



Submission on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

29 August 2019

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1 EXECUTIVE SUMMARY

- A. The ETU The ETU does not support the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill).
- B. The ETU supports the Australian Council of Trade Unions (ACTU) submission to this inquiry.
- C. The Bill is simply another ideological attack on Unions that goes further than the recommendations made by the Trade Union Royal Commission and goes well beyond any equivalence to the regulation of corporations in Australia.
- D. Further, the Bill is seeking to allow the Government to interfere with workers benefits.
- E. The Bill should be rejected entirely. If, contrary to these submissions, the Senate believes some form of greater regulation should be introduced, then the Bill should be amended in accordance with the Recommendations outlined below.

2 RECOMMENDATIONS

- 1. The Bill is a destabilising and unwarranted attack on Worker Entitlement Funds, and the regulation around these funds, which unfairly and unnecessarily jeopardises key protections for employees in high risk and itinerant industries.
- 2. The ETU strongly recommends that the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 be rejected.
- 3. In the alternate, if the Senate believes some form of greater regulation should be introduced, the Bill should be amended to:
 - permit employees to prescribe their choice of fund in enterprise agreements, consistent with the Choice of Super provisions;
 - apply equally to all Worker Entitlement Funds, including single-employer funds; and
 - expressly permit the distribution of surplus funds to sponsors exclusively for the provision of services such as hardship, welfare, training, professional development and industry programs.

3 INTRODUCTION

1. The Electrical Trades Union of Australia (“the ETU”) is the Electrical, Energy and Services Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU). The ETU represents over 60,000 electrical and electronic workers around the country and the CEPU as a whole represents over 100,000 workers nationally.
2. The ETU welcomes the opportunity to make a submission on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019.
3. A substantial portion of the ETU’s membership work in industries where Worker Entitlement Funds are built into enterprise agreements, particularly in the electrical contracting and construction industries.

4 INCOME PROTECTION AND REDUNDANCY FUNDS – THEIR PURPOSE

4. These funds, at least where they are enshrined in enterprise agreements, principally operate in the construction and service industries.
5. The practical effect of the Bill will predominantly be upon income protection schemes and redundancy trusts in construction industries, with some collateral damage to other funds¹.
6. Income protection and redundancy have been key features of industrial instruments in construction for, in some cases, over thirty years. They were developed in response to the inherent nature of the construction industry, specifically:
 - a. the short-term and itinerant nature of employment in the sector;
 - b. the heightened incidence of employer insolvency; and
 - c. the resultant difficulty in attracting and maintaining a skilled workforce in that environment.
7. These schemes, developed jointly by employers and unions, have operated successfully to instil a degree of certainty into inherently unstable industries.

4.1 Redundancy Trusts

8. Emerging in the 1980s, redundancy trusts were the product of a collaborative approach by unions and employers to secure redundancy entitlements. In short, the funds operate by:
 - a. the employer and employees agreeing on a redundancy fund in the course of enterprise bargaining;
 - b. the employer offsetting future lump sum liabilities by paying an amount on a recurring basis into the fund on behalf of each employee covered by the agreement;
 - c. the fund manages the employee’s contribution;
 - d. in the event of a redundancy situation, the fund pays the employee their redundancy, in satisfaction of the employer’s obligations.
9. These funds are closely regulated by the Australian Taxation Office.

¹ Such as Jetco, a training fund which operates in Queensland and the Northern Territory

