Senate Education and Employment Legislation Committee

Inquiry into the Fair Work laws Amendment (Proper Use of Worker Benefits) Bill 2019

Submission by the Construction, Forestry, Maritime, Mining and Energy Union

29th August 2019

Executive Summary

The Senate has referred the Fair Work laws Amendment (Proper Use of Worker Benefits) Bill 2019 to the Senate Education and Employment Legislation Committee for inquiry.

The Bill's alleged purpose is to protect monies held for redundancy pay, sick leave and other benefits and to ensure this money is managed responsibly, transparently and in the best interests of workers.

Worker Entitlement Funds have been in existence for over 30 years in the building and construction industry. There is no evidence or history of these Worker Entitlement Funds not managing the monies entrusted to them responsibly, or not meeting their obligations to pay workers their entitlements. On the contrary the Worker Entitlement Funds in the building and construction industry have, since their establishment, paid out over $2.5 billion in redundancy entitlements to workers. This is significant in an industry where the liquidation and phoenixing of companies is rife.

The Worker Entitlement Funds benefit both employers and workers and use the earnings from investing the money held in trust to provide additional benefits to the industry such as much needed support of training and suicide awareness and prevention programs.

The provisions contained in the Bill are unnecessary and not only threaten the viability of the services provided by the Worker Entitlement Funds but also the existence of the Funds and the protection of worker entitlements.

The Bill also contains proposed changes to the Fair Work Act 2009 and the Fair Work (Registered Organisations) Act 2009 which seek to further regulate enterprise bargaining and the internal affairs of trade unions. These provisions do nothing more than add another level of complexity to an already complex system of workplace bargaining and further interfere in the democratic processes of trade unions.

The Senate Committee is strongly urged to reject the Fair Work laws Amendment (Proper Use of Worker Benefits) Bill 2019.

Introduction

1. The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (Cth) (Worker Benefits Bill) has been referred to the Senate Education and Employment Legislation Committee for inquiry. According to the Explanatory Memorandum, the Worker Benefits Bill seeks to amend a number of existing Acts in the following ways:

    - Amend the *Fair Work (Registered Organisations) Act 2009* (the RO Act) to apply governance, financial reporting and financial disclosure requirements to worker entitlement funds.
    - Amend the *Fair Work Act 2009* (the FW Act) to:

        prohibit terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity;

        require any term of a modern award or enterprise agreement that names a worker entitlement fund or insurance product to allow an employee to choose another fund or insurance product;

        prohibit any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association; and

        prohibit any action with the intent to coerce an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme.
    - Amend the RO Act to:

        require registered organisations to have written financial expenditure policies that have been approved by the committee of management;

        require registered organisations to report certain loans, grants and donations ;

        require specific disclosure by registered organisations of the financial benefits obtained by them and persons linked to them in connection with employee insurance products, welfare fund arrangements and training fund arrangements;

        introduce a range of new penalties to ensure compliance by registered organisations with financial management, disclosure and reporting requirements ; and

        make a small number of minor technical amendments to correct referencing and other drafting errors, and to provide clarity on the operation of existing obligations.
    - Make consequential amendments to the *Fringe Benefits Tax Assessment Act 1986*, the *Income Tax Assessment Act 1997* and the *Taxation Administration Act 1953*.[1]

2. The supposed reason for introducing the Worker Benefits Bill, as stated by the Attorney-General, Minister for Industrial Relations, the Hon Christian Porter MP, is to:

1 Explanatory Memorandum, *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019*, p.i-ii

"*protect what is now over $2 billion dollars held for redundancy pay, sick leave and other benefits for workers in many industries. The bill is aimed at ensuring this money is managed responsibly, transparently and in the best interests of workers.*"[2]

3. There is, however, no evidence or history of Worker Entitlement Funds (WEFs) in the building and construction industry not managing the monies entrusted to them responsibly, or not meeting their obligations to pay workers their entitlements. On the contrary the WEF's in the building and construction industry have, since their establishment, paid out over $2.5 billion in entitlements to workers.

4. Worker Entitlement Funds (WEFs) in the building and construction industry have been in existence for nearly 30 years. They were established to safeguard redundancy and other entitlements of building and construction workers. They have performed this function well in the best interest of workers and employers. WEFs have also played an important role in providing training and welfare benefits to both employers and workers in the industry. It will be extremely difficult, if not impossible, to maintain these benefits should the provisions contained in the Workers Benefits Bill be legislated.

5. It is quite obvious that an ulterior motive behind the Worker Benefits Bill is curbing the activities of trade unions and increasing the regulatory burden on them. This is demonstrated by the unrelated provisions contained in the other schedules in the Worker Benefits Bill which seek to:

   - impose further financial management and responsibility obligations on registered organisations (Schedule 1);
   - regulate contributions to union election funds (Schedule 3);
   - limit the claims unions can make for contributions to particular superannuation funds, welfare funds and other worker benefit funds (Schedule 4); and
   - require unions to disclose any financial benefit they receive from promoting or arranging an insurance product, welfare fund or other such arrangement (Schedule 5).

6. These provisions essentially mirror those contained the previous Bill[3], introduced in the 45th Parliament, which lapsed when that Parliament was dissolved on 11th April 2019. The following comments from the CFMEU's October 2017 submission on the previous Bill are therefore just as appropriate to the provisions of the Worker Benefits Bill:

   "*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 2nd reading speech 4th July 2019
3 *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017*

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."

