Senate Standing Committee on Education and Employment Inquiries into the Fair Work Amendment (Corrupting Benefits) Bill 2017, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 and Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

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This submission is made in my capacity as an academic expert on employment law and workplace relations, and the views expressed are mine alone.

In summary, I support the passage of the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017 and the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, albeit in each case with some changes to address what I would regard as significant ambiguities or omissions.

In the case of the Fair Work Amendment (Corrupting Benefits) Bill 2017, I accept the argument for some kind of measure to prohibit certain payments to unions or union officials, or to require employees voting on a proposed enterprise agreement to be informed about 'secret' benefits negotiated by either their union or the employer. But, as drafted, the Bill's prohibitions are expressed in terms that are either too wide or too uncertain, or both. There is a particular danger here of regulatory overreach, with potential costs for both unions and employers.

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017

I support the changes proposed in this Bill, in particular those which seek to give effect to recommendations made by the Productivity Commission in its 2015 review of the workplace relations framework.

It is desirable to spare both the Fair Work Commission (FWC) and major stakeholders the strain on their resources imposed by the need to hold regular four-yearly reviews of all modern awards. Subject to one qualification, the amendments proposed in Schedule 1 to the Bill would still leave the FWC with sufficient discretion to review awards as new issues arise, once the current (and very protracted) review instituted in 2014 is completed.

The qualification is that s 157(2) of the Fair Work Act 2009 (FW Act) would continue to prevent the FWC from varying modern award minimum wages on anything other than work value grounds, outside the scheduled annual wage reviews. For the reasons explained by the Productivity Commission on p 353 of its 2015 report, this limitation should be removed. I support the implementation of Recommendation 8.2 in that report, subject to retaining the present requirement in s 157(2) that the FWC would need to be satisfied that there was a good reason to vary award wage rates outside the system of annual wage reviews.

I also agree that the FWC should have the discretion to 'overlook minor procedural or technical errors when approving an [enterprise] agreement', and that this power should

extend to 'minor errors or defects relating to the issuing or content of a notice of employee representational rights' (Productivity Commission Recommendation 20.1).

However, while the proposed new s 188(2) of the FW Act accurately reflects the recommendation, there is one aspect that concerns me. This is the requirement that the exercise of the proposed discretion be conditioned on the FWC being satisfied that 'the employees covered by the agreement were not likely to have been disadvantaged by the errors'.

The problem is with the term 'disadvantaged'. The purpose of the various procedural requirements in ss 173–174 and 180–182 is not to *advantage* the employees to be covered by a proposed agreement. It is to ensure that they *genuinely agree* to the terms proposed by their employer and that (in the case of the notice of employee representational rights) they are *informed of their right to be represented* by a trade union or other bargaining representative. The question of 'advantage' is dealt with by a separate requirement, the better off overall test in s 189.

Suppose, for instance that a 'technical' error results in a group of employees being denied the opportunity to vote on a proposed agreement. As the proposed new s 188(2) stands, the employer might argue that the employees have not been disadvantaged because the new agreement is, objectively, beneficial for them. If accepted, reasoning of that type could significantly dilute the procedural safeguards established by ss 173–174 and 180–182.

To avoid any such possibility, I recommend that proposed new s 188(2)(b) be amended to read something like this:

> 'the errors did not significantly impair the capacity of the employees covered by the agreement to:
>
> (i) be informed of their right to be represented by a bargaining representative; or
>
> (ii) genuinely agree to the agreement.'

Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017

I strongly support each of the measures in this Bill. The need for them has been amply demonstrated by the reports referred to in the Explanatory Memorandum (EM), as well as a number of other media investigations into the underpayment and exploitation of vulnerable workers. I support in particular the proposal to give the Fair Work Ombudsman (FWO) evidence-gathering powers that are similar to those enjoyed by other enforcement agencies. The proposed limitations and safeguards on the use of those powers appear to strike an appropriate balance between the objective of detecting breaches of labour standards and the protection of individual freedoms.

