Protect Services Pty Ltd

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As trustee for Protect Services Trust

'Protect Group' Submission

To The Senate Education and Employment Legislation Committee

For the Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

28 August 2019

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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.

We anticipate that both of the first-named entitles will be required to register as Approved Worker Entitlement Funds. The third entity, Protect Services Pty Ltd is the administration services company.

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2. Executive Summary

Protect supports regulation and formalisation of good governance of Worker Entitlement Funds, insofar as it is in-line with standards which apply to other corporate or investment entities. However, there are many examples where the Bill is out of line with standards applying to other businesses:

- Disclosure of individual transactions and details of individual director votes on training and welfare payments is unprecedented
  - This is a major intrusion of company directors into the role of management – where company directors would be required to vote on individual payments!
- There is an obligation on funds to proactively 'give' (as opposed to make available) a copy of its constitution to people who it suspects *may* join the fund.
- There is potential for Ministerial Rules to be imposed at any time (discussed below)
- The Bill introduces a prohibition on distributions of surpluses (profits and accumulated profits) of trusts to registered organisation; a prohibition which does not apply to other trusts - nor to companies paying dividends. (discussed below)

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, (governance, capital adequacy, liquidity) and allow the Minister to require public disclosure of any matter. Ultimately, this situation leads to uncertainty in the operation of Registered Worker Entitlement Funds. *See paragraph 5.1*

The Bill introduces a prohibition on distributions to registered organisations. Trusts in all other fields are able to distribute surpluses to their sponsors/beneficiaries. Companies distribute profits to their owners via dividends. However, where the recipient is a registered organisation, such distributions will be prevented by this legislation.

We submit that an appropriate amendment is to permit distributions to registered organisations where those funds are set aside to only be used for training and welfare (permitted elsewhere in the Bill) and not for registered organisations to use the funds for political or industrial purposes. Protect is not equipped nor has the expertise to provide training and welfare services for both employers and employees in the industry. This function is performed well by many programs established by employer associations and unions throughout Australia.

The Bill allows 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". Of major concern is that the 2019 Bill has added an additional requirement above the 2017 Bill, to require disclosure of directors who voted in support of such payments. This is based on the misguided view that directors would be involved in operations at a transactional level. *See paragraph 5.3*

Protect manages its portfolio to ensure it has more than sufficient funds available to pay workers entitlements, with sufficient cash available to pay multiple years' claims without needing to realise/redeem other investments. Protect has paid $472,000,000 in workers' entitlements to nearly 90,000 workers.

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. 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 Act. As companies, directors must meet their obligations specified in sections 181 to 184 of the Corporations Act 2001. Fund governance is further discussed at *paragraph 5.6*

Summary of Recommendations

In summary, our key recommendations are:

- Remove the granting of power to a Minister to make Rules; instead, articulate matters of "capital adequacy, liquidity and governance" in the legislation, following a reasonable and genuine consultation process.
- Allow a trustee's discretion on the distribution of current and prior year income as occurs in other sectors; failing that, allow distributions into a special purpose vehicle which provides for training and welfare programs or services.
- Remove onerous transactional approval and disclosure requirements relating to training and welfare payments; instead introduce a threshold for disclosure and approval.
- Amend the provision of information clauses relating to making a constitution available to members.
- Provide for grandfathering of existing investment arrangements for transitioning funds in the legislation

3. Introduction and clarification

Protect has been operating since the year 2000, safeguarding workers' redundancy and severance entitlements, predominantly in the electrical industry.

At 30 June 2019, there are over 13,500 workers around Australia with an active Protect account, accumulating their entitlements. In the past year, Protect paid out $33 million in entitlements to over 3,700 workers.

The primary purpose of the fund is the preservation of worker entitlements relating to severance and redundancy. Notwithstanding publicity surrounding trust distributions made by the fund, the fund remains able to meet all workers' entitlements. As at 30 June 2019, the investment portfolio is highly liquid, with cash comprising 28% of the portfolio. 70% of the portfolio is in 'income/conservative' assets and 30% in 'growth' assets such as domestic and international equities. In addition, it has sufficient liquidity to cover multiple years' claims at current levels, before needing to realise any other investments.