7. The Construction Forestry, Maritime, Mining and Energy Union (the CFMEU) opposes the content of the Worker Benefits Bill and strongly urges the Senate Committee to put workers and their industries first and recommend that the Worker Benefits Bill be rejected.

History of Worker Entitlement Funds in the Building and Construction Industry

8. The establishment of Worker Entitlement Funds (WEFs) in the building and construction industry can be traced back to the redundancy disputes of the late 1980's.

9. The Australian Conciliation and Arbitration Commission 1984 Termination, Change and Redundancy Case, which determined a new redundancy standard for employees covered by Federal awards, did not contemplate the building and construction industry and daily hire employees were excluded from the notice provisions in the decision.[4] This led to industrial disputation in the industry and arising from these disputes a separate industry specific redundancy/severance entitlement was agreed upon by the industrial parties and subsequently inserted into Federal and State building and construction awards.

10. On 22 March 1989 a Full Bench of the Australian Industrial Relations Commission[5] (AIRC) granted applications to vary the principal building and construction industry awards for redundancy payments.[6] On 10 October, 1990 the AIRC issued its decision on what was to become the final form of the redundancy provisions for the building and construction industry[7] reflecting an in-principle agreement between all of the organizations respondent to the awards. Appeals against this decision and formulation set out therein were dismissed by two separate Full Benches.[8]

11. At the same time as the AIRC proceedings were occurring, the industry parties at a State level agreed to the establishment of redundancy funds to enable contributions to be made by employers on behalf of their employees to fund employer liabilities under the awards. The funds established at this time included:

- Building Employees Redundancy Trust (BERT) which was established in Queensland in 1989
- Building Industry Redundancy Trust (BIRST) which was established in South Australia in 1989

4 See 8 IR 34 at 50
5 The Australian Conciliation and Arbitration Commission became the Australian Industrial Relations Commission in ***1988 (check)***
6 Building & Construction Industry Termination, Change and Redundancy (TCR) Test Case – Print H7465
7 Print J4870
8 See Print K4831 and K2799

- Construction Employees Redundancy Trust (now ACIRT[9]) which was established in NSW
- Redundancy Payment Central fund Limited (Incolink is its trading name) which was established in Victoria in 1988
- TAS Construction Employees Redundancy Trust (now part of ACIRT) which was established in Tasmania
- WA Construction Industry Redundancy Fund (now ReddiFund[10]) which was established in Western Australia in 1989

12. The award clauses, determined at the time, contained a specific provision to prevent any "double dipping" of the award entitlement and contributions made to a redundancy fund. This provision is still included in the redundancy clause in the modern award, the Building and Construction General On-site Award 2010, which states:

> "*17.4 Redundancy pay schemes*
>
> *(a) An employer may offset an employee's redundancy pay entitlement in whole or in part by contributions to a redundancy pay scheme.*
>
> *(b) Provided that where the employment of an employee is terminated and:*
>
> *(i) the employee receives a benefit from a redundancy pay scheme, the employee will only receive the difference between the redundancy pay in this clause and the amount of the redundancy pay scheme benefit the employee receives which is attributable to employer contributions. If the redundancy pay scheme benefit is greater than the amount payable under clause 17.3 then the employee will receive no redundancy payment under clause 17.3; or*
>
> *(ii) the employee does not receive a benefit from a redundancy pay scheme, contributions made by an employer on behalf of an employee to the scheme will, to the extent of those contributions, be offset against the liability of the employer under clause 17.3, and payments to the employee will be made in accordance with the rules of the redundancy pay scheme fund or any agreement relating thereto. The employee will be entitled to the fund benefit or the award benefit whichever is greater but not both.*
>
> *(c) The redundancy pay scheme must be an Approved Worker Entitlement Fund under the Fringe Benefits Tax Assessment Act 1986*."

13. Since their establishment the industry redundancy funds, or Workers Entitlement Funds to give them the name consistent with the fringe benefits legislation, have paid out over $2.5 billion[11] in redundancy payments to workers in the building and construction industry:

- ACIRT has paid out over $1.05 billion since the beginning of 2010
- Since the BERT Fund commenced, it has paid out over $649 million in redundancy benefits to members[12]
- Since 1989 BIRST in SA has paid $158 million to workers in the building industry[13]
- Incolink has paid out $531 million to over 87,000 claimants since July 2014
- WACIRF/ReddiFund has processed more than 101,000 claims and paid out more than $191 million.

9 ACIRT was established in October 1994. The AMEC fund joined it in 1995, the CERT Fund in 1997 and TASCERT in 2000
10 ReddiFund replaced WACIRF in 2003
11 This is a conservative figure as the ACIRT amounts are only for the period since 2010 and the Incolink figure is only for the period post July 2014
12 https://www.bert.com.au/bert/
13 https://www.birst.com.au/pdf/members_report.pdf p.3

Worker Entitlement Funds Benefit Employees, Employers and Government

14. The obvious benefits of WEFs are the redundancy entitlements paid to workers. For example according to its 2019 Annual Report ACIRT alone paid $101,795,547 to its members in the last year.[14]

15. Employers also see the collection and payment of redundancy entitlements as a benefit as noted by Peter Marino, CEO of the Azzurri Concrete company,

