Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

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Law and Bills Digest Section

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House: House of Representatives
Portfolio: Industrial Relations
Commencement: Various commencement dates as set out in clause 2 of the Bill and referred to in the body of this Bills Digest.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

All hyperlinks in this Bills Digest are correct as at February 2020.
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History of the Bill

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 (the Previous Bill) was introduced into the House of Representatives on 19 October 2017. The Bill was passed by that chamber and introduced to the Senate on 13 November 2017, but did not progress. The Previous Bill lapsed at the end of the last Parliament on 1 July 2019.

The Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) was introduced into the House of Representatives on 4 July 2019 in ‘substantially similar terms’ to the Previous Bill—although there are some differences. A Bills Digest was prepared in respect of the Previous Bill. Whilst much of the material in this Bills Digest has been sourced from that earlier one, where there are differences between the Bill and the Previous Bill, these are noted and explored.

Purpose of the Bill

The purpose of the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 (the Bill) is to amend the Fair Work (Registered Organisations) Act 2009 (the FWRO Act), the Fair Work Act 2009 (the FW Act) and other legislation by:

- imposing new governance and transparency requirements on registered organisations by requiring registered organisations to have written financial expenditure policies that have been approved by the committee of management
- requiring registered organisations to report certain loans, grants and donations
- requiring registered organisations to disclose the financial benefits obtained by them and persons linked to them in connection with:
  - employee insurance products
  - employee welfare fund arrangements and
  - training fund arrangements
- introducing a range of new penalties to ensure compliance by registered organisations with financial management, disclosure and reporting requirements
- imposing new governance and transparency requirements on entities related to registered organisations such as worker entitlement funds (WEFs) and other similar funds
- creating a registration process for worker entitlement funds and applying governance, financial reporting and financial disclosure requirements to them
- prohibiting terms of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered WEF or a registered charity
- requiring any term of a modern award or enterprise agreement that names a WEF or insurance product to allow an employee to choose another fund or insurance product
- prohibiting any term of a modern award, enterprise agreement or contract of employment permitting or requiring employee contributions to an election fund for an industrial association and

• prohibiting any action with the intent to coerce an employer to pay amounts to a particular WEF, superannuation fund, training fund, welfare fund or employee insurance scheme.

Structure of the Bill

This Bill is divided into six Schedules:

• Schedule 1 contains amendments to the FWRO Act relating to financial management and accountability of registered organisations
• Schedule 2 deals with the regulation of WEFs
• Schedule 3 deals with election payments
• Schedule 4 deals with coerced payments to employee benefit funds
• Schedule 5 deals with disclosable arrangements, such as employee insurance schemes and
• Schedule 6 deals with minor and technical amendments.

Background

Organisations registered under the FWRO Act have certain rights under the FW Act and other legislation, including in relation to bargaining for enterprise agreements. Registered organisations that represent the interests of employees include trade unions and professional associations, whilst registered organisations that represent the interests of employers or an industry are referred to as employer organisations.

Registered organisations (organisations) occupy a unique position within Australia’s workplace relations system. Whilst they represent the interests of their members, organisations also seek to advance their own interests.

For example, organisations may set up (usually via a ‘joint venture’ with other industry parties, such as employers) various forms of worker entitlement funds (WEFs). These are then used to fund various employee entitlements such as redundancy pay (thus representing the interests of their members). Generally—as with other managed investment funds—income that is identified as excess to the forecast requirements of the WEF may be distributed to the parties who set up the WEF from time to time (thus representing the interests of the organisation itself).

The Royal Commission into Trade Union Governance and Corruption (RCTUGC) examined the operation of worker entitlement funds and related entities.

The Bill responds to the recommendations made by the RCTUGC in relation to the regulation and oversight of WEFs and related issues such as disclosure of certain benefits arising from specified arrangements between registered organisations and employers and the types of terms that can be included in modern awards, enterprise agreements and employment contracts in relation to WEFs. The Bill also introduces governance, record keeping and transparency requirements on organisations.

The Government notes that it has ‘taken the opportunity to adopt several amendments suggested in the previous detailed committee process which more closely align these reforms with their corporate equivalents’ and has, ‘in response to concerns from’ WEFs, ‘amended the Bill to delay

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5. C Porter (Minister for Industrial Relations), Industrial reforms a major test for Labor, media release, 4 July 2019.
the commencement of the provisions that affect them, to give them sufficient time to adjust to the new scheme.

Committee consideration

The Previous Bill was considered by two Senate Committees, as noted below.

Previous Senate Education and Employment Legislation Committee Inquiry

The Previous Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report by 10 November 2017. Details of the inquiry are on the inquiry homepage. The majority of the Committee recommended that the Bill be passed subject to one recommendation.

The Australian Labor Party (Labor) and the Australian Greens (the Greens) both issued Dissenting Reports, recommending that the Senate reject the Bill. Amongst other things, Labor considered:

... the provisions of the Bill that prevent worker entitlement funds from being able to distribute excess capital and/or income to the Sponsors is punitive and political rather than fair and logical and that a large part of the intent of the legislation is premised not for good governance nor to protect members' benefits but to stop funds flowing to our Sponsors.

The Greens described the Bill as ‘yet another example of the government’s determination to erode workers’ rights and undermine unions in an effort to reduce the effectiveness of their collective power’.

Both Labor and the Greens were concerned with the perceived lack of consultation on the Bill.

Senate Standing Committee for the Scrutiny of Bills

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny Committee), after considering the Minister’s responses to its initial scrutiny concerns, remained concerned with a number of elements of the Previous Bill.

In relation to the current Bill, the Scrutiny Committee noted it had commented on the Previous Bill and ‘reiterates those comments’. As such, those concerns are examined below.

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7. Senate Education and Employment Legislation Committee, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017 [Provisions], The Senate, Canberra, November 2017, p. 14. Recommendation 1 being that: ‘... the government review the wording of proposed section 329LD in light of the concerns raised that it would not allow for a gift or donation to be made to charities operating in this sector’. Proposed section 329LD is discussed under the heading ‘Authorised uses of income’ below.
Broad delegation of administrative powers
In relation to the infringement notice regime contained in proposed section 329MB, the Committee considered that it would be appropriate to amend the Bill to confine persons authorised to issue infringement notices to officers with specified attributes, qualifications or qualities. In that regard, the Bill has been amended as discussed below under the heading ‘Key issues and provisions’.

Procedural fairness
Proposed Subdivision B of Division 5 of proposed Part 3C provides a deregistration process for non-compliant registered WEFs. Proposed section 329MK states that this Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule in relation to the Commissioner’s decision to deregister a registered WEF.

The Committee noted the Minister’s advice that proposed sections 329MG and 329MK are not intended to exclude the natural justice hearing rule, but stated:

... the Minister’s response does not address why proposed section 329MK, which provides that the Subdivision is taken to be an exhaustive statement of the requirements of the natural justice hearing rule, is necessary and appropriate. The committee reiterates that the natural justice hearing rule enables the courts to consider whether a hearing provided prior to an adverse decision is fair in the circumstances of the case, including in the statutory context of the power being exercised.

The Committee further noted that the effect of proposed section 329MK would be that the only applicable procedural fairness requirements are those set out in the Subdivision, and therefore concluded that in ‘the absence of a satisfactory response as to why it is necessary and appropriate to provide that proposed Subdivision B provides an exhaustive statement of the natural justice hearing rule’ the Committee reiterated its scrutiny concerns and ‘leaves to the Senate as a whole the appropriateness of excluding aspects of the natural justice hearing rule in relation to the deregistration process’. The relevant proposed provisions noted above have not changed in the current Bill.

Exclusion of merits review
Proposed section 329MA provides the Commissioner with the power to direct the operator of a registered WEF to take, or stop taking, one or more actions. Proposed section 329NI lists a number of decisions made by the Commissioner that are reviewable by the Administrative Appeals Tribunal (AAT). Proposed section 329MA is not listed in proposed section 329NI. This means that decisions are not subject to any form of merits review.

The Committee noted the Minister’s advice that:

• decisions taken under proposed section 329MA are directed towards ensuring compliance with the conditions for registration of a WEF and ‘are thus properly characterised as law enforcement in nature’ and

16. Ibid., p. 45.
17. Ibid.
• non-compliance with a direction given under proposed section 329MA is subject to a civil liability action and judicial review of the Commissioner's direction under proposed section 329MA is available.

The Committee concluded that as it was not clear that determinations made under proposed section 329MA are of a law enforcement nature, ‘it remains unclear why it would be inappropriate to allow merits review of the Commissioner's decision’. The relevant proposed provisions noted above have not changed in the current Bill. These concerns are explored in detail below in the ‘Key issues and provisions’ parts of this Digest.

**Current Senate Education and Employment Legislation Committee Inquiry**

The Bill was referred to the Senate Education and Employment Legislation Committee for inquiry and report by 25 October 2019. Details of the inquiry are at available at the inquiry homepage. The majority of the Committee recommended that the Bill be passed.

Labor and the Greens both issued Dissenting Reports, recommending that the Senate reject the Bill. Amongst other things, Labor considers:

... the Bill could effectively shut down worker-run funds, while incentivising employers to set up and run their own funds, without the community dividends provided by the current joint employer union funds.

The Greens described the Bill as ‘an ideological attack on unions, [not motivated by] any real concern about the proper regulation of workers’ benefits’ that goes ‘significantly beyond the recommendations of the Royal Commission into Trade Union Governance and Corruption’.

**Policy position of non-government parties/independents**

**Opposition**

The Australian Labor Party opposes the Bill. The Manager of Opposition Business, Tony Burke, stated ‘in whatever form it comes out, Labor is going to continue to oppose it’.

**Other non-government parties/independents**

The Greens oppose the Bill. In the second reading debate in the House of Representatives, Adam Bandt vote against the Bill. Of the other non-government MPs, Dr Helen Haines, Bob Katter, Zali

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18. Ibid., p. 47.
24. Ibid.
Stegall and Andrew Wilkie voted against the Bill. Rebekha Sharkie voted for the Bill. At the time of writing the position of non-government parties/independents in the Senate was not clear.

Position of major interest groups

Almost all trade unions and operators of funds that are likely to be captured by the reforms proposed in Schedule 2 oppose the Bill. Objections to specific aspects of the Bill are noted below in the ‘Key issues and provisions’ sections of this digest.

Employer and industry associations are generally supportive of the Bill. However the Master Plumbers’ and Mechanical Services Association of Australia, which represents plumbing contractors throughout Australia (some of which are employers) opposed the Previous Bill.

Financial implications

The Explanatory Memorandum states that ‘the Bill will have a minor financial impact’ on the Commonwealth.

Statement of Compatibility with Human Rights

As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bill’s compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bill is compatible.

Parliamentary Joint Committee on Human Rights

In its third report of 2019 the Parliamentary Joint Committee on Human Rights (PJCHR) noted that the Bill has ‘been reintroduced in relevantly substantially similar terms to those previously commented on’ and that it ‘reiterates its views as set out in its previous reports’ regarding the Bill.

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27. Ibid.
28. Ibid.
29. See the submissions to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, The Senate, Canberra, 2019, from: Protect Services Ltd (Protect), [Submission no. 20], 28 August 2019, pp. 1–2, 16: ‘the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 should be rejected or amended on the basis that there has been insufficient consultation, the legislation contains excessive Minister discretion that creates business uncertainty and risk of operational interference, and the uses of income of the fund are punitive’; Queensland Council of Unions, [Submission no. 28], 29 August 2019, p. 1; Electrical Trades Union Of Australia (ETU), [Submission no. 36], 29 August 2019, p. 3; Incolink, [Submission no. 7], 29 August 2019, pp. 6–7; MATES in Construction, [Submission no. 16], n.d., pp. 4–7; Construction Forestry Maritime Mining and Energy Union (CFMMEU), [Submission no. 15], 29 August 2019, p. 2; Australian Council of Trade Unions (ACTU), [Submission no. 26], 29 August 2019, p. 19 and BERT Fund, [Submission no. 33], n.d., p. 4. The Contracting Industry Redundancy Trust (CIRT) whilst not indicating support or opposition for the Bill, recommended a number of changes to various provisions: CIRT, [Submission no. 12], 26 August 2019.
30. See the submissions from: Housing Industry Association (HIA), [Submission no. 8], 29 August 2019, p. 3; Australian Industry Group (AiG), [Submission no. 18], 29 August 2019, p. 3; Master Builders Australia (MBA), [Submission no. 19], 29 August 2019, p. 2.
32. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. iii.
33. The Statement of Compatibility with Human Rights can be found at page v of the Explanatory Memorandum to the Bill.
34. Parliamentary Joint Committee on Human Rights (PJCHR), Human rights scrutiny report, 3, 2019, 30 July 2019, p. 15.
In that regard the PJCHR raised a number of concerns with the Previous Bill and sought advice from the Minister on a number of issues.\(^{35}\) Whilst the relevant issues are explored in detail below under the ‘Key issues and Provisions’ parts of this Digest, in brief the PJCHR:

- concluded that the proposed prohibition on any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered WEF or a registered charity is likely to be incompatible with the right to collectively bargain\(^{36}\)
- was ‘unable to conclude’ that requirements that WEFs be registered and meet certain conditions relating to financial management, board composition, disclosure and how money is spent is ‘a proportionate limitation on the right to freedom of association and the right to just and favourable conditions at work’\(^{37}\) (which includes the right of workers to autonomy of union processes, organising their administration and activities and formulating their own programs without interference)\(^{38}\)
- concluded that the proposed prohibition on any person organising, taking or threatening to take any action (other than protected industrial action) with the intent to coerce a person to pay amounts to a particular WEF, superannuation fund, training fund, welfare fund or employee insurance scheme ‘did not appear to be a proportionate limitation on the right to strike as an aspect of the right to freedom of association’\(^{39}\) and, due to the absence of a substantive assessment of the issue, ‘it was not possible to conclude that the measure is [a] proportionate limitation on the right to freedom of expression and assembly.’\(^{40}\)

**Key issues and provisions: financial management obligations**

**Schedule 1** of the Bill seeks to introduce a number of new financial management obligations into the *FWRO Act*, to reflect issues identified by the RCTUGC and its associated recommendations (9, 10, 17 and 39).\(^{41}\) Schedule 1 will commence on the earlier of a day to be fixed by proclamation, or six months after Royal Assent.\(^{42}\)

**Changes from previous Bill**

**Differences between the Bill and Previous Bill regarding financial management and accountability**

The misuse of credits cards was an issue of major concern to the RCTUGC, and is reflected in its recommendation 10. The Previous Bill contained detailed rules relating to retaining records of certain credit card expenditure by reporting units. Those rules are not contained in the Bill.

In addition, the Previous Bill sought to impose highly specific rules and requirements relating to financial management and accountability. In contrast the Bill proposes simpler, principles-based requirements, arguably reflecting an attempt to ‘more closely align these reforms with their corporate equivalents’.\(^{43}\)

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37. Ibid., p. 110.
39. Ibid., p. 115.
40. Ibid., p. 117.
42. Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, *proposed section 2*, table item 2.
Reportable loans, grants and donations – current provisions

Currently section 237 of the *FWRO Act* requires organisations to provide the Commissioner of the Registered Organisations Commission (ROC) with statements about loans, grants and donations over $1,000 made by the organisation, including details about the amount involved, the purpose of the loan, grant or donation and the name and address of the person to whom the loan, grant or donation was provided.

