Board Protocols - Related Party Transactions

Scope

A This document provides guidance to the Board on the application of the *Corporations Act 2021* (Cth) **(Corporations Act),** ASX Listing Rules and the Corporate Governance Principles and Recommendations[1] in relation to dealing with related party transactions and potential conflicts of interest, including meeting processes to be followed, what information to include in meeting materials and approval protocols.

Reference is also made to the ASIC Regulatory Guide 76: Related Party Transactions, March 2011, which provides comprehensive guidance on disclosure and governance principles for related party transactions.

B Oversight of the implementation and compliance with this Protocol has been delegated by the Board to the Audit and Risk Committee.

C This policy applies to directors and key management personnel.

1. Related Party Transactions

1.1 A 'related party transaction' is any transaction through which the Company provides a financial benefit to a related party (such as a director, their spouse and certain other relatives). Almost by definition, related party transactions involve conflicts of interest because related parties are often in a position to influence the decision of whether the benefit is provided to them and the terms of the provision of the benefit.

1.2 Related party: Chapter 2E of the *Corporations Act* provides a specific definition of a related party, being:

- an entity that controls the Company;
- a director of the Company;
- a director of an entity that controls the Company;
- a spouse, parent or child of either, a director of the Company, or a director of an entity that controls the Company; or
- an entity controlled by a related party of one of the above; or
- a person who was a related party within the 6 months immediately before the financial benefit is given (see s 228(6) of the Corporations Act).

[1] ASX Corporate Governance Council, Corporate Governance Principles and Recommendations, 4th edition, February 2019 ("**Corporate Governance Principles and Recommendations**").

Chapter 2E definitions and exceptions are technical and must be considered on a case by case basis.

1.3 Financial benefit: A financial benefit can be a payment, but can also be:

- provision of goods or services at below-market rates;
- awarding a contract that is more favourable or preferential to the other party (for example, including terms that are not at 'arms length');
- granting of options or shares; or
- forgiveness of debt.

1.4 The *Corporations Act* imposes significant obligations on the Boards of companies and their directors in relation to related party transactions.

1.5 Under the *Corporations Act*, related party transactions can potentially arise from relationships between the Company and entities which control the Company or are controlled by a related party.

1.6 Together with the provisions about directors' duties, the *Corporations Act* includes specific provisions to protect and help manage the risks of related party transactions, including:

- provisions which exclude directors of public companies with material personal interests in certain matters from attending director meetings about, or voting on, these matters; and
- provisions which require public companies to obtain shareholder approval to provide a financial benefit to a related party, subject to certain exceptions.

The attached **Appendix** provides an overview of Directors' duties.

1.7 Importantly, Directors have fiduciary and directors' duties to the Company, including the duty to not use their position or company information to gain an advantage for themselves or someone else, or to cause detriment to the company. These duties and the review of how conflicts of interest are managed will apply even as related party transactions can be approved and entered.

Furthermore, as the Company is a listed public company, under ASX Listing Rule 10.1 the Company must not, without shareholder approval, acquire a substantial asset from, or dispose of a substantial asset to, a person or entity with a 'relevant interest' in at least 10% of the total votes attached to the voting securities in the Company.

Examples of transactions to which ASX Listing Rule 10.1 would apply include:
(a) sale of a Company asset to a related party of substantial shareholder in the Company,
(b) purchase by the Company of an asset from a related party of substantial shareholder, or
(c) entering a contract where a financial benefit is provided to a related party.
in each case who has a relevant interest in at least 10% of the issued voting shares in the Company and where the value of that asset is equal to 5% or more of the equity interests as set out in the Company's latest accounts.

Consult early with the Company Secretary or with legal advice before any proposed substantial asset transaction.

Independence of Directors

1.8 The ASX Corporate Governance Principles and Recommendations note the following factors which are relevant to assessing the 'independence' of a director:

- is, or has been, employed in an executive capacity by the entity or any of its child entities and there has not been a period of at least three years between ceasing such employment and serving on the Board;
- is, or has within the last three years been, a partner, director or senior employee of a provider of material professional services to the entity or any of its child entities;
- is, or has been within the last three years, in a material business relationship (eg as a supplier or customer) with the entity or any of its child entities, or an officer of, or otherwise associated with, someone with such a relationship;
- is a substantial security holder of the entity or an officer of, or otherwise associated with, a substantial security holder of the entity;
- has a material contractual relationship with the entity or its child entities other than as a director;
- has close family ties with any person who falls within any of the categories described above; or
- has been a director of the entity for such a period that his or her independence may have been compromised.[2]

Therefore, whether a director is independent will affect the composition of the Board and its committees and imposes additional obligations on directors to disclose matters affecting a director's independence.

1.9 Directors must avoid situations in which there is a 'real and substantial' conflict between the director's interests and the Company's interests.[3] However, a director will not necessarily breach the rule against conflicts of interest merely because they are also a director of a company that competes with the Company.

