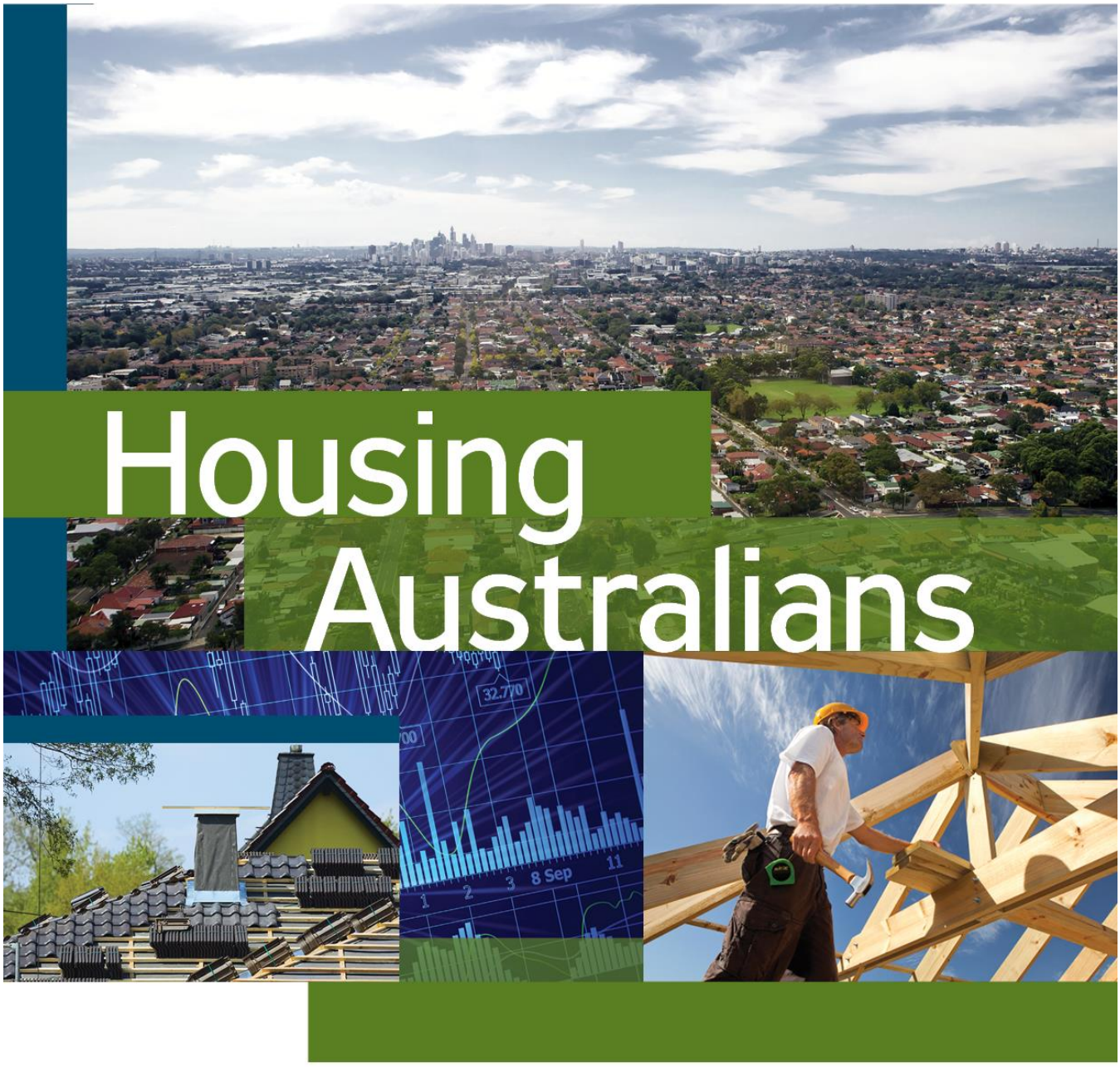
HOUSING INDUSTRY ASSOCIATION



Submission to the
Senate Education and Employment Committee

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

29 August 2019

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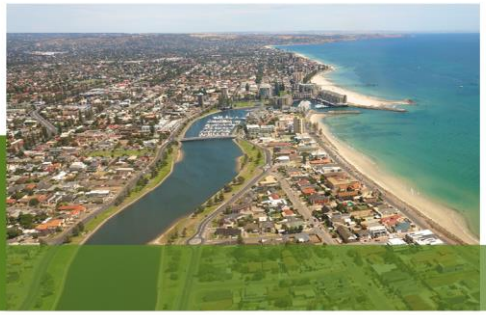

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1. INTRODUCTION

Housing Industry Association (HIA) provides the following submission in response to the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (Bill) which has been referred to the Senate Education and Employment Committee.

HIA supports the Bill.

The proposed amendments implement a number of recommendations arising from the Royal Commission into Trade Union Governance and Corruption and, if passed, will help to improve public accountability and transparency in relation to the operation of worker entitlement funds and other similar funds.

HIA most particularly supports those measures that will improve the governance framework for building industry redundancy funds.

Many employers in the construction industry are required to make significant contributions to redundancy funds such as Incolink, Building Employment Redundancy Trust (BERT) and Australian Construction Industry Redundancy Trust (ACIRT). In most cases, payments are made because of conditions imposed under union pattern enterprise bargaining agreements. The arrangements impose considerable costs on the building and construction industry.

It is both reasonable and appropriate that such funds be registered and subject to financial reporting, external auditing, actuarial assessment and annual reporting obligations, have independent directors and disclose financial benefits to organisations and officials.

As Commissioner Heydon identified in his Final Report, worker funds in the construction industry currently hold around $2 billion in assets under management.[1] This is in on par with the levels of funds managed by APRA regulated entities.

