

Member Briefing: Corrupting Benefits Changes *Updated 23 August 2017*

Disclaimer: The contents of this document are intended as an analysis only and does not contain legal advice. The precise legal meaning and scope of application of the information contained herein will require specific advice independently obtained. Unless specified, explanations of specific legislative clauses have been summarised and should not be used a substitute for the precise words contained in legislation.

1. Background to Corrupting Benefits Amendments to the *Fair Work Act 2009*

Changes to the *Fair Work Act 2009* (Cth) (**FW Act**) prohibiting the payment of certain benefits to employee organisations (described as corrupting benefits) have arisen from the Report of the Royal Commission into Trade Union Governance and Corruption and in particular recommendations 40, 41 and 48 of [chapter 4](#) of that report.

According to the [Explanatory Memorandum](#), the amendments aim to rectify shortcomings in current legislation where payments are designed to influence the conduct of registered organisations and their officers. It aims to create better transparency for members of registered organisations, providing them with confidence that the organisation is conducting itself with transparency and accountability.

There were negotiations in the Senate in order to allow the legislation to pass, which are reflected in a [Supplementary Explanatory Memorandum](#).

The [Fair Work Amendment \(Corrupting Benefits\) Act 2017](#) passed both houses of parliament in its most recent sitting, and received royal assent on 18 August 2017.

2. Overview of Key Changes

- It will be a criminal offence to dishonestly pay, receive, or solicit a corrupting benefit.
- It will be criminal offence for a national system employer to promise or provide any cash or in kind payment other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; it will also be an offence to receive such a payment.
- There will be an exemption for token benefits.
- Bargaining representatives must disclose financial benefits that they or a connected person or body reasonably expect to receive because of a term of the proposed agreement; this will be a civil penalty provision but will not affect whether the enterprise agreement is approved.

3. Specific Amendments Explained

The *Fair Work Amendment (Corrupting Benefits) Act 2017* makes a number of changes to the FW Act. Further detail on the changes is contained below.

- A new Part 3-7 Corrupting benefits is inserted at the end of Chapter 3.
- The new Part allows for any state based sanctions to remain applicable to the conduct which the FW Act is seeking to prohibit (for example, relevant offences under a state or territory Crimes Act related to bribery or secret commissions).
- A prohibition on a person giving a corrupting benefit (new 536D) will be enlivened if a person (the defendant) dishonestly:
 - provides; or
 - causes to be provided; or
 - offers or promises to provide; or
 - causes an offer or promise to provide; or

a benefit to another person, AND

The person giving the benefit does so with the intention of influencing a registered organisation's officer or employee (who may be the other person referred to above);

- in the exercise of their duties as an officer or employee;
 - to exercise power under the FW Act or the *Fair Work (Registered Organisations) Act 2009* (Cth) (**RO Act**) improperly;
 - to give an advantage of any kind to the person (giving the benefit), or a person or entity associated with the person, which would not be legitimately due.
- A complimentary provision exists which determines that an offence will be committed if a person (the defendant) dishonestly:
 - Requests (whether or not expressly and whether or not by threats); or
 - Receives or obtains; or
 - Agrees to receive or obtain;

a benefit from a person (provider) for the defendant or another person; AND

The defendant does so with the intention that, or the intention that the provider believes that, the receipt or the expectation of the receipt of the benefit would tend to influence a registered organisation or its officer or employee (who may be the defendant):

- in the performance of their duties;
- to exercise power under the FW Act or the RO Act improperly;
- to give an advantage of any kind to the person (giving the benefit), or a person or entity associated with the person, which would not be legitimately due.

