

**Senate Education and Employment
Legislation Committee**

Fair Work Amendment (Corrupting Benefits) Bill 2017

**SUBMISSION BY THE
CONSTRUCTION, FORESTRY, MINING AND ENERGY UNION**

6 April, 2017

Introduction

1. On 22nd March 2017, the Turnbull Government introduced the *Fair Work Amendment (Corrupting Benefits) Bill 2017* (CB Bill) into the Parliament. The Bill amends the *Fair Work Act 2009* (FW Act). It does this by inserting a new Part 3-7 into Chapter 3 of the FW Act.
2. The substance of the CB Bill can be conveniently divided into three parts and summarised as follows:
 - (i) A prohibition on giving, receiving or soliciting a ‘corrupting benefit’. Criminal penalties apply.
 - (ii) A prohibition on employers providing, or offering or promising to provide, any cash or in-kind benefits to unions or those connected to unions such as their officers/employees. A corresponding prohibition on unions/officers/employees receiving, soliciting or agreeing to obtain such cash/in-kind benefits. Criminal penalties apply.
 - (iii) A requirement that a bargaining representative for a proposed agreement disclose any financial benefits that they or a person/body connected with them could or would reasonably be expected to derive because of a term of an enterprise agreement. Civil penalties apply.
3. The CFMEU supports appropriate criminal sanctions for those found to have engaged in the payment or receipt of benefits that are designed to improperly influence people who hold important positions in the community. This includes holders of public office such as politicians, as well as trade union and corporate office holders. The proper place for those laws is the criminal law. Ad hoc additions to industrial legislation, which is not a criminal jurisdiction, is poor law-making.
4. The focus of this submission is the new criminal offences proposed in Divisions 2 and 3 of the CB Bill.

Background

5. The Government has said the CB Bill is the response to Recommendations 40, 41 and 48 of the Trade Union Royal Commission (TURC) and is designed to promote ‘better governance of trade unions’.
6. However, the Government has used the CB Bill as a convenient political weapon against the Leader of the Opposition in the Parliamentary debate and in the media. They have done this by linking the Bill to the actions of the Leader of the Opposition when he was the National Secretary of the Australian Workers’ Union and by referring to

TURC case studies that included an examination of interactions between the AWU and certain employers.

7. That the CB Bill can and is being used in this way is no coincidence. The Coalition Government's stated concern to improve union governance is totally disingenuous. The Coalition shows no interest in the efficient and effective operation of trade unions or the interests of trade union members, except where they can use the issue to damage political opponents.

Discussion

The Rights of Union Members and Trade Unions

8. The Statement of Compatibility with Human Rights (attached to the Explanatory Memorandum and endorsed by the Minister), asserts that the new criminal sanctions in the CB Bill are aimed at "*improving the integrity and democratic functioning of registered organisations and ensuring that registered organisations are focussed on representing the interests of their members rather than the discrete interests of the organisation or its officers or employees.*" (emphasis added)
9. This, in turn, is said to promote "the right of every individual to enjoy just and favourable conditions of work" and to "advance the right to freedom of association".
10. By operation of the *Fair Work (Registered Organisations) Act* 2009, trade unions are incorporated bodies and have a legal personality. Trade unions as legal entities also have rights and obligations, which are separate and distinct from the rights and obligations of individual members and the sum of the members that make up the organisation.
11. However, the rights and interests of union members are also intertwined with the rights that are exercisable by their trade unions. They are not mutually exclusive. Trade unions are the manifestation of the exercise of the right to freedom of association of individual members. Trade unions are the means by which members advance their individual and collective industrial interests. The CB Bill proceeds on the flawed basis that the rights of trade unions as voluntary representative bodies of workers can be dispensed with or overridden without any implications for the rights of the workers themselves.
12. In many respects, the CB Bill represents an attack on the representative nature of trade unions and therefore diminishes, rather than advances, the right of workers to freedom of association.