> "*At the end of the day you never know in life. We like ACIRT. It's a bit of comfort for our employees. It's virtually job security for them. If things happen, they have security. Happy employees make a happy environment.*
>
> *'My opinion's always been like this. In the last 10 years I've seen a number of*
>
> *companies liquidated or pheonixed and individuals have lost all their entitlements. When it comes to ACIRT, there's more pros than cons by a country mile.*"[15]

16. The importance of this employers' comment and the significance of these payments, particularly for the Federal government, cannot be ignored. It is well known that the building and construction industry is plagued by phoenix companies and companies going into liquidation. The December 2015 Report of the Senate Economics References Committee on Insolvency in the Australian Construction Industry noted that:

> "*The industry's rate of insolvencies is out of proportion to its share of national output. Over the past decade the industry has accounted for between 8 per cent and 10 per cent of annual GDP and roughly the same proportion of total employment. Over the same period, the construction industry has accounted for between one-fifth and one-quarter of all insolvencies in Australia.*
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> *This outcome isn't, as some have argued, the result of market forces. While the construction industry is highly competitive and market forces play a part, there are other powerful factors at play. The structure of the commercial construction sector, serious imbalances of power in contractual relationships, harsh, oppressive and unconscionable commercial conduct play a major role when combined with unlawful and criminal conduct and a growing culture of sharp business practices all contribute to market distortions. As a result, the industry is burdened every year by nearly $3 billion in unpaid debts, including subcontractor payments, employee entitlements and tax debts averaging around $630 million a year for the past three years.*
>
> *.....*
> *The economic cost of insolvencies in the construction industry is staggering. In 2013–14 alone, ASIC figures indicate that insolvent businesses in the construction industry had, at the very least, a total shortfall of liabilities over assets accessible by their creditors of $1.625 billion. Others who have analysed the data place the amount at $2.7 billion. The construction industry consistently rates as either the highest or second highest as against all other industries when it comes to unpaid employee entitlements.*"[16]

17. The existence of the WEF's in the building and construction industry will not prevent all of these economic costs being incurred, now or in the future, but they do go some way in lessoning the

14 https://www.acirt.com.au/FormBuilder/_Resource/_module/XhAoMt_jR0GkjkoEbTQBtg/docs/publications/member/annual_report.pdf p.5
15 Ibid, p.11
16 https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Insolvency_construction/Report/b02

burden on employees and the cost for the Federal government. If it were not for the WEFs the call on the Federal Entitlements Guarantee (FEG) scheme would be a lot higher than the average annual payment of $235.3 million incurred in the four year period between 1 July 2014 and 30 June 2018.[17]

18. An often overlooked benefit to employers (in addition to ensuring that their financial obligations to employees are met) is that the contributions that they make to the WEFs are an allowable deduction under section 8-1 of the ***Income Tax Assessment Act 1997***.[18] Contributions made to a WEF are also exempt payments under the Fringe Benefits Tax legislation as long as they meet the criteria determined under that legislation. According to the ATO's "Fringe benefits tax – a guide for employers":

> *"20.9 Worker entitlement contributions*
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> *A worker entitlement fund is a (trust) fund for employee long service leave, sick leave or redundancy payments. These funds are often referred to as redundancy trusts or redundancy funds. Although these funds operate in a variety of ways, their purpose is to manage employee entitlements and provide portability and protection.*
>
> *Contributions to worker entitlement funds for the FBT year commencing 1 April 2006, and for all later FBT years, are exempt benefits where the payment is:*
>
> - *made to an approved worker entitlement fund*
> - *made under an industrial agreement, and*
> - *either for leave, redundancy or the reasonable administrative expenses of the fund.*
>
> *A payment made according to an existing industrial practice or an existing fund will not be exempt from FBT unless it satisfies the above criteria."*[19]

17 https://www.ag.gov.au/industrial-relations/industrial-relations-publications/Documents/feg_recovery_program_fact_sheet.pdf
18 See for example https://www.acirt.com.au/Employer/?page=Employer-Tax-Implications
19 https://www.ato.gov.au/law/view/document?DocID=SAV/FBTGEMP/00021&PiT=99991231235958/&anchor=Approved_worker_entitlement_funds#Approved_worker_entitlement_funds

19. The structure, investment strategy and benefits paid for by WEFs are determined by the trust deeds and decisions of the Boards of Directors of the individual funds. There are however some common elements in that the Boards of the WEFs have equal representation from employer organisations and trade unions:

Worker Entitlement Fund	Board Composition
ACIRT	7 employer representatives (3 from MBA NSW, 2 from AIG, 1 from CCF and 1 from MP&MCA)
	7 union representatives (3 from CFMEU, 1 from ACTU, 1 from AMWU, 1from AWU and 1 from CEPU(Plumbers))
BERT	4 employer representatives (4 from the QMBA)
	4 union representatives (3 from CFMEU and 1 CEPU (Plumbers))
BIRST	4 employer representatives (2 from MBA SA and 2 from private employers)
	4 union representatives (3 from CFMEU and 1 CEPU (Plumbers))
REDDIFUND	3 employer representatives (1 from MBA WA, 1 from Master Plumbers & Gas-fitters WA and 1 from Construction Contractors Association of WA)
	3 union representatives (3 from the CFMEU)
	1 Chair (non-voting)
INCOLINK	4 employer representatives (4 From MBA VIC)
	4 union representatives (2 from CFMEU, 1 from CEPU (Plumbers) and 1 from VTHC)
	1 Chair
	1 Independent non-voting Director

20. In addition to the redundancy payments a number of the WEFs provide additional benefits to the industry funded out of the investment returns on monies held in trust. Contrary to the claims of "rivers of gold" flowing to trade unions, the reality is that the WEF's use the income earned to provide genuine benefits to employers and employees in the building and construction industry.

