

Senate Standing Committees on Economics

Inquiry into the unlawful underpayment of  
employees' remuneration

Queensland Government Submission

February 2020

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## Executive summary

The Queensland Government welcomes the opportunity to make this submission in response to the Senate Economics References Committee (the Committee) inquiry into the matter of unlawful underpayment of employees' remuneration.

The rights of workers to a fair day's pay for a fair day's work and to receive what they are legally entitled to is one of the most fundamental tenets of a fair industrial relations system. Yet, the evidence unfortunately is that for too many workers this is not the reality.

The Queensland Parliament's 2018 wage theft inquiry ('wage theft inquiry'), initiated by the Palaszczuk Government, laid bare the extent of the problem with wage theft and the impact it has on workers, their families, and those business doing the right thing. The Inquiry found wage theft is endemic across Queensland and Australian workplaces, affecting around 437 000 workers each year in Queensland alone (around one in five workers). In global terms, the Inquiry found wage theft costs Queensland workers approximately \$1.22 billion per year, with an additional \$1.12 billion in unpaid superannuation.

The findings and recommendations from the Inquiry made clear that existing regulatory and enforcement measures have not been adequate – something needs to change to stop rampant wage theft.

The Queensland Government notes that responsibility for these matters rests primarily within the jurisdiction of the Australian Government, following the federal takeover of industrial relations powers in 2005 and the further referral of residual powers in 2009. However, the Queensland Government maintains a strong interest in the welfare of all Queensland employers and employees, regardless of whether they are covered in the state or federal industrial relations jurisdiction, and will therefore continue to take an active role in finding workable solutions to stop wage theft.

For its part, the Queensland Government has accepted all 17 recommendations from its own wage theft inquiry. These include 11 recommendations that require Australian Government action to address wage theft. The Queensland Government reiterates our call for the Australian Government to implement in full these 11 recommendations, as outlined further in this submission.

The Queensland Government has accepted in principle the wage theft inquiry's recommendation that it legislate at a state level to make wage theft a criminal offence, where the conduct is proved to be deliberate or reckless. The Queensland Government considers criminalisation of wage theft is a necessary and important step to take given the severity of the problem, and is continuing to work through the detail of how to best implement this recommendation at a state level. We welcome the indication from the Australian Government that it has now also come to a similar position in support of criminalising wage theft, in line with the recommendation of its own Migrant Worker Taskforce Inquiry.

While the Queensland Government supports criminalisation of wage theft, the response cannot begin and end there. To deal comprehensively with wage theft, action needs to be taken on a range of related matters that together only make it harder for workers to receive their fair and lawful entitlements. These include:

- The continued use of WorkChoices era-zombie agreements;
- A federal regulator, the Fair Work Ombudsman (FWO), that at least to this point has not been able or willing to take the action necessary to stop wage theft;
- The prevalence of sham contracting;
- Unregulated labour hire operators that underpay and exploit their workers; and
- Wage recovery process that are costly, complex and time-consuming.

These matters require the concerted attention of policy-makers, regulators, courts and tribunals, as well as practitioners, employers, employees, unions and employer groups.

The recommendations from the wage theft inquiry provide a blueprint or package of reforms that would go a long way to addressing these issues at a national level. We commend them to the Committee and call on the Australian Government again to implement them in full.

Wage theft is a national issue requiring a national response and action by the Australian Government is long overdue.

## Recommendations

### ***The Queensland Government recommends that the Australian Government:***

1. Legislate criminal penalties for deliberate forms of wage theft, provided it does this in close consultation with States and Territories on the detail of the proposed amendments, consistent with the 2009 IGA.
2. Allocate appropriate and sufficient resources to investigate and prosecute all forms of wage theft.
3. Appoint an additional 53 FWO inspectors based in Queensland in accordance with recommendation 11 of the Queensland Wage Theft Inquiry Report.
4. Review the performance, resourcing and culture of the FWO to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion, in accordance with recommendation 12 of the Queensland Wage Theft Inquiry Report.
5. Amend the *Fair Work Act 2009* (Cwlth) (FW Act) to include superannuation as a national employment standard in accordance with recommendation 13 of the Queensland Wage Theft Inquiry Report.
6. Include unpaid superannuation contributions under the Fair Entitlements Guarantee scheme and extend the scheme to include overseas visa workers in accordance with recommendation 9 of the Queensland Wage Theft Inquiry Report.
7. Introduce a national labour hire licensing scheme based on the successful state-based scheme operating in Queensland since April 2018, in accordance with recommendation 4 of the Queensland Wage Theft Inquiry Report.
8. Amend the FW Act to remove the 'reckless defence' provision from section 357(2), in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
9. Amend the FW Act to provide the Fair Work Commission (FWC) with powers similar to the QIRC under section 471 of the *Industrial Relations Act 2016* (IR Act), to assess the status of an employment contract, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
10. Introduce a 'reasonable person' test for determining whether an employer has engaged in sham contracting, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
11. Legislate for an automatic termination date of the remaining Work Choices 'zombie' agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result, in accordance with recommendation 16 of the Queensland Wage Theft Inquiry Report.
12. Consider measures to improve worker representation in the workplace and ensure compliance with industrial instruments, using the model of the Queensland IR Act, in accordance with recommendation 6 of the Queensland Wage Theft Inquiry Report.
13. Appoint additional Federal Circuit Court judges in Queensland, and ensure Queensland retains its proportionate share of Federal Court judges in accordance with Recommendation 7 of the Queensland Wage Theft Inquiry Report.
14. Fund a workplace rights information and support service based in Queensland as is funded for other Australian jurisdictions and was formerly the case up until the removal of funding in 2016 by the then Federal Government, in accordance with Recommendation 10 of the Queensland Wage Theft Inquiry Report.
15. Consider reform of the FW Act to more adequately accommodate emerging forms of non-traditional employment, including broadening the definition of worker and providing broader access to the benefits of collective bargaining, minimum standards of pay and conditions, and access to the Fair Work Commission, in line with recommendation 17 of the Queensland Wage Theft Inquiry Report.
16. Consider the Queensland Government's Ethical Supplier Mandate as a model for ensuring Australian Government procurement policies address wage theft.

