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As trustee for Protect Services Trust

'Protect Group' Submission

To The Education and Employment Legislation Committee

For the Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

25 October 2017

1. Submitting Entities

This submission is made on behalf of the following entities:

ElecNet (Aust) Pty Ltd, as Trustee for the Protect Severance Scheme; and
The Protect Severance Scheme No 2 Pty Ltd, as Trustee for the Protect Severance Scheme No 2; and
Protect Services Pty Ltd as Trustee for the Protect Services Trust.

This submission refers to these entities collectively as "Protect" as they have a common membership base and governance structure.

2. Executive Summary

- Protect is a **strongly governed** organisation that already operates along the lines proposed in the Bill. Protect supports in-principle the aspects relating to formalising fund governance, registration and disclosure. *See paragraph 5.9 of this submission*.

- We have concerns over the **risk, cost and uncertainty** surrounding the **extensive powers afforded to the Minister** to make *Worker Entitlement Fund Rules* in a range of areas which each have the potential to materially impact operations. There are no parameters to regulate the timeframes in which the Minister may impose such changes to the Rules, and the terms of reference are very broad, leading to uncertainty as to operation of Registered Worker Entitlement Funds. *See paragraph 5.1*.

- The Bill applies **conditions** on operating a Registered Worker Entitlement Fund **which do not apply to other corporate or investment entities**, namely for the Minister to impose Rules and require public disclosure beyond what is required by the Corporations Act or Australian Accounting Standards. *See paragraphs 5.1 and 5.10*

- Under the current Bill, support from the sponsors in the form of a guarantee in the event of a severe downturn in the financial position would be unlikely and would place the Fund and **workers' benefits at more risk** than under the current regime. *See paragraph 5.7*

- There has been a **lack of genuine consultation** in drafting the Bill and a lack of adequate time to review the Bill, with the apparent priority given to tabling the Bill in Parliament rather than pursuing genuine stakeholder consultation. The outcome is a Bill that, as presently drafted, creates a concerning degree of uncertainty surrounding investments, reporting and disclosure

among other matters, which are subject to the Minister's Worker Entitlement Fund Rules. *See paragraph 5.4*

- We welcome the ability for Registered Worker Entitlement Funds to use funds to deliver **training and welfare** services for members. However, the onerous reporting requirements for individual payments go far beyond what is required of listed companies or regulated superannuation and investment trusts, which manage a significantly larger pool of assets for a broader section of the community. There appears to be no good policy reason for these payments to be singled out for special disclosure rules that do not apply to other forms of "reasonable administration expenses". *See paragraph 5.3*

- Assertions that there is a **lack of regulation are mis-informed**; worker entitlement funds currently comply with Trust Law, the Corporations Act (including ASIC regulation), the Fringe Benefits Tax Assessment Act (to the extent they wish to be Approved Worker Entitlement Funds) and the Income Tax Assessment Acts. As companies, directors must meet their obligations specified in sections 181 to 184 of the Corporations Act 2001. *See paragraph 5.9.4*

- A **timeframe of 6 months** to become compliant is **unreasonable** when most aspects of the funds' operations and governance will be affected. System software, staff training and education and member communication changes may be necessary and these must be undertaken with due care and appropriate testing. The implications of the Minister's Worker Entitlement Fund Rules are as yet unknown but have the potential to be operationally intrusive. The risk that the interests of our worker members will be adversely affected is substantially increased by an unreasonably short timeframe for implementation of these new requirements. *See paragraphs 5.2 and 5.11*

3. Introduction

The Outline contained in the Explanatory Memorandum accompanying the Bill states that the Royal Commission report:

> "*made 79 recommendations for law reform to address problems associated with the current regulation and transparency of registered organisations*."

To put this comment into perspective, the Bill seeks to address just *two* recommendations which directly relate to Worker Entitlement Funds – recommendations 45 and 46. Other recommendations seek to regulate other parties, such as unions, by addressing recommendations 43, 49 and 50, which do not affect the operation of the Funds, only the requirements surrounding the industrial agreement to nominate a Fund. Worker Entitlement Funds are not a party to these agreements.

A small number of other recommendations referred to in the Explanatory Memorandum seek to regulate unions and/or provide more general reporting and disclosure requirements.

