Submission to Senate Education & Employment Legislation Committee: *Fair Work Laws Amendment (Proper use of Worker Benefits) Bill 2017*

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Contents

Contents **2**

General Observations **3**

Schedule 1 Provisions **4**

Schedule 2 Provisions **6**

Scope of provisions *7*

Gaining and maintaining registration *8*

Schedule 3 provisions **15**

Schedule 4 provisions **16**

Schedule 5 provisions **17**

General Observations

The *Fair Work Laws Amendment (Proper use of Worker Benefits) Bill 2017* ("the Bill") is an unnecessary and far-reaching package of laws that are designed to undermine the work of unions in providing insurance, redundancy protection, training and welfare to Australian workers. As a whole, the Bill amounts to an attack on workers' ability to make collective decisions about their insurance cover, redundancy protection, and training providers, amongst other things

The onerous new regulatory and registration regime for worker entitlement funds established by the Bill will ultimately impact the effectiveness of those funds. The Bill will effectively shut down worker-run funds, while allowing employers to set up and run their own funds. It creates one set of rules for working people and another for corporations.

In effect, the Bill seeks to dismantle a system that has consistently delivered benefits to those working people who are most in need of support, and their families.

Overall, the Bill seeks to increase the power of the newly-created Registered Organisations Commission ("ROC") to an unprecedented level, and adds bureaucratic complexity to an already heavily regulated and robust system of governance. It subjects registered organisations to an unprecedented standard of reporting and governance, in some instances higher than that which applies to banks and other corporations.

This Bill has been rushed through with little consultation or proper legislative development, and is yet another politically motivated attack from this government on working people.

The remainder of this submission comments on the provisions contained in each Schedule of the Bill. Our ability to provide a comprehensive analysis of these provisions has been severely inhibited by the unreasonable time constraints placed on the making of submissions to this inquiry.

We oppose strongly oppose the Bill.

Schedule 1 Provisions

These provisions provide additional requirements to disclose loans, grants and donations and impose new requirements about internal financial management practices and policies. Evidently the existing financial accounting obligations in Tier 1 of the Australian Accounting Standards, which apply to public companies that raise capital from pockets of Australians every day, are considered insufficient for the non-profit and largely volunteer managed organisations that make up our Australian labour movement.

The provisions relating to loans, grants and donations could have just as easily been adopted by modification of the reporting guidelines issued under section 253 of the *Fair Work (Registered Organisations) Act* ("the RO Act"), with the same legal effect save that the information would have been included in financial reports and therefore provided to members even in the absence of a request for it. The existing law[1] requires disclosure to the ROC of the full particulars of loans, grants and donations of $1,000 or more made by the organisation. The amendment[2] will see loans, grants and donations *to* the organisation also disclosed in the same way. In addition, the $1,000 disclosure threshold is to be modified such that loans, grants or donations from or to a particular person that total $1,000 or more will need to be individually disclosed.

Registered organisations are currently required by the RO Act to contain provisions in their rules that require them to develop and implement policies in relation to their expenditure[3]. The precise details of the policies are left for the organisation to decide in accordance with their democratic structures (just as internal policy matters are left for corporations to decide). However, this Bill interferes with this internal governance[4] by introducing a statutory requirement for organisations to develop policies dealing with particular topics, including topics to be prescribed in regulations. Because this is a civil penalty provision and there is no legislated grace period provided for making or changing such regulations, organisations could be prosecuted for non-compliance if they have

[1] s. 237 of the RO Act.

[2] Items 4-10 of Schedule 1

[3] s. 141(1)(ca) of the RO Act.

[4] Item 16 of Schedule 1.

been unable to conclude the internal democratic governance processes required to adopt new policies when the regulations change. Additionally, there is to be a requirement to provide policies to the ROC and organisations must post them on their website. Non-compliance with these requirements, or non-compliance with the new requirement to review such policies every 4 years and lodge and post revised policies, will sound in civil penalties of up to $105,000. One can only imagine the outcry if similar requirements were imposed upon corporations, whether they be small businesses or major public capital raising outfits.

