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Senate Education and Employment Legislation Committee

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

About this supplementary submission

This supplementary submission to the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (Bill) has been prepared by Incolink in response to an invitation by the Committee at its hearing on 20 September 2019 in Melbourne.

About us

It is important to again summarise the key features of Incolink to highlight why it is the oldest, biggest and most successful fund that distinguishes it from its peers and why there should be minimum disruption to its ongoing success.

Incolink is the genesis of an industry's collaborative effort and collective will in 1988 to ensure the longevity and success of the commercial building, construction and civil allied industries, a significantly contributing sector to the Victorian and wider economy. It does this by:

1. Providing a safety net for workers: financial, wellbeing, safety, discretionary cover (funeral, emergency transport, accidental dental) and general protection of their entitlements;
2. Alleviating the legal obligations of employers: custodians of entitlements and claims payment; and
3. Investing back in the industry: OH&S training and awareness, industry skilled training, industry centric insurance cover for workers and employers, workplace injury management, wellbeing and support services (counselling, suicide prevention, GP health checks, support for workers experiencing mental health, financial and drug & alcohol issues, support on worksites during critical incidents).

This collaborative effort and collective will remains as strong as ever with an iron cast undertaking from the Board to:

1. always ensure the fund remains the safety net for our workers; and
 2. provide meaningful returns to support and strengthen the commercial construction industry
- both of which are self-evident with our breadth of industry centric offerings.

Incolink is already regulated AND on many levels

At its core Incolink is a corporate trustee tasked with the enormous stewardship responsibility for circa \$900m in members' funds under management.

Contract with the Industry

As a constitutional corporation its actions/conduct is contractually governed by the constitution, which like any corporations either private or ASX listed, is responsible to its members (represented equally on the Board by nominees from Unions and Employer Associations in addition to an independent director). This ensures that any decision it makes has the unanimous support of the industry.

Law of Equity & Trustee Act

As a corporate trustee its actions/conduct is also governed by the law of equity and the *Trustee Act 1958* (Vic). Incolink is fully aware of its duties to always act in the best interests of the beneficiary, which essentially is the industry. Put simply, Incolink does not profit from the trust, neither does it allow conflicts of interest to arise between its own interests and that of the industry beneficiary. Cognisant of the representative composition on its Board, Incolink has always and continues to discharge its duties in an exemplary manner, regardless of the interest of its nominee Board representatives. What Incolink has delivered to the members and the industry at large is testament to this.

Fringe Benefits Tax Assessment Act 1986

In managing a number of approved worker entitlement funds Incolink is also subject to strict obligations and duties under the respective fund's trust deed. Importantly the funds themselves are approved worker entitlement funds because both the respective funds and Incolink having satisfied the processes under Division 426 in Schedule 1 to the *Taxation Administration Act 1953* (Cth) and have qualified to be specifically endorsed by the ATO as an *approved worker entitlement fund* pursuant to section 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth).

Corporations Act 2001

As a corporation, Incolink is also subject to the *Corporations Act 2001*. Its activities, the conduct and governance of its Board including auditing and reporting requirements are all regulated by the Corporations Act.

ASIC Corporations (Employee redundancy funds relief) Instrument 2015/115

It should also be noted that via ASIC Corporations (Amendment) Instrument 2018/825, Incolink has been granted relief from the managed investment and associated provisions in the Corporations Act. This continues the effect of longstanding ASIC relief set out in ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150 until 1 October 2021. This relief is from requirements to:

- hold an Australian financial services licence with appropriate authorisations
- register the employee redundancy fund as a managed investment scheme, and
- comply with the managed investment provisions in Chapter 5C of the Corporations Act and other associated provisions, including those relating to Product Disclosure Statements, ongoing disclosure requirements and the anti-hawking provisions.

