



**Australian Government**  

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**Department of Employment**

**Senate Education and Employment Legislation Committee**

**Inquiry into the**

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

**Submission of the**

**Department of Employment**

**April 2017**

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## Introduction

1. The Department of Employment welcomes the opportunity to make a written submission to the Senate Education and Employment Legislation Committee (the Committee) inquiry into the Fair Work Amendment (Corrupting Benefits) Bill 2017 (the Bill).
2. During the 2016 election campaign the Australian Government committed to implement recommendations made by the Royal Commission into Trade Union Governance and Corruption (Royal Commission) led by Commissioner John Dyson Heydon AC QC.<sup>1</sup> The Bill will implement recommendations 40, 41 and 48 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.

### **Recommendation 48**

The *Fair Work Act 2009* (Cth) be amended to require an organisation that is a bargaining representative to disclose all financial benefits, whether direct or indirect, that would or could reasonably be expected to be derived by the organisation, an officer of the organisation or a related entity as a direct or indirect consequence of the operation of the terms of a proposed enterprise agreement. A short, simple and clear disclosure document should be provided to all employees before they vote for an enterprise agreement.

3. The Bill will amend the *Fair Work Act 2009* (Fair Work Act) to:
  - ban corrupt and illegitimate payments made between employers and unions, and
  - require both employers and organisations that are bargaining representatives to disclose financial benefits they stand to gain as a result of an enterprise agreement before employees vote on the agreement.
4. This submission outlines the case for reform contained in the final report of the Royal Commission and provides details of the key measures in the Bill.

## The case for reform outlined by the Royal Commission into Trade Union Governance and Corruption

### Corrupting benefits

5. The Royal Commission found that the payment and receipt of corrupting benefits was widespread, and that such arrangements have no place in a lawful and democratic society. Commissioner Heydon found that the payment of corrupting benefits increases the cost of doing business and is anti-competitive, causes union officials to perform their duties, powers or

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<sup>1</sup> *The Coalition's commitment to fairness and transparency in workplaces*, 17 June 2016.

functions improperly, and reinforces a culture of lawlessness amongst unions which can adversely impact the broader Australian society (Final Report, Volume 5, pp 244-5).

6. The Royal Commission recommended that a federal corrupting benefits offence be enacted, and that employers be prohibited from making corrupting or other illegitimate payments to unions.
7. The Royal Commission found that corrupting benefits have been provided by employers to unions or their officials to secure industrial peace and to give employers a competitive advantage. For example, through its examination of numerous case studies, the Royal Commission found that:
  - Cleanevent paid the Victorian Branch of the Australian Workers Union (AWU) \$75,000 to maintain an enterprise agreement that removed penalty rates, overtime and shift loadings. The payments were detailed in a secret letter between the AWU and Cleanevent that was never disclosed to the cleaning workers. Level one casuals working at events were entitled to 176% more per hour under the award than under the enterprise agreement (Final Report, Volume 4, Chapter 10.2).
  - A number of New South Wales construction companies owned by Jianqiu Zhang paid the New South Wales branch of the Construction, Forestry, Mining and Energy Union (CFMEU) more than \$118,000 to avoid entering into an enterprise agreement with the union. The payments were disguised as donations for various charitable causes including safety industry dinners, picnic day sponsorship, 'Mates in Construction' and a 'Friends of Sinn Fein' speaking tour (Final Report, Volume 3, Chapter 7.3).
  - Winslow Constructors paid the Victorian branch of the AWU around \$200,000 and provided the union with lists of employee names who were secretly signed up to the union. In return the AWU provided Winslow with advance notice of terms of a competitor's enterprise agreement, giving Winslow a competitive advantage. The AWU hid the payments behind false invoices for 'OHS training', 'workplace inspections' and similar (Final Report, Volume 4, Chapter 10.8).
8. The conduct referred to in the case studies outlined above has not resulted in criminal convictions. The Bill would capture this type of behaviour. Some of the case studies examined by the Royal Commission that deal with the payment of corrupting benefits are at Attachment A.
9. The Royal Commission considered the various state criminal laws concerning secret commissions and the potential complexities in applying these laws to registered organisations. While the *Criminal Code Act 1995* (Cth) outlaws bribery of foreign public officials and Commonwealth public officials, there is no Commonwealth criminal law outlawing bribery between employers and registered organisations. Each Australian state and territory jurisdiction outlaws blackmail or extortion and criminalises the giving or receipt of secret commissions, corrupt commissions, corrupt benefits, corrupt rewards or bribes. As discussed below, these laws are often not well adapted to prosecuting employers who provide, and organisations who accept, corrupting benefits. Further, the law that applies will depend upon which state an offence is committed in. For these reasons it is appropriate that the Commonwealth enact standalone criminal corrupting benefits offences in the Fair Work Act. These offences apply equally to both parties in each corrupting transaction.
10. The Royal Commission found that the criminal laws dealing with secret commissions differ across state and territory jurisdictions and are difficult to apply to officers of registered organisations. Many of the state and territory laws apply in respect of 'agents', which will not necessarily capture a transfer between an employer and a union official. Where a union official might be an agent, it is unclear how current laws will apply to them as they can be

