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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 make a submission to the Queensland Parliamentary Inquiry into wage theft in Queensland (**Inquiry**).

The Queensland Law Society (the **Society**) is the peak professional body for Queensland's legal practitioners. We advocate for good law and good lawyers. The Society is an independent, apolitical representative body upon which government can rely to provide advice, and which promotes good, evidence-based law and policy.

The following submissions have been provided by the Society's Industrial Law Committee and are primarily aimed at responding to paragraphs (d), (f) and (g) of the Committee's terms of reference.

The problem of wage theft

The Society understands 'wage theft' to refer to systematic and/or intentional failures by employers to pay their employees their minimum or contracted wage, annual leave, superannuation, termination and redundancy entitlements.

The extent of wage theft and its impacts upon the economy has elsewhere been the subject of much analysis.¹ Given that wage theft occurs primarily in the private sector, these submissions are limited to addressing the practical and, for the most part, simple means by which the Society believes that wage theft may be combatted.

The Society recognises the vital role that the Fair Work Ombudsman (**FWO**) and unions play in the enforcement of workplace entitlements. However, it is necessary for the FWO and unions to deploy their limited resources in a targeted way. Accordingly, the Society has drafted these submissions with principal regard to the procedural and administrative hurdles faced by *individuals* in pursuing their own entitlements.

¹ See for example the recent report published by PwC relating to the 'Economic Impacts of Potential Illegal Phoenix Activity'.

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Urgent need for new appointments to the Federal Circuit Court in Queensland

The Federal Circuit Court (FCC) and Federal Court are the primary courts with carriage of matters relating to the enforcement of workplace entitlements. However, because such claims generally deal with monetary sums that are relatively small in comparison to commercial disputes, and do not raise matters of general importance or complexity, the FCC will generally be the appropriate forum within which such claims are to be brought. Indeed, one of the reasons for the establishment of the FCC was to provide litigants pursuing employment law matters with an expeditious and economical means of having their disputes resolved.²

However, Queensland has historically had fewer FCC judges with employment and industrial relations experience as compared with other States and Territories. The table below sets out the current comparative ratios of FCC judges who staff relevant Australian registries and who predominantly deal with employment and industrial relations matters.

Jurisdiction	Number of FCC judges who predominantly deal with employment matters (per one million residents) ³
Queensland ⁴	0.403
New South Wales	1.390
Victoria	1.410
South Australia	2.315
ACT	4.819
Western Australia	0.387

For the purposes of the above calculations, we have excluded Judge Leanne Turner, who only intermittently hears employment and industrial relations matters, and whose principal practising background is in family law. However, even if Judge Turner were included, the Queensland ratio would only increase to 0.604 judge per one million residents.

The above under-representation in Queensland of FCC judges has contributed to the development of extensive delays in matters progressing through the FCC's Queensland registry. It has also contributed to parties forum shopping and commencing their proceedings in the Federal Court, which has in turn caused delays in that Court and is restricting its capacity to deal with the complex matters that ought to be its predominant focus.

Without addressing the above imbalance on an urgent basis, the planned merger of the FCC with the Family Court will not, in the Society's submissions, do anything to aid aggrieved employees and former employees in accessing the Court system to pursue wage and other entitlement matters in a timely manner.

² *Finch v The Heat Group Pty Ltd (No 5)* [2016] FCA 191 at [119].

³ Population data is as at the end of the December quarter, 2017:

<http://www.abs.gov.au/ausstats/abs@.nsf/0/D56C4A3E41586764CA2581A70015893E?Opendocument>

⁴ In Queensland, two FCC judges predominantly have carriage of employment and industrial relations matters

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Alternative means to address the current delays within the FCC and Federal Court

The Society notes that, 'eligible State or Territory Courts', which include the Queensland Magistrates and District Courts,⁵ have jurisdiction under the *Fair Work Act 2009* (Cth) (**FW Act**) to make compensation orders and levy penalties in respect of, among other matters, breaches of the National Employment Standards and modern awards.⁶ These are the predominant breaches that occur in respect of wage theft. In addition, the FW Act and *Fair Work Act Regulations 2009* (Cth) (**FW Regs**) make provision for a number of State industrial courts to be an 'eligible State or Territory Court'.

Despite the provisions of the FW Act, few claims have been brought under it in any eligible State or Territory Court (although the use of 'Employment Claims' in the Magistrates Court has increased over time, and this is further discussed below). This may likely be because parties, including the FWO, recognise that the FCC and Federal Court have the best expertise to deal with employment law matters, and that the State Courts' processes are not tailored to deal with employment matters.

