the impact of wage underpayments on workers’ interests as a collective. In Section 6.4.1, I have covered how these offences might affect individual welfare interests, namely, economic stability and physical and mental wellbeing.

⁷⁰² Ibid 43.

⁷⁰³ Ibid.

⁷⁰⁴ See, eg, Julie Hare, ‘Unis Admit Underpaying Casuals by \$83m: Report’, *Australian Financial Review* (19 February 2023).

⁷⁰⁵ Fair Work Ombudsman, *Annual Report 2023–2024* (2024) 42.

Wage underpayment has been linked to wage stagnation.⁷⁰⁶ Wage underpayment practices place ‘downward pressure on wages at other businesses’.⁷⁰⁷ Campbell notes that a belief that workers will accept underpayments results in ‘a shift in the effort bargain, confident in the expectation that labour supply will be endlessly replenished by new cohorts’.⁷⁰⁸ Further, businesses that rely on underpayments are predatory, as ‘[f]irst, they seek to take advantage of vulnerable employees, who are impeded in one way or another from challenging underpayments. Second, they seek to steal a march on competitors, who may be more reluctant to underpay or less capable of doing so’.⁷⁰⁹

Systematic underpayment and non-compliance with entitlements are shown to lead to expectations in industry that underpayment is normalised. The process of underpayments erodes expectations about payment practices and entitlements. This is particularly the case in industries in which underpayment practices are the norm, resulting in an acceptance by vulnerable labour market participants that they cannot bargain for a lawful pay rate, and if they do, they will lose their job. Reports show that workers in the hospitality industry accept underpayment as a norm.⁷¹⁰ In that context, challenging the pay will lead to a loss of their job and blacklisting in the industry. This culture of underpayment and the associated expectation stifles real wages for employees and removes their capacity to demand the payment of entitlements because their job is insecure and they can be replaced if they demand compliance. By causing wage stagnation and affecting expectations about non-compliant working conditions, this culture causes a significant and lasting erosion in conditions for employees. It reduces bargaining power in those industries for employees to use their numbers to pressure businesses to pay the lawfully owed entitlements. Thus, it also harms expectations to receive legal protections and further normalises the culture of underpayment.

6.4.2.2 Interference with Employers’ Interests

In this section, I consider the impact of wage theft on the legitimate business interests of employers as a collective. I assume that legitimate business interests include compliance

⁷⁰⁶ Ibid 42–3.

⁷⁰⁷ Tess Hardy and Andrew Stewart, ‘What’s Causing the Wages Slowdown’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do About It* (University of Adelaide Press, 2018) 57, 64 (‘Wages Slowdown’).

⁷⁰⁸ Iain Campbell, ‘Temporary Migrant Workers, Underpayment and Predatory Business Models’ in Andrew Stewart, Jim Stanford and Tess Hardy (eds), *The Wages Crisis in Australia: What It Is and What to Do About It* (University of Adelaide Press, 2018) 187, 193 (‘Temporary Migrant Workers’).

⁷⁰⁹ Ibid.

⁷¹⁰ Robinson and Brenner, ‘Restaurant Wage-Theft Scandals’ (n 330).

by employers with their legal obligations relating to minimum labour standards for wages and other entitlements.⁷¹¹

Employers have an interest in a fair and efficient marketplace in which other employers and firms are complying with their legal obligations concerning pay and other employee entitlements. When some firms do not comply with their legal obligations, but other law-abiding firms do, the non-compliant firms obtain an unfair competitive advantage.⁷¹² Therefore, there is an interest in promoting compliance with the law to protect the economic interests of firms and overall competition.

The full or partial withholding of employees' entitlements has a negative effect on businesses that comply with their legal obligations. This may be construed as a setback. Setbacks materialise in many ways. Employers who underpay wages are obtaining a financial advantage as their wage bill is less than legally required.⁷¹³ In contrast, employers who pay their employees the minimum standards of wages and other entitlements are in effect employing labour at a more expensive labour cost. Employers who underpay their employees also gain the benefit of 'avoiding taxation and superannuation liabilities'.⁷¹⁴ The 2017 Senate Economics Reference Committee report, *Superbad*, identifies that employers who do not pay superannuation guarantee entitlements gain an unfair advantage as 'non-compliant employers are able to operate on lower overheads, in turn increasing the likelihood of higher profit margins'.⁷¹⁵ Employers who are complying with the law are unevenly contributing to government taxation by complying with taxation and superannuation liabilities; those who do not declare all work gain 'an additional bonus from avoiding taxation and superannuation liabilities'.⁷¹⁶ Unfair competition also can result in the undercutting of other businesses in the provision of goods and services by enabling cheaper products that cut against the profit margins of compliant businesses.⁷¹⁷ Thus, businesses that do underpay gain an advantage over firms that adhere to their legal obligations about pay and the attribution of entitlements.⁷¹⁸

The setbacks are relatively lasting or significant because they create a perverse situation such that employers who do comply with the law are at a significant disadvantage to non-

⁷¹¹ See discussion of justifications for minimum labour standard protections in Section 1.2.3.

⁷¹² *2017 Senate Report: Superbad* (n 176) 25.

⁷¹³ Campbell, 'Temporary Migrant Workers' (n 708) 193.

⁷¹⁴ *Ibid.*

⁷¹⁵ *2017 Senate Report: Superbad* (n 176) 25.

⁷¹⁶ Campbell, 'Temporary Migrant Workers' (n 708) 193.

⁷¹⁷ Elizabeth J Kennedy, 'Wage Theft as Public Larceny' (2016) 81 *Brooklyn Law Review* 517, 531.

⁷¹⁸ *2022 Senate Report: Systemic, Sustained and Shameful* (n 135) 40.

compliant businesses. They make competition in business more difficult for compliant firms because of pressure on the costs of goods and services, thus harming the sustainability of businesses. They create an incentive for compliant businesses to shift their practices to become non-compliant. These shifts are contrary to the government's stated objectives.

6.4.3 Government's Interests

6.4.3.1 Government's Interests in Promoting Compliance

The government has interests in promoting compliance with minimum labour obligations relating to pay and work conditions, for non-compliance results in increased demands on government's services and affects its income-generating sources.

The government has an interest in promoting the accurate payment of entitlements because non-compliance increases its financial costs. First, it increases the costs of the services it provides. The government provides welfare support to workers and families, depending on their income. When workers do not receive their full entitlements, the government is under pressure to provide social security in various forms to fill the immediate gaps in their payments. This situation may result in increased demand for charities and other social services that the government supports financially in order to provide material aid to support individuals. Second, when businesses do not remit superannuation to employees, the long-term burden on government services in old age increases, such as through individuals' increased reliance on the age pension to compensate for the reduction in the superannuation available to them.⁷¹⁹

Moreover, the government has an interest in promoting the accurate payment of entitlements because non-compliance reduces its taxation revenue, which results in less immediate funds to distribute to the community towards implementing government policies. This failure to accurately pay entitlements affects various taxation streams, such as the payroll tax collected by the state governments and the income tax collected by the Federal Government. The Senate Economics References Committee's 2022 report, *Systemic, Sustained and Shameful* observes: 'Low incomes increase reliance on taxpayer support through pensions, payments, and offsets available through the tax system, while

⁷¹⁹ Anderson and Hardy, 'Who Should Be the Super Police?' (n 676) 164; 2022 *Senate Report: Systemic, Sustained and Shameful* (n 135) 7.

at the same time negatively impacting tax revenues at both state and federal levels.⁷²⁰ Joel Feinberg regards criminalisation as essential for tax compliance, stating: ‘If there were no crime of tax-evasion, then there would be no efficient way of raising revenue for public expenditure, at least some of which are needed by everyone (courts, police, defense forces, some social insurance schemes).’⁷²¹ I consider the harms and wrongs connected to tax evasion further in Section 8.2.3.2.

The government also has schemes for unpaid entitlements, such as the *Fair Entitlements Guarantee Act 2012* (Cth), to enable former employees to receive unpaid employee entitlements if a business has become bankrupt or insolvent. The scheme is intended to protect employees, who are unsecured creditors.⁷²² The need to fill a gap in cases where an employer is insolvent imposes further burdens on the government to support employees.

Non-compliance has significant and relatively lasting adverse effects on the government because it imposes an immediate penalty on the government through increased costs and decreased revenues. It further increases employees’ reliance on social security support from the government in the future because the schemes designed to assist them in their retirement are diluted. As Hardy and Stewart note:

In the longer term, the effects of underpayment may be magnified, due to lost superannuation entitlements. Indeed, where superannuation is not paid in full, the government is short-changed on two fronts. It collects less from the taxes levied on superannuation contributions and investment income, and it must ultimately pay out more by way of the Age Pension.⁷²³

Hence, the immediate loss of revenue has longer-term effects on the government, which may result in greater future reliance on government support systems among those affected by wage theft.

⁷²⁰ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135) 44.

⁷²¹ Joel Feinberg, *Harmless Wrongdoing* (Oxford University Press, 1988) 313 (‘*Harmless Wrongdoing*’).

⁷²² Helen Anderson, *The Protection of Employee Entitlements in Insolvency: An Australian Perspective* (Melbourne University Publishing, 2014) 13. See also Helen Anderson, ‘Understanding the Phoenix Landscape for Employees (2016) 29 *Australian Journal of Labour Law* 257.

⁷²³ Hardy and Stewart, ‘Wages Slowdown’ (n 707) 64.

6.5 Chapter Summary

In this chapter, I have applied Green's harmfulness element to criminal wage theft offences. By identifying how criminal wage theft interferes with a broad range of interests in a 'significant or relatively lasting' way, it has been possible to identify a range of harms associated with the targeted conduct.

As described earlier in this chapter, identifying harms connected to the subject matter is one criterion in the framework. It is also necessary to demonstrate that the harms are 'public' in nature. Green requires the harmfulness element to be considered alongside the wrongfulness criteria to establish that the offence captures a 'public harm' because it also involves a violation of moral norms.

In this chapter, I have identified that the subject matter of offending caught by the wage theft offences causes a range of harms. The offending causes and illegitimate interference with

- individuals' interests in economic stability;
- individuals' interests in personal wellbeing and decent work;
- employees' collective interests in decent working conditions;
- employers' interests in fair competition;
- union activities in protecting members' working conditions;
- government interests in promoting compliance to gain taxation revenue and reduce additional costs associated with increased demand on social welfare supports.

In this chapter, harms have not been ranked to determine their relative importance, because the harmfulness criterion is designed to result in the identification of a broad range of harms. The extent to which harms apply will differ, with some harms being more harmful to certain, rather than all, classes of people.

In reviewing the breadth of harms identified to determine the most significant examples, it is likely that the greatest weight should be afforded to how the conduct harms the individual. This is particularly so, given that the offence relating to 'full or partial withholding of employees' entitlements' is targeted towards helping a particular victim employee who has not received their entitlements in full. However, the broader effects to the government and other collectives cannot be ignored. In identifying a range of harms,

it is likely that the harms can be contemplated in aggregate. For example, it is unlikely that conduct that makes the detection of underpayments more difficult for government agencies and unions would by itself be sufficient to justify criminalisation despite the existence of an identifiable harm. That specific harm to the government needs to be evaluated with reference to the other harms identified, such as causing economic and non-economic harms to the individual employee affected by the wage theft and their families.

In Chapter 8, I consider the interaction between the different elements to weigh up my conclusions as to the extent that the identified harms, along with the findings on the other elements in the framework, suggest a moral basis for criminalisation.

Chapter 7: Element 3—Identifying Violations of Moral Norms

7.1 Introduction

In this chapter, I examine the Victorian criminal wage theft offences with reference to the third element of Green’s analytical framework: ‘moral wrongfulness’. As described in Section 4.4.3, moral wrongfulness, according to Green, ‘refers to the violation of a moral norm that occurs when a criminal act is committed’.⁷²⁴ He views the requirement of wrongfulness as essential to criminalisation.⁷²⁵ In Section 7.2, I explain the scope of the moral wrongfulness element and expand on Green’s justifications for using moral norms. In this chapter, I consider the specific norms that Green identifies and apply the tests he establishes to assess the extent to which there is a violation of moral norms. He also requires as part of the analysis of moral wrongfulness he also requires that the degree of violation to be compared with established criminal offences to benchmark the severity and whether criminalisation is warranted. I leave this discussion to Chapter 8, incorporating my discussion of established offences into my evaluation and the weighing up of my findings on the s 6 offences to reflect the significance Green places on wrongfulness in his framework.

The concept of moral wrongfulness is important to address in relation to the Victorian criminal wage theft offences, as it calls into question the moral associations evoked by the terminology of wage theft. I conclude that the moral norm against stealing has no relevance to assessing moral wrongfulness in relation to the specific subject matter and structure of the Victorian wage theft offences. In Section 7.3, I describe why the norm against stealing does not apply to the s 6 offences. This then requires an analysis of the offences through the other moral norms that Green sets out to assess whether there are other grounds to find violations of moral norms. In Section 7.4, I examine, the extent to which the offences suggest violations of other moral norms that Green identifies: the norm against cheating, disobedience, promise-breaking, exploitation and deception. By applying his tests, I find that the norm against cheating and disobedience are the most applicable to the findings of violations of moral norms in relation to the Victorian wage theft offences. I view there to be only narrow circumstances in which the norm against

⁷²⁴ Green, *Lying, Cheating and Stealing* (n 18) 39.

⁷²⁵ For discussion of Green’s theoretical justifications for including an element of ‘wrongfulness’, see Section 4.3.2.

exploitation or promise-breaking aid the appreciation of potential moral wrongfulness in relation to the offences examined. I consider that while some instances of wage theft may involve deception, the structure of the offence does not require deception as an element, as the norm against deception is not an integral part of the offence.

7.2 Green's Use of Moral Norms to Assess Moral Wrongfulness

The assessment of moral wrongfulness is conceptually challenging, given the absence of a uniform approach to assessing what is 'morally wrong'. As a concept, morality is not fixed, nor is it universally understood.⁷²⁶ This creates a challenge for evaluating whether offending can be characterised as 'wrongful'. Green observes that the concept of 'morality' and the boundaries between 'moral' and 'immoral' conduct are subject to significant scholarly debates in various fields, including moral philosophy and socio-legal approaches.⁷²⁷ Green approaches the question of determining 'moral wrongfulness' through a non-consequentialist or deontological approach by focusing on 'intrinsic wrongfulness' according to moral rules or values, rather than the consequences of the acts or omissions.⁷²⁸

Green evaluates moral wrongfulness using a descriptive rather than a normative approach to assessing morality.⁷²⁹ Gert and Gert distinguish the approaches to morality as being used 'descriptively to refer to certain codes of conduct put forward by a society or a group (such as a religion), or accepted by an individual for her own behavior, or normatively to refer to a code of conduct that, given specified conditions, would be put forward by all rational people'.⁷³⁰ Green describes the approach he takes to identifying moral norms as 'an exercise in descriptive moral theory, rather than in saying why, as a normative matter, we should refrain from lying or cheating or stealing'.⁷³¹ He adds that this approach is not 'a meta-ethical task of describing the foundations of the moral system within which such norms exist'.⁷³² His approach relies on tests he develops that are designed to assess the existence of various moral norms that he identifies as established categories of everyday

⁷²⁶ Bernard Gert and Joshua Gert, 'The Definition of Morality', Stanford Encyclopedia of Philosophy (Web Page, 8 September 2020) <<https://plato.stanford.edu/archives/fall2020/entries/morality-definition/>>.

⁷²⁷ See generally Green, *Lying, Cheating and Stealing* (n 18) Ch 1. See also at: 10–12.

⁷²⁸ Ibid 39.

⁷²⁹ See Geoffrey Brennan et al, *Explaining Norms* (Oxford University Press, 2013) ch 1 ('*Explaining Norms*').

⁷³⁰ Bernard Gert and Joshua Gert, 'The Definition of Morality', Stanford Encyclopedia of Philosophy (Web Page, 8 September 2020) <<https://plato.stanford.edu/archives/fall2020/entries/morality-definition/>>.

⁷³¹ Green, *Lying, Cheating and Stealing* (n 18) 4.

⁷³² Ibid 2, 4.

moral norms that are held in society.⁷³³ In his monograph, Green focuses on the moral norm against deception, cheating, stealing, coercion, exploitation, disloyalty, breaking a promise and disobedience.⁷³⁴ He characterises moral norms as articulating concrete ideals.⁷³⁵

The approach of identifying moral norms to evaluate conduct is an established approach to assessing morality. For example, Brennan et al take a very similar approach to Green in identifying and describing moral norms.⁷³⁶ Similarly to Green, Brennan et al approach the task of identifying moral norms by describing norms, rather than presenting a normative argument as to whether the norms should be endorsed.⁷³⁷ Such norms are described as being ‘accepted rules or normative principles’.⁷³⁸ Brennan et al describe moral norms as ‘the norms of positive morality— what is accepted among the group in question as the requirements of morality’.⁷³⁹ They identify moral norms as including ‘norms that exist in most societies forbidding murder, rape, and torture, norms of truth-telling and promise-keeping, and norms of beneficence’.⁷⁴⁰

Green explains that the purpose of his monograph is ‘to develop a detailed account of the notion of moral wrongfulness, which is described in terms of a range of everyday, but nevertheless powerful, moral norms that inform and shape the leading white collar criminal offenses’.⁷⁴¹ He justifies the norm-based approach, as he observes that norms are readily understood by members in society, and states:

Although there will be significant disagreement over the precise content and application of such norms, almost every civilized person will have some rudimentary understanding that it is morally wrong, at least in certain core cases, to lie, cheat, steal, coerce, exploit, break promises, and the like. Moreover, such an approach is more suggestive of the richly nuanced way people actually think about the content of their moral lives. Even people who have never had occasion to read a single page of moral philosophy are capable of making remarkably fine-grained distinctions, about, say what properly constitutes cheating or stealing.⁷⁴²

⁷³³ Ibid 45.

⁷³⁴ Ibid 4.

⁷³⁵ Ibid 45.

⁷³⁶ See Brennan et al, *Explaining Norms* (n 729) 2, 10, 57.

⁷³⁷ Ibid 2, 10, 57.

⁷³⁸ Ibid 2.

⁷³⁹ Ibid 57.

⁷⁴⁰ Ibid.

⁷⁴¹ Green, *Lying, Cheating and Stealing* (n 18) 4.

⁷⁴² Ibid 45.

Berman holds a largely positive view about the structure of Green's analytical framework and contribution to discussing white-collar crime.⁷⁴³ Given the extent to which criminalising certain types of white-collar crimes are controversial or at least 'morally ambiguous', in Berman's review of Green's key monograph, he questions whether the moral norms are as clear as Green allows. Indeed, Berman suggests the norms are 'fuzzier'.⁷⁴⁴ He questions the extent to which moral norms reflect 'fine-grained' distinctions, given that offences such as white-collar crimes are regarded as morally ambiguous and at times controversial in enforcement. He opines that 'perhaps there are many fewer everyday moral norms that are properly described as ours. Instead, there may be a large number of fine-grained moral norms that vary across individuals or groups'.⁷⁴⁵ This links back to the opening concern in this section that assessing morality is difficult, as it is not universally understood. Similarly, there are competing understandings of the meaning of dishonesty, despite it being used as a criminal law element.⁷⁴⁶ Berman's view suggests that despite Green's assurances, the specific tests that are applied to assess violations of moral norms will involve subjective variance, depending on the characteristics and background of the person who examines the offences. This results in a selective examination of moral wrongfulness that may not be satisfactory to all who consider the specific subject matter of the offences. Nevertheless, Green's approach is helpful in guiding an analysis of the Victorian wage theft offences. I limit some of the challenges with conceptualising morality by using the specific tests that he provides.

Although Green developed his framework to apply it to specific types of 'white-collar crimes', I consider there are enough similarities between criminal wage theft offences and types of crimes he discusses in his monograph. In Section 4.2, I explained that violations of minimum labour standards capture similar harms and wrongs to the types of crimes Green examines. The offending occurs in an employment context, and targets officers and employers, who may be abstract entities. The criminal wage theft offence specifically includes dishonesty as an element. The degree of similarities enables a fruitful discussion informed by the specific norms Green identifies. There may be other norms that could be examined, but I consider Green's norms sufficiently comprehensive for analysing the criminal wage theft context.

⁷⁴³ Berman, *Moral Structure* (n 520) 327.

⁷⁴⁴ *Ibid* 312

⁷⁴⁵ *Ibid*.

⁷⁴⁶ See similar issues in discussion of dishonesty in Section 5.4.2.

7.3 Inapplicability of the Norm against Stealing to the Wage Theft Offences

I begin my examination of the norms by addressing a key terminology issue regarding the concept of wage theft. I observe that despite the clear linguistic association with the broad category of conduct as a type of theft, Green's norm against stealing does not apply to the Victorian wage theft offence. Before addressing the specific tests, I explain the origins of the terminology of wage theft and the way it has been used to describe labour standard violations relating to wages and other entitlements.

7.3.1 Terminology of Wage Theft

In Section 1.1, I explained the very wide range of conduct that may be regarded as constituting the broad popular understanding of the term wage theft. In this thesis, I have largely limited my explanation of wage theft to the specific subject matter issues that are addressed in the Victorian *Wage Theft Act*. Nevertheless, to understand the origins of the terminology of 'wage theft', which is important to the discussion of the moral wrongfulness issue, it is necessary to consider more broadly the circumstances that led to the adoption of this term to describe labour violations relating to pay and working conditions.

The term wage theft has a broad application in Australia and an international context.⁷⁴⁷ Benjamin Levin observes that the term first emerged in academic literature in 1988.⁷⁴⁸ It then gained greater prominence from the mid-2000s. Levin notes that labour activists, such as Kim Bobo in the US, began to popularise the term around that time to reflect unscrupulous payment practices largely affecting vulnerable workers.⁷⁴⁹ Levin describes wage theft as a 'story of advocates and activists seeking to address a problem and attract public attention'.⁷⁵⁰ Bobo, a Christian labour organiser and founder of Interfaith Worker Justice, popularised the terminology as part of her campaign to rectify the problems of underpayment and non-payment to workers.⁷⁵¹ A key aspect of her account of the activist

⁷⁴⁷ See Chapters 1 and 2. See also Clibborn and Wright, 'Employer Theft' (n 22) 212; Lovelock and Foley, 'Agenda Setting' (n 3).

⁷⁴⁸ Benjamin Levin, 'Wage Theft Criminalization' (2021) 54 *UC Davis Law Review* 1429, 1440 ('Wage Theft', citing Michal R Belknap, 'From Pound to Harley: The Founding of AJS' (1988) 72 *Judicature* 78, 82.

⁷⁴⁹ Levin, 'Wage Theft' (n 748) 1444.

⁷⁵⁰ *Ibid.*

⁷⁵¹ Kim Bobo, *Wage Theft in America: Why Millions of Working Americans Are Not Getting Paid—And What We Can Do About It* (New Press, 2008) ('*Wage Theft in America*').

space was to present wage theft as constituting theft. She describes a ‘crises of wage theft and payroll fraud. Unscrupulous employers are stealing money from workers by cheating them of wages owed or not paying them at all’.⁷⁵² Bobo further describes underpayments of wages as ‘sins of commission’ directly against employees, such as the failure to pay them the minimum wage for hours worked by underpaying them, the failure to pay them for all hours worked, the failure to pay penalties for overtime or the misclassification of their status (eg as independent contractor).⁷⁵³ Bobo also describes ‘sins of omission’ where structural vulnerabilities in supply chains lead to managers placing pressure on firms to underpay workers in order to reduce labour costs and increase profit margins.⁷⁵⁴ A key aspect of Bobo’s campaign was to associate the denial of workers’ wages through exploitative workplace practices with developed moral notions that regard theft and stealing as morally wrongful as a means of garnering support for increasing efforts to rectify the problem. However, there is a tension inherent within Bobo’s characterisations, as the failure to do an act— eg ‘failing to pay’ would be treated as an omission in Australian criminal law.

In Victoria, the language of theft to describe wage theft was a prominent feature in the Labor Government’s legislative materials and press releases linked to the Victorian offences.⁷⁵⁵ Similarly, labour activists at the Young Workers Centre at Victorian Trades Hall supported the criminalisation of wage theft, in line with the argument that employers who ‘take’ wages should be treated the same as workers who steal money from a till and are treated criminally.⁷⁵⁶ James Murphy, Katie Lovelock and Emily Foley have noted how the growing media awareness of underpayment scandals in Australia led to the widespread use of the term wage theft by union activists. The authors argue:

Once wage theft grew as an issue in the media, union activists found a straightforward and emotionally powerful phrase to capture a whole spectrum of workplace exploitation. It allowed workers suffering a range of mistreatments— misclassification, unpaid overtime, non-payment of penalty rates, and more— to use a single umbrella

⁷⁵² Ibid xi.

⁷⁵³ Ibid 22.

⁷⁵⁴ Ibid 22–3.

⁷⁵⁵ Daniel Andrews, ‘Wage Theft Legislation Passes Victorian Parliament’ (Media Release 17 June 2020); Andrews, ‘Dodgy Employers to Face Jail for Wage Theft’ (n 1).

⁷⁵⁶ Young Workers Centre, *The Great Wage Rip Off* (May 2017) 12; Fitzpatrick, ‘Wage Theft and Young Workers’ (n 27) 173.

term to describe a common plight, creating new opportunities for collective identification and action.⁷⁵⁷

At the time that many governmental inquiries at the state and federal level were ongoing, employer groups were calling for the wage theft rhetoric to be dropped.⁷⁵⁸ For example, the Australian Industry Group challenged the widespread use of the language of wage theft to describe the underpayments of workers' wages. It objected to the terminology of wage theft, as it implies that employers have satisfied all elements of a criminal offence regardless of the circumstances in which the underpayment occurs and regardless of the latter's intent.⁷⁵⁹

Moreover, Levin, an American criminal law academic, has criticised the language of wage theft and has been highly critical of the calls to criminalise wage theft in the US legal context.⁷⁶⁰ The stated purpose of his article is to 'de-exceptionalise'⁷⁶¹ the conduct from 'other abusive practices that characterize workplace relations'.⁷⁶² Levin argues that the conduct does not deserve special criminal treatment and identifies a range of problems that are associated with increasing the reach of criminal institutions and law enforcement. He observes that proponents of criminalisation fail to account for the associated high costs, including problems associated with mass incarceration, structural abuses with carceral systems and issues with criminal enforcement.⁷⁶³ Levin also observes that the criminal law 'does not redistribute power or resources from bosses to workers; it distributes more power to the institutions of the carceral state'.⁷⁶⁴ This criticism of criminalisation is similar to concerns that Nicola Lacey raises in her foreword to the edited collection, *Criminality at Work*, discussed in Section 1.2.2.⁷⁶⁵ In particular, Lacey cautions against the use of the criminal law to achieve labour law objectives in terms of the 'worker-protective' function, given that the criminal law has traditionally been used repressively against workers.⁷⁶⁶ For example, employees could be held criminally liable under the Master and Servant Legislation for absconding from their employers.

⁷⁵⁷ Murphy, Lovelock and Foley, 'Agenda Setting' (n 3) 10.

⁷⁵⁸ Ibid 7.

⁷⁵⁹ See, eg, Australian Industry Group, Submission No 38 to Queensland Education, Employment and Small Business Committee, *Inquiry into Wage Theft* (2018).

⁷⁶⁰ Levin, 'Wage Theft' (n 748).

⁷⁶¹ Ibid 1436.

⁷⁶² Ibid 1435.

⁷⁶³ Ibid 1492–6.

⁷⁶⁴ Ibid 1494.

⁷⁶⁵ Lacey, 'Foreword' (n 60) vi.

⁷⁶⁶ Ibid.

Levin, who analyses the intended purpose of adopting the language of wage theft to evoke moral associations,⁷⁶⁷ observes:

The phrase invokes a certain moral clarity: theft is wrong. Rather than relying on more complicated or radical moves that challenge the sanctity of private property, ‘freedom of contract’, or the inherent unfreeness of the ‘free market’, wage theft conjures up bad actors and innocent workers. Workers have earned their wages, and bosses have stolen them. The phrase implies an easy (and uncritical) analogy to the realm of property crime, bringing with it the same certainty that bosses have taken what does not belong to them and have therefore offended community morality.⁷⁶⁸

Levin rejects the characterisation of the conduct as a type of theft or otherwise analogous conduct. Instead, he seeks to link the underpayments and other types of breaches to contractual law rights and to the inherent circumstances and inequality of bargaining power in workplace relations.