2. SPECIFIC COMMENTS ON THE BILL

2.1 REDUNDANCY IN THE CONSTRUCTION INDUSTRY

The promotion and operation of worker entitlements funds in the construction industry, including redundancy funds, is largely underpinned by the operation of the industry specific redundancy scheme under the *Building and Construction General Onsite Award 2010.*

The Award facilitates an industry specific redundancy arrangement, which departs from the general understanding of what is considered a 'redundancy' for the purposes of severance payments.

[1] Royal Commission into Trade Union Governance and Corruption, Final Report, pg. 297.

Although the usual understanding is that an employee becomes 'redundant' when their employer no longer requires their services for reasons unconnected to the individual employee's performance, the Award defines redundancy as:

> *"…a situation where an employee ceases to be employed by an employer to whom this award applies, other than for reasons of misconduct or refusal of duty".*

This means that employers, regardless of size, must make a redundancy payment under any circumstance involving the ending of an employment relationship, be it termination for any reason (aside for misconduct or refusal of duty) or resignation.

Relying on this award obligation, pattern enterprise agreements used in the industry further require that employers provision for this obligation, via contributions to a union mandated fund.

As highlighted by the Royal Commission:

> *"It is also worth making the point that apart from 'genuine redundancy accounts', most so-called redundancy funds are not limited to making a payment in circumstances of genuine redundancy: workers (or their estates) are commonly entitled to a benefit when they cease employment, retire, reach a particular age or die. Thus, the contributions paid by employers are, in effect, a deferred entitlement of the employees on whose behalf the contributions are made."*[2]

The broad variety of circumstances for which payments can be made from a construction industry redundancy fund potentially emboldens those responsible for its management to use those funds for purposes not strictly related to "redundancy" or even termination of employment.

2.2 UNCAPPED CONTRIBUTIONS

Some redundancy funds do not provide for capped contributions.

Employer contributions to redundancy funds can continue indefinitely even though the maximum level of employee benefit has been reached. These excess funds are simply a tax on industry the proceeds of which are currently available for uses determined by the managers of the scheme rather than by the contributors or the beneficiaries.

While the Bill seeks to provide some relief on this matter, HIA considers that more could be to address the additional financial burden imposed on the industry.

[2] Royal Commission into Trade Union Governance and Corruption, Final Report, pg. 305.

HIA notes that under Recommendation 168, the 2003 Cole Royal Commission recommended that the surpluses in redundancy funds be applied to either the reduction of employer contributions or the accounts of employee beneficiaries.

2.3 Unlawful Terms

HIA supports the proposed insertion of section 151A and amendment to section 194 of the *Fair Work Act* which seek to make a term of a modern award or enterprise agreement that require payments to be made to unregistered worker entitlement funds unlawful. A term will also be unlawful unless an employee can choose the worker entitlement fund into which payments are made on their behalf.

While the proposed provision seeks to ensure employees can choose the worker entitlement fund into which payments are made, it is unclear how this arrangement will co-exist within a bargaining framework that continues to permit enterprise agreements containing terms that specify worker entitlements funds.

The nomination of a fund in an enterprise agreement should not be permitted. An employee should be free to choose whether to participate in such arrangements without any prescription even if that prescription is accompanied by a choice of fund contributions.

2.4 Registration of Worker Entitlement Funds

Proposed section 329KA of the Bill sets out the application requirements for the registration of a worker entitlement fund. Subsection (3) requires that the Commission publish certain information about the application.

If material relating to an application is to be made publically available on the Fair Work Commission's website, interested persons should be able to avail themselves of an opportunity to make submissions in relation to such applications, particularly in light of the conduct of some funds outlined by the Royal Commission.

HIA submit that the proposed section be amended to enable such a process.

2.5 Coerced Payments

Proposed section 355A seeks to amend the *Fair Work Act 2009* to prohibit the coercion of payments to employee benefit funds. These measures are in direct response to evidence of the actions of some unions provided to the Royal Commission.

Unions should be prohibited from using unlawful means to enforce agreed contributions to certain redundancy funds and the use of industrial pressure to contribute to certain funds in preference over others.

As indicated above, the continued ability of worker entitlement funds to be named in enterprise agreements is the root cause of the identified problems. Notwithstanding proposed provisions that will require employees to be given a choice of the fund they wish to make contributions to, amendments to the Fair Work Act that will explicitly prohibit pattern bargaining may also be required to fully address the issue.

2.6 USE OF FUNDS

As a matter of principle, contributions made to worker entitlement funds including redundancy funds belong to the beneficiaries of those funds and should be wholly and solely for their benefit.

HIA supports proposed sections 329LC and 329LD of the Bill which seek to curtail the discretion of fund trustees in relation to the use of contributions and income.

2.7 GENERAL GOVERNANCE - REGISTERED WORKER ENTITLEMENT FUNDS

Worker entitlement funds are currently exempt from requirements of other managed investment schemes governed by the *Corporations Act 2001*.

Although HIA understands a number of funds already comply with these requirements, for example, ACIRT currently publishes their annual report and audited financial accounts and makes their governing trust deed publically available, an aggrieved employer or beneficiary currently has little recourse or remedy except through the trust fund.

The Bill will redress this omission, by giving the Registered Organisation Commission oversite powers and setting the initial and ongoing conditions for registration of a worker entitlement fund. These requirements broadly mirror those currently in the Corporations Act.

While no system of prudential regulation ever has, or can, provide an absolute guarantee against financial failures or unsavoury dealings, the best way to ensure proper prudential and transparent management of workers funds is to impose appropriate regulatory oversite of these functions.