



## MATES in Construction | Submission

### **Senate Standing Committee on Education and Employment Legislation Committee**

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

### **Background**

**Construction workers' suicide rates are 71% higher** than the rates for other employed men in Australia.

Every year 191 construction workers take their own lives – one every second day. A construction worker is six times more likely to die by suicide than an accident at work. Around 5,500 construction workers will attempt suicide each year and of them around 970 will be permanently disabled after a suicide attempt.

MATES in Construction is a multimodal program establishing a local care program on construction sites where mates look out for mates. The program has trained more than 120,000 workers and we have a network of 10,000 volunteer connection points on sites across Australia. The organisation also provides case management being the missing middle between a worker in crisis and the right level of care. The service also operates a 24/7 helpline.

MATES in Construction (MIC) was established in Queensland in March 2008 by the Building Employees Redundancy Trust. The organisation was established in response to a report commissioned and funded in part by BERT establishing suicide to be a significant problem in the industry.

MATES in Construction was established in:

- WA in 2011 by Reddifund;
- SA in 2012 by BIRST; and
- NSW in 2013 by MIC Qld with support from the Commonwealth Government.

Research has shown MATES in Construction to have a return on investment particularly to the commonwealth of \$4.60 per dollar invested. Suicide rates in the Queensland construction industry fell by 7.9 over the first five years of the program against an increasing trend amongst Queensland men generally.

This decrease in risk ratio has decreased continually in Queensland since the introduction of the program from almost 100% elevated risk to “only” 22% elevated risk. A conservative estimate is that up to 30 lives have been saved so far, just in Queensland.

### **Structure**

Each organisation that makes up the MIC Group is a company limited by guarantee and is a wholly owned subsidiary of a State-based redundancy fund for workers in the construction industry i.e.:

- the sole member of Qld & NT is B.E.R.T. Pty Ltd ACN 010 917 281 (**BERT**);
- the sole member of SA is SABIRST Limited ACN 140 138 110 (**BIRST**);
- the sole member of WA is Reddifund Limited ACN 009 404 273 (**Reddifund**);

MIC is a registered charity with the Australian Charities & Not-for-profits Commission (**ACNC**) in the subtype of health promotion charity; and consequently is endorsed as a deductible gift recipient (**DGR**) pursuant to Item 1.1.6 of the table in section 30-20 of the *Income Tax Assessment Act 1997* (Cth) (**Tax Act**); and

### **Funding impact**

Being industry led has allowed MATES in Construction to further develop the mental health agenda for the industry. In September 2016 the Minister for Health opened a roundtable facilitated by MATES and *beyondblue* to assist the industry in developing a blueprint for better mental health. This document is now being finished and implementation will commence in 2018.

MATES in Construction has broad industry support and has a broad funding base. The funding from worker entitlement funds are important to the stability and sustainability of MATES in Construction. In the 2016-17 financial year MATES in Construction received the same level of funding from four worker entitlement funds as was received from the Commonwealth Government.

An unintended consequence of changes to the operation of worker entitlement schemes, including redundancy trust, could result substantial decline in funds to MIC for the operation of its services and outreach.

### ***Funding breakdown***

The MIC Group receives funding for its activities from:

- the Commonwealth and some State governments;
- annual donations from the Redundancy Funds;
- the receipt of one-off grants from industry construction bodies for the employment of field officers;
- some fee-for-service work, e.g. a redundancy fund may purchase an amount of counselling to be administered by a MIC entity on their behalf; and
- an annual payment from the Redundancy Funds in return for delivering services to the industry and reporting on results and milestones on the Program e.g. number of people trained.

Over 18% of the MIC Group's funding is received from the Redundancy Funds. The Redundancy Funds support the MIC Group using income derived from the management of their assets which comprise contributions received from employers on behalf of the workers.

## Royal Commission

The Royal Commission into the Building and Construction Industry (Royal Commission) report fundamentally formed a particular view in relation to income derived by Worker Entitlement Funds.

In the case of the MIC Group however, the income which it receives from Worker Entitlement Funds is used solely for the purpose of benefiting construction workers and the industry more broadly by undertaking activities to further its charitable purpose. The distribution of income by the Redundancy Funds to the MIC Group is a prime example of a return on investment of workers' contribution being used for proper purposes for the benefit of the workers.