Division 2 - 'Corrupting Benefits'

13. The prohibition on the payment and receipt of 'corrupting benefits' in the CB Bill is said to be designed to stop benefits being paid which are intended to influence a union officer/employee from acting improperly.
14. 'Corrupting benefits' are not defined. Instead, any 'benefit' (which includes any advantage and is not limited to property) paid with the intention of influencing a union officer/employee to act improperly or give an advantage of any kind to the giver, is an offence.
15. Similarly, any officer/employee who receives, requests or agrees to receive or obtain a benefit with the intention that, or the intention that the provider believes that, the receipt etc., will tend to improperly influence an officer/employee, is guilty of an offence.
16. In the case of the prohibition on the giving of a 'corrupting benefit', the benefit can be given (or offered/promised) to any person whatsoever. It does not necessarily have to go to the union or union officer/employee whom the giver intends to influence, or even anyone associated with or connected to that officer/employee.
17. In the case of the request for or receipt of a benefit, the fault element is that the defendant acts with the intention that, or the intention that the provider believes that, the receipt or expectation thereof will tend to influence *a* (but not any particular) union officer/employee who may or not also be the defendant. There is no need to prove that the provider of the benefit actually believed anything in relation to the benefit.
18. In either case, it is not necessary that any person actually be influenced in order to establish the offence. The maximum penalties for individuals are 10 years' imprisonment or a penalty of \$900,000, or both.

Concurrent Operation of State and Territory Laws

19. Division 1 of the new Part 3-7 provides that the proposed new sections will operate concurrently with existing State and Territory laws. This means that existing State and Territory laws, including criminal laws dealing with secret commissions, corrupt benefits, or rewards or bribes, may apply in addition to the measures in the CB Bill dealing with similar conduct. This is so even where the penalties, fault elements or defences are different in those State/Territory laws (s. 536C(3)).
20. Volume Five of the TURC Final Report noted that every State and Territory has laws criminalising the giving or taking of secret commissions, corrupt commissions, corrupt benefits, corrupt rewards or bribes.¹ The Criminal Code (Cth) deals with the bribery of

¹ *Criminal Code* 2002 (ACT), ss 356-357 (bribes and corrupting benefits); *Crimes Act* 1900 (NSW), s 249B (corrupt commissions or rewards); *Criminal Code* (NT), s 236 (secret commissions); *Criminal Code* (Qld), ss

Commonwealth public officials. The penalty in New South Wales, Queensland and Western Australia for these offences is seven years imprisonment.

21. The TURC report conceded that the solicitation or receipt of the payment by a union official which would tend to cause the official to exercise his or her duties improperly may give rise to criminal liability under these (State and Territory) laws. Likewise, the payment by an employer may give rise to criminal liability on the part of the employer.² However the Report went on to argue that the existing criminal law framework was inadequate for an industrial context.
22. The TURC report maintained that the existing laws are ineffective for a number of reasons. First, it said the laws differ across jurisdictions. If uniformity is desirable, then the laws should be properly aligned. Instead, the report recommended the creation of another version of the same offences to apply to one sector of the community only. It said those extra laws should be bolted on to the existing laws. Surprisingly the TURC report does not suggest that the problems attached to having different laws should be addressed as it was in the UK - that is, by enacting a single uniform piece of legislation - even though the UK approach was referred to in the report.
23. Second, there was an unconvincing argument that the laws are not suited to industrial circumstances, mostly because of some 'potential complexities' in applying agency concepts to unions and union officials. This argument is without substance. No authority is cited for the proposition. In fact, in the case that is referred to, the Full Court of the Victorian Supreme Court dismissed such an argument when it was raised on appeal.³ The report itself acknowledged that '(t)he solicitation or receipt of the payment by a union official which would tend to cause the official to exercise his or her duties improperly may give rise to criminal liability under these provisions. Likewise, the payment by an employer may give rise to criminal liability on the part of the employer.'⁴
24. Third, there was an argument that crimes in the nature of blackmail are difficult to investigate, though exactly how this makes a case for new laws is never explained. Next, an argument was put that people engaged in this conduct are adept at disguising it, though why they would be any more adept than those in the commercial or political world was not explained and is not at all clear.
25. State and Territory laws deal with corrupting benefits in a comprehensive way. To the extent real deficiencies can be identified they should be rectified. However, laws

442B–BA (secret commissions); *Criminal Law Consolidation Act 1935* (SA), ss 150 (bribes); *Criminal Code* (Tas), s 266(1) (secret commissions); *Crimes Act 1958* (Vic), s 176 (secret commissions); *Criminal Code* (WA), ss 529–530 (corrupt rewards)

² Page 249

³ *R v Gallagher* [1986] VR 219

⁴ Ibid

dealing with corrupting benefits should be retained in the general criminal law and apply uniformly to all members of the community.

