

Submission to the EDUCATION AND WORKFORCE SELECT COMMITTEE on the:

Crimes (Theft by Employer) Amendment Bill

Submitted by the New Zealand Council of Trade Unions Te Kauae Kaimahi

12 October 2023

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This submission is made on behalf of the 31 unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 340,000 union members, the CTU is one of the largest democratic organisations in New Zealand.

The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga), the Māori arm of Te Kauae Kaimahi (CTU), which represents approximately 60,000 Māori workers.

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1. Executive summary

- 1.1. This submission is made on behalf of the unions affiliated to the New Zealand Council of Trade Unions Te Kauae Kaimahi (CTU). With over 300,000 members, the CTU is one of the largest democratic organisations in New Zealand.
- 1.2. The CTU acknowledges Te Tiriti o Waitangi as the founding document of Aotearoa New Zealand and formally acknowledges this through Te Rūnanga o Ngā Kaimahi Māori o Aotearoa (Te Rūnanga) the Māori arm of Te Kauae Kaimahi (CTU) which represents approximately 60,000 Māori workers.
- 1.3. The CTU welcomes the opportunity to submit before the Select Committee on the **Crimes (Theft by Employer) Amendment Bill** (the Bill). This proposed legislation is long overdue, it recognises that working people have a natural and indefeasible right to ownership of their wages and minimum entitlements and provides the necessary tools to protect that right.

2. Introduction

- 2.1. The CTU emphatically supports the ‘Crimes (Theft by Employer) Amendment Bill’.
- 2.2. The crime of theft is among the most basic and understandable concepts in criminal law. It is so ubiquitous and ingrained in the public consciousness that even those who are totally untrained in the law are perfectly competent to identify it and articulate its basic elements.
- 2.3. In essence, the crime of theft occurs wherever one person intentionally deprives another of their property, without lawful justification.¹
- 2.4. Most people have a basic idea that ‘theft is theft’, a notion that is strongly linked to the belief that everyone is equal before the law, and every person’s fundamental rights will be treated equally before the law.
- 2.5. If the law valued the property rights of one class of people above another, that would reveal a deep seated and unjustifiable inequality.

¹ Crimes Act 1961, s 219- Provides a basic definition of theft in modern law.

- 2.6. The vast majority of people in Aotearoa New Zealand do not accept that this is the sort of society that we want to live in.
- 2.7. Yet the absence of effective law to criminalise the theft of wages and other monies owed to workers reflects a serious double standard. One where a worker may be punished for stealing from their employer,² but where an employer does not face the same sanction for depriving workers of what they are entitled to own and possess.
- 2.8. Historically, criminal, and common law have recognised a concept of ‘theft as a servant’ which describes situations where workers steal from their employers³.
- 2.9. The term is no longer fashionable as it highlights the servility that has been historically imposed on working people. Yet, despite the change in terminology, elements of this historic servility are still (regrettably) preserved in the disparity between how the law treats theft by employers against theft by workers in the context of employment relationships.
- 2.10. While the law clearly criminalises, theft committed by workers against their employers, the same legal accountability is not accorded to instances where employers unlawfully take from workers the wages and monies that they are entitled to.
- 2.11. Workers are frequently held criminally accountable for actions of theft against their employers. As noted by the Honourable Camilla Belich in her speech to Parliament supporting this Bill,⁴ the police are often the first port of call for employers who seek retribution against workers for actions of theft.
- 2.12. On top of the criminal sanction, employers can avail themselves of extensive civil remedies to address theft by their employees. Such actions may include summary

² Ibid, s 227 (b)(ii) (repealed on 1 October 2003 by Crimes Amendment Act)- codification in statute of the crime of ‘theft by servant’ and provided for a maximum penalty of 7 years.