The Explanatory Memorandum goes on to say:

> "*The examples of corruption, financial misconduct and mismanagement outlined in the Report have demonstrated that the existing regulatory framework is not satisfactory in preventing fraud and financial mismanagement, and promoting acceptable standards of democratic governance in the interests of members*."

This comment creates the misleading impression that Worker Entitlement Funds engaged in the above practices. There are only two of the 79 recommendations affecting the direct operations of the Funds, yet the insinuation is that that the other 77 recommendations are somehow applicable and relate to misconduct or mismanagement of Worker Entitlement Funds. Consideration should be given to

separating the legislation relating to Worker Entitlements Funds from the legislation relating to employer associations and unions.

The Explanatory Memorandum on page iii provides the single statement, "The Bill will have a minor financial impact". This unsubstantiated statement fails to take into consideration

- the costs associated with registration and ongoing compliance with conditions (which could be a significant cost to members based on the cost of compliance with similar regulation in the financial services and superannuation industries);
- the risk and cost associated with re-structuring investment portfolios together with the risk of liquidating assets at a sub-optimal time to meet as-yet-unknown capital adequacy and liquidity requirements. *See paragraph 5.2*
- reporting and disclosure requirements, also subject to the Minister's *Worker Entitlement Fund Rules* create a risk of initiating a substantial and costly software project to modify existing systems; costs are likely to escalate due to the short timeframe provided for transition.

4. Profile of Protect

The Protect funds exist to provide its members with financial security in situations of significant need. In effect, workers direct part of their employee entitlements into Protect so they have access to funds during periods of unemployment, as well as having entitlements shielded from the potential insolvency of their employers.

The existence of Worker Entitlement Funds, such as Protect, reduces the strain on the welfare system which would otherwise be called upon by workers in times of unemployment or to make-good the entitlements where the employer has not made adequate provision or is in liquidation.

In the absence of Protect, workers could be forced to claim their redundancy entitlements through the Government 'Fair Entitlements Guarantee' (FEG) scheme, at taxpayer expense. The waiting period for FEG can be extensive, leaving the worker no alternative than to register for benefits with Department of Human Services creating a further burden on taxpayers.

Worker Entitlement Funds provide workers with the financial security and income stability to survive cycles in the economy. These funds have been established in recognition of the transitory nature of employment in certain industries, such as building and construction. The funds have been established to provide benefits to employees who would normally be entitled to benefits on termination of employment, in circumstances where the industry has largely transitioned to project-based work rather than permanent employment. The multiple industries that Protect members participate in are particularly prone to specific, and wider, economic instabilities.

The fund was established in the context of an industry in transition where redundancies were becoming an increasingly regular occurrence and entitlements were at risk due to the high incidence of companies going into administration and liquidation. Employees' salary and other entitlements were either not being paid or their payment was being significantly delayed whilst the claims of other creditors were being considered. Protect and other employee benefit funds were established to ensure workers' entitlements were immediately available when these events occurred.

Despite the assertions that workers' benefits can be better protected, Protect has in the past five financial years paid over $280 million in benefits to workers. Clearly the payments are being made to the workers for whom the contributions were made.

4.1. Current Structure

Protect Services Pty Ltd is a services company that provides administration services to ElecNet (Protect1) and the Protect Severance Scheme No 2 (Protect2). Protect1 is no longer accepting contributions from employers. Protect2 accepts contributions and is an Approved Worker Entitlement Fund (AWEF) under the *Fringe Benefits Tax Assessment Act 1986*.

The 'sponsors' of the Electrical Division of Protect1 and Protect2 are:

- The Victorian Divisional Branch of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Unions of Australia (the ETU).
- The National Electrical and Communications Association (NECA).

The Boards of the trustee companies of the Protect Funds are each comprised of two independent, voting directors, two representatives nominated by NECA and three representatives nominated by the ETU. The directors of the employer and employee organisations are appointed to represent the interests of their members in the management and governance of the Protect Funds. The two independent directors have been appointed to the board of the trustee companies to provide additional investment, governance and compliance expertise. The Chairs of the Boards and Board Sub Committees are either one of the two independent directors.