10. This works well for all concerned as:
 - a. for employers, it means they do not need to record and make provision for significant contingent liabilities;
 - b. for employees, it means that their redundancy pay is guaranteed; and
 - c. for both employers and employees it mitigates one of the risks associated with an itinerant and often unstable industry.
11. As noted by the Senate Economics Committee, the construction industry typically accounts for between 20% and 25% of all insolvencies, and around 23% of all external administrations². Suffice is to say, this is grossly disproportionate with its overall share of the economy, which the Office of the Chief Economist estimates at 7.4% of GDP and 9.2% of employment³.
12. On average, **over 1,800 insolvencies occurred each year for the past 10 years in the construction industry.**
13. Necessarily, insolvency situations involve a shortfall of money. Typically, the company will not have sufficient liquidity to pay out employee entitlements, particularly redundancy. Also, there will usually be no or little notice of the impending collapse.
14. In the past twelve months alone, thousands of ETU members have been affected by the collapse of electrical contractors, both large and small, such as:
 - a. RCR Tomlinson;
 - b. Hastie Group;
 - c. Adelaide Central Electric; and
 - d. as recently as August 2019, ECM.
15. In each of these cases, redundancy trusts were able to quickly pay employees their redundancy entitlements. Routinely, this money is used to keep bread on the table and mortgage or rent paid. Whilst most entitlements can ultimately be recovered via the FEG scheme, this process can take months – often paying out well after the employee has secured alternate employment.
16. In 2018, ETU member Adrian Valente was working with Adelaide Central Electric (“ACE”), an Adelaide electrical contractor. When ACE collapsed in September, dozens of workers were left short. Adrian hadn’t been paid in a fortnight and was given no pay on termination.
17. Adrian and his partner were expecting their first child, so the collapse could have put real strain on his family. Luckily for Adrian, he was in a redundancy trust which paid him approximately \$6,000 in redundancy entitlements. This guaranteed Adrian a continuity of income and allowed him to pay his bills on time, relieve stress, and to exercise real control over his future. It also deferred the need for Adrian to seek assistance of Government welfare benefits.
18. Adrian was also left short on other accrued entitlements, like annual leave and unused rostered days off. Adrian had to go through the FEG scheme to recover these entitlements. These entitlements were not paid out until some three months later. Some of Adrian’s workmates had to wait even longer.

² Senate Economics References Committee *Report: Insolvency in the Australian construction industry* at page 16

³ Office of the Chief Economist 2018 *Industry Insights: Flexibility and Growth* page 26

19. And that exposes the key benefits of redundancy trusts, in that they:
 - a. guarantee a continuity of income and financial security;
 - b. take strain off the Commonwealth's FEG scheme; and
 - c. reduce unemployed workers reliance on Government welfare.

4.2 Income Protection Insurance

20. Employment in the construction industry is largely short term and itinerant. Workers are commonly laid off at the end of each construction job, and even those who stay with the same employer routinely have their continuity of service broken. This means employees in construction don't accrue significant sick leave as each break in continuity results in employee's forfeiting all accrued sick leave.
21. Working in construction is also dangerous and physical, leading to above average incidents of workplace injury: meaning that construction workers have a higher incidence of being unable to work due to injury or ill-health.
22. It is this feature of construction that has led unions and employers to develop income protection insurance that is tailored to the industry. Commonly, when compared to income protection offered on the retail market, industry income protection schemes:
 - a. have reduced waiting periods, or sometimes no wait period at all; and
 - b. are more lenient around pre-existing conditions, to take into account the realities of bodily wear and tear from working in construction.
23. The schemes work by the employer and the employees agreeing on an income protection insurer in the course of bargaining. The employer then pays the premium on behalf of each of the employees.
24. Functionally, income protection often fills the role of sick leave for construction workers. Absent income protection, when a construction worker is injured outside of work they are placed in real financial jeopardy – often having financial pressure force them to return to work before they are recovered, leading to further and worse injuries.
25. By way of example, take Kevin Booth. Kevin is an ETU member who has worked as an electrician for nearly two decades. Kevin has worked across Australia in domestic, commercial, industrial, resource and high-rise construction.
26. In that time, Kevin has worked for at least eighteen different employers across dozens of sites and projects. When one job ended, Kevin would move on and get a new job.
27. Currently, after working consistently for 19 years in the construction industry, Kevin has less than 2 days of accrued personal leave. By way of comparison, an employee in a fixed industry working for the same employer over the same time, under the National Employment Standards, would have accrued over 6 months personal leave.
28. In construction, income protection is not a "nice to have", it is vital.

5 WHAT THE BILL SEEKS TO DO – UNDERMINING VITAL PROTECTIONS

29. These submissions focus upon those aspects of the Bill relating to Worker Entitlement Funds.

30. In short, the Bill seeks to:
- drastically increase the regulation imposed upon Worker Entitlement Funds;
 - introduce the Registered Organisations Commissioner as an additional regulator of Worker Entitlement Funds;
 - prohibit industrial instruments or contracts from nominating a Worker Entitlement Fund; and
 - prescribe the purposes for which payments from Worker Entitlement Funds can be made.