The ROC is not the appropriate regulator

Incolink itself is regulated. The funds it operates are endorsed and approved by the ATO and regulated by relevant legislation. As a corporate trustee and like many others in the market responsible for the management of significant sums of members' moneys, ASIC is the obvious and most logical regulator. The Bill proposes to introduce a new regulator, the ROC, one that we submit, is not at all suited nor adequately equipped to understand let alone able to regulate the activities of a corporate entity whose

duties and activities, given the size of the fund it manages (\$900m), are complex. By proposing the ROC as the regulator, then by extension, given the corporate trustee activities of Cbus or the GPT Group, the ROC should also be their regulator. This notion at a minimum, is illogical.

If the nexus that justifies introducing the ROC as a regulator of redundancy funds is the employer and union organisations that jointly (and most important, collaboratively) own these funds then the same argument would apply to the regulation of other funds prudently managed by corporate trustees such as Cbus and Australian Super. If it is simply due to the fact that these funds receive, manages and pay worker entitlements pursuant to industrial legislative frameworks such as Awards or Enterprise Agreements then the same argument applies to the likes of Cbus and Australian Super.

Irrespective of:

- the category of beneficiary/member of the funds,
- the category of members of the corporate trustee entity,
- the nature of the requirement for the moneys to be contributed to these funds; and
- the nature and sources of the moneys being contributed to these fund

when examining the basic and common characteristic of these funds, they are no different to any other funds managed by a corporate trustee, such as many large ASX listed trusts. That is, a trust is set up that allows for moneys to be paid into and a corporate trustee is tasked with the prudent stewardship of those funds for the ultimate benefit of those designated or deemed as rightful recipient of those funds.

Again, at its core Incolink is simply a corporate trustee tasked with the enormous stewardship responsibility for circa \$900m in members' funds.

The Bill should be separated from the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019

The deliberate interdependence of the Bill and the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* point to the obvious conclusion that there is misguided and ill-conceived perception of alleged questionable activities by representative associations in the industrial landscape requiring close regulation. Redundancy funds by virtue of being owned and operated by the collaborative effort and collective will of the two sides of the traditional industrial divide are innocent victims of the long shadow of this misguided perception.

If it is the will and intent of the Executive arm of Government to regulate alleged improper conduct of representative associations then it should do so; but not in a way that cast aspersions on all redundancy funds. It wrongly assumes that representative associations that rightfully own and prudently operate redundancy funds have acted improperly when in fact they are already regulated, well governed and have a proven track record of providing and maintain critical safety net for its members, as well as continuing to invest back in the industry and in a transparent manner, to the wider benefit of its members and the economy.

The interdependency of the Bill and the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2019* is unwarranted, unjust, illogical and should be separated.

Incolink's concerns - recommendations for clarity and certainty

Incolink does not shy away from scrutiny and regulation because it is already regulated and acts within and in compliance with existing regulatory frameworks. It has been the subject of previous Royal Commissions as well as biased and unbalanced reporting including ill-informed commentaries from

certain quarters of the industry. If it is Parliament's will to proceed with the passage of the Bill, which we again submit is unnecessary, then following are our suggested amendments (see **Attachment A**) that will provide certainty and clarification for our current activities; noting that the Committee members were in agreement that Incolink is still able to continue with its current breadth of industry centric activities.

Concluding remarks

Incolink has been operating successfully and with more than adequate internal and external governance for over 30 years. The principle people who should be able to direct member-based organisations how to spend their resources are members themselves and our Fund has operated with distinction for over 30 years at the proper direction of our members. To quote from the recent hearing which we attended *if it ain't broke, don't fix it*. There is no valid or justifiable reason for this to change.

We respect Parliament's intention but the pursuit of proper governance and transparency to right alleged wrongdoings in certain quarters of the industry is misdirected and for that reason alone the Bill should be considered in isolation and be reviewed on its own merits, if not abandoned. It is not proper to pursue an agenda at the costs of and harm to a mature industry that has been well governed and consistently provides intended benefits.

Incolink looks forward to further engagement with the Australian Government in relation to the Bill if it is Parliament's intent to pass the Bill.