³ Ibid, s 220

⁴ (30 August 2023) 771 NZPD:

‘...this bill is extremely necessary to right a wrong, really, within our system. At the moment, if you are employed by someone and that employer doesn't pay you money intentionally—what would commonly be understood as theft—then there are no repercussions for that employer apart from civil remedies. That is not acceptable. If employees steal from their employer—and that's what we're talking about—the first thing that employers do is go to the police, and that employee suffers the full force of the law if they are found guilty for that offence. There is no justification for having a different rule apply to employers than it does to employees. It's not right, and this bill will make it right.’ [Camilla Belich]

dismissal,⁵ proceedings in the Employment Relations Authority⁶ and even claims based in tort.⁷

- 2.13. Additionally, an act of theft by an employee is viewed as a severe and typically irreparable breach of a worker's duties to act in a manner consistent with 'good faith' and 'fidelity' towards their employer.⁸
- 2.14. The consequences for theft by workers are severely treated by both criminal and civil jurisdictions. Workers who commit theft face financial penalties, the possible loss of liberty and lifelong reputational damage.
- 2.15. Yet holding employers accountable for theft against workers is limited to civil action that can only be taken at the workers' expense.
- 2.16. Indeed, for many working people, the cost and risk associated with civil litigation prevents many culpable employers from experiencing any kind of legal sanction.
- 2.17. The disparity in how the law treats employers who steal from their workers, against how it treats employees who behave in the same way is not justifiable. There is no public policy justification for coddling employers who commit intentional acts of theft against their workers.

⁵ *Hosegood v Head Auto Wreckers Ltd* BC201064407 – The Employment Relations Authority summarises the well-established common law principle that any substantiated theft by an employee can justify dismissal, even if the value of the goods/monies stolen is insignificant:

'There is no doubt that an employer can justifiably dismiss an employee who steals money or goods from it, even if the value of those goods is not significant. No employer can be expected to keep on an employee who it cannot trust because he or she has stolen from his or her employer.' [23]

⁶ Employers who mistakenly overpay workers may reclaim the value of the overpayment on the grounds of 'unjust enrichment' as expressed by the Authority at *Gold Star Training Ltd v Tua* [2022] NZERA 533; BC202263246 where the Employment Relations Authority found that the 'overpaid' employee:

'... was unjustifiably enriched by receiving the benefit of advance payments for piece work that she did not complete. Some of the deficiencies and compliance issues were so blatant that [the employee], as an experienced and qualified Assessor, should have known the assessments she submitted were non-compliant with NZQA requirements.' [129]

⁷ An employer may pursue a tort action for theft (for example the tort of 'conversion') through the High Court.

⁸ In addition to acting in 'good faith' (which is a reciprocal duty), employees are required to act with 'fidelity' towards their employers. Failing to act with 'fidelity' may justify dismissal. Fidelity encompasses an obligation not to act 'fraudulently' or 'dishonestly' towards employers, but also has broader implications– *Caffe Coffee (NZ) Ltd v Farrimond* (2016) 14 NZELR 933:

'...as the Court of Appeal made clear in Big Save Furniture Ltd v Bridge, a duty of fidelity is not breached only when an employee acts fraudulently or dishonestly. The Court confirmed that the duty of fidelity and loyalty which an employee owes to an employer is broken "when there is conduct which undermines the relationship of trust and confidence which must exist between employer and employee".'[35]

- 2.18. The disparity itself illustrates, quite shamefully, that while we no longer like to refer to workers as ‘servants’, the law still has some archaic features that require employees to accept a subordinate and deferential status in relation to their employers.
- 2.19. Theft against employees is not a ‘lesser crime’ than any theft experienced by an employer. It is time that Parliament addresses this anachronistic and unfair treatment of working people.
- 2.20. Theft by employers has a disproportionate impact on Māori workers. In addition to explicit forms of discrimination, Māori also face significant structural disadvantages that hamper access to justice and, the ability to hold employers accountable. For example, the New Zealand Nurses Association reports that Māori nurses face issues of underfunding that their non-Māori counterparts do not face to the same extent.
- 2.21. The CTU wishes to strongly emphasise the disadvantage of Māori workers in holding employers accountable for theft through the civil jurisdiction, and we say that this adds another dimension to the importance of this Bill.