5.1 Inconsistent with TURC Recommendations

31. The TURC final report made recommendations 45 and 46 to deal with the regulatory oversight of Worker Entitlement Funds, providing:

Recommendation 45 Legislation, either standalone or amending the Corporations Act 2001 (Cth), be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds. The legislation should provide for registration of worker entitlement funds with the Australian Securities and Investments Commission, and contain a prohibition on any person carrying on or operating an unregistered worker entitlement fund above a certain minimum number of persons. Key recommended features of the legislative scheme are explained at paragraphs 93 and 95 of Volume 5, Chapter 5 of the Report.

Recommendation 46 In consequence of the enactment of the legislation recommended by Recommendation 45, Class Order [CO 02/314] not be extended. In further consequence, s58PB of the Fringe Benefits Tax Assessment Act 1986 (Cth) be repealed and the fringe benefits tax exemption in s 58PA(a) be amended to refer to registered worker entitlement funds.

32. At no point did the recommendations suggest that Worker Entitlement Funds be moved under the jurisdiction of the industrial regulator. Further, the industrial regulator has no subject matter expertise in regulating what is, essentially, an aspect of the financial services industry – albeit an aspect not plagued by the scandals and impropriety revealed in the Banking Royal Commission.
33. The recommendation advised of changes to the Corporations Act to remove inconsistencies with those laws to provide for the appropriate reporting, auditing and disclosure requirements necessary for good Governance. This is the appropriate place for these changes to be made.
34. Other Worker Entitlement Funds, such as Superannuation and Long Service Leave are regulated by Australia’s taxation and corporation laws, there is no reason for a cohort of Worker Entitlement Funds to be treated differently.

5.2 Regulation above what Corporations must comply with

35. This Bill continues the practice of the Liberal Government to introduce a regulatory regime which goes far beyond those requirements which Corporations must comply with.
36. The level of Government interference and overreach into the operation of Unions and of Worker Entitlement Funds which Unions have set up in cooperation with industry is unprecedented.

37. Under the proposed bill Worker Entitlement Funds will be required to be regulated by Corporations Laws, Taxation Laws, the Registered Organisations Commission and the Fair Work Act, creating unnecessary duplication and inefficient regulatory burden.
38. The effect of this Bill is contrary to the Governments own Guide to Best Practice Regulation.⁴
39. Employee benefit funds were created due to the high frequency of unscrupulous employers failing to pay their employees what they are owed. Whether that be through phoenixing, insolvency or straight out wage theft, all too often workers miss out on what is rightfully theirs.
40. On average, over 1,800 insolvencies occurred each year for the past 10 years in the construction industry.
41. The Senate Economic References Committee Report on Insolvency in the Australian Construction Industry was released in 2015.⁵ In its Report, the Committee noted that:
 - Over the past decade, the construction industry has accounted for between one-fifth and one-quarter of all insolvencies in Australia, which is disproportionately high relative to its share of national output.
 - Factors which have contributed to this high rate of insolvencies include: the structure of the commercial construction sector; serious imbalances of power in contractual relationships; and harsh, oppressive, unconscionable commercial conduct.
 - Illegal 'phoenix' activity remains a significant issue in the construction industry.
 - The construction industry is burdened with nearly \$3 billion in unpaid debts each year.
 - The legislative regime covering security of payment in the construction industry is "fragmented and disparate".
42. In stark contrast to the above, **there has not been a single case of a worker not receiving their legitimate entitlements from a Union affiliated Worker Entitlement Fund.**
43. Why the Government would seek to unnecessarily interfere with such important funds, particularly when they are so acutely aware of the issues, is beyond comprehension.
44. In the Senate Inquiries response to the report, recommendations were made including:

Recommendation 9

- The committee recommends that construction industry participants, particularly those representing the interests of subcontractors, develop partnerships with mental health support organisations to provide ready access to support, counselling and treatment for people in the industry who may suffer from the adverse mental health effects of the financial distress caused by contractual disputes and insolvency in the construction industry.

