



13 April 2017

Committee Secretary
Senate Education and Employment Committees
PO Box 6100
Parliament House
Canberra ACT 2600

By email: eec.sen@aph.gov.au

Dear Sir/Madam

SUBMISSION ON FAIR WORK AMENDMENT (CORRUPTING BENEFITS) BILL 2017

This submission has been prepared by the Industrial Law Committee of the Law Council's Federal Litigation & Disputes Resolution Section (**the Committee**).¹ The Committee is grateful to have the opportunity to provide feedback on the Fair Work Amendment (Corrupting Benefits) Bill 2017 (Cth) (**the Bill**).

The Committee notes that the Bill has two proposed operations, the first concerning corrupting benefits (proposed Part 3-7) and the second concerning disclosure of financial benefits during the course of enterprise bargaining (see proposed ss 179-180.).

Schedule 1 – Amendments Relating to Corrupting Benefits

Giving, receiving or soliciting corrupting benefits

The first operation of the Bill is to prohibit the 'giving, receiving or soliciting' of corrupting benefits. It is noted in the Explanatory Memorandum that the insertion of the new Part 3-7 into the *Fair Work Act 2009* (Cth) (**FW Act**) (particularly ss 536D and 536E) is designed to address concerns raised during the Royal Commission into Trade Union Governance and Corruption with examples of benefits being offered and/or provided, usually by employers, in order 'to achieve 'industrial peace', avoid threatened conduct that would be detrimental to the employer or obtain a benefit at the expense of the employer's employees or competitors'.² The Committee is supportive of this objective. However, the Committee does raise the following concerns with the amendments proposed under sch 1 of the Bill.

¹ The Law Council of Australia is a peak national representative body of the Australian legal profession. It represents the Australian legal profession on national and international issues, on federal law and the operation of federal courts and tribunals. The Law Council represents 60,000 Australian lawyers through state and territory bar associations and law societies, as well as Law Firms Australia.

² Explanatory Memorandum, Fair Work Amendment (Corrupting Benefits) Bill 2017 (Cth) [20].

As a general proposition, whenever the legislature creates new offences, it should take care and use precise terms to ensure that it does not criminalise conduct that was not intended to be caught by the proposed provisions.

The touchstone of the proposed Part 3-7 is the making or offering of a benefit to another person 'with the intention of influencing' that person to 'perform their duties or functions **improperly**'. No guidance is supplied either in the Bill or the Explanatory Memorandum, as to the definition or criteria of the word 'improperly'.

There is also little guidance on the related term '**legitimately due**' (see s 536D(5) and s 536D(6)). However, the Committee does note paragraph 36 of the Explanatory Memorandum which emphasises that 'it will not be sufficient for a defendant to claim that providing a benefit which results in the defendant receiving an advantage is 'standard practice' or that such behaviour is frequently engaged in by other parties'.

Some clarity is provided in s 536D(4) which makes it clear that the questions of what is improper and whether an advantage would be 'legitimately due' are questions for the trier of fact. However, s 536D(3) significantly complicates the interpretation of these terms by providing that the defendant's intention does not need to be 'in relation to a particular registered organisations officer or employee' or in relation to an official '*performing or exercising duties, functions or powers in a particular way*'. It is difficult to see how the test of requisite intention is to be ascertained, given the apparent indication that the defendant's intention might be as little as a hope that giving something to an official might influence them to perhaps formulate some unspecified idea to do something unstated.

While other legislation contains the word 'improper', it is clear from several recent cases that there will be significant debate on the meaning of the term.³ While it is tolerably clear what sort of conduct might be 'improper' in relation to accounting for legal fees (see *Batrouney v Forster* [2016] VSCA 80) or in obtaining evidence (see *Director Consumer Affairs Victoria v Good Guys* [2016] FCA 22), it is less obvious that it would be clear what constitutes an 'improper' performance of a union official's functions.

