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Office of the President

30 July 2020

Our ref: LP-MC

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

**Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020**

Thank you for the opportunity to provide this submission to the Inquiry into the Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020.

This submission has been prepared with the assistance of QLS legal policy committees including the Industrial Law Committee and Criminal Law Committee, whose members have substantial expertise in this area.

## General comments

QLS made a significant submission to the inquiry into wage theft in 2018 by the Education, Employment and Small Business Committee of the Queensland Parliament and provided evidence to the committee. Following the release in November 2018 of the Committee's report we anticipated further consultation particularly in relation to the implementation of the Committee's recommendations regarding wage recovery. Limited consultation has occurred. It is disappointing proper consideration of these reforms has therefore been compromised.

Prior to providing detailed comments about the conciliation provisions of the draft, we make the following general comments.

Our members work at the coalface of this area of the law. Authorities only have limited resources to assist members of the public. Decreasing union membership has limited the ability of unions to take proceedings on members' behalf. In the circumstances the responsibility for advising and assisting the public on means of recovering wages

predominantly falls on the legal profession. There is accordingly a significant body of experience in our membership which can assist in formulating appropriate wage recovery measures.

QLS supports the concept of early conciliation by specialists in wage claims. Several of our members conduct voluntary conciliation of minor claims in the Federal Circuit Court. The bill creates a conciliation process for use in claims in the Industrial Magistrates Court of Queensland relating to the civil remedy provisions of the *Fair Work Act 2009* (Cth) (**FW Act**). In this regard we note that a Magistrates Court constituted by a police officer, stipendiary or special magistrate or an industrial magistrate is an *"eligible State or Territory Court"* for the purposes of the FW Act. We note that section 556 of the *Industrial Relations Act 2016* (QLD) (**IR Act**) provides for appeal from an industrial magistrate to the Industrial Court of Queensland. However, that court is not named as an eligible state or territory court in the FW Act.

Whilst the Industrial Magistrates Court may be eligible under the FW Act to deal with federal wage matters, it has not been used in practice for this purpose so far as we are aware. If not commenced in the Federal Circuit Court, claims for wages and entitlements and penalties are usually commenced in the Magistrates Court. This may be because of a lack of general knowledge of the functions of the Industrial Magistrates Court, lack of an apparent costs power (in this regard we note that the general power to award costs contained in section 545 of the IR Act does not appear to extend to the Industrial Magistrates Court) or something as simple as the lack of any published forms or detail of its processes. It should be clear that the general rule is that each party bears their own costs with the court having a discretion to award costs in cases of frivolous, vexatious or unreasonable behaviour. This is the case in the Federal Circuit Court and the employment claims procedure under the *Magistrates Courts Act 1921* (**Magistrates Court Act**). The current provisions of the IR Act dealing with Industrial Magistrates are minimal and provide no information for practitioners about the processes of the Industrial Magistrates Court.

The *Industrial Relations (Tribunals) Rules 2011* provide some detail about mechanical steps in the Industrial Magistrates Court, but will clearly need significant attention if the Industrial Magistrates Court is to have a significant role to play in practical wage recovery actions. QLS suggests that not all of the current rules are necessary or appropriate in wage recovery claims and a simplified process should be established.

This point can be illustrated by reference to the current employment claims procedure in Part 5A of the Magistrates Courts Act. The provisions are not widely known to the public or practitioners unless they have specialist experience in this area. There is little to guide the public other than the statutory provisions themselves and the specific employment claim form is very general in nature. One of the points QLS emphasised in its submission to the previous parliamentary inquiry was the importance of educating the public on the means available to take action. Unless this is done, in conjunction with other steps, the Industrial Magistrates Court jurisdiction is likely to continue to be underutilised, which will largely render the amendments proposed by the bill irrelevant.

Bearing those general comments in mind, QLS makes the following particular comments on the draft bill.

## Amendments to the IR Act

Clause 9 – Insertion of new ch11, pt 3, div 4

This clause inserts provisions to facilitate conciliation of fair work claims in the Industrial Magistrates Court.

*Conciliation in the Magistrates Court*
Given the civil courts have a separate power to deal with private sector wage claims (separate to the Part 5A process), and most significant wage claims are dealt with in state courts, the proposed conciliation process should be extended to those Magistrates Court claims as well.

