



Submission to The Education, Employment and Small Business Committee

Inquiry into Wage Theft in Queensland

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submission

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Introduction

The Queensland Nurses and Midwives' Union (QNMU) thanks the Education, Employment and Small Business Committee (the Committee) for the opportunity to make a submission to the inquiry into Wage Theft in Queensland (the Inquiry).

Nursing and midwifery is the largest occupational group in Queensland Health (QH) and one of the largest across the Queensland government. The QNMU is the principal health union in Queensland covering all categories of workers that make up the nursing workforce including registered nurses (RN), registered midwives (RM), enrolled nurses (EN) and assistants in nursing (AIN) who are employed in the public, private and not-for-profit health sectors including aged care.

Our more than 59,000 members work across a variety of settings from single person operations to large health and non-health institutions, and in a full range of classifications from entry level trainees to senior management. The majority of nurses and midwives in Queensland are members of the QNMU.

As the terms of reference include wage theft within both the State and federal systems, we have included recommendations relevant to the Queensland setting, changes to the *Fair Work Act 2009* and the Superannuation scheme.

We thank the Minister for Education and Minister for Industrial Relations for instigating this inquiry and note that State and federal governments need to take action to halt the prevalence and acceptance of wage theft.

Recommendations

State Industrial Relations

The QNMU recommends:

- QH commission an independent review of the current model of governance to determine the efficacy of human resources policy development, implementation and interpretation within HHS and the Department of Health (DoH);
- QH conduct a statewide training needs analysis and education program for human resources (HR) and industrial relations (IR) staff to enable more consistent and accurate decision-making on employment-related matters.

Federal Industrial Relations

The QNMU recommends:

The federal parliament

- amend section 481 – Entry to Investigate Suspected Contravention - of the *Fair Work Act 2009* to enable a permit holder to enter premises for the purpose of investigating a suspected contravention of the Act as it affects any worker whose industrial interests the union is entitled to represent;
- delete sub-sections 318(d) (e) and (f) of the *Fair Work Act 2009*;
- amend Part 2-4 - Enterprise Bargaining - of the *Fair Work Act 2009* to include industry bargaining.

The federal government

- resource the Office of the Fair Work Ombudsman (FWO) appropriately to enable it to undertake its investigation and enforcement roles effectively;
- resource the Australian Tax Office (ATO) appropriately to enable it to carry out the initiatives making superannuation payments more transparent and employers more accountable and to enforce compliance with the *Superannuation Guarantee (Administration) Act 1992*;
- remove the minimum threshold for the compulsory employer superannuation contribution of \$450 per month in earnings.

Federal and State governments fund a public education campaign to:

- increase workers' awareness of workplace rights and entitlements and the action they can take to remedy wage theft;
- increase employers' awareness of their workplace obligations to comply with industrial laws and keep accurate time and wages records.

Wage Theft

The QNMU represents members in both the state and federal industrial relations jurisdictions. Over the past few years, we have made many submissions highlighting the deficiencies in legal, structural and institutional frameworks that permit wage theft to occur. Some of these include submissions to:

- The Senate Education, Employment and Workplace Relations Committee *Fair Work Amendment (Tackling Job Insecurity) Bill 2012*;
- The Queensland Health Payroll System Commission of Inquiry 2012;
- The Senate Economic References Committee Inquiry into Economic Security for Women in Retirement 2015;
- The Productivity Commission Inquiry into Australia's Workplace Relations Framework 2015;
- The Queensland Finance and Administration Committee Inquiry into the Practices of the Labour Hire Industry in Queensland 2016;
- The Senate Standing Committee on Education and employment Committee Inquiry into Corporate Avoidance of the *Fair Work Act 2009* 2016;
- The Productivity Commission Productivity Review 2016;
- The Senate Select Committee Inquiry into the Future of Work and Workers 2018;
- The Productivity Commission on Assessing Efficiency and Competitiveness and other superannuation inquiries 2016,2017, 2018.

Ours has been a long game.

