

Senate Education and Employment Legislation Committee

Victorian Government Submission:

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

28 August 2019

Industrial Relations Victoria
Department of Premier and Cabinet
1 Spring Street, Melbourne Victoria 3000

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Executive Summary

1. In its commitment to the rights of working people, the Victorian Government supports the right of employers, workers, and their representatives to negotiate agreements pertaining to workplace conditions. This right is enshrined in the *Fair Work Act 2009* (the FW Act) and in International Labour Organisation (ILO) Conventions, to which Australia is a signatory.
2. The Victorian Government welcomes the opportunity to comment on the Fair Work Laws (Proper Use of Worker Benefits) Bill 2019 (the Bill).
3. The Victorian Government does not support the passage of the Bill, as it:
 - contravenes a number of ILO conventions, including the freedom of the parties to reach their own agreement without interference;
 - gives undue power to the Minister to prescribe something that is lawful to be unlawful;
 - adversely impacts on the right of working people to be protected by, and have the benefits of, an enterprise agreement negotiated on their behalf by their union; and
 - is unbalanced as it is predominantly directed at unions and working people, and not employer associations.
4. The Victorian Government also asks the Committee to note that, as with other major pieces of Commonwealth workplace relations legislation, there has been a distinct lack of consultation with respect to this Bill. This applies to the parties that will be affected directly by this legislation, and to the states and territories that form part of the national workplace relations laws. *The Inter-Governmental Agreement for a National Workplace Relations System for the Private Sector 2009*, entered into by all Australian governments mandates a consultative process. This has been ignored with respect to this Bill.

Background to the Bill

5. The Bill has been drafted in the same terms as the Fair Work Laws (Proper Use of Worker Benefits) Bill 2017. The 2017 Bill was, according to the then Federal Government, drafted in part response to the Royal Commission into Trade Union Governance and Corruption (the Heydon Commission).
6. The Bill:
 - prohibits awards or enterprise agreements providing for 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;
 - requires employees be given the option to choose another fund or insurance product;
 - prohibits an award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association;
 - prohibits the coercion of an employer to pay amounts to a particular worker entitlement fund, superannuation fund, training fund, welfare fund or employee insurance scheme; and
 - requires all donations of more than \$1,000 to be reported.

The right to bargain

7. The Victorian Government submits that the Bill is inconsistent with the right to freedom of association and the right of workers to bargain collectively free from unreasonable interference on the part of the state.
8. These rights are protected by the *International Covenant on Civil and Political Rights* (Article 22) and the *International Covenant on Economic, Social and Cultural Rights* (Articles 7 and 8). These rights are supported by the International Labour Organization Convention number 87, *Freedom of Association and Protection of the Right to Organise* (1948), and Convention number 98, the *Right to Organise and Collective Bargaining* (1949).
9. These Covenants and Conventions, when taken together, protect the right of workers and employers to bargain collectively for employment terms and conditions. In particular, Article 4 of Convention 98 provides that an employer and an employee must be free to reach their own agreement without interference.
10. The Committee is asked to note that the Victorian Government recently submitted its Article 22 report to the Commonwealth. Under Article 22 of the ILO Constitution, Australia must report annually as to how we have given effect, in law and practice to Conventions that Australia has ratified.
11. Victorian legislation is compliant with Convention 87 (*Freedom of Association and Protection of the Right to Organise*) and with Convention 98 (*Right to Organise and Collective Bargaining*). The Commonwealth

consolidates all jurisdictional reports and adds its own responses before finalising the Australian report to the ILO. The final report for the year including how the Commonwealth reports on its own compliance is not yet available.

12. The Bill prohibits certain matters from being included in enterprise agreements, namely, a provision providing for contributions for the benefit of an employee being made to other than certain funds. This represents an unreasonable limitation on the right of employees to bargain for certain beneficial entitlements.
13. The Victorian Government accepts that a limitation on matters permissible to be included in agreements may be justifiable in certain circumstances. The Victorian Government submits, however, that those grounds do not exist in the current circumstances. The limitation is neither justifiable nor proportionate.
14. The Victorian Government endorses the findings of the Federal Parliamentary Joint Committee on Human Rights on the provisions in the 2017 Bill, (which are identical to those in the current Bill). The committee stated that:

The International Labour Organization's Committee on Freedom of Association has raised concerns in relation to Australia's restrictions on bargaining outcomes through prohibiting particular matters in enterprise agreements. The provisions introduced by the bill prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is a further restriction on bargaining outcomes.