*Early referral to conciliation*
Whilst not a specific requirement of Part 5A of the Magistrates Courts Act, the practice in respect of employment claims under that part has been to refer claims to the Queensland Industrial Relations Commission (**QIRC**) before the filing of a defence is required. This often facilitates an early resolution according to our members. It is desirable that conciliation take place at as early a stage as possible. Whilst the proposed provisions do not prevent that from occurring, they do not require it and it would be helpful to do so. Clause 507C only gives the registrar a discretion to refer the parties to conciliation before the Industrial Magistrates Court hears the fair work claim and a party can notify the registrar that it does not wish to participate in the process and the matter is then simply referred for a hearing.

In addition to the registrar having the power to refer a claim to conciliation by an industrial commissioner, it would be advantageous for industrial magistrates to also have this power, to be exercised in appropriate cases. It would also be advantageous for industrial magistrates themselves to have this power in appropriate cases, as is the case in the QIRC and Fair Work Commission. Whilst conciliation may not be successful at an early stage (when the defendant usually will not have filed a defence), it may be successful at a later date after the issues have been refined, relevant material filed and the parties have had an opportunity to consider their positions. The experience of QLS volunteer mediators has been that parties often arrive for the early conciliation conference without having obtained advice or properly understanding their legal position.

*Conciliation should be compulsory*
QLS is concerned that some employers will not consent to attending conciliation. Enlightened employers may well see early conciliation as an opportunity to resolve the matter, but many employers are likely to consider that applicants will not proceed to a hearing because of the time, cost and emotional investment often required in legal action, particularly where parties are self-represented. Delay and obfuscation are tools often utilised in this process. Claims under Part 5A of the Magistrates Courts Act are the subject of compulsory conciliation (although with apparently little consequence for employers who do not comply with directions) and the Federal Circuit Court effectively compels parties to attend early conciliation in minor wage claim matters. There is no obvious reason why conciliation should only occur with the consent of the parties. Consideration should also be given to providing the court with the power to impose a penalty for non-attendance.

The inclusions of provisions requiring the compulsory conciliation of fair work claim commenced in the Industrial Magistrates Court, would be unlikely to give rise to any inconsistency with Federal law, in light of the Commonwealth parliament explicitly conferring jurisdiction on State Courts in respect of fair work claims and in circumstances where s.79 of the *Judiciary Act 1903* (Cth) clearly contemplates that such claims be subject to the procedures of the court in which the claim is commenced.

Compulsory conciliation will:

(a) ensure that there is a reasonable attempt by the parties to settle the matter before proceeding to hearing and preparing the necessary documents associated with that; and
(b) prevent any unnecessary pressure on either party to proceed to a hearing, which may be the case if either party chooses not to participate in the conciliation.

The starting point should be that conciliation is required and the registrar has discretion not to refer the claim to conciliation only upon provision of adequate reasons by a party.

Clause 507D provides that each industrial commissioner is a conciliator for fair work claims. There does not appear to be a power to appoint any other person as a conciliator. This power exists under Part 5A of the Magistrates Courts Act and whilst QLS is not aware of this power being utilised, it would be appropriate for this alternative to be available.

*Requirement for reasonable attempt at conciliation*
Clause 507F provides that the conciliation process is finished if the parties agree on a resolution of the fair work claim in whole or in part or the conciliator decides the conciliation process is finished. This latter provision gives the conciliator an arbitrary power. It should be subject to a requirement that the conciliator be satisfied that a reasonable attempt at conciliation has been made by the parties. It should not be possible for a party to attend a conciliation and simply adopt an entrenched position; rather there should be an obligation to reasonably participate in the conference.

<u>Clause 12 – Amendment of s.530 (Legal Representation)</u>

Legal representation is currently permitted in the Industrial Magistrates Court under section 530(1)(e) of the IR Act where all parties consent or where proceedings are brought by an employee which could have been commenced in another court of competent jurisdiction. This will be the case in almost all wage recovery situations. It is not clear why a requirement is being inserted by clause 13 to require the leave of the Industrial Magistrates Court for legal representation when this is not necessary in other courts in which the same claim could be made. This will likely act as a disincentive for lawyers to use this jurisdiction.

