

Ai GROUP SUBMISSION

Senate Education and Employment
Legislation Committee

**Fair Work Amendment (Corrupting
Benefits) Bill 2017**

10 April 2017



Ai Group Submission to Senate Education and Employment Legislation Committee

About Australian Industry Group

The Australian Industry Group (Ai Group) is a peak industry association in Australia which along with its affiliates represents the interests of more than 60,000 businesses in an expanding range of sectors including: manufacturing, engineering, construction, automotive, food, transport, information technology, telecommunications, call centres, labour hire, printing, defence, mining equipment and supplies, airlines, health, community services and other industries. The businesses which we represent employ more than one million people. Ai Group members operate small, medium and large businesses across a range of industries. Ai Group is closely affiliated with many other employer groups and directly manages a number of those organisations.

Ai Group contact for this submission

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Summary of Ai Group's position

The Australian Industry Group (**Ai Group**) welcomes the opportunity to make a submission on the *Fair Work Amendment (Corrupting Benefits) Bill 2017 (Bill)*.

The Bill contains important reforms that implement three recommendations (40, 41 and 48) of the Royal Commission into Trade Union Governance and Corruption (**Heydon Royal Commission**).

The Royal Commission's final report demonstrates that the case for change is irrefutable. In the light of the Royal Commission's findings and recommendations, any view that the existing laws are working effectively is simply unsustainable. The content of the final report highlights that the Royal Commission was both necessary and worthwhile.

The Bill would amend the *Fair Work Act 2009 (FW Act)* to:

- 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;
- Make it a criminal offence to solicit, receive, obtain or agree to obtain any such payment;
- Require bargaining representatives for a proposed enterprise agreement (employers, employer organisations, and unions) to disclose 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. Civil penalties would apply to these provisions.

Some important changes are needed to the Bill to ensure fairness to employers, employees, registered organisations, officers of registered organisations, and employees of registered organisations.

We urge the Committee to recommend that the Bill is passed with the amendments proposed by Ai Group in this submission.

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Other vital recommendations of the Heydon Royal Commission that this Bill does not address

Ai Group was a very active participant in the Heydon Royal Commission. Amongst other issues, Ai Group's submissions focused upon:

- The millions of dollars per year of inappropriate revenue which flow to unions from the following sources:
 - The distribution of surpluses to unions by many worker entitlement funds (e.g. many construction industry redundancy funds). These amounts are inappropriately distributed to unions from funds contributed by employers for the benefit of their employees.
 - The payment of very large, inappropriate commissions to unions from insurance companies which offer substandard income protection insurance at grossly inflated prices. Unions often misuse the enterprise bargaining laws to coerce employers to purchase these products even though employers are typically able to purchase insurance that would provide more generous benefits to their employees at much lower cost (e.g. through an industry superannuation fund or through the insurance company which the company uses for other types of insurance). In such cases, unions are benefiting at the expense of both employers and employees.
- The role that industry-wide pattern bargaining plays in delivering these inappropriate revenue streams to unions.

As union membership revenue has declined, the above lucrative and inappropriate revenue streams have become central to union finances. The revenue streams no doubt result in the fines which militant unions regularly incur for unlawful conduct having a significantly reduced impact on their operations.

The Bill partially addresses some of the issues of concern that Ai Group raised throughout the Heydon Royal Commission, and which the Royal Commission made recommendations upon.

In addition to the three recommendations dealt with in the Bill, it is vital that numerous other worthwhile recommendations of the Heydon Royal Commission are implemented without delay, including the following recommendations that are consistent with proposals in Ai Group's submissions to the Royal Commission:

- Legislation dealing comprehensively with the governance, financial reporting and financial disclosures required by worker entitlement funds (e.g. construction industry redundancy funds) including registration of these funds. (Recommendations 45-46).

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- An amendment to section 194 of the FW Act to make it unlawful to include any term in an enterprise agreement that requires or permits contributions to a worker entitlement fund (other than a superannuation fund) unless the fund is a registered worker entitlement fund or a registered charity. (Recommendation 49).
- A new civil remedy provision in the FW Act prohibiting a person from organising or taking 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. (Recommendation 50).
- Amendments to the *Competition and Consumer Act 2010* (Cth) to outlaw enterprise agreement clauses that impose restrictions on the supply or acquisition of goods and services, e.g. clauses which restrict the engagement of contractors. This recommendation addresses the problematic decision of the Full Federal Court in *Australian Industry Group v Fair Work Australia* [2012] FCAFC 108 (“The ADJ Contracting Case”). (Recommendation 59).

Schedule 1, Division 2 – Giving, receiving or soliciting corrupting benefits

Ai Group supports appropriate legislative provisions to address the provision and receipt of “corrupting benefits” by registered organisations.

However, we propose that the Bill be amended to achieve a more appropriate balance between the interests of stamping out “corrupting benefits” and ensuring fairness for employers, employees, registered organisations, officers of registered organisations, and employees of registered organisations.

