Australian Government
Registered Organisations Commission

GUIDANCE NOTE
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Disclosure obligations for bargaining representatives under the *Fair Work Act 2009*

A guide to understanding the disclosure obligations by bargaining representatives in respect of a proposed enterprise agreement.

Contents

Disclosure obligations for bargaining representatives under the Fair Work Act 2009

Since 11 September 2017 the Fair Work Act 2009 (**FW Act**) has contained disclosure obligations which apply during enterprise bargaining.

This guidance note explains the disclosure obligations (contained in sections 179, 179A and 180 of the FW Act), which apply to:

- registered organisations that are a bargaining representative in respect of a proposed enterprise agreement, and
- employers that will be covered by a proposed enterprise agreement.

It is intended to assist registered organisations and employers understand their disclosure obligations, including through practical examples.

How this guidance note should be used

As there are no decided cases on this legislation, the information in this guidance note should be treated as general guidance only. It does not constitute legal advice or a comprehensive technical explanation of the obligations, and readers should seek independent legal advice to address specific issues relevant to their own situation.

The Registered Organisations Commission (**ROC**) is not responsible for enforcing these laws. Enforcement can be undertaken by a Fair Work Inspector, including the Fair Work Ombudsman (**FWO**). For further information on enforcement action by the FWO, please refer to the Fair Work Ombudsman website.

Part 1: Overview

The disclosure obligations apply during enterprise bargaining in respect of a proposed enterprise agreement other than a greenfields agreement. The obligations are contained in sections 179, 179A and 180 of the FW Act.

They require:

a) registered organisations that are bargaining representatives in respect of a proposed enterprise agreement, and

b) employers that will be covered by a proposed agreement,

to disclose certain financial benefits which will be (or can reasonably be expected to be) received as a direct or indirect consequence of a term of the proposed enterprise agreement.

Employers that will be covered by a proposed enterprise agreement must take all reasonable steps to provide any disclosures to employees during the access period for the enterprise agreement. This will include disclosures that registered organisations that are bargaining representatives must provide to the employer. The obligations therefore ensure that employees are informed of these benefits before they vote on the agreement.

Failure to comply with these disclosure requirements, including knowingly or recklessly making a false or misleading representation in a disclosure document, can give rise to civil penalties.

An affected employee, a bargaining representative for the proposed agreement, or a Fair Work Inspector may apply to the courts for orders in respect of alleged contraventions.[1]

Penalties: Failure to comply with the disclosure requirements may give rise to a fine of up to a maximum of 60 penalty units for an individual (currently $13 320) and up to 300 penalty units for a body corporate (currently $66 600).

Key terms

- The **access period** is the seven-day period ending immediately before voting for the enterprise agreement starts.[2] The seven-day period is not limited to working days, and requires seven clear days[3].

[1] See Chapter 4, Part 4-1, FW Act
[2] Subsection 180(4), FW Act
[3] Hydro Electric Corporation [2014] FWC 4169

- A **registered organisation**, in this guidance note, refers to a registered organisation that is acting as a bargaining representative[4]. This will either be a union[5] that is representing employees who will be covered by the proposed enterprise agreement[6] or it will be an employer organisation that has been appointed to act as a bargaining representative for an employer that will be covered by the proposed enterprise agreement.

  For more information about **registered organisations** please visit the ROC website.

- An **employer**, in this guidance note, refers to an employer that will be covered by a proposed enterprise agreement.[7]

- A **Fair Work Inspector** means the FWO[8], a Fair Work Inspector appointed by the FWO, the Australian Building and Construction Commissioner or an Australian Building and Construction Commission Inspector.[9]

- The **RO Act** means the Fair Work (Registered Organisations) Act 2009.

4 Under section 176 of the FW Act, bargaining representatives can be registered organisations under the RO Act, or employers covered by the proposed agreement, but could also be any other natural person or legal entity. The disclosure obligations explained in this guidance note do not apply to bargaining representatives appointed under subsections 176(1)(c) or (d) that are not registered organisations (or covered employers).

5 In this guidance note, a **union** means an employee organisation registered under the RO Act. Note that not all unions are registered under the RO Act.