However, the following options are available to the Queensland Government as a means of addressing the under-representation of FCC judges in Queensland:

- (a) make appointments to the Magistrates and District Court of practitioners who have detailed expertise in employment law matters, and set up an employment list or other process to bring national system employment law matters in the State Courts;
- (b) request the Commonwealth Minister for Employment to amend the FW Regs to include the Industrial Court of Queensland as an 'eligible State or Territory Court', and make additional appointments to that Court to encourage the bringing of FW Act claims directly in that jurisdiction;
- (c) commit substantial additional resources including additional magistrates, registry staff and registry resources importantly additional infrastructure such as hearing rooms, to further promote the bringing of 'Employment Claims' within the current processes established under the *Magistrates Court Act 1921* (**MC Act**), which processes are further described below.

The Society believes that the latter two options are preferable. However, for clarity, the better approach by far is for the Commonwealth to appoint more FCC Judges. While the above options have merit, the Society is strongly of the view that:

- (a) the FCC and Federal Courts are the appropriate forums for the bringing of employment law matters under the FW Act; and
- (b) to promote consistency of approaches and limit complexity for litigants and practitioners, jurisdiction to hear matters in respect of *any* laws ought not be bifurcated unnecessarily.

Employment Claims through the Magistrates Court

As identified above, the FCC and Federal Court are (and ought to be) the primary avenues for the enforcement of outstanding workplace entitlements. However, in circumstances where the challenges associated with pursuing claims in this jurisdiction are well documented, an

⁵ See s 12 of the FW Act.

⁶ See ss 539, 545(3) and 546 of the FW Act.

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'Employment Claim' through the Magistrates Court offers an alternative and existing avenue for private sector employees seeking to recover wages in Queensland.

'Employment Claims' are commenced by filing a Form 2A in the Magistrates Court.⁷ Part 5A of the MC Act sets out the process for dealing with Employment Claims. Consistent with the object of Part 5A being to '*reduced the cost of proceedings brought in a Magistrates Court by low income employees against employers for breaches of contracts of employment*,⁸ the process includes a requirement that the claim immediately proceed to a conciliation conference before a member of the Queensland Industrial Relations Commission (**QIRC**).⁹ If the matter is unresolved at the conclusion of the conciliation, the matter will proceed as a civil claim within the MC.

Statutory entitlements can be pursued through Employment Claims either as a contractual entitlement¹⁰ or under the FW Act in the Court's capacity as an eligible State or Territory Court.¹¹ Individual employees may be represented by organisations, such as unions,¹² and the presupposition that costs follow the event is displaced by the limitation on the ability to award costs set out at s 42ZC of the MC Act.¹³

The annual reports of the QIRC demonstrate that the use of the jurisdiction is increasing,¹⁴ however, the Society submits that there are measures that can be taken to ensure consistency with the process and procedures at a Federal level and to promote the jurisdiction as a genuine alternative to pursuing unpaid or underpaid entitlements through the FCC and Federal Courts. The measures proposed below largely seek to replicate the features of the Federal jurisdiction:

(a) Forms

Employees seeking to recover entitlements through the small claims process in the Federal Circuit Court are able to use a pro forma application form, being the Form 5, to initiate these proceedings. Prospective applicants in this jurisdiction are prompted by the Form 5 to provide the details relevant to their claim. This procedure stands in contrast with the Form 2A which relies on the prospective plaintiff identifying and articulating the basis for their claim – a process that presents difficulties for unrepresented litigants and increases the costs incurred by represented litigants. The Society submits there is justification for establishing a pro forma Employment Claim form for use in this jurisdiction, and further submits that the Form 5 ought to be used as a guide in this process.

(b) Education

There are limited guides and resources available to individuals considering pursuing an Employment Claim. The information provided on the Queensland Court website is limited and imprecise. The website redirects employees seeking information about making an Employment Claim in the Magistrates Court to Chapter 4, Part 1 of the FW

⁷ Sections 522 of the *Uniform Civil Procedure Rules 1999* and 42B of the *Magistrates Court Act 1921*

⁸ Section 42A of the *Magistrates Court Act 1921*

⁹ Sections 42F and 42G of the *Magistrates Court Act 1921*, unless there is an objection taken to the classification of the claim as an Employment Claim pursuant to section 42C.

¹⁰ Section 42B(1)(b) of the *Magistrates Court Act 1921* (Qld).

¹¹ Section 42B(4) of the *Magistrates Court Act 1921* (Qld).

¹² Section 42B of the *Magistrates Court Act 1921* (Qld).