My main concern is with the threshold for establishing a 'serious' contravention, as set out in proposed s 557A of the FW Act. I can see the sense in requiring that the contravention be 'part of a systematic pattern of conduct relating to one or more other persons'. But I am less sure about the requirement that the contravention be 'deliberate'. For individual

defendants (ie, those who are not corporations), this clearly requires that the contravention not be innocent or inadvertent. But what degree of knowledge must be shown on the part of the defendant? Must they have known exactly what provision of the FW Act (or of a particular modern award or enterprise agreement, etc) they were contravening? Or is it sufficient – as I would argue it should be – that they were recklessly indifferent to the existence of a particular requirement under the Act (or an award or agreement, etc)?

Paragraph 22 of the EM states: 'The term "deliberate" is not defined, but is intended to be read synonymously with the term "intentional" that is used elsewhere in the Fair Work Act." With respect, however, that is not very helpful . The relatively few uses of the term 'intentional' in the rest of the Act involve particular *conduct* needing to be intentional (such as hindering an entry permit holder, or damaging property), rather than a *contravention*.

A more relevant analogy might be found in s 550 of the FW Act, which imposes 'accessorial' liability for being 'involved' in someone else's contravention. There has been extensive case law on this and similar provisions in other legislation, the effect of which has been summarised as follows:[1]

> Section 550(2) makes clear that 'being involved' can include aiding, abetting, counselling, procuring or inducing (by threats or promises or otherwise) a contravention. It can also include being in any way (directly or indirectly) 'knowingly concerned in or party to' a contravention, or conspiring with others to effect a contravention. A similar provision in the *Competition and Consumer Act 2010*, s 75B(1), has been interpreted to require that the person concerned must be an *intentional* participant with knowledge of the 'essential elements' of the contravention in question,[2] whether or not the person 'knows that those matters amount to a contravention'.[3] In other words, it is 'not necessary that the accessory should appreciate that the conduct in question is unlawful'.[4] The requisite knowledge will not be inferred simply because the alleged accessory was negligent or even reckless in failing to make necessary inquiries. But if a person has been 'wilfully blind', in the sense of deliberately shutting their eyes to the truth or refusing to make inquiries, this may be enough to establish knowing involvement.[5]

This seems to me to set the bar about right. At any event, I suggest that proposed s 557A be reworded to make it clearer what level of knowledge is required.

The same point can be made about proposed s 557B, which states that a corporation's contravention is to be regarded as deliberate if it has 'expressly, tacitly or impliedly authorised' the contravention. The issue again is whether a corporation can be said to have

[1] A Stewart, A Forsyth, M Irving, R Johnstone and S McCrystal, *Creighton and Stewart's Labour Law*, 6th ed, 2016, [19.44] (some footnotes omitted).
[2] *Yorke v Lucas* (1985) 158 CLR 661.
[3] *CFMEU v Director, FWBII* (2012) 209 FCR 448 at [38]. See also *Dain v Bradley* [2012] FWA 7276 at [47]–[50].
[4] *FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365 at [176]. See also *Rafferty v Madgwicks* (2012) 287 ALR 437 at [254]. The Federal Court has held that, where an accessory is alleged to have breached the term of an award, it must be shown that the accessory knew that an award applied, even if the accessory did not know which *particular* award applied and was breached: *FWO v Devine Marine Group Pty Ltd* [2014] FCA 1365.
[5] See eg *FWO v Liquid Fuel Pty Ltd* [2015] FCCA 2694 and the authorities cited ibid at [26]–[38], [80]–[81].

authorised a contravention (as opposed to the conduct that amounts to a contravention) if the relevant managers were not aware (or not *precisely* aware) of the legal requirements being contravened. Again, this should be clarified.

