COMPLIANCE ADVICE

WORKPLACE RELATIONS

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'Corrupting benefits' amendments to the *Fair Work Act* – Important implications for enterprise bargaining

SUMMARY

The *Fair Work Amendment (Corrupting Benefits) Act 2017* has been passed by Parliament and will come into operation shortly. The Act amends the *Fair Work Act 2009* to outlaw certain payments and benefits provided by employers to unions and union officials. The Act also requires disclosure of financial benefits that unions and employers would receive from the terms of a proposed enterprise agreement.

The Act contains hefty criminal and civil penalties for unions, employers and others that breach the legislation, so it is important that Members understand the new requirements and ensure compliance.

On 10 August 2017, the *Fair Work Amendment (Corrupting Benefits) Act 2017* (**Amendment Act**) was passed by Parliament. The legislation will come into operation shortly on a date to be proclaimed following Royal Assent.

The Amendment Act varies the *Fair Work Act 2009* (**FW Act**) to:

- Make it a criminal offence for a person to give, receive or solicit a "corrupting benefit".
- Make it a criminal offence for an employer to provide any cash or in kind payment to a union (other than certain specified payments) and make it a criminal offence for a union to solicit or receive such a payment.
- Require union bargaining representatives for a proposed enterprise agreement to disclose any financial benefits that the union would derive because of a term of the agreement.
- Require employers to disclose any financial benefits that they would receive because of a term of a proposed enterprise agreement.

Corrupting benefits

"Corrupting benefits" are benefits dishonestly offered or provided, with the intention of influencing an officer or employee of a union or registered employer organisation:

- In the performance of their duties to members of the organisation or the exercise of their powers and functions; or
- To give an advantage that is not legitimately due.

Penalties of up to 10 years' imprisonment and $5.25 million apply for those who give, receive or solicit a corrupting benefit.

For example, if an employer dishonestly offered a union or union official a $10,000 cash payment to agree to a particular industrial outcome that disadvantaged the union's members, this may constitute a "corrupting benefit".

Employer cash or in kind payments to unions

Cash and in kind payments made by employers to unions, union officers, union staff and associated entities are unlawful, other than payments that are expressly permitted under the legislation.

Penalties of up to two years' imprisonment and $525,000 apply to those who give, receive or solicit an unlawful payment.

The cash and in kind payments that are permitted (and hence remain lawful) are:

- A payment to a union made by deduction from the wages of an employee who has agreed in writing to become a member of the union and is made for a membership fee payable by the employee.
- A benefit provided and used for the sole or dominant purpose of benefiting the employer's employees, or former employees.
- A benefit of nominal value, meaning no more than 2 penalty units (currently $420), associated with travel or hospitality during consultation, negotiation or bargaining.
- A benefit of nominal value, meaning no more than 2 penalty units (currently $420), that is:
    - a token gift, an event invitation or a similar benefit; and
    - given in accordance with common courteous practice among employers and unions;
- A payment made, at no more than market value, for goods or services supplied to the employer in the ordinary course of the union's business.
- A payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory.
- A benefit provided in accordance with an order, judgment or award of a court or tribunal, or in settlement of a matter before the FWC or a genuine legal dispute.
- A gift or contribution deductible under section 30.15 of the *Income Tax Assessment Act 1997* and used in accordance with the law.
- A benefit prescribed by the Regulations.

For example, if an employer makes a payment to a union (or an entity controlled by a union) for goods or services that exceed the market value, this may constitute an unlawful payment if the goods or services are not required to be purchased under the terms of an enterprise agreement made under the FW Act.

Disclosure by union bargaining representatives during enterprise bargaining

Union bargaining representatives for a proposed enterprise agreement (other than a greenfields agreement) must disclose any direct or indirect financial benefits that the union (and related entities) would derive because of any term of the proposed agreement.

The following financial benefits are excluded from the disclosure requirements:

- Payments to employees covered by the agreement; and
- Union membership fees.

The disclosure must be made by the union to the employer that would be covered by the proposed enterprise agreement, in a Disclosure Document that meets the requirements of the legislation and Regulations.

The union must provide the Disclosure Document to the employer no later than the end of the fourth day of the "access period" referred to in s.180(4) of the FW Act. The "access period" is the seven day period which ends immediately before the employees vote to approve the proposed enterprise agreement, during which the employees must have access to a copy of the proposed agreement.

As soon as practicable after an employer receives a Disclosure Document from a union, the employer must provide a copy of the document (or access to it) to the employees covered by the proposed enterprise agreement

Penalties of up to $63,000 apply for breaches of these requirements.

Disclosure by employers

Employers are required to disclose to employees any direct or indirect financial benefits that the employer (or a related entity) would derive because of any term of a proposed enterprise agreement (except for a greenfield agreement), other than benefits received or obtained in the ordinary course of doing business.

If the employer would receive any such financial benefits from the terms of a proposed enterprise agreement, the employer must:

- Prepare a Disclosure Document that meets the requirements of the legislation and Regulations.
- Provide the Disclosure Document to the employees no later than the end of the fourth day of the "access period" referred to in s.180(4) of the FW Act (see above).

Penalties of up to $63,000 apply for breaches of these requirements.

Do you require further advice?

For information or assistance, please contact the **Ai Group Workplace Advice Service** on 1300 55 66 77.

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