3. Maximum term of imprisonment

- 3.1. While the Bill criminalises the intentional failure to pay employees the monies they are owed and defines such action as a form of theft, it also establishes considerably lower maximum penalties for ‘theft by employer’ than other forms of theft.
- 3.2. The Bill provides that an employer, who is an individual, will be liable to a term of imprisonment not exceeding a term of 1 year or to a fine not exceeding \$5000 (or both). Whereas if the employer is not a natural person, it will be liable to a fine not exceeding \$30,000.⁹
- 3.3. In comparison, the ordinary crime of theft carries higher maximum penalties, with a prison term of not exceeding 7 years (for theft by a person in a special relationship or if the value of property stolen exceeds \$1000)¹⁰. Even the special category of theft relating to the theft of livestock carries a maximum term of imprisonment of 7 years.¹¹

⁹Crimes (Theft by Employer) Amendment Bill (245-1), cl 4- new section 220AA (2)(a) &(b)

¹⁰ Crimes Act 1961, s 220

¹¹ Ibid, s 220A

- 3.4. Employees facing charges of theft against their employers may be charged with ‘theft by a person in a special relationship’.
- 3.5. A ‘special relationship’ is one where an employee is made accountable to the employer for the employer’s property (or proceeds thereof) or, one that requires an employee to deal with the employer’s property (or its proceeds) in a manner determined by the employer.
- 3.6. As explained at **paragraph 3.3** of this submission, theft by a person in a special relationship is viewed as among the most serious types of theft under the provisions of the Crimes Act 1961.
- 3.7. However, this Bill differentiates ‘employment relationships’ from other types of ‘special relationship’ and provides that thefts committed by employers in the context of employment will incur the least possible penalty.
- 3.8. While defining ‘theft by an employer’ as a crime is a positive step towards affirming the property rights of working people, codifying this crime as having a lesser penalty than what an employee would face if they stole from their employer is at the same time regressive.
- 3.9. **The CTU recommends that the maximum term of imprisonment for ‘theft by an employer’ be expanded to carry a maximum term of imprisonment of 7 years. This would align wage theft with other forms of theft and ensure that culpable employers are held appropriately accountable.**

4. Liability for directors

- 4.1. While the Bill imposes liability on ‘employers’ who commit theft against their employees, it does not extend that liability to the directors who control employers that are corporate entities.
- 4.2. This is a serious omission. In many cases, a director cannot be considered an employer in a strict sense. Workers who are employed by companies are technically employed by the company itself.
- 4.3. The current wording of the Bill would allow a director to avoid liability, even where they are directly responsible for the corporate employer’s ‘act of theft’. They can do so by simply asserting that they are not the employer and cannot be found liable for the crime of ‘theft by employer’.

- 4.4. **The CTU recommends that the Bill include a definition of employer can includes natural persons who control the actions of a corporate entity.**

5. Mens rea

- 5.1. **Proposed section 220AA (2)** provides that ‘theft by employer’ has the *mens rea* (or mental element) of ‘intention’¹².
- 5.2. Theft ordinarily requires the mental element of ‘intention’ in order for the offence to be completed. However, difficulty arises when trying to attribute this ‘mental element’ to corporate entities and other non-natural persons. As artificial persons do not have ‘minds’ in the conventional sense, imputing a mental element to these entities can be challenging.
- 5.3. Traditionally, attributing mens rea to artificial persons has relied on the common law doctrine of ‘identification’¹³, whereby a natural person is identified as holding the culpable mens rea that can be attributed to the culpable artificial personality.
- 5.4. This approach to attributing mens rea has serious limitations. Especially where corporate structures are designed to defuse and obfuscate decision making processes¹⁴. Applying the doctrine of identification can mean that everywhere an individual is pointed, some structural technicality can be relied on to distance that person from the actus reus¹⁵ of the crime.
- 5.5. This does not mean however, that corporations should be excused from being guilty of serious crimes. Corporations can act and do so in ways that have a deliberate and profound impact on human lives.
- 5.6. Moreover, if a corporation can claim legal ‘personhood’ and claim the advantages of acting as a person, it should also be held accountable for any crimes it commits while ‘acting’ in its corporate interests.
- 5.7. However, more effective ways of attributing mens rea to corporate entities and other artificial persons should be utilised if the crime of ‘theft by employer’ is to be effective in targeting the criminal activity of such entities.

