



# MEMO

To: Board of Directors  
From: Company Secretary  
Subject: **RELATED PARTY CONTRACTS & BENEFITS**

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My understanding of the Corporations Act (as a practicing Company Secretary) is that, generally speaking:

## **Related Party Interest**

### i) for all companies

- Sec.191(1) requires a director to disclose<sup>1</sup> a “material personal interest”<sup>2</sup> (that he personally, or indirectly through a related party<sup>3</sup>, might have, and whether or not he might gain from the transaction) in a matter that relates to the affairs of the company – and the nature and extent of that interest – which must be recorded in the board minutes – before a contract or other transaction (in which he has that interest) is discussed/voted on/entered into; and

### ii) for public companies

- Under Sec.195(1) that director cannot stay in the board meeting whilst the matter is being discussed, nor vote on the matter, unless – under Sec.195(2) – the remaining (disinterested) directors resolve to agree
- However, if there are insufficient disinterested directors to form a quorum (which under our Constitution is 2) then no Sec.195(2) vote can be taken
- Therefore, for the matter to be decided on the directors must call a shareholders meeting – Sec.195(4).

Note: my understanding is that it is generally agreed that if a director appoints an alternate director, and if that alternate is present at the meeting and the appointing director is absent, then provided he has no interest or conflict himself in the matter then he can vote on it. Importantly, the alternate is not bound to follow any instructions of the appointing director and in fact must exercise his own mind and judgment about the matters being considered and act in the best interests of the company.



## Related Party Benefit

For public companies if, regardless of whether or not a director may have a material personal interest, a matter or transaction is one where a director, or any related party of his, will receive a financial benefit, then Sec.208 requires the company – or entity controlled by that public company – to obtain shareholder approval before giving the financial benefit to that director or related party.

Sec.210 – 216 contain exemptions, in particular Sec.210 provides for where any benefit would be reasonable in the circumstances if the public company and the related party were dealing at arm's length and/or on commercial terms.

Otherwise a general meeting must be called, at which the related party (or associate) cannot vote – Sec.224. Meeting documents must include an explanatory memorandum giving full particulars of the transaction, the nature of the benefit (which may require an independent experts report to quantify), and other relevant information, and must be lodged with ASIC 14 days before despatch to shareholders, to allow them time to comment if they wish.

## Summary

- A. With 3 ABC directors on the XYZ board, all of whom are also indirect shareholders in XYZ, in my opinion they may all have a 'material personal interest' in any transaction between ABC and XYZ and therefore there is only 1 remaining disinterested ABC director who on his own is not a quorum – so virtually **any transaction with XYZ may require ABC shareholders' approval**.
- B. Regardless of above, if any ABC director was to be receiving a benefit from any transaction with XYZ then that matter would also require ABC shareholders' approval (although maybe all such transactions fit under the Sec.210 exemption – being on 'arm's length'/commercial terms).

## Footnotes

<sup>1</sup> With some exceptions – set out in Sec.191(2) – including where the interest:

- arises because the director is a shareholder, and is common with other shareholders
- [in most cases] relates to director's remuneration
- is because the director has guaranteed the company's loans or other obligations
- arises because the director is also a director of a parent, subsidiary or related body corporate

<sup>2</sup> The interest must be a "*material personal interest*". This term is not defined in the Act but there have been many cases which have largely determined its scope; these include the degree of [potential] advantage to the director personally, either direct or indirect, and is not limited to any financial or pecuniary gain.



<sup>3</sup> A *related party* is defined (see Sec.228) as including:

- director of the company and any controlling entity
- spouses
- parents and children (of both directors and/or spouses)
- an entity controlled by any of the above
- any other entity acting in concert with a related party.

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**DISCLAIMER**

*The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.*