Similarly, it is not clear why a requirement is being inserted for leave to be given by a conciliator for a party to be legally represented at a conciliation. This is not a requirement of the Part 5A conciliation process under the Magistrates Courts Act It introduces an element of considerable uncertainty for parties which is likely to be a disincentive for the use of lawyers in this jurisdiction. This is because a party may be put to some cost in instructing a lawyer without any certainty that they will be given leave to appear. There are also no grounds for

leave set out in the draft legislation. Although understandable in relation to lay agents, in our view it is not justifiable in relation to the legal profession.

It is our members experience that legal representation assists rather than hinders the resolution of matters. Legal practitioners are often of great assistance to the conciliator in assisting their own client to understand the issues and in articulating their client's position concisely. Generally speaking, legal practitioners are of significant assistance in resolving matters. The own costs rule will be sufficient to deter any unmeritorious matters.

Clause 14 - Insertion of new ch 11, pt 5, div 5A

In respect of clause 14, we make similar comments about the conciliation process as mentioned above.

Clause 18 – Amendment of s.42B (Application of pt 5A)

Clause 18 amends section 42B(3) and (4) of the Magistrates Courts Act to provide that a claim under section 539 of the FW Act is not an employment claim. This amendment removes the ability of a claimant to also seek a penalty for breach of the FW Act where there is a common law claim for breach of contract. It also appears to remove the ability to include a claim for failure to pay statutory or award entitlements in addition to any common law claim. The reason for removing that ability, in circumstances where the Magistrates Court retains that ability in non-Part 5A matters, is not clear. Whilst we understand the intention may be to provide claimants with incentive to use the Industrial Magistrates Court, significant work will be required to promote the Industrial Magistrates Court as a practical venue for action by claimants. It would also be desirable for applicants to retain the ability to bring both a common law claim and statutory based claim in the one action.

Consideration should be given to duplicating the costs provision for employment claims in section 42ZC of the Magistrates Courts Act in respect of Industrial Magistrates Court fair work claims.

*Industrial Relations (Tribunal) Rules 2011*

QLS understands that it is the government's intention for the *Industrial Relations (Tribunal) Rules 27011* to apply to claims commenced in the Industrial Magistrates Court.[1] These Rules will require significant amendment in order to ensure the Industrial Magistrates Court is equipped to deal with such claims.

Presently, employment claims commenced pursuant to Part 5A of the Magistrates Courts Act, are subject to the simplified procedure at rule 522A-N of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**). The simplified procedure varies the application of certain procedural rules to allow the claims to be dealt with efficiently, including by prohibiting a defendant from relying on a cross-claim by way of set-off or counterclaim in response to the claim, and specifically

[1] Explanatory Speech, Criminal Code and Other Legislation (Wage Theft) Amendment Bill 2020, Hon G Grace MP on 15 July 2020

providing that rules relating to pleadings, disclosure or the inspection of documents, and the conduct of hearings[2] do not apply to an employment claim.

Consideration should be given to replicating the procedural rules set out at rule 522A-N of the UCPR, in the rules that are to apply to proceeding commenced in the Industrial Magistrates Court.

## Amendments to the Criminal Code

QLS has concerns with the amendments proposed to the *Criminal Code* by the draft bill as the criminalisation of non-payment, or late, or partial payment of a debt due and payable is a departure from long-standing principles. Further, it may be argued that this type of conduct is already adequately punishable under workplace prosecution provisions. We are pleased to see, however, that the offence is still tied to a requirement for dishonesty.

QLS is also concerned that the amendments will create uncertainty for employers and prosecuting agencies. What a prosecutor will have to prove to make out the offence of stealing is:

1. an amount was payable to an employee;
2. the amount was not paid;
3. the non-payment was fraudulent.

The proposed amendments take a simplistic approach to the problem of "wage theft" by making it a criminal offence and it may create uncertainty for employers and prosecuting agencies. In a practical sense, the charge will presumably be reserved for more serious cases. As we have stated previously, whilst criminalisation of this conduct may have some general deterrent effect, it is unlikely to result in criminal charges for every breach that occurs. There is still a demonstrated need for appropriate resourcing of the legal assistance sector and the courts to ensure that wage disputes can be effectively dealt with and unpaid wages recovered.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted] or by phone on [redacted]

Yours faithfully

Luke Murphy
**President**

[2] r.522N of the *Uniform Civil Procedure Rules 1999* (Qld)

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