Australian Government
Attorney-General's Department

Senate Education and Employment Legislation Committee Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

Submission of the Attorney-General's Department

August 2019

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Introduction

The Attorney-General's Department welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill).

The Royal Commission into Trade Union Governance and Corruption (the Heydon Royal Commission) found numerous examples of misconduct and a lack of transparency and accountability of the financial affairs of registered organisations and their associated entities. The Bill responds to the Australian Government's commitment to implement recommendations of the Heydon Royal Commission by implementing 10 of those recommendations, in full or in part.

The Bill will ensure appropriate governance and transparency requirements are applied to associated entities of registered organisations, in particular worker entitlement funds.

In summary, the Bill amends the *Fair Work (Registered Organisations) Act 2009* (RO Act) and *Fair Work Act 2009* (FW Act) to:

- strengthen financial management, disclosure and record-keeping requirements for registered organisations (Schedule 1);
- require worker entitlement funds to become registered, have proper governance arrangements, prepare annual reports, update members on their entitlements and have at least one independent director on their boards (Schedule 2);
- ensure that funds held for workers' benefit be properly approved, transparent, overseen by a regulator, and spent for the benefit of the workers (Schedule 2);
- prohibit relevant terms from requiring or permitting payments into any fund other than a superannuation fund, a registered worker entitlement fund or a registered charity (Schedule 2);
- require relevant terms that name a worker entitlement fund or insurance product to allow an employee to choose another fund or insurance product (Schedule 2);
- prohibit relevant terms from requiring or permitting employee contributions to an election fund for an industrial association (Schedule 3);
- prohibit organising, taking or threatening to take any action with the intent to coerce payments into a particular superannuation fund, worker entitlement fund or other employee benefit fund (Schedule 4);
- require registered organisations to disclose any financial benefits obtained through a discloseable arrangement with an employer (Schedule 5); and
- make minor and technical amendments to the RO Act (Schedule 6).

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

Legislative History

This Bill was first introduced in the House of Representatives on 19 October 2017 and was passed by that chamber on 26 October 2017. The Bill was then introduced into the Senate and had its second reading moved on 13 November 2017. The Bill lapsed when the Parliament was prorogued.

On 4 July 2019, the Bill was reintroduced into the House of Representatives with several amendments suggested in the previous detailed Committee processes.

Debate commenced on the Bill in the House of Representatives on 1 August 2019.

Discussion

Schedule 1 – Financial management and accountability

This Schedule makes amendments to improve the financial management and recordkeeping obligations for registered organisations.

The Heydon Royal Commission made a number of recommendations aimed at ensuring registered organisations meet basic financial management and governance standards, and this Schedule responds to recommendations 9, 10, 17 and 39.

This Schedule amends the RO Act to require registered organisations to have written policies dealing with financial expenditure that are binding on all officers and employees of the organisation. The organisation's committee of management must approve these policies.

While the existing provisions of the RO Act require registered organisations to have rules that require the development and implementation of policies regarding expenditure, there is no requirement that the policies be written. As part of its examination of financial mismanagement in registered organisations, the Heydon Royal Commission uncovered at least one example of a branch of an organisation with no written financial policies, despite the rules of the organisation requiring the development and implementation of polices relating to expenditure.

Failures to comply with the new financial expenditure policy requirements in the Schedule will attract a civil penalty of 100 penalty units.

The Schedule allows the Registered Organisations Commissioner to publish model financial policies. These policies may be adopted, in whole or in part, by an organisation.

The Schedule also attaches civil penalties of 100 penalty units to the existing requirement in the RO Act for registered organisations to keep and retain proper financial records for a period of seven years. Currently, there is no penalty for failures to comply with these requirements. The level of penalties are consistent with the penalties that apply to other breaches of financial requirements under the RO Act, for example, the requirement to prepare an annual operating report. In contrast, the comparable *Corporations Act 2001* (Corporations Act) obligation is an offence of strict liability.

The Schedule also amends section 237 of the RO Act to require registered organisations to disclose to the Registered Organisations Commission (ROC) all loans, grants and donations over $1,000 the organisation has received during the financial year. This amendment expands upon the existing requirement in the RO Act to lodge a statement with the ROC disclosing all loans, grants and donations over $1,000 the organisation has made during the financial year. The amendments will also require the disclosure of any loans, grants or donations from or to a particular person where, over the course of the financial year, multiple payments add up to more than $1,000.