Protect also operates outside the electrical industry with the AMWU (Metals) Victorian Branch, known as the fund's Manufacturing Division and MUA WA Branch, known as the Maritime Division. These organisations do not sit on the Board but accounts, investments and investment strategy are separated for each Division.

5. Concerns with the Bill - Schedule 2

References throughout this submission to sections of an Act refer to the *Fair Work (Registered Organisations) Act 2009*, unless otherwise stated. Our comments relate to Schedule 2 – Regulation of Worker Entitlement Funds.

5.1. Worker Entitlement Fund Rules

We are concerned at the extensive powers granted to the Minister to issue Worker Entitlement Fund Rules under **s329NJ,** and **the lack of a transparent notice period** which the Registered Worker Entitlement Fund has to comply with the Rules. This is a source of **significant business risk** and presents an unknown cost because neither content nor timing is transparent. Specifically, the following sections may have an extensive impact on the structure and operation of the funds:

- ***s329HC(1)(b)*** – Allows the Minister to change the definition of a Worker Entitlement Fund – in other words to increase the scope of coverage of the legislation.
- ***S329LA, condition 6*** – Allows the Minister to impose any requirements into a Fund's constitution. Under our constitution (trust deed) the trustee cannot make any amendments that would be to the detrimental to our employers and members. This power granted to the Minister may put the trustee in a position where they are contravening their fiduciary duties.
- ***S329LA, condition 13*** – Allows the Minister to impose capital adequacy, liquidity and governance requirements on the funds. "Governance" requirements are not defined and in effect allow the Minister to provide broad conditions so long as there is a tenuous link to 'governance'. Both capital adequacy and liquidity requirements are not defined in the section, nor is there any indication on the timeframe required to achieve this position.

- ***S329LA, condition 16*** – Allows the Minister to require that contributors are provided with "information" prescribed by the worker entitlement fund rules and at the time and intervals prescribed by the rules. This has far-reaching consequences for the operations of a business. Funds operate with sophisticated and custom-built information technology systems. Changes to information and reporting must be taken with due care, with consideration given to proper amendments to software. Such changes may require many months of work (and cost) to modify systems in response to a Minister's imposition. While we do not object to providing contributors with information, more certainty needs to be provided to operators to ensure reasonable timeframes to comply, as well as appropriate contemporary methods of low-cost electronic communication such as email or text message. Funds also enter into a broad range of confidential commercial arrangements and handle sensitive business and financial information as many other corporate entities do. The broad scope of the Minister's powers makes it unclear whether Registered Worker Entitlement Funds could continue to enter into such arrangements.
- ***S329LF(3)(h)*** *and* ***s329LF(5)(d)***– allow the Minister to specify any 'other matter' to be included in an Annual Report and Auditor's report. There are no restrictions on the period of notice to obtain the information and report on it. The condition is far-reaching and has the potential for matters to be included in annual reports of funds, such as terms of contracts, directors' and officers' details, which are not imposed on other corporations. Additional reporting and/or auditing requirements, of an as-yet unknown extent, have potential to add significant cost.

These catch-all provisions provide a **serious degree of uncertainty** in operating a business when key operating parameters are at the whim of a Minister – conditions that are not imposed on other corporations. The above suggests that, in rushing the Bill into Parliament, inadequate consideration has been given to its drafting and a number of matters have simply been deferred to be decided by the Minister at a later date.

Under the previous provisions on *approved worker entitlement funds* in section 58PB of the Fringe Benefits Tax Assessment Act, there are no corresponding provisions providing a Minister or Commissioner of Taxation with extensive powers to create or modify rules.

5.2. Investment Matters

Protect's documented investment strategy sets an investment return target to preserve workers' entitlements, with secondary considerations to cover the costs of operating the Funds (which ensures worker's entitlements are not eroded by administration costs), and to build a buffer against investment fluctuations. If all of those aims are being met, there is no reason why the fund should not provide an amount for distribution to the Sponsors. This is not unlike the manner in which trustees of retail superannuation funds can distribute income to their sponsors instead of returning that excess money to fund members or companies paying dividends to their shareholders.