6 The union must be entitled to represent the industrial interests of the member who is an employee in relation to work that will be performed under the proposed agreement – subsection 176(3), FW Act

7 Under the FW Act, an employer that will be covered by the proposed agreement may act as their own bargaining representative, and can also appoint another bargaining representative under section 176(1)(d). In either case, the disclosure obligations explained in this guidance note will apply to the employer as an employer who will be covered by a proposed agreement.

8 In his or her capacity as a Fair Work Inspector.

9 Subsection 539(2) and section 12, FW Act, and sections 5 and 111, Building and Construction Industry (Improving Productivity) Act 2016

Part 2: Who needs to disclose?

You must make a disclosure if you are:

- a registered organisation that is acting as a bargaining representative for a proposed enterprise agreement, or
- an employer who will be covered by a proposed enterprise agreement,

and you (or a related body) will receive, or can reasonably expect to receive, particular financial benefits from a term in the agreement.[10]

Even if an employer does not have any disclosures of its own to make, it is responsible for passing on to employees any disclosures made by a registered organisation (see **Parts 4 and 5** for more information).

For registered organisations, the obligation to make any disclosures falls on the organisation as a whole not just, for example, the branch that is participating in bargaining. This means that all financial benefits that the organisation or any of its branches or divisions will, or expects to, receive must be disclosed (see **Part 3** for more information).

The disclosure obligations do not apply in relation to enterprise bargaining for a proposed greenfields agreement.[11]

The disclosure obligations do not apply to individual employees who have chosen to represent themselves as a bargaining representative for a proposed enterprise agreement.

[10] Sections 179 and 179A, FW Act
[11] Subsections 179(1)(a) and 179A(1)(a), FW Act

I am an employer organisation – do disclosure obligations apply to me?

Yes, if:

- you have been appointed as a bargaining representative in respect of a proposed enterprise agreement, or
- you are an employer organisation that is also an employer that will be covered by a proposed enterprise agreement.

I am an employer that will be covered by a proposed enterprise agreement, but have appointed a bargaining representative – do the disclosure obligations apply to me?

Yes, the obligations will still apply to you as an employer even if you have appointed a bargaining representative.

In that case, if your bargaining representative is a registered organisation, it will also need to comply with its own disclosure obligations.

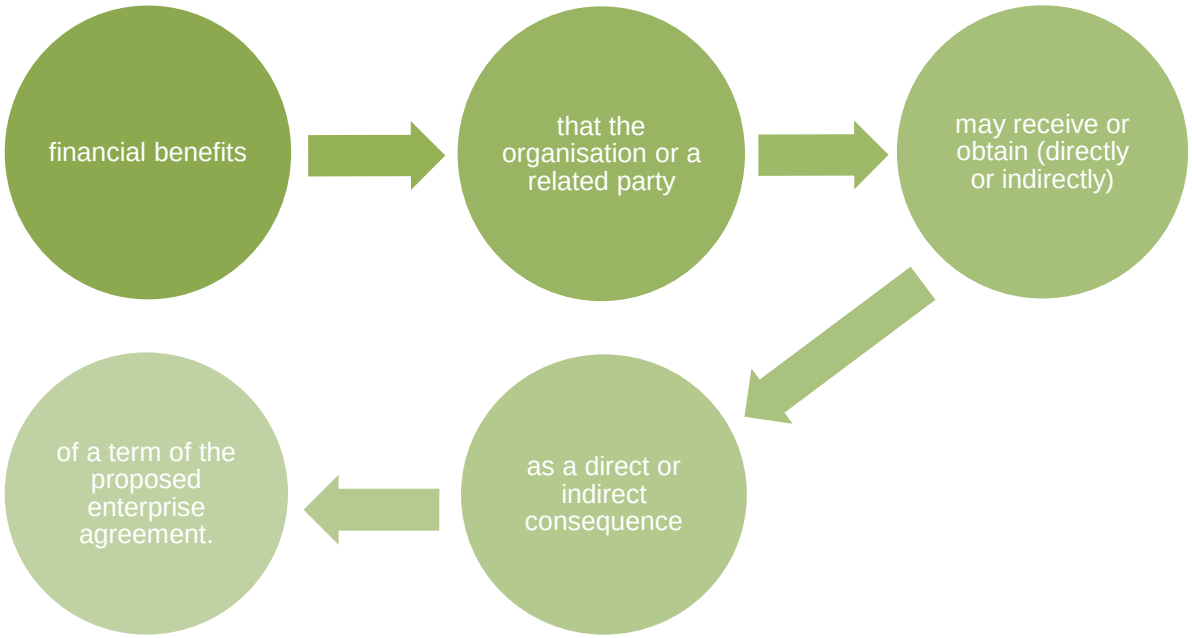
Part 3: What do I need to disclose?

