

3 April 2019

Mr Tony Beech
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Dear Mr Beech

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Inquiry into Wage Theft in Western Australia

We refer to the Inquiry into the systematic and deliberate underpayment of wages or entitlements of workers in Western Australia announced by The Hon Bill Johnston MLA, Minister for Industrial Relations and respond to the call for submissions in this Inquiry.

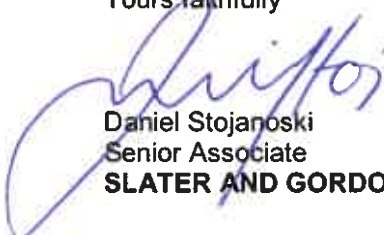
When regard is had to the Terms of Reference, it is our view that there are a number of recommendations the Inquiry should make to the Western Australian Government.

Rather than set out comprehensive submissions for each of those recommendations, we offer a brief outline of matters for recommendation at the Schedule to this letter. These recommendations in short are:

1. Raising awareness to employees of the benefits of being a member of a trade union.
2. Raising awareness of the jurisdiction of the Industrial Magistrates Court of Western Australia.
3. Raising awareness of the WA Industrial Relations Commission denied contractual benefits jurisdiction.
4. Raising awareness of the existence of the State Industrial Inspectorate.
5. Empowering the Industrial Inspectorate with an administrative assessment function: Creating a tailored system to assist vulnerable and low paid workers
6. Reversing the onus of proof.
7. Updating and increasing civil penalties in the *Industrial Relations Act 1979* (WA).
8. Wage theft should be a criminal offence but in very limited circumstances.
9. Creating a register of businesses that fail to pay following judgment.
10. Termination of WorkChoices agreements.
11. Expansion of the powers of the WA Industrial Relations Commission to determine and declare individual employee entitlements.

After considering the Schedule, should you require a more comprehensive submission on any of those matters, please contact us and we will be able to prepare a comprehensive submission to that effect.

Yours faithfully


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Schedule

Recommendations the Inquiry should make to the Western Australian Government		
Recommendation	Term of Reference	Brief detail
Raising awareness to employees of the benefits of being a member of a trade union	7 and 9	<ul style="list-style-type: none"> • The Western Australian Government should raise awareness to employees of the benefits of becoming a member of trade union as, for example, where an employee is underpaid wages their union may be able to recover the underpayment or perhaps even institute proceedings. A stronger trade union industry also acts as a deterrent to employers who engage in, or consider engaging in wage theft as trade unions will be inclined to hold these employers to account. • Often it is not financial viable for an employee/ former employee to retain legal services at a cost to recover industrial entitlements.
Raising awareness of the jurisdiction of the Industrial Magistrates Court of Western Australia	1, 5, 7 and 9	<ul style="list-style-type: none"> • The Industrial Magistrates Court of Western Australia is a cost effective and quick process for obtaining the recovery of denied industrial entitlements. • However it is in our experience that almost every client that has sought our advice with respect to wage theft is not aware of the existence of the Industrial Magistrates Court of Western Australia and its function in this regard. • There is a lack of awareness in the general public of the function of the Industrial Magistrates Court of Western Australia. The Inquiry should recommend to the Western Australian Government that it raise awareness of the existence and function of the Industrial Magistrates Court of Western Australia in this regard.
Raising awareness of the WA Industrial Relations Commission denied contractual benefits jurisdiction	1, 5, 7 and 9	<ul style="list-style-type: none"> • The WA Industrial Relations Commission has jurisdiction to hear a claim by an employee that they have been denied a benefit under their contract of employment.¹ • The WA Industrial Relations Commission must also take into account considerations of equity, good conscience and the substantial merits of the case, without regard to technicalities and legal form.² In essence, the WA Industrial Relations Commission provides a quick and balanced forum for an employee to make a wage theft claim that they have been denied a benefit under their contract. • However our experience is that clients are not aware of this jurisdiction. More ought be done by the Western Australian Government to educate employees/ former employees of the existence of this jurisdiction.

