



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 76

Related party transactions

Chapter 3 — Internal administration (Part 3.2)

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From 5 July 2007, this document may be referred to as Regulatory Guide 76 (RG 76) or Policy Statement 76 (PS 76). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 76.1) or their policy statement number (e.g. PS 76.1).

Headnotes

Directors' voting; directors' meetings; quorum requirements; relief from s232A(1) and (4); s232B of the Corporations Law; shortening period for ASIC comments on lodged documents (s243U(3)); ASIC comments on documents (s243W); allowing related party or its associate to vote on a resolution at shareholders' meeting (s243ZF(4)).

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Purpose and interpretation

RG 76.1 This guide outlines the principles ASIC uses when considering applications for relief from s232A(1) and 232A(4) of the Corporations Law (Law).

RG 76.2 It also sets out the circumstances in which ASIC will exercise its powers under s243U(3), s243W and s243ZF(4) of Pt 3.2A of the Law.

RG 76.3 In this guide a reference to a *company* is to a public company. A reference to a *director* is to a director of a public company. A reference to a *meeting* is to a meeting of the board or of directors. The definition of public company is expanded for the purposes of s232A and Pt 3.2A.

The Law

Section 232A

RG 76.4 If a director has a material personal interest in a matter being considered at a meeting, he or she must not:

- (a) vote on the matter; or
- (b) be present while the Board is considering the matter (s232A(1)).

RG 76.5 In ASIC's view, the requirement that an interested director not vote or be present in s232A(1) applies to all meetings of the board however held.

RG 76.6 ASIC proposes to apply s232A(1) on the basis that "meeting" includes any procedure by which the board or the directors resolve any matter. For example, ASIC considers that the prohibition on voting extends to resolutions of a board made without a meeting (that is, circular or circulating resolutions). Attributing a narrow meaning to "meeting" would allow directors with material personal interests to do what the section is designed to prevent them from doing — vote — and would deny the section its intended operation.

RG 76.7 The subsection also applies to meetings of directors other than board meetings, such as audit committee (or other committee) meetings.

Exception

RG 76.8 The prohibition in s232A(1) does not apply where the board has passed a resolution:

- (a) specifying the director, interest and matter; and
- (b) stating that the directors voting for the resolution are satisfied that the interest should not disqualify the interested director from considering or voting on the matter (s232A(3)).

RG 76.9 Subsection 232A(1) has the effect that no interested director may be present or vote on such a resolution.

Quorum of directors

RG 76.10 A quorum will not be present for the purpose of a particular matter unless two ~~disinterested~~ directors *who are entitled to vote* are present (s232A(4)).

[*Historical note:* RG 76.10 amended 23/1/1995 by deleting the word “disinterested” in the phrase “two disinterested directors” and inserting the phrase “who are entitled to vote” after the word “directors”.]

RG 76.11 The restrictions in s232A are in addition to any restriction on directors voting contained in a company’s articles of association (s232A(8)). For example, the articles may provide that a quorum of a meeting of directors must include at least one director who is not and never has been an executive director. This is a further restriction with which the directors must comply.

~~RG 76.11A — The restrictions in s232A are also in addition to the restrictions contained in the Australian Stock Exchange (ASX) Listing Rules (in particular Rule 3L(6)).~~

[*Historical note:* RG 76.11A inserted 23/1/1995. The paragraph was subsequently deleted on 3/3/1997.]

RG 76.12 It is therefore possible that a meeting will lack a quorum for the purposes of s232A(4) because of the combined effect of a director having a material personal interest under s232A(1), ~~and~~ a restriction in the company’s articles ~~and ASX Listing Rule 3L(6)~~.

[*Historical note:* RG 76.12 amended 23/1/1995 by deleting the word “and” before “a restriction” and inserting “and ASX Listing Rule 3L(6)” at the end of the sentence. Further amended 3/3/1997 by deleting the words “and ASX Listing Rule 3L(6)” at the end of the sentence.]

RG 76.13 When determining whether there is a quorum of two ~~disinterested~~ directors *who are entitled to vote*, the following should not be counted:

- (a) a director ineligible to vote under the articles; and
- (b) a director who has a material personal interest and so is ineligible to vote under s232A(1) . ~~;~~~~and~~
- ~~(c) a director ineligible to vote under ASX Listing Rule 3L(6).~~

[*Historical note:* RG 76.13 amended 23/1/1995 by deleting the word “disinterested” in the phrase “two disinterested directors” and adding the word “who are entitled to vote” after the word “directors” in the same sentence. Subpara (b) was amended by deleting “; and” and a new subpara (c) was inserted. This read: “(c) a director ineligible to vote under ASX Listing Rule 3L(6).” Further amended 3/3/1997 by deleting para (c) and replacing the “; and” at the end of para (b) with the full stop.]

General meeting of the company

RG 76.14 If there is no quorum, a general meeting of the company “may deal” with the matter (s232A(5) and 232A(6)). Neither the voting prohibitions in s232A(1) nor the quorum requirement of s232A(4) apply to a proposal by a director that the board call a general meeting of the company to consider a matter with which the board cannot deal because of the quorum requirement. An interested director may put and vote on such a proposal.