ATTACHMENT A

Appropriate Regulator

Incolink remain fundamentally opposed to the ROC as the regulator and therefore have not focussed on those provisions dealing with ROC. We strongly recommend that ASIC be the regulator, which it already is and consequential amendments to relevant provisions of the *Corporations Act 2001* and the *Fringe Benefits Tax Assessment Act 1986* will provide the required relief.

Practical provisions-amendments

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
4 (194)	(j) a term that has the effect of requiring or permitting payments to be made for a kind of insurance cover, unless each employee to be covered can choose the insurance product (offering that kind of cover) for which the payments are to be made; or	<p>The insurance products we provide are purchased by us as a Group Purchaser and have been extensively negotiated with our underwriter, QBE and thus are unique for our members. The ability for each employee to choose and potentially be covered across multiple underwriters creates an impossible task to manage.</p> <p>If an insurance product is negotiated via an Industrial Instrument then that is the collective will of all employees covered by that Industrial Instrument and as negotiated via their bargaining representative. To have each employee having the ability to choose a product is inconsistent with the outcome principle of for example any EA negotiation process.</p>	Delete “unless each employee to be covered can choose the insurance product (offering that kind of cover) for which the payments are to be made”
	(k) a term that has the effect of requiring or permitting payments to be made to a fund that	To provide clarity around Incolink’s existing services	After “training” insert “including OH&S training and awareness”

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
	provides training or welfare services or assistance or makes payments in relation to training or welfare services or assistance, unless the fund is:		After “welfare” insert “including wellbeing and support”
8 (333B)	(b) to a fund that provides training or welfare services or assistance or makes payments in relation to training or welfare services or assistance, unless the fund is:	To provide clarity around Incolink’s existing services	After “training” insert “including OH&S training and awareness” After “welfare” insert “including wellbeing and support”
13 (329 HC(1)(b))	(b) a fund of a kind prescribed by the worker entitlement fund rules.	<ul style="list-style-type: none"> Ministerial intervention in operational matters No timeframes or consultation provided for in Minister’s decisions Potential for politicising Rules Ministers are not afforded with such extensive powers in other comparable industries such as Superannuation Funds or Managed Investment Schemes 	Amend “rules” to “regulations” as regulations provide for a more transparent and consultative process.
13 (329HD)	(3) The operator of a single-employer fund may, by written notice given to the Commissioner, elect for the fund to be a worker entitlement fund.	There is no good policy reason for single-employer funds being exempted from registration. The Bill gives favourable treatment for single-employer funds. Worker benefits are not quarantined and managed at arms-length from the employer and will be at risk of being frozen or clawed back by creditors in the event of the employer’s insolvency. This would defeat the very purpose which has necessitated the creation of worker	The concept of the single-employer fund, which is exempt from registration, should be removed from the Bill. OR Delete the word “may” and insert the word “must” (be registered)

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
		entitlement funds in the first place.	
13 (329KA(3)(c))	The power conferred on the Commissioner to publish ‘any other details the Commissioner considers appropriate’ from the materials supplied with an application.	This is too broad, particularly given the Commissioner’s power under 329KA(2)(c) to require that the application be accompanied by “any information or documents” required by the Commissioner. The provisions should acknowledge that some information provided to the Commissioner as part of the application process is likely to be confidential and should not be publishable	Delete s329KA(3)(c). OR Amend s329KA(3)(c) to read: (c) Subject to prior consultation, including properly considering submissions from the operator and any other details the Commissioner considers appropriate.
13 (329LA Condition)	New definition	To provide clarity around Incolink’s existing services, in particular Industry Skills Training and OH&S Training and Awareness Projects	Insert new condition 23 as follows: “For the purpose of sections 329LC and 329LD: 1. Training means industry specific skills training to be delivered by Registered Training Organisation and currently registered with either the Australian Skills Quality Authority and/or Victorian Registration and Qualifications Authority or equivalent. 2. OH&S Training and Awareness means projects which may or may not involve training that delivers quantifiable skills and/or knowledge of OH&S awareness and responsibilities