A failure to lodge such statements with the ROC or making false and misleading statements about such loans, grants and donations attract civil penalties of up to 100 penalty units. The statements lodged with the ROC must be available for inspection by members of the organisation during office hours.

Proposed definition of reportable loans, grants and donations

Proposed subsections 237(1A) and (1B), at item 5 of Schedule 1 to the Bill, define reportable loans, grants and donations as:

- a loan, grant or donation exceeding $1,000
- a loan, grant or donation of $1,000 or less made by the organisation to a person during the financial year, if the total value of loans, grants and donations made by the organisation to the person during the financial year exceeds $1,000 and
- a loan, grant or donation of $1,000 or less made to the organisation by a person during the financial year, if the total value of loans, grants and donations made to the organisation by the person during the financial year exceeds $1,000.

Proposed reporting obligations in relation to reportable loans, grants and donations

Proposed subsection 237(1) provides that organisations will have to lodge with the Commissioner of the ROC (the Commissioner) annual statements that include the details of each reportable loan, grant or donation. That is, loans, grants and donations:

- over $1,000 made by, or to, an organisation during a financial year and
- under $1,000 made by or to the organisation if the total of those loans, grants and donations being provided to, or received from, an individual would together exceed $1,000 within a financial year.

In contrast to the present situation, under the Bill details of relevant loans, grants and donations made to the organisation (and not just those made by it) must be provided to the Commissioner on an annual basis.

Details to be reported

The relevant details that must be reported to the Commissioner are:

- the name and address of the person to whom a reportable loan was made, and the arrangements for repayment of the loan
- the name and address of the person who made a reportable loan to the organisation, and the arrangements for repayment of the loan

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44. *Fair Work (Registered Organisations) Act 2009*, (FWRO Act), subsections 237(1) and (3).
45. Ibid., subsection 237(4).
46. *FWRO Act*, proposed paragraph 237(5)(d), at item 8 of Schedule 1.
• the name and address of the person to whom a reportable grant or donation was made and
• the name and address of the person who made a reportable grant or donation to the organisation.

However, in relation to reportable loans, grants and donations made to persons by the organisation, the name and address do not need to be reported if the loan, grant or donation was made to ‘relieve a member of the organisation, or a dependant of such a member, from severe financial hardship’.

**Other obligations**

Section 293J of the *FWRO Act* requires organisations to prepare officer and related party disclosure statements (ORPDS). An ORPDS must contain details regarding the top five most highly remunerated officers and payments made to related parties and declared persons or bodies. Further, section 252 of the *FWRO Act* requires organisations and branches of organisations to keep proper financial records, and also details the purposes for which financial records must be kept.

**Proposed paragraph 252(1)(d), at item 11 of Schedule 1,** imposes a specific obligation on reporting units to keep financial records in a manner that will enable an ORPDS to be prepared in accordance with section 293J of the *FWRO Act* for the organisation to which the reporting unit relates or, if the reporting unit is made up of one or more branches, each such branch. ‘Reporting unit’ is defined at section 242 of the *FWRO Act*. If an organisation is not divided into branches, the ‘reporting unit’ is the whole of the organisation. If an organisation is divided into branches, each branch will be a ‘reporting unit’ unless alternative arrangements are authorised by the Fair Work Commission (FWC).

**Penalties**

Currently subsection 252(5) of the *FWRO Act* requires organisations to keep the financial records required under subsection 252(1) for at least seven years after the completion of the relevant transactions. The amendment to **proposed subsection 252(5), at item 12 of Schedule 1,** provides that a civil penalty of up to 100 penalty units will apply for failures to comply with the requirement to retain records.

**Privacy protection measures**

The Bill contains a number of measures designed to protect the privacy of individuals captured by the disclosure and reporting obligations pertaining to reportable loans, donations and grants. As noted above the name and address of an individual or entity does not need to be reported if the reportable loan, grant or donation was made to ‘relieve a member of the organisation, or a dependant of such a member, from severe financial hardship’.

Further, **proposed subsection 237(4A), at item 6 of Schedule 1,** provides that the Commissioner must omit from the reportable loan, grant and donation statements any residential addresses and

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47. *FWRO Act,* proposed paragraph 237(5)(e), at item 8 of Schedule 1.
48. *FWRO Act,* proposed paragraph 237(6)(c), at item 10 of Schedule 1.
49. *FWRO Act,* proposed paragraph 237(6)(d), at item 10 of Schedule 1.
50. *FWRO Act,* proposed paragraphs 237(5)(d) and 237(6)(c).
51. Ibid.
also has the discretion to omit any other personal information to ‘protect the privacy of such information during an inspection’ of the statements by members of the organisation.\textsuperscript{52} 

\textbf{Commencement of new obligations in relation to reportable loans, grants and donations}

\textbf{Item 16} of Schedule 1 provides that the new obligations in relation to reportable loans, grants and donations and keeping records to enable the preparation of an ORPDS will apply in relation to financial years commencing on or after the day \textbf{item 16} commences.

\textbf{Policies dealing with expenditure}

Currently paragraph 141(1)(ca) of the \textit{FWRO Act} provides that organisations must have rules that require the organisation and its branches to ‘develop and implement’ policies relating to the expenditure of the organisation or branch. Whilst developing and implementing such policies would appear to encompass their application to all officers and employees, the amendments proposed by the Government are more directive and detailed. As a result they are likely to operate to remove any uncertainty about their application to all officers and employees of the organisation or branch.

\textbf{Item 2} of Schedule 1 repeals paragraph 141(1)(ca) of the \textit{FWRO Act}. In its place, \textbf{item 15} inserts \textit{proposed Division 5} of Part 2A of Chapter 9 of the \textit{FWRO Act} which deals with policies relating to expenditure. \textit{Proposed section 293N} provides that an organisation and any branch of it must, at all times, have written policies that:

\begin{itemize}
  \item are approved by the committee of management of the organisation or branch
  \item are binding on all officers and employees of the organisation or branch and
  \item deal with the expenditure of the organisation or branch.
\end{itemize}

A failure to comply with the above requirements attracts a civil penalty of up to 100 penalty units.\textsuperscript{53}

\textbf{Compliance with policies and duties of officers}

\textit{Proposed section 293P} of the \textit{FWRO Act}, at \textbf{item 15} of Schedule 1, provides that when determining whether an officer or employee of an organisation or branch has breached various financial management duties set out in Division 2 of Part 2 of Chapter 9 of the \textit{FWRO Act}, which sets out general duties in relation to the financial management of organisations, regard may be had to whether the officer or employee complied with the mandatory and binding policies regarding expenditure discussed above.

\textbf{Model policies dealing with expenditure}

Currently section 142A of the \textit{FWRO Act} enables the Minister to make model rules about the expenditure of organisations or branches. \textbf{Item 3} of Schedule 1 will repeal section 142A. In its place, \textit{proposed section 293Q} provides that the Commissioner (rather than the Minister) may publish model policies in relation to expenditure, which organisations or branches can adopt in whole or part and with or without modification.

\textsuperscript{52} \textit{Explanatory Memorandum}, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 5.

\textsuperscript{53} \textit{FWRO Act}, \textit{proposed section 293N}. 

Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019 15
Commencement of obligations regarding expenditure accountability policies

**Item 17** of Schedule 1 has the effect of ensuring that organisations and branches will have six months from the date upon which **Item 17** commences to develop expenditure policies that comply with the new obligations discussed above. However, as paragraph 141(1)(ca) of the *FWRO* Act continues to have effect during that period, organisations and branches will still be required to ‘develop and implement’ policies relating to the expenditure of the organisation or branch, as discussed above.

Key issues and provisions: regulation of worker entitlement funds

Schedule 2 deals with regulation of worker entitlement funds (WEFs). Broadly speaking a WEF can be defined as a fund established for the purpose of funding employee entitlements such as redundancy pay, sick leave and other similar entitlements. According to the RCTUGC the typical features of a WEF are:

- they are established as ‘joint ventures’ between industry parties (that is a union(s), employer(s) or employer organisation(s), although some do not involve employer organisations)
- operated by a trustee company, the directors of whom are associated with the industry parties
- pursuant to enterprise agreements negotiated with a particular union, employers make regular payments on behalf of workers into a particular WEF
- the WEF will commonly provide a financial benefit to the industry parties
- under the rules of the WEF, employees will be entitled to receive certain benefits (for example, sick leave or redundancy pay) including in some circumstances, retirement benefits, age-related benefits and death benefits, provided certain conditions are satisfied and
- the rules of the WEF will be set out in a trust deed entered into between the corporate trustee and the industry parties, but the ‘trust deed can be, and often is, amended from time to time’.

RCTUGC findings in relation to worker entitlement funds

The RCTUGC examined the current regulation of WEFs under the *Corporations Act 2001*, the *Fringe Benefits Tax Assessment Act 1986* (*FBTA* Act) and in particular the impact of ASIC Class Order [CO 02/314] (the Class Order), which has been repealed and effectively replaced by the ASIC Corporations (Employee redundancy funds relief) Instrument 2015/1150 (the Relief Instrument). The Australian Securities and Investments Commission (ASIC) noted that the relief provided by the Relief Instrument was the same as that provided by the Class Order. However, ASIC also noted that as part of its consultation process the following issues were raised:

- whether employee redundancy funds would actually meet the definition of a 'managed investment scheme' in the *Corporations Act*
- if they did, whether they should be subject to the managed investment and associated provisions in the *Corporations Act* and

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55. Ibid., pp. 3456–58, 3466. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at pages 295–97 and 305].
• a 12-month extension to the relief was inadequate and that the relief should be extended for a longer period.57

ASIC decided to extend the interim relief for employee redundancy funds by 24 months to sunset on 1 October 2018 in consideration of the submissions received, and announced:

ASIC intends to conduct a full policy review and to conduct further consultation before the relief provided under the new instrument sunsets or expires.58

The exemption has since been extended to 1 October 2021.59

Whilst beyond the scope of this Digest to explore, the RCTUGC noted that the effect of the Class Order (now replaced by the Relief Instrument) was to exempt WEFs from a range of governance, reporting and oversight requirements that would otherwise be imposed on WEFs as, in the view of the RCTUGC, they are captured by the definition of a managed investment scheme contained in the Corporations Act.60

**RCTUGC conclusions about the effect of the current regulatory regime**

The RCTUGC concluded that a ‘startling consequence’ of the operation of the Class Order (and therefore the Relief Instrument) is that WEFs ‘are not subject to any mandatory disclosure requirements’.61 The RCTUGC also noted that as a result of the operation of the Class Order (and therefore the Relief Instrument):

• there is no statutory requirement on WEFs to provide annual reports or accounts to persons with an interest in the fund

• there is no requirement that the entities operating WEFs treat different types of members (for example, union or non-union workers) who hold interests of the same class equally and those who hold interests of different classes ‘fairly’ and

• WEFs ‘invariably distribute the income generated on contributions received to industry parties (for example, unions and employer organisations) to be used for purposes they see fit’.62

The RCTUGC also noted:

• on a ‘proper construction’ of the FBT Act, WEFs are not permitted to distribute income to persons other than to the employers who make contributions and the employees on whose behalf those contributions are made, but many WEFs ‘avoid this limitation in practice’ by ‘treating the income generated in a prior financial year as capital, and they then distribute the capital to industry parties’

• the absence of any requirement for one or more independent directors on the board of directors of companies operating WEFs ‘can lead to significant deadlocks where, as is commonly the case, unions and employer organisations have equal representation’

• although the FBT Act ‘has the effect of imposing some minimum governance requirements’ on WEFs those requirements ‘are by no means comprehensive’ and do not include a requirement that directors and managers involved in the WEF ‘be of good fame and character’ or deal with the forfeiture of workers’ interests and

57. Ibid.
58. Ibid.
60. RCTUGC, Final report, vol. 5, ch. 5, Part E – Worker Entitlement Funds, op. cit., p. 3461. [Note, in the hard copy of Volume 5 of the RCTUGC’s Final Report, this information is at page 300].
61. Ibid., p. 3463. [Note, in the hard copy of Volume 5 of the RCTUGC’s Final Report, this information is at page 302].
62. Ibid., pp. 3463–65. [Note, in the hard copy of Volume 5 of the RCTUGC’s Final Report, this information is at pages 302-04].
• it is ‘not usual to impose indirect regulation on an entity’ through taxation legislation such as the *FBTA Act*.63

The RCTUGC noted that there were three possible reform options that could deal with the above issues:

1. revocation or amendment of the Class Order (replaced by the Relief Instrument)
2. amendment of the relevant conditions in the *FBTA Act* and
3. introducing specific legislation subjecting WEFs to governance, supervision and reporting requirements ‘overseen by an appropriate regulator’.64

**What did the RCTUGC recommend?**

The RCTUGC, whilst arguing that the retention of the Class Order after its sunset date ‘was inappropriate’ nonetheless considered that:

... there is force in the arguments advanced that revoking the Class Order and subjecting worker entitlement funds to the full requirements of Chapter 5C and 7 of the *Corporations Act 2001* (Cth) would amount to excessive regulation.65

Ultimately, the RCTUGC concluded that the *FBTA Act* required amendment and the preferable course of action was to ‘introduce specific legislative provisions governing worker entitlement funds, either in the *Corporations Act 2001* (Cth) or in a standalone Act’.66 It therefore recommended:

**Recommendation 45**

Legislation, either standalone or amending the *Corporations Act 2001* (Cth), be enacted dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds. The legislation should provide for registration of worker entitlement funds with the Australian Securities and Investments Commission, and contain a prohibition on any person carrying on or operating an unregistered worker entitlement fund above a certain minimum number of persons.

**Recommendation 46**

In consequence of the enactment of the above legislation, Class Order [CO 02/314] not be extended. In further consequence, s 58PB of the *Fringe Benefits Tax Assessment Act 1986* (Cth) be repealed and the fringe benefits tax exemption in s 58PA(a) be amended to refer to registered worker entitlement funds.67

In this regard, the regime proposed by the Bill differs somewhat from the recommendations of the RCTUGC as noted below where appropriate.

**Overview of the regulatory model adopted by the Bill**

In summary the Bill proposes:

• the ROC, rather than ASIC, is the primary regulator of WEFs

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63. Ibid., pp. 3467–68. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at pages 306–07].
64. Ibid., p. 3469. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 308].
65. Ibid., p. 3476. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 315].
66. Ibid., pp. 3476–77. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at pages 315–16].
67. Ibid., p. 3481. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 320].
• registration of WEFs will effectively be mandatory and will be contingent on certain ongoing conditions being complied with
• WEFs be subject to stringent rules regarding the allowable uses of members’ contributions and capital of the fund and
• the Minister is granted substantial powers that can determine a range of matters impacting on the internal governance of operators of WEFs.

