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THE CONSTRUCTION, FORESTRY, MINING AND ENERGY, INDUSTRIAL UNION OF EMPLOYEES, QUEENSLAND

SUBMISSION TO THE EDUCATION, EMPLOYMENT AND SMALL BUSINESS COMMITTEE OF THE QUEENSLAND LEGISLATIVE ASSEMBLY

WAGE THEFT INQUIRY

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Introduction

1. The Construction, Forestry, Mining and Energy, Industrial Union of Employees, Queensland (CFMEU) is the principal union in the building and construction industry and also has a significant membership in the manufacturing and maintenance services industries in Queensland, representing many tens of thousands of workers across the State in blue-collar trades and non-trades classifications of work.
2. The CFMEU has never taken a backwards step in fighting for its members' rights and entitlements for over 160 years. In doing so, it has made significant advances in addressing inequality in Queensland over many decades. History has demonstrated that the CFMEU and its members have brought about such advances as the eight-hour day, penalty rates for overtime and shift work, paid personal leave, paid annual leave and public holidays, portable long service leave, wet weather pay, disability and expense-related allowances, industry-specific redundancy, worker compensation, income protection insurance, and industry superannuation, not through any sense of benevolence on the part of the employing class, but rather in the face of active opposition from powerful vested interests. These historic achievements could easily be taken for granted today, but for the fact that they are so critical to the welfare and standard of living of the many thousands of construction workers, their families, and the communities in which they live, across the State.
3. And yet, whilst these remain legal entitlements for construction workers, whether under enterprise agreements, awards or legislation, they are all too often the subject of what can only be described as 'wage theft', where entitlements are unlawfully withheld or denied by dishonest and unscrupulous employers. Indeed, in the six-month period from January to June 2018, the CFMEU recovered in excess of $3.566 million in otherwise unpaid entitlements on behalf of members. Over the last decade, the CFMEU has recovered in excess of $30 million on behalf of its members. That money would not have been recovered but for the on-going and proactive work of the CFMEU. Further, the CFMEU, along with other building trades unions, has recently uncovered widespread wage theft by group training organisations, including those ran by the Queensland Master Builders Association and the Housing Industry Association, that have underpaid apprentices and trainees across Queensland on an estimated scale of between $110 million and $360 million overall. Research has consistently demonstrated that unionised workplaces achieve better and improved compliance outcomes as a result of increased inspection and scrutiny. Accordingly, unions like the CFMEU are a critical force in stamping out the scourge of wage theft in Queensland and across Australia.
4. The CFMEU rejects the conservative mantra that policies that favour business at the expense of workers will in turn increase investment and create more jobs. Indeed, Dabla-Norris et al. (2015) find that increasing the wealth of the rich by one percentage point lowers a country's GDP growth

by 0.08 percentage points, whereas increasing the wealth of the poor and middle class increases GDP growth by up to 0.38 percentage points. Yet since at least the mid-1990s, Australia has been in the grip of the kind of labour market 'deregulation' that has meant that workers' protections are being stripped away. Conversely, regulation has significantly increased in other respects – particularly in relation to the control and subordination of workers (for example, the content of enterprise agreements), as well as in relation to trade union activities. As put by Campbell and Tham (2013): labour market deregulation has been a process of removing "the protective aspect [of regulation] that is oriented to defending the interests of workers against the authority of employers or indeed branches of the state."

5. These trends, grounded in neo-liberal myth, have led to an explosion in wage theft, whether in the narrower sense of employers deliberately evading their 'black letter' obligations to their employees, or in the broader sense of deploying other strategies that are designed to contribute to inequality and the declining labour share of income, by pushing many of the costs and risks of employment onto workers.
6. The CFMEU congratulates the Palaszczuk Government on initiating this important and long overdue inquiry and for demonstrating a desire to stamp out the evil practice of sham contracting. In many ways, the Palaszczuk Government has led the nation with regard to the strong and effective regulation of corporate Australia for the benefit of working Queenslanders, including through such measures as:
    a. A procurement policy which puts Queenslanders first with mandatory local content, thereby creating local jobs;
    b. A building licencing regime that makes holding a licence contingent on compliance with industrial laws and work health and safety best practice;
    c. Introducing a specific offence of industrial manslaughter to bring about work health and safety best practice; and
    d. Cracking down on rogue labour hire operators that prey on vulnerable and insecure workers.
7. This Inquiry will no doubt expose the extent to which wage theft has affected some of Queensland's most vulnerable workers, and the ways in which the Turnbull Government and the LNP have taken steps to actively undermine compliance with industrial laws that set minimum wages and conditions of employment, and superannuation legislation. Further, it will expose the extent to which wage theft has undermined Federal and State Government revenue through non-payment of PAYE, worker compensation premiums and payroll taxes and has therefore limited Queenslanders' access to important services.

