

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

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

25 October 2017



Ai Group Submission to Senate Education and Employment Legislation Committee

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Summary of Ai Group's position

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission to the Senate Education and Employment Legislation Committee's inquiry into the *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (Bill)*.

Ai Group strongly supports the Bill.

The Bill would deliver vital and long overdue reforms to protect workers' benefits.

Any arguments in support of the current distinct lack of governance standards for worker benefit arrangements, that are made by those with vested interests, need to be emphatically rejected. The current arrangements are not operating in the interests of workers and are indefensible.

It is essential that the Bill is passed by Parliament without delay.

Schedule 1 – Financial management and accountability

Schedule 1 gives effect to the following recommendations 9, 10 and 39 of the Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**):

Recommendation 9

Section 141(1)(ca) of the RO Act be repealed. A new civil penalty provision be introduced requiring organisations and branches to adopt, in accordance with their rules, policies binding on all officers and employees concerning financial management and accountability.

The required policies should include policies concerning financial decision-making, receipting of money, levels of authorisation of expenditure, credit cards, procurement, hospitality and gifts, the establishment, operation and governance of related entities and any other matter prescribed by regulations.

Organisations or branches should be required to review their policies every four years and to lodge a copy of their current policies with the registered organisations regulator.

Recommendation 10

A new division dealing with financial disclosures by 'reporting units' to their members be introduced to Part 3 of Chapter 8 of the RO Act to replace and strengthen existing provisions concerning financial disclosure. The regime would require 'reporting units' to lodge audited financial disclosure statements with the registered organisations regulator on discrete topics, including (a) loans, grants and donations by the reporting unit, (b) remuneration of officers and (c) credit card expenditure.

Civil penalties should apply to reporting units that fail to comply with their obligations under the regime. Further, civil penalties should also apply to officers who knowingly or recklessly

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make a false statement in a financial disclosure statement.

Recommendation 39

The RO Act be amended to require reporting units to lodge an audited financial disclosure statement (see Recommendation 10) providing details in respect of (a) loans, grants and donations (including in-kind donations) made to reporting units in excess of \$1,000 and (b) other payments made to reporting units in excess of \$10,000.

The provisions in Schedule 1 are balanced, practicable and appropriate. They apply equally to unions and registered employer organisations like Ai Group.

The Bill provides a workable and fair timeframe for registered organisations to implement the new requirements (see Items 17 and 18 of Schedule 1).

Schedule 2 – Regulation of worker entitlement funds

Schedule 2 of the Bill addresses the widespread, highly inappropriate current practice of some unions that are siphoning millions of dollars a year from money contributed by employers to worker entitlement funds. This money was contributed by employers for the benefit of their employees – not for the benefit of union head offices.

Throughout the Heydon Royal Commission, a key issue focussed upon by Ai Group was the millions of dollars in revenue that flows every year to unions from the inappropriate practices of some employee entitlement funds. These inappropriate practices include:

-) The regular distribution of millions of dollars in so-called “surpluses” to unions, from the investment earnings on funds contributed by employers for the benefit of their employees;
-) Unions siphoning off a portion of the money contributed by employers to welfare and charity funds operated or supported by unions;
-) Employee entitlement funds discriminating between union members and non-union members when providing certain benefits; and
-) Employee entitlement funds making payments to workers on strike under the guise of “hardship payments”.

Money paid into employee entitlement funds is paid by employers for the benefit of their own employees – not for the benefit of union head offices. Employees’ entitlements need to be protected from “cash-grabs” by union head offices.

The vast sums that construction unions receive each year from employee entitlement funds allows them to operate a law-breaking model. They can readily afford the fines that they incur for breaking the law because the money that they receive from employee entitlement funds far exceed the fines that they incur.

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The CFMEU has reportedly incurred around **\$10 million in fines for unlawful conduct over the past 10 years** in cases pursued by the Australian Building and Construction Commission and its predecessors. This amount is dwarfed by the revenue flows to the CFMEU from employee entitlement funds. Such revenue flows to the CFMEU over the past **five years** reportedly include:¹

\$44 million from construction industry redundancy funds
\$22 million from training funds
\$5 million from income protection insurance commissions
\$4 million from charity/welfare funds

\$75 million

It can be seen from the above that the largest source of inappropriate revenue flows to the CFMEU are from construction industry redundancy funds (including Incolink and the Building Employees Redundancy Trust). However, the CFMEU receives large revenue flows from other inappropriate sources. For example, the Royal Commission uncovered the fact that the CFMEU was siphoning off approximately half of the funds contributed by employers for drug and alcohol rehabilitation services:

“The second matter examined concerns a clause in CFMEU NSW enterprise bargaining/enterprise agreements (EBAs). Pursuant to that clause, employers made payments to the BTG D&A Committee for the purpose of assisting ‘with the provision of drug & alcohol rehabilitation & treatment services / safety programs for the building industry’. From 2004 to 2011 inclusive, employers paid approximately \$2.6 million to the BTG D&A Committee pursuant to the clause. Over that time, approximately half of that money was siphoned to the CFMEU NSW and deposited into its general revenue.”²

In any civilized society, all organisations and citizens need to comply with the law. Ensuring that employee entitlements are used for the purposes for which the contributions were made, and are not siphoned off by the CFMEU, will assist in effecting a change in the CFMEU’s current unlawful business model.