The question of whether the conduct can be viewed as a type of theft raises the issue of ‘fair labelling’ in the criminal law. That is, whether the offences accurately reflect the nature of wrongdoing.⁷⁶⁹ Andrew Ashworth explains that the principle of fair labelling involves seeing that ‘the widely felt distinctions between kinds of offences and degrees of wrongdoing are respected and signalled by law, and that offences be divided and labelled so as to represent fairly the nature and magnitude of the law-breaking’.⁷⁷⁰ In discussing theft, Green observes that the criminal law should observe the distinction between theft and other concepts of fraud to avoid conflation as a single charge of theft.⁷⁷¹ Sarah Green assesses whether ‘wage theft’ is a good label for the kinds of poor employment practices associated with the term by comparing those practices with the current statutory offence in the UK. Ultimately, she assesses that ‘wage fraud’ would be a much better label.⁷⁷² I address her explanation further in my examination of the norm against stealing.

⁷⁶⁷ Levin, ‘Wage Theft’ (n 748) 1432.

⁷⁶⁸ *Ibid* 1432–3 (Citations omitted).

⁷⁶⁹ Green, *Lying, Cheating and Stealing* (n 18) 42, 46. See also Chalmers and Leverick, ‘Fair Labelling’ (n 407).

⁷⁷⁰ Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 4th ed, 2005) 89–90, quoted in Green, *Lying, Cheating and Stealing* (n 18) 42.

⁷⁷¹ Green, *Lying, Cheating and Stealing* (n 18) 42.

⁷⁷² Sarah Green, ‘Wage Theft’ (n 25) 134, citing Glanville Williams, ‘Conviction and Fair Labelling’ (1983) 42 *Current Legal Problems* 85; Chalmers and Leverick, ‘Fair Labelling’ (n 407).

7.3.2 The Norm against Stealing

The norm against stealing is not a good fit for any analysis of the subject matter of the Victorian wage theft offences. This is despite the linguistic equivalence involved in linking the offences to theft or stealing through the language of wage theft that is widely adopted.

Green views the norm against stealing as protecting ownership rights.⁷⁷³ There are other ways to conceptualise the norm against stealing, such as the right to possession or the right to autonomy, but Green does not support those approaches as a way of applying his third element.⁷⁷⁴ Green observes that

to steal something is to violate, in some fundamental way, another's rights of ownership. Note that this is different from saying that stealing is merely a violation of some particular set of laws concerning property. To be sure, in modern, liberal societies, we tend to think of rights of ownership in legalistic terms ... But the concept of stealing itself seems to be in some fundamental way pre-legal'.⁷⁷⁵

Green uses the example of young children learning not to take others' things as constituting an awareness that to take from another is wrong.⁷⁷⁶ This view suggests that ownership does not derive merely from a legal right of ownership but because of the broader awareness of not taking other people's property.

In Whelan's article on the criminalisation of cartels considered in Section 4.3.3.1, he summarises Green's test for determining whether the norm against stealing is violated as capturing 'an intentional and fundamental violation of another's rights of ownership in something that is capable of being bought or sold'.⁷⁷⁷ In applying it the criminal cartel offences he examines, Whelan identifies the following four elements:

1. There must be 'the existence of something that is capable of being bought or sold'.⁷⁷⁸

⁷⁷³ Ibid 89–90, citing Tony Honoré, 'Ownership', in Anthony G Guest (ed), *Oxford Essays in Jurisprudence* (Clarendon Press, 1961) 107.

⁷⁷⁴ See, eg, Alex Steel, 'Taking Possession: The Defining Element of Theft?' (2008) 32 *Melbourne University Law Review* 1030, 1031, 1045, 1063; Steel, 'Harms and Wrongs of Stealing' (n 561) 713–16, 721. See also Simester and Sullivan, 'Property Offences' (n 561); Joseph Raz, 'Autonomy, Toleration, and the Harm Principle' in R Gavison (ed), *Issues in Contemporary Legal Philosophy* (Oxford University Press, 1987) 313, 327.

⁷⁷⁵ Green, *Lying, Cheating and Stealing* (n 18) 89; Green, *Theft Law* (n 252) 95–102.

⁷⁷⁶ Green, *Lying, Cheating and Stealing* (n 18) 89–90.

⁷⁷⁷ Whelan, 'Cartel Criminalization' (n 461) 544.

⁷⁷⁸ Ibid.

2. The victim must have a legal right of ownership over the thing.⁷⁷⁹
3. There must be a fundamental violation of the rights of ownership—such as the inability to use or possess the property.⁷⁸⁰
4. There must be an intention to ‘steal’ the thing.⁷⁸¹

7.3.2.1 Application to Wage Theft Offences

I now turn to consider how the norm against stealing could apply to the Victorian wage theft offence.

In Sarah Green’s chapter in the edited collection, *Criminality at Work*, she examines whether the kinds of employment practices that are regarded as wage theft could be encompassed within the general theft offence in the *Theft Act 1968* (UK).⁷⁸² She assesses that there are two main questions that must be resolved in the analysis. These are ‘whether the subject matter of the victim’s property rights existed, and whether the victim had the relevant interest in it, before the employer performed any action which could amount to appropriation of that subject matter’.⁷⁸³ I consider that these doctrinal questions are important to assess by reference to the Victorian general theft offence. Sarah Green’s findings in her chapter are particularly pertinent to consider, since Victoria’s theft offence is essentially the same as s 1 of the *Theft Act 1968* (UK).⁷⁸⁴ Section 72 of the *Crimes Act 1958* (Vic) provides:

- (1) A person steals if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it.
- (2) A person who steals is guilty of theft; and ‘thief’ shall be construed accordingly.

A key preliminary requirement is to establish whether the right to receive the payment of wages or other employee entitlements is property, according to theft law. In s 71(1) of the *Crimes Act 1958* (Vic) property is defined as ‘money and all other property real or personal including things in action and other intangible property’. This is the same broad definition as adopted by s 4(1) of the *Theft Act 1968* (UK). As Alex Steel observes, the definition of property used in the UK (and Victoria) ‘includes, by default, all forms of

⁷⁷⁹ Ibid 544–7.

⁷⁸⁰ Ibid 547.

⁷⁸¹ Ibid 547–8.

⁷⁸² Sarah Green, ‘Wage Theft’ (n 25).

⁷⁸³ Ibid 136.

⁷⁸⁴ Alex Steel, ‘Problematic and Unnecessary? Issues with the Use of the Theft Offence to Protect Intangible Property’ (2008) 30 *Sydney Law Review* 575, 576 (‘Intangible Property’).

property recognised by civil law’ unless expressly excluded.⁷⁸⁵ In Victoria, the definition of ‘things in action’ includes the right to payment of money under a contract⁷⁸⁶ and a right to a debt.⁷⁸⁷ It also includes equitable interests such as trust property.⁷⁸⁸ I consider that these categories are likely the most amenable to the kind of practices that might be caught by the definition of the word ‘withhold’ in the *Wage Theft Act* that includes the failure to pay, attribute or distribute entitlements.⁷⁸⁹ I note that the definition also covers acts, including ‘cashback’ schemes which occur when an employer asks for money back after pay is transferred, or unlawful deductions. Cashback schemes would likely already fit the theft requirements. I focus on the ‘failure to pay’ example, as it is the main kind of circumstances caught by the Victorian offences.

The failure to pay wages under the common law is a contractual breach that entitles an employee a right to sue for damages.⁷⁹⁰ For contractual breaches, an ‘action for damages is not a debt unless and until judgment is signed for the claimant’.⁷⁹¹ Stewart et al describe that if wages are accrued ‘under an award, enterprise agreement, or statute, then in the absence of any provision to the contrary, the obligation is absolute’.⁷⁹² The *Fair Work Act* treats these as ‘required amounts’,⁷⁹³ with a six year limit to seek repayment.⁷⁹⁴ Given this time limit, it appears to be a right to seek a remedy similar to contractual breaches, with the total amount owed assessed at judgment. Sarah Green observes that:

A damages claim ... does not, by definition, arise as a phenomenon until *after* the relevant activity of the employer has taken place. Even then, the claim is not something of which the employer’s activity can deprive the victim: on the contrary, the employer’s activity is what generates the claim in the first place.⁷⁹⁵

This timing issue has implications for whether an employer can appropriate the unpaid wages. Sarah Green concludes that it is ‘impossible for the employer to appropriate the chose in action which is the damages claim. This is a highly significant distinction, and one which makes a debt claim, but not a damages claim, susceptible in principle to

⁷⁸⁵ Ibid 583.

⁷⁸⁶ *Norman v Federal Commissioner of Taxation* (1963) 109 CLR 9, 26.

⁷⁸⁷ *R v Baruday* [1984] VR 685.

⁷⁸⁸ See Steel, ‘Intangible Property’ (n 784) 603–10.

⁷⁸⁹ *Wage Theft Act* s 3(1) (‘definition of withhold’) See discussion of ‘withholding’ in Section 3.4.1.2.

⁷⁹⁰ Stewart et al, *Labour Law* (n 86) 538.

⁷⁹¹ Sarah Green, ‘Wage Theft’ (n 25) 137.

⁷⁹² Stewart et al, *Labour Law* (n 86) 539.

⁷⁹³ *Fair Work Act* s 546A.

⁷⁹⁴ Ibid.

⁷⁹⁵ Sarah Green, ‘Wage Theft’ (n 25) 137.

theft'.⁷⁹⁶ Sarah Green notes that for standard examples of wage theft to fit the theft offence, 'the employee's proprietary interest in the monies lawfully due would need to arise prior to those actions of the employer which amounted to the purported appropriation'.⁷⁹⁷ For such an interest to exist ahead of the failure to pay, she is of the view that if the payment would have to be treated as trust property through an 'institutional' constructive trust that exists by law, rather than on judgment.⁷⁹⁸ Institutional constructive trusts can arise 'where a fiduciary acts in breach of obligations or where a stranger takes property aware of the equitable rights of others'.⁷⁹⁹ However, ultimately, Sarah Green was not satisfied that the constructive trust fits the circumstances. It is doubtful that the law governing constructive trusts in Australia would result in a different outcome.

I am not limited by the Victorian definition of property (and the degree to which wage theft offences could be caught by the theft offences in Victoria) to analyse the offences through Stuart Green's norm.

Sarah Green observes 'the law does not always equate what someone is owed with something she owns. In other words, there is an important forensic difference between saying "that is mine; give it to me" and "I performed services for you; pay me what they are worth"'.⁸⁰⁰ This recognises that what is ordinarily understood as stealing might ultimately be distinct from the characteristics of wages owed by an employer. For one, the core definition of 'withholding employee entitlements' largely captures omissions, such as a failure to pay, distribute or attribute employee entitlements to the employee.⁸⁰¹ I agree with Sarah Green's assessment that 'from a criminal law perspective at least, the shape and tenor of the offence of theft is not the most natural fit with the wrong of exploitative payment practice, or with its consequent harms'.⁸⁰² Given Stuart Green focuses on 'a collection of everyday, but nevertheless powerful, moral norms' any reliance on complex doctrinal analysis of proprietary interests to align the failure to pay wages with theft is a poor match.⁸⁰³

⁷⁹⁶ Ibid 138.

⁷⁹⁷ Ibid 139.

⁷⁹⁸ Ibid 140.

⁷⁹⁹ See Steel, 'Intangible Property' (n 784) 606 fn 196.

⁸⁰⁰ Ibid 134–5.

⁸⁰¹ Cf Bobo, *Wage Theft in America* (n 751) 22, who describes the failure to pay wages is an example of a 'sin of commission'.

⁸⁰² See Steel, 'Intangible Property' (n 784) 606 fn 196, 146.

⁸⁰³ Green, *Lying, Cheating and Stealing* (n 18) 45. For discussion of complexity of doctrinal analysis for finding intangible rights, see Steel, 'Intangible Property' (n 784) 613–14.

The amenability of the theft analysis was further tested in how Queensland approached the adaption of the stealing offence in the *Criminal Code 1899* (Qld) to capture wage theft.⁸⁰⁴ The stealing offence does not extend to intangible property and is a codification of larceny.⁸⁰⁵ In s 390 of the *Criminal Code 1899* (Qld) property that is capable of being stolen is defined as ‘moveable or capable of being moved’. To enact wage theft offences connected to stealing, the definition was expressly extended to include the failure to pay an employee an amount payable to them in relation to their performance of work as ‘a thing capable of being stolen’.⁸⁰⁶ Dietrich and Raj have described the deeming provision as a type of ‘radical surgery’ on the offence that was conducted to extend the definition of stealing to cover entitlements owed under an act, an industrial instrument or an agreement and to deem omissions as positive dealings with moveable property.⁸⁰⁷ As the authors have stated, the effect of the amendments is that: ‘An employer can be found liable for stealing for failing to pay a sum owed— a debt— and this is even though there is no positive conduct by the “thief”, other than that a date has arisen for payment’.⁸⁰⁸

It is likely that conceptualising wage theft as a fraud-like offence is a better way to characterise the offence than the language of theft. As Dietrich and Raj argue:

The offence of fraud seems more apposite given that there is no need to override the requirements that were part of the pre-existing definition of stealing (before the ‘wage theft’ specific amendments) that the property be movable and that there must be a positive act of conversion. Obviously, the phrase ‘wage theft’ as a metaphor for dishonest conduct is so powerful, that the legislature felt the need to turn the metaphor into reality, even if the conduct in question is not necessarily of the same genus.⁸⁰⁹

Sarah Green also reached the same conclusions that ‘wage fraud’ better fits the kind of interests impacted.⁸¹⁰ I also agree with Steel, who argues that ‘theft is too strongly tied to property interests to appropriately include contractual rights’.⁸¹¹ As the wage theft offences target dishonest withholdings, Green’s other norms that more closely target dishonesty are a better fit.

⁸⁰⁴ *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Qld). See *Criminal Code Act 1899* (Qld) ss 391(6A), 398(16).

⁸⁰⁵ Steel, ‘Intangible Property’ (n 784) 576.

⁸⁰⁶ *Criminal Code 1899* (Qld) s 391(6A).

⁸⁰⁷ Dietrich and Raj, ‘Property, Stealing, and Other Concepts’ (n 19) 223.

⁸⁰⁸ *Ibid.*

⁸⁰⁹ *Ibid.* 226.

⁸¹⁰ Sarah Green, ‘Wage Theft’ (n 25) 134.

⁸¹¹ Steel, ‘Intangible Property’ (n 784) 614.

7.4 Other Possible Moral Norms That May Be Violated by the Offences

I have argued that despite the language of wage theft, the moral norm of stealing does not support the s 6 offences. In this part, I consider other norms that Green contemplates in connection with ‘moral wrongfulness’.

Green addresses other moral norms in his monograph, including the norm against deception, cheating, exploitation, breaking a promise and disobedience.⁸¹² His account of moral norms distinguishes similar but different moral norm concepts. For example, he distinguishes the norm against cheating from those against stealing and deception.⁸¹³ I will address these to help me assess whether the offences recognise the types of violations of these norms.

7.4.1 The Norm against Cheating

Green introduces the concept of cheating by reference to general examples: cheating in the form of performance-enhancing drugs in sport, financial fraud, academic plagiarism and cheating in monogamous relationships.⁸¹⁴ He observes that cheating is generally thought of as a ‘purely moral concept’ but the norm against cheating may also be applied in a criminal law context. He develops ‘a positive theory of cheating, beginning with a description of its paradigmatic formal elements’ that is distinguished ‘from other morally wrongful acts, such as promise-breaking and deceiving’.⁸¹⁵ In developing his theory, Green seeks to observe the inherent qualities of ‘cheating’, a term that he regards as under-theorised in the literature. In his account of ‘cheating’, he does not regard the concepts of ‘deception and covertness’ as essential requirements to satisfy his test.⁸¹⁶ The core focus of the norm against cheating is on ‘rule-breaking and advantage-seeking’.⁸¹⁷ Green does not expressly consider dishonesty as part of his norm against cheating. However, I have been strongly influenced by how the UK Supreme Court has considered cheating as being expressly defined as equivalent to dishonesty. The concepts of breaking rules and seeking advantage are also similar to how dishonesty is established through the *Peters* test of dishonesty.

⁸¹² Green, *Lying, Cheating and Stealing* (n 18) 4.

⁸¹³ *Ibid* 56.

⁸¹⁴ *Ibid* 53–6.

⁸¹⁵ *Ibid* 56.

⁸¹⁶ *Ibid* 54–6.

⁸¹⁷ *Ibid* 56–66.

7.4.1.1 Connecting Cheating to the Concept of Dishonesty

In 2018, the UK Supreme Court issued a significant judgment in *Ivey v Genting Casinos (UK) Ltd* (*Ivey v Genty Casinos*)⁸¹⁸ that directly addressed the role of dishonesty in cheating. As the Victorian offences use dishonesty as a key element in the offence structure, I consider the extent to which dishonesty and cheating overlap and are related concepts.

Ivey v Genting Casinos was a civil case relating to a professional gambler who sued a casino for its failure to pay out his winnings of £7.7 million in the game of Punto Banco Baccarat. The game ordinarily relies on random card decks. The casino refused to pay out the winnings because Ivey reversed the ‘house advantage’ by engaging in ‘edge sorting’. Edge sorting involves visually identifying cards on the basis that manufactured cards may not be entirely symmetrical. Ivey had manipulated the card deck by asking the dealer to keep a deck for future rounds of the game and by convincing the dealer to rotate some cards. Edge sorting ‘involves identifying small differences in the pattern on the reverse of playing cards and exploiting that information to increase the chances of winning’.⁸¹⁹ Mr Ivey did not ever touch the cards but rather convinced the dealer to rotate some of them. The casino refused to pay on the basis that this was not a legitimate strategy. The concept of cheating was relevant in that case, as there is an implied contractual term not to ‘cheat’. In addition, in resolving the dispute, s 42(1)(a) of the *Gambling Act 2005* (UK), which creates an offence to cheat at gambling, was also considered. The case is significant because although a civil case, the unanimous judgment led to the reversal of the test of dishonesty in English law, for civil and criminal law cases have both relied on this decision, with later criminal cases in the UK adopting the test of dishonesty articulated in this case.⁸²⁰ Now, the approach to assessing dishonesty in the UK is very similar to the test in *Peters* that I have explained guides the standard of dishonesty for the Victorian offence.

In *Ivey v Genting Casinos*, Lord Hughes delivered the unanimous decision. He contemplated the differences between deception, cheating and dishonesty by reference to examples:

⁸¹⁸ *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391.

⁸¹⁹ Jamie Grierson, ‘Poker Player Loses Court Over £7.7m Winnings from London Casino’, *Guardian* (25 October 2017).

⁸²⁰ See, eg, *Booth v The Queen* [2021] QB 685.

Although the great majority of cheating will involve something which the ordinary person (or juror) would describe as dishonest, this is not invariably so. When, as it often will, the cheating involves deception of the other party, it will usually be easy to describe what was done as dishonest. It is, however, perfectly clear that in ordinary language cheating need not involve deception.⁸²¹

The observation that cheating does not always involve deception is consistent with how Green describes cheating.

Lord Hughes also contemplated the scope of cheating by reference to examples. Lady Hale, writing extrajudicially, summarises examples that Lord Hughes provides of cheating:

the runner who deliberately trips up another runner; the stable lad who starves the favourite of water for a day then gives him two buckets of water to drink just before the race; the sportsman who takes performance enhancing drugs; deliberate time-wasting in many forms of game—rubber bridge being a prime example known to me; or upsetting the card table to force a re-deal when loss seems unavoidable.⁸²²

In the case, Lord Hughes assessed that taking positive steps to fix the deck was cheating. Lord Hughes also observed that what was done in the case also amounted to dishonesty.⁸²³

Next, Lord Hughes considered factors that distinguish legitimate actions from cheating. Lord Hughes regarded cheating as ‘normally involve a deliberate (and not an accidental) act designed to gain an advantage in the play which is objectively improper, given the nature, parameters and rules (formal or informal) of the game under examination’.⁸²⁴ This formulation is similar to how Green has formulated a test for assessing the norm against cheating, which is presented in Section 7.4.1.2.

Lord Hughes also contemplated the role of dishonesty and considered that dishonesty may have a role to play in distinguishing legitimate from illegitimate activities in certain cases. Lady Hale observes:

Although it was not necessary for our decision, and thus strictly *obiter dicta*, we went on to consider the meaning of dishonesty in the criminal law. This was because the law had got itself into a very strange position— such that Mr Ivey could claim that he and

⁸²¹ *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 [45].

⁸²² Hale, ‘Dishonesty’ (n 563) 247. See also *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 [45]–[46].

⁸²³ Hale, ‘Dishonesty’ (n 563) 248.

⁸²⁴ *Ivey v Genting Casinos (UK) Ltd* [2018] AC 391 [47].

Ms Cheung were not dishonest in law, despite having deliberately set out to deceive the croupier into doing something to distort the odds in what was supposed to be a game of pure chance.⁸²⁵

Given this finding, I contemplate the role of dishonesty in this discussion of the norm against cheating.

7.4.1.2 Application to Wage Theft Offences

To satisfy that the moral norm against cheating has been violated, Green requires satisfaction of two elements:

1. The person must ‘violate a fair and fairly enforced rule’.⁸²⁶
2. The person must do so ‘with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship’.⁸²⁷

In addition to Green’s specific test, I will also consider how dishonesty can be used to shape an assessment of cheating.

As discussed in Section 3.4.1, the definition of ‘employee entitlements’ used in the *Wage Theft Act* includes individual agreements to pay above the minimum entitlements. It also includes statutory protections connected to minimum labour standards that are more ordinarily considered when reflecting on the term wage theft. In this part, I focus on the kind of interests that are more clearly caught by minimum labour standards, including in workplace instruments, rather than contracts that are well above those standards. I consider that the norm against promise-breaking is a better fit for analysis of private agreements of a higher value, as the interests are more closely linked to contractual law issues.

7.4.1.2.1 The Rules

- *Defining the Rules*

⁸²⁵ Hale, ‘Dishonesty’ (n 563) 248.

⁸²⁶ Green, *Lying, Cheating and Stealing* (n 18) 57.

⁸²⁷ *Ibid.*

According to the first limb of Green’s test, the rule must be ‘general, prescriptive, mandatory, conduct based and represent a standard’.⁸²⁸ In evaluating s 6 offences, I am guided by the approach Whelan takes to analyse cartel conduct through this norm.⁸²⁹

The rules, contained in s 6, relate to the legal requirements to pay or attribute employee entitlements owed to the employee, including entitlements to ‘wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation’.⁸³⁰ The sources of those employee entitlements include the National Employee Standards, industrial instruments, such as modern awards and enterprise agreements, and individual employment agreements.⁸³¹ However, it can also include individual employment agreements that are significantly above minimum standards.

The rules are sufficiently specific to be regarded as a ‘rule’ rather than a ‘principle’ or a ‘policy’, as they are set out clearly in legislation and other sources of law.⁸³² Whelan considers that ‘cartel prohibition is nonetheless precise enough to specify a particular outcome or mode of behaviour’.⁸³³ Similarly, the specific obligations are clear enough that they must relate specifically to defined entitlements in statute, individual employment agreements, or industrial instruments, such as modern awards and enterprise agreements, even if specific interpretations are contested. The exact content of the obligations that may be variably applied are determined by mechanisms such as the minimum wage decisions, or tables of wages in awards or enterprise agreements.⁸³⁴ The *Fair Work Act* also sets out methods for enterprise bargaining and review processes for the terms of awards. Statutory protections may further operate to modify industrial agreements or individual agreements create complexities awards or enterprise agreement incorporate minimum requirements contained in the National Employee Standards that cannot be negotiated away.⁸³⁵ In discussions of non-compliance with employee entitlements, business groups and human resources lobbyists have argued that variance in the scope of award rates and rates in enterprise agreements is large in operation and

⁸²⁸ Whelan, ‘Cartel Criminalization’ (n 461) 555, citing Green, *Lying, Cheating and Stealing* (n 18) 58–62.

⁸²⁹ Whelan, ‘Cartel Criminalization’ (n 461) 555–9.

⁸³⁰ *Wage Theft Act* s 3(1) (definition of ‘employee entitlements’).

⁸³¹ See discussion of the sources of employee entitlements in Section 3.4.1.1.

⁸³² Whelan, ‘Cartel Criminalization’ (n 461) 556, who distinguishes a ‘Dworkinian sense of rule’ from principle or policy, citing Richard Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) 22–28.

⁸³³ Whelan, ‘Cartel Criminalization’ (n 461) 556.

⁸³⁴ Fair Work Ombudsman, *Minimum Wages* (Web Page) <<https://www.fairwork.gov.au/pay-and-wages/minimum-wages>>.

⁸³⁵ *Fair Work Act* s 55.

create complexity that makes compliance with obligations difficult.⁸³⁶ However, this issue does not shift from a finding that the rules are defined, as it is possible to ascertain the legal obligations, including through payroll software or engagement with expertise. The rules are general in application as they relate to general types of employee entitlements regarding pay or the attribution of entitlements rather than an obligation that is applicable in a specific circumstance.⁸³⁷ Even if individuals agree to their own individualised contract with a higher level of entitlements, minimum entitlements (including protections about overtime and other conditions) will apply regardless. The rules are prescriptive as they are set to guide behaviour by requiring employers to meet minimum standards obligations in relation to the entitlements, including rates of pay or the attribution of leave allowances.⁸³⁸ The rules are mandatory as they describe ‘what one must not do’⁸³⁹—that is, an employer should not withhold employee entitlements—rather than advising the employer that it is good practice to pay employees their minimum entitlements. The rules relate to conduct as they guide employer obligations, rather than proscribing standards for the agencies to review and apply when assessing regulatory breaches. The obligations are further supported by civil remedy provisions contained in the *Fair Work Act* in the event of breach. As discussed in Section 2.2.2, those affected by breaches of their protected entitlements can seek court-ordered penalties and other remedies for breaches relating to the National Employment Standards, awards and enterprise agreements. The withholding of wages or other entitlements, such as leave, and penalty rates constitutes a violation of the rules contained in statutes or other sources of entitlements, including industrial awards or enterprise agreements.

- *The Rules Must Be Fair*

The rule ‘must be fair, issued by a legitimate authority and enforced in an even-handed manner’.⁸⁴⁰ Whelan observes that to assess fairness, it is necessary to answer the question: ‘[i]s the existence of the rule itself inherently unfair?’ Based on Whelan’s question in the cartel context—‘By prohibiting cartels is one acting *ipso facto* unfairly towards the potential cartelist?’—the question that applies for the wage theft offences is whether prohibiting non-compliance with employee entitlement obligations or other pay

⁸³⁶ Anna Patty, “Beyond Hopeless”: Complaints about Awards System “Excuse” for Underpayments”, *Sydney Morning Herald* (31 October 2019).

⁸³⁷ Whelan, ‘Cartel Criminalization’ (n 461) 555, citing William Twining and David Miers, *How to Do Things with Rules* (Weidenfeld and Nicholson, 1991) 123.

⁸³⁸ Whelan, ‘Cartel Criminalization’ (n 461) 555.

⁸³⁹ *Ibid.*

⁸⁴⁰ *Ibid* 556.

obligations is unfair on the employer. This issue connects to whether imposing minimum standards in relation to pay or other entitlement obligations on employers is unfair. It also connects to the broader principles and justifications for labour standard protections that were canvassed in Section 1.2.3.

In Chapter 1, I addressed some of the justifications for the creation of minimum labour standards, including allowing for wage protections and providing for other entitlements. Boucher describes labour law as essentially having a ‘*pacifying*’ role for the law, against a background of conflict between workers and capital’.⁸⁴¹ Specific rights, such as the statutory minimum, are intended to partially work against a disparity in bargaining power between the worker and their employer. Kahn-Freund famously argued that ‘the main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship’.⁸⁴² Harry Arthurs, in a report on the Canadian Federal Labour Standards, regarded decency that as the most fundamental principle for labour regulation, which he considers ‘underlies all labour standards legislation’.⁸⁴³ Arthurs states:

Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as ‘decent’. No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.⁸⁴⁴

As observed in Chapter 1, the grounds for supporting minimum wage entitlements and other minimum conditions assumed that the law has a legitimate role in protecting vulnerable workers. Indeed, the sources are supported on the basis that the community has endorsed a need to protect low-paid employees from exploitation. The purposes of minimum standards support the finding that the entitlements are fair. The kind of entitlement that is protected by s 6 includes wages, as well as other entitlements linked to hours, loadings and overtime protections.