The provisions around the corrupting benefit then go on to detail that:

- there is no need for actual influence;
- whether performance is improper is a matter for the trier of fact;
- certain matters may be disregarded when determining whether an advantage would be legitimately due;
- in determining whether an advantage would not be legitimately due, certain factors are to be disregarded;
- the meaning of benefit is any advantage and not limited to property

Penalties for breaching these provisions are:

Individual: imprisonment of up to 10 years or 5000 penalty units (\$1,050,000)(or both)

Body Corporate: 25,000 penalty units (\$5,250,000)

Penalty unit = \$210 (from 1 July 2017)

Giving a cash or in kind payment

Division 3 of the new Part 3-7 outlines offences relating to cash or in kind payments to employee organisations

The offence provision applies to national system employers (other than employee organisations) in circumstances where:

A person (described as the defendant):

- provides
- causes to be provided; or
- offers to provide, or promises to provide; or
- causes an offer of the provision, or a promise of the provision;

a cash or in kind payment to another person; AND

- the other person is an employee organisation or a prohibited beneficiary in relation to an employee organisation; and
- the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant, or a person who has a prescribed connection with the defendant, employs a person who is, or is entitled to be, a member of the organisation and whose industrial interests the organisation is entitled to represent.

Penalty:

Individual—imprisonment for 2 years or 500 penalty units (\$105,000), or both; or
body corporate—2,500 penalty units (\$525,000).

The following cash or in kind payments would not constitute an offence for the purposes of Division 3:

- (a) a payment to the organisation:
 - (i) made by deduction from the wages of an employee of the defendant who has agreed in writing to become a member of the organisation; and
 - (ii) made for a membership fee payable by the employee;
- (b) a benefit provided and used for the sole or dominant purpose of benefiting the defendant's employees;
- (c) a gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law;
- (ca) a benefit of nominal value (no more than \$420) associated with travel or hospitality during consultation, negotiation or bargaining;
- (cb) a benefit of nominal value (no more than \$420) that is a token gift – an event invitation or similar benefit – and given in accordance with common courteous practice among employers and organisations;
- (d) a payment made, at market value, for goods or services supplied to the defendant in the ordinary course of the organisation's business for purposes in relation to the ordinary course of the 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 or award of a court or tribunal;
- (g) a non-corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations.

The legislation then goes on to define various terms used throughout the division including what constitutes:

- a cash or in kind benefit;
- a prohibited beneficiary;
- and that the meanings of control, entity and spouse have the same meanings as in the RO Act.

A complimentary offence provision regarding soliciting or receiving a cash or in kind payment in a similar form to the corrupting benefits provision at s536D.

Disclosure by an organisation and employers

Members may recall that during the Heydon Royal Commission into Trade Union Corruption and Governance, concerns were raised over products provided under enterprise agreements (i.e. income protection insurance). It was further alleged that companies providing the products were providing benefit to unions and employers for utilising that product over others on the market.

Further amendments at s179 and s179A relate to disclosable benefits by organisations that are bargaining representatives.

These provisions effectively require either an organisation that is not an employer and who is a bargaining representative for an agreement (not greenfields agreement), or an employer, to prepare a document which outlines the nature and particulars of any benefit it (or a related person) will receive (or reasonably expects to receive) either directly or indirectly or under the terms of an agreement.

Where this document is prepared by an organisation not the employer, it must be provided to any employer covered by the agreement no later than the end of the fourth day of the access period referred to in s180(4) of the FW Act for the agreement. An employer must provide a document it is required to prepare under s179A (or provide access to the document) by the end of the fourth day of the access period.

An employer who receives a document disclosing a benefit from another organisation must take all reasonable steps to ensure that the relevant employees are provided or have access to the document as soon as practicable after the employer receives it.

This will not apply to:

- a financial benefit payable to an individual as an employee covered by the agreement; or
- payment of a membership fee for membership of an organisation; or
- as prescribed by the regulations for the purposes of this paragraph

Where the requirements outlined above are not complied with, the offences are civil remedy offences but are not taken to effect whether employees genuinely agreed to the agreement.

4. Key messages for AMMA members:

- Careful consideration should be undertaken if members decide or are asked to contribute to union endeavours (such as training fund and the like). Focus on whether payments are for a legitimate purpose and the making of the payment can reference a legitimate commercial benefit having been obtained for any payment.
- What constitutes a benefit is likely to be extremely broad, (and can include in kind payments) although an exception for token gifts and courtesy (up to \$420) will be excluded. The precise scope is unlikely to be known until tested in the courts.
- Where an enterprise agreement mandates the use of a particular product (i.e. income protection insurance), employers should be cognisant of any financial benefit they (or any bargaining representative) may receive and if so, comply with disclosure requirements.