45. This Bill severely limits the capacity for Unions and employer associations to fund such initiatives.

⁴ <https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation>

⁵

https://www.apf.gov.au/parliamentary_business/committees/senate/economics/insolvency_construction/Report

6 JEOPARDISING THE SCHEMES

- 46. Both income protection and redundancy trusts are built on “scale”. That is, the larger the scheme the more secure the entitlements are and the better the benefits that can be offered.
- 47. The Bill attacks this scale. It prohibits an enterprise agreement specifying an income protection or redundancy trust for all employees, meaning that employees can’t use their collective bargaining power to get better conditions or drive down costs. Functionally, employees will be on their own.
- 48. These are Funds which have been built up over years or decades, and which offer conditions far above what’s available in the retail market. This Bill undermines all these years of effort and risks throwing injured, sick and sacked workers onto welfare.

6.1 The Employer carve out

- 49. Notwithstanding the Government’s rhetoric around the need for improved regulation, employer-run schemes are provided an express carve out⁶. None of the heightened governance standards, nor the red-tape, will apply to employer-run schemes.
- 50. The term itself is left largely undefined, meaning that this will see banks and insurers simply “skinning” their products specifically to an employer, and doing the bare minimum to ensure the employer meets the definition of “operator”.
- 51. Employers will be able to freely spruik these schemes
- 52. In reality the effect of the Bill is nothing less than a free kick to large banks and insurers, and to undermine industry run schemes.

7 UPPING THE COSTS

- 53. The Morrison Government is at every turn introducing more and more regulation targeted specifically at Trade Unions and, in this instance, Worker Benefit funds. In doing so, the Government is acting contrary to its election commitments to reduce regulatory burden in Australia and is ignoring its own guide to regulation.
- 54. Regulation is in every case the default option for Government for matters pertaining to Trade Unions.
- 55. Regulation is being imposed with no demonstrable overall net benefit to employees, their unions, industry or the economy.
- 56. There is no concomitant relief in the regulatory burden on unions elsewhere, so in no way is the cost burden of the proposed regulation offset whatsoever.
- 57. The proposed regulatory policy change has not been the subject of a Regulation Impact Statement.
- 58. There has been no consultation in a genuine and timely way with affected businesses and workers or their representative Unions and Associations. Nor has there been consultation with Worker Entitlement Funds.

⁶ see Schedule 2, item 392

59. There has been no effort made to avoid creating cumulative or overlapping regulatory burdens with many of the proposed changes being a replication of other regulatory requirements which already apply.
60. The sole aim of this legislation is to impose cost barriers upon Unions and employee benefit funds. Barriers which will have the effect of reducing workers' rights and benefits, not securing them.
61. The new regulatory regime will impose further compliance cost on both unions and Worker Entitlement Funds. It will mean the members money in the Worker Entitlement Fund will be frittered away on expensive lawyers and duplicate auditors due to the multiple and overlapping obligations. It is also likely to make it difficult to attract investment in the setup of new funds or the expansion of existing schemes.
62. The Bill will impose an additional layer of bureaucracy, requiring Funds to be registered with a third regulator – the Registered Organisations Commission. The Funds are already registered with ASIC and the ATO, with the ATO registration and compliance being especially stringent. The Bill simply increases cost for these schemes to operate.
63. That means either higher prices or lower benefits. Or both.

8 WHAT ABOUT THE SURPLUSES?

64. In some instances, these funds will have considerable assets under management. Consequently, the assets are invested wisely and routinely deliver a good return.
65. In most instances, this return is retained in the funds. From time to time, the returns – i.e. not the worker entitlements – will be distributed to sponsor organisations, typically unions and employer associations⁷. Alternatively, the funds may distribute the surpluses for the betterment of the fund members' industries.
66. The below are typical examples of how these distributions are spent:

8.1 Queensland - Positive Power Mob

67. The QLD/NT Branch of the ETU worked in conjunction with the power industry to develop the Positive Power Mob program from 2008 through to 2012. The program was developed in partnership with Qld Aboriginal and Torres Strait Island communities to identify opportunities for participants to engage in an 8 – 12 week work ready pre-vocational program to assist in securing apprenticeships and other technical serviceperson roles within the South East Queensland power company Energex Pty Ltd.
68. Surplus income associated with a union-controlled Worker Entitlement Fund was used to fund the ETU's resourcing requirements, necessary to make this program a success.
69. Over the life of the program, 50 workers of Aboriginal and / or Torres Strait Island descent secured vital work skills, knowledge and experience with over half of all participants securing electrical apprenticeships in the electrical industry.
70. This program could not have been funded under the proposed Bill.

