

EXPLANATORY STATEMENT

Select Legislative Instrument No. 13, 2017

Issued by the authority of the Minister for Employment

Subject – *Fair Work Act 2009*

Fair Work Amendment (Corrupting Benefits) Regulations 2017

The *Fair Work Act 2009* (the Act) requires certain 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.

Sections 179 and 179A of the Act set out the process for the disclosure of financial benefits by organisations and employers respectively. For organisations, they are required to give a disclosure document to the employer, who must then take all reasonable steps to provide the document to employees before they vote on the proposed enterprise agreement. For employers, they must take all reasonable steps to prepare and give a disclosure document directly to employees before they vote on the proposed enterprise agreement. Failure to comply with these requirements can give rise to civil remedies, but does not preclude approval of the enterprise agreement by the Fair Work Commission.

Subsections 179(4) (in relation to organisations) and 179A(3) (in relation to employers) set out the requirements relating to the content of a disclosure document. These requirements include that the document must itemise the beneficial terms of the agreement, describe the nature and (as far as reasonably practicable) amount of each disclosable financial benefit, name each beneficiary and be in accordance with any other requirements prescribed by the regulations.

The *Fair Work Amendment (Corrupting Benefits) Regulations 2017* (the Amending Regulations) amend the *Fair Work Regulations 2009* (the Regulations) to prescribe further technical requirements in relation to the content and form of disclosure documents prepared for this purpose.

Details of the proposed Amending Regulations are set out at Attachment A.

The Amending Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Government consulted on the implementation of the Amending Regulations with relevant Commonwealth agencies.

A Statement of Compatibility with Human Rights for the Amending Regulations, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011* is at Attachment B. The Statement's assessment is that the Amending Regulations are compatible with human rights.

The disclosure obligations in sections 179 and 179A of the Act were introduced to respond to recommendation 48 of the Final Report of the Royal Commission into Trade Union Governance and Corruption. The Interim and Final Reports of the Royal Commission 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.

The Amending Regulations commence on 29 January 2018.

Details of the Fair Work Amendment (Corrupting Benefits) Regulations 2017

Section 1 – Name

This section provides that the name of the regulations is the *Fair Work Amendment (Corrupting Benefits) Regulations 2017*.

Section 2 – Commencement

This section provides that the Amending Regulations will commence on 29 January 2018.

Section 3 – Authority

This section provides that the amendments are made under the *Fair Work Act 2009* (the Act).

Section 4 – Schedules

This section provides that each instrument 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

Item 1

Item 1 of the Amending Regulations inserts new regulation 2.06AA, which prescribes additional requirements in relation to the content and form of disclosure documents prepared in accordance with sections 179 and 179A of the Act.

Disclosure by organisations that are bargaining representatives

New subregulation 2.06AA(1) prescribes additional requirements relating to disclosure documents prepared by organisations for the purposes of paragraph 179(4)(d) of the Act.

New subparagraph 2.06AA(1)(a)(i) provides that a disclosure document must set out the name of the person (if known by the organisation) who will or can reasonably be expected to provide each section 179 disclosable benefit. Note that the provider of the benefit may be an entity other than the employer or an entity referred to in the proposed enterprise agreement.

New subparagraph 2.06AA(1)(a)(ii) provides that where it is not reasonably practicable to describe the amount of a section 179 disclosable benefit, the disclosure document must set out the basis on which the amount is or will be determined.

New paragraph 2.06AA(1)(b) provides that a disclosure document must be in the form set out in Schedule 2.1A.

Disclosure by employers

New subregulation 2.06AA(2) prescribes additional requirements relating to disclosure documents prepared by employers for the purposes of paragraph 179A(3)(d) of the Act.

New subparagraph 2.06AA(2)(a)(i) provides that a disclosure document must set out the name of the person (if known by the employer) who will or can reasonably be expected to provide each section 179A disclosable benefit. Note that the provider of the benefit may be an entity other than an organisation or an entity referred to in the proposed enterprise agreement.

New subparagraph 2.06AA(2)(a)(ii) provides that where it is not reasonably practicable to describe the amount of a section 179A disclosable benefit, the disclosure document must set out the basis on which the amount is or will be determined.

New paragraph 2.06AA(2)(b) provides that a disclosure document must be in the form set out in Schedule 2.1A.

A note under new subregulation 2.06AA(2) alerts the reader that strict compliance with the form is not necessary and substantial compliance is sufficient.

Item 2

Item 2 inserts new Part 7-2 and new regulation 7.02 into the Regulations, which provide for the application of the new requirements concerning disclosure documents.