What you need to disclose depends on whether you are a registered organisation acting as a bargaining representative or an employer that will be covered by a proposed enterprise agreement.

a) I am a registered organisation acting as a bargaining representative

You must disclose any **financial benefit** (other than those which are specifically excluded – see below) that you, or a **related party**, will receive, or can reasonably expect to receive, directly or indirectly, and as a direct or indirect consequence of a term in the proposed enterprise agreement.[12] This includes financial benefits which will or may be received by the organisation itself, or by any branches or divisions of the organisation.

In summary, registered organisations must disclose:[13]



Registered organisations do not need to disclose the following financial benefits:[14]

- benefits payable to an individual as an employee who is covered by the agreement,
- payment of a membership fee for membership of a registered organisation, and
- any financial benefits prescribed by legislation.[15]

[12] Section 179, FW Act
[13] This diagram represents a simplified depiction of the provisions as an aid to interpreting them and is not a substitute for consideration of the terms of the provisions.
[14] Subsection 179(6), FW Act
[15] At the time of publication there were no such prescribed benefits.

How do I know who is a related party of a registered organisation?

Registered organisations must disclose financial benefits which any of their related parties will, or can reasonably expect to, receive.

A wide range of persons and entities may fall within the definition of a related party - related parties include, but are not limited to:

a) entities controlled by the registered organisation

b) officers of the registered organisation and their spouses (including de facto partners)

c) relatives of officers of the registered organisation

d) relatives of an officer's spouse (including de facto partners)

e) entities controlled by any of the parties referred to in b) – d) above[16].

Note that an entity is also a related party of an organisation if:

- at any time within the prior 6 months, the entity was previously a related party of one of the above kinds, or
- the entity reasonably believes that it is likely to become a related party of one of the above kinds at any time in the future.

For a full list of related parties, including an explanation of when an entity is 'controlled' by the registered organisation, please see **Appendix 2** to this guidance note.

[16] Section 12 and subsection 179(2), FW Act, and section 9B of the RO Act

Examples: A clause in a proposed enterprise agreement (the **GHI EA**) contains a term that permits employees to authorise their employer, GHI Ltd, to make a deduction from their after-tax pay to pay union membership fees to DEF Union. DEF Union is a registered organisation representing employees that will be covered by the proposed GHI EA.

DEF Union does not need to disclose this benefit because the financial benefits are payments of a union membership fee, which do not need to be disclosed.

A clause in the GHI EA requires GHI Ltd to provide training to employees. Although it is not specified in the agreement, this training will most likely be provided (for a fee) by GHI Co., a training organisation which is 100% owned and controlled by DEF Union and which has always provided the training in the past.

Although it will depend on all the circumstances, on these facts we recommend that DEF Union discloses that GHI Co. can reasonably expect to receive a fee for providing the training. Although it is possible that GHI Ltd will use another provider, the obligation arises if DEF Union can directly or indirectly reasonably expect to receive a benefit.

Although DEF Union will not itself receive the fee, it will still need to disclose it because GHI Co. is a related party – it is an entity which it controls.

Fred is an officer of DEF Union. Fred's wife, Mei, is an employee of GHI Ltd and will be covered by the GHI EA, under which she will receive her salary, superannuation and some other financial benefits such as a first aid allowance.

DEF Union does not need to disclose that Mei will receive financial benefits under the proposed agreement, even though she is a related party of DEF Union (being the spouse of one of DEF's officers). This is because DEF Union is not required to disclose financial benefits which are payable to an individual as an employee who is covered by the agreement.

A term in the GHI EA requires that GHI Ltd makes contributions to an employee redundancy fund, the ER Fund. DEF Union has an officer, Muhammad, who is a director of the ER Fund. The fund pays a director's fee to Muhammad of $5000 per year, and an annual trust distribution to DEF Union as a sponsoring organisation.