⁸⁴¹ Anna Boucher, *Patterns of Exploitation: Understanding Migrant Worker Rights in Advanced Democracy* (Oxford University Press, 2023) 17 (‘*Patterns of Exploitation*’).

⁸⁴² Kahn-Freund, ‘Labour and the Law’ (n 82) 18.

⁸⁴³ Harry W Arthurs, *Fairness at Work: Federal Labour Standards for the 21st Century* (Report, 2006) 47.

⁸⁴⁴ *Ibid.*

- *The Rules Must Be Legitimate and Enforced with Even-Handiness*

I now address the concepts of legitimacy and even-handedness. As Whelan observes, these issues are ‘institution-specific’.⁸⁴⁵ The relevant sources of the entitlements include obligations owed in the *Fair Work Act*, such as in the National Employment Standards; industrial instruments, such as awards and enterprise agreements; and individual contracts. The relevant institutions that have legislated to establish the rules include the Parliament of Australia, which enacted the rules contained in the *Fair Work Act*, and the Parliament of Victoria in relation to the *Wage Theft Act*, the federal labour inspectorate regulator (FWO) and other actors, such as the Fair Work Commission in relation to award modifications or records of finalised enterprise agreement negotiations. In relation to the specific offences, Workplace Inspectorate Victoria is also a relevant authority, as it can investigate and prosecute employers and individuals in accordance with its statutory powers. It is assumed that these bodies and authorities act legitimately in exercising their powers and responsibilities.⁸⁴⁶ As for even-handedness, regulatory bodies, such as the FWO and Wage Inspectorate Victoria, have enforcement and compliance policies that are followed before commencing litigation or prosecution.⁸⁴⁷ It is beyond the scope of this thesis to evaluate the extent to which the agencies are acting according to their stated legislative framework and policy objectives.

7.4.1.2.2 The Cheating Limb

This limb requires consideration of whether the employer engaged with their victim in a ‘mutually beneficial, co-operative, rule governed enterprise’ and whether the violation of the rule led to the gaining of an advantage over the victims.⁸⁴⁸ Green describes the test for the cheating limb as requiring the person to act ‘with the intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship’.⁸⁴⁹ Having noted how the Victorian offences also include dishonesty in the offence structure, I also consider how dishonesty connects to the cheating limb.

⁸⁴⁵ Whelan, ‘Cartel Criminalization’ (n 461) 556

⁸⁴⁶ I observed in Section 2.3.2 that if the High Court challenge to the Victorian Act had been resolved in favour of the applicants (Mr Setia and his company), the entire Victorian scheme may have been rendered inoperable.

⁸⁴⁷ Wage Inspectorate Victoria, *Compliance and Enforcement Policy* (September 2021); Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025).

⁸⁴⁸ Whelan, ‘Cartel Criminalization’ (n 461) 557.

⁸⁴⁹ Green, *Lying, Cheating and Stealing* (n 18) 57.

- *An Engagement with Their Victim in a ‘Mutually Beneficial, Co-Operative, Rule Governed Enterprise’*

As Whelan observes in his discussion of cartels, this definition requires the identification of relevant victims. I cast this enquiry broadly when characterising impact in order to examine who may be regarded as direct victims and who may be indirectly affected by underpayments. The victims are those who are directly affected by the offences, such as the employee and those who they support financially, such as their families and dependents.⁸⁵⁰ The victims may also include market participants, such as other competitors’ employees and competitor businesses that are engaging in lawful compliance practices, and who are therefore adversely affected by unlawful undercutting of wages in terms of business. It may also include other workers, as industry norms may result in the normalisation of payments below the minimum across sectors. The impact of normalised wage underpayment may result in less opportunity to leave an employer. The ‘mutually beneficial, co-operative, rule governed enterprise’ relates to the place of the employer in the broader economy and labour market. In the context of employment, the arrangements are governed by various sources of employment rights, such as contracts, industrial agreements, such as awards and enterprise agreements, and statutory mechanisms to support entitlements, including the National Employment Standards. Employment agreements are contracts of service between the employee and their employer in exchange for wages.⁸⁵¹ The specific mechanisms for the setting of conditions add to the requirements involved in the context of the employment agreement. Non-compliance with the set rules and standards affects the various categories of victims whose interests are impacted.⁸⁵²

- *The Violation of the Rule Leads to the Gaining of an Advantage over the Victims*

Green describes cheating as requiring an ‘intent to obtain an advantage over a party with whom she is in a cooperative, rule-bound relationship’.⁸⁵³

Unfair advantage

⁸⁵⁰ See discussion in Section 6.4.1.

⁸⁵¹ I expand on the ‘work-wage bargain’ in relation to my discussion of the norm against promise-breaking, in Section 7.4.3.

⁸⁵² See Section 6.4.

⁸⁵³ Green, *Lying, Cheating and Stealing* (n 18) 57.

The unfair advantage may be characterised as that received by employers who withhold entitlements of the benefit of labour at a rate less than specified in the minimum labour standards (or an agreed rate that is higher) owed to employees. This results in the employee losing out on their employment entitlements and the protections that are applied through various mechanisms in relation to wages. The employer who underpays may also gain an advantage in a labour market by undercutting other employers who are abiding by the rules. However, there are arguably certain advantages that relate to the underpaying of wages. One advantage may be cheaper prices of goods and services, if the cost of labour is reduced to reflect the price margins that consumers are willing to pay. Another advantage is that if rule breaking is common in an industry, the advantage obtained is a type of leveller against others who are non-compliant and allows competition. Nevertheless, as the statutory rules create an obligation to follow minimum standards, the deliberate, dishonest breaking of rules in order to gain an advantage suggests a negative connotation and undermines the purposes of the rules addressed above.

Intention to cheat

The application of this aspect of Green’s test is difficult to resolve in relation to the s 6 offences, owing to the statutory ambiguities identified in Chapter 3, with the implications further discussed in Chapter 5. The ambiguities may have significant effects on the scope of the offences, thus affecting the requisite state of mind and the extent to which this suggests ‘cheating’. To recap, I have observed the following ambiguities:

	Interpretation 1	Interpretation 2
Intent:	The accused intended to pay the employee less than the minimum amount required by law.	The accused intended to pay the employee what was actually paid.

	Interpretation 1	Interpretation 2	Interpretation 3
Awareness	The accused is aware that the employer had knowledge of the specific source of law or calculation method of entitlements that was required by law.	The accused is aware of their pay obligations to the employee and that the rate of pay may differ depending on the hours of work and the employment status of an employee.	The accused is reckless as to their pay obligations, including mistaken interpretations of the source of law, and fails to investigate pay obligations and to

			check or audit the payroll system.
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Depending on how these elements are resolved, dishonesty may have a larger or smaller role to play in defining the subject matter of the offence. Dishonesty that is connected to less specific knowledge (or even recklessness) or intent will have a more significant role in distinguishing types of withholdings from being regarded as criminal, or just a breach of the employer’s duties that may be subject to a remedy through another source of law. In contrast, if the employer is required to have more specific knowledge and intention regarding the specific withholding of obligations and knowledge of key sources of entitlements, dishonesty will have a lesser role to play, as it is unlikely that such a circumstance would not be the intentional taking of an advantage.

If the offence requires more specific knowledge and intent, then it may be easier to find a moral basis for criminalisation supported by the norm against cheating. However, if recklessness with regard to the rules suffices, then it may be more difficult to establish that the employer actually cheated the employee, as the employer is more likely to be engaging in a category of conduct that can be construed as accidental. Similarly, the offence structure includes various attribution methods that have a defence of due diligence to prevent liability from arising.

Overall, it is likely that the s 6 offences target subject matter that would violate the norm against cheating. However, the extent to which the offence fits this norm will depend on how a court resolves the statutory ambiguities. As discussed in Section 5.4.2, dishonesty may operate as either a positive or a negative element. The degree to which this norm supports criminalisation will depend on the extent to which the offence is shaped by dishonesty rather than specific knowledge and intent. However, if the offence were to cover reckless conduct, it is unlikely to be as justifiable as other examples that require more specific knowledge or intent. As discussed, these issues cannot be clearly resolved owing to the statutory ambiguities that persist in the drafting of the offences.

7.4.2 The Norm against Disobedience

Green introduces the norm against disobedience in *Lying, Cheating and Stealing*, with the disclaimer that it is ‘undoubtedly one of the most controversial of the moral norms’ that he considers.⁸⁵⁴ Green also addresses eight kinds of moral wrongfulness as follows:

⁸⁵⁴ Green, *Lying, Cheating and Stealing* (n 18) 114.

‘cheating, deception, stealing, coercion, exploitation, disloyalty, promise-breaking, and disobedience [are] dealt with [in his book] in roughly decreasing order of their importance in the context of white-collar criminal law’.⁸⁵⁵ He observes: ‘[m]any readers will be skeptical that disobedience of the law is a form of moral wrongfulness in the first place, let alone the kind that should justify penal sanctions.’⁸⁵⁶ Green identifies that ‘the modern view is that, if there is a moral obligation to obey the law at all, it is a limited, prima facie, obligation, one that applies only when laws are “just” and when such obligation is not overridden by competing moral claims’.⁸⁵⁷

Green explains how the norm of disobedience operates in relation to tax evasion, which is an offence I will return to address in Chapter 8. He observes that: ‘every violation of a just law involves some form of disobedience’ and offers little to explain how the moral content of, for example, the crime of tax evasion, differs from that of more trivial regulatory violations.⁸⁵⁸ The norm against cheating also involves rule breaking. Green notes that ‘[s]ince the rule at issue in tax evasion is a legal rule, it might seem that the analysis of tax-evasion-as-disobedience would be subsumed by the earlier analysis of tax-evasion-as-cheating’.⁸⁵⁹ Nevertheless, he regards the norm against disobedience as helpful for analysing white-collar crime. For example, he argues that in contrast to the norm against cheating: ‘which tends to highlight the wrong done, *horizontally*, to the taxpayer’s fellow citizens—the disobedience analysis tends to highlight the vertical nature of the wrong (and harm) done to the government, which needs tax revenue to function’.⁸⁶⁰ Green identifies that different types of conduct will fit different in the analysis. For example, he identifies that ‘offenders who engage in trivially harmful conduct, such as driving with an expired license, can be subject to criminal sanctions. Once again, the defendant’s act would unlikely be regarded as wrongful absent the violation of law’.⁸⁶¹

In order to conceptualise how violation is a form of disobedience, Green evaluates the offence by reference to the concepts of *mala in se* and *mala prohibitum* and argues that

⁸⁵⁵ Ibid 50.

⁸⁵⁶ Ibid 114.

⁸⁵⁷ Ibid 115, MBE Smith, ‘Is There a Prima Facie Obligation to Obey the Law?’ (1973) 82 *Yale Law Journal* 950.

⁸⁵⁸ Green, ‘Tax Evasion as Crime’ (n 392) 72.

⁸⁵⁹ Ibid.

⁸⁶⁰ Ibid 72–3.

⁸⁶¹ Green, *Lying, Cheating and Stealing* (n 18) 126.

there is no such thing as a pure *malum in se* or *malum prohibitum* offence. Even those crimes that can most plausibly be considered *mala in se* are to some extent defined by law. Conversely, even conduct that is most clearly *malum prohibitum* has some nonlegal moral content. The point is that *malum in se* and *malum prohibitum* are better thought of as contrasting qualities along a continuum that, to one degree or another, characterize all criminal offences, rather than as precise categories into which special offences either do or do not [fall].⁸⁶²

In order to examine the characteristics of the offence, Green identifies the aspects that point to the two different categories. In *Lying, Cheating and Stealing*, he poses the following question:

To what extent does, or should, the putative wrongfulness of disobedience play a role in informing the criminal law? In a sense, every violation of law involves disobedience to the government or other lawful authority. But in the case of core *mala in se* offenses (at least for the non-recidivist), the moral content of such disobedience is trivial. For example, we punish murderers not because they violate the law (although the law certainly helps define what should count as murder), but because they violate the norm against unjustified killing. By contrast, the cases I am interested in here are those in which we punish conduct primarily because it involves disobedience to the law or lawful authority.⁸⁶³

7.4.2.1 Application to Wage Theft Offences

The Victorian criminal wage theft offences largely target breaches of minimum entitlement standards. In light of this context, the norm against disobedience assists in connecting wage theft to the protective purposes of labour law. As identified in Section 6.4.3, the failure to make correct wage payments has widespread effects, including for the government that collects taxes and provides safety-net supports to individuals in the form of social security payments, or in relation to the age pension where superannuation and assets are insufficient to support a person in old age. The laws are also implemented to reflect social values in ensuring that workers are provided with minimum standards and a decent wage.

Criminal wage theft is a novel offence in the Australian context. The specific rules about loading or penalty rates are established in statute. As identified in Section 4.2, moral

⁸⁶² Green, 'Tax Evasion as Crime' (n 392) 73.

⁸⁶³ Green, *Lying, Cheating and Stealing* (n 18) 126.

ambiguities may arise where the relevant conduct is traditionally not regarded as justifying criminal intervention, eg where the breaches may be regarded as trivial.⁸⁶⁴ As identified elsewhere in this chapter, it is not a criminal offence under the general law to fail to pay a debt or breach a contractual obligation. The amount of money that employers owe to their employees is determined within the framework of legally defined rules through statute or industrial instruments, such as awards or enterprise agreements. However, at times, individuals may choose to set their own pay amount above the entitlements. In those instances, where the amount is above statutory minima, a strong justification for criminalisation through the norm against disobedience is absent as it is not linked to the rules set out by the government—instead, it is connected to contractual rights negotiated by parties to reflect the ‘high-performance’ aspect. The wrong of ‘withholding employee entitlements’ is connected to legal obligations relating to pay and conditions, which are connected to general labour law concepts about protecting workers, but the wrong of wage theft is more closely connected to the prohibition, rather than a freestanding moral wrong such as applies in more traditional offences.

The analogy of an employee stealing from a till has been frequently evoked when discussing the criminalization of wage underpayments since it suggests a degree of unfairness in the different treatment. The offence structure also includes fault requirements that distinguish careless record-keeping mistakes from fraudulent attempts to ‘cook the books’ in order to avoid detection. The more the payments are regarded as being a subtype of fraud, the easier it is to conceptualise wage underpayments as subject matter that the government and society more broadly seeks to punish. The laws governing pay obligations, particularly those contained in the *Fair Work Act*, protect workers by setting minimum standards and requiring employers to provide a minimum degree of support to employees to enable them to participate in decent work. The greater the extent to which wage theft undermines those principles, the closer the offence can be considered *mala in se*.

It is likely that the norm against disobedience can be used to justify criminal wage theft offences. However, in order to do so, the subject matter that such a norm supports would need to be tied closely to minimum standards and those protections, rather than broader breaches that can be captured by the offence structure that are more clearly tied to contractual law and protections instead.

⁸⁶⁴ Ibid 24–6.

7.4.3 The Norm against Promise-Breaking

The norm against promise-breaking suggests that the obligation not to break a contract may, according to some accounts, be regarded as a moral wrongdoing.

Green treats promise-breaking as a distinct category from cheating, as it relates more to promissory obligations. He notes: ‘In light of the minimal degree of opprobrium that usually attaches to promise-breaking in that context, the idea that such moral wrongfulness might play a role in defining the moral content of crimes seems at first thought improbable.’⁸⁶⁵ He states that the norm has different characteristics from the other ones he examines and has some importance in relation to ‘a small but interesting collection of white-collar and regulatory offences’.⁸⁶⁶ Although Green is hesitant in considering promise-breaking as a justification for criminal action, it nevertheless is a norm that is likely connected with breaches relating to the wage theft offences, as the obligations relating to the incomplete or non-payment of employee entitlements are connected with contractual rights and include the promise to abide by employment law, including requirements relating to minimum employment standards. I consider the degree of relevance to the circumstances in which the Victorian offences capture promise-based conduct. In doing so, I examine different rationales for upholding contractual promises, such as economic rationales and promise-based rationales, to consider their application to the offences.

7.4.3.1 Defining the Norm

Green defines promises as ‘a social practice the rules of which, including the rule that promises must be in general be kept, we are bound to obey’.⁸⁶⁷ In many circumstances, a promise is unenforceable—for example, if were to state to my workplace that: ‘I promise to wash the dishes in the office kitchen next Friday’ is not a legally enforceable promise. Green observes that criminal sanctions, or indeed legal consequences at all, very rarely result as a consequence of a broken promise.⁸⁶⁸ Nevertheless, he argues that in certain circumstances, there may be a moral duty to fulfil the terms of a promise that could be supported by the criminal law.⁸⁶⁹ He identifies three general categories of moral promises

⁸⁶⁵ Green, *Lying, Cheating and Stealing* (n 18) 107.

⁸⁶⁶ *Ibid.*

⁸⁶⁷ *Ibid.*

⁸⁶⁸ Green, ‘Regulatory Offences’ (n 11) 1599, 1601.

⁸⁶⁹ This is contested in private law theory. See, eg, Green, *Lying, Cheating and Stealing* (n 18) 107, citing Patrick Atiyah, *Promises, Morals and Law* (Clarendon Press, 1981); Charles Fried, *Contract as Promise:*

to which this could apply. The first comprises circumstances involving special duties to the public or the state, such as a promise to not endanger life or property or not to disrupt essential government services.⁸⁷⁰ The second category relates to violations of promises that were never intended to be fulfilled—for example, where an individual takes \$1,000 for a promised supply of a good but knows at the time of the transaction that they would never deliver the product to the other party.⁸⁷¹ The key issue to distinguish this example from a debt is that there never was the intention to honour the contract. I will return to this example. The third category consists of false promises that statements are truthful, such as perjury.⁸⁷²

In this section, I examine promise-breaking norms relating to contractual obligations rather than examining the specific rules imposed by statutory overlay.⁸⁷³ I regard those rules as part of the obligation, but not core to the norm against promise-breaking. In distinguishing types of broken promises relating to agreements, Green distinguishes between circumstances in which a promise is frustrated because the event is impeded and where there is no intention to complete the promise in the first place.⁸⁷⁴ I consider whether the agreement between an employer and their employee creates a moral obligation not to breach the contract, and if so, whether breaking that promise could create any justification for criminal intervention. A moral obligation to fulfil a promise, including contractual obligations, is a separate discussion from whether there is legal obligation to complete the promise (ie specific performance). It is also a separate discussion from whether there are any other mechanisms in the civil law to recover underpayments of wages or other employee entitlements. Employment agreements have common law contractual foundations (ie the common law agreement to enter into a contract to provide a service), which are supported by further protections overlaying that agreement that may include terms in the National Employment Standards, modern awards, or enterprise agreements. As this norm focuses on the agreement between the employer and their employee in making the promise, I focus on that relationship in this analysis. The agreement includes the promise to fulfil the agreement in line with obligations imposed by statutory employment measures and other relevant industrial instruments.

A Theory of Contractual Obligation (Harvard University Press, 1981); Joseph Raz, 'Promises and Obligations' in PMS Hacker and Joseph Raz (eds), *Law, Morality and Society* (Clarendon Press, 1977).

⁸⁷⁰ Green, *Lying, Cheating and Stealing* (n 18) 111–12.

⁸⁷¹ *Ibid* 112.

⁸⁷² *Ibid*.

⁸⁷³ Green, 'Regulatory Offenses' (n 11) 1599, 1601.

⁸⁷⁴ Green, *Lying, Cheating and Stealing* (n 18) 253.

In order to examine whether there is a moral obligation to fulfil a contractual obligation in an employment contract, I consider theories of private law regarding contractual obligations relating to contracts of service. I note that Green suggests that: ‘contractual and fiduciary duties are viewed as violations of private obligations arising from the assent of parties, rather than as violations of duties owed to the public’.⁸⁷⁵ He notes that certain aspects of an arrangement may shift the circumstances to justify criminal intervention.

7.4.3.2 *Promise-Based and Economic Justifications*

This part considers whether a promise to perform a contract creates a moral norm to uphold the terms of an agreement, or merely a contractual obligation to fulfil a promise.

A question arises in theoretical debates on private law as to whether the breach of contract creates:

1. a legal obligation to fulfil the terms of the agreement; or
2. both a legal and a moral obligation to fulfil the terms of the agreement.⁸⁷⁶

Green observes: ‘The dominant scholarly view is that promise-keeping is basically irrelevant to the law of contract and that breach of contract remedies are not a sanction for immoral behavior.’⁸⁷⁷ In the case of contractual obligations where labour has been rendered, the likely outcome is that damages can be awarded to reflect the failed remuneration that was conditional on the performance of the contract.⁸⁷⁸ For example, for employment contracts, compensation can be sought to recover lost wages and other entitlements. Specific performance is usually not ordered for employment contracts because of the personal service element. However, promise-based accounts (referenced later in this section) recognise a moral justification for honouring contractual obligations. If there is a moral obligation, the next issue to consider is whether there are circumstances that justify a criminal sanction for non-compliance.

According to Smith, completed contracts have:

1. ‘a tangible effect because they allow for a shifting of resources between the parties to the contract’; and

⁸⁷⁵ Green, ‘Regulatory Offenses’ (n 11) 1599, 1600.

⁸⁷⁶ See generally Katy Barnett, ‘The “Performance Interest” in Contract Law’ in John Eldridge and Timothy Pilkington (eds), *Australian Contract Law in the 21st Century* (Federation Press, 2021) 22 (‘Performance Interest’).

⁸⁷⁷ Green, ‘Regulatory Offenses’ (n 11) 1599 fn 215.

⁸⁷⁸ See Mark Irving, *Contract of Employment* (Lexis Nexis, 2nd ed, 2019) 564–6 (‘*Employment*’).

2. ‘an intangible effect because they create bonds of trust between contracting parties’.⁸⁷⁹

The first of these accounts prioritises economic effect.⁸⁸⁰ The second approach prioritises the promissory obligations based on the bonds of trust between contracting parties.⁸⁸¹

- *The Economic Account*

One view is that a breach of contract results in a failure to fulfil a legal obligation, with remedies, such as compensatory damages, awardable as an efficient allocation of economic loss (the ‘Economic Account’). According to a purely economic account, it would be impermissible to impose other types of sanctions for a private law breach other than compensatory damages.⁸⁸² According to the ‘efficient breach theory’, such an approach is permissible if there is a financial advantage obtainable via breach.⁸⁸³

- *The Promise-Based Account*

Some accounts argue that as a voluntary promise creates an oath between strangers, the failure to fulfil the terms of the contract, including the failure to make full payment, is immoral conduct (the ‘Promise-Based’ Account).⁸⁸⁴ The moral obligation is enforced by the legal remedy.⁸⁸⁵

Such an approach emphasises trust-based elements between contracting parties. According to a promise-based account, there is a duty to honour a voluntary agreement, which creates a moral obligation to fulfil the contract. This account of contract law connects to Green’s presentation of the moral norm against promise-breaking.⁸⁸⁶ According to Mark Giancaspro, the promise-based account is linked to ‘the Latin maxim *pacta sunt servanda* (“agreements are to be kept”) and has its roots in religion and philosophy’.⁸⁸⁷

⁸⁷⁹ Stephen A Smith, ‘Performance, Punishment and the Nature of Contractual Obligations’ (1997) 60 *Modern Law Review* 360, 367, quoted in Barnett, ‘Performance Interest’ (n 876) 23.

⁸⁸⁰ Barnett, ‘Performance Interest’ (n 876) 23.

⁸⁸¹ *Ibid.*

⁸⁸² Richard Posner, ‘An Economic Theory of the Criminal Law’ (1945) 85 *Columbia Law Review* 1193, 1194–95. See also Oliver Wendell Holmes Jr, *The Common Law* (Little, Brown & Co, 1881) 301.

⁸⁸³ Richard Posner, *Economic Analysis of Law* (Wolters Kluwer, 9th ed, 2014) at [4.10].

⁸⁸⁴ Daniel Markovitz, ‘Making and Keeping Contracts’ (2013) 92 *Virginia Law Review* 1325.

⁸⁸⁵ Mark Giancaspro, ‘“It’s Just Business” ... Or Is It? When An Efficient Breach of Contract Becomes Unconscionable Conduct Under the Australian Consumer Law’ (2022) 48(2) *Monash University Law Review* 272, 275 (‘It’s Just Business’). See also Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Harvard University Press, 1981) 16.

⁸⁸⁶ Green, *Lying, Cheating and Stealing* (n 18) 45.

⁸⁸⁷ Giancaspro, ‘It’s Just Business’ (n 885) 272, citing Hans Wehberg, ‘*Pacta Sunt Servanda*’ (1959) 53(4) *American Journal of International Law* 775.

In discussions on private law, some authors have considered the boundaries between private law and the criminal law.⁸⁸⁸ Largely, sources note a significant reluctance to consider that there is a role for the criminal law in private contractual matters. It is unlikely that the promise-breaking norm and any moral attachment that is owed as a result, in and of itself, would justify a criminal response for the breach. A mere breach of a common law employment agreement and the surrounding moral obligations is unlikely to be sufficient to justify criminal intervention. A criminal justification for intervention would require the addition of other characteristics, such as fraud, surrounding the promissory breach.⁸⁸⁹

7.4.3.3 Application to Wage Theft Offences

The norm against promise-breaking is relevant in terms of the employment agreement that involves a contract for service. The key question is whether the failure to make full payment of entitlements violates a moral obligation connected with the norm against promise-breaking, such that the use of criminal law may be justified.

The norm against promise-breaking focuses on the common law rights related to the employment contract, which includes the obligations in the specific statutory overlay, such as additional obligations specified in other sources of law, such as the National Employment Standards. When entering into an agreement, employers promise their workers that they will be remunerated in exchange for their labour.⁸⁹⁰ This is frequently known as the ‘wages for work bargain’.⁸⁹¹ Employment agreements are a type of contract for service. Employees complete work by relying on the promise of remuneration in exchange for labour. In response to a breach of a contract, the parties to a contract are entitled to sue for compensatory damages to recover the lost wages. The failure to pay the contractual stipulated terms is a breach of contract. The relationship entails the basic promise that: ‘in exchange for labour, you will receive payment’, which is central to the service contract. The failure to honour that expectation leads to promise-breaking. According to a ‘promise-based account’, there is a moral obligation to fulfil that promise,

⁸⁸⁸ Monu Bedi, ‘Contract Breaches and the Criminal/Civil Divide: An Inter-Common Law Analysis’ (2012) 28 *Georgia State University Law Review* 559 (‘Contract Breaches and the Criminal/Civil Divide’); John Coffee Jr, ‘Does “Unlawful” Mean “Criminal”? Reflections on the Disappearing Tort/Crime Distinction in American Law’ (1991) 71 *Boston University Law Review* 192.

⁸⁸⁹ Green, ‘Regulatory Offenses’ (n 11) 1600.

⁸⁹⁰ Mark Freedland and Simon Deakin, ‘The Exchange Principle and the Wage-Work Bargain’ in Mark Freedland (ed), *The Contract of Employment* (Oxford University Press, 2016) 52, 52.

⁸⁹¹ Irving, *Employment* (n 878) 566, citing *Browning v Crumlin Valley Collieries* [1926] 1 KB 522, 528.

which is supported by the legal obligation. The requirements to pay according to the minimum entitlement standards is an inherent part of the promise.

