

Senate Standing Committee on Education and Employment

QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 2 and 4

Senator Cameron asked on 12 April 2017 on proof Hansard page 65-68

Question

What consultation has taken place specifically in relation to the corrupting benefits bill with people who are going to be affected?

Why was there no consultation on the corrupting benefits bill?

Answer

The Fair Work Amendment (Corrupting Benefits) Bill (the Bill) implements three recommendations made by the Royal Commission into Trade Union Governance and Corruption (the Royal Commission). These recommendations, including model legislative provisions, have been public since the Royal Commission's Final Report (the Final Report) was tabled on 30 December 2015. The Government announced its intention to legislate the Royal Commission's recommendations in June 2016.

The Royal Commission consulted with a range of interested parties regarding law reform through the release of four 'Issues Papers' in 2014 and a 'Discussion Paper on Law Reform' in 2015. These papers included draft amendments to the *Fair Work Act 2009* relating to corrupting benefits. The ACTU was asked by the Royal Commission for its views on the proposals but declined to provide any comments. Other stakeholders provided feedback and comments to the Royal Commission.

The Bill is subject to detailed public scrutiny through the Parliamentary process.

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 3

Senator Cameron asked on 12 April 2017 on proof Hansard page 67

Question

When did the Department of Employment issue drafting instructions? When did the Minister for Employment issue drafting instructions?

Answer

As is usually the case, the instruction of drafters is an ongoing process and instructions are issued progressively. The Department issued initial drafting instructions for developing legislation giving effect to the recommendations of the Royal Commission on 10 February 2017.

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 5

Senator Marshall asked on 12 April 2017 on proof Hansard page 70

Question

Can you explain how State and Territory secret commission provisions will apply to dealings between corporations but not to dealings between corporations and registered organisations?

What is an example of a secret commission relating to a registered organisation which would be an offence at State law?

Answer

The Department has referred to Commissioner Heydon's view that it is unclear how a number of the State and Territory provisions regarding secret commissions can be applied to registered organisations.

The Corrupting Benefits legislation responds to Commissioner Heydon's concerns and the recommendations provided in the Final Report on how these issues should be addressed. As the Final Report states (Volume 5, Chapter 4 at [33]):

One issue is that the provisions in many jurisdictions turn on the identification of an 'agent' and 'principal' and the principal's 'affairs or business'. Although these terms are capable of application to registered organisations, they are not well suited to that purpose. Further, a union official may be at the same time an agent for the union, an agent for the members of the union as a whole, and an agent for some sub-class of the members of the union [citing *R v Gallagher* [1986] VR 219 (FC)]. This can lead to confusion as to who the official's principal is for the purposes of a charge, and the scope of the principal's 'affairs or business'.

Provisions that turn on the identification of an 'agent' and a 'principal' include section 249B of the *Crimes Act 1900* (NSW), section 176 of the *Crimes Act 1958* (Vic), sections 442B and 442BA of the *Criminal Code* (Qld), sections 529 and 530 of the *Criminal Code* (WA) and section 266 of the *Criminal Code* (Tas).

The following examples were in the Final Report in relation to which the Commission made a finding that there may have been contraventions of secret commission prohibitions in State laws:

- The matter of the Thiess Hochtief Joint Venture and the CFMEU NSW: see Chapter 7.4 of Volume 3 at [162]-[176].
- The matter of the CFMEU Queensland and employees of Mirvac: see Chapter 8.1 of Volume 4 at [172]-[210].
- The matter of the Australian Workers Union Vic Branch and Cleanevent: see Chapter 10.2 of Volume 4 at [423]-[452].
- The matter of the Australian Workers Union Vic Branch and John Holland Pty Ltd: see Chapter 10.3 of Volume 4 at [222]-[235].

- The matter of the Australian Workers Union and ACI Operations Pty Ltd: see Chapter 10.5 of Volume 4 at [108]-[120].
- The matter of the Australian Workers Union and Chiquita Mushrooms: see Chapter 10.6 of Volume 4 at [109]-[118].

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 6

Senator Marshall asked on 12 April 2017 on proof Hansard page 70

Question

In each state, how many prosecutions have there been of corporations for secret commissions?

Answer

The information sought by the Senator is not within the knowledge of the Department, nor is it readily ascertainable.

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 7

Senator Marshall asked on 12 April 2017 on proof Hansard page 71

Question

Senator MARSHALL: I think you asserted that state offences would not necessarily capture a transfer between an employer and a union official. Can you provide an example of where a prosecution has failed on this basis?

Ms Anderson: Perhaps I could refer you to our submission, where we provide a number of examples from the royal commission. On page 4—

Senator MARSHALL: No, no. That was not my question. My question was about where a prosecution has failed on that basis. The royal commission was its own thing. There were no prosecutions involved there. You can take my position as being the same as Senator Cameron's. I am not really interested in the royal commission. I am interested in the factual basis of this bill.

Ms Anderson: These provisions were drafted—

Senator MARSHALL: Let me ask the question again. You have asserted to the shadow minister that the state offences would not necessarily capture a transfer between an employer and a union official. Can you provide an example of where a prosecution has failed on this basis? If you cannot, that is all right.