Based on the information provided and the above analysis, prohibiting terms of industrial agreements that require or permit payments to worker entitlement funds is likely to be incompatible with the right to collectively bargain.¹

Onerous reporting requirements

15. The Victorian Government submits that the Bill contains undue and bureaucratic reporting requirements. Registered organisations are already heavily regulated, and minor changes to the already onerous reporting requirements under the *Fair Work (Registered Organisations Act 2009* (the RO Act) could have addressed any identified problems. For example, section 253 of the RO requires registered organisations to prepare detailed annual reports, consistent with Australian Accounting Standards. Failure to comply with the requirements attracts a penalty of 100 penalty units.
16. Registered organisations must already disclose loans, donations, and grants of \$1,000 or more made by the organisation. The Bill will require the reporting of loans, donations and grants made to the organisation.

¹ Human Rights Scrutiny Report. Report Number 2 of 2018. Page 106

17. Critically though, the Bill requires registered organisations to develop and implement expenditure policies that go well beyond any similar requirements imposed on corporations. This differential treatment is not explained or justified. These overly burdensome requirements mean that unions will have less time and resources to undertake their core role of representing the interests of their members. Workers' rights and benefits will, therefore, ultimately suffer as a result of these requirements.

Worker entitlement funds

18. One of the important functions of unions is to provide benefits to workers over and above industrial representation. Worker entitlement funds have existed for many years, and provide benefits including training, welfare support, and termination payments.
19. The Victorian Government submits that the Bill unduly interferes with this important union function and service. Unions will be prohibited from operating worker entitlement funds, in direct contravention of Article 3 of ILO Convention 87.
20. Further, in contravention of Article 4 of ILO Convention 98, collective agreements will not be able to provide for contributions to union worker entitlement funds for the benefit of those workers.
21. Worker entitlement funds will not be allowed to distribute income to the union managing them, and the union will be prohibited from determining how income is to be distributed, for the ultimate benefit of those workers.
22. The Victorian Government submits that the Bill treats unions differently, and less favourably, than other entities. Similar restrictions are not proposed for private corporations.
23. The Bill empowers the Federal Minister to prescribe any fund to be a worker entitlement fund for the purposes of the legislation. A fund operated by the union in compliance with the law, at the stroke of a pen, could become prescribed, meaning that the union is liable for criminal prosecution. A charity such as MATES in Construction, established in 2008 to help prevent suicides amongst construction workers, could be prescribed, thus making the charity unviable and removing essential assistance in this critical area.
24. The Federal Government argues that the changes were recommended by the Heydon Commission. This is not accurate. Chapter 5 of Volume 5 the Final Report makes it clear that members of unions and employer groups should still be able to benefit from income distributed by way of enterprise agreements.

Do worker entitlement funds need further protection?

25. The Victorian Government submits that the Federal Government has failed to establish that worker entitlement funds are at risk or are being misused.

The simple fact that the Federal Government does not like the way that the funds are being used does not of itself amount to misuse.

26. Thus, the justification for the Bill falls at the first hurdle. The Victorian Government submits that any threat to worker funds, or any cases of misuse are adequately addressed by the combination of Fair Work laws, and general governance laws that already apply to registered organisations.

Conclusion

27. The Victorian Government asks the Committee to recommend against passage of the Bill. The consequences of the proposed changes that will result from the Bill have either not been considered or have been ignored. The Bill is inconsistent with long-established human rights such as the right to bargain collectively. These rights are enshrined in international laws to which Australia is a signatory.
28. The Bill purports to be about protecting union members. The more likely outcome will be that workers will suffer because they will be prevented from bargaining for favourable outcomes. Further, union resources will be diverted towards unnecessary and time-consuming paperwork. The impact will be felt by all workers, not just union members, as all working people benefit from the gains made by unions.
29. Much effort has been put into drafting this Bill, which the Federal Government has given high priority to. At the same time, the Federal Government has ignored more pressing matters, such as addressing the gender pay gap, and tackling the widespread underpayment of wages.