21. It is important to note that none of the WEFs, in the building and construction industry, use the money collected and held in trust for members' redundancy entitlements to pay for administrative costs or the additional benefits provided. Of equal importance is the fact that WEFs are already required to be audited on an annual basis in accordance with the trust deed of the WEF.

22. The range and level of additional benefits or services provided by the WEFs varies across the funds.

23. The ACIRT fund has 95,000 members and over 2000 contributing employers.[20] The income of the fund is used to pay for its administration expenses, pay funeral expenses in certain circumstances and pay annual distributions to members of the fund. Over the last 10 years ACIRT has paid out $150m in distributions. The average balance of members is $1500.

20 ACIRT News and Annual Review 2019, op cit. p.3

24. The Building Employees Redundancy Trust (BERT) was established in 1989 to provide redundancy payments and benefits to its members and training grants for employees in the Queensland building and construction industry. It now also covers the Northern Territory building and construction industry. In 1996 a new trust, the BERT Fund No.2 was established to cater for the new benefits introduced by BERT, including the Welfare Fund.

25. The BERT fund has 65,000 members and over 800 contributing employers. In addition to paying out over $649 million in redundancy benefits to members the fund has contributed in excess of $64 million for industry training and $92 million for employer and member benefits.

26. The BERT Training Fund (BTF) is a joint union and employer initiative which provides members of BERT with funding and assistance to improve their skills. The BTF, which was previously known as the Queensland Construction Training Fund was established in 1991 to enable the industry to take responsibility for the funding of its training needs. BTF provides assistance in both the trade and non-trade occupations in the building, civil and engineering construction sectors of the industry. The applicant may either be employed or unemployed. BTF receives annual financial disbursements from BERT and related trust funds. These funds are provided to BTF for the purpose of improving skills in the industry. The following are the key conditions for individual members having access to the funding for training:

    - Generally, BTF will only fund accredited training.
    - The training can be for short courses (e.g. asbestos removal, computer skills, confined spaces, crane operating (mobile, tower, etc.), traffic controller), certificate III courses (e.g. demolition, drilling, surface extraction operations, gas fitting, fire protection inspection and testing), or advanced (certificate) courses (e.g. certificate IV, diploma, advanced diploma in Building and Construction; certificate IV, diploma, advanced diploma in Work Health and Safety; certificate IV in civil construction supervision; certificate IV, diploma in plumbing and services).
    - The training can be done anywhere provided it is delivered by a registered training organisation.
    - Training grants are limited to a total of $1,500.00 per course.
    - No funding is provided for Recognition of Prior Learning (RPL) assessment or inductions.
    - Reimbursement by BTF is only made after the training is completed.

27. The BTF also provides grants to the sponsoring organisations for apprentice scholarship schemes. The grants are fully audited each year. These apprentice scholarship schemes recruit and place applicants with participating employers. They also provide subsidies to these employers and employ full time field officers to ensure the apprentices are correctly trained. There are currently 572 apprentices/trainees participating in the schemes and over 820 apprentices/trainees in the building, civil construction and plumbing industries have completed their training since 2013. The BTF apprentice training scheme has a completion rate of 95.1%, well above the national rate of 56.1%, and a major part of this can be attributed to the active role that the field officers play in the apprenticeship/traineeship.

28. The BERT fund also currently offers the following benefits:

    - **Dental Benefit** – The BERT Dental Scheme provides dental coverage to members and their dependants, for accidental damage to sound and healthy teeth occurring outside of working hours.

- **Funeral Benefit** – members are covered by a funeral benefit in the event of death of either the member / the members wife, husband or defacto / the members dependent children up to the age of 16. The amount payable is determined by the Date of Death. For deaths on or after 1 July 2019 the benefit payable is $12,000. For deaths prior to this date the amount payable $10,000.
- **Work Injury Management Service** – this service ensures that injured workers and their employers are supported and guided through the workers' compensation process. It is provided at no additional cost to employers who contribute to BERT and through its care and attention has reduced the anxiety and provided genuine support to everyone involved. It has significantly reduced the time off work for many injured workers and 94.5% of injured workers returned to full-time work (from claims received between January 2013 – January 2016).[21]
- **Child Care Benefit** – Child care payments may be made on a discretionary basis for members whose partner dies and who have children aged up to thirteen (13) years of age who are dependents of the member.
- **MATES in Construction** – The BERT Welfare Fund founded MATES in Construction (MIC) in 2008. MIC provides support through its MIC program of suicide awareness and prevention and other initiatives that support workers with mental health problems or prevent them from developing. This ultimately has been creating a more resilient building and construction workforce. BERT was the sole initial funding source and remains MIC's Principal Sponsor. Without BERT starting MIC on such solid footing it would not be the success it is today with a broad funding base and universal support from the construction industry. BERT has made accumulated payments of $7.4 million to MIC.
- **Ambulance Cover** – The BERT Ambulance Scheme provides cover to members who are working in Queensland, NT and NSW and their dependants, for the cost of ambulance travel occurring outside of working hours.
- **Counselling / Converge** – This workers assistance program provides confidential, professional and free counselling with support to members, along with their immediate family members.
- **Financial Planning** – BERT Welfare (in consultation with Skylight Financial Solutions) provides a free financial counselling and planning service with the aim to help members achieve their goals and objectives and provide vital assistance and guidance in effectively planning ahead.
- **Travel Insurance** – Travel insurance covers members and their accompanying spouse/defacto and dependent children when travelling for more than 250km from their usual place of residence within Australia or overseas for up to 90 days.

