



Fair Work Employment Lawyers
A Division of Supportah.

30 July 2018

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

Dear Secretary,

Submission to the The Queensland Parliamentary Inquiry Into Wage Theft

1. We write to the Committee with respect to a very narrow but important issue that is contributing to wage theft in Queensland.
2. FWEL Pty Limited t/a Fair Work Employment Lawyers and separately trading as Worker Law is a Queensland based incorporated legal practice that offers affordable access to justice for employees.
3. This is Management Liability Insurance, otherwise known as Employment Practices policies.
4. The issue is highly relevant to the litigation of claims of wage theft, through the legal system.
5. These insurance policies indemnify the management of a company from legal costs associated with the conduct of their management, but usually will not cover the actual underpayment.
6. In a typical case, an employer who has underpaid a worker's wages has no incentive to settle a righteous claim, as settlement acknowledges the underpayment and will require an employer to pay the backpay.
7. The insurance policy will cover the cost of litigation, including defending cases where pecuniary penalties may be applied, such that the employer is



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placed in a position where it may gamble on a successful outcome - even if it has very little prospects of success.

8. A sample “insured definition”:

“Provides cover for each Insured Person in respect of Wrongful Acts or Employment Practice Breach or Trustee Breach as defined in the policy wording. Provides cover for the Company in respect of Directors & Officers Liability/Company Reimbursement, Entity, Employment Practices, Trustee, Crime and Taxation Investigation as defined in the policy wording.”

9. Employers, when a matter is finally resolved, are still required to pay back the underpayment.
10. Agreeing to settle a claim can often be resisted by employers who would prefer to take a chance of not paying the correct wages, if for no other reason it also delays the employer having to find the funds for the back payment.
11. The indemnity does not merely extend to legal costs. It often extends to Civil Penalties, including pecuniary penalties under workplace laws.
12. Under s 546 of the *Fair Work Act 2009* (Cth), pecuniary penalties may be applied by a Court for the breach of civil remedy provisions. These penalties, interest and legal costs are often covered by the insurance policy and are not paid by the employer under some policy wordings.
13. The framework for any legal proceeding requires that each party bear some risk in relation to that matter especially under the FWA and the Industrial Relations Act 2016 (Qld), where costs don’t follow the proceeding.
14. The threat of a potential costs order against the losing party, albeit in limited circumstances, often serves as a strong incentive to settle matters and frees up considerable resources in the judicial system.



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15. In the absence of coercive risks of costs orders and pecuniary penalty orders, the employer has no pressing risk by continuing to fight on.
16. These policies therefore encourage employers to deny and delay in relation to underpayment of wages claims. As we have seen through our experiences with IR Claims, the cost of correctly calculating an underpayment of wages is considerable - and out of reach for most underpaid workers.
17. What results is a system in which the underpaid worker, many of whom represent the most vulnerable in our society, is tasked with a Herculean battle to recover what is rightfully theirs.
18. When an employer's insurer is added to the mix, the worker is also up against a top tier firm, just to recover what was stolen from them.
19. They must battle the employer who has no incentive to settle and which is usually in a considerably stronger position to meet the cost of litigating claims.
20. It is a sobering reality that the premiums for this type of insurance are sometimes paid for out of the stolen wages of the underpaid worker.
21. That the recovery of their wages is now made harder as a rogue employer can underwrite its legal defence, where a worker who is not a member of the union, has no similar insurance they can access.
22. Whether a union commences litigation on behalf of a member, it is of course up to the relevant union and union membership does not guarantee a fully funded litigation through to final determination.
23. However, subject to policy wordings and the progress of settlement negotiations, an employer can pay to have precisely that - fully funded litigation through to final determination.
24. We were involved with a particular concerning case where the employer





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objected to pay an underpayment even going so far as to file false evidence as to the nature of our client's work patterns.

25. This created a three way contest where the insured employer fought with the insurer to not pay the actual underpayment and relied on the insurer to fund the case through close to trial.
26. Separately our client had to consider the risk of a potentially impecunious employer fighting on because of the insurance policy to delay any payment of the wage theft.
27. We appreciate this is only one narrow factor contributing to wage theft and our colleagues at Industrial Relations Claims have made a far more detailed submission as to the broader issues which we hope will be of assistance to the Committee.
28. The purpose of this submission was to raise to the committee that this is yet another imbalance, especially for employees who are non-unionised.

Kind regards

A handwritten signature in blue ink, appearing to read 'M. Stapleton', with a long, sweeping underline.

Matthew Stapleton
Legal Practitioner Director
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