¹² Crimes (Theft by Employer) Amendment Bill, cl 4

¹³ Stephanie Bishop “Corporate Manslaughter: Is it New Zealand’s turn to introduce the Crime?” employment law bulletin May 2014

¹⁵ Actus Reus is the physical act of a crime. Along with *mens rea* (the mental element), it is one of the two elements that make up a crime.

- 5.8. **The CTU recommends that the mens rea component of the Bill be expanded to include (in addition to intention) ‘recklessness’ with respect to a legal duty.**
- 5.9. ‘Recklessness’ can and has been attributed to corporations without relying on the doctrine of identification¹⁶. It allows for a corporation to be held responsible for a ‘culture of indifference’, that leads to a criminal action and for that culture to serve as the mental element of the crime.
- 5.10. A recklessness mens rea is easier to attribute to artificial personalities that lack ‘organic minds’ but do possess a sort of ‘systemic mind’ where the corporation acts through the sum of all its internal processes, systems, and individual actors.

6. Models provided by overseas jurisdictions

- 6.1. The crime of theft, by an employer in the context of an employment relationship, has been recognised in other jurisdictions.
- 6.2. The ‘wage theft’ law¹⁷ in Victoria (Australia) provides an example of how theft by an employer is handled in a common law jurisdiction.
- 6.3. Victoria’s wage theft law provides that an employer commits a crime where they:
- deliberately and dishonestly underpay employees
 - deliberately and dishonestly withhold wages, superannuation or other employee entitlements
 - falsify employee entitlement records to gain a financial advantage
 - avoid keeping employee entitlement records to gain a financial advantage.¹⁸
- 6.4. The Victorian law also imposes a punishment of imprisonment for up to 10 years, which is aligned with the maximum term of imprisonment that can be imposed for ordinary forms of theft.
- 6.5. Like the current Bill, the Victorian law also provides for the imposition of a fine. Where the crime is committed by an individual, a fine can be up to \$218,088, whereas for a company, the maximum fine can reach \$1,090,440.

¹⁶ Health and Safety at Work Act 2015, s 47–Offence of reckless conduct in respect of duty

¹⁷ Wage Theft Act 2020 (Victoria- Australia)

¹⁸ <https://www.vic.gov.au/victorias-wage-theft-laws>

- 6.6. In terms of serving as a meaningful deterrent against the crime of theft by an employer, there are several features of the Victorian law that are advantageous.
- 6.7. Firstly, the mens rea component of the Victorian law is ‘deliberate and dishonest’ conduct as opposed to ‘intention’ which is provided for in the current Bill. The version of mens rea provided in the Victorian law is more adaptable and attributable to corporate structures, allowing a corporation to be more easily held accountable for systemic failures.
- 6.8. The Victorian approach highlights the need for a more suitable and slightly expanded form of mens rea in the current Bill as put to the Committee at **paragraph 4.8** of this submission.
- 6.9. Additionally, the Victorian law deters the commission of ‘wage theft’ by imposing meaningfully deterrent punishments on both individual and corporate employers.
- 6.10. As mentioned at paragraph 5.4 of this submission, the Victorian law imposes a maximum term of imprisonment that reflects what the court may impose in any ordinary instance of theft.
- 6.11. The fines imposable under the Victorian law are also much higher than what is provided in the current Bill.¹⁹
- 6.12. For many employers, acts of theft against workers is seen as contributing to profit margins and business efficacy. If such thefts are to be meaningfully punished by way of a fine, the fine must be significant enough to financially harm the culpable party.
- 6.13. For many businesses, particularly very large corporations, smaller fines can be absorbed as ‘operational costs’²⁰ that can be offset by the profitable gains derived from theft.
- 6.14. If this Bill is to be efficacious as a deterrent against the criminal activity of businesses, the financial penalty for committing acts of theft by an employer must undermine the view that the cost of committing the crime can be offset by profits.
- 6.15. **The CTU recommends that the fines imposable by our courts against employers be adjusted to match the maximum fines provided for in the Victorian legislation.**

¹⁹ Ibid, ‘These crimes are punishable by a fine of up to **\$230,772** or up to **10 years**’ jail for individuals and a fine of up to **\$1,153,860** for companies.’

