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# Fair Work Amendment (Corrupting Benefits) Bill 2017

## Senate Education and Employment Legislation Committee

7 April 2017



Australian  
Chamber of Commerce  
and Industry



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# 1 Introduction

1. The Australian Chamber welcomes the opportunity to provide a submission in relation to the *Fair Work Amendment (Corrupting Benefits) Bill 2017* (Cth)(Bill) and broadly supports its passage. It is important that officers of organisations act ethically, are motivated by appropriate considerations in discharging their responsibilities and make decisions in the interests of the organisation and not in their own interests. The policy and regulatory framework must support this outcome and where there is evidence of systematic failure it is appropriate that the framework be reviewed and strengthened.
2. The Bill seeks to do a number of key things including creating criminal offences in the *Fair Work Act 2009* (Cth)(Act) with regard to the giving and soliciting or receiving/obtaining of corrupting benefits. As a matter of general principle the Australian Chamber favours an approach that separates criminal and industrial law and avoids overlap of and conflict between the two jurisdictions.
3. However there is a strong evidentiary basis as contained within the findings of multiple Royal Commissions that underpins the need for a stronger policy and regulatory response to discourage the giving and receiving of corrupting benefits and effect lasting cultural change. In this regard the Australian Chamber supports the policy intent underpinning the Bill and understands that the behaviour it is intended to capture in the creation of criminal offences, notwithstanding that it may arise in industrial dealings, is behaviour that is commonly understood to be ‘criminal’ in nature rather than breaches of industrial/workplace laws more generally.
4. There is also evidence that there are system failures in properly addressing corrupt, criminal behaviours occurring in an industrial context in the current statutory context.
5. Of note, paragraph (h) of the Terms of Reference for the most recent Royal Commission into Trade Union Governance and Corruption required the Commission to inquire and report into:

*any bribe, secret commission or other unlawful payment or benefit arising from contracts, arrangements or understandings between an employee association, or an officer of an employee association, and any other party.*

6. After 21 months, 189 hearing days and a consideration of evidence from 505 individual witnesses, the most recent Royal Commission made a number of key recommendations in its December 2015 Final Report,<sup>1</sup> the following three of which are relevant in the consideration of the Bill:

*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.*

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<sup>1</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, December 2015.

*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.*

7. The conduct uncovered that led to these recommendations warrants a unique policy response. It is outlined in the Royal Commission's Final Report and includes:
  - a. Payments made to "secure industrial peace from, or to keep favour with" the union.<sup>2</sup>
  - b. Provision and receipt of free work and materials for improper purposes.<sup>3</sup>
  - c. Disguised payments which may have amounted to criminal offences of soliciting corrupt commissions.<sup>4</sup>
8. In particular, the Royal Commission found that its consideration of a number of case studies threw up two recurring and often overlapping patterns of conduct which could be described "as 'bribes', others as 'secret commissions', others as 'blackmail money', others still as payments for industrial peace"<sup>5</sup>, including:

*A person – usually an employer of workers – makes, offers or agrees to make a payment or provide a benefit to a union, union official or to an entity associated with a union, in order:*

- i. to avoid expressly or impliedly threatened conduct by a union or union official which, if it occurred, would be harmful to the person; or*
- ii. to obtain a favour for the person in connection with the union's affairs;*

*A union official obtains or solicits a payment or other benefit for himself or herself, or the union or an entity associated with the union, in return for which the union official agrees:*

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<sup>2</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 2, December 2015.

<sup>3</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 2, December 2015.

<sup>4</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 2, December 2015.

<sup>5</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 4, December 2015.

iii. *not to engage in threatened conduct which if it occurred would be detrimental to the person – usually an employer – from whom the payment is obtained or solicited;*

iv. *to provide the person making or agreeing to the payment or benefit with a favour in connection with the union's affairs.*<sup>6</sup>

9. The Australian Chamber opposes the making and receiving of payments and benefits that have the effect of corrupting an official by causing them to exercise their duties and powers improperly or to act unlawfully. The Australian Chamber agrees with rationale for measures that seek to eliminate the giving and receiving of corrupting benefits for reasons including:
- a. These practices increase the cost of doing business with the effect that costs will either be passed on to consumers or where this is not possible, creates competitive disadvantage for the business making the payment.<sup>7</sup>
  - b. These practices “undermine the proper performance by union officials of their duties and responsibilities” and “can entrench the power of dishonest union officials”.<sup>8</sup>
  - c. These practices foster a culture “antithetical to the rule of law”, including because “threatening and bullying behaviour by union officials are rewarded” and that such practices normalise corruption more broadly.<sup>9</sup>
10. It is important that there is a policy and regulatory framework in place that is effective in deterring such conduct and we note the serious consequences that the Bill proposes for the offences it will create. The findings of the Royal Commission suggest a pattern of conduct supporting a need for the framework to be strengthened in the general manner proposed by the Bill.

