

## **Senate Standing Committee on Education and Employment**

### **QUESTIONS ON NOTICE**

#### **Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017**

##### **Department of Employment Question No. 1**

**Senator Paterson asked in writing**

##### **Question**

If the Bill is passed, will worker entitlement funds be prevented from making payments to charities, such as rehabilitation, suicide prevention and counselling services, and payments for training?

##### **Answer**

No. The Bill allows worker entitlement funds to make payments to charities so that those charities can provide training and welfare services to participants in the industry (and their dependents), subject only to the governance criteria in s329LD(2) of the Bill being satisfied. These criteria ensure that payments are made with appropriate oversight by the fund. They provide that payments for training or welfare services need to be approved by the voting directors of the operator of the fund including at least one independent director, are to be provided at market value, on commercial terms and are to be negotiated at arm's length from any director of the operator who has a material interest in the provider of the services.

**Senate Standing Committee on Education and Employment**

**QUESTIONS ON NOTICE**

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

**Department of Employment Question No. 2**

**Senator Paterson asked in writing**

**Question**

Why is it appropriate to ensure there are no conflicts of interest between those making payments and those receiving payments from a worker entitlement fund for welfare and training services?

**Answer**

Worker entitlement funds hold amounts of money paid by employers for the benefit of employees. Because these funds are for the benefit of employees, the Bill ensures that appropriate governance measures are in place to protect those funds for employees. This is why the Bill provides for appropriate governance standards in the context of payments made out of the fund for welfare services and training services, so as to ensure that such payments benefit workers whose entitlements are funding those services.

## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE

#### Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

#### Department of Employment Question No. 3

Senator Paterson asked in writing

#### Question

What examples from the Royal Commission show that it is important to ensure this independence in the making of such payments?

#### Answer

The Royal Commission into Trade Union Governance and Corruption (Heydon Royal Commission) and a previous Royal Commission led by Commissioner Cole in 2001-2003, raised significant concerns about the lack of transparency and accountability of worker entitlement funds and payments made by these funds including to charities or training funds. Examples from the Heydon Royal Commission include:

#### Building Employees Redundancy Trust (BERT)

The Royal Commission heard evidence that BERT makes significant payments to the Queensland Construction Training Fund, which in turn makes payments to the CFMEU for the purpose of administering and carrying out apprenticeship trainee schemes. However, the Royal Commission found that:

Only a very small portion of the money granted to the CFMEU goes to meet the fees for actual training courses. The vast bulk of it is earmarked to meet estimated 'administrative' and other costs of the CFMEU itself.<sup>1</sup>

The Royal Commission estimated that, of the '\$2.235 million paid by way of general training grants to the CFMEU in the 2012-2013 financial year, almost \$1.4 million of that went directly to, and remained with, the CFMEU.'<sup>2</sup>

The Royal Commission also found that non-union worker members of BERT 'do not enjoy the full range of welfare benefits that are funded by the profits generated from the investment of their own redundancy monies'.<sup>3</sup> The Commission went on to state:

They are excluded from these benefits because they are not union members. ... [U]nder the existing system, the CFMEU uses these benefit programs as selling points for union membership. They are deliberately acting against the best interests of the members of the BERT fund generally in order to secure an advantage for the CFMEU.<sup>4</sup>

Some examples of the welfare programs cited by the Royal Commission that exclude non-union members are travel insurance, funeral benefits, dental benefits, free counselling and

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<sup>1</sup> Interim Report of the Royal Commission into Trade Union Governance and Corruption, volume 1, p 782.

<sup>2</sup> Ibid, volume 1, p 843.

<sup>3</sup> Ibid, volume 1, p 779.

<sup>4</sup> Ibid, volume 1, p 779.

child care payments. These welfare services are only available to financial members of the BLF, CFMEU or CEPU and their families.<sup>5</sup>

### Incolink

The Royal Commission found that 'many millions of dollars' flow from Incolink's approved worker entitlement funds to unions and employer organisations.<sup>6</sup> Two of Incolink's funds were said to:

make substantial "grants" of many millions of dollars each year to various unions and industry parties. The two largest recipients of funds are the MBAV and the CFMEU Vic.<sup>7</sup>

The Royal Commission reported that, over a five-year period (2011 to 2015), Incolink paid around \$35m to the CFMEU, \$32m to the Master Builders Association of Victoria (MBAV), and \$18m to the Plumbing Joint Training Fund.<sup>8</sup>

The Incolink Annual Report for 2014/15 states that \$22 million in 'grants' were paid by the fund in that year and used for training programs.<sup>9</sup> However, it was not made clear to the Royal Commission why the vast majority of grant money is provided to the organisations that participate on the Incolink board (CFMEU, MBAV and the CEPU's Plumbing Joint Training Fund<sup>10</sup>) compared to any other organisation.