The more difficult question is whether the moral norm can support a criminal response. According to Green's account, there are very limited grounds for the promise-breaking norm to justify criminal intervention. The contract of service would need to be entered into on a fraudulent basis, where the employer had no intention to pay any wages in exchange for service. Consistently, in Australian law, the remedy for breach of contract is usually compensatory damages rather than providing a criminal sanction. Underpayment for service based on the terms of the contract or failure to pay for work is treated as a breach of the contractual agreement.⁸⁹² Damages for a failure to pay wages according to the contractual agreement are linked to the breach. The overriding view is that a breach of a service contract does not entitle the employee to more than damages. The criminal law does not treat the failure to pay a debt as a criminal offence.⁸⁹³ Instead, the obligation is reinforced by contractual law and remedies, such as compensatory damages discussed earlier in relation to this norm. In Australia, there was a historic mechanism where 'servants' who absconded from their employment, such as farm workers, could be criminally prosecuted, fined and imprisoned for a failure to complete the terms of an agreement.⁸⁹⁴ The basis of the criminal sanctioning was the workers' obedience to their 'masters'—rather than on the basis of a breach of promise.⁸⁹⁵ Nevertheless, there may be limited circumstances in which criminalisation could be justified. Green notes that an intention to obtain labour with no intention to make payment could be regarded as a basis to rely on the criminal law in response to wrongdoing.⁸⁹⁶

While the promise to pay is an important aspect of the employer–employee arrangement, the aspect of breach that could support criminalisation is likely to be more closely connected to the norm against cheating, which seeks to focus on the element of cheating and dishonesty rather than the existence of a promise.

⁸⁹² Irving, *Employment* (n 878) 564.

⁸⁹³ Arie Freiberg and R C McCallum, 'The Enforcement of Federal Awards: Civil or Criminal Penalties?' [1979] (Sept) *Australian Business Law Review* 246, 247 n 6.

⁸⁹⁴ See Merritt, 'Abstentionist or Interventionist' (n 61); Adrian Merritt, 'The Development and Application of Masters and Servants Legislation In New South Wales—1845 to 1930' (PhD Thesis, Australian National University, 1981).

⁸⁹⁵ Merritt, 'Abstentionist or Interventionist' (n 61) 69.

⁸⁹⁶ Green, *Lying, Cheating and Stealing* (n 18) 112. See generally Bedi, 'Contract Breaches and the Criminal/Civil Divide' (n 888).

7.4.4 The Norm against Exploitation

Green's specific test for assessing whether there has been a violation of the norm against exploitation focuses on individual actors, rather than broader structural issues that may explain exploitation. The Victorian wage theft offence targets individual actors, rather than the broader circumstances that explain why exploitation might occur. Sayomi Ariyawansa observes that the Victorian wage theft offences are transactional in nature⁸⁹⁷ and argues that

while the Victorian *Wage Theft Act* signals a pleasing desire to clamp down on the problem of systemic exploitation and underpayment of vulnerable workers, these laws treat the issue of exploitation and underpayment as a transactional problem—that is, the product of discrete transactions between an employer and worker—and do not address the structural factors behind this issue.⁸⁹⁸

I bear in mind that transactional exploitation is the focus of the offences and that Green's test also focuses on transactional factors. For these reasons, I consider that the broader structural issues of labour markets are not relevant in assessing whether the norm against exploitation is violated. For labour lawyers investigating wage theft, a broader understanding of exploitation that links to structural factors is often considered to be of great relevance in understanding why wage theft has occurred. Taking into account the frequent use of exploitation to mean a much broader concept in labour-related fields, I explain the elements on which Green's test focuses.

Green distinguishes exploitation from other kinds of moral wrongs. According to him, exploitation 'involves X's "using" or "manipulating" or "taking advantage of" V, usually for his own benefit and often at V's expense'.⁸⁹⁹ I expand on the elements that he uses to assess whether a violation occurs in relation to the wage theft offences. He states that 'exploitation is harder to distinguish from morally acceptable forms of getting another to do what one wants than [is the case for] deception and coercion'.⁹⁰⁰ Green observes that the focus of assessing exploitation is on the 'effects of such conduct on V's interests'.⁹⁰¹

⁸⁹⁷ Sayomi Rushini Ariyawansa, 'Understanding the Exploitation of Temporary Migrant Workers in Australia: Examining Temporary Labour Migration from pre-Federation until 2020' (PhD Thesis, University of Melbourne, 2021) 177, 187.

⁸⁹⁸ Ibid.

⁸⁹⁹ Green, *Lying, Cheating and Stealing* (n 18) 95.

⁹⁰⁰ Ibid.

⁹⁰¹ Ibid 96

Green is hesitant to apply the norm against exploitation to white-collar crime, as he states that: ‘exploitation is harder to distinguish from merely aggressive but lawful business behaviour’ and therefore likely to be more morally ambiguous than other norms.⁹⁰² Wage theft is typically connected to non-compliance with standards that are already supported by other sources of law (eg statutory minimum standards) involving civil consequences for breach. The offences Green examines in his monograph include crimes such as insider trading, tax evasion, bribery and financial fraud, which are distinguishable from exploitation that may occur in a labour context. The examples of exploitation he covers include price gouging, payday loan provisions at unreasonably high interest rates, and ticket scalping offences.⁹⁰³ Therefore, I consider whether the circumstance of underpayments in a wage theft context give rise to different considerations. Exploitation and labour market vulnerabilities occur in a different context to market manipulation or fraud relating to business, as in those types of white-collar offences the victim is more likely to be able to engage in more choices. For instance, in the case of price gouging, Green notes that a buyer may choose to not purchase the product, resulting in no direct exploitation of anyone.⁹⁰⁴ In contrast, an employee’s choices relating to changing jobs may be more limited because of disparities in bargaining power. I addressed some of these concerns in Section 1.2.3, when discussing how general labour law principles justifying minimum protections apply.

7.4.4.1 The Use of the Term ‘Exploitation’ in the Discussion of Labour Law

Before addressing how the norm of exploitation might apply to the wage theft offences, I consider the broader meaning of exploitation that would be more commonly understood by someone in the field of labour law.

In the labour law literature, the term ‘exploitation’ is often tied to the circumstances of wage theft. The link was frequently adopted in the Senate Economics References Committee’s 2022 report, *Systemic, Sustained and Shameful*, to describe the circumstances of unlawful underpayments of entitlements.⁹⁰⁵ The *Migrant Workers’ Taskforce Report*, which I discussed in Chapter 2, also uses the term ‘exploitation’ to discuss wage theft. Fels and Cousins justify the use of the term ‘wage exploitation’ far more broadly than intentional underpayments. They state: ‘Wage underpayment may be

⁹⁰² Ibid 97.

⁹⁰³ Ibid 96–7.

⁹⁰⁴ Ibid.

⁹⁰⁵ 2022 Senate Report: *Systemic, Sustained and Shameful* (n 135).

inadvertent, but the outcome is no different as to when it is deliberate. The terms wage exploitation and wage theft are more emotive, but also apt descriptions of the problem, which in essence involves employers not complying with the minimum legal entitlements of their employees.⁹⁰⁶

Beyond the specific underpayment context, the term ‘exploitation’ is readily employed to describe circumstances of vulnerabilities between capital and labour in the labour market.⁹⁰⁷ Ariyawansa observes that

the problem of ‘exploitation’ is often associated with: non-compliance with labour standards; employer wage deductions; being employed in the incorrect wage classification; underpayment and ‘wage theft’; non-compliance with occupational health and safety laws, and poor working conditions; substandard employer-provided accommodations; coercive employer conduct, including sexual coercion; as well as other forms of employer contraventions of workplace and immigration laws.⁹⁰⁸

Boucher makes similar observations. In her book, she engages in a systematic review of cases affecting migrant workers across four different countries and six different labour law jurisdictions,⁹⁰⁹ observing a schematic account of exploitation.⁹¹⁰ She notes that exploitation comprises ‘five main components: (1) criminal infringements against the body and mind, (2) economic violations against wage and hour entitlements, (3) safety violations, (4) leave and other workplace entitlement violations, aside from overtime, and (5) discrimination’.⁹¹¹ Each category may have violations of different levels of seriousness, and there may be an overlap between different categories.⁹¹² This approach suggests that there may be a broad range of unlawful labour practices that may incorporate aspects of exploitation albeit to different degrees—however, the mere fact that exploitative practices exist does not in itself justify a criminal law response. The kind of interests protected by the s 6 offences fit under both (2) and (4) of Boucher’s categories.

I have identified a range of possible labour contexts that may engage or involve the concept of exploitation. As Ariyawansa observes, the term exploitation is often used in

⁹⁰⁶ *Migrant Workers’ Taskforce Report* (n 181) 5.

⁹⁰⁷ Boucher, *Patterns of Exploitation* (n 841) 17–18.

⁹⁰⁸ *Ibid* 16–17.

⁹⁰⁹ *Ibid* 27–8.

⁹¹⁰ *Ibid* 16–17. Boucher creates the Migrant Worker Rights Database. The database is comprised of 907 court and tribunal cases, across the chosen jurisdictions of Australian, the United Kingdom, California in the United States and Alberta, British Columbia and Ontario in Canada.

⁹¹¹ *Ibid* 16

⁹¹² *Ibid*.

labour law discussions without terminological precision.⁹¹³ She draws on theoretical approaches that address labour exploitation to analyse exploitation affecting temporary migrant workers. Ariyawansa observes that

the general concept of exploitation is associated with taking unfair or unethical advantage of someone. For a transactional account of exploitation, a discrete transaction between individual actors is the locus of the relevant unfair advantage-taking. For a structural account of exploitation, broader systems and institutions are the locus of unfair advantage-taking, as such accounts concern the ‘rules of the game’ that advantage one group (or a number of groups) to the detriment of another group (or a number of groups).⁹¹⁴

Ariyawansa observes that transactional accounts of exploitation are linked to liberal theories of justice and focus on individual actors.⁹¹⁵ In contrast, structural accounts focus on Marxist theory and on ‘broader systems and background structures’.⁹¹⁶ Virginia Mantouvalou favours an approach that examines exploitation by reference to structural vulnerabilities. She observes that most legal responses to labour exploitation tend to focus on ‘individual wrongdoers, and often misses the role of institutions that create structural injustice’.⁹¹⁷

In recent work, Mantouvalou has examined structural injustices affecting certain categories of who she identifies are at an increased risk of labour exploitation.⁹¹⁸ She discusses that there is a type of workplace exploitation that is ‘state-mediated structures of exploitation’.⁹¹⁹ This relates to a particular category of workplace exploitation which is exacerbated by impact of ‘specific pieces of legislation’ exacerbating inequalities.⁹²⁰ In particular, Mantouvalou identifies there are categories of workers who face

a special structural vulnerability ... created, perhaps as an unintended consequence of laws with a prima facie legitimate aim, when the state explicitly excludes workers from

⁹¹³ Sayomi Ariyawansa, “‘Structural’ and ‘Transactional’ Exploitation in the Workplace and Beyond: Examining the Treatment of Temporary Migrant Workers in Australia” (2022) 35(3) *Australian Journal of Labour Law* 185 (‘Exploitation in the Workplace’), citing Virginia Mantouvalou, ‘Legal Construction of Structures of Exploitation’ in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 188 (‘Structures of Exploitation’).

⁹¹⁴ Ariyawansa, ‘Exploitation in the Workplace’ (n 912) 193 (citations omitted).

⁹¹⁵ *Ibid.*

⁹¹⁶ *Ibid.*

⁹¹⁷ Mantouvalou, ‘Structures of Exploitation’ (n 913) 198–203. See also Jonathan Wolff and Virginia Mantouvalou (eds), *Structural Injustice and the Law* (UCL Press, 2024); Jude Browne and Maeve McKeown (eds), *What is Structural Injustice* (Oxford University Press, 2024).

⁹¹⁸ Virginia Mantouvalou, *Structural Injustice and Worker’s Rights* (Oxford University Press, 2023).

⁹¹⁹ *Ibid.* 11.

⁹²⁰ *Ibid.*

protective rules or when it creates a legal framework that leads to this situation, and the state knows or ought to have known of the vulnerability and the exploitation, or the immediate risk of exploitation.⁹²¹

She identifies that as a result of the special vulnerability, certain classes of workers are ‘placed in a position of great bargaining weakness, a position of oppressive subordination more extreme than the typical inequality and subordination that characterises the employment relation’.⁹²² She identifies migrant workers, domestic workers, prison workers, and precarious workers, such as care workers in on-demand jobs, as particularly at risk of workplace exploitation.⁹²³ This type of exploitation, she identifies, is distinct from extreme examples such as modern slavery and human trafficking, but nevertheless is of a different category than the inherent disparities in bargaining powers that occur in a labour market between capital (employer) and labour (employee).⁹²⁴

In a similar way, Ariyawansa argues that to understand the factors that lead to temporary migrant worker exploitation, both accounts need to be incorporated to identify ‘*how* these workers are exploited, *where* exploitation occurs, and *who is* responsible’.⁹²⁵ She presents this as a normative best practice approach in assessing the circumstances of exploitation in the context of the temporary migrant workforce. Doing so, provides policy markers with the context to develop policy solutions targeting the root causes of exploitation.

7.4.4.2 Application to the Wage Theft Offences

The specific test that Green applies in determining whether there has been a violation of the norm against exploitation focuses on individual actors, rather than broader structural issues. In applying Green’s test to the offences, the broader labour law context and understanding of exploitation are set aside.

7.4.4.2.1 The Test

According to Green, exploitation ‘involves X’s ‘using’ or ‘manipulating’ or ‘taking advantage of’ V, usually for his own benefit and often at V’s expense’.⁹²⁶

⁹²¹ Mantouvalou, ‘Structures of Exploitation’ (n 913) 188–9.

⁹²² Ibid 197.

⁹²³ Ibid 198–203; Mantouvalou, *Structural Injustice and Worker’s Rights* (n 918) 29–110.

⁹²⁴ Mantouvalou, ‘Structures of Exploitation’ (n 913) 188–9, 192–3.

⁹²⁵ Ibid 205.

⁹²⁶ Green, *Lying, Cheating and Stealing* (n 18) 95.

Green adopts Feinberg’s formulation for defining the norm against exploitation as consisting of three elements. I address those specific elements in my application of the offences. I observe that Green’s approach to assessing exploitation is narrow in operation, which affects the success of finding a violation of the norm other than in very limited circumstances. This may be regarded as a challenge to the idea of exploitation in a criminal law context (but note my discussion of slavery-like offences in Chapter 8), or it may suggest a different basis for finding moral wrongfulness that could justify criminalisation for labour-related offences.

- First element: ‘Using’/‘playing on’ the victim

The first element relates to using—which Green describes as ‘playing on’ the victim.⁹²⁷ This includes ‘offer[ing] inducements, employ[ing] flattery, beg[ging] or beseech[ing]; [they] can try alluring portrayals or seductive suggestions; [they] can appeal to duty, sympathy, friendship or greed, probing constantly for the character trait whose cultivation will yield to the desired response’.⁹²⁸

The concept of ‘using’ could be adapted to the employment context by reference to the inducement to receive payment in the form of wages and other employee entitlements in exchange for the performance of a service contract. However, it is questionable whether the generalised context of the employee–employer relationship would be sufficient to satisfy the specific type of meaning of ‘using’ that Green appears to rely on. The mere existence of unequal bargaining power may be insufficient to find that the employer has ‘used’, in the sense of ‘playing on’, the victim by simply engaging in employment.

Feinberg’s description of ‘use’ relates to ‘playing on’—it is defined by reference to personal attributes of the victim—such as flattery or greed.⁹²⁹ Green’s test for the norm against exploitation requires an additional characteristic and reliance on a personalised ‘playing on’ of a victim. This significantly narrows the applicability of the norm against exploitation, as defined by Green, to the circumstances of wage theft and underpayments.

For instance, the employer may advise the potential employee that owing to market conditions, they can only pay a flat rate, as everyone in the industry is doing so and if they paid the full entitlements they would go bankrupt. This may use the circumstances

⁹²⁷ Ibid.

⁹²⁸ Ibid, citing Feinberg, *Harmless Wrongdoing* (n 721) 177.

⁹²⁹ Green, *Lying, Cheating and Stealing* (n 18) 95.

of employment arrangement and the financial circumstances to press the victim into receiving a less than legally obliged rate of pay, as the consequence is that the victim will be unable to receive wages if they do not agree. (It should be noted that s 6(2) of the *Wage Theft Act* expressly excludes consent to receive less than the minimum entitlement as a relevant consideration in assessing dishonesty.) However, many instances of underpayment occur more covertly. The payslip does not reflect the hours worked, and the employee does not verify their leave entitlements. In those specific circumstances, it seems more difficult to satisfy the idea of ‘playing on the victim’, as the employer would not be appealing to any personalised basis to gain the advantage. Instead, they are simply not paying the employee their entitlements or providing an accurate record.

- Second element: ‘Exploitation of a Trait or Circumstance of the Victim’

The second element requires the exploitation of a ‘trait of V or a circumstance in which V is found’.⁹³⁰ Green describes this as including character traits that may be virtues (eg ‘generosity, loyalty, courage or conscientiousness’) and vices (eg greed, recklessness, lust or envy).⁹³¹ It may include permanent aspects of the victim’s character or ‘short-lived deviations, particularly when brought on by particular circumstances, either unfortunate, such as illness or hunger; or fortunate, such as new-found wealth or freedom’.⁹³²

The second element likely applies in connection with the circumstances of the victim of underpayments. Many of the early discussions of wage underpayments reported in the media seemed to be about low-paid jobs. However, as discussed in Chapter 2, wage underpayments have been shown to occur in a broad range of circumstances relating to payroll non-compliance. There is no clear specific characteristic of an underpaid employee.

The circumstances are the comparative lack of bargaining power and factors that make exercising choices in labour market a limited endeavour.⁹³³ In my discussion of the norm against cheating, I noted how labour law protections are frequently justified as a mechanism to counterbalance the inherent inequalities between employers who have access to capital and workers who lack sufficient bargaining power in a labour market to protect themselves against competition.⁹³⁴ Bargaining power disparity commonly arises

⁹³⁰ Ibid.

⁹³¹ Ibid.

⁹³² Ibid.

⁹³³ Ibid. 95. See also Schofield-Georgeson, ‘Coercive Federal Australian Labour Law’ (n 64).

⁹³⁴ See Productivity Commission, *Workplace Relations Framework* (n 95) 1137.

for low-paid workers or those in junior employment positions which make it difficult to challenge their specific circumstances and demand lawful payment.

The specific vulnerabilities will differ depending on the examined cohort. For example, in reports on migrant workers, Berg and Farbenblum observe that certain factors increase the vulnerability and susceptibility to underpayments.⁹³⁵ For instance, the vulnerabilities may be linked to education, English-language skills or other forms of precarity, such as temporary visas that are tied to a particular employer, which make navigating a labour market challenging and places employers at a distinct advantage.⁹³⁶ In the context of underpayments of casual workers at universities, factors that were addressed include precarity of work, and payment structures creating barriers to receiving pay for the time that the work takes—which affected the casual academics’ capacity to request additional payment or conversion to an ongoing contract.⁹³⁷

In Ariyawansa’s account of exploitation as involving both transactional and structural issues, the latter are likely to be as relevant as the former. Wage theft raises significant issues such as the context of the breach, which suggest structural issues and social vulnerabilities. The first vulnerability relates to the inherent (but lawful) imbalance in the comparative bargaining position of the employer and employee.⁹³⁸ The second vulnerability relates to employment aspects. One vulnerability relates to the precarity of work for groups such as migrant workers. The *Migrant Workers’ Taskforce Report* focuses on breaches that affect migrant workers, suggesting a wide range of payment practices that had an adverse impact on them.⁹³⁹ This vulnerability associated with visas and insecure work creates an environment in which wage underpayments are more likely to occur.⁹⁴⁰

- Third element: ‘Intend a benefit from the exploitation’

The third element requires a person to ‘intend a benefit from the exploitation, usually at the victim’s expense’.⁹⁴¹

⁹³⁵ Berg and Farbenblum, ‘National Temporary Migrant Work Survey’ (n 28).

⁹³⁶ *Ibid* 7.

⁹³⁷ Kate Bone, ‘Dependent and Vulnerable: The Experiences of Academics on Casual and Insecure Contracts’, *Conversation* (18 July 2019).

⁹³⁸ Kahn-Freund, ‘Labour and the Law’ (n 82) 18.

⁹³⁹ *Migrant Workers’ Taskforce Report* (n 181).

⁹⁴⁰ Berg and Farbenblum, ‘National Temporary Migrant Work Survey’ (n 28).

⁹⁴¹ Green, *Lying, Cheating and Stealing* (n 18) 95.

The key aspect of this definition is that the employer must have the intention to gain a benefit. I discussed mental elements in Chapter 5. It is likely that the circumstances of the withholding and the element of dishonesty that is required to connect an employer to the offending would be sufficient to satisfy the notion of intention. A financial advantage, which can include an advantage at the victim's expense, is the benefit of reduced labour costs and obtaining the value of employment at a rate lower than prescribed by statute (or other industrial instrument, including awards or enterprise agreements). The employer gains an advantage over competitors who are correctly paying wages according to their profit margins. The costs of not receiving entitlements directly and negatively affects a worker and their family's wellbeing. I discussed some of these concepts in Section 6.4 in relation to different categories of harmfulness.

7.4.4.2.2 Limitations of Green's Approach to Assessing a Violation of the Norm against Exploitation

From Green's definition and the manner in which the concept of use is employed, it is unlikely that failing to fulfil contractual obligations will be regarded as a 'use' or 'playing on' a victim, despite the engagement for a contract of service.

Underpayments of entitlements occur in circumstances where an employer has used an aspect of financial inducement to exploit the personal vulnerability linked to the employees' socio-economic status to take advantage of labour at a price below market rates. However, the first element is less amenable to the circumstances of wage theft since as the 'manipulation/use' element is less specifically related to issues of flattery, greed or duty elements—but is specifically linked to the financial need to be paid in exchange for labour. Payment informs part of the working obligation of the employer to pay wages in exchange for labour. In most circumstances, it is unlikely the 'use' element will be sufficiently satisfied in a manner to shift the inherent exploitation in a labour market to the character of a moral norm of sufficient degree to justify criminal. The underpayment as a practice would be unlikely to fit the specific definitions of this norm in most circumstances, unless there is a particular inducement or other intention to use an aspect of the personalised characteristic of the worker.

This outcome based on the specific test I adopt from Green's writing may challenge the expectations of labour lawyers or others in adjacent fields. The idea that workers who receive less than their entitlements are exploited is very commonly assumed in labour law

literature.⁹⁴² The structural circumstances of wage theft are also regarded as important in the various studies that have examined when wage theft occurs and what increases vulnerabilities.⁹⁴³ The fact that Green's approach does not contemplate those circumstances may suggest a deficiency in his model, when assessing the norm against exploitation. A countervailing argument to such a concern is that if the norm of exploitation operated more broadly it may justify criminal intervention by mere fact of an inequality of bargaining power and the lack of receipt of entitlements. Given this potential breadth, I argue there that must be more involved in terms of exploitation in a transactional sense to justify criminal intervention. In this way, the norm against cheating as framed by Green is better for the purposes of establishing moral wrongfulness when contemplated from the perspective of analysing criminal offences, as in most instances, the heart of the exploitation is the limited bargaining power and other fundamental aspects of employment, rather than any specific characteristics of the offending.

7.4.5 The Norm against Deception

The norm against deception is a relevant norm to consider in relation to the conduct caught by fraud-like offence structures. Green observes: 'The moral content of fraud follows directly from the way in which its statutory elements are defined.'⁹⁴⁴ He observes that fraud may be linked to deceptions regarding property, or may be connected with a broad range of other conduct, such as fraudulent behaviour in relation to 'notions as diverse as breach of trust, conflicts of interest, non-disclosure of material facts, exploitation, taking unfair advantage, non-performance of contractual obligations, and misuse of corporate assets'.⁹⁴⁵

According to Green: 'deception consists of the communication of a message, or attempt to communicate a message, with which the communicator, in communicating, intends to cause a person to believe something that is untrue'.⁹⁴⁶ The form of the message can include statements, 'deceptive conduct, gestures, pictures, even silences'.⁹⁴⁷ Green observes that the forms of deception can include "lying," "merely misleading", "falsely exculpating," and "falsely inculcating".⁹⁴⁸ The different types of deceptions affect the

⁹⁴² See, eg, Ariyawansa, 'Exploitation in the Workplace' (n 913) 185.

⁹⁴³ See, eg, *Migrant Workers' Taskforce Report* (n 181).

⁹⁴⁴ Green, *Lying, Cheating and Stealing* (n 18) 150.

⁹⁴⁵ *Ibid* 151.

⁹⁴⁶ *Ibid* 76.

⁹⁴⁷ *Ibid* 77.

⁹⁴⁸ *Ibid* 76.

way in which it adversely affects its victims. I briefly address the different categories that Green considers in his monograph. Green distinguishes lying, the '(intentional) deception that (1) comes in the form of a verifiable assertion, and (2) is literally false', from merely misleading statements.⁹⁴⁹ Misleading statements do not require a specific false assertion. Green argues that the different approaches elicit different responses from those deceived, thus affecting the nature of the wrongdoing associated with the type of deception. Green contrasts the impact of merely misleading statements from lying as, '[a] victim who is deceived by a non-lie feels foolish and embarrassed, presumably because he believes he has contributed to his own harm by drawing unwarranted inferences from misleading premises. By contrast, a victim of lies is much more likely to feel "brutalized" (in Adler's word) by some external force'.⁹⁵⁰ Green further considers how deception may be used to either deflect responsibility by attempting to prevent a finding of wrongdoing or be used to implicate another person in wrongdoing. He defines circumstances of false exculpation as occurring when: 'a person who is suspected of having engaged in, or having information about another's involvement in, some alleged course of wrongful conduct, falsely denies such involvement' or when a person 'makes it harder for another to obtain truthful information about such information'.⁹⁵¹ False inculpation includes circumstances in which 'a person who purports to have information about another's conduct either makes a false accusation against another or prevents another from obtaining true information about a third party's wrongdoing'.⁹⁵²

7.4.5.1 Application to the Wage Theft Offences

According to Green, to assess whether there is a violation or not against deception, there must be 'the communication of a message, or attempt to communicate a message, with which the communicator, in communicating, intends to cause a person to believe something that is untrue'.⁹⁵³

In Section 5.4.3, I explained that the s 6 offences do not require deception as a separate element to the offence. Similarly, the offence does not focus on deceptions relating to communications. There is no requirement in the offence structure that the victim is deceived. An upfront employer who tells their employee that they are not going to pay

⁹⁴⁹ Ibid 77.

⁹⁵⁰ Ibid 80, citing Jonathan E Adler, 'Lying, Deceiving, or Falsely Implicating' (1997) 94 *Journal of Philosophy* 432.

⁹⁵¹ Green, *Lying, Cheating and Stealing* (n 18) 81.

⁹⁵² Ibid 86

⁹⁵³ Ibid 76.

the legal requirements could nevertheless be caught by the offence structure. In circumstances in which the employer has covered up records and deliberately lies to their employee about the accuracy of pay obligations, then those practices will be considered relevant in assessing dishonesty. However, the concept of deception is not the key element of the offence to establish liability and is not a required element of the offences. The norm against deception does not support the s 6 wage theft offences.

7.5 Chapter Summary

In this chapter, I have analysed the possible violations of moral norms using the specific tests that Green adopts to assess those characteristics. I observe that the tests are useful as they guide analysis to a topic that is contentious—assessing what is morally wrongful—as a generalised concept is difficult to apply, given the lack of a clear universal standard of morality that is fixed and consistent across communities. Green regards the moral wrongfulness element as a mechanism to consider wrongfulness in isolation from harm.⁹⁵⁴

Although I have adopted the specific moral norms that Green identified, there could be other tests applied for other moral norms. For example, there may be a moral norm to be careful with other people's finances—such a norm is reflected in fiduciary duties and obligations that trustees, for example, owe beneficiaries in trusts. I have chosen to limit my discussion to the specific moral norms that Green identifies, as he has already shown how those norms can be considered in relation to white-collar crime. I also regard the norm against cheating and disobedience to be helpful and can directly compare his findings in relation to tax evasion in Section 8.2.3.2.