¹ s. 29(1)(b)(ii) *Industrial Relations Act 1979* (WA).

² s. 26 IR Act; see for example *Belo Fisheries v Froggett* (1983) 63 WAIG 2307.

<p>Raising awareness of the existence of the State Industrial Inspectorate</p>	<p>1, 5, 7 and 9</p>	<ul style="list-style-type: none"> • A Western Australian Government industrial inspector function exists in Western Australia which is created pursuant to <i>Industrial Relations Act 1979</i> (WA) ("IR Act"). • A primary function of the Industrial Inspector is to recover underpayment of industrial entitlements. In dispensing this primary function, the Industrial Inspector is empowered under s. 98 of the IR Act to undertake workplace inspections, inspection of materials at the workplace³ and may call the WA Police if he or she is obstructed in performing his or her function. • The Industrial Inspector can bring wage theft claims to the Industrial Magistrates Court of Western Australia on behalf of employees or former employees.⁴ • It is in our experience that almost every, if not all clients covered by the State employment system that have sought our advice in relation to wage theft is not aware of the existence of the Industrial Inspector and that there is a system in place to assist in the recovery of underpayment of industrial entitlements. Little is known about Industrial Inspectors and how often they prosecute wage theft claims.
<p>Empowering the Industrial Inspectorate with an administrative assessment function: Creating a tailored system to assist vulnerable and low paid workers</p>	<p>1, 4, 5, 7 and 9</p>	<ul style="list-style-type: none"> • The Inquiry into Wage Theft in Queensland ("Queensland inquiry") cited empirical and anecdotal evidence that the problem of wage theft is particularly pronounced in those areas that typically employ the most vulnerable workers.⁵ These findings of the Queensland inquiry generally accord with our experience. • We find that complaints regarding the underpayment of wages and basic entitlements such as overtime are less common in workplaces with a relatively higher proportion of unionised staff and/or where the employer is a signatory to an enterprise agreement. • The more serious or blatant examples of wage theft tend to come to our attention from vulnerable clients with a relatively lower level of formal education or to whom English is a second language. • Based on the reports we have received, it is not uncommon for employers of vulnerable and lower paid employees to adopt hard line policies against the payment of "costly" entitlements such as overtime. In such cases, we have witnessed employment contract provisions that purport to exclude the provisions of the <i>Fair Work Act 2009</i> ("FW Act") and Awards. Although such clauses are unlikely to be legally enforceable, lower paid employees commonly do not have the resources, time or know how to take an entitlement dispute to a court for enforcement. • Some employees have come to us for advice for the purpose of making an aggregate claim for unpaid entitlements, but usually an employee is compelled to devote the significant resources to a claim only after their employment has been terminated. In those circumstances, the making of a claim can be stifled because the employee can be much less able to obtain the necessary evidence to prove their actual work hours and rostered days. In the meantime, the

³ A power also given to the Industrial Inspector under s26A of the *Long Service Leave Act 1958* (WA).

⁴ See, for example, s. 12 of the *Long Service Leave Act 1958* (WA).

⁵ See Report No. 9 by the 56th Parliament Education, Employment and Small Business Committee, "A fair day's pay for a fair day's work? Exposing wage theft in Queensland", dated November 2018, pages 33 to 42.