29. The BIRST fund in South Australia has 4,400 members and over 290 contributing employers. The additional benefits provided by BIRST include:
    - **Mates in Construction** – Mates in Construction South Australia (MIC SA) was created by BIRST in 2013. It is a registered charity funded by BIRST, the Federal Government, the Construction Industry Training Board, industry partners and other fundraising

21 https://www.bert.com.au/media/1105/bert-work-injury-management-service-program-brochure.pdf

initiatives. Since 2013 approximately 18,000 workers have received general awareness training, and assistance has been provided to more than 800 workers who sought help.[22]

- **Drug and Alcohol Program** – BIRST funds the Construction and Other Industries Drug and Alcohol Program Inc. (COIDAP) to help address the issue of unsafe work practices related to drugs and alcohol in the workplace.
- **Journey Personal Accident Cover** – this cover protects a members income for injuries sustained whilst travelling to or from their home, to or from their place of employment.
- **Funeral Cover** – the cover can reimburse the actual cost incurred of the funeral of a member, their spouse or dependant offspring to a maximum limit of $8000.
- **Emergency Transport** – this cover reimburses a member for the cost of ambulance transport anywhere in Australia resulting from an accident or at the request of a qualified medical practitioner.

30. The Incolink fund covers workers in Victoria and Tasmania. It has over 82 000 worker and employer members.[23] Protecting employees' redundancy entitlements is a first order priority for Incolink. However, Incolink's co-operative approach has also seen it emerge as a significant funder of industry training and employee support services. It does this by using funds that are generated from investment returns whilst always maintaining a strong reserve balance and ensuring that all liabilities are fully funded.

31. Incolink's Member Wellbeing & Support team offers 24/7 support in the following areas:

- **Preventative Education** – Incolink's team of Support Workers deliver mental health and wellbeing preventative education sessions on site, at employer offices, at union training centres and TAFE institutions. These sessions are designed to provide early intervention and general awareness on issues such as alcohol and other drugs, mental health and wellbeing, suicide awareness and responsible gambling.
- **Apprentice Support** – Incolink works with the TAFEs to offer preventative education and support for construction apprentices.
- **Life Care – Incolink Suicide Prevention** – The Life Care Program aims to reduce suicide among apprentices and young workers by promoting life skills, raising awareness about suicide risk factors and offering support to those who need it. In the last year Incolink delivered 138 sessions with 2,005 participants which resulted in 232 referrals.
- **Gambling Harms Awareness** – Incolink's Problem Gambling preventative education program is designed to raise awareness about the risks of gambling among workers and apprentices. The program helps them understand harms related to gambling, learn strategies to help them gamble responsibly and find out where to get support if they need it.
- **Alcohol and Other Drugs Program, Tasmania** – Incolink delivers Alcohol and Other Drugs (AOD) preventative education sessions to workers and apprentices across Tasmania generously supported by WorkSafe Tasmania

22 BIRST Members Report 2019
23 https://incolink.org.au/media/1729/39193-incolink-ar-v15b-web.pdf

- **RegionalLink Mental Health Awareness Initiative –** In response to industry needs and following on from its successful Contact+Connect program in 2016-17, Incolink rolled out the first of a series of smartphone-based mental health awareness programs – TasLink and GippslandLink – to its regional members.
- **Counselling & Mental Health** – Incolink's professional counselling team provides support to workers and their families, discussing issues like relationship difficulties, stress from work or home, mental health issues, grief and suicidal ideation.
- **24/7 Counselling Service** – The construction industry is characterised by long hours, making it difficult for workers to receive support. Incolink responded by establishing a 24/7 counselling service to assist in reducing the stress and anxiety often experienced by people seeking support.
- **Alcohol and Other Drugs** – Alcohol and Drug Counsellors offer assistance with drug and alcohol related issues.
- **Critical Incident Support** – Working with site managers and union officials, Incolink has established a set of Critical Incident Response Guidelines to provide debriefing and/or counselling sessions to groups or individual workers after an incident.
- **Incolink Financial Rights** – Incolink provides confidential debt crisis support and can assist members to understand their rights and manage a wide range of financial matters, including rules and laws relating to bills and debts, mortgage or rental payments, personal advocacy, bankruptcy and whether members might qualify for government assistance.
- **Incolink Job Support** – the Job Support team provide a range of services to employers and workers. For employers, they assist in the search for suitably qualified workers. For workers, they provide advice to help them to develop their careers in construction.
- **Incolink Health Checks** – the Health Checks program delivers Incolink's Wellbeing & Support services to workers on site through preventative education toolbox sessions, voluntary medical health checks and follow up sessions that include direct links to Incolink counselling and support services.
- **Incolink Skin Checks** – Skin Cancer Prevention has long been an issue for the construction industry where workers spend long hours outside. In 2017/2018 Incolink launched Skin Checks which includes a preventative education component. After the initial trial period, 380 skin checks and 4 education sessions were delivered and 19 people have been referred on to other practitioners to have suspicious growths assessed.