Several of the provisions in Schedule 1, Division 2 of the Bill 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.

To achieve a better balance, Ai Group proposes the following amendments to Division 2 of the Bill:

- Delete s.536D(1)(b)(iii), s.536D(2)(b)(iii), s.536D(5) and s.536D(6) to remove the concept of “*advantages of any kind, which would not be legitimately due*”. The concept is vague and uncertain and, as a consequence, the provisions could lead to unfairness for employers, employees, registered organisations, officers of registered organisations, and employees of registered organisations. As explained in paragraph 36 of the Explanatory Memorandum for the Bill, the concept has been adopted from the provisions in the *Criminal Code Act 1995* (Cth) which relate to the bribing of foreign officials (see Chapter 4—The Integrity and Security of the International Community and Foreign Governments, Division 70—Bribery of Foreign Public Officials). The concept is not included in the provisions in the *Criminal Code Act 1995* (Cth) that apply to the bribing of Commonwealth public officials (see Chapter 7 –

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The Proper Administration of Government, Division 141 – Bribery). The provisions relating to the bribery of Commonwealth public officials are a more appropriate model upon which to base the provisions of this Bill. As drafted, registered organisation officials would be exposed to much harsher penalties for giving and receiving “corrupting benefits” than Government Ministers and other Parliamentarians.

- Amend s.536D and s.536E to limit the provisions to officers of registered organisations, as defined in the *Fair Work (Registered Organisations) Act 2009*. All of the examples used in the final report of Heydon Royal Commission in support of the “corrupting benefits” recommendations relate to officers of unions, not employees of registered organisations. It is not appropriate to expose all employees of all registered organisations to the regime in Division 2 of the Bill, bearing in mind that all officers and employees are covered by criminal laws, such as those dealing with secret commissions, bribery, corruption and fraud.
- Reduce the maximum penalties for an individual of 10 years’ imprisonment and 5,000 penalty units (\$900,000), to a maximum penalty of 2,000 penalty units (\$360,000). This would align the maximum monetary penalty in the Bill with the maximum monetary penalty for the most serious contraventions of a registered organisation officer’s duties under the *Fair Work (Registered Organisations) Amendment Act 2016*, which passed through Parliament in November 2016. Criminal penalties are not appropriate or necessary because the legislation would not exclude the operation of criminal laws, such as those dealing with secret commissions, bribery, corruption and fraud (see s.536C in the Bill and paragraph 17 of the Explanatory Memorandum). Also, the *Fair Work (Registered Organisations) Amendment Act 2016* includes criminal penalties of up to 5 years’ imprisonment for serious breaches of officers’ duties. We note that the maximum term of imprisonment under the provisions of the *Criminal Code Act 1995* (Cth), that apply to the bribing of Commonwealth public officials (Division 141 – Bribery), is 5 years.
- Reduce the maximum penalty for a body corporate of 25,000 penalty units (\$4,500,000) to \$10,000 penalty units (\$1,800,000). This would align the maximum penalty in the Bill with the maximum monetary penalty for the most serious contraventions by a body corporate under the *Fair Work (Registered Organisations) Amendment Act 2016*.
- A statutory defence needs to be included in the Bill to protect registered organisations and employers in circumstances where the conduct is that of an employee or agent and the registered organisation or employer has taken reasonable steps to prevent the conduct.

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Schedule 1, Division 3 – Cash or in kind payments to employee organisations etc.

Ai Group supports appropriate legislative provisions to address the provision of inappropriate payments to unions.

However, the provisions of the Bill, as currently drafted, are too vague and could lead to risks and unfair outcomes for employers, employees, registered organisations, officers of registered organisations, and employees of registered organisations.

Subsection 536F(3) of the Bill includes the following appropriate exemptions:

- Payments by an employer to a union of union fees deducted from employees' pay, with the employees' consent (536F(3)(a));
- Benefits provided and used for the sole or dominant purpose of benefitting the defendant's employees (paragraph 536F(3)(b));
- Gifts or contributions that are deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law (paragraph 536F(3)(c));
- Payments made, at market value, for goods or services supplied to the defendant where that supply is in the ordinary course of the organisation's business and in relation to the ordinary course of the defendant's business (paragraph 536F(3)(d));
- Payments made under or in accordance with a law of the Commonwealth or a law of a State or Territory (paragraph 536F(3)(e));
- Benefits provided in accordance with an order, judgment or award of a court or tribunal (paragraph 536F(3)(f));
- A non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations (paragraph 536F(3)(g)).

The exemption in paragraph 536F(3)(b) is particularly important. This exemption would appear to exclude many "benefits" provided in day-to-day interactions between employers and union officials, including:

- The provision of photocopying, telephone and other similar facilities for use by a shop steward (who is a union officer and hence a "prohibited beneficiary" under the Bill) for the purposes of representing union members in the workplace;
- The provision of sandwiches and coffee at enterprise bargaining meetings;
- The payment of travel and accommodation costs for shop stewards to travel to a central location to negotiate a national or State-wide enterprise agreement;

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- Payment for a meal or coffee at a meeting between an employer and a union official held to discuss industrial issues affecting the employer's employees.

