

Senate Education and Employment Legislation Committee

WEDNESDAY 25 SEPTEMBER 2019

Attorney General's Department

Question No. 1

Senators asked the following question via email on Thursday 26 September 2019:

In 2017 the Senate Education and Employment Legislation Committee conducted an inquiry into the provisions of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017. The committee recommended that the bill be passed, subject to one recommendation: that the government review the wording of proposed section 329LD in light of the concerns raised by submitters that it would not allow for a gift or donation to be made to charities. The wording of proposed section 329LD remains unchanged in the 2019 version of the bill.

1.) In the drafting of the 2019 bill, what consideration was given to the committee's recommendation regarding proposed section 329LD?

The response to the honourable Senators' question is as follows:

A range of feedback was considered from stakeholders and various Parliamentary Committee processes in drafting the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill). This included the Senate Education and Employment Legislation Committee's inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017. The committee's recommendation was not adopted for the reasons set out in Question No. 2.

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Question No. 2

Senators asked the following question via email on Thursday 26 September 2019:

2.) Please provide details on the reasons for leaving the wording unchanged in the 2019 version of the bill.

The response to the honourable Senators' question is as follows:

The Royal Commission into Trade Union Governance and Corruption (Royal Commission) considered that after the payment of necessary expenses to manage the fund, all of the money held by worker entitlement funds should be used solely for the purposes of benefitting employees, or if there are surplus funds, returning those funds to employer contributors.¹ The Royal Commission also noted that on a proper construction of the current provisions of the *Fringe Benefits Tax Assessment Act 1958*, approved worker entitlement funds are not permitted to distribute income to persons other than the employers who make contributions and the employees on whose behalf contributions are made.²

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) recognises the importance of training and welfare payments, and allows for them provided there is appropriate oversight and they meet the following requirements:

- the payments are for the sole purpose of providing training or welfare services to current or former participants in an industry in which members of the fund participate (and their spouses and dependants);
- if the training and welfare services are not provided by the operator of the fund, they are provided at market value, on commercial terms and negotiated at arm's length from any director of the operator who has a material interest in the provider of the services;
- the services are provided in a way that does not 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 payments are approved by the voting directors of the fund before they are made, including at least one independent director; and
- fund members are notified or have access to information regarding who the payment was made to, what the payment was for, and which directors voted to make the payment.

¹ Royal Commission into Trade Union Governance and Corruption, *Final Report*, Vol 5, pp 319.

² Royal Commission into Trade Union Governance and Corruption, *Final Report*, Vol 5, pp 306.

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Question No. 3

Senators asked the following question by email on Thursday 26 September 2019:

The Senate Standing Committee for the Scrutiny of Bills raised 5 key issues in relation to the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 and reiterated its comments in its Scrutiny Digest 3 of 2019 in relation to the 2019 bill. The issues related to:

- Privacy - Schedule 1, Item 6, proposed subsection 237(4A)
- Broad delegation of administrative powers – Schedule 2, Item 13, proposed section 329MB
- Procedural fairness – Schedule 2, item 13, proposed section 329MK
- Exclusion of merits review – Schedule 2, item 13, proposed section 329NI
- Reversal of evidential burden of proof – Schedule 2, item 13, proposed section 329NF

3.) In the drafting of the 2019 bill and EM, what consideration was given to the five issues identified by the Scrutiny Committee? Please address each issue separately.

The response to the honourable Senators' question is as follows:

Key Issue 1: Privacy – Schedule 1, Item 6, proposed subsection 237(4A)

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) does not increase the level of personal detail that has to be included in a statement prepared under section 237 of the *Fair Work (Registered Organisations) Act 2009* (RO Act). This was acknowledged by the Committee in Scrutiny Digest 15 of 2017 at paragraph 2.108, and is made clear in the amended Statement of Compatibility with Human Rights (HR Statement) in the explanatory memorandum (EM) to the Bill.

Items 8 and 10 of Schedule 1 to the Bill amend subsections 237(5) and (6) to reflect the new requirement for registered organisations to disclose any loans, grants or donations over \$1,000 made to the organisation.

Item 6 of Schedule 1 to the Bill inserts new subsection 237(4A) to require the Commissioner to, upon receiving a section 237 statement lodge by an organisation, omit any residential addresses. The Commissioner will also have the discretion to omit any other personal information included in a section 237 statement.