## Introduction

The Queensland Government welcomes the opportunity to make this submission in response to the Senate Economics References Committee (the Committee) inquiry into the matter of unlawful underpayment of employees' remuneration. We note that the Committee is examining the following issues:

- causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers; and
- measures that can be taken to address the issue.

The Queensland Government has taken a lead role in responding to the growing scourge of wage theft, establishing the first dedicated parliamentary wage theft inquiry in the country to better understand the impact and extent of wage theft and develop practical and workable solutions to stamp it out.

While the Queensland Government will take all the action it can at a state level, the fact is these are matters requiring national responses. Action by the Australian Government to rectify the serious issue of employer non-compliance and introduce tougher workplace laws to deal with wage theft and exploitative labour hire arrangements is long overdue.

In the submission that follows, we provide information on the findings and recommendations from the Queensland Parliamentary wage theft inquiry ('wage theft inquiry'), which we believe provide a model or blueprint for Australian Government action to address this issue at a national level. This includes making wage theft a criminal offence but also a number of other key actions required for this scourge to be fully addressed (see **attachment 1** for full list of recommendations).

### Queensland Parliamentary Wage Theft Inquiry

On 7 May 2018, the Queensland Government moved a motion to establish a Parliamentary Inquiry into wage theft in Queensland to examine the incidence, forms and impacts of wage theft in Queensland, report on the effectiveness of the current regulatory framework and to recommend options for eradicating the practice into the future. The motion was supported 53 votes to 39, with the Opposition LNP opposing the establishment of the Inquiry.

The Queensland Parliamentary Education, Employment and Small Business Committee (the Committee) conducted the wage theft inquiry, travelling across Queensland, holding 24 hearings, receiving evidence from more than 100 witnesses, 360 survey respondents, and 49 written submissions.

On 16 November 2018, the Committee tabled its report – [\*A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland\*](#) (the Report) which included 17 recommendations for action to address wage theft<sup>1</sup>. Key facts and findings from the wage theft inquiry include:

- wage theft is widespread and, in many cases, part of a deliberate business model;
- up to 437,000 Queensland workers are likely to be affected by wage theft each year, costing more than \$1 billion every year in unpaid or underpaid wages;
- in addition, 580 000 Queensland workers are likely to have unpaid super with the annual loss associated with the underpayment or non-payment of superannuation estimated at \$1.12 billion;

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<sup>1</sup> <https://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/past-inquiries/Wagetheft>

- particular industry sectors, notably hospitality, horticulture, contract cleaning and workers in convenience stores and petrol stations, are 'hot spots' for wage theft;
- good employers acknowledge that wage theft is happening and are concerned about the impact it has on law abiding businesses;
- wage recovery processes should be simple, low-cost and quick - they are not at the moment;
- the FWO is under-resourced and not able or willing to action necessary to stop wage theft (the Committee observed that there are an estimated 38 FWO inspectors to cover all of Queensland, compared to 71 state inspectors in 2005 prior to Work Choices and the federal takeover of IR powers);
- there is a strong case for criminalising wage theft and broad support for it; and
- there was broad support for better education on rights at work, including in schools.

On 15 February 2019, the Queensland Government accepted all 17 recommendations of the attached report in the Queensland Government [response](#). Of the 17 recommendations, 11 were for action by the Australian Government. The Queensland Government committed to providing the evidence from the wage theft inquiry to the federal jurisdiction that regulates and enforces private sector wages.

The Queensland Government has made repeated representations urging a national response to wage theft, writing to both the former Minister, the Hon. Kelly O'Dwyer, and current Minister, the Hon. Christian Porter, calling for the Australian Government to implement the 11 recommendations from the wage theft inquiry that are within its jurisdiction.

In October 2019, these recommendations were again presented in response to Minister Porter's consultation on: *Improving protections of employees' wages and entitlements: Strengthening penalties for non-compliance* discussion paper.

The Queensland Government welcomes this opportunity to again present the evidence, findings and recommendations from the wage theft inquiry for consideration in this Senate Inquiry process, and, ultimately, to strengthen protections for workers and ensure they receive their full, legal entitlements and a 'fair day's pay for a fair day's work'.

The submission below starts with the question of criminalising wage theft and then turns to a range of other recommended regulatory responses in the civil area.

### Criminalisation of wage theft

The Queensland Government is concerned that the current regulatory framework has not been able to deter unlawful underpayment or non-payment of employees' remuneration by employers and believes that stronger penalty and deterrence measures are needed for those who commit wage theft.

As shown by evidence provided to the wage theft inquiry, a lack of enforcement by the FWO and ineffective civil penalties have resulted in a clear need for additional deterrence to reflect the extent and seriousness of this issue. In certain cases, employers engage in wage theft with the full knowledge that it is an offence because the penalties currently in place are smaller than the financial benefit they would gain from underpaying workers. The evidence also found that wage theft has been viewed in some quarters as a profitable 'business model', providing an advantage over other business competitors.