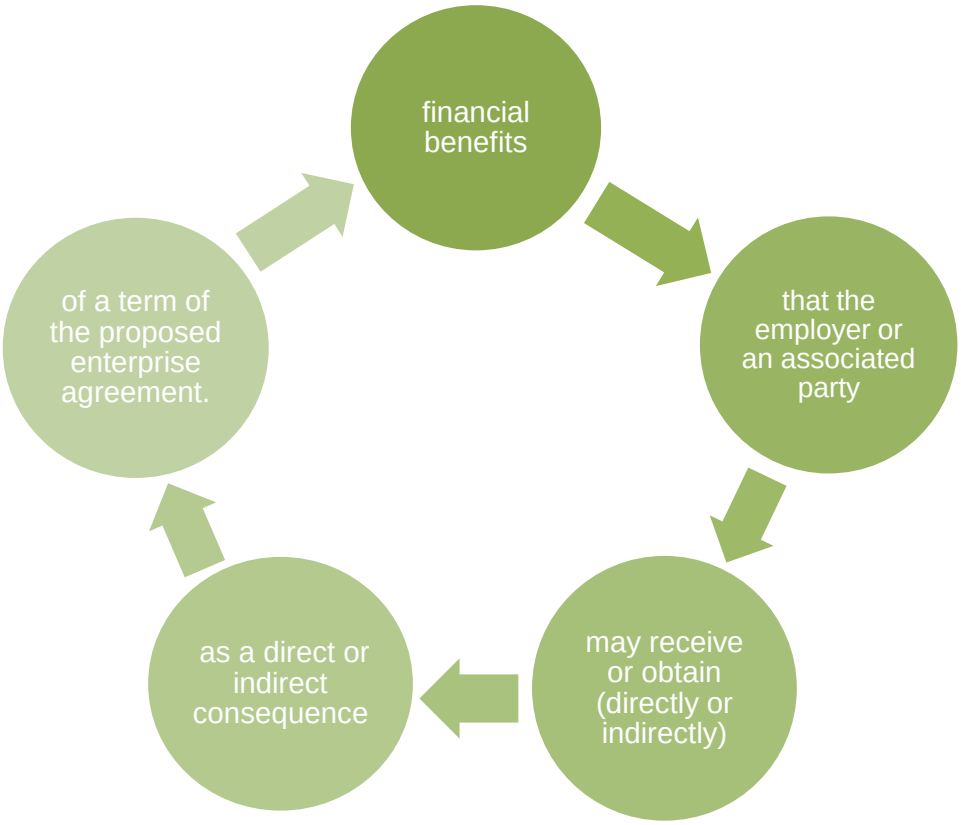
DEF Union may need to disclose both the payment of the director's fee to Muhammad, and the trust distribution. This is because both are financial benefits that the union, or one of its related parties (Muhammad), will receive, as a possible indirect consequence of the term of the enterprise agreement.

b) I am an employer that will be covered by a proposed enterprise agreement

You must disclose any **financial benefit** (other than those which are specifically excluded – see below) that you, or an **associated entity**, will receive, or can reasonably expect to receive, directly or indirectly, and as a direct or indirect consequence of a term in the proposed enterprise agreement.[17]

[17] Section 179A, FW Act

In summary, employers must disclose:[18]



Employers do not need to disclose the following financial benefits:[19]

- benefits received or obtained in the ordinary course of the employer's business, or
- any benefits prescribed by legislation.[20]

[18] This diagram represents a simplified depiction of the provisions as an aid to interpreting them and is not a substitute for consideration of the terms of the provisions.
[19] Subsection 179A(4), FW Act
[20] At the time of publication there were no such prescribed benefits.

How do I know who is an associated entity of an employer?

Employers must disclose financial benefits which any of their associated entities will, or can reasonably expect to, receive.

A wide range of entities may fall within the definition of an associated entity - associated entities include, but are not limited to:[21]

a) the employer's related bodies corporate

b) entities controlled by the employer

c) an entity which controls the employer, and the operations, resources or affairs of the employer are material to that entity

d) certain entities with a 'qualifying investment' in the employer, and vice versa

e) an entity which controls the employer and another entity, and their operations, resources or affairs are material to the entity.

This list is an overview of the types of entities who could be associated entities, and should not be relied on as a definitive list. For a full list of associated entities, please see section 50AAA, Corporations Act 2001.

