FAIR WORK AMENDMENT (CORRUPTING BENEFITS) BILL 2017

EXPLANATORY MEMORANDUM

(Circulated by authority of the Minister for Employment, Senator the Hon Michaelia Cash)
The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the Bill) amends the *Fair Work Act 2009* (the Act) to respond to recommendations of the Final Report of the Royal Commission into Trade Union Governance and Corruption (the TURC Report), to promote the better governance of registered organisations.

The TURC Report highlighted numerous examples of payments being made to influence registered organisations and their officers and lack of transparency relating to financial benefits derived by bargaining representatives. These recent examples demonstrate that the existing regulatory framework is not sufficient to provide members of registered organisations with confidence that the management of registered organisations is accountable and transparent.

The Bill responds to TURC Report recommendations 40, 41 and 48, by amending the Act to:

- make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit;
- make it a criminal offence to receive or solicit a corrupting benefit;
- make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries;
- make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment;
- require bargaining representatives for a proposed enterprise agreement (employers, employer organisations, and unions) to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement. Failure to comply with these requirements can give rise to civil remedies, but will not preclude the approval of the enterprise agreement.

Substantial penalties will be imposed in relation to the giving, receiving or soliciting of corrupting benefits, with the provisions ensuring that there is a uniform and clear federal regime applying to registered organisations throughout Australia.

Disclosure 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.

In addressing these issues, the amendments will improve the governance and financial transparency of registered organisations.
FINANCIAL IMPACT STATEMENT

Nil
REGULATION IMPACT STATEMENT

The Interim and Final reports of the Royal Commission into Trade Union Governance and Corruption have been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement as set out in the Australian Government Guide to Regulation. The Office of Best Practice Regulation ID for this proposal is 19873.

These Royal Commission reports can be accessed at:

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Fair Work Amendment (Corrupting Benefits) Bill 2017

The Fair Work Amendment (Corrupting Benefits) Bill 2017 (the Bill) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Overview of the Bill

The object of the Fair Work Act 2009 (the Act) is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.

This Bill amends the Act to respond to recommendations of the final report of the Royal Commission into Trade Union Governance and Corruption (the TURC Report). The Bill responds to TURC Report recommendations 40, 41 and 48, by amending the Act to:

- make it a criminal offence to give a registered organisation, or a person associated with a registered organisation a corrupting benefit;
- make it a criminal offence to receive or solicit a corrupting benefit;
- make it a criminal offence for a national system employer other than an employee organisation to provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries;
- make it a criminal offence to solicit, receive, obtain or agree or obtain any such prohibited payment;
- require bargaining representatives for a proposed enterprise agreement (employers, employer organisations, and unions) to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement. Failure to comply with these requirements can give rise to civil remedies, but will not preclude the approval of the enterprise agreement.

Human rights implications

The definition of ‘human rights’ in the Human Rights (Parliamentary Scrutiny) Act 2011 relates to the core seven United Nations human rights treaties. The Bill is relevant to the following rights:

- the right to freedom of association, including the right to form and join trade unions and the right of trade unions to function freely in Article 22 of the International Covenant on Civil and Political Rights (ICCPR) and Article 8 of the International Covenant on Economic, Social and Cultural Rights (ICESCR);
- the right to take part in public affairs and elections in Article 25 of the ICCPR;

The Fair Work Amendment (Corrupting Benefits) Bill 2017
• the right to freedom of opinion and expression in Article 19 of the ICCPR;
• the right to work and the right to just and favourable conditions of work under Articles 6 and 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR); and
• the right to the presumption of innocence and the minimum guarantees contained in Article 14 of the ICCPR.

The content of the rights to work and rights in work in the ICESCR can be informed by specific obligations in treaties of the International Labour Organization, such as the Right to Organise and Collective Bargaining Convention 1949 (No. 98), that protects the right of employees to collectively bargain for terms and conditions of employment.

The Right to Freedom of Association

Article 22(1) of the ICCPR protects the right to freedom of association, including the right to form and join trade unions. Relevantly, Article 8(1)(a) of the ICESCR also provides for:

 três...”

Prohibition of illegitimate payments and benefits

The amendments that create criminal offences in relation to the giving or receiving of illegitimate payments and benefits are relevant to the right to freedom of association.

Judicial consideration of the role of officers of registered organisations has made clear that such officers hold a position of trust that involves the maintenance and advancement of interests of their members. A recurring scenario noted by the TURC Report involves an officer of an employee organisation (on behalf of herself or himself or the employee organisation) obtaining or soliciting illegitimate payments or benefits from an employer, in return for which the officer promises a benefit in return—for example that:

• there will be ‘industrial peace’;
• the employee organisation will not engage in threatened conduct that, if it occurred, would be detrimental to the employer; or
• the officer will exercise his or her powers in such a way as to confer a benefit on the employer at the expense of the employer’s workers or the employer’s competitors.

The TURC Report found that providing such benefits and payments increases the costs for employers and other persons doing business, leading to increased prices for consumers. They also undermine the proper performance of officer and employee duties, reward and entrench dishonest behaviour, and foster a culture that is antithetical to the rule of law.

