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Commission

# Corrupting benefits offences under the *Fair Work Act 2009*

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A guide to understanding the criminal offences relating to corrupting benefits and illegitimate cash and in kind payments to registered organisations.

## Guidance Note



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# Corrupting benefits offences under the *Fair Work Act 2009*

New corrupting benefits offences contained in the *Fair Work Act 2009* (FW Act) took effect on 11 September 2017. These changes were introduced in response to recommendations made by the Royal Commission into Trade Union Governance and Corruption. This guidance note explains the new offences, contained in Part 3-7 of the FW Act. Those offences broadly fall into two categories:

1. giving, receiving or soliciting a **corrupting benefit**, and
2. giving, receiving or soliciting a **cash or in kind payment** that is not a legitimate payment. In this guidance note, for convenience and clarity, such a payment will be referred to as an **'illegitimate payment'**.



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# 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 offences, and readers should seek independent legal advice to address specific issues relevant to their own situation.

The Fair Work Commission (**the Commission**) is not responsible for monitoring compliance with, or enforcing, these laws. The Fair Work Ombudsman (FWO) is responsible for monitoring compliance with these laws and, because these are criminal offences, investigations of any potential breaches will usually be undertaken by the Australian Federal Police (AFP). The AFP would consider whether or not to investigate in accordance with its own policies and procedures.



# Part 1: Overview

On 11 September 2017 a new Part 3–7 entitled ‘Corrupting Benefits’ was inserted into the FW Act. It introduced discrete but overlapping new penalty offences directed at improving the governance and financial transparency of registered organisations.<sup>1</sup>

The new offences relate to the giving, receiving or soliciting of a:

## 1. Corrupting benefit<sup>2</sup>

This offence prohibits a person **dishonestly** giving, offering, receiving or soliciting benefits (or potential benefits) with an **intention of influencing** an officer or employee of an organisation.

The influence must relate to the performance of the officer’s or employee’s duties or functions, the exercise of their powers, or to giving a relevant **advantage**. It is also an offence if there was an intention to cause the provider of the benefit to believe that an officer or employee would be so influenced.

The offence applies equally to employer organisations and employee organisations (unions).

**Penalties:** Breach of the provisions attracts criminal liability. Individuals are liable for imprisonment of up to ten years and/or a fine of up to 5000 penalty units. A body corporate may be fined a maximum of 25 000 penalty units.<sup>3</sup>

## 2. Cash or in kind payment that is not a legitimate payment<sup>4</sup>

This offence prohibits some **national system employers** from providing or offering **cash or in kind payments** to a federally registered union or its **prohibited beneficiary**, other than certain legitimate payments.<sup>5</sup> This will apply where that employer, or a connected person, employs a person who is, or is entitled to be, a member of that union.

<sup>1</sup> Explanatory Memorandum, *Fair Work Amendment (Corrupting Benefits) Bill 2017*, page (i).

<sup>2</sup> Part 3-7, Division 2, FW Act.

<sup>3</sup> Subsections 536D(1) and 536D(2), FW Act. As at January 2023, each penalty unit is valued at \$275 which means that the maximum penalty is \$1 375 000 for an individual, or \$6 875 000 for a body corporate.

<sup>4</sup> Part 3-7, Division 3, FW Act. For an explanation of what is a legitimate payment, see Part 6 of this guidance note.

<sup>5</sup> As stated, in this guidance note, for convenience and clarity, such a payment will be referred to as an **‘illegitimate payment’**.



**Penalties:** Breach of the provisions attracts criminal liability. Individuals are liable for imprisonment of up to two years and/or a fine of up to 500 penalty units. A body corporate may be fined a maximum of 2500 penalty units.<sup>6</sup>

In each case, the provisions distinguish between the act of **giving or offering** a corrupting benefit or illegitimate payment, and **receiving or soliciting** a corrupting benefit or illegitimate payment. This may create separate offences relating to each side of a 'transaction'.

- **Giving or offering**

is the act of **providing, offering, or promising to provide** a corrupting benefit or illegitimate payment (or **causing** any one of those things to occur).

- **Receiving or soliciting**

is the act of **requesting, receiving or obtaining, or agreeing to receive or obtain**, a corrupting benefit or illegitimate payment.

Where this guidance note refers to '**giving or offering**' or '**receiving or soliciting**', each of those terms should be read as including all of the above mentioned elements.

## Key definitions

- An **organisation** is an organisation registered under Part 2 of the *Fair Work (Registered Organisations) Act 2009* (the RO Act). It includes the national office of an association of employers or employees (i.e. a union), or one of their branches. A list of all registered organisations can be found on the Commission's [website](#).
- A **connected person** is a spouse (including a de facto partner<sup>7</sup>) of the relevant person, an associated entity of the relevant person, or a person who has a prescribed connection with

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<sup>6</sup> Subsections 536F(1) and 536G(1), FW Act. As at January 2023, each penalty unit is valued at \$275 which means that the maximum penalty is \$137 500 for an individual, or \$687 500 for a body corporate.

<sup>7</sup> Subsection 536F(6), FW Act, and section 6, RO Act.





the relevant person.<sup>8</sup> For the meaning of ‘associated entity’, see section 50AAA, *Corporations Act 2001*.

- An **employee** of an organisation is anyone employed by a registered organisation or one of its branches.<sup>9</sup>
- An **employee organisation** is an organisation federally registered under the RO Act that represents the collective interest of a group of employees, and is commonly referred to as a **union**. For simplicity we use the term ‘**union**’ in this guidance note, however it should be noted that not all unions are employee organisations.
- A **national system employer**, in broad terms, is an employer covered and bound by the FW Act. Whether an employer is a national system employer may depend on the location of the employment relationship (state or territory) and, in some cases, the legal status and business of the employer.<sup>10</sup>

The definition of a national system employer is relevant for the offences of giving or receiving illegitimate payments. It is defined more narrowly for the purposes of the offence of **giving or offering** an illegitimate payment, as opposed to receiving or soliciting. The former provisions **do not extend** to a national system employer who is **only** a national system employer because of a referral of State powers to the Commonwealth. See Part 4 of this guidance note for further information.