The additional content requirements included in new regulation 2.06AA and the form set out in Schedule 2.1A apply in relation to:

- a disclosure document given by an organisation under subsection 179(1) on or after 29 January 2018;
- a disclosure document, access to a copy of which is first given, or copies of which are given, by an employer under subsection 180(4B) of the Act on or after 29 January 2018.

Item 3

Item 3 of the Amending Regulations inserts a new Schedule 2.1A into the Regulations, which sets out a form for disclosure documents.

The form is prescribed for the purposes of paragraphs 179(4)(d) and 179A(3)(d) of the Act. It is to be used by bargaining representatives, which are employers, employer organisations and unions when disclosing financial benefits that will be, or can reasonably be expected to be, received or obtained (directly or indirectly) by a relevant beneficiary as a direct or indirect consequence of the operation of one or more terms of the proposed enterprise agreement. For an explanation of the term beneficiary, see section 179 of the Act in relation to organisations and section 179A in relation to employers.

The form requires bargaining representatives to relevantly, complete a table by itemising the beneficial terms of the proposed agreement, for example, by inserting the relevant clause number of the proposed enterprise agreement. It is not intended that the disclosure document extract or provide a detailed explanation of the beneficial terms.

The form also requires bargaining representatives to describe the nature of the disclosable benefit. Examples of financial benefits received or obtained by a beneficiary as a consequence of the operation of one or more terms of the proposed enterprise agreement

could include director's fees, management fees, brokerage fees, commissions, dividends and trust and share distributions.

Bargaining representatives are also required to describe (as far as reasonably practicable) the amount of the financial benefit. This could be the total amount (for example, where there is a 'one off' payment being made as a consequence of a term of the proposed agreement) or for a recurring financial benefit, the amount and frequency of the payment. For example, where an employer is required to make a recurring payment every six months into a training fund controlled by the organisation, this would be disclosed on the form.

Where it is not reasonably practicable to describe the amount of a disclosable benefit, the basis on which the amount is or will be determined must be set out. For example, where an organisation receives a commission based on a set premium times the number of employees that are signed up to an insurance scheme, the basis on which the financial benefit is determined may be a 10 per cent commission for each employee. If the number of employees that will be signed up to the scheme is known at the time of the disclosure, then the amount should be described as it is known and, if relevant, the basis for determining a future financial benefit (such as the percentage commission for each new member).

The form also requires a bargaining representative to disclose the name of each beneficiary, as well as the person (if known) who will or can reasonably be expected to provide the benefit. The provider of the benefit need not be the employer, an organisation or an entity referred to in the proposed enterprise agreement.

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) Regulations 2017

This disallowable legislative instrument 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 disallowable legislative instrument

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.

Sections 179 and 179A of the Act require certain 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 does not preclude the approval of the enterprise agreement.

The *Fair Work Amendment (Corrupting Benefits) Regulations 2017* (the Amending Regulations) amend the *Fair Work Regulations 2009* to prescribe further technical requirements in relation to the content and form of a disclosure document prepared for this purpose.

Human rights implications

Right to privacy and reputation

The Amending Regulations engage the right to privacy and reputation. Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR) provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. For interference with privacy not to be arbitrary it must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. Reasonableness in this context incorporates notions of proportionality to the end sought and necessity in the circumstances.

Item 1 of the Amending Regulations inserts new regulation 2.06AA, which prescribes additional requirements in relation to the content and form of disclosure documents prepared in accordance with sections 179 and 179A of the Act.

Relevantly, the Amending Regulations require that disclosure documents include the name of the provider (if known) of any disclosable benefit.

The requirements to name the provider of a disclosable benefit are considered to be reasonable in the circumstances and in accordance with the aims and objectives of the ICCPR, in particular the right to freedom of association in Article 22.

The requirements are limited in the following respects. They only arise if the financial benefit is reasonably expected to be obtained as a direct or indirect consequence of the operation of a term of the proposed enterprise agreement. Further, the disclosure is only required to be made to employees and the employer who will be covered by a proposed enterprise agreement, and is required to be made shortly before employees are requested to vote on the proposed agreement.

As indicated in the Statement of Compatibility with Human Rights prepared in relation to the Fair Work Amendment (Corrupting Benefits) Bill 2017 (the Bill), the substantive new disclosure requirements promote freedom of association and 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 Parliamentary Joint Committee on Human Rights reported on the Bill in its Human Rights Scrutiny Reports 4 and 6 of 2017.

Conclusion

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

Senator the Hon Michaelia Cash, Minister for Employment