Senate Education and Employment Legislation Committee

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

SUBMISSION BY THE

CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION

25 October 2017

The Introduction of the Bill

1. The Turnbull Government introduced the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill* 2017 (**'the Bill')** into the House on 19 October 2017. On the same day, the Bill was referred to the Senate Education and Employment Legislation Committee with a reporting date of 10 November 2017.

2. On the morning of 23 October 2017, the CFMEU was formally advised that any submissions to the Committee would be required by close of business Wednesday 25 October 2017 – i.e. in less than three working days.

3. This unacceptably short period in which to analyse and comment on a lengthy and detailed piece of legislation gives interested parties no real opportunity to properly address the legislation or to assess its full impact.

4. Amongst other things, this Bill goes to the heart of the regulation of industry workers' entitlement funds which have been operating for decades and which manage a significant amount of workers' capital. Such important measures warrant proper and careful consideration. The indecent haste with which the Government has managed the introduction of this Bill shows that it is not genuinely concerned to get proper policy settings in place. Instead, the Government intends to try to push through this legislation without any consultation or public scrutiny.

5. This approach to the passage of the Bill itself is entirely at odds with the Government's own political rhetoric of transparency, accountability and good governance - the very reasons they put forward for the introduction of the Bill in the first place.

6. The degree of intrusion into internal union matters represented by this Bill is deeply troubling and forms part of a pattern of ever more onerous legislative prescription aimed at unions.

7. Australia is unusual amongst developed democracies in the extent to which there is statutory interference in the internal operations of trade unions. Indeed, it is strongly arguable that aspects of the current framework concerned with the regulation of trade unions in Australia are inconsistent with our key international labour obligations. At a general level, the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) of the International Labour Organisation (ILO) adopts at Article 3 as one of its fundamental principles the following:

Article 3

> *1. Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes.*

> *2. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.*

8. In conformity with international labour norms, the proper approach to regulation should be interfere in the internal workings of unions *only to the extent necessary* to achieve the objectives relating to democratic control and accountability.

9. It is therefore an unwarranted and illegitimate purpose for executive Government to legislate for the policies and industrial objectives of unions that it prefers. That is a matter for the democratic processes of unions, as set out in their registered rules. The Bill transgresses this important conceptual delineation by attempting to proscribe certain practices (real or perceived) that have developed as a result of the normal functioning of unions as representative bodies of workers during bargaining with employers.

10. The CFMEU opposes the contents of the Bill in its entirety and strongly urges the Committee to recommend that the Bill be rejected.

Schedule 1:

Financial Management and Accountability

11. It was a mandatory requirement in the rules of all federally registered organisations since 2014 that there be rules governing financial management and accountability. These include rule requirements that there be published policies and procedures relating to union expenditure, disclosure of officer remuneration, non-cash benefits and material personal interests, payments to related parties and mandatory training for officers with financial management duties. With the passage of the *Fair Work (Registered Organisations) Amendment Act 2016* most of these obligations were converted to statutory obligation with accompanying civil penalties. Schedule 1 proposes to convert the rules obligation to have financial management policies into a statutory obligation with attendant civil penalties.

12. The proposed measures are detailed and highly prescriptive. There are no equivalent measures for publicly listed companies that manage shareholder funds which far exceed union resources. Moreover, section 293N(1) allows for further extensive Ministerial interference in, and micro-management of, union affairs through the regulation-making power. Given the track record of the Coalition Government, that type of interference is likely to be undertaken for political purposes rather than to genuinely improve the functioning of trade unions.

Schedule 2:

Regulation of Worker Entitlement Funds

13. The Government has prosecuted its case for the amendments relating to worker entitlement funds on the basis that unions and individual officers have systematically and improperly enriched themselves at the expense of members of the funds. In a media release on 12 September 2017 the Minister went so far as to say that payments to funds:

> '….are often secured through clauses in enterprise agreements that are negotiated by the same officials controlling the funds into which the entitlements are paid, **and those officials then make distributions to themselves from these funds.'**

This sort of hyperbole is calculated to mislead and undermines any rational debate about the history, purpose and operation of these funds.

