

Chapter 2

Key issues

The need for reform

2.1 The Final Report of the Royal Commission into Trade Union Governance and Corruption (the Royal Commission), released in December 2015, looked at corrupt and improper conduct in the industrial relations arena, focusing on both employers and registered organisations. The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the bill) is the government's regulatory response to several findings of the report. It seeks to outlaw the provision of corrupting benefits and require the disclosure of legitimate benefits arising from enterprise agreements.

2.2 The inquiry attracted submissions from unions, employer groups and academics, reflecting a broad range of views. Submitters were unanimous in their rejection of corruption, with unions notably calling for the highest standards of governance and ethical conduct on the part of their officials and members.¹

2.3 Of those who did not support the bill, predominantly unions but also some academic and industry submitters, the foremost criticisms included:

- bribery offences being included in the *Fair Work Act* (the FWA, or the Act), creating an overlap between criminal and industrial law;
- a perceived need to improve definitional clarity in certain parts of the bill; and
- concerns around proposed disclosure obligations.

2.4 These issues are examined in more detail below.

Bribery offences in the FWA

2.5 The Royal Commission highlighted multiple examples of payments being made with the aim of influencing registered organisations and their officers.² In response, the bill would:

- Make it a criminal offence for a person to give a registered organisation (i.e. a union or registered employer association), or a person associated with a registered organisation a corrupting benefit;
- Make it a criminal offence to receive or solicit a corrupting benefit;
- Make it a criminal offence for an employer to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to a union;

1 See for example Electrical Trades Union of Australia, *Submission 1*, p. 2.

2 *Explanatory Memorandum*, Fair Work Amendment (Corrupting Benefits) Bill 2017, p. i.

- Make it a criminal offence to solicit, receive, obtain or agree to obtain any such payment;³

2.6 Submitters were divided on the net benefit of including criminal offences in the FWA.

2.7 Representing the view of affiliated unions, the Australian Council of Trade Unions (ACTU) described including criminal bribery offences in the Act as 'incongruous'⁴, submitting that:

The object of the FW Act, as set out at section 3 thereof, is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.⁵

2.8 The ACTU suggested that the proposed criminal bribery offences might be better placed in the *Criminal Code Act 1995*.⁶

2.9 Ai Group supported the introduction of measures addressing the provision and receipt of corrupting benefits to the FWA, but sought clarity on the legislative basis for the proposed provisions, questioning the comparative severity of the penalties involved:

Several of the provisions...are inexplicably based upon the provisions in the *Criminal Code Act 1995* (Cth) which relate to the bribing of foreign officials, rather than the provisions in this same legislation that apply to the bribing of Commonwealth public officials.⁷

2.10 The Australian Chamber of Commerce and Industry (ACCI) expressed in-principle support for separating criminal and industrial law, in view of the benefits of avoiding conflict and overlap between the two. However, ACCI conceded that:

[T]here is a strong evidentiary basis as contained within the findings of multiple Royal Commissions that underpins the need for a stronger policy and regulatory response to discourage the giving and receiving of corrupting benefits and effect lasting cultural change. In this regard the Australian Chamber supports the policy intent underpinning the Bill and understands that the behaviour it is intended to capture in the creation of criminal offences, notwithstanding that it may arise in industrial dealings, is behaviour that is commonly understood to be 'criminal' in nature rather than breaches of industrial/workplace laws more generally.⁸

3 Ai Group, *Submission 7*, p. 3.

4 Australian Council of Trade Unions, *Submission 5*, p. 5.

5 ACTU, *Submission 5*, p. 5.

6 ACTU, *Submission 5*, p. 5.

7 Ai Group, *Submission 7*, pp. 5–6.

8 Australian Chamber of Commerce and Industry, *Submission 6*, p. 1.

2.11 ACCI further noted the current failure to adequately address corrupt behaviour occurring in the industrial context, citing recommendations made by the Royal Commission:

Recommendation 40: Legislation be enacted amending the *Fair Work Act 2009* (Cth) to include a provision criminalising the giving or receiving of corrupting benefits in relation to officers of registered organisations, with a maximum term of imprisonment of ten years.

