Queensland Law Society

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Office of the President

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Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

By email: eesbc@parliament.qld.gov.au

Dear Committee Secretary

Inquiry into wage theft in Queensland

Thank you for the opportunity to appear at the public hearing for the Inquiry into the Wage Theft on 16 August 2018.

The Committee has requested that the Queensland Law Society (QLS) provide answers to several questions raised at hearing. QLS has considered these questions and provides the following responses.

Question 1: Would QLS contend that there may be a gap in the existing criminal law that would need to be addressed?

The failure to pay wages and entitlements has not traditionally been regarded as a criminal matter. We note that there is a statutory obligation to pay award wages and the superannuation guarantee and that, as with a failure to pay tax, a range of sanctions including criminal penalties could be imposed for failing to comply with this statutory obligation.

As to whether any offences under the current Queensland criminal law adequately capture this behaviour, we contend that a non-payment of a wage or benefit could not usually be prosecuted under the Queensland Criminal Code[1] (which we believe is the case in other comparable jurisdictions as well). There is a provision in the United Kingdom legislation about dishonestly retaining a benefit, which is not mirrored here in Queensland, but even that provision is directed at first receiving something (e.g. bank errors in your favour), rather than not paying what you owe.[2]

It may be possible, at least in relation to Queensland statutes, to charge a person with the general offence of breach of statutory duty in section 204 of the Code, though it is only a misdemeanour, with a maximum penalty of 1 year. Further, in an egregious case, it may also be possible to prosecute someone for fraud under section 408C of the Code. This could occur in circumstances where an employer promised to pay the award wage and the superannuation benefit and if it could be proved they intended not to pay. The employer could be found to

[1] *Criminal Code Act 1899*
[2] Section 24A of the *Theft Act 1968 (UK)*

have dishonestly obtained the benefit of the employees' service and/or dishonestly induced the employees to do the work.

If Government is of the view that these offences, and the civil penalties in the *Fair Work Act 2009* (Cth) are insufficient, then we submit that Criminal Code is not the best vehicle for any amendments to further enforce statutory obligations in the industrial relations arena, particularly as the majority of those obligations are imposed by federal law. The logical place for such penalties should be in the legislation imposing the obligation.

We also dispute that amending the law in Queensland (or elsewhere) to criminalise this behaviour will be an effective solution to the issue of wage theft. First, there may be constitutional issues involved in amending the law to cover breaches of federal obligations. Secondly, if the additional resources and measures outlined in our previous submission and during our appearance at the public hearing are not implemented, then any new offence will be of limited, if any, benefit to workers.

If a new offence was to be considered, it should only capture deliberate actions. We would object to criminal sanctions imposed for inadvertent errors. A criminal sanction, if any is required, should be reserved for cases of dishonesty and deliberate and sustained underpayment.

Finally, we note that the Committee enquired about whether there are "wage theft" offences in other jurisdictions. Whilst no detailed research has been undertaken, QLS is not aware of any criminal offence for wage theft elsewhere in Australia or comparable jurisdictions overseas.

Question 2: Under the state legislation, is an employer required to be at a conference?

We advise that section 42H of the *Magistrates Court Act 1921* provides that a conciliator may, by written notice, require the parties to a dispute to participate in a conciliation process in a particular way. The parties must comply with a requirement made by the conciliator (subsection 2) and if a party does not comply, a Magistrates Court may impose sanctions against the party (subsection 3).

Therefore, an employer will be effectively compelled to attend a conciliation conference if this is required by the conciliator.

Question 3: Can QLS expand on the point from the written submission that superannuation should be added to the group of entitlements that are recoverable through the FEG scheme?

Our previous submission to this inquiry provided the following information on the Fair Entitlements Guarantee Scheme:

> *The Fair Entitlements Guarantee Scheme (**FEG Scheme**), which is operated by the Department of Jobs and Small Business (**Department**) provides employees monetary advances in respect of their owed wages and entitlements. An advance under the FEG Scheme is only triggered if the employee's employer has had an 'insolvency event', which is defined as the appointment of a liquidator under the Corporations Act 2001 (Cth) (**Corporations Act**) or, in the case of individual employers, where they have gone into bankruptcy. An employee will also only qualify for an advance if the end of*

> *their employment was due to the insolvency event, or occurred within six months of it (**six month threshold**).*
>
> *Once an advance is made, the Department then obtains subrogation rights to pursue the relevant employee's entitlements on behalf of the Commonwealth.*

The submission went on to say:

> *At present, employees who apply to the FEG Scheme for the purposes of recovering their unpaid wages, annual leave, termination or redundancy entitlements are not eligible to recover any unpaid superannuation contributions. Rather, any such claim must be pursued through the Australian Taxation Office (**ATO**), or by the employee bringing Court proceedings in their own capacity.*
>
> *There is no good policy reason for the continued strict division of responsibility between the Department and ATO. The Society recommends that superannuation be added to the group of entitlements that are recoverable through the FEG Scheme, and that the Department be given subrogation rights in respect of those entitlements.*

As stated, currently, the options for an employee to recover superannuation benefits are not practical. If the employer is insolvent or bankrupt, it may be extremely difficult for action to be taken by the ATO.

Compulsory superannuation entitlements arise independently of the obligations to pay wages and entitlements pursuant to minimum National Employment Standards or an award/enterprise agreement or contractual entitlement. The benefit of the superannuation entitlement is a deferred one for employees and some contractors, which is difficult to privately enforce. There is a policy issue to be considered as to whether the taxpayer (through the government) should cover the loss of compulsory superannuation contributions.

However, whilst we acknowledge that superannuation benefits are different to a loss of wage or other entitlement, QLS's view is that there is an entitlement and there ought to be an available remedy where they are not paid.

Finally, for the sake of completeness, we point out that in addition to the avenues set out in the QLS's original submission, there is also an avenue for employees to apply to the Queensland Civil and Administrative Tribunal where the claim is for a fixed debt or liquidated damages. This excludes the vast majority of employment related wage claims.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Senior Policy Solicitor, Kate Brodnik by phone on [redacted] or by email to [redacted].

Yours faithfully

Ken Taylor
President