At the end of Chapter 6, the Commission makes 3 recommendations for reform. Notably, and critically for the MIC Group, whilst the Commission makes recommendations regarding the payment of contributions to Worker Entitlement Funds directly, it does not make any recommendation that the law should be amended to restrict how and to what parties income derived by an Worker Entitlement Fund can be applied or distributed.

The Report does not give a reason for this, but it can be implied that the Commission was of the view that the other recommendations made for reform (such as requiring Worker Entitlement Funds be registered and subject to direct regulation and reporting requirements) are sufficient to ensure the proper operation of Worker Entitlement Funds and protection of workers such that specific legislation regarding the use of income derived by Worker Entitlement Funds is unnecessary.

Despite this, the Bill contains a proposed new section 329LD of the RO Act which limits the uses of income of Worker Entitlement Funds.

As stated in paragraph 6 of explanatory memorandum, the express purpose of the Bill is to protect workers by bringing into effect the recommendations made by the Commission in the Report.

The key drivers for reform pursuant to the explanatory memorandum are:

- (1) the lack of transparency and accountability of the financial affairs of unions and associated entities such as Worker Entitlement Funds;
- (2) the prevention of fraud and financial mismanagement in unions and associated entities;
- (3) the promotion of acceptable standards of democratic governance of unions and associated entities in the interests of members; and
- (4) fundamentally, the protection of workers.

In the explanatory memorandum, the argument by the Government does not rely on any particular finding of the Commission in relation to proposed new section 329LD of the RO Act. The explanatory memorandum does however refer to the Commission's finding that the income of Worker Entitlement Funds generated from contributions received on behalf of employees should be used either for the benefit of employers who contribute to the fund or the employees who are ostensibly the intended beneficiaries of the fund.

However, as discussed from paragraph 0 onwards below, section 329LD in its current form does not have this effect.

## Consequences of the Bill for MIC

Proposed section 329LD is as follows:

### **329LD**      ***Authorised uses of income***

- (1) *For the purposes of paragraph 329LB(1)(e), **income** of the **fund** may only be used for the following purposes:*
  - (a) *a purpose mentioned in subsection 329LC(1);*
  - (b) *to make payments other than worker entitlements to persons mentioned in paragraph 329LC(1)(a);*
  - (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 or welfare payments covered by subsection (2).*
- (2) *A payment is a training or welfare payment covered by this subsection if:*
  - (a) *the payment made for the sole purpose of providing training or welfare services to either or both of the following:*
    - (i) *participants or former participants in any industry in which funds members participate;*
    - (ii) *spouses or dependents of such participants or former participants; and*
  - (b) *if the services are not provided by the operator of the fund;*
    - (i) *the services are provided at market value and on commercial terms;*
    - (ii) *all arrangements for providing the services are negotiated at arm's length from any director of the operator who has a material personal interest in the provider of the services; and*
  - (c) *the services are provided in a way that does not discriminate unfairly between fund members; and*
  - (d) *before it is made, the payment is approved by the voting directors of the operator; and*
  - (e) *the voting directors who approve the payment include:*
    - (i) *a voting director who is independent in the way described in condition 9;*
    - (ii) *a voting director who is independent in the way described in condition 10.*

Only payments covered by subsection (2) are relevant to the MIC Group.

The term **income** is not defined in the Bill or the RO Act, so it is unclear whether the section applies to income derived before or after the imposition of income tax. The consequences of this are discussed further below.

The effect of subsection (2) is that the:

Redundancy Funds will be prohibited from distributing any income to the MIC Group as it does currently, including by making a tax deductible donation;

Redundancy Funds will only be able to support the activities of the MIC Group if the MIC Group provides services:

- a) at market value; and
- b) on commercial terms.

This is problematic for the MIC Group for the following reasons:

A substantial amount of the MIC Group's funding is received from the Redundancy Funds by way of gift. Because each of the entities in the MIC Group are endorsed as DGRs, the Redundancy Funds are afforded a tax deduction for these donations.

If the Redundancy Funds are prohibited from making donations to the MIC Group, the MIC Group's overall funding would be significantly reduced.