Amendments incorporated into the Bill

The provisions in the Schedule regarding the need to have financial policies have been simplified and streamlined compared to the 2017 version of the Bill.

Separately, the requirement in the 2017 Bill for organisations to retain credit card statements has been removed given the absence of any Corporations Act equivalent.

Schedule 2 – Regulation of worker entitlement funds

Most significantly, this Schedule of the Bill contains provisions that provide for the registration of worker entitlement funds and deals comprehensively with the governance, financial reporting and financial disclosures required by registered worker entitlement funds. It responds to Recommendations 45, 46 and 49 of the Heydon Royal Commission.

These recommendations follow a number of findings from the Heydon Royal Commission that concerned worker entitlement funds making payments to registered employee and employer organisations without the knowledge of the employees whose entitlements were being held by those funds. The minimum governance standards recommended by the Heydon Royal Commission and implemented by the Bill seek to ensure that these funds are and remain financially viable, and have the capacity to pay out employee entitlements, into the future.

Current law

Worker entitlement funds manage and invest entitlements for workers, such as redundancy and sick leave pay, in some industries. They are typically 'joint ventures' between unions and employer groups.

While it is the case that many worker entitlement funds are established as trusts, they are also in the form of managed investment schemes and need to be regulated appropriately.

Due to a 2001 Australian Securities and Investments Commission (ASIC) Class Order, worker entitlement funds are currently exempt from the regulatory requirements that apply to managed investment schemes and financial products under the Corporations Act. By contrast, under the Corporations Act other managed investment schemes must:

- have a compliance plan, which sets out how the scheme will operate to comply with its constitution and the Corporations Act;

- have an external compliance committee or, alternatively, a board at least half of which must be external directors, who monitor the scheme's compliance with the law;
- notify ASIC of certain events such as changes to the financial position of the licensee; and
- provide a Product Disclosure Statement.

Worker entitlement funds are also currently subject to minimal indirect regulation through the FBTA Act. If the fund chooses to become an 'approved' fund, contributions from employers to the fund are exempt from fringe benefits tax.

However, the governance requirements imposed by the FBTA Act are far from comprehensive and largely concern how fund money can be spent. They do not, for example, require the funds to disclose any fees they charge, provide annual reports, require the funds to be operated by people of good fame or character, or require funds to have independent voting directors on their boards. Further, the only consequence for a failure to comply with the restrictions in the FBTA Act is the removal of the tax exemption for contributing employers. There are no direct consequences for the worker entitlement fund itself.

Royal Commission findings

In 2003, the Cole Royal Commission into the Building and Construction Industry 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'. The Heydon Royal Commission's Final Report echoed these concerns.[1]

The Heydon Royal Commission estimated that worker entitlement funds in the construction industry alone collectively hold around $2 billion in assets, including entitlements held in trust.[2] For the Heydon Royal Commission, the size of the sector—and the repercussions that might follow if a fund failed—emphasised the need for worker entitlement funds to be regulated properly and comprehensively.

The Heydon 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 and employer groups or the amount of any fees deducted, nor were the funds required to provide annual reports or accounts to people with an interest in the fund. The Heydon Royal Commission recommended that funds should be subject to basic minimum governance standards, such as a requirement that those running the fund be of good fame or character and that funds provide regular financial reports to an independent regulator.

The Heydon Royal Commission also found that most "…worker entitlement funds invariably distribute the income generated on contributions received to industry parties (for example,

[1] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 5-E, pp 314-315.
[2] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 5-E, p 297.

unions and employer organisations) to be used for purposes they see fit".[3] This may include payments for services, administration and directors fees, and commissions. For example, the Heydon Royal Commission found that Incolink had paid over $67 million to its sponsoring union and employer organisation between 2011 and 2015.[4] The Heydon Royal Commission found the fund also directed unclaimed workers' funds to its sponsors.

