Australian Government
Department of Employment

Senate Education and Employment Legislation Committee
Inquiry into the
Fair Work Laws Amendment
(Proper Use of Worker Benefits) Bill 2017

Submission of the
Department of Employment
October 2017

Contents

Summary

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Bill).

2. During the 2016 election campaign, the Australian Government committed to implement recommendations of Royal Commission into Trade Union Governance and Corruption (Royal Commission). The Bill implements 10 of those recommendations, in full or in part.

3. The Bill will ensure appropriate governance and transparency for worker entitlement funds, and make related changes to ensure that funds are used to benefit workers and not for other purposes.

4. The Bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) and *Fair Work Act 2009* (FW Act) to:

    a. Require worker entitlement funds to be registered, and have proper governance arrangements such as providing annual reports on their operation, updating members on their entitlements and having at least one independent director on their boards;
    b. Ensure that payments under awards, enterprise agreements and contracts of employment can only be made to registered worker entitlement funds, charities and superannuation funds;
    c. Help ensure that payments by employees to election funds within their organisation cannot be compelled by making certain terms of an enterprise agreement or contract employment unlawful;
    d. Prohibit anyone coercing payments into a particular fund;
    e. Require employers and registered organisations to disclose any financial benefits they receive through payments into funds or particular insurance arrangements that organisations arrange or promote; and
    f. Strengthen financial management, disclosure and record-keeping requirements for registered organisations.

5. The Bill also makes consequential amendments to the *Fringe Benefits Tax Assessment Act 1986*, *Income Tax Assessment Act 1997* and *Taxation Administration Act 1953*.

6. This submission outlines the key measures in the Bill.

Schedule 1 – Financial management and accountability

7. This schedule amends and expands the financial disclosure and record keeping requirements for registered organisations.

8. Although there are existing financial management provisions in the RO Act, the Royal Commission identified a number of examples of significant financial mismanagement by some registered organisations. For example, despite being required to have rules setting out financial policies, at least one branch of an organisation examined by the Royal Commission was thought to have no written policies concerning expenditure. The Royal Commission also heard evidence

of officers and employees in a number of other organisations allegedly misusing credit cards to the value of hundreds of thousands of dollars.

9. The Royal Commission made a number of recommendations aimed at ensuring registered organisations meet basic financial management and governance standards, including recommendations 9, 10, 17 and 39, which are implemented in full or in part by the Bill.

10. There are currently no consequences for an organisation that fails to keep proper financial records, as required under section 252 of the RO Act. The Bill fixes this gap in the existing law by making this a civil penalty provision.

11. The Bill also requires registered organisations to have written and binding policies on: financial decision-making; receipts; levels of authorisation of expenditure; credit cards; procurement; hospitality and gifts; the establishment, operation and governance of related parties; and any other matters prescribed by the regulations. These are basic measures for good governance.

12. These policies must be approved by the committee of management and reviewed at least once every four years. Organisations will be required to lodge their policies with the Registered Organisations Commissioner as well as make them available to members. Failing to have such policies will attract a maximum civil penalty of 100 penalty units. The Bill allows the Registered Organisations Commissioner to publish model financial policies, which may be adopted, in whole or in part, by an organisation.

13. The Bill requires registered organisations to lodge with the Registered Organisations Commissioner statements about any loans, grants and donations they receive, in addition to their existing obligation to disclose those loans, grants and donations they give, if the arrangement is valued over $1,000. This includes a series of smaller arrangements that, over a year, add up to over $1,000. This extends the existing reporting obligations in section 237 of the RO Act.

14. The Bill also requires organisations to keep credit and charge card statements and records of the use of other cards that have their charges reimbursed by the organisation.

Schedule 2 – Regulation of worker entitlement funds

15. This schedule of the Bill contains provisions that deal with the governance, financial reporting and financial disclosures of worker entitlement funds. It implements Recommendations 45, 46 and 49 of the Royal Commission.

16. These recommendations follow a number of findings from the Royal Commission which involved worker entitlement funds making payments to registered organisations without the knowledge of employees whose entitlements were being held by those funds.

17. Worker entitlement funds manage and invest entitlements for workers, such as redundancy and sick leave pay. They are typically ‘joint ventures’ between unions and employer groups. They are similar to managed investment schemes, but are currently exempt from the regulatory

requirements that apply to managed investment schemes and financial products under the *Corporations Act 2001*.