Example: Terms of the proposed GHI EA permit GHI Ltd to charge fees for managing employee salary sacrifice arrangements, and for making the deductions from salary for union membership fees.

GHI Ltd should disclose each of these fees if it can reasonably expect to receive a net financial benefit as a direct result of the terms of the agreement. Such a benefit is unlikely to be received by GHI Ltd in the ordinary course of its business.

[21] Section 12, FW Act, and section 50AAA, Corporations Act 2001. The FW Regulations may prescribe additional 'associated entities', and may also prescribe that particular persons or bodies are not to be treated as associated entities for the purposes of these provisions – subsection 179A(2), FW Act.

Part 4: How do I disclose?

You must make any disclosures in the prescribed form[22] which can be found at Schedule 2.1A of the Fair Work Regulations 2009 (**FW Regulations**) (the **disclosure form**).

The disclosure form ensures that the details required by legislation[23] are included. It is not intended to be a lengthy or complicated document, and it is not expected that you will normally need to extract, or provide a detailed explanation of, the terms of the enterprise agreement.[24]

You must disclose each financial benefit separately on the disclosure form. In particular, you must describe its nature and, as far as reasonably practicable, the amount.[25]

For example, you should state the total amount of any 'one-off' payments.

Where recurring payments will be received, the amount and frequency of the payment should be described. For example, where an employer is required to make a recurring payment every six months into a training fund controlled by the registered organisation, this would be disclosed on the form.[26]

If it is not reasonably practicable to describe the amount of the benefit, you should state the basis on which the amount is or will be determined.[27]

For example, where an employer discloses that it will charge fees for employees who enter into salary sacrifice arrangements, it is unlikely to be able to state the total amount of financial benefit it will receive, as this will be dependent on the total number of participating employees. Instead, the employer should disclose the basis for determining the financial benefit, such as the fees it will charge for each salary sacrifice transaction.

Where you have no financial benefits to disclose, then you do not need to prepare a disclosure form. However, if you are an employer you will be required to provide to your employees any disclosure form provided to you by a registered organisation (see **Part 5** below).

You must not knowingly or recklessly (i.e. not caring whether it is true or false[28]) make a false or misleading representation in a disclosure form.[29]

22 Regulation 2.06AA, FW Regulations
23 At subsections 179(4) and 179A(3) of the FW Act, and Regulation 2.06AA of the FW Regulations
24 Fair Work Amendment (Corrupting Benefits) Bill 2017, Explanatory Memorandum paragraphs 74 and 80
25 Subsections 179(4)(b) and 179A(3)(b), FW Act
26 Explanatory Memorandum to the Fair Work Amendment (Corrupting Benefits) Regulations 2017
27 Regulation 2.06AA(1)(a)(ii) and (2)(a)(ii), FW Regulations
28 Fair Work Amendment (Corrupting Benefits) Bill 2017, Explanatory Memorandum paragraphs 75 and 87
29 Subsections 179(5) and 180(4C), FW Act

Penalties: Knowingly or recklessly making a false or misleading representation in a disclosure form may give rise to a fine of up to a maximum of 60 penalty units for an individual (currently $13 320) and up to 300 penalty units for a body corporate (currently $66 600).[30]

Sample disclosure form

Appendix 1 of this guidance note contains a sample disclosure form which has been completed from the perspective of a union acting as a bargaining representative, with the hypothetical information included in **green**.

Please ensure that each time you make a disclosure you use the latest version of the form, available to download from, for example, the Federal Register of Legislation.

What if I want to make modifications to the form?

Save for providing the relevant information in the disclosure form, we do not recommend that any additional modifications to the form are made – the form is designed to assist you to ensure that all information that is required under legislation is included in the disclosure.

Who should sign the form?

The form should be signed by a person who is authorised to execute documents on behalf of the registered organisation or employer.

[30] Subsections 179(5) and 180(4C), FW Act

Part 5: When and to whom should I disclose?

When and to whom you need to disclose depends on whether you are a registered organisation acting as a bargaining representative or an employer that will be covered by a proposed enterprise agreement.

a) I am a registered organisation acting as a bargaining representative

As a registered organisation you must take all reasonable steps to give the disclosure form **to each employer** that will be covered by the proposed enterprise agreement by no later than the end of the fourth day of the access period.[31]

It is then the responsibility of the employer(s) to take all reasonable steps to ensure that (as soon as practicable) the employees are either given a copy of the form or have access to a copy throughout the remainder of the access period.

