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# Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 [provisions]

## Senate Education and Employment Legislation Committee

### August 2019



Australian  
Chamber of Commerce  
and Industry



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# 1 INTRODUCTION

1. The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* (the Worker Benefits Bill) was introduced into the House of Representatives on 4 July 2019. On 4 July 2019, the Senate referred the provisions of the Bill to the Education and Employment Legislation Committee (the Committee) for inquiry and report by 25 October 2019.
2. This is not the first time this Committee has considered these amendments. The Committee inquired into and reported on the previous *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017*<sup>1</sup> that did not pass the Senate prior to the proroguing of the previous Parliament.
3. ACCI strongly supports the Bill as introduced. Employers continue to view the rationale for these changes as **relatively straightforward and non-controversial**; a view which has been bolstered by reviewing the previous Committee report and considering changes to the Bill between its 2017 and 2019 iterations:
  - a. Substantial monies are held on trust, contributed by employers (and, or for) employees, for particular purposes e.g (redundancy pay, sick leave, training, etc).
  - b. There is a clear regulatory gap to be addressed. Standards of transparency, and protections of governance and accountability in relation to these funds, fall short of those applicable to comparable monies held in trust in other areas.
  - c. More than \$2 billion is held in trust in these funds. Having such substantial amounts of money held in our financial system without proper and effective standards of oversight and governance represents an unacceptable level of risk, particularly in light of previous instances of unacceptable conduct, misappropriation etc.
  - d. Clear regulatory gaps have been highlighted by multiple Royal Commissions (the highest form of independent legal inquiry in our legal system), and the most recent of these Royal Commissions made specific remedial recommendations to improve transparency and governance in relation to these funds, which both trade unions and employers organisations contribute to the governance of, cosponsor and receive distributions from.
  - e. The recommendations of the Royal Commission were sensible, proportionate, balanced and derived from existing financial oversight and governance in other areas.
  - f. There must be a strong presumption by lawmakers towards giving effect to the specific remedial recommendations of any Royal Commission, and in this instance no serious case has been (or could be) made to not apply proper, otherwise applicable standards of transparency and governance.
  - g. The proposed standards of conduct, character and governance are consistent with like regulation in comparable areas such as the operation of corporations and charities.

<sup>1</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Bills\\_LEGislation/Bills\\_Search\\_Results/Result?bld=r6003](https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bld=r6003)



- h. In the wake of these changes, there will be no diminution in the capacity to:
  - i. Run effective trade unions and employers' organisations, consistent with the expectations of their members and the wider Australian community.
  - ii. Gather and administer funds, and to hold and distribute monies for the current range of purposes, many of which are supported by both employers and employees (for example redundancy, sick leave, training, mental health etc).
- 4. For the reasons set out throughout this submission, Senators should conclude that these changes:
  - a. Are merited.
  - b. Respond to genuine concerns and risks.
  - c. Are proportionate.
  - d. Will be effective, and should be supported.

## 1.1 Regulation will apply equally to unions and employers' organisations

- 5. The Minister for Industrial Relations made clear in introducing the Bill into the House of Representatives that it responds to concerns regarding governance, transparency and the proper use of worker benefits under arrangements established and supported by both trade unions and employers' organisations:

*"Most of these funds are joint ventures of unions and employer groups, and two royal commissions have warned about clear conflicts of interest that potentially arise. The Heydon Royal Commission, and the Cole Royal Commission before that, found that these funds have funnelled millions of dollars back to the unions and employer groups represented on their boards.*

*These include payments for services, administration and directors fees, and commissions, however there are also numerous examples of funds simply being transferred to unions and employer associations represented on these funds' boards. As recently as 2017, one fund transferred over \$30 million to its sponsoring union and employer association."*<sup>2</sup>

- 6. Concerns regarding the management and transparency of funds, and decisions on the expenditure and distribution of funds and earnings (that have given rise to the Bill), have arisen with both union and employer nominees sitting on fund boards and in relation to funds with both employer and union cosponsors.

<sup>2</sup> Cth. Parliamentary Debates. House of Representatives. 4 July 2019, p.287. [https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/ce759aa1-47bf-467d-a58b-3bf640990032/0081/hansard\\_frag.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/genpdf/chamber/hansardr/ce759aa1-47bf-467d-a58b-3bf640990032/0081/hansard_frag.pdf;fileType=application%2Fpdf)



7. Schedule 1: Employers' organisations that register under the *Fair Work (Registered Organisations) Act 2009* choose to submit to prescribed standards of governance, oversight and accountability, and thereby accept the compliance costs and obligations of doing so (as do those other employers' organisations that choose the alternative path of incorporation as companies). The proposed financial and accounting rules in Schedule 1 of the Bill will apply equally to all registered organisations (both registered trade unions and registered employers' organisations (and, for noting, there are more registered organisations of employers than there are registered trade unions)).
8. Schedules 2-5: The Royal Commission into Trade Union Governance and Corruption (the Royal Commission) found significant problems with the governance, operation and transparency of what it termed 'relevant entities', which includes election funds, worker entitlement funds and employee insurance schemes.<sup>3</sup> Such funds would fall within the scope of regulation proposed in the Bill, as 'worker entitlement funds' within the meaning of proposed s.329HC of the *Registered Organisations Act 2009*, and would require registration following the passage of the proposed amendments.
9. Employers' organisations have played a role in both the creation and ongoing oversight of such funds. Their nominees to fund boards have played a role in overseeing the flow of monies into and out of funds, including distributions to employer and union bodies.
  - a. Employers' organisations were in many cases originating cosponsors of funds that the Bill will subject to additional regulation.
  - b. A number of funds have directors nominated by both trade unions and employers' organisations, as well as independent directors.
  - c. Some employer bodies (as well as unions) have guaranteed additional funding into such funds in the event of any future shortfall.
  - d. Some funds have made financial distributions of capital and income surpluses to both employers organisations and trade unions.
10. The proposed changes in the Bill will apply equally to both trade unions and their nominees to fund boards, and to employers' organisations and their nominees to fund boards. The new rules will also apply equally to any distribution of funds to sponsoring or originating organisations, whether representing employers or employees.

## 1.2 Proposed changes are consistent with existing regulation

11. Australian legislation has provided for registration of trade unions and employers organisations since the passage of the original Commonwealth Conciliation and Arbitration Act in 1904. This included rules addressing the control of property, investment, and auditing.