Registered Organisations are currently under an obligation to retain their financial records for 7 years. This currently does not attract a civil penalty, although there is a strong imperative to retain such records. The Bill will make this retention requirement a civil penalty provision[5]. Additionally, it will explicitly require the source records from which Officer and Related Party Disclosure Statements are produced[6] and credit card statements[7] to be retained for the period. The requirement to keep credit card statements extends to extracts of statements realting to credit cards held by persons other than the reporting unit of the organisation concerned, where that particular card was used for performing duties in relation to the reporting unit by any officer of the reporting unit or of any part of the organisation of which the reporting unit is part.

[5] Item 13 of Schedule 1.

[6] Item 12 of Schedule 1.

[7] Item 14 of Schedule 1.

Schedule 2 Provisions

These provisions establish a new regulatory and registration regime for worker entitlement funds. Worker entitlement funds of different types can provide a range of valuable benefits, including training and training facilities, income protection insurance, welfare support and portable entitlements. Some are structured as trusts with a corporate trustee and commonly provide cover for redundancy and other employment entitlements that are accessed on termination of employment. These funds principally operate in industries with a high incidence of phoenix operators and unfunded entitlements[8]. As such, the funds potentially save the Commonwealth millions of dollars in expenses that would otherwise be claimed against the *Fair Entitlement Guarantee* scheme. In the present context where the Government is actively pursuing reforms to reduce the incidence of claims to that scheme, the provisions of Schedule 2 of this Bill – which introduce enormous barriers to operating worker entitlements funds – are incongruous and absurd.

The Royal Commission report contained some recommendations about the features of a new scheme of regulation for worker entitlement funds. Not all of those features have been embraced in the Bill, and some have been directly contradicted. The Royal Commission report also observed that "the precise terms of the criteria with which registered worker entitlement funds would be required to comply should be a matter for consultation"[9].There has been no consultation whatsoever with those involved in the running of these funds which is evident in the many flaws in the provisions in this Schedule.

The most significant effects of the provisions in Schedule 2 are as follows:

- Unions will be prohibited by law from operating worker entitlement funds, in clear contravention of Article 3 of ILO Convention 87 and the principle of freedom of association. This major change did not form part of the Royal Commission's recommendations.

[8] Department of Employment: Reforms to address corporate misuse of the Fair Entitlements Guarantee Scheme. May 2017, at page 3. See also Senate Standing Committee on Economics, Insolvency in the Australian Construction Industry

[9] Royal Commisison into Trade Union Governance and Corruption:Final Report (hereafter "TURC Report"), Chapter 5 of Volume 5 at paragraph 95.

- Collective agreements (among other employment instruments) will not be permitted to provide for contributions to be made to union operated worker entitlement funds, in clear contravention of Article 4 of ILO Convention 98 and the principle of voluntary agreement making.
- Worker entitlement funds will become the only managed investment schemes in Australia that will be prohibited from distributing any income that they generate to their operator, or which are restricted in how their operator may dispose of income earned from operating the scheme[10].
- Worker and entitlement funds, no longer operated by unions, will become the only managed investment schemes in Australia not only regulated by ASIC and the ATO but also regulated by the ROC. This comes less than 12 months after the then proposed ROC was described by none other than the Prime Minister as "A *dedicated* watchdog with enhanced power to monitor and *regulate registered organisations*"[11].
- Welfare and training funds operated by unions, which used to benefit from some income distributions from Worker Entitlement Funds, will also not be able to receive income through terms of enterprise agreements. Whist this is also a clear contravention of Article 4 of ILO Convention 98, it also contradicts the position of the Royal Commission which was predicated on welfare and training contributions continuing to be levied through enterprise agreements[12].

Scope of provisions

The new provisions have two central definitions: *Worker entitlements* and *worker entitlement funds*. Their scope is potentially very broad, and is dealt with in proposed section 329HC of the RO

[10] Performance fees on the profits of managed investment schemes (e.g. a percentage of profit generated) and Management Fees (e.g. a percentage of the value of assets in the fund) are commonplace in commercial offerings. These are additional to account fees, transaction fees and administrative fees which are also commonplace and may also generate some income for the operator.

[11] *House Hansard* 31/08/2016 @11:41

[12] TURC Report, Chapter 5 of Volume 5, paragraph 95(e).