As indicated above, the Queensland Government supports the criminalisation of wage theft and has accepted the recommendation of the wage theft inquiry to introduce this at a state

level. This position was taken in response to the evidence presented to the wage theft inquiry of systematic and deliberate cases of wage theft justifies taking this step into the criminal sphere. The Queensland Government believes that criminalisation of wage theft would help send a strong message to the community that wage theft is not acceptable – it is a crime.

It was also observed throughout the wage theft inquiry that criminalising wage theft would rectify the current imbalance in the law, where under the Queensland Criminal Code it is an aggravated offence for an employee (a 'servant') who steals from their employer, but there is no corresponding offence for an employer who effectively 'steals' from their workers. There is understandably concerns expressed in the community when there are reports of employees going to jail for taking money from their employers, but some businesses seem to go largely unpunished for cases of systematic and deliberate wage theft.

The wage theft inquiry showed there is broad support for criminalisation – not only from unions, but also from employers and employer groups such as Bundaberg Fruit and Vegetable Growers, Wessel Petroleum, and the National Retail Association (see **Attachment 2**).

Based on the wage theft inquiry recommendation, the Queensland Government position is that a criminal offence should apply only to proven cases of deliberate wage theft. Making wage theft a criminal offence is not about penalising honest mistakes and no stakeholders have sought to argue otherwise in our experience.

The Queensland Government submits that if wage theft is criminalised that the criminal offences for wage theft should at a minimum include deliberate wage theft in the following circumstances:

- unpaid hours or underpayment of hours (below minimum wage, below relevant award, not paid for higher duties, not paid for all hours worked, not paid for time spent training/meetings, unreasonably long trials)
- unpaid penalty rates (overtime, late/early shifts, weekends, public holidays)
- unreasonable deductions (paying for breakages, returned meals and order mistakes, mandated staff accommodation with high costs)
- unpaid superannuation
- withholding of other entitlements (not paid for breaks, leave and other entitlements)
- sham contracting and the misuse of ABNs (deliberate mischaracterisation of an employment relationship as independent contracting – this matter is also dealt with later in the submission).

The Queensland Government recommends that a federal offence could utilise existing enforcement agencies, FWO and Australian Taxation Office (ATO), which are better placed to gather evidence to support criminal prosecution. The Queensland Government also notes that the introduction of criminal penalties in the Commonwealth jurisdiction will only provide effective deterrence and punishment if appropriate and sufficient Commonwealth resources are allocated for the investigation and prosecution of these matters.

If the Commonwealth proceeds with its stated intention to criminalise wage theft, we look forward to ongoing, meaningful consultation between the Commonwealth, states and territories on any future proposed legislative changes in line with the provisions – and the spirit and intent - of the 2009 Inter-governmental Referral Agreement.

**Recommendation 1**

*The Queensland Government recommends that the Australian Government legislate criminal penalties for deliberate forms of wage theft, provided it does this in close consultation with States and Territories on the detail of the proposed amendments, consistent with the 2009 IGA.*

**Recommendation 2**

*The Queensland Government recommends that if the Australian Government proceeds to criminalise wage theft, that it allocates appropriate and sufficient resources to investigate and prosecute all forms of wage theft.*

**Enforcement and compliance – role of the FWO**

The Queensland Government believes that criminalisation itself will not provide the complete answer to wage theft if other critical weaknesses in the current regulatory framework are not addressed. The wage theft inquiry found that proper use and enforcement of existing laws and civil penalty provisions is also required.

In this regard, a recurring theme throughout the wage theft inquiry was the failure of the FWO to support and assist workers who have been underpaid. Evidence of concern included:

- The FWO not investigating individual cases and investigating only when they have received complaints from a number of employees;
- The FWO relying on mediation processes that see workers accepting less than what they are owed;
- A focus on education rather than enforcement, including a stated policy of taking compliance action in no more than 10% of cases; and
- Employers feeling there is little chance of being caught if they do the wrong thing and workers reporting they don't get any real assistance when they contact the FWO to help with unpaid wages.

The FWO's very own compliance reports point to the lack of effective action being taken by employers who do the wrong thing. One report showed that 38% of employers who were previously in breach of their obligations were still non-compliant when the FWO audited them a second time. But despite repeated evidence of non-compliance, the FWO commenced legal proceedings in only 2 out of 184 cases.

Another FWO compliance report of audits in five regional areas, including Ipswich and Wide Bay in Queensland, found over 40% of employers were not complying with their legal obligations, including nearly one in three who were underpaying their workers; yet the FWO did not impose a single fine for underpayment.

This sort of evidence and experience affects community confidence in the system, and this is only made worse when a similar pattern is repeated in more high-profile cases, including the case of George Colombaris for example where a 'contrition payment' of \$200,000 was the regulatory response to \$8.7million of unpaid wages.

The Queensland Government believes that the issue of unlawful underpayment by employers of employee's remuneration is at least in part the result of an under resourced regulator and a lack of resources. The wage theft inquiry took evidence that there are currently only 38 FWO inspectors in Queensland to cover over two million workers. By comparison, in 2005 before WorkChoices there were 71 state-based inspectors in Queensland to police the state industrial relations jurisdiction. To restore the same ratio of inspectors to employed people as existed in Queensland in 2005, a total of 91 FWO inspectors – an increase of 53 on current levels – is required, based on workforce growth of 28% over that period.

The current lack of inspectors on the ground leads to practical problems. Cases reported to the Queensland Government include the example where workers in Oxley, a suburb in Brisbane, who were trying to get wages owed to them had to deal with an FWO case worker

in Perth on the phone, when they should have been able to have an inspector on the ground in Queensland taking action to get their money back.

Inspectors on the ground, investigating and auditing, do make a difference. The wage theft inquiry heard evidence of an Inspector from the Queensland Office of Industrial Relations successfully pursuing a long service leave claim (a state-based entitlement) on behalf of a Queensland worker by physically going to the employer's workplace in Bundaberg. The concern is that FWO are not taking this sort of proactive approach nearly enough.

