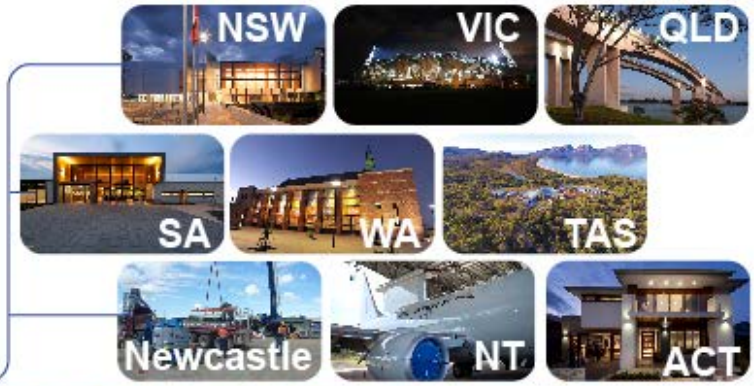
Master Builders Australia

Submission to Royal Commission into Trade Union Governance and Corruption

Issues Paper 4: Relevant Entities

19 August 2014



Master Builders Australia Limited

ABN 68 137 130 182

Level 1, 16 Bentham Street (PO Box 7170), YARRALUMLA ACT 2600

T: +61 2 6202 8888, F: +61 2 6202 8877, enquiries@masterbuilders.com.au, www.masterbuilders.com.au

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1 Introduction

1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 124 years the movement has grown to over 32,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.

1.2 The building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Purpose of Submission

2.1 On 23 July 2014, the Royal Commission issued its Fourth Issues Paper entitled 'Relevant Entities' (Issues Paper). This submission responds to the Issues Paper.

2.2 The Issues Paper contains a series of specific questions, some of which are answered in section 6 of this submission. The questions responded to are shown in italics.

3 Background

3.1 The Royal Commission's Terms of Reference define relevant entities as entities established by employee associations or their officials that are, or have been:

- a fund, organisation, account or other financial arrangement; and
- established for, or purportedly for, an industrial purpose or the welfare of members of an employee association; and
- a separate legal entity from any employee association.

3.2 The Terms of Reference require the Royal Commission to inquire into and report on:

- the governance arrangements and alleged financial irregularities associated with the affairs of trade unions, related 'relevant entities', organisations, accounts and financial arrangements;
- the adequacy of existing laws regarding governance, accountability and financial management of entities or funds related to the affairs of trade unions; and
- allegations involving union officials establishing and benefiting from funds or accounts set up for purposes unrelated to the needs of their members, and the conduct of union officials.

3.3 As the Royal Commission notes in the Issues Paper, it is clear from the Terms of Reference that 'relevant entities' may encompass many different types of entities with a range of purposes and uses. Further it is stated in the Issues Paper that:

> *The Royal Commission does not assume that all relevant entities are illegal or unethical or facilitate illegal or unethical conduct. Both legitimate and illegitimate relevant entities that trade unions and their officers may establish fall within the scope of inquiry.*[1]

4 Cole Royal Commission

4.1 Master Builders notes that the issue of funds/entities established for a number of industrial and related purposes relevant to the current context was considered by the Cole Royal Commission.

4.2 In the June 2003 submission on the Cole Royal Commission Final Report, Master Builders endorsed Recommendations 166 and 167 of the Cole Royal Commission Report. These recommendations are as follows:

> *Recommendation 166 - Legislation be enacted to prohibit employee associations from directing income or assets of that employee association to any person or body where the effect is, or might be, to put that income or those assets beyond the reach of creditors of that employee association. All assets and liabilities, income and expenses of an employee association should be*

[1] Issues Paper 4: Relevant Entities page 3

> *required to be declared in consolidated accounts of that employee association. Registration conditions under the Workplace Relations Act 1996 (C'wth) and equivalent State legislation may be a suitable means of implementing this recommendation.*
>
> *Recommendation 167 – The Commonwealth encourage the States and Territories to ensure that moneys held or received by long service leave funds should be used only for the purpose of paying employees' long service leave entitlements.*

4.3 Master Builders took the following stance in relation to the other Cole Royal Commission recommendations about redundancy funds and, subject to Recommendation 167, to long service leave funds, a position maintained:

> *The building and construction industry has complex arrangements regarding redundancy.*[2] *In essence, there are a number of redundancy funds that were set up for the benefit of employees to facilitate payment of their entitlements. Similarly, funds have been established to provide long service leave entitlements for employees.*[3] *These funds have legitimate industrial and commercial purposes.*[4]

4.4 Master Builders supported Recommendation 171 relating to the disclosure of benefits/income received from income protection insurance as follows:

> *Recommendation 171 – The proposed obligation to genuinely bargain in the Building and Construction Industry Improvement Act include the requirement that there be full disclosure, in writing, of any direct or indirect financial benefit that may be derived by any negotiating party to an industrial agreement from any term sought in the enterprise bargaining agreement, such as commissions or other income (see also Recommendation 8).*

4.5 Recommendation 171 remains cogent. Master Builders, for example, understands that the requirement set out in the CFMEU pattern agreement promoted in the Australian Capital Territory requires monies to be placed with a company, ABN 69 009 098 864,[5] which uses a Built-Plus policy relating to income protection. We understand that the CFMEU receives a commission for moneys paid in respect of Built-Plus policies: Attachment A is a document which sets out the "promoter" Creative Safety Intiatives (sic) Trust (which we understand is controlled by the CFMEU) receives from 8.89% to 13.34% of all

[2] These are set out comprehensively in Chapter 13, Volume Ten of the Final Report of the Royal Commission into the Building and Construction Industry (Feb 2003) (hereafter 'Cole').

[3] Chapter 12, Volume Ten of Cole.

[4] Extract from the Master Builders' submission to the Senate Economics Legislation Committee on Schedule 7 *Taxation Laws Amendment Bill (No.4) 2003* May, 2003.

[5] ABN for Jardine Lloyd Thompson P/L.

contributions made to Built Plus. Clause 37 of the ACT pattern agreement dealing with this matter is as follows:

> ***Income Protection Insurance***
>
> *At a cost of no more than $20 per week, per Employee (see Clause 1.7 of this Agreement) the Company will provide the income protection insurance offered by Jardine Lloyd Thompson Pty Limited under its Built-Plus policy, to those Employees who are able to be insured under the terms and conditions of that policy.*
>
> *Income Protection will be paid for all periods of Employees (sic) authorised absence.*
>
> *The cost of BUILT-PLUS policy will not exceed $20 per week per Employee during the nominal term of this Agreement.*
>
> *It is agreed Income Protection Insurance will be paid quarterly.*
>
> *It is agreed that if the Company has not made a valid or current insurance payment the Company shall be liable for any loss of earnings or benefits that would have otherwise been given to the Employee.*

4.6 Master Builders also supported Recommendations 172 – 176 inclusive as follows:

> *Recommendation 172*
>
> *(a) To the extent that it is necessary, the reporting guidelines issued by the Industrial Registrar include a requirement that a reporting unit disclose all commissions and other benefits received, directly or indirectly:*
>
> *(i) by that reporting unit; and*
>
> *(ii) by any officer, member or employee of that reporting unit where a commission or benefit was received in their capacity as an officer, member or employee of that reporting unit.*
>
> *(b) Disclosure shall include details of:*
>
> *(i) the source of all such commissions and benefits.*
>
> *Recommendation 173*
>
> *(a) The Industrial Registrar prepare a report as soon as possible after the end of each financial year addressing the completeness of the financial and operating reports prepared by reporting units of registered organisations with coverage in the building and construction industry. Such a*

report be based on information provided in financial and operating reports provided to the Industrial Registry pursuant to the Workplace Relations Amendment (Registration and Accountability of Organisations) Act 2002 (C'wth) and note the extent of compliance with the requirements of that Act by each such reporting unit.

(b) The Industrial Registrar provide the report to the Minister for Employment and Workplace Relations and to the Australian Building and Construction Commission.

Recommendation 174 - The Building and Construction Industry Improvement Act provide that the Australian Industrial Relations Commission not certify any industrial agreement or instrument or make any award which restricts the choice of superannuation funds or schemes available to an employee, or requires an employer to make contributions on behalf of an employee to a particular superannuation fund or scheme.

