Fair Work Amendment (Corrupting Benefits) Bill 2017

Submission to the Senate Education and Employment Legislation Committee

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INTRODUCTION

Since its formation in 1927, the ACTU has been the peak trade union body in Australia. There is no other national confederation representing unions. For 90 years the ACTU has played the leading role in advocating in the Fair Work Commission, and its statutory predecessors, for the improvement of employment conditions of employees. It has consulted with governments in the development of almost every legislative measure concerning employment conditions and trade union regulation over that period.

The ACTU consists of affiliated unions and State and regional trades and labour councils. There are currently 43 ACTU affiliates. They have approximately 2 million members who are engaged across a broad spectrum of industries and occupations in the public and private sector. All but 7 of the ACTU affiliates are organisations registered as employee organisations under the *Fair Work (Registered Organisations) Act*. When account is taken of federated structures adopted by unions, all but 6 small unions of the 45 organisations registered as employee organisations under that Act are ACTU affiliates.

The ACTU supports a legislative regime that promotes the operation of accountable, democratic and effective trade unions that are member-governed.

The Fair Work Amendment (Corrupting Benefits) Bill ("the Bill") deals with two disparate areas of regulation. The first involves criminal offences for bribery and other payments to unions. The second involves disclosure during bargaining. This submission deals with them separately. For the reasons discussed below, we are of the view that the Bill should not be passed.

CRIMINAL OFFENCES

Corrupt payments

The Bill proposes the inclusion of criminal offences the *Fair Work Act 2009* ("the FW Act"). Four offences relating to interactions with unions are proposed. The first two are giving and receiving 'corrupting benefits'.

These proposed offences have resonance in offences in the *Criminal Code Act 1995* dealing with bribery of Commonwealth public officials and bribery of foreign public officials.

The second set of two proposed offences are giving and receiving of any payment that is not sanctioned by the Act. These are strict liability offences which require no unlawful intent. These proposed offences are novel. The ACTU is not aware of any similar Commonwealth offence.

The ACTU raises the following concerns about the proposal to create criminal offences:

- There was no stakeholder consultation;
- Bribery offences are proposed in an Act that deals with employment;
- The proposal goes further than the findings of the Trade Union Royal Commission ("TURC");
- The offences are confined to union related bribes; and
- The proposal includes new strict liability offences that are:
    - Unprecedented;
    - Uncertain as to their operation;
    - Contrary to international obligations; and
    - Misuses of the criminal law for a politically partisan purpose of restricting union revenue raising.

The ACTU opposes the Bill and submits that:

- Proper consultation occur;
- Any offences proposed following that consultation become offences under the Criminal Code;
- The proposed offences not be confined to interactions with trade unions;
- The strict liability offences should not be introduced.

Failure to Consult

Despite the gravity of the proposed offences the usual stakeholder consultation processes have been by-passed.

As a minimum the Bill should have been submitted to the Committee on Industrial Legislation (a subcommittee of the National Workplace Relations Consultative Council). This Bill was, inexplicably, never submitted to the Committee.

As a consequence key stakeholders are faced with fully developed proposed legislation without any opportunity to engage in a structured and considered dialogue with Government.

Amending the FW Act?

Including criminal bribery offences in the FW Act is incongruous. The object of the FW Act, as set out at section 3 thereof, is to is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians. Including criminal offences concerning bribery into the Act has little to do with the object of that FW Act.

Bribery offences relating to Commonwealth and Foreign Officials are found in the *Criminal Code Act 1995.* That Act is the appropriate legislative vehicle for bribery offences.

Departure from the Trade Union Royal Commission Recommendations

The first two proposed offences (contained in the proposed Division 2 of the proposed Part 3-7) directly target the transfer of benefits by reason of them being corrupting. However, it also however extends to the transfer of benefits "not legitimately due".

This proposal is said to be based on recommendation 40 of the TURC. However, the additional category of benefits "not legitimately due" departs from the reasons given in the TURC report and the model draft provision provided by the Royal Commission. As a consequence, the proposed offences are not limited to corrupting benefits that have a connection to the conduct of an officer or employee of a registered organisation *in their capacity as such*.