<sup>3</sup> Royal Commission into Trade Union Governance and Corruption (2016) Final Report, Vol.5, Chapter 5, pp.271-326



12. Registration has seen Australian unions and employers' organisations submit to parliament-directed oversight of their operations, including their financial operations for more than a century (and has seen our unions accorded a nearly unparalleled level of systemic support and privilege for the same period).
13. As set out in Part 5 of this submission this level of oversight and control of the integrity of financial affairs in exchange for substantial operational and industrial privileges is entirely consistent with the protection of freedom of association and the right to collectively organise under international labour standards of the International Labor Organisation (the ILO, the special agency of the UN on employment and industrial relations).
14. The most recent substantial changes in this area were by the Rudd/Gillard government, which put in place the *Fair Work (Registered Organisations) Act 2009*, and introduced amendments in the *Fair Work (Registered Organisations) Amendment Act 2012*. Labor in government has stood for proper controls on and oversight of the operations and activities of registered organisations, in particular to protect union members and maintain the integrity of the rule of law.
15. Critically, existing legislation already regulates the rules of registered organisations, and one of the foremost requirements of registration has consistently been (for more than a century) ensuring an organisation's registered rules comply with prescribed statutory requirements.
  - a. Regulation of registered organisations' financial affairs and expenditures is an existing, long-standing part of our workplace relations system. It is not being introduced for the first time in this Bill.
  - b. Existing legislation already places substantial reporting and compliance obligations on registered organisations as to the keeping of their records and accounts.<sup>4</sup> Registered trade unions and employers' organisations must already audit, report, submit etc.
  - c. It is clear from reading the Worker Benefits Bill alongside the *Fair Work (Registered Organisations) Act 2009* that it builds on existing, well known areas of the law, and that the additional changes are:
    - i. Legitimate extrapolations that build on known and accepted regulation.
    - ii. Proportionate and consistent with the effective, transparent and accountable operations of registered organisations.
    - iii. A merited response to demonstrated concerns, that would not place any undue or inappropriate regulatory burden on registered organisations.
    - iv. Broadly consistent with comparable rules applying to charities, sporting organisations, corporations etc.
16. Usefully, Section 5 of the *Fair Work (Registered Organisations) Act 2009* sets out "Parliament's intention in enacting this Act".

<sup>4</sup> Fair Work (Registered Organisations) Act 2009, Chapter 8.





17. This articulates why Parliament has chosen to impose regulation and oversight on our unions and Employers' organisations. We ask that Senators assess the proposed changes in the current Bill against these existing, already accepted legislative intentions; an assessment that should lead to a conclusion that the proposed changes are entirely consistent with this long standing area of regulation of our industrial relations system:
- (1) *It is Parliament's intention in enacting this Act to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation.*
  - (2) *Parliament considers that those relations will be enhanced and those adverse effects will be reduced, if associations of employers and employees are required to meet the standards set out in this Act in order to gain the rights and privileges accorded to associations under this Act and the Fair Work Act.*
  - (3) *The standards set out in this Act:*
    - (a) *ensure that employer and employee organisations registered under this Act are representative of and accountable to their members, and are able to operate effectively; and*
    - (b) *encourage members to participate in the affairs of organisations to which they belong; and*
    - (c) *encourage the efficient management of organisations and high standards of accountability of organisations to their members; and*
    - (d) *provide for the democratic functioning and control of organisations; and*
    - (e) *facilitate the registration of a diverse range of employer and employee organisations.*
  - (4) *It is also Parliament's intention in enacting this Act to assist employers and employees to promote and protect their economic and social interests through the formation of employer and employee organisations, by providing for the registration of those associations and according rights and privileges to them once registered.*
  - (5) *Parliament recognises and respects the role of employer and employee organisations in facilitating the operation of the workplace relations system.*

### **1.3 Implement specific recommendations of a Royal Commission**

18. Regulatory gaps have been identified by multiple Royal Commissions (the highest form of independent legal inquiry in our legal system), and the most recent of these Royal Commissions made specific remedial recommendations to improve transparency and governance in relation to worker benefit funds. The current Bill seeks to address these gaps as recommended by the Royal Commission based on extensive evidence.



19. Specific problems with the operation of worker entitlement funds identified by the Royal Commission included:
  - a. “A number of unions promote forms of enterprise agreements that require employers to make payments to certain relevant entities, such as redundancy funds and employee insurance schemes in order to generate income for the union that is not, or not properly, disclosed”.<sup>5</sup>
  - b. “A lack of transparency concerning the financial relationships between a relevant entity (i.e. funds) and the trade union with which it is associated”.<sup>6</sup>
  - c. “Many relevant entities (funds) have poor or non-existent governance.”
  - d. “(Funds) can be used in a way that subverts the democratic processes of a union” and “...unless there is proper disclosure, the existence of relevant entities reduces the accountability and transparency of the union’s finances and has the potential to concentrate power in the hands of a few union officials at the expense of the committee of management”.<sup>7</sup>

#### 1.4 Recent commitments to integrity

20. This Bill seeks to meet community expectations regarding integrity, transparency, governance and oversight of monies held on trust for members of the Australian community. It reflects growing contemporary expectations that those in positions of trust, authority and privilege will be accountable and behave properly, particularly in relation to money and grants of legal privilege.
21. We see a link to another active policy debate, proposals for a National Integrity Commission. ACCI has taken note of various comments on the need for greater integrity, probity and accountability in the administration of positions held on trust.
22. The ACTU called in February 2019<sup>8</sup> for “a genuine national integrity commission for Australia”, and for “the establishment of a genuine Federal independent Commission against corruption with a broad mandate, effective powers and adequate safeguards against partisan abuse”. The ACTU continued, “our current framework fails to prevent corrupting influences on our political processes and the operation of government”.
23. The ETU goes further, stating that in relation to the government “If they had nothing to hide, they would have nothing to fear from a national corruption commission”.
24. Trade unions and employers organisations should similarly have nothing to fear from greater openness and transparency in relation to monies held in trust for the benefit of employees.

<sup>5</sup> Royal Commission into Trade Union Governance and Corruption (2016) Final Report, Vol. p.274

<sup>6</sup> Royal Commission into Trade Union Governance and Corruption (2016) Final Report, Vol. p.274

<sup>7</sup> Royal Commission into Trade Union Governance and Corruption (2016) Final Report, Vol. p.273

<sup>8</sup> <https://www.actu.org.au/our-work/submissions/2019/a-genuine-national-integrity-commission-for-australia>



25. The point of raising this is that Senators and various interests across our community have broadly accepted a number of propositions on the need for transparency and probity that, applied consistently to this Bill, should clearly support its passage.

## 1.5 What this is not

26. In Parts 2 and 5 and throughout this submission, we respond to a number of the charges made in opposition to the passage of these changes, which are overwhelmingly exaggerated or inaccurate.
27. This is not an anti-union Bill. It will not impose an undue or deliberate burden on either running a union or a worker benefit fund. Registration and compliance will not be so costly or complex as to be un navigable.
28. Funds will still exist, will still be able to take in and pay out monies, and will still be able to do their work, transparently and legitimately and subject to due oversight, democracy and accountability. There will be no dividend or reduction in costs for employers, that is not the aim of these amendments.
29. Funds will still be able to support training, health and welfare, and will ultimately be strengthened by doing so subject to suitable, widely applied standards of transparency and accountability.
- a. Doing business in this country has been enhanced rather than diminished by the trend of recent decades towards greater transparency and proper standards of governance.
  - b. Unions and funds will ultimately reach the same conclusion, that they will be strengthened by the confidence of operating subject to reduced risks of misappropriation or corruption.
  - c. This is not saying there should be a blank cheque to additional regulation or a blanket concession that all regulatory proposals will be positive, however it is a recognition that proper standards of governance have ultimately strengthened Australian businesses and a wide variety of other organisations.