- An officer of an organisation is defined in the RO Act.<sup>11</sup> It includes a person who under the organisation’s rules is entitled to participate directly in the management of the affairs, or the determination of policy, of the organisation, and will usually be a person who has been

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<sup>8</sup> Subsections 536D(1)(b)(iii), 536D(2)(b)(iii), 536F(1)(d), 536G(1)(d), FW Act. As at August 2018, there are no prescribed connections under the *Fair Work Regulations 2009* (the **FW Regulations**).

<sup>9</sup> ‘Employee’ is given its ordinary meaning, see section 536B and subsection 536E(b) of the FW Act. Sometimes it may not be clear whether a person is employed by a registered organisation or not, for example if a person is a consultant. In such cases we recommend that you act as if the person is an employee in relation to these provisions.

<sup>10</sup> For further information on whether an employer is a national system employer refer to the publications available on the Fair Work Commission website (see <https://www.fwc.gov.au/general-protections-benchbook/coverage-general-protections/national-system-employer>) or seek independent legal advice.

<sup>11</sup> Subsection 536E(a), FW Act, and sections 6 and 9, RO Act.



elected to their position. The President, Vice President, Secretary, Assistant Secretary, Treasurer and members of the Committee of Management of the organisation or a branch of the organisation are normally officers.

- The term **person** has an expanded meaning. A person can be any natural person or legal entity. It includes an individual, a body corporate, a State or Federal Government entity or any other collective group of persons that comprise a body politic.<sup>12</sup>
- A **prohibited beneficiary**, in relation to an employee organisation (union), includes:<sup>13</sup>
  - the union’s officers and employees
  - the spouse (including a de facto partner<sup>14</sup>) of an officer or employee of the union
  - an entity<sup>15</sup> controlled by the union
  - an entity controlled by an officer or employee of the union
  - a person or entity to whom the union or any prohibited beneficiary requests or directs a cash or in kind payment to be made
  - a person who has a prescribed connection with the organisation or a prohibited beneficiary.<sup>16</sup>

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<sup>12</sup> ‘Person’ is not defined in the FW Act. See section 2C, *Acts Interpretation Act 1901*.

<sup>13</sup> Subsection 536F(5), FW Act.

<sup>14</sup> Subsection 536F(6), FW Act, and section 6, RO Act.

<sup>15</sup> ‘Entity’ includes a body corporate, partnership, unincorporated body, individual, or trustee (either individually if there is only one or together if there are multiple) - subsection 536F(6), FW Act; section 6, RO Act; and section 9, *Corporations Act 2001*.

<sup>16</sup> As at August 2018, there are no prescribed connections in the FW Regulations.



## Part 2: Giving or offering a corrupting benefit

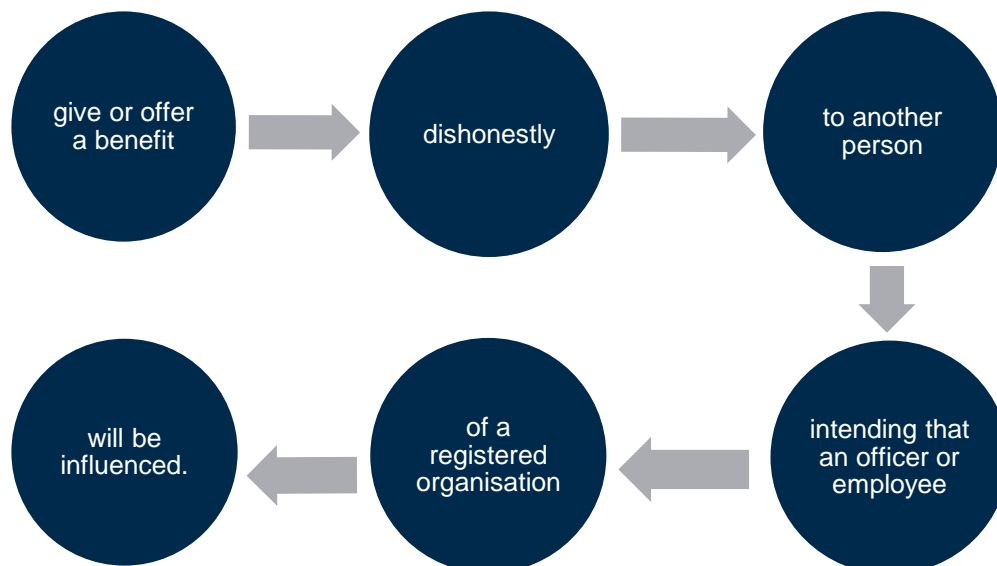
This Part is relevant to any person, natural or legal (for example, a company), including those who might deal with organisations or their officers or employees.

### Overview

A person commits an offence if they dishonestly give or offer a benefit to another person with the intention of influencing an officer or employee of an organisation.<sup>17</sup>

The influence must relate to the performance of the officer's or employee's duties or functions, the exercise of their powers, or giving a relevant advantage.

In summary, it is an offence for a person to:<sup>18</sup>



<sup>17</sup> Subsection 536D(1), FW Act.

<sup>18</sup> 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.



It is also an offence to **cause** someone else to give or offer a benefit, such as by acting through an agent or third party.

This means that a person who is responsible for directing or requesting that a benefit be given or offered may be liable even if someone else gave or offered the benefit.



In this Part, **giving or offering** includes:

- the act of **providing, offering or promising to provide**, a corrupting benefit (or **causing** any one of those things to occur).



**Examples:** An employer or their representative cannot offer to make a payment to an organisation (or its officers or employees) on the proviso that the organisation (or its officers or employees) 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.

A person cannot pay money to an officer of an organisation on the understanding that the officer will cause the organisation not to bargain for an enterprise agreement with any business owned or controlled by the person.<sup>19</sup>

## What is a benefit?

A benefit can be any form of advantage, and is not limited to cash or property.<sup>20</sup>

Giving cash, in the form of a bribe, is an obvious example, but a benefit could also take a less tangible form, such as nominating someone for a position of power.

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<sup>19</sup> Explanatory Memorandum, *Fair Work Amendment (Corrupting Benefits) Bill 2017*, paragraph 23.