¹³ *Magistrates Court Act 1921*

¹⁴ There being 88 Employment Claims in 2016/2017; 77 Employment Claims in 2015/2016; 52 Employment Claims in 2014/2015; 27 Employment Claims in 2013/2014; and 18 Employment Claims in 2012/2013:

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Act and the FWO, despite no (or very little) information relevant to proceedings in the State Courts being found in these resources. In circumstances where a lack of understanding of the avenues available to address wage theft is associated with increased vulnerability to wage theft,¹⁵ ensuring there are appropriate resources and educational tools available to employees wishing to pursue an Employment Claim will go some way to remedying this vulnerability. The Society submits that the comprehensive educational resources published by the FWO in relation to small claims under the FW Act can and should be used as an example of the resources that could be produced in this space.

(c) Presumption in favour of employee

The *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*, inter alia, reversed the onus of proof in proceedings involving allegations of unpaid entitlements if the employer failed to maintain proper employment records. The Society submits that a similar reversal of the onus of proof in Employment Claims would ensure consistency with the Federal jurisdiction and appropriately remedy the disadvantage suffered by plaintiff employees as a result of the defendant employer's failure to comply with the obligation to keep time and wage records.

Filing fees

Though not the predominant access to justice issue, the fees required to be paid by litigants who wish to pursue wages and other entitlement claims in the FCC and Federal Courts is likely to act as a real disincentive to the bringing of those claims.

At present, an employee wishing to pursue a general protections claim¹⁶ must pay a filing fee of \$71.90 in both the FCC and Federal Court. The payment of this relatively minor fee is entirely appropriate. However, where an employee wishes to pursue an underpayment of wages or entitlements claim that is not related to a general protections claim, they are required to pay the following fees:

	FCC	Federal Court
Where claim is for less than \$10,000	\$215	N/A
Where claim is for between \$10,000 and \$20,000	\$355	N/A
For all other claims	\$655	\$1,390

¹⁵ Berg, L. and Farbenblum, B. "Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey" [2017] UTSLRS 33

¹⁶ These refer to claims in which employees allege that they have been dismissed from their employment due to the exercise of workplace rights or because they have protected attributes.

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Although employees who face economic hardship may apply to the Court Registrar for an exemption from the above fees, such exemptions are discretionary. The information that is required to be provided in support of an exemption may also be daunting for some employees. In any event, there is no good policy reason for the differentiation between the fee approaches that apply to general protection applications, and broader employment entitlement claims.

Access to 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 Society proposes consideration of the following reforms, which are intended to increase the practical utility of the FEG Scheme:

(a) Qualifying for the FEG Scheme

The FEG Scheme presupposes that, in the majority of cases, employers will enter into voluntary liquidations or bankruptcies, or that creditors will seek the winding up of an employer, and that the termination of relevant employees will occur as a result of that action.

However, directors of some corporate employers may frequently have very little incentive to voluntarily wind up their company's operations. There may also be an absence of creditors who are owed a sufficient amount of money to justify the commencement of a wind up. Alternatively, unsecured creditors may accept that there is no utility in a court ordered wind up having regard to the employer's pool of assets. Similar considerations apply in respect to the bankruptcy of an individual.

In circumstances where a corporate employer has been effectively abandoned by its directors and has ceased operations but has not been wound up, Part 5.4C of the Corporations Act gives ASIC the power to order the winding up of the company (subject to notice requirements). This mechanism was introduced as a means by which employees of abandoned corporate employers could access the predecessor to the FEG Scheme without the difficulties associated with having to themselves apply for the winding up of their employer. In enacting the legislation, Commonwealth Parliament recognised that '[t]he cost of placing a company into liquidation can be prohibitive for employees who have incurred losses in wealth due to the failure to receive their entitlements'.¹⁷

The same considerations apply in the event that an employee wishes to recover unpaid wages and other entitlements from an employer that continues to trade but who is technically insolvent. However, in those circumstances, the restrictions that apply to an ASIC initiated wind up under Part 5.4C of the Corporations Act mean that it will not be available and that the only option for an affected employee will be for them to follow

¹⁷ *Corporations Amendment (Phoenixing and Other Measures) Bill 2012* (Cth).

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cumbersome and costly Court processes seeking the winding up or bankruptcy of their employer. Even putting aside the complexity that self-represented employees, who may frequently come from lower socio-economic backgrounds, must overcome in that regard, the expense and time that a Court ordered wind-up requires risks employee potentially falling short of meeting the six month threshold.