**Commencement dates relating to worker entitlement funds**

Parts 1 to 3 of Schedule 2 (the substantive amendments creating the proposed regime and its transitional rules) will commence on the earlier of a day to be fixed by proclamation, or six months after Royal Assent.\(^{68}\) Part 4 of Schedule 2 (which deals with pre-commencement applications by funds for registration as a WEF) commences the day after the Act receives the Royal Assent.\(^{69}\) The commencement of Part 5 of Schedule 2 is linked to the commencement of the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill*, which is currently before the Senate.\(^{70}\)

**Key definitions**

**Worker entitlement**

*Proposed section 329HB* of the *FWRO Act*, at *item 13* of *Schedule 2* to the Bill, defines a ‘worker entitlement’ as any payment:

• in respect of or in lieu of leave (however described)
• that is an employment termination payment or any other payment in relation to termination of employment or
• payable by an employer to an employee under a fair work instrument or contract of employment.

**Worker entitlement fund**

A ‘worker entitlement fund’ is defined expansively in *proposed section 329HC* as a fund whose purposes are or include paying worker entitlements (discussed above) to fund members. Fund members are defined in *proposed subsection 329HC(2)* as workers:

• in respect of whom contributions are made or
• in respect of whom transfers from other funds of amounts that relate to worker entitlements are made.

A WEF is also defined as including funds whose purposes include paying worker entitlements to the dependants (in the event of the worker’s death) or legal representatives of fund members.\(^{71}\) The Explanatory Memorandum notes ‘the question of a fund’s purpose is a question of fact to be determined in light of evidence such as the fund’s constituting documents’.\(^{72}\)

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68. *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019*, proposed section 2, table item 3.
71. *Proposed paragraphs 329HC(1)(a)(ii) and (iii)* of the *FWRO Act*.
Proposed paragraph 329HC(1)(b) enables the worker entitlement fund rules (WEF Rules) to prescribe additional funds for the purpose of this definition. The Government argues allowing the WEF Rules (which are legislative instruments and hence subject to the usual Parliamentary scrutiny and disallowance processes) to prescribe types of funds not covered by the proposed definition as WEFs:

... is necessary as the Royal Commission did not deal comprehensively with all types of funds. It is important and appropriate to provide scope to add to the definition as the need arises to address any gaps or attempts to circumvent the intent of the registration provisions. 73

However, proposed subsection 329HC(3) provides that certain types of funds such as superannuation funds and registered charities are excluded from the definition of a WEF. In addition, proposed subsection 329HC(4) excludes single-employer funds from the definition of a WEF unless an election for the fund under proposed section 329HD is in effect (discussed below).

The effect of the definition of a WEF is that any fund (other than those of a type specifically excluded) that provides any or all of the range of benefits identified by the RCTUGC as usually being provided by such funds will be captured by the definition.

Single employer funds

As noted above, single-employer funds are excluded from the definition of a WEF. Proposed section 329HD defines ‘single-employer fund’ as a fund:

- that has purposes that include paying worker entitlements to fund members or their death benefits dependants or legal personal representatives,
- that is controlled by a single employer (this includes trusts where the employer is or appoints the trustee), and
- to which all contributions are made in respect of employees of the employer.

Despite being excluded from the definition of a WEF, proposed subsection 329HD(3) allows the operator of a single-employer fund to elect for the fund to be a WEF.

Operator of a worker entitlement fund

Proposed subsection 329HE(1) defines the ‘operator’ of a WEF that is a trust to be the trustee, or each trustee, of the fund. The note to the proposed subsection states that it is a condition for registration of a WEF that the fund has no more than one operator. 74 A person is not an operator of a WEF merely because they:

- act as an agent or employee of another person or
- take steps in accordance with a constitution that comply with the conditions regarding winding up a WEF or remedying a defect that led to the WEF being deregistered. 75

Registration of worker entitlement funds effectively mandatory

Proposed section 329JA provides that it is an offence to operate an unregistered WEF. Proposed section 329JB provides that a civil penalty of up to 100 penalty units applies where a person

73. Ibid.

74. See also proposed section 329LA of the FWRO Act.

75. Proposed subsection 329HE(2) of the FWRO Act.
contributes to an unregistered WEF. As result of these two provisions and the expansive definition of a ‘worker entitlement fund’ and related definitions, registration of WEFs is effectively mandatory. This point is expressly made in the Bill’s Explanatory Memorandum.

Criminal offence for operating an unregistered fund

Proposed section 329JA provides the penalty for operating an unregistered fund is 200 penalty units or imprisonment for five years or both. This is identical to the penalty imposed by the Corporations Act for operating an unregistered managed investment scheme. The elements of the offence are:

- the person is an operator of a fund
- the fund is a WEF
- the fund is not registered and either:
  - the purposes of the fund are or include the payment, by or on behalf of one or more federal system employers, of worker entitlements to or in relation to one or more federal system employees or
  - the person is a constitutional corporation.

Civil penalty for contributions to unregistered WEFs

Proposed section 329JB provides that a civil penalty of up to 100 penalty units applies where a person contributes to an unregistered WEF. The Government notes that the penalty ‘is intended to ensure that only registered worker entitlement funds operate’. As the penalty applies to ‘a person’ this means that not only will employees potentially be liable for making contributions to unregistered WEFs, but that employers will also be liable in certain circumstances. The Government argues this:

... will also serve the legitimate policy purpose of ensuring that employers and other fund contributors take sufficient care to ensure that they are making payments only to registered worker entitlement funds.

Registration process

Proposed section 329KA deals with application requirements for the registration of a WEF. Applications for registration to the Commissioner:

76. However, where a body corporate is convicted of an offence, subsection 4B(3) of the Crimes Act 1914 allows a court to impose a fine of up to five times the penalty stated.
77. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, para 56: ‘This amendment complements amendments to the RO Act requiring the registration of worker entitlement funds’ and para 62: ‘This amendment gives effect to recommendation 49 of the Report. The amendment complements amendments to the RO Act requiring the registration of worker entitlement funds’ (emphasis added).
78. However, where a body corporate is convicted of an offence, subsection 4B(3) of the Crimes Act 1914 allows a court to impose a fine of up to five times the penalty stated.
79. See Corporations Act 2001, subsection 601ED(5) and Schedule 3, item 163.
80. Section 6 of the FWRO Act defines federal system employer as a national system employer within the meaning of the FW Act. A national system employer is an employer that is covered by the FW Act. For more information see Workplace Info, ‘National system employer’, Workplace Info website, last updated 13 November 2019.
81. However, where a body corporate is convicted of an offence, subsection 4B(3) of the Crimes Act 1914 allows a court to impose a fine of up to five times the penalty stated.
83. Ibid.
• must be in writing and in the form specified by the Commissioner, and accompanied by any information or documents required by the Commissioner;\(^8^4\)

• may result in the Commissioner, by written notice, requesting further information or inviting the applicant to make written submission in relation to the application by a specified deadline;\(^8^5\) and

• must be decided no later than 40 days after the application is made, or after the deadline specified in a written notice requesting further information or submissions from the applicant.\(^8^6\)

As soon as practicable after the application is made, certain details about the application (such as the name of the fund and its operator) must be published on the Commission’s website.\(^8^7\) Proposed subsection 329KA(6) then provides that once an application is determined, the details of the application are to be removed from the website (this is because details of the fund must be included on the register maintained under proposed section 329KD).

### Consideration of applications

Proposed section 329KB provides that the Commissioner must grant an application if satisfied that the fund is, or will be on registration, a WEF and the initial conditions for registration applicable to the fund will be satisfied (both in relation to the fund and its operator).\(^8^8\) The conditions for registration are discussed below.

However if the Commissioner is not required to approve the application, proposed section 329KC provides that the application must be refused.

Once granted, the Commissioner must notify the applicant and enter the name of the fund on the register established by proposed section 329KD. Likewise if the application is refused, the Commissioner must notify the applicant within 14 days of the refusal and set out, in writing, the reasons for refusal.\(^8^9\)

### Appeal rights in relation to registration decisions

Proposed section 329NI provides that appeals against a decision to refuse to register a WEF can be made to the Administrative Appeals Tribunal (AAT).

### When does registration take effect?

Proposed section 329KE provides that a WEF is registered once the Commissioner approves an application and the WEF is not deregistered.

### Overview of conditions of registration

Proposed section 329LA sets out the initial and ongoing conditions for registration of a WEF. Only certain conditions are applicable to single-employer funds. The conditions are set out in the table to proposed section 329LA.
Changes from previous Bill

Differences between the Bill and Previous Bill regarding conditions of registration
The Previous Bill sought to impose a good fame and character requirement not only on officers of a WEF, but also certain staff. The Bill only applies the good fame and character requirement to officers. In addition, the Bill makes changes to certain disclosure requirements noted below.

One operator
Condition one provides that a WEF can only have one operator—this is both an initial and ongoing condition, and is applicable to single-employer funds. The Government notes that this condition is based on the requirement in section 601FA of the Corporations Act, which provides that a managed investment scheme can only have one operator.

Operator is a constitutional corporation and not an organisation
Condition two provides that the operator of a WEF must be a constitutional corporation and not a registered organisation—this is both an initial and ongoing condition. Whilst the Government notes that the Superannuation Industry (Supervision) Act 1993 imposes a similar requirement in relation to superannuation funds, this condition was criticised by some stakeholders. For example the Australian Council of Trade Unions (ACTU) argued:

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. 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.

This condition does not apply to single-employer funds.

Compliance with conditions
Condition three provides that the Commissioner must be satisfied that the operator, and other persons likely to be involved in the operation of the WEF, will conduct its affairs in a way that meets the ongoing conditions imposed by proposed section 329LA.

The Government notes ‘this condition will allow the Commissioner to refuse an application for registration on the basis of past conduct and to prevent phoenix arrangements’.

Equal treatment of members
Condition four provides that the WEF must treat members equally and, if there are different classes of members, the WEF must treat members of a class equally with other members of that class. Further, different classes of members must be treated without discrimination on the basis of

90. Proposed section 329LA, table item 1.
91. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 16.
92. Proposed section 329LA, table item 2.
95. Proposed section 329LA, table item 3.
96. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 16.
membership of an organisation (for example on the basis of union membership). This is an ongoing condition and is applicable to single-employer funds.97

Whilst the Government argues that this ‘requirement adapts the requirement in section 601FC(1)(d) of the Corporations Act in relation to equal treatment’98 this is disputed by a number of stakeholders. For example the ACTU argued that the provisions in the Corporations Act actually:

... require managed investment funds to “treat the members who hold interests of the same class equally and members who hold interests of different classes fairly”99 (emphasis added)

Other stakeholders criticised other aspects of this condition. For example, Protect Services Ltd (an operator of funds that would be eligible for registration as WEFs) previously noted that whilst this condition aims to ‘ensure that entitlements and services provided to union members are also provided to non-union members’:

... the drafting of the condition is open to a far broader interpretation which will have consequences beyond what is intended. For instance, the condition does not take into consideration the fact there may be legitimate reasons for different classes of members (i.e., different divisions) having different rules or access to benefits because the divisions cater for different demographics or industries. In Protect’s case, we currently have members in the Electrical division, Metals/Manufacturing division and Maritime division. The drafted condition may prevent an operator from offering training and welfare services tailored to the needs of those divisions. It may also be open to interpretation as to whether an operator may provide a service, such as training, to Metal workers but not provide similar training to Electrical workers. We submit that the clause be amended to remove any ambiguity and to allow, in effect, the tailoring of different services (albeit irrespective of union membership, which is the intention). Superannuation law contains similar requirements but refers to members of different classes being treated ‘fairly’, which is a more appropriate test. There are also exemptions in superannuation law that allow a trustee to offer different benefits to different classes of members in certain circumstances (i.e., where an employer has arranged particular insurances for their employees), but these exceptions in superannuation law only came about after trustees and employers pointed out that the initial drafting of the relevant legislation was too restrictive.100 (emphasis added).

Limits of classes of members

If the WEF has different classes of members, condition five provides that these must not be differentiated by reference to membership of a registered organisation. This is an ongoing condition that also applies to single-employer funds.101

The Government notes this is based on a recommendation of the RCTUGC.102 This provision was criticised by some stakeholders as being unnecessary and ideologically based. For example, the ACTU previously argued that this condition:

... 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

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98. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 16.
101. Proposed section 329LA, table item 5.
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, making a 1.1 million donation in 2009 to the Victorian Bushfire relief appeal. 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. 103 (emphasis added)

The ACTU also argued that ‘there is nothing at all untoward’ about a WEF (after the interests of members are accounted for) applying its own profits or surplus ‘to purposes that it sees fit’ as is the case with companies and other managed investment schemes. 104

**Constitutional requirements**

Condition six provides that a WEF must have a written constitution that complies with the requirements set out in **proposed subsection 329LB(1)** and the WEF Rules issued by the Minister. 105 This condition is both an initial and ongoing condition for registration, and also applies to single-employer funds. 106 **Proposed subsection 329LB(1)** provides that a constitution of a WEF must:

- require that the operator be a constitutional corporation and must not be an organisation
- specify that no more than five per cent of the assets of the WEF may be invested in an entity controlled by a contributor to the WEF or an associate of a contributor
- specify that the assets of the WEF are not to be used in relation to financial assistance to a contributor, member or associate of a contributor or member of the WEF
- require that contributions to the WEF may only be used for purposes authorised by **proposed section 329LC** (discussed under the heading ‘**Authorised uses of contributions**’ below)
- require that income of the fund may only be used for purposes authorised by **proposed section 329LD** (discussed under the heading ‘**Authorised uses of income**’ below)
- not allow contributions or income of the fund to be used to make a payment to an employee relating to periods of industrial action (for example, strike pay)
- provide that unclaimed or forfeited money, or money that is treated as such under the constitution, must not be paid to an industrial association or related party of an industrial association 107
- require that a separate account be kept for each fund member in a way that enables the member’s entitlements to be calculated.

Whilst the Government argues that the above requirement are modelled on the requirements that currently apply to ‘approved worker entitlement funds’ in subsection 58PB(4) of the **FTBA Act**, 108

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104. Ibid.
106. Ibid.
107. Proposed subsection 329LB(3) applies the definition of ‘related party’ in section 9B of the Fair Work (Registered Organisations) Act 2009 to industrial associations and their officers for the purposes of proposed paragraph 329LB(1)(g).
some stakeholders have criticised the requirements. For example the ACTU previously argued that condition six would:

- impose on WEFs more restrictions on the distributions of their surplus income when compared to managed investment funds and under the current regime and
- impose a requirement to comply with the WEF Rules issued by the Minister at any time, which may result in operators being required to ‘give information to contributors, at any time’ and therefore ‘this power could be used excessively and oppressively, with no explicit or implicit limit expressed in the Bill on its exercise’. The ACTU also argued that the prohibition on unions operating WEFs is a clear contravention of Article 3 of ILO Convention 87 and the principle of freedom of association and ‘did not form part of the Royal Commission’s recommendations’. Protect Services Ltd also criticised condition six on the basis that as it allows the Minister to ‘impose any requirements into a Fund’s constitution’ the use of this power ‘may put the trustee in a position where they are contravening their fiduciary duties’.

Condition seven—an ongoing condition—provides that the WEF must be administered in accordance with its constitution, which includes the above requirements. This condition also applies to single-employer funds.

**Officers of the operator must be of good fame and character**

Condition eight provides that the Commissioner must have no reason to believe that any officer of the operator of the WEF who performs duties in relation to the fund is not of good fame or character.