The building and construction industry

8. Wage theft is especially rife in the building and construction industry. Its general characteristics and culture make it an industry in which many 'fly by night' and rogue employers can operate and even thrive.
9. Firstly, it is an industry within which many small employers compete within complex systems of contracting and subcontracting with very few construction workers working directly for the large building corporations that price projects. Intense competitive pressures amongst employers lead many to cut corners and seek unfair competitive advantages. At a structural level, labour market deregulation has meant that wages and other employment entitlements have become the predominant basis on which these employers compete, with many resorting to wage theft in the knowledge that the likelihood of being caught and penalised is negligible. In many ways, this is actively encouraged by employer groups such as the Master Builders Queensland (MBQ) and the Housing Industry Association (HIA).
10. Secondly, as work in the building and construction industry is project-based, most employment in the industry is only short-term. This means that construction workers are usually engaged on a daily hire or casual basis or through a labour hire arrangement and therefore regularly suffer from chronic job insecurity throughout their working lives. Indeed, almost one in four workers in the building and construction industry is casual (23.9%), with work engaged as labourers facing the highest rate of casual workers by occupation with almost half of all labourers (47%) being engaged casually. Construction workers such as these, who face chronically precarious and unpredictable employment are frequently forced to undertake unpaid or underpaid work activities or forego other legal entitlements such as the superannuation guarantee in order to gain or retain access to jobs.
11. Thirdly, it is an industry within which work is itinerant, meaning it is performed at construction sites, from location to location. This is extremely enabling for unscrupulous employers intent on evading their legal obligations, as they may simply abscond and not readily face the prospect of inspection by unions or government agencies. Further, the itinerant nature of the industry may mean that any given employer is not vested with any real property (i.e. land/premises) against which worker-creditors can stake a claim in the event of insolvency.

Sham contracting in the building and construction industry

12. Sham contracting is a device that attempts to disguise an employment relationship as one of 'client' and 'independent contractor'. It has come to be a shorthand description for a variety of arrangements designed to give the appearance of a commercial contract for services between two commercial parties when in substance and at law, the true nature of the relationship is one of employer and employee.

13. Generally, sham contracting arrangements involve payment at some "agreed rate" without regard to obligations that arise under applicable industrial instruments, superannuation and worker compensation legislation. The most typical sham contracting arrangement is for the 'contractor' to be paid for a fixed loaded or 'all-in' hourly rate in lieu of all other conditions of employment. For taxation purposes, the payments made are treated as though they were paid as part of an "arm's length" commercial transaction to evade payroll and income taxation legislation. In instances of sham contracting, it is not uncommon for employees to be forced to provide an Australian Business Number (ABN) in order to gain or retain what is actually employment.
14. Successive inquiries and official figures have shown that sham contracting is a widespread problem across the Australian economy and that the problem is largely concentrated in the building and construction industry. Whilst legitimate independent contracting arrangements occur throughout the building and construction industry, the CFMEU has uncovered widespread sham contracting through its extensive involvement in the industry. On the basis of official figures, the CFMEU (2011) has estimated that the number of sham contracting arrangements in the building and construction industry as being between 92,000 and 168,000. This represents between 26-46% of all "independent contractors" in the industry. Accordingly, in 2011 the CFMEU estimated that $2.5 billion of tax revenue is lost in the construction industry alone through the abuse of sham contracting arrangements.