As the Committee ought to be aware, most officers of registered organisations are employees in the occupations and industries that their union's rules provide coverage of.

Take the example of an electrician, police officer, building inspector or bartender. Under the proposal now before the Committee, the offer or receipt of a bribe (or another other benefit "not

legitimately due") would take on a different legal character depending on whether the employee also held a position as an officer of their union.

The nature of the bribe could relate to matters entirely disconnected from the fact that the employee held a position of an officer of a union - such as a bribe to falsify an electrical safety certificate, to overlook a breathalyser reading, to sign off defective building works or to provide free alcohol – yet it would be caught by proposal at paragraphs 536D(1)(b)(iii) and 536D(2)(b)(iii).

This is to be compared with the "problem" that the Royal Commission believed arose from its case studies. It was described in its report this way:

> "These case studies – which involved different unions in different states at different times – throw up two recurring and often overlapping patterns of conduct:
>
> (a) 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.
>
> (b) 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 the 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 affair***s."[1](emphasis added)

The TURC proposed a provision which limited the prohibition of "favours" to circumstances where there was some connection with the union's affairs, as follows:

> "**536A Corrupting benefits in relation to organisations**
>
> Giving a corrupting benefit
>
> (1) A person (the ***first person***) is guilty of an offence if:
>
> (a) the first person:
>
> (i) provides a benefit to another person; or
>
> (ii) causes a benefit to be provided to another person; or
>
> (iii) offers to provide, or promises to provide, a benefit to another person; or
>
> (iv) 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
>
> (b) the receipt, or expectation of the receipt, of the benefit would tend to

[1] Chapter 4 of Volume 5 at [3]

influence an officer or employee of an organisation or a branch of an organisation (who may be the other person):

(i) to exercise improperly the officer or employee's duties to the organisation or branch, or the members of the organisation or branch; or

(ii) to exercise improperly any power conferred on the officer or employee under the *Fair Work Act* 2009 or *Fair Work (Registered Organisations) Act* 2009; or

(iii) to provide a favour **in connection with the affairs of the organisation or branch,** including the affairs of the members of the organisation or branch, to the first person or a related entity of the first person, where the recipient has:

(A) no legitimate entitlement to the favour; or

(B) a legitimate entitlement to the favour, but otherwise has no reasonable expectation that the favour will be provided; and

(c) the first person intends, knows or believes that the receipt or expectation of the receipt of the benefit will have a result specified in one or more of subparagraphs (b)(i), (b)(ii) and (b)(iii).

(2) For the avoidance of doubt, the fault element for paragraph (1)(b) is that specified in paragraph (1)(c)."[2] (emphasis added)

The TURC's intent to limit the prohibition of favours or illegitimate benefits to circumstances where the favour or benefit is given or received in connection with affairs of the union has been lost in the Bill.

In any event, we believe a better approach, if any deficiency is perceived to exist in current laws concerning corrupt payments or bribery, would be consult widely, including with State and Territory Governments, on the creation of uniform laws to apply to all sectors of society. We note that the TURC report makes some reference to the *Bribery Act 2010* (UK). That Act could form the starting point for such consultation.

Restricted to bribery of union officials

Current Commonwealth bribery offences specifically target bribery of Commonwealth public officials and foreign public officials. Other acts of bribery or corruption are dealt with under criminal laws which apply generally. Those laws have been used to deal with bribery of former union officers.

[2] Appendix 1 to Volume 5. The same language was used in the drafting of the proposed offence in relation to the receipt of corrupting benefits.

A number of former union officials have been charged over conduct referred to in the Royal Commission. The ACTU understands that fraud and theft charges have been laid against former HSU official Kathy Jackson. Also that former AWU official Ralph Blewitt has been charged with fraud. Former BLF official Dave Hanna has been charged with receiving secret commissions. In the only completed proceedings, former CFMEU official Fihi Kivalu has been convicted on blackmail charges related to bribes. The ACTU is unaware of any charges against the companies who paid the bribes.