In order to assess whether the norm is violated to a degree that could warrant criminal intervention, Green suggests:

One of the best ways to determine whether a given moral norm deserves the kind of discrete analysis [involves applying the tests he sets out] is to consider the reactive emotions that its violation is likely to evoke. Each violation certainly has the potential to bring about shame, guilt, or regret in the one who has deceived, cheated, stolen, coerced, exploited, been disloyal, or broken a promise; and to cause resentment, outrage, or anger in the one who has been deceived, cheated, coerced, exploited, or betrayed, had something stolen, or had a promise to him broken. But the quality of such reactive emotions will differ depending on

⁹⁵⁴ Ibid 127.

which wrong has been committed. That is, such wrongs generally feel different from each other—a significant psychological phenomenon since differences in reactive emotions, though not conclusive, are usually a reliable indicator of differences in moral content.⁹⁵⁵

For the criminal wage theft offences, a finding of moral wrongfulness is best supported through the application of tests relating to the norms against cheating and disobedience. The norm against cheating includes reference to the ‘breaking of rules’ to gain an advantage—a significant feature of non-compliance with the sources of minimum standard legislation. I also consider that the norm against cheating would also allow analysis of the significance of dishonesty as an element of the offence. Cheating in the sense of the deliberate intention of an employer to not pay their employee their lawful wage entitlements may evoke anger in respect of the worker who has not received their entitlements. It is likely that the impact or anger connected to the cheating is closely tied to the comparative status of the employee vis-a-vis their employer. For example, a low-paid worker is more likely to feel shame if they are unable to meet their living expenses or provide for their families. In contrast, a higher-paid employee who is ‘cheated’ because they do not receive the entire high-performance contract is more likely to regard it as a business transaction in which the terms have not been fulfilled.

The norm against disobedience similarly focuses on the violation of rules but considers the broader implication of the rule breaking as having an effect on society and how the harm and wrong affects the government. The values connected to wage underpayments for low-paid workers are connected to societal values relating to minimum wages and entitlements. The failure to honour a high-performance contract is of a different character. I consider that this norm is a weaker justification for criminalisation than the cheating analysis.

In this chapter, I have also analysed the conduct through the norms against stealing, exploitation, promise-breaking and deception. These norms either do not support a moral wrongfulness finding at all—for example, norms against stealing, exploitation or deception—or suggest that a moral violation will only support a criminal finding in unusual circumstances (eg where a person enters into a contract with no intention to fulfil it at the time of the agreement).

⁹⁵⁵ Ibid 128.

Green's test for the norm against stealing cannot be used to support the criminal offences, as the subject matter of the offences must be a type of thing that can be bought and sold. The entitlement to receive personal wages is not capable of commodification. I have also addressed some of the challenges that arise because of the linguistic choice of wage theft as appropriate terminology applied to describe non-compliance with wage and payroll obligations.

I have analysed the norm against exploitation, noting that the concept of exploitation is often mentioned in relation to labour violations connected with minimum wage obligations. I have expressed concerns that the phrasing of Green's test and personalised 'use' of an aspect of a victim may influence the success of the exploitation norm from applying in most instances as sufficient to support a criminal finding. The exploitative factors largely relate to the circumstances of unequal bargaining power—however, this is not a characteristic that invariably suggests a criminal wrongfulness. Various protections are available, including labour regulation methods, to help minimise the disparity of bargaining power. A breach of those obligations would unlikely be ordinarily sufficient to justify criminalisation.

The norm against promise-breaking is also unlikely to support criminalisation, except when the employer fraudulently enters into an employment contract with no intention to pay. The extent to which a contract creates a promissory obligation as a norm is debated. The failure to honour the agreement may be 'wrong' in the sense that there are other legal remedies to recover damages, but typically, the failure to honour a contractual agreement is not regarded as a criminal breach. It is unlikely that the norm against promise-breaking is a sufficient basis to criminalise wage underpayments.

The norm against deception is not relevant for this specific offence because deception is not a required element of the offence. As discussed in Section 5.4.2, there may be examples where deception demonstrates dishonesty, but the offence lacks any requirement to also demonstrate that a person was in fact deceived.

Part III:
Conclusions

Chapter 8: Weighing up the Elements to the Victorian Wage Theft Offences

8.1 Introduction

In this chapter, I bring together my analysis of the three elements of Green's framework to provide an account of the degree to which his method determines that the Victorian wage theft offences are an appropriate instance of criminalisation.

In Chapters 5 to 7 of this thesis, I considered the three elements of Green's framework separately to help guide my examination of the criminal offences in s 6 the *Wage Theft Act*. In this chapter, I assess how different aspects of Green's framework are to be balanced against each other, in circumstances where not every aspect of the framework favours the same conclusion.

I also incorporate the step of analogising the moral content of the offences discussed here, with established criminal offences. Green recommends that we compare the extent to which the wrongs and harms caught by other offences are similar to, or different from, those identified in a newly enacted or proposed offence.

8.2 Weighing Up the Findings

In this chapter, I argue that Green's framework assists justifying the criminal wage theft offences when the subject matter is more closely linked to the kind of interests protected by minimum labour standards. However, I consider that the framework to be less successful at supporting criminalisation when the characteristics of the 'offending' are more closely tied to individual agreements negotiated by an employee with their employer that result in it being lifted above minimum standards and conditions.

I evaluate whether the s 6 offences capture the kind of circumstances that could be regarded as 'public wrongs'. To guide the analysis, I use the norms of cheating and disobedience to focus this analysis, while also considering the implications of the harm and fault elements.

8.2.1 The Scope of the s 6 Offences

Criminal wage theft offences sprang up in the context of increasing pressure on governments to strengthen the penalties for wage underpayments in Australia, where

there was a growing perception that despite the penalties at the federal level for contraventions of protections regarding terms and conditions of employment, wage underpayment was still occurring in large numbers.⁹⁵⁶ In the Second Reading Speech, the Wage Theft Bill was justified as a means of addressing the problem of wage theft, noting ‘story after story of Australian workers being exploited and a Commonwealth system that far too often fails to adequately respond’. As such, the Bill was earmarked as a legal response that could fill a gap.⁹⁵⁷ In this part, I consider whether the s 6 offences capture a subject matter that is an appropriate instance for criminalisation.

The definition of ‘employee entitlements’ used in the *Wage Theft Act* includes entitlements in the National Employment Standards, and industrial instruments, including awards and enterprise agreements, as well as state-based entitlements, including long service leave. The definition also includes agreed amounts between an employer and their employee that are above the minimum entitlements.⁹⁵⁸ The Act does not include a monetary limit on the kind of contracts of employment that could be covered.

For the types of entitlements that are directly connected to minimum labour standards, it is easier to find a moral basis for criminalisation with reference to the norm against cheating and disobedience and by reference to their related harms. However, it is more difficult to find the same support utilising Green’s framework in the case of well-paid employees. With no monetary limit, it would be possible for the employer of a sportsperson on a high-performance contract who was engaged as an employee to be caught by the offence, if an amount of their salary was withheld and the other elements of the s 6 offence were established. It is unlikely that if an elite sportsperson on an \$1 million contract had complained to Wage Inspectorate Victoria, when it had resources for investigating complaints under the *Wage Theft Act*, that its resources would have been prioritised for investigation and prosecution of that person’s concerns. Wage Inspectorate Victoria’s *Compliance and Enforcement Policy* that applied to wage theft offences required investigators to weigh up various factors, in assessing whether to investigate and prosecute, including whether there is ‘a risk that vulnerable members of our community are being exploited’.⁹⁵⁹ A high profile sportsperson lacks the requisite vulnerability factors and would be able to use other means to resolve the issue directly with the employer, by through obtaining contractual damages. Furthermore, it is unlikely that such

⁹⁵⁶ See Chapter 2 for discussion of legislative developments.

⁹⁵⁷ Victoria, *Parliamentary Debates*, Legislative Assembly, 19 March 2020, 1097 (Jill Hennessy).

⁹⁵⁸ See discussion in Section 3.4.1.1.

⁹⁵⁹ Wage Inspectorate Victoria, *Compliance and Enforcement Policy* (September 2021) 4–5.

an issue would meet the public interest requirements to justify criminal prosecution for an offence under the Act.⁹⁶⁰ Nevertheless, the scope of the offence would theoretically allow for prosecution and conviction.

Noting this issue, I now consider whether wage theft can be construed as a ‘public wrong’ deserving of criminalisation.

8.2.2 Wage Theft as a ‘Public Wrong’

Green links the element of harm closely to moral wrongfulness. His view is that ‘*private* wrongs [should] not become criminalized’.⁹⁶¹ That is, if there is no identified harm, even if the conduct violates moral norms in some way, it should not be subject to criminal law. He explains that ‘harm caused by criminal acts [must be] ‘public’ in a way that the criminal law considers relevant—ie that it is the sort of harm that somehow properly concerns the community as a whole, rather than just individual citizens within such community’.⁹⁶²

To illustrate the meaning of a private wrong versus a public wrong, Green provides the example of breaking an important promise owed to a friend—the wrong is connected to the failure to keep a promise but is not of a public significance.⁹⁶³ Instead, it is a private matter and the fall out of breaking the promise is to be resolved privately between the friends. In contrast, lying under oath by making a false statement to protect a friend in a court proceeding could fit the requirements for the crime of perjury.⁹⁶⁴ The failure to be truthful in a court proceeding is regarded as a public harm as it undermines the integrity of the justice system. It is a criminal response to a violation of the promise ‘to uphold the law’.⁹⁶⁵

In Section 6.4, I identified a broad range of harms that are likely to occur regardless of whether the employer or officers are at fault. For instance, harms linked to the economic impact of a worker not receiving their full minimum legal entitlements, such as their full quantum of wages and other entitlements, will occur regardless of the circumstances in which the underpayments are made. Aside from the direct economic impact of less expendable income to the worker at payday, the financial impact is likely to have other

⁹⁶⁰ Ibid 5–6.

⁹⁶¹ Green, *Lying, Cheating and Stealing* (n 18) 44.

⁹⁶² Ibid 34.

⁹⁶³ Ibid 45.

⁹⁶⁴ *Crimes Act 1958* (Vic) s 314.

⁹⁶⁵ Green, *Lying, Cheating and Stealing* (n 18) 112.

flow-on effects on the worker's wellbeing, their family or other dependents, and their quality of life connected with receiving a reduced wage and not receiving periods of leave and other entitlements. In the important *Migrant Workers' Taskforce Report*, Fels and Cousins state: 'Wage underpayment may be inadvertent, but the outcome is no different as to when it is deliberate. The terms wage exploitation and wage theft are more emotive, but also apt descriptions of the problem, which in essence involves employers not complying with the minimum legal entitlements of their employees.'⁹⁶⁶ The result is that many of the harms identified in Chapter 6 may arise regardless of the intent of the employer. This reflects the fact that it is not the case that on all occasions where harms occur that they are sufficiently 'wrongful' to justify criminal intervention. Instead, it is necessary to examine the nature of the violation of the norm, the kinds of harms that arise, and fault elements to evaluate the extent to which offences target 'public wrongs' that merit criminalisation.

8.2.2.1 The Norm against Cheating

For the s 6 wage theft offences, the cheating analysis highlights the impacts of violation on the relative condition of the employer vis-à-vis their employee and the breaking of rules to obtain an advantage. In Section 7.4.1, I argued that the norm against cheating is the most helpful norm to assess moral wrongfulness in relation to the wage theft offences because the withholding of the entitlements results in an employer obtaining an advantage over their employee by not fulfilling minimum wage obligations and not complying with the rules, including those set out in statute or other sources of entitlements. The cheating element is closely linked to the requirement to demonstrate dishonesty, which is a required element in the Victorian wage theft offences.

There is variance as to how this norm operates, since much depends on how the ambiguities relating to the implied intentional elements would be interpreted. As discussed in Section 5.4.2, there is ambiguity in the implied intentional elements that has a significant impact on the scope of the offences, which may result in the element of dishonesty assuming great importance in distinguishing breaches that are criminal from other breaches that are not subject to criminal treatment, leaving substantial discretion to the trier-of-fact to judge the circumstances of the offending. Alternatively, if the requirements of 'withholdings of employee entitlements' is interpreted to require an intent to withhold below the agreed (or minimum) entitlement and the employer has to

⁹⁶⁶ *Migrant Workers' Taskforce Report* (n 181) 6.

have specific awareness of that obligation, then dishonesty will likely be established in most cases and operate as a defence (in that it may operate to exclude certain examples from being covered where there is inadvertence or a genuine issue that has resulted in a payment delay). Depending on how these interpretation questions are resolved, the element of dishonesty will have different degrees of importance in marking the boundaries of the offences and in turn, affect the cheating analysis. For example, if awareness is interpreted to include recklessness as to compliance with the obligations, then the offence structure may capture breaches that are close to inadvertence or mistake, which is more difficult to accept as a form of cheating.

The cheating norm most clearly connects to the impacts that the cheating causes to the individual and their families, impacting welfare interests. I would argue that norm is best reflected in violations that embody the kinds of entitlements connected to the minimum standard sources, rather than broader agreements to pay significantly over the standards. For example, a footballer in the Australian Football League ('AFL') on a \$1 million contract will be receiving support from a player agent in negotiating their contract with their football club and would have powers to challenge underpayment through contractual dispute resolution clauses and could enlist the AFL Players Association. This differs from the lack of bargaining power and vulnerabilities that exist in the case of a casual employee working in a café who relies on the award to set their wages and conditions, including penalty rates for weekends and public holidays. A breach involving the failure to pay the footballer their full entitlements is more similar to the breaking of a promise rather than an attempt to cheat and obtain an advantage, as is required to satisfy Green's norm against cheating. In Section 7.4.3, I observed that the norm against promise-breaking has only a very narrow role to play in supporting criminal intervention, such as where there is a criminal inducement to enter into the agreement, but no intention to ever honour it. Hence, the further away from the breach is to minimum standards or similar obligations, and is better characterised as a contractual breach, the more difficult it becomes to regard the 'withholding' as a 'public wrong' that the community would be concerned with.

In Section 6.4.1, I noted that the non-payment of an expected amount of pay may significantly affect the individual's or their family's ability to manage their financial affairs even if the amount owing is above the minimum standards. The impact may range from discomfort and reduced discretionary choices to extreme financial stress to the employee, such that they are unable to service their mortgage. This suggests that the assessment of where the line is drawn— between characterising an underpayment as

promise-breaking/contractual breach that more closely reflects private contractual negotiations and situations where an employer's failure to pay an agreement above minimum conditions— can nevertheless cause harms that are similar to the types of interests protected by minimum standard protections. This creates a fuzziness as to how the scope of the subject matter would apply to individual circumstances.

In Section 6.4.2, I also noted that the withholding of wages and other pay entitlements affects collectives, including law-abiding firms. I also noted that non-compliance with pay obligations also affects governments, by not only reducing their capacity to collect tax revenues but also by creating a greater reliance on governments to provide support for an individual throughout their life. These harms are secondary to the core impacts of the offence when considered through the cheating analysis.

8.2.2.2 *The Norm against Disobedience*

As Green observes, the norm against disobedience is controversial and casts some doubts on whether there is a moral obligation to obey the law.⁹⁶⁷ Nevertheless, I have found that the way in which Green approaches the analysis of the norm against disobedience— by considering the degree to which an offence sits on a spectrum of *mala in se* and *mala prohibitum* offences— is useful.⁹⁶⁸ It offers a way to consider how the labour law rationales for minimum standard protections connect to the 'offending'. In Section 1.2.3, I considered three of the main general labour law rationales for enlisting minimum labour standards, including:

1. *Labour law is intended to address disparities in bargaining power between capital and labour.*
2. *Labour law is intended to provide social equality by protecting workers 'against the economic logic of the commodification of labour'.⁹⁶⁹*
3. *Labour law is intended to correct labour market inefficiencies.*

Labour law rationales for the recognition of statutory protections for minimum labour standards are connected to a protective purpose in light of workers' relative lack of bargaining power. The kind of protections are geared at creating a statutory basis to challenge non-compliance with the legal duties that set a floor of standards to protect

⁹⁶⁷ Green, *Lying, Cheating and Stealing* (n 18) 114.

⁹⁶⁸ Green, 'Tax Evasion as Crime' (n 392) 73.

⁹⁶⁹ Collins, *Employment Law* (n 87) 5.

workers. Statutory schemes such as the *Fair Work Act* contain civil penalty provisions that arise in the event of breach by an employer. The harms to government include the generation of a reduction in taxation income and places additional burdens on the government to fill gaps caused by reduced wages.

The norm against disobedience when connected to minimum labour standards emphasises the protective function of labour law to ensure that low-paid employees should receive fair remuneration. In contrast, where an individual's contract is breached and it is not clearly tied to those minimum standards (for example, the sportsperson who was not paid their full \$1 million salary), the breach is not linked to the rules set out by the government, but instead connected to the choices relating to contractual negotiation and private bargaining.

Green's framework also requires consideration of mental elements, alongside the two other elements—moral wrongfulness and harm. For the disobedience analysis, it is relevant that s 6 includes mental elements, including the implied intentionality requirements linked to the withholding of the employee entitlements and there is also a requirement to assess whether the withholding occurred dishonestly. These elements work to ensure that the mere breach of minimum labour conditions does not automatically provide a justification to impose criminal sanctioning despite a failure to obey the law. For the disobedience analysis, this is helpful to curtail the potential breadth of findings connected to the norm against disobedience because otherwise there is a risk that the norm would also favour criminalising much of what is currently non-criminal, on the basis it is a departure from the law.

I consider that the disobedience analysis is weaker than the cheating analysis for the wage theft offences. Indeed, this is consistent with Green's statement that of the eight kinds of moral wrongfulness he addresses, 'cheating, deception, stealing, coercion, exploitation, disloyalty, promise-breaking, and disobedience [are] dealt with [in this book] in roughly decreasing order of their importance in the context of white-collar criminal law'.⁹⁷⁰

I consider the disobedience analysis to quite neatly link the offending to the labour law protective purposes for the establishment of minimum standards relating to pay and conditions. It also further supports my concern that the scope of the offences to include wage terms in contractual agreement that improve on minimum protection standards is

⁹⁷⁰ Green, *Lying, Cheating and Stealing* (n 18) 50.

too expansive because the labour law rationales for imposing protections progressively fall away when there is no monetary limit on agreement.

8.2.3 Analogising the s 6 Wage Theft Offences with Other Offences

The final factor considered in Green's framework is the extent to which a newly enacted offence may be analogous other established categories. In his research, including his book on the limits of theft law, he contemplates the extent to which the offences are supported by other already established offences. This aspect of the framework is intended to help gauge whether the proposed crime is of the same or a similar character to already established offences and to help assess the degree to which the moral violations suggest a criminal law response could be merited, rather than another legal or non-legal response.

8.2.3.1 Theft

As discussed in Section 7.3.2.1, it is too simplistic to make a finding of criminality by analogising wage theft to theft and stealing. For one, the subject matter is not analogous. The offence largely captures the failure to do an act. The term wage theft serves limited analytical purpose in assessing the actual moral characteristics of the offences themselves. It is necessary to review the specific characteristics of the s 6 offences on their own merits. Adopting Whelan's restatement of Green's norm against stealing, I have observed that employee entitlements were not 'capable of being bought or sold'.⁹⁷¹ The right to recover unpaid wages is either treated as a breach of contract that could give rise to a right to seek damages, or a statutory right to recover unpaid entitlements. These are choses in actions that are caught by the definition of property. However, there are doctrinal issues that suggest that the timing of the employer's actions results in no appropriation of a proprietary interest. As such, the analogy with theft will ordinarily fail. (I observe that there may be instances where there is in fact theft—eg a cashback scheme could be regarded as a form of theft, as the employer may demand cash from the employee that they are entitled to, and the employer receives the amount as cash (ie property).)

8.2.3.2 Tax Fraud

Australia has a range of criminal offences that are used to prosecute tax fraud. Mirko Bagaric, Theo Alexander and Athula Pathinayake observe that in Australia, there is no specific offence known as tax fraud; however, the authors view the term as 'a convenient

⁹⁷¹ Whelan, 'Cartel Criminalization' (n 461) 544.

broad definition for a range of offences which involve the dishonest obtaining or failure to pay a tax obligation'.⁹⁷²

At the federal level, the most serious tax fraud offences are prosecuted under s 134.1(1) (dishonestly obtaining Commonwealth property), s 134.1(2) (obtaining financial advantage by deception) and s 135.4(3) (dishonestly causing a loss to the Commonwealth) of the *Commonwealth Criminal Code*. These offences are structured in a similar way to ordinary fraud offences with elements like dishonestly obtaining an advantage by deception. For example, s 134.1(1) provides:

A person commits an offence if:

- (a) the person, by a deception, dishonestly obtains property belonging to another with the intention of permanently depriving the other of the property; and
- (b) the property belongs to a Commonwealth entity.

The definition of property that applies to this offence is very broad. The definition includes: 'a thing in action or other intangible property'.⁹⁷³ The Revised Explanatory Memorandum to the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth) that inserted new offences into the *Criminal Code* explains that the term property is 'defined widely' and includes the Commonwealth's 'right to recover funds'.⁹⁷⁴ The income tax legislation includes the right to recover primary tax debts and so, a failure to pay tax revenue is caught in this definition property.⁹⁷⁵ In Victoria, the relevant tax fraud offence is contained in s 61 of the *Victorian Tax Administration Act 1997* (Vic). Section 61 states: 'A person must not, by a deliberate act or omission, evade or attempt to evade tax.' I address the characteristics of these offences further below.

At first glance, the types of interests these offences are protecting seem similar to those protected by the s 6 wage theft offences. Green seeks to explain how tax evasion can be justified according to its moral characteristics.⁹⁷⁶ He characterises tax evasion as the

⁹⁷² Mirko Bagaric, Theo Alexander and Athula Pathinayake, 'The Fallacy of General Deterrence and the Futility of Imprisoning Offenders for Tax Fraud' (2011) 26 *Australian Tax Forum* 511, 513 ('Tax Fraud').

⁹⁷³ Commonwealth Criminal Code s 130.1 (definition of 'property').

⁹⁷⁴ Revised Explanatory Memorandum. Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Bill 2000 (Cth) 27.

⁹⁷⁵ *Taxation Administration Act 1953* (Cth) s 8AAZA. Primary tax debts are defined as amounts owed to the Commonwealth under tax legislation. In contrast, superannuation is treated as pay obligation on employers to their employees. Employers who fail to pay their employees the superannuation guarantee are liable to pay the Superannuation Guarantee Charge to the Australian Tax Office: see, eg, *Superannuation Guarantee (Administration) Act 1992* (Cth) s 16.

⁹⁷⁶ Green, *Lying, Cheating and Stealing* (n 18) 243–8; Green, 'Wrong with Tax Evasion?' (n 392).

failure to comply with tax obligations by failing to pay or underpaying amounts owed, including the incorrect claiming of deductions or omitting to declare all income.⁹⁷⁷ In contrast, tax avoidance is legally permitted. Green notes: ‘From the perspective of the criminal law, tax evasion is a baffling and anomalous offense. It deviates from the traditional paradigm of crime in that the harms it causes are highly diffuse, significant only in the aggregate, and hard to identify with any certainty.’⁹⁷⁸

The specific underpayment context for wage offences affects a known individual employer—which results in a more tightly connected relationship between the withholding of the entitlements and the harms caused. There are also harms to governmental interests. For example, in Section 6.4.3, I argued that the failure to pay entitlements directly impacts on income tax revenue, results in missing superannuation for employees, and leads to higher reliance on government supports by employees, including those entitled to the age pension and other services.

Green rejects the claim that tax evasion can be regarded as a form of stealing. He argues that: ‘Stealing has traditionally involved the act of depriving another of a specific good or service without paying for it. It involves not just a temporary violation of the owner’s right to exclude others from using the property, but also a more permanent violation of the owner’s right to use or possess it himself.’⁹⁷⁹ In the context of tax evasion, Green likens the obligation to pay tax to the failure to pay a debt. Although the definition of property in the *Commonwealth Criminal Code* includes the right to recover a debt owed to the government, a better way to characterise the interests that are protected in the Commonwealth tax offences is to consider it as a right to recover tax revenue as a legally retrievable amount owed to it, by using its tax regulatory powers rather than as a broader version of a property right that might be caught by a theft offence. Hence, I agree with Green’s approach which assesses that the norm against stealing is inapplicable to tax evasion. This is consistent with my findings in relation to the wage theft offences, as I consider stealing is not a good conceptual match for the type of interests that they are protecting.⁹⁸⁰

Instead, Green relies on other moral norms for criminalisation. These are cheating, disobedience and deception.⁹⁸¹ I rely on Green’s assessment of how tax evasion can be

⁹⁷⁷ Green, ‘Tax Evasion as Crime’ (n 392) 63–4.

⁹⁷⁸ Green, *Lying, Cheating and Stealing* (n 18) 47.

⁹⁷⁹ Green, ‘Tax Evasion as Crime’ (n 392) 65.

⁹⁸⁰ See Section 7.3.2.

⁹⁸¹ Green, ‘Tax Evasion as Crime’ (n 392) 65.

justified according to his framework to consider the extent to which the findings are: a) applicable to tax fraud offences in Australia; and b) applicable as a comparison to the Victorian wage theft offences.

Before addressing the relevant moral norms, I introduce the kind of justifications included in sentencing remarks that are provided for enforcing the criminal law as enacted. The Commonwealth Director of Public Prosecutions states: ‘Prosecuting fraud against the Australian taxation system is important to maintaining public confidence in the taxation system.’⁹⁸² In sentencing remarks, Simpson J in *R v Agius* reflected on the need for punishment for tax evasion, given the self-assessment tax system:

The Australian taxation system, based as it is on self-assessment, depends for its integrity upon the honesty of citizens. Of course, there will always be those who choose to cheat. They are cheating their fellow citizens, casting a greater burden on each of them. Further, when it is known that the system can be, and is, cheated, the very structures of society are damaged. The self-assessment system depends not only on the honesty of taxpayers, but on the confidence of taxpayers that others will make their proper contributions, or that, if they do not, they will be adequately punished.⁹⁸³

Simpson J identifies harms in relation to both the government—who requires the tax revenue—and individual citizens, who are otherwise required to shoulder a greater burden of tax. These sentencing remarks are consistent with the concerns of Bagaric, Alexander and Pathinayake, who explain:

Taxation is the main source of government revenue and if a large portion of the population ceased paying their tax obligation, the government’s capacity to provide essential goods and services would be severely depleted. In absolute terms the harm caused by a single instance of tax evasion is negligible compared to the overall government budget, but the compound effect of wide-scale tax fraud could potentially cause a meaningful negative impact on government revenue.⁹⁸⁴

Green regards tax evasion as a form of cheating as the offender violates the rules relating to the taxes they owe and does so to obtain an advantage over others who are complying with their tax obligations. This assessment is consistent with Simpson J’s sentencing remarks in the Australian context where he focuses on the impact of tax evasion as

⁹⁸² Commonwealth Director of Public Prosecutions, ‘Tax Fraud’ (Web Page) <<https://www.cdpp.gov.au/crimes-we-prosecute/fraud/tax-fraud>>.

⁹⁸³ *R v Agius* [2012] NSWSC 978 [63].

⁹⁸⁴ Bagaric, Alexander and Pathinayake, ‘Tax Fraud’ (n 972) 512.

‘cheating their fellow citizens, casting a greater burden on each of them’.⁹⁸⁵ Green claims that ‘evading taxes causes harm not just to the government but also to one’s fellow citizens, who are forced to bear a heavier burden as a result of one’s conduct’.⁹⁸⁶ Further, he describes: ‘The tax evader violates the rule that requires citizens to pay the specific taxes they owe, and he normally does so for the purpose of obtaining an advantage over others. The tax evader is a free rider: he fails to pay his fair share of keeping our government running, while continuing to reap, or potentially reap, the benefits of being a citizen.’⁹⁸⁷ In similar ways, non-compliance with wage obligations results in the wage thief obtaining an advantage over other law-abiding employers, who pay their employees the amounts legally owed, as their margins are lower. The harms to government include a reduction in tax revenue and a greater reliance on government to provide supports.

Green further observes that many people who fail to pay taxes properly justify it on the basis that ‘everyone else is doing it’.⁹⁸⁸ Such an argument is also made in the context of wage underpayments. Green argues: ‘So long as at least some people were following the rules and paying all the taxes they owed, there is an argument that X would be cheating, since he would still be gaining an unfair advantage over the honest taxpayers’.⁹⁸⁹ The counterargument would be linked to inconsistent or ineffective enforcement such that a cohort was regularly getting away with underpayments or non-compliance was a business norm.

The rationales for tax evasion being a crime are very similar to the justifications for criminal wage theft offences. The main difference is that tax fraud offences focus on the impact on the government, which requires the tax revenue to fund services for its citizens. In contrast, the wage theft offences focus on the harm to individuals who are not paid their correct wages and instead, it prioritises the protection of individual interests in being paid lawfully their full entitlements. The harms identified that are connected to the broader governmental and collective interests are secondary to the effects on the individual and their families.