This condition is initial and ongoing, and is linked to proposed section 329LE which provides that when considering whether there is reason to believe that a person is not of good fame or character, the Commissioner must have regard to the following:

- any conviction of the person, within the period of ten years ending immediately before the consideration time, for an offence that involves dishonesty and is punishable by imprisonment for at least three months
- whether the person has at any time been:
  - because of a conviction, ineligible to be a candidate for election, or elected or appointed, to an office in an organisation or
  - otherwise disqualified under the FWRO Act from holding office in an organisation and
- any other matters the Commissioner considers relevant.

As noted above, in the Previous Bill this condition also applied to certain staff of the fund—an aspect of the condition that was criticised by some stakeholders. Protect Services Ltd

112. Proposed section 329LA, table item 7.
113. Proposed section 329LA, table item 8.
114. ACTU, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, op. cit., p. 11; Protect, Submission to the Senate Education and
recommended that the condition be amended to ensure that it only applies to directors and officers, ‘otherwise more onerous conditions are placed on fund operators than are placed on unions in terms of who may be employed’.  

The removal of non-officer employees from the good fame and character condition from the Bill appears to indicate that this critique of the drafting of the Previous Bill was actioned by the Government.

**Two types of independent directors**

Conditions nine and ten provide that a WEF must have:

- **condition nine**: at least one voting director who is independent of, and has no material relationship with, the operator of the fund other than in the role as director and
- **condition ten**: at least one voting director who is independent of, and has no material relationship, with any of the following:
  - any contributor to the fund or associates of contributors to the fund
  - any organisation that has a member, or associate of a member, who is a fund contributor
  - any organisation that has a member, or associate of a member, who is a fund member or
  - any associate of the operator of the fund.

These conditions are both initial and ongoing. The Government notes that the first requirement noted above (condition nine) ‘is intended to prevent deadlocks on the board of a fund operator’.

These requirements have been criticised by a number of stakeholders. For example, the ACTU previously noted that as a result of these two conditions and proposed paragraph 329LD(2)(e) the independent directors ‘must vote in favour of’ and will have a veto right over ‘payments to a training or welfare service provider’.

Further the ACTU argued:

> ... 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.

Protect Services Ltd also previously expressed concern about how the above two conditions are drafted, noting that ‘it is not clear from the language in the Bill whether the same independent director’ can satisfy both conditions.

In that regard the Explanatory Memorandum notes:

> ... the payment must be approved by the voting directors of the operator including by at least one voting director who is independent [sic] per condition 9 and one voting director who is independent per condition 10 before it is made, noting that this may be the same person. (emphasis added)
This means a single independent director can fulfil both roles in relation to conditions nine and ten.

**Fund to be managed at arm’s length**

Condition 11 provides that a WEF and its investments must be managed at arm’s length from:

- the contributors to the fund and their associates and
- the fund members.\(^{123}\)

This is both an initial and ongoing condition. The Government notes that it is modelled on paragraph 58PB(4)(a) of the *FBTA Act* (which the Bill will repeal).\(^{124}\) The drafting of condition 11 has been criticised by some stakeholders. For example, Protect Services Ltd noted that as currently drafted the condition ‘presents some ambiguity’ resulting in significant practical issues.\(^{125}\) As noted by the RCTUGC, WEFs are frequently established as ‘joint ventures’ between industry parties and are operated by a trustee company, the directors of whom are associated with the industry parties (and may be appointed by them).\(^{126}\)

Protect Services Ltd noted that this means that because directors of a WEF are drawn from industry parties ‘to represent worker and employer interests respectively’ this means that:

- directors nominated by an employer or employer association may be an owner or executive in a business that is a contributor to the fund
- directors nominated by a union ‘may have commenced their careers as a worker and will likely be a fund member’.\(^{127}\)

As such, as drafted, condition 11 would prevent such persons from being directors of the operator of a WEF. Therefore Protect Services Ltd recommended that it instead should be ‘sufficient to rely on directors’ obligations under the *Corporations Act* to avoid conflicts of interest’.\(^{128}\) Further, it was also noted that paragraph 58PB(4)(a) of the *FBTA Act*—which the Government says condition 11 is modelled on—only refers to ‘“contributors to the fund”, not fund members’.\(^{129}\)

**Arrangements to ensure contributions and income retains their character**

Condition 12—which is an ongoing condition—provides that there must be arrangements in place to ensure that the provisions requiring that contributions and income retain their character are given effect.\(^{130}\) The Government notes that this ‘is to prevent the operator converting contributions into capital’.\(^{131}\)

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123. *Proposed section 329LA, table item 11*.
128. Ibid.
129. Ibid.
130. *Proposed section 329LA, table item 12*.
This condition is linked to **proposed subsections 329LC(2) and 329LD(3)**, which provide that:

- an amount that is paid into a fund as a contribution continues at all later times, while held by the fund, to have the character of a contribution and

- an amount that is earned, derived or received as income by a fund while the fund is registered continues at all later times, while held by the fund, to have the character of income.

### Compliance with worker entitlement fund rules

**Condition 13**—an ongoing condition—provides that the WEF must comply with requirements in relation to capital adequacy, governance and liquidity that are prescribed by the WEF Rules.¹³²

This condition has been criticised by a number of stakeholders. Protect Services Ltd previously noted:

> ... condition 13, requires that funds comply with prescribed worker entitlement fund rules in relation to “capital adequacy, governance and liquidity”. Under s329NJ, the Minister is provided broad and extensive power to prescribe such Rules. We strongly believe that such fundamental parameters should be clearly set out in the relevant legislation, rather than being prescribed by the Minister. We also urge that such rules become available as soon as possible in order for the Board to consider any investment portfolio implications.¹³³

Protect Services further argued that as the WEF Rules can deal with a broad ‘range of areas which each have the potential to materially impact operations’ (such as capital adequacy, governance and liquidity) and that ‘there are no parameters to regulate the timeframes’ in which any changes to the WEF Rules made by the Minister come into effect, there would be ongoing ‘uncertainty as to operation of Registered Worker Entitlement Funds’.¹³⁴

The ACTU also criticised the requirement to comply with WEF Rules on the basis that this ‘power could be used excessively and oppressively, with no explicit or implicit limit expressed in the Bill on its exercise’.¹³⁵

### Provision of annual audited reports

**Condition 14**—an ongoing condition—provides that an operator must give the Commissioner audited annual reports for a fund in accordance with **proposed section 329LF**.¹³⁶ The audited annual reports must be prepared for the financial year in accordance with any applicable Australian Accounting Standards and be provided to the Commissioner within four months after the end of the financial year¹³⁷ (the Previous Bill provided for a shorter period of three months). The annual report must also include:

- a statement of the profit or loss of the fund, net of tax and net of benefits paid to fund members, for the financial year

- a statement of the financial position of the fund as at the end of the financial year, including all assets and liabilities (including liabilities for accrued benefits)

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134. Ibid., p. 1.
137. Proposed subsection 329LF(2).
• a statement of the benefits, including the type of benefits, paid for the financial year to fund members
• details of certain payments in relation to insurance cover related to payments of worker entitlements (including details of any commissions or benefits received or obtained by the operator of the fund or a related party of the operator in relation to the insurance cover for the financial year)
• a statement of any management or administration fees paid for the financial year and the recipients
• the number and total value of any benefits forfeited during the financial year
• details of certain training or welfare payments including a new requirement (compared to the Previous Bill) to include a statement of the voting directors who voted to make each such individual payment (discussed below)
• any other matters prescribed by the WEF Rules and
• the auditor’s report.

The annual report must be audited by a registered auditor or a registered company auditor and the auditor’s report of the audit must be attached to (and form part of) the annual report. The audit itself, along with the audit report, must comply with any applicable Australian Auditing Standards. The auditor’s report must also set out:
• whether the annual report complies with the requirements discussed above
• whether the auditor was given all information, explanation and assistance necessary for the conduct of the audit (and if not, the reasons why)
• whether the auditor is of the opinion that the operator has kept financial records sufficient to enable an annual report for the fund to be prepared and audited in accordance with the requirements in proposed Part 3C of the FWRO Act (and if not, the reasons why) and
• any other matters prescribed by the WEF Rules.

The ACTU, after noting that companies that currently operate WEFs may be required to lodge such reports with ASIC, if their size and/or ASIC requires them to do so, criticised the above requirements on the basis that:

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

Likewise, Protect Services Ltd also previously criticised allowing the Minister to specify matters that must be included in the annual report and auditor’s report:

There are no restrictions on the period of notice to obtain the information and report on it. The condition is far-reaching and has the potential for matters to be included in annual reports of funds, such as terms of contracts, directors’ and officers’ details, which are not imposed on other corporations. Additional reporting and/or auditing requirements, of an as-yet unknown extent, have potential to add significant cost. These catch-all provisions provide a serious degree of uncertainty in operating a

138. Proposed subsections 329LF(3) and (4).
139. Proposed subsection 329LF(4) and (6).
140. Proposed subsection 329LF(5).
business when key operating parameters are at the whim of a Minister – conditions that are not imposed on other corporations.  

New requirement proposed by the Bill

The Bill proposes that annual reports made in compliance with condition 14 must include a statement containing certain details of training or welfare payments. The Bill adds a new requirement not contained in the Previous Bill, namely that the relevant statement include the voting directors who voted to make each such individual payment. The Explanatory Memorandum contains no explanation for the rationale behind this new requirement.

Informing the Commission about certain changes

Condition 15—an ongoing condition—provides that the operator of a WEF must notify the Commissioner in writing of any changes of details included in the register of WEFs, within three months of the change occurring. This includes the name of the WEF, the name of its operator and other details the Commissioner considers appropriate.

Provision of information to the Commission, contributors and members

Condition 16—an ongoing condition—provides that the operator of a WEF must give to the contributors of the WEF the information prescribed by the Minister in the WEF Rules at the prescribed time, or at the intervals required by the Rules. This condition has attracted some criticism. For example, Protect Services Ltd previously argued:

... condition 16 ... Allows the Minister to require that contributors are provided with “information” prescribed by the worker entitlement fund rules and at the time and intervals prescribed by the rules. This has far-reaching consequences for the operations of a business. Funds operate with sophisticated and custom-built information technology systems. Changes to information and reporting must be taken with due care, with consideration given to proper amendments to software. Such changes may require many months of work (and cost) to modify systems in response to a Minister’s imposition. While we do not object to providing contributors with information, more certainty needs to be provided to operators to ensure reasonable timeframes to comply, as well as appropriate contemporary methods of low-cost electronic communication such as email or text message. Funds also enter into a broad range of confidential commercial arrangements and handle sensitive business and financial information as many other corporate entities do. The broad scope of the Minister’s powers makes it unclear whether Registered Worker Entitlement Funds could continue to enter into such arrangements. (emphasis added).

The ACTU also previously argued that the power of the Minister (via the WEF Rules) to require ‘on an ad-hoc basis’ operators to give information to contributors, at any time ‘could be used excessively and oppressively, with no explicit or implicit limit expressed in the Bill on its exercise’.

143. Proposed section 329LA, table item 15.
144. Proposed subsection 329KD(2).
145. Proposed section 329LA, table item 16.
Condition 17—an ongoing condition—effectively requires the operator to provide workers with an annual statement. 148 Protect Services Ltd criticised this requirement arguing:

... we regard the concept of annual statements as outdated, when information is available to members “24/7” through online access as well as a Smartphone App. While we respect the fact that not all members have such access it is important that communications with members are cost effective and efficient. 149

However, Protect Services Ltd previously noted with approval that the Explanatory Memorandum provides that the requirement that an operator ‘gives’ a certain thing (in this case, the annual statements) ‘may be met by emailing the relevant person, including emailing a link to the prescribed information’. 150

Condition 18—an ongoing condition—provides that the operator must give the Commissioner, contributors and fund members information about any change to the constitution of the WEF and any change to the operation of the WEF affecting payments to members as soon as practicable. 151

Disclosure of certain information and documents
Condition 19—an ongoing condition—provides that an operator of a WEF must give a person certain information either before they become a member of the WEF, or as soon as practicable after they become a member. The information that must be provided in a statement includes:

• the amount of any fees and administrative expenses charged by the operator in relation to the fund and

• information about the eligibility of fund members to make claims for payment from the WEF and how to make such a claim. 152

Condition 20—an ongoing condition—provides that an operator of a WEF must:

• on request, give a copy of the constitution of the fund to any contributor to the fund

• give a copy of the constitution of the WEF to each person who may become a fund member and

• ensure that each member has a copy of the constitution or has access to it on the WEF’s website. 153

The ACTU criticised conditions 19 and 20 on the basis that a requirement to ‘give’ the above information is clearly different in law to a requirement to take reasonable steps to provide, or to ensure that the thing is available and therefore:

... 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. 154

148. Proposed section 329LA, table item 17.
151. Proposed section 329LA, table item 18.
152. Proposed section 329LA, table item 19.
Protect Services Ltd also previously criticised condition 20 on the basis of its practicality. Protect Services Ltd noted that subcondition 20(b), which requires a copy of the constitution to be provided to each person who ‘the operator knows may become a fund member’, causes two issues:

- it requires that the operator establishes a knowledge of who may become a member and
- operators ‘can only establish who may become a member if an employer chooses to disclose their list of employees and their contact details to [the operator] prior to becoming a contributor’.  

Protect Services Ltd noted that in relation to the second point above ‘this is impractical and unlikely to occur or may impose an obligation on us to obtain details for people [who] are not yet party to an industrial agreement to become a member’ and therefore recommended that either subcondition 20(b) be removed from the Bill or the word ‘or’ be substituted for the word ‘and’ at the end of subcondition 20(b), which would allow ‘notification to be provided or for the information to be available on a website’. 

Condition 21—an ongoing condition—provides that if the income of the WEF is used to make certain training or welfare payments, the operator of the fund must notify each member of the fund as soon as is practicable after the payment is approved. Such a notification must include:

- who the payment will be made to
- details of the particular training and welfare services provided and
- the voting directors for voted to make the payment.

Alternatively, the operator of the WEF can ensure that each member has access to this information on the WEF’s website. 

New requirement proposed by the Bill

The Bill adds a new requirement not contained in the Previous Bill, namely that the relevant notifications of training or welfare payments covered by proposed subsection 329LD(2) must include the voting directors who voted to make each such individual payment. The Explanatory Memorandum contains no explanation for the rationale behind this new requirement.

Training requirements

Condition 22—an ongoing condition—provides that an operator of a WEF must comply with training requirements set out in proposed section 329LG. Those requirements are that the officers and staff members of an operator of a WEF whose duties include those related to the financial management of the WEF must undertake approved training (discussed below) within six months of the later of:

- assuming duties that relate to the financial management of a fund or
- condition 22 starting to apply in relation to the fund.

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156. Ibid.
158. Proposed section 329LA, table item 22.
159. Proposed subsections 329LG(1) and (2).
Under the Previous Bill, the training requirements had to be met within six months of the person assuming duties that related to the financial management of the fund. Whilst not stated in the Explanatory Memorandum, this change appears to reflect the Government’s assertion that the Bill was amended ‘to delay the commencement of the provisions’ that affect WEFs ‘to give them sufficient time to adjust to the new scheme’.  