### Recommendation

The Australian Chamber supports the policy intent underpinning the *Fair Work Amendment (Corrupting Benefits) Bill 2017* (Cth)(Bill) and broadly supports its passage pending consideration of amendments identified through the process of this inquiry that to address any unintended consequences arising from the Bill's passage and/or better align the technical provisions of the Bill with its policy intent.

11. This position is consistent with the Australian Chamber recommendation in submissions made in response to the Royal Commission's Discussion Paper dated 19 May 2015 (Royal Commission Discussion Paper) in which it recommended that the regulatory framework be strengthened to eliminate the practice of giving and receiving corrupting benefits.<sup>10</sup>

<sup>6</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 3, December 2015.

<sup>7</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 7, December 2015.

<sup>8</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, paras 8-9, December 2015.

<sup>9</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 10, December 2015.

<sup>10</sup> Australian Chamber of Commerce and Industry, *Royal Commission into Trade Union Governance and Corruption: Options for Law Reform*, August 2015, p. 3.





## 2 Proposed Part 3-7— Corrupting benefits

12. The Australian Chamber holds strongly the view that organisations formed to represent the interests of their members should be accountable to and act in the best interests of those members. The Australian Chamber also holds the view that there is scope for strengthening the system to ensure this outcome, drive proper governance and affect cultural change. Consistent with this view the Australian Chamber supports the changes proposed by the Bill and the intent underpinning them which the Explanatory Memorandum describes as being:

*to address scenarios that were frequently raised in the case studies examined by the Royal Commission. These scenarios typically involved an employer making, offering to make or agreeing to provide a payment or other benefit to a registered organisation or an officer 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.<sup>11</sup>*

13. The creation of the offences and the serious consequences proposed are not only directed at the behaviour of union officials and employees. The Royal Commission found:

*Introducing disclosure requirements and improving the clarity of existing criminal laws are measures which are unlikely, on their own, to have a significant effect in discouraging or preventing the giving and taking of corrupting benefits. The provision of corrupt payments and other benefits by employers to unions or union officials has been a recurring problem in Australia that has been identified by successive Royal Commissions over more than 30 years. It is insidious. It is immensely damaging. Not only is the criminal activity involved longstanding. It is also clandestine because both employers and union officials have an interest in keeping it quiet.<sup>12</sup>*

14. The changes proposed by the Bill will likely require some businesses to reflect on their existing practices and models and modify them to ensure that practices such as paying for 'industrial peace' are no longer tolerated. This will help to drive positive cultural change in the number of workplaces.

### 2.1 New offences for providing and receiving corrupting benefits

15. The Bill proposes new provisions that will make it a criminal offence for a person to give a registered organisation (or a person associated with a registered organisation) a corrupting benefit.
16. Specifically, proposed subsection 536D(1) provides that a person (Defendant) will commit an offence if they:

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<sup>11</sup> Explanatory Memorandum, p. 3, para 20.

<sup>12</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 58, December 2015.

- a. provide a benefit to another person; or
- b. cause a benefit to be provided to another person; or
- c. offers to provide, or promises to provide a benefit to another person; or
- d. causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

do so with the intention of influencing a registered organisations officer or employee to:

- a. perform his or her functions improperly; or
- b. exercise his or her powers/functions under the Act or *Fair Work (Registered Organisations) Act 2009*(Cth) (Registered Organisations Act) improperly; or
- c. to give an advantage of any kind, which would not be legitimately due to the defendant, a spouse, associated entity of the defendant or a person who has a prescribed connection with the defendant.

