Ai GROUP SUBMISSION

Senate Education and Employment Legislation Committee

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

29 August 2019

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Introduction

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's (**Committee**) inquiry into the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (**Bill**).

Ai Group strongly supports the passage of the Bill. It would deliver essential reforms to protect workers' entitlements through amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) and the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) consistent with recommendations made in the Final Report of the Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**).

The Bill is designed to ensure that worker entitlement funds adhere to appropriate governance standards. These include the redundancy funds that operate in the construction and electrical contracting industries. Employers are obliged through enterprise agreements to contribute to these funds to create a pool from which redundancy entitlements are paid.

There is so much focus these days on 'wage theft' but why is it not wage theft for unions and some employer groups to siphon money from worker entitlement funds into their own bank accounts? Not all unions and employer associations engage in this conduct and many, including Ai Group, find this conduct abhorrent.

Parties with vested interests are currently raising a series of spurious arguments to ensure that the tap is not turned off and the rivers of gold continue to flow to them from worker entitlement funds as they have for the past 20 years. Their claims do not stand up to scrutiny as highlighted in this submission.

The Bill would also require unions and employer associations to disclose to employers and employees the financial benefits (e.g. commissions) that they receive from income protection insurance and other products that they promote or arrange. Currently, millions of dollars per year flow to unions and some employer associations from very large, inappropriate commissions paid to them by insurance companies which offer substandard income protection insurance products at grossly inflated prices.

The Bill is not an attack on unions or anyone else. The reforms in the Bill are long overdue and have been recommended by two Royal Commissions (i.e. the Heydon Royal Commission and the Royal Commission into the Building and Construction Industry).

Ai Group is well placed to provide informed views to the inquiry about the problems that the Bill is designed to address and the impacts that the Bill will have on registered organisations and worker entitlement funds.

Ai Group is a registered organisation under the RO Act. Ai Group's predecessor organisations were first registered in the NSW industrial relations system in 1902 and federally in 1926. Ai Group has maintained continuous registration ever since.

In addition, Ai Group is a sponsoring organisation of the Australian Construction Industry Redundancy Trust (**ACIRT**) and two of the directors on the ACIRT Board are appointed by Ai Group. There is a gulf between the governance arrangements that ACIRT has implemented, and the extremely inadequate governance arrangements that many other funds have implemented.

The Bill contains vital reforms that are clearly in the interests of workers and the broader community. The Bill protects the community's interests, not vested interests.

Ai Group urges the Committee to recommend that the Bill is passed by Parliament without delay.

Previous Ai Group submissions

Over the past 18 years, Ai Group has made numerous submissions in relation to proposed reforms to the laws governing worker entitlement funds and the financial regulation of registered organisations, including the following submissions:

- 25 October 2017 – Submission to an inquiry by the Senate Education and Employment Legislation Committee into the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017*;
- 4 February 2016 – Response to the Final Report of the Heydon Royal Commission;
- 21 August 2015 – Submission in response to the *Discussion Paper – Options for Law Reform* issued by Heydon Royal Commission;
- 30 June 2015 – Submission to an inquiry by the Senate Education and Employment References Committee into the *Fair Work (Registered Organisations) Amendment Bill 2014 [No 2]*;
- 22 August 2014 – Submission to the Heydon Royal Commission regarding *Issue Paper 4: Relevant Entities*;
- 14 November 2014 – Submission to the Heydon Royal Commission – *Response to Counsel Assisting Submissions*;
- 17 January 2014 – Submission to an inquiry by the Senate Education and Employment References Committee into the *Fair Work (Registered Organisations) Amendment Bill 2014*;
- 22 November 2013 – Submission to an inquiry by the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment (Towards Transparency) Bill 2012*; and
- 21 June 2012 – Submission to an inquiry by the Senate Education and Employment Legislation Committee into the *Fair Work (Registered Organisations) Amendment Bill 2012*.

- July 2003 – Ai Group's response to the final report of the Royal Commission into the Building and Construction Industry.

Ai Group's views on the various Schedules in the Bill are set out below.

Schedule 1 – Financial management and accountability

Schedule 1 responds to the following recommendations 9, 10 and 39 of the Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**):