18. Worker entitlement funds are subject to a degree of indirect regulation through the *Fringe Benefits Tax Assessment Act 1986* (FBTA Act) if they choose to become 'approved' funds and have contributions paid to them by employers exempted from fringe benefits tax. However, the governance requirements imposed by the FBTA Act are far from comprehensive. The provisions in the FBTA Act largely concern how fund money can be spent. They do not, for example, require the funds to disclose any fees they charge, or provide annual reports to interested persons, or to be operated by people of good fame or character, or to have independent voting directors on their boards. Further, the only consequence of worker entitlement funds not adhering to the law is the removal of the tax exemption for contributing employers.

19. In 2003, the Cole Royal Commission said the 'repercussions would be enormous should any of these funds diminish or collapse for reasons of mismanagement, misappropriation or abuse' and that the opportunity for this to occur 'is manifest'. This passage was quoted with approval in the Heydon Royal Commission's Final Report (Vol 5, p 314).

20. The Royal Commission estimated that worker entitlement funds in the construction industry alone collectively hold around $2 billion in assets, including entitlements held on trust (Final Report, Vol 5, p 297). For the Royal Commission, the size of the sector, and the repercussions that might follow if a fund failed, highlighted the need for worker entitlement funds to be properly regulated.

21. The Royal Commission identified a number of problems with the existing regulation of worker entitlement funds. For example, it noted that funds were not required to disclose commissions paid to unions or fees they deducted, nor were they required to provide annual reports or accounts to people with an interest in the fund. The Commission recommended that funds should be subject to governance standards, such as a requirement that directors be of good fame or character and provide regular financial reports to an independent regulator, and that there should be rules about how they deal with forfeited funds. The Commission also stressed the potential for conflicts of interest and breaches of fiduciary duties when worker entitlement funds make payments to unions and employer groups.

22. The Bill requires worker entitlement funds to be registered and to meet certain conditions. Broadly, the conditions relate to financial management, disclosure, board composition, and how fund money may be spent. For example, the Bill requires worker entitlement funds to have an independent voting director on their boards; to publish and provide the Registered Organisations Commissioner with annual reports; and to provide worker and employer members with information about their entitlements held by the fund. The Bill gives the Registered Organisations Commissioner the role of regulating these funds. The Bill also includes criminal and civil penalties respectively for operating or contributing to an unregistered worker entitlement fund.

23. The Bill maintains existing restrictions on the use of contributions and income by worker entitlement funds and adds some further requirements on how income can be spent. The Bill

also clarifies that contributions must always be treated as contributions, and income must always be treated as income. This is aimed at ensuring funds cannot avoid the statutory restrictions on how they may spend contributions and income.

24. The Royal Commission found that most funds distribute the income generated from investing contributions to industry parties 'to be used for purposes they see fit' (Final Report, Vol 5, p 304). Under the Bill, fund income can be paid to industry parties, but only for training and welfare services for workers, and only if these arrangements are transparent and made at arm's length. By clarifying the law about how fund money may be spent, the Bill reduces the potential for union officials to have a conflict of interest, or to breach their fiduciary duties, when they negotiate agreements that require employers to contribute to worker entitlement funds and ensures that funds are used for the benefit of workers.

25. In most other respects, the provisions in the Bill that regulate how fund money may be spent mirror the existing laws that relate to approved worker entitlement funds in the FBTA Act. However, under the scheme in this Bill, the consequences if a worker entitlement fund fails to comply with the laws about how fund money may be spent will include civil penalties and potential deregistration, not simply the removal of the fringe benefits tax exemption that is available when employers contribute to the fund.

26. The Bill includes civil penalties for failing to meet the prescribed conditions of registration and for failing to comply with any direction given by the Registered Organisations Commissioner in relation to those conditions.

27. Another enforcement mechanism in the Bill is the power of the Registered Organisations Commissioner to deregister funds that do not comply with their conditions. The Commissioner must give the fund notice of the proposed deregistration and publish this notice on its website. When deciding whether to deregister a fund, the Commissioner must consider the seriousness of the non-compliance, any previous non-compliance with ongoing conditions, whether deregistration would be in the best interests of the fund members, and whether other actions might be more appropriate.

28. Some employers contribute to funds that hold entitlements only for their own employees. The Bill allows these 'single-employer funds' to elect to be registered and regulated by the scheme, which would allow them to continue to be eligible for the fringe benefit tax exemption for contributions to registered worker entitlement funds. Single employer funds that elect to be regulated will be subject to fewer conditions than worker entitlement funds that manage contributions from multiple employers.

29. This lighter-touch regulation for single-employer funds is appropriate. These funds are set up to protect the entitlements only for an employer's own employees, while other multi-employer funds hold millions of dollars' worth of entitlements and accept contributions from thousands of employers for thousands of workers. Overregulation of single-employer funds may deter employers from establishing these funds entirely which might make workers' entitlements more vulnerable to non-payment, particularly in the case of a business winding up.

