

Labor Senators' Additional Comments

1.1 Labor Party senators broadly agree with the objectives of the bill. Serious misconduct should attract appropriate penalties, and Labor senators agree that, as their members' representatives, officials of registered organisations should be held to a high moral standard. Corrupt behaviour – where it exists – should not be tolerated, and the introduction of strong penalties will be a positive step in eliminating it. It is for these reasons that Labor senators' remarks take the form of additional comments, rather than a dissenting report.

1.2 Notwithstanding Labor senators' support for the bill, the committee received clear and repeated evidence that some amendments were necessary. These shortcomings were identified in evidence from both employers and employees. For example, Ai Group submitted that:

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.¹

1.3 In summary, some parts of the bill lack sufficient definitional clarity, while other provisions may give rise to considerable, quite possibly unintended consequences not only for registered organisations, but also employers.

1.4 Having considered the evidence put to the committee, Labor senators consider that some provisions of the bill as it stands could serve to hobble its effective administration, and potentially hinder successful prosecutions. The suggested amendments have been drafted to strengthen the operation of the bill, and bring more certainty to those who would be subject to it.

1.5 Accordingly, Labor senators consider that the bill should be amended to address the following significant problems.

Giving, receiving or soliciting corrupting benefits

1.6 The 'corrupt' behaviour proposed in the offences is threefold: improperly performing the duties of an official of a Registered Organisation, exercising powers or functions under the FWA or Registered Organisations Act improperly, and giving an advantage of any kind, which would not be legitimately due, to the employer.

1.7 As drafted, the prohibition on giving an advantage 'not legitimately due' would not have any connection to 'the affairs of the organisation or branch' of the registered organisation, as was recommended by the Heydon Royal Commission. This limb of the offence appears to have been lifted from the bribery of foreign officials offence in the Criminal Code, but not appropriately amended.

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

1.8 The remedy is to require that the advantage must be ‘in connection with the affairs of the organisation or branch, including the affairs of the members of the organisation or branch’.

Recommendation 1

1.9 Labor senators recommend the amendment of proposed subparagraphs 536D(1)(b)(iii) and 536D(2)(b)(iii) to require that an advantage must be ‘in connection with the affairs of the organisation or branch, including the affairs of the members of the organisation or branch’.

1.10 The bill would impose no requirement that conduct be engaged in ‘dishonestly’. Instead, it would require that the giving or receiving be carried out with the intention to influence an officer of a registered organisation to act ‘improperly’. The bill contains no definition of ‘improperly’, only that it is a matter for the trier of fact. In contrast, the existing Criminal Code offences of bribing and providing corrupting benefits to a Commonwealth public official require dishonesty, which is defined.

Recommendation 2

1.11 Labor senators recommend that these proposed new offences be amended so as to make them consistent with the Criminal Code offences, and to define the term ‘improper’.

1.12 The proposed test for the employer offering or paying a bribe is an ‘intention to influence’ a registered organisation official to act improperly, while the proposed test for the registered organisation official asking for or receiving the bribe is an intention that the offeror believes that the official ‘will tend to be influenced’ to act improperly. The Government’s justification for these different tests is wholly inadequate. Labor senators consider that the ‘tend to influence’ test should be removed, and the relevant provisions be amended to be consistent with the drafting and penalties of the existing bribery of Commonwealth officers and corrupting benefits offences in the Criminal Code (sections 141.1 and 142.1).

Recommendation 3

1.13 Labor senators recommend that proposed paragraph 536D(2)(b) be amended to remove the proposed ‘tend to influence’ test, and make it consistent with the drafting and penalties of the existing bribery of Commonwealth officers and corrupting benefits offences in the Criminal Code (sections 141.1 and 142.1).

Making cash or in kind payments to a registered organisation

1.14 The bill would create a strict liability offence, where the giving or receiving of cash or in kind payments between an employer and registered organisation is an offence, unless it falls within the enumerated exceptions. Given that the stated purpose of this offence is to prevent corrupt or illegitimate payments, the offence should have a fault element of dishonesty.

Recommendation 4

1.15 Labor senators recommend that the proposed new offences in proposed subsection 536F(1) be amended to include a fault element as a requirement for the offences to be made out.

1.16 It is not currently clear whether proposed section 536F would make it an offence for registered organisations to request and receive payment from employers of wages or entitlements owed to ex-employees. Similarly, that provision may make it an offence for registered organisations to negotiate the settlement of disputes with employers before court proceedings are commenced.

Recommendation 5

1.17 Labor senators recommend that registered organisation requests for, and receipt of, payments from employers of wages or entitlements owed to ex-employees, and the negotiation and settlement of disputes with employers before court proceedings are commenced, be enumerated exceptions under proposed subsection 536F(3).

Disclosure requirements

1.18 The bill would require registered organisations to disclose any potential benefits from an enterprise agreement that may flow to an extended and unreasonable number of people and groups. Accordingly, 'related party' should be defined more tightly than the bill does in its present form.

Recommendation 6

1.19 Labor senators recommend that the definition of 'related party' under the proposed disclosure requirements be amended to specify the registered organisation, all branches of the organisation, any entity controlled by the organisation, and the officers and spouses and other family members of the organisation or branch of the organisation that is the bargaining representative.

Conclusion

1.20 Given the flaws in the bill identified by both employer and employee representatives, the amendments proposed are a reasonable package of improvements. None of them could be said to thwart the intention of the bill or to render the offences impotent. On the other hand, they do address some of the overreach, whether intentional or not, in the drafting of the offences which have potentially significant consequences for registered organisations and employers.

Senator Gavin Marshall

Deputy Chair