## 1.6 There will be a suitable introductory / transitional period

30. As set out by the Minister for Industrial Relations in introducing these changes into the House, at the request of funds various provisions in the Bill allow suitable transitional periods for funds to introduce new financial policies, procedures and reporting.
31. The regulator, the ROC, also provides substantial assistance to those it regulates, including advisory services and information to support compliance and changes of approach. The ROC would support the proposed accountability and governance of worker benefit funds in a similar manner.
32. This transition period will also allow the recipients of monies from funds, such as charities and not-for-profits to move to a service based model and properly invoice funds for the services they actually provide.

## 1.7 Consequences of failing to pass these changes

33. Not passing these amendments would mean the 46<sup>th</sup> Parliament would effectively:
- a. Accept the holding of more than \$2 billion on trust for the benefit of working Australians subject to opaque governance and transparency, no requirement for mandatory disclosure<sup>9</sup>, and subject to “very little specific legislation regulating their (funds’) activities”.<sup>10</sup>
  - b. Accept little or no transparency requirements on worker entitlement funds to disclose commissions and other payments to unions and employer organisations.<sup>11</sup>
  - c. Accept that monies held for worker benefit can and should be subject to substantially lesser standards of transparency and oversight than is applied to managed investment funds under the Corporations Act.
  - d. Perpetuate a situation in which there is no disclosure of fees and charges, and no requirement to explain to workers the circumstances in which they will, or will not be entitled to a payment from a fund.<sup>12</sup>
  - e. Expose more than \$2 billion held on trust for the benefit of working Australians to serious risk of misappropriation or distribution to trade unions and employers’ organisations, rather than being directed to its stated purpose.
  - f. Allow substantial revenue flows to registered organisations to generate conflicts of interest and potential breaches of fiduciary duty on the part of those negotiating agreements.<sup>13</sup>
  - g. Fail to act on concerns regarding transparency, governance and the risk of misappropriation of funds, based on evidence to a Royal Commission.<sup>14</sup>
  - h. Accept that trade union elections be at risk of manipulation via union slush funds<sup>15</sup>, with insufficient disclosure to union members/voters<sup>16</sup>, particularly on spending. It would also mean accepting that election funds can be used to channel cash to union officials.<sup>17</sup>
  - i. Accept the coercion of non-voluntary contributions from employers and others.<sup>18</sup>
  - j. Permit the levying of the wages of union officials to keep their leaders in office.<sup>19</sup>

<sup>9</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.302, para 63.

<sup>10</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.298, para 53.

<sup>11</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.303, para 64

<sup>12</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.303, para 64

<sup>13</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.303, para 71

<sup>14</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.274, para 5.

<sup>15</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.274, para 6.

<sup>16</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.280, para 20.

<sup>17</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.281, para 21.

<sup>18</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.281, para 20.

<sup>19</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.283, para 25.



- k. Accept that existing union officials can turn their position into a sinecure, misusing funds for the benefit of workers to overcome democratic challengers, distorting elections.<sup>20</sup>
- l. Overlook deficient or non-existent record keeping.<sup>21</sup>
- m. Exempt this subset of funds from general requirements to annually report.<sup>22</sup>
- n. Accept ongoing risks of the unacceptable conduct revealed by the Royal Commission.<sup>23</sup>
- o. Allow worker entitlement funds to continue to give preferential treatment to union members over non-union members with the aim of generating union membership; a discrimination that is otherwise specifically unlawful under the Fair Work Act.<sup>24</sup>
- p. Fail to implement specific remedial recommendations of the highest form of independent inquiry in our legal system (a Royal Commission), in the context of clear community expectations that the findings and recommendations of other Royal Commissions on banking, sexual abuse and the treatment of older Australians and Australians with disability, will be acted on.
- q. Set a dangerous precedent that financial arrangements supported by trade unions should be exempt from the standards of oversight and governance that we apply to charities and the wider not-for-profit sector.
- r. Accord the operational priorities of funds and some registered organisations greater moral legitimacy than the health and welfare work our charities.

### **Recommendation:**

That the Senate pass the Bill as introduced. ACCI does not propose any amendments.

<sup>20</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.281, para 20.

<sup>21</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, p.36, para 79.

<sup>22</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.303, para 64.

<sup>23</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.281, para 20 supports the amendments in Schedule 1 of the Bill.

<sup>24</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.303, para 66.

## 2 RESPONSE TO THE PREVIOUS INQUIRY / REPORT

34. ACCI strongly supports passage of these amendments, and has consistently done so in the wake of the Royal Commission. We view these changes as important and overdue and do not support any further delay in their passage.
35. This said, one of few 'positives' of the non-passage of the preceding Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 is that we have an opportunity to review and respond to the concerns aired in this Committee's preceding inquiry report to the last Parliament.<sup>25</sup>

### 2.1 Labor Senators' Dissenting Report

36. Labor Senators issued a two and half page dissenting report, which concluded against passage of the 2017 Bill.<sup>26</sup> This dissenting report made a number of claims and conclusions that should not weigh against passage of the 2019 Bill.
37. Claim: The Bill will impose an (implicitly unduly) '**heavy regulatory burden**'. The regulatory burden following these amendments will not be unduly heavy, on funds, unions, or employer organisations.
- The schedules of the Bill, in particular Schedule 2, represent a proportionate regulatory response that will be able to be navigated fairly easily by funds holding more than \$2 billion on trust.
  - Operating financial arrangements demands governance and compliance, and this does unavoidably impose some costs.
  - On balance, the community determines that the public policy good of appropriate transparency and governance justifies imposing appropriate standards of governance and transparency, and attendant costs, whether running a corporation, a union, an EMBO or running a charity or sporting organisation.
38. Unions and registered employers' organisations already maintain financial and electoral records, audit and report under the Fair Work (Registered Organisations) Act, introduced by Labor in 2009.
39. Schedule 1 is an extrapolation on a well-known and long-standing set of regulatory obligations, and we do not foresee that it would require hiring of new administrative staff or significant additional costs for those regulated.
40. Senators may wish to recall the regulation imposed by the ACNC, the Australian Charities and Not-for-Profits Commission. Australia requires organisations that exist to save lives, fund medical research, and support the most vulnerable in our community to comply with:

<sup>25</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017.