Wage theft is insidious. It is not always a simple underpayment or non-payment that disadvantages a worker. Wage 'theft'¹ can also occur 'legally' when employers terminate enterprise bargaining agreements (EBAs) so their workers revert to lower award wages, and when they exploit a labour market with high rates of insecure jobs, low wages growth, a hamstrung union movement and limited institutional enforcement.

The current characteristics of the labour market and its regulation work to create an environment where employers have many means of deceitfully denying workers their lawful entitlements yet also have the capacity to act within the regulatory framework to reduce wages and conditions. For these reasons, the QNMU, like other affiliated unions, supports the Australian Council of Trade Union's (ACTU) *Change the Rules* campaign.

At every turn, the weight of choice lies with employers. In the end, it does not matter whether employers are willful in their intent, incompetent or ignorant. The outcome for workers is the same – less income, less respect.

The QNMU recovers a staggering amount of unpaid monies for its members. Since 2012 this is in **excess of \$9 million**. We are currently refining our processes to enable a more specific breakdown of this amount.

¹ Recognising here the term 'theft' implies the deceitful taking of property.

It is important to note the actual amount of wages recovered by unions or the FWO is not necessarily indicative of the extent to which wage theft occurs. Institutional data gives an empirical snapshot, but its prevalence is widespread, endemic and more likely to affect the most vulnerable of workers.

This inquiry is significant not only for exposing the shameless and often deliberate withholding of payments to workers, but for highlighting the valuable contribution trade unions make to restoring wage justice for all workers not just members. But for unions, prosecution of these claims would be much less frequent, more difficult and more expensive.

Wage Theft in Nursing and Midwifery

Wage theft refers to the non-payment or underpayment of the full wages to which employees are legally entitled (Galvin, 2016: 325; Milkman et al., 2010; Vosko et al., 2017). There are multiple types of wage theft arising from non-compliance with employment laws and policy. For the purposes of this submission, the QNMU defines 'wage theft' as:

- the non-payment or under-payment of wages including overtime, penalties, allowances, meal breaks, leave, leave loadings, superannuation, time off in lieu (TOIL), or any other employee entitlement arising from employment regulation, policies or the common law; and
- an employer's deliberate actions to deny the same rate of pay to workers undertaking work of equal value through the use of inadequate federal employment laws.

Wage theft in nursing and midwifery may be caused by the strict control of time as a contested resource. Nurses and midwives work under considerable pressure to perform their tasks within tight timeframes, often forgoing meal breaks and working additional unpaid time, just to be able to care properly for their patients and provide an appropriate handover to the next shift.

Gaps in employment regulation, incorrect and inconsistent interpretation of industrial instruments by employers and inadequate institutional enforcement are the major contributors to wage theft.

State Industrial Relations

Queensland Health Governance

In our view, much of the problem in QH stems from its devolved governance structure. Since the inception of the *Hospital and Health Boards Act 2011* (the Act), there have been some positive outcomes for consumers. We acknowledge a key objective in the current scheme to

'be closer to the patient' is being met to a degree, however, the QNMU continues to experience many and varied adverse consequences of a system lacking robust lines of accountability.

The Act created a 'devolved' model of 16 geographically determined Hospital and Health Services (HHS)² as statutory bodies independently responsible for delivery of health services in their local area through a Health and Hospital Board (HHB). The Governor-in-Council appoints the board on the recommendation of the Minister of Health. This has taken place within the Westminster system of government where responsibility for the department lies with the Minister.

Delivery of public health services requires sound governance and administration. Theoretically, the new structure aimed to devolve local decision-making to HHS while allowing the Department of Health (DoH) to provide the overarching consistency of service for patients, maintain standards of safety and quality and provide transparency and sustainability of funding.

Our experiences of this model clearly demonstrate that although there are arrangements, processes and tools for managing risk at both the central and devolved levels, in practice, there is little to suggest actual correlation between the DoH and HHS. HHS continue to act independent of each other, making inconsistent and ineffective decisions, with limited regard for the fallout for staff.

The Queensland government should be a model employer. There are more than enough regulations and resources available to enable this, however, the scale of infringements and potential risks are so widespread and constant we seek an independent review of the current model of governance to determine the efficacy of HR/ IR policy development, implementation and interpretation within HHS and the DoH.