²⁰ Sharan Burrow ‘Scandal: Inside the global supply chains of 50 top companies’ employment Frontline Report of the International Trade Union Conference, 2016- page 6

- 6.16. Victoria also addresses the need for robust, resourced, and effective enforcement mechanisms.
- 6.17. Victoria has an independent ‘Wage Inspectorate’²¹ that has a specialised role in educating the public about their rights and obligations, investigating and prosecuting crimes of wage theft and, responding to reports, complaints and tip-offs about wage theft.
- 6.18. The establishment of such a specialised institution will have tremendous advantages in meeting the objectives of the proposed law.
- 6.19. Not only would such an institution ensure that the existing Labour Inspectorate, with its already considerable workload, will not be overloaded with additional matters. The specialised nature of institution and its ability to bring prosecutions will ensure that the enforcement of the law will not be limited to exceptional or overly egregious cases.
- 6.20. Wage theft is a prevalent and unaddressed social issue. It is essential that any law designed to address it does not simply lie in the books, but that it is capable to realistically addressing the problem.
- 6.21. **The CTU recommends that an independent, resourced and mandated specialised ‘Wage Inspectorate’ be established with similar functions to its counterpart in Victoria.**
- 6.22. The Norwegian example of a ‘wage theft’ law is like the current Bill in that it criminalises the ‘deliberate’ withholding of an employee’s pay, holiday pay or any other allowance as a species of theft.²²
- 6.23. This law also requires the court to consider certain aggravating factors in determining the degree of punishment imposed on a culpable employer.
- 6.24. Factors such as the amount of pay stolen, whether the theft was systematic, organised, socially harmful or grievous all factor in determining punishment.

²¹ <https://www.vic.gov.au/wage-inspectorate-victoria>

²² <https://frifagbevegelse.no/foreign-workers/new-norwegian-law-on-wage-theft-stealing-pay-from-employees-can-now-be-punished-by-a-six-year-prison-sentence-6.539.847256.740db919ad>

‘Ordinary wage theft is now punishable by imprisonment for up to two years, while gross wage theft may result in imprisonment for up to six years.

In assessing whether the wage theft is gross, emphasis will be placed on the amount of pay that has been stolen, whether the theft appears to be systematic or organised or whether for other reasons the offence is especially grievous or socially harmful.’

- 6.25. This approach allows the judiciary to be responsive to the seriousness and social harm of each case. It especially targets instances where wage theft practises are ‘systematised’ or entrenched as a common practise.
- 6.26. **The CTU recommends that the Bill incorporate a requirement for the court to consider factors such as the amount stolen, the systematic or organised nature of the theft and, any social harm or grievous component when carry out sentencing.**

7. Capturing all situations of theft

- 7.1. The Bill covers instances of theft involving any monies that an employer is ‘required’ to pay an individual worker.
- 7.2. That ‘requirement’ must be either in an employment agreement (which may be unwritten or include unwritten terms) or otherwise required by law (for example where a payment is provided for as a statutory minimum entitlement).
- 7.3. In a plain and literal sense, this Bill may not cover instances where an employer steals tips from their employees. Firstly, tips are not ‘required’ or ‘owed’ by employers. They are gifted directly by customers to workers.
- 7.4. Oftentimes, the tips are pooled, or collected all together (for example in a tip jar) and not gifted to any individual. In these circumstances, the tips are left in the custody of the business with the tip-giver holding an assumption that the pooled funds will be distributed fairly.
- 7.5. Employers who contrive policies to deprive workers of their tips or who take pooled tip funds that are left in their care may avoid liability under the Bill. They may also evade liability under the general law dealing with theft.
- 7.6. A clear law is required to protect the proprietary interest that workers have in funds that customers intend to gift them.
- 7.7. Tips are a vital source of supplementary income for many low-income earning workers.
- 7.8. Despite this, they are not recognised as part of a worker’s formal remuneration in employment agreements and not given any protection as a statutory minimum entitlement.