Prohibiting illegitimate benefits and payments advances the right to freedom of association by improving the integrity and democratic functioning of registered organisations and ensuring

1 Diane Margaret Robertson v the State Public Services Federation [1993] FCA 336 at [17] per French J
that registered organisations are focussed on representing the interests of their members rather than the discrete interests of the organisation or its officers or employees.

**Disclosure of financial benefits**

These amendments are also relevant to the right to freedom of association in requiring registered organisations that are bargaining representatives for a proposed enterprise agreement to disclose financial benefits that the organisation or a related party of the organisation would receive because of the operation of a proposed enterprise agreement.

The amendments promote freedom of association by making transparent the terms of an enterprise agreement that financially benefit a registered organisation. By making clear any conflicts of interest that may exist, these amendments improve the capacity of registered organisations to represent and protect members’ interests.

**Right to freedom of opinion and expression and the right to take part in public affairs and elections**

Article 19 of the ICCPR protects the right to freedom of opinion and expression. Article 25 of the ICCPR protects the right to take part in public affairs, directly or through freely chosen representatives, and the right to vote and to be elected at genuine elections.

Prohibiting illegitimate payments and benefits will improve the integrity of registered organisations and ensure that they advance the interests of their members. To the extent that this may limit the right of organisations to participate in the political process, the limitation is reasonable, necessary, and proportionate.

The Bill pursues a legitimate objective of protecting the interests of members and eliminating corruption by implementing measures that the TURC Report found to be necessary.

In addition, the Bill clarifies that the prohibition of illegitimate payments and benefits will not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

**Right to organise and collective bargaining**

Article 6(1) of the ICESCR recognises the right to work and Article 7 requires that States Parties recognise the right of everyone to enjoy just and favourable conditions of work. These rights are informed by Article 4 of the ILO Right to Organise and Collective Bargaining Convention 1949 (No 98), which protects the right of employees to collectively bargain for terms and conditions of employment.

Article 4 requires States Parties to (among other things) take measures appropriate to national conditions to encourage and promote machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

**Prohibition of illegitimate payments and benefits**

Prohibiting the making or soliciting of illegitimate payments and benefits safeguards the right of every individual to enjoy just and favourable conditions of work by improving the integrity and democratic functioning of registered organisations and ensuring that registered
organisations are focussed on representing the interests of their members rather than the discrete interests of the organisation or its officers or employees.

The Bill also 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. It will not be an offence to provide benefits for the sole or dominant purpose of benefiting the defendant’s employees.

Disclosure of financial benefits

The TURC Report found that where an organisation (or an officer of the organisation, or a related entity) derives a financial benefit because of the terms of an enterprise agreement, which is not disclosed, this can give rise to an actual or potential conflict of interest for the organisation and can lead to breaches of fiduciary duties by union officials (Vol 5, p 330).

These amendments will require bargaining representatives for a proposed enterprise agreement to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement. Failure to comply with these requirements may give rise to a civil remedy. The requirements do not apply to benefits payable to employees covered by the agreement, payments received or obtained in the ordinary course of the employer’s business, or membership fees of the relevant organisation.

These amendments promote collective bargaining by making transparent the effect of terms in enterprise agreements that financially benefit a bargaining representative or a person or body reasonably connected with it. This ensures that employees who are asked to vote on an enterprise agreement are properly informed about its effect, thereby enhancing the open and informed voluntary negotiation of terms and conditions of employment. The consequences of failing to comply with these new disclosure requirements are necessary and proportionate to promoting this legitimate objective.

Right to the presumption of innocence

Article 14(2) of the ICCPR provides that everyone charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.

The amendments that make it a criminal offence for an employer other than an employee organisation to:

- provide, offer or promise to provide any cash or in kind payment, other than certain legitimate payments to an employee organisation or its prohibited beneficiaries; and
- solicit, receive, obtain or agree or obtain any such prohibited payment;

are relevant to this right through the imposition of strict liability in relation to certain elements of the offences (new sections 536F and 536G).

When strict liability applies, the prosecution is required to prove the physical but not the fault elements of the offence. Strict liability only attaches to jurisdictional elements of the new offences.
While the application of strict liability limits the right to the presumption of innocence, this is within the permissible limitations to the right. The offences pursue the legitimate objective of eliminating illegitimate cash or in kind payments and this is reasonable, necessary and proportionate for achieving this objective and guaranteeing the democratic functioning of employee organisations, as identified by the TURC Report.

Removing the need to establish a defendant’s state of mind is reasonable and proportionate in order to ensure the integrity of the regulatory scheme in relation to registered organisations, noting also that the defence of honest and reasonable mistake of fact is available where the defendant has turned their mind to the existence of these facts (section 9.2 of the Criminal Code).

The right is also relevant to the imposition on the defendant of an evidential burden in relation to the exceptions to the criminal offence in new subsection 536F(3). This means that the defendant only bears the burden of pointing to evidence which suggests a reasonable possibility that the exception has been met. It is then incumbent on the prosecution to establish beyond a reasonable doubt that the exception does not apply. Whether the benefit was provided for one of the permitted purposes can be expected to be within the peculiar knowledge of the defendant. As such, it is reasonable for the defendant to bring evidence to show that they are not in breach, rather than requiring the prosecution to locate evidence (which is likely to be significantly more difficult and costly), to prove that the benefit was provided for a permitted purpose.