> **Recommendation 9**
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> Section 141(1)(ca) of the RO Act be repealed. A new civil penalty provision be introduced requiring organisations and branches to adopt, in accordance with their rules, policies binding on all officers and employees concerning financial management and accountability.
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> The required policies should include policies concerning financial decision-making, receipting of money, levels of authorisation of expenditure, credit cards, procurement, hospitality and gifts, the establishment, operation and governance of related entities and any other matter prescribed by regulations.
>
> Organisations or branches should be required to review their policies every four years and to lodge a copy of their current policies with the registered organisations regulator.
>
> **Recommendation 10**
>
> A new division dealing with financial disclosures by 'reporting units' to their members be introduced to Part 3 of Chapter 8 of the RO Act to replace and strengthen existing provisions concerning financial disclosure. The regime would require 'reporting units' to lodge audited financial disclosure statements with the registered organisations regulator on discrete topics, including (a) loans, grants and donations by the reporting unit, (b) remuneration of officers and (c) credit card expenditure.
>
> Civil penalties should apply to reporting units that fail to comply with their obligations under the regime. Further, civil penalties should also apply to officers who knowingly or recklessly make a false statement in a financial disclosure statement.
>
> **Recommendation 39**
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> The RO Act be amended to require reporting units to lodge an audited financial disclosure statement (see Recommendation 10) providing details in respect of (a) loans, grants and donations (including in-kind donations) made to reporting units in excess of $1,000 and (b) other payments made to reporting units in excess of $10,000.

Schedule 1 of the Bill would require particulars to be set out in a statement by a registered organisation where loans, grants or donations exceeding $1,000 are made to the organisation during the financial year. This reform will ensure that inappropriate and unlawful payments cannot be easily disguised.

The case studies examined by the Heydon Royal Commission revealed that payments are sometimes made by a business to a union in response to threats of harm to the business or to obtain a benefit from the union, and that these payments are often disguised as donations. [1]

[1] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, pp 242 – 243.

The merits of the proposed new requirement are highlighted by the opaque nature of some recent financial reports provided to the Registered Organisations Commission (**ROC**) by various unions. For example:

- The financial report of the Victorian/Tasmanian Branch of the Construction, Forestry, Maritime, Mining and Energy Union (Construction and General Division) (**CFMMEU**) recorded for the year ended 30 June 2018, grants to the sum of $7,825,261. This is an almost $6 million increase from the previous year. No other explanation is provided concerning this figure.

- The ACT Branch of the CFMMEU (Construction and General Division) recorded for the year ended 30 June 2018, grants to the sum of $2,042,996. This was a significant increase in the $250,000 in grants recorded for the previous financial year and constituted over half of the revenue recorded for the reporting year. To place this figure into perspective, the total contribution to revenue which derived from membership subscriptions for the year ending 30 June 2018 was $1,435,023.

Schedule 1 of the Bill would also require registered organisations and branches to have written policies dealing with expenditure that are approved by the committee of management.

The requirement to have such policies is obviously essential. Many registered organisations receive a large amount of revenue each year and have substantial assets. For example:

- The Victorian/Tasmanian Branch of the CFMMEU (Construction and General Division) recorded revenue of $30,238,248 in the 2018 reporting period.

- The total revenue for the Victorian Branch of the Electrical Division of the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (**ETU**) was $39,148,056 in the 2017 reporting period and $23,160,369 in the 2016 reporting period.

Any argument that organisations which collectively control such a substantial amount of wealth should not be required to institute written financial policies is unsupportable.

Numerous examples of financial mismanagement of union funds support the proposition that such policies are necessary. For example, Fair Work Australia's report into Craig Thomson and the Health Services Union prompted the *Fair Work (Registered Organisations) Amendment Act 2012* which introduced s.141(1)(ca) into the RO Act obliging an organisation to have rules requiring "the organisation and each of its branches to develop and implement policies relating to the expenditure of the organisation or the branch (as the case may be)". However, the Final Report of the Heydon Royal Commission referred to this provision's ineffectiveness as it provided "no guidance on the types or kinds of 'appropriate policies' and even whether they should be in writing".[2] Referring to financial impropriety within the New South Wales branch of the NUW which came to light in the

[2] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, 79.

course of the inquiry, the Final Report stated that although the federal Rules of the NUW contained a clause consistent with s.141(1)(ca), there was no evidence that the New South Wales branch of the union had adopted any formal or written policies concerning expenditure.[3]

The provisions in Schedule 1 are balanced, practicable and appropriate. They would apply equally to unions and registered employer organisations like Ai Group.

The Bill provides a workable and fair timeframe for registered organisations to implement the new requirements (see Items 16 and 17 of Schedule 1).

Schedule 2 – Regulation of worker entitlement funds

Schedule 2 of the Bill is designed to ensure that worker entitlement funds adhere to appropriate governance standards. These include the redundancy funds that operate in the construction and electrical contracting industries. Employers are obliged through enterprise agreements to contribute to these funds to create a pool from which redundancy entitlements are paid.

The Final Report of the Heydon Royal Commission provided the following information about the size of worker entitlement funds:[4]

> 52. Collectively, worker entitlement funds in the construction industry hold around $2 billion in assets under management:
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> (a) As at 30 June 2015, Incolink managed in excess of $714 million in investment assets in its various redundancy funds with worker entitlements of $577 million.
>
> (b) As at 30 June 2015, ACIRT had total assets of $594 million.
>
> (c) The Protect Severance Scheme considered in the Interim Report held assets in excess of $245 million as 30 June 2013.

How could anyone quibble with the simple proposition that money paid by employers into worker entitlement funds for the benefit of their employees should be protected?