- ***Section 329LD*** does not allow for a distribution of income nor prior years income under ***s329LD(3)*** to sponsors of the fund. Distributions of income are permitted to fund members (workers) under ***s329LD(1)(b)*** and to contributors (employers) under ***s329LD(1)(c)***. This change in the framework for distribution of income may have the effect of both workers and employers claiming an entitlement to the income of investment of capital. If the fund operators (which are generally trustees of trusts) were required to take into consideration a claim of these beneficiaries on the income of the fund when setting the fund's investment strategy, this could have the unintended

consequence of shifting the core purpose of Registered Worker Entitlement Funds away from capital preservation in order to generate income to meet beneficiary expectations.

The investment strategy and returns will need significant restructuring to accommodate the appropriate outcomes for a different set of beneficiaries. **However, decisions about the investments in the portfolio is at this time is hampered by a lack of detail about capital adequacy and liquidity requirements.**

- ***S329LA, condition 13***, requires that funds comply with prescribed *worker entitlement fund rules* in relation to "capital adequacy, governance and liquidity". Under **s329NJ**, the Minister is provided broad and extensive power to prescribe such Rules. We strongly believe that such fundamental parameters should be clearly set out in the relevant legislation, rather than being prescribed by the Minister. We also urge that such rules become available as soon as possible in order for the Board to consider any investment portfolio implications.
- In effect, **Clause 2, Provision 3** and **s34 (a)** of the Fair Work Act 2009 allow for **6 months** to implement the matters contained in the Bill. In investments, time is of the essence and appropriate time needs to be provided to transition the investment portfolio at the optimal time. We submit that rules relating to the grandfathering of existing investment arrangements for transitioning funds should be included in the legislation, so there is no need to liquidate fund assets to satisfy any changes in investment arrangements prescribed by the Minister.
- ***S329LA, condition 11***, aims to ensure investment management is at arms length from contributors and fund members. This presents some ambiguity and a practical issue, depending on interpretation. Directors and Trustees of the Funds are nominated by the Sponsors, the ETU and NECA, to represent worker and employer interests respectively. These nominee directors have drawn their experience from the industry. NECA/Employer-nominated directors may be an owner or executive in a business that is a contributor to the fund. ETU nominated directors may have commenced their careers as a worker and will likely be a fund member. We submit that it is sufficient to rely on directors' obligations under the Corporations Act to avoid conflicts of interest. A strict reading of the clause could result in all industry-nominated directors (and the majority of the Board) being prevented from making decisions in the best interests of the fund. (We note the Explanatory Memorandum's reference to the clause being modelled on s58PB(4)(a) of the FBTA Act, however this only referred to "contributors to the fund", not fund members).

5.3. Training and Welfare Payments

We welcome the inclusion of the ability of Funds to use fund income for the purposes of 'training or welfare payments' as provided by ***s329LD(1)(d)*** and ***s329LD(2).***

We are concerned by the requirement in ***s329LD(2)(d)*** that <u>every payment</u> in relation to training and welfare services must be approved by an independent director ***s329LD9(2) (d)*** and ***(e)***. The Protect boards are able to delegate their authority to sub-Committees, Management or Staff to make payments on certain matters, within agreed limits. This is documented in a Register of Delegations which applies to many forms of expenditure that are considered "reasonable administration costs" as referred to in ***s329LC(1)(g)***. Any expenditure listed in the Register of Delegations which exceeds the expenditure limit or was not anticipated in budget would require the approval of the Board. This is consistent with normal corporate practice. It is onerous and impractical to single out training and welfare payments for separate independent Director approval, however small the amount.

We submit that a more practical approach would be for the fund operator to be required to disclose in its annual report any arrangement under which an amount over a prescribed threshold was made,

rather than each payment having to be disclosed ($50,000 would be a suitable materiality threshold for this purpose).

5.4. Rushed Timing of the Bill / Lack of Consultation

We submit that the Bill has been rushed into Parliament without adequate consideration and consultation. This is evident from the number of loose ends left for the Minister to decide via the Worker Entitlement Fund Rules, referred to above.

The Department of Employment will argue that industry has been consulted, including meetings with executives of all existing worker entitlement funds in all States.

On Thursday September 28, executives of the existing funds were provided with notice to attend a meeting in Canberra on Wednesday October 4 to discuss the Bill which would propose to regulate the entirety of our operations. Most States had a public holiday on Monday or Friday, leaving effectively a little over two business days' notice.