<sup>20</sup> Subsection 536D(7), FW Act.



## Does it matter who gives or offers the benefit?

No – the benefit can be given or offered by anyone, whether they are an individual or company.

There is no need for the person giving or offering the benefit to have links or dealings with the organisation concerned; what matters is the intention of the person giving or offering the benefit.

The benefit must be **dishonestly** given or offered with the **intention to influence** an officer or employee of an organisation.

## What does ‘dishonest’ mean?

To trigger the offence, the benefit must be **dishonestly** given or offered.

The FW Act defines the term ‘dishonest’ as meaning dishonest according to the standards of ordinary people, and known to be such by the person committing the offence.<sup>21</sup>

What might be considered dishonest will be determined by a trial Judge on a case by case basis.

Relevant considerations could include the presence of fraud, deceptive conduct, threats or coercion, intention to disadvantage another person or gain an unfair advantage, use of unfair means or practices, a lack of honesty, or suppression of the truth.

## What is the relevant intention?

The benefit must be dishonestly given or offered with the **intention to influence** an officer or employee of an organisation.

It is the dishonest provision or offer of a benefit, with an intention to influence an officer or employee, which converts the innocent provision or offer of a benefit into a potential offence.

## What does influencing an officer or employee mean?

An **intention to influence** an officer or employee means influencing them:

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<sup>21</sup> Section 536CA, FW Act.



- in how they carry out their role, that is, in the performance of their duties, powers or functions<sup>22</sup>; or
- to **give an advantage** to the person providing or offering the benefit, or a connected person, which is not legitimately due.<sup>23</sup>

Influencing an officer or employee in how they carry out their role might include, for example, seeking to change the position an officer takes in the course of enterprise bargaining, or seeking to persuade an officer to overlook or not investigate a suspected OHS contraventions.

An advantage can be anything in connection with the relevant affairs<sup>24</sup>, and can be given to the person giving or offering the benefit or to any connected person.

The advantage can be given in any way, including by doing or not doing a thing, or by causing or influencing another person to do or not do a thing.<sup>25</sup> For an offence to have been committed, the advantage must be one that was not '**legitimately due**' to the person who received it or was intended to receive it.<sup>26</sup>

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<sup>22</sup> This could include the performance of their duties or functions conferred expressly or impliedly by the organisation, or the rules of the organisation; or the exercise of powers or performance of functions under the FW Act or the RO Act.

<sup>23</sup> Subsection 536D(1)(b), FW Act.

<sup>24</sup> Subsection 536D(b)(iii), FW Act.

<sup>25</sup> Subsection 536D(5), FW Act.

<sup>26</sup> Subsection 536D(1)(b)(iii), FW Act.



Advantages that are **'legitimately due'** are permitted.

Whether an advantage is legitimately due is a question for the court or tribunal to decide.<sup>27</sup>

In working out if the advantage is legitimately due, the court or tribunal cannot take into account claims that the advantage is (or is perceived to be) customary, necessary or required in the situation, the value of the advantage, and any official tolerance of the advantage.<sup>28</sup>



**Did the benefit need to influence an employee or officer?**

No, the intention to influence is enough – it doesn't matter whether an employee or officer is influenced to act in a certain manner or to provide an advantage.<sup>29</sup>

The intent of the person giving or offering the benefit does not need to be directed at influencing a particular employee or officer or towards an employee or officer acting in any particular manner or providing any particular advantage.<sup>30</sup>

## Does it matter who receives, or is intended to receive, the benefit?

No – the benefit does not have to be given or offered to an organisation, or to an officer or an employee of an organisation.

The benefit can be given or offered to anyone; what matters is the intention of the person giving or offering the benefit.

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<sup>27</sup> Subsection 536D(4), FW Act.

<sup>28</sup> Subsection 536D(6), FW Act.

<sup>29</sup> Subsection 536D(3)(d), FW Act.

<sup>30</sup> Subsections 536D(3)(a) and (b), FW Act.



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## Summary

A person must not dishonestly give someone a benefit with the intention of influencing an officer or employee of an organisation as to how they carry out their role, or to gain an advantage that was not legitimately due.

For example, it is an offence to give someone an expensive watch to try to stop an official inspecting a work site or to encourage an official to support an enterprise agreement.





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# Part 3: Receiving or soliciting a corrupting benefit

This Part is relevant to any person, natural or legal (for example, a company), who might receive or solicit a benefit on the basis that it might influence an officer or employee of an organisation. It will be particularly relevant to any person who acts on behalf of an organisation (including its officers and employees).

## Overview

A person commits an offence if they dishonestly receive or solicit a benefit for themselves or for another person:

- with the intention that the receipt, or expectation of receipt, of the benefit will influence an officer or employee of an organisation, or
- with the intention that the provider believes that the receipt, or expectation of receipt, of the benefit will influence an officer or employee of an organisation.<sup>31</sup>

The influence must relate to the performance of the officer's or employee's duties or functions, the exercise of their powers, or giving a relevant advantage.

In summary, it is an offence for a person to:<sup>32</sup>

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<sup>31</sup> Section 536D(2), FW Act.

<sup>32</sup> 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.



It is also an offence to **agree** to receive or obtain such a benefit. That means that a person could commit an offence by reaching an agreement to obtain a benefit that is never received.



A person cannot request that an employer make payments to them, or to another person, intending that the payments will cause officers of an organisation to discourage the organisation's members from engaging in industrial action in relation to changes in the workplace.

An officer of an organisation cannot 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.<sup>33</sup>

<sup>33</sup> Paragraph 29, Explanatory Memorandum, *Fair Work Amendment (Corrupting Benefits) Bill 2017*.



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In this Part, **receiving or soliciting** includes:

- the act of **requesting, receiving or obtaining**, or **agreeing to receive or obtain**, a corrupting benefit.

## What is a benefit?

As discussed above, a benefit can be any form of advantage, and is not limited to cash or property.<sup>34</sup>

Receiving cash, as a bribe, is an obvious example, but a benefit could also take a less tangible form, such as being nominated for a position of power.