The term 'wage theft' was used during question time on July 24,25, 29 this year. The term was used opportunistically by the government as the Bill was tabled in Parliament around the time of a high-profile celebrity chef was found to have engaged in wage theft. The government sought to use the same term to apply to the trust distributions legally paid by Protect to other parties.

We dismiss the term 'wage theft' entirely.

Worker Entitlement funds were established to protect against wage theft, where employers could make workers redundant without having made an adequate provision for a redundancy payment, before avoiding liability via liquidation or administration. Protecting redundancy payments via in Worker Entitlement Funds is a solution to an historic problem of wage theft – allowing workers' redundancy entitlements to be honoured even in the event of employer insolvency.

Wage theft implies deliberate or inadvertent underpayment of workers. Worker entitlement funds pay workers the amount to which they are entitled. There are no underpayments.

If, in the government's view, the practice of a trust legally distributing surplus funds to its sponsors/beneficiaries is wage theft, then presumably it would be wage theft to instead distribute surpluses to employers, as would be permitted by ***s329LD(1)(c)*** of the Bill.

Wage theft is usually understood to be the employer's retention of entitlements of a worker. If the government is truly of the view that a distribution amounts to "wage theft", they should remove ***s329LD(1)(c)***, which would then prevent any future distribution being paid to anyone other than the worker.

During Question Time on 24 July 2019, the Prime Minister used the term 'misappropriation' in reference to Worker Entitlement Funds paying distributions of surpluses to unions and employer associations. We dismiss this term entirely.

Protect manages its portfolio to ensure it has more than sufficient funds to cover all potential claims of members.

Trusts paying a distribution of an amount in excess of what is needed to pay members' redundancy claims is not a misappropriation. In the same way, companies paying a dividend to their shareholders is not a misappropriation.

In the absence of these Funds, an employer would be making provision for workers' redundancy and would effectively earn a return on those funds. When a worker is made redundant and paid their entitlement, the worker is not also paid the employer's earnings on the entitlement while it was being held. Those earnings are retained by the employer and could eventually be paid as dividends to its business' owners. The Bill provides an exemption for employers profiting from their own fund, providing them with the ability to distribute their surplus to their owners.

On August 7, 2019, it was reported that Suncorp Limited announced plans to distribute the $506 million surplus from the Australian Life Insurance business to shareholders. The market reaction was for Suncorp shares to increase by 4%, outperforming the market by over 3% on the day. However, if a worker entitlement fund makes a distribution to a registered organisation, there is condemnation. *Further comment on the Surplus distribution is provided in paragraph 5.5*

It is important to distinguish between fund members as customers as distinct from owners. A clear analogy is one of a retailer or a supermarket. The customers entering a retail outlet are not first provided with information about the company's owners and where the profits of the business flow. Customers' interest is in the products and services. Customers entering a retailer do not receive a record of the company's dividend history. This information is provided to the investors, the current and prospective owners of the business.

Workers, through an EBA, join Protect on the basis of the service offering (a severance entitlement, income protection insurance and counselling). They do not join Protect on the promise of an investment return. The Bill will turn these funds into investment vehicles where workers may choose their respective fund on the basis of investment returns.

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.

The fund was established collaboratively between employer and employee representatives 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 ten financial years paid over $410 million in benefits to workers who are members of the ufnd.

Joining Protect

Membership of Protect results from an industrial agreement between an employer and its employees and/or a union or employer association. A clause in the agreement creates a responsibility for an employer to contribute severance/redundancy payments and/or income protection insurance payments to an insurer – Protect may or may not be specifically named. This is the point at which employees make a choice.

Protect plays no part in the industrial negotiations. Protect staff may be invited to speak to workers or the employer about the features of the redundancy fund or income protection insurance coverage.

Unlike superannuation, workers or employers cannot voluntarily join Protect without an industrial agreement. Typically, Protect only becomes aware of a new employer when the employer chooses to contact Protect after an Enterprise Bargaining Agreement has been certified by Fair Work Australia. Protect's initial role is to assist the employer to register themselves and all relevant employees and to explain the process for making contributions.