Act. *Worker entitlements* include payments in lieu of, or *in respect* of leave; any payments *in relation to* termination of employment and any payment which a Fair Work Instrument (eg. an award or an enterprise agreement) or contract of employment provides for an employer to make *in relation to* an employee.

A *worker entitlement fund* is one of two things: A fund whose purposes who include paying worker entitlements (as defined) to its members, their dependents or legal personal representatives, or, alternately, a fund prescribed in rules made by the Minister. The Minister is, on the face of it, empowered to prescribe funds in this way even if they do not provide a benefit to the members that would meet the definition of *worker entitlements*. The most troubling aspect of this executive power, aside from the lack of certainty, is that union operated funds that comply with the law may be prescribed, with the result that the Union instantly will be liable for a criminal offence under proposed section 329JA of the RO Act. It is to be noted that the scope created in these provisions also extends significantly on the scope which formed the context of the discussion in the Royal Commission's final report.[13]

There are some exemptions from what would otherwise be considered a worker entitlement fund under the definition. These include superannuation funds, registered charities, discretionary mutual funds and funds established by statute. However, curiously, an employer can establish a fund for its own employees and suffer absolutely no restriction on the investment income generated. The employer is not covered by any of the new regulation in this schedule, unless they voluntarily opt-in to it[14].

Gaining and maintaining registration

Registration is important because, as above, in the absence of registration employers will face civil penalties[15] for contributing into such funds and operators of unregistered funds will face criminal prosecution[16]. Funds need to meet particular conditions to be granted registration and to remain

[13] Volume 5 of Final Report, at paragraph 2(b).

[14] Propsed sections 329HC(4) and 329HD(3) of the RO Act

[15] Proposed Section 329JB of the RO Act

[16] Proposed section 329JA of the RO Act.

registered. These are referred to in the Bill as the *initial conditions* for registration and the *ongoing conditions* for registration, respectively. Some conditions are classed as both *initial conditions* and *ongoing conditions.*

Applications for registration must be made to the ROC, and the ROC will regulate them (notwithstanding the recommendation by the Royal Commission that the funds be registered and regulated by ASIC[17]). Applications for registration will be posted on the ROC's website. This is a curious condition given that approval of applications is non-discretionary where the set criteria are met and there is no procedure for objections[18]. The set criteria are whether the fund is a *worker entitlement fund* (as defined) and whether the *initial conditions* for registration are met.

It is true to say that many of the initial and ongoing conditions for registration have their roots in the existing regulatory regime that applies to worker entitlements funds under the *Fringe Benefits Tax Assessment Act*[19] or commercial offerings regulated by the *Corporations Act.* However, there are notable departures from these models and the mode of regulation also differs significantly.

The departures in substance are as follows:

- A worker entitlement fund will now only be allowed to be operated by a constitutional corporation, and will not be allowed to be operated by a registered organisation[20]. There was no recommendation to this effect made by the Royal Commission. It is clearly inconsistent with Australia's international obligations, given the consequences of operating an unregistered fund;
- Worker entitlement funds will no longer be able to make transfers of benefits from contributions (such as employment termination payments) to a fund member's superannuation funds. The Royal Commission report stated that this capacity should be retained[21].

[17] TURC Report, Recommendation 45.

[18] Proposed section 329KA-KD of the RO Act.

[19] S.58PA-PB.

[20] Items 2&6 of the table at proposed section 329LA of the RO Act and proposed section 329LB(1)(a) of the RO Act.

[21] TURC Report, Chapter 5 of Volume 5, at paragraph 95(e).