Recommendation 175 – The Building and Construction Industry Improvement Act provides that:

(a) a person shall not, by threat of industrial action, coercion or other form of intimidation, persuade or attempt to persuade:

(i) an employee or prospective employee to nominate a particular superannuation fund or scheme; or

(ii) an employer to make contributions to a particular superannuation fund or scheme on behalf of an employee; and

(b) a person contravening this provision be liable to a civil penalty.

Recommendation 176 – The Australian Building and Construction Commission be authorised to monitor projects where development funds are provided by building and construction industry superannuation, long service leave, redundancy or other industry funds to ensure that conditions are not attached to such loans or equity interests which infringe provisions of the Building and Construction Industry Improvement Act or the Workplace Relations Act 1996 (C'wth).

4.7 Master Builders remains supportive of these recommendations obviously with relevant legislative and other references updated.

5 Changes to Workplace Relations Laws

5.1 Master Builders contends many funds/entities are not in of themselves illegitimate but their placement in labour law instruments is problematic. In Master Builders' submission a source of illegitimacy (even in respect of the funds which pass the tests set out at paragraph 6.1.2 of this submission)

derives from the fact that business owners are often coerced to utilise them, via abuse of the enterprise bargaining process. It is concerning that these tactics continue to endure, despite being extensively documented by the Cole Royal Commission. The Cole Royal Commission's recommendation that bargaining representatives' interests in any entities named in an enterprise agreement be disclosed reinforces this point: see Recommendation 171 in particular discussed above at paragraph 4.4.

5.2 Whilst we proffer the recommendations for change set out in this section of the submission, the need for strong disclosure, accounting and governance structures for unions and relevant entities and strong and timely enforcement of the law to ensure those who break the law are held accountable for their actions is a serious concern. Reform of the law simpliciter is not enough.

5.3 With that proposition in mind, we would also recommend limiting the kinds of entities that can be included in enterprise agreements, by restricting them to 'permitted matters' as defined in section 172(1)(a) of the *Fair Work Act*, 2009 (FW Act), i.e. funds that relate to the 'employment relationship'. That would exclude matters such as income protection insurance relating to non-work related injury and illnesses[6] and, perhaps, requirements to solely use union controlled training providers.

5.4 The FW Act extends the concept of "matters pertaining to the relationship between employers and employees" to "matters pertaining to the relationship between an employer or employers and an employee organisation or employee organisations" pursuant to paragraph 172(1)(b). Matters that fall within this latter test are also "permitted matters" for the purposes of agreement content. Although Clause 676 of the EM provides a list of permitted matters under this provision, there does not seem to be a discernible test as to the nature of the "relationship" mentioned in the provision. In other words, there is little or no basis for labelling the interactions between an employer and a relevant union as a "relationship" in a formal sense; any contract is not between the employer and a union but between employees and the union or unions of which they are a member. S172(1)(b) should not found agreement content rules and should be discarded both on the grounds of uncertainty and on the basis that there is no

[6] Held not to be non-permitted in *Australian Maritime Officers Union v Sydney Ferries Corporation* (2009) 180 IR 112.

formal basis for recognising the so-called relationship at law. That step would also strengthen the recommendation made in the last paragraph.

5.5 Currently, where a provision does not sit lawfully within an enterprise agreement because it does not sufficiently pertain to the relationships vindicated by s172, that clause could potentially stand as an arrangement or understanding affecting supply or acquisition of goods and services or a covenant affecting competition under s45 or s45B of the *Competition and Consumer Act 2010* (Cth) (CCA). That would in turn make it unlawful and s194 FW Act would operate to make the enterprise agreement unable to be approved. To Master Builders' knowledge this argument has not been advanced before the Fair Work Commission. Master Builders has drawn this issue to the attention of the Competition Policy Review panel.[7] The problematic nature of the issue is compounded by the fact that inclusion of a non-permitted matter in an enterprise agreement does not invalidate the agreement. This is because s253(2) FW Act states that the inclusion of the term does not prevent the agreement from being an enterprise agreement. As the FWC does not have a role in checking non-permitted content in enterprise agreements, non-permitted matters may appear in the agreement albeit that, in theory, they are unable to be enforced.