The current corporate structure is included as Appendix 1

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 must 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 or posting onto a website.
- ***S329LF(3)(h)*** *and* ***s329LF(5)(d)***– allow the Minister to specify 'any other matters' 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 confidential 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 a secondary consideration to cover the costs of operating the Funds - which ensures worker's entitlements are not eroded by administration costs. 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.

- ***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 the meantime, decisions about the investments in the portfolio is at this time is hampered by a lack of detail about capital adequacy and liquidity requirements.**
- In effect, **Clause 2, Provision 3** and **s34 (a)** of the Fair Work Act 2009 allow for 12 months to implement the matters contained in the Bill. 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.

5.3. Training and Welfare Payments

We welcome the inclusion of the ability of Funds to use 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 every payment in relation to training and welfare services must be approved by the voting directors, including an independent director

s329LD9(2) (d) and ***(e)***. **This is an extraordinary intrusion of the role of a director into the domain of management at a transactional level**.

Under s198D of the Corporations Act 2001, directors may delegate their power to a committee, a director, an employee of the company or any other person.

The 2019 drafting of the Bill now includes two new provisions **s329LA condition 21(c)** and **s329LF(3)(g)(v)** that require the disclosure of the directors who voted to make the payment. In effect, these new conditions (compared to the 2017 Bill) would operate so as to prevent directors from exercising their right to delegate their power to management as is allowed under the Corporations Act. **These requirements for transactional approvals demonstrate a fundamental misunderstanding of the role of a Company Director**.

The Protect boards' constitutions allow for directors 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.

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, say $50,000, was made, rather than each payment having to be disclosed.

5.4. Choice of Fund

The amendments to the 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. Currently, the choice is made collectively by employees at the time pf voting on an enterprise agreement.

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
- 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.

5.5. Distributions of income

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

The wording and tone of the September 12, 2017 media release by the then Minister of Employment, Senator Michaelia Cash, at the time of the release of the 2017 Bill, makes it clear that issues of governance surrounding the operation of Worker Entitlements Funds are purely incidental, and removing the ability for registered organisations to provide programs and benefits with surplus funds was paramount.

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 Worker Entitlement Funds is because some of those sponsors are employer associations and 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 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. However, under the Bill, single employer funds would be able to distribute income to their owners, whereas Worker Entitlement Funds would not.

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. Furthermore, in the event of a negative investment year, workers entitlements are not eroded.

The distribution of income and capital (ie accumulated profits) is permitted by the Trust Deed of the Protect Severance Scheme as follows:

> *14.1 "…the income of the Trust Fund for the Year of Income shall be applied first in meeting all outgoings, expenses, losses and damages incurred or suffered by the Trustee in the administration…"*
>
> *14.1A*
>
> *(a) the Trustee may retain part or all of the income of the Trust Fund and apply such amount as an accretion to the capital of the Trust Fund; and*

(b) any amount so capitalised may be distributed and if it is distributed, shall be distributed in such a manner as the Trustee determines

Distributions of "Capital"

Minister Porter incorrectly interpreted "capital" as the amount "meant to pay…workers" in Question Time on 29 July in the following quote from Hansard:

- *"…we have an example before us as a parliament where they have actually distributed the capital out of the account…"*
- *"I want to make some further comments about this $32 million, a capital amount, that was moved from the organisation Protect, meant to pay for severance funds for electrical workers in the future, to the ETU."*

To clarify, the distribution of capital in question is a distribution of accumulated surpluses – the profits built up and retained over the years. This explanation is supported by clause 14.1A of the Trust Deed. This is clearly different to the Minister's use of the term "capital" to refer to the amounts set aside for workers entitlements. **These distributions were made without eroding the amounts payable for workers entitlements**.

What has Protect paid out as Distributions?

In the 17 years since its inception to the introduction of the Proper Use of Worker Benefits Bill 2017, Protect made an average distribution to the ETU Victoria of $630,000, and $210,000 to NECA. There were 10 years in which no distributions were made to either party. The decision to distribute a surplus amount is made by the Protect board, not by an individual sponsor.