The Commissioner may approve training provided by an organisation, peak council or other body or person that the Commissioner is satisfied has the appropriate skills and expertise to provide the training. Proposed subsection 329LG(4) provides that an operator may apply to the Commissioner on behalf of an officer or staff member for an exemption from the training requirements. The Commissioner has the discretion to grant such exemptions subject to any conditions if satisfied that the person has ‘a proper understanding’ of their duties ‘relating to the financial management’ of the WEF because of their:

- experience as a company director or as an officer of a registered organisation or
- other professional qualifications and experience.

Authorised uses of contributions

Proposed section 329LC effectively limits the purposes for which a constitution complying with condition six of registration (and therefore proposed section 329LB) can allow contributions to a WEF to be used. The Government notes that these authorised uses are adapted from the requirements in paragraph 58PB(4)(c) of the FBTA Act. The authorised uses of contributions are:

- to pay a kind of worker entitlement to WEF members for whom contributions have been made for that kind of entitlement (payments may also be made to death benefits dependants or legal personal representatives of those WEF members)
- to make investments to generate income from the assets of the WEF
- to reimburse contributors to the fund who have paid entitlements directly to WEF members in circumstances where the contributor was under an obligation or permitted to pay those entitlements
- to return contributions to contributors to the WEF
- to pay, at market value, for certain types of insurance cover
- to transfer contributions to another WEF
- to pay the reasonable administrative expenses of the WEF including administrative costs to the trustee and board fees to directors of the operator
- to pay amounts to an external administrator of a contributor in certain circumstances
- to pay interest on or repay money lent to the WEF.

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161. Proposed subsection 329LG(3).
162. Proposed subsection 329LG(5).
164. Proposed subsection 329LC(1).
Authorised uses of income

Proposed section 329LD effectively limits the purposes for which a constitution complying with condition six of registration (and therefore proposed section 329LB) can allow income of a WEF to be used. The authorised uses of the income of a WEF are:

- the purposes covered in proposed section 329LC in relation to authorised uses of contributions (discussed above)
- payments other than worker entitlements to fund members, their death benefits dependants or legal personal representatives
- payments to a contributor to the fund whose contributions are in respect of employees or former employees of the contributor and
- payments for certain training and welfare purposes.  

Income of a WEF may only be used to make payments for training and welfare purposes when they satisfy the criteria in proposed subsection 329LD(2):

- the payment is made for the sole purpose of providing training or welfare services to either or both of:
  - participants or former participants in any industry in which fund members participate and
  - the spouses or dependents of such participants or former participants and
- if the training or welfare services are not provided by the operator of the WEF:
  - the services must be provided at market value and on commercial terms and
  - negotiated at arm’s length from any director with a material personal interest in the provider of the services and
- the services are provided in such a way that does not discriminate ‘unfairly’ between fund members and
- before payment is made, the payment is approved by the voting directors of the operator including by:
  - at least one voting director who is independent as per condition nine and
  - a voting director who is independent per condition ten.

In 2017 the Senate Education and Employment Legislation Committee expressed concern that proposed section 329LD may operate to prevent gifts or donations to charities connected to the provision of workers benefits (for example, charities established to prevent suicide and improve mental health in particular industries). The Committee recommended:

... the government review the wording of proposed section 329LD in light of the concerns raised that it would not allow for a gift or donation to be made to charities operating in this sector.

The wording of proposed section 329LD remains unchanged from the Previous Bill. In its 2019 Report on the Bill, the Senate Education and Employment Legislation Committee revisited the issue and noted:

The committee notes the concerns raised by submitters in regard to proposed section 329LD. In particular, it acknowledges the concerns about the prohibition on gifts and donations in the context of

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165. Proposed subsection 329LD(1).
166. Proposed subsection 329LD(2).
168. Ibid., p. 13.
the valuable work carried out by MATES in Construction in the building and construction industry. However, noting the assurances of the department, the committee is of the view that the wording in proposed section 329LD will still allow for MATES in Construction to continue their work, provided they take steps to convert their operations into a ‘fee-for-service’ model which would qualify as services provided at market value on commercial terms.169

The Committee therefore did not reiterate its recommendation that proposed section 329LD be amended, and instead recommended that the Bill be passed.170

Restrictions on distributions of income or capital

A number of stakeholders were critical of the restrictions on the types of distributions of income or capital that the Bill proposes to impose on WEFs. For example, Protect Services Ltd previously argued:

Section 329LD does not allow for a distribution of income nor prior years income under s329LD(3) to sponsors of the fund. Distributions of income are permitted to fund members (workers) under s329LD(1)(b) and to contributors (employers) under s329LD(1)(c). This change in the framework for distribution of income may have the effect of both workers and employers claiming an entitlement to the income of investment of capital. If the fund operators (which are generally trustees of trusts) were required to take into consideration a claim of these beneficiaries on the income of the fund when setting the fund’s investment strategy, this could have the unintended consequence of shifting the core purpose of Registered Worker Entitlement Funds away from capital preservation in order to generate income to meet beneficiary expectations... it is important to note that trustees of retail superannuation funds can distribute income to their sponsors instead of returning that excess money to fund members and likewise companies can distribute excess to their shareholders via dividends.

We submit that the only reason that such distributions are being prevented in the case of our fund is because some of those sponsors are unions.171 (emphasis added)

The ACTU made a similar point, arguing that if passed in its current form, WEFs would become ‘the only managed investment schemes in Australia’ that would be:

• prohibited from distributing any income that they generate to their operator or sponsor and
• restricted in how their operator may dispose of income earned from operating the fund.172

Human rights criticism of registration requirements for worker entitlement funds

The PJCHR previously expressed concern about the proposed WEF registration regime discussed above. The PJCHR noted that under condition two in proposed section 329LA a WEF will only be able to be operated by a corporation and cannot be operated by a registered organisation (that is, a trade union or employer organisation). In addition, it noted that under proposed sections 329JA to 329JB it will be an offence to operate an unregistered WEF and a civil penalty provision for employers to contribute to such a fund.173

The PJCHR noted that the interpretation of the right to freedom of association and the right to just and favourable conditions of work is informed by the ILO treaties, and that ILO Convention 87 specifically protects the right of workers to autonomy of union processes, organising their
administration and activities and formulating their own programs without interference. The PJCHR stated:

Providing that registered organisations cannot administer 'worker entitlement funds' and limiting the purposes for which such money may be used would appear to engage and limit these rights. However, the statement of compatibility does not acknowledge this limitation so does not provide an assessment of whether the limitation is permissible as a matter of international human rights law.\(^{174}\)

After considering the Minister’s responses, the PJCHR concluded:

... it was unclear from the information provided that ... the measure is the least rights restrictive approach. It was unclear from the response whether there are any other reasonably available less rights restrictive alternatives to prohibiting registered organisations from operating such funds in general. Accordingly, it was uncertain whether the measure constitutes a proportionate limitation on the right to freedom of association. Based on the information provided and the above analysis, the committee was unable to conclude that the measure is a proportionate limitation on the right to freedom of association and the right to just and favourable conditions at work.\(^{175}\)

**Other provisions related to authorised uses of contributions and income**

Under the new annual reporting requirements WEFs must report on training and welfare payments. Specifically they will be required to include in the annual report details of:

- the total amount of payments paid for training or welfare services
- the amount of each individual training or welfare services payment made
- who the payments were made to
- the purpose of each individual payment and
- the voting directors for voted to make the payment.\(^{176}\)

WEFs must also report on payments made in relation to certain types of insurance that can be made from member contributions.\(^{177}\)

As noted above, under condition 21 WEFs must notify each member, as soon as is practicable after the payment is approved, about training and welfare service related payments. That notification must detail who the payment was made to, what training or welfare services will be provided and the voting directors for voted to make the payment. Alternatively, the operator of the WEF can ensure that each member has access to such information on the website of the fund.\(^{178}\)

The penalty for non-compliance with conditions six and seven (and hence proposed sections 329LC and 329LD) is 100 penalty units and/or deregistration.\(^{179}\) Likewise the penalty for non-compliance with condition 14 (and hence proposed section 329LF) is 100 penalty units and/or deregistration.\(^{180}\)

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175. Ibid., p. 110.
176. Proposed paragraph 329LF(3)(g).
177. Proposed paragraph 329LF(3)(d).
179. See proposed sections 329ME, 329MG.
180. See proposed sections 329MF, 329MG.
The Commissioner may also issue a direction to a fund to comply with an ongoing condition. Failure to comply with such a direction attracts a maximum penalty of 60 penalty units.

Finally, the Commissioner may also seek an injunction from the Federal Court under existing section 308 of the FWRO Act in relation to a breach of a civil penalty provision.

**New requirements and other changes proposed by the Bill**

The Bill adds a new requirement not contained in the Previous Bill relating to the information that must be contained in annual reports in relation to training or welfare payments covered by proposed subsection 329LD(2). Proposed subparagraph 329LF(3)(g)(v) provides that annual reports must also include the voting directors who voted to make each such individual training or welfare payment. The Explanatory Memorandum contains no explanation for the rationale behind this new requirement.

In addition, proposed paragraph 329LF(2)(b) now provides that annual reports for a WEF must be provided to the Commissioner within four months after the end of the financial year, rather than the three month period provided for in the Previous Bill. No explanation for this change is contained in the Explanatory Memorandum. However, the Government notes that ‘in response to concerns from’ WEFs it ‘amended the Bill to delay the commencement of the provisions that affect them, to give them sufficient time to adjust to the new scheme’ and the amendment is consistent with that stated position.

**Worker entitlement fund rules**

Proposed section 329NJ provides that the Minister may, by legislative instrument, make WEF Rules that prescribe matters:

- required or permitted to be prescribed by the WEF Rules or
- necessary or convenient to be prescribed for carrying out or giving effect to the amendments to the FWRO Act contained in proposed Part 3C.

As the breadth of the WEF Rules and their interaction with the reforms proposed by the Bill has attracted substantial criticism from stakeholders, it is examined below in detail. However, it should be noted that the WEF Rules are legislative instruments and therefore subject to Parliamentary scrutiny and disallowance.

**What can be prescribed by the WEF Rules?**

Apart from the broad drafting contained in proposed subsection 329NJ(1), a range of other provisions allow the WEF Rules to deal with a wide array of different matters. Some of these are discussed below.

**Types of funds regulated**

The WEF Rules can be used to prescribe that certain types of funds are worker entitlement funds, and therefore must be registered (as operating an unregistered WEF is an offence). This was

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181. Proposed section 329MA.
182. Ibid.
185. Proposed paragraph 329HC(1)(b).
criticised by some stakeholders on the basis that it allows the Minister ‘to increase the scope of coverage of the legislation’ and therefore this introduces ‘a source of significant business risk’ rooted in increased uncertainty.”\(^\text{186}\) The ACTU also previously argued:

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 [FWRO] 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.\(^\text{187}\)

**Constitutional requirements**

The WEF Rules can be used to impose requirements in relation to the constitution of a WEF.\(^\text{188}\) As such, the WEF Rules can be used to regulate a broad array of matters related to membership, elections, numbers and types of directors, voting requirements and so forth.\(^\text{189}\) United Voice argued:

The extent of regulation and interference in internal affairs, down to the level of requiring a union to submit its internal policies to the regulator, is unparalleled. It certainly is not a feature of corporate regulation, despite persistent misconduct, which harms workers, consumers and the economy, and includes wage theft, fraud, insider trading and money laundering.\(^\text{190}\)

A number of other stakeholders previously expressed similar concerns about the ability of the WEF Rules to regulate the contents of the constitutions of WEFs, arguing it was an inappropriate degree of interference and regulation.\(^\text{191}\)

**Capital adequacy and liquidity requirements**

The WEF Rules can be used to prescribe both capital adequacy and liquidity requirements that WEFs must comply with.\(^\text{192}\)

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188. Proposed subsection 329LA(1), table item 6(b).

189. T Clarke, Evidence to Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, 30 October 2017, p. 1: ‘The worker entitlement rules will enable the Minister to directly determine which funds are regulated under the Bill, what the constitutions must say in order to become or remain registered, and what internal governance procedures they adopt’ and M Connolly, Evidence to Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, 30 October 2017, p. 24: ‘Condition 6 of 329LA, allows for any requirements to be imposed on a fund’s constitution. Again, this is another very broad requirement that could be imposed on our industry that does not apply elsewhere.’

190. United Voice (UV), Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, [Submission no. 5], n.d., p. 2.


Some stakeholders expressed concerns about this power, noting that both capital adequacy and liquidity are not defined, nor is there any indication regarding minimum or maximum timeframes in which WEFs would be ‘required to achieve this position’.

Protect Services Ltd argued:

We strongly believe that such fundamental parameters should be clearly set out in the relevant legislation, rather than being prescribed by the Minister. We also urge that such rules become available as soon as possible in order for the Board to consider any investment portfolio implications.

**Governance**

The WEF Rules can be used to prescribe ‘governance’ requirements that WEFs must comply with. Some stakeholders expressed concern about this power. For example, Protect Services Ltd argued that as ‘governance’ requirements are not defined in the Bill it would ‘in effect allow the Minister to provide broad conditions so long as there is a tenuous link to “governance”’ and thus expose WEFs to operational uncertainty and risk.

**Specific impact on annual and audit reports**

Proposed paragraph 329LF(3)(h) requires WEFs to include in their annual report ‘any other matters’ prescribed by the WEF Rules. Likewise proposed paragraph 329LF(5)(d) requires auditors to include in their audit report ‘any other matters’ prescribed by the WEF Rules.

Further, in relation to the contents of the auditor’s report, proposed subsections 329NJ(2) and (3) effectively allow the WEF Rules to specify how WEFs are to be audited, including by applying, adopting or incorporating (with or without modification) relevant accounting or auditing and assurance standards in force at a particular time. Protect Services Ltd previously criticised the above requirements:

S329LF(3)(h) and s329LF(5)(d)— allow the Minister to specify any ‘other matter’ to be included in an Annual Report and Auditor’s report. There are no restrictions on the period of notice to obtain the information and report on it. The condition is far-reaching and has the potential for matters to be included in annual reports of funds, such as terms of contracts, directors’ and officers’ details, which are not imposed on other corporations. Additional reporting and/or auditing requirements, of an as-yet unknown extent, have potential to add significant cost.

These catch-all provisions provide a serious degree of uncertainty in operating a business when key operating parameters are at the whim of a Minister — conditions that are not imposed on other corporations.

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193. Protect, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, op. cit., p. 6: Connolly, Evidence to Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, op. cit., p. 24: ‘The other thing, in terms of uncertainty and what it means for the operation, is that changing the investment portfolio in order to meet the capital adequacy requirements, if we need to liquidate assets or change our portfolio structure, are very complex matters that need to be done in the appropriate time frame’.


196. Protect, Submission to the Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, op. cit., p. 4: Connolly, Evidence to Senate Education and Employment Legislation Committee, Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, op. cit., p. 24: ‘Firstly, we’d like to know what we have to do… There are particular terms in there like the ‘capital adequacy requirements’… If we are managing a great deal of money on behalf of others then we need to know what they are. Similiarly, the ability for the minister to impose the broad term, ‘governance requirements’. I think that is as broad a word as we could possibly find in order to impose conditions on an organisation.’ (emphasis added)

The ACTU was also critical of this aspect of the potential application of the WEF Rules arguing:

The worker entitlement rules will enable the minister to directly... impose requirements on the content of the annual reports and audit reports of the funds. This rule-making power can be used to introduce change just for the sake of it, to constantly keep these funds on the hop, tying them up in red tape.¹⁹⁸

Limits on the rule-making power of the Minister

Whilst the breadth of the matters allowed to be dealt with by the WEF Rules is substantial, there are limits on the rule-making power of the Minister. First, proposed subsection 329NJ(4) provides that the WEF Rules cannot:

- create an offence or civil penalty
- provide powers of arrest, detention, entry, search or seizure
- impose a tax
- set an amount to be appropriated from the Consolidated Revenue Fund or
- directly amend the text of the FWRO Act.