To address these concerns, the appointment of more inspectors on the ground in Queensland is a first priority, followed by a full independent review into the resourcing, performance, and culture of the FWO. The Queensland Government notes that while the federal Government committed a small amount of additional funding for the FWO in the last federal budget and the FWO has made some public comments that it intends to take a more robust approach to wage theft, the FWO has been operating for almost 10 years with no proper review of its performance, resourcing and culture. The time is right for this comprehensive review to occur.

In Queensland, we have seen the benefits of having undertaken a similar exercise with a best practice review of Workplace Health and Safety Queensland (WHSQ) in 2017, which recommended a stronger regulatory focus on compliance and enforcement by the safety regulator, rather than a primarily educative function. We also note a full review into the FWO was also recommended by the 2016 Senate Inquiry report into the temporary work visa program and has not been acted upon by the Australian Government.

**Recommendation 3**

*The Queensland Government recommends that the Australian Government appoint an additional 53 FWO inspectors based in Queensland in accordance with recommendation 11 of the Queensland Wage Theft Inquiry Report.*

**Recommendation 4**

*The Queensland Government recommends that the Australian Government review the performance, resourcing and culture of the FWO to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion, in accordance with recommendation 12 of the Queensland Wage Theft Inquiry Report.*

## Superannuation

The Queensland Government notes that the Committee's terms of reference also include superannuation theft.

The issue of unpaid superannuation was a recurring theme throughout the wage theft inquiry.

The evidence presented to the wage theft inquiry highlighted the scale of this issue which has resulted in more than half a million workers being denied access to more than a billion dollars in superannuation owed to them. This evidence was consistent with estimates nationally of up to \$5.9 billion per year in unpaid superannuation entitlements. This situation has lifelong ramifications for workers saving for retirement.

Currently, the ATO is responsible for unpaid super and the evidence to the wage theft inquiry confirmed it has not been an effective force in recovering these entitlements for workers, with this being attributed to factors such as a lack of resources and a failure to conduct proactive, random audits.

To address this, the Queensland Government supports the inclusion of superannuation in the National Employment Standards (NES) under the *Fair Work Act 2009* (FW Act) so that it can be pursued and recovered in the same manner as any other industrial entitlement.

A further issue is that victims of wage theft often find the company that employs them has collapsed, and they are left in the position of having to recover their entitlements through the Fair Entitlements Guarantee (FEG) scheme.

However, unpaid super is not currently part of the FEG scheme, even though it is one of the most common forms of wage theft and unpaid entitlements. ASIC figures show unpaid super features in over 40 per cent of insolvencies. In our submission, superannuation should not be treated any differently from other entitlements covered by the FEG scheme.

Overseas workers on temporary work visas are in the even worse position of having no recourse to FEG at all if they lose their entitlements from companies that have gone into liquidation – making their already vulnerable situation even worse. In our submission, there is no good reason why temporary visa holders are afforded less protection than Australian workers.

It is the Queensland Government's position that both these inequities should be rectified. The Queensland Government notes that the Migrant Worker Taskforce Inquiry has now followed the wage theft inquiry in recommending the FEG scheme be extended to temporary visa workers from overseas. We note further that previous Senate Inquiries have also recommended this change, but no action has been taken by the Australian Government to this point.

The Queensland Government submits that protections around the vital entitlement of superannuation should be strengthened. First, as outlined above, superannuation should be included in the NES so it can be pursued and recovered in the same manner as any other industrial entitlement. Second, the FEG scheme should be amended to include unpaid superannuation contributions and coverage under the FEG scheme should be extended to include temporary overseas visa workers who are currently denied access.

**Recommendation 5**

*The Queensland Government recommends that the Australian Government amend the FW Act to include superannuation as a national employment standard in accordance with recommendation 13 of the Queensland Wage Theft Inquiry Report.*

**Recommendation 6**

*The Queensland Government recommends that the Australian Government include unpaid superannuation contributions under the Fair Entitlements Guarantee scheme and extend the scheme to include overseas visa workers in accordance with recommendation 9 of the Queensland Wage Theft Inquiry Report.*

## Labour hire licensing

The issues encountered by some workers in the labour hire industry have been well documented in numerous reports and inquiries over many years – cases of wage theft, sexual harassment, sub-standard housing, and serious workplace health and safety risks.

In response, the Queensland Government took strong action to establish a nation-first labour hire licensing scheme establishing basic minimum obligations that all labour hire providers must meet before they can operate in Queensland.

The new laws have been a great success since they commenced on 16 April 2018, lifting the standard of the industry and protecting vulnerable workers from exploitation. A copy of the first anniversary [report](#) is included for the Committee's consideration.

Currently, there are 3,047 licensed labour hire providers in Queensland. This shows that labour hire providers, in the main, are aware of their legal obligation to be licensed and are

ready to get on with business. At the same time, strong action has been taken where necessary to protect vulnerable workers, and deal with unscrupulous providers.

Key to the success of the Queensland labour hire licensing scheme is the establishment of a specialised regulator to monitor and enforce compliance. To date, the Labour Hire Licensing Compliance Unit has taken compliance action against 374 providers who have not met the required standards.

This includes:

- 18 licence applications have been refused;
- 14 applicants were given conditional licences;
- 137 applications have been withdrawn for failing to provide compliance information;
- 38 licences have been cancelled
- 167 licences have been suspended at some point (with 44 currently under suspension).

The first conviction under the new laws was also recorded in June 2019 for a provider found operating without a licence in the region around Stanthorpe, and two further successful prosecutions have since followed.

