



Proper Use of **Worker Benefits Bill and COVID-19**

Monday, 25 August 2020

Introduction

The *Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019* is an unreasonable intrusion on Incolink – Australia's oldest, largest and most comprehensive workers' entitlement scheme – and puts at risk important services vital to the wellbeing of workers in the construction sector.

It seeks to place significant administrative burdens and restrictions on the operations of Incolink and other workers' entitlement schemes. By reaching deep into the governance and operations of Incolink, it will add cost and complexity, slow decision making and innovation and potentially risk the benefits to workers, employers and the broader economy from our operations.

The Bill puts at risk Incolink's investments in training, occupational health and safety, wellbeing and support services as well as Incolink's ability to provide broad based insurance coverage to members.

The below example demonstrates how the Bill places the health and safety of industry workers at risk, by imposing onerous and unreasonable regulatory burdens in providing wellbeing and support services to members – services that are particularly critical in the current climate.

Case study: How this Bill may have stopped workplace COVID-19 health testing

- COVID-19 has caused disruption to the economy with construction no exception. From early 2020 there were fears the industry could be shut down risking hundreds of thousands of direct and indirect construction industry jobs and millions in earnings and taxation revenue.
- As an organisation trusted and respected by both employers and workers, Incolink was the logical choice to step up and undertake proactive asymptomatic testing across the industry to protect the health and safety of workers and the projects they were working on.
- Working across just 3 days in late April, Incolink went from discussing this arrangement with its stakeholders and Government to publicly launching and commencing testing.
- Incolink has expended its own resources as well as partnering with other organisations and the State Government who also contributed financially to the testing.
- Incolink undertook over 16,000 COVID-19 tests across 210 clinics (sites) in Victoria and Tasmania between May and August 2020.
- Since day 1, employers and workers have expressed their strong support for testing with high levels of interest and almost universal (voluntary) participation among workers and site management.
- As a result of testing, the industry was able to highlight its low levels of infection among asymptomatic workers, thus assisting with key policy decisions that ensured the industry continued to operate safely.
- There were just seven positive cases identified by this testing, which helped protect the workers who tested positive and their families and reduced the risk of infection on the relevant work sites.

Why The Bill Compromises This Type of Initiative?

The way the Bill seeks to regulate decision making puts at risk Incolink's ability to act quickly, decisively and for the betterment of the industry during seismic events such as the current COVID-19 crisis.

The matters on which Incolink could spend money under the Bill is unclear, in particular whether Incolink could have invested in services like COVID-19 testing given the uncertainty about whether these sorts of services fall within the relevant restrictive definitions under the Bill.

Proposed clause 329LD regulates how Incolink can use and spend income. While it leaves welfare undefined, it introduces tests for how income can be spent on training and welfare services. The requirements of this clause would have compromised our capacity to perform COVID-19 testing in the construction industry.

Specific Regulatory Hurdles

Sole benefit of Members

- A threshold question on COVID-19 testing is whether the expenditure is truly for the sole benefit of workers (subclause 329LD(2)(a)). Given testing was a joint Government and industry priority, there could be an argument put that it wasn't for the sole benefit of workers.
- Under the Bill, Incolink may be exposed to the risk of a worker (e.g. someone who didn't believe in testing) seeking to challenge this expenditure or raise the matter with the ROC.

Service not provided by the Operator

- Subclause 329LD(2)(b) would have also been a hurdle as Incolink do not have the capacity itself to undertake COVID-19 testing. Incolink currently partners with the Australian Prostate Centre (**APC**) to deliver skin and health checks and looked to them

to undertake COVID-19 testing. They agreed and terms were struck which were made easier given Incolink's existing relationship with the APC.

- Incolink believes it paid appropriate rates for the service, yet on a strict reading of this subclause, that belief might not have been sufficient. Should Incolink have undertaken further market testing/ investigation to ascertain whether the APC, a registered charity, was indeed proposing to conduct the service at market rates and commercial terms? The Bill would place an impractical and illogical hurdle and puts at risk the enormous industry and policy benefit the testing has provided.

Discrimination unfairly between members

- Subclause 329LD(2)(c) prohibits discrimination in how services are undertaken but it doesn't provide any guidance as to what that means in practice. In order to reduce the administrative burden on Incolink to call employers and request their interest in testing, Incolink sent an email to all employers issuing a broad call for expressions of interest to be logged on Incolink's website. That list was the main way testing locations were initially determined. The only relevant consideration was how to test the greatest number of workers. Some questions with this process are raised:
 - *Did this consideration discriminate against workers at smaller sites?*
 - *Did Incolink inadvertently test certain trades or sites at higher rates than others?*
 - *Did Incolink attend sites with more CFMEU coverage than ETU, AMWU or AWU members and therefore indirectly discriminate against them?*
 - *Did Incolink err in going to Tasmania once or should it have gone more than once?*
- All of these questions could have been raised either internally or externally and slowed Incolink's testing regime. Adhering to this non-discrimination requirement may actually have reduced the number of workers tested thus negatively impacting the health and wellbeing of workers.

