29 August 2019

FAIR WORK LAWS AMENDMENT (PROPER USE OF WORKERS' BENEFITS) BILL 2019

NSW Business Chamber

140 Arthur Street

North Sydney NSW 2060

INTRODUCTION

The NSW Business Chamber (the Chamber) and Australian Business Industrial (ABI) appreciate the opportunity to provide comment on the *Fair Work Laws Amendment (Proper Use of Workers' Benefits) Bill 2019*.

The Chamber is one of Australia's largest business support groups, with a direct membership of more than 20,000 businesses, providing services to over 30,000 businesses each year. Tracing its heritage back to the Sydney Chamber of Commerce, established in 1825, the Chamber works with thousands of businesses ranging in size from owner-operators to large corporations, and spanning all industry sectors from product-based manufacturers to service provider enterprises.

Australian Business Industrial is registered under the Fair Work (Registered Organisations) Act 2009 and has some 4,200 members.

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OVERVIEW

On 4 July 2019, the Proposed Bill was introduced, read a first time and had its second reading moved by the Minister for Industrial Relations, the Hon Christian Porter MP.

The Proposed Bill seeks to amend the *Fair Work Act 2009 (Cth)* (FW Act) and the *Fair Work (Registered Organisations) Act 2009* (RO Act) to "*protect workers through greater governance and transparency of registered organisations and associated entities, in particular worker entitlement funds and gives effect to the recommendations made by the Royal Commission into Trade Union Governance and Corruption*" (Royal Commission).

The Proposed Bill creates civil penalties for operators of a worker entitlement funds and well as civil penalties for non-registered worker entitlement funds. The Proposed Bill has defined an operator that is a trust to mean the trustee, or each trustee, of the fund to be liable (Operators).

BACKGROUND

Royal Commission into Trade Union Governance and Corruption

The Royal Commission was established in March 2014 to make inquiries into the governance and financial irregularities associated with the affairs of registered organisations. The Royal Commission published its final report in late December 2015 (Final Report). This arose after a comprehensive and detailed inquiry over an 18 month period to deliver the Final Report which presented 78 recommendations for law reform.

The Royal Commission received many submissions in response to a discussion and issues paper it published, submissions from affected parties in particular case studies and other parties in relation to policy issues raised by the Royal Commission more generally.

Additionally, the Royal Commission also had regard to public submissions, papers, draft and final reports of a number of other inquiries which have been, or are being, conducted into issues that overlap with or complement matters arising out of the Royal Commission's inquiry.

The Proposed Bill arises from the Royal Commission's recommendations contained in the Final Report.

Rationale for Worker Benefit Funds

The rationale for the creation of worker entitlement funds is principally to ensure that employee entitlements are preserved and can be paid on the cessation of employment, minimising the prospect of unforeseen events compromising employees' ability to access their lawful entitlements.

This rationale is demonstrated in various Government and other publications:

The Australian Taxation Office (ATO) states that the funds are established for the principle purpose to "preserve the benefits and entitlements of employees engaged in particular industries"[1]. The ATO website further advises that these funds were created:

> *"to provide benefits to employees who would normally be entitled to benefits on termination of employment under the terms and conditions of their employment. The use of the funds is recognised in many awards and enterprise agreements.*
>
> *Employers contribute to the funds to assist in satisfying their obligations when employees leave their employment. Typically, employers contribute to the funds at some point in each pay cycle. When you terminate your employment with your employer, the fund makes a payment to you and the amount is offset against the amount your employer is required to pay you under your employment agreement or industrial award."*

The Final Report states that worker entitlement funds are funds established for the purpose of funding employee entitlements such as redundancy pay and sick leave. The Final Report advises that:

> *"These funds operate primarily in the building and construction industry and are typically established as "joint ventures" between industries parties, that is a union or unions and an employer organisation or organisations, although some do not involve employer associations. Most worker entitlement funds are operated by a trustee company, the directors of whom are associated with the industry parties.*

The Australian Business Register states that a worker entitlement fund is a fund for *"long service leave, sick leave or redundancy payments*[2]*."* It further states that the principle purpose of the fund *"is to manage employee entitlements and provide portability and protection."*

[1] Can be accessed at https://www.ato.gov.au/Individuals/Working/In-detail/Payments-from-worker-entitlement-funds---information-for-individuals/
[2] Can be accessed at https://abr.business.gov.au/Help/AWEF

Characteristics of Worker Benefit Funds

The Final Report summarises Worker Benefit Funds having the following characteristics:

> *"51. The basic structure of these funds is typically as follows:*
>
> *(a) Pursuant to enterprise agreements negotiated with a particular union, employers make regular payments on behalf of workers into a particular worker entitlement fund.*
>
> *(b) The fund will commonly provide a financial benefit to the industry parties. As a result the union negotiating enterprise agreements will have a strong incentive to require the employer to make contributions to a particular fund.*
>
> *(c) Under the rules of the relevant fund, employees will be entitled to receive certain benefits (for example, sick leave or redundancy pay) if certain conditions are satisfied.*
>
> *(d) The rules of the fund will be set out in a trust deed entered into between the corporate trustee and the industry parties. These trust deed can be, and often is, amended from time to time.* [3]*"*

SUBMISSION

The Chamber and ABI support the Proposed Bill as it:

- Will implement recommendations of the Royal Commission.
- Will ensure transparency and proportionate regulation across registered organisations; consistent with the RO Act objectives.
- Will support the objectives of the FW Act.
- Is a proportionate response, consistent with comparable legislation.