32. In accordance with its charter, Incolink can distribute surplus funds to participating industry associations for the purposes of supporting industry training and development as well as funding initiatives that improve safety within the industry. Incolink invests back into the industry to strengthen the commercial construction industry as a whole. Organisations must formally apply for funding and, in accordance with established guidelines, outline the proposed purpose and benefits to the industry. All funding applications are subject to Board approval and the processes for grant applications and disbursements are independently audited.

33. During 2017/18, Incolink committed grants totaling $21,347,205 from fund reserves. This includes funding industry training undertaken by sponsoring organisations such as Master Builders Association of Victoria, the Construction, Forestry, Maritime, Mining and Energy Union – Construction & General Division, and the Plumbing Joint Training Fund. It also supported occupational health and safety officers across the industry. The disbursement of these grants fell into three categories:

    - Training and Development – $16.2 million
    - Occupational Health and Safety – $4.8 million
    - Victorian Building Industry Disputes Panel – $0.3 million

34. In 2017/2018 the training and development grants funded 244 courses and the training of 16, 886 workers. The funding of OH&S officer-related roles creates jobs in the industry and assists the promotion of the importance of OH&S across the commercial building and construction industry.

35. Incolink's Accident & Illness Benefits Program sets an industry benchmark for protecting building and construction workers. It provides insurance cover in the following areas:

    - Leisure Time Accident & Illness Benefits Program;
    - TAC Top-Up;
    - WorkCover Top-Up;
    - Workplace Trauma
    - Portable Sick Leave
    - Ambulance
    - Accidental Dental
    - Funeral

    During FY18, Incolink's Accident & Illness Benefits Program supported members by paying out 2,047 claims to the value of $21,796,375.[24]

36. Incolink also supports community activities and organisations including:

    - The Victorian Building Industry Picnic Day
    - Brodie's Law Foundation
    - Lynall Hall Community College – The Island Campus
    - Kids Under Cover

24 Ibid., p.33

37. The ReddiFund in Western Australia has 1650 members and 135 contributing employers. The additional benefits provided include:

    - Mates in Construction – this is a ReddiFund sponsored service that provides construction workers with suicide awareness knowledge that help to reduce the rate of suicide within the construction industry. Mates in Construction trains selected workers to become Connectors who then learns the skills and awareness to enable them to pick up warning signs in work colleagues and offer an understanding ear and professional help.
    - Support for industry training
    - An optional $12 per week indemnity cover that includes ambulance, journeys to and from work, funeral, child care and leisure travel.

Proposed Amendments to the RO Act – Registration of Funds

38. As demonstrated above the WEFs in the building and construction industry are responsible, transparent and operate in the best interests of workers. The proposed amendments to the RO Act contained in the Worker Benefits Bill are therefore not only unnecessary, but are also potentially damaging to the WEFs and the benefits that they provide to industry.

39. It should be noted that including WEFs under the (RO) Act was not the course of action recommended by the Heydon Trade Union Royal Commission (TURC). The specific recommendation of the TURC was:

Recommendation 45

> "Legislation, either standalone or amending the *Corporations Act* 2001 (Cth), be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds. The legislation should provide for registration of worker entitlement funds with the Australian Securities and Investments Commission, and contain a prohibition on any person carrying on or operating an unregistered worker entitlement fund above a certain minimum number of persons."

40. Despite the recommendation of the TURC the Worker Benefits Bill seeks to insert a new Part 3C in Chapter 11 of the RO Act which defines and regulates "worker entitlement funds". The proposed provisions are an unnecessary and unwarranted intrusion into the independent operation of the WEFs.

41. The proposed s. 329LA requires WEFs to have 2 categories of 'independent' directors that must be on the board of the trust:

    (a) at least 1 voting director who is independent of, and has no material relationship with, the operator of the fund (i.e. the trustee of the fund), other than his or her role as director;

(b) at least 1 voting director who is independent of all of the following, and has no material relationship with any of them:

- any contributor to the fund;
- any organisation which has a member who is a contributor to the fund (e.g. employer association);
- any organisation which has a member who is a fund member (e.g. a union);
- any associate to any of these categories;
- any associate of the operator.

42. These 'independent' directors are able to veto payments made to training and welfare programs (see below).

43. There is no similar requirement under the Corporations Act for a specific number of independent directors. There is an arguable case that it is not in the best interest of workers to have directors in control of what is essentially their money and who have no connection with them or the industry in which they work. The Australian Institute of Company Directors in its publication "***Role of non-executive directors – Board composition***"[25] notes that "***there are studies which question whether the presence of independent directors really improves company performance and board effectiveness***.[26]"

44. Whether or not there are independent directors on the board of a particular WEF should be left up to its members and the requirements of the trust deed to determine. As the table in paragraph 19 above shows some of the WEFs have independent directors and some don't. There is no suggestion that the performance of the WEFs is affected by whether or not they have independent directors.

45. The proposed s.329NJ - Worker entitlement fund rules, gives the Minister unprecedented power to intervene in the internal administration of the WEFS by allowing the Minister to make any rules that are permitted to be prescribed by fund rules or necessary or convenient to be prescribed for carrying out or giving effect to this Part, being Part 3C of the RO Act. This means, for example, that the Minister could impose additional rules dealing with the constitution of a fund (s.329LB), authorised uses of contributions (s.329LC), or the authorised uses of income (s.329LD).