As noted above, the TURC report made reference to the UK *Bribery Act 2010.* That Act contains two general offences covering the offering, promising or giving of a bribe and the requesting, agreeing to receive or accepting of a bribe. It also sets out two further offences which specifically address commercial bribery. The Act also creates an offence relating to bribery of a foreign public official and creates a new form of corporate liability for failing to prevent bribery on behalf of a commercial organisation.

The UK Act has much broader application than that proposed by the Bill which is confined simply to bribing union officials.

There is no reason to target union related bribery. If the aim is to deal with corruption including bribery then the law should be amended to deal with that issue generally.

Other Payments

Strict Liability Offences

The second set of offences (contained in the proposed Division 2 of the proposed Part 3-7) are concerned with prohibiting payments to unions, irrespective of any dishonest, fraudulent or corrupt intent. A person can be found criminally liable under the proposed provisions for simply providing funds to a union if those funds do not fall within categories determined by government.

This provision is novel. The ACTU cannot find a similar offence anywhere.

The TURC recommendation to introduce provisions of this nature was ill-informed. The TURC made its recommendation, and drafted proposed provisions, based on a limited view of the role of unions. The TURC took an unduly narrow view of unions as being servicing organisations in the nature of legal service providers or agents in employment negotiations. The broader representative function of unions – to build workers' collective voice and power in society - was not considered by the TURC at all.

The misconception of the role of unions by the TURC led to it believing that unions were only entitled to limited revenue streams. It posited a restricted list of "legitimate" payments that might be made to a union or which a union might demand on behalf of its members. It did so without fully considering the existing revenue streams of unions.

The proposed offences:

- apply to monies that union directs be paid to its members[3];
- provide no exemptions for settlements (as opposed to judgements or orders) that benefit former employees (such as underpayment or unfair dismissal settlements for former employees); and
- provide no exemptions for settlements that benefit the union directly (such as sums in respect of civil penalties sought by a union for breach of an enterprise agreement).

Covers claims for unpaid wages

The provision is poorly drafted. It is currently drafted is a manner that would make a claim by a union for payments for unpaid wages to be made to certain workers a criminal offence. This is because the provision does not exempt requests for payment be made to union members who are not employees at the time the claim is made.

Unions are given statutory rights to represent their members who are former employees in a plethora of legal processes including unfair dismissal proceedings in the Fair Work Commission and underpayment claims in Courts. We can see very serious detriments, and absolutely no benefit, in any law which requires disputes to be run to judgment when all parties concerned are (as encouraged by current case management practice) in position to resolve them.

The reason unions are given such representative rights is because it recognised that few working people would have the time, resources and experience to efficiently and effectively conduct such proceeding on their own behalf. By criminalising this legitimate function of unions, workers will be forced to either go to the Fair Work Ombudsman instead, or give up.

Constraints on bargaining

There is uncertainty as to how these provisions will interact with other provisions of the FW Act. For example, section 172 of the FW Act permits enterprise agreements to contain terms that are "matters pertaining to the relationship between an employer or employers, and the employee

[3] See proposed 536F(5)(d)

organisation or employee organisations, that will be covered by the agreement". The prohibition of payments by employers to unions cuts across the broad import of s172 and suggests an intention that the scope of what can be contained in an enterprise agreement is to be further restricted, which is highly objectionable. It may also render the content of some extant agreements unenforceable by virtue of them becoming "unlawful terms". The retrospective nature of the provision is also highly objectionable.

It is notable that in considering the issue of criminalising payments to unions, the TURC had regard to the *Taft-Hartley* statute in the United States[4]. Even that legislation (which itself has been controversial) provides a broad exemption:

> "with respect to the payment or delivery of any money or thing of value in satisfaction of a judgment of any court or a decision or award of an arbitrator or impartial chairman or in compromise, adjustment, settlement, or release of any claim, complaint, grievance or dispute in the absence of fraud or duress"[5]

The above exemption is apt to cover the situation of the union settling industrial disputes and recovering funds for the benefit of a member who is not an employee of the employer concerned. However, the provisions drafted in the Bill would prohibit such activities. What possible public benefit is there to forcing legal proceedings about the breach of an enterprise agreement to run to judgement where the employer concedes liability and is willing to compromise the claim by paying a sum in respect of penalties that would be recoverable by the union?