Conclusion

The amendments to the Act are compatible with human rights because they advance the protection of human rights. To the extent that the amendments may limit human rights, those limitations are reasonable, necessary and proportionate.

Minister for Employment, Senator the Hon Michaelia Cash
NOTES ON CLAUSES

In these notes on clauses, the following abbreviations are used:

<table>
<thead>
<tr>
<th>Act</th>
<th>Fair Work Act 2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bill</td>
<td>Fair Work Amendment (Corrupting Benefits) Bill 2017</td>
</tr>
<tr>
<td>FWC</td>
<td>Fair Work Commission</td>
</tr>
<tr>
<td>Regulations</td>
<td>Fair Work Regulations 2009</td>
</tr>
<tr>
<td>Registered Organisations Act</td>
<td>Fair Work (Registered Organisations) Act 2009</td>
</tr>
<tr>
<td>Royal Commission</td>
<td>The Royal Commission into Trade Union Governance and Corruption</td>
</tr>
<tr>
<td>TURC Report</td>
<td>Hon John Dyson Heydon AC QC’s Final Report of the Royal Commission into Trade Union Governance and Corruption</td>
</tr>
</tbody>
</table>

Clause 1 – Short title

1. This is a formal provision specifying the short title.

Clause 2 – Commencement

2. The table in this clause sets out when the provisions of the Bill commence.

Clause 3 – Schedules

3. Clause 3 of the Bill provides that legislation that is specified in a Schedule is amended or repealed as set out in that Schedule, and any other item in a Schedule operates according to its terms.
SCHEDULE 1 – AMENDMENTS RELATING TO CORRUPTING BENEFITS

Overview

4. Schedule 1 inserts new Part 3-7 into the Act. This new Part contains new criminal offences:

- The giving, receiving or soliciting of a corrupting benefit. A person commits an offence if they provide a corrupting benefit to a registered organisation, or a person associated with a registered organisation. A person who receives or solicits a corrupting benefit will also commit an offence; and

- The giving of cash or in kind payments to employee organisations. An employer other than an employee organisation, will commit an offence if they provide, offer or promise to provide any cash or in kind payment to an employee organisation or its prohibited beneficiaries. Certain legitimate categories of payment are excluded. Any person who solicits, receives or agrees to receive such any prohibited payment will also commit an offence.

Fair Work Act 2009

Item 1 – At the end of section 6

5. This item amends the description of Chapter 3 provided in section 6 of the Act by inserting new subsection 6(8) which provides that Part 3-7 deals with offences relating to corrupting benefits.

Item 2 – Section 12

6. Section 12 of the Act contains the Dictionary for the Act. Item 2 inserts three new definitions into the dictionary:

- ‘cash or in kind payment’;
- ‘prohibited beneficiary’;
- ‘registered organisations officer or employee’.

7. The signpost definitions provided for ‘cash or in kind payment’ ‘prohibited beneficiary’ and ‘registered organisation officer or employee’ are required as a result of new sections 536D and 536F.

Item 3 – At the end of Chapter 3

8. Item 3 inserts new Part 3-7 of Chapter 3 including new Divisions 1 – 3 and sections 536A – 536G.


10. New section 536A provides a guide to Part 3-7 including a brief description of what the Part does.
11. New section 536B provides that, for the purposes of Part 3-7, employee and employer have their ordinary meanings. This is necessary because, in some other parts of the Act, ‘employee’ and ‘employer’ are taken only to refer to national system employees and employers.

12. New subsection 536C(1) provides that Part 3-7 does not operate to exclude or limit the operation of any state or territory laws that are capable of operating concurrently with the Part.

13. Section 109 of the Constitution invalidates a state law to the extent that it is inconsistent with a Commonwealth law. Determining whether a state law is inconsistent with a Commonwealth law involves interpreting both laws. If the Commonwealth law is interpreted as operating to the exclusion of state law, the state law will be interpreted as inconsistent with the Commonwealth law and invalid.

14. This subsection applies to territory laws in the same way as it applies to state laws. While section 109 of the Constitution does not apply to territory laws, similar principles apply in relation to the inconsistency or repugnancy of territory laws with Commonwealth laws.

15. A concurrent operation provision, such as new section 536C, is used in interpreting the Commonwealth law to determine whether it operates to the exclusion of state or territory law. It indicates the Parliament’s intention that the Commonwealth law should not operate to the exclusion of state or territory law to the extent that the laws are capable of operating concurrently. In some cases, the laws may not be able to operate concurrently despite this general intention.

16. Subsection 536C(2) provides that Part 3-7 is not intended to exclude the concurrent operation of state laws imposing offences or civil penalties, where the same or similar conduct is also an offence under this Part. Under subsection 536(3), subsection 536(2) applies even if the penalty, fault elements, defences or exceptions that apply to the offence under the state or territory law are different to those contained in Part 3-7.

17. Relevant state or territory laws in this context could include laws criminalising secret commissions, corrupt benefits or rewards or bribes.