There is so much focus these days on 'wage theft' but why is it not wage theft for unions and some employer groups to siphon money from worker entitlement funds into their own bank accounts? Not all unions and employer associations engage in this conduct and many, including Ai Group, find this conduct abhorrent.

In addition to transferring investment earnings on workers' entitlements to the unions and employer associations represented on their boards, other inappropriate practices of some worker entitlement funds include:

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[3] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, 79.

[4] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, 297.

- Discriminating between union members and non-union members when providing benefits to workers (e.g. access to training grants);

- Making payments to workers on strike under the guise of 'hardship payments'. The payment of strike pay by employers is unlawful in Australia, and the acceptance of strike pay by employees is also unlawful. Such laws should not be able to be circumvented by worker entitlement funds.

Spurious arguments of vested interests opposed to appropriate governance arrangements

Parties with vested interests are currently raising a series of spurious arguments to ensure that the tap is not turned off and the rivers of gold continue to flow to them from worker entitlement funds as they have for the past 20 years. Their claims do not stand up to scrutiny as highlighted below.

Claim One – The investment earnings on the money contributed by employers into workers entitlement funds are 'surpluses' or 'profits'. What nonsense this is. The money is contributed into the funds by employers for the benefit of their employees. The investment earnings belong to the employees – not to unions or employer associations. Why should workers not receive the benefit of the investment earnings on their own entitlements? Who would accept the idea of a superannuation fund that does not provide investment earnings to fund members? The same principle needs to apply to worker entitlement funds.

Currently, construction and electrical contracting industry redundancy funds hold around $2 billion in workers' entitlements. Just imagine how much higher this figure would be if tens of millions of dollars of investment earnings had not been siphoned off over the past 20 years.

Claim Two – There are no conflicts of interest. This claim is patently wrong. There is a glaring conflict of interest in allowing board members of worker entitlement funds to vote on and pass resolutions transferring millions of dollars to the organisations that appointed them to the board.

Claim Three – The money transferred to unions and employer associations is spent on training and WHS services. Is it? Where is the evidence? Who decides what training will be provided, and to whom? How are the administration costs associated with training and WHS services calculated and treated by the organisations that receive the grants? Is the money that is transferred to a union or employer group held in a separate bank account that can only be spent on training and/or WHS services, or is the money treated as general revenue by the organisation? If the money is transferred to a special bank account, what happens to the investment earnings on the bank account? Is the money in the account spent in a timely way or are millions of dollars retained year after year, so that the investment earnings can be used to prop up the relevant union or employer organisation? The current lack of governance means that it is very difficult to get answers to these questions, either from the worker entitlement funds or from the unions and employer associations that money has been transferred to.

In any event, there is no legitimate reason why the investment earnings on workers' redundancy entitlements should be, or need to be, used for the provision of training or WHS services by unions or employer associations. Many unions and employer associations offer training and WHS services which are not propped up by raids on worker entitlement funds.

Claim Four – The money that is transferred to unions and employer associations is spent for the benefit of fund members. This is not true. How can the provision of services by a union be of benefit to all fund members when some are not union members, and unions typically only provide services to their members? Also, none of the workers who are fund members are members of an employer association, so how can the transfer of money to an employer association be of benefit to fund members.

Claim Five – The Bill would impose unreasonable arrangements on worker entitlement funds. This is not true, as can be highlighted by the governance arrangements that ACIRT has implemented. Under its trust deed, ACIRT appropriately prohibits the distribution of money to the unions and employer organisations represented on its board. Any surplus funds are paid to the workers. If ACIRT can implement appropriate governance standards, clearly the other funds can as well.

The inappropriate conduct of Protect, the ETU and NECA

As has been reported widely in the media, $16.9 million was recently transferred from the Protect redundancy fund to Victorian Branch of the ETU as an alleged 'profit share', in a bid to beat the introduction of the legislative amendments in the Bill. The extraordinary payment was more than double the amount raised annually by the ETU in membership dues. The $16.9 million came from investment returns on contributions made by employers to Protect on behalf of their employees.

In addition to the $16.9 million transferred to the ETU, $5.6 million was transferred from Protect to the Victorian chapter of the National Electrical and Communications Association (**NECA**).

All up, $22.5 million was transferred out of Protect to the ETU and NECA to beat the introduction of the legislative amendments in the Bill.