In addition, the Compliance Unit has carried out over 370 audits and investigations, made more than 1700 desk enquiries and criminal history checks, and forged strong links with other local, state and federal agencies, such as the ATO, Border Force, FWO, WorkCover, WHSQ, Emergency Services, and local councils, to break the business model of unscrupulous providers.

The new laws have been welcomed by parties across the spectrum. This was confirmed by evidence to the wage theft inquiry, including from employers and growers' groups, praising the positive impact of the new laws, for example:

Joe Moro, President, Mareeba District Fruit and Vegetable Growers Association and chair of the FNQ Growers Association:

*"We are very happy with the changes that the State Government has made in regard to the requirement to regulate, control and manage contractors who carry out the supply of labour to industry in particular and all industries" (Townsville public hearing, 28 August 2018)*

Cherry Emerick, Industry Development Officer, Bowen Gumlu Growers Association:

*"There have been no complaints about people being paid incorrectly or anything like that. We put some of that down to the fact that the Queensland State Government invested in labour hire contract licensing. I would not say it has eradicated the problem, but the standard has definitely lifted." (Mackay public hearing 29 August 2018)*

Allan Mahony, Chair of the Bundaberg Fruit and Vegetable Growers said it was one of the positives for the industry:

*"...The other positive is the labour hire contractor registration which we think has quietened it [i.e. wage theft, exploitation etc] down a bit. We are not saying it has fixed the industry. but it has definitely quietened it...we are not hearing it day in day out...that has to be a positive" (Bundaberg public hearing, 12 September 2018)*

The Queensland Government has repeatedly and consistently called on the federal Government to implement a national labour hire licensing scheme so the benefits of the Queensland scheme can flow to workers, employers and providers across the country.

The Queensland Government notes that the Australian Government has provided in-principle support for the recommendations from the Migrant Workers' Taskforce inquiry for a national registration scheme for labour hire providers. However, the Queensland Government is concerned the federal Government's intention is to introduce a 'light touch' registration scheme with limited coverage, when the experience in Queensland demonstrates the benefits of a rigorous licensing scheme with broad coverage of the entire labour hire sector.

**Recommendation 7**

*The Queensland Government recommends that the Commonwealth introduce a national labour hire licensing scheme based on the successful state-based scheme operating in Queensland since April 2018.*

Sham contracting

Sham contracting was another issue consistently raised during the wage theft inquiry – that is, workers being asked to get an ABN as their own business where, on a reasonable interpretation, they were actually employees in an employment relationship.

Evidence presented to the wage theft inquiry highlighted the deliberate mischaracterisation of an employment relationship as an independent contracting arrangement in an attempt to evade their obligations as an employer. Key industries highlighted in the evidence included the new 'gig' economy, construction, cleaning, tourism and transport industries. The evidence was consistent with that from previous inquiries, such as the 2016 Queensland labour hire inquiry where it was found sham contracting had been used regularly by some labour hire companies who required workers to have an ABN to avoid obligations.

The existing provisions in the FW Act have not been effective in dealing with sham contracting. Currently, misrepresenting employment as an independent contracting arrangement is an offence under section 357 (1) of the FW Act. However, under section 357 (2) an accused has a statutory defence if they can prove that they did not know and were not reckless as to whether the contract was a contract of employment rather than a contract for services. Therefore, an employer is only in breach of the legislation if they have been found to have deliberately misrepresented an employment arrangement as a contracting arrangement.

The presumption is that workers are independent contractors unless they can prove otherwise, and employers can defend a claim simply by showing they have not been 'reckless' in presenting the relationship as a contract for service rather than a contract of employment.

As previously stated in our submission to the 2016 Senate Education and Employment References Committee inquiry into the incidence of, and trends in, corporate avoidance of the FW Act<sup>2</sup>, the Queensland Government is supportive of genuine independent contracting arrangements but is concerned that the current legislation does not effectively deter the use of 'sham' or artificial contract arrangements to hide a genuine employment relationship.

Numerous inquiries at the federal level have made the case for change to these provisions. The 2012 review of the FW Act considered the provisions ineffectual in addressing sham contracting and recommended removing the reckless defence from the offence of sham contracting to provide stronger protections for employees. Similarly, in 2015, the Productivity Commission found '*it is too easy under the current test for an employer to escape prosecution for sham contracting*'.

<sup>2</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Education\\_and\\_Employment/AvoidanceofFairWork](https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/AvoidanceofFairWork)

The wage theft inquiry has also recommended removing the 'reckless defence' from the offence of sham contracting under section 357(2) of the FW Act. The wage theft inquiry also recommended the introduction of a 'reasonable person' test for determining whether an employer has engaged in sham contracting. The Queensland Government continues to support the introduction of such a test to ensure employers accurately represent the legal status of their work arrangements to their workforce. Under the test, an employer would not be involved in sham contracting if they believed the contract was a contract for services and a reasonable person would have believed that the contract was a contract for services.

It is also important that the Fair Work legislation provide additional protection from adverse action taken against an employee who questions whether a workplace right exists or whether they are in fact an employee and not an independent contractor.

In Queensland, the *Industrial Relations Act 2016* (IR Act) provides at section 471 that the Queensland Industrial Relations Commission (QIRC) has power to amend or declare void contracts where they are found to be sham contracting arrangements and to declare persons working under a contract for services to be employees. However, our submission acknowledges that this provision is limited as a result of the Commonwealth laws for independent contractors which exclude state laws from regulating independent contractors and overrides state unfair contracts provisions.

The wage theft inquiry also recommended that similar provisions should be introduced in the FW Act to enable the Fair Work Commission (FWC) to be given the power to assess the status of an employment contract.