Fraudulent phoenix activity

15. Phoenix activity is the avoidance of paying outstanding debts including employee entitlements, taxes, etc. by a business through the deliberate liquidation of corporate entities. The Australian Government defines phoenix activity in its most basic form as involving "one corporate entity carrying on a business, accumulating debts without any intention of repaying those debts (for the purpose of wealth creation or to boost the cash flow of the business) and liquidating to avoid repayment of the debt. The business then continues in another corporate entity, controlled by the same person or group of individuals."
16. It is costly on employees as they lose income and superannuation that is owing to them. In 2012, PricewaterhouseCoopers (PwC) estimated the total impact of phoenix activity is up to $3.19 billion each year, including up to $655 million in costs to employees. Phoenix activity has been highlighted as a significant issue in the labour hire industry. Typically, the fraudulent labour hire phoenix arrangement will be structured as follows:
    - a private group is set up consisting of several entities including a labour hire entity;
    - the labour hire entity typically has a single director who is not the ultimate 'controller' of the group;
    - the labour hire entity has few, if any, assets and minimal share capital;

- the labour hire entity fails to meet its liabilities and is placed into administration or liquidation;
- a new labour hire entity is set up and the labour is moved across to this entity;
- the process is repeated with the financial benefits from the unpaid liabilities shared amongst the group (Australian Government, 2009).

17. As pointed out by the CFMEU in its 2015 submission to the Senate Economics References Committee Inquiry into insolvency in the Australian building and construction industry:
    - According to external administrators' reports lodged with ASIC, unpaid employee entitlements of companies in the building and construction industry experiencing an insolvency event in 2013-14 alone amounted to almost $57 million at the lower end, and up to a median amount of almost $137 million;
    - There has not been a single prosecution taken under s 596AB of the *Corporations Act* – a section directed to agreements or transactions that prevent the recovery, or reduce the amount of, recoverable employee entitlements;
    - In 2016, the LNP Federal Government cut ASIC's funding by $120 million over a four-year period. In financial year 2015-16, it lost 12% of its operating budget and 209 staff. By contrast, the LNP Federal Government increased funding for the FWBC (now ABCC);
    - Across its entire area of corporate and marketplace responsibility, ASCI obtained civil penalties against companies and directors of just over $3 million in the six months to December 2014. For its part, the then FWBC obtained $2.26 million in penalties, mostly against workers and their unions in the 2013-14 financial year.

The Australian Building and Construction Commission (ABCC)

18. The Australian Building and Construction Commission (ABCC) has actively contributed to the growth of wage theft in Australia. Since its inception in 2005, the ABCC has deliberately turned a blind eye to wage theft, including the high-profile issue of sham contracting in the building and construction industry. It has allowed such practices to continue unchecked and has even prosecuted unions on behalf of employers engaging in wage theft.
19. Indeed, in *Lovell v O'Carroll, the Plumbers and Gasfitters Employees' Union of Australia Qld Branch (PGEU), and the Communications, Electrical and Plumbing Union* (CEPU) (QUD427/2007), the Federal Court of Australia criticised the ABCC in the strongest possible terms for not just bringing a baseless and unmeritorious action against a union and its official, but also for bringing the case on behalf of a party (Underground) that should have been the subject of an investigation itself into sham contracting. As put by the Court in that matter:

> *"The set-up by Underground of its workers as independent subcontractors is and was a matter requiring thorough investigation* [as] *a sham, a bogus arrangement. It was an example of dishonest or fraudulent financial engineering by Underground, whose intended purposes was to avoid the payments made under the certified agreement which bound Underground at the time [and] to evade payment by the employer to the ATO of the income tax which the employer was obliged under the law of the Commonwealth to pay to the office in respect of the income tax obligations of its employees. It was also an attempt to evade the obligations on the employer to pay into the superannuation funds of the employees the 9 per cent that is mandated by Commonwealth legislation."*

20. As recently as 2009, the ABCC concluded that sham contracting was not a problem in the building and construction industry. Rather, it has used its powers under successive laws to restrict the ability of unions to represent workers in stamping out forms of wage theft like sham contracting. Since the election of the Coalition LNP Government in 2013 and ABCC's re-establishment under the *Building and Construction Industry (Improving Productivity) Act 2016*, this has re-emerged as the agency's default position. Indeed, the ABCC Annual Report 2016-2017 discloses that in the years 2015-16 and 2016-17, of the 1018 investigations conducted by the ABCC, only 52 were into suspected contraventions that the CFMEU regards as wage theft (of which 36 in relation to "wages and entitlements" and 16 into "misclassifications/sham contracting"). Conversely, there were 284 investigations into trade union officials with regard to enforcing arid technicalities under the prohibitive right of entry laws of the *Fair Work Act 2009* (Cth) (FW Act).
21. Further, of all current legal cases being conducted by the ABCC (as at 29 July 2018), none are against an employer for any kind of wage theft. Rather, all nine matters are being pressed against workers and various parts of the CFMEU and its officials in relation to trade union activities (of which four are in relation to right of entry civil penalty provisions). This is despite section 16 of the *Building and Construction Industry (Improving Productivity Act) 2016* requiring the ABC Commissioner to 'police' the law uniformly and pursue employee underpayments and sham contracting cases, including through the use of extensive powers created by that Act.