The "consultation" meeting agenda consisted of the following items:

9:00am:	Introductions and overview of draft Bill
9:30am:	Reading time—attendees read draft Bill
10:30am:	Discussion—attendees invited to comment on draft Bill
Noon:	End

The fact that only one hour was set aside to review the Draft Bill of over 40 pages, affecting the entirety of our operations and business model, demonstrates the intention to push through the legislation without genuinely consulting. The 49-page explanatory memorandum, released into Parliament with the Bill, was not provided at the consultation meeting.

Following the release of the Bill, notification to provide this submission was emailed to an admin@... email address, meant for general customer enquires. The email was received at 4:46pm on a Friday – limiting the time to comment. The timeframe to complete this submission was just 3 business days. Again, an unreasonable timeframe to properly consider a position and seek advice.

We submit the request for an industry consultative committee be established to develop a more well-considered Bill that delivers accountability, transparency and regulation to a very important industry. As an operator of such a fund we seek certainty about our operation, which is not currently afforded by the unknown element associated with the Minister's ability to issue Rules. An industry consultative committee could work on developing practical solutions to many of the issues referred to as Rules, with a view to including these within an amended Bill, rather than through a Rule.

5.5. Choice of Fund

The amendments to Fair Work Act 2009 ***s194(i) and (j)*** and ***s151A*** introduce the ability for employees to choose a fund for contributions and insurance payments to be made into.

This would be onerous and add extra responsibility on the employer, not the Fund, to source more than one fund and would therefore increase the administration and general cost of the employer doing business.

Some States have only one fund operating in their State which means that employers would have to look to sourcing alternatives from different States. It would also mean that if the employer was required to pay into multiple funds, the employer would be required to complete and lodge multiple returns and may be required to pay a different amount for different workers depending on the rules

of the funds. This is unlike Superannuation Funds which are all structured similarly and have the same legislative rules and employers must submit a return for each fund which are basically identical.

It is important to differentiate worker entitlement funds from superannuation funds.

- Currently Choice of Superannuation fund is not available where a superannuation fund is specified in an enterprise agreement. The "Proper use of Worker Funds" amendment imposes a more onerous requirement for redundancy funds and insurance products.
- Superannuation funds are in general many times larger in funds under management and staffing than worker entitlement funds. Therefore, the resources they can and do dedicate to such aspects as providing a 'clearing house' is way beyond the resources of worker entitlement funds.
- There are limited options for members to select a fund given current approved funds operate in different states and different industries and are limited in numbers
- ***Section 2(1) Provision 3*** *of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Act 2017* ***Section 34*** of the Fair Work Act 2009 provides for a 6 month transition period, which is well short of the12 month timeframe provided for well-resourced superannuation funds to comply with the choice of Superannuation Fund requirements.
- The purpose of choice of fund in superannuation was to allow fund members to transfer their benefits to another eligible fund based on considerations such as net investment returns and fund features. However, Registered Worker Entitlement Funds are not investment vehicles and are not intended to generate investment income for members, but to preserve their entitlement to capital. Further, the legislation largely prohibits fund operators from distinguishing their fund from other funds by offering a range of features to their members: a practical outcome of the design of the legislation is that all the funds will largely be the same. For this reason, it is misconceived for choice of fund to be required in the context of Registered Worker Entitlement Funds.

Arrangements are already in place to allow for workers accounts to be transferred between funds. Namely ***s58PB(4)(c)(vi)*** of the Fringe Benefits Tax Assessment Act currently permits contributions to be used "to transfer contributions to another approved worker entitlement fund". This is mirrored in the new Fair Work (Registered Organisations) Act ***s329LC(1)(f)*** which makes the amendments to ***s 151A*** and ***s194*** of the Fair Work Act 2009 unnecessary.

5.6. Distributions of income

Section 329LD does not allow for a distribution of income to sponsors of the fund.

The wording and tone of the September 12, 2017 media release by the Minister of Employment, Senator Michaelia Cash makes it clear that issues of governance surrounding the operation of Worker Entitlements Funds are purely incidental, and it was cutting off a source of funds for trade unions that was front of mind.