The Queensland Government submits that the introduction of a reasonable person test and FWC review of contract provisions together with the removal of the reckless defence would provide an affordable avenue for individuals to address contract concerns and to seek a review of the application of the existing common law definition of a subcontractor to their work.

**Recommendation 8**

*The Queensland Government recommends that the Australian Government amend the FW Act to remove the 'reckless defence' provision from section 357(2), in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.*

**Recommendation 9**

*The Queensland Government recommends that the Australian Government amend the FW Act to provide the FWC with powers similar to the QIRC under section 471 of the IR Act, to assess the status of an employment contract, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.*

**Recommendation 10**

*The Queensland Government recommends that the Australian Government introduce a 'reasonable person' test for determining whether an employer has engaged in sham contracting, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry report.*

## Zombie agreements

The issue of 'Zombie' agreements refers to agreements made during the Work Choices period when protections such as the no disadvantage test were removed. These include Australian Workplace Agreements and Employer Greenfield Agreements still operating well past their expiry date. As a result, they often include wage rates well below the award and have no penalty rates, but they continue to have legal force unless they are terminated.

The wage theft inquiry took evidence not only from workers disadvantaged by these agreements, but from employers in industries like security who are forced to compete with employers who still have their workers on zombie agreements.

The Queensland Government submits that these remaining legacy agreements from the WorkChoices era have no place in a fair and modern industrial relations system and they should be terminated with a legislated 'drop dead' date.

To ensure there is no further disadvantage for workers who are moved off these agreements, consideration should be given in the drafting of such amendments to any necessary transitional arrangements and further protections for workers.

**Recommendation 11**

*The Queensland Government recommends that the Australian Government legislate for an automatic termination date of remaining Work Choices 'zombie' agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result, in line with recommendation 16 of the Queensland wage theft inquiry.*

Fair access to workplaces

The Queensland Government submits that the important role unions play in combating wage theft should be better recognised in the national workplace relations system. This position is supported by strong evidence to the wage theft inquiry that confirmed wage theft is far less likely to occur when workers have access to union representation. Furthermore, workers in union workplaces are more likely to know their entitlements and, with the support of their union, to be willing to take action to recover their wages if they are not paid properly.

The wage theft inquiry also confirmed the critical role that unions play in educating, advising and advocating for members' workplace rights. The benefits of the work of unions extend also beyond their membership; their work has also helped maintain and enforce industry standards for all workers.

The wage theft inquiry heard that current federal right of entry laws have made it very difficult for unions to do much of this critical work. In most cases, they can only inspect the records of members and they can only enter if there is a suspected breach. Extra legal hurdles apply in order to access non-member records.

The Queensland Government believes that the right of entry provisions in the Queensland IR Act provide a more workable, balanced model that allows unions to access records of both member and non-members within their coverage, thereby encouraging better worker representation and awareness of workplace rights.

If the Australian Government is serious about addressing wage theft, it should heed the findings of the Queensland wage theft inquiry and recognise the important role and contribution that unions have to make.

**Recommendation 12**

*The Queensland Government recommends that the Australian Government consider measures to improve worker representation in the workplace and ensure compliance with industrial instruments, using the model of the Queensland IR Act, in line with recommendation 6 of the Queensland Wage Theft Inquiry report.*

Wage recovery processes

As indicated above, the Queensland Government supports the criminalisation of wage theft, considering this to be an important and necessary step to provide greater deterrence and punishment for those employers who commit deliberate and reckless acts of wage theft.

However, it should be remembered that for most affected workers their primary focus, understandably, is getting back what is owed to them. It is therefore essential that the wage recovery processes in the national workplace relation system should be simple, low-cost and quick. As noted previously this process could be better supported by a more proactive approach by the FWO inspectors to addressing individual wage complaints with an employer as a matter of priority.

The Queensland Government is very concerned about the findings of the wage theft inquiry that found that the current wage recovery process is costly, complex and time-consuming and deter workers from acting to report and recover lost wages.

The wage theft inquiry also found affected workers, especially temporary migrants and young people, are poorly informed about avenues for reclaiming their wages, noting the National Temporary Migrant Work Survey, *Wage Theft in Silence: Why Migrant Workers Do Not Recover Their Unpaid Wages in Australia*, which found 42 per cent of those who responded did not know what to do if they were the victim of wage theft.

The wage theft inquiry recognised there is some capacity to address these issues at a state level by virtue of the fact that under the FW Act, unpaid wages can be pursued either through the federal courts or through an 'eligible state or territory court'. The Queensland Government is currently working through options identified by the wage theft inquiry and the actions available to ensure wage recovery processes for Queensland workers are simple, low-cost and quick.

At a federal level, evidence to the wage theft inquiry was that wage recovery processes through the Federal Circuit Court (FCC) are notoriously slow and drawn-out and recommended that more judges would increase accessibility and decrease delays in the court process. Historically, Queensland has had less than its fair share of FCC judges with employment and industrial relations experience compared with other jurisdictions.

For example, the Queensland Law Society calculated that in Queensland the ratio of FCC judges who deal mainly with employment matters was 0.403 judges per one million residents, compared with 4.819 in the ACT and 2.315 in SA.

**Recommendation 13**

*The Queensland Government recommends that the Australian Government appoint additional Federal Circuit Court judges in Queensland, and ensure Queensland retains its proportionate share of Federal Court judges in accordance with Recommendation 7 of the Queensland Wage Theft Inquiry Report.*

[Workplace information and support services](#)

This submission has outlined above the critical role that unions play in representing workers and providing a defence against even more widespread wage theft.

