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Level 1 / 44 Parliament Place

WEST PERTH WA 6005

28 August 2019

To the Education and Employment Legislation Committee

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

1. Submitting Entity

This submission is made on behalf of ReddiFund Ltd as Trustee for ReddiFund ('ReddiFund')

The 'sponsors' of ReddiFund are:

- Master Builders Association of Western Australia (MBA WA).
- Master Plumbers and Gas Fitters Association of Western Australia (MPGA WA).
- Construction Contractors Association of Western Australia (CCA WA).
- Construction Forestry Mining Energy Union of Western Australia (CFMEU WA).

The Independent Chairman is Colin Emmott who up until recently was a senior partner of accounting firm HLB Mann Judd.

2. Executive Summary

ReddiFund is a strongly governed Fund and agrees this should occur in any Worker Entitlement Fund.

ReddiFund does have concerns over the risk, cost and uncertainty surrounding the extensive powers afforded to the Minister and Commissioner to make Registered 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 (scope or) timeframes in which the Minister or Commissioner 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.

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 or Commissioner to impose Rules and require public disclosure beyond what is required by the Corporations Act or Australian Accounting Standards.

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.

3. Concerns with the Bill

3.1. 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:

- **S237 (1)** – Requires a Report on each reportable loan made within 90 days after the end of each financial year which should be aligned to S329LF (2)(b) being within 4 months after end of financial year. Does this mean that any related party loans that occurred and repaid during the year require reporting adding another layer of unnecessary reporting.
- **S237 (1) (b)** – Requires aggregation of all grants or donations over \$1,000 which could be very time consuming when the employees of the Fund are fundraising for various charities throughout the year.
- **S237 (5) (d)** - Requires disclosure of name, address and loan details on any loan provided to a member who was in severe hardship which does not provide any privacy to the member. Anyone who is in severe hardship would not want their name published in any report outside that organisation.
- **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. It appears 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.

3.2. Administration

Annual Statements to Workers

S329LA, item 17, requires the operator to provide workers with an annual statement. ReddiFund currently provides this twice-yearly via online access or manually by request.

We regard the issuance of annual statements as outdated, when information is available to members “24/7” through online access. While we respect that a minority of members may not have a mobile phone to have access it is important that communications with members are cost effective and efficient.

Provision of Information to Employers and Workers

S329LA, item 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 (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 who are not yet party to an industrial agreement to become a member.

Public Disclosure

We have no objection to public disclosure requirements on the basis 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 **S329LC & S329LD** in the draft Bill. This expenditure type has been 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.

Reasonable costs of administration

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.
- reporting and disclosure requirements, also subject to the Minister’s and Commissioner’s Registered 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.

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 level of service to members and contributors.

S252A (2) The requirement to hold credit card statement does not specify the period that credit card statements are to be kept. The way it reads it appears that they must be kept forever, not just the statutory period of 7 years or the Tax Office requirement of 5 years. Most credit card statements these days are online and not paper based.

S293N This requirement to have written policies dealing with expenditure appears restrictive when Board agrees to an Annual Budget for Management or Staff to make payments on certain matters within agreed limits. These payments apply to many forms of expenditure that are considered “reasonable administration costs” and documented in the Annual Budget. Any expenditure that exceeds the amount forecasted in the budget requires the approval of the Board. This is consistent with normal corporate practice.

Training

We are concerned by the requirement in **S329LD (2)(d)** that every payment in relation to training services must be approved by the voting directors, including an independent director **S329LD (2)(e)**.

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.

This requirement for transactional approvals demonstrates a fundamental misunderstanding of the role of a Company Director.

ReddiFund’s constitution allows 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”. Any expenditure that exceeds the limit listed in the Register of Delegations or not forecasted in the budget requires the approval of the Board. This is consistent with

normal corporate practice.

We are concerned by the requirement in **S329LG (condition 22) (3)** that all training requirements of Directors and Staff are to be approved by the Commissioner. This requirement does not apply to other corporate or investment entities.

3.3. Investments

ReddiFund'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.

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 at this time are 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.

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.

3.4. Governance Standards

ReddiFund has been active in maintaining its governance regime which includes:

- Board of Directors comprising of one independent director and six industry-representative directors with bi-monthly meetings.
- Investment Committee meet quarterly.
- All meetings are minuted and approved at the following meeting.
- Risk management framework.
- Directors undertaking training sessions with Australian Institute of Company Directors.
- Externally managed investments (Commonwealth Bank of Australia) with our advisors available for all Investment Committee meetings.
- Documented Investment Policy.

- Externally Audited Annual Accounts
- Directors Code of Conduct.
- Credit Card Policies.
- Conflict of Interest and Gift Registers are maintained.
- Board and Management responsibilities are defined in a Register of Delegations
- Extensive human resources policies & Board/Governance policies.

This regime is in addition to compliance of the various ReddiFund 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.

ReddiFund's governance standards are high and we welcome the formalisation of governance standards for the industry and given our current regime we are confident we will be compliant on governance aspects.

3.5. Trust Deed /Constitution

In many respects, the existing constitutions and trust deeds of the ReddiFund 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 twelve months is both unreasonable and unrealistic.

3.6. Transition

The **timeframe of 12 months** to become registered and 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 and Commissioner's Registered 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.

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 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 Registered Organisation Commissioner having no reason to believe that the fund will not comply with the ongoing conditions prescribed in the legislation.

4. Conclusion

ReddiFund 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.

Whilst improved governance standards are good for the industry, the FWA Amendment (Proper Use of Workers Funds) Bill 2019 requires further clarification and amendments on the basis the legislation contains excessive Ministerial and Commissioner discretion that creates business uncertainty and risk of operational interference, and the uses of income of the fund are punitive. Clarification of these issues in the legislation is essential if Directors of funds are to perform their duties as required under law.

It appears that a large part of the intent of the legislation is not about good governance but restricting the legitimate uses of income and imposes additional costs that far exceed what is expected in other regulatory or corporate environments.