14. Worker entitlement funds were established by trade unions for the benefit of their members and workers generally. One of the purposes for which the funds were established was to secure worker entitlements from commercial risks such as employer insolvency. Another was to provide a level of portability for entitlements that might not otherwise accrue, particularly in itinerant or project-based industries like the construction industry. In those respects they serve a

valuable role in ensuring not only that workers receive their lawful entitlements, but that taxpayers do not have to pick up the bill for employers who fail to meet their obligations.

15. These funds have been effectively and efficiently managed for many years. Although many of the existing funds are jointly managed by union and employer representatives, one of the fundamental changes that would be wrought by this legislation would be to prevent unions establishing and operating worker entitlement funds altogether. That deprives trade unions of their most basic right to advance the economic and industrial interests of their members through these types of funds.

16. In the case of some of funds, income earned on contributions is applied to provide various benefits to industry participants and the industries in which they operate. Some examples of these funds and the benefits they provide are:

Incolink – Victorian construction industry redundancy fund (approx. 43,500 fund members)

- Insurance benefits, including income protection and accident and illness - 536 claims settled worth over $10 million
- A portable sick leave insurance scheme
- Wellbeing and support services such as counselling and drug and alcohol support - 256 Life Care Suicide Prevention education sessions were delivered to 3,188 building and construction apprentices across Victoria
- Apprentice support programs
- Job support, which includes employment, training and careers services - $22.4 million in contributions were paid for industry training and development and specific industry occupational health and safety programs[1]. Training is provided to approximately 16,000 workers each year. An amount of $4.8 million was provided in 2016-17 to fund the scheme's Occupational Health & Safety program.
- Ambulance, accident and funeral cover
- Health checks for approximately 4,000 workers each year.

BERT – Queensland/Northern Territory construction industry redundancy fund

- BERT training fund – provides funding to meet the cost of training courses with registered training organisations. Currently over 600 construction industry apprentices receive funding through this system
- 'Mates in Construction' funding – industry suicide prevention and mental health organisation
- Funeral benefits
- Travel insurance

These funds are an example of unions and employers working together to deal with industry problems. It is wrong to say that the worker entitlement funds simply hand

[1] Incolink Annual Report 2016

money over to union officials or unions (or employers for that matter) to apply in whatever way they see fit. Funding or grants that are provided are conditional upon and subject to strict auditing requirements.

17. In any case the Heydon Final Report did not recommend that unions or union officials should be banned from obtaining *any* financial benefit from the operation of clauses in enterprise agreements, including clauses that specified contributions to particular worker entitlement funds. The main recommendations of the Report in this respect were firstly that there be mandatory disclosure where clauses confer, directly or indirectly, benefits on bargaining representatives. That measure has already been enacted through the recent 'Corrupting Benefits' amendments. The second was to impose a system of mandatory registration and minimum governance requirements on entities through whom financial benefits might be conferred.

18. Trustee directors of jointly managed funds, both union and employer, receive board fees for the work they do in administering the funds. That is not unusual, particularly given that the creation of the funds was driven by the unions. The CFMEU has made no secret of the fact that any board fees paid to individual CFMEU directors of these funds are not retained by those individual directors but are passed back to the union that they represent for the benefit of union members.

19. To the extent income from the schemes has been applied to parties other than the fund members directly, these are legitimate payments made in the interests of a significant number of fund members or the industry in which fund members are engaged. This includes payments for training and welfare purposes or for specific industry-related purposes (see above) which the trustees of the fund have determined - democratically and lawfully - to ultimately be in the interest of fund members. There is nothing improper in those arrangements.

20. The Heydon Royal Commission never really came to terms with the idea that fund income could be legitimately applied to the collective benefit of workers in an industry or a significant number of them, or the industry itself. For example counsel assisting suggested during the QLD CFMEU hearings that construction industry fund members would find it unacceptable that fund proceeds could be used to train apprentices for the industry, particularly because these apprentices would later become competitors for the jobs of those fund members. That strange proposition, made without the benefit of a single fund member complainant, shows an extraordinary lack of understanding of how a manual skills-based industry actually works or the attitudes of those who work in those industries and want to see skills passed on for the benefit of all.