46. 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 Worker Benefits Bill's passage which can be quickly reversed through this rule-making power once the Worker Benefits Bill has passed.

47. It is of some significance that in the proposed s.329LB - Constitution of fund, there are additional words ins.329LB(1)(c) which refer to "or donation" . This requirement to be included in the constitution of a WEF would prohibit donations to a contributor, a fund member, an associate of a contributor or an associate of a fund member. This additional wording is not contained in s.58PB(4)(b)(ii) of the FBTA Act on which it is based (see paragraph 130 of the

25 https://aicd.companydirectors.com.au/-/media/cd2/resources/director-resources/director-tools/pdf/05446-1-11-mem-director-tools-bc-non-executive-directors_a4_web.ashx

26 See, for example, Dalton, D.R., Daily, C.M., Elstrand, A.E. & Johnson, J.L., 1998, 'Meta-analytic reviews of board composition, leadership structure, and financial performance', Strategic Management Journal, vol 19, no 3, pp 269-290; Bhagat, S. & Black, B., 1999, 'The uncertain relationship between board composition and firm performance', Business Lawyer, vol 54, no 3, pp 921-963; Rhoades, D.L., Rechner, P.L. & Sundaramurthy, C., 2000, 'Board composition and financial performance: A meta-analysis of the influence of outside directors', Journal of Managerial Issues, vol 12, no 1, pp 76-91; Kiel, G.C. & Nicholson, G.J., 2003, 'Board composition and corporate performance: How the Australian experience informs contrasting theories of corporate governance', Corporate Governance: An International Review, vol 11, no 3, pp 189-205.

Explanatory Memorandum). This would potentially impact on any donations made by a fund including those to Mates in Construction, and any other charity associated with an employer or fund member. The Minister could also make a rule that donations includes grants, i.e. grants made to organisations to fund OH&S officers, or associated entities of organisations that provide training.

48. The minster could also make rules defining what "training or welfare services" are. This could affect what can be provided under s.329LD (1) (d) and (2). The Minster could exclude certain payments made to RTO's, or payments made for types of insurance or ambulance cover.

49. The powers of the minster under s.329NJ, and the potential usage identified above, are also relevant to the existence of a WEF. Item 6 of the conditions for registration under s.328LA requires that. The fund has a written constitution that complies with;

    (a) Subsection 329LB(1); and
    (b) Any other requirements prescribed by the worker entitlement fund rules.

    This is an initial and ongoing condition for registration. Therefore if a WEF does not comply with the rules set by the Minster, the Commissioner can deregister a WEF under s.329MI.

50. Under s.329LD, income can only be used for the following purposes:

    (a) to make payments for a purpose mentioned in s.329LC(1) (see above);

    (b) To make payments other than worker entitlements to a fund member, death benefits dependants of fund members or legal representatives of fund members;

    (c) to make payments to a contributor to the fund whose contributions are in respect of employees or former employees of the contributor;

    (d) to make training and welfare payments, subject to conditions described below.

51. The restrictions on payments for training and welfare payments include (at s.329LD(2)):

    (a) If the services are not provided by the operator of the fund the services have to be provided at "market value" and on commercial terms, and must be negotiated at arm's length from any director who has a material personal interest in the provider of the services.;

    (b) Before a payment is made the payment must be approved by the voting directors and it must be approved by the two 'independent' directors referred to in paragraph 41 above.

52. The terms of the Worker Benefits Bill in s.329LD(2) mean that the two so-called 'independent' directors effectively have a power of veto over fund expenditure on training and welfare services. 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. The resolution of deadlocks is properly a matter to be determined by fund rules rather than a mandatory requirement for so-called 'independent' directors with powers above and beyond other directors.

53. Also of concern is the other provision in s. 329LD(2) that requires 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. There is no equivalent restriction in corporate law.

54. One example of such payments is the contributions made by WEFs in the building and construction industry to the 'Mates in Construction' mental health/self-harm and suicide prevention programme. Incidents of suicides and non-fatal suicide behaviour (NFSB) severely affect workers in the construction industry and have a huge financial cost. According to the 2015 report "*The economic cost of suicide and non-fatal suicidal behaviour in the Australian construction industry by state and territory*", by Doran, Ling and Milner:

> "*The total cost of suicide and NFSB in the Australian CI is estimated at $1.57 billion. The majority of this cost is attributed to the cost associated with NFSB resulting in full incapacity (76.5% of total costs or $1.20 billion), followed by the cost of a suicide (23.3% of total costs or $365 million) and NFSB resulting in a short absence from work (0.1% of total costs or $1.96 million). By state and territory, the cost of suicide and NFSB in the WA CI accounts for 29.4% of total costs ($461 million) followed by NSW (22.7% of total costs or $356 million), QLD (22.1% of total costs or $345 million) and VIC (16.6% of total costs or $259 million)*."[27]

55. A further study conducted in 2017, *"SUICIDE IN THE CONSTRUCTION INDUSTRY: Report submitted to MATES in Construction by Deakin University"*, by Maheen and Milner, found that,