[3] Final Report at 296-297

Need to Implement the Royal Commission into Trade Union Governance and Corruption

The Royal Commission's Final Report exposes a concerning lack of proper rules and safeguards. ABI and NSWBC urge the Committee that the recommendations made by the Final Report should be taken seriously as it is an impartial report which has undertaken a comprehensive analysis of the current circumstances surrounding worker entitlement funds.

The Proposed Bill seeks to codify recommendations 9, 10, 17, 39, 43, 45, 46, 47, 49 and 50.

Royal Commission's Findings into Worker Entitlement Funds

Under Chapter 9 the "Regulation of Relevant Entities," Subject E of the Final Report was based on the topic "Worker Entitlement Funds."

The Final Report considered three worker entitlement funds[4] in detail and relevant legislation of the *Corporations Act 2001 (Cth)* (Corporations Act) and *Fringe Benefits Tax Assessment Act 1986 (Cth)* (Fringe Benefits Act) in order to make its recommendations.

The Final Report found that the problems with existing worker funds are as follows:

- Worker entitlement funds are not subject to any mandatory disclosure requirements.
- Entities operating worker entitlement funds are not subject to requirements of the Corporations Act to treat members (i.e. workers) who hold interest of different classes fairly. By way of example, the funds can give preferential treatment to union members over non-union members with the aim of generating union membership.
- Worker entitlement funds invariably distribute the income generated on contributions received to industry parties (e.g. employer associations or unions) to be used for purposes they see fit. This leads to some perverse outcomes. It appears improper that contributions paid by employers on behalf of their employees will generate substantial income that is then distributed to third parties in circumstances where the employees do not receive the benefit, either directly or indirectly of the income generated.
- Although it appears from the Fringe Benefits Act that worker entitlement funds are not permitted to distribute income to persons other than to the employers who make contributions and the employees on whose behalf those contributions are made, many funds avoid this limitation and practice. An example of this is treating the income generated as "capital" and distributing capital to industry parties.
- There are no independent directors on the board of directors of worker entitlement funds. This can lead to deadlocks between unions and employer associations and means there is no guarantee of impartial and objective contributions at the Board level.

[4] the Building Employees Redundancy Trust (BERT) Fund, a redundancy fund covering the Queensland construction industry which is primarily associated with the Construction, Forestry, Mining and Energy Union, the Protect Scheme, which operates a redundancy fund for electrical trades employees in Victoria and Incolink, which operates a number of redundancy funds and sick leave schemes for construction industry employees in Victoria and Tasmania.

- The Fringe Benefits Act only imposes minimum governance requirements on worker entitlement funds and this is not comprehensive enough.
- The legislation regulating this body is indirect through the Fringe Benefits Act.

In coming to its recommendations, the Royal Commission itself took many general observations and factors into account. These included the history of industrial relations regulation in Australia throughout the various states, relevant legislation, the possible implications of the recommendations on registered organisations and their political role. The Commission sought to find balanced, apolitical recommendations to assist the legislature and its recommendations should accordingly carry significant weight.

The Cole Royal Commission

The Final Report is not the first time that worker entitlement funds have been the subject of regulation recommendations. The Cole Royal Commission Final Report[5] published in 2002 stated that registered organisations, whether it be unions or employer associations are abusing the purpose of the worker entitlement funds were created. Commissioner Cole stated that:

> *"Those administering the funds appear to have lost sight of the fundamental premise that employer contributions are to fund redundancy entitlements. It follows that contributions, and returns on investments of the fund, should be held by the fund and distributed only for the purpose of paying redundancy entitlements ...*
>
> *If (worker entitlement) funds were used only for the purposes for which they were established, contributions could be reduced – thus reducing building costs – or benefits to employees could be increased."*

The Chamber and ABI adopt the views of Commissioner Cole: that is, the principled rationale for workers entitlement funds do no operate to achieve their original purpose.

The Proposed Bill will ensure these funds truly service all employees, not just the registered organisations who have created and operate the funds.

[5] Cole Royal Commission Final Report Vol 20, p 278 - 281.

Ensure Transparency and Proportionate Regulation across Registered Organisations

In many cases, operators of worker entitlement funds have been registered organisations such as employer associations and trade unions.

Registered organisations, both employer associations and trade unions, should be transparent and proportionately regulated regarding their financial accounting. This is particularly the case as such organisations benefit from several privileges as part of the national workplace relations system.

Following registration, a registered organisation is able to:

- represent its members before the Fair Work Commission;
- gain right of entry/WHS permits;
- obtain preferential tax treatment as a not for profit member-based organisation;
- become a body corporate; and
- sue or be sued in its registered name.