Recommendation 41: Legislation be enacted amending the *Fair Work Act 2009* (Cth) making it a criminal offence for an employer to provide, offer or promise to provide any payment or benefit to an employee organisation or its officials. Certain legitimate categories of payment should be permitted, subject to strict safeguards. An equivalent criminal offence should apply to any person soliciting, receiving or agreeing to receive a prohibited payment or benefit. A two year maximum term of imprisonment should apply to the commission of these offences.⁹

2.12 ACCI concluded that inappropriate and corrupt conduct such as that identified by the Royal Commission 'warrants a unique policy response.'¹⁰

Committee view

2.13 The committee notes concerns about the inclusion of criminal offences in legislation governing industrial relations. However, evidence has shown that serious misconduct can and does occur in the industrial relations arena, necessitating a targeted government response. In and of itself, the argument that introducing criminal offences into the FWA is a novel approach does not contribute meaningfully to the debate. The committee is persuaded that, as put by ACCI, corrupt and inappropriate industrial arrangements warrant a unique policy response.

Definitional clarity

2.14 Support for tackling corrupt and inappropriate industrial conduct was strong. At the same time, a number of witnesses sought clarity on the range of industrial arrangements the bill would capture.

2.15 Professor Andrew Stewart, an academic with considerable expertise in employment law and workplace relations, questioned whether the bill would achieve its objectives 'without creating undue uncertainty or having unnecessary consequences'.¹¹ Professor Stewart submitted that:

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

9 See ACCI, *Submission 6*, pp. 1–2.

10 ACCI, *Submission 6*, p. 2.

11 Professor Andrew Stewart, *Submission 4*, p. 4.

broad prohibitions for which extensive exclusions must then be formulated.¹²

2.16 Professor Stewart identified several potential drafting weaknesses, focusing firstly on section 536D of the bill, which outlines offences associated with giving, receiving or soliciting a corrupting benefit. Under the proposed section, an offence would be deemed to have been committed where a payment is made with the intention of influencing a registered organisation officer or employee:

- i. to perform his or her duties or functions as such an officer or employee improperly; or
- ii. to exercise his or her powers or perform his or her functions under this Act or the Registered Organisations Act improperly; or
- iii. to give an advantage of any kind, which would not be legitimately due, to the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant.¹³

2.17 There is considerable ambiguity, Professor Stewart suggested, around how impropriety is to be established:

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 [explanatory memorandum] 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.¹⁴

2.18 The Industrial Law Committee of the Law Council of Australia recommended that clarification of the term 'improper' be included in the bill and through a supplementary explanatory memorandum.¹⁵

2.19 The committee sought clarity on the judicial authority underpinning the term 'improper' from the department. The department explained that impropriety is an established concept in the context of carrying out official duties, citing a majority decision of the High Court:

Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention

12 Professor Andrew Stewart, *Submission 4*, p. 4.

13 Paragraph 536D(1)(b), Fair Work Amendment (Corrupting Benefits) Bill 2017.

14 Professor Andrew Stewart, *Submission 4*, p. 4.

15 Law Council of Australia, *Submission 11*, p. 3.

in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.¹⁶

2.20 The committee therefore notes that 'improper' conduct is not restricted to instances of conscious abuse of power, and acknowledges the department's evidence indicating that the term is well-established in the relevant context.

Defining 'corrupting' benefits

2.21 The bill also seeks to prohibit employers giving or being asked to give money, goods or services to a registered union or a person connected to a union. The bill accounts for payments required by legitimate industrial arrangements through the inclusion of a series of exemptions at proposed subsection 536F(3):

Subsection (1) does not apply to the following cash or in kind payments:

- a) a payment to the organisation:
 - i. made by deduction from the wages of an employee of the defendant who has agreed in writing to become a member of the organisation; and
 - ii. made for a membership fee payable by the employee;
- b) a benefit provided and used for the sole or dominant purpose of benefiting the defendant's employees;
- c) a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law;
- d) a payment made, at market value, for goods or services supplied to the defendant in the ordinary course of the organisation's business for purposes in relation to the ordinary course of the defendant's business;
- e) a payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory;
- f) a benefit provided in accordance with an order, judgment or award of a court or tribunal;
- g) a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

2.22 While supporting the prohibition on the provision of inappropriate payments to unions, the Ai Group provided several examples of common benefits provided by employers and employer associations to union officials that would appear to fall outside these exemptions. These benefits would potentially encompass nominal hospitality, small gifts, and invitations to a farewell dinner function including:

16 *R v Byrnes*, (1995) 183 CLR 501, cited in Department of Employment, *answer to question on notice*, received 1 May 2017, p. 11.

- A meal and/or refreshments provided by an industry association or a Government Department / Agency for a meeting with a union official that is eligible to represent any of its employees:

For example if Ai Group had a meeting in its offices at 12.30pm with the National Secretary of the ASU (a union which is eligible to represent Ai Group's clerical staff) to discuss industry or award matters, and Ai Group provided some sandwiches and coffee, this "benefit" would appear to not be covered under any of the exemptions...