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
			under State and Federal work health and safety laws, as they relate to the industry”
13 (329LA, Condition 3)	The operator of the fund, and any other person likely to be involved in the operation of the fund, will conduct the fund’s affairs in accordance with the ongoing conditions applicable to the fund	A broad set of terms that creates obligations on third party contracts and obliges the operator to conduct more onerous compliance checks than apply to other companies.	Remove the phrase “, and any other person likely to be involved in the operation of the fund,”
13 (329LA, Condition 4(b))	Requires that (b) the different classes (if any) of fund members are treated without discrimination by reference to membership of an organisation	This imposes a higher obligation than the term ‘treated fairly’ as used in s52 of the Superannuation Industry (Supervision) Act and Corps Act	Replace “treated without discrimination” with “treated fairly”
13 (329LA, Condition 6)	Company Constitution to comply with (b) any other requirements prescribed by the worker entitlement fund rules	Highly uncertain operating conditions	<ol style="list-style-type: none"> 1. Amend “rules” to “regulations” as regulations provide for a more transparent and consultative process. 2. Remove the vague, expansive term “any other”
13 (329LA, Condition 13)	The fund complies with any requirements prescribed by the worker entitlement fund rules in relation to capital adequacy, governance and liquidity	Highly uncertain operating conditions	<ol style="list-style-type: none"> 1. Amend “rules” to “regulations” as regulations provide for a more transparent and consultative process. 2. Remove the vague, expansive term “any requirements”

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
13 (329LA, Condition 15)	The operator notifies the Commission in writing of any change in a detail included on the register under section 329KD, within 3 months of the change occurring.	<p>The intent may be to assist the Commissioner in keeping the register of operators up to date, but it has the unintended consequence of administratively being overly onerous on an operator.</p> <p>This needs to be subject to a materiality threshold and needs to be drafted so that notification is only required once the operator becomes aware of such matters.</p>	Amend condition 15 to read: “The operator notifies the Commission in writing within 3 months of it becoming aware of any material change in a detail included on the register under section 329KD”
13 (329LA, Condition 16)	<p>The operator gives the contributors to the fund the information prescribed by the worker entitlement fund rules:</p> <p>(a) at the time prescribed by the worker entitlement fund rules; or</p> <p>(b) at the intervals prescribed by the worker entitlement fund rules</p>	Highly uncertain operating conditions	Include some practical framework, clarity or threshold around when and via what medium an operator is required to provide “the information” to contributors such as via email or via its website.
13 (329LA, Condition 18)	<p>The operator gives the Commissioner, the contributors and the fund members, information about:</p> <p>(a) any change to the constitution of the fund; and</p> <p>(b) any change to the operation of the fund affecting payments to fund members;</p> <p>as soon as practicable</p>	<p>The intent may be to assist the Commissioner in keeping the register of operators up to date, but it has the unintended consequence of administratively being overly onerous on an operator.</p> <p>This needs to be subject to a materiality threshold and needs to be drafted so that notification is only required once the operator becomes aware of such matters.</p>	<p>S1017B of the Corporations Act (Ongoing disclosure of material changes and significant events) provides a good precedent.</p> <p>Amend condition 18 to read:</p> <p>The operator gives the Commissioner, the contributors and the fund members, information about:</p> <p>(a) any material change to the</p>

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
			<p>constitution of the fund; and</p> <p>(b) any material change to the operation of the fund affecting payments to fund members;</p> <p>as soon as practicable upon the operator becoming aware of such change.</p>
13 (329LA, Condition 20(b))	The operator is required to provide a copy of the fund's constitution to each person the operator knows may become a fund member	<p>This requirement is too broad and requires the operator to operate in the hypothetical realm.</p> <p>This is adequately covered off under condition 20(c) where there is the obligation to make the constitution available on the fund's website.</p>	Delete condition 20(b)
13 (329LA, Condition 21)	<p>training or welfare payment</p> <p>training or welfare services</p>	To provide clarity around Incolink's existing services	<p>After "training" insert "including OH&S training and awareness"</p> <p>After "welfare" insert "including wellbeing and support"</p>
13 (329LA, Condition 21)	<p>If income of the fund is used to make a training or welfare payment covered by subsection 329LD(2)—as soon as practicable after the payment is approved, the operator notifies each fund member of, or ensures that each fund member has access on the website of the fund (if any) to, the following information:</p> <p>(a) the person to whom the amount is to be paid;</p> <p>(b) details of the particular training or welfare services for which the amount is to be paid;</p>	This is too onerous and suggests that each payment needs to be disclosed to members. The requirement should be that the arrangement (not individual payments) must be disclosed, disclosure should be subject to a materiality threshold (that is, payments in excess of \$100,000 per annum are likely to be made under the arrangement), and the	<p>Amend condition 21 to read:</p> <p>If income of the fund is used to make a training payment, including OH&S training and awareness or welfare including wellbeing and support, covered by subsection 329LD(2)—as soon as practicable after the arrangement is approved,</p>

