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27 October 2017

Dear Committee Secretary

**Re: Fair Work Laws Amendment (Proper Use of Benefits) Bill 2017**

Please accept the attached submission to the Senate Education and Employment Legislation Committee Inquiry into the Fair Work Laws Amendment (Proper Use of Benefits) Bill 2017.

This submission is made on behalf of BERT Fund.

Yours Sincerely

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## Submission

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### The BERT entities

The **BERT Fund**, an Employee Redundancy Trust, commenced operations in 1989.

All income generated from the investment of members' funds was and continues to be applied to the costs of administering the fund(s).

Any surplus was and continues to be distributed to the sponsors.

The sponsors donate those sums into a Welfare Fund which provides benefits to individuals (not Organisations) in the construction industry.

**BERT Training Fund** was created in 1995. Its purpose was and continues to be the provision of financial assistance solely for training purposes to members of the Construction Industry. The ultimate beneficiaries are limited to contributing employers and BERT Fund Members.

The ATO amended the Fringe Benefits law to stymie tax avoidance by high income earners. This change had the unintended consequence of levying FBT on the Employers in respect of contributions they made to the Fund.

The ATO introduced the concept of an "approved worker entitlement fund" to remedy the fault.

As a result, the sponsors were obliged to create a second fund, **BERT Fund No 2** in 2003. **BERT Fund No 2** receives employer contributions previously paid to BERT Fund.

At the same time the sponsors agreed to create the **Building Employees Welfare Trust (BEWT)** to:

1. fund education and training in the construction industry
2. fund the provision of counselling and welfare services for industry members.
3. fund investigations into issues affecting the wellbeing and health of industry members such as the high suicide rate and to fund remedial action in those areas.

In 2015, the sponsors resolved to create **BERT Welfare Ltd** to house the Welfare Fund and to receive distributions from the other trusts. This entity performs the same functions as the Welfare Fund.

**BERT has received \$605 Million in employer contributions since 2003. It has paid \$458 Million to workers over that time frame.**

### Submissions made by Protect and Incolink

We have seen the submissions of these worker entitlement funds.

**We support their comments, proposals and recommendations.**

BERT has been given an extremely limited time to undertake a proper analysis of complex changes affecting five (5) separate acts with far reaching implications.

Accordingly, BERT will confine this submission to issues not covered by our fellow funds and/or germane to our funds only.

### **Comment on the AIG submission**

AIG alleges that BERT's welfare distributions are used by the CFMEU to pay for its expenses including fines.

This is a shameful falsehood which is maliciously designed to bring BERT, its Sponsors and Directors into disrepute.

The facts are different:

1. 81 % of the payments made to CFMEU fund the Apprenticeship Mentor Scheme. (\$3.4 Million in 2017). This sum was exclusively applied to pay the cost of training coordinators /mentors, apprentice wages, tuition fees, Personal Protective Equipment and tools.

CFMEU provides BERT with audited acquittals of the program. This procedure ensures that expenditure is properly applied.

The employers of the apprentices (contributing Employers) and the apprentices (Fund members) themselves were the beneficiaries of this outlay.

**The CFMEU received no financial benefit.**

2. The remaining 19% (\$781,000) was spent on funeral expense payments and the funding of a single Alcohol and Drug Impairment Officer.

**The CFMEU received no financial benefit.**

The press has referred to the CFMEU's "**rivers of gold**" alluding to the nonsense espoused by IAG, This exposition refutes that lie.

### **Governance**

BERT has operated for 28 years, since 1989. The Fund Operators have been regulated by ASIC since inception and that body has not once raised any governance or other issues.

During this time BERT has been subjected to intense scrutiny by two Royal Commissions.

A recent ASIC examination prompted by the Royal Commission Report revealed that there were no irregularities.

There are eight directors, three of whom are independent.

### **CFMEU**

It is clear that this legislation is driven by a desire to disadvantage the CFMEU. The proposed changes to the law implies that the CFMEU has the power to enrich itself from the funds which therefore need protection.

