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To the Secretary,

Submission – Inquiry into Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

National Entitlement Security Trust (NEST) was established in 2000 to provide a vehicle to secure worker entitlements in the Manufacturing Industry.

Workers in NEST are covered by Enterprise Bargaining Agreements (EBAs) that include contributions to Worker Entitlement Funds (WEFs).

WEFs play a key role in securing the entitlements of workers. This gives workers' peace of mind that they will be paid what they are owed in a timely manner in the event of their employer going into administration. These funds are also vital in providing for portability of worker entitlements. As work continues to change and the number of workers in insecure work increases, workers entitlements funds will ensure that workers maintain access to the full suite of industrial rights.

The Bill will do nothing to improve governance of WEFs and will subject them to an unnecessary increase in red tape. The proposed establishment of single-employer funds appears to be a direct attack on the long-term sustainability of the established and successful WEFs with no justification.

The Bill is also bad for taxpayers, as WEFs ensure that employers pay their workers entitlements ahead of time. This means that their employees won't need to rely on the Fair Entitlement Guarantee (FEG) should their employer go into receivership. Given that the government has expressed several times that it is concerned about the growth in reliance on FEG, it is counterproductive to attack WEFs which will help them to achieve this goal.

Thank you for the opportunity to make a submission to this inquiry. We would welcome the opportunity to provide further evidence if it would assist with the committee. If you require any additional information, please contact Victoria Angelis in the first instance.

Kind regards,

Dave Oliver
Independent Chair NEST

Submission – Inquiry into Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

Thank you for the opportunity for the National Entitlement Security Trust (NEST) to make a submission on the inquiry into Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill). NEST was established in 2000 to secure employee entitlements in a way that benefitted workers and employers. NEST's primary focus has been on the Manufacturing, but the trust deed does not limit NEST's coverage. The trust deed provides the ability to secure all forms of worker entitlements. Since its inception, NEST has delivered on this promise and secured the entitlements of approximately 9000 workers and has received contributions from 88 employers.

Not only does NEST ensure that workers entitlements are guaranteed and available when they need them, we also provide an important service to employers. This is achieved by helping businesses who contribute to the fund to reduce risk, improve their balance sheets and retain their workers by providing a highly valued employee benefit. Contributions are Fringe Benefit Tax (FBT) exempt and tax deductible, adding further incentive to employers to use NEST to secure their workers entitlements.

Darrell Lea example:

"The benefits of NEST can be easily demonstrated through a plethora of case studies over the past 18 years of its operation. An example is Darrell Lea who became a member of NEST in March of 2005 and made contributions on behalf of an average of 229 employees totalling an amount of \$946,000. In September of 2012 Darrel Lea went into administration. All of the 229 employees were able to receive their full employee entitlements at the time of the administration. This resulted in savings to the Australian taxpayer as the Fair Entitlements Guarantee (FEG) did not have to pay for the entitlements of these employees. This "would not" have been the case if Darrell Lea had not made contributions to NEST on behalf of their employees.

In addition, NEST plays an important social role as well. This is particularly acute when considering the impact of phoenixing and corporate collapses on workers and their families. By securing workers entitlements in a trust which is removed from the corporation in receivership, workers and their families have confidence that they will have prompt access to the money they are owed, which is particularly important during the turmoil created by sudden unemployment. This also means that NEST reduces the need to rely on the Fair Entitlements Guarantee (FEG) and ensures that workers' entitlements are paid by their employer, not the taxpayer. We will go into more details about the benefits provided by NEST below.

NEST does not believe that the changes proposed in this bill will improve outcomes for workers, employers, industry or society. NEST is already well regulated, well administered and has been providing a significant benefit for over 18 years. NEST currently has an independent chair with a casting vote where the board is deadlocked, however, the veto power provided for in the legislation is not consistent with a harmonious and functional management committee based on our decades of successful management of a corporate trust.

NEST is concerned that the creation of single employer funds will undermine this successful model for secure workers entitlements. Combined with a ban on fund selection through enterprise agreements and a requirement for employee choice under existing agreements, these changes may undermine the viability of NEST while creating an influx of for-profit commercial funds and unregulated single employer

funds. It is hard to see how the policy goal of securing employee entitlements to provide certainty to workers and their families would be furthered by the proposed changes. We will go into more detail about our concerns with the legislation below.

NEST recommends that the committee propose that the legislation not be passed.

Benefits for workers, employers and the community

NEST has been securing workers entitlements for 18 years. The trust provides for equal representation from workers and employers who contribute to the fund, with an independent chair. This model has proved very sustainable and successful, approximately \$20,000,000 under management.

As work has changed, the benefits of NEST have only increased, as workers entitlements can follow them from one job to the next, where both employers are contributors to the scheme. This is particularly important given the increasing number of precarious workers (contract, project, labour hire, etc.) who otherwise may not have access to the full suite of industrial entitlements as traditional full-time, directly employed, permanent workers. This will only increase in the years to come as the nature of work continues to change.