Award and Agreement Terms

21. The proposed amendments establish a new system of mandatory registration for industry funds and oversight of their governance arrangements by the Registered Organisations Commission (ROC). Item 3 of Schedule 2 goes much further than simply requiring that awards designate that payments for workers' entitlements must be paid to a registered worker entitlement fund. Under this

provision, a modern award cannot include a term relating to the payment to a worker entitlement fund unless each and every individual employee can, under the terms of the award clause, choose the particular registered fund to which payments can be made.

22. This requirement for individual choice of funds is further extended into the provisions relating to enterprise agreements. The proposed addition to s 194 of the FW Act makes a term of a proposed agreement unlawful unless each of the employees on whose behalf payments are to be made can choose the registered worker entitlement fund into which the payments are to be made. On this basis, a clause in an agreement designating one (or even many) registered funds would be classified as an unlawful term even where it formed part of an agreement that had been unanimously approved by a ballot of employees.

23. These amendments also go further than simply establishing a regime of registered funds with minimum governance requirements including that contributions be made only to those funds. They require that each award and agreement confer a positive right on individual employees to direct payment to a particular registered fund even though another registered fund may have been agreed to during enterprise agreement negotiations. The same issue arises in relation to the choice of insurance products. There was no recommendation to this effect in the TURC Report.

24. It should also be recognised that the pooling of workers capital gives all members of the funds a combined purchasing power that they would not otherwise enjoy. If individual workers disperse contributions to a wide range of funds, or if, as the Bill proposes, a plethora of single employer funds are created which are completely outside the scheme of regulation[2], then this will quickly undermine the commerciality of benefits that the funds can provide. This will result in a reduced level of benefit or an increase in the unit cost of providing the benefit/s, or both.

25. The amendments also render other enterprise agreement clauses as unlawful terms. These include clauses that require or permit payments to certain funds that provide or make payments in relation to training and welfare unless those funds are one of a number of designated types, including a registered worker entitlement fund. Thus unions will be unable to achieve contributions to union-operated benefits funds through the ordinary processes of bargaining.

Training and Welfare Payments

26. In the second reading speech for the Bill the Assistant Minister for Trade, Tourism and Investment said:

> *'The funds will still be able to spend money on training and welfare services for the benefit of workers, such as crisis counselling or health checks, but the arrangements will have to be reasonable, transparent, and made at arm's length.'*

[2] Section 329HC(4).

However the terms of the Bill mean that fund income can only be used for training and welfare purposes where that is approved by at least two of the so-called 'independent' directors (s 329LD(2). These directors effectively have a power of veto over fund expenditure of this kind. This gives them more power than other directors of fund trustees and was not something that formed any part of the TURC recommendations. In fact the only rationale and role for independent directors in the TURC report was as a mechanism for breaking board deadlocks[3]. The resolution of deadlocks is properly a matter to be determined by fund rules rather than a mandatory requirement for a so-called 'independent' director with powers above and beyond other directors.

Use of Fund Income

27. It is important to note that the Heydon Final Report made no specific recommendations that the law be changed to restrict or determine the use to which worker entitlement fund income could be put. However the section 329LD of the Bill imposes strict rules on the application of fund income. Among these is a requirement that any payment for training or welfare purposes that are not provided by the fund operator must be provided at market value and on commercial terms. This means that payments to welfare or charitable organisations which are made as a gift or donation will be prohibited even where the payment is for a legitimate and beneficial purpose that is of direct and measurable benefit to members of the funds. One example of such payments is the contributions made by redundancy funds to the 'Mates in Construction' mental health/self-harm and suicide prevention programme. There is no equivalent restriction in corporate law.