All of the directors on the board of Protect are nominated by the ETU and NECA. Surely, anyone can see the glaring conflict of interest in directors nominated by the ETU and NECA resolving to transfer $16.9 million of the investment earnings on workers' entitlements to the ETU and NECA. This conduct is highly inappropriate and it should be unlawful

The brazen nature of the conduct is highlighted by the following notation in the 2017 financial accounts of the ETU: (emphasis added)

> **Other items**
>
> **a. Significant changes in the financial affairs**
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> During the 2017 year the financial affairs of the union included a substantial distribution of capital from Protect Severance Scheme (Protect). The distribution was received after the

> trustee, ElecNet (Aust) Pty Ltd, resolved to make the distribution to its sponsors (Electrical Trades Union of Australia – Victorian Branch (ETU) and National Electrical Contractors Association – Victoria (NECA)). The distribution was made in response to the introduction of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, which if it became law, would prohibit Protect making any further distributions to its sponsors, and in the Executive and State Council's view, would put at risk benefits for thousands of electrical workers and their families.
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> The ETU has set aside a significant amount of the capital received to ensure that their members continue to receive their rightful benefits into the future. The Executive and State Council, by resolution, have specified that these funds shall not be used by the ETU for industrial, operational or political purposes. The ETU has entered into a Facility Agreement with Protect to loan back the capital distributed to the ETU if Protect neds to recall the distribution to meet ongoing expenses.

In effect, the directors on the board of Protect resolved to inappropriately transfer $16.9 million of the investment earnings on employee entitlements in Protect to the ETU in 2017 because a Bill was before Parliament that, if passed, would prevent them making such an inappropriate transfer at a later stage.

The ETU has earned almost $30 million in the last year from so called 'profits', management fees, directors' fees, administrative charges and other revenue derived from worker entitlement funds, from commission on insurance products that employers are coerced to purchase, and from related sources, compared to $8 million that it received from membership dues.

Similar issues arise with the $5.6 million transferred from Protect to NECA. The importance of the distributions to the Victorian Chapter of NECA's financial result is demonstrated by the following notation in organisation's 2018 Financial Return: (emphasis added)

> The Association invested significant effort into a number of membership activities and system development initiatives. This led to an operation loss of ($599,276). A distribution from Protect Services of $10,388,124 helped to turn around the profit/(loss) of the Association for the financial year after providing for income tax amounted to $9,788,848 (2017: profit of $2,190).

Only the most recent annual report is available on Protect's website (2017/18). It does not include any detailed financial information and reads like a promotional brochure.

The Protect trust deed, that contributing employers are required to agree to, is also available on Protect's website. The following provisions in the trust deed highlight how the CEPU and NECA have structured the fund to operate at their behest. The "sponsors" are defined in the trust deed as the ETU and NECA: (emphasis added)

> **21 Trustee's discretion absolute**
>
> Subject to any express provision to the contrary, every discretion vested in the Trustee shall be absolute and uncontrolled and may be exercised without the Trustee assigning any reason for its exercise and every power vested in it shall be exercisable in its absolute discretion and the Trustee shall have the like discretion in deciding whether to exercise any such power.

31 Powers of the Sponsors

Except to the extent (if any) expressly provided in this Deed, in the exercise, non-exercise or partial exercise of any power exercisable by the Sponsors under this Deed, the Sponsors:

(a) Have an absolute and uncontrolled discretion and are not required to give to any person any reason for or explanation of their exercise, or partial exercise, of that power; and

(b) Are not under any fiduciary or other duty and may act entirely in the interests of the Sponsors.

The highly inappropriate structure and practices of Protect, that any right-minded person would be appalled at, need to be urgently addressed through the passage of the Bill through Parliament.

Incolink

Incolink's annual reports are available on its website. The reports show that the following amounts have been transferred to the sponsoring organisations and other organisations over the past four years in the form of grants:

2018 Annual Report	$21,347,205 in the year
2017 Annual Report	$21,074,405 in the year
2016 Annual Report	$22,400,000 in the year
2015 Annual Report	$22,000,000 in the year

The annual reports of Incolink indicate that the majority of the money transferred to the CFMMEU, the Master Builders Association of Victoria, the CEPU and other organisations was for the purposes of training and WHS services. However, there are many legitimate questions that arise. Some of these are identified above in the section entitled: *Claim Three – The money transferred to unions and employer associations is spent on training and WHS services.*

In any event, there is no legitimate reason why the investment earnings on workers' redundancy entitlements should be used for the provision of training or WHS services by unions or employer associations.

ACIRT

As mentioned above, Ai Group is a sponsoring organisation for ACIRT. Under its trust deed, ACIRT appropriately prohibits the distribution of money to its sponsoring unions and employer organisations. Any surplus funds are paid to the workers. If ACIRT can implement appropriate governance standards, clearly the other funds can as well.