With the introduction of the Bill and faced with the threat of eliminating the ability of a trust to distribute surpluses to its sponsors/beneficiaries, extraordinary distributions of current and prior year income were made as have been disclosed in the accounts of the ETU and NECA. In respect of the financial year ended 30 June 2017, Protect distributed $12.8m and $4.3m to the ETU and NECA respectively. Following a very strong investment year to 30 June 2018, distributions of $31.5m and $10.5m were paid to the ETU and NECA respectively.

Notably, trust distributions have not impacted the ability of the fund to pay worker entitlements. Since its inception Protect has paid $472 million in entitlements to 89,545 workers.

Why has Protect paid the distributions?

Due to strong investment performance, the Protect fund generated surpluses, which accumulated in excess of the amounts needed to fund workers' entitlements and cover the costs of administering the fund. The Trust had a surplus of assets over the liabilities owing to workers.

Following the global financial crisis in 2008/2009, no distributions were declared in the financial years between 2009 and 2014 inclusive. Distributions recommenced following the fund's return to surplus (excess of assets over liabilities) and continued as investment returns remained strong, with returns in excess of 10% recorded in two of the past five years.

Under the Trust Deed, the trustees are able distribute the capital (ie accumulated surpluses) of the fund at its discretion – see clause 14.1A of the Trust Deed quoted earlier.

The ETU Victoria has publicly stated, "*Given the uncertainty around future operations of industry schemes the Morrison Government's proposed legislation has created, the employer association and the union have accepted the distribution of Protect's surplus*.[1]"

[1] Electrical Trades Union Media Alert 24 July 2019

The distribution decisions will only be made to the extent that workers' funds are not eroded. In other words, the remaining assets are at least 100% of the liabilities.

In making distribution decisions, the board considers:

- Cash flow – the availability of payments from employer contributions compared to the cash requirements for paying redundancy claims to workers.
- The liquidity of assets in the investment portfolio which ensure the ability of the fund to pay redundancy claims to workers.
- Investment strategy – which is now a conservative portfolio of 70% income assets (cash, fixed interest etc) and 30% growth assets (domestic and international equities etc). The conservative portfolio, largely managed by Pitcher Partners Investment Services, is designed with the intention of preserving worker entitlements and reducing the downside risk of a severe market downturn.
- A facility agreement on commercial terms was established with the ETU Victoria and NECA Victoria to provide a further safety net to deal with very severe circumstances or 'perfect storm' situation such as mass industry-wide redundancies coinciding with a time when investment markets are in a severe downturn.

What are the distribution proceeds used for?

- In making a decision to distribute surpluses from the Trust Fund, the trustees/directors foremost consideration is the interests of the members of the fund. Before declaring a distribution, directors satisfied themselves that there would be sufficient funds available to pay the entitlements of worker entitlements as well as other liabilities.
- Valid trust distributions must be unconditional – that is, the trustees cannot impose a condition on the distribution such as how the proceeds are used. Use of the proceeds is a matter for the recipients.
- Trusts in other fields, or corporations who pay dividends, do not impose conditions on their shareholders as to the use of their dividends.
- Unions and employer associations are best equipped to then re-invest in the industry through training and welfare programs, something Protect is not equipped to do. A distribution a valid method we have available to re-invest in industry, albeit indirectly.

Protect's trust distribution payments to the ETU Victoria are directed into the ETU's special purpose trust, the 'distress, hardship, welfare and training fund' – which operates under a trust deed which prevents it from expenditure on political or industrial matters. Instead, we understand the fund is utilised to provide benefits such as ambulance cover, funeral benefits, domestic violence and autism support and training. This support mechanism is in place for tens of thousands of workers and their families. This is an excellent example of funds being used to reinvest in the electrical industry by providing genuine services, as opposed to cheap media headlines claiming unions are 'skimming' from worker entitlement funds.