Schedule 3 – Election Funds

30. Schedule 3 gives effect to recommendation 43 of the Royal Commission. The Royal Commission heard evidence regarding a number of 'election funds' established for the campaigns of people running for office in a registered organisation. The Royal Commission found that election funds often receive contributions deducted from the salaries of the relevant organisation's employees and officials. The Royal Commission questioned whether these contributions were truly voluntary.

31. To ensure that election fund contributions are voluntary and not a condition of working for a union or an employer group, the Bill amends the FW Act to prohibit any term of an enterprise agreement or contract of employment that permits or requires employee contributions to an election fund. This will not prohibit officers and employees of registered organisations from making genuine donations outside of their employment agreement.

Schedule 4 – Prohibiting coerced payments

32. Schedule 4 gives effect to recommendation 50 of the Royal Commission. The Royal Commission uncovered serious coercive behaviour by some registered organisations—coercive behaviour that was aimed at securing employer payments to funds that provide significant financial benefits back to the registered organisation. The Commission raised concerns about this conduct and the issue of whether the current FW Act prohibits such coercive behaviour, particularly when it occurs outside the bargaining process. The Commission recommended a new civil remedy provision be added to the FW Act that will apply in broader circumstances than the current prohibition on coercion.

33. The Bill implements this recommendation and prohibits any action, other than protected industrial action, that is taken with the intent to coerce a person to make payments to a particular worker entitlement fund, superannuation fund, training fund, welfare fund, employee insurance scheme or certain managed investment schemes. The penalty is the same as for the other forms of coercion prohibited by the FW Act.

Schedule 5 – Disclosable arrangements

34. Schedule 5 of the Bill gives effect to recommendation 47 of the Royal Commission and increases transparency around the benefits that flow to organisations and employers from certain arrangements between them. The Royal Commission recommended greater disclosure, particularly around the financial benefits received by registered organisations from promoting insurance and other insurance-like arrangements. The Commission found that some registered organisations 'received very substantial commissions that were not disclosed properly, if at all, to the participants (both employers and employees) involved in the schemes' (Final Report, Vol 5, p 322).

35. The Bill requires registered organisations and employers to disclose any financial benefits they receive, and persons linked to them receive, from arrangements between them that are

promoted or arranged by an organisation and involve employee insurance products, certain managed investment schemes, worker entitlement funds, training funds or welfare funds.

36. For example, if a registered organisation receives a commission for promoting an insurance product, the organisation would be required to disclose this to relevant employers, who must then in turn disclose this to their employees. The disclosure must also be given to the Registered Organisations Commissioner, who must then publish the information on the Commission website. Similar obligations apply to employers, who must disclose financial benefits to employees.

37. This scheme complements existing arrangements for transparency in enterprise bargaining (sections 179 and 179A of the FW Act) and serves to alert employers and workers to potential conflicts of interest.

Human Rights

38. The Bill is consistent with Australia's human rights obligations. To the extent that it may limit human rights, those limitations pursue legitimate objectives and are reasonable, necessary and proportionate.

39. For example, by prohibiting terms of an enterprise agreement that allow employers to contribute to unregistered worker entitlement funds, the Bill may be said to engage with the right to negotiate terms and conditions of employment voluntarily. However, the provisions are reasonable, necessary and proportionate. They do not prohibit contributions to worker entitlement funds. Rather, they simply subject these funds to governance and disclosure requirements, and place reasonable restrictions on how fund money may be spent. This is designed to address potential conflicts of interest, breaches of fiduciary duties and coercion, which were problems identified by the Royal Commission.

40. The Bill engages the right to privacy through proposed amendments in Schedules 1 and 5, but the measures are reasonable and proportionate. Where the Registered Organisations Commissioner is required to publish information on its website, they must omit any residential addresses and may omit other personal information to limit any potential for breaches of privacy.

41. The Bill may also engage the right to protection from arbitrary interferences with, or attacks upon, reputation. For example, it requires the Registered Organisations Commissioner to consider whether certain officers and staff of a worker entitlement fund are of good fame or character. However, this is a reasonable and proportionate measure to ensure these funds are managed responsibly and professionally.

Consultation

42. The Department consulted on an exposure draft of the Bill with a range of stakeholders, including unions and employer groups as part of the Committee on Industrial Legislation, a sub-

committee of the National Workplace Consultative Council. Worker entitlement funds were also consulted.

43. A number of changes were made to the Bill following consultation. For example, the Bill was amended to allow worker entitlement funds to spend fund income on training and welfare services, provided such arrangements are transparent and made at arm's length. The Bill was also amended to more lightly regulate single-employer funds.

Conclusion

44. The Department appreciates the opportunity to provide a submission to the inquiry and is available to discuss the submission at a hearing of the Committee.