5.6 The apparent exemption from the CCA of entities embedded in pattern enterprise agreements facilitates arrangements which would otherwise appear to be plainly in breach of the statute and contrary to the intent of the legislation, i.e. the promotion of competition. For example, the pattern agreement promoted in the Australian Capital Territory contains a provision which requires the employer to solely use the CFMEU-controlled training provider, Creative Safety Initiatives, for vocational training. The Agreement states that 'It is agreed that a training program will be developed and delivered by the Approved Training Authority'.[8] That entity is defined as 'Construction Employment Training Welfare Ltd as trustee for Creative Safety Initiative (CSI) Trust (ABN 16 827 621 177)'.[9] This monopoly would plainly breach the CCA were it to occur outside the context of enterprise bargaining.

[7] http://competitionpolicyreview.gov.au/files/2014/06/Master_Builders_Australia.pdf accessed 12 August 2014

[8] Clause 28.2.

[9] Clause 3.6

5.7 Whilst Master Builders recommends these changes to the FW Act be adopted, we reiterate our concern that such reform is likely to be largely irrelevant in a practical sense without effective regulation and active enforcement of the rule of law. Prohibiting the inclusion of specific industry funds from enterprise agreements matters little if a union can simply coerce an employer to comply with its demands through other, unlawful, means, without any real concern of being held to account.

6 Specific Questions

6.1 Why and for what purposes might trade unions or union officials establish relevant entities? What legitimate uses might there be?

6.1.1 The Cole Royal Commission's investigations into industry funds found that:

> *Regulation of industry funds varies from comprehensive requirements, in the case of superannuation and long service leave funds, through to nominated boards of management with no external governance upon the manner in which the fund will be managed, in the case of some redundancy or severance funds.*[10]

6.1.2 Master Builders distinguishes funds which are 'legitimate' compared with those entities which require additional disciplines based on the following criteria:

- publishes reports to the members for whose benefit it operates;
- makes returns to those members; and
- has transparent accounting and governance structures.

Master Builders commends these criteria to the Royal Commission. Any entity controlled by officers of registered organisations should, at law, be required to follow these disciplines. Master Builders' participation (and that of its member associations) in any arrangement/fund with unions is presaged on ensuring that the relevant entity exhibits these characteristics.

[10] Para 78 p19 Vol 10 Final Report of the Royal Commission into the Building and Construction Industry.

6.2 *Is the use of relevant entities a common practice for funding trade union elections? Are candidates for union elections required to declare their use and if not, should they be?*

Master Builders has no knowledge of the use of funds in the manner indicated. Master Builders would support a prohibition on funds from entities (controlled or part-controlled) being used for any purposes in trade union elections. Master Builders' position in this regard was communicated to the Royal Commission in the submission dated 11 July 2014 on the Royal Commission's Issues paper entitled 'Funding of Trade Union Elections.'

6.3 *Which union officers have authority to establish and manage relevant entities (in whatever forms they may take) on behalf of, or in the name of, trade unions? Do committees of management need to authorise the creation of relevant entities?*

Master Builders has no knowledge of these matters.

6.4 *What internal controls do trade unions have in place to stop union officials from setting up illegitimate or unauthorised relevant entities, or payments to such entities? Are there processes for union officials, employees or members to report these issues?*

Master Builders has no knowledge of these matters.

6.5 *To what extent does the Fair Work Registered Organisations) Act 2009 (the RO Act) cover the establishment and operation of relevant entities? What other laws apply (e.g. superannuation laws with respect to superannuation funds as relevant entities?)*

These matters are canvassed in Volume 10 of the Cole Royal Commission report which led to the making of the recommendations set out in section 4 of this submission.

6.6 *Do the provisions in the RO Act around the requirements for financial management, reporting, disclosure and auditing, as well as the duties of union officials, effectively cover relevant entities and conduct regarding relevant entities?*

Additional requirements which should be placed on registered organisations were discussed in Master Builders' submission dated 11 July 2014 to the Royal Commission on its issues paper entitled 'Duties of Union Officials'.

6.7 *The RO Act provides for financial disclosure obligations regarding payments by trade unions to, and remuneration to union officials by, 'related parties' (which are defined as trade union officials and their spouses and entities controlled by related parties). To what extent do these obligations cover relevant entities? Do the provisions regarding 'related parties' need to be strengthened?*

As indicated in Master Builders' submission dated 11 July 2014 to the Royal Commission on its Issues Paper dealing with Duties of Union Officials, Master Builders is now supportive of the increased disciplines that would be introduced if the Fair Work (Registered Organisations) Amendment Bill 2014 were to be enacted.