		<p>poor workplace practices are able to continue.</p> <ul style="list-style-type: none"> • We consider that low paid and vulnerable employees are in need of a system that can provide fast and low-cost determination and enforcement of basic entitlements, particularly where an entitlement may be relatively simple to confirm because it is clearly set out within an Award or another industrial instrument. • Some parallels can be drawn between the current predicament of low paid and vulnerable workers and the circumstances that brought about the introduction of the Commonwealth Child Support Scheme in the late 1980's. The Child Support scheme was introduced in response to inadequacies in the system at the time, the general effect of which was that a large number of primary carer parents were effectively unable to access court-enforced payment of child support against unwilling non-custodial parents.⁶ • The solution introduced by the <i>Child Support Act 1988 (Cth)</i> (later renamed the <i>Child Support Registration and Collection) Act 1988 (Cth)</i> was to establish a system of administrative assessment and enforcement of child support. We do not propose that the Western Australian Parliament establish a system whereby employment entitlements become assessed as payable to the State. However, for certain entitlements that are clearly set out within legislation or an industrial instrument, we suggest that it could be cost effective for a government office such as the Industrial Inspectorate to be empowered to consider evidence provided by an employee and an employer and then make a determination that could be enforced as a court order. • The scheme could allow disputed determinations of the Western Australian Industrial Inspectorate to be challenged in a court. The Industrial Inspectorate could also be empowered to impose penalties for non-compliance at first instance. • It is our hope that such a scheme could offer fast and cost-effective resolution of entitlement disputes, possibly with the effect of reducing the number of cases that are heard in a court.
Reversing the onus of proof	2, 6 and 8	<ul style="list-style-type: none"> • Currently when an employee makes a wage theft claim, the employee has to show they have not received that entitlement. As aforementioned, often wage theft claims are made after the employee has been dismissed. An employee's access to documents is limited and often there is no ability to access documents. This means the employee/ or former employee cannot satisfy evidentiary requirements to make out a wage theft claim. In turn employers are more inclined to engage in and intentionally practice wage theft given it will be difficult for the employee to make out a claim of wage theft. • There should be a reverse onus of proof on the employer to establish that they did not underpay the worker or otherwise it is too be presumed the underpayment claim is made out. A reverse onus of proof is not something that is unusual in employment matters and is utilised in, for example, General Protections claims made under the FW Act.⁷

⁶ Child Support (Adoption of Laws) Amendment Bill 2017 Explanatory Memorandum accessed on 29 March 2019 at [http://www.parliament.wa.gov.au/parliament/bills.nsf/1327A455C77470094825814D000ADC97/\\$File/EM14-1.pdf](http://www.parliament.wa.gov.au/parliament/bills.nsf/1327A455C77470094825814D000ADC97/$File/EM14-1.pdf)

⁷ See s. 361 FW Act.

		<ul style="list-style-type: none"> • This reverse presumption would also act as a deterrent to employers from engaging in wage theft as it would be relatively easier for an employee to make out an underpayment claim. • A reversal of the onus of proof may also assist the Industrial Inspectorate to conduct enquiries with employers into allegations of underpayment or non-payment of entitlements.
Updating and increasing civil penalties in the IR Act	5 and 8	<ul style="list-style-type: none"> • The penalties applicable to breaches under Part 3 section 83E of the IR Act are currently relatively small, especially when compared to the civil remedy penalty provisions as contained in the FW Act at s. 539 which are currently \$63,000 for a body corporate or \$12,600 for an individual. The FW Act civil remedy provisions may be accessed for certain wage theft claims. • As it stands, and in respect to the civil penalties available under the IR Act, the current State framework is in-effective in combating wage theft and supporting workers. • An increase in the civil penalties available under the IR Act could act as a deterrent to employers who engage in/ propose to engage in wage theft.
Wage theft should be a criminal offence but in very limited circumstances	6	<ul style="list-style-type: none"> • Wage theft should be a criminal offence but in very limited circumstances whereby the wage theft must be aggravated and intentional on the part of the employer. • If all wage theft is a criminal offence, then this could be disadvantageous to workers making claims as the standard of proof wide rise to a beyond a reasonable doubt, instead of the civil balance of probabilities test. • Some employers may genuinely have erred in providing the worker the entitlements. These employers should not be subjected the criminal sanctions. It would otherwise have a negative effect on business and the economy in general.
Creating a register of businesses that fail to pay following judgment	7 and 8	<ul style="list-style-type: none"> • Our experience is that even though we may have obtained a successful judgement for the recovery of industrial entitlements, some employers simply do not pay the judgment ordered or any amount at all. The employee/ former employee is then required to, for example bring enforcement proceedings in the District Court under the <i>Civil Judgments Enforcement Act 2004 (WA)</i> which is complex undertaking for the lay person and often not financial viable with legal representation. • An online register could be developed that lists employers that have participated in wage theft but then fail to comply with a judgment to pay the employee. • We do not recommend the register list all employers that participate in wage theft, only those that fail to meet a judgment in the favour of the employee. This is because in our experience some employers have genuinely made an error, and when notified, they rectify it immediately. It would not be in the interests of the economy to list these businesses on the register. • The register is a cost effective solution that acts as a deterrent to employers that have no intention of paying their