## Does it matter who receives the benefit?

No – the benefit can be received by, or intended to be received by, anyone. It may be an organisation, or an officer or employee of an organisation, that receives the benefit, but it doesn't have to be.

The benefit could be received by someone who has no connection to the organisation; what matters is the intention of the person receiving or soliciting the benefit.



The benefit does not have to be received. It is enough for a person dishonestly to request, or agree to receive or obtain, the benefit for their benefit or the benefit of another person.

The offence may be committed even if the person who was to provide the benefit rejects any request, or never had any intention of carrying through with an agreement to provide the benefit.

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<sup>34</sup> Subsection 536D(7), FW Act.



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The benefit must be **dishonestly** received or solicited, with the **intention to influence** an officer or employee of an organisation or to cause the provider of the benefit to **believe that it will influence** an officer or employee of an organisation.

## What does ‘dishonest’ mean?

To trigger the offence, a person must receive or solicit the benefit **dishonestly**.

The FW Act defines the term ‘dishonest’ as meaning dishonest according to the standards of ordinary people, and known to be such by the person committing the offence.<sup>35</sup>

What might be considered dishonest will be determined by a trial Judge on a case by case basis. Relevant considerations could include the presence of fraud, deceptive conduct, threats or coercion, intention to disadvantage another person or gain an unfair advantage, use of unfair means or practices, a lack of honesty, or suppression of the truth.

It is not necessary for a request to be made using threats or coercion for an offence to have been committed.<sup>36</sup>

## What is the relevant intention?

The benefit must be dishonestly received or solicited with the intention that its receipt, or expectation of its receipt, will:

- **influence** an officer or employee of an organisation, or
- cause the provider of the benefit to **believe that it will influence** an officer or employee of an organisation.

It is not necessary that the provider of the benefit believes that the benefit will influence an officer or employee. It is sufficient if the person receiving or soliciting the benefit intended that the provider holds that belief.<sup>37</sup>

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<sup>35</sup> Section 536CA, FW Act.

<sup>36</sup> Subsection 536D(2)(a)(i), FW Act.

<sup>37</sup> Subsection 536D(3)(c), FW Act.



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It is the dishonest receipt or soliciting of a benefit, with an intention that it influences an officer or employee, or that the provider of the benefit believes that it will influence an officer or employee, that converts the innocent receipt or solicitation of a benefit into a potential offence.

## What does influencing an officer or employee mean?

For a detailed discussion on what it means to influence an officer or employee, refer to the discussion above commencing on page seven in Part two of this guidance note.



This provision may be contravened by a person who holds themselves out as being able to influence or control the conduct of an officer or employee of an organisation, even though they might not themselves be an officer or employee of that organisation.

## Does it matter who gives or offers the benefit?

No – a benefit could be received or solicited from anyone.

There is no need for the person giving or offering the benefit to have links or dealings with the organisation concerned; what matters is the **intention** of the person receiving or soliciting the benefit.

## Summary

A person must not dishonestly receive or solicit a benefit with the intention that either:

- the benefit would influence an officer or employee of an organisation in the performance of their role, or
- the provider of the benefit would believe that the benefit would influence an officer or employee in the performance of their role.

For example, it is an offence for an officer to agree to accept a bribe from an employer in exchange for the officer taking a position that seeks to convince employees to cease protected industrial action.

It would also be an offence even if the officer would have acted in the same way regardless of whether the bribe had been offered or provided.



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# Part 4: Giving or offering an illegitimate payment

This Part is relevant to national system employers when dealing with federally registered unions that represent the industrial interests of employees of the employer or a connected person.

The definition of a national system employee, in respect of this offence, **excludes** employers who are national system employers **only** because of a referral law made by a State. For example, in general terms, this may exclude some sole traders and partnerships in NSW, QLD, SA and TAS from the scope of this offence.

## Overview

It is an offence for employers to give or offer a cash or in kind payment to a union (or its prohibited beneficiaries) if the union is entitled to represent the employer's employees (or the employees of a connected person), unless the payment counts as a legitimate payment.

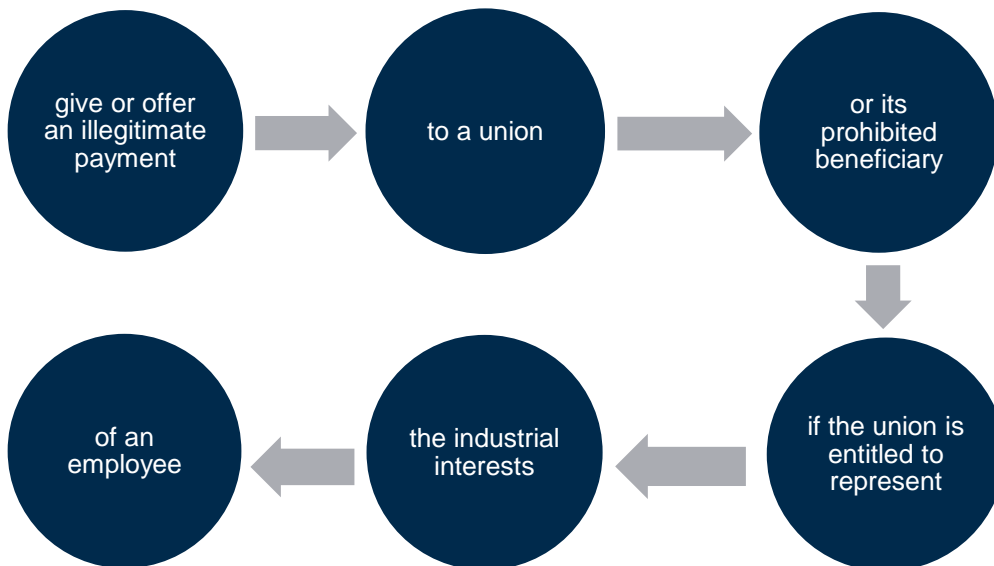
In this guidance note a payment that contravenes this offence is referred to as an **illegitimate payment**.

In summary, it is an offence for a relevant<sup>38</sup> national system employer to:<sup>39</sup>

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<sup>38</sup> In addition to the limitation set out in the introduction to this Part, the offence also excludes employers who are federally registered unions – subsection 536F(1)(a), FW Act.