For our union, recovering non-payment and underpayment of entitlements is as relentless and demanding as it is stressful for the individual(s) concerned. We recognise it is our responsibility to act for our members in this capacity, however, wage recovery is resource intensive for employers as well as ourselves.

In our experience, much of the HHS HR misinformation and decision-making stems from an alarming lack of industrial relations knowledge and processes on the part of practitioners. For these reasons we seek a statewide training needs analysis and education program for human resources (HR) and industrial relations (IR) staff to enable more consistent and accurate decision-making on employment related matters.

² Except for Children's Health which is a separate board not appointed according to location.

The QNMU conducts comprehensive training for members and workplace activists to increase their awareness of entitlements. This responsibility should not lie solely with unions. It is incumbent on state and federal governments and employers to take up this role as well.

Recommendations

The QNMU recommends:

- QH conduct an independent review of the current model of governance to determine the efficacy of human resources policy development, implementation and interpretation within HHS and the DoH;
- QH conduct a statewide training needs analysis and education program for human resources (HR) and industrial relations (IR) staff to enable more consistent and accurate decision-making on employment related matters.

Federal Industrial Relations

In the federal sphere, the changing industry structure under the new commercialised social care arrangements through the National Disability Insurance Scheme (NDIS) and Consumer Directed Care (CDC) in aged care may exacerbate the problem of wage theft (Deloitte, 2015).

The QNMU has consistently argued that any worker performing nursing work should be appropriately qualified and remunerated. We have found an increasing number of aged care home workers (not necessarily nurses) accepting payments that are much less than the minimum rate. Nurses working in residential aged care facilities already receive significantly less pay than public sector nurses.³

These inequities occur because the primary focus of bargaining is the enterprise. Federal laws do not adequately support bargaining across sectors or industries and inhibit bargaining at the source of power in fragmented workplaces. This is at odds with international practice amongst many other developed economies around the world.

³ Nationally this is around \$200 per week (Australian Nursing and Midwifery Federation, 2018).

An inability to negotiate on a sectoral or industry wide basis limits outcomes of bargaining to specific enterprises, is resource intensive and inefficient. This restricts the capacity of workers to determine who they bargain with and constrains industry-wide improvements including skills development and training.

In particular, collective bargaining across an industry and/or with parties who have the capacity to determine workplace outcomes is more reflective of modern organisations seeking worker participation and inclusion.

Deficiencies in the *Fair Work Act 2009* enable employers to contract out of employment obligations, terminate EBAs and restrict union rights of entry all of which enable wage theft to proliferate.

If the range of protections for terms and conditions for full-time permanent employees is an accepted standard, then around half the workforce operates outside this form of employment. Unchecked non-compliance with employment laws resulting in wage theft can be seen to arise from a regulatory gap whereby lack of enforcement encourages evasion (Macdonald et al, 2018). Our recommendations around amendment of the *Fair Work Act 2009* are intended as short term, minimum standards that form part of the *Change the Rules* campaign.

Corporate Avoidance of Employment Regulation

The rising prevalence of contracting-out of services changes the nature of the employment relationship. Contractual mechanisms for regulating labour may replace collective labour law, but they are a poor substitute. This has important implications for the way governments should approach the monitoring and enforcement of employment standards (Holley, 2014). In the federal arena, the FWO has been instrumental in investigating widespread non-compliance of industrial awards and agreements. However, the FWO does not appear to have the resources to properly undertake its enforcement role.

Various sources (Hall, 2002; Taylor, 2003, p. 302; O'Neill, 2004; Graham, 2007; Victorian Government, 2015; Senate Education and Employment References Committee, 2015) have identified that when employers avoid their obligations by contracting out or through non-standard arrangements that erode pay and employment conditions there are less protections for employees and they are disinclined to speak up largely out of fear.

In the short term, the QNMU seeks restoration of the federal rights of trade unions to investigate suspected breaches of the *Fair Work Act 2009*. At present, unions can only investigate on behalf of a member (section 481). Unions must also give notice which allows

employers to hide evidence, (although they can make application not to provide notice). In our view, improving workers' rights through greater union access is a better alternative to reliance on the powers and resources of the FWO to monitor and enforce regulation.