The portability and security provided by NEST is one of the main reasons why workers bargained for contributions to NEST being part in their enterprise agreements. Part of that benefit is the knowledge that we can monitor the contributions being made and chase up employers who do not make contributions on time. The mandated requirement for individual choice set out in the Bill will undermine the ability of NEST to ensure that each worker whose enterprise agreement requires contributions to be made are in fact being made.

While all workers benefit from having quick access to their entitlements when they need them, this is particularly important for workers whose employer has gone into administration. By holding workers entitlements, NEST is able to guarantee all of an employee's entitlement can be paid. In some cases, these entitlements may exceed that which is provided for by FEG.

Taxpayers also benefit when a worker has their entitlements secured in NEST. The FEG currently costs the commonwealth government over \$1 billion between 2012-13 and 2015-16 and the government has recently made changes to prevent corporate abuse of the scheme. Having an enterprise agreement that requires an employer to contribute to NEST is the best way to ensure that a worker receives all of their entitlements - paid for by their employer, rather than the taxpayer.

NEST has been designed to appeal to employers as much as employees and their involvement delivers a number of tangible benefits to their businesses. Due to the structure of the trust, contributions to NEST are tax free and FBT exempt. This means that employers are able to improve their balance sheets by removing liabilities (in the form of accrued employee entitlements) and manage them in a cost-effective manner.

This also assist them to manage their risk that unfunded liabilities can present. Importantly, involvement in NEST is highly valued by current and prospective employees, so it serves as an important recruitment and retention tool for employers seeking to engage the best workers.

NEST pays excess investment returns to contributing employers if not determined by the EBA. This helps to keep the fund affordable for employers as the surplus is used to subsidise actual entitlements providing a saving for employers, while ensuring that employees have their entitlements secured. This was a decision taken by NEST from its inception and it has served the employers and employees who are part of the fund as well.

Problems with the Bill

NEST has reviewed the proposed legislation in detail and identified a range of problems with the Bill. Our primary concern is that the Bill and associated documentation, including the findings of the Trade Union Royal Commission (TURC), do not articulate any problems with NEST, nor articulate any policy justification for the changes that are being sought. In our view, the proposed changes would weaken NEST – which has proven fit for purpose – and undermines the many benefits which workers and employers gain from their involvement.

Additional red-tape

The Bill establishes a complicated and onerous system of registration for NEST and other Worker Entitlement Funds (WEFs). The imposition of this additional red tape has been justified by the claim that NEST is currently unregulated, this is not correct. NEST has a range of regulatory responsibilities under taxation and corporations' law. The current regulation has proved fit for purpose as NEST has delivered benefits to workers, employers and industry without any hint of impropriety which has been rampant in other parts of the finance sector.

The Bill also grants the Minister the power to create new rules for NEST and to change those rules at any time, creating further regulatory uncertainty for NEST as we seek to comply with the new regime. In our view, the registration regime set out in the Bill may result in NEST being deregistered for purely administrative reasons unrelated to our performance as a fund.

Another concern is with the decision for the Registered Organisations Commission (ROC) as the regulator for WEFs. The ROC has been designed and staffed to regulate registered industrial organisations. It does not have the experience, skills or corporate infrastructure to properly regulate financial trusts like NEST. We believe that the primary concern for government regulation of funds like NEST should be our financial sustainability and ability to administer funds in accordance with our trust deed. Whilst we do not support the proposed regulatory scheme, we believe that oversight of any new regulations, should they be implemented, be undertaken by the Australian Securities Investment Commission (ASIC) who have expertise in regulation in the management of funds.

The Bill also requires NEST to appoint two independent directors. One must be unrelated to the operator of the fund, and a second unrelated to the operator, associate of the operator or any contributor to the fund, or union who has members that contribute to the fund. The current board comprises of experts from the industries covered by NEST, if the Bill passes in its current form the current Board would have to be replaced by persons unfamiliar with the characteristics of the industries covered which in our view is counterproductive. The policy reason given for these changes were to avoid deadlocks, ignoring the options currently available to boards of management to handle deadlocks. NEST has never had an issue with managing deadlocked or split boards and has operated with an independent chair since its inception.

Further, the changes which provide these independent directors with veto power over certain decisions of the board are not consistent with good governance in a boardroom setting. The NEST board has been a successful, consensus based decision-making body since its inception. This has helped to provide a united and stable approach that has allowed NEST to grow while providing great service to workers and employers who contribute to the fund. The creation of a de-facto “super director” with special powers to veto certain decisions – particularly where those directors, by definition, have the least connection to, and least knowledge of, the needs of the workers and employers who contribute to the fund – may introduce disharmony to a board without any clear justification or benefit.

Individual Choice

The Bill would require individual choice to be allowed for all current and future industrial agreements. While this is drafted to appear as a benefit to workers, the policy case behind mandating individual choice needs to be examined. NEST is not wealth creation vehicle; we exist to secure an existing and

defined entitlement. Indeed, one of the reasons that entitlements paid to workers by NEST receive different taxation treatment is because it is not used to create wealth for contributors to the trust. That is the reason that NEST disperses excess funds to employers to subsidise entitlements and in some cases to improve entitlements for employees.