Second, proposed subsection 329NJ(5) provides that where the WEF Rules are inconsistent with the Regulations made under the FWRO Act, the Rules have no effect to the extent of any such inconsistency, but are taken to be consistent to the extent they are capable of operating concurrently with the Regulations.

Consequences of non-compliance with conditions other than de-registration

Broadly speaking, the Bill proposes a range of consequences for operators who fail to comply with the conditions for registration. These are:

- infringement notices
- civil penalties and
- de-registration.

Whilst the Bill also creates a criminal offence in relation to operating an unregistered WEF (discussed above) the civil enforcement regime is focused on non-compliance with conditions of registration as a WEF by operators, along with de-registration in certain cases (discussed below separately).

Civil penalties

The Bill creates a range of civil penalties for failing to comply with conditions of registration. Single-employer funds are subject to a smaller range of penalties. As noted above, single employer funds that elect to be registered (and hence regulated) are subject to fewer conditions than WEFs that manage contributions from multiple employers. The Department of Employment previously noted:

... lighter-touch regulation for single-employer funds is appropriate. These funds are set up to protect the entitlements only for an employer’s own employees, while other multi-employer funds hold millions of dollars’ worth of entitlements and accept contributions from thousands of employers for thousands of workers. Overregulation of single-employer funds may deter employers from establishing these funds

entirely which might make workers’ entitlements more vulnerable to non-payment, particularly in the case of a business winding up. 199

This ‘light touch’ regulation is reflected in the fact that many of the civil penalties for breaching conditions of registration do not apply to single-employer funds. The table below provides an outline of the main civil penalty provisions in relation to breaching conditions of registration and their application.

**Table 1: proposed civil penalties for non-compliance with registration conditions**

<table>
<thead>
<tr>
<th>Condition(s)</th>
<th>Provision</th>
<th>Penalty</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Four (equal and non-discriminatory treatment)</td>
<td>Proposed section 329MC</td>
<td>100 penalty units</td>
<td>Does not apply to single-employer funds.</td>
</tr>
<tr>
<td>Five (classes of membership)</td>
<td>Proposed section 329MD</td>
<td>100 penalty units</td>
<td>Does not apply to single-employer funds.</td>
</tr>
<tr>
<td>Six and parts of Seven (constitutional aspects)</td>
<td>Proposed section 329ME</td>
<td>100 penalty units</td>
<td>Does not apply to single-employer funds.</td>
</tr>
<tr>
<td>Conditions 14 to 21</td>
<td>Proposed section 329MF</td>
<td>100 penalty units</td>
<td>Does not apply to single-employer funds.</td>
</tr>
</tbody>
</table>

**Source:** Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019.

In addition to the above penalties, **proposed section 329MA** enables the Commissioner to give an operator of a registered WEF fund that is not a single-employer fund a written notice directing the operator to take, or stop taking, one or more actions specified in the notice, provided that the Commissioner is satisfied that giving the notice is in the best interests of the fund’s contributors or members.

Such a notice given by the Commissioner is for the purposes of ensuring that:

- an ongoing condition in relation to a WEF is being complied with or
- a report, notice, information or a statement given in accordance with conditions 14 to 19 is not false or misleading in a material particular.

A failure to comply with a direction is a civil liability contravention with a maximum penalty of 60 penalty units. 200 The Government notes that such directions and associated civil penalties will operate ‘as an alternative to deregistration’. 201

**Infringement notice regime**

**Proposed section 329MB** provides that each of the civil penalty provisions in **proposed sections 329ME** (constitution) and 329MF (giving information) that apply to operators of registered WEFs that are not single-employer funds are subject to the infringement notice framework established

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200. Proposed subsection 328MA(3).
under Part 5 of the *Regulatory Powers (Standard Provisions) Act 2014*. An infringement notice is:

... a notice of a pecuniary penalty imposed on a person by statute setting out particulars of an alleged contravention of a law ... Infringement notices are administrative methods for dealing with certain breaches of the law and are typically used for low-level offences and where a high volume of uncontested contraventions is likely.

**Proposed section 329MB** will allow a small group of persons with particular expertise in the regulation of registered organisations and their associated entities to be authorised as infringement officers by the Commissioner. In contrast to the Previous Bill however, such persons must be a Senior Executive Service (SES) employee or acting SES employee. The effect of **proposed section 329MB** is that such employees will be permitted to exercise powers and functions in relation to infringement notices (such as issuing infringement notices) as part of the overall enforcement regime created by the Bill.

**De-registration of worker entitlement funds**

**Proposed section 329MG** sets out the process for deregistration of a WEF for non-compliance with an ongoing condition of registration. Importantly, within this process there are certain circumstances in which the Commissioner has no discretion and deregistration is mandated.

**Show cause notice**

The first step in the deregistration process is the Commissioner giving a WEF operator a show-cause notice. However, before issuing a show-cause notice the Commissioner must consider:

- the seriousness of the non-compliance
- any previous non-compliance with ongoing conditions in relation to the WEF
- whether deregistration would be in the best interests of the fund members
- whether action other than deregistration (such as the imposition of civil penalties) would be more appropriate in the circumstances and
- any other matters.

If the Commissioner determines it is appropriate to issue a show cause notice, the notice must:

- set out the grounds for the proposed deregistration
- include the proposed date of effect (which must be at least 56 days after the day the notice was given) and
- invite submissions on the proposed deregistration within a specified time-frame (at least 28 days after the notice was given).

The notice must also be published on the Commission’s website.

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205. Proposed subsections 329MG(3) and (4).

206. Proposed subsections 329MG(1) and (2).

207. Proposed paragraph 328MG(1)(b).
Mandatory de-registration following the issue of a show-cause notice

If a show-cause notice related to non-compliance with conditions one or two then, after considering any submissions of the operator, if the Commissioner continues to be satisfied that the condition has not or is not being complied with the Commissioner must, by written notice, deregister the WEF. The deregistration takes effect from the day of the proposed deregistration provided in the written notice. Once deregistered, the Commissioner must remove the details of the WEF from the register as soon as practicable.

Discretionary de-registration following the issue of a show-cause notice

If a show-cause notice related to non-compliance with ongoing conditions other than conditions one and two then, after considering any submissions of the operator, if the Commissioner continues to be satisfied that the condition has not or is not being complied with the Commissioner may, by written notice, deregister the WEF.

The deregistration takes effect from the day of the proposed deregistration provided in the written notice. Once deregistered, the Commissioner must remove the details of the WEF from the register as soon as practicable.

If the Commissioner determines not to deregister the WEF, the Commissioner must within 14 days of making that decision notify the operator of the decision and the reasons for the decision and publish a copy of the notice on the Commission’s website.

Natural justice requirements

Proposed section 329MK provides that the show-cause process exhaustively deals with the natural justice (procedural fairness) requirements in relation to the deregistration process. As noted earlier in this digest, the Senate Standing Committee for the Scrutiny of Bills raised some concerns about this provision.

Deregistration on other grounds

A WEF maybe also be deregistered on request by the operator, or when a WEF has been fully wound up or otherwise ceases to exist. In addition, where the operator of a single-employer fund that elected to register as a WEF revokes that election, the WEF is also deregistered.

Post-deregistration obligations

The Bill retains the post-deregistration obligations contained in the Previous Bill, as well as including a new obligation. These requirements do not apply to single-employer funds.

Consistent with the Previous Bill, proposed subsection 329NC(3) provides that a former operator of a deregistered WEF must, no more than 90 days after deregistration takes effect provide:

208. Conditions one and two require a fund to have one operator that is a constitutional corporation and not an organisation.
209. Proposed subsection 329MH(1).
210. Proposed subsections 329MH(2) and (3).
211. Proposed subsection 329MI(1).
212. Proposed subsections 329MI(2) and (3).
213. Proposed section 329MJ.
214. Proposed sections 329NA and 329NB.
215. Proposed section 329NE.
216. Proposed subsection 329NC(7).
- a final annual report
- final information for contributors and
- final information for fund members.

Each requirement is a civil penalty provision with a maximum penalty of 100 penalty units. The requirements do not apply if the registration of the fund is reinstated before the end of the 90-day period following the deregistration day and do not apply to single-employer funds.

**Proposed subsection 329NC(2)** imposes a new requirement that a former operator of a deregistered WEF must, no more than seven days after the deregistration takes effect, give a written notice to the contributors of the WEF informing them of the deregistration. The Explanatory Memorandum notes that this is to ‘ensure that contributors do not inadvertently contribute to a deregistered fund’.  

**Reinstatement of registration**

Other than through the appeals process (discussed below) **proposed section 329ND** allows the Commissioner to re-register a WEF if satisfied:

- it should not have been deregistered or
- that the conditions that led to deregistration are now being complied with.

The Commissioner must include the details of the reinstated worker entitlement fund on the register of funds as soon as practicable.

**Appeal rights in relation to deregistration decisions**

**Proposed section 329NI** provides that appeals against a decision to deregister a WEF can be made to the AAT.

**Information gathering and sharing powers**

**Proposed section 329NF** provides information gathering powers to the Commissioner. In summary, if the Commissioner believes on reasonable grounds that a person has information or a document:

- relevant to determining whether an ongoing condition applicable to a registered WEF has been or is being complied with or
- whether **proposed section 329NC** (in relation to final reports after deregistration) has been complied with

the Commissioner may require, by issuing a written notice, a person to give the Commissioner specified information or documents or a specified kind of information or documents. The written notice must specify a time, at least 14 days after the notice was given, for compliance with the requirement to provide information or documents to the Commissioner.

A civil penalty of 30 penalty units applies if a person who is given a notice does not comply with it, except where the person has a reasonable excuse, including that to answer a question or produce a document may tend to incriminate the person or expose the person to a penalty. As such, the

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218. Proposed subsections 329NF(1) and (2).
219. Proposed subsection 329NF(3).
220. Proposed subsections 329NF(4) to (6).
proposed information gathering powers do not abrogate the privilege against self-incrimination, nor do they abrogate the right to legal professional privilege.\textsuperscript{221}

**Information sharing powers**

Currently paragraph 329G(2)(b) of the *FWRO Act* allows the Commissioner to disclose information if they reasonably believe that its disclosure is likely to assist in the administration or enforcement of a law of the Commonwealth, a state or territory. In spite of the existence of this broad power, proposed section 329NH requires the Commissioner to provide to the Commissioner of Taxation:

- a copy of constitutions of registered WEFs and funds for which an application for registration has been made and
- information about changes to the constitutions of registered WEFs.

**Publishing of annual reports of WEFs**

Proposed section 329NG provides that the Commissioner must publish the annual reports of registered WEFs on its website.

**Transitional rules for WEFs**

The Bill contains detailed transitional rules regarding WEFs. These are described on pages 32 to 36 of the Explanatory Memorandum. The transition period for certain funds has been extended from six months under the Previous Bill to 12 months in the Bill.\textsuperscript{222}

**Key issues and provisions: prohibiting terms requiring payment to WEFs**

**Modern awards and payments to WEFs**

The RCTUGC recommended that the *FW Act* be amended:

…. to make unlawful any term of an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund (other than a superannuation fund) providing for, or for the payment of, employee entitlements, training or welfare unless the fund is:

(a) a registered worker entitlement fund (see Recommendation 45); or

(b) a registered charity.\textsuperscript{223}

The amendments proposed by the Bill differ substantially from this recommendation. For example, proposed section 151A of the *FW Act*, at Item 3 of Schedule 2 to the Bill, prohibits any term of a modern award requiring or permitting contributions to be made to a WEF unless it is registered and each employee can choose the registered WEF to which the payments are to be made.

Whilst the RCTUGC made no recommendations in relation to imposing such a prohibition in relation to modern awards the Government argues:

The Bill will amend the FW Act to prohibit any term of a modern award (section 151A) or an enterprise agreement (paragraphs 194(i)-(k)) requiring or permitting contributions to be made to any fund other

\textsuperscript{221}. *Explanatory Memorandum*, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 28.

\textsuperscript{222}. Item 34(a), Schedule 2, Part 2.

\textsuperscript{223}. RCTUGC, *Final report*, vol. 5, ch. 6, Part B – Enterprise Agreements, op. cit., p. 3500. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 339].
than a superannuation fund, a registered worker entitlement fund or a registered charity or deductible gift recipient (recommendation 49)... The legitimate objective of these amendments is to address the potential for misappropriation of funds and to avoid conflicts of interest and possible coercion... The provisions... are necessary to support the governance and disclosure requirements... that will operate to protect the interests of members. The provisions are required to respond to the findings of two Royal Commissions on the imperative to properly regulate worker entitlement funds and the significant amounts of money the funds control that should be used solely for the benefit of workers.

Preventing enterprise agreements from including terms requiring or allowing payments to unregistered funds provides the necessary incentives for funds to become registered. In return, the registration requirements in the Bill will provide workers with a guarantee that any contribution made to a worker entitlement fund on their behalf will be subject to appropriate scrutiny and oversight. The restrictions are a proportionate response to the need to regulate worker entitlement funds and protect the rights of workers. 224

This restriction has been criticised by some stakeholders. For example, it is argued that introducing the ability for employees to choose a fund for contributions and insurance payments to be made into on their behalf ‘would be onerous and add extra responsibility on the employer, not the Fund, to source more than one fund’ and, because of the small number of funds operating in some states, would ‘increase the administration and general cost of the employer doing business’. 225

Further it is also argued that comparisons with choice of superannuation funds rules are inappropriate for a range of reasons including that ‘Registered Worker Entitlement Funds are not investment vehicles and are not intended to generate investment income for members, but to preserve their entitlement to capital’. 226 The CFMMEU also argued that the prohibition against modern awards (and enterprise agreements) requiring or permitting contributions to be made to a specific registered WEF unless such a term enables employees to choose their own WEF would undermine the effectiveness of WEFs generally:

It should also be recognised that the pooling of workers capital gives all members of the funds a combined purchasing power that they would not otherwise enjoy. If individual workers disperse contributions to a wide range of funds, or if, as the Worker Benefits Bill proposes, a plethora of single employer funds are created which are completely outside the scheme of regulation, then this will quickly undermine the commerciality of benefits that the funds can provide. This will result in a reduced level of benefit or an increase in the unit cost of providing the benefit/s, or both. 227

The ACTU argued that prohibiting employment instruments such as modern awards from mandating contributions to certain WEFs is a ‘clear contravention of Article 4 of ILO Convention 98 and the principle of voluntary agreement making’. 228

226. Ibid., p. 8.
**Enterprise agreements, employment contracts and payments to WEFs**

The Bill would amend the *FW Act* to prohibit any term of an enterprise agreement (proposed paragraphs 194(i)-(k), at item 4 of Schedule 2) or an employment contract (proposed section 333B, at item 8 of Schedule 2) from requiring or permitting contributions to be made to any fund that makes payments or provides training in relation to welfare services or assistance other than a:

- superannuation fund
- registered WEF
- registered charity or
- deductible gift recipient.