Recommendations

The QNMU recommends

The federal parliament

- amend section 481 – Entry to Investigate Suspected Contravention - of the *Fair Work Act 2009* to enable a permit holder to enter premises for the purpose of investigating a suspected contravention of the Act as it affects any worker whose industrial interests the union is entitled to represent;
- delete sub-sections 318(d) (e) and (f) of the *Fair Work Act 2009*.
- amend part 2-4 of the Fair Work Act 2009 to enable industry wide bargaining.

The federal government

- resource the FWO appropriately to enable it to undertake its investigation and enforcement roles effectively;
- resource the ATO appropriately to enable it to carry out the initiatives making superannuation payments more transparent and employers more accountable and to enforce compliance with the *Superannuation Guarantee (Administration) Act 1992*.

Federal and State governments fund a public education campaign to:

- increase workers' awareness of workplace rights and entitlements and the action they can take to remedy wage theft;
- make employers aware of their workplace obligations to comply with industrial laws and keep accurate time and wages records.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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- [REDACTED]
- [REDACTED]
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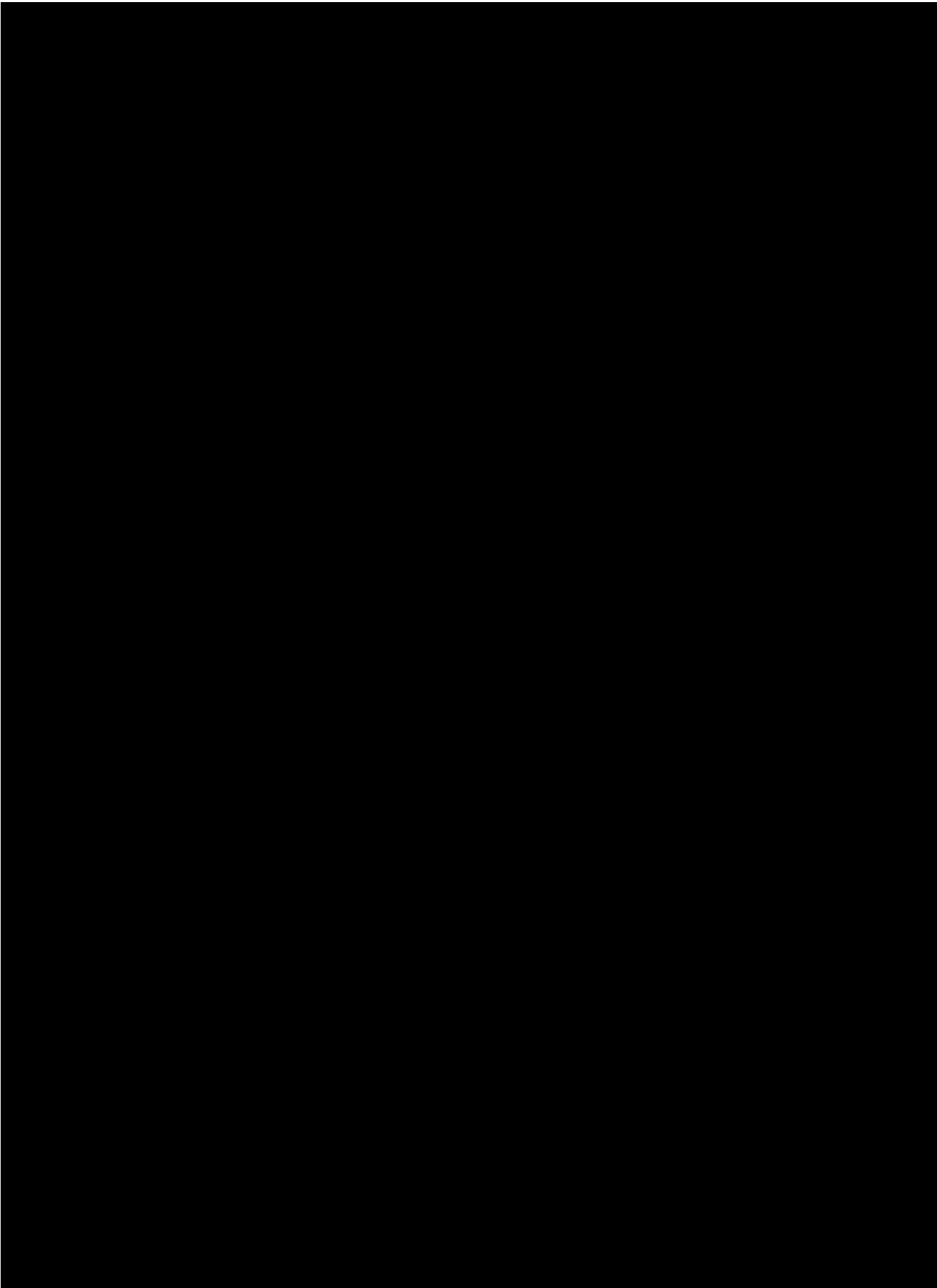
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[REDACTED]