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
	(c) the voting directors who voted to make the payment	<p>disclosure should be made in the fund's annual report (which is to be made available on the fund's website).</p> <p>The requirement to single out the individual voting directors who voted to make the payment is an overreach into the internal governance arrangement of the operator. By singling out a decision maker only serves to deter attracting suitable independent voting directors to the operator.</p>	<p>the operator disclose on the website of the fund (if any) to, the following information:</p> <p>(a) the parties to the arrangement and the amount paid under that arrangement if the amount exceeds \$100,000;</p> <p>(b) details of the particular arrangement for training including OH&S training and awareness or welfare including wellbeing and support services for which the amount disclosed under (a) is to be paid.</p> <p>Delete condition 21(c)</p>
13 (329LC(1)(a))	<p>For the purposes of paragraph 329LB(1)(d), contributions to the fund may only be used for the following purposes:</p> <p>(a) to pay a kind of worker entitlement to:</p> <p>(i) fund members in respect of whom amounts are paid to the fund, in a form mentioned in subsection 329HC(2), for that kind of worker entitlement; or</p> <p>(ii) death benefits dependants (within the meaning of the <i>Income Tax Assessment Act</i></p>	<p>Incolink successfully manages an Apprentice Scheme to support the future generation of worker members via providing apprentices with adequate/equitable financial support, which are derived from a combination of Incolink's income and a levy on worker contributions. By only permitting payments to fund members in respect of whom amounts are paid to the fund this</p>	<p>Add s329LC(1)(a)(iv) to read: "apprentices".</p>

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
	1997) of those fund members; or (iii) legal personal representatives (within the meaning of the <i>Income Tax Assessment Act 1997</i>) of those fund members;	excludes the industry's conscious and collective effort to support apprentice worker members.	
13 (329LC(1)(b))	(b) to make investments to generate income from the assets of the fund;	Prescribing that investments can only be made 'to generate income' may prevent fund operators from adopting investment strategies that preserve capital.	Amend s329LC(1)(b) to read: "to make investments for the benefit of fund members".
13 (329LC)	No allowance for all other contributions permitted under an Industrial Instrument	Where the contributors have agreed via an Industrial Instrument to make contributions such as in respect of training including OH&S training and awareness and welfare including well-being and support services then they should be permitted to be used/paid for those purposes so long as they are permitted under the relevant Industrial Instrument.	Add s329LC(1)(j) to read: "to use and/or pay for any purposes authorised under the relevant Industrial Instrument causing such contributions to the fund".
	No allowance for making payment of contribution under hardship/extenuating circumstances	From time to time Incolink's members suffer extreme financial hardship due to extenuating circumstances. It is appropriate that the safety net extend to members under these situations to provide interim access to their severance contributions to assist them during difficult times.	Add s329LC(1)(k) to read: "to pay to members moneys from their account under extreme financial hardship or extenuating circumstances as reasonably determined by the operator and in accordance with the rules of the fund".
13 (329LD(1)(d))	(d) to make training or welfare payments covered by subsection (2).	To provide clarity around Incolink's existing services	After "training" insert "including OH&S training and awareness" After "welfare" insert "including