Given that NEST meets any reasonable set of criteria set out for a WEF (member funds are available when required, we can demonstrate long term sustainability and meet all expected standards of corporate governance), we can see no practical benefit to workers for being able to choose one fund over another. There is no opportunity cost for workers, as the entitlement they are paid is determined by the terms of their employment, not the performance of trust (unlike superannuation). None of the policy goals set achieved by contributing to NEST are furthered by allowing individual choice and mandating individual choice may impact on our long-term sustainability.

There is also the question of practicality for employers being required to make payments into multiple different WEFs. The government has acknowledged concerns from businesses about the complexity of contributing to many different superannuation funds and has established the Small Business Superannuation Clearing House to simplify the process. There is no suggestion that a similar system will be established for WEFs. This means that the proposed system of individual choice will undermine existing agreements, create uncertainty within the management of NEST, provide poorer outcomes for workers and more complex administration requirements on employers without any clear benefit to workers, employers or NEST.

Single Employer Funds

NEST has significant concerns about the creation of single employer funds in the Bill. These funds will be entirely unregulated, unlike NEST or other funds which are established under the new rules set out in the Bill, and registration with the ROC will be voluntary for these funds. NEST has a number of concerns around the operation of these funds, which we will set out below.

- 1) **Poor regulation of single-employer funds.** As single-employer funds will not need to be registered as WEF's and will not be subject to any regulatory oversight. Single-employer funds are also exempt from a range of penalties set out in the Bill. In essence, the Bill will allow the creation of unregulated, unmonitored funds which will have no accountability – exactly the same thing that it incorrectly claims is wrong with the current system.
- 2) **Threat to workers entitlements.** It is unclear how single-employer funds, where they are controlled entirely by the employer, with funds entirely drawn from the company's finances, in an unregistered trust will be able to separate from the other parts of the corporation in cases of insolvency. This may lead to cases where employees' entitlements are not paid in a timely

manner when a company goes into administration or receivership. In many cases, it can take months for legal questions around company assets can be resolved, leaving workers without access to their funds. In some cases, a poorly established single-employer fund may lead to workers entitlements being reabsorbed into the corporate entity, and distributed to creditors, rather than paid to employees. This creates significant uncertainty for workers and may see more workers relying on the FEG than would be the case if the funds were by NEST.

It is also unclear whether payments from single-employer funds to employees can be made post-tax. This may leave employees worse off as the money that arrives in their bank account will be less when paid by a single-employer fund compared to a payment from a WEF. This may see workers significantly worse off, which is a particular concern for employees facing redundancy or other unexpected hardship.

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- 3) **Reduced benefit to employers.** Given the complexity in becoming a registered WEF, it is to be expected that that the majority (if not all) single-employer funds will be unregulated. As such, it is unlikely that they will be able to secure the same taxation treatment enjoyed by NEST. This treatment allows contributions to be claimed at tax deductions and means that they do not attract FBT. These are significant benefits to an employer who contributes to an existing fund, which are unlikely to exist for single-employer funds.
- 4) **Sham single-employer funds.** The above concerns both relate to good faith actors setting up single-employer funds and the problems that may exist, given the regulatory framework established by the Bill. However, given the high incidence of phoenixing, corporate malfeasance and increased reliance on the FEG, it is reasonable to ask how bad-father actors may exploit the loopholes crated by single-employer funds. Given there is no regulator responsible for inspecting the trust deed for any single-employer funds, there is no guarantee that they will have the best interests of the worker at their core.

There is also no guarantee that a single-employer fund will even involve the establishment of a trust and may simply be a separate bank account in which funds are placed. They may also be abused by employers who use them to transfer their own “entitlements” to protect them from recovery by administrators. There are doubtless many other means through which unscrupulous employers may seek to abuse the single-employer fund as a means of circumventing their legal requirement under the relevant Award or enterprise agreement.

Given these significant concerns, an important question arises about the policy reason behind the creation of single-employer funds. Given that they appear to create no benefit to workers and no benefit to employers who act in good faith, while creating a loophole to be exploited by bad-faith actors, it is difficult to understand why they are being created by the Bill. The only reason that appears to justify their creation is to give some substance to the individual choice mandate created in the Bill (discussed above).

Conclusion

NEST was established by workers and employers to secure workers entitlements and make them portable between jobs, while assisting businesses to manage risk and improve their balance sheets. The current administrative and regulatory environment has ensured that NEST is sustainable, attractive to workers and employers and fit for purpose – and the results speak for themselves.

The Bill does nothing to improve the operation, accountability or governance of NEST. It creates unnecessary red tape and an unreasonable administrative burden on NEST – which will be administered by a government agency which is not suited to the task.

The Bill also undermines the sustainable future of NEST by creating single-employer funds which provide no benefit to workers, nor employers who are acting in good-faith. These single-employer funds create loopholes which may be exploited, leave workers entitlements insecure and result in an even greater reliance on the Fair Entitlement Guarantee.

NEST recommends that the Committee recommend that the Bill not be passed by the Senate.