To our knowledge, NECA directs its distributions from Protect into a Victorian Education Fund. That fund is governed by an investment charter and policy and an investment committee. We understand that Fund also acts as security for the facility agreement in place.We are advised that NECA Victoria has expenditure criteria for that fund. The funds, we understand, are directed to investing in training for the industry and NECA members. We are informed that recent examples of expenditure include establishment of training colleges, development of training courses in business management,

development of training facilities and development of technical training in new technologies (such as sustainable technologies, artificial intelligence and the forthcoming EV revolution), participation in the development of industry standards such as AS3000, roadshows to support and educate industry participants in those standards (varying between 2000 and 3,500 participants per annum), development of wellness courses, OH&S training and systems recognizing the need for safe sites and the many legislative requirements

As the Bill supports the use of Worker Entitlement Funds' income and capital in being applied to training and welfare payments, we submit that the Bill should be amended to allow funds to distribute income and capital to registered organisations on the condition those funds are applied to training and welfare. In practice, this is what is occurring with Protect's distributions to the ETU which are directed into an ETU trust which is prevented from expenditure on political or industrial matters.

Insurance

Protect acts as a collection agent for income protection insurance. The union or in some cases, an employer, is the policy holder of a policy issued by ATC Insurance Solutions. The fund's administrator, Protect Services Pty Ltd (ie, not the worker entitlement fund) has been engaged as the collection agent. This was established due to the synergies of administering redundancy accounts (registration, contribution payment collection) and insurance accounts with the same workers and employers.

As with redundancy/severance accounts, Protect is not a party to the industrial negotiations between employers and workers. Protect makes its staff available to present to workers or employers to assist them to understand the insurance coverage and claims process.

An ETU media release of 25/7/19 explains the disclosure:

> *"Commission payments on insurance premiums are thoroughly disclosed to all members and prospective members of the scheme, as well as their employers. Both the ETU and Protect go to great lengths to ensure the arrangement is exceptionally transparent.*
>
> - *"Financial Benefit Declarations" are included on Protect's promotional literature*
> - *Letters are sent to all new members of Protect, and their employers, clearly outlining the commission payments in plain English.*
> - *Commissions are declared at all EBA negotiations via a form issued to all employees.*
> - *ETU discloses the commissions to employees during EBA "mass meetings"*
> - *ETU discloses the commissions to members at joint delegate meetings*
> - *ETU discloses they received revenue from Protect's Income Insurance on their website*
> - *ETU has disclosed the commissions in editions of their members magazine"*

The Commission payments on insurance are a matter between the union and the insurer, with Protect Services' role being to collect the agreed amount from the employer, forward the commission to the union and remit the balance to the insurer, less any administration fee if applicable. This is separate to the worker's redundancy fund account, if they have one.

5.6. Governance Matters

In Question Time on the 24th of July 2019 the Attorney General stated, that funds "are the subject of very little proper regulation in terms of governance." This is a tired, outdated view, formed around the time of the Cole Royal Commission in 2003, some 16 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, Gift and Entertainment register

Protect has a Policy on payment for Directors' services whether they are paid to the sponsor or paid to the respective Director. Payments for Directors services are determined and benchmarked by an independent expert in the field, on a triannual basis. All payments for Directors services align to the Policy in place and those independent recommendations. Those recommendations acknowledge the added responsibility of Chairing the board or a committee.

This regime is in addition to compliance of the various Protect entities with Trust Law, the Corporations Act, 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.

5.7. Administration Matters

5.7.1. Provision of Information to Employers and Workers

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

Sub condition (a) requires a copy of the constitution of the fund 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.
- Or, insert the equivalent phrases as used in Condition 19, being "…or if this is impracticable, as soon as practicable after the person becomes a fund member…"

5.7.2. 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. The 2019 drafting has further extended the required disclosure at ***s329LF(3)(g)(v)*** to disclose the names of the directors who voted to make each individual payment!

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 original draft Bill viewed on October 4 2017. This expenditure type was subsequently and hastily added, with an attempt made by the drafter 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.

6. Conclusion

Protect supports any initiative that genuinely seeks to improve the performance of 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 Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 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.

APPENDIX 1 - Corporate 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, MUA WA Branch, known as the Maritime Division and Victorian Firefighters. These organisations do not sit on the board but accounts, investments and investment strategy are separated for each Division.

* To allow for the appropriate transition for a new independent director to replace the retiring Chairman (on 30 September), a third independent director was appointed in April 2019. There are three independent directors on the board between April and September; thereafter it will revert to two.