		<p>employees correctly even following a judgment.</p> <ul style="list-style-type: none"> • The Inquiry could also make this recommendation to the Federal Government to deal with wage theft in the federal jurisdiction, indeed given a larger proportion of employers are in the national system when compared to the WA State system it would be more appropriate that the Federal Government create this register, which can include in it the relevant offending WA State system employers.
Termination of WorkChoices agreements	1, 2 and 8	<ul style="list-style-type: none"> • Enterprise Agreements made during the WorkChoices era that have not been terminated are still in effect today as they were created due to the <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> (Cth). These WorkChoices era Agreements are also known in the industry as “zombie” agreements. • On creation, these WorkChoices Agreements did not have to consider the “no disadvantage test” and were never subject to the FW Act’s Better Off Overall Test (“BOOT”) or National Employment Standards (“NES”), and therefore could be less favourable to an employee than under the relevant Award. In effect, this amounts to “lawful” wage theft. • Our experience has been that employees are seeking our advice for wage theft in this regard, however our advice in some circumstances has been that they are not indeed being subjected to wage theft as a zombie agreement covers their employment despite that employee receiving less than that prescribed under the relevant Award. • The Western Australian Government ought recommend to the Federal Government to terminate all WorkChoices era Agreements currently in use that do not pass the BOOT or meet the NES.
Expansion of the powers of the WA Industrial Relations Commission to determine and declare individual employee entitlements	1, 3, 6 and 7	<ul style="list-style-type: none"> • In our experience, industrial disputes that are bought before the WA Industrial Relations Commission by a Union can be complicated and may involve a mix of individual entitlement issues as well as other industrial matters. • Currently, the WA Industrial Relations Commission has power under s. 46 of the IR Act to declare the true meaning of an award, but the Commission is not able to determine whether a particular employee has an entitlement owed to them pursuant to the provisions of an Award. • The Industrial Magistrates Court of Western Australia has exclusive jurisdiction to determine individual entitlements under an award under s. 83 of the IR Act. • In the circumstances of an industrial dispute that also involves individual entitlement issues, an employee must commence separate proceedings in another forum such as in the Industrial Magistrates Court of Western Australia if they wish to seek enforcement of their Award entitlement. The strict separation of powers and functions can lead to unnecessary litigation. • For those industrial matters that include individual entitlement issues which are ancillary or arise from the main dispute under applications made pursuant to ss. 44 or s 46 of the IR Act, we submit that the public interest and the interests of employees would be better served if the WA Industrial Relations Commission were granted the power to deal with and declare individual entitlements that may be owed under an Award.

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| | | <ul style="list-style-type: none">• Our proposal contemplates that the Industrial Magistrates Court of Western Australia would still have exclusive power for the enforcement and imposition of penalties for the specific orders regarding the payment of money, however the employee that has obtained a <u>declaration</u> from the WA Industrial Relations Commission may not need to commence proceedings in the Industrial Magistrates Court of Western Australia as the employer may be inclined to pay the entitlements following an underpayment <u>declaration</u> of the WA Industrial Relations Commission knowing full well that if the employee took proceedings to the Industrial Magistrates Court of Western Australia that employee would rely on the declaration of the Western Australian Industrial Relations Commission to bring a successful claim and the employer could then be subjected to penalties following proceedings at the Industrial Magistrates Court of Western Australia. This recommendation in this regard would be given greater effect if civil penalties under the IR Act were increased as submitted in a spate recommendation above. |
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