A final point concerns the aforementioned s 550. If a person is knowingly 'involved' in an another person's serious contravention, would that expose them to the higher penalties proposed in the Bill? And if not, why not? The FWO has repeatedly used s 550 to pursue managers, directors and advisers who are involved in an employer's contravention. This is especially important where the employer is a company that goes into liquidation without sufficient assets to meet its liabilities. It is at least arguable that the 'guiding mind(s)' behind a serious contravention should be exposed to the higher level of penalties, bearing in mind that the maximum will always be one fifth of that set for a corporation.

As the Bill stands, it is unclear whether s 550 would apply to a serious contravention (as opposed to the underlying 'ordinary' contravention). The EM does not appear to address the matter. Whatever the intent here, it could usefully be clarified.

Fair Work Amendment (Corrupting Benefits) Bill 2017

This Bill presents the first of what presumably will be many amendments to be based on recommendations from the 2015 Final Report of the Trade Union Royal Commission (TURC). Based on the evidence gathered by the TURC, I have reservations about the report's general conclusion about 'widespread' and 'deep-seated' misconduct within the union movement. It is also troubling that both the TURC and the government's response have targeted corruption exclusively within trade unions, rather than responding to the widespread calls for a federal anti-corruption body with a wider remit and powers.

Nevertheless, the TURC did expose a number of practices that arguably call for some form of regulatory response. To that extent I believe the government was justified in seeking both to outlaw the provision of 'corrupting' benefits and to require the disclosure of certain types of arrangement that may be regarded as benefiting organisations at the expense of their members.

The question, however, is whether the Bill achieves these objectives without creating undue uncertainty or having unnecessary consequences. As the Bill stands, I believe its drafting fails on both those scores. The essential problem is that, rather than identify with some specificity the types of practice or arrangement that are to be outlawed, the Bill relies on overly broad prohibitions for which extensive exclusions must then be formulated.

The first drafting problem I would identify is with the new offences in proposed s 536D of the FW Act for giving, receiving or soliciting benefits intended to influence an officer or employee of a registered union to perform their duties or exercise their statutory functions 'improperly'. It is not clear to me how, or by reference to what standard, it is to be determined whether behaviour is 'improper'. Some of the examples given in the EM seem to suggest that it would be improper merely for an organisation to be caused to act differently to what it might otherwise have been expected to have done. The difficulties here seem obvious. An alternative would be to limit the prohibition to attempts to influence

an officer or employee to *breach* their duties to the organisation, and/or to fail to act in what they honestly believe to be the best interests of their members.

Moving on to proposed ss 536F–536G, these create incredibly broad prohibitions on employers giving or being asked to give money, goods or services to a registered union or someone connected to such a union. In order to prevent these catching the most mundane and unremarkable of industrial arrangements, a series of exceptions are created. But it is far from clear that these operate as widely as they should. For example, an employer may decide to provide catering for a meeting, or to allow unions to use its information technology system to disseminate information to its members. It is not obvious that any of the stated exceptions would apply – yet surely these are not 'corrupting' benefits.

Similar points apply to the disclosure obligations in proposed ss 179 and 179A. These presumptively require both union bargaining representatives and employers to disclose *any* kind of financial benefit that they or a related party stand to receive, whether directly *or indirectly*, from a proposed enterprise agreement. This is especially problematic for employers, who might be said to anticipate all kinds of benefits from either the fact of having concluded an agreement or from particular clauses in the agreement. To escape a disclosure obligation, they must rely on an exception for benefits 'received or obtained in the ordinary course of the employer's business' – whatever that means (no explanation is offered in the EM).

Finally, I note that paragraph 63 of the EM suggests that the purpose of the new disclosure requirements is, as recommended by the TURC, 'to ensure that employees who are asked to vote for a proposed enterprise agreement are properly informed about its effect'. Yet proposed s 188A would preclude the FWC from taking any breach of the new disclosure requirements into account in determining whether the employees concerned had genuinely agreed to the new agreement. It is not clear why that should be the case. If employees have voted on a proposed agreement without being told about significant but undisclosed benefits to either their union or their employer, why should that not be a basis for the FWC to conclude that their agreement was not genuine?