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
			wellbeing and support”
13 (329LD(2)(a))	(2) A payment is a training or welfare payment covered by this subsection if: (a) the payment is made for the sole purpose of providing training or welfare services to either or both of the following:	To provide clarity around Incolink’s existing services	After “training” insert “including OH&S training and awareness” After “welfare” insert “including wellbeing and support”
13 (329LD(2)(b))	Applies a “market value” and “commercial terms” test for investments in training or welfare but does not focus on quality.	Incolink has always and continue to support quality and industry focussed skills training and OH&S training and awareness projects that are not available elsewhere lest quality and hence safety is compromised.	Delete 329LD (2)(b)(i) and insert “the services should be provided by a Registered Training Organisation. The funding of Occupational, Health and Safety training and awareness programs is allowed as long as it is for suitably qualified persons.”
13 (329LD(2)(d) and (e))	Require that <u>every payment</u> in relation to training and welfare services must be approved all directors, including approval by an independent director.	<ul style="list-style-type: none"> ▪ This imposes a day-to-day operating role on all non-executive directors! ▪ This establishes an independent director who has sole power of veto over training and welfare payments. This would give independent directors greater Boardroom rights than nominee directors’ which does not happen in other industries. ▪ Requiring every payment to obtain approval does not apply elsewhere in the corporate world – management are ordinarily provided with delegated authority to act within agreed 	Remove s329LD(2)(d) and (e) or replace “every payment” with the term “each arrangement”

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
		<p>operating and financial parameters.</p> <ul style="list-style-type: none"> There is no justification to single out training and welfare payments from other forms of reasonable administration costs and outlays incurred in operating a worker entitlement fund. 	
13 (329LD)	Severely and unjustly limits the use of income.	Incolink has always endeavoured to support and invest back in the industry via ad hoc programs that are solely for the benefit of the industry and or its participants. This must be allowed to continue for the betterment of the industry.	Add s329LD(3) to read: “A payment is permitted if it is for the dominant purpose of benefitting the industry, the participants or former participants in any industry in which fund members participate”.
13 (329LF(3)(g)(ii), (iii), (iv) &(v))	Annual Report must disclose details of “each individual payment” in regard to training or welfare payments	<ul style="list-style-type: none"> Onerous requirement to provide a lengthy list of operational expenditures. Has potential to breach privacy and commercial confidentiality, given that the Commissioner is obliged to publicly disclose the annual report under s329NG. 	<ul style="list-style-type: none"> Amend s329LF(3)(g)(iv) to remove the word “individual”. Amend s329LF(3)(g)(ii) to include a threshold amount in aggregate over a year. Amend s329LF(3)(g)(iii) to refer only to the payments in (ii) above, being those above a threshold; remove the word “individual”. Delete s329LF(g)(v).
13 (329LF(3)(h) & (5)(d))	<ul style="list-style-type: none"> Reporting of “any other matters” in an annual report prescribed by the Rules Reporting of “any other matters” in the auditors report prescribed by the Rules 	<ul style="list-style-type: none"> Ministerial intervention in operational matters No timeframes or consultation provided for in Minister’s decisions Potential for politicising Rules 	<p>Amend Rules to “Regulations”</p> <ul style="list-style-type: none"> Regulations provide for a more transparent and consultative process. <p>Remove vague, expansive terms</p>

Bill Section (Target section)	Effect	Problem(s) / Justification for Change	Solutions
			relating to “any other” matters
13 (329NJ)	Provides the Minister with extensive powers to make rules affecting the Funds	Ministers are not afforded with such extensive powers in other comparable industries such as Superannuation Funds or Managed Investment Schemes	<i>Amend</i> Rules to “Regulations” <ul style="list-style-type: none"> Regulations provide for a more transparent and consultative process.
Schedule 2 - Fair Work Act 2009: 3 (s151A(b)) 4 (194(i) & (j))	Introduce the ability for employees to choose a fund for contributions	Applies a standard of choice that is not imposed on Superannuation funds. If a Superannuation fund is prescribed in an EBA, there is no requirement to provide a choice of fund.	<i>Remove</i> s151A(b) and s194(i) & (j)