In addition, the additional millions of dollars that employers are forced to pay each year into employee entitlement funds as a result of the unions’ “cash grab”, has the effect of driving up construction costs and reducing the number of roads, bridges, railways, schools, hospitals and ports that the Federal and State Governments can afford to build.

¹ *The Australian*, “Unions ‘skim’ \$130m from worker funds”, 7 September 2017. The figures in the article were based on disclosures to the Australian Electoral Commission.

² Heydon Royal Commission Final Report, Volume 3, Chapter 7.4, paragraph 5.

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The application of appropriate governance standards to employee entitlement funds is long overdue.

Superannuation funds are subject to rigorous governance standards but these do not apply to construction and electrical contracting industry redundancy funds even though billions of dollars of worker entitlements are held in these funds.

Members of superannuation funds rightly expect to, and do, benefit from the investment earnings on employer contributions to superannuation funds. It is not right that investment earnings on employer contributions to most construction and electrical contracting industry redundancy funds are diverted to union head offices.

This practice is “ripping-off” workers and needs to be stamped out as recommended by the Heydon Royal Commission.

Schedule 3 – Election payments

Schedule 3 implements the following recommendation 43 of the Heydon Royal Commission

The Fair Work Act 2009 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.

This recommendation has obvious merit, as explained in the following extract from Volume 5, Chapter 5 of the Final Report of the Heydon Royal Commission:

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.*

Prohibition of any compulsion on employees to contribute to an election fund

23. *As was noted in the Discussion Paper, there is nothing wrong with members of an employee or employer organisation joining together to pool resources to fund a particular candidate or ticket of candidates in an election. However, any steps taken with the effect of legally or practically compelling contributions infringe basic principles of freedom of association.*

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It is unjust for an employee to be forced through the terms of a contract of employment to make regular payments into a union election fund, or to allow regular salary deductions for this purpose, as currently occurs with some employees of unions.

Workers need to be protected from such inappropriate practices.

Ai Group supports Schedule 3 of the Bill.

Schedule 4 – Prohibiting coerced payments to employee benefit funds

Schedule 4 implements the following recommendation 50 of the Heydon Royal Commission:

A new civil remedy provision be added to the Fair Work Act 2009 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.

The reason why the Royal Commission recommended this amendment is explained in Volume 5, Chapter 6, paragraph 30 of the final report:

30. *The third recommendation is to introduce a specific civil remedy provision 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. 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. 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. The maximum penalty should be the same as for the other forms of coercion.*

The provisions of the Bill (consistent with Heydon Royal Commission recommendation 50) do not outlaw coercion in the form of protected industrial action during enterprise bargaining negotiations. However, it is appropriate that union coercion in other contexts be outlawed in order to protect workers from:

-) A union that coerces an employer to pay workers' entitlements into a particular employee entitlement fund that is supported by the union, but provides less favourable benefits to workers than other employee entitlement funds;

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- J A union that coerces an employer to contribute to a particular superannuation fund that is supported by the union, but provides substandard returns to workers;
- J A union that coerces an employer to arrange insurance protection for workers through an insurance provider that is supported by the union, but provides a substandard insurance product for workers.

Workers need to be protected from such inappropriate coercion. The Bill provides such protection.

Schedule 5 – Disclosable arrangements

Schedule 5 implements recommendation 47 of the Heydon Royal Commission by requiring that registered organisations disclose to employers and employees the financial benefits (e.g. commissions) that they receive from income protection insurance and other products that they promote or arrange.

Currently, millions of dollars per year flow to unions from very large, inappropriate commissions paid to them by insurance companies which offer substandard income protection insurance products at grossly inflated prices.

Unions are misusing the enterprise bargaining laws to coerce employers to purchase these substandard, grossly overpriced insurance products, including through the use of industry-wide pattern agreements. If there was free competition in the market it is highly unlikely that these insurance products would be purchased because employers are typically able to purchase insurance products that provide much more favourable benefits for workers at a much lower cost (e.g. through an industry superannuation fund or through the insurance company which the company uses for other types of insurance). Many employers have advised Ai Group that they can purchase income protection insurance for 1/3 to 1/5 of the cost of the insurance products that the unions coerce them to purchase.

It is obvious that unions are currently enriching themselves at the expense of both workers and employers.

Workers need to be protected from these inappropriate arrangements.

The provisions of Schedule 5 will provide a lot more protection to workers than currently exists, because workers will be made aware of the large proportion of employer payments to union-aligned insurance companies for worker insurance benefits that end up in the bank accounts of unions through commission. The workers may prefer (and indeed are likely to prefer) that, instead of unions receiving generous commission from insurance companies, the workers receive a more generous insurance product or increased remuneration.

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The provisions in the Bill will enable workers to understand why insurance products that are not aligned with unions typically provide superior benefits to workers at a much lower cost for employers. This knowledge will enable workers to make an informed choice about which particular insurance products they would like their employer to provide.

Conclusion

The Bill contains critical reforms that are long overdue.

The current arrangements are not operating in the interests of workers and are indefensible.

It is vital that the Bill is passed without delay.