An examination of the facts will refute that notion –

1. **CFMEU is a minority shareholder in the fund operators**
2. **CFMEU can appoint a maximum of 3 out of 8 Directors.**

No rational person can argue that the CFMEU *by itself* has the power to force the funds to do anything.

There is no need to protect the funds from events which cannot occur.

Therefore the entire legislative changes do nothing other than impose unnecessary costs upon the funds.

Not only is that a waste of time and money but these costs will ultimately be borne by the very party the funds were created to serve – the workers.

## **Specific Issues**

### **1. Transitional Arrangements**

The transition period of 6 months is unreasonable because BERT may not be able to affect the changes required to software, training and marketing material, recording and reporting processes within such a short time frame. The period should be no less than 12 months so that the BERT is afforded a fair opportunity to affect these far reaching changes in a properly planned fashion.

### **2. Contracts**

The funds have a number of contractual arrangements. For example the commitment to the mentoring program extends for up to 4 years. The effect of the legislation may make the funds incapable of meeting their contractual obligations. These would result in legal penalties (damages) incurred by the funds.

The legislation makes no provision for this situation.

BERT recommends that the legislation permits all existing contractual arrangements to remain in place, unchanged.

### **3. Reporting**

The funds are obliged to report to the Commissioner within 90 days after year end. The funds have numerous Managed Investments which makes it impossible to produce audited financial statements and supporting schedules within that time frame.

We request that the reporting deadline be set at no less than 120 days after year end.

### **4. Apprenticeship Mentor Programme**

BERT is a financial services organisation. It has neither the resources nor the expertise to deliver the programme. That function has been delegated to the unions as they have industry knowledge, hands on expertise and established employer relationships.

**The Directors and Sponsors have unanimously and consistently agreed that this is the optimum delivery arrangement.**

The union employees who deliver the program do not participate in union activities such as organising and recruitment.

This is a deliberate arrangement strictly enforced so that there is no scope for unwarranted criticism that the scheme is an elaborate ruse to disguise recruiting activity.

Sadly, this modus operandi has not silenced determined ideological critics, despite the facts of the matter giving the lie to their unfounded allegations.

The scheme is widely supported by both industry employers and their representatives.

Currently, the scheme supports the training of more than 600 apprentices.

Contrary to the allegations of CFMEU misuse of the funds, they are deployed as follows:

- Training Coordinator / Mentor wages
- Apprentice wages while they are attending TAFE.
- Personal Protective Equipment
- Tools
- Employer subsidy

This arrangement benefits apprentices (Fund Members), employers (contributing Employers) and the industry as a whole, as it facilitates the development of needed industry skills.

Apprenticeships are a 4 year commitment. The legislation will force BERT to renege on its commitment to these young people – a disgraceful, mean spirited outcome.

Additionally, the burden of support will have to be taken up by government that is **the taxpayer**.

This cannot be characterised as a desirable outcome.

#### **5. Indigenous Persons Training Scheme.**

BERT recently commenced funding a Northern Territory Indigenous Persons training programme.

This hands on tuition is also delivered by CFMEU employees whose sole function is to organise and in some cases, deliver the training itself in remote areas within the Territory.

This admirable and socially beneficial enterprise will be halted by the legislation.

#### **6. Donations to Mates in Construction (MIC)**

MIC provides suicide prevention services and counselling to members of the construction industry. BERT provided its seed capital and continues to support its activities with generous donations.

MIC has an outstanding record of achievement in this worthy activity and is widely recognised as a leader in best practice.

The ATO has granted MIC “deductible gift recipient” (DGR) status. The purpose of this status is to encourage financial support of deserving charities. This is achieved by permitting the donor to treat the donation as a deductible expense.

The restrictions in the bill prevents BERT from making a donation to MIC in a DGR compliant fashion.

Accordingly, BERT’s financial support will be halved in value. As this problem is common to all the funds, financial support for MIC is certain to fall away by as much as 50%.

This is an undesirable outcome.

BERT suggests that this be remedied by the addition of a new subsection 329 LD(e) “to make payments to a registered charity”.

BERT supports the amendments proposed in the MIC Submission.

#### **Recommendation**

**It is clear that the Bill is so flawed it should be rejected in its entirety.**