In the circumstances, the Society recommends that consideration be given to ASIC being conferred broader powers to order the winding up of a company. To achieve the policy aims referred to above, such a power could be limited to where an employee has served a valid statutory demand seeking the repayment of qualifying entitlements (i.e. wages, annual leave, termination and redundancy payments), with which the employer has failed to comply or which they have not applied to be set aside. Similarly, the Society recommends that consideration be given to the Secretary of the Department or their delegate being conferred standing under the *Bankruptcy Act 1966* (Qld) to seek a sequestration order where an individual employer has failed to comply with a bankruptcy notice given by an employee or has not applied to set it aside. Under the proposal, the trigger for a person to qualify for an advance under the FEG Scheme would not change, and the Secretary would have the same subrogation rights as they do at present.

(b) **Greater cooperation between the Department and the Australian Taxation Office**

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.

(c) **Self-help**

In addition to, or as an alternative to the approaches referred to above, the Society proposes that the six month threshold be extended to allow employees additional time to directly pursue remedies themselves either through negotiating a payment plan with their employer, or by filing Court proceedings seeking orders against their corporate employers, and any other persons involved in the employer's contraventions of workplace laws (most commonly this will be the company's directors).

The Courts are increasingly ordering that company directors be jointly liable for the breaches of workplace laws committed by their companies. Such orders send a powerful message to directors that they cannot hide behind the corporate veil. However, the FEG Scheme is currently structured in such a way that, rather than pursuing joint compensation claims, and potentially seeking the recovery of unpaid entitlements against the personal assets of a complicit director, the six month threshold incentivises an employee cutting their losses and seeking an advance from FEG. In those circumstances, FEG is then left to seek recovery from the assets of the

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company, and has much more limited scope (at least under existing law) to seek recovery from an individual director.

In addition, even if an employee is successful in obtaining orders against an individual director, and they otherwise qualify for an advance through the FEG Scheme, s 19 of the *Fair Entitlements Guarantee Act 2012* (Cth) requires that any advance that would otherwise be payable to them be reduced by the amount that is payable by a company director or other person involved in the contravention. This is so notwithstanding that the sum that is payable by such a person may itself be difficult to enforce due to the person's financial circumstances.

(d) Anti-avoidance legislation

In 2017, the Commonwealth Government published an exposure draft of the *Corporations Amendment (Strengthening Protections for Employee Entitlements) Bill 2018 (Bill)*. The Bill proposes to lower the threshold for establishing criminal offences and civil penalties relating to transactions that were entered into for the purposes of preventing the recovery of employee entitlements, or reducing the amount of entitlements that can be recovered. The Bill also provides a direct means by which either the Commissioner of Taxation, the FWO, the Secretary of the Department or an employee can seek compensation against persons who are involved in such transactions, and provides an avenue for Courts to make contribution orders against entities that are in the same corporate group as the entity responsible for the contravention. The Society is broadly supportive of the proposed legislation, which will provide a powerful tool to combat phoenixing practices.

Practical tools for enforcing entitlements

In some circumstances, obtaining an order for the repayment of wages or other entitlements against an employer or any other person who was involved in a contravention of workplace laws will only be the start of the battle. The current complex enforcement regimes that apply in the FCC and Federal Court do not adequately serve litigants. In that regard:

- (a) The FCC and Federal Courts take their enforcement processes from the Supreme Court of the State or Territory of the registry in which enforcement processes are commenced. This adds a significant layer of complexity, particularly because such State procedures are not well suited to the enforcement of what may sometimes be relatively small workplace entitlement claims.
- (b) There is an insufficient capacity to test the veracity of assertions made by employers and their officers through their statements of financial position (which must be provided in Queensland prior to the making of any enforcement orders). The Society recommends that template subpoenas be published (at no cost) for litigants to use against banks and other financial institutions so these litigants they may assess the true financial circumstances of the company and individuals against whom they seek to enforce orders.
- (c) There is currently very little practical recourse available to litigants in the event that their employers or their officers obfuscate or mislead the Court in the course of enforcement hearings. Such hearings are predominantly run by Court registrars who, by virtue of the nature of their positions, do not have the same perceived authority as if

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those hearing were run by a judge. The Society believes that, wherever practicable, enforcement hearings be heard by a judge of the relevant Court.

There are no other relevant issues that the Society raises at this time. However, we welcome the opportunity for continued consultation in the future, including in the course of the Inquiry's public hearings.

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 (07) [REDACTED] or by email to [REDACTED]

Yours faithfully

A handwritten signature in black ink, appearing to read 'Ken Taylor', with a long horizontal flourish extending to the right.

Ken Taylor
President