- 7.9. There are other types of payment that do not strictly fall within the scope of the Bill but do have great significance to the workers who are entitled to them.
- 7.10. For example, commission payments are often determined by an employer's internal policies and tied to a worker's performance, they do not typically form part of the base remuneration that a worker is entitled to. Yet, commissions do form a significant portion of many workers actual income.
- 7.11. There may also be situations where an employee is owed a clear legal entitlement to a payment from an employer, but where a strict reading of the Bill would preclude a finding of theft where the payment is withheld.
- 7.12. For example, it is not clear whether remedies awarded by the Employment Relations Authority, or the court, for successful claims of unjustifiable action and disadvantage would be protected by the proposed amendment.
- 7.13. While the proposed **s 220AA (1)(b)(ii)** does cover instances where monies are 'otherwise required by law', this wording is followed by 3 minimum entitlement statutes that serve as examples of what such payments may be²³. On a narrow reading, it may be arguable that any payment that is not a statutory minimum entitlement cannot be protected by the application of the proposed law²⁴.
- 7.14. **The CTU recommends that the Bill adopt a broader formulation at s 220AA (1)(b)(ii) that allows for a payment 'otherwise required by law' to include any entitlement, not just statutory minimums.**
- 7.15. To the best of our knowledge, there has not been a comprehensive study of the scale of 'wage theft' in New Zealand. It therefore not possible to provide an accurate figure of the scale of wage theft in New Zealand.
- 7.16. However, based on complaints to the Labour Inspectorate, the annual repayment of payroll 'errors', and research detailing the extent of wage theft in comparable countries,²⁵

²³ Crimes (Theft by Employer) Amendment Bill, cl 4- proposed s 220AA (1)(b)(ii):

'...as otherwise required under law (for example, under the Holidays Act 2003, Minimum Wage Act 1983, or the Wages Protection Act 1983).'

²⁴ The list of examples provided at s 220AA (1)(b)(ii) may limit the interpretation of the broader term describing monies 'otherwise required by law' as the list is limited to statutory minimum entitlements. This may occur through the application of the interpretive rule 'edjusedem generis' (literally 'of the same kind').

²⁵ [Employers steal billions from workers' paychecks each year: Survey data show millions of workers are paid less than the minimum wage, at significant cost to taxpayers and state economies | Economic Policy Institute \(epi.org\)](#)

²⁶ it is reasonable to estimate that at least tens-of-millions of dollars are stolen from workers annually in New Zealand. This figure is likely much higher than estimated when all the possible forms of ‘theft by employer’ are properly considered.

7.17. Accordingly, the CTU notes that theft by employers comes in many forms, and these will need to be covered by this law, including:

- Failing to pay KiwiSaver and/or superannuation;
- Failing to pay for breaks;
- Failing to pay overtime;
- The compulsory use of employer-provided staff accommodation to claw back wages;
- Withholding of wages on the basis that it will put visa status at risk;
- Not paying for trial or training periods;
- Misclassifying workers as independent contractors;
- Deliberate employee misclassification;
- Not paying personal, annual or paid leave;
- Not paying appropriately for higher duties;
- Failing to meet basic worker entitlements in family run businesses;
- Phoenixing-type activity, where a firm goes into administration or liquidation to avoid having to pay employee entitlements, then re-emerges under a different legal structure but with the same or related individuals in control;
- Inappropriate deductions from workers’ wages such as inflated rent and transport costs;
- Charging employees for PPE;
- Paying ‘all-inclusive’ flat hourly or daily rates of pay without regard to specific entitlements
- Non-payment of shift allowances or penalty rates;
- Failing to deduct or remit taxation amounts;
- Requiring the employee to pay an ‘employment bond’;
- Passing on the costs of acquiring a medical certificate for less than 3 days absence.
- Failing to pay for ‘on call’ periods.
- Salaried workers working extra hours in breach of the Minimum Wage Act
- Employers not honouring grandfathered agreements with better set of conditions
- Failure to pay allowances;
- Incorrectly asserting all sort of conduct as “serious misconduct” so as to deprive workers of notice pay;

²⁶ [Ending wage theft: eradicating underpayment in the Australian workplace \(apo.org.au\)](https://apo.org.au/publication/ending-wage-theft-eradicating-underpayment-in-the-australian-workplace)

- Businesses trying to avoid redundancy pay where it is required in employment agreements
- Unlawful imposition of casual status on workers despite the real nature of their work.