18. New Division 2, ‘Giving, receiving or soliciting corrupting benefits’, includes sections 536D and 536E.

19. New section 536D makes it an offence to give, receive or solicit corrupting benefits.

20. The offences created in Division 2 are designed 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.

21. Subsection 536D(1) provides that a person (the defendant) commits the offence of giving a corrupting benefit if the defendant:
• provides;
• causes to be provided;
• offers or promises to provide; or
• causes an offer or promise to provide;

a benefit to another person with the intention that the benefit will influence an officer or employee of a registered organisation to:

• perform his or her duties or functions as an officer or employee improperly;
• exercise his or her powers or functions under the Act or the Registered Organisations Act improperly; or
• give the defendant, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the defendant or any other person with a prescribed connection to the defendant, an advantage of any kind which is not legitimately due to the defendant or the other person.

22. The above described benefit does not need to be provided to the officer or employee who acts improperly for an offence to have occurred; the benefit may be provided to another person but if the provision of that benefit is intended to influence an officer or employee, the provision of the benefit will fall within the scope of the offence in subsection 536D(1). Further, a person can commit an offence under subsection 536D(1) irrespective of whether an officer or employee of a registered organisation actually engages in improper behaviour or the person who provided the benefit, or another person, actually receives an advantage which is not legitimately due to them.

23. New subsection 536D(1) will make it an offence, for example, for an employer or their representative to offer to make a payment to a registered organisation or its officer on the proviso that the organisation and its officers attempt to convince their members to accept lesser terms and conditions of employment in an enterprise agreement than the organisation would otherwise have advocated for. Further, a person who pays money to an officer of a registered organisation on the understanding that the officer will cause their organisation not to bargain for an enterprise agreement with any businesses owned or controlled by the person would also commit an offence under this provision.

24. The penalty for offences committed under subsection 536D(1) by an individual is 10 years imprisonment, a fine of 5,000 penalty units ($900,000) or both. The penalty for an offence committed by a body corporate is a fine of 25,000 penalty units ($4,500,000).

25. The quantum set for the maximum penalties takes into account recommendation 40 of the TURC Report (which relies on the penalties in section 70.2 of the Criminal Code for bribery of foreign officials) and other penalties in the Act. The penalties have been aligned with other penalties in the Act and provide the appropriate level of deterrence to address the corporate and organisational misbehaviour identified in the Final Report.

26. Subsection 536D(2) provides that a person (the defendant) commits the offence of receiving or soliciting a corrupting benefit if the defendant:
Schedule 1 – Amendments relating to corrupting benefits

- requests (whether expressly and with the use of threats or otherwise);
- receives or obtains; or
- agrees to receive or obtain

a benefit from another person (the provider) with the intention that, or the intention that the provider believe that, the benefit will influence an officer or employee of a registered organisation to:

- perform his or her duties or functions as an officer or employee improperly;
- exercise his or her powers or functions under this Act or the Registered Organisations Act improperly; or
- give the provider, a spouse (within the meaning of the Registered Organisations Act) or associated entity of the provider or any other person with a prescribed connection to the provider, an advantage of any kind which is not legitimately due to the provider or the other person.

27. To commit the offence it is enough that the defendant intends the provider to believe that the receipt of the benefit will influence an officer or employee. The offence may also be established if the defendant anticipates receiving the benefit, whether they have received it or not.

28. As with subsection 536D(1), the person who requests or receives the benefit need not be the officer or employee who acts improperly for an offence to have occurred; the benefit may be received by another person, such as the spouse or relative of the officer of the registered organisation. If the request or receipt of a benefit is intended to influence the officer or employee, or make the provider of the benefit believe it will influence the officer or employee, the request or receipt will fall within the scope of subsection 536D(2). Further, a person can commit an offence under subsection 536D(2) irrespective of whether an officer or employee of an organisation actually engages in improper behaviour or a person actually receives an advantage which is not legitimately due to them.

29. For example, new subsection 536D(2) would make it an offence:

- for a person to request that an employer make payments to that person, or another person, on the basis that this will cause the officers of a registered organisation to discourage members of the organisation from engaging in industrial action in relation to changes in the workplace; or
- for an officer of a registered organisation to solicit a building company to renovate a house owned by the officer’s spouse on the understanding that the organisation will not enter building sites on which the building company is performing work.

30. The penalty for offences committed under subsection 536D(2) are the same as those for offences under subsection 536D(1), namely:

- 10 years imprisonment, a fine of 5,000 penalty units ($900,000) or both for an individual; and
Schedule 1 – Amendments relating to corrupting benefits

- a fine of 25,000 penalty units ($4,500,000) for a body corporate.

31. As is the case for the offence under subsection 536D(1), the penalties have been aligned with other penalties in the Act and provide the appropriate level of deterrence to address the corporate and organisational misbehaviour identified in the Final Report.

32. Subsection 536D(3) explains that there is no need to prove that there was an intention to influence a particular officer or employee of a registered organisation for the purposes of proving that an offence has occurred under subsections 536D(1) or 536D(2). Further, a person can commit an offence under subsection 536D(1) or 536D(2) if they intend an officer or employee of a registered organisation to act improperly or give an advantage, whether or not they intend that an officer will act in a particular manner or give a particular advantage which is not legitimately due. Paragraph 536D(3)(c) provides that, in relation to subsection 536D(2), there is no need to prove a person providing the benefit believed anything for an offence to have occurred. Finally, paragraph 536D(3)(d) provides that there is no need to prove that any person was actually influenced by the receipt, or expected receipt, of a benefit in order for an offence to have occurred.