In some circumstances it may be quite clear that conduct of a union official meets the definition of improper. For example, if an employer gave an official plane tickets for a holiday on the understanding the official would ensure that there is no industrial action or demand for a pay increases at a workplace for a year, then the section would be (rightly) engaged. However, other circumstances may be less clear. For example, would the section be engaged in circumstances where an employer agreed to fund a training programme (also supported by the relevant union) in the hope that a union official would drop their extant claim for the inclusion in the proposed enterprise agreement of provisions concerning rates of pay for apprentices? What if the employer had a habit of making an annual donation to a particular charity or training programme, but in a particular year ensured they informed the union how much they had donated, in the hope that this might create a good atmosphere in which to commence bargaining? Would the section be engaged in these circumstances?

Section 183 of the *Corporations Act 2001* (Cth) and its interpretation by the courts provides some possible clarity on the meaning of impropriety. Section 183 relates to directors, officers

³ See eg, consideration of the term 'improperly' where it appears in the *Legal Profession Act 2004* (Cth) in *Batrouney v Forster* [2016] VSCA 80, [230] and where it appears in the *Evidence Act 1995* (Cth) in *Director Consumer Affairs Victoria v Good Guys* [2016] FCA 22 (in the context of improperly obtained evidence).

and employees 'improperly using information'. In relation to this provision impropriety is taken to mean a breach of the standards of conduct expected by reasonable people, with knowledge of the duties, powers and authority of the relevant position and the circumstances of the case.⁴

That approach to the interpretation of the word 'improper' has been applied to s 500 of the FW Act. The section provides that a permit holder (a union official) must not 'intentionally hinder or obstruct a person, or otherwise act in an improper manner' when exercising or seeking to exercise rights under Part 3-4 of the FW Act which deals with a permit holder's right of entry.⁵

Those authorities provide some guidance as to a broad standard to be used by the Courts. However, in circumstances where the duties, powers and authority of union officials are governed by a complex suite of provisions in the FW Act, and other legislation including state occupational health and safety laws, it may provide greater clarity to make express provision in the FW Act in relation to the meaning of the term 'improperly'.

Recommendation

The Committee recommends that clarification of the meaning of the term 'improperly' be provided through the Bill and by a supplementary explanatory memorandum.

Giving cash or in kind payments provisions

As to the giving cash or in kind payments provisions (ss 536F and 536G), it seems that s536F(5)(d) captures in the term 'prohibited beneficiaries', donations by employers to political parties and charities. These provisions are subject to strict liability (see s536F(1)(c) and s536F(2)) which means that no *mens rea* element is relevant. As a result of the strict liability nature of these provisions, it would not matter why an employer made a donation, unless one of the exceptions in s 536F(3) were engaged (such as, the donation would be for the sole or dominant purpose of benefitting employees). It is significant that donations to the Royal Children's Hospital or an anti-domestic violence program at the request of the union, for example, would not pass this test.

Recommendation

The Committee recommends that the strict liability nature of ss 536F and 536G be reconsidered to ensure that the proposed amendments do not go further than intended.

⁴ See eg, *R v Byrnes and Hopwood* (1995) 183 CLR 501, 514-5 (Brennan, Deane, Toohey and Gaudron JJ); *Hart Security Australia Pty Limited v Boucouzis* [2016] NSWCA 307, [84]-[85] (Meagher JA); *HSU v Jackson (No 4)* [2015] FCA 865, [113] (Tracey J).

⁵ See eg, *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* [2017] FCA 197, [285] (North J) ('Castlemaine Site Case').

Schedule 2 - Amendments relating to disclosure by organisations and employers

The second operation of the Bill, is the requirement of disclosure during the course of enterprise bargaining by bargaining representatives (employers and organisations) of financial benefits which flow to the bargaining representatives as the result of entry into a particular term(s) of the proposed enterprise agreement (see proposed ss 179, 179A and 180(4A)-(4C)). The Committee does not have any concerns with the proposed sections requiring transparency and disclosure, and considers these amendments clear and appropriate.

Contact

The Committee would welcome the opportunity to discuss the submission further. Please contact Mr Ingmar Taylor SC, Chair, Industrial law Committee at
in the first instance.

Yours sincerely

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