On the issue of distributing funds to sponsors, the Heydon Royal Commission remarked:

> '…there is an inherent unfairness in taking contributions paid by employers on behalf of employees, generating a substantial income from those contributions, and then distributing the money to other persons in circumstances where many employees will never receive the benefit, either directly or indirectly, of the income generated… It may be accepted that the purpose of a worker entitlement fund is to secure the payment of entitlements. Consequently such funds might adopt risk adverse investment strategy. However, it does not follow that because the generation of income is not the purpose of the fund, workers should not be entitled to any return which is made on the contributions. In fact, it is contrary to the underlying premise of such a fund – to operate solely for the benefit of employees – that the income should be used to benefit others.'[5]

Governance standards

In responding to the need to apply proper governance standards to worker entitlement funds, this Schedule of the Bill requires worker entitlement funds to apply to the ROC in order to become registered and to comply with certain conditions of registration. Broadly, the conditions for registration relate to financial management, disclosure, board composition, and how fund money may be spent. For example, the Schedule requires worker entitlement funds to have an independent voting director on their boards; to publish and provide the ROC with annual reports; and to provide employee members and employer contributors with appropriate information about the fund.

The ROC is the appropriate body to regulate worker entitlement funds given the funds' connection to registered organisations. While the Heydon Royal Commission recommended that ASIC should be the regulator, the ROC was not created until after the Royal Commission handed down its final report. The ROC is well placed to regulate worker entitlement funds as a dedicated and specialised regulator, which has the ability to bring the appropriate focus to regulating these funds. In contrast, ASIC would need to divert resources from the regulation of the corporate sector, which is appropriately its focus, in order to operate as the regulator of these funds.

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[3] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 5-E, p 304 [67].
[4] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 4*, Chapter 11, Appendix A, pp 980-985.
[5] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 5-E, pp 304-305 [69].

Single-employer funds

Some employers contribute to funds that hold entitlements, such as redundancy pay, only for their own employees. These funds are established by employers for the sole purpose of holding these entitlements in trust by the employer until they are required to be paid to employees.

The Schedule allows these single-employer funds to elect to be registered and regulated by the scheme. If a single employer elects to have their fund registered and regulated by the scheme, contributions to the fund will be eligible for the fringe benefit tax exemption.

Single employer funds that elect to be regulated will be subject to fewer conditions than worker entitlement funds that manage contributions from multiple employers. The less onerous regulation for single-employer funds is appropriate. The funds are set up by an employer to protect the entitlements of that employer's own employees. In contrast, multi-employer funds hold millions of dollars' worth of entitlements, accept contributions from many employers for thousands of workers and are generally 'joint ventures' between unions and employer groups.

How fund money can be spent

The Schedule maintains existing FBTA Act restrictions on the use of contributions and income by worker entitlement funds but expands the list of matters on which income earned by a fund can be spent. The Schedule also clarifies that contributions must always be treated as contributions, and that income must always be treated as income, in order to ensure funds cannot avoid the restrictions on spending by re-classifying contributions or income as 'capital'.

With regard to the current, indirect regulation of worker entitlement funds under the FBTA Act, the Heydon Royal Commission noted that, on a proper construction of section 58PB of the Act, approved funds are not permitted to distribute income to persons other than employers who contribute to the fund and employee members of the fund. However, the Heydon Royal Commission found that:

> '…many 'approved worker entitlement funds' avoid this limitation in practice…by treating the income generated in a prior financial year as capital, and [that] they then distribute the capital to industry parties'.[6]

The Schedule allows fund income to be used to provide training and welfare services for workers, provided the payments meet specific criteria. This was not one of the uses of income recommended by the Heydon Royal Commission.

Where the services are to be provided by parties other than the operator of the fund, the services must be provided in a transparent manner and negotiated at arm's length from any director of the fund with a material personal interest in the provider of the services. A minor amendment to further enhance transparency has been made to the criteria attaching to training and welfare

[6] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 5*, Chapter 5-E, p 306 [73].

payments to require funds to disclose to fund members the identity of voting directors who voted in favour of any payments.

This Schedule also ensures that training and welfare services funded by worker entitlement funds cannot discriminate unfairly between members of the fund—for example, by denying members access to certain benefits based on whether or not they hold union membership.