simultaneously the agent for the union, members of the union overall and a specific class of union members (Final Report, Volume 5, p 256). That makes it difficult to determine who the principal is, and therefore whether the payment is 'secret', how the agent is required to act, and whether there is a relationship that warrants the application of the provisions.

## **Disclosure by employers and organisations that are bargaining representatives**

11. The Royal Commission uncovered numerous examples where enterprise agreements contained terms requiring employers to contribute to certain funds in which an employer organisation or union held a pecuniary interest that was not disclosed to workers.
12. The Royal Commission recommended that an organisation that is a bargaining representative be required to disclose all financial benefits derived from the terms of a proposed enterprise agreement.
13. By way of example, the Royal Commission found that in 2013 and 2014 the Australian Capital Territory branch of the CFMEU received over \$1.1 million in revenue through clauses in 'pattern' enterprise agreements that required employers to make payments to relevant entities associated with the CFMEU ACT that were not disclosed to workers. The Royal Commission found that employees were worse off under some of the clauses (Final Report, Volume 3, Chapter 6.6).
14. The Royal Commission also found that since 2003 the New South Wales branch of the CFMEU has received, and continues to receive, significant financial benefits by way of payments and commissions from the UPlus Scheme, an income protection and workers compensation top-up scheme promoted by the CFMEU NSW in its enterprise agreements. Workers were not informed of this arrangement.
15. The Bill differs from the recommendation made by the Royal Commission in that it extends the disclosure obligations to employers. This will allow employees to make an informed decision when voting on an enterprise agreement.

## **Key measures in the Fair Work Amendment (Corrupting Benefits) Bill 2017**

### **Giving, receiving or soliciting corrupting benefits**

16. The Bill will make it a criminal offence to give, offer or cause a benefit to be given or offered to another person with the intention of influencing an officer or employee of a registered organisation:
  - to perform their duties, powers or functions improperly, or
  - to give the person providing the benefit, or someone associated with the provider, an illegitimate advantage.
17. It will also be a criminal offence to receive, agree to receive or request a corrupting benefit.
18. The penalties are the same for both offences, so both parties to a corrupting benefits transaction will face the same consequences. The maximum penalty for an individual will be 10

years' imprisonment, a \$900,000 fine (5,000 penalty units) or both. The maximum penalty for a body corporate will be a \$4.5 million fine (25,000 penalty units).<sup>2</sup>

19. The provisions are largely based on those proposed by the Royal Commission, with minor adjustments to ensure consistency with the Fair Work Act framework and to provide greater clarity where Commissioner Heydon identified some further consideration was warranted. For example, the penalties take into account that the Royal Commission recommended adopting the penalties in section 70.2 of the Criminal Code for bribery of foreign officials, but the penalties in the Bill have been adjusted to align with other penalties in the Fair Work Act.