33. Subsection 536D(4) provides that in any prosecution for an offence under subsection 536D(1) or (2), it would be for the trier of fact to determine, from the evidence available, whether the performance or exercise of duties, functions or powers by an officer or employee would be ‘improper’. Some examples of impropriety would include where an officer or employee of a registered organisation exercises his or her duties in a manner that is not bona fide or for the genuine benefit of the members of the organisation. Similarly, it would be for the trier of fact to determine on the facts of the case whether an advantage would not be legitimately due to a person.

34. Subsection 536D(5) explains that an ‘advantage’ given per subparagraphs 536D(1)(b)(iii) and 536D(2)(b)(iii), may be given in any way, including by act or omission, or influencing another person’s acts or omissions.

35. Subsection 536D(6) provides that in determining whether an advantage is ‘not legitimately due’ to a person for the purposes of subparagraphs 536D(1)(b)(iii) and 536D(2)(b)(iii), no regard must be had to whether:

- the advantage is, or maybe perceived to be, customary, necessary or required in the situation;
- the value of the advantage; and
- any official tolerance of the advantage.

36. The concept of ‘not legitimately due’ provided for in subsections 536D(5) and (6) is based on subsection 70.2(2) of the Criminal Code in relation to similar offences relating to the bribing foreign public officials. Subsection 536D(6) makes it clear that it will not be sufficient for a defendant to claim that providing a benefit which results in the defendant receiving an advantage is ‘standard practice’ or that such behaviour is frequently engaged in by other parties.

37. Subsection 536D(7) provides that for the purposes of section 536D, ‘benefit’ includes any advantage and is not limited to property.
38. New section 536E provides that, for the purposes of section 536D, ‘registered organisations officer or employee’ includes an officer, within the meaning of the Registered Organisations Act, of an organisation or branch of an organisation and an employee of an organisation or branch of an organisation.

39. New Division 3, ‘Cash or in kind payments to employee organisations etc.’ includes sections 536F, 536G and 536H.

40. New section 536F prohibits, with certain exceptions, the giving of benefits by a national system employer other than an employee organisation to an employee organisation or its prohibited beneficiaries.

41. Subsection 536F(1) provides that it is an offence for a national system employer, who is not an employee organisation, (the defendant) to:

- provide, cause to be provided or offer or promise to provide a cash or in kind payment to another person; or

- cause an offer or a promise of the provision of a cash or in kind payment to be made to another person (second person);

if that second person is an employee organisation or a prohibited beneficiary in relation to the employee organisation, and the defendant, spouse (within the meaning of the Registered Organisations Act), associated entity or 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.

42. This new subsection is intended to capture any cash or in kind payment the employer caused to occur, including from related parties or entities. 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.

43. Subsection 536F(1) provides that the penalty for an individual for the offence of giving a cash or in kind payment to an employee organisation or prohibited beneficiary is imprisonment for 2 years or 500 penalty units ($90,000), or both. The penalty for a body corporate is 2,500 penalty units ($450,000).

44. The 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. The departure from the fine-imprisonment ratio in the Attorney General’s Department Guide to Framing Commonwealth Offences is to respond to the recommendation in the TURC report.

45. Subsection 536F(2) provides that strict liability applies to the following elements of the offence:

- the defendant being a national system employer other than an employee organisation (paragraph 536F(1)(a));
Schedule 1 – Amendments relating to corrupting benefits

- the other person being an employee organisation or prohibited beneficiary in relation to the employee organisation (paragraph 536F(1)(c));
- the entitlement to represent an employee of the employer (paragraph 536F(1)(d)).

46. It will not be necessary to establish a defendant’s state of mind in relation to each of these matters, but the defence of honest and reasonable mistake of fact will apply where the defendant has turned his or her mind to the existence of these facts (section 9.2 of the Criminal Code). The elements attracting strict liability are jurisdictional in nature and are necessary to pursue the legitimate objective of eliminating illegitimate cash or in kind payments.

47. Subsection 536F(3) provides for exceptions to the offence in subsection 536F(1) that allow national system employers to make necessary or legitimate payments. These exceptions allow for:

- payments to an organisation made by the deduction of membership fees from the wages of an employee of the defendant where the employee has agreed in writing to become a member of the employee organisation (paragraph 536F(3)(a));
- benefits provided and used for the sole or dominant purpose of benefitting the defendant’s employees (paragraph 536F(3)(b));
- gifts or contributions that are deductible under section 30-15 of the Income Tax Assessment Act 1997 and used in accordance with the law (paragraph 536F(3)(c));
- payments made, at market value, for goods or services supplied to the defendant where that supply is in the ordinary course of the organisation’s business and in relation to the ordinary course of the defendant’s business (paragraph 536F(3)(d));
- payments made under or in accordance with a law of the Commonwealth or a law of a State or Territory (paragraph 536F(3)(e));
- benefits provided in accordance with an order, judgment or award of a court or tribunal (paragraph 536F(3)(f));
- a non corrupting benefit prescribed by, or provided in circumstances prescribed by, the regulations (paragraph 536F(3)(g)).