Green argues that the moral norm against disobedience is identifiable in relation to tax evasion and states: ‘In contrast to the cheating analysis— which tends to highlight the wrong done, horizontally, to the taxpayer’s fellow citizens— the disobedience analysis

⁹⁸⁵ *R v Agius* [2012] NSWSC 978 [63].

⁹⁸⁶ Green, ‘Tax Evasion as Crime’ (n 392) 69.

⁹⁸⁷ *Ibid.*

⁹⁸⁸ *Ibid* 71–2.

⁹⁸⁹ *Ibid.*

tends to highlight the vertical nature of the wrong (and harm) done to the government, which needs tax revenue to function.⁹⁹⁰ Similar to this analysis, failure to pay full entitlements impacts government tax revenue including income tax and payroll tax. It also may result in employees requiring greater reliance on the government to provide suitable resources. The norm against disobedience emphasises a moral obligation to obey the law. In my analysis of the wage theft offences, I considered that the labour rationales for including protections of minimum entitlements connected to pay and conditions are significant because they seek to provide protections to workers, reflecting a view that state intervention is necessary to establish a safety net and promote goals such as dignity at work. By disobeying laws that regulate minimum labour standards these values are affected. However, the norm against disobedience has limited utility in explaining wages that are above minimum standards because they are connected to individual contractual agreements and not directly linked to a specific rule that is enforceable by the government and that is separate from individual rights.

Green also regards tax evasion as connected to the norm against deception. In particular, he emphasises that tax involves ‘deceptive covering up’.⁹⁹¹ In the tax offences marked above, the Commonwealth offences include ‘by deception’ as a key definitional element. In contrast, the Victorian offence that specifically relates to tax evasion connects deliberateness to engage in ‘tax evasion’, which is not defined in the statute. It is likely that the meaning of ‘evade’ would include some form of deception. The dishonesty element is regarded as a factor that further justifies criminalisation, as cover-ups cost more to detect and suggest the offender is aware of the legal obligation. In the s 6 wage theft offences, there is no requirement to demonstrate that the employee was deceived. Instead, it includes dishonesty but not deception as an element of the offence. I explained that in the drafting of the Victorian offences, deception is not a helpful norm to justify criminal liability because it is not an inherent requirement of the offence, despite deceptive practices potentially also occurring at the same time, such as in respect of poor record-keeping designed to obscure detection.

Both tax fraud and the Victorian criminal wage theft offences can be explained by reference to the norms against cheating and disobedience. Tax evasion can be conceptualised as causing harms and wrongs to both the government, which requires the tax revenue to provide services to citizens, and to citizens, who otherwise are required to

⁹⁹⁰ Ibid 72–3.

⁹⁹¹ Ibid 73–4.

provide support to the government by making good any shortfall, and in turn, to citizens who rely on government revenue for support. In contrast, the criminal wage offences criminalise obligations to pay an individual, which are owed based on the employment context and connected to pay obligations and related entitlements, with any tax shortfall impacting on the government treated as a secondary issue. This suggests a similar but different type of public wrongfulness, as the individual is the feature of the wage theft offences, rather than the government's interests in taxation that is focused on the harm to the government and its capacity to fulfil its promises. There are also other similar features. The Victorian offence includes dishonesty as an element to capture cheating. Similarly, the tax fraud offences use concepts like dishonesty, deception, and evasion. The disobedience analysis is stronger in relation to tax fraud offences given the public focus of the offence on harming the capacity of the government to gain tax revenue. This can be compared with the wage theft offences which relate the individual's employment rights as their primary focus, including the payment of wages and other entitlements in exchange for providing labour to the employer.

8.2.3.3 *Modern Slavery*

The term 'modern slavery' captures a broad range of coercive work practices. I use this term to reflect how it is generally used in the labour law literature. I note that the offences in the Australian context do not expressly make reference to 'modern slavery' but instead rely on slavery and slavery-like offences in statutory drafting. Martijn Boersma and Justine Nolan describe modern slavery as a form of terminology that captures

a range of abuses, such as forced labour (work performed under the threat of punishment); bonded labour (work to pay off debt without control over conditions); human trafficking (movement of people for exploitation); child slavery (exploitative work performed by children for the gains by a third party); and domestic servitude (exploitative work in private residences). Other abuses include deceptive recruitment for labour and forced marriage.⁹⁹²

As Boersma and Nolan observe:

Modern slavery is increasingly regarded as being part of a continuum of exploitation, which recognises that people can be exposed to conditions that can gradually worsen, sometimes leading to slavery. While the most extreme forms of exploitation represent

⁹⁹² Martijn Boersma and Justine Nolan, 'Modern Slavery and The Employment Relationship: Exploring the Continuum of Exploitation' (2022) 64(2) *Journal of Industrial Relations* 165, 166.

instances of modern slavery, focusing on labour exploitation more broadly is also important as it is not always clear at what point non-compliance with labour standards seeps into cases of criminal exploitation.⁹⁹³

To support the implementation of the *Modern Slavery Act 2018* (Cth), a diagram was produced to demonstrate the distinctions on a continuum from decent work to modern slavery.⁹⁹⁴ As illustrated in Figure 8.1, modern slavery occurs at the most extreme end of the spectrum:



Figure 8.1: Where Does Modern Slavery Fit?

The concept of wage theft and related underpayments belongs within the ‘substandard working’ conditions category—but ordinarily do not reach the level of extreme exploitative practices that would fall under ‘modern slavery’. However, drawing a clear line of distinction between wage theft at the most serious end and modern slavery at the

⁹⁹³ Ibid, citing Hannah Lewis et al, *Precarious Lives: Forced Labour, Exploitation and Asylum* (Bristol University Press, 2015).

⁹⁹⁴ Attorney-General’s Department (Cth), *Commonwealth Modern Slavery Act 2018 Guidance for Reporting Entities* (May 2023) 9.

other end is blurred. However, the wage theft offences seem to be focusing mostly on working conditions rather than the more extreme aspects illustrated in Figure 8.1.

In Australia, most Commonwealth offences for modern slavery are located in divs 270 and 271 of the *Commonwealth Criminal Code*. These offences include human trafficking, slavery and slavery-like practices (including servitude, forced labour, deceptive recruiting practices, forced marriage and debt bondage). Section 270.1 of the *Commonwealth Criminal Code* defines slavery as ‘the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person’. In addition to these criminal offences, Australia also imposes mandatory reporting obligations on large businesses to assess the risks of modern slavery across their operations and supply networks. The reporting scheme located in the *Modern Slavery Act 2018* (Cth) does not include criminal offences in the event of a breach. This adopts the broader language of modern slavery that is used internationally in labour-related fields to describe the circumstances of the offending.

In this part, I draw on the circumstances of domestic servitude to draw distinctions between the criminal wage theft offences and the kind of offending that is intended to be captured by the slavery-like offences in the *Criminal Code*. I introduce two examples of modern slavery-like circumstances that have been heard as civil penalty proceedings relating to the *Fair Work Act*, before addressing an example of a couple held criminally liable for domestic servitude and sentenced to imprisonment, and an example of a business owner held criminally liable for forced labour.

In Australia, there have been some instances of modern slavery-like practices that have been dealt with by the Australian courts as wage underpayment issues. In two recent high-profile matters, the Federal Court of Australia ruled that domestic servants employed in the households of foreign high commissioners were owed legal protections, including for minimum wages and other working conditions. The Court went on to hold that claims of diplomatic and foreign state immunity could be rejected, as the individuals were employed in a personal capacity and not in connection with their diplomatic mission.⁹⁹⁵ Practices reflecting domestic servitude and slavery-like concepts were discussed in both cases, despite these being heard as civil claims (rather than as criminal proceedings prosecuted by the state). In the two cases, one involving the former Sri Lankan Deputy High Commissioner to Australia, Ms Arunatilaka, and the other, the former Indian High

⁹⁹⁵ *Shergill v Singh* [2023] FCA 1346; *Danaratna v Arunatilaka* [2024] FCA 918.

Commissioner to Australia, Mr Suri, both diplomats did not engage with the court proceedings. After Mr Suri was formally found liable, the Indian Government rejected the findings, and noted diplomatic immunities and privileges.⁹⁹⁶ In *Shergill v Singh*, Raper J observed:

Ms Shergill was a member of a proportion of Australian workers who are invisible from Australian society: Their work and entire existence is entrapped within domestic servitude. These workers, by fear, the precarious nature of their employment arising from their visa status, their lack of language skills, complete isolation and their slave-like working conditions, are precluded from participating in our society and huddling under the cloak of our societal protections. Their invisibility breeds exploitation and unlawful practices.

In both instances, the workers received minimum financial compensation for their work and worked long hours, without leave. In *Shergill v Singh*, Raper J found that Ms Shergill ‘was only paid the equivalent of approximately \$2,496.08 in wages for work performed during the employment claim period’, which was sent to a bank account in India.⁹⁹⁷ Both examples reflect circumstances that have characteristics of ‘modern slavery’ since they relate to domestic servitude where the domestic workers were obliged to work in the homes of the senior diplomats without payment and in breach of the minimum standards applicable in Australia. The choice to bring the claims through the *Fair Work Act* procedures, rather than under the criminal law, may reflect the difficulties in extraditing the diplomats and the choice by pro bono legal actors to be supported by law firms (rather than criminal prosecutions brought by the Commonwealth Director of Public Prosecutions).⁹⁹⁸

In Victoria, in the case of *DPP (Cth) v Kannan*, a couple were found criminally liable for domestic slavery. They housed a woman as a domestic servant in their home. In sentencing the couple, Champion J observed: ‘The parties have informed the Court that, as far as they are aware, apart from one previous case which contained an element of domestic slavery, this may be the first case solely relating to slavery by domestic

⁹⁹⁶ Natasha Kaul, ‘India Rejects Australian Court’s Order for Ex-Indian High Commissioner to Compensate Former Worker’, *SBS* (10 November 2023).

⁹⁹⁷ *Shergill v Singh* [2023] FCA 1346 [13], [88].

⁹⁹⁸ Clayton Utz, ‘No Diplomatic Immunity as Federal Court Fines Former Indian High Commissioner A Further \$97,200 over Domestic Worker Wage Theft’ (Media Release, 20 March 2024).

servitude to be heard by an Australian court.⁹⁹⁹ In that case, Champion J explained the meaning of slavery:

Slavery is defined in the *Code* as the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person. The High Court of Australia has observed that ‘powers of control, in the context of an issue of slavery, are powers of the kind and degree that would attach to a right of ownership if such a right were legally possible, not powers of a kind that are no more than an incident of harsh employment, either generally or at a particular time and place’.¹⁰⁰⁰

In *DPP (Cth) v Kannan*, a woman was kept as a domestic servant from 2007 to 2015, working up to 23 hours a day. It was not until she was taken by paramedics to hospital in 2015 that the victim’s condition came to light.¹⁰⁰¹ In sentencing remarks, Champion J observed:

The fact is that you developed almost absolute control over all aspects of her day-to-day life. This began to evolve from very early on after her arrival into Australia when you took away her passport and thus removed her immediate ability to leave the country when she wished. Further, you paid her minimal sums of money, which you undoubtedly saw to be to your own advantage, controlled how and when she worked, controlled her communications with her family and others, and controlled how and when she received health care. ...

To understand the concept of slavery, we must rid ourselves of ingrained images of rows of men chained together at the oars of a galley, or men and women working in fields in bondage. Slavery can be much more subtle than that and may not involve physical restraint. What must be reaffirmed is that possessing or using a person in a condition of slavery is repugnant, degrading of the human condition, and a gross breach of human rights.¹⁰⁰²

In the Judicial College of Victoria’s publication, *Modern Slavery: Guidance for Australian Courts*, the following facts were identified as indicating the seriousness of the

⁹⁹⁹ *DPP (Cth) v Kannan* [2021] VSC 439 [3].

¹⁰⁰⁰ *Ibid* [4], citing *R v Tang* (2008) 237 CLR 1 [42].

¹⁰⁰¹ Adam Cooper and Simone Fox Koob, ‘Couple Jailed for Keeping Woman as a Domestic Slave’, *Age* (21 July 2021).

¹⁰⁰² *DPP (Cth) v Kannan* [2021] VSC 439 [102]–[103].

offending and be taken into account when weighing up the gravity of the criminal offence in sentencing:

- ‘The victim’s illiteracy, poverty, deprived circumstances, ignorance of Australia, and inability to extricate herself and return home made her vulnerable and were facts taken advantage of by offenders to possess, control and manage her;
- The severe limitation of the victim’s freedom to act and make decisions for herself;
- The almost complete control the offenders exercised over the victim throughout the period she lived with them;
- It “occurred in the daily presence and with the obvious knowledge and comprehension of [the offenders’] children. [The offenders] set them a deplorable example of how parents should act towards another human being”¹⁰⁰³.

In 2024, in a different case, Dr Farschi was found guilty for forced labour. He was sentenced to 3 years and 6 months’ imprisonment, after being found guilty by a jury for charges relating to ‘causing a person to remain in forced labour’ and ‘conducting a business involving forced labour’.¹⁰⁰⁴ Dr Farschi engaged ‘RA’ to work as a baker in his Persian sweets and confectionary shop. RA came to Australia via boat from Indonesia, seeking asylum. After spending time in immigration detention on Christmas Island and Darwin, RA was granted a bridging visa. RA completed an unpaid trial, three months of unpaid training and then was paid \$10 per hour without any penalty rates for the long hours worked. Dr Farschi subjected RA to threats relating to his visa status and insinuated that if RA were deported, Dr Farschi would advise people in Iran that RA had converted to Christianity (which would pose a risk to his life). In the sentencing remarks, the threats are summarised in the following statements:

- ‘that the (then) Department of Immigration is looking for a reason to send [RA] back, because he is a refugee;
- that you had recordings of [RA] smoking opium and working illegally;
- that you could harness your connections at the (then) Department of Immigration to [RA]’s detriment;
- that you had the power to have [RA] placed into immigration detention;
- that you would inform Centrelink that [RA] was paid in cash and not declaring income;
- that you had an understanding of the law and regulations, which you could use to your advantage;

¹⁰⁰³ Judicial College of Victoria, *Modern Slavery: Guidance for Australia Courts* (2022) 37, citing *DPP (Cth) v Kannan* [2021] VSC 439, [218], [220], [224]–[225], [229].

¹⁰⁰⁴ *Farschi v The King* [2024] VSCA 235.

- that you could afford to pay any fines or penalties associated with the way you treated [RA]; and
- that you would inform people in Iran that [RA] had converted to Christianity'.¹⁰⁰⁵

In assessing moral culpability, Kidd CJ considered the length of time, the vulnerabilities of the victim, RA, who had limited financial means and the fact that he was on a visa and had limited understanding of English. In particular, Kidd CJ stated that

you knowingly took advantage of [RA], threatening to have him deported if he did not continue working for you. You made multiple threats of the same or similar character over a period of time. The threats which you made were calculated, manipulative and pernicious. Your motive was a commercial one—you sought for your business to benefit on the back of the forced labour of [RA].¹⁰⁰⁶

The specific context of modern slavery offences, including the example of domestic servitude, is of a more exploitative and serious nature than wage underpayments. As Virginia Mantouvalou summarises, the moral basis for the criminalisation of modern slavery includes

some legal and moral principles of general application, namely humiliation, ownership of the person, exploitation of vulnerability, and denial of choice; and also some legal doctrines that are specific to the employment relation, namely sub-standard working conditions, restrictions on the ability to exit the employment relation, as well as restrictions on the worker's power to control her or his life away from work.¹⁰⁰⁷

The specific sentencing remarks in both cases focuses on the lack of autonomy of the worker and the existence of coercion. This is a different target than the general characteristic of wage underpayment, even where deliberate—as the worker can choose to not continue to work for an employer and leave. The failure to pay the full entitlements, while often present for modern slavery offences, is not the target of the offences. Slavery as an offence is a *jus cogens* violation—that is, a universally recognised prohibition. Wage underpayments are clearly of a different character than the circumstance of modern slavery entailing a complete lack of autonomy. Even where there are vulnerabilities and a lack of language skills, which may render the position more susceptible to wage underpayments are more easily achieved, the offences seek to target the criminality

¹⁰⁰⁵ *DPP(Cth) v Farschi* [2024] VCC 24 [36].

¹⁰⁰⁶ *Ibid* [71]–[72].

¹⁰⁰⁷ Virginia Mantouvalou, 'The UK Modern Slavery Act 2015: Three Years On' (2018) 81(6) *Modern Law Review* 1017, 1020.

involved pushing work through coercion and the stripping the worker of their autonomy, which differs in character from the types of interests that are targeted in the dishonest withholdings of employee entitlements offences in Victoria.

8.2.3.4 Findings Relating to Comparisons of Wage Theft Offences with Other Offences

In this section, I have compared the dishonest withholdings of employee entitlements offences with established offences. Of the examples I have considered it is the tax fraud that encompasses similar types of harms and wrongs to the Victorian offences as they also target a withholding. The failure to properly account for tax to the government involves a similar type of withholding because an outstanding obligation to remit tax is not honoured. The justification for imposing criminal sanctions for tax evasion is connected to the idea of cheating and obtaining an advantage over other citizens, and disobedience to the government's tax laws. The closer the underpayment of wages is to the minimum prescribed legal standards (rather than higher pay agreements that more readily appear as contractual breaches), the closer the offence appears to criminalise similar interests as tax evasion. Nevertheless, I conclude that the disobedience analysis is a better fit for tax evasion than for accounting for criminal wage theft due to different harms. The focus of the tax fraud offences is on the government failing to receive an amount owed to it as tax revenue which it will use to support public spending, with the financial advantage over law-abiding taxpayers secondary. In contrast, for the wage theft offences, the employee entitlements are owed to individuals, with any adverse impact on government interests of secondary importance.

Modern slavery offences often capture wage underpayments, but the criminal offences target practices that involve coercion, threats and deception and often include denying workers their freedom and autonomy. In the event that criminal wage theft offences and slavery-like offences both occur, the target of the criminal offence is different, although the wage underpayment aspects may occur simultaneously. The labelling of the offences as slavery-like is a better target for those offences as reflecting fair labelling in criminal law rather than instead opting to focus on the wage underpayment issues connected to the offending.

8.3 Conclusion to the Application of Green's Framework

In this chapter, I have drawn together my conclusions from Part II relating to the individual elements in Green's framework to assess the degree to which it suggests the offences merit criminal intervention.

I have argued that extent to which the offences capture 'public wrongs' varied depending on whether the offence targeted minimum labour standards breaches protect low-paid employees (thus linked to the protective purposes of labour law) rather than breaches that caught individual agreements that were well above the minimum labour standards. The exact point at which this occurs is not clear, because examples have shown contraventions of minimum conditions across workplace law, including statute and workplace instruments, and overtime can impact employees who are earning a salary that is (notionally) well above the minimum entitlements. For example, in 2020 law graduates at top tier law firms received backpay because their salary did not cover the extensive overtime hours they worked during the Hayne Royal Commission into Misconduct in the Banking, Superannuation and Financial Services. This resulted in an underpayment when their annualised salary was compared to the entitlements in the Legal Services Award.¹⁰⁰⁸

The norm against cheating and the harms associated with wage underpayments that have an impact on the individual and their families suggest that where an employer seeks to intentionally obtain an advantage over low-paid workers and causes harms to the employee by not meeting the legally required minima in relation to pay and conditions, such subject matter could be supported by Green's framework. In my discussion, I argue that dishonesty is a type of cheating, but I noted that if the common law presumptions interpreted awareness as recklessness, the cheating analysis would be less clear.

Similarly, the norm against disobedience emphasises the protective function of minimum labour conditions to support fair remuneration by ensuring that employees receive minimum workplace protections relating to pay and conditions given the relative disparity of bargaining power between the employer and the employees. The relevant harms include the impact of non-compliance on the government, including in respect of tax revenue losses caused by employees receiving lower income, and the increased reliance of workers on government to provide social supports given lower wages received.

¹⁰⁰⁸ Hannah Wootton and David Marin-Guzman, 'Woolies' Law Firm Underpaid its Own Staff', *Australian Financial Review* (20 January 2020).

However, the same labour law rationales that support protecting low-paid employees does not extend to high-paid employees, given the likelihood of a lower disparity in bargaining power in respect of the employer and less need to rely on the protective rationales of labour law to protect against bargaining disparities, as contractual remedies would likely be sufficient to rectify issues. The two subject matter classes are of a different nature with only the first example reflecting what is ordinarily considered when contemplating wage theft. Nevertheless, in my analysis of the norm against cheating, I observed that there is ambiguity as to assessing the point (ie monetary amount) at which labour protections are no longer required.

Green's framework is helpful in making the case that the offences do involve 'public wrongs' that can be supported. However, the framework also helps to assess issues relating to the drafting of the offences, including the inconsistent logic for the broad subject matter that extends beyond what is ordinarily considered as 'wage theft' and the implications of interpretative ambiguities in evaluating the offence, including how dishonesty would operate given unresolved interpretive issues about intentionality requirements connected to 'withholding' that shifts the role of dishonesty in the offence structure.

Chapter 9: Conclusion

9.1 Thesis Overview

This thesis addresses a research gap regarding criminal wage theft offences by focusing on theoretical justifications for the criminalisation of contraventions of pay and related conditions. This discussion also focuses on the limits of the criminal law as part of broader criminalisation debates, rather than as a labour law issue. To answer my research question, I have engaged in a theoretically informed doctrinal analysis using Stuart Green's analytical framework to examine the Victorian criminal wage theft offences.¹⁰⁰⁹ Green's approach relies on concepts such as moral wrongfulness and harmfulness, which is closely connected to that of Joel Feinberg and his account of criminalisation that involves a moral justification for permitting criminal intervention.¹⁰¹⁰ This approach is distinct from other approaches that have examined criminal wage theft in Australia, which have instead focused on how criminal offences might operate as part of a broader regulatory framework that seeks to encourage compliance and permit enforcement action in the event of breach.¹⁰¹¹

I have approached the analysis of the criminal offences in this thesis with full knowledge of the fact that I come to this thesis with a labour law background and that the audience of this thesis is likely to comprise those who seek to understand the intended goals of criminalising wage theft. The decision to criminalise wage theft in Victoria and in other jurisdictions arose in the context of the labour movement seeking to find a legal solution to prominent wage theft scandals.¹⁰¹² Noting this, I have sought in this thesis to take a step back to examine whether the offences truly target conduct that should be treated criminally, and if so, whether there are issues that arise in the criminalisation process that should also be contemplated by legislators.

My thesis explores the following research question:

Is there a theoretically informed justification for the criminalisation of certain kinds of wage theft?

¹⁰⁰⁹ Green, *Lying, Cheating and Stealing* (n 18) 4.

¹⁰¹⁰ Feinberg, *Harm to Others* (n 129).

¹⁰¹¹ See, eg, Hardy, 'A New Dawn for Deterrence?' (n 19) 239–41; Nikoloudakis and Ranieri, 'A Proposed Regulatory Model' (n 19); Dietrich and Raj, 'Property, Stealing, and Other Concepts' (n 19); Hardy, Howe and Kennedy, 'Criminal Liability' (n 13); Lewis, 'Deterrence, Enforcement and Compliance' (n 19).

¹⁰¹² See discussion in Chapter 2.

As outlined in the previous chapter, I conclude that yes, for some of the subject matter that is caught by the Victorian wage theft offences, Green's framework can support a moral basis to permit criminal intervention.

In this thesis, I have adopted Green's analytical framework to examine the Victorian criminal wage theft offences. As I explain in Section 1.3, I adopt an interpretivist method of doctrinal research to examine the Victorian wage theft offences. My approach involves identifying and describing the law, selecting an appropriate theoretical account that fits the legal context, and then analysing whether the law can be justified according to the chosen framework.¹⁰¹³ In Section 1.2, I also contextualised the intersection between criminal law literature and labour law, by reference to key literature from both fields. In Part I of the thesis, I described and examined the law, before explaining Green's framework and how I would use it to aid my examination of the Victorian offences. In Part II of the thesis, I apply this framework and in Chapter 8 I reach conclusions about the degree to which it supports a moral basis for criminal intervention.

Chapters 2 and 3 work together to establish the context in which the criminal offences were enacted. In Chapter 2, I explained the legislative background and the context of the legislative developments that have resulted in the criminalisation of wage theft in Victoria. In addition, I provided context to the developments occurring in different jurisdictions, including at the Commonwealth level that were occurring at the same time. In Section 2.4, I explained that despite the repeal of the Victorian wage theft offences,¹⁰¹⁴ my thesis remains instructive as a proof of concept for future examination of other offences, including the new offence in the *Fair Work Act*, but is also relevant to other jurisdictions who seek to criminalise wage theft.

In Chapter 3, I described how the elements of offences in s 6 would likely be interpreted by the courts. I focused on the novel s 6 dishonest withholding of employee entitlement offences. For the s 6 offences, I noted that there is ambiguity particularly in relation to how common law presumptions relating to intentionality and 'withholding of employee entitlement' will operate. I identified the following ambiguities:

¹⁰¹³ Varuhas, 'Mapping Doctrinal Methods' (n 117) 97.

¹⁰¹⁴ *Wage Theft Amendment Act 2025* (Vic).

	Interpretation 1	Interpretation 2
Intent:	The accused intended to pay the employee what was actually paid.	The accused intended to pay the employee less than the minimum amount required by law.

	Interpretation 1	Interpretation 2	Interpretation 3
Awareness	The accused is aware that the employer had knowledge of the specific source of law or calculation method of entitlements that was required by law.	The accused is aware of their pay obligations to the employee and that the rate of pay may differ depending on the hours of work and the employment status of an employee.	The accused is reckless as to their pay obligations, including mistaken interpretations of the source of law, and fails to investigate pay obligations and to check or audit the payroll system.

Depending on how these interpretations are resolved, it will affect the role of dishonesty in the offence structure. I returned to the impact of these ambiguities in Chapter 5.

In Chapter 3, I also considered how the framework applies to attributing liability to officers and different types of employers based on corporate liability principles. The *Wage Theft Act* requires these methods to reflect that the employer is not always a natural person and that key individuals may not be involved in the day-to-day management of the operations. Given the inclusion of the element of dishonesty in the offence structure, this requirement as an element raises a host of interesting questions about deeming liability. The specific way in which dishonesty can be attributed to an abstract entity is a difficult conceptual issue that has proven to be a challenge in other legal contexts. For example, I noted that if an officer is unable to show they exercised due diligence, they may be deemed to liable for the actions of the employer, even if that person was not dishonest, or they were aware of the factors that led to the underpayments.¹⁰¹⁵

In Chapter 4, I set out Stuart Green’s framework, including an account of the rationales for the tests he adopts to assess newly enacted or proposed criminal offences. Green’s framework is a three-part analytical framework that relates to the application of three elements, namely,

1. the mental state of the actor as prescribed by statute,

¹⁰¹⁵ See Section 5.6.

2. the social harmfulness of the action and
3. the moral wrongfulness of the conduct.¹⁰¹⁶

In Section 4.2, I explain why the Victorian offences are a ‘fit’ for the application of Green’s framework. Green justifies his model as particularly useful to offences when the subject matter suggests moral ambiguity. I explained that the Victorian offences are ‘morally ambiguous’ because the content of the contraventions of employees’ labour entitlements have not traditionally been addressed by the criminal law and there are shades of grey relating to the subject matter. The term wage theft has been used to capture a broad range of behaviour concerning wages and hour violations. At the extreme end, an employer may deliberately underpay their employee. However, it is more difficult to assess the degree of wrongfulness for more marginal cases—for example, the failure to pay a person on a rostering system who is directed to begin their shift five minutes early each shift for that time is trivial, but still a breach. The failure to pay for those five minutes each shift is of a different character than paying an international student working in a café a flat rate of \$10 per hour that is well below the minimum rate of pay for their work classification; refusing to make amends when questioned about the rate of pay; and threatening to contact immigration authorities if they challenge the issue further. The first type seems more like a technical breach, whereas the deliberate failure to pay at the required rate is more significant as it suggests dishonesty.