<sup>39</sup> 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.



It is also an offence to **cause** someone else to give or offer an illegitimate payment, such as by acting through an agent or third party.

This means that a person who is responsible for directing or requesting that an illegitimate payment be offered may be liable even if someone else provided the illegitimate payment.



In this Part, **giving or offering** includes:

the act of **providing, offering, or promising to provide** an illegitimate payment (or **causing** any one of those things to occur)

## What is an illegitimate payment?

An illegitimate payment is a **cash or in kind payment** made to a union, or a union's prohibited beneficiary, which is not a legitimate payment.

There are various types of **legitimate payments** that employers may lawfully provide to a union that are exceptions to the general prohibition. These legitimate payments are explained below in Part 6 of this guidance note.



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An illegitimate payment will include a **benefit** that is in cash or any other monetary form, or is in the nature of goods or services.<sup>40</sup> This could include, for example, investment products, digital currencies, property, products and services.

## Does it matter who gives or offers the illegitimate payment?

No – the offence is made out when a national system employer:

- gives or offers the illegitimate payment to a union or prohibited beneficiary directly; or
- causes the illegitimate payment to be given or offered to a union by somebody else. This could be by an associated entity, another company or business, or an individual.

## Will my business be caught by the offence?

You will be caught by the provisions if you are a relevant national system employer and you, or a connected person, employ a person who is or could be a member of the union that receives the illegitimate payment.



A **connected person** is a spouse (including a de facto partner) of the relevant person, an associated entity of the relevant person, or a person who has a prescribed connection with the relevant person.

The union to which an illegitimate payment is made must also be entitled to represent that employee's industrial interests.

Even if you have no employees who are members of the relevant union, you may still be liable if your employees are eligible for membership of the union.

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<sup>40</sup> Subsection 536F(4), FW Act. It may also include prescribed benefits under the FW Regulations. As at August 2018, no such benefits have been prescribed.





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### How do I know if the union is entitled to represent my employees?

An employee organisation is generally entitled to represent the interests of their members. The union's rules will define who can be members. Check the union's rules, which can be found at [www.fwc.gov.au](http://www.fwc.gov.au).

If you're uncertain about whether you, or one of your connected persons, employ people who are or could be members of a particular union, we recommend that you seek legal advice.

## Am I dealing with a union covered by the provisions?

The provisions only relate to payments made to federally registered unions, being unions registered under the RO Act, and their **prohibited beneficiaries**. A full list of registered organisations, which includes all federally registered unions, can be found at [www.fwc.gov.au](http://www.fwc.gov.au).

Some federally registered unions are associated with State based unions. It is important that employers are clear as to which entity they might be dealing with.

Even if you are dealing with a State union, you will need to consider whether the recipient of a payment might fall within the definition of a prohibited beneficiary of a federally registered union.

## What is a prohibited beneficiary of a union?

The illegitimate payment must not be given or offered to a union or to a prohibited beneficiary of a union.

**Prohibited beneficiaries** include:<sup>41</sup>

- the union's officers and employees
- the spouse (including a de facto partner<sup>42</sup>) of an officer or employee of the union
- an entity<sup>43</sup> controlled by the union

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<sup>41</sup> Subsection 536F(5), FW Act.

<sup>42</sup> Subsection 536F(6), FW Act, and section 6, RO Act.

<sup>43</sup> 'Entity' includes a body corporate, partnership, unincorporated body, individual, or trustee (either individually if there is only one or together if there are multiple) - subsection 536F(6), FW Act, section 6, RO Act, *and* section 9, *Corporations Act 2001*.



- an entity controlled by an officer or employee of the union
- a person or entity to whom the union or any prohibited beneficiary requests or directs a cash or in kind payment to be made
- a person who has a prescribed connection with the organisation or a prohibited beneficiary.<sup>44</sup>

### How do I know if the union, or an officer or employee of the union, controls an entity?



Where you are considering making a relevant payment to an entity (this can include any incorporated or unincorporated company, a partnership or an individual), you need to be sure that the entity is not **controlled** by the union, or by an officer or employee of the union.

A union, officer or employee **controls** an entity if they are able to determine the outcome of decisions about the entity's financial and operating policies.<sup>45</sup> Control can include practical influence, and exercising patterns of behaviour.<sup>46</sup>

The entity will not be controlled if the union, officer or employee has to team up with another entity to control the outcome or if the union is obligated by law to use its influence for the benefit of someone other than its members.<sup>47</sup>



**Examples:** A union owns a training company and all of the directors on the board are officers or employees of the union. This is therefore a prohibited beneficiary.

A cleaning company has two directors, one is the President of a union and the other is their spouse. The President of the union tends to make all of the decisions about what the cleaning company does. This is likely a controlled entity of an officer and therefore a prohibited beneficiary.

<sup>44</sup> As at August 2018, there are no prescribed connections in the FW Regulations.

<sup>45</sup> Subsection 536F(6), FW Act, section 6, RO Act, and sections 9 and 50AA, *Corporations Act 2001*.

<sup>46</sup> Subsection 50AA(2), *Corporations Act 2001*.

<sup>47</sup> Subsections 50AA(3) and (4), *Corporations Act 2001*.



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## Are ‘dishonesty’ and ‘intention’ relevant?

The offence of giving or offering an illegitimate payment does not require proof that there was an intention to influence another person (such as an officer or employee of the union). There is also no requirement to establish dishonesty.

In this regard, the offence may be described as a strict liability offence. Because of this, the penalties are lower than those for the offences of giving, receiving or soliciting a corrupting benefit<sup>48</sup>, as described in Parts 2 and 3 of this guidance note.

## Summary

Employers must not make cash or in kind payments to unions (or the union’s prohibited beneficiaries) if that union is entitled to represent the employer’s employees, or the employees of a connected person.

There are, however, a wide range of exceptions that identify legitimate reasons for an employer to provide **legitimate payments** to unions or their prohibited beneficiaries.

For more detail on the legitimate payments that can be provided to unions, see Part 6 of this guidance note below.