- Funds will be required to have at least one director who is independent of, and has no material relationship with, the operator of the fund[22]. They will also require at least one director who is independent of, and has no material relationship with, any associate of the operator of or a contributor to the fund, or any union that has a member that is a contributor or fund member. This change was described in the Royal Commission report as being necessary to avoid deadlocks and conflicts of interest[23]. However, all corporations have options available to relieve deadlocks and the issue of potential conflict of interest cannot be said to be material in light of the proposed prohibition on unions deriving income from the fund and the extensive disclosure provisions contained in the Bill.
- Worker entitlement funds will become more restricted in the distributions of their surplus income[24] (that is income that is not required to ensure that member's interests in the scheme are fully funded). Notably, outside of the funds' internal and administration purposes, external transfers are limited to training and welfare payments that meet rigid criteria and are individually disclosed. These criteria include the following:
    - Payments can only be made to deliver services to persons who are (or are the spouses or dependents of) participants or former participants in an industry in which fund members participate.
    - Market value and commercial terms: If the payment is for services at below market value (i.e. if the services are run at a loss because they provide more benefit to workers at the expense of profit to the provider) or if the payment is to a service provider that is a charity (including charities registred with the ACNC and deductible gift recipients), it will not be possible to make the payment.
    - The services are provided in a way that does not discriminate unfairly between fund members: A payment of surplus income to a provider that offers its services only to union members will not be permitted.
    - Every single payment to a training or welfare services provider needs to be voted on in advance by the directors of the operator of the fund; and

[22] Item 9 of the table at proposed section 329LA of the RO Act.

[23] TURC Report, Chapter 5 of Volume 5, at paragraph 95(b).

[24] Proposed sections 329LD, 329LB(1)(a), Items 6,7 & 12 of the table at proposed section 329LA of the RO Act.

- The independent directors must vote in favour of, and will have a right veto over, payments to a training or welfare service provider.

These provisions are not found in the regulation of commercial offerings and are a substantial and unjustified interference in the governance of these entities. Under these proposed laws, recent donations made to Suicide Prevention Australia, the Brodie's Law Foundation and the Mater Medical Research Institute[25] would become unlawful.

- A "good fame and character"[26] test will apply to officers and employees of corporations that operate worker entitlement funds. Whist this test in terms is adapted from the test that applies for the granting or banning of Australia Financial Services Licenses (which commercial providers of managed investment schemes are required to hold)[27], in that setting the test does not apply to all staff of the operator of the scheme who perform duties in relation to it. Rather, in the commercial sector, the only persons who are required to meet this test are those who are the officers of the operator or who are persons who participate in making in decisions affecting the business or who have the capacity to significantly affect its financial standing and persons who have the defacto capacity to control the directors[28]. Under the Bill, all staff members who perform any duties "in relation to the fund" are covered by this requirement. The test appears to be designed to ensure that persons disqualified from or deemed ineligible for office in Registered Organisation (for example, because they are found to have breached civil penalty provisions that contravene Australia's requirements under international law) are unable to find employment in such funds.
- Fund members of the same class are to be treated equally, and any different fund classes are to be treated without discrimination by reference to union membership.[29] This is not a current requirement of worker entitlement funds and is adapted – heavily – from provisions in the *Corporations Act* that require managed investment funds to "treat the members who

[25] See pages 37-40 of the Annual Report for Incolink:
https://www.incolink.org.au/media/1522/incolink_annualreport_fy1516_web.pdf

[26] Item 8 of the table at proposed section 329LA of the RO Act and proposed section 329LE of the RO Act.

[27] *Corporations Act* s. 601FA, 601FB, 913B, 920A.

[28] Corporations Act, s.9.

[29] Items 4 and 5 of the table at proposed section 329LA of the RO Act.

hold interests of the same class equally and members who hold interests of different classes fairly"[30]. This is based on the Royal Commission report and the ideological objection taken therein to funds applying their surplus income to entities that benefit union members (no ideological objection is apparently taken to commercial providers of managed investment schemes applying their management or performance fees to any particular purpose). A member's interest in a fund is in the form of funded employment entitlements and insurance benefits. There is no discrimination between members of the fund in terms of the nature or accessibility of their interest in the fund. The "discrimination" seized upon by the Royal Commission only arises after the extent of fund member interests in the fund has been fully accounted for and a surplus exists. That surplus (income) is directed as deemed appropriate. The situation is comparable to the Commonwealth Bank, a provider of managed investments[31], making a 1.1 million donation in 2009 to the Victorian Bushfire relief appeal[32]. Some of that may have benefited persons who were interest holders in its various managed schemes - much of it would not have – but the nature and extent of the interest holders' interests in those schemes was unaltered by this expenditure, nor did they suffer any discrimination. There is nothing at all untoward about a scheme applying its own profits, surplus after the interests of the interest holders are accounted for, to purposes that it sees fit.