The prohibition on such terms in enterprise agreements is broadly consistent with the recommendation of the RCTUGC. Likewise, whilst the RCTUGC did not recommend such prohibitions apply to employment contracts, given that they usually—in conjunction with a modern award or enterprise agreement—form the basis or totality of the employment arrangement, the inclusion of such a prohibition in terms of employment contracts is arguably consistent with the underlying purpose of the RCTUGC’s recommendation. That said, the inclusion of deductible gift recipients in the type of funds that payments can be made to under the terms of an enterprise agreement or employment contract goes further than what was recommended by the RCTUGC, but in doing so adds a degree of flexibility beyond what was recommended.

Currently subsection 186(4) of the *FW Act* provides that before approving an enterprise agreement, the FWC must be satisfied that an agreement does not include any unlawful terms (defined in section 194). As the amendments expand the list of unlawful terms as noted above, the amendments would prevent an enterprise agreement containing these terms from being approved by the FWC, and therefore being legally enforceable. The extension of this prohibition to terms in employment contracts will prevent them from being used to circumvent the prohibition against their inclusion in enterprise agreements and modern awards.

**Changes from Previous Bill**

Proposed section 333B differs from the version contained in the Previous Bill. The changes ensure consistency between proposed section 333B and proposed paragraphs 194(i)-(k) by including a registered WEF in the list of entities to which a contract of employment may require or permit payments to be made in relation to training or welfare services or assistance (previously excluded from proposed section 333B).

**Application of prohibitions of certain terms**

Item 26 of Schedule 2 of the Bill inserts proposed Part 7 into Schedule 1 to the *FW Act*. Proposed clause 32 of Schedule 1 to the *FW Act* provides that the prohibitions on terms of modern awards, enterprise agreements and employment contracts in Part 1 of Schedule 2 to the Bill will apply only to modern awards made or varied after commencement and to enterprise agreements and employment contracts that are made after the commencement of the amendments, but do not apply in relation to a transitioning approved fund or transitioning non-approved fund, as defined by proposed clause 31 of Schedule 1 to the *FW Act*. The Explanatory Memorandum notes ‘this
mean a transitioning approved fund or a transitioning non-approved fund can be named in a modern award or enterprise agreement’.229

Human rights concerns

The PJCHR raised concerns about the compatibility of the proposed prohibition on any term of a modern award or an enterprise agreement requiring or permitting contributions for the benefit of an employee to be made to any fund other than a superannuation fund, a registered WEF or a registered charity with the right to freedom of association and the right to just and favourable conditions at work (which includes the right to collectively bargain without unreasonable and disproportionate interference from the state).230 The PJCHR noted that the above rights are informed by ILO treaties, and hence:

The principle of 'autonomy of bargaining' in the negotiation of collective agreements is an 'essential element' of Article 4 of ILO Convention No. 98 which envisages that parties will be free to reach their own settlement of a collective agreement without interference.231

The PJCHR stated that prohibiting the inclusion of particular terms in an enterprise agreement interferes with the outcomes of the bargaining process and therefore ‘engages and limits the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association’.232 The PJCHR noted that international supervisory mechanisms have previously raised specific concerns in relation to current restrictions imposed on bargaining outcomes under Australian domestic law.233

The PJCHR noted that the prohibition may be permissible, provided certain criteria are satisfied, including that the measure must address a legitimate objective, be rationally connected to that objective and be a proportionate way to achieve that objective.234 In that regard the PJCHR noted:

... the statement of compatibility provides limited information as to whether the limitation is proportionate. In order to be a proportionate limitation on human rights a measure must be the least rights restrictive way of achieving its stated objective.235

The PJCHR concluded that the measure engages and limits the right to freedom of association, the right to collectively bargain, and the right to just and favourable conditions of work and raised questions as to its compatibility with those rights. The PJCHR sought from the Minister advice regarding:

• whether the limitation is a reasonable and proportionate measure to achieve that objective (including findings by relevant international supervisory mechanisms about whether the limitation is permissible) and

• whether consultation has occurred with the relevant workers' and employers' organisations in relation to the measure.236

After considering the Minister’s responses, the PJCHR noted:

231. Ibid., p. 17.
232. Ibid.
234. Ibid., p. 18; Ibid., Human rights scrutiny report, 12, 2017, op. cit.
236. Ibid., p. 20.
Ultimately the PJCHR concluded that the provisions in the Bill prohibiting terms of modern awards, enterprise agreements and employment contracts from requiring or permitting payments to specific WEFs ‘is a further restriction on bargaining outcomes’ and therefore concluded the prohibitions are ‘likely to be incompatible with the right to collectively bargain’. 238

**Key issues and provisions: prohibition of election payments**

Schedule 3 deals with election payments in relation to industrial associations. It will commence immediately after Parts 1 to 3 of Schedule 2 commence. 239

The RCTUGC recommended that the *FW Act* 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. 240

The amendments in Schedule 3 of the Bill give effect to and are consistent with this recommendation. **Item 1** will amend section 12 of the *FW Act* to insert a definition of ‘regulated election purpose’. A ‘regulated election purpose’ is defined as a payment:

> …. made for a purpose that includes the purpose of funding, supporting or promoting the election of a candidate or group of candidates for an election or elections to an office in an industrial association (including the election of a person or group of persons in a future election or elections). 241

**Item 2** amends section 194 of the *FW Act* to include in the definition of an ‘unlawful term’ of an enterprise agreement a term that requires or permits a payment to be made for a regulated election purpose. The effect of this is to prevent the FWC from approving agreements with such terms, and prevent those agreements from being legally enforceable. **Proposed section 333C**, at **item 5** of Schedule 3, imposes the same prohibition on the inclusion of such a term in employment contracts. None of the amendments in Schedule 3 appear to deal with the inclusion of such terms in modern awards.

**Item 6** provides that the above prohibitions will apply to enterprise agreements and employment contracts made after the commencement of the amendments in Schedule 3. That is the prohibition will not apply retrospectively.

**Human rights concerns**

The PJCHR raised concerns about the compatibility of the proposed prohibition of any term of an enterprise agreement or contract of employment permitting or requiring employee contributions

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238. Ibid., p. 106.
239. Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, **proposed section 2, table item 8**.
241. **Item 1, Schedule 3**.
to an election fund with the right to just and favourable conditions of work and the right to collectively bargain as an aspect of the right to freedom of association, as it represents an interference with the outcomes of collective bargaining processes.  

The PJCHR noted that the Explanatory Memorandum ‘only asserts that the measure ‘is reasonable, necessary and proportionate’ and ‘provides no reasoning or evidence’ as to whether the proposed prohibition ‘is rationally connected (that is, effective to achieve) and proportionate to the stated objectives’. The PJCHR stated that this ‘raises questions as to whether the measure is compatible with the right to freedom of association and the right to just and favourable conditions at work’ and sought from the Minister advice regarding:

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective
- how the measure is effective to achieve (that is, rationally connected to) its stated objective and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including whether the measure is the least rights restrictive way of achieving its stated objective).

After considering the Minister’s responses, the PJCHR noted that ensuring that non-incumbent candidates for elected union positions are not disadvantaged and that employees can choose whether to contribute to a particular fund in the particular circumstances ‘would appear to constitute legitimate objectives for the purposes of international human rights law’. Further, the PJCHR noted ‘the measures would also appear to be rationally connected to these objectives’.

In relation to whether the measure is reasonable and proportionate, the PJCHR noted that employees will still be able to make genuine contributions, voluntarily and independently of an industrial instrument and that therefore ‘on balance, this would appear to be a proportionate limitation on bargaining outcomes’.

The PJCHR therefore concluded that the prohibition on enterprise agreements or employment contracts containing terms requiring or permitting a payment to specific election funds ‘appears to be compatible with the right to freedom of association and the right to just and favourable conditions of work’.

**Key issues and provisions: coerced payments to employee benefit funds**

Schedule 4 deals with coerced payments to employee benefit funds. **Items 1 and 3** will commence on the earlier of a day to be fixed by proclamation or six months after Royal Assent. **Item 2** will
commence at the later of immediately after item 1 commences and the time Parts 1 to 3 of Schedule 2 commence.²⁵¹

**What the law does already**

Arguably, existing section 343 of the *FW Act* already prohibits the coercion of payments to employee benefit funds (that is, funds that would be considered WEFs under the regulatory framework proposed by the Bill) where such coercion is in relation to a proposed enterprise agreement.

**What the Bill will do**

Despite the existence of section 343 of the *FW Act* the RCTUGC recommended:

> 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.²⁵² (emphasis added)

The amendments in Schedule 4 purport to give effect to this recommendation.²⁵³ **Proposed section 355A** prohibits a person from organising or taking, or threatening to organise or take, any action (other than protected industrial action) against another person with intent to coerce that other person (or a third person) to make payments to certain employee benefit funds including:

- superannuation funds
- training funds
- welfare funds
- life or disability insurance cover funds
- WEFs and
- certain types of managed investment schemes that are promoted by an organisation or related party.²⁵⁴

In this regard, as the prohibition is expressed as applying to any coercion against another person, rather than an employer, and also applies to types of funds arguably not captured by the RCTUGC’s recommendation, the proposed amendment would have a broader application than recommended by the RCTUGC.

**Proposed subsection 355A(2)** provides that the prohibition does not apply to protected industrial action. The penalty for such coercion is a civil penalty of up to 60 penalty units.²⁵⁵

**Human rights concerns**

The PJCHR expressed concerns about the measure in both relation to the right to strike and freedom of expression and assembly. The PJCHR noted that the right to strike is protected as an aspect of both the right to freedom of association and the right to form and join trade unions.

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²⁵¹  Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, proposed section 2, table item 10.
²⁵²  RCTUGC, *Final report*, vol. 5, ch. 6, Part B – Term Requiring Contributions to Employee Benefit Funds or Employee Insurance Schemes, op. cit., p. 3501. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 340].
²⁵⁴  Proposed subsection 355A(3) and item 2 of Schedule 4.
²⁵⁵  Item 3, Schedule 4.
under Article 22 of the *International Covenant on Civil and Political Rights (ICCPR)* and Article 8 of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. However the right to strike is not absolute and may be limited in certain circumstances. The PJCHR also noted that the right to freedom of assembly and the right to freedom of expression are protected by Articles 19 and 21 of the *ICCPR*, but those rights may be limited for certain prescribed purposes (for example, where it is necessary to respect the rights of others, to protect national security, public safety, public order, public health or morals) provided those limitations are prescribed by law, reasonable, necessary and proportionate to achieving the prescribed purpose.

The PJCHR noted that the prohibition proposed by Schedule 4 of the Bill and proposed section 355A in particular engages and limits the right to strike:

This is because it may impose an additional penalty or disincentive to taking unprotected industrial action with the intent of influencing the conduct of an employer. The existing restrictions on taking industrial action under Australian domestic law have been consistently criticised by international supervisory mechanisms as going beyond what is permissible.

The PJCHR noted that whilst the Explanatory Memorandum ‘acknowledges that the measure engages work-related rights’ it ‘does not expressly acknowledge that the right to strike is an aspect of the right to freedom of association’. The PJCHR further noted that the prohibition ‘on forms of protest action appears to be potentially quite broad and therefore ‘may extend to prohibiting forms of expression or assembly’ and therefore ‘it may engage and limit the right to freedom of expression and assembly’. The PJCHR further noted:

- beyond providing a description of the measure, the Explanatory Memorandum does not clearly identify the legitimate objective of the measure
- the Explanatory Memorandum appears to argue that the measure in fact supports freedom of association and human rights, but provides no explanation of the reasoning for this view and therefore the statement of compatibility contained in the Explanatory Memorandum:

... does not meet the standards outlined in the committee's *Guidance Note 1*, which require that where a limitation on a right is proposed the statement of compatibility provide a reasoned and evidence-based assessment of how the measure pursues a legitimate objective, is rationally connected to that objective, and is proportionate.

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258. Ibid., p. 24.

259. Ibid., p. 24.

260. Ibid.

261. Ibid., p. 116.

262. Ibid., p. 116.

263. Ibid., p. 116.

264. Ibid.

265. Ibid., pp. 113–14.
The PJCHR concluded that there were ‘questions as to whether the measure is compatible with the right to strike as an aspect of the right to freedom of association’ and therefore sought from the Minister further advice regarding:

- whether the measure is aimed at achieving a legitimate objective for the purposes of international human rights law
- how the measure is effective to achieve (that is, rationally connected to) that objective
- the scope of any restriction on the right to freedom of expression and assembly and
- whether the limitation is a reasonable and proportionate measure to achieve the stated objective (including any relevant safeguards and whether the measure is the least rights restrictive way of achieving its stated objective).

After considering the Minister’s response, the PJCHR concluded that the measure ‘did not appear to be a proportionate limitation on the right to strike as an aspect of the right to freedom of association’ and further:

As the information provided to the committee did not include a substantive assessment as to whether any limitation on the right to freedom of expression and assembly is permissible, it was not possible to conclude that the measure is proportionate.

**Key issues and provisions: disclosable arrangements**

Schedule 5 inserts a new Part 3D into Chapter 11 of the *FWRO Act* dealing with ‘disclosable arrangements’. Items 1 to 3 and item 5 of the Schedule will commence on the later of a day to be fixed by proclamation or six months after Royal Assent. Item 4 will commence at the later of the time Parts 1 to 3 of Schedule 2 commence and immediately after the commencement of items 1 to 3.

The RCTUGC examined the types of arrangements that will be captured by the amendments in Schedule 5 of the Bill. In framing its recommendation, the RCTUGC argued:

The more suitable course is to introduce, whether by legislation or regulation, provisions specifically dealing with disclosure to employers of the nature and quantum of the pecuniary benefits received (including amounts that can reasonably be expected to be received) by unions from the operation of *employee insurance schemes*. The quantum should include both the total amount received, but also the proportion of the payment made by the employer that will be received by the union. The benefits disclosed should include:

(a) direct cash payments to the union;

(b) direct cash payments to an entity related to the union or at the direction of the union, or to any entity where the money, or part of it, is eventually paid to the union;

(c) other financial benefits provided to the union, such as the payment of insurance premiums on the union’s behalf;

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267. Ibid., pp. 23–24.
269. Ibid., p. 117.
270. Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, proposed section 2, table items 12 and 14.
(d) other financial benefits provided to an entity related to the union, or to any entity where the value of the financial benefit, or part of it, is transferred to the union; and

(e) financial benefits provided solely to union members (for example, ambulance or health benefits).

The disclosure should be short, simple and would capture any form of commission or fees.\(^{272}\) (emphasis added)

The above gives context to the RCTUGC’s recommendation 47 that amendments be made to the Corporations Act requiring disclosure of ‘the direct and indirect pecuniary benefits obtained by them in connection with employee insurance products’ and that the provisions should require:

- a branch of a registered organisation, and an officer of a branch of a registered organisation
- 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)
- 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.\(^{273}\)

Importantly however the RCTUGC noted that it ‘is important to emphasise that the disclosure envisaged by recommendation 47 is separate from any disclosure that occurs as part of enterprise bargaining’.\(^{274}\)

**Proposal differs from the recommendation of the RCTUGC**

The disclosable arrangement regime proposed by Schedule 5 of the Bill differs from the broad model proposed by the RCTUGC in a number of substantive ways.