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<sup>5</sup> Ibid, volume 1, p 824-825.

<sup>6</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption, vol 4, p 940-1

<sup>7</sup> Ibid, vol 4, p 944

<sup>8</sup> Ibid, table, vol 4, p 981.

<sup>9</sup> Incolink Annual Report, 2015, page 32.

<sup>10</sup> Final Report of the Royal Commission into Trade Union Governance and Corruption, vol 4, 939-40.

**Senate Standing Committee on Education and Employment**

**QUESTIONS ON NOTICE**

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

**Department of Employment Question No. 4**

**Senator Paterson asked in writing**

**Question**

Apart from requiring this independence, will the Bill allow such payments for training and welfare services to continue?

**Answer**

Yes. The Bill allows worker entitlement funds to continue to provide financial support to training and welfare services, subject only to the governance criteria in s329LD(2) of the Bill being satisfied. See also response to question 1.

## **Senate Standing Committee on Education and Employment**

### **QUESTIONS ON NOTICE**

#### **Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017**

##### **Department of Employment Question No. 5**

##### **Senator Paterson asked on 30 October 2017 on Hansard page 72**

##### **Question**

There's been some conjecture about the consultation that the government has engaged in about this bill. It is probably not useful for you to provide this verbally now but perhaps on notice you could provide details of who was consulted, when they were consulted and what form the consultation took.

##### **Answer**

The Department has answered this question on Hansard page 74 in response to questions from Senator Ketter.

On 3 October 2017, the Department consulted with the Committee on Industrial Legislation. Attendees were given a copy of an exposure draft of the Bill and allowed time to read it. Stakeholders were then invited to comment. The Department invited all participants of the Committee on Industrial Legislation to attend, which extends to members of the participant representative bodies. The following stakeholders chose to attend the Committee on Industrial Legislation consultation on 3 October 2017:

- Australian Council of Trade Unions
- Australian Chamber of Commerce and Industry
- Housing Industry Association
- Master Builders Australia
- Australian Industry Group
- National Farmers' Federation

On 3 October 2017, the Department also consulted with state and territory officials. Attendees were given a copy of an exposure draft of the Bill and allowed time to read it. They were then invited to comment.

On 4 October 2017, the Department Consulted with a number of worker entitlement funds. All worker entitlement funds currently registered for fringe benefits tax purposes were invited to attend. Attendees were given a copy of relevant parts of an exposure draft of the Bill and time to read the Bill. They were then invited to comment. Representatives from the following funds attended the consultation on 4 October 2017:

- |             |                           |
|-------------|---------------------------|
| • Incolink  | • NEST                    |
| • MERT      | • ProTrust                |
| • Reddifund | • ACIRT                   |
| • Protect   | • BERT                    |
| • BIRST     | • J&P Richardson          |
| • CIRT      | • Shaw's Darwin Transport |



## Senate Standing Committee on Education and Employment

### QUESTIONS ON NOTICE

#### Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017

#### Department of Employment Question No. 6

Senator Ketter asked on 27 October 2017 on proof Hansard page 75

#### Question

On notice, can I ask you to have a look at the issues identified by the ACTU and the CFMEU where there is an inconsistency between the bill and the royal commission, and provide a list of those?

#### Answer

The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017* (the Bill) implements recommendations 9, 10, 17, 39, 43, 45, 46, 47, 49 and 50 from the final report of the Heydon Royal Commission into Trade Union Governance and Corruption (Final Report).

The provisions of the Bill give effect to the recommendations, taking into account the existing statutory framework and broader policy considerations.