- 17. An offence will have occurred if a benefit has been provided to another person but with the intent to influence the officer or employee. The offence will also apply regardless of whether the officer or employee actually engages in improper conduct. The effect of this provision is that a person does not have to provide a benefit directly to an officer or employee of a registered organisation for an offence to have occurred.
- 18. The Royal Commission examined a number of payments made by employers in the maritime industry totalling \$3,200,000 which it concluded were “not made by employers completely voluntarily” and were made to “secure industrial peace from, or to keep favour with, the MUA”.<sup>13</sup> One of these payments related to a political candidate. Payments of this nature that satisfied the required elements of the offence would be prohibited under the new provisions notwithstanding that the officer or employee of the registered organisation was not the direct recipient.
- 19. In recommending the creation of new criminal offences for the giving of corrupting payments the Royal Commission suggested that the general defence of duress available under the *Criminal Code* (Cth) would apply and the Australian Chamber submits that it is important that this is the case.<sup>14</sup> However the a general practice of ‘paying off the union’ or otherwise providing a benefit to ‘keep the peace’ should not be considered a viable commercial solution.
- 20. Aside from criminality that might arise from such behaviour, it rewards bad union behaviour, creates unfair competitive advantage through unethical behaviour and endorsement of such practices can have a negative impact on the culture and practices of the organisation by normalising practices such as bribery, corruption, blackmail and extortion. These types of practices should not be tolerated by organisations or by the law.

<sup>13</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 1(b), December 2015.

<sup>14</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 56, December 2015 and *Criminal Code* (Cth), ss 2.2(2), 10.2.

21. Importantly, the Bill also proposes to make it a criminal offence to receive or solicit a corrupting benefit.
22. This offence is created by proposed subsection 536D(2) which provides that a person (Defendant) commits an offence if they:
  - a. Request (whether or not expressly and whether or not by threats), receives or obtains or agrees to receive or obtain a benefit from a person (Provider) for the Defendant or another person; and
  - b. Do so with the intention that, or the intention that the provider believes that, the receipt (or expectation of receipt) of the benefit will tend to influence a registered organisations officer or employee:
    - to perform his or her duties improperly;
    - exercise his or her powers/functions under the Act or Registered Organisations Act improperly; or
    - to give an advantage of any kind, which would not be legitimately due to the provider, a spouse, associated entity of the defendant or a person who has a prescribed connection with the defendant.
23. “Benefit” is broadly defined for the purposes of the section and “includes any advantage and is not limited to property”.<sup>15</sup>
24. In working out whether an advantage would not be legitimately due to a person the trier of fact is to disregard:
  - a. Whether the advantage might be, or whether the advantage might be, or be perceived to be, customary, necessary or required in the situation; and
  - b. the value of the advantage; and
  - c. any official tolerance of the advantage.<sup>16</sup>
25. This concept of ‘not legitimately due’ is based on subsection 70.2(2) of the Criminal Code in relation to similar offences relating to the bribing foreign public officials.
26. Proposed subsection 536D(3) clarifies that it is not necessary that the any person actually be influenced as a result of such conduct for an offence to have been committed. It is enough that the Defendant intends the Provider to believe that the receipt of the benefit will do so for an offence to have been committed. This subsection also has the effect that:
  - a. a Defendant’s intention does not need to be in relation to a particular registered organisations officer/employee or in relation to the way a registered organisations officer/employee performs or exercise their duties, functions or powers and whether this gives advantage to a particular person;

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<sup>15</sup> S 536D(7).

<sup>16</sup> S 536D(6).

- b. for the person receiving or soliciting a corrupting benefit the belief of the provider of the benefit is irrelevant.<sup>17</sup>
27. The Royal Commission uncovered patterns of behaviour that are relevant to the consideration of this provision including one in which:
- A union official obtains or solicits a payment or other benefit for himself or herself, or the union or an entity associated with the union, in return for which the union official agrees:*
- (i) *not to engage in threatened conduct which if it occurred would be detrimental to the person – usually an employer – from whom he payment is obtained or solicited; or*
- (ii) *To provide the person making or agreeing to the payment or benefit with a favour in connection with the union’s affairs.*<sup>18</sup>
28. As noted by the Royal Commission, these payments (which can also be provided in kind, such as through the provision of free building work and/or materials) “have a tendency to ‘corrupt’ a union official, in the sense that they have a tendency to cause a union official to exercise improperly the official’s duties and powers, or have a tendency to cause a union official to act unlawfully”.<sup>19</sup>
29. The findings of the Royal Commission make a strong case for a strengthened policy response in outlawing them. It is one thing for the threat of industrial action to achieve a bargaining outcome, it is another altogether and entirely inappropriate for such a threat to be made as a means for a person to improperly derive a personal gain or to further entrench the power of persons acting dishonestly.
30. The Royal Commission observed that an unchecked culture of giving and receiving corrupting benefits:
- ...comes to taint and impact the wider society. Corruption becomes more normal in business to business dealings, in the dealings of business with bureaucrats, in the dealings of business with politicians, and in the dealings between citizens and institutions capable of conferring desirable privileges and positions like educational institutions and employers. Corruption distorts markets. It makes money, not work or talent, the passport to success. It may even creep into the dealings of litigants with courts. Eventually it pollutes every business, social and personal relationship.*<sup>20</sup>
31. The Australian Chamber shares this concern and supports strong penalties to deal with such practices as they occur.
32. The consequences proposed for these new offences are serious with the maximum penalty for an individual being imprisonment for 10 years or 5,000 penalty units (\$900,000) or both and for a body corporate 25,000 penalty units (\$4,500,000).