As mentioned earlier, it is important to note that trustees of retail superannuation funds can distribute income to their sponsors instead of returning that excess money to fund members and likewise companies can distribute excess to their shareholders via dividends. We submit that the only reason that such distributions are being prevented in the case of our fund is because some of those sponsors are unions.

Outside of the existence of Worker Entitlement Funds, employers should make provision for redundancy and severance payments. The employer does not provide the outgoing workers with payment of the income generated from the holding the provision in reserve for the redundancy.

Hence, to make payments 'other than worker entitlements' to workers does not reflect the situation in the rest of society.

In the above case, any income generated by the employer is retained by the employer, in effect in recognition of the risk involved in retaining and managing funds in anticipation of a redundancy event. In the case of Worker Entitlement Funds, the funds themselves assume the risk and cost of managing the fund and are therefore entitled to generate income for its own stakeholders.

If Worker Entitlement Funds have to consider distributing income to its contributors and members, they will also need to consider if they should share in any losses or pay administration fees. Protect does not currently charge any administration fees to manage severance accounts.

5.7. Fund Guarantee

A consequence of not permitting sponsors to receive an income distribution is that the sponsors would be unlikely to provide a guarantee to support the fund in the event of severe investment downturn.

If a severe decline in investment markets such as the 2008-09 GFC took place, and that decline coincided with widespread unemployment with the consequential severance claims, the fund may well be underfunded. An avenue that Funds would have is to seek a guarantor. However, if there is no distribution of income forthcoming to sponsors we expect they would be unable to provide such a guarantee.

Under the current Bill, such support from the sponsors would be unlikely and would place the Fund and workers' benefits at more risk than under the current regime.

5.8. Income Tax

We submit that the inability to distribute excess capital and/or income to the Sponsors is punitive and political rather than fair and logical. There has been no acknowledgement that worker entitlement funds are generally not able to distribute income like other trusts due to prohibitions in the FBT legislation, and so generally pay tax at the top marginal rate (currently 47%) on their income. This far exceeds any corporate tax rate. Protect has paid over $7 million income tax for the past three financial years and remitted over $21 million in PAYG Withholding in respect of payments made to workers.

Under the proposed regime, income could be distributable to either members or contributors or both and be taxable in their hands. We submit that any amounts after expenses and taxes would be insignificant as worker entitlement funds such as Protect usually hold severance money for a short term.

5.9. Governance Matters

5.9.1. Audited accounts

S329LA, condition 14 require the completion of audited annual reports. Protect's accounts are currently audited by Pitcher Partners, so this condition poses no concern.

5.9.2. Independent Directors

S329LA, conditions 9 & **10** require the appointment of at least one independent, voting director. Protect entities currently have two independent directors on a board of seven directors. Both directors are independent of the electrical and metals industries, having gained their experience in the fields of finance, investment and governance. Both independent directors having voting rights. One independent director is the Chairman of the Board and the other independent director is Chairman of the Audit and Risk Committee.

Although each of Protect's independent directors satisfies condition 9 and condition 10, it is not clear from the language in the Bill whether the same independent director can satisfy condition 9 and condition 10. We submit that any ambiguity be removed.

5.9.3. Good fame and character

S329LA, condition 8(b) imposes a requirement for "a staff member of the operator" to be of "good fame and character" which is defined in ***s329LE***.

One element of the definition is that a person must not, at any time, have been ineligible to be a candidate for an election to hold office in an organisation (eg a union). However, any such person would be eligible to remain an employee of an organisation although not permitted to be elected to an office. The drafting of the current clause therefore presents an anomaly which allows a person to be employed by an organisation but not employed by a worker entitlement fund. We submit that the clause be amended to relate only to directors and officers – retain ***s3229LA, condition 8(a)*** but omit ***condition 8(b)***. Otherwise more onerous conditions are placed on fund operators than are placed on unions in terms of who may be employed.

5.9.4. Governance standards

The second reading speech from Mr Pitt, MP, stated in support of the Bill, that "there is little governance of these funds." This is a tired, outdated view, formed around the time of the Cole Royal Commission in 2003, some 14 years ago.