Registered organisations must comply with the RO Act and the *Fair Work (Registered Organisations) Regulations 2009*.

Section 5 of the RO Act provides Parliament's intention in creating the RO Act:

*"**Parliament's intention in enacting this Act***

(1) It is Parliament's intention in enacting this Act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.

(2) Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if associations of employers and employees are required to meet the standards set out in this Act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act.

(3) The standards set out in this Act:

(a) ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and

(b) encourage members to participate in the affairs of organisations to which they belong; and

(c) encourage the efficient management of organisations and high standards of accountability of organisations to their members; and

(d) provide for the democratic functioning and control of organisations; and

(e) facilitate the registration of a diverse range of employer and employee organisations.

(4) It is also Parliament's intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.

(5) Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system."

The RO's Act's stated desire to achieve accountability and protect and promote the economic and social interests of employers and employees the merit for the Proposed Bill is easily identifiable.

Given that the Proposed Bill is intended to apply to all organisations operating worker entitlement funds, it cannot be asserted that the Bill is partisan or regulates one side of the political spectrum.

Supports the Objectives of the FW Act to Protect Employees in Australia

The Proposed Bill also supports the underlying principles of the FW Act.

The primary object of the FW Act is to

> *"provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians"*

Part of providing a balanced framework for Australians is to make sure that the very institutions that govern and represent both employers and employees are rationally regulated and do not operate in a regulatory regime that might facilitate misuse of worker entitlements.

The companies which pay money into these accounts specifically for the benefit of employees have a legitimate expectation that such monies will be used responsibly. These companies should also be entitled to transparency regarding how their contributions have been spent.

Without proper regulation, corruption and undesirable conduct may take advantage of the contributions of honest Australian employers and their hard working employees. This is an outcome inconsistent with the objects of the FW Act.

The Proposed Bill addresses these concerns.

Proposed Bill is Proportionate and Consistent with Comparable Legislation

The Proposed Bill aims to ensure transparency of the financial affairs of registered organisations and worker entitlement funds, thereby ensuring greater accountability of Operators and worker entitlement funds to their members.

The Proposed Bill will amend the RO Act to:

- require Operators to adopt written financial expenditure policies that are binding on all officers and employees (recommendation 9);
- enhance financial disclosure requirements by Operators (recommendations 10 and 39);
- deal comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds (recommendations 45 and 46);
- require specific disclosure by registered organisations of the direct and indirect financial benefits obtained by the organisation or a related part of the organisation in connection with employee insurance products, worker entitlement funds, training funds and welfare funds (recommendation 47); and
- introduce a range of new civil penalties to ensure compliance with the new financial management and disclosure requirements (recommendations 9, 10, 17 and 47).

Additionally, the Proposed Bill will amend the FW Act to prohibit:

- any term of a modern award, enterprise agreement or contract of employment requiring or permitting employee contributions to a fund established for the purpose of funding elections for offices of industrial associations (recommendation 43);
- any term of a modern award or contract of employment requiring or permitting employee contributions to an unregistered worker entitlement fund (to support recommendations 45);
- any term of an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity (recommendation 49); and
- any action, other than protected industrial action, with intent to coerce a person to pay amounts to a particular worker entitlement fund, superannuation fund, training or welfare fund or employee insurance scheme (recommendation 50).

A comparison can be made between the proposed Bill other parts of the Corporations Act (for example, registered managed investment schemes):

Proposed Bill	Corporations Act
Constitution	***Constitution***
s.329LA of the Proposed Bill requires that a fund must have a constitution that is complied with, and that funds are administered in accordance with their constitutions.	s.601EA(4) of the Corporations Act requires that when applying for registration, a scheme must have a constitution and that constitution needs to comply with ss. 601GA and 601GB
Product Disclosure Statement	***Product Disclosure Statement***
Schedule 5 of the Proposed Bill requires a prescribed set of disclosures to those putting money into worker entitlement funds.	ss. 1012A, 1012B, 1012C, 1012H, 1012I and 1014J of the Corporations Act requires registered managed investment schemes to provide product disclosure statements and regulate their form and content
External director/ external compliance committee	***External director/ external compliance committee***
s.329LA of the Proposed Bill require that at least one of the voting directors of the operator of the fund is independent of, and has no material relationship with, the operator of the fund, other than his or her role as director	601EA(4) of the Corporations Act also requires managed investment schemes applying for registration to lodge a copy of their compliance plan settling out how they will comply with their constitution and regulatory requirements
Annual Reporting	***Annual Reporting***
Proposed s.329LA will require that the operators of funds lodge audited annual reports for each financial year in accordance with s.329LP	s.292 of the Corporations Act, requires registered schemes to prepare financial and directors reports, the content of which is regulated by s.295 of the Corporations Act

The amendments drafted in the Proposed Bill are proportionate and consistent when compared with regulation on other businesses in the Corporations Act.

CONCLUSION

For the reasons set out above, the Chamber and ABI submit that Senate should pass the Proposed Bill as introduced.