The Heydon Royal Commission noted examples of distributions paid by worker entitlement funds to registered organisations to fund a number of welfare programs that were made available only to union members and their families. The Heydon Royal Commission further noted that as these programs were only available to union members, these union members got to enjoy benefits despite contributing nothing to the raising of funds required to support the programs while members of the worker entitlement fund missed out. The Royal Commission termed such arrangements, '…inequitable and indefensible.'[7]

Penalties and deregistration

Schedule 2 of the Bill introduces criminal penalties for anyone who operates an unregistered worker entitlement fund. As already noted, worker entitlement funds are similar in structure to managed investment schemes, but are exempted from regulation under the Corporations Act provisions by an ASIC Class Order that has been in place since 2001. Under the Bill, the penalties for managing an unregistered worker entitlement fund will be less than those for the comparable Corporations Act offence of operating an unregistered managed investment scheme. The penalty in the Corporations Act is 600 penalty units or imprisonment for 5 years, or both. In contrast, this Schedule has a penalty for operating an unregistered worker entitlement fund of 200 penalty units or imprisonment for 5 years, or both.

The Schedule also includes civil penalties for failing to meet the prescribed conditions of registration, contributing to an unregistered worker entitlement fund and failing to comply with directions given by the Registered Organisations Commissioner to comply with those conditions.

The Schedule also provides the Registered Organisations Commissioner with the capacity, as a last resort, to deregister funds that are failing to comply with the conditions of registration. 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. Decisions to deregister, or refuse to register, a worker entitlement fund are reviewable by the Administrative Appeals Tribunal. This is modelled on similar arrangements that apply to the decisions of ASIC.

[7] *Royal Commission into Trade Union Governance and Corruption Interim Report: Volume 1*, Chapter 5.2, p 826 [141].

Amendments incorporated into the Bill

A number of amendments have been incorporated into this schedule since the 2017 version of the Bill. These include amendments to:

- allow worker entitlement funds a full 12 months to comply with the new regulatory scheme following the Bill's commencement, double the original six months proposed in the 2017 version of the Bill. This amendment is intended to give existing funds sufficient time to take the steps necessary to become compliant with the new regime;

- clarify that only officers of worker entitlement funds, not staff, must be of good fame and character. This provides greater parity with comparable Corporations Act requirements;

- provide that worker entitlement funds will have four months after the end of the financial year to provide an annual report to the ROC. This amendment better aligns the requirement with the ASIC guidelines, and responds to concerns from some stakeholders that, in ordered to be completed, the annual reports of worker entitlement funds will likely need to include information generated in the end of financial year reports of other entities; and

- require funds that are deregistered to notify contributors of the deregistration within seven days of it taking effect, and to clarify that funds that are reinstated within the prescribed period do not have to complete a final report. The first amendment ensures contributors do not inadvertently make donations to an unregistered worker entitlement fund. The second amendment clarifies that a final report is not required if a worker entitlement fund is re-registered within the prescribed timeframe.

Schedule 3 – Election Funds

This Schedule responds to recommendation 43 of the Heydon Royal Commission. The Heydon Royal Commission heard evidence regarding a number of 'election funds' established for the campaigns of people running for office in a registered organisation, often receiving contributions deducted from the salaries of the relevant organisation's employees and officers. The Heydon Royal Commission questioned whether these contributions were truly voluntary.

To ensure that election fund contributions are voluntary and not a condition of working for a union or an employer group, the Schedule amends the FW Act to prohibit enterprise agreements and contracts of employment from including terms requiring or permitting payments for the purposes of funding, supporting or promoting the election of candidate(s) in election(s) for office in an industrial association. This will not prohibit officers and employees of registered organisations from making genuine donations outside of their employment agreement. The prohibition will apply to enterprise agreements and contracts of employment made after this Schedule commences.

Schedule 4 – Prohibiting coerced payments

Schedule 4 responds to recommendation 50 of the Heydon Royal Commission. The Heydon Royal Commission uncovered examples of serious coercive behaviour by some registered organisations aimed at securing employer payments to funds that provide significant financial benefits back to the registered organisation.

For example, in the case study of Universal Cranes, the Commission observed that '[CFMEU officers] pursued a campaign against Smithbridge Group in order to force companies in that group to enter into enterprise agreements with the CFMEU on terms that required the companies to make payments to BERT, BEWT and CIPQ [a worker entitlement fund, a welfare fund and an insurance scheme]…'[8]

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.

The Schedule implements the Commission's 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 those that apply for other forms of coercion prohibited by the FW Act.

Schedule 5 – Disclosable arrangements

This Schedule amends the RO Act to address concerns identified by the Heydon Royal Commission about the non-disclosure, or inadequate disclosure, to employers and employees about financial benefits paid to registered organisations in connection with the promotion of employee insurance and other arrangements. The Schedule responds to recommendation 47 of the Heydon Royal Commission.