8. Congruent processes for restoring stolen property

- 8.1. While the ‘theft by employer’ is a much-needed addition to the Crimes Act 1961, it is important that civil courses of action remain open to workers who have been victims of this crime.
- 8.2. The property rights of employers enjoy protection in both civil and criminal jurisdictions.
- 8.3. Accordingly, there is no reason based in justice, fairness, or public policy for workers to enjoy any lesser protections.
- 8.4. **The CTU recommends that the policy intention of the Bill clearly state that workers are not compelled to choose one jurisdiction over another.**
- 8.5. Wage theft in the Crimes Act while providing a significant deterrent and punitive effective, does not return stolen wages to victims. Therefore, access to civil remedies that restore their stolen monies needs to be more accessible for working people.
- 8.6. Repayment of stolen monies to working people through civil processes must be based on the principle that they are no worse off than if they had received the monies correctly.
- 8.7. Just as for employers, the fact that a worker seeks justice and restoration through a civil process should not mean that criminal justice can no longer apply.
- 8.8. **Accordingly, the CTU encourages Parliament to continue looking at ways of improving accessibility to civil justice for working people.**
- 8.9. Costs associated with taking civil claims and the adequate resourcing of institutions such as the Employment Relations Authority, the Employment Mediation service and the Labour Inspectorate remain important issues and should be addressed, notwithstanding the passage of this Bill.

9. Summary of recommendations

- 9.1. That the maximum term of imprisonment for ‘theft by an employer’ be expanded to allow for 7 years imprisonment in cases where the culpable employer is an individual.

- 9.2. That the Bill include a definition of employer can includes natural persons (such as directors) who control the actions of a corporate entity.
- 9.3. That the mens rea component of the Bill be expanded to include (in addition to intention) 'recklessness' with respect to a legal duty.
- 9.4. That the fines imposable by our courts against employers be adjusted to match the maximum fines provided for in the Victorian legislation.
- 9.5. That an independent and specialised 'Wage Inspectorate' be established with similar functions to its counterpart in Victoria.
- 9.6. That the Bill incorporate a requirement for the court to consider factors such as the amount stolen, the systematic or organised nature of the theft and, any social harm or grievous component when carry out sentencing.
- 9.7. That the Bill adopt a broader formulation at s **220AA (1)(b)(ii)** that allows fora payment 'otherwise required by law' to include any entitlement, not just statutory minimums.
- 9.8. That the policy intention of the Bill clearly state that workers are not compelled to choose one jurisdiction over another.
- 9.9. Parliament should continue looking at ways of improving access to civil justice.

10. Conclusion

- 10.1. This Bill is a tremendously positive step towards affirming and protecting the property rights of working people.
- 10.2. The inability of criminal law to easily address and deter crimes of 'theft by an employer' reveals a longstanding and unjustifiable disparity between the treatment of workers and the treatment of employers.
- 10.3. Theft against employees in the context of employment relationships are a serious social problem. It is chronically under-reported and, disproportionately impacts the poorest sectors of the community.

- 10.4. The cost of pursuing civil claims is prohibitive for many working people, and this structural barrier to accessing justice serves as a shield for many unscrupulous employers who carry out acts of theft against their employees.
- 10.5. The CTU looks forward to this Bill being passed into law, with all the recommendations in this submission being adopted.
- 10.6. Even after this law is enacted, the considerable task of ensuring that the avenues of justice remain open for working people will remain. The need for well resourced and effective enforcement mechanisms must be addressed as part of that larger project.

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