<sup>17</sup> S 536D(3)(c).

<sup>18</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 4, December 2015.

<sup>19</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 5, December 2015.

<sup>20</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 10, December 2015.

33. The Explanatory Memorandum notes that the quantum set for the maximum penalties is based on the penalties in section 70.2 of the Criminal Code for bribery of foreign officials and are said to provide the appropriate level of deterrence to address the corporate and organisational misbehaviour identified in the Royal Commission's Final Report.<sup>21</sup>
34. On the quantum of penalties the Royal Commission found that:
- ...Having regard to the size of some of the companies involved in making corrupting payments, it would have to be substantial. The penalties for those who bribe foreign public officials provide a useful guide.*<sup>22</sup>
35. Existing Commonwealth criminal laws prohibiting the giving and receiving of Commonwealth public officials provide another model for consideration.<sup>23</sup>

## **2.2 New offences for employers providing corrupting payments to unions and for the union employees or officials receiving them**

36. The Bill proposes to create specific criminal offences for employers to provide (or offer/promise to provide) cash or in kind payments to a union or its prohibited beneficiaries.
37. Division 3 of proposed Part 3-7 creates these offences. Specifically, proposed section 536F creates an offence with regard to a national system employer (Employer Defendant) that provides or offers/promises to provide (or cause someone else to do so) a cash or in kind payment to an employee organisation or prohibited beneficiary of an employee organisation (as defined by proposed subsection 536F(5)). This offence applies in circumstances where the Employer Defendant, a spouse, an associated entity of the Defendant or a person with a prescribed connection with the Defendant employ a person who is or is entitled to be a member of the organisation and whose industrial interests the organisation is entitled to represent.<sup>24</sup>
38. Subsection 536F(4) defines a "cash or in kind payment" as including a benefit that is:
- a. in cash or any other money form; or
  - b. goods or services; or
  - c. prescribed by the regulations.
39. The following cash or in kind payments are excluded for the purpose of this offence:
- a. payments for union membership fees for employees who have agreed to become a union member;
  - b. benefits provided and used for the sole or dominant purpose of benefiting the Employer Defendant's employees;

<sup>21</sup> Explanatory Memorandum, p. 4, para 25.

<sup>22</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 55, December 2015.

<sup>23</sup> See, eg, *Criminal Code* (Cth), s 142.1.

<sup>24</sup> S 536F(1)(d).

- c. a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997*(Cth) and used in accordance with the law;
  - d. a payment made, at market value, for goods and services supplied to the Employer Defendant in the ordinary course of the organisation's business for purposes in relation to the ordinary course of the Employer Defendant's business;
  - e. a payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory;
  - f. a benefit provided in accordance with an order, judgment award of a court or tribunal;
  - g. a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.<sup>25</sup>
40. Proposed subsection 536F(3) also provides that the regulations may prescribe a cash or in kind payment that would otherwise be covered by the above.
41. The Bill's Explanatory Memorandum clarifies that the Bill does not prohibit the provision of payments in the nature of work entitlements to members of employee associations, or settlement payments in relation to actions against employers for contraventions of industrial laws.<sup>26</sup>
42. Proposed subsection 536G creates an offence for an employee organisation or officer (Union Defendant) to request, receive/obtain (or agree to receive/obtain) a cash or in kind payment themselves or for another person if the provider of the payment or another person would commit an offence under proposed subsection 536f(1).
43. The maximum penalty for these offences relating to cash or in kind payments are imprisonment for 2 years or 500 penalty units (\$90,000) or both for an individual or for a body corporate 2,500 (\$450,000) penalty units.
44. The Explanatory Memorandum notes that "[t]he penalties for this offence are lower than those provided for in new section 536D because there is no requirement under subsection 536F(1) to prove that there was an intention to influence the defendant".<sup>27</sup> There are also strict liability aspects associated with the defence<sup>28</sup> which the Explanatory Memorandum states "are necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments".<sup>29</sup>
45. This is broadly consistent with the recommendations of the Royal Commission that "subject to certain exceptions, all payments by employers to a relevant union or officials of that union be outlawed".<sup>30</sup>

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<sup>25</sup> S 536F(3).