<sup>26</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, pp.15-17



- a. Rules to maintain charitable status.
  - b. Notification of the ACNC on prescribed matters.
  - c. The registration of their rules / articles of association.
  - d. Record keeping and reporting obligations in relation to their financial affairs.
  - e. Annual reporting, including financial reporting.
  - f. Governance standards, including for those operating overseas, external conduct standards.
41. Claim: Suggestions of a lack of governance in such funds reflects a **'tired, outdated view'** (a claim advanced through the self-interest of the Protect fund<sup>27</sup>). The Royal Commission found clear governance and accountability risks in relation to trade unions, and the failure to pass the recommended remedial measures to date. Respectfully, where a series of Royal Commissions find a repeated pattern of unacceptable conduct, the fault is not with the repeated findings, but the failure of legislators to act on clear concerns and recommendations.
42. Claim: It is claimed that the proposed changes will **render funds incapable of investing in 'supporting safety, mental health, drug and alcohol training'**,<sup>28</sup> and specifically that 'MATES in Construction will lose funding'.<sup>29</sup>
43. ACCI sees no problem with employers and workers, and organisations, supporting measures for safety, mental health, suicide prevention etc, and in particular breaking down barriers to ensure more construction workers take care of their physical and mental health.
44. We see no barrier in the proposed changes to such the outflow of monies from funds to charities such as MATES in Construction (Aust) Limited, provided that:
- a. Any funds wanting to donate money to a charity such as MATES in Construction register under the new Part 3C of the Fair Work (Registered Organisations) Act.
  - b. Any such funds meet the initial and ongoing conditions for registration, set out in proposed s.329LA of the Act (operated by those of suitable character, an independent director, arms-length management of investments, auditing, reporting etc).
  - c. Services are provided at market value and on commercial terms, are provided at arms-length from the fund, and are properly approved.<sup>30</sup>

<sup>27</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, para 1.3, p.15

<sup>28</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, para 1.11, p.16

<sup>29</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, para 1.10, p.16

<sup>30</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Proposed s.329LD(2), p.24



- d. The intended recipient of funds is a registered charity. A search of the ACNC website indicates that MATES in Construction is already registered as such.<sup>31</sup>
45. We also note proposed s.329LD(2) and the identification of ‘training or welfare services’ as an expressly authorised use of fund income. This seems to clarify that charities such as MATES in Construction will still be able to rely on worker benefit funds to support their activities and services.
46. We invite Senators to consider the accountability of corporations for charitable donations. The fact that monies are directed to charity doesn’t absolve corporations from properly accounting for such expenditures, and maintaining proper standards of transparency and accountability to shareholders, auditors, or corporate regulators.
47. We also note that MATES in Construction and any fund wanting to make donations to it will have 12 months to transition to the new arrangements, and to meeting the new requirements. Rather than opposing these changes, organisations such as MATES should actively open a dialogue with government, or the ROC, on any support they require to navigate the proposed new operating environment.
48. Claim: It is claimed that these changes will ‘**shift the core purpose of registered worker entitlement funds** away from capital preservation in order to generate income to meet beneficiary expectations’ and furthermore will prevent the ‘distribution of excess capital and income’.<sup>32</sup>
49. What an extraordinary charge. There is nothing wrong with expecting training funds to deliver training, nothing wrong with expecting worker benefit funds to benefit workers, or with expecting insurance funds to deliver insurance. That said, we see nothing in the changes in Schedule 2 of the Bill that would preclude proper financial management of funds on a sustainable basis, or sensible and healthy levels of accumulation versus distribution.
50. We also note that the proposed rules will be able to regulate parameters for “capital adequacy, governance and liquidity”<sup>33</sup> which will protect rather than detract from the financial sustainability of funds.
51. Such funds should not exist for the purpose of distributing fees or payments to either employer or employee organisations, and whilst payments may reasonably be made, we see no basis to conclude that the Bill is anything other than a requirement for proper governance and transparency.
52. Claim: These changes are the product of ‘**inadequate consultation**’.<sup>34</sup> Previous claims of any rush in these propositions, inadequate consultation or insufficient time for examination by this Committee, cannot be sustained given that the previous legislation and the most recent iteration have effectively been before the Senate for almost two years.

<sup>31</sup> <https://www.acnc.gov.au/charity/8bc978b4847c4c739a563b6436b7b363>

<sup>32</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators’ Dissenting Report, para 1.10, p.16

<sup>33</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Proposed s.239LA, Item 13, p.24

<sup>34</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators’ Dissenting Report, para 1.8, p.16



53. The ACTU, ACCI and others were given an opportunity to comment on the immediate legislation prior to its introduction, and the Royal Commission recommendations the Bill seeks to implement have been publicly available for more than three and a half years.
54. Labor Senators also claimed in 2017 that the changes would deliver broad '**intervention powers** to the Minister'<sup>35</sup>, and that the Minister would have essential unilateral powers in relation to the scope and reach of the legislation through rule making.<sup>36</sup> Such claims also came from the Greens, and are addressed below.

## 2.2 Australian Greens Senators' Dissenting Report

55. Turning to the previously identified concerns of Australian Greens' Senators, which led them to not recommend passage of the 2017 Bill:
56. Claim: These changes would lead to an '**erosion of worker's rights** and the undermining of trade unions'<sup>37</sup>. This is not sustainable looking at the Bill at hand:
  - a. In essence, it is solely Schedule 1 that applies substantive duties directly to registered organisations, and these duties are for proper financial management, reporting and transparency.
  - b. There is nothing "eroding" in requiring unions to operate subject to proper standards of financial transparency and sound governance.
57. Claim: These changes will '**prevent workers from acting collectively**'<sup>38</sup>. Capacity for unions to operate collectively is found in the Fair Work Act, and the Fair Work (Registered Organisations) Act. The Bill currently under consideration would make no change to:
  - a. Rights to organise, bargain or otherwise act collectively.
  - b. Scope to take protected industrial action.
  - c. General protections for union members and office holders.
  - d. If anything, collective representation will be strengthened by improved financial governance (just as commercial businesses have been on balance strengthened by proper transparency, reporting and governance, notwithstanding some additional costs).