The CFMMEU

The CFMMEU has reportedly incurred more than $16 million in fines for unlawful conduct over the past 10 years or so in cases pursued by the Australian Building and Construction Commission and its predecessors. However, this amount is dwarfed by the revenue flows to the CFMMEU from worker entitlement funds. Revenue flows to the CFMMEU for the five years between 2012 and 2017 have reportedly included:[5]

$44 million	from construction industry redundancy funds
$22 million	from training funds
$5 million	from income protection insurance commissions
$4 million	from charity/welfare funds
_____	
$75 million	
_____	

It can be seen from the above that the largest source of inappropriate revenue flows to the CFMMEU are from construction industry redundancy funds. However, the CFMMEU has received large revenue flows from other inappropriate sources. For example, the Heydon Royal Commission uncovered the fact that the CFMMEU was siphoning off approximately half of the funds contributed by employers for drug and alcohol rehabilitation services:

> "The second matter examined concerns a clause in CFMEU NSW enterprise bargaining/enterprise agreements (EBAs). Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting 'with the provision of drug & alcohol rehabilitation & treatment services / safety programs for the building industry'. From 2004 to 2011 inclusive, employers paid approximately $2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was siphoned to the CFMEU NSW and deposited into its general revenue."[6]

Ensuring that employee entitlements are used for the purposes for which the contributions were made, and are not siphoned off by the CFMMEU, will most likely assist in effecting a change in the CFMMEU's current law-breaking conduct. Numerous respected judges have expressed dismay at the blatant disregard that the CFMMEU has for the rule of law. The numerous fines and cost orders imposed on the CFMMEU over the past decade have had no noticeable impact on the unions' financial strength or its unlawful conduct.

[5] *The Australian*, "Unions 'skim' $130m from worker funds", 7 September 2017. The figures in the article were based on disclosures to the Australian Electoral Commission.

[6] Heydon Royal Commission Final Report, Volume 3, Chapter 7.4, paragraph 5.

The governance arrangements that apply to superannuation funds

Superannuation funds are subject to rigorous governance standards under superannuation legislation but such legislation and standards do not apply to construction and electrical contracting industry redundancy funds even though billions of dollars of workers' entitlements are held in these funds.

Members of superannuation funds rightly expect to, and do, benefit from the investment earnings on employer contributions to superannuation funds. It is not right that investment earnings on employer contributions to most construction and electrical contracting industry redundancy funds are diverted to unions and some employer associations (not Ai Group).

The Cole Royal Commission

Worker entitlement funds in the building and construction industry were examined in great detail by the Cole Royal Commission. Relevant findings and recommendations included:[7] (emphasis added)

> Redundancy funds have become significant financial concerns in the industry. For the financial year ended 30 June 2001, the eight principal schemes held a total of $534.8 million of members' funds in trust. I provide overview comment below, referring to evidence elsewhere in my report, about the manner in which redundancy funds are administered and the industrial demands which employee organisations make to ensure that employers contribute to funds nominated by those employee associations.
>
> Employers make weekly contributions to redundancy funds for the benefit of their employees. However, with the exception of the Australian Construction Industry Redundancy Trust (ACIRT), the surpluses earned by these funds are enjoyed by employee and employer associations, or other bodies, none of which contributes to the fund. Income of the funds is also applied for purposes unrelated to the purpose for which contributions are made, namely redundancy. This is unwarranted and I make a recommendation that redundancy funds should be used only for the purpose of meeting employee redundancy entitlements. I also recommend that the surpluses be applied solely for the benefit of employees or to reduce the contributions required by employers.

The funds were found to have been applied for uses unconnected with redundancy to the benefit of certain industrial associations. This was considered to provide an incentive to industrial associations to pattern bargain in order to safeguard a steady flow of income into such funds. Volume 10 of the Final Report stated:[8]

> Pattern EBAs in each State and Territory nominate particular funds for superannuation contributions, for example the Construction & Building Unions Superannuation Fund (Cbus) and the Building Unions Superannuation Scheme (Queensland) (BUSS Q). I also found consistent evidence of pattern agreements providing for employers to contribute to industry sponsored redundancy funds, for example ACIRT and BERT.
>
> The evidence demonstrated that an overwhelming majority of certified agreements were in conformity with a pattern EBA containing a clause which provided for contributions to these

[7] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Funds, 13.

[8] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Funds, 17-20.

nominated funds. Employers were subject to commercial and industrial pressure to enter into certified agreements in accordance with pattern EBAs.

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Following agreement reached between major contractors and unions in the late 1980s, a number of redundancy schemes were established in the building and construction industry to provide portability and security of benefits for employees. Pattern EBAs in the building and construction industry require payment of redundancy benefits to a nominated redundancy fund. Likewise, many pattern agreements provide for employer contributions to income protection or top-up insurance schemes or funds nominated in the pattern.

I have dealt elsewhere in my report with the industrial pressures which are applied to require contractors to enter into a certified agreement in accordance with an applicable pattern EBA in order to work on major sites. Where that situation applies, the result is that nominated funds obtain coverage of workers on such sites.

This situation may be contrasted with the varying and numerous funds utilised by employers and employees working in rural areas and on smaller sites where there is not such a requirement in order to work on the site.

Evidence was received by the Commission that contributions to nominated funds are also provided for in site or project agreements certified pursuant to Federal or State legislation. This requirement is sometimes contrary to an applicable government code of practice.