26. There is no good reason why trade unions and trade union officials should face harsher criminal sanctions for receiving corrupting benefits than say those holding high public office or corporate office holders who engage in the same conduct. Nor should they face offences which include strict liability elements in those offences, whilst contraventions by other public office holders are dependent on the proof of the relevant *mens rea*.

27. Any fair minded analysis of the public record in relation to the corrupt conduct of corporations and public officials, including,

- the conflicted and corrupt advice provided by financial planners engaged by the Commonwealth Bank
- the payment of corrupting benefits by the Australian Wheat Board to Iraqi public officials, in breach of international sanctions against the Saddam Hussein regime
- the criminal activities of a number of agents and employees of Securrency in providing bribes to a number of foreign public officials to secure contracts; and
- the convictions of Mr. Obeid and Mr. Macdonald for misconduct in public office.

would lead to the conclusion that any attempt to address corrupting benefits should apply ‘across the board’. The approach in this Bill to address the issue of corrupting benefits in the industrial sphere exposes an ideological agenda not a real policy agenda.

Division 3 - Cash or In-Kind Benefits

28. The prohibition in the CB Bill on the giving of a cash or in-kind benefits to unions or prohibited union beneficiaries is of particular concern.

29. The approach taken in the Bill is essentially the one recommended by TURC, i.e.:

61. (c) Outside certain specific categories of payment there are few, if any, legitimate reasons why employers should make payments to unions or union officials.

(d) A blanket prohibition (except for certain categories of payment) will be easier to police and enforce. (Vol 5, Ch 4 Final Report – emphasis added)

30. This represents a peculiarly narrow view of the legitimate role of unions in their dealings with employers. That approach is carried through into the CB Bill. The

prohibition in the proposed Division 3 is extraordinarily wide and the exemptions are so limited that the combined effect is to criminalise conduct that is in no sense corrupt or improper.

The Offence

31. Section 536F of the Bill makes it an offence to provide or offer to provide a cash or in-kind payment (including goods and services) to a union, union officer/employee or spouse or entity controlled by that officer/employee, or other entity controlled by a union or a person with a 'prescribed connection' with the union.
32. The prohibition extends as far as a payment to a person or entity which bears no relation at all to a union but to whom the union, or even the spouse of a union employee, has requested or directed that a payment be made (s 536F(5)(d)).
33. There is a corresponding provision (s 536G) prohibiting the receiving, soliciting or agreeing to receive a cash or in-kind payment by unions or their officers or employees, where to make the payment would be a breach of the above section.
34. The intention with which the payment is made or requested is irrelevant to the offence. Even perfectly benign payments, or requests to employers for payments to certain charitable causes or fundraising events will be unlawful under these provisions.
35. The maximum penalty is 2 years imprisonment or a penalty of \$90,000, or both. There is no requirement to prove that there was an intention to influence the recipient.
36. These offences are ones of strict liability. There is no need for the prosecution to satisfy a court that the defendant intended to provide or request a particular benefit. But the defendant also bears an evidential burden to positively show that one or other of the limited exemptions apply (note to s 536F(3) and Explanatory Memorandum).

The Exceptions

37. There are a number of limited listed exceptions to this. These include:-
 - (i) payroll deductions
 - (ii) a benefit for the sole or dominant purpose of benefiting the employer's employees
 - (iii) certain tax deductible gifts
 - (iv) payments for goods and services at market value supplied to the employer in the ordinary course of the union's business
 - (v) payments pursuant to court orders