<sup>35</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, para 1.7, p.16

<sup>36</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Labor Senators' Dissenting Report, para 1.8, p.16

<sup>37</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.1, p.19

<sup>38</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.4, p.19



58. Claim: These changes will '**infringe on ILO treaties** and are incompatible with freedom of association'<sup>39</sup>. As set out in Part 5, this is not a sustainable contention.
59. Claim: These changes open up the prospect of, implicitly undue, '**ministerial intervention in the operation of worker entitlement funds**'.<sup>40</sup>
- a. The Minister is not the regulator, which is the ROC that operates according to public sector standards, commonwealth prosecution guidelines, administrative law, and rights of appeal.
  - b. Scope to make supporting rules is widely accorded across a range of Commonwealth legislation, sometimes to ministers and sometimes to agencies and regulators.
  - c. Such rules can only be in relation to the scope of new Part 3C of *the Fair Work (Registered Organisations) Act 2009*, this is not an at large power for the Minister.
  - d. Such rules are appealable by any interest that genuinely believes they exceed appropriate scope for the making of delegated legislation.
  - e. Such rules cannot be inconsistent with the legislation / regulations and appear disallowable.
  - f. The power to make rules (proposed s.329NJ) is also subject to the caveats set out in proposed s.329NJ(4).
60. Claim: These changes will '**allow the ROC to investigate people who administer worker entitlement funds but are outside a registered organisation**'.<sup>41</sup>
61. Yes, the proposed changes will allow a Commonwealth regulator to ensure compliance with financial and administrative requirements that are consistent with community expectations.
62. The amendments will change the role of the ROC to also impose specific and limited regulation on funds, in particular the Registration scheme in Schedule 2 of the Bill. This is actually in the interests of unions, which already deal with this regulator in relation to their financial affairs, and the ROC understands and works well with the cultures of the industrial relations policy community.
63. Claim: These changes represent '**excessive regulation**'<sup>42</sup>. Such a concern is not rightly applied in this instance; the very real threat of misuse and misdirection of funds justifies the level of compliance and oversight in the Worker Benefits Bill. The proposed regulation is not excessive, rather it is proportionate and essential to protect monies held on trust for the benefit of employees and to ensure more effective governance of these funds.

<sup>39</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.4, p.15

<sup>40</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.6, p.19

<sup>41</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.6, p.19

<sup>42</sup> Senate Education and Employment Legislation Committee (2017) *Report on the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [provisions]*, November 2017, Australian Greens Senators' Dissenting Report, para 1.7, p.20

## 3 PROVISIONS – SCHEDULES 1 AND 2

### 3.1 Schedule 1—Financial management and accountability

64. The Royal Commission into Trade Union Governance and Corruption found:
- a. “Payments totalling \$3,200,000 by a number of employers in the maritime industry at the direction or request of the MUA or its officials. These include payments made to the MUA, payments made to a separate entity established by officials of the MUA and also a payment to a political candidate, who happens to be the Deputy State Secretary of the MUA, Western Australia Branch.”<sup>43</sup> “[T]he payments were not made by employers completely voluntarily for legitimate purposes. They were made to secure industrial peace from, or to keep favour with, the MUA. In some cases they had to be made repeatedly.”<sup>44</sup>
  - b. “The purchase, in 2012 and 2013, by the outgoing and the incoming Secretaries of the Western Australian branch of the TWU, of two Ford F350s. The cost was about \$150,000 each. The purchase was for their use. But it was not they who paid. It was the TWU which paid. The other event was the making of a significant redundancy payment to the outgoing Secretary in July 2013. These various transactions were very advantageous to the two officials, and they were correspondingly harmful to the TWU.”<sup>45</sup>
  - c. The misuse of union credit cards in the NSW branch of the NUW.<sup>46</sup>
  - d. Misuse of funds and unacceptably poor record keeping in the HSU.<sup>47</sup>
65. Schedule 1 of the Bill will introduce enhanced financial management obligations into the *Fair Work (Registered Organisations) Act 2009*, encompassing:
- a. Requiring appropriate record keeping and reporting on a prescribed subset of loans / payments, increasing transparency and financial accountability to members.<sup>48</sup>
  - b. Requiring reporting on loans both to and by registered organisations.<sup>49</sup>
  - c. Making reporting subject to suitable protections of privacy and non-identification.<sup>50</sup>
  - d. Maintaining existing scope for unions to make hardship payments to striking or out of work members.<sup>51</sup>

<sup>43</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, p.84

<sup>44</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, p.84

<sup>45</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, p.84

<sup>46</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, p.86

<sup>47</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 1, pp.88-90

<sup>48</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 1, *passim*

<sup>49</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 1, Item 5, p.5

<sup>50</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 1, Div 5, Items 7 and 8, p.9

<sup>51</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 1, Div 5, Items 7 and 8, p.9

- e. Requiring registered trade unions and employer organisations to have and apply policies for expenditures by officers and employees.<sup>52</sup> This bolsters existing provisions in essence found to not be effective.<sup>53</sup>
  - f. Providing a 12-month transitional period to the new arrangements for expenditure policies.<sup>54</sup>
  - g. Ensuring compliance with the requirements for proper record keeping by registered organisations is supported by appropriate civil penalties.
66. These provisions would amend existing provisions that regulate financial record keeping and accounting by registered trade unions and employers' organisations, to implement the specific remedial recommendations of the Royal Commission into Trade Union Governance and Corruption, including:
- a. Recommendation 9 for organisations to adopt policies on financial management and accountability.<sup>55</sup>
  - b. Recommendation 10 on reporting units and financial disclosures.<sup>56</sup>
  - c. Recommendation 17 on financial record keeping.<sup>57</sup>
  - d. Recommendation 39 on audited financial disclosure statements.<sup>58</sup>
67. This follows 2012 amendments by the previous Labor government to enhance the financial governance of trade unions (and registered employers' organisations). The Royal Commission critiqued the performance of the 2012 changes and:
- a. Identified serious examples of malfeasance after the 2012 changes, such as those within the NSW branch of the NUW.<sup>59</sup>
  - b. Noted that independent research commissioned by the ACTU recommended comparable requirements for financial policies.<sup>60 61</sup>
  - c. Noted changes to comparable laws in Queensland.<sup>62</sup>
  - d. Recommended additional measures to ensure the laws could operate as intended by Parliament in 2012.

<sup>52</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 1, Div 5, p.9

<sup>53</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Explanatory Memorandum, p.7

<sup>54</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 1, Part 2, p.10

<sup>55</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.82

<sup>56</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.92

<sup>57</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.111

<sup>58</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, p.263

<sup>59</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 74, p.79

<sup>60</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 76, p.80

<sup>61</sup> Independent Panel on Best Practice for Union Governance, Report to ACTU Executive to Invite Comment and Discussion, March 2013

<sup>62</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 78, p.81

## 3.2 Schedule 2—Regulation of worker entitlement funds

68. Schedule 2 addresses the regulation of worker entitlement funds, in five (5) parts. The Minister provided a very clear re-statement of the need for more effective regulation in this area when introducing these amendments:

*The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill is designed to protect what is now over \$2 billion dollars held for redundancy pay, sick leave and other benefits for workers in many industries. The bill is aimed at ensuring this money is managed responsibly, transparently and in the best interests of workers.*

*Most of these funds are joint ventures of unions and employer groups, and two royal commissions have warned about clear conflicts of interest that potentially arise...*

*Commissioner Heydon recommended that the funds be properly regulated and required to meet basic governance, financial reporting and disclosure standards. In fact, he said there was a 'compelling case' for such reform.*