Resolving disputes

Another transfer of benefits which is common and would be criminalised by these provisions is the provision of benefits as part of a resolution of a dispute reached through conciliations conducted by the Fair Work Commission. No modern awards, and not all enterprise agreements, enable the Fair Work Commission to make orders of the type that would be captured by the exemption provided in proposed section 536F(3)(f), but rather only permit the Fair Work Commission to conciliate, express an opinion, or make a recommendation. Where the Fair Work Commission does manage to broker a solution that is lawful, reasonable and acceptable to the parties, it ought not be a criminal offence to implement it.

Finally, unions do often negotiate conditions on behalf of their members in disputes that are never the subject of legal proceedings, and this can result in the transfer of legitimate benefits to the workers that would be criminalised by these provisions. For example, in some complex supply chains where the head contractor is both a direct employer and a user of labour hire or

[4] See paragraphs [24]-[28] of Chapter 4 of Volume 5.
[5] 29 U.S. Code § 186(c)(2)

other contractors, one of those contractors may become defunct leaving their workforce unpaid (perhaps because the head contractor has not paid the subcontractor). In those cases, unions representing the contractors employees (who may also have members employed by the head contractor) often negotiate the terms under which the subcontractors former employees may become direct employees of the head contractor, including an amount in compensation for past unpaid entitlements. This should not be illegal.

Purpose of Provision

The clear intent is for the government to arbitrarily limit the scope of permissible dealings between unions and corporations. The format of the provision is, effectively, "all transfers of cash or in kind benefits to unions are illegal except those the government of the day approves". The types of payments that may be approved, or prohibited, are to a large extent facilitated by regulations, meaning there is no Parliamentary scrutiny of them other than by exception. A law of this type clearly collides with international obligations concerning the free functioning of trade unions[6] and voluntary bargaining[7].

[6] Article 3 of ILO C87
[7] Article 4 of ILO C98

DISCLOSURE DURING BARGAINING

We do not object to the basic principle of disclosure of benefits in the course of bargaining. We do however have some concerns about the drafting of the proposed provisions.

Firstly, it is not clear why the employer's disclosure need only be made to its employees. It ought also to be made to the bargaining representatives, consistent with the good faith bargaining requirements.

Secondly, the definition of "related party" referenced in the proposal is ill suited to the disclosure required. The definition (adopted from the *Fair Work (Registered Organisations) Act* includes entities as remote as those that are controlled by a step parent of an officer's spouse, or entities who could have been described that way "at any time within the previous 6 months"[8].

It is not reasonable to expect that an organisation will know what benefits might flow directly or indirectly to persons in those categories from the terms of a proposed agreement in circumstances where the organisation has had no previous dealings with them. It is to be remembered that the revised disclosure scheme in the *Fair Work* (*Registered Organisations) Act* only requires union officers to identify related parties in connection with benefits they receive from them in connection with their performance of their duties and only requires unions to identify related parties when they pay them. In the latter case, there are also exemptions around *arms length terms*.

In bargaining for an agreement, it is simply not possible to know what service providers might be engaged by an employer to assist in delivering on the commitments made to employees in the terms of the agreement, let alone their history for the last 6 months. This is particularly so given that negotiations for the agreement may be conducted by organisers or delegates in a branch of a union in (for example, Tasmania) who have no knowledge of the family history and associated business interests of officers of (for example) the West Australian branch of the same union.

The disclosure requirements could be much improved by some significant streamlining so as to require only reasonable disclosure in relation to the union, the branch of the union and the entities that both control, and the officers and spouses of the branch of the union concerned.

[8] s. 9B(5)

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