Building industry-specific laws

Industrial action

22. The *Building and Construction Industry (Improving Productivity) Act 2016*, which re-established the Howard-era ABCC, establishes industrial relations regulation that is specific to the construction industry. In particular, it creates a number of civil penalty provisions, including prohibitions on engaging in "unlawful industrial action" (that is, where industrial action is not "protected industrial

action" under the *Fair Work Act 2009* (FW Act) within the context of enterprise bargaining) that only apply to construction workers. For its part, the 2016 Act defines industrial action as, amongst other things, "a failure or refusal […] by employees to attend work [or] to perform any building work at all by employees who attend work, where that work is building work" (s 7).

23. Penalties for building and construction workers who engage in unprotected industrial action are significant and well-exceed penalties for the same conduct under the FW Act. Whereas penalties for engaging in unprotected industrial action under the Fair Work Act may be up to 60 penalty units, under the ABCC legislation, civil penalties may be up to 1,000 penalty units for unions and 200 penalty units for individuals. In 2018, that equates to some $210,000 for unions and $42,000 for individuals (versus $12,600 under the FW Act) per contravention.
24. The rationale for higher penalties for engaging in industrial action in the building and construction industry came from the Howard Government's Cole Royal Commission into the Building and Construction Industry in 2003. However, Commissioner Cole also recommended that the maximum penalties for employers who breach awards and agreements by underpaying employees their lawful entitlements should be increased to the same level as those for industrial action (Recommendation 165, Volume 1 *Final Report*). Successive Coalition Governments have ignored that recommendation. The result is that under the ABCC legislation, workers are exposed to far higher penalties for engaging in unprotected industrial action than employers who engage in wage theft. Further, the disparity in penalties between workers and employers in contravening industrial laws distorts industrial regulation massively in favour of wage theft insofar as a worker simply refusing to work might be the only effective mechanism by which he or she can recover unpaid wages. There is something dramatically wrong and improper with Australia's industrial laws when an employer who engages in wage theft can be penalised to a maximum of $12,600, whereas a victim of wage theft who refuses to continue working can be penalised up to $42,000.

Picketing

25. The *Building and Construction Industry (Improving Productivity) Act 2016* also creates an industry-specific prohibition on picketing. Under that Act, an unlawful picket is defined to include any action that is industrially motivated and that directly restricts persons from accessing or leaving a building site, or that has that purpose. Accordingly, for picketing to be unlawful under the Act, it does not actually have to restrict or prevent in any material way, access or egress at a building site. The prohibition applies to any group of persons, including members of the general public, who may then be subjected to Grade A Civil Penalties under the Act (up to $42,000) and injunctions (contempt of which is a criminal offence, punishable with imprisonment).
26. The prohibition against picketing includes conduct such as peaceful assemblies and the conveying of information to persons entering or leaving a building site. Thus even action that is not unlawful

at common law and action which is motivated by an otherwise perfectly lawful industrial purpose, including in circumstances where an employer has engaged in wage theft, come within the remit of the prohibition on picketing.

27. Again, participating in a picket might be the only effective means by which an employee can recover stolen wages; yet the current legislative framework favours wage thieves (penalties being a maximum of $12,600) over workers who are otherwise forced by their employer to invoke their democratic rights in order to recover their wages (penalties being a maximum of $42,000). This aspect of the ABCC legislative regime is an example of just how abhorrent that regime is to democratic principles. As the Statement of Compatibility with Human Rights, which was annexed to the Explanatory Memorandum to the *Building and Construction Industry (Improving Productivity) Bill 2013* concedes: "[t]he right to freedom of assembly is limited by the prohibition on unlawful picketing that is contained in s 47 of the Bill."