<sup>26</sup> Explanatory Memorandum, p. vii.

<sup>27</sup> Explanatory Memorandum, p. 7, para 43.

<sup>28</sup> S 536F(2).

<sup>29</sup> Explanatory Memorandum, p. 8, para 46.

<sup>30</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 60, December 2015.

46. The justifications the Royal Commission offered for such an approach included difficulties of investigation and proof and the need for ease of enforcement by the police.<sup>31</sup>
47. Through the process of this inquiry Australian Chamber members may identify categories legitimate of payment that should not fall within such an offence, whether reflective of those included in the prescribed exemptions, of the nature contained within the United States *Taft-Hartley Act*<sup>32</sup> or otherwise. In this regard the Australian Chamber supports the availability of the regulation making power to exclude benefits that are legitimate / non-corrupting. This is important to ensure the provisions do not operate in a manner that exceeds their policy intent.

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<sup>31</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 61, December 2015.

<sup>32</sup> See Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 63, December 2015.







### 3 Schedule 2—Amendments relating to disclosure by organisations and employers

48. The Royal Commission Discussion Paper stated that:

*However humble the beginnings of the trade union movement, it is clear that many modern trade unions are large and complicated commercial enterprises. Large unions, such as those named in the Commission's Terms of Reference, receive significant revenue from commercial arrangements such as management fees and commissions. They operate complex commercial structures. They have large numbers of staff. They operate across multiple jurisdictions. The funds which certain unions have established are even more complex: incorporated associations, unincorporated associations, trusts and various corporate entities (references omitted).<sup>33</sup>*

49. Against this backdrop, issues arise in relation to use of funds, fiduciary duties of union officials, conflict of interest and proper governance. The Royal Commission's identified a concern that:

*...a number of unions promote forms of enterprise agreements that require employers to make payments to certain relevant entities, such as redundancy funds and employee insurance schemes, in order to general income for the union that is not, or not properly disclosed...<sup>34</sup>*

50. It also identified a long list of fund types from which a union could have a financial interest such as 'fighting funds' or 'election funds', redundancy funds, worker entitlement funds, training funds, welfare funds, employee insurance schemes, industry superannuation funds, charities and other generic accounts, associations or funds.<sup>35</sup>

51. The Royal Commission noted the finding of the earlier Cole Royal Commission that:

*Union representatives would be less likely to suggest or promise that industrial unrest or some other adverse consequence would be averted if a 'donation' is made to the union if they know that such donations must be included in statements of the organisation that might be scrutinised by a third party. Clients and contractors would be more likely to resist inappropriate demands for payments if they know that such payments will come to the attention of a regulatory body.<sup>36</sup>*

52. Agreeing with this rationale, the Australian Chamber recommended strengthened transparency and disclosure obligations in response to the Royal Commission Discussion Paper.<sup>37</sup>

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<sup>33</sup> Discussion Paper, p. 17.

<sup>34</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 5, para 4 December 2015.

<sup>35</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 5, para 2 December 2015.

<sup>36</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 44, December 2015.

<sup>37</sup> Australian Chamber of Commerce and Industry, *Royal Commission into Trade Union Governance and Corruption: Options for Law Reform*, August 2015, p. 18.

53. The Bill's measures specifically target bargaining representatives for enterprise agreements (whether they be employers, employer organisations or unions) by requiring them to disclose financial benefits they (or a person/body connected with them) stands to receive because of a term of a proposed enterprise agreement.
54. Specifically, Schedule 2 of the Bill will create new disclosure requirements for organisations that are bargaining representatives that will or can reasonably expect to receive/obtain a "section 179 disclosable benefit".<sup>38</sup> The Bill's Explanatory Memorandum notes that "[d]isclosure of financial benefits obtained as a consequence of enterprise bargaining is intended to improve transparency and ensure that employees who are asked to vote for an enterprise agreement are properly informed about its effect."<sup>39</sup> The Australian Chamber supports this policy rationale.
55. A "section 197 disclosable benefit" is defined as any financial benefit other than one that is:
- a. payable to an individual as an employee covered by the agreement; or
  - b. payment of a membership fee for membership of an organisation; or
  - c. prescribed by the regulations.<sup>40</sup>
56. In the case of bargaining representatives:
- a. these disclosure requirements apply where they will or can reasonably expect to receive/obtain a section 197 disclosable benefit as a direct or indirect consequence of the operation of one or more terms of the agreement (the beneficial terms);<sup>41</sup>
  - b. all reasonable steps must be taken to give each employer that will be covered by the agreement a disclosure document<sup>42</sup> within a prescribed timeframe.<sup>43</sup>
57. Disclosure requirements will also apply to employers that will or can reasonably expect to receive/obtain a "section 179A disclosable benefit" which is any financial benefit, other than a financial benefit that is:
- a. received or obtained in the ordinary course of the employer's business; or
  - b. prescribed by the regulations.<sup>44</sup>
58. Employers in these circumstances must take all reasonable steps to ensure that relevant employees are given a copy of a disclosure document within a reasonable time frame.<sup>45</sup>
59. The disclosure document must:

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<sup>38</sup> S 179(1).

<sup>39</sup> Explanatory Memorandum, p. i.

<sup>40</sup> S 179(6).

<sup>41</sup> S 179(1)(c).

<sup>42</sup> S 179(1).

<sup>43</sup> S 179(3).

<sup>44</sup> S 179A(4).

<sup>45</sup> S 180(4A).

- a. itemise the beneficial terms; and
  - b. describe the nature and (as far as reasonably practicable) amount of each section 179 disclosable benefit in relation to each beneficiary; and
  - c. name each beneficiary; and
  - d. be in accordance with any other requirements prescribed by the regulations for the purposes of this paragraph; and
  - e. be given in a manner prescribed by the regulations (if any).<sup>46</sup>
60. Failing to make a declaration or knowingly or recklessly making a false or misleading declaration will give rise to civil penalties<sup>47</sup> but will not prevent the approval of the enterprise agreement.
61. The proposed changes will provide increased transparency in an environment in which “very substantial revenue flows to unions generate significant conflicts of interest and potential breaches of fiduciary duty on the part of unions and union officials negotiating enterprise agreements”.<sup>48</sup>

The Royal Commission found that while:<sup>49</sup>

*...the union and union officials owe a duty to act in the interests of union member employees when negotiating enterprise agreements. At the same time, there is a significant potential and incentive for the union to act in its own interests to generate revenue.*

*The substantial revenue flows to unions also lead to a greater potential for coercive conduct by unions who seek to compel employers in enterprise negotiations to contribute to funds from which the union will derive a financial benefit. Circumstances in which this has occurred are explored in the case studies relating to Universal Cranes<sup>50</sup> and the ACT CFMEU.<sup>51</sup>*

62. The Australian Chamber recommends the passage of the Schedule 2 amendments.

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<sup>46</sup> S 179(4), S 179A(3).

<sup>47</sup> S 180(4C), S 179(5).

<sup>48</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 5, para 72, December 2015

<sup>49</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 5, paras 71-72, December 2015

<sup>50</sup> Royal Commission into Trade Union Governance and Corruption, *Interim Report* (2014), Vol 2, ch 8.7.

<sup>51</sup> See Vol 3, ch 6.3 of this Report.



## 4 Other matters

63. When the Royal Commission into Trade Union Governance and Corruption released its Discussion Paper exploring options for law reform, it identified three possible triggers for law reform:
- a. “where there is no, or no adequate, regulation”;
  - b. “where the existing law is unclear or needs amendment”;
  - c. “where there is regulation but it is being ignored or flouted”.<sup>52</sup>
64. In responding to the Royal Commission Discussion Paper the Australian Chamber noted that it was particularly concerned with this last category.
65. We note that the Bill is concerned with corrupting benefits and Australia currently has legislative regimes in place which criminalise corrupt behaviours or which provide civil penalties, acting as a deterrent to their many forms. Corruption is combatted by federal and state laws involving civil and criminal sanctions. Proposed section 536C provides that Part 3-7 does not exclude or limit the operation of State and Territory law even if such laws provide for differing penalties, fault elements, defences or exceptions in relation to the offence.
66. This has the practical effect that the amendments in the Bill will operate concurrently with State and Territory criminal law and that offences of corrupt conduct may arise under both the Act and criminal statutes. The Explanatory Memorandum notes that “[r]elevant state or territory laws in this context could include laws criminalising secret or corrupt commissions, corrupt benefits or rewards or bribes”.
67. Ordinarily, it is the Australian Chamber’s position that overlapping regulatory regimes at the state and federal levels have the potential to create confusion and complexity. However recent high profile reports of inappropriate conduct within registered organisations have placed the governance practices of registered organisations squarely in the public domain and have provided the impetus for an examination of the effectiveness of the current statutory framework in ensuring that registered organisations are accountable to their members.
68. In light of this behaviour, it cannot be denied that reform of the current statutory framework to drive greater transparency, better governance, accountability to members of those organisations and cultural change is required.
69. There are also apparent failures in applying existing laws where corrupt conduct of a criminal nature manifests itself in an industrial setting. The Royal Commission found that on the basis of the case studies it examined:

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<sup>52</sup> Discussion Paper, pp. 1-2.