There is no compelling reason, legally or otherwise, that an employee based organisation, such as the Redundancy Funds, should be precluded from making donations to a legitimate and effective charity, which is properly registered, endorsed and regulated, and which is carried on for the benefit of the employees themselves.

Due to the multi-modal and comprehensive nature of the Program, it is wholly impractical for the MIC Group to quantify the market value of the Program as required by proposed section 329LD(2)(b)(i).

- a) The upshot of this is that it would be impossible, without significant alteration to the MIC Group's business model and more importantly, the way in which the Program is delivered, for the MIC Group to be able to receive funds from the Redundancy Funds under section 329LD(2).
- b) As mentioned in paragraph **Error! Reference source not found.**, the effectiveness of the Program lies in its multi-modal nature. If the delivery model of the Program had to change in order to comply with the requirements of section 329LD, the effectiveness of the Program itself would likely be jeopardised.

Ultimately, the immediate effect of the proposed section 329LD is that the MIC Group's source of funding will be drastically reduced and as a consequence, its ability to continue to provide benevolent services to workers in the industry will be significantly compromised. The impact of the reduction in funding is as follows:

- Queensland – 40% cut in staffing and services (mainly frontline);
- Western Australia – 15-20% cut in staffing and services (mainly frontline); and

- South Australia – the organisation will become unviable and be forced to cease operating.

It is difficult to reconcile a fundamental driver of reform (being the protection of workers and ensuring that the workers receive the benefit of the income derived from Worker Entitlement Funds) with the effect and impact of the proposed amending legislation.

For these reasons, and in relation to the MIC Group and its role, section 329LD is inconsistent with the view of the Commission, which has been demonstrably accepted by the Commonwealth Government, that the income of Worker Entitlement Funds should be used for the benefit of the employees who contribute to fund.

The distribution of income from the Redundancy Funds to the MIC Group is entirely consistent with the goal of ensuring that income generated on contributions received by Worker Entitlement Funds are used for the benefit of the employees who are the intended beneficiaries of the fund.

### **Possible amendments**

Section 329LD(2) could be amended to specifically authorise distributions of income from a Worker Entitlement Fund to a registered charity in the same way that contributions to registered charities are authorised in the proposed amendment to section 194 of the *Fair Work Act 2009* (Cth) in accordance with the Commissioner's Recommendation 49.

If thought necessary to ensure that the workers receive the benefit of such distributions of income from a Worker Entitlement Fund, the authorisation could be limited to apply only to charities that will benefit the workers, or the industry generally. The MIC Group would fulfil this requirement.

The benefits of this approach are that:

- a. Charities registered with the ACNC are subject to rigorous regulation and reporting obligations under the *Australian Charities & Not-for-profit Commission Act 2012* (Cth) (**ACNC Act**). This will ensure that the recipient charity must be accountable and be transparent as required under the ACNC Act.
  - i. It is relevant to note that a key object of the ACNC Act is to maintain, protect and enhance public trust and confidence in the Australian not-for-profit sector.<sup>1</sup>
- b. There is little risk that a registered charity which receives income from Worker Entitlement Funds could use those funds for political purposes. This is because the purpose of promoting or opposing a political party or candidate for a political office is a disqualifying purpose under the *Charities Act 2013* (Cth)<sup>2</sup>, meaning that if a charity did engage in this kind of activity, it would risk having its registration as a charity revoked.<sup>3</sup>

Ultimately, allowing Worker Entitlement Funds to donate income derived from employee funds to a registered charity will ensure that:

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<sup>1</sup> Section 15-5(1)(a) of the ACNC Act.

<sup>2</sup> Section 11(b).

<sup>3</sup> See definition of "charity" in section 5(c) of the *Charities Act 2013* (Cth) and the entitlement to registration as a charity in section 25-5 of the ACNC Act.

- a. the workers are receiving the benefit of their income through the receipt of necessary services;
- b. the recipient of the income and the use of the income by the recipient will be subject to regulatory and reporting obligations under the ACNC Act.

## **Summary**

In its present form, section 329LD risks the ongoing existence and extent of the MIC Group's activities which are carried on solely for the benefit of the workers.

However, section 329LD can be amended to allow Worker Entitlement Funds to distribute income to the MIC Group in a way that ensures that the income is being applied for the benefit of the workers and that there is accountability and transparency regarding the use of the income.