Building Code 2016

28. The *Building and Construction Industry (Improving Productivity) Act 2016* provides the legislative basis for the *Code for Tendering and Performance of Building Work 2016* (the Building Code), which came into effect on 2 December 2016, and operates as a legislative instrument that further regulates industrial relations in the building and construction industry.
29. Relevantly, the Building Code severely impedes the capacity of workers to negotiate terms favourable to them in enterprise bargaining agreements. It establishes wide-ranging restrictions on the content of enterprise agreements, above and beyond the limitations prescribed by the FW Act, and contraventions of the Code can cause an employer to be ineligible to tender for construction work that is funded by the Commonwealth government.
30. Most limitations on the content of enterprise agreements are imposed under the guise of the "right of the code covered entity to manage its business or improve productivity" (s 11(1)(a)), regardless of the wishes of the agreement-making parties. Examples of enterprise agreement clauses that are prohibited under the Code include:
    a. Clauses that require employers to make reasonable efforts to attract job candidates amongst suitably skilled Australian citizens or permanent residents before engaging foreign visa holders. This is despite the fact that foreign visa holders, as a particularly vulnerable cohort of workers, are frequently victims of some of the worst kinds of wage theft.
    b. Clauses that curtail wage theft against workers in precarious employment by:
        i. placing limits on the number of casual employees as a proportion of the workforce;

ii. requiring consultation with unions or their delegates about the use of subcontractors;

iii. and requiring employees of businesses to whom work is contracted out to be paid no less than the rates and conditions of permanent employees.

c. Clauses that place reasonable limits on the amount of overtime required to be worked, whereas unpaid overtime is a particularly prevalent form of wage theft.

d. Clauses that require employees to only perform tasks that are able to be safely performed having regard to the worker's skills, competencies, and experience, whereas the deliberate misclassification of workers is a widespread means by which wages are stolen.

e. Clauses that limit the 'cashing out' of entitlements through the use of 'all in' or 'rolled up' rates of pay, which fuel the growth wage theft and sham contracting by enabling employers to simply ignore various entitlements arising under industrial instruments. (Indeed, in a recent publication the QMBA actively promoted "all in rates" in favour of specific compliance with conditions arising under the *Building and Construction General Onsite Award 2010*).

f. Clauses that permit union officials to come onto a construction site to assist with a dispute settlement process, or at the invitation of an occupier, which hampers the resolution of wage claims, and reduces the possibility of inspection and detection of wage theft.

31. The Building Code 2016 is extraordinarily enabling of unscrupulous employers who engage in wage theft activity, and should be condemned.

General Federal industrial laws

Right of Entry to investigate suspected contraventions

32. Part 3-4 of the FW Act regulates the entry of union officials onto premises in order to exercise their representative role at the workplace. Division 2, Subdivision A of that Part allows union officials who are permit holders to enter premises to investigate suspected contraventions of the FW Act and industrial instruments, including allegations of non- or underpayment of wages and other entitlements. Conversely, union officials who are not permit holders, are stripped of that right.

33. Under Division 6 of Part 3-4, the Fair Work Commission may issue a right of entry permit, and section 513 of the FW Act sets out matters that the FWC must take into account when considering an application for a proposed permit holder. Subsection 513(1)(d) specifically provides that the FWC must take into account whether the trade union official, or any other person, has ever been ordered to pay a civil penalty under the FW Act or any other industrial law in relation to the

official's conduct. That is, a trade union official's record of contraventions of industrial laws, such as those contained in the *Building and Construction Industry (Improving Productivity) Act 2016*, must be taken into account when considering whether the proposed permit holder is a "fit and proper person" to hold the entry permit.

34. This is an increasingly difficult hurdle for trade union officials to overcome in an environment of the one-sided and over-zealous regulation under the *Building and Construction Industry (Improving Productivity) Act 2016*, and the civil prosecution activity adopted by the ABCC. Consequently, trade union officials are increasingly precluded from investigating and identifying wage theft under the right of entry provisions of the FW Act, even in circumstances where their record of civil contraventions arose out of conduct that was responsive to criminal wage theft committed by employers.
35. Further, even when a trade union official is a permit holder, the entry notice requirements under section 518 of the FW Act are overly prescriptive and are especially ill adapted to the short-term and transient nature of work in the building and construction industry. This is especially so when coupled with the requirement under section 487 to provide notice of the entry during working hours and at least 24 hours before the entry.
36. Needless to say, 24 hours is sufficient time for an employer in the building and construction industry that engages in dishonest wage theft to either abscond or destroy records, rendering any rights of entry nugatory.