6.8 *Is the current definition of a reporting unit under the RO Act appropriate? Do the current arrangements (individual reporting units providing separate reports) provide adequate transparency of the financial management of trade unions as a whole?*

As indicated in Master Builders' submission dated 11 July 2014 to the Royal Commission on its Issues Paper dealing with Duties of Officials, Master Builders is now supportive of the increased disciplines that would be introduced if the Fair Work (Registered Organisations) Amendment Bill 2014 were to be enacted.

6.9 *Is there a need for legislative or other changes to improve the governance, transparency and accountability of relevant entities? If so, what could be done?*

The additional requirements which should be placed on registered organisations were discussed in Master Builders' submission dated 11 July 2014 to the Royal Commission on its issues paper dealing with Duties of Union Officials. Any new laws which are instituted to deal with the issues raised by the Royal Commission's Terms of Reference should reflect the criteria set out in paragraph 6.1.2 of this submission.

7 Conclusion

7.1 Master Builders submits that the Recommendations that were derived from the Cole Royal Commission discussed at section 4 of this submission, remain relevant and should be acted upon. The changes to workplace relations laws mentioned in section 5 of this submission should be made law.

7.2 Whilst we proffer the recommendations for change set out in this submission, the need for strong disclosure, accounting and governance structures for unions and relevant entities and strong and timely enforcement of the law to ensure those who break the law are held accountable for their actions remains an abiding concern. Reform of the law simpliciter is not enough.

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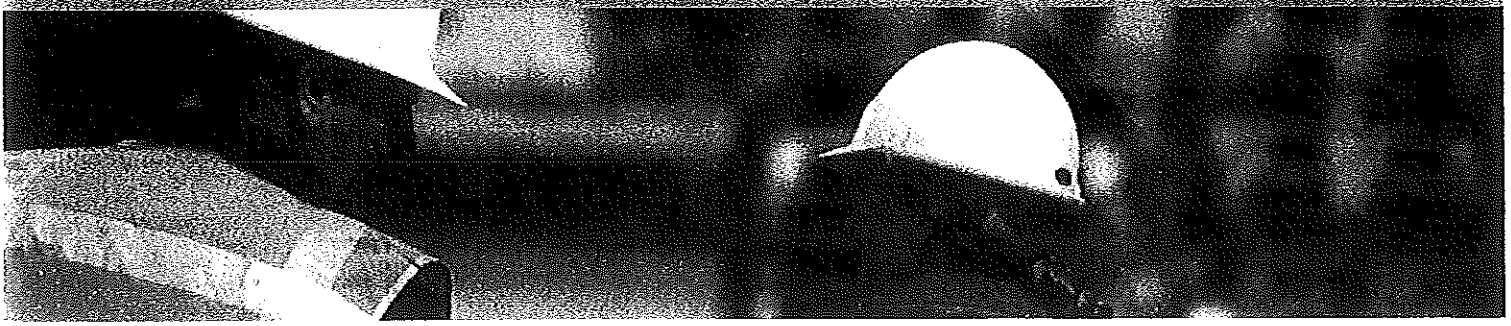
Attachment A

JLT

Tailored Solutions for Construction and Allied Workers

BUILT PLUS 24/7 Group Personal Accident Sickness Insurance



JLT LEADING THE WAY ON INCOME PROTECTION

The JLT (CSI) Discretionary Trust is specifically designed for the affiliated members of the CFMEU and offers a unique and innovative alternative to traditional insurance cover. The discretionary trust has been fully endorsed by the CFMEU, and provides you with competitive, cost effective weekly benefits. All backed by our dedicated Customer Service and Claims Teams.

KEY FEATURES AND BENEFITS	COVER COMPARISON CHECKLIST	
	JLT	OTHERS
→ Injury & Sickness - 365 days. Worldwide. 24/7 Protection	✓	?
→ Broad Coverage - providing protection beyond the scope of normal insurance	✓	?
→ Maximum Benefit Period - 104 weeks (other than psychological illness where maximum weekly benefit period is 26 weeks)	✓	?
→ Waiting Period - 28 days	✓	?
→ Flexible Cover - three levels available	✓	?
→ Funeral Expenses (following death as a result of injury) - up to $10,000	✓	?
→ Crisis Illness benefit - 13 weeks advance payment of income considered	✓	?
→ Cover for All Disclosed Employees - up to age 70 (Injury & Sickness)	✓	?