Ms Volzke: I could not give you a case name, but I think it goes back to the concept that the agency which is at the centre of a lot of the secret commission offences does not necessarily lend itself to applying to registered organisations. But I cannot give you a specific case example.

Answer

The Royal Commission found, on the basis of its consultations and cross examinations of witnesses, that there are limitations on the existing law that need to be addressed. This Bill implements three of the Commission's recommendations for changes to the law.

The examples of the shortfall in the existing state and territory laws will be cases not brought for prosecution on the basis that they will not meet the test set out in the law. It is therefore not possible to provide a particular case name.

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QUESTIONS ON NOTICE Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 8

Senator Marshall asked on 12 April 2017 on proof Hansard page 71

Question

The department has advised that ‘dishonestly’ and ‘corruptly’ have not been used because of a lack of judicial authority as to the meaning of those terms. By that, do you mean that there is no – or no clear – authority for the way in which the judge is to direct a jury as to the meaning of ‘dishonestly’ and ‘corruptly’?

Answer

The difficulty with the terms *dishonestly* and *corruptly* is the lack of settled and clear judicial authority on their meaning in the context of bribery offences.

Dishonestly

The concept of dishonesty is used in relation to bribery and related offences in the *Criminal Code*. ‘Dishonesty’ is defined in section 130.3. It involves both an objective and subjective test. It reflects the *Ghosh*¹ test, which required conduct to be objectively dishonest (according to the standards of ordinary people) as well as subjectively dishonest (known by the defendant to be dishonest according to the standards of ordinary people).

However, in *Peters v the Queen*² and *Macleod v The Queen*³, the High Court rejected the *Ghosh* test. The *Peters* test does not include the subjective limb of the test; it is entirely objective. In *SAJ v The Queen*⁴, the Victorian Court of Appeal held that the word ‘dishonestly’ in subsection 184(2) of the *Corporations Act 2001*, which makes it an offence for a director, other officer or employee of a corporation to use their position dishonestly with the intention of gaining an advantage, either directly or indirectly, for themselves, someone else, or to cause detriment to the company, or being reckless as to that result, was to apply the objective *Peters* test.

Corruptly

The Department refers the Committee to the Final Report, which noted that there are conflicting authorities in Australian jurisdictions about the meaning of the word ‘corruptly’ in the context of laws regulating corrupting benefits.⁵ In New South Wales and Western Australia a payment must be corrupt according to ordinary concepts; in Victoria and Queensland there is no such requirement.

¹ *R v Ghosh* (1982) QB 1053

² (1998) 192 CLR 493

³ (2003) 214 CLR 230

⁴ (2012) 225 A Crim R 528

⁵ Chapter 4, Volume 5, *Final Report* of the Royal Commission into Trade Union Governance and Corruption, [34]

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 9

Senator Marshall asked on 12 April 2017 on proof Hansard page 71

Question

Given that the new offences use the term 'improper' and whether or not the relevant action was improper is a matter for a trier of fact, what is the judicial authority as to the meaning of the term?

Answer

Impropriety in the context of carrying out an officer's duties is a well-established concept. In *R v Byrnes*⁶ a majority of the High Court stated (at 514-515) in relation to an offence of improper use of position:

Impropriety does not depend on an alleged offender's consciousness of impropriety. Impropriety consists in a breach of the standards of conduct that would be expected of a person in the position of the alleged offender by reasonable persons with knowledge of the duties, powers and authority of the position and the circumstances of the case. When impropriety is said to consist in an abuse of power, the state of mind of the alleged offender is important: the alleged offender's knowledge or means of knowledge of the circumstances in which the power is exercised and his purpose or intention in exercising the power are important factors in determining the question whether the power has been abused. But impropriety is not restricted to abuse of power. It may consist in the doing of an act which a director or officer knows or ought to know that he has no authority to do.

⁶ (1995) 183 CLR 501

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QUESTIONS ON NOTICE Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 10

Senator Marshall asked on 12 April 2017 on proof Hansard page 72

Senator Marshall provided further detail in writing.

Question

Can you confirm that section 536D(2)(b) refers to the intention of the provider of influencing a registered organisation's officer to act improperly?

Answer

The Department confirms that:

- A. Paragraph 536D(1)(b) refers to the intention of the provider of *influencing* a registered organisation's officer or employee to act improperly (etc).
- B. Paragraph 536D(2)(b) refers to two possible intentions:
 1. The intention of the receiver that the receipt, or expectation of the receipt, of the benefit will tend to influence a registered organisation's officer or employee to act improperly (etc).
 2. The intention of the receiver that the provider believes that, the receipt, or expectation of the receipt, of the benefit will tend to influence a registered organisation's officer or employee to act improperly (etc).
- C. There is no requirement that any person actually be influenced or (for subsection 536D(2)) that the receiver actually know the state of mind of the provider.

It is correct that a defendant would contravene subsection 536D(2) by requesting a benefit with the intention that the receipt will *tend to influence* a registered organisations officer or employee, and that a defendant would contravene subsection 536D(1) by providing a benefit with the intention of *influencing* a registered organisations officer or employee.