48. The regulations may also prescribe a cash or in kind payment that would otherwise be covered by any of the exceptions in subsection 536F(3) as a cash or in kind payment to which subsection 536F(1) applies.

49. For example, if an employee organisation makes a side deal with an employer in which the employer agrees to make payments to an employee organisation’s ‘slush fund’, this would not be covered by an exception in new subsection 536F(3) and the employer would commit an offence.

50. Including offence content in regulations as provided by subsection 536F(3) is necessary in this instance as the Royal Commission did not deal comprehensively with the categories of legitimate payments. It is important and appropriate to provide scope to add to
or remove certain types of payments as the need arises. The regulation making power is only available to exclude those benefits that are non-corrupting.

51. The note to subsection 536F(3) points to a defendant bearing an evidential burden in relation to the matters in this subsection. This means that the defendant bears the burden of pointing to evidence that suggests a reasonable possibility that a relevant exception has been met. It is then incumbent on the prosecution to establish beyond a reasonable doubt that the exception does not apply. Whether the benefit was provided for one of the permitted purposes can be expected to be within the peculiar knowledge of the defendant. As such, it is reasonable for the defendant to bring evidence (which is most likely easily and readily available to them) to demonstrate that one of the exceptions applies, rather than requiring the prosecution to locate evidence (which is likely to be significantly more difficult and costly), to prove that the benefit was provided for a permitted purpose.

52. Subsection 536F(4) defines the term ‘cash or in kind payment’ to be a benefit in the form of cash, other money, goods or services.

53. Subsection 536F(5) defines the term ‘prohibited beneficiary’ to include certain persons connected with the employee organisation. The following persons and entities are prohibited beneficiaries:
   - an entity controlled by the organisation;
   - an officer of the employee organisation;
   - the spouse of, or entity controlled by, such an officer or employee;
   - a person or entity to whom the organisation or a prohibited beneficiary of the organisation requests or directs the defendant to provide a cash or in kind payment to;
   - a person who has a prescribed connection with the organisation or a prohibited beneficiary of the organisation.

54. A regulation making power to prescribe additional persons who have a connection with the organisation or a prohibited beneficiary is a necessary anti-avoidance measure to address any attempts to circumvent the application of the prohibition.

55. Subsection 536F(6) clarifies that ‘control’, ‘entity’ and ‘officer’ used in subsection 536F(5) have the same meanings as in the Registered Organisations Act.

56. Subsection 536F(7) clarifies that sections 30D and 30N of the Act do not apply to extend the meaning of ‘national system employer’ in new section 536F. This is so that it is clear that the provision does not rely on referrals of State power.

57. New section 536G prohibits the soliciting, receiving or agreeing to receive a cash or in kind payment. The section makes it an offence for an employee organisation (the defendant) to request, receive, obtain or agree to receive or obtain a cash or in kind payment from a second person (the provider) for the defendant or another person, in circumstances where, if the provider were to provide the benefit to the defendant or other person, the provider or another person would commit an offence against subsection 536F(1).
58. The note to subsection 536G provides that the maximum penalty for an individual for the offence of receiving or soliciting a cash or in kind benefit is imprisonment for 2 years or 500 penalty units ($90,000), or both. The penalty for a body corporate is 2,500 penalty units ($450,000). The penalties for this offence are lower than those provided for in new section 536D. This is appropriate because the prohibition on receiving or soliciting a cash or in kind payment would not require any proof of an intention to influence.

59. The departure from the fine-imprisonment ratio in the Attorney General’s Department Guide to Framing Commonwealth Offences is to respond to the recommendation in the TURC report.

60. New section 536H provides that this Division does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.
SCHEDULE 2 – AMENDMENTS RELATING TO DISCLOSURE BY ORGANISATIONS AND EMPLOYERS

Overview

61. Part 2-4 of the Act provides a framework for the making of enterprise agreements through a process of collective bargaining in good faith. The TURC Report identified that enterprise agreement terms requiring payments to certain funds in order to generate income for a registered organisation ‘can give rise to actual and potential conflicts of interest, breaches of fiduciary duty and the potential for coercion’ (TURC Report, Volume 5, p 328).

62. Examples of the conflicts of interest cited in the TURC Report included enterprise agreement terms obliging employers to use particular providers of income protection insurance and workers’ compensation top-up cover, resulting in financial benefits flowing to an organisation.

63. The TURC Report considered that such conflicts should be disclosed as a ‘basic first step’, including to ensure that employees who are asked to vote for a proposed enterprise agreement are properly informed about its effect (TURC Report, Volume 5, p 336).

64. Schedule 2 of the Bill responds to recommendation 48 of the TURC Report by amending Part 2-4 of the Act to require bargaining representatives (employers and organisations) for a proposed enterprise agreement to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement. The disclosure document would be provided to employees before they commence voting on a proposed enterprise agreement.

Fair Work Act 2009

Item 1 – Section 12

65. Section 12 contains the Dictionary to the Act. Item 1 amends section 12 to provide that ‘related party’ has the same meaning as in the Registered Organisations Act, and inserts signpost definitions of the terms ‘section 179A disclosable benefit’ and ‘section 179 disclosable benefit’ into the Dictionary.