*With the passing of this bill, workers' money held by these funds will need to be responsibly invested and transparently managed by properly trained individuals. The funds will need to have at least one independent voting director on their boards. They will have to be run by people of good character. They will have to be managed at arm's length. They will be required to treat union members the same as non-members. They will be required to be open with workers, employers and the regulators about how money is spent.*

*These are basic standards that should apply to people who manage other people's moneys.*

### 3.2.1 Part 1 – The Principal Amendments

69. New provisions will ensure that awards<sup>63</sup>, enterprise agreements<sup>64</sup> and contracts of employment<sup>65</sup> cannot require or permit payments into worker entitlement funds, unless the fund is registered and employees can choose the funds into which contributions on their behalf are directed.
70. Funds will need to be registered<sup>66</sup> and there will be penalties for operating an unregistered fund.<sup>67</sup> A fund would need a constitution<sup>68</sup>, and contributions could only be used for proper purposes.<sup>69</sup> Persons administering funds would need to be of good fame and character.<sup>70</sup> Deregistration of funds is possible<sup>71</sup>, but the courts will have other options.<sup>72</sup> Decisions are appealable to the AAT.<sup>73</sup>
71. These provisions appear analogous with the regulation of comparable financial arrangements unrelated to unions or workplace relations.

<sup>63</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 3, p.11

<sup>64</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 4, p.12

<sup>65</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 8, p.13

<sup>66</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.15

<sup>67</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.19

<sup>68</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.26

<sup>69</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.27

<sup>70</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.29

<sup>71</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.37

<sup>72</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.33

<sup>73</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.33



72. The requirements for registration are clearly and transparently set out<sup>74</sup>, and ACCI can see nothing in these requirements that would impose any undue burden or impediment to fund registration.

### 3.2.2 Parts 2 – 5

73. The new registration requirements for funds are subject to transitional arrangements<sup>75</sup>, including early applications for pre-commencement registration.<sup>76</sup> This will allow the funds subject to this regulation appropriate time to make a transition to the new reporting and other transparency / governance requirements with the support of the ROC (which despite the calculated rhetoric and vitriol directed at it, actually has a strong record of actively working with and supporting unions and registered employers' organisations transitioning to new regulation).

### 3.2.3 This is consistent with comparable regulation

74. Some may claim that the new financial and reporting regulation is more arduous than applies to other comparable funds or managed investment schemes. Such claims would be inaccurate, and ACCI understands that the proposed regulation and registration scheme draws from existing management and oversight requirements for superannuation and managed investments, and will not be more onerous than long-established rules in these areas.

75. The following illustrates equivalence between existing, long-standing regulation of comparable managed investment funds, and the proposed requirements for worker benefit funds:

76. Requirement for a constitution:

- a. One of the requirements for registration in proposed s.329LA is that a fund must have a constitution that is complied with, and that funds are administered in accordance with their constitutions.<sup>77</sup>
- b. Section 601EA(4) of the Corporations Act 2001 sets out the requirements for managed investment schemes applying for registration. These include lodging the scheme's constitution.

77. Requirement for a compliance plan:

- a. Section 601EA(4) of the Corporations Act 2001 also requires managed investment schemes applying for registration to lodge a copy of their compliance plan setting out how they will comply with their constitution and regulatory requirements.
- b. Section 601HA regulates the contents of the compliance plan for managed investment schemes. This appears a more onerous and detailed level of prescription than will be applied to worker benefit funds.

78. External compliance committee or external directors:

<sup>74</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.22

<sup>75</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.49

<sup>76</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, Item 13, p.57

<sup>77</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, p.23, Items 6 and 7 of the table.



- a. Requirements for registration in proposed s.329LA are that:

*At least one of the voting directors of the operator of the fund is independent of, and has no material relationship with, the operator of the fund, other than his or her role as director*

*At least one of the voting directors of the operator of the fund is independent of all of the following and has no material relationships with any of them:*

*(a) any contributor to the fund;*

*(b) any organisation which has a member who is a contributor to the fund;*

*(c) any organisation which has a member who is a fund member;*

*(d) any associate of a person mentioned in paragraph (a), (b) or (c);*

*(e) any associate of the operator<sup>78</sup>*

- b. Section 601JA of the *Corporations Act 2001* requires the establishment of an external compliance committee where less than half its directors are external (and breaching this is a strict liability offence).
- c. It seems that the Worker Benefits Bill would apply a less onerous set of requirements to worker benefit funds than the *Corporations Act 2001* applies to managed investment schemes.

79. Annual reporting:

- a. Proposed s.329LA will require that the operators of funds lodge audited annual reports for the fund for each financial year in accordance with s.329LF.
- b. This is directly comparable to Section 292 of the *Corporations Act 2001*, which requires registered schemes to prepare financial and director's reports, the content of which is also regulated (s.295 of the *Corporations Act*).

80. Providing a product disclosure statement:

- a. Schedule 5 of the Worker Benefits Bill will require a prescribed set of disclosures to those putting money into funds.
- b. Various provisions of the *Corporations Act 2001*<sup>79</sup> require registered managed investment schemes to provide product disclosure statements and regulate their form and content.

<sup>78</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, Part 1, p.24, Items 9 and 10 of the table.

<sup>79</sup> *Corporations Act 2001*, ss.1012A, 1012B, 1012C or 1012I, 1012H, and 1014J.

## 4 PROVISIONS – SCHEDULES 3, 4 AND 5

### 4.1 Schedule 3—Election payments

#### 4.1.1 Royal Commission findings and recommendations

81. The Royal Commission found a number of problems with the use and operation of election funds by various unions<sup>80</sup>, summarised<sup>81</sup> to include:
- a. “commonly insufficient disclosure of the sources of revenue for election funds both to contributors and to voters in union elections”
  - b. “commonly insufficient disclosure of the activities and expenditure of election funds to contributors and to voters in union elections”
  - c. “lack of clarity in the legal status of contributions to an election fund and the entitlement (if any) which contributors have to the money in the fund”
  - d. “Money is used for purposes unconnected with the purpose for which the election fund was formed, with little knowledge of or oversight over the use of the money”
  - e. “In a number of cases, it is questionable whether contributors’ decisions to contribute are truly voluntary, particularly where contributions by union employees are automatically deducted pursuant to the terms of contributors’ employment contracts with the union.”
  - f. “Incumbent union officers are able to entrench their positions by the establishment of a substantial election fund, funded through the use of automatic payroll deductions, conferring a disproportionate advantage on incumbents, over and above the benefit of incumbency itself.”
  - g. “a lack of governance and record-keeping in relation to a number of union election funds”.
82. These are not abstract or academic findings. They were firmly grounded in evidence to the Royal Commission, which cited the following example of unacceptable conduct leading it to recommend changes to legislation in this area:

*21. The election fund operated in connection with the NUW NSW Branch provides a useful example of the problems. That campaign fund was funded by deductions from the wages of union officials.*

*Transfers were made from the NUW NSW Branch to an account styled the ‘Derrick Belan Team Account’, from which withdrawals were made, despite there being no contested election at the Branch between 2002 and 2014.*

<sup>80</sup> Royal Commission into Trade Union Governance and Corruption, Interim Report (2014), Vol 1, ch 4.1, pp 516-517.