The HR Statement notes that the discretion the Bill provides to the Commissioner is necessary to ensure the protection of privacy without compromising on transparency. Allowing members of an organisation to view statements produced under section 237 would not serve the purpose of providing meaningful transparency about the operations of the organisation if

the name(s) of the people who give or receive loans, grants and donations were automatically removed.

As mentioned in the HR Statement, the Office of the Australian Information Commissioner was also consulted during the drafting of the Bill in order to ensure that appropriate attention was directed toward protecting privacy and personal information.

Key Issue 2: Delegation of administrative powers – Schedule 2, Item 13, proposed section 329MB

Subsection 329MB(3) of the Bill has been amended to respond to these concerns by restricting the Commissioner's capacity to delegate the authority to issue infringement notices. The Commissioner will now only be able to delegate the power to issue infringement notices to SES employees working for the Commissioner in accordance with section 329CA of the RO Act.

Key Issue 3: Procedural fairness – Schedule 2, item 13, proposed sections 329MK

Proposed section 329MK of the Bill is not intended to exclude the natural justice hearing rule in relation to the process for de-registering a WEF. Rather, section 329MK provides that the provisions in Subdivision B of Division 5 of Part 3C of the RO Act as amended will be taken to be an exhaustive statement of the requirements of the natural justice rule in relation to decisions by the Commissioner about the deregistration of a WEF.

Section 329MG sets out the requirements for a fair hearing in relation to a proposed deregistration. This includes that the fund operator be provided with a written notice that the Commissioner proposes to de-register the fund. The notice must, among other things, specify the grounds for deregistration and invite the operator to make submissions on the proposed deregistration, giving the operator no less than 28 days to make submissions. The Commissioner will be required to consider any such submissions prior to determining whether a condition of registration has not been, or is not being, complied with (subsections 329MH(1)(c) and 329MI(1)(c)).

Together, these provisions are intended to ensure that the operator of the fund will have a fair opportunity to put its case to the Commissioner and that its submissions are considered before any decision about deregistration is made. Where there has not been non-compliance with conditions 1 or 2, the Commissioner is required to consider the seriousness of the non-compliance, any previous non-compliance, whether deregistration would be in the best interests of the fund members and whether action other than deregistration would be more appropriate in the circumstances (subsection 329MG(4)). The Commissioner may also consider other matters as relevant (subsection 329MG(5)).

The natural justice hearing rule enables independent consideration of whether a hearing provided prior to an adverse decision is fair in the circumstances of the case, including in the statutory context of the power being exercised. Consistent with this rule, paragraph 329NI(b) provides that the fund operator that has been deregistered can make an application to the Administrative Appeals Tribunal (AAT) to have the decision of the Commissioner reviewed. The AAT will be able to consider whether the decision by the Commissioner to deregister the fund is fair in context including whether the Commissioner has complied with the requirements set out section 329MG and 329MH.

Key Issue 4: Exclusion of merits review – Schedule 2, item 13, proposed section 329NI

Decisions made by the Commissioner under proposed section 329MA of the Bill have been excluded from review by the AAT on the basis of the principle that decisions of a law enforcement nature should not be made subject to merits review because this could jeopardise enforcement of the law.

Under proposed section 329MA, the Commissioner will have the capacity to determine whether or not to give a written notice directing the operator of a fund to take, or stop taking, one or more actions to ensure that the fund is compliant with the ongoing conditions of registration set out in section 329LA. Decisions made under section 329MA by the Commissioner will not have the effect of depriving a worker entitlement fund of any of the benefits of registration. Such decisions are directed toward ensuring compliance with the law and are thus properly characterised as law enforcement in nature.

Similarly, where the Australian Securities and Investment Commission (ASIC) issues an infringement notice to a disclosing entity for failures to comply with continuous disclosure requirements, ASIC's decision is not subject to merits review by the AAT (see sections 1317C(i) and 1317DAC of the *Corporations Act 2001*).

Decisions made by the Commissioner under section 329MA are subject to separate external review processes, including review by the Federal Court under section 39B of the *Judiciary Act 1903*.

Key Issue 5: Reversal of evidential burden of proof – Schedule 2, item 13, proposed section 329NF

The 'Right to the presumption of innocence and other guarantees' section of the Statement of Compatibility with Human Rights (HR Statement) included in the explanatory memorandum (EM) for the Bill has been expanded since the 2017 iteration to respond to 'burden of proof' matters raised by the Committee in Scrutiny Report 13 of 2017 (see pages xiii – xiv of the HR Statement).