Item 2 – Before section 180

Disclosure by organisations that are bargaining representatives

66. Item 2 inserts new section 179, which sets out the process for the disclosure of financial benefits that an organisation that is a bargaining representative, or a related party of the organisation, would or could reasonably be expected to derive because of a term of the proposed enterprise agreement. After receiving a disclosure document from the organisation, the employer must then take all reasonable steps to provide the document to employees before they vote on the proposed enterprise agreement (in accordance with new subsection 180(4A), see item 3).

67. Where the proposed enterprise agreement is a single-enterprise agreement with two or more single interest employers, or a multi-enterprise agreement, each employer must be given a disclosure document.
68. New subsection 179(1) provides that an organisation must take all reasonable steps to ensure that each employer covered by a proposed enterprise agreement is given a written disclosure document, in the following circumstances:

- the organisation is a bargaining representative for a proposed enterprise agreement that is not a greenfields agreement; and

- the organisation is not an employer that will be covered by the agreement (i.e., the organisation does not need to disclose benefits to itself when bargaining for its own enterprise agreement); and

- as a direct or indirect consequence of the operation of one or more terms of the agreement, the organisation or a person mentioned in new subsection 179(2) would, or could reasonably be expected to, receive or obtain (directly or indirectly) a section 179 disclosable benefit (each such person being a beneficiary).

69. Subsection 179(1) is a civil remedy provision. Under Part 4-1 of the Act, a person who contravenes subsection 179(1) may be subject to a maximum civil penalty of 60 penalty units in the case of an individual, and 300 penalty units in the case of a body corporate (see item 5).

70. Subsection 179(2) provides that further persons capable of being a beneficiary for this purpose are a related party of the organisation (other than a related party prescribed by the regulations) and any person or body prescribed by the regulations.

71. The effect of this subsection is that an organisation that is a bargaining representative must take all reasonable steps to disclose financial benefits that these beneficiaries would or could reasonably be expected to derive because of a term of the proposed agreement.

72. Related party is defined as having the same meaning as in the Registered Organisations Act (item 1). Section 9B of the Registered Organisations Act provides that a related party of an organisation includes:

- an entity controlled by the organisation;

- officers of the organisation, their spouses, and relatives of officers and spouses;

- an entity controlled by one of the above-mentioned entities or persons;

- an entity that has been a related entity within the previous 6 months;

- an entity that has reasonable grounds to believe it is likely to become a related party at any time in the future; and

- an entity that acts in concert with a related party on the understanding that the related party will receive a financial benefit if the organisation gives the entity a financial benefit.

73. Subsection 179(3) provides that the disclosure document must be given to each employer that will be covered by the proposed enterprise agreement no later than the end of the fourth day of the access period referred to in subsection 180(4). The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process by which employees can approve the agreement. This timeframe is to ensure
that the organisation has sufficient time to prepare the disclosure document (including before
the start of the access period) and the employer has sufficient time to take all reasonable steps
to give the disclosure document to employees before they commence voting on a proposed
enterprise agreement.

74. Subsection 179(4) sets out requirements relating to the content of a disclosure
document. It is intended that the document be as short, simple and clear as possible. The
document must itemise the beneficial terms of the agreement (i.e., terms as a direct or indirect
consequence of which a beneficiary would or could reasonably be expected to obtain, directly
or indirectly, a section 179 disclosable benefit). The document is not required to extract, or
provide a detailed explanation of, the beneficial terms, and it is intended that relevant clauses
could be identified for the purposes of paragraph 179(4)(a) by referring to the clause number.
The document must also describe the nature and (as far as reasonably practicable) amount of
each section 179 disclosable benefit, and must name each beneficiary. Regulations may
prescribe further requirements in relation to the content or form of a disclosure document or
the manner in which it is given.

75. Subsection 179(5) provides that an organisation that gives an employer a disclosure
document must not knowingly or recklessly (i.e., not caring whether it is true or false) make a
false or misleading representation in the document. This subsection is a civil remedy
provision. Under Part 4-1 of the Act, a person who contravenes subsection 179(5) may be
subject to a maximum civil penalty of 60 penalty units in the case of an individual, and 300
penalty units in the case of a body corporate (see item 5).

76. Subsection 179(6) provides that a section 179 disclosable benefit (for the purpose of
the disclosure requirement in new subsection 179(1)) is any financial benefit but does not
include a financial benefit payable to an individual in his or her capacity as an employee
covered by the relevant agreement. This ensures, for example, that remuneration an employee
is expected to receive under the terms of a proposed enterprise agreement would not be a
section 179 disclosable benefit because the employee is a relative of an officer of the
organisation. A section 179 disclosable benefit also does not include payment of a
membership fee for membership of an organisation, or any other financial benefits that may
be prescribed by the regulations.

Disclosure by employers

77. Item 2 also inserts new section 179A, which sets out the process for the disclosure of
financial benefits that an employer or an associated entity of the employer would or could
reasonably be expected to derive because of a term of a proposed enterprise agreement. The
employer must take all reasonable steps to provide the document to employees before they
vote on the proposed enterprise agreement (in accordance with new subsection 180(4B), see
item 3).