The 'access period' is the seven-day period ending immediately before voting for the enterprise agreement starts.[32]

b) I am an employer that will be covered by a proposed enterprise agreement

As an employer, you have to give both your own disclosure form (if you have disclosures to make), **and** any disclosure form provided to you by a registered organisation, to employees who will be covered by the proposed agreement.

In relation to **your own disclosure form** you must take all reasonable steps to, by the end of the fourth day of the access period:

- give a copy of the form to employees who will be covered by the agreement, or
- ensure that those employees are given access to a copy of the form for the remainder of the access period.[33]

In relation to **a registered organisation's disclosure form**, you must take all reasonable steps, as soon as practicable after you receive the form, to:

- give a copy of the form to employees who will be covered by the agreement, or

ensure that those employees are given access to a copy of the form for the remainder of the access period.[34]

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31 Subsections 179(1) and (3), FW Act
32 Subsection 180(4), FW Act
33 Subsection 180(4B), FW Act
34 Subsection 180(4A), FW Act

There is no ongoing requirement for disclosure during the life of the enterprise agreement once it has been approved.

Penalties: Failure to provide the disclosure form may give rise to a fine of up to a maximum of 60 penalty units for an individual (currently $13 320) and up to 300 penalty units for a body corporate (currently $66 600).[35]

[35] Subsections 179(1), 180(4A) and 180(4B), FW Act

Part 6: What happens if I don't comply?

Failing to provide the disclosure form as required, or knowingly or recklessly making false or misleading representations in the form, may give rise to a fine of up to 60 penalty units (currently $13 320) for an individual and up to 300 penalty units for a body corporate (currently $66 600) per contravention.[36]

An affected employee, a bargaining representative or a Fair Work Inspector are each able to apply to a court for orders in relation to an alleged contravention of the provisions.[37]

Failure to comply with the disclosure obligations:

- will not prevent approval of the proposed enterprise agreement by the Fair Work Commission,[38]
- is not reasonable grounds for believing that the proposed enterprise agreement has not been genuinely agreed to by employees[39].

[36] Chapter 4, Part4-1, FW Act. The penalty unit amounts are current as at the updated date of publication.
[37] Subsection 539(2), FW Act
[38] Subsection 188A(b), FW Act
[39] Subsection 188A(a), FW Act

Further information

For further information please contact the Registered Organisations Commission on 1300 341 665 or email regorgs@roc.gov.au.

Appendix 1 – Sample disclosure form

Schedule 2.1A—Document for disclosure of benefits

Note: See regulation 2.06AA.

Fair Work Act 2009, sections 179 and 179A

DISCLOSURE BY BARGAINING REPRESENTATIVE OF FINANCIAL BENEFITS AS A CONSEQUENCE OF PROPOSED ENTERPRISE AGREEMENT

This document is prepared by **DEF Union** in relation to a proposed enterprise agreement **GHI EA.**

Certain financial benefits that will be, or can reasonably be expected to be, received or obtained as a direct or indirect consequence of the operation of one or more terms (**beneficial terms**) of a proposed enterprise agreement must be disclosed to employees before they vote on the agreement. The nature and (as far as reasonably practicable) the amount of each such benefit, and the name of each person who will or can reasonably be expected to receive, or provide, each such benefit must be disclosed in the following table, using a separate section for each beneficial term.

Examples of benefits that must be disclosed include director's fees, management fees, brokerage fees, commissions, dividends and trust and share distributions. See sections 179 and 179A of the Fair Work Act 2009.

Beneficial term: Clause 12(a)			
Nature of financial benefit	**Amount of financial benefit**	**Name of beneficiary**	**Name of provider**
Fee for providing training to employees	**GHI Co., a training organisation which is owned by DEF Union, will receive a fee of approximately $3000 per employee for providing training in respect of each employee trained by GHI Co. under this clause**	**GHI Co.**	**GHI Ltd**

Beneficial term: Clause 18			
Nature of financial benefit	**Amount of financial benefit**	**Name of beneficiary**	**Name of provider**
Director's fee for union officer who sits on Board of the ER Fund	**$5,000 per year**	**Muhammad Nazir, DEF Union officer**	**ER Fund**