In Part II, I apply Green’s framework to the s 6 dishonest withholding of employee entitlement offences. I address Green’s three elements in separate chapters, before weighing up the elements in Chapter 8, as part of my thesis conclusions in Part III.

In Chapter 5, I apply Green’s first element to the offences—I examine mental elements and the impact of statutory choices on defining the target of the offence. In Chapters 3 and 5, I identified statutory ambiguities that make it very difficult to assess exactly what the offence targets as there is ambiguity in how key elements of the offences would be interpreted by courts, including in respect of mental elements and the role of the standard of dishonesty in operating in the offence structure. In Chapter 3, I identify a range of interpretive issues relating to the ‘withholding of employee entitlements’. Those possible interpretations influence how dishonesty operates in the offences structure. If intention means intention to pay what was paid, dishonesty will operate in a positive sense to distinguish types of withholdings as criminal. In contrast, if intention is to underpay with

¹⁰¹⁶ Green, *Lying, Cheating and Stealing* (n 18) 4.

more specific knowledge of obligations is required, dishonesty is likely to have a less important role in distinguishing the types of withholdings, as there will likely be limited circumstances where such deliberate underpayments will not also be dishonest. I consider the implications of these findings as to the role of dishonesty in my cheating analysis in Chapter 7.

In Chapter 6, I applied Green's second element to the offences—I examined harmfulness. Harmfulness, as a concept in Green's framework, is closely tied to moral wrongfulness, and both elements are necessary to demonstrate that there was a 'public wrong'. In this chapter, I identified a broad range of harms that could be connected to the offending impacting individuals, collectives and the government, but I concluded that many of the harms could be present regardless of the satisfaction of the fault elements necessary to establish a criminal offence. I will return to these findings in Chapter 8.

In Chapter 7, I applied Green's third element to the offences, that is, I examined the scope and meaning of moral wrongfulness. Green uses tests to assess if the offences capture violations of moral norms. In this chapter, I explained why the moral norm against stealing is not relevant in assessing moral wrongfulness in relation to the specific subject matter and structure of the employee entitlement offences in the Victorian *Wage Theft Act*. This finding is significant, given that proponents have used the linguistic association of 'theft' to justify calls for its criminalisation in Australia and other countries. Thereafter, I considered other norms using the tests Green identifies and adopts: the norms against cheating, disobedience, deception, exploitation and promise-breaking. By applying those tests, I found that the norms against cheating and disobedience are the most applicable to findings of violations of moral norms in relation to the Victorian wage theft offences.

In Part III, I set out my conclusions.

The discussion in Chapter 8 evaluated my findings to assess the degree to which Green's frameworks determined whether Victorian wage theft offences are an appropriate instance of criminalisation. I conclude that the norm against cheating and the harms associated with wage underpayment suggest its criminalisation would be supported by Green's framework. Similarly, the norm against disobedience may also support criminalisation when closely linked to the kinds of minimum labour standards protected, as it emphasises the labour law protective function to ensure that employees should receive fair remuneration and protections relating to pay and conditions.

I considered that the scope of employee entitlement offences should be narrowed. Minimum labour entitlements include a range of rights including loading payments and penalty rates. The labour law rationales that support protecting low-paid employees by creating protective minimum standards do not extend to high-paid employees, given the likelihood of a lower disparity in bargaining power in the employer/employee relationship. A higher paid individual has more power to use private remedies to rectify underpayments or otherwise negotiate terms and conditions. I considered that where the offence captures agreements that are no longer connected to the labour law logic relating to minimum standards, the framework becomes less supportive of criminalisation (eg the closer the subject matter comes to criminalising contractual breaches). There is ambiguity in setting a monetary limit in such a way that it does not arbitrarily cut off certain employees who may still benefit from protections, such as those connected to overtime and leave. Refining the offence structure to exclude high-paid individuals, such as by setting a limit, perhaps in line with the high-income threshold tests adopted in the law of unfair dismissal, would work towards remedying the breadth of subject matter beyond the types of payments mentioned by legislators in the legislative materials accompanying the Wage Theft Bill 2020 (Vic) which focused on low-paid workers.

Green considers that his framework is helpful in deciding whether to criminalise when there is moral ambiguity, in order to assess whether the newly enacted offences or proposed offences capture those who are ‘blameworthy’.¹⁰¹⁷ The framework is useful in determining whether the offences do capture ‘public wrongs’.¹⁰¹⁸ It is also helpful in guiding analysis of newly enacted criminal offences to identify areas where drafting could be changed to allow the framework to better support the offences. For example, I argued that if the offence extends to employers who are reckless about pay obligations, the cheating analysis would be weakened. The scope of the offence is uncertain, as the implied common law intentionality assumptions connected to the withholding of employee entitlements have never been interpreted by a court, and those interpretation issues impact on how dishonesty operates in the offence structure.

¹⁰¹⁷ Green, *Lying, Cheating and Stealing* (n 18) 1, 23–6.

¹⁰¹⁸ I discuss how Bogg and Freedland discuss ‘public wrongs’, drawing on Duff in Section 9.3 below.

9.2 Areas for Future Research

The decision to criminalise conduct ‘is as much a political and social act as it is a legal (and possibly an economic) one’.¹⁰¹⁹ A range of issues need to be assessed as to why the criminal law should be the response when other legal responses might be available. To adopt a question Green raises in his monograph on theft law, *[g]iven the civil and nonlaw alternatives, if and when is it appropriate to treat wage theft as a crime?*¹⁰²⁰ As Green observes, ‘even if the harm principle is satisfied, a legislature must consider many other issues before properly deciding whether some conduct should be treated as criminal. Among these further questions, which Feinberg explicitly sets aside, is the extent to which the benefits of criminalizing some particular conduct would outweigh its costs’.¹⁰²¹ I draw on some of the further considerations that Green regards as relevant in assessing whether to introduce new criminal offences. He recommends:

When drafting statutes, deciding whether to prosecute, and imposing punishment, legislatures, prosecutors, and courts, respectively, should consider the extent to which the conduct in question is deserving of censure, whether it makes sense for the state (rather than, or in addition to, individuals) to pursue proceedings, whether the criminal law would be effective in preventing the alleged harms, and whether the benefits of criminalization would outweigh its costs.¹⁰²²

Once a legislator has enacted laws, there are a range of other procedural issues that apply in assessing whether to criminalise or use the criminal law to prosecute an individual (or an employer) as an offender. Green observes:

In approaching the task of determining whether a particular crime type or token should be criminalized, it will be helpful to think of the procedural context in which such questions are likely to arise. The process of criminalization ordinarily begins with the legislature, which must decide whether a given crime type, however defined, should be subject to criminal penalties. Having determined that it should, the legislature must then decide how much punishment to authorize ... The decision-making process then shifts to the prosecutor, who must decide whether and how to bring criminal charges in

¹⁰¹⁹ Caron Beaton-Wells and Ariel Ezrachi, ‘Criminalising Cartels: Why Critical Studies?’ in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Hart Publishing, 2011) 2, 6 (‘Criminalising Cartels’).

¹⁰²⁰ Green, *Theft Law* (n 252) 138.

¹⁰²¹ *Ibid* 139.

¹⁰²² *Ibid* 271. See also at: 5, 140.

a given case. Finally, assuming that the defendant is convicted, a court will have to decide the punishment to be imposed.¹⁰²³

Green's three-part framework focuses on identifying the characteristics of the offences—but it does not explain the motivations as to why a state may choose to prosecute a particular instance or what criminalising will achieve in comparison to other legal responses. These issues have become even more important for consideration, given the recent legislative development in which the FWO has powers to investigate alleged wage theft through its civil investigatory powers or to pursue prosecution according to the newly enacted criminal offences in s 327A of the *Fair Work Act*. I address this development further in my discussion of other relevant factors that may aid legislators in determining whether to choose to criminalise over another legal response.

9.2.1 Other Relevant Factors in Deciding to Criminalise an Offence

In this thesis, I have analysed the Victorian wage theft offences by reference to a 'moral' justification for criminalisation. Green assumes that in order for offending to justify criminal sanctioning, it must be regarded as 'morally wrongful' for the offender to 'deserve' punishment.¹⁰²⁴ As Caron Beaton-Wells and Ariel Ezrachi observe, in criminal law, there is 'the classic debate about the legitimate scope and functions of criminal law and the contest between those who regard it as necessary that offences have some "moral" content and those who are prepared to settle for a consequentialist or effects-driven model'.¹⁰²⁵ The analytical framework I adopt prioritises the moral grounds as finding a reason to criminalise. However, the additional factors that Green contemplates introduce more practical considerations.

The findings in Chapter 8 that draw on conclusions from Part II suggest that some aspects of what is caught by the s 6 offence deserve censuring because these are 'wrongful'. However, there are particular considerations as to whether the criminal law is the best legal remedy. I am guided by the types of matters that Green considers in his monograph on theft.¹⁰²⁶ Green identifies questions to help decide whether 'theft in its various forms should be treated as a crime'.¹⁰²⁷ In his assessment of theft law, Green applies the extended factors 'to a collection of potentially problematic, borderline forms of theft and theft-

¹⁰²³ Ibid 140.

¹⁰²⁴ Green, *Lying, Cheating and Stealing* (n 18) 21–3.

¹⁰²⁵ Beaton-Wells and Ezrachi, 'Criminalising Cartels' (n 1019) 5.

¹⁰²⁶ Green, *Theft Law* (n 252).

¹⁰²⁷ Ibid 140.

related conduct’ to assess what should and should not be a crime.¹⁰²⁸ The sources that Green uses to inform his questions follow established approaches in criminalisation literature that seek to rationalise a principled basis for intervention by the criminal law. The approach reflects the broader goals of criminalisation by attempting to find boundaries for criminal law intervention.¹⁰²⁹ These issues are only briefly canvassed here as reflecting avenues for further research.

Green builds on the work of others, including Feinberg, Husak and Schonscheck to consider some limiting principles that can help guide whether to consider something a crime or to treat it with reference to other legal or nonlegal interventions.¹⁰³⁰ The questions are summarised in Table 9.1.

Table 9.1: Stuart Green’s Extended Factors¹⁰³¹

1. ‘is [the proposed crime] deserving of the kind of censure that criminal sanctions are intended to impose?’
2. is there a significant advantage to be gained by having the prosecution of such conduct initiated by the state rather than or in addition to an action initiated by a private party?
3. does the state have a substantial interest in preventing the harm caused by the prohibited conduct?
4. does the criminal law provide an effective means of preventing such harms from occurring?
5. would the benefits of criminalization outweigh its costs, including not only the costs of prosecution and incarceration but also the costs of chilling otherwise socially beneficial conduct?’

I consider some of these questions and whether they would help to decide whether to criminalise wage theft should be a crime.

- *Is the form of wage theft captured by the Victorian s 6 offences deserving of the kind of censure that criminal sanctions are intended to impose?*

The question of whether a ‘crime’ is of the kind that is deserving of criminal sanctions requires awareness of the moral characteristics of what constitutes the crime (ie the process that took place in Part II of the thesis and in Chapter 8), as well as of the purposes

¹⁰²⁸ Ibid 5–6.

¹⁰²⁹ See discussion in Section 1.2.1.

¹⁰³⁰ Green, *Theft Law* (n 252) 140, citing Feinberg, *Harm to Others* (n 129) 4; Husak, *Overcriminalization* (n 11); Jonathan Schonscheck, *On Criminalization: An Essay in the Philosophy of the Criminal Law* (Kluwer, 1994).

¹⁰³¹ Green, *Theft Law* (n 252) 5, 140.

of criminal sanctions versus other potential penalties or remedies. Criminal sanctions are characterised as having the ability ‘to communicate to offenders the censure or condemnation that they deserve for their crimes’.¹⁰³² The lack of community condemnation for a particular type of offence could be seen as another example of overcriminalisation and a dilution of the meaning and force of the criminal law.¹⁰³³ Others consider that the criminal law might have a role in shifting and shaping public opinion to lead to support for the deployment of criminal law as ‘a powerful factor in making the proscribed conduct illegitimate’.¹⁰³⁴

The criminal law is considered to have a communicative and expressive function that other remedies lack. Criminal censure conveys to the community and offender that what they have done is ‘wrongful’ in the criminal law. Feinberg explains that

punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those ‘in whose name’ the punishment is inflicted. Punishment, in short, has a *symbolic significance* largely missing from other kinds of penalties.¹⁰³⁵

In contrast, civil remedies or breach of contract do not have the same expressive function.¹⁰³⁶ Green remarks that civil remedies, such as damages, ‘do not have the expressive or communicative quality of criminal sanctions like imprisonment and even criminal fines. Thus, one of the reasons to impose criminal penalties on theft, rather than or in addition to civil sanctions, is to express resentment, indignation, disapproval, or reprobation for such conduct’.¹⁰³⁷ Further, ‘such expressivity in criminal law also has an instrumental function: criminal law is believed to have the power to shape, change, and reinforce social norms by making statements that create and sustain such norms, rather than controlling behavior directly’.¹⁰³⁸

¹⁰³² Green, *Theft Law* (n 252) 141, citing Duff, *Realm of Criminal Law* (n 30).

¹⁰³³ Beaton-Wells, ‘Jury is Still Out’ (n 1007) 277–8, citing Green, *Lying, Cheating and Stealing* (n 18) 24–6.

¹⁰³⁴ See, eg, Harry V Ball and Lawrence M Friedman, ‘The Use of Criminal Sanctions in the Enforcement of Economic Legislation: A Sociological View’ (1964) 17 *Stanford Law Review* 197, 217.

¹⁰³⁵ Joel Feinberg, *Doing and Deserving: Essays in Theory of Responsibility* (Princeton University Press, 1970) 98 (emphasis in original), quoted in Green, *Theft Law* (n 252) 141.

¹⁰³⁶ Green, *Theft Law* (n 252) 141.

¹⁰³⁷ *Ibid.*

¹⁰³⁸ *Ibid.*, citing Paul H Robinson and John M Darley, ‘The Utility of Desert’ (1997) 91 *Northwestern University Law Review* 453, 471.

In literature that justifies criminal sanctions for wage theft, there is generally a link provided by the existence of criminal sanctions that it will have the effect of shaping behaviour such that unscrupulous employers will choose to underpay their workers. For example, in the *Migrant Workers' Taskforce Report*, Allan Fels and David Cousins identify that the introduction of

criminal sanctions to the current suite of enforcement tools for very serious contraventions, such as deliberate recidivists, may have some additional deterrence effect beyond that expected from increasing civil penalties. ... The introduction of criminal sanctions would provide a clear signal to unscrupulous employers that exploitation of migrant workers is unacceptable, and the consequences of doing so can be severe.¹⁰³⁹

Similarly, in the 2020 discussion paper on compliance and enforcement from the Attorney-General's Department, input was sought into the criminalisation of underpayments, and it was noted that:

Criminal sanctions are generally reserved for the most serious misconduct, with the intention of ensuring just punishment for the misconduct, protecting the community by denouncing such conduct, specifically deterring the offender from ever repeating the conduct and generally deterring others from potentially engaging in such conduct, and promoting rehabilitation of the offender.¹⁰⁴⁰

In assessing whether something should be sanctioned by the criminal law, the degree of wrongfulness is relevant. The extent to which censure through criminal prosecution is justifiable depends on the characteristics of what is criminalised.

The Victorian offences capture a broad range of potential instances of wage theft. For example, it continues to capture more technical deliberate breaches such as requiring an employee to attend work five minutes early before every shift but not paying them for that time. But it would also capture an employer who advises an employee that they will only be receiving \$10 per hour because they are in breach of their student visa conditions and risk deportation if they do not agree to conditions. These examples are of a different character. I have already concluded that the justifications for criminalisation do not hold up for high-paid performance contracts. There are still areas of 'grey' or moral ambiguity that arise in relation to what the offences capture across the types of potential withholding.

¹⁰³⁹ *Migrant Workers' Taskforce Report* (n 181) 87.

¹⁰⁴⁰ Attorney-General's Department, 'Strengthening Penalties for Non-Compliance' (n 189) 10.

This affects the capacity to judge the limits of behaviours that should and should not be treated criminally because it relies on the judgment of prosecutors to exercise discretion not to charge an employer where the ambiguity exists. Green observes:

In general, the more *malum prohibitum*-like a given act of theft is, the weaker the case for criminalization. The problem of moral ambiguity in theft law is particularly evident in the case of offenses such as failing to return lost or misdelivered property, writing a bad check, breaching a contract based on a false promise, and certain cases of extortion.¹⁰⁴¹

A promise to pay wages when the employer knows they are having cash flow issues, but nevertheless intends to pay one week later, is very different from an employer who deliberately deceives an employee by inaccurately recording hours on a timesheet or doctoring a record and fails to pay the full entitlements. Yet, the offence structure, theoretically, could treat both examples as criminal offences.

Given the continued existence of ‘shades of grey’ in the Victorian offence structure including in respect of scope and mental elements, there remains challenges in assessing what should be censured through a criminal law response as against what kind of wage theft might be best left to another legal response.

- *Is there a significant advantage to be gained by having the prosecution of such conduct initiated by the state rather than, or in addition to, an action initiated by a private party?*

The landscape has shifted since the Victorian offences were introduced, with the recent enactment of the new federal criminal offence. In 2020, when the Wage Theft Bill was introduced to the Victorian Parliament, the *Fair Work Act* lacked a criminal offence for wage theft. Part of the justifications made for that Bill was to fill a gap where there was no option for the Commonwealth to criminally prosecute individuals or employers who breached their employment entitlement obligations. The justifications for introducing the criminal sanctions hinged on the lack of an appropriate penalty and the desire to supercharge deterrent effects. The state government was seeking to intervene through the use of the criminal law in an area in which the civil enforcement scheme was considered inadequate, considering the breadth of high-profile scandals being reported at the time

¹⁰⁴¹ Green, *Theft Law* (n 252) 141, 143. As discussed in Sections 4.2 and 7.4.2, Green rejects the idea of a binary of ‘*mala in se*’ and ‘*mala prohibitum*’. See also Green, ‘Conceptual Utility’ (n 410).

that the Bill was announced.¹⁰⁴² Given that *Wage Theft Amendment Act 2025* (Vic) recently repealed the wage theft offences in Victoria, it is artificial not to consider how criminal offences will now operate alongside the civil regulatory powers of the FWO.

Since 1 January 2025, the FWO has dual-track enforcement powers that involve choices relating to whether to bring criminal or civil proceedings.¹⁰⁴³ Green considers that the criminal law should capture a public wrong that concerns the broader community to justify the state prosecuting the individual.¹⁰⁴⁴ The FWO ‘is responsible for conducting investigations of the criminal underpayment offence and related offence, but only the [Commonwealth Director of Public Prosecutions] or [Australian Federal Police] may commence proceedings’.¹⁰⁴⁵ The choice for the FWO will be whether to investigate as a potential criminal offence and refer a brief of evidence to the Commonwealth Director of Public Prosecutions who will then assess if there is sufficient evidence to prosecute and whether it is in the public interest, or instead choose another type of enforcement action to be taken in line with the FWO’s *Compliance and Enforcement Policy*. The FWO has greater control over choices in relation to commencing civil proceedings and other enforcement activities, than criminal proceedings as the prosecuting agency makes the decision whether to prosecute. This may have implications on how often criminal prosecutions are used compared with other responses.

As Green observes,

conduct that is subject to criminal penalties will also be subject to civil remedies, and vice versa. Public and private proceedings are not mutually exclusive but instead run on parallel tracks subject to different procedures and burdens of proof, and sometimes requiring proof of slightly different elements. This is true not only of newer statutory provisions involving matters such as insider trading, price fixing, and the environment, but also of more traditional, common law-based, core offenses like murder and criminal assault. Each such offense can be, and often is, also addressed through corresponding civil tort proceedings.¹⁰⁴⁶

The FWO is the labour regulator that can also bring proceedings on behalf of the state, in accordance with its statutory purposes. In the context of criminal wage theft, the comparator will now be the different tests in the *Fair Work Act* for treating breaches as

¹⁰⁴² See discussion in Section 2.3.

¹⁰⁴³ See discussion in Hardy, Howe and Kennedy (n 13) 204–9.

¹⁰⁴⁴ Green, *Theft Law* (n 252) 147.

¹⁰⁴⁵ Fair Work Ombudsman, *Compliance and Enforcement Policy* (2025) 20; *Fair Work Act* s 327C.

¹⁰⁴⁶ Green, *Theft Law* (n 252) 147.

civil contraventions—either regular contraventions or serious contraventions—or as criminal offences.¹⁰⁴⁷ Tess Hardy has recently considered how the federal criminal offences might operate alongside the civil remedies connected to contraventions and serious contraventions.¹⁰⁴⁸ In the future, it will be necessary to evaluate how the FWO chooses to bring civil versus criminal proceedings to assess whether there is a significant advantage in allowing this as an option.

A further complicating factor is assessing the differences between criminal sanctions and civil penalties in corporate contexts. As Emma Ferris and Stuart Ross, who approach wage theft from a criminological lens, observe, in Australia ‘wage theft has been treated as a regulatory issue falling under the jurisdiction of the FWO, which enforces workplace laws through nonpunitive mechanisms’.¹⁰⁴⁹ In this context, civil penalties would not be regarded as ‘punitive’ in the same way that criminologists would view criminal sanctions such as criminal fines or imprisonment. However, recent High Court decisions suggest that the purposes of civil penalties often overlap with some of the purposes of criminal sanctions.¹⁰⁵⁰ In *Australian Building and Construction Commissioner v Pattinson*, a 6:1 majority found that civil penalties are imposed ‘primarily, if not solely, for the purpose of deterrence’.¹⁰⁵¹ In contrast, criminal sanctions include other concepts such as retribution and rehabilitation.¹⁰⁵² Given this overlap in how the courts have addressed civil penalties which are available for contraventions of many of the same legal duties in the *Fair Work Act*, the criminalising of the same would also need to do something different to the civil penalties to be ‘effective’ at preventing harms.

In the discussion paper on compliance and enforcement, the Attorney-General’s Department (Cth) articulated that ‘adding criminal sanctions’ will ‘send a strong and unambiguous message to employers that they cannot get away with exploiting vulnerable employees’ and will ‘enhance specific and general deterrence and reduce the harmful effects of this unlawful conduct’.¹⁰⁵³ There is not enough evidence to evaluate whether this assertion will transpire in practice. The effectiveness of deterrence as operating to change behaviour is raised in a range of literature. For example, Hardy conducted a

¹⁰⁴⁷ See discussion in Sections 2.2.2 and 2.2.3.1.

¹⁰⁴⁸ Hardy, ‘A New Dawn for Deterrence’ (n 19).

¹⁰⁴⁹ Ferris and Ross, ‘Hospitality Industry’ (n 21) 43.

¹⁰⁵⁰ *Ibid.*

¹⁰⁵¹ (2022) 274 CLR 450 [45].

¹⁰⁵² *Ibid.*, citing *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 [55].

¹⁰⁵³ Attorney-General’s Department, ‘Strengthening Penalties for Non-Compliance’ (n 189) 11.

review of literature that identifies a role for deterrence in relation to civil penalties and employment standard enforcement.¹⁰⁵⁴ In the article, Hardy also considered the broader application of deterrence to criminal wage underpayments, raising doubts over ‘the assumption that increasing the severity of sanction will ‘supercharge’ deterrence in and of itself’.¹⁰⁵⁵

- *Do the benefits of criminalising wage theft outweigh its costs, including not only the costs of prosecution and incarceration but also the costs of chilling consequences on society?*

A range of costs are associated with criminalising wage theft. Jennifer Collins observes that there is ‘tension in using the criminal law’s censuring and preventive functions in relation to exploitation in work relations because of its potential to produce counter-productive effects for vulnerable workers’.¹⁰⁵⁶ For example, a goal of underpaid employees may be to receive their backpay for underpayments, rather than to lose their job because their employer is incapacitated. If an employer who is an individual is imprisoned, or the employer who is a body corporate is otherwise shut down because of the financial effects of criminal fines, or from reputational damage associated with criminal prosecution for underpayments, the employee may no longer have their job.

9.3 Intersection between Criminal Law and Labour Law

The thesis occurs at the intersection between criminal law and labour law. In recent times, there has been growing attention in academic scholarship on the interactions between the different legal approaches. In Section 1.2.2, I introduced Bogg et al’s edited collection, *Criminality at Work*, in which contributors examined the suitability of the criminal law as a legal response in the context of workplace laws. In Alan Bogg and Mark Freedland’s introduction to their edited collection, they draw on the work of Antony Duff. Duff identifies that criminalised wrongs should engage

some aspect of the polity’s civil order, in which the polity therefore has in principle the standing to intervene. We must argue that such conduct is, when seen in the context of

¹⁰⁵⁴ Tess Hardy, ‘Digging into Deterrence: An Examination of Deterrence-Based Theories and Evidence in Employment Standards Enforcement’ (2021) 31 (2-3) *International Journal of Comparative Labour Law and Industrial Relations* 133.

¹⁰⁵⁵ Ibid 135, citing Caron Beaton-Wells and Christine Parker, ‘Justifying Criminal Sanctions for Cartel Conduct: A Hard Case’ (2013) 1(1) *Journal of Antitrust Enforcement* 198, 215.

¹⁰⁵⁶ Jennifer Collins, ‘Exploitation at Work: Beyond a “Criminalisation” or “Regulatory Alternative” Dichotomy’ in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 97, 104.

the polity's civil order, wrongful, which is also to argue that we have reason to call those who engage in it to formal, public, censorial (and potentially punitive) account.¹⁰⁵⁷

Bogg and Freedland suggest that one of the purposes of the collection is to try to answer the following queries:

should we identify the category of 'labour wrongs as public wrongs' as a basis for reasonable legislative choices to criminalize labour wrongs? And on what basis should we opt for criminal law rather than private law, statutory rights enforced in the civil courts and tribunals, or professional regulation.¹⁰⁵⁸

Bogg and Freedland suggest that from the perspective of labour lawyers, public wrong justifications for criminalisation should be aligned with traditional labour law goals, such as protecting workers.¹⁰⁵⁹ Throughout this thesis, I have contemplated how the justifications to criminalise wage theft are connected to the broader labour law goals because the motivations for criminalising wage theft have been heavily tied to the labour movement.

Consistent with Green, Duff argues that where a 'public wrong' is identified, 'criminalization is *an* appropriate response to a public wrong, not that it is *the* appropriate response'.¹⁰⁶⁰ Instead, it is necessary to evaluate options for a response. Drawing on Duff's explanation of available responses, Bogg and Freedland explain, '[e]ven then, having identified that the wrong is public in this sense of engaging the polity's civil order, there are other ways in which the polity might respond: do nothing; restorative justice; non-governmental codes; non-criminal regulation; private law; preventive measures'.¹⁰⁶¹

Bogg and Freedland frame the question of when to criminalise behaviour in a similar way to the Green's five questions that I quoted in Section 9.2.1. They observe that

the legislator must have good reason to respond through the modalities of the criminal law, which involves a specific kind of public response: one that involves an authoritative determination of guilt, the public calling of an offender to account, public censoring of the wrongdoing, and the imposition of punishment. This does not provide

¹⁰⁵⁷ Duff, *Realm of Criminal Law* (n 30) 333, quoted in Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 10.

¹⁰⁵⁸ Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 31–2.

¹⁰⁵⁹ Ibid 30. Rosado Marzán, 'Better Matches' (n 55) 312.

¹⁰⁶⁰ Duff, *Realm of Criminal Law* (n 30) 297.

¹⁰⁶¹ Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 10, citing Duff, *Realm of Criminal Law* (n 30) 280–92.

a scientific formula through which decisions on criminalization can be cranked out mechanistically. Its application requires judgement and political deliberation.¹⁰⁶²

Throughout the thesis, I have been mindful of the fact that the offences were motivated by attempts to rectify a problem arising between employers and their employees fell acutely within the public consciousness owing to high-profile scandals, as outlined in Chapter 2. Thus, I have contemplated the extent to which the offences match the goals of labour intervention. The edited collection, *Criminality at Work*, tracks the suitability of the criminal law in different labour law contexts. This law has specialised purposes connected to punishment and censuring that may not always meet the broader objectives of labour law interventions, which may be more instrumental in nature. The criminal law has not until recently been used readily in a labour law space, and such use does not always match the goals of criminal law. The edited collection attempts to address the suitability of the recent influx of criminal laws in territories traditionally reserved to labour law, and in doing so, seeks to understand better the appropriate boundaries for intervention.