The wage theft inquiry found that community legal centres and other private and community organisations also provide an invaluable role in assisting and sometimes representing workers who are seeking to pursue the recovery of unpaid entitlements. The FWO refers workers to such organisations in some cases, the inquiry heard.

The Working Women's service (WWS) was one such organisation that had provided these services to Queensland workers for many years. However, in 2016 the Australian Government discontinued all funding for the WWS in Queensland. The Queensland Government has continued to fund the WWS, which is now part of Basic Rights Queensland, since that time.

The wage theft inquiry noted that Queensland, the ACT and Tasmania are the only Australian jurisdictions that do not receive funding from the Australian Government to provide state-based advice and assistance in respect of employment matters under the FW Act.

The FWO does provide funding to GrowCom but their work is industry-specific and not a general advisory service for all sectors as in other jurisdictions. For example, the FWO currently provides funding to the Redfern Legal Centre in New South Wales, Working Women's Centre in South Australia and Northern Territory, the Employment Law Centre of Western Australia, and Job Watch in Victoria. The wage theft inquiry recommended that the Australian Government fund a workplace rights information and support service based in Queensland, as is funded for other jurisdictions

**Recommendation 14**

*The Queensland Government recommends that the Australian Government fund a workplace rights information and support service based in Queensland as is funded for other Australian jurisdictions, and was formerly the case, up until the removal of funding in 2016 by the then Federal Government, in accordance with Recommendation 10 of the Queensland Wage Theft Inquiry Report.*

**Non-standard employment and the gig economy**

Another key area of concern for Queensland workers which was reflected in the evidence to the wage theft inquiry was a concern that there is a growing band of 'workers' who are being denied access to entitlements and protections enjoyed by employees in a standard employment relationship. This includes workers in the gig economy, who are often left on wages and conditions that are below the award and the NES.

In response, the wage theft inquiry recommended reform of the FW Act to more adequately accommodate emerging forms of non-traditional employment. This should include consideration of law reform to broaden the definition of worker and provide broader access to the benefits of collective bargaining, minimum standards for pay and conditions, and access to the FWC. The Australian Parliament's recent Future of Work inquiry made a similar recommendation that *'the Australian Government make legislative amendments that broaden the definition of employee to capture gig workers and ensure that they have full access to protection under Australia's industrial relations system.'*

The Queensland Government recognises these are complex issues and for that reason we have also called for these matters to be on the agenda for future industrial relations Ministerial Council meetings to allow for further consideration of ongoing changes to the nature of work, including areas such as the gig economy, and how governments can best respond.

**Recommendation 15**

*The Queensland Government recommends that the Australian Government consider reform of the FW Act to more adequately accommodate emerging forms of non-traditional employment, including broadening the definition of worker and providing broader access to the benefits of collective bargaining, minimum standards of pay and conditions, and access to the Fair Work Commission, in line with recommendation 17 of the Queensland Wage Theft Inquiry Report.*

**Government procurement practices**

Submissions to the wage theft inquiry strongly supported the view that the Queensland Government should only be contracting with employers who do the right thing by their workers and this should be reflected in government procurement policies and practices. Accordingly, the Inquiry made a recommendation that the Queensland Government ensure its procurement policies allow for appropriate and proportionate action to be taken against companies that have underpaid workers – a recommendation the Queensland Government accepted.

The Queensland Government submits that government procurement practices have the potential to impact significantly on the issue of wage theft by holding suppliers to government accountable for best practice industrial relations. As such, the Queensland Government has implemented a range of measures, including the introduction and adoption of the [Ethical Supplier Mandate within the Queensland Procurement Policy](#).

The Queensland Government's Ethical Supplier Mandate requires business to uphold their economic, social and environmental obligations under law and provides for action to be taken against suppliers that breach contractual obligations, policies or laws, unless their conduct is due to an honest mistake, oversight, or accident. This is designed to make Queensland workplaces fairer and safer, and ensure suppliers are treated fairly and not exposed to undercutting and unjust competition.

The model involves issuing demerits to suppliers on a sliding scale for minor, moderate and major compliance issues. A supplier may be sanctioned if it breaches the Ethical Supplier Threshold or reaches 20 demerit points within a 12-month period. Sanctions affect access to future contracts, not current contracts, however, where a supplier is sanctioned and has an existing contract with government, extension options under that contract will not be exercised.

The Queensland Government procurement policy approach provides a model for the Committee to consider in developing any recommendations to ensure Australian Government procurement process play their part in combating the practice of wage theft amongst businesses supplying to government at a national level.

**Recommendation 16**

*The Queensland Government recommends that the Australian Government consider the Queensland Government's Ethical Supplier Mandate as a model for ensuring Australian Government procurement policies address wage theft.*

## Conclusion

The Queensland Government has provided the following key issues for the Committee's consideration and recommended that the Australian Government act immediately to remedy wage theft nationally by:

- Appointing additional FWO inspectors based in Queensland;
- Reviewing the performance, resourcing and culture of the FWO;
- Funding a workplace rights information and support service in Queensland;
- Appointing additional Federal Circuit Court judges in Queensland;
- Implementing a national labour hire licensing scheme base on the Queensland model; and
- Including unpaid superannuation contributions under the Fair Entitlements Guarantee scheme and extend the scheme to include overseas visa workers.

The Queensland Government also submits that to deal comprehensively with wage theft, action needs to be taken on a range of related matters that together only make it harder for workers to receive their fair and lawful entitlements. The following amendments to the FW Act have also been provided for the Committee's consideration to ensure workers are guaranteed of receiving their fair and lawful entitlements by:

- Including superannuation as a National Employment Standard (NES)
- Terminating 'zombie agreements' from the Work Choices era (i.e. expired Australian Workplace Agreements and Employer Greenfield Agreements)
- Increasing the FWC powers to assess sham contracting arrangements and remove the 'reckless defence' provision from section 357(2) FW Act;
- Expanding the definition of worker under the FW Act to accommodate emerging forms of engagement and provide access to minimum protections and rights

Attachment 1 provides a summary of these recommendations.