- Funds will be required to prepare and lodge audited financial reports, in accordance with Australian Accounting Standards, with the ROC[33]. Public companies operating managed investment schemes are required to lodge such financial reports with ASIC. Companies that currently operate worker entitlements funds are subject to the *Corporations Act* may be required to lodge such reports depending on their size and if ASIC require them to[34]. The main purpose of this regulation appears to be to expose funds to a civil penalty of over $100,000 if they do not provide the same document to two different regulators on the same date. The existing enforcement mechanism for failing to comply with existing regular

[30] s. 601FC(1)(d).

[31] https://www.commbank.com.au/personal/financial-planning/investment-products/investment-financial-reports.html

[32] https://www.commbank.com.au/about-us/news/media-releases/2009/200409-news-thank-you.html

[33] Item 14 of the table at proposed section 329LA of the RO Act.

[34] S. 292-294B.

financial reporting requirements to ASIC is an offence of strict liability[35], so it is unclear why additional regulation in this area is necessary.

- The Minister's executive power to make "worker entitlement fund rules" will enable the Minister to require, on an ad-hoc basis, operators of funds to give information to contributors, at any time[36]. This power could be used excessively and oppressively, with no explicit or implicit limit expressed in the Bill on its exercise.
- There are requirements around what the operator of the fund must "give" to particular persons, including fund members and *prospective* fund members[37]. The things that the operator must "give" include the constitution, information "about" any change to the constitution or particular changes to the fund's operation, and statements that appear to be in the nature of product disclosure statements. A requirement to "give" something is clearly different in law to a requirement to take reasonable steps to provide, or to ensure that the thing is available. Particularly in industries where workers are highly mobile, it is inevitable that the requirement to "give" could not be satisfied in all circumstances. It is a highly oppressive requirement that results in civil penalties and possible deregistration.
- There is an unbounded requirement for officers and staff of operators of worker entitlement funds to undertake "approved training".[38] The requirements of the training, save that it must cover the duties that relate to the financial management of the fund, are at large. This is particularly problematic given the broad powers of the Minister to issue rules at will that change the nature or extent of those duties from time to time.

As noted above, the mode of regulation is different to that which currently pertains. The difference is that compliance with each of the registration conditions may be investigated through the use of coercive powers[39], many may result in infringement notices[40] or civil penalties[41] and all

[35] *Corporations Act* s.319.

[36] Item 6 of the table at proposed section 329LA of the RO Act.

[37] Items 17-20 of the table at proposed section 329LA of the RO Act.

[38] Proposed section 329LG and item 22 of the table of the table at proposed section 329LA of the RO Act.

[39] Proposed sections 329MA, 329NF of the RO Act and Item 15 of Schedule 2 the Bill.

[40] Proposed section 329MB of the RO Act.

[41] Proposed sections 329MC-329MF of the RO Act.

may (and some must) result in the fund being deregistered[42]. As above, not all of the provisions proposed in this Bill have a comparator in the regulation of commercial funds, thus the enforcement of the regulation is necessarily not equivalent.

The transitional provisions in this Schedule appear to contemplate a lead time of approximately 6 months for existing funds to transition to registration, which is clearly an insufficient amount of time. One perplexing consequence of the transitional provisions is that they appear (from the limited time available to review the Bill) to leave untouched provisions in extant agreements that require contributions to funds that might not ever become registered. This would result in conflicting obligations: on the one hand, the employer faces a civil penalty for not making contribution to the fund in accordance with the term of the agreement, yet the employer also faces a civil penalty for making a contribution to that fund.

[42] Proposed section 329MH-MI of the RO Act.

Schedule 3 provisions

This brief Schedule is about payments for the purse of funding, supporting or promoting candidates for elections in industrial associations. Terms in contracts of employment that require such payments to be made will be rendered void.[43] In addition, terms in enterprise agreements that require such payments will be unenforceable and, if present in a proposed enterprise agreement, will result in the agreement not being able to be approved. It is to be noted that deductions from an employee's pay or requirements on employees to spend money for such purposes are already unlawful[44].

[43] Item 5 of Schedule 3.