> "*During 2001 to 2015, there were 13,402 total number of suicides amongst construction workers in Australia. The proportion of females are much lower across all states. This is partly because there are relatively fewer females employed in construction as men, but is also because females are less likely to die by suicide than men."*[28]
>
> *……*
>
> *"The incident-rate ratios (IRR) of suicide for males in the construction industry compared to males in other occupations by state can be seen in Table 3. Across Australia and all time periods, construction workers have significantly higher suicide rates than non-construction workers. Having said that, the gap between construction vs non-construction is being gradually reducing in QLD, VIC, SA, and WA."*[29]
>
> *……..*
>
> *"These results suggest suicide among construction workers remains elevated compared to other occupational groups and should remain a target for suicide intervention and prevention*."[30]

56. It would be incredibly short-sighed of the Senate, and the Parliament as a whole, if ideological pursuit of this legislation results in a reduction of such beneficial services as those provided by Mates in Construction, funded to a large part by the income of WEFs across Australia.

57. In a similar vein the Workers Benefits Bill also threatens WEFs using income to fund other current programs, e.g.:

    - The substantial support for training in the industry provided through Incolink and BERT;
    - OHS support provided by Incolink and BIRST (Incolink's view is that it would prevent them from making OHS grants, which it uses to employ OHS experts);

27 http://matesinconstruction.org.au/wp-content/uploads/2016/03/Cost-of-suicide-in-construction-industry-final-report.pdf
28 http://micaus.bpndw46jvgfycmdxu.maxcdn-edge.com/wp-content/uploads/2015/11/17584-mic-qld-Deakin-report-volume-2-297x210mm-v10.pdf p.9
29 Ibid., p.17
30 Ibid., p.25

- the "market value" inclusion for both insurance and training and welfare payments may affect a WEFs ability to prioritise quality services.

58. Also note that one of the conditions of registration proposed under s. 329LA is that where income of the fund is used to make a training or welfare payment covered by s. 329LD(2) , then – as soon as practicable after the payment is approved – the operator must notify each fund member of, or ensure they have access on the funds website, to:

    (a) the person to whom the amount is paid;

    (b) detailed of the particular training or welfare services for which the amount is paid; and

    (c) the voting directors who voted to make the payment.

59. Putting aside the potential conflict with privacy issues, the administrative headache and cost that this provision imposes will threaten the viability of the important training grants provided by WEFs particularly the individual grants of $1500 provided by the BTF in Queensland and the Northern Territory.

60. A final point to be made in regard to the registration of WEF's is the proposal to give recognition to single-employer funds under s.329HD and them being excluded from the definition of a worker entitlement funds under s. 329HC(4). This retrograde step, which allows the single-employer fund to be controlled by an employer, appears to be at odds with the concerns of the ATO on employee benefit trusts:

> *"Our concerns with employee benefit trusts*
>
> *These arrangements are designed to defer or avoid tax on the employer company's profits. They are structured to purportedly provide a large tax deduction to the employer and avoid fringe benefits tax liability.*
>
> *Our concerns are:*
>
> - *the deduction claimed under section 8-1 of the Income Tax Assessment Act 1997 for the contribution to the trust may be disallowed*
> - *Part IVA of the Income Tax Assessment Act 1936* may apply to cancel the deduction
> - *the amount contributed on behalf of employees may be assessable to the employee under section 6-5 of the Income Tax Assessment Act 1997*
> - *Part IVA of the Income Tax Assessment Act 1936* may apply to include the income that has been directed by the employee, as assessable income in the same income year the contribution is made to the trust
> - *where the contribution is made to benefit a specific employee, fringe benefit tax may be payable on the employer's contribution*
> - *fringe benefits tax may apply to loans* provided by the trustee of the employee benefits trust."[31]

61. The provisions of the Worker Benefits Bill concerning WEFs are clearly not in the best interests of the workers whose entitlements are being protected by them and should be rejected by the Senate Committee.

31 https://www.ato.gov.au/General/Tax-planning/In-detail/Employee-benefit-arrangements-of-concern/

Amendments to the Fair Work Act 2009 Contained in the Worker Entitlements Bill

Schedule 1: Financial Management and Accountability

62. 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.

63. 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.

Schedule 2: Regulation of Worker Entitlement Funds – Award and Agreement Terms

64. The proposed amendments establish a new system of mandatory registration for WEFs 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 WEF. 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 WEF to which payments can be made.

65. 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 WEF 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.

66. 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.

67. 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 Worker Benefits Bill proposes, a plethora of single employer funds are created which are completely outside the scheme of regulation, 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.

68. 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 WEF. Thus unions will be unable to achieve contributions to union-operated benefits funds through the ordinary processes of bargaining.

Schedule 3: Election Payments

69. Schedule 3 of the Worker Benefits 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.

70. The intent of the measures in Schedule 3 appears to be to address a perceived problem, identified in Volume 5 of the TURC 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 TURC recommendations.

71. The TURC 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. The first of these measures was rejected by the TURC 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."

72. However Item 2 of Schedule 3 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.

73. The TURC 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 TURC recommendation given the focus on voluntariness.

Schedule 4: Prohibiting Coerced Payments to Employee Benefit Funds

74. 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.

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

Schedule 5: Disclosable Arrangements

76. The disclosable arrangement provisions go well beyond Recommendation 47 of the TURC Final Report which was confined to a consideration of insurance arrangements involving some connection with a registered organisation. 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.

77. 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. 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

78. The Worker Benefits Bill should be opposed.

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