The reason for the use of the words *tend to influence* in subsection 536D(2) is that the provision needs to cover circumstances in which the person who solicits the corrupting benefit is not necessarily the officer or employee whose conduct is potentially influenced, including where the person who solicits the benefit does not know whose conduct might ultimately be influenced. In such cases, the most that the defendant could know is that the officer or employee would *tend* to be influenced by the recipient.

This point is borne out by the differences between subsections 141.1(3) and 142.1(3) of the *Criminal Code*:

- Subsection 141.1(3) applies only where the Commonwealth public official who solicits the corrupting benefit is the *same person* as the Commonwealth public official whose conduct is said to be influenced. Because it is the same person, the language of *tend to influence* need not be used: the soliciting official will know whether the benefit will influence his or her own conduct.
- Subsection 142.1(3) applies where the Commonwealth public official solicits a corrupting benefit that may influence *any* Commonwealth public official. The

provision therefore uses the language of *tend to influence*, because the soliciting official will not necessarily intend that the benefit influence a particular public official.

Paragraph 28 of the explanatory memorandum reads correctly whether the phrase 'influence' or 'tend to influence' is used. If the request or receipt of a benefit is intended to make a provider believe that an officer or employee will tend to be influenced, it will fit within the scope of subsection 536D(2).

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QUESTIONS ON NOTICE

Fair Work Amendment (Corrupting Benefits) Bill 2017

Department of Employment Question No. 11

Senator Marshall asked on 12 April 2017 on proof Hansard page 75

Senator Marshall provided further detail in writing

Question

The only example given in the explanatory memorandum of the type of payment this section is intended to prevent or capture is at paragraph 42, which says 'For example, it is intended to apply in circumstances where the spouse of a national system employer causes to provide a cash or in kind payment to an employee organisation for the purpose of the employee organisation treating the employer's company favourably in an industrial campaign'. Why isn't this example covered by the new corruption benefits offence. If it is, why is another offence required?

Answer

The offence provisions contained in sections 536D, 536F and 536G of the Bill serve distinct purposes. Section 536D provides a substantial criminal penalty for cases where it can be proven that a person making or receiving a payment did so with the intention to corrupt. By contrast, sections 536F and 536G require no such intention.

Commissioner Heydon specifically recommended that a two-tiered approach of this kind be taken given the long history of corrupting payments that had been identified by successive Royal Commissions over a period of more than 30 years.⁷ Even with a clear federal corrupting benefits provision, Commissioner Heydon recognised the difficulties associated with attempting to prove, beyond reasonable doubt, that a person has corrupting intentions when a payment is made from an employer, or an associate of an employer, to a registered organisation, officer or employee.

In the example provided by paragraph 42 of the explanatory memorandum for the Bill, a conviction could only be achieved under proposed subsection 536D(1) if the prosecution was able to prove beyond a reasonable doubt that the payment was intended to influence an officer or employee of an organisation to act improperly or give an undue advantage to the employer. Where the prosecution makes the assessment that it is not possible to prove such an intention, section 536F will be available, which does not require this element.

⁷ Chapter 4, Volume 5, *Final Report*, [58]

Question

Do you agree that this offence is intended to capture situations where the request or payment is made for corrupt, improper or illegitimate purposes? This follows, doesn't it, from the list of exemptions contained in s536F(3), which the explanatory memorandum describes at paragraph 47 as exemptions 'that allow national system employers to make necessary or legitimate payments'. It also follows from the use of the term 'a non-corrupting benefit' in s536F(3)(g): a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

Therefore, it follows, doesn't it, that in order to capture corrupt, improper or illegitimate requests for payments or payments, but to not criminalise necessary or legitimate payments, this offence should contain a fault element at s536F(1)(b) and s536G(1)(a). In order to be consistent with the corrupting benefits offences, this fault element should be 'improperly'.

Answer

Sections 536F and 536G give effect to recommendation 41 of the Final Report. Consistently with that recommendation, this is a strict liability offence for the reasons explained above.

Question

You would accept, wouldn't you, that there are likely to be circumstances other than those set out in s536F(3) where a request for payment should not give rise to liability under s536F(1)? This is the reason, isn't it, for the inclusion of s536F(3)(g) which exempts 'a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations'.

Answer

In the Final Report, Commissioner Heydon concluded that there are very few circumstances in which a payment from an employer to an employee organisation is legitimate given the high risk of an actual, or potential, conflict of interest. Following, Commissioner Heydon recommended that all payments from employers to an employee organisation or its officials should be outlawed unless the payments fall within certain legitimate exceptions.⁸

The exceptions provided in subsection 536F(3) from the offence in subsection 536F(1) cover the identified legitimate payments that could be made from a national system employer to an employee organisation. The exception in paragraph 536F(3)(g) allows other payments to be prescribed at a later date and reflects Commissioner Heydon's view that other categories of legitimate payment may become apparent.

⁸ Chapter 4, Volume 5, *Final Report*, [60]