However, subject to what may be included in Regulations made under paragraph 536F(3)(g), the following common benefits provided by employers and employer associations to union officials would appear to be potentially prohibited under the Bill, as currently drafted:

- Numerous benefits provided by an employer to an employee shop steward (who is a union officer and hence a "prohibited beneficiary" under the Bill) in the ordinary course of the employment relationship, beyond award and legislative entitlements;
- Training leave provided to a union shop steward (who is a union officer) by an employer for the purposes of attending a union training course, other than leave provided in accordance with an award or enterprise agreement;
- 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.
- If a senior Commonwealth official had a meeting in the relevant Government Department / Agency's offices at 1.00pm with the National Secretary of the CPSU (a union which is eligible to represent Government employees) to discuss policy matters, and the Government provided some sandwiches and coffee, this "benefit" would appear to not be covered under any of the exemptions.
- If the Chief Executive of Ai Group had a meeting over lunch or dinner at a restaurant with the National Secretary of the AMWU (a union that is eligible to cover Ai Group's printing employees) to discuss industry issues, and Ai Group paid for the meal, 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.

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- 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.

The following amendments should be made to the Bill:

- The following additional exclusions need to be added:
 - 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.
- The criminal penalties should be removed from the Bill. Criminal penalties are not appropriate or necessary because the legislation would not exclude the operation of criminal laws, such as those dealing with secret commissions, bribery, corruption and fraud (see s.536C in the Bill and paragraph 17 of the Explanatory Memorandum). Also, the *Fair Work (Registered Organisations) Amendment Act 2016* includes criminal penalties of up to 5 years’ imprisonment for serious breaches of officers’ duties.
- A statutory defence needs to be included in the Bill to protect registered organisations and employers in circumstances where the unlawful conduct is that of an employee or agent and the registered organisation or employer has taken reasonable steps to prevent the conduct.

Schedule 2 – Amendments relating to disclosure by organisations and employers

Ai Group strongly supports the provisions of Schedule 2 in the Bill which would implement recommendation 48 of the Heydon Royal Commission. Recommendation 48 addresses a key area of concern that Ai Group raised throughout to the Royal Commission and made a number of detailed submissions about.

As referred to earlier in this submission, unions are deriving very lucrative and inappropriate revenue streams from the contributions made by employers to worker entitlement funds (e.g. various construction industry redundancy funds such as Incolink and PROTECT) and from insurance products which employers are coerced to purchase at inflated prices. Typically, unions insist that

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the obligation to contribute to these funds and to purchase these insurance products are included in enterprise agreements. The enterprise agreements often reflect industry-wide pattern agreements that unions negotiate with some State-based employer associations, or groups of employers. (Note: Ai Group does not negotiate or support industry-wide pattern agreements).

With the exception of the Australian Construction Industry Redundancy Trust (**ACIRT**), construction and electrical contracting industry redundancy funds regularly distribute surplus income back to unions and some employer associations (not Ai Group). This is highly inappropriate. The money paid to a redundancy fund is contributed by individual employers for the benefit of individual employees. It is not contributed for the benefit of unions or employer associations. These practices need to be stamped out but, in the meantime, the bargaining representatives that negotiate these agreements need to disclose to the relevant employers and to their members the benefits that they are receiving from the enterprise agreements that they are encouraging their members to enter into.

With regard to the income protection insurance products referred to in many enterprise agreements, typically these products are much more costly for the employer and provide fewer benefits to the employees than other insurance products readily available in the market. However, because of the very substantial payments made to the unions by the relevant insurer or broker, the unions typically refuse to accept an employer's offer to provide equivalent or better benefits to employees through an alternative insurance provider (e.g. through an industry superannuation fund or through the insurance company which the employer is using for other types of insurance). Employers have advised Ai Group that they can purchase income protection insurance for as little as 1/5th of the cost of the insurance products that the unions force them to purchase, while providing more generous insurance benefits to employees. This highlights that unions and the insurance companies that they are aligned with are reaping huge, inappropriate financial rewards at the expense of employers, employees and consumers (that purchase the businesses' products and services at consequently higher prices).

The provisions of Schedule 2 of the Bill are very important and need to be implemented without delay.

Conclusion

The Bill contains important reforms that implement three recommendations (40, 41 and 48) of the Heydon Royal Commission.

Some important changes are needed to the Bill to ensure fairness to employers, employees, registered organisations, officers of registered organisations, and employees of registered organisations, as set out in this submission.

We urge the Committee to recommend that the Bill is passed with the amendments proposed by Ai Group.

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In addition to the three recommendations dealt with in the Bill, it is vital that numerous other worthwhile recommendations of the Heydon Royal Commission are implemented without delay, including those referred to on pages 4 and 5 of this submission.