78. Subsection 179A(1) provides that an employer must prepare a disclosure document in
the following circumstances:

- the employer will be covered by a proposed enterprise agreement that is not a
greenfields agreement; and

- as a direct or indirect consequence of the operation of one or more terms of the
agreement, the employer or a person mentioned in new subsection 179A(2) would, or
could reasonably be expected to, receive or obtain (directly or indirectly) a section 179A disclosable benefit (each such person being a beneficiary).

79. Subsection 179A(2) provides that further persons capable of being a beneficiary for this purpose are an associated entity of the employer (other than an associated entity prescribed by the regulations) and any person or body prescribed by the regulations. Associated entity is defined in section 12 of the Act as having the meaning given by section 50AAA of the Corporations Act 2001.

80. Subsection 179A(3) sets out requirements relating to the content of a disclosure document. It is intended that the document be as short, simple and clear as possible. The document must itemise the beneficial terms of the agreement (i.e., terms as a direct or indirect consequence of which the employer, or an associated entity, would or could reasonably be expected to obtain, directly or indirectly, a section 179A disclosable benefit). It is not intended that the document extract or provide a detailed explanation of the beneficial terms. The relevant clauses could be identified for the purposes of paragraph 179A(3)(a) by simply referring to the clause number. The document must describe the nature and (as far as reasonably practicable) amount of each section 179A disclosable benefit, and must name each beneficiary. The document must also be in accordance with any other requirements prescribed by the regulations.

81. Subsection 179A(4) provides that a section 179A disclosable benefit is any financial benefit but does not include a financial benefit that is received or obtained in the ordinary course of the employer’s business or a financial benefit that is prescribed in the regulations.

**Item 3 – After subsection 180(4)**

82. Section 180 sets out pre-approval steps that an employer must carry out in relation to a proposed enterprise agreement.

83. Item 3 amends section 180 to insert new subsections 180(4A), 180(4B) and 180(4C) to require employers to take all reasonable steps to give employees disclosure documents before they vote on a proposed enterprise agreement.

84. Subsection 180(4A) provides that if an organisation has given an employer a disclosure document under new section 179 by the end of the fourth day of the access period for the agreement, then the employer must take all reasonable steps to ensure that (as soon as practicable) the relevant employees are either given a copy of the document, or have access to a copy of the document throughout the remainder of the access period.

85. Subsection 180(4B) provides that if an employer is required to prepare its own disclosure document under new section 179A, then the employer must take all reasonable steps to ensure that the relevant employees are either given a copy of the document by the end of the fourth day of the access period, or have access to a copy of the document by the end of the fourth day, and throughout the remainder, of the access period.

86. The access period for a proposed enterprise agreement is the 7-day period ending immediately before the start of the voting process by which employees can approve the agreement (see subsection 180(4)).
87. The effect of new subsection 180(4C) is that an employer must not knowingly or recklessly (i.e., not caring whether it is true or false), make a false or misleading representation in its disclosure document.

88. New subsections 180(4A), 180(4B), and 180(4C) are civil remedy provisions. Under Part 4-1 of the Act, an employer that contravenes subsections 180(4A), 180(4B) or 180(4C) may be subject to a maximum civil penalty of 60 penalty units in the case of an individual, and 300 penalty units in the case of a body corporate (see item 5).

**Item 4 – After section 188**

89. Item 4 inserts new section 188A, which ensures that a failure to comply with the new disclosure requirements does not prevent the approval of an enterprise agreement by the FWC.

90. Section 188A provides that a failure by an organisation or an employer to comply with the disclosure requirements in new sections 179, 179A, or subsections 180(4A), 180(4B) or 180(4C) in relation to an agreement does not amount to reasonable grounds for believing that the agreement has not been genuinely agreed to by the employees. Such failures are also not otherwise relevant to approval of the agreement by the FWC. For example, if an organisation failed to give the employer a disclosure document by the end of the fourth day of the access period, or knowingly or recklessly made false or misleading representations in the document, this would not prevent the employer from requesting that employees approve the proposed enterprise agreement, and would not prevent the FWC from approving the agreement.

**Item 5 – Subsection 539(2) (before table item 6)**

91. Item 5 inserts new items into the table of civil remedy provisions in subsection 539(2) of the Act. The new civil remedy provisions (subsections 179(1) and 179(5), and 180(4A), 180(4B) and 180(4C)) concern disclosure obligations cast on organisations that are bargaining representatives and employers, as referred to in items 2 and 3. This item identifies who has standing to apply for an order, the courts to which an application for an order may be made, and the maximum penalty that may be imposed by a court.

**Item 6 – In the appropriate position in Schedule 1**

92. Item 6 inserts a new Part 6 and clause 30 in Schedule 1 of the Act.

93. New clause 30 has the effect that the new disclosure amendments apply in relation to a proposed enterprise agreement for which the access period begins on or after the commencement of Schedule 2 of the Bill. That commencement is the earliest of a day to be fixed by Proclamation or the day after the period of 6 months beginning on the day of Royal Assent (see item 2 of the table in clause 2 of the Bill for that commencement day).