First, the regime will be housed in the FWRO Act rather than the Corporations Act as recommended. Second the regime will apply not only to pecuniary benefits derived from employee insurance schemes but also certain managed investment schemes, training funds, welfare funds and any other types of arrangements prescribed by the ‘disposable arrangements rules’ (DARs). This means the regime proposed by the Bill has substantially broader application than that envisaged and recommended by the RCTUGC. Third, the regime proposed by the RCTUGC envisaged disclosure by registered organisations to employers. In contrast, the Bill proposes to mandate that employers ‘pass on to employees disclosures made by an organisation to the employer’ as well.\(^{275}\)

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\(^{272}\) RCTUGC, *Final report*, vol. 5, ch. 5, Part F – Employee Insurance Schemes, op. cit., p. 3486. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 325].

\(^{273}\) Ibid., recommendation 47, p. 3487. [Note, in the hard copy of Volume 5 of the RCTUGC’s *Final Report*, this information is at page 326].

\(^{274}\) Ibid.

\(^{275}\) Proposed section 329PA; *Explanatory Memorandum*, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 43.
Who is covered by the disclosable arrangements regime?

The disclosable arrangements regime will apply to both registered organisations (and their branches) and federal system employers, as well as persons linked to them (a ‘related party’). 276

What is a disclosable arrangement?

Proposed section 329PD of the FWRO Act, at item 3 of Schedule 5, defines a disclosable arrangement as including any arrangement (whether or not in writing and whether formal or informal):

• between an organisation, or a related party, and a federal system employer for:
  – insurance promoted or arranged by the organisation or a related party to be offered or provided to the employer’s employees or
  – the organisation or a related party to refer the employer to an insurer or insurance intermediary for the purposes of employees of the employer being offered or provided insurance 277
• for a federal system employer to become a member of, or make payments in relation to, a managed investment scheme (within the meaning of the Corporations Act) if:
  – the arrangement is promoted or arranged by an organisation or a related party and
  – the arrangement is for the purposes of (or for purposes that include) managing financial risk and
  – employees of the employer benefit or may benefit from the arrangement if specified events occur in relation to the employees 278
• between an organisation, or a related party, and a federal system employer for the employer to:
  – become a member of or make payments to a training fund, welfare fund or WEF that is for the benefit of the employer’s employees if
  – the fund is arranged or promoted by the organisation or a related party 279 or
• between an organisation, or a related party, and a federal system employer if the arrangement is prescribed by the DARs. 280

Proposed section 329PC provides that the DARs may prescribe that certain financial benefits are not disclosable arrangements for the purposes of proposed Part 3D of Chapter 11 of the FWRO Act.

Disclosable arrangements rules

Proposed section 329PE provides that the Minister may, by legislative instrument, make disclosable arrangements rules (DARs) that prescribe matters:

• required or permitted to be prescribed by the DARs or
• necessary or convenient to be prescribed for carrying out or giving effect to the amendments to the FWRO Act contained in proposed Part 3D of Chapter 11.

Noting that the DARs are legislative instruments and therefore are subject to Parliamentary scrutiny and disallowance, 281 nonetheless the breadth of the DARs and their interaction with the

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276. Proposed sections 329PB and 329PD.
277. Proposed subsection 329PD(2).
278. Proposed subsection 329PD(3).
279. Proposed subsection 329PD(4) and item 4 of Schedule 5 to the Bill (proposed subparagraph 329PD(4)(a)(iii)).
280. Proposed subsection 329PD(5).
reforms proposed by the Bill attracted criticism from some stakeholders. For example, the ACTU previously argued:

... 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. 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 pecuniary benefits associated with employee insurance products. 282

Limits on the rule-making power of the Minister

Whilst the breadth of the matters allowed to be dealt with by the DARs is substantial, there are limits on the rule-making power of the Minister. First, proposed subsection 329PE(2) provides that the DARs cannot:

• create an offence or civil penalty
• provide powers of arrest, detention, entry, search or seizure
• impose a tax
• set an amount to be appropriated from the Consolidated Revenue Fund or
• directly amend the text of the FWRO Act.

Second, proposed subsection 329PE(3) provides that where the DARs are inconsistent with Regulations made under the FWRO Act, the DARs have no effect to the extent of any such inconsistency, but are taken to be consistent to the extent they are capable of operating concurrently with the Regulations.

What must be disclosed?

In general, organisations must disclose a financial benefit it, or a related party of it:

• can reasonably be expected to receive or obtain (directly or indirectly)
• in connection with a disclosable arrangement it proposes to enter into or with an existing disclosable arrangement it proposes to change. 283

Proposed section 329PD defines the types of disclosable arrangement which the above obligations apply.

Certain insurance products

Proposed subsection 329PD(2) provides that a disclosable arrangement includes an arrangement between an organisation or a related party of an organisation and an employer for:

• insurance promoted or arranged by the organisation or a related party of an organisation to be offered or provided to employees of the employer or

281. Proposed subsection 329PE(1).
283. Proposed subsection 329QA(1), (2) and (4).
• referring the employer to an insurance intermediary for the purposes of employees of the employer being offered or provided insurance.

Managed investment products, training and welfare fund and WEFs

The definition of disclosable arrangements also includes arrangements between an organisation or a related party of an organisation and an employer for an employer to become a member of, or make payments in relation to:

• managed investment schemes
• training funds or welfare funds where the arrangement is promoted or arranged by the organisation and
• WEFs. 284

Consideration for services provided by officers of organisations

Where an organisation or a related party of an organisation is a party to a disclosable arrangement mentioned in proposed subsection 329PD(3) or (4) and the organisation, or an officer of the organisation, will or can reasonably be expected to receive consideration from the managed investment scheme or type of fund to which the arrangement relates for services provided by an officer of the organisation, the consideration is taken (under proposed subsection 329QA(4)) to be a financial benefit for the purposes of proposed Part 3 of Chapter 11 of the FWRO Act. 285 This means that the organisation must provide the employer a disclosed document in relation to the agreement, in accordance with proposed subsection 329QA(3).

Criticisms of deeming consideration provided to officers to be a financial benefit

The ACTU criticised the effect of proposed subsection 329QA(4) on the basis that its effect is:

... 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. 286

Who must disclosure be made to?

An organisation must disclose to employers any financial benefits it or persons linked to it might receive or obtain in connection with a disclosable arrangement it proposes to enter into, or an existing disclosable arrangement it proposes to change, with an employer. 287 In turn, the employer must notify its employees of the organisation’s disclosure. 288

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284. Proposed subsection 329PD(3), (4) and item 4 of Schedule 5 to the Bill (proposed subparagraph 329PD(4)(a)(iii)).
287. Proposed subsections 329QA(1) and (2).
288. Proposed section 329RA.
Changes from previous Bill

The Previous Bill also required that an employer had to disclose to its employees any financial benefits it or persons linked to it might receive or obtain in connection with a disclosable arrangement it proposes to enter into, or an existing disclosable arrangement it proposes to change, with an organisation or person linked to the organisation.²⁸⁹ This requirement was criticised by a number of stakeholders.²⁹⁰ The Bill has removed that requirement.

How must the disclosure be made?

Disclosures made by organisations and employers must be made by a disclosure document that is provided by the organisation to the employer who must then give a copy of it to its employees.²⁹¹

The disclosure document must describe the connection between the arrangement and the financial benefits that will or can reasonably be expected to be received or obtained in connection with it by the organisation or a related party to the organisation (the expected recipients) and:

- describe the nature and (as far as reasonably practicable) amount of those financial benefits in relation to each expected recipient
- name each expected recipient
- be in accordance with any other requirements prescribed by the DARs and
- be given in a manner (if any) prescribed by the DARs.²⁹²

When must the disclosure be made?

In relation to proposed disclosable arrangements, organisations must disclose the arrangement before the arrangement is entered into.²⁹³ In relation to disclosable arrangements in force prior to the commencement of the proposed amendments, the organisation must disclose relevant changes to the arrangement before the proposed change takes effect.²⁹⁴

The ACTU was critical of the timing requirements related to disclosure, arguing:

… the requirement to disclose is pre-emptive, ongoing and enforceable by way of civil penalty. In addition, disclosures are required to be provided to the ROC, which in turn must publish the disclosures on its website… 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 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.²⁹⁵

²⁸⁹. Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2017, proposed subsection 329RB(1) and (2).
²⁹¹. Proposed subsections 329QA(1) and (2) and 329RA.
²⁹². Proposed subsection 329QA(3).
²⁹³. Proposed subsection 329QA(1).
²⁹⁴. Proposed subsection 329QA(2).
**Alternative disclosure**

Section 179 of the *FW Act* provides that organisations that are bargaining representatives for a proposed enterprise agreement must take all reasonable steps to provide a document to the employers that will be covered by the proposed enterprise agreement disclosing certain financial benefits that the organisation (or certain related persons) will, or expects to, receive under the terms of the agreement. Under section 179, the document must disclose any financial benefit, other than a financial benefit that is:

- payable to an employee covered by the agreement (for example, wages)
- payment of a membership fee for an organisation, or
- prescribed by the Regulations.

To prevent an organisation from having to disclose the same financial benefits under the *FWRO Act* and the *FW Act* proposed section 329QD provides that an organisation complies with its disclosure obligations in relation to a financial benefit that an organisation or related party of an organisation will or can reasonably be expected to receive or obtain in connection with a disclosable arrangement where:

- the organisation gives the employer a document under section 179 of the *FW Act* that meets the requirements of proposed section 329QA or 329QB in relation to the arrangement (other than any requirements in relation to manner and form) and
- the organisation gives the document to the employer by the time required under proposed section 329QA or 329QB.

Whilst this will prevent duplication of disclosure obligations where an organisation has disclosed under section 179 of the *FW Act*, it must still comply with its obligations to keep such disclosures up to date and to give copies of the disclosure to the Commissioner as if the disclosure had been made under proposed section 329QA.

**Changes from the Previous Bill**

The Previous Bill contained extensive employer disclosure obligations. The Bill has removed those. Instead, employers are now only obligated to notify their employees of an organisation’s disclosure.

**Other obligations**

In addition to the disclosure obligations, organisations must:

- keep their disclosures up to date
- correct any inaccuracies or misleading material included in the disclosure document as soon as practicable after becoming aware of the inaccuracy or misleading material
- notify the Commissioner about disclosable arrangements by providing the Commissioner with copies of the disclosure documents no later than 28 days after the later of:
  - the day the arrangement to which the document relates is entered into and
  - the day the document is given to the employer or employees.

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296. Proposed subsection 329QB(1), 329SA(2) and 329QD(2).
297. Proposed section 329RA.
298. Proposed section 329QB.
299. Proposed paragraphs 329QB(1)(b)(ii) and (2)(b).
• notify the Commissioner about any previously notified arrangements coming to an end. 301

**Penalties for non-disclosure and other matters**

Table 2 sets out the penalties for non-disclosure and other related matters.

**Table 2: proposed civil penalties for non-compliance with disclosure and related obligations**

<table>
<thead>
<tr>
<th>Obligation</th>
<th>Provision(s)</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Failure to provide a disclosure document by the required time</td>
<td>Proposed subsections 329QA(1) and (2).</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Employer failing to notify employees of organisation’s disclosure</td>
<td>Proposed section 329RA</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Knowingly or recklessly making false or misleading statements in a disclosure document</td>
<td>Proposed section 329QC</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Failing to keep disclosures up to date</td>
<td>Proposed subsection 329QB(1)</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Failing to correct any inaccuracies or misleading material included in the disclosure document as soon as practicable</td>
<td>Proposed paragraph 329QB(1)(b)(ii) and (2)(b)</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Failing to notify Commissioner about disclosable arrangements by providing the Commissioner with copies of the disclosure documents by the required time</td>
<td>Proposed subsection 329SA(2)</td>
<td>60 penalty units</td>
</tr>
<tr>
<td>Failing to notify the Commissioner about a notified arrangement coming to an end</td>
<td>Proposed subsection 329SA(3)</td>
<td>60 penalty units</td>
</tr>
</tbody>
</table>


**Publication by the Commissioner of disclosure documents**

Proposed subsection 329SC(1) requires the Commissioner to publish on the Commission’s website copies of disclosure documents provided under the new regime, as soon as practicable. Proposed subsection 329SC(2) provides that the Commissioner must omit any residential addresses and has the discretion to omit other personal information (such as names).

The Explanatory Memorandum states that ‘[i]t is expected that only information that is required to provide the necessary level of transparency of disclosable arrangements will be published’. 302

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300. Proposed subsections 329SA(1) and (2).
301. Proposed subsection 329SA(3).
302. Explanatory Memorandum, Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019, p. 44.
Application of amendments

Item 5 deals with the application of the amendments in Schedule 5. Subitem 5(1) provides that the regime created by proposed Part 3D of Chapter 11 will apply in relation to disclosable arrangements entered into on or after the commencement of proposed Part 3D.

Subitem 5(2) provides that the disclosure obligations in proposed Part 3D also apply to arrangements entered into before the commencement of proposed Part 3D as if:

- the arrangement had been entered into on the day item 5 commences
- the references in proposed section 329QA to a ‘financial benefit that will or can reasonably be expected to be received or obtained in connection with the arrangement’ were references to financial benefits that ‘will or can reasonably be expected to be received or obtained on or after that day’ and
- the time by which a document must be given under proposed section 329QA in relation to the arrangement was six months after the commencement of Item 5.

This means that in effect, the amendments will apply retrospectively to arrangements entered into before the application of proposed Part 3D, provided the financial benefits arising from the arrangement ‘will or can reasonably be expected to be received or obtained’ on or after the commencement of proposed Part 3D.

Subitem 5(3) provides that for arrangements captured by the retrospective operation of the amendments provided in subitem 5(2), an organisation is taken to comply with its obligation to provide copies of the disclosure documents to the Commissioner if they do so no later than 28 days after giving the document to the employer under proposed section 329QA.

Other provisions

Items 18 to 25 of Part 1 of Schedule 2 make amendments to taxation legislation reflecting the intention to shift regulation of WEFs from the FBTA Act to the FWRO Act.

Concluding comments

As highlighted throughout this Digest, the Bill contains a number of changes from the Previous Bill. Even with those changes, the Bill contains a number of measures which are highly contentious and/or go beyond, or at least substantially build upon, the recommendations of the RCTUGC.

The prohibition on distributing income to the sponsors of WEFs after the forecast claims on the fund by employees have been accounted for is particularly controversial and would set WEFs apart from other collective investment or insurance funds.

In addition, the discretion granted to the Minister by the WEF Rules and DARs is substantial and may allow a degree of intervention into the management of WEFs that is highly granular when compared to other comparable collective investment vehicles.

More broadly, other measures such as the disclosable arrangements regime, apart from being contentious, may impose a regulatory burden on registered organisations that other entities do not have to comply with.

303. See proposed subsection 329SA(2).
Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019

Members, Senators and Parliamentary staff can obtain further information from the Parliamentary Library on (02) 6277 2500.