The examples noted by the Heydon Royal Commission included an arrangement between the CFMEU NSW Branch and income protection insurance scheme U-Plus. The Royal Commission noted that CFMEU NSW did not routinely, if at all, disclose to employees the substantial financial benefits the union received from U-Plus. The Royal Commission said that this '…had created an environment in which there are inherent conflicts of interest between union officials and the workers they represent...'[9]

This Schedule requires registered organisations to disclose any financial benefits they, or a related party, receive in connection with a disclosable arrangement. Discloseable arrangements include arrangements between an organisation and employer to purchase insurance for employees where that insurance is promoted or arranged by the organisation or a related party of the organisation. Discloseable arrangements also include arrangements for an employer to become a member of, or make payments in relation to, managed investment schemes, worker entitlement funds, training funds or welfare funds where the arrangement is promoted or arranged by the organisation.

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[8] *Royal Commission into Trade Union Governance and Corruption Interim Report: Volume 2*, Chapter 8.7, p 1400 [4].
[9] *Royal Commission into Trade Union Governance and Corruption Final Report: Volume 3*, Chapter 7.6, p 783 - 784 [3].

Organisations will be required to disclose all reasonably expected direct and indirect financial benefits. For example, if a registered organisation receives a commission for promoting an insurance product, the organisation would be required to disclose this to relevant employer(s), 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.

This Schedule has been amended to remove the requirement that employers also disclose to their employees any financial benefits the employer obtains from a disclosable arrangement in order to more closely align the Schedule with the Heydon Royal Commission recommendation.

This Schedule complements existing arrangements for transparency in enterprise bargaining (sections 179, 179A and 180 of the FW Act) and serves to alert employers and workers to potential conflicts of interest.

Schedule 6 – Minor and technical amendments

Schedule 6 is a new addition to the Bill that was not included in the 2017 version of the Bill. This Schedule makes minor technical and clarifying amendments to the RO Act.

Human Rights

The Bill is consistent with Australia's human rights obligations. To the extent that the Bill may limit human rights, those limitations pursue legitimate objectives and are reasonable, necessary and proportionate. These issues are addressed comprehensively in the Statement of Compatibility with Human Rights for the Bill and certain aspects are extracted below.

By prohibiting terms of an enterprise agreement that allow employers to contribute to unregistered worker entitlement funds, the Bill engages with the right to collectively bargain, but the provisions are reasonable, necessary and proportionate. The provisions do not prohibit contributions to worker entitlement funds, rather they require such contributions to be made to registered worker entitlement funds that are subject to appropriate governance and disclosure obligations. These provisions are necessary to support the provisions of the Bill applying basic governance and disclosure requirements to worker entitlement funds and placing reasonable restrictions on how fund money may be spent. These measures are necessary to address potential conflicts of interest, breaches of fiduciary duties and coercion identified as issues by the Heydon Royal Commission and ensure that money held in the name of workers is properly managed.

The Bill also engages with the right to privacy through proposed amendments in Schedules 1 and 5, but these measures are reasonable and proportionate. Where the Registered Organisations Commissioner is required to publish information on its website, the Commissioner must omit any residential addresses and may omit other personal information to limit any potential for breaches of privacy. This is an improvement on the current RO Act which does not require the removal of residential addresses from loans, grants and donations statements before the statements are viewed by members. The Office of the Australian Information Commissioner was consulted

during the drafting of the Bill in order to ensure that appropriate attention was directed toward protecting privacy and personal information.

The provisions in the Bill prohibiting any action intended to coerce payments into particular funds engage with the right to freedom of association. However, they form a reasonable and proportionate response to coercive behaviour that might otherwise infringe upon the right to freedom of association by compelling contributions to funds by people who have a right not to engage with a registered organisation or contribute to associated funds.

The Bill also engages the right to protection from arbitrary interferences with, or attacks upon, reputation by requiring the Registered Organisations Commissioner to consider whether certain officers of a worker entitlement fund are of good fame or character. However, these powers are prescribed by law and cannot be imposed arbitrarily. They form a reasonable and proportionate measure to ensure these funds are managed responsibly and professionally.

Conclusion

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.