[44] Sections 324-325 of the *Fair Work Act*.

Schedule 4 provisions

This schedule introduces a new civil penalty. It prohibits action taken (or threats to take action) with the intent to coerce a person to pay an amount to particular types of funds. Those funds are (broadly) superannuation funds, training funds, welfare fund, funds that provide life insurance or disability insurance and certain managed investment schemes that are associated with a registered organisation. The provision would not apply to coercion that occurred in the context of protected industrial action. Coercion about these matters is already prohibited by s. 343 of the *Fair Work Act* where it occurs in relation to the terms of proposed enterprise agreements. It is unclear why a new penalty provision is required that applies to matters that are otherwise outside the footprint of the *Fair Work Act*. Coercion that manifests as a stoppage of work of or interruption to the supply of goods and services is, contrary to Australia's international obligations, already actionable in number of ways under Australian law. It is to be noted that the provisions go beyond what was recommended by the Royal Commission, which dealt only with coercion applied to employers.[45]

[45] TURC Report, recommendation 50

Schedule 5 provisions

These 16 pages of new law largely overlap with disclosure obligations recently introduced through the *Corrupting Benefits Bill*. However, unlike those amendments, which are found in the *Fair Work Act*, these new and overlapping laws will be housed in the RO Act.

The provisions go far beyond requiring unions to make disclosures to employers and their employees of the benefits they or their officers may reasonably expect to obtain as a consequence of entering into particular arrangements with those employers.

Firstly, the Bill contains deeming provisions[46] to the effect that where union officials are already paid for their time in managing established training and welfare funds, that payment is deemed to be "a financial benefit that the organisation will, or can be reasonably be expected to, receive *in connection with*" the arrangement, and therefore be disclosable. This will create the impression that the union, or one if its officials, is receiving a kickback as a result of "doing a deal" with the employer, whereas the reality is that the income flow is entirely independent of any arrangement ultimately entered into with the employer in question.

Secondly, the arrangements that must be disclosed are too broad. They are not limited to arrangements that are contractual in nature or legally binding. Further, the Minister may, at any time, unilaterally prescribe what constitutes a disclosable arrangement[47]. Beyond the Minister's power to prescribe, the arrangements that are covered are arrangements for the provision of or referral for insurance, arrangements for certain management investment schemes, training funds and welfare funds. It is to be noted that Royal Commission limited its recommendation to recommendation to pecuniary benefits associated with employee insurance products.[48]

[46] Proposed section 329QA(4) of the RO Act.

[47] Proposed section 329PE(5) of the RO Act.

[48] TURC Report, recommendaiton 47.

Thirdly, the requirement to disclose is pre-emptive[49], ongoing[50] and enforceable by way of civil penalty[51]. In addition, disclosures are required to be provided to the ROC, which in turn must publish the disclosures on its website[52]. Disclosures are to be made to employers[53], who in turn must provide the disclosure documents to employees.[54]

The oppressiveness of these provisions becomes obvious once it is understood that the obligation to disclose something and consequentially have it published on the ROC website arises at the point when the arrangement is *proposed* and *before* it is entered into. This means compulsory disclosures to the employer, its employees and the world at large of arrangements that may never be entered into simply because the employer rejects them. The ROC is given authority to take down notices where notified that such arrangements have come to an end, but it is *not* authorised to remove notices that refer to arrangements that were proposed but never entered into[55]. Those familiar with industrial negotiations would understand that claims are often modified or withdrawn or re-tabled at various times. The net effect is therefore to create red-tape disincentives to employers negotiating with unions that have established offerings outside their union to benefit their members.

There is no corresponding obligation on employers in this Bill to disclose to unions or their workforce if they propose to enter into an arrangement with a union whereby they themselves may derive some benefit from a party other than the union.

[49] Proposed section 329QA of the RO Act.

[50] Proposed section 329QB of the RO Act.

[51] Proposed sections 329QA-QC and 329SA of the RO Act.

[52] Proposed sections 329SA-SC of the RO Act.

[53] Proposed section 329QA of the RO Act.

[54] Proposed section 329RA of the RO Act.

[55] Proposed section 329SA(3) and 329SC of the RO Act.

D-NO: 129/2017