2. Related Party Transaction Protocols

Identify existing and potential related party transactions

2.1 It is the responsibility of each director to fully disclose in writing and on a timely basis to the Board details of any existing or potential related party interests.

Related party interests would include, for example, the following in relation to the Company or a related party:

- substantial shareholdings;
- director appointments or key management positions;
- material contractual relationships;
- material customer or supplier agreements; and
- material business dealings.

[2] See Box 2.3 of the Corporate Governance Principles and Recommendations.

[3] See ASIC RG 76 at 76.36.

2.2 The Company Secretary will maintain a register recording all related party interests, issues and actions for each director whether or not those items have been disclosed by the director.

2.3 It is the responsibility of each director to fully disclose in writing and on a timely basis to the Board details of any potential related party transaction arising as a result of the director's related party interest, including, without limitation, any potentially adverse information, the nature and extent of the interest, its relation to the company affairs, and confirmation that updates must be made whenever the interest materially changes.

2.4 A director with a material personal interest in a related party transaction must not attend that part of a Board meeting (including any relevant Committee meeting) while the related party matter is being considered, unless approved by all attending "non-interested directors" (as defined below).

2.5 A director with a material personal interest in a related party transaction must not receive documentation or papers specific to the related party transaction which are distributed to directors for their consideration, unless approved by all attending "non-interested directors".

2.6 A director with a material personal interest in a related party transaction must not vote on a related party transaction, unless approved by all attending "non-interested directors".

2.7 A director with a material personal interest in a related party transaction must not lead or participate in negotiations, or sign any documentation, on behalf of either the Company or on behalf of the related party, with respect to the related party transaction, unless otherwise approved by the "non-interested directors".

Voting Protocols

Subject to section 195 of the Corporations Act, where a director has a material personal interest in a matter being considered at a Board meeting, that director must not be present while the matter is being considered or vote on the matter, unless the directors who do not have a material personal interest in the matter have not passed a resolution that:

- identifies the director, the nature and extent of the director's interest in the matter and its relation to the affairs of the Company; and
- states that those directors are satisfied that the interest should not disqualify the director from voting or being present.

The role of "non-interested directors"

2.8 "Non-interested directors" are those directors who do not have a material personal interest, or another form of conflict of interest, in respect of a matter being approved by the Board.

2.9 When making decisions to provide financial benefits to a related party, non-interested directors must:

(a) make appropriate inquiries of management and seek appropriate advice, to the extent necessary, about the proposal;
(b) determine whether the *Corporations Act*, the Company's Constitution, the relevant Committee Charter or any other applicable rule that requires the conflicted director to be excluded from papers, attendance, deliberation, quorum and/or voting;
(c) determine whether any exception, approval mechanism or other lawful basis exists for the conflicted director to participate in any part of the process;
(d) independently assess the information provided to them, making inquiries of management or external advisers as are reasonably necessary; and

(e) exercise 'special vigilance' with 'scrupulous concern' to ensure the necessary corporate approvals are obtained.[4]

(f) ensure the minutes clearly record the disclosed interest, steps taken to manage the conflict, the basis for any decision permitting or restricting participation, any legal advice obtained, the quorum position, and any requirement for escalation or shareholder approval.

Legal advice must be obtained for any uncertainty in the process.

Review of registers

2.10 Directors will be required to routinely review and confirm that their relevant details maintained in the register are factual, complete and up to date. Ad hoc review by directors will be required following any material regulatory change, governance incident or board requested review.

Additional protocols for board decisions

2.11 To assist the Company Secretary in this role and to better assist the Company to deal with any potential related party transactions, the Board will consider:

- a structured process for Board review of matters for which a related party has a vested interest; and
- as part of all management recommendations and positions put to the Board, requiring management to include an explicit set of arguments as to why these are in the interests of all shareholders.

[4] See ASIC RG 76 at 76.57-76.58.

Appendix

Directors and duties – overview

In-line with the Board Charter, Trading Policy and Disclosure Policy directors must at all times act in accordance with legal and statutory requirements, and discharge all their duties as directors. In doing so directors must, among other things:

- discharge their duties in good faith and in the best interests of the Company and for a proper purpose;
- act with care and diligence, demonstrate commercial reasonableness in their decision making and act with the level of skill and care expected of a director of a major company, including applying an independent and enquiring mind to their responsibilities;
- avoid conflicts of interest except in those circumstances permitted by the *Corporations Act 2001* (Cth) ("***Corporations Act***");
- not make improper use of information gained through their position as a director;
- not take improper advantage of their position as a director;
- notify other directors of a material personal interest when a conflict arises;
- make reasonable enquiries if relying on information or advice provided by others;
- undertake any necessary inquiries in respect of delegates;
- give the Company or ASX Limited all the information required by the *Corporations Act*; and
- not permit the Company to engage in insolvent trading.

In addition, a director of the Company must not disclose any confidential information it receives from the Company to anyone (whether a competitor of the Company or not).