- A nominal gift given to a union official for speaking at a Conference organised by an industry association.

For example, if Ai Group invited the National Secretary of Professionals Australia (which is eligible to represent Ai Group's professional IT staff) to speak at its Annual Workplace Relations Conference, and Ai Group gave the official a \$20 bottle of wine in appreciation, this "benefit" would appear to not be covered under any of the exemptions.

- An invitation to a farewell dinner or function.

For example, if Ai Group invited the National Secretary of the AMWU, ASU and/or Professionals Australia to a retirement function for a longstanding, senior Ai Group staff member, this "benefit" would appear to not be covered under any of the exemptions.¹⁷

2.23 Accordingly, the Ai Group recommended that following additional exclusions be included in the bill:

Benefits with a nominal value (e.g. up to the value of one penalty unit – currently \$180), including, for example:

- Free or subsidised meals and/or beverages provided to union officials infrequently or reciprocally;
- Gifts of single bottles of reasonably priced alcohol, chocolate or other token gifts given at functions, events, etc;
- Invitations to farewell functions, annual dinners, award ceremonies and other appropriate functions.¹⁸

2.24 The committee supports this recommendation and encourages the government to consider amending the bill in light of this evidence.

Recommendation 1

2.25 The committee recommends that the government consider the Ai Group's proposed additional exemptions to the provisions relating to cash or in kind payments to employee organisations.

17 Ai Group, *Submission 7*, pp. 8–9.

18 Ai Group, *Submission 7*, p. 9.

Disclosure

2.26 If enacted, the bill would increase transparency by requiring bargaining representatives (employers, employer organisations and unions) for a proposed enterprise agreement to disclose details of expected financial benefits:

...that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement.¹⁹

2.27 The rationale behind the proposed disclosure obligation was undisputed, with the ACTU describing it as 'coming from the right place'.²⁰ However, linking the proposed disclosure obligations to the definition of related parties in the *Fair Work (Registered Organisations) Act* was seen as problematic. The *Registered Organisations Act*, the ACTU explained, is more straightforward in its application of related party regulation:

[T]he way the registered organisations act uses related party regulation is for the union to identify when its officers are entering into dealings with themselves or are causing the union to enter into relationships with people to disclose, 'These are the related parties and this is the money that's going.' Here you have a situation where an employer, in implementing the terms of the agreement, might make an arrangement with a business who, unbeknownst to the union officials in that branch, has some stepbrother company related person in some other branch of the union in another part of the country who derives a benefit as a result of that, and that is casting too wide a net. I think you need to concentrate on moneys that the union or a branch of the union are receiving, rather than having this sort of related party.²¹

2.28 Other stakeholders did not share this view. Citing the need for a considerable increase in transparency in an environment in which conflicts of interest are present, ACCI submitted that the proposed changes would bring about positive change.²²

2.29 Similarly, the Industrial Law Committee of Law Council of Australia's Federal Litigation and Disputes Resolution Section did not have any concerns relating to the sections on disclosure, describing them as 'clear and appropriate'.²³

2.30 The department underscored the need to bolster transparency. As the bill seeks to extend disclosure obligations to employers, the department explained, its

19 *Explanatory Memorandum*, Fair Work Amendment (Corrupting Benefits) Bill 2017, p. i.

20 Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 19.

21 Mr Trevor Clarke, Director, Legal and Industrial, Australian Council of Trade Unions, *Proof Committee Hansard*, 12 April 2017, p. 21.

22 ACCI, *Submission 6*, p. 15.

23 Law Council of Australia, *Submission 11*, p. 4.

enactment would allow employees to make better-informed decisions when voting on enterprise agreements.²⁴

Committee view

2.31 The committee recognises concerns around the difficulty of establishing whether behaviour is improper, noting that industrial arrangements between unions and employers are inherently complex. The proposed legislation will clearly require both businesses and unions to reflect on and review their existing practices to ensure that improper arrangements are not a feature of their dealings.

2.32 The committee supports calls for serious misconduct to attract serious penalties under the FWA. Union officials, by virtue of their role, have a higher moral duty towards the people whose interests they represent, and all necessary steps must be taken to protect against improper conduct. In protecting workers, the committee also supports an end to practices which see employers in effect paying for industrial peace, and is of the view that introducing strong penalties for corrupt conduct will be a positive step towards this goal. To this end, the committee supports the bill.

Recommendation 2

2.33 Subject to Recommendation 1, the committee recommends that the Senate pass the bill.

Senator Bridget McKenzie

Chair

24 Department of Employment, *Submission 2*, p. 5.