Wage theft needs to be comprehensively dealt with by a concerted effort of policy-makers, regulators, courts and tribunals, as well as practitioners, employers, employees, unions and employer groups. Queensland has taken a lead role thus far in responding to these issues, but ultimately this is a national issue requiring a national response and national leadership.

## Attachment 1: Queensland Government Recommendations

### ***The Queensland Government recommends that the Australian Government:***

1. Legislate criminal penalties for deliberate forms of wage theft, provided it does this in close consultation with States and Territories on the detail of the proposed amendments, consistent with the 2009 IGA.
2. Allocate appropriate resources to investigate and prosecute all forms of wage theft.
3. Appoint an additional 53 FWO inspectors based in Queensland in accordance with recommendation 11 of the Queensland Wage Theft Inquiry Report.
4. Review the performance, resourcing and culture of the FWO to ensure that it can respond to wage theft and support affected workers in an effective and timely fashion, in accordance with recommendation 12 of the Queensland Wage Theft Inquiry Report.
5. Amend the *Fair Work Act 2009* (Cwlth) (FW Act) to include superannuation as a national employment standard in accordance with recommendation 13 of the Queensland Wage Theft Inquiry Report.
6. Include unpaid superannuation contributions under the Fair Entitlements Guarantee scheme and extend the scheme to include overseas visa workers in accordance with recommendation 9 of the Queensland Wage Theft Inquiry Report.
7. Introduce a national labour hire licensing scheme based on the successful state-based scheme operating in Queensland since April 2018, in accordance with recommendation 4 of the Queensland Wage Theft Inquiry Report.
8. Amend the FW Act to remove the 'reckless defence' provision from section 357(2), in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
9. Amend the FW Act to provide the FWC with powers similar to the QIRC under section 471 of the *Industrial Relations Act 2016* (IR Act), to assess the status of an employment contract, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
10. Introduce a 'reasonable person' test for determining whether an employer has engaged in sham contracting, in accordance with recommendation 14 of the Queensland Wage Theft Inquiry Report.
11. Legislate for an automatic termination date of the remaining Work Choices 'zombie' agreements, with consideration given to necessary transitional arrangements and protections to ensure no workers are disadvantaged as a result, in accordance with recommendation 16 of the Queensland Wage Theft Inquiry Report.
12. Consider measures to improve worker representation in the workplace and ensure compliance with industrial instruments, using the model of the Queensland IR Act, in accordance with recommendation 6 of the Queensland Wage Theft Inquiry Report.
13. Appoint additional Federal Circuit Court judges in Queensland, and ensure Queensland retains its proportionate share of Federal Court judges in accordance with Recommendation 7 of the Queensland Wage Theft Inquiry Report.
14. Fund a workplace rights information and support service based in Queensland as is funded for other Australian jurisdictions and was formerly the case up until the removal of funding in 2016 by the then Federal Government, in accordance with Recommendation 10 of the Queensland Wage Theft Inquiry Report.
15. Consider reform of the FW Act to more adequately accommodate emerging forms of non-traditional employment, including broadening the definition of worker and providing broader access to the benefits of collective bargaining, minimum standards of pay and conditions, and access to the Fair Work Commission, in line with recommendation 17 of the Queensland Wage Theft Inquiry Report.
16. *Consider the Queensland Government's Ethical Supplier Mandate as a model for ensuring Australian Government procurement policies address wage theft.*

## Attachment 2: Support for criminalisation of wage theft

### 1. Allan Mahony, Bundaberg Fruit and Vegetable Growers, evidence at Bundaberg hearing 12 September 2018

*'The other point I have here is non-compliance. To me it is criminal...We should see this as a crime.*

*Q: Where wage theft is intentional and where it is proved to be intentional, a number of people think there should be criminal findings. Would you support that?*

*Mr Mahony: Definitely.*

### 2. Mr Paul Wessel, Ms Amanda Wessel, Wessel Petroleum, evidence at Bundaberg hearing 12 September 2018

*Q: Where wage theft is intentional and where it is proved to be intentional, do you support the criminalisation of it?*

*Ms Wessel: "I think they [employers who commit wage theft] should go to jail because the person who steals the money is stealing for themselves out of the till. These guys are making other workers suffer.*

*Mr Wessel: I would not have any dramas if they went to jail. I think that is where they should end up.*

### 3. Lindsay Carroll, National Retail Association, evidence to Brisbane hearing 16 August 2018

*"We would support criminalisation of wage theft only if it was limited to circumstances where the employer knowingly and deliberately declined to pay employees all of their entitlements"*

### 4. Brian McCarrick, Ardent Security, evidence at Townsville hearing 28 August 2018

*Q...do you think when it is done knowingly [it]should be included in the Criminal Code and that those employers should face prosecution*

*Mr McCarrick: I believe so, because what is the difference between going to Coles and stealing a loaf of bread or stealing 50 bucks from the employee. There is no difference. It is stealing in both cases. If I go into that employee's house and steal something from them, there is no difference. It is still stealing.*

### 5. Andrew Bourke, Executive Security Group, evidence at Brisbane hearing 17 September 2018

*'There have to be criminal penalties...if I put my hand in my staff member's pay packet, it is theft'*

### 6. Michael Fraser, Franchise Redress, evidence to Gold Coast hearing 10 September 2018

*" there should be criminal sanctions..."*