*...the existing criminal laws do not appear to operate as much of a deterrent to employers giving and union officials taking bribes, secret commissions and other unlawful payments, particularly in the building and construction industry. The cases [sic] studies considered are spread over time and place and involve a range of unions. They do not involve a rogue union official or employer, or even a rogue union.<sup>53</sup>*

70. It noted that its findings were reflective of those behaviours uncovered by previous Royal Commissions. In particular, it referenced examples where these prior Royal Commissions examined circumstances of union officials that had received secret commissions in the form of work done and materials provided in relation to the construction of various beach houses and where payments made were described as donations or disguised through false invoices or false contracts.<sup>54</sup>
71. The Royal Commission found a number of reasons why the existing legal framework was not proving to be effective in deterring corrupting payments including because:
  - a. criminal laws between jurisdictions vary in terms of the elements of the offence (in ways that are sometimes conflicting) and the penalties and do not apply well to officers of registered organisations;<sup>55</sup>
  - b. there is a general culture of silence within unions and the investigation of matters such as blackmail, extortion and secret commissions is inherently difficult.<sup>56</sup> Companies who have provide the payments or benefits are also unlikely to come forward<sup>57</sup> and payments are often disguised;<sup>58</sup>
  - c. an apparent reluctance for police to become involved with 'industrial relations' matters;<sup>59</sup>
  - d. the cost to a business of making a payment to a union or official being much less than the cost of refusing to make the payment.<sup>60</sup>
72. The Act provides a targeted mechanism for addressing corrupt conduct of the nature uncovered by the Commission and Royal Commissions before it and the Australian Chamber supports its passage. An increased likelihood that those involved in the giving and receiving of corrupting benefits will be exposed to criminal penalty will help drive cultural change. The changes proposed by the Bill will also better ensure that member based organisations represent the interests of their members rather than the discrete interests of the organisation or its officers or employees. These changes are supported by the Australian Chamber.

<sup>53</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 29, December 2015.

<sup>54</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 30, December 2015.

<sup>55</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 33, December 2015.

<sup>56</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 37, December 2015.

<sup>57</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 38, December 2015.

<sup>58</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 39, December 2015.

<sup>59</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 40, December 2015.

<sup>60</sup> Royal Commission into Trade Union Governance and Corruption, Final Report, Chapter 4, para 41, December 2015.



73. The application and of the new laws will, if passed, warrant close monitoring to ensure that the outcomes they generate are in line with their policy intent and that penalties administered are proportionate to the nature of the offences. The Australian Chamber supports a risk based approach to enforcement and the findings of the Royal Commission assist in identifying where high areas and sectors for focus.
74. This submission is made by the Australian Chamber without prejudice to the views of its individual members who may wish to make individual submissions based on a consideration of the Bill from the perspective of the particular industries or memberships.







## 5 About the Australian Chamber

The Australian Chamber of Commerce and Industry is the largest and most representative business advocacy network in Australia. We speak on behalf of Australian business at home and abroad.

Our membership comprises all state and territory chambers of commerce and dozens of national industry associations. Individual businesses are also able to be members of our Business Leaders Council.

We represent more than 300,000 businesses of all sizes, across all industries and all parts of the country, employing over 4 million Australian workers.

The Australian Chamber strives to make Australia a great place to do business in order to improve everyone's standard of living.

We seek to create an environment in which businesspeople, employees and independent contractors can achieve their potential as part of a dynamic private sector. We encourage entrepreneurship and innovation to achieve prosperity, economic growth and jobs.

We focus on issues that impact on business, including economics, trade, workplace relations, work health and safety, and employment, education and training.

We advocate for Australian business in public debate and to policy decision-makers, including ministers, shadow ministers, other members of parliament, ministerial policy advisors, public servants, regulators and other national agencies. We represent Australian business in international forums.

We represent the broad interests of the private sector rather than individual clients or a narrow sectional interest.