Issues

38. There are serious issues about a range of legitimate employer payments that may not be covered by the exceptions.
39. For example, unions are entitled to represent the industrial interests of persons other than employees. This includes subcontractors.
40. Rule 2(J) of the CFMEU's registered rules provides that the following are eligible for membership of the union:
- (J) ... independent contractors who, if they were employees performing work of the kind which they usually perform as independent contractors, would be eligible for membership of the Union, shall be eligible for membership of the Union.
41. Payments received by unions from employers on behalf of subcontract members, where for example, the union had negotiated the settlement of a contractual dispute on behalf of its subcontractor member/s, would fall within the prohibition and not be covered by any of the exemptions. The CB Bill would criminalise this activity. It would deprive trade unions of a legitimate representative role and deny a right of voluntary association to small subcontractors.
42. Likewise, payments by principal contractors to unions to cover the entitlements of workers not employed by them (for example employees of subcontractors who have disappeared or become insolvent, such as recently occurred at the Bendigo Hospital in Victoria), which are then dispersed to workers, would not be covered by the proposed exemptions.
43. Payments of this kind are regularly negotiated in the construction industry, an industry that accounts for more than 20% of all insolvency events and one that is plagued by the problem of 'phoenixing'. Payments are sought on the basis that the head contractors have received the benefit of the employees' work and should therefore pay for that benefit. For many smaller subcontractors, assistance in recovering disputed payments can mean the difference between remaining in business or not.
44. Potentially even payments to unions who recover entitlements recovered for ex-employees would amount to a criminal offence because this is not covered by the exemption in s 536F(3)(b).
45. One of the most basic functions of unions is to ensure that their members receive their lawful entitlements whether from their current or previous employers. The CFMEU is one of the most active unions in wages recovery action on behalf of those who have been underpaid by their former employers. The construction industry is notorious for employer non-compliance and underpayments. The Government's own regulator in the construction industry, the ABCC, does nothing to address this most basic industrial issue.

46. To criminalise the important work of unions here is to allow employers who do not comply with their lawful obligations to operate with impunity. That the government would contemplate introducing such a law in circumstances where corporate wage theft and underpayment of workers is rife defies belief.
47. Fundraising for certain charitable causes and payments made and sought will only be exempt from criminal sanctions where the gift or contribution comes within the scope of section 30-15 of the *Income Tax Assessment Act 1997* and is made to a designated deductible gift recipient and ‘used in accordance with the law’. On this last requirement, it is not obvious why a donor should have the exempt status of a contribution potentially undone by the use to which a recipient puts the donation.
48. Unions are active fundraisers for charitable causes, not all of which would necessarily qualify under this or other exemptions in s 536F(3). If workers and their union ‘passed the hat around’ to support the family of a co-worker killed in a workplace accident and asked the employer to match the contribution, this would be caught by proposed Division 3.
49. In the construction industry, a workplace fatality might result in a union request for a charitable donation to the deceased worker’s dependants by a principal contractor who is not necessarily the employer of the employee who has been killed, but who nonetheless owed a duty of care to the deceased under workplace health and safety legislation. Again, the prohibition would capture this legitimate benevolent request.
50. There are other legitimate situations in which unions ask employers to make payments to third parties. However, the definition of ‘prohibited beneficiary’ is extraordinarily wide and includes any entity to whom a union requests or directs that a cash or in kind payment be made (s 536F(5)(d)). Thus, any request for a payment to a third party will be caught unless one of the exemptions apply. This raises questions about employer sponsorship of union organised events, especially those with broad industry-wide objectives. For example a contribution to the costs of a fundraising dinner for the purpose of improving safety in the construction industry generally, as opposed to the safety of the employer’s employees specifically, which involves payment to a third party at the request of a union, would on the face of it, be caught and not fall within the exemptions.
51. The prohibition in Division 3 extends to payments to the very broadly defined ‘prohibited beneficiaries’ not just trade unions. However, one of the most important exemptions, which relates to goods or services supplied at market value in the ordinary course of business (ss (3)(d)) applies only to goods or service supplied in the ordinary course of the **organisation’s** business. It does not extend to goods and services supplied by a prohibited beneficiary. This means that entities with only a remote connection to a trade union would be unable to conduct the most basic commercial transactions with employers without infringing these provisions. An employer would be prohibited from making a payment to the spouse of a trade union employee conducting a legitimate

business, for goods or services supplied in the ordinary course by that business. Further, the employer would have no way of knowing what connection if any, a commercial entity had with a trade union.

52. The same situation applies in respect of payments to union-related/controlled entities, unless one or other of the exemptions applies.
53. Clearly this proposed Division severely curtails the demands and requests that unions can lawfully make of employers and in turn, the representative capacity of unions.
54. The Committee should recommend that the Bill not be passed in its current form. A proper process of consultation should occur, as outlined in the ACTU submission, to determine how these issues can be addressed in a measured, fair and apolitical way.