<sup>81</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, pp.280-81





*Payments made from the campaign funds instead went to fund the costs of a breakaway union in Queensland, a car for Derrick Belan, and unidentified cash withdrawals.*

*Following closure of the account, the balance was withdrawn, and further deductions on account of campaign fund contributions from union staff were eventually kept in cash in Derrick Belan's personal possession. They were not accounted for in any way. There was no constitutive document explaining the purposes and setting out the rules of the fund. There were no records of any oral agreement dealing with those matters. It was unclear whether the arrangements were to be seen as contractual, agency or trust arrangements.<sup>82</sup>*

83. The Royal Commissioner concluded:

*22. These problems with election funds have the potential to affect adversely the democratic processes of the union. In many unions, employees of the union are compelled to contribute to an election fund, which in practice is commonly controlled by the Secretary. Over time the Secretary accumulates a substantial war chest that the Secretary can use to further his or her influence within the union. The election fund thus operates to reinforce the power and influence of the current Secretary. Further, because of the lack of transparency and oversight associated with election funds, members of the union do not know who is funding a particular candidate in an election and where the candidate's allegiances may lie as a result of funds received...*

*...The preferable solution concerning practical compulsion is to introduce basic governance requirements for election funds. If election funds are operated properly, and not used for the personal benefit of particular union officials, the prospect of practical compulsion is likely to be considerably reduced.<sup>83</sup>*

84. The amendments in Schedule 3 seek to give effect to Recommendation 43 of the Royal Commission:

**Recommendation 43**

The *Fair Work Act 2009* (Cth) be amended to prohibit any term of a modern award, enterprise agreement or contract of employment permitting an employer to deduct, or requiring an employee to pay, from an employee's salary an amount to be paid towards an election fund.

<sup>82</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, pp.281-282, paragraph breaks added

<sup>83</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 32

#### 4.1.2 The amendments

85. The proposed amendments in Schedule 3 are integrity measures to protect more effectively democracy and transparency within trade unions and registered employers' organisations.
86. These amendments would ensure that new enterprise agreements<sup>84</sup> could not contain terms requiring or permitting an employer to make a payment for funding, supporting or promoting the election of a candidate or group of candidates.<sup>85</sup>
87. They would also invalidate contract terms requiring the funding, support or promotion of a candidate or candidates in union elections (and theoretically in employers' organisation elections).
88. This is an integrity measure, and considerable risks of corruption would appear to be raised by practices to date that should not be allowed to continue unaddressed / insufficiently addressed.
89. Nothing in the amendments would preclude a union candidate or team gathering financial support from union members (effectively donations from the 'electorate' they seek to represent).

#### 4.2 Schedule 4—Prohibiting coerced payments to employee benefit funds

90. These amendments to the *Fair Work Act 2009* would prohibit persons from taking (organising or threatening) industrial action to coerce others to pay into various identified forms of worker benefit funds, backed by appropriate civil remedy provisions.<sup>86</sup> This does not apply to protected industrial action.
91. They build on known and long-standing areas of the law, including s.355 of the existing *Fair Work Act 2009*, which prohibit coercion for various purposes. A new provision added to existing s.539 of the *Fair Work Act 2009* would clarify who can make application for orders relating to alleged coercion in relation to worker benefit funds. Importantly, our independent Courts would determine whether and at what level any penalty was awarded.
92. These changes were specifically recommended by the Royal Commission, as follows:

##### **Recommendation 50**

A new civil remedy provision be added to the *Fair Work Act 2009* (Cth) prohibiting a person from organising or taking (or threatening to organise or take) any action, other than protected industrial action, with intent to coerce an employer to pay amounts to a particular employee benefit fund, superannuation fund or employee insurance scheme.

<sup>84</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 3, Division 2, p.60

<sup>85</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 3, p.60

<sup>86</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 4, Item 3, p.62

93. The Royal Commissioner explained this recommendation as follows:

*The reason for recommending this specific prohibition is that it is questionable whether the existing prohibitions on coercion in the FW Act capture coercion which occurs outside the enterprise bargaining process. Thus, s 343 of the FW Act prohibits action done with an intent to coerce a person to exercise a ‘workplace right’ in a particular way. A ‘workplace right’ includes participating in the process of making an enterprise agreement.<sup>26</sup> Accordingly, action done to coerce an employer to agree to a particular term of an enterprise agreement requiring contributions to a particular employee benefit fund is prohibited. However, it is doubtful whether action taken outside the enterprise bargaining process, for example, as part of seeking to come to a ‘side deal’ between employer and union, would be caught.<sup>87</sup>*

94. Thus, this is not a new concept but builds on the various extant provisions of the Fair Work Act that prohibit coercion. There are at least six such areas in which the existing Fair Work Act prohibits coercive behaviour:
- a. Section 343 – protecting against coercion to exercise or not exercise a workplace right.
  - b. Section 348 – protecting against coercion to participate in a strike or ban.
  - c. Section 355 – protecting against coercion to hire or not hire someone as an employee or independent contractor, or to allocate particular duties or responsibilities.
  - d. Section 473 and 475 – protecting against coercion in relation to strike pay.
  - e. Section 712AA – ensuring the Fair Work Ombudsman can get access to documentary evidence of coercion of employees by an employer.
95. There are at least 250 references to coercion in Commonwealth legislation, primarily to prohibit coercion and address how coerced ‘agreement’ should be treated, including:
- a. The Commonwealth criminal code, family law.
  - b. Transnational crime, human trafficking and the International Criminal Court.
  - c. The Fair Work Act, and allied legislation relating to the ABCC, WHS, paid parental leave etc.
  - d. ASIC, and consumer protection.

### 4.3 Schedule 5—Disclosable arrangements

96. These amendments address the importance of disclosure, and the risks of non-disclosure of financial arrangements and financial benefits payable from those controlling or managing funds to registered organisations seeking to have employers make payments into those funds.