⁷ both of which are not-for-profit

8.2 Mates in Construction

71. Mates in Construction was created in 2009 to provide real support to workers in the construction industry which had some of the highest suicide rates in the country. Whilst Mates in Construction has helped many people in the industry the most significant statistic is the 35 suicides that the program has directly intervened in and prevented since its inception.
72. Mates in Construction is expanding into other industry sectors particularly mining and the power industry. Seed funding for these expansions comes from a range of sources including surplus income associated with a union-controlled Worker Entitlement Fund.
73. The Mates in Construction program regularly assists people outside of the construction industry and delivers training programs for Managers, Supervisors and Union Officials around mental health. Many of these people are not in the construction industry.
74. This program could not be funded under this proposed Bill.

8.3 Tasmania – counselling and support services

75. In Tasmania surplus income associated with a union-controlled Worker Entitlement Fund is utilised to enter into arrangements with counselling and support services which are made available to all Union members and their families.
76. Since these arrangements have been in place, an average of 4 counselling appointments per month have been accessed for everything from financial counselling right through to assistance with depression and suicide prevention.
77. These services will have to be abandoned as they cannot be funded under this proposed Bill.

8.4 Western Australia – ambulance cover

78. In Western Australia surplus of a union affiliated Worker Entitlement Fund are utilised to provide ambulance cover which is made available to over 7,000 Union members and their families.
79. These arrangements have been in place for close to a decade and many families have been saved each year from paying massive ambulance costs and in some cases has meant that families have not had to think twice about calling an ambulance for fear they may not be able to afford the cost.
80. This service would have to be abandoned as it cannot be funded under this proposed Bill.

8.5 Victoria – ambulance levy

81. In Victoria surpluses associated with a union affiliated Worker Entitlement Fund is utilised to pay ambulance costs (where members are not a member of Ambulance Victoria), hardship payments (where members, their spouse or children have cancer and other illnesses) to help with the medical costs, and funeral costs (for members their spouse or children who have sadly passed). This support mechanism is in place for over 18,000 Union members and extends to their families.

82. These arrangements have been in place for well over a decade and many families have been saved each year from paying massive costs at some of the most difficult times in their lives.
83. By way of example, during the period 1/1/14 to 25/10/17 the following support payments were made to thousands of Victorian workers;

Ambulance Costs	\$1,326,276
Funeral Costs	\$710,477
Hardship Payments	\$346,762

84. This support would no longer be available as it cannot be funded under this proposed Bill.

9 CONCLUSION

85. The Bill is like a drunken haymaker punch, the Government swinging wildly to try and hit unions and uncaring of who gets in the way.
86. The facts are simple:
- a. the funds protect workers;
 - b. any profits are ploughed back into improving the industry;
 - c. there have been zero instances of impropriety; and
 - d. there have been zero instances of collapse.
87. Without income protection and redundancy trusts, construction workers are put at serious risk of bankruptcy and, fundamentally, the ability to provide for themselves and their families.
88. Rather than attacking this sector, the Government should be investigating how this track record can be replicated. Instead, it is attacking these Funds under a misguided belief that it will hurt unions. In truth, it jeopardises fundamental entitlements for vulnerable workers – this Bill will hurt everyday Australians.
89. The Bill should be rejected.
90. In the alternate, if the Senate believes some form of greater regulation should be introduced, the Bill should be amended to:
- a. permit employees to prescribe their choice of fund in enterprise agreements, consistent with the Choice of Super provisions;
 - b. apply equally to all Worker Entitlement Funds, including single-employer funds; and
 - c. expressly permit the distribution of surplus funds to sponsors exclusively for the provision of services such as hardship, welfare, training, professional development and industry programs.