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<sup>48</sup> See paragraphs 44 and 58, Explanatory Memorandum, *Fair Work Amendment (Corrupting Benefits) Bill 2017*.



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# Part 5: Receiving or soliciting an illegitimate payment

This part is relevant to federally registered unions and their officers and employees when dealing with a national system employer if that employer or a connected person has employees whose industrial interests the union is entitled to represent.

## Overview

It is an offence for unions, and their officers or employees, to receive or solicit a cash or in kind payment from a national system employer if that employer or a connected person has employees that the union is entitled to represent, unless the payment counts as a legitimate payment.<sup>49</sup>

Consistently with Part 4 above, in this guidance note, a payment that contravenes this offence is referred to as an **illegitimate payment**.



This offence covers **all** national system employers<sup>50</sup> regardless of whether coverage under the FW Act is extended to them because of a referral law by a State. This is a wider definition than for the offence described above in Part 4 of this guidance note.

In summary, it is an offence for a union, or officer or employee of a union, to:<sup>51</sup>

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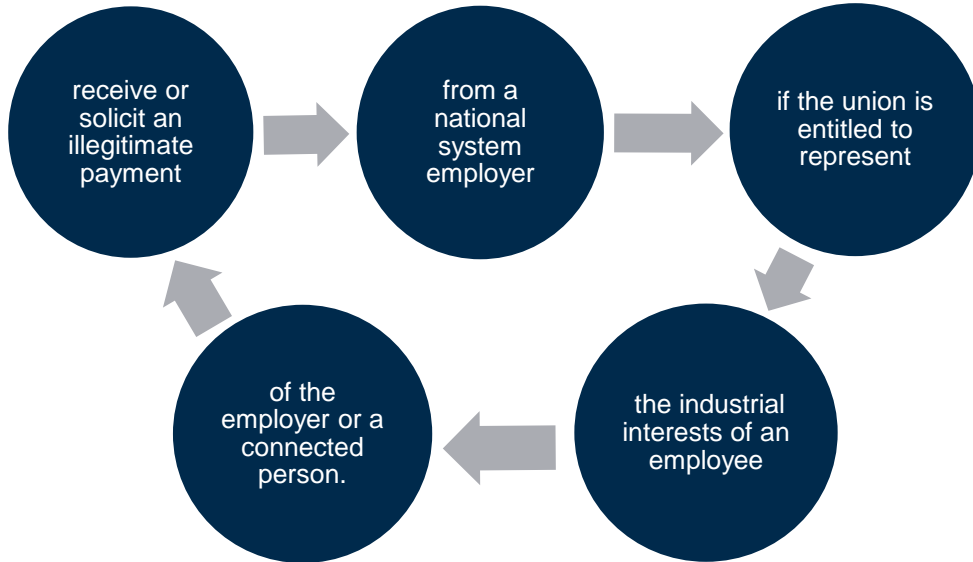
<sup>49</sup> Section 536G, FW Act.

<sup>50</sup> Other than a federally registered union, which is excluded by subsection 536G(1)(c).

<sup>51</sup> 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.



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It is also an offence to **agree** to receive or obtain an illegitimate payment.

That means that a union, officer or employee could commit an offence by reaching an agreement to obtain an illegitimate payment that is never received.



In this Part, **receiving or soliciting** includes:

- the act of requesting, receiving or obtaining, or agreeing to receive or obtain, an illegitimate payment.

## What is an illegitimate payment?

As discussed above, an illegitimate payment is a cash or in kind payment made to a union, which is not a legitimate payment.

There are various types of **legitimate payments** that unions may lawfully receive from an employer that are exceptions to the general prohibition. These legitimate payments are explained below in Part 6 of this guidance note.



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An illegitimate payment will include a **benefit** that is in cash or any other monetary form, or is in the nature of goods or services.<sup>52</sup> This could include, for example, investment products, digital currencies, property, products and services.

## Does it matter who receives the illegitimate payment?

No – the offence is triggered if a union, or an officer or employee of a union receives or solicits the illegitimate payment. The benefit does not have to be received by a union, officer or employee for there to have been an offence.<sup>53</sup>

The illegitimate payment can be solicited for the benefit of another person, including someone who has no connection to the organisation. It could, for example, be received by a company, business or individual.



The illegitimate payment does not have to be received. It is enough for a union, officer or employee to request, or to agree to receive or obtain, such a payment.

The offence may be committed even if the person who was to provide the benefit rejects a request or never had any intention to carry through with an agreement to provide the illegitimate payment.

## Does it matter who gives or offers the illegitimate payment?

Yes – the illegitimate payment must originate from a national system employer who employs (or has a connected person who employs) any person who is, or who is entitled to be, a member of the union that requests or solicits the payment. The union must be entitled to represent the employee's industrial interests.<sup>54</sup>

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<sup>52</sup> Subsection 536F(4), FW Act. It may also include prescribed benefits under the FW Regulations. As at August 2018, no such benefits have been prescribed.

<sup>53</sup> Subsection 536G(1)(a), FW Act.

<sup>54</sup> Subsection 536G(1)(d), FW Act.



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A **connected person** is a spouse (including a de facto partner) of the relevant person, an associated entity of the relevant person, or a person who has a prescribed connection with the relevant person.

## Am I dealing with an employer covered by these provisions?

An employer will be covered by the provisions if it is a national system employer (other than a federally registered union) and if the employer, or a connected person, employs a person who is or could be a member of the union, whose industrial interests the union is entitled to represent.

## Are 'dishonesty' and 'intention' relevant?

The offence of receiving or soliciting an illegitimate payment does not require proof that there was an intention to influence another person (such as an officer or employee of the union). There is also no requirement to establish dishonesty.

In this regard, the offence may be described as a strict liability offence. Because of this, the penalties are lower than those for the offences of giving, receiving or soliciting a corrupting benefit<sup>55</sup>, as above described in Parts 2 and 3 of this guidance note.

## Summary

Unions and their officials and employees must not receive or solicit cash or in kind payments from an employer if that employer, or a connected person, has employees whose interests the union is entitled to represent.

There are, however, a wide range of exceptions that identify legitimate reasons for an employer to provide **legitimate payments** to unions, or their officials or employees.