<sup>87</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 30, p.338



97. They centre on insurance and other insurance like arrangements, per Recommendation 47 from the Royal Commission.

**Recommendation 47**

Amendments be made to Chapter 7 of the *Corporations Act 2001 (Cth)*, or relevant regulations, requiring specific disclosure by registered organisations of the direct and indirect pecuniary benefits obtained by them in connection with employee insurance products. The detail and mechanism should be a matter of consultation. In broad terms, the provisions should require:

- (a) a branch of a registered organisation, and an officer of a branch of a registered organisation,
  - (b) that arranges or promotes a particular insurance product providing cover for employees of an employer, or refers an employer to a person who arranges or provides such a product (whether in enterprise bargaining or otherwise),
  - (c) to disclose in writing to the employer in no more than two pages the nature and quantum of all direct and indirect pecuniary benefits that the branch or any related entity receives or expects to receive, or which are available only to the branch's members, from the issuer of the product, or any arranger or promoter, or any related entity.
98. Disclosure rules and requirements are a key tenet of contemporary governance in Australia, in both the public and private sectors. Our laws impose disclosure requirements in relation to areas as diverse as:
- a. Public sector administration and integrity.<sup>88</sup>
  - b. Health and welfare services, and communication with patients.
  - c. The funding of political parties and elections.
  - d. Communications between companies and shareholders / regulators (continuous disclosure).
  - e. Consumer law.

<sup>88</sup> The Public Interest Disclosure Act 2013.



99. The Royal Commission analysed the applicability of the disclosure requirements in Chapter 7.7 of the Corporations Act 2001 to worker benefit funds, noting that such requirements would ordinarily be applicable to such funds<sup>89</sup>, save for a class order arrangement.<sup>90</sup>
100. The disclosure provisions of the Worker Benefits Bill seek to ensure that financial benefits, commissions and payments are properly transparent and disclosed, introducing a new Part 3D into the *Fair Work (Registered Organisations) Act 2009* to this effect.<sup>91</sup>
101. The amendments would apply suitable disclosure arrangements in relation to:
  - a. Insurance products.<sup>92</sup>
  - b. Managed investment schemes.<sup>93</sup>
  - c. Training and welfare funds / arrangements.<sup>94</sup>
102. Where trade unions seek monies be paid by employers, they will need to disclose any financial benefit the union may receive<sup>95</sup>, and will need to provide transparent information on the financial benefits they are set to receive.<sup>96</sup>
103. In turn, an employer must notify employees of disclosure information it receives from trade unions.<sup>97</sup>
104. This information will be publicly available, increasing transparency.<sup>98</sup>
105. Statutory rules can be created to support the disclosure arrangements (delegated legislation), subject to various controls / parameters.<sup>99</sup>

<sup>89</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 105, p.323

<sup>90</sup> Royal Commission into Trade Union Governance and Corruption, Final Report (2015), Vol 5, Para 100, p.322

<sup>91</sup> New ss.329PA-329PD

<sup>92</sup> Proposed s.329PD(2)

<sup>93</sup> Proposed s.329PD(3)

<sup>94</sup> Proposed s.329PD(4)

<sup>95</sup> Proposed s.329QA

<sup>96</sup> Proposed s.329QA(3)

<sup>97</sup> Proposed s.329RA

<sup>98</sup> Proposed s.329SC

<sup>99</sup> Proposed s.329PE

## 5 INTERNATIONAL TREATY OBLIGATIONS / ILO

106. Australia has treaty obligations through various agencies of the United Nations that are periodically raised in relation to both proposed and in force legislation in the industrial relations portfolio. This includes conventions of the International Labour Organisation (ILO) that have been ratified by Australia (Australia has ratified 41 ILO conventions that are currently in force).<sup>100</sup>
107. ACCI is a uniquely placed expert voice on Australia's ILO treaty obligations regarding employment and workplace relations. ACCI is Australia's largest and most representative organisation representing employers, recognised by the ILO as the employer social partner for Australia (as the ACTU is for workers<sup>101</sup>). ACCI's Director – Workplace Relations, Scott Barklamb, is a titular member of the ILO's Governing Body, one of only 14 such members globally. The Australian Government also sits on the ILO Governing Body.
108. ACCI knows of no impediment in Australia's ILO treaty obligations to the passage of the Worker Benefits Bill.
109. It is for any interest seeking to oppose or amend the Bill to properly make such a case, and to identify the specific conventions it contends are breached and how they say the Bill would risk such as breach. It is also open to ACCI and the ACTU to move beyond commentary on legislation to lodge a formal complaint with the ILO where they genuinely consider their concerns have merit.
110. One of the ILO's 8 fundamental conventions has a dedicated enforcement mechanism; the *Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) (C87)*. This is the ILO convention most often raised as a concern in relation to proposed workplace relations laws. There is a published compendium of decisions of the ILO's Committee on Freedom of Association (CFA), which is somewhat akin to a legal database on what does and does not threaten to breach C87, which can be examined to assess any claims that may be made regarding proposed legislation.
111. We have examined the database of ILO decisions on C87 and can see no impediment or concerns regarding the proposed Worker Benefits Bill. In particular:
- a. The changes proposed in the Bill in no way represent any interference (and in particular not any prohibited interference) that would trigger any concerns under C87 for the establishment or running of Australian trade unions.
  - b. There is no interference (and in particular not any prohibited interference) in the administration of any Australian trade union. Duties of disclosure and reporting in the Bill are consistent with comparable duties applicable to companies, charities etc, and C87 does not stand for any authority that trade unions or employers' organisations are exempt from laws or standards of general application in any ILO member state (e.g. from accounting standards, taxation, WHS, building standards).

<sup>100</sup> [https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200\\_COUNTRY\\_ID:102544](https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11200:0::NO::P11200_COUNTRY_ID:102544)

<sup>101</sup> The ILO term for trade unions.



- c. Rights to operate unions and employers' organisations do not give officials *carte blanche* immunity from the general application of the law or community standards for running comparable organisations. (And by way of analogy it would be more than anomalous to regulate the financial affairs of charities through the Australian Charities and Not-for-profits Commission, and to not be able to do so in relation to trade unions and employers' organisations)
  - d. The Bill allocates administrative responsibilities and oversight to the proper administrative agency of Government (the ROC). The Bill also secures transparency for the benefit of individual employers and employees, and protection from fraud and improper use.
  - e. Deregistration in relation to this Bill concerns the registration of funds, not of trade unions or employers' organisations. The amendments would in no way change the capacity of Australian workers to freely form and operate trade unions.
  - f. Administrative decisions are appealable to the courts / judicial authorities if they are improper, conflicted, flawed or otherwise inconsistent with legislation / administrative law (note proposed s.329NI).<sup>102</sup>
  - g. The proposed changes will actually increase the independence and free operation of trade unions in Australia by ensuing even more financial separation between employers and union elections.<sup>103</sup> As a simplification, these changes appear set to make Australia 'even more compliant' with our ILO obligations regarding C87.
112. In summary, **ACCI can see no concerns arising from Australia's ILO obligations for the passage of the Worker Benefits Bill.**

<sup>102</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 2, p.45

<sup>103</sup> Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, Schedule 3





## 6 ABOUT THE AUSTRALIAN CHAMBER

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia the best place in the world to do business – so that Australians have the jobs, living standards and opportunities to which they aspire.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.