### **Giving, receiving or soliciting a cash or in kind payment**

20. The Bill will make it a criminal offence for a national system employer (other than a union) to provide a cash or in kind payment to a union or its prohibited beneficiaries, in circumstances where the employer employs someone who is, or is entitled to be, represented by the union. There are exceptions for specified legitimate payments.
21. As the provisions capture illegitimate payments between employers and unions, unions who are national system employers will not be covered by this provision in their capacity as employers.
22. It will also be a criminal offence to receive, agree to receive or request a prohibited cash or in kind payment if, in providing that payment, the other party would have committed an offence under the provisions of this Bill.
23. The offence will not apply where an employer provides a payment to a union that is:
- for membership fees made by a legitimate wages deduction authorised by the employee
  - provided and used to benefit the employer's employees
  - a genuine gift that is tax deductible
  - for goods and services supplied at market value and supplied in the ordinary course of the organisation's business and the defendant's business
  - made in accordance with an Australian law
  - made in accordance with a court or tribunal order, judgment or award, or
  - a non-corrupting payment provided in accordance with the regulations.
24. A prohibited beneficiary will include an entity controlled by the union, an officer or employee of the union (or their spouses or entities controlled by them), and a person or entity to whom the organisation or a prohibited beneficiary directs that a payment be made.
25. The penalties are the same for both offences, so both employers and unions will face the same consequences. The maximum penalty for an individual will be two years' imprisonment, a \$90,000 fine (500 penalty units) or both. The maximum penalty for a body corporate will be a \$450,000 fine (2,500 penalty units).<sup>3</sup>
26. The penalties are lower than those that apply to the corrupting benefits offences (set out at paragraph 18 of this submission). This was recommended by the Royal Commission because of the nature of the offence, being that there is no requirement to prove there was a particular intention in making the payment.

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<sup>2</sup> If the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from \$180 to \$210 on 1 July 2017.

<sup>3</sup> If the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from \$180 to \$210 on 1 July 2017.

27. Minor adjustments have been made to the draft provisions included in the Royal Commission's final report to ensure that the penalties for the new offences align with the current Fair Work Act framework.

## **Disclosure by employers and organisations that are bargaining representatives**

28. The Bill will require bargaining representatives for a proposed enterprise agreement to disclose financial benefits that the representative, or someone reasonably connected with the representative, stands to gain from a term of the proposed agreement. The disclosure requirements apply both to organisations that are bargaining representatives and to employers.

29. Financial benefits that do not need to be disclosed are financial benefits that are:

- payable to an individual as an employee covered by the agreement; or
- payment of a membership fee for membership of an organisation; or
- received or obtained in the ordinary course of an employer's business; or
- prescribed by the regulations.

30. The disclosure requirements apply to employers and registered organisations that are bargaining representatives. It is intended that the disclosure document will be as short, simple and clear as possible.

31. A union or organisation acting as a bargaining representative for an employer will be required to take all reasonable steps to give the disclosure document to the employer within a certain period of time. The employer must then take all reasonable steps to provide an organisation's disclosure document, as well as their own disclosure document, to employees before they vote on the proposed agreement.

32. Failure to comply with these requirements will not preclude the approval of the agreement, but penalties will apply. The maximum penalty will be 60 penalty units (currently \$10,800) for an individual and 300 penalty units (currently \$54,000) for a body corporate.<sup>4</sup>

## **Conclusion**

33. The Department appreciates the opportunity to provide a submission to this inquiry and is available to discuss the submission at a hearing of the Committee.

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<sup>4</sup> If the Crimes Amendment (Penalty Unit) Bill 2017 passes both houses of Parliament, Commonwealth penalty units will increase from \$180 to \$210 on 1 July 2017.