Protect has been active in maintaining its governance regime which includes

- Board of directors with two independent directors and five industry-representative directors; bi-monthly meetings
- Audit and Risk Committee, HR and Remuneration Committee and monthly Investment and Finance Committee meetings are all in place.
- Board and Committee charters are in place
- All meetings are minuted and approved at the following meeting
- Risk management framework
- Criteria for appointment of directors together with a requirement to complete the Australian Institute of Company Directors' course.
- Externally managed investments (via Pitcher Partners Investment Services [PPIS]). A PPIS advisor attends all monthly Investment and Finance Committee meetings.
- Documented Investment Guidelines
- Audit reviews of accounts
- Conflict of Interest and Gift registers are maintained and tabled at Board meetings
- Board and Management responsibilities are defined in a Register of Delegations
- Annual Board Strategy meetings
- Extensive set of human resources policies
- Extensive set of Board/Governance policies, including Conflict Management Policy, Procurement Policy, Sponsorship Policy, Director Training Policy, Auditor Appointment Policy

This regime is in addition to compliance of the various Protect entities with Trust Law, the Corporations Act (including ASIC regulation), the Fringe Benefits Tax Assessment Act (to the extent they wish to be Approved Worker Entitlement Funds) and the Income Tax Assessment Acts. As companies, directors must meet their obligations specified in sections 181 to 184 of the Corporations Act 2001. As such, given that Protect's governance standards are high, despite the contention there

is "little governance" in the industry, **we welcome the formalisation of governance standards** for the industry and given our current regime we are confident we can transition quickly to be compliant on governance aspects.

5.10. Administration Matters

5.10.1. Provision of Information to Employers and Workers

S329LA, condition 20, creates some practical concerns. We have no objection to providing information and making it available – our concern is one of cost and efficiency.

> Sub condition (a) clause requires a copy of the 'constitution' to be provided on request to any contributor. We have no objection to this.
>
> Sub condition (b) states that a copy of the constitution must be provided to each person who the operator knows may become a fund member. This presents two problems. First, it requires that the operator establishes a knowledge of who may become a member. Second, we can only establish who may become a member if an employer chooses to disclose their list of employees and their contact details to us prior to becoming a contributor. This is impractical and unlikely to occur or may impose an obligation on us to obtain details for people are not yet party to an industrial agreement to become a member.

The practical solution here is to:

- Amend sub condition (a) to include "fund member" as well as contributor – to ensure the funds give a copy of the constitution on request
- Remove sub condition (b) as explained above, or change the last word to read "or" instead of "and". This latter solution will then be consistent with Condition 21 which allows for notification to be provided or for the information to be available on a website.

5.10.2. Annual Statements to Workers

S329LA, condition 17, requires the operator to provide workers with an annual statement. Protect currently provides this twice-yearly.

However, we regard the concept of annual statements as outdated, when information is available to members "24/7" through online access as well as a Smartphone App. While we respect the fact that not all members have such access it is important that communications with members are cost effective and efficient. We welcome the comment in paragraph 142 of the Explanatory Memorandum that a requirement for an operator to 'give' a certain thing "*may be met by emailing the relevant person, including emailing a link to the prescribed information.*"

5.10.3. Public Disclosure

We have no objection to public disclosure requirements, where they meet the standards of other corporations, public or private.

The Commissioner must publish the Annual Report according to ***s329NG***. However, under ***s329LF(3)(g)***, the Annual Report must disclose details of "each individual payment" in regard to training or welfare payments. We contest that this is onerous, a potential breach of commercial confidentiality and is a condition that does not apply elsewhere in the corporate world.

There appears to be no justification for singling out training and welfare payments from other reasonable costs of administration and disclosing them separately. There was no provision for training

and welfare payments included in the list of permissible expenditure under ***ss329LC & LD*** in the draft Bill viewed on October 4. This expenditure type has been subsequently and hastily added, with an attempt made by the draftor to provide 'additional governance' but without any logical policy reason to differentiate it from other reasonable administrative expenses.

In addition, ***s329LF(3)(h***), provides the Minister with power to nominate any other matters to include in an annual report, which the commissioner is required to publicly disclose. This appears to impose a significant degree of public disclosure at the discretion of the Minister and with potential to impose conditions on the funds that do not exist elsewhere.