Subsection 329NF(4) of the Bill creates an offence for failing to comply with a written notice issued by the Commissioner under subsection 329NF(3). These notices will require a person to give the Commissioner specified information or documents to assist the Commissioner in determining whether a requirement relating to the final report of a fund or an ongoing condition of a fund's registration is being complied with. Subsection 329NF(5) provides a defence that the offence will not apply where a person has a reasonable excuse for failing to comply with the written notice. The onus is on the defendant to demonstrate that he or she had a reasonable excuse.

The onus of proving the defence of 'reasonable excuse' rests with the defendant because the reasons for non-compliance are a matter peculiarly within the knowledge of that person.

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Question No. 4

Senators asked the following question by email on Thursday 26 September 2019:

The Scrutiny committee recommended that key explanatory information provided by the Minister in response to the Scrutiny committee be included in the 2017 EM to provide clarity around the operation of proposed subsection 237(4A) and proposed section 329NF. This material was not included in the 2019 EM.

4.) What were the reasons behind this decision?

The response to the honourable Senators' question is as follows:

Further explanatory material concerning proposed sections 237(4A) and 329NF of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) has been added to the Statement of Compatibility with Human Rights (HR Statement) included in the explanatory memorandum (EM) for the Bill.

In Scrutiny Digest 15 of 2017, the Senate Standing Committee for the Scrutiny of Bills (the Committee) stated that, in light of the information provided by the then Minister in response to Scrutiny Digest 13 of 2017, the Committee had no further comment other than to request that explanatory material be added to the EM.

- See paragraphs 2.110 and 2.111 of Scrutiny Digest 15 of 2017 in relation to section 237(4A) in the Bill, and paragraphs 2.145 and 2.146 of Scrutiny Digest 15 of 2017 in relation to section 329NF in the Bill.

The HR Statement has been amended since the 2017 iteration in relation to:

- section 237(4A) in order to address the type of concerns raised by the Committee in Scrutiny Digest 13 of 2017 (see pages xiv – xv of the HR Statement); and
- section 329NF, specifically in the 'Right to the presumption of innocence and other guarantees' section of the HR Statement. This section has also been expanded to respond to 'burden of proof' issues raised by the Committee in Scrutiny Report 13 of 2017 (see pages xiii – xiv of the HR Statement).

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Question No. 5

Senators asked the following question by email on Thursday 26 September 2019:

The Scrutiny committee noted that the 2017 EM described proposed section 329NF as providing for a civil penalty; however, the proposed section 329NF 'clearly appears' to impose a criminal (not civil) penalty. The Scrutiny committee sought clarification from the Minister on whether the penalty for 329NF(4) was intended to be civil or criminal. The Minister stated that it was intended to be subject to a criminal penalty.

The Scrutiny committee subsequently recommended that the incorrect reference to a civil penalty in the EM be corrected. The reference to a civil penalty remains in the 2019 bill.

5.) Please clarify whether the penalty under 329NF(4) is intended to be civil or criminal.

The response to the honourable Senators' question is as follows:

The penalty attached to proposed subsection 329NF(4) of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill is a criminal penalty.

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Question No. 6

Senators asked the following question by email on Thursday 26 September 2019:

- 6.) Noting the importance of the EM as a point of access to understanding the law and at times as extrinsic material to assist with interpretation, if the reference to 'civil penalty' in the 2019 EM is incorrect, will the department be issuing a correction? If so, when will this occur?

The response to the honourable Senators' question is as follows:

The reference in paragraph 211 of the explanatory memorandum (EM) for the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) that a civil penalty will apply if a person fails to comply with a notice issued under subsection 329NF(2) is an administrative oversight.

Proposed subsection 329NF(4) of the Bill includes the words 'Penalty: 30 penalty units'. Throughout the rest of the Bill and the *Fair Work (Registered Organisations) Act 2009* (RO Act), a civil penalty is denoted by the use of the words 'Civil penalty: X penalty units'. Throughout the Bill and the RO Act, where a penalty is not explicitly expressed to be a civil penalty, it is a criminal penalty. The note to the defence to this offence in proposed subsection 329NF(5) also refers to the defendant's evidential burden of proof by reference to the *Criminal Code*. In this context, it is clear that the penalty attached to subsection 329NF(4) is criminal in nature.

The question of whether a correction will be made to paragraph 211 of the EM is under consideration.