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In addition to a requirement that contractors enter a union-endorsed EBA, employers are subject to commercial and industrial pressure to ensure that contributions are paid and are up to date. Evidence of this requirement was widespread.

For example, the Commission received extensive evidence of site inductions at which employees or their employers were required to provide details about membership of nominated funds. The information is then utilised to ensure contributions were, and remained, up to date.

The Cole Royal Commission (like the recent Heydon Royal Commission) identified the need for appropriate regulation to ensure that appropriate governance standards apply to the operation of worker entitlement funds:[9] (emphasis added)

> Superannuation and long service leave funds operate under a considered regime of public accounting, auditing and reporting. This achieves reasonable transparency in their operations. Redundancy funds, however, do not. This leaves open the potential for maladministration. This should not be so. Any failure of a redundancy fund would disadvantage a great number of people. I make recommendations that redundancy funds should similarly be subject to a regulated system of accounting, external auditing, actuarial assessment and reporting.
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> - - -
>
> Redundancy funds have matured throughout Australia to become a significant component of the industry's financial structure. Approximately $500 million is currently under management yet they function without any prudential control. The repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse. The opportunity for any of these events to occur is manifest.

[9] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Funds, 13, 287.

In the final report, the Cole Royal Commission highlighted that those administering redundancy funds appear to have lost sight of the reason why the funds were established, i.e. to provide redundancy benefits to employees: (emphasis added)

> The large amounts of money generated by the funds and distributed for purposes other than payment of redundancy entitlements makes plain that redundancy funds have now progressed well beyond the purpose for which they were established. They have become an additional income stream for employees, for employer and employee associations and for other unrelated bodies. Employers do not receive a return on their money, yet the schemes are all funded by weekly employer contributions and returns on investments of previous contributions.
>
> 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.
>
> Under the various awards, redundancy entitlements increase with time and with increases in rates of pay. It follows that surpluses generated by the fund should be credited against employee members' accounts, and not distributed to them or to sponsors or to others, in order that additional funds are available to meet increased redundancy entitlements.
>
> If 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.[10]

Recommendation 168 of the Cole Royal Commission included ensuring surpluses in redundancy funds are either credited to the employee members' accounts to be payable only in the event of redundancy or, if funds held are sufficient to meet redundancy obligations, used to reduce any contributions required.[11] The Cole Royal Commission also recommended that distributions in this manner be a prerequisite for registration of the fund as a prescribed fund exempt from fringe benefits tax.[12]

The Heydon Royal Commission

The Heydon Royal Commission also identified the problems caused by, and the risks for workers created by, the absence of governance standards for worker entitlement funds.

The Final Report of the Heydon Royal Commission recommended legislation be enacted, dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds.

The Bill achieves the same objectives as those identified by the Heydon Royal Commission.

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[10] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Funds, 281.

[11] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 1 – Summary of Findings and Recommendations, 146.

[12] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 1 – Summary of Findings and Recommendations, 146.

Ai Group strongly supports Schedule 2 of the Bill. The provisions will provide far more protection for workers' entitlements and bring an end to the inappropriate conduct that is currently occurring.

Schedule 3 – Election payments

The democratic governance of registered organisations requires fair elections for officers. Election funds may potentially be used to assist one candidate over another in an election for office.

The Heydon Royal Commission noted in its Final Report that in a number of cases, it was questionable whether decisions by employees of unions to contribute to election funds were truly voluntary. This was particularly the case where such contributions were automatically deducted pursuant to the terms of an employee's employment contract with the union. This problem was highlighted in the following extract from the Final Report:

> Incumbent union officers are able to entrench their positions by the establishment of a substantial election fund, funded through the use of automatic payroll deductions, conferring a disproportionate advantage on incumbents, over and above the benefit of incumbency itself.

Schedule 3 implements the following recommendation 43 of the Heydon Royal Commission

> The *Fair Work Act 2009* be amended to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund.

This recommendation has obvious merit, as explained in the following extract from Volume 5, Chapter 5 of the Final Report of the Heydon Royal Commission:

> 22. These problems with election funds have the potential to affect adversely the democratic processes of the union. In many unions, employees of the union are compelled to contribute to an election fund, which in practice is commonly controlled by the Secretary. Over time the Secretary accumulates a substantial war chest that the Secretary can use to further his or her influence within the union. The election fund thus operates to reinforce the power and influence of the current Secretary. Further, because of the lack of transparency and oversight associated with election funds, members of the union do not know who is funding a particular candidate in an election and where the candidate's allegiances may lie as a result of funds received.
>
> **Prohibition of any compulsion on employees to contribute to an election fund**
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> 23. As was noted in the Discussion Paper, there is nothing wrong with members of an employee or employer organisation joining together to pool resources to fund a particular candidate or ticket of candidates in an election. However, any steps taken with the effect of legally or practically compelling contributions infringe basic principles of freedom of association.