TYPE OF COVER	LEVEL OF COVER	COST PER WEEK
Gold	85% of gross weekly basic wage up to $2,000 plus 9.25% super guaranteed to a maximum of $185.00 per week. Gold Cover includes Workers' Compensation top up	$23.50
Silver	100% of gross weekly basic wage up to $1,000 plus 9.25% of super guaranteed to a maximum of $92.50 per week.	$19.00
Bronze	100% of gross weekly basic wage up to $700 plus 9.25% super guaranteed to a maximum of $64.75 per week.	$16.00

For further details and a competitive quote contact:

CFMEU

Steve Gilder
T: (08) 8418 0231 **M:** 0409 248 879 **E:** Steve.gilder@jlta.com.au
For Claims assistance call: 1800 640 009

THE JLT (CSI) DISCRETIONARY TRUST ARRANGEMENT
Acceptance Form

Before completing this Acceptance Form, be sure to read Sections 1, 2, 3 and 4 of our PDS. Our PDS will help a Potential Member decide whether to become a Member of the JDT Arrangement.

This Acceptance Form relates to both the Scheme Cover and Insurance Cover components of the JDT Arrangement.

Date of Trust Deed: 30th April 2012 **Fund Period:** 31st May 2013 **to** 31st May 2014

PLEASE NOTE You are not a member of this JDT Arrangement until we receive your **Membership Contribution** and completed **Acceptance form**

Employer ..... **ABN** .....

Address .....

.....

Contact Name ..... **PH** .....

E-mail ..... **Fax** .....

TOTAL CONTRIBUTION (Incl. GST)	Gold	Silver	Bronze
Breakdown of Contribution			
Aggregate Contribution* This is the proportion of the Total Membership Contribution payable by a Member to meet claims and costs attributable to claims management	48.58%	53.05%	50.74%
Administration Contribution** This is the proportion of the Total Membership Contribution payable by a Member which represents the administrative fees of the JDT Arrangement	7.33%	9.17%	11.00%
Insurance Cover Contribution. This is the proportion of the Total Membership Contribution payable by a Member which represents the premium paid to the Insurer for the Insurance Cover	18.49%	12.44%	11.20%
Insurance Cover premium stamp duty (GST Exempt)	2.03%	1.37%	1.24%
Jardine Lloyd Thompson Pty Ltd (the Broker's) Broking Fee	5.77%	3.89%	3.50%
Creative Safety Initiatives Trust (the Promoter's) Fee. This is an administrative fee paid for the distribution, contribution collection and other related services provided by the Promoter.	8.89%	11.11%	13.34%
GST Payable	8.91%	8.97%	8.98%

**Includes Claims Management Service Fee $500.00 per claim*

*** The Administration Contribution can be broken down as follows based on budgeted estimations:*

- *Actuary fees- 2%*
- *Legal costs- 2%*
- *Audit fees- 7%*
- *Scheme Manager's (JGS's) Fees- 89%*

Please complete and return this Acceptance Form with your payment and retain a copy for your records.

Declaration (In addition to the duty to disclose certain information to the Insurer and the Trustee)

a) I have read the PDS and agree to be bound by the Rules. I am aware that the withdrawal from the JDT Arrangement as a Member does not entitle the Member to a refund of the Total Membership Contribution in full or in part, other than any applicable return Membership Contribution in respect of the unexpired portion of the Insurance Cover.

b) I agree to receive the PDS, FSG and annual report for this product online at www.jlta.com.au/csi or I have obtained a hard copy of the PDS and FSG

c) Privacy Act implications: Upon joining the JDT Arrangement you, as a Member, acknowledge that, as part of the financial reports, the Trustee will be declaring Members' detailed Claims data to all Members and service providers performing specific tasks on behalf of the Trust.

LEVEL OF COVER (PLEASE TICK)

☐ Gold - 85% cover up to $2,000 plus 9% super per week

☐ Silver - 100% cover up to $1,000 plus 9% super per week

☐ Bronze - 100% cover up to $700 plus 9% super per week

Signature ..... Date .....

PLEASE TURN THE PAGE TO COMPLETE ALL DETAILS