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The Secretary  
Standing Committee on Education and Employment – Legislation Committee  
Parliament House, Canberra

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## **RE: Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017**

The Senate Education and Employment Legislation Committee (Committee) is inquiring into the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* (bill).

During the course of the Australian Chamber's evidence before the Committee Senator Ketter asked about the value of Schedule 4 of the bill reaching beyond the current s 343 *Fair Work Act 2009* (FW Act). The Senator's question raises two issues; whether

- (i) s 343 of the FW Act was sufficient to address coercion to pay into a specified worker benefit or superannuation fund or insurance scheme which is not protected industrial action; and whether
- (ii) Schedule 4 went further than the underpinning recommendation of the final report of the Royal Commission into Trade Union Governance and Corruption (Report) it is intended to give effect to.

### **Is s 343 FW Act sufficient to address the concerns which prompted Recommendation 50?**

Schedule 4, *Prohibiting coerced payments to employee benefit funds*, is intended to give effect to recommendation 50 in the Report which is in the following terms:

*A new civil remedy provision be added to the Fair Work Act 2009 (Cth) prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme.*

Recommendation 50 was drafted with the operation of s 343 of the FW Act in mind. The Report states:

*The reason for recommending this specific prohibition is that it is questionable whether the existing prohibitions on coercion in the FW Act capture coercion which occurs outside the enterprise bargaining process.*

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*Thus, s 343 of the FW Act prohibits action done with an intent to coerce a person to exercise a 'workplace right' in a particular way. A 'workplace right' includes participating in the process of making an enterprise agreement. Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a 'side deal' between employer and union, would be caught.<sup>1</sup>*

The issue which was exercising the Royal Commission was the moral hazard facing unions or their officers when pursuing claims for particular employee benefit funds or insurance schemes where there was also benefit to the organisation and the persuasive capacity of this organisational benefit to drive conflicted motive. Amongst other identified consequences, the lure of benefit conduces to coercive conduct.

The problem is a long standing one.

Clearly transparency, or prohibition, are important strategies to combat inappropriate organisational gain but no single strategy is likely to do all the work. This seems particularly the case if transparency rather than prohibition is adopted, although, as demonstrated in a number of iterations of what is now the *Building Code 2016*, side deals are also resorted to avoid direct restrictions on bargaining. The Royal Commission said:

*The Commission has considered a number of options for dealing with the problems identified earlier in this Chapter. Two observations may be made at the outset. First, it is not suggested that clauses requiring payments to employee benefit funds, or employee insurance schemes, should be prohibited. Secondly, it is unlikely that any single mechanism will avoid all of the problems already identified.<sup>2</sup>*

Recommendation 50 was one of three related recommendations (Recommendations 48 – 50) made to address these problems. Recommendation 48 was given effect to with the passage of the *Fair Work Amendment (Corrupting Benefits) Act 2017*.

### **Does Schedule 4 exceed Recommendation 50?**

Recommendation 50 proposes that coercion directed towards an employer which is not protected industrial action should be prohibited. Proposed s 355A FW Act proposes to prohibit action taken by a person to coerce another person or a third person to pay into a superannuation, training, welfare, managed investment or worker entitlement fund or insurance scheme. Whilst the spectrum of employee

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<sup>1</sup> Para 30, Chapter 6, *Final Report*, Vol 5

<sup>2</sup> Para 22, Chapter 6, *Final Report*, Vol 5





benefit funds is not wider than proposed by Recommendation 50 it is the case that Schedule 4 would capture coercive behaviour directed at persons which are not employers. It includes coercion directed towards individuals such as employees.

There are other protections for employees in the FW Act. S 344 FW Act prohibits undue influence or pressure (which includes but is wider than coercion) on employees to direct deductions from their wages, but the prohibition is confined to undue influence or pressure exerted by an employer.

In its discussion of the engagement of the bill's provisions with the right to freedom of association under the *International Covenant on Civil and Political Rights* the Explanatory Memorandum explains

*The amendments will prohibit any action, other than protected industrial action, with intent to coerce a person to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme (Recommendation 50).*

*The amendment seeks to remove any legal or practical compulsion on employees to contribute to certain funds. The amendment does not prevent employees making genuine contributions voluntarily and independently into a worker entitlement fund, superannuation fund, training fund, welfare fund or an insurance scheme. Compelling contributions to such a fund or scheme could be said to infringe basic principles of freedom of association. By prohibiting mandatory contributions, the amendments promote human rights. The amendments address the problems identified by the Royal Commission in a reasonable, necessary and proportionate manner.<sup>3</sup>*

The Australian Chamber supports passage of Schedule 4.

### **Committee on Industrial Legislation**

Earlier during the Australian Chamber's evidence there was brief discussion about its attendance at the Committee on Industrial Legislation. The date of that meeting was 3 October 2017.

I can also confirm that the Australian Chamber was advised on Friday 20 October that the Committee might require submissions by Wednesday 25 October. This notice was confirmed formally on Monday 23 October.

The Australian Chamber restates its appreciation to the Committee for providing the opportunity to give evidence by phone and to the Committee Secretariat for facilitating this.

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<sup>3</sup> P xi, *Explanatory Memorandum*



I would be pleased to address any further questions the Committee may have of the Australian Chamber.

Yours sincerely,

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