Areas in the Bill that modify the recommendations from the Royal Commission recommendations are:

#### Recommendations 10 and 39

- In light of the new disclosure requirements provided for in the *Fair Work (Registered Organisations) Amendment Act 2016* (2016 Act), the provisions of the Bill responding to Recommendations 10 and 39 have been adapted to ensure that there is no unnecessary duplication of reporting requirements. For example, remuneration of officers will be required to be disclosed under the officer and related party disclosure statements introduced by the 2016 Act (s293J) and as such, requiring a separate audited statement of similar information was not warranted.
- The requirement for the Registered Organisations Commission (ROC) to publish credit and charge card expenditure including credit card statements was modified to address the administrative burden and privacy concerns arising from this recommendation. These documents will still need to be retained by the organisation, but there is no upfront requirement to provide this documentation to the ROC.

#### Recommendation 45

- The Royal Commission recommended that ASIC regulate worker entitlement funds, or that such funds be regulated through standalone legislation. The Bill incorporates the amendments into the Fair Work (Registered Organisations) Act and provides the regulator of that Act, the Registered Organisations Commission, regulate these funds consistently with its role under this Act. ASIC already has extensive responsibilities, while the ROC is a dedicated and specialised regulator that can bring the necessary focus to regulating this multi-billion-dollar industry. The ROC is well suited to regulating worker entitlement funds given that such funds are usually controlled by unions and employer groups. The ROC was not established at the time of the Royal Commission's recommendation.



- The Royal Commission recommended that all of the money of a worker entitlement fund should be used solely for the purposes of benefiting employees, with surplus funds returned to contributors (ie. employers who contribute money on their employees' behalf). Even though Commissioner Heydon specifically recommended against allowing the income of funds to be used for any other purposes, the Bill allows an exception for funds to make payments for training and welfare services for workers. The exception recognises the important historical role worker entitlement funds have played in contributing to training and welfare services in the industries in which they operate.
- The Royal Commission recommended that smaller worker entitlement funds be excluded from regulation. There are practical and legal difficulties in giving effect to this recommendation and the Bill instead provides for a reduced level of regulation for single-employer funds. The Bill imposes fewer conditions on single-employer funds because unlike the bigger funds, they do not hold hundreds of millions of dollars for workers across an industry. Over-regulation of single-employer funds may also deter employers from establishing these funds which might make workers' entitlements more vulnerable to non-payment, particularly in the case of a business winding up.

#### **Recommendation 47**

Schedule 5 of the Bill responds to Recommendation 47 of the Final Report and has been modified to complement the disclosure regime established by the *Fair Work Amendment (Corrupting Benefits) Act 2017* to prevent duplication and ensure adequate disclosure by employers and organisations of financial benefits flowing from certain arrangements between them. Relevantly:

- The Bill amends the RO Act, rather than the Corporations Act, to ensure that relevant disclosure obligations stay within the Fair Work framework and to minimise duplication with existing disclosure requirements under the Fair Work Act.
- The Bill requires employers to also make disclosures, to ensure parity with the requirement for organisations.
- The Bill applies the recommended disclosure requirements to financial benefits received in connection with certain managed investment schemes, training funds, welfare funds, and worker entitlement funds, as well as employee insurance products.

#### **Recommendation 49**

The Royal Commission recommended that the Fair Work Act 2009 (Cth) be amended to make unlawful any term of an enterprise agreement that required contributions to be paid for the benefit of employees into a fund if it was not a superannuation fund, a registered worker entitlement fund or a registered charity. In addition, the Bill also provides that an enterprise agreement cannot compel employees to have contributions on their behalf paid into a particular fund.

#### **Recommendation 46**

This recommendation was to make consequential amendments to the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act) and that the existing class order excluding worker entitlement funds from regulation under the Corporations Act not be extended. The amendments to the FBTA Act are contained in this Bill, however worker entitlement funds will be formally excluded from regulation under the Corporations Act via amendments to that legislation at a later date. There is no duplication of regulation as worker entitlement funds continue to be exempt from regulation under the Corporations Act by virtue of the relevant class order.

**Recommendation 50**

The Royal Commission recommended a new civil penalty provision prohibiting a person from coercing an employer to pay an amount into a relevant fund. Schedule 4 of the Bill creates a new civil penalty provision which provides that a person must not take, or threaten to organise or take any action against another person (as opposed to an employer) with intent to coerce the other person, or a third person, to pay an amount to types of relevant funds. The provision is modelled on s 355 of the Fair Work Act, which is similarly expressed in general terms.

Recommendations 9, 17 and 43 have been implemented as set out by the Heydon Royal Commission.