## Australian Chamber Members

**AUSTRALIAN CHAMBER MEMBERS:** BUSINESS SA CANBERRA BUSINESS CHAMBER CHAMBER OF COMMERCE  
NORTHERN TERRITORY CHAMBER OF COMMERCE & INDUSTRY QUEENSLAND CHAMBER OF COMMERCE &  
INDUSTRY WESTERN AUSTRALIA NEW SOUTH WALES BUSINESS CHAMBER TASMANIAN CHAMBER OF  
COMMERCE & INDUSTRY VICTORIAN CHAMBER OF COMMERCE & INDUSTRY **MEMBER NATIONAL INDUSTRY**  
**ASSOCIATIONS:** ACCORD – HYGIENE, COSMETIC & SPECIALTY PRODUCTS INDUSTRY AGED AND COMMUNITY  
SERVICES AUSTRALIA ARAB CHAMBER OF COMMERCE AND INDUSTRY AUSTRALIA AIR CONDITIONING &  
MECHANICAL CONTRACTORS' ASSOCIATION ASSOCIATION OF FINANCIAL ADVISERS ASSOCIATION OF  
INDEPENDENT SCHOOLS OF NSW AUSTRALIAN SUBSCRIPTION TELEVISION AND RADIO ASSOCIATION  
AUSTRALIAN BEVERAGES COUNCIL LIMITED AUSTRALIAN DENTAL ASSOCIATION AUSTRALIAN DENTAL  
INDUSTRY ASSOCIATION AUSTRALIAN FEDERATION OF EMPLOYERS & INDUSTRIES AUSTRALIAN FEDERATION  
OF TRAVEL AGENTS AUSTRALIAN HOTELS ASSOCIATION AUSTRALIAN INTERNATIONAL AIRLINES  
OPERATIONS GROUP AUSTRALIAN MADE CAMPAIGN LIMITED AUSTRALIAN MINES & METALS ASSOCIATION  
AUSTRALIAN PAINT MANUFACTURERS' FEDERATION AUSTRALIAN RECORDING INDUSTRY ASSOCIATION  
AUSTRALIAN RETAILERS' ASSOCIATION AUSTRALIAN SELF MEDICATION INDUSTRY AUSTRALIAN STEEL  
INSTITUTE AUSTRALIAN TOURISM INDUSTRY COUNCIL AUSTRALIAN VETERINARY ASSOCIATION BUS  
INDUSTRY CONFEDERATION BUSINESS COUNCIL OF CO-OPERATIVES AND MUTUALS CARAVAN INDUSTRY  
ASSOCIATION OF AUSTRALIA CEMENT CONCRETE AND AGGREGATES AUSTRALIA CHIROPRACTORS'  
ASSOCIATION OF AUSTRALIA CONSULT AUSTRALIA CUSTOMER OWNED BANKING ASSOCIATION CRUISE  
LINES INTERNATIONAL ASSOCIATION DIRECT SELLING ASSOCIATION OF AUSTRALIA EXHIBITION AND EVENT  
ASSOCIATION OF AUSTRALASIA FITNESS AUSTRALIA HOUSING INDUSTRY ASSOCIATION HIRE AND RENTAL  
INDUSTRY ASSOCIATION LTD LARGE FORMAT RETAIL ASSOCIATION LIVE PERFORMANCE AUSTRALIA MASTER  
BUILDERS AUSTRALIA MASTER PLUMBERS' & MECHANICAL SERVICES ASSOCIATION OF AUSTRALIA MEDICAL  
TECHNOLOGY ASSOCIATION OF AUSTRALIA MEDICINES AUSTRALIA NATIONAL DISABILITY SERVICES  
NATIONAL ELECTRICAL & COMMUNICATIONS ASSOCIATION NATIONAL EMPLOYMENT SERVICES ASSOCIATION  
NATIONAL FIRE INDUSTRY ASSOCIATION NATIONAL RETAIL ASSOCIATION NATIONAL ROAD AND MOTORISTS'  
ASSOCIATION NSW TAXI COUNCIL NATIONAL ONLINE RETAIL ASSOCIATION OIL INDUSTRY INDUSTRIAL  
ASSOCIATION OUTDOOR MEDIA ASSOCIATION PHARMACY GUILD OF AUSTRALIA PHONOGRAPHIC  
PERFORMANCE COMPANY OF AUSTRALIA PLASTICS & CHEMICALS INDUSTRIES ASSOCIATION PRINTING  
INDUSTRIES ASSOCIATION OF AUSTRALIA RESTAURANT & CATERING AUSTRALIA RECRUITMENT &  
CONSULTING SERVICES ASSOCIATION OF AUSTRALIA AND NEW ZEALAND SCREEN PRODUCERS AUSTRALIA  
THE TAX INSTITUTE VICTORIAN AUTOMOBILE CHAMBER OF COMMERCE