Prior approval from Directors

- Subclauses 329LD(2)(d) and (e) require a vote of Directors and consent of independent directors before training and welfare funding can be expended. While Incolink has strong governance, with its CEO maintaining formal and informal discussions with its Chair and Board members, this matter did not go to the Board for formal decision (although the Board were fully across the matter). The CEO had the delegation to make this decision and invest funds in the service. While the Board was informed prior to the commencement of testing, and updated as the testing was being rolled out, it did not decide on this course of action. No director, including those independent of unions and employer associations has ever sought to stop testing. A requirement that a Board meeting had occurred prior to any money being expended would have diverted management attention away from testing into managing Board decisions. The imposition of this Bill poses important questions:
 - *What if a Board meeting could not have been scheduled during April?*
 - *What if an independent director was ill or on a leave during these few days in late April?*
- The entire testing may have been delayed or cancelled due to the imposition of this requirement.
- It is perverse to impose layers of bureaucracy, under the guise of good governance and transparency that are impractical and only serve to hamper an organisation's operation and stymie progress.

“ Kane Constructions Pty Ltd

“In the space of about 3 hours we managed to test 181 people out of 209 that signed in. (86.5% of site). Overall solid effort by the Incolink team. Very efficient and professional.”

“ Downer Group

“I would like to pass on a huge thanks to yourself and your team especially Phuong who again has made COVID testing on site an smooth process with minimal disruptions to the works occurring.”

“ LU Simon Group

“We would like to thank you and your team for your efforts in testing as many people as possible. Please also thank the nurses for their work and testing the vast amount of people we had participating. We wish the very best to you and your team in keeping up the fantastic work in flattening the curve.”

“ Hickory

“Just wanted to reach out and let you know what a pleasure it has been working with Yvonne & Ben to roll out Incolink Coronavirus screening and flu shot clinics on our projects. The pre planning and onsite execution has been flawless and they are both very professional, polite and reassuring to both our management team and all the guys on site. It's a great programme which we are looking to roll out across our other projects.”

“ Lendlease

“A massive shout out & thank you to Incolink. It was a very slick operation at both sites and we really appreciate you lining up the awesome bunch of health professionals that ran the clinics. We really appreciate you also accommodating our needs and starting earlier than usual and doing the afternoon shift as well.”

Other Critical Services Compromised By This Bill

1. The Bill creates significant uncertainty about whether we can continue to provide suicide prevention, mental health support and drug & alcohol counselling. These services have all seen a significant increase in demand during the COVID-19 pandemic.
2. The Bill would prevent us investing in key Occupational Health and Safety initiatives – we conduct over 100,000 awareness contacts (including training sessions) with workers and employers in the commercial building and construction industry in Victoria every year.
3. The Bill would compromise our ability to attend critical work incidents, which include suicide events.
4. The Bill would jeopardise 4,000 physical health checks conducted with workers each year.

Conclusion

The impact of the proposed subclauses in this Bill is to create extra decision-making steps and doubt on whether Incolink wellbeing and support services are allowable and able to be undertaken for the betterment of the industry. The Bill would fetter the governance of the organisation by forcing the Board to reconsider its delegations to management and would require additional governance burdens.

Were the Bill in place, Incolink would not have been able to implement COVID-19 testing and 16,000 workers would not have been tested, while 7 workers may not have known they had COVID-19, at a time while they were still feeling well enough to work and asymptomatic. Industry would have had less evidence to show to Government that they were dealing with COVID-19 effectively and sites were safe to open. Construction in Victoria would not have received exemptions under Stage 4 lock down to allow some operations to continue to occur.

Private collaborative enterprises are meant to operate with agility and efficiently so they can better serve their stakeholders, the hardworking people of the building and construction industry, not be mired in red tape that completely negates the purpose of their creation.

Incolink is well governed and is committed to good governance and transparency but Regulation should improve the industry, not take it backwards. Incolink urges the adoption of the suggested amendments to the Bill in its Supplementary Submission to the Inquiry into the Fair Work Laws Amendment (Proper Use of Worker Benefits) Bill 2019.