ATTACHMENT A

**Key examples of corrupt and secret payments identified by the Royal Commission into Trade Union Governance and Corruption**

In Chapter 4, Volume 5 of the Royal Commission's Final Report, Commissioner Heydon identified a number of case studies which examined whether corrupt payments had been made. The Royal Commission made the following findings:

- **Sapiem paid \$1,000,000 at the request of the MUA** at the same time it was negotiating the use of foreign-crewed tugboats, rather than domestic, on the Blacktip gas field project in Darwin. The payment was made to MUA's relevant entity, Maritime Employees Training Limited. (Final Report, Ch 1, Vol 2)
- **SapuraKencana paid more than \$350,000 at the request of the MUA** at the same time it was planning to use foreign crewed tugs. (Final Report, Ch 1, Vol 2)
- **Dredging International paid almost \$1 million at the request of the MUA** apparently as part of a deal to finalise an enterprise agreement. (Final Report, Ch 1, Vol 2)
- **Van Oord paid over \$1 million at the request of the MUA** to avoid industrial disruption. (Final Report, Ch 1, Vol 2)
- **Thiess-Hochtief paid \$100,000 to the Building Trades Group of Unions Drug and Alcohol Committee** (an entity controlled by the CFMEU) while it was constructing the Epping to Chatswood Rail Link in Sydney, apparently for industrial peace. The payment was falsely invoiced as being for 'drug and alcohol safety training' but was siphoned into the CFMEU's general account. (Final Report, Ch 7.4, Vol 3)
- **Underworld figure George Alex made regular cash payments of \$2,500 to an official of the CFMEU NSW** to ensure favourable treatment of Mr Alex's companies that were repeatedly involved in phoenixing, leaving workers with unpaid wages and entitlements. (Final Report, Ch 7.2, Vol 3)
- **Senior Mirvac executives provided around \$150,000 worth of free building work on then CFMEU Queensland President David Hanna's house** in Cornubia, Queensland in order to secure industrial peace and otherwise favourable treatment by the CFMEU. Mirvac disguised the work by inflating invoices from subcontractors on their existing Orion Shopping Centre Project. (Final Report, Ch 8.1, Vol 3)
- **A number of NSW construction companies owned by Jianqui Zhang paid the CFMEU NSW more than \$118,000** to avoid entering into an enterprise agreement with the union. The payments were disguised as donations for various charitable causes including safety industry dinners, picnic day sponsorship, 'Mates in Construction' and a 'Friends of Sinn Fein' speaking tour. (Final Report, Ch 7.3, Vol 3)
- **A number of Canberra construction companies paid a CFMEU ACT organiser more than \$210,000** to win construction work in Canberra. The CFMEU denied knowledge of the payments, however did not report these allegations to any authority and paid the organiser a generous 'redundancy payment' when he quietly resigned from the union. (Final Report, Ch 6.2, Vol 3)



- **Thiess Contractors paid the AWU Workplace Reform Association more than \$400,000** in return for good relations with the union. The payments were fraudulently siphoned into a slush fund controlled by Bruce Wilson, who used the money for his personal benefit. (Interim Report, Ch 3.2, Vol 1)
- **Thiess John Holland paid AWU Victoria \$300,000 plus GST** to ensure minimal industrial disruption while they built the Eastlink freeway extension in Melbourne's eastern suburbs. The AWU issued false invoices to disguise the payments as 'training', 'back strain research', 'AWU magazine advertisements', 'forum tickets' and 'conference sponsorships' - but none of these benefits were actually provided. The payments were not disclosed to AWU members or employees. (Final Report, Ch 10.3, Vol 4)
- **ACI Operations paid AWU Victoria around \$500,000** to secure industrial peace while they laid workers off at their Spotswood glass manufacturing factory. The AWU invoiced the payments as 'paid education leave', but the payments were predominantly used to offset a loan to renovate the union's Victorian office and for other general union costs. (Final Report, Ch 10.5, Vol 4)
- **Cleanevent paid AWU Victoria \$75,000** to maintain an enterprise agreement that paid cleaning workers well-below award rates and stripped them of penalty rates, overtime and shift loadings. The payments were allegedly detailed in a secret letter between the AWU and Cleanevent and never disclosed to the cleaning workers. Level 1 casuals working at events were entitled to 176% more per hour under the award than under the agreement sealed by these payments. (Final Report, Ch 10.2, Vol 4)
- **Chiquita Mushrooms paid AWU Victoria \$24,000** to avoid industrial unrest while it was transitioning its mushroom picking workforce to labour hire. The AWU allegedly falsely invoiced the payments as 'paid education leave' and never disclosed the payments to Chiquita employees. (Final Report, Ch 10.6, Vol 4)