Minimum standard obligations extend beyond merely agreeing to pay for a service and include societal values, such as protecting the labour rights of employees around pay and conditions, to help promote concepts such as dignity at work and provide a protective framework.¹⁰⁶³ Given this social value aspect, the purposes of minimum wage protections and other minimum standards are necessary context to understand the criminalisation project that occurs for wage underpayments and connected standards relating to pay and hour regulation.

To justify the criminalisation of underpayments, it is essential to move away from viewing underpayments as a general part of doing business or an expected norm in an industry. The advocacy relating to criminalising wage theft has connected the conduct to stealing from the till, which has traditionally been treated as a possible crime unlike delayed payment. To enact laws that reflect this shift successfully, there needs to be awareness of subject matter limits and framing to ensure that only those who are culpable are caught. The *Wage Theft Act* has not achieved this objective, because of statutory ambiguity. Refining the subject matter to more readily reflect the goals of labour law may

¹⁰⁶² Bogg and Freedland, 'Criminality at Work: A Framework' (n 53) 16.

¹⁰⁶³ See discussion of labour law goals in Section 1.2.3.

assist in rectifying the challenges that emerge from the Victorian *Wage Theft Act* for other jurisdictions with criminal wage theft offences.

In the *Criminality at Work* collection, David Cabrelli examines the interaction between the criminal law and labour law to enforce statutory rights.¹⁰⁶⁴ Cabrelli states that in relation to minimum wage controls, the following considerations could apply to justify criminal intervention:

If a society places weight on the dignity of workers and the capacity of wage controls to generate redistributive results, there is a strong case to be made for the proposition that a polity's values will be breached where the earning capacity of some of the workforce is squeezed by the employer so that they struggle to meet their basic needs. In such a context, the deprivation of a wage floor would strike at the society's shared values and be wrongful.¹⁰⁶⁵

The Victorian *Wage Theft Act* shares similar characteristics as it captures minimum wage entitlements, which includes the safety net of a wage floor that varies for different categories of workers, depending on the source of entitlement: statute or a workplace instrument, but also regulates other related conditions. However, the offences also cover other agreements to pay employees above those minimum standards. Labour law protections typically focus on a floor of protections rather than create additional remedies for higher-paid individuals. Criminalising any type of wage underpayment including well above minimum entitlements owed in workplace laws and instruments is not of the same category as the other types of protections that labour law seeks to protect. These labour law principles and justifications have influenced my interpretation of the offences, as I consider the labour law rationales to be entwined with the choices made by legislators to enact criminal laws in this context.

9.4 Conclusion

The decision to criminalise wage theft marks a significant shift in approach to regulating non-compliance with minimum labour standards in Australia. At the time of commencing my doctorate, there were no criminal offences expressly targeting wage theft on the statute books in Australia. The calls to criminalise wage theft that were beginning to

¹⁰⁶⁴ David Cabrelli, 'Using Criminal Law to Enforce Statutory Employment Rights' in Alan Bogg et al (eds), *Criminality at Work* (Oxford University Press, 2020) 53.

¹⁰⁶⁵ Ibid 60.

rumble in 2018 led to legislative changes, first in Victoria, then Queensland before the enactment of criminal sanctions in the *Fair Work Act* in December 2023.

The Victorian offences demonstrate that achieving policy goals to distinguish behaviour by introducing criminal sanctions may not always result in the successful demarcation of subject matter. Wage theft itself is a murky concept because despite attempts to distinguish deliberate underpayments from reckless or unintentional underpayments, the distinctions are blurry in practice. The criminal law itself is not always the best mechanism for addressing problems. As discussed in Chapter 8, refining the subject matter limits to be more clearly connected to labour law rationales would go some way to clarifying the offences and to better target offending that could be regarded as a ‘public wrong’.

The Victorian wage theft offences have now been repealed. My thesis examining the Victorian wage theft offences offers a proof of concept for analysing newly enacted criminal offences using Green’s framework.¹⁰⁶⁶ I enlist Green’s framework to examine what is being criminalised, and assess, from a moral perspective, the degree to which the offences capture types of offending that ‘deserve’ criminal sanctioning. This approach offers a valuable way to analyse whether newly enacted offences indeed amount to ‘public wrongs’ and are a good fit for a criminal law response, rather than one rooted in the civil law. I consider this is an important step that has been missing from much of the discussion in Australia so far.

An avenue for future research would be to apply Green’s framework to the newly enacted federal criminal offences to consider the extent to which those offences capture subject matter that suggests a moral basis for criminal intervention. The same method adopted in this thesis would enable a thorough examination to assess who is a federal wage thief caught by the s 327A criminal offence in the *Fair Work Act*. After this analysis is complete, it could lead to an additional project of comparing the drafting of the Victorian offences with the federal offence to propose a model offence structure that more successfully captures moral wrongfulness.

Section 327A(1) provides that:

An employer commits an offence if:

¹⁰⁶⁶ See also discussion in Section 2.4.

- (a) the employer is required to pay an amount (a required amount) to, on behalf of, or for the benefit of, an employee under:
- (i) this Act; or
 - (ii) a fair work instrument; or
 - (iii) a transitional instrument (as continued in existence by Schedule 3 to the Transitional Act); and
- (b) the required amount is not an amount covered by subsection (2); and
- (c) the employer engages in conduct; and
- (d) the conduct results in a failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

To understand the offence, I would need to work through the same kind of statutory questions I undertook in Chapter 3 to unpack the offence. The offence includes unusual elements for a criminal offence by reference to the ‘required amount’ under laws.¹⁰⁶⁷ The Explanatory Memorandum states that the new criminal offence relates to ‘intentional conduct’.¹⁰⁶⁸ However, it is unclear the extent to which the offence achieves this objective of only capturing intentional conduct.¹⁰⁶⁹ A quirk in the *Commonwealth Criminal Code* is that ‘engage in conduct’ includes an omission.¹⁰⁷⁰ But as with my discussion of the s 6 wage theft offence, there needs to be a legal duty to do the thing that was not done. The offence refers to the fault elements set out in general principles in *Commonwealth Criminal Code*. The offence expressly applies intent to s 327A(1)(c)–(d) and absolute liability to s 327A(1)(a)–(b). Section 5.2(3) of the *Criminal Code* defines intention when applied to results as ‘[a] person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events’. When applied to s 327A(1)(d) this raises issues as to what kind of knowledge would be required to demonstrate that a person knew that the ‘failure to pay the required amount’ would occur in the ordinary course of events. These issues will need to be considered closely to map the offence as a first step, before Green’s framework could be applied to compare findings.

¹⁰⁶⁷ For a recent article on this offence, see Hardy, ‘A New Dawn for Deterrence’ (n 19).

¹⁰⁶⁸ Explanatory Memorandum, Fair Work Act Legislation Amendment (Closing Loopholes) Bill 2023, 8.

¹⁰⁶⁹ For a helpful social media discussion of the potential ambiguities with the federal wage theft offences, see @jeremy_gans (Jeremy Gans) (X, 4 January 2025, 1:02PM AEST) <https://x.com/jeremy_gans/status/1875362156008645059>.

¹⁰⁷⁰ *Commonwealth Criminal Code* s 4.1(2) (definition of ‘engage in conduct’).

The newly enacted federal wage theft offence is quite different to the kind of elements that are generally present in a fraud-like offence. For one, it does not include dishonesty to shape the offence as a way of distinguishing a deliberate failure to pay on time from deferred payments due to extenuating circumstances such as a cash flow issue. I would need to assess the degree to which this changes my analysis. I consider it likely that my analysis of the norm against cheating will have less success in accounting for the federal offence, as the dishonesty element helped complete the cheating analysis for the Victorian offences. This may result in the federal offence lacking some of the features that provided the moral justification for the adoption of the criminal law that were present for the Victorian offences. I consider this analysis is important to assess whether the enacted federal wage theft achieves their objective to distinguish ‘criminal’ wage theft from the kinds of contraventions that fit the definitional elements to be regarded as ‘serious contraventions’ of the *Fair Work Act*. My preliminary assessment is that the Victorian offences are more successful at capturing moral wrongfulness than the newly enacted s 327A federal offences.

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Appendix A:
Extract from *Wage Theft Act 2020* (Vic)

Authorised Version No. 003

Wage Theft Act 2020

No. 21 of 2020

Authorised Version incorporating amendments as at
10 February 2025

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Authorised Version No. 003

Wage Theft Act 2020

No. 21 of 2020

Authorised Version incorporating amendments as at
10 February 2025

The Parliament of Victoria enacts:

Part 1—Preliminary

1 Purposes

The purposes of this Act are—

- (a) to create offences relating to the theft of employee entitlements and the keeping of records relating to employee entitlements; and
- (b) to establish the Wage Inspectorate Victoria; and
- (c) to provide for the functions and powers of the Wage Inspectorate Victoria in relation to investigating and enforcing employee entitlement offences and related matters; and
- (d) to make consequential amendments of other Acts.

2 Commencement

- (1) Subject to subsection (2), this Act comes into operation on a day or days to be proclaimed.
- (2) If a provision of this Act does not come into operation before 1 July 2021, it comes into operation on that day.

3 Definitions

(1) In this Act—

associate, in relation to a body corporate, means an employee or agent of the body corporate to the extent that the person is acting within the actual or apparent scope of the person's employment or within the person's actual or apparent authority;

board of directors, in relation to a body corporate, means the body (by whatever name called) exercising the executive authority of the body corporate;

Commissioner means the Commissioner of the Wage Inspectorate Victoria appointed under section 25(2);

corporate culture, in relation to an employer that is not a natural person, means an attitude, policy, rule, course of conduct or practice existing within the employer generally or in the part of the employer in which the relevant conduct is carried out or the relevant intention is formed;

employee, in relation to an employer, means a person who is or has been employed by the employer;

employee entitlement means an amount payable by an employer to or in respect of an employee, or any other benefit payable or attributable by an employer to or in respect of an employee, including wages or salary, allowances and gratuities, and the attribution of annual leave, long service leave, meal breaks and superannuation—

(a) in accordance with the relevant laws, contracts and agreements; or

- (b) if the amount or benefit under a contract or agreement is less than the minimum amount or benefit required under the relevant laws, in accordance with the relevant laws; or
- (c) if the amount or benefit under a contract or agreement is more than the minimum amount or benefit required under the relevant laws, in accordance with the contract or agreement that applies to the employee;

employee entitlement offence means—

- (a) an offence against section 6(1), 6(7), 7(1), 7(2), 8(1) or 8(2); or
- (b) an offence against section 321, 321G or 321M of the **Crimes Act 1958** in relation to an offence referred to in paragraph (a); or
- (c) an offence against section 257(1) of the **Crimes Act 1958** in relation to a criminal investigation of, or criminal proceeding for—
 - (i) an offence referred to in paragraph (a); or
 - (ii) an offence referred to in paragraph (b);

employee entitlement record means a record of an employee entitlement;

employer means a natural person, body corporate, partnership, unincorporated association or other entity that employs or has employed another person;

inspector means an inspector appointed under section 33;

S. 3(1) def. of
*Integrity
Oversight
Victoria*
inserted by
No. 31/2024
s. 113(Sch. 1
item 42.1(a)).

Integrity Oversight Victoria has the same meaning as in the **Integrity Oversight Victoria Act 2011**;

Office of Public Prosecutions means the Office of Public Prosecutions established under the **Public Prosecutions Act 1994**;

officer—

- (a) in relation to a body corporate that is a corporation within the meaning of the Corporations Act, means an officer of the corporation within the meaning of section 9 of that Act; or
- (b) in relation to an entity that is neither a natural person nor a corporation, means—
 - (i) if the entity is a body corporate that is not a corporation within the meaning of the Corporations Act, a member of the board of directors of the body corporate; or
 - (ii) if the entity is a partnership (other than a partnership that is incorporated or is otherwise a separate legal entity), a partner in the partnership; or
 - (iii) if the entity is an unincorporated association, an office holder of the unincorporated association; or
 - (iv) a person who makes, or participates in making, decisions that affect the whole, or a substantial part, of the business of the entity; or

- (v) a person who has the capacity to affect significantly the entity's financial standing;

privilege means—

- (a) any privilege that a person is entitled to claim in any proceedings before a court or tribunal, other than the privilege provided for in Division 1C of Part 3.10 of the **Evidence Act 2008**; or
- (b) public interest immunity;

registered office, in relation to a body corporate, has the meaning given by section 9 of the Corporations Act;

undertaking means an undertaking under section 63;

* * * * *

S. 3(1) def. of *Victorian Inspectorate* repealed by No. 31/2024 s. 113(Sch. 1 item 42.1(b)).

Wage Inspectorate Victoria means the Wage Inspectorate Victoria established under section 19;

withhold means fail to pay, distribute or attribute or otherwise deprive, whether directly or indirectly, and includes—

- (a) fail to pay, distribute or attribute to a third party; and
- (b) make an unlawful deduction or require the payment of an unlawful fee or other charge; and
- (c) require the payment of an amount to the employer from the employee entitlements;

workplace includes residential premises where work is carried out, but does not include a part of any premises that is the domestic home of a person.

- (2) For the purposes of this Act—
- (a) the following persons are taken to be employed by the Crown under a contract of service—
 - (i) a police officer within the meaning of the **Victoria Police Act 2013**;
 - (ii) a police reservist within the meaning of the **Victoria Police Act 2013**;
 - (iii) a protective services officer within the meaning of the **Victoria Police Act 2013**; and
 - (b) despite any rule of law to the contrary, the contract of service and the relationship of employer and employee is to be taken to exist between the Crown and each of those persons in respect of the performance of the duties and exercise of the powers as such a person (whether arising at common law, under statute, by the instructions of superiors or otherwise).
- (3) For the purposes of this Act, a reference to the owner or occupier of premises includes a reference to the following—
- (a) a person authorised by the owner or occupier to receive correspondence directed to the owner or occupier;
 - (b) a person who apparently represents the owner or occupier.

4 Act binds the Crown

- (1) This Act binds the Crown—
 - (a) in right of the State of Victoria; and
 - (b) to the extent that the legislative power of the Parliament permits, in all its other capacities.
- (2) To avoid doubt, the Crown is a body corporate for the purposes of this Act.

5 Application of Act

- (1) This Act applies to employee entitlements that are paid, payable or attributable by an employer for or in relation to services that are performed by an employee—
 - (a) wholly in Victoria; or
 - (b) in 2 or more Australian jurisdictions, or partly in one or more Australian jurisdictions and partly outside Australia if—
 - (i) the employee is based in Victoria; or
 - (ii) the employer is based in Victoria and the employee is based outside Australia; or
 - (iii) the employee entitlements are paid, payable or attributable in Victoria and both the employer and the employee are based outside Australia; or
 - (iv) the employee entitlements are paid, payable or attributable in an Australian jurisdiction for services performed mainly in Victoria and both the employer and the employee are based outside Australia; or
 - (c) wholly outside Australia if the employee entitlements are paid, payable or attributable in Victoria.

(2) In subsection (1)—

Australian jurisdiction means an Australian State or a Territory.

(3) This Act applies to employee entitlements irrespective of when the entitlements accrue or have accrued.

Part 2—Wage theft offences

6 Dishonest withholding of employee entitlements

- (1) An employer must not dishonestly—
- (a) withhold the whole or part of an employee entitlement owed by the employer to an 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 an employee and that other person does so.

Penalty: In the case of a body corporate,
6000 penalty units;
In any other case, level 5 imprisonment
(10 years maximum).

- (2) In determining whether a withholding is dishonest under subsection (1), consent by or on behalf of the employee to the withholding is irrelevant if the withholding reduces the employee entitlement to less than the minimum amount or benefit required under the relevant laws.
- (3) For the purposes of subsection (1)(b), the means by which authorisation or permission may be established include any of the following—
- (a) proving that the employer or an officer of the employer gave that authorisation or permission, whether expressly or impliedly;
 - (b) in the case of an employer that is a body corporate, proving that the employer's board of directors gave that authorisation or permission, whether expressly or impliedly;

- (c) in the case of an employer that is not a natural person, proving that a corporate culture existed within the employer that directed, encouraged, tolerated or led to the relevant conduct being carried out.
 - (4) Subsection (3)(a) does not apply if the employer proves that it exercised due diligence to prevent the authorisation or permission being given.
 - (5) It is a defence to a charge for an offence against subsection (1) if the employer proves that, before the alleged offence, the employer had exercised due diligence to pay or attribute the employee entitlements to the employee.
 - (6) For the purposes of subsection (5), evidence that the employer failed to comply with a requirement of a regulator is evidence that the employer had not taken all reasonable steps to pay or attribute the employee entitlements to the employee.
 - (7) An officer of an employer must not dishonestly—
 - (a) withhold the whole or part of an employee entitlement owed by the employer to an 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 an employee and that other person does so.
- Penalty: Level 5 imprisonment (10 years maximum).
- (8) In determining whether a withholding is dishonest under subsection (7), consent by or on behalf of the employee to the withholding is irrelevant if the withholding reduces the employee entitlement to less than the minimum amount or benefit required under the relevant laws.

- (9) For the purposes of subsection (7)(b), the means by which authorisation or permission may be established include proving that the officer directed, encouraged or tolerated the relevant conduct being carried out.
- (10) It is a defence to a charge for an offence against subsection (7) if the officer proves that, before the alleged offence, the officer had exercised due diligence to pay or attribute the employee entitlements to the employee.
- (11) In this section—
dishonest means dishonest according to the standards of a reasonable person.

Note

See section 11 for attribution to a body corporate of physical and fault elements of the offence.

7 Falsification of employee entitlement record

- (1) An employer must not falsify, or expressly or impliedly authorise or permit another person to falsify, an employee entitlement record in respect of an employee with a view to dishonestly—
- (a) obtaining a financial advantage for the employer or another person; or
 - (b) preventing the exposure of a financial advantage obtained by the employer or another person.

Penalty: In the case of a body corporate,
6000 penalty units;
In any other case, level 5 imprisonment
(10 years maximum).

- (2) An officer of an employer must not falsify, or expressly or impliedly authorise or permit another person to falsify, an employee entitlement record

in respect of an employee with a view to dishonestly—

- (a) obtaining a financial advantage for the employer or another person; or
- (b) preventing the exposure of a financial advantage obtained by the employer or another person.

Penalty: Level 5 imprisonment (10 years maximum).

- (3) In determining whether the obtaining of a financial advantage is dishonest, consent by or on behalf of the employee to a reduction of the employee's entitlement is irrelevant if the employee entitlement so reduced is less than the minimum amount or benefit required under the relevant laws.
- (4) For the purposes of subsection (1), the means by which authorisation or permission may be established include any of the following—
 - (a) proving that the employer or an officer of the employer gave that authorisation or permission, whether expressly or impliedly;
 - (b) in the case of an employer that is a body corporate, proving that the employer's board of directors gave that authorisation or permission, whether expressly or impliedly;
 - (c) in the case of an employer other than a natural person, proving that a corporate culture existed within the employer that directed, encouraged, tolerated or led to the relevant conduct being carried out.
- (5) Subsection (4)(a) does not apply if the employer proves that it exercised due diligence to prevent the authorisation or permission being given.

(6) For the purposes of subsection (2), the means by which authorisation or permission may be established include proving that the officer directed, encouraged or tolerated the relevant conduct being carried out.

(7) In this section—

dishonest means dishonest according to the standards of a reasonable person;

falsify, in relation to a record, includes—

- (a) produce or make a record that is misleading, false or deceptive in a material particular; and
- (b) copy a record that is misleading, false or deceptive in a material particular; and
- (c) alter a record in such a way that causes the record to be misleading, false or deceptive in a material particular; and
- (d) provide information that causes a record to be misleading, false or deceptive in a material particular.

Note

See section 11 for attribution to a body corporate of physical and fault elements of the offence.

8 Failure to keep employee entitlement record

(1) An employer must not fail to keep, or expressly or impliedly authorise or permit another person to fail to keep, an employee entitlement record in respect of an employee with a view to dishonestly—

- (a) obtaining a financial advantage for the employer or another person; or

(b) preventing the exposure of a financial advantage obtained by the employer or another person.

Penalty: In the case of a body corporate,
6000 penalty units;

In any other case, level 5 imprisonment
(10 years maximum).

(2) An officer of an employer must not fail to keep, or expressly or impliedly authorise or permit another person to fail to keep, an employee entitlement record in respect of an employee with a view to dishonestly—

(a) obtaining a financial advantage for the employer or another person; or

(b) preventing the exposure of a financial advantage obtained by the employer or another person.

Penalty: Level 5 imprisonment (10 years
maximum).

(3) In determining whether the obtaining of a financial advantage is dishonest, consent of the employee to a reduction of the employee's entitlement is irrelevant if the employee entitlement so reduced is less than the minimum amount or benefit required under the relevant laws.

(4) For the purposes of subsection (1), the means by which authorisation or permission may be established include any of the following—

(a) proving that the employer or an officer of the employer gave that authorisation or permission, whether expressly or impliedly;

- (b) in the case of an employer that is a body corporate, proving that the employer's board of directors gave that authorisation or permission, whether expressly or impliedly;
 - (c) in the case of an employer other than a natural person, proving that a corporate culture existed within the employer that directed, encouraged, tolerated or led to the relevant conduct being carried out.
- (5) Subsection (4)(a) does not apply if the employer proves that it exercised due diligence to prevent the authorisation or permission being given.
- (6) For the purposes of subsection (2), the means by which authorisation or permission may be established include proving that the officer directed, encouraged or tolerated the relevant conduct being carried out.
- (7) In this section—
- dishonest* means dishonest according to the standards of a reasonable person;
- fail to keep* a record includes—
- (a) not make a record; and
 - (b) destroy, deface or conceal a record.

Note

See section 11 for attribution to a body corporate of physical and fault elements of the offence.

9 Complicity in commission of offence

Subdivision (1) of Division 1 of Part II of the **Crimes Act 1958** does not apply to a person who—

- (a) acts under the direction of the employer; and
- (b) is not an officer of the employer.

10 Body corporate liability for offence by officer

- (1) If an officer of a body corporate commits an employee entitlement offence, the body corporate must be taken to have also committed the offence and may be prosecuted and found guilty of the offence, whether or not the officer has been prosecuted for or found guilty of the offence.
- (2) In a prosecution of a body corporate for an employee entitlement offence brought in reliance on subsection (1), it is a defence to the charge for the body corporate to prove that it exercised due diligence to prevent the commission of the offence by the officer.

11 Attribution to body corporate of conduct, knowledge, intention and belief of officers and associates

- (1) For the purposes of a proceeding against a body corporate for an employee entitlement offence—
 - (a) relevant conduct engaged in by an officer of the body corporate to the extent that the officer is acting within the actual or apparent scope of the officer's employment or within the officer's actual or apparent authority must also be attributed to the body corporate; and
 - (b) knowledge or intention of, or a belief held by, any of the following must also be attributed to the body corporate—
 - (i) the board of directors of the body corporate;
 - (ii) an officer of the body corporate.
- (2) For the purposes of a proceeding against a body corporate for an employee entitlement offence—
 - (a) relevant conduct engaged in by an associate of the body corporate must also be attributed to the body corporate if—

- (i) an officer of the body corporate or the board of directors of the body corporate authorised or permitted the relevant conduct to be carried out, whether expressly or impliedly; or
 - (ii) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the relevant conduct being carried out; and
- (b) knowledge or intention of, or a belief held by, an associate of the body corporate must also be attributed to the body corporate if a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to the acquisition of the knowledge or the formation of that intention or belief.
- (3) It is not necessary that each element of an employee entitlement offence that is attributed to a body corporate by force of this section be supplied by the same officer or associate of the body corporate.
- (4) In this section—
engage in conduct includes fail or refuse to engage in conduct.

12 Factors relevant to corporate culture in body corporate

Factors relevant to the issue of whether a corporate culture existed within a body corporate include the following—

- (a) whether authority to commit the offence charged or an offence of a similar character had been given by an officer of the body corporate;

- (b) whether the associate of the body corporate who carried out the relevant conduct or formed the relevant intention believed on reasonable grounds, or entertained a reasonable expectation, that an officer of the body corporate would have authorised or permitted the relevant conduct being carried out with the relevant intention.

13 Officers' liability for employee entitlement offence

- (1) If a body corporate commits an employee entitlement offence, 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, whether or not the body corporate has been prosecuted for or found guilty of the offence.
- (2) In a prosecution of an officer of a body corporate for an employee entitlement offence brought in reliance on subsection (1), it is a defence to the charge for the officer to prove that the officer exercised due diligence to prevent the commission of the offence by the body corporate.
- (3) If an officer of a body corporate is convicted of an employee entitlement offence and, but for this section, the officer would not have been convicted of the offence, the officer is not liable to be sentenced to imprisonment for that offence.

14 Offences by partnerships and partners

- (1) If this Act provides that an employer that is a partnership commits an employee entitlement offence, the reference to the employer is to be read as a reference to—
 - (a) each partner in the partnership; or
 - (b) in the case of a partnership in which any partner has under the law of the place where it is formed limited liability for the liabilities

of the partnership, each partner in the partnership whose liability is not so limited.

- (2) If an employer who is a partner in a partnership commits an employee entitlement offence (other than because of subsection (1)) in the course of the activities of the partnership, the following also commit the employee entitlement offence—
 - (a) each other partner in the partnership;
 - (b) in the case of a partnership in which any partner has under the law of the place where it is formed limited liability for the liabilities of the partnership, each other partner in the partnership whose liability is not so limited.
- (3) It is a defence to a charge for an offence against a partner for the partner to prove that the partner exercised due diligence to avoid the commission of the offence.
- (4) If a partner is convicted of an employee entitlement offence and, but for this section, the partner would not have been convicted of the offence, the partner is not liable to be sentenced to imprisonment for that offence.
- (5) This section does not apply in relation to a partnership that is incorporated or is otherwise a separate legal entity.

15 Offences by unincorporated associations

- (1) If this Act provides that an employer that is an unincorporated association commits an employee entitlement offence, the reference to the employer is to be read as a reference to each member of the committee of management of the association.
- (2) If a person who is an officer of an unincorporated association commits an employee entitlement offence in the course of the activities of the

unincorporated association, each other officer at the time of the commission of the offence also commits the offence.

- (3) It is a defence to a charge brought under subsection (1) or (2) if the person charged proves that the person exercised due diligence to avoid the commission of the offence.
- (4) If a person is convicted of an employee entitlement offence and, but for this section, the person would not have been convicted of the offence, the person is not liable to be sentenced to imprisonment for that offence.

16 Responsible agency for the Crown

- (1) If a proceeding is brought against the Crown for an employee entitlement offence, the responsible agency in respect of the offence may be specified in any document commencing or relating to the proceeding.
- (2) The responsible agency in respect of an employee entitlement offence is entitled to act in a proceeding against the Crown for the offence and, subject to any relevant rules of court, the procedural rights and obligations of the Crown as the accused in the proceeding are conferred or imposed on the responsible agency.
- (3) The person prosecuting the offence may change the responsible agency during the proceeding with the leave of the court.
- (4) In this section—

responsible agency in respect of an offence means the agency of the Crown—

 - (a) whose acts or omissions are alleged to constitute the offence; or
 - (b) if that agency has ceased to exist, that is the successor of that agency; or

- (c) if that agency has ceased to exist and there is no clear successor, that the court declares to be the responsible agency.

17 Proceedings against successors to public bodies

- (1) A proceeding for an employee entitlement offence that was commenced against a public body before its dissolution, or that could have been commenced against a public body if not for its dissolution, may be continued or commenced against its successor if the successor is a public body.
- (2) In this section—

public body means—

- (a) a body corporate representing the Crown; or
- (b) a State owned enterprise or reorganising body (within the meaning of the **State Owned Enterprises Act 1992**); or
- (c) a Council (within the meaning of the **Local Government Act 2020**); or
- (d) a public entity (within the meaning of the **Public Administration Act 2004**).

18 Maximum fine for body corporate for indictable offence heard and determined summarily

If a body corporate is found guilty by the Magistrates' Court in a summary hearing of an offence against section 6(1), 7(1) or 8(1), the maximum fine that the court may impose on the body corporate for the offence is 2500 penalty units.