It is unjust for an employee to be forced through the terms of a contract of employment to make regular payments into a union election fund, or to be forced to allow regular salary deductions for this purpose, as currently occurs with some employees of unions. Workers need to be protected from such inappropriate practices.

Schedule 3 of the Bill would assist in ensuring that the enterprise bargaining process is not used to inappropriately provide an additional source of monies for election funds by adding to the list of unlawful terms, a term that has the effect of requiring or permitting a payment to be made for a 'regulated election purpose' as defined in the proposed amendment to section 12 of the FW Act.[13] The Bill would also protect parties to an employment relationship from coercion to make such payments pursuant to an employment contract by providing that such a term would be of no effect.[14]

Ai Group supports Schedule 3 of the Bill.

Schedule 4 – Prohibiting coerced payments to employee benefit funds

Schedule 4 implements the following recommendation 50 of the Heydon Royal Commission:

> A new civil remedy provision be added to the *Fair Work Act 2009* prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme.

The reason why the Heydon Royal Commission recommended this amendment is explained in Volume 5, Chapter 6, paragraph 30 of the final report:

> 30. The third recommendation is to introduce a specific civil remedy provision prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme. The reason for recommending this specific prohibition is that it is questionable whether the existing prohibitions on coercion in the FW Act capture coercion which occurs outside the enterprise bargaining process. Thus, s 343 of the FW Act prohibits action done with an intent to coerce a person to exercise a 'workplace right' in a particular way. A 'workplace right' includes participating in the process of making an enterprise agreement. Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a 'side deal' between employer and union, would be caught. The maximum penalty should be the same as for the other forms of coercion.

The use of compulsion on employers, outside of the legitimate bargaining process, to make payments into funds which are favoured by unions, is a practice which adds to the cost of doing business and fails to direct funding to benefits that are genuinely valued by employees. A fund which is favoured by a union may hold this preferential status as a result of the financial relationship the enjoys, directly or indirectly, with the union rather than due to the level of benefits provided to fund members.

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[13] *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 Sch 3, items 1-2.*

[14] *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 Sch 3, item 5.*

The Final Report of the Cole Royal Commission referred to inappropriate coercion in the building and construction industry to contribute to certain superannuation funds. The issue was described in the following manner:

> The Commission received evidence of industrial and commercial pressure being brought to bear on employers in the building and construction industry to compel contribution to superannuation funds or schemes favoured by unions. Seeking to influence an employee's choice of superannuation fund or scheme, or to compel an employer to contribute to a specified fund or scheme through the use of coercion, threats or intimidation should render a person liable to a civil penalty under Commonwealth law.

The Final Report of the Cole Royal Commission made a recommendation that such practices be outlawed. A provision reflecting this recommendation is in force under the *Building and Construction Industry (Improving Productivity) Act 2016* (s.53).

The Heydon Royal Commission uncovered evidence of similar coercion to make contributions to various types of funds and the coercion was not confined to the building and construction industry.

The provisions of the Bill do not outlaw coercion in the form of protected industrial action during enterprise bargaining negotiations. However, it is appropriate that union coercion in other contexts be outlawed in order to protect workers from:

- A union that coerces an employer to pay workers' entitlements into a particular worker entitlement fund that is supported by the union, but provides less favourable benefits to workers than other funds;

- A union that coerces an employer to contribute to a particular superannuation fund that is supported by the union, but provides substandard returns to workers;

- A union that coerces an employer to arrange insurance protection for workers through an insurance provider that is supported by the union but provides a substandard insurance product for workers.

Workers need to be protected from such inappropriate coercion.

The provisions of Schedule 4 are fair and reasonable and would provide appropriate protection to workers.

Schedule 5 – Disclosable arrangements

Schedule 5 introduces into the RO Act the concept of a 'disclosable arrangement', involving a federal system employer's engagement with either insurance schemes, a managed investment scheme (within the meaning of the *Corporations Act 2001* (Cth), a training or welfare fund or a worker entitlement fund (s.329PD). If an organisation (or related party) proposes to enter into a 'disclosable arrangement' with a federal system employer and the organisation (or related party) will, or can reasonably be expected to, receive or obtain a financial benefit in connection with the arrangement,

the organisation is required to provide the employer with a document which outlines relevant information about the financial benefits receivable under the arrangement (s.329QA). There would also be a requirement to keep such disclosures up to date (s.329QB).

Employees would be entitled to receive notification of an organisation's disclosure from their employer (s.329RA).

An organisation making a disclosure would be required to give the disclosure document to the ROC (proposed s.329SA(2)) which would publish the document (s.329SC). The organisation would also be required to notify the ROC when the arrangement comes to an end (proposed s.329SA(3)).

Schedule 5 implements recommendation 47 of the Heydon Royal Commission by requiring that registered organisations disclose to employers and employees the financial benefits (e.g. commissions) that they receive from income protection insurance and other products that they promote or arrange.