For more detail on the legitimate payments that can be received by unions, see Part 6 of this guidance note below.

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<sup>55</sup> See paragraphs 44 and 58, Explanatory Memorandum, *Fair Work Amendment (Corrupting Benefits) Bill 2017*.



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# Part 6: Legitimate payments

This Part identifies specific ‘legitimate’ benefits listed in the FW Act that are excluded from the offence provisions prohibiting cash or in kind payments between national system employers and federally registered unions as above described in Parts 4 and 5 of this guidance note.

This Part is relevant to both national system employers considering giving or offering a payment to a union or its prohibited beneficiaries, and to unions and their officers and employees that may consider receiving or soliciting such a payment. If the payment falls within one of the exceptions set out below then it will not be covered by the prohibitions on cash or in kind payments set out in sections 536F and 536G of the FW Act.

## Overview

The offences relating to giving, receiving or soliciting a **cash or in kind payment** describe a general prohibition of certain payments between employers and unions that are not ‘**legitimate payments**’.

Consistently with earlier Parts, in this guidance note, a payment that contravenes this offence is referred to as an **illegitimate payment**.

In effect, the legislation defines an allowable, or ‘legitimate’ payment, by a range of exceptions. Those exceptions define the ways in which employers may provide permissible cash or in kind payments to unions, officers, employees and other prohibited beneficiaries.

A cash or in kind payment that is a legitimate payment is not an illegitimate payment.

## What are the categories of legitimate payment?

The following categories of cash or in kind payments from an employer to a union are permitted:

### a. **Union membership fees**

A payment made for a membership fee, payable by an employee, made by deduction from the wages of the employee who has agreed in writing to become a member of the union.





**b. Benefits for the purpose of employees**

A benefit provided and used for the sole or dominant purpose of benefitting the employer's employees, or its former employees in relation to their former employment.

**c. Tax deductible gifts**

A gift or contribution deductible under section 30-15 of the *Income Tax Assessment Act 1997* and used in accordance with the law.

**d. Certain benefits of nominal value**

A benefit of nominal value associated with travel or hospitality during consultation, negotiation or enterprise bargaining; or

A token gift, event invitation or similar benefit of nominal value given in accordance with common courteous practice among employers and unions.

**e. Market value services**

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.

**f. Payments made by law**

A payment made under or in accordance with a law of the Commonwealth, or a law of a State or Territory; or

A benefit provided in accordance with an order, judgment or award of a court or tribunal, or in settlement of a matter before the Fair Work Commission or a genuine legal dispute.<sup>56</sup>

A defendant bears the evidentiary onus of establishing that a cash or in kind payment falls within one of the categories above.<sup>57</sup> Each of the categories are explained in further detail below using examples.

Payments that are legitimate payments might still in certain circumstances be capable of constituting an offence relate to the giving, receiving or soliciting of a corrupting benefit as described in Parts 2 and 3 of this guidance note.

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<sup>56</sup> Subsections 536F(3) and 536G(2), FW Act. The FW Act also enables a legitimate payment to be prescribed by, or provided in the circumstances prescribed. As at August 2018, no non-corrupting benefits have been prescribed under the FW Regulations.

<sup>57</sup> See the 'Note' to subsection 536F(3), FW Act.



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## A. Union membership fees

It is legitimate for an employer to make a payment to a union which is made in respect of a membership fee:

- made by deduction from the wages of an employee,
- where that employee has agreed in writing to become a member of the union.

The membership fee must be payable by the employee to the union. Such a payment is not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>58</sup>

To rely upon the exception, as a matter of best practice, employers should request written evidence of the agreement between the employee and union before establishing deductions from wages.

Employers will also need to have regard to section 324 of the FW Act regarding other requirements for making permitted deductions from the wages of an employee.

## B. Benefits for the purpose of employees

It is legitimate for an employer to make a payment to a union which is used for the sole or dominant purpose of benefiting the employer's employees, or the employer's former employees in relation to their former employment. Such a payment is not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>59</sup>

In other contexts, courts have held that a sole or dominant purpose does not have to be the primary or substantial purpose, but it will need to be the 'ruling, prevailing or most influential' purpose.<sup>60</sup> It is less likely to be sufficient if a benefit to the employer's employees was only one of many purposes, or was a peripheral or ancillary purpose.

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<sup>58</sup> Subsections 536F(3)(a) and 536G(2), FW Act.

<sup>59</sup> Subsections 536F(3)(b) and 536G(2), FW Act.

<sup>60</sup> *Eso Australia Resources Ltd v Federal Commissioner of Taxation* (1991) 201 CLR 49; *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404 at page 416.



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**Example:** A group of employees of MNO Ltd in finance roles are entitled to be represented by DEF Union. MNO Ltd would like to send these employees on a training course related to book-keeping and decides to use Training Co Pty Ltd (a training company which is fully owned by DEF Union). MNO Ltd pays for the course at market value.

This is a legitimate payment, because it is a benefit provided for the sole purpose of benefitting MNO Ltd's employees in their employment.

## C. Tax deductible gifts

It is legitimate for an employer to make a gift or contribution to a union or prohibited beneficiary of a union that is deductible under section 30-15 of the *Income Tax Assessment Act 1997* and the gift or contribution is used in accordance with the law. Such a payment is not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>61</sup>



**Example:** PQR Pty Ltd's employees are entitled to be represented by ABC Union. ABC Union is fundraising to support the community following a bushfire and to raise money for the local hospital.

PQR Pty Ltd's contribution to ABC Union's fundraising effort would be a legitimate payment if it is deductible under section 30-15 of the *Income Tax Assessment Act 1997* and the contribution is used in accordance with the law.

For information about the types of payments which may fall within in this category, it is recommended that you obtain legal advice or contact the [Australian Tax Office](#).

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<sup>61</sup> Subsections 536F(3)(c) and 536G(2), FW Act.