Fund Rules

28. Proposed s 329NJ gives the Minister unprecedented power to intervene in the internal administration of the funds by allowing the Minister to make any rules that are permitted to be prescribed by fund rules. This extraordinarily wide rule-making power allows the Minister to determine virtually any aspect of the fund's operation and suggests that the promise to allow funds to continue to support legitimate expenditure on welfare and training may be a short term measure to secure the Bill's passage which can be quickly reversed through this rule-making power once the Bill has passed. It is unclear whether this Ministerial rule-making power could extend to taking a fund outside the bounds of a being a workers entitlement fund altogether.[4]

[3] Final Report Volume 5 page 307.
[4] See section 329HC(1)(b)

Schedule 3:

Election Payments

29. Schedule 3 of the Bill does three things. It defines a 'regulated election purpose'. Secondly, it makes a term of an enterprise agreement that requires or permits a payment for such a purpose to be unlawful. It also provides that any term of a contract of employment has no effect to the extent it requires or permits a payment for such a purpose.

30. The intent of the measures in Schedule 3 appears to be to address a perceived problem, identified in Volume 5 of the Heydon Final Report, that union officials and employees are being coerced into making contributions to election funds for the re-election of certain officials. However the measures in the Schedule go beyond the Heydon recommendations.

31. The Heydon Final Report (and an earlier TURC Discussion paper) considered two measures to specifically address the perceived problem of ensuring the voluntariness of contributions to election funds. One was prohibiting the use of direct debit and payroll deduction arrangements. The other was prohibiting any condition of employment requiring an employee of an organisation to contribute to an election fund.[5] The first of these measures was rejected by the Heydon Report which said that there could be no suggestion that employees should be prohibited from contributing to a mutual fund. The Report concluded:

> *Direct debit arrangements can be a convenient way of employees making genuine contributions to a cause they believe in, provided they are entered into voluntarily and independently of a contract of employment. Accordingly, they should not be prohibited.*[6]

32. However Item 2 of Schedule 3 that a term of an enterprise agreement adopts a prohibition on direct debit and payroll deduction arrangements for election-related purposes by providing that such terms are 'unlawful terms' under the Fair Work Act.

33. The Heydon Report provides no justification for this measure. Moreover, the other measure (Item 5), also makes ineffective the terms of a contract of employment voluntarily entered into, which *permits* (as opposed to 'requiring' – see Volume 5 page 285, paragraph 30) an employee direct debit or payroll deduction arrangement. This cannot have been the intention of the Heydon recommendation given the focus on voluntariness.

[5] Volume 5 page 284.
[6] Volume 5 page 285.

Schedule 4:

Prohibiting Coerced Payments to Employee Benefit Funds

34. There is simply no evidence that a provision prohibiting 'coerced' claims for payments outside the bargaining system is warranted. The measure was suggested to the Heydon Commission by the Australian Industry Group and adopted in the Final Report without any real analysis save for the suggestion that the existing provisions of the Act may not cover a situation where claims are made outside the bargaining process. Any action that amounts to 'coercion' and which is not taken in relation to a proposed enterprise agreement, for example in pursuit of a 'side-deal', would be very likely to be unprotected industrial action in any case and would expose those taking the action to a civil penalty.

35. In any event, the proposed s 355A in the Bill goes further than recommendation 50 in the Heydon Final Report in that the prohibition applies not just to employers but to any third party.

Schedule 5:

Disclosable Arrangements

36. The disclosable arrangement provisions go well beyond Recommendation 47 of the Final Report which was confined to a consideration of insurance arrangements involving some connection with a registered organisation.[7] The proposed measures cover managed investment schemes i.e. worker entitlement funds, funds which provide training and welfare services and indeed any other arrangement prescribed by disclosable arrangement rules which are determined entirely by the Minister.[8]

37. The disclosure rules are cumbersome, highly prescriptive and have a complex interaction with the existing disclosure rules during enterprise bargaining. Not only are the arrangements to be disclosed before any arrangement is entered into, but also when they come to an end.[9] These arrangements are deliberately designed to hamstring unions in compliance red tape and to create work for the ROC. Significantly the proposed disclosure rules apply to unions only and not to employers as is the case with the recent *Corrupting Benefits* amendments.

Recommendation:

38. The Bill should be opposed.

[7] See Volume 5 Chapter 5 Part F
[8] Section 329PE and 329PF.
[9] Section 329SA.