Beneficial term: Clause 18			
Nature of financial benefit	**Amount of financial benefit**	**Name of beneficiary**	**Name of provider**
Discretionary trust distribution	**The amount of distribution is a discretionary matter for the independent trustees. For the 2017/2018 financial year DEF Union received a distribution of $15,000.**	**DEF Union**	**ER Fund**

Name of authorised person: **Jane Bloggs, Secretary DEF Union**
Signature of authorised person: *J Bloggs*
Date: **30 June 2018**

Appendix 2 – Related parties

When making disclosures under section 179 of the FW Act, registered organisations must disclose not only any financial benefits that they will receive, but also any financial benefits that their 'related parties' will, or can reasonably expect to, receive.

A 'related party', for the purposes of the FW Act, has the same meaning as in the RO Act.[40]

A 'related party' to a registered organisation includes:

- an entity controlled by the registered organisation, other than:[41]
  - a branch, sub-branch, division or subdivision of the organisation
  - a State/Territory-registered association where the organisation is a Federal counterpart of the association
- officers of the registered organisation, and spouses of officers (including de facto partners)[42]
- relatives of officers (a parent, step-parent, child, stepchild, grandparent, grandchild, brother or sister of the officer)[43]
- relatives of an officer's spouse[44]
- an entity controlled by any of the above related parties (unless the entity is also controlled by the organisation).[45]

When is an entity 'controlled' by a registered organisation, or another person or entity?

An entity controls another entity if it has the capacity to determine the outcome of decisions about that other entity's financial and operating policies.[46]

In order to determine whether an entity or person controls another entity, you should ask the following questions:

- Does or can the person or entity exert practical influence over the other entity? The right of the person or entity to enforce contractual or other rights against the other entity would generally not be considered to be exerting practical influence over that entity.

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40 Section 12, FW Act
41 Section 9B(1), RO Act
42 Section 6 & subsection 9B(2), RO Act
43 Section 6 & subsection 9B(3), RO Act
44 Section 6 & subsection 9B(3), RO Act
45 Subsection 9B(4), RO Act
46 The meaning of 'control' is defined in section 6 of the RO Act as having the same meaning as in the Corporations Act 2001. 'Control' is defined in section 50AA of the Corporations Act 2001.

- Is there any practice or pattern of behaviour by the person or entity affecting the other entity's financial/operating policies?[47]

Example: WXY Pty Ltd is a registered training organisation. DEF Union is able to appoint two-thirds of the directors to WXY Pty Ltd. WXY Pty Ltd is likely to be a related party of DEF Union.

An entity is a related party of a registered organisation at a particular time if:

- the entity was a related party of one of the above kinds at any time within the previous six months,[48] or
- the entity believes, or has reasonable grounds to believe, that it is likely to become a related party of the organisation at any time in the future.[49]

As noted above, a related party relevantly includes officers and their spouses, and relatives of officers and spouses.

Example: Miguel was the President of DEF Union until he lost at the election in March 2018. After the election, Miguel became an employee of DEF Union.

Miguel is a former officer and therefore remains a related party of DEF Union for a period of six months from March 2018.

Marcus is successful at the election and succeeds Miguel as President. Marcus is engaged to marry Olga, who owns a controlling stake in MNO Pty Ltd. MNO Pty Ltd is likely to be a related party of DEF Union.

An entity is also a related party of a registered organisation, if the entity acts in concert with another related party of the organisation, on the understanding that the related party will receive a financial benefit if the organisation gives the entity a financial benefit.[50]

These definitions of 'related party' also apply in respect of a branch of a registered organisation.[51]

47 Ford, Austin and Ramsay's Principles of Corporations Law (17th edition, 2018), at [9.510]
48 Subsection 9B(5), RO Act
49 Subsection 9B(6), RO Act
50 Subsection 9B(7), RO Act
51 Subsection 9B(8), RO Act

Related parties which may be prescribed

The FW Act provides that additional 'related parties' may be prescribed by the FW Regulations.[52] In addition, the FW Regulations may also prescribe that particular persons or bodies are not to be treated as related parties for the purposes of the disclosure provisions.[53] At the time of publication, no such prescriptions have been made.

[52] Subsection 179(2)(b), FW Act
[53] Subsection 179(2)(a), FW Act