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## D. Certain benefits of nominal value

### Travel and hospitality

It is legitimate for an employer to provide a benefit of nominal value associated with travel or hospitality during consultation, negotiation or bargaining. Such a benefit is not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>62</sup>

The references to consultation, negotiation and bargaining are not defined but are likely to include the common engagements between employers and unions including:

**Consultation:** Includes obligations arising under the FW Act for employers to consult with employees in a variety of situations - for example, when considering making a major workplace change that will have a significant effect on employees. Other consultation obligations could arise from an enterprise agreement or modern award, or from the employer's own internal policies.

**Negotiation:** This includes a broad range of interactions between an employer and a union. For example, an enterprise agreement might require that a union and the employer negotiate the terms of reference of a working party, or a union official might represent an employee in negotiating terms on termination of employment.

**Bargaining:** This includes enterprise bargaining for a proposed enterprise agreement between an employer and employees where a union may act as a bargaining representative on behalf of the employees.

### Token gifts and other benefits

It is legitimate for an employer to provide a benefit of nominal value in the nature of a token gift, an event invitation or a similar benefit given in accordance with common courteous practice among employers and unions.

It is recommended that employers and unions carefully review any regular gifts or benefits they give or receive.

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<sup>62</sup> Subsections 536F(3)(ca) and (cb) and 536G(2), FW Act.



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## What is a 'nominal value'?

In respect of each of the above categories of benefits, nominal value has been set by reference to a sum that is no more than the equivalent in value of 2 penalty units.<sup>63</sup>

As at July 2020, a 'nominal value' has been set in the amount of \$550.<sup>64</sup>

Until the Courts provide judicial guidance on these provisions, no definitive view can be provided as to how the 'nominal value' is to be applied in practice. It is recommended that employers and unions take considerable care in considering offering or receiving any benefit that may exceed the value of \$550.

The Commission expects that enforcement agencies will take into account the seriousness of any contravention in accordance with their own relevant priorities and policies.

If you are unsure about specific circumstances in which benefits of nominal value may be allowed, because the legislation is yet to be interpreted by a court, it is recommended you seek legal advice.

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<sup>63</sup> Sections 536F(3)(ca) and 536F(3)(cb), FW Act.

<sup>64</sup> Section 4AA, Crimes Act 1914 defines a penalty unit as \$275.



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**Example:** MNO Ltd and DEF Union are each bargaining representatives for a new proposed enterprise agreement, which will apply to most of MNO Ltd's employees. At various times during bargaining, MNO Ltd provides, free of charge:

- car parking for officials for the day, and
- a light lunch of sandwiches, drinks and snacks for the bargaining meeting.

On these facts, the benefits provided appear to be of nominal value associated with hospitality during bargaining, and accordingly are likely to be considered legitimate payments.

MNO Ltd holds a modest annual Christmas barbeque for its clients, staff, key stakeholders, and their families. Traditionally, MNO Ltd has always invited several representatives of DEF Union to attend. Inexpensive gifts bearing MNO Ltd's logo from its merchandising stocks are handed out to children in attendance.

On these facts, the benefits provided appear to be of nominal value and of a token nature associated with common courteous practice among employers and organisations, and accordingly are likely to be legitimate payments.

## E. Market value services

It is legitimate for an employer to make a payment to a union, which is made at no more than market value, for goods or services supplied to the employer in the ordinary course of the union's business. Such a payment is not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>65</sup>

'Market value' is likely to be taken to have its ordinary meaning – that is, the face value of the goods or services being provided, and not at any inflated value.

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<sup>65</sup> Subsections 536F(3)(d) and 536G(2), FW Act.



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The requirement that the goods or services be provided in the ordinary course of the union's business might exclude any specifically tailored, personalised or one-off arrangements made between an employer and the union.



**Example:** MNO Ltd is making 10 roles redundant. It decides to provide assistance to affected employees by providing re-training. DEF Union, which is entitled to represent some of MNO Ltd's employees, fully owns Training Co Pty Ltd, a training company that provides re-training for employees at a standard cost of \$300 per employee.

MNO Ltd decides to engage Training Co Pty Ltd and pays \$300 per person for each of the 10 employees being made redundant to receive re-training.

This is a legitimate payment on the basis that it is a payment made at market value for training to be provided in the ordinary course of the union's business.

## F. Payments made by law

It is legitimate for an employer to make a payment to a union which is made under or in accordance with a law of the Commonwealth, or a law of a State or Territory.

Similarly, it is legitimate for an employer to provide a benefit to a union in accordance with an order of a court or tribunal, or in settlement of a matter before the Fair Work Commission or a genuine legal dispute.

Payments of this nature are not covered by the cash or in kind offence provisions referred to above in Parts 4 and 5 of this guidance note.<sup>66</sup>

A benefit could also be non-financial, such as an injunction to prevent a party from doing something, or an order reinstating a person's employment following termination.

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<sup>66</sup> Subsections 536F(3)(e) and (f) and 536G(2), FW Act.



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**Employee:** MNO Ltd makes Fred, one of its employees, redundant following a restructuring. Fred is also an officer of DEF Union.

In accordance with the FW Act, MNO Ltd pays Fred his entitlements on termination of employment, including redundancy pay and payments in respect of accrued and unused annual leave and his notice period.

Although Fred is an officer of DEF Union, the payments are legitimate because they are made in accordance with the FW Act.

Under an Enterprise Agreement approved by the Fair Work Commission, MNO Ltd must at its cost allow a certain number of union delegates to take paid leave to undertake union business.

Although this provides a benefit to DEF Union, the benefits are legitimate as they are required to be given by force of law in accordance with the Enterprise Agreement.

DEF Union brings legal proceedings against MNO Ltd in respect of a genuine legal dispute. DEF Union is successful and MNO Ltd is ordered by the court to pay an amount in damages and costs to DEF Union, which it does.

The payment made by MNO Ltd to DEF Union is a legitimate payment as it is required by an order of a court.

## Further information

For further information please contact the Fair Work Commission on 1300 341 665 or email [regorgs@fwc.gov.au](mailto:regorgs@fwc.gov.au).

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This guidance note is not intended to be comprehensive. The Fair Work Commission does not provide legal advice. Users must rely upon the relevant legislation, which is set out in the *Fair Work (Registered Organisations) Act 2009*, the *Fair Work Act 2009*, the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* and the *Fair Work (Registered Organisations) Regulations 2009*.