Currently, millions of dollars per year flow to unions from very large, inappropriate commissions paid to them by insurance companies which offer substandard income protection insurance products at grossly inflated prices.

Unions are misusing the enterprise bargaining laws to coerce employers to purchase these substandard, grossly overpriced insurance products, including through the use of industry-wide pattern agreements. If there was free competition in the market it is highly unlikely that these insurance products would be purchased because employers are typically able to purchase insurance products that provide much more favourable benefits for workers at a much lower cost (e.g. through an industry superannuation fund or through the insurance company which the company uses for other types of insurance). Many employers have advised Ai Group that they can purchase income protection insurance for 1/3 to 1/5 of the cost of the insurance products that the unions coerce them to purchase.

Unions are currently enriching themselves at the expense of both workers and employers. Workers need to be protected from these inappropriate arrangements.

The provisions of Schedule 5 will provide a lot more protection to workers than currently exists, because workers will be made aware of the large proportion of employer payments to union-aligned insurance companies for worker insurance benefits that end up in the bank accounts of unions through commission. The workers may prefer (and indeed are likely to prefer) that, instead of unions receiving generous commission from insurance companies, the workers receive a more generous insurance product or increased remuneration.

The provisions in the Bill will enable workers to understand why insurance products that are not aligned with unions typically provide superior benefits to workers at a much lower cost for employers. This knowledge will enable workers to make an informed choice about which particular insurance products they would like their employer to provide.

The importance of the issues addressed in Schedule 5 of the Bill were identified in the Final Report of the Cole Royal Commission, a chapter of which was devoted to 'income protection insurance' schemes in the building and construction industry.[15] The Final Report stated:[16]

> It was found that a number of employer and employee associations received commissions or support from insurance brokers.
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> In evidence presented to the Commission, it was apparent that the capacity for employer and employee associations to derive income from delivery of a workforce to an insurer was a factor in income protection insurance becoming a commonly demanded entitlement under pattern EBAs.
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> Non-disclosure of commissions or other benefits to be received by any party to an industrial agreement, arising from that agreement, during the course of agreement negotiations may amount to unlawful conduct. Parties should disclose all benefits to be received or the benefit should not be obtained. The ElecNet (Aust) Pty Ltd case study demonstrated that a 'spotters fee' paid to one party to an industrial agreement resulted in a significant cost imposition upon employers across that sector of the industry, for no extra benefit to the beneficiaries of the income protection scheme. The only beneficiary was the CEPU. There is no proper basis upon which employers should be asked, under the guise of providing cover for their employees, to provide an income stream to a third party, here a union.

The issue is not confined to the bargaining process and the new disclosure obligations introduced under the *Fair Work Amendment (Corrupting Benefits) Act 2017* do not go far enough. It is important that employers, employees and the ROC are capable of accessing information concerning financial benefits accruing to a registered organisation pursuant to a scheme organised or promoted by that organisation.

The Heydon Royal Commission considered the operation of a number of insurance schemes which were associated with various union branches.[17] The common features of such schemes included:[18]

- *"Employers, pursuant to a clause in a union-negotiated enterprise agreement, pay premiums for income protection or other insurance to a commercial insurance broker, or to a common fund that remits the premiums to a commercial insurance broker…"*
- *"The insurance broker remits the premium, less a commission, to a commercial insurer. The insurer usually provides insurance by way of a group insurance policy covering all of the workers declared by the various employers."*

[15] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Chapter 14 – Income Protection Insurance in the Building and Construction Industry.

[16] *Final Report of the Royal Commission into the Building and Construction Industry* (2003) – Volume 10 – Chapter 14 – Income Protection Insurance in the Building and Construction Industry, 312-313.

[17] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, p 321

[18] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, p 321

- *"The broker pays part of the commission to the union as a fee for promoting the scheme in enterprise agreements."*

The Heydon Royal Commission summarised the relevant issue as follows:[19]

> For present purposes, the significant issue exposed by the evidence is that the unions involved in the income protection insurance schemes examined by the Commission often received very substantial commissions that were not disclosed properly, if at all, to the participants (both employers and employees) involved in the schemes.

The provisions of Schedule 5 have obvious merit in protecting the interests of workers and employers. The provisions are fair and reasonable and would apply equally to unions and registered employer organisations like Ai Group.

Conclusion

The Bill contains critical reforms that are long overdue. The current laws are not operating in the interests of workers and are indefensible.

The Bill is not an attack on unions or anyone else. The reforms in the Bill are long overdue and have been recommended by two Royal Commissions (i.e. the Heydon Royal Commission and the Royal Commission into the Building and Construction Industry).

We urge all Senators to adopt a position on this Bill that reflects the interests of workers, and not be swayed by vested interests that are being enriched at the expense of workers.

We urge the Committee to recommend that the Bill is passed without delay.

[19] *Royal Commission into Trade Union Governance and Corruption*, Final Report – Volume 5, p 322.