Enforcement and recovery processes

37. Under the FW Act, often the only option left for employees who have been the victim of wage theft is to take their wage complaint to court. But usually this is unviable. Specifically, the FW Act vests jurisdiction in the Federal Court, the Federal Circuit Court or an "eligible State or Territory Court" to deal with contraventions of civil remedy provisions, including contraventions of industrial instruments or the National Employment Standards.
38. A consequence of this, however, is that employees in the federal system no longer have the benefit of being able to pursue wage complaints in specialist tribunals where matters can be dealt with quickly, efficiently, on an informal basis and relatively cost-free. Conversely, proceedings in any of the Courts with jurisdiction over the FW Act may be procedurally complex, time-consuming, and require representation by a paid lawyer. This is the case even in relation to small claims (as such) in the Federal Circuit Court, where applicants forego the possibility of seeking penalties in addition to compensation. With regard to filing fees alone, these range between $1,665 and $4,045 for unions and $665 and $1,390 for individuals in matters other than small claims in the Federal or Federal Circuit Court. These fees are significant deterrents against victims of wage theft seeking recourse, when such workers often do not have the means to cover the cost of commencing

proceedings. Further, these fees are particularly onerous when civil penalties against employers can be no more than 60 penalty units for a given contravention.

Recommendations

Make Wage Theft a Crime

39. If a worker steals from the boss, he or she will no doubt face the full force of the criminal law. So why should it be any different for bosses who steal from their workers?
40. The Queensland Government should legislate to create a specific offence of 'Wage Theft' under the Crimes Act, which adequately covers all kinds of wage theft that occur in Queensland, in order to create proper deterrence against employers from engaging in these dishonest practices.

Increase Inspectorate Activity for LSL and Worker Compensation Compliance

41. Deliberate non-payment of long service leave and worker compensation premiums are not only instances of wage theft in themselves, but are also an indicator of wider non-compliance with employment obligations on the part of employers, including wage theft.
42. The Fair Work Ombudsman barely scratches the surface when it comes to wage theft. Recently, it crowed about recovering some $31,000 on behalf of a migrant worker against convenience store chain 7-11, out of the possible tens of millions of dollars that enterprise would owe in terms of backpay for its systemic wage theft. The FWO's excuse that it does not recover more money on behalf of vulnerable workers is that it is "under-resourced". Yet it still manages to direct hundreds of thousands of dollars at prosecuting workers and their union for engaging in industrial action.
43. Together, the ABCC and Fair Work Ombudsman have been abject failures in investigating and prosecuting wage theft.
44. The Queensland Government should show the way and invest in increased inspectorate activity and prosecutions with regard to long service leave and worker compensation premium non-compliance to help stamp out wage theft for the benefit and economic wellbeing of Queenslanders.

The Queensland Government should condemn the ABCC and the Building Code

45. The ABCC and Building Code should be seen for what they are: politically motivated facilitators of wage theft in the building and construction industry.
46. Wage theft is worsened when the Turnbull Government thinks it is appropriate to spend tens of millions of taxpayers' dollars on reinstating the ABCC to prosecute building workers and their unions over contraventions of civil penalty provisions, and turning a blind eye to employer conduct that is truly reprehensible in the building and construction industry.

47. The Queensland Government and its agencies should cease all or any engagement with the ABCC, and publicly condemn it and the Building Code.

Refer powers of eligible Queensland Court to QIRC

48. Recovering stolen wages and seeking civil penalties before in court system is prohibitively expensive, time-consuming and ineffective. Whilst the *Fair Work Act 2009* vests jurisdiction in eligible State Courts (including Magistrates and District Courts) in addition to the Federal and Federal Circuit Courts, the Queensland Government should legislate to refer that jurisdiction to the Queensland Industrial Relations Commission (QIRC).
49. This would enable workers to more readily recover their wages and seek penalties that deter employers from engaging in wage theft.