The effectiveness of transfer of business provisions in protecting workers' pay and conditions

In this case study, the transfer of business provisions allowed aged care provider [REDACTED] [REDACTED] to convince [REDACTED] staff who were on a superior EBA to move onto the [REDACTED] agreement when it bought [REDACTED]. Here, the Act does not prevent an employer from using its much greater resources and access to persuade employees, particularly non-union members, to move onto a lesser agreement.

[REDACTED]

[REDACTED]



Recommendations

The QNMU recommends the federal parliament:

- delete sub-sections 318(d) (e) and (f) of the *Fair Work Act 2009*;
- amend Part 2-4 – Enterprise Bargaining – to enable industry-wide collective bargaining.

Superannuation

To be eligible for superannuation guarantee (SG) contributions from an employer, an employee must be aged 18 or over and earning over \$450 a month in ordinary time earnings (OTE). This threshold excludes a potentially significant number of employees and can easily be exploited by employers to avoid their SG obligations. For example, an employer may deliberately roster staff in ways to keep them under the \$450 threshold.

The Australian Tax Office (ATO) plays an important role in enforcing compliance with the *Superannuation Guarantee (Administration) Act 1992*. A recent Senate Economics References Committee (2017) inquiry into the non-compliance with the SG recommended the ATO should prioritise its work on calculating and publishing an accurate, reliable estimate of the SG gap and commit to publishing this gap annually in order for progress to be tracked over time.

The Senate committee also recommended the government strongly consider introducing amendments to the *Superannuation Guarantee (Administration) Act 1992* to remove the \$450 monthly threshold on SG eligibility and review ATO resource levels to ensure that the agency is well-equipped to undertake effective and comprehensive compliance activities to combat SG non-payment (Senate Economics References Committee, 2017). These are important measures in combatting wage theft through non-compliance of statutory employment obligations.

The implementation of new technologies has already been improving efficiencies within the default superannuation process. The introduction of SuperStream and Single Touch Payroll have been suitable mechanisms for streamlining and simplifying the interaction with super funds.

The 2018/9 federal budget announced new powers for the ATO to proactively reunite lost and low balance inactive super accounts. This is a welcome move to address Australia's \$16 billion lost superannuation problem, however the ATO must be resourced adequately to implement this initiative.

The QNMU supports the proposed policy changes that will promote SG payment compliance including:

- Extending Single Touch payroll to small employers (with less than 20 employees) from 1 July, 2019;
- Requiring funds to report contributions to the ATO at least monthly;
- Assigning stronger powers to the ATO to penalise non-compliant employers and recover unpaid contributions (Productivity Commission, 2018, p. 50).

These mechanisms have occurred through close collaboration between the superannuation industry, employers, payroll providers, gateways, administrators and the ATO.

Recommendations

The QNMU recommends the federal government:

- provide adequate resourcing for the ATO to carry out the initiatives making superannuation payments more transparent and employers accountable and to enforce compliance with the *Superannuation Guarantee (Administration) Act 1992*;
- remove the minimum threshold for the compulsory employer superannuation contribution of \$450 per month in earnings.

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