5.10.4. Reasonable costs of administration

S329LC(1)(g) permits worker entitlement funds to use the contributions (or income under ***s 329LD(1)(a)***) on "reasonable administrative expenses of the fund". This is an identical provision to ***s58PB(4)(c)(vii)*** of the Fringe Benefits Tax Assessment Act, under which approved worker entitlement funds are currently operating.

That said, the funds or their administrators operate as an employer and as a responsible corporate citizen. As such, reasonable expenses relate not just to the administration of the fund but more broadly as the reasonable cost of being a good employer and corporate citizen. As with any other employer, expenses are incurred in supporting staff functions or team building events and donating to charity fun-runs or similar where staff participate. These are costs involved in being a good employer, which in turn aids staff morale and retention and provides a better a level of service to members and contributors.

5.10.5. Equal Treatment of Members

S329LA, condition 4, aims to ensure a fund operates in a such a way that "b) different classes (if any) of fund members are treated without discrimination by reference to membership of an organisation." We understand that the intention, in practice, is to ensure that entitlements and services provided to union members are also provided to non union members. However, we are concerned that the drafting of the condition is open to a far broader interpretation which will have consequences beyond what is intended.

For instance, the condition does not take into consideration the fact there may be legitimate reasons for different classes of members (i.e., different divisions) having different rules or access to benefits because the divisions cater for different demographics or industries. In Protect's case, we currently have members in the Electrical division, Metals/Manufacturing division and Maritime division. The drafted condition may prevent an operator from offering training and welfare services tailored to the needs of those divisions. It may also be open to interpretation as to whether an operator may provide a service, such as training, to Metal workers but not provide similar training to Electrical workers. We submit that the clause be amended to remove any ambiguity and to allow, in effect, the tailoring of different services (albeit irrespective of union membership, which is the intention).

Superannuation law contains similar requirements but refers to members of different classes being treated 'fairly', which is a more appropriate test. There are also exemptions in superannuation law that allow a trustee to offer different benefits to different classes of members in certain circumstances (i.e., where an employer has arranged particular insurances for their employees), but these exceptions in superannuation law only came about after trustees and employers pointed out that the initial drafting of the relevant legislation was too restrictive.

5.11. Other Impacts

5.11.1. Trust Deed /Constitution

In many respects, the existing constitutions and trust deeds of the Protect entities will need to be amended to ensure compliance and consistency with the Bill in its current form. This is a costly and time consuming project. Such changes to the constitution and trust deeds can only be made once the final form of the Legislation is settled. Only then can work commence on operational changes, software modifications and developing any communication materials designed to explain changes to members or provide additional disclosures. To achieve this in a timeframe of six months is both unreasonable and unrealistic.

5.11.2. Transition

The legislation distinguishes between existing funds which have been endorsed as approved worker entitlement funds by the Commissioner of Taxation (referred to as 'Transitioning Funds') and funds that have not been so endorsed (referred to as 'Transitioning Non-Approved Funds').

However, these concepts are only used in the context of grandfathering of industrial instruments and employment contracts which refer to Transitioning Funds. There is no acknowledgement that Transitioning Funds have been required to comply with extensive governance obligations in order to obtain and maintain their endorsement as Approved Worker Entitlement Funds.

We submit that the legislation should be amended to require the RO Commissioner to approve the registration of a fund that is endorsed as an Approved Worker Entitlement Fund on the commencement date of the legislation, subject to the RO Commissioner having no reason to believe that the fund will not comply with the ongoing conditions prescribed in the legislation.

6. Conclusion

Protect supports any initiative that genuinely seeks to improve the performance Worker Entitlement Funds by providing greater certainty and standardising governance practises across the sector.

We submit that while improved governance standards are good for the industry, the FWA Amendment (Proper Use of Workers Funds) should be rejected or amended on the basis that there has been insufficient consultation, the legislation contains excessive Minister discretion that creates business uncertainty and risk of operational interference, and the uses of income of the fund are punitive.

We submit that a large part of the intent of the legislation is premised not for good governance nor to protect members' benefits but to stop funds flowing to our Sponsors. In doing so, it restricts legitimate uses of income and imposes additional costs that far exceed what is expected in other regulatory or corporate environments.