Material personal interest

RG 76.15 “Material personal interest” is not defined in the Law. However, the prohibition on attending and voting does not apply if the only interest that the director has:

- (a) is as a member of the company; and
- (b) is in common with the other members of the company (s232A(2)).

RG 76.16 This exception is probably only available where the interest is in common with all members of the company. This may be important where, for example, there are classes of shares with different rights and the issue in question will affect those classes differently.

RG 76.17 Subsection 231(3) provides that a director does not have a material personal interest in a contract merely because:

- (a) where the contract relates to a loan to the company — the director has guaranteed repayment; or

- (b) where the contract is made with, for the benefit of, or on behalf of a related body corporate — the director is also a director of that related body corporate.

RG 76.18 To be caught by the prohibition, an interest must be both personal and material. To be personal an interest need not be pecuniary. However, it will not be personal if it affects the director as a member of a group or class, such as, ordinary customers of a bank or shop on generally available terms.

RG 76.19 At common law, a person in a fiduciary position, such as a director of a company, has a duty not to profit from a position of trust or place himself or herself in a position where duty and interest might conflict. The vast range of types of transactions to which the rule might apply means it is not possible to define “interests”. However, the conflict rule must be applied realistically to a state of affairs which discloses a real conflict of duty and interest and not some theoretical conflict. In other words, an interest will not be material if it is remote or contingent.

In connection with the above para, see generally: *The Queen v District Council of Victor Harbour; Ex parte Costain Australia Ltd* [1983] 34 SASR 188; Gibbs J in *Re Hewson; Ex parte Sydney Stock Exchange* (1967) 10 FLR 479; *Bray v Ford* [1896] AC 44; *Phipps v Boardman* [1967] 2 AC 46 per Upjohn LJ; *NZ Netherlands Society v Kuys* [1973] 1 WLR 1126; *Boulting v ACTAT* [1963] 2 QB 606 at 638 per Upjohn LJ; and PD Finn, *Fiduciary Obligations*, Chapter 21.

RG 76.20 Applying this principle, an interest is unlikely to be material for the purposes of s232A if the conflict is theoretical. On the other hand, s232A does not expressly identify conflict of interest as the basis of materiality or when an interest is personal. Therefore, a court may find that the prohibition will apply even if the interests of the company and the director coincide.

RG 76.21 Ultimately, whether a director has a material personal interest will depend on the particular circumstances. If in doubt, directors should seek specific legal advice.

Other obligations

RG 76.22 Section 232A does not negate the operation of the Law and Accounting Standards on general disclosure by directors to a company and the general duties of a director under the common law and s232.

Section 232B

RG 76.23 ASIC has a discretion under s232B(1) to declare that s232A(1) and 232A(4) do not apply to meetings of the board or of directors, but only if satisfied:

- (a) that the matter in question cannot be dealt with at those meetings because the quorum of two ~~disinterested~~ directors *who are entitled to vote* required by s232A(4) cannot be obtained (s232B(1)(a)); and
- (b) that it is urgent or there is some other compelling reason requiring that the matter be dealt with at those meetings and not by a general meeting of the company, even though directors have a material personal interest in the matter (s232B(1)(b)).

[*Historical note:* RG 76.23(a) amended 23/1/1995 by deleting the word “disinterested” in the phrase “two disinterested directors” and adding the words “who are entitled to vote” after the word “directors” in the same sentence.]

ASIC must be satisfied that both conditions are met.

RG 76.24 ASIC considers that it has power under s232B to grant relief from the prohibition on voting in s232A(1) or the quorum requirement in s232A(4) or both. ASIC may make a declaration subject to conditions (s232B(2)).

RG 76.25 Relief under s232B is not an assurance by ASIC that an interested director voting at a meeting has not otherwise breached his or her common law or statutory duties to the company. Also, relief from s232A does not exempt the *director or the* company from:

- (a) restrictions on voting or quorum requirements in a company’s memorandum or articles of association; or
- (b) the ~~Australian Stock Exchange (ASX) Listing Rules. (in particular, Rule 3L(6)).~~

[*Historical note:* RG 76.25 amended 23/1/1995 by adding the words “director or the” between the words “does not exempt the” and “company from”. Subpara (b) was also amended. It formerly read: “the Australian Stock Exchange (ASX) Listing Rules, (in particular, Rule 3L(6)).”]

Contents of applications and relief

First condition — No quorum (s232B(1)(a))

RG 76.26 Applications for relief under s232B must satisfy ASIC that the quorum requirement of s232A(4) prevents a matter being dealt

with at meetings. Since this will involve considering the earlier subsections, an application for a declaration under s232B must set out:

- (a) details of the material personal interest of the director ~~or~~ *and* each *other* director and confirm that each interest is not as an ordinary member of the company in common with *the* other members, that is, to which s232A(2) applies;
- (b) the reasons why the quorum requirement of s232A(4) cannot be met, which may include the operations of the company's articles and the requirements of the ASX Listing Rules.

ASIC will not reject an application as unnecessary if there is a commercially significant risk of a contravention of the Law.

[Historical note: RG 76.26 amended 23/1/1995. In subpara (a) the phrase "the director or each director" was replaced with the phrase "the director and each other director", and the word "the" was added before "other members" later in the sentence. RG 76.26 was further amended by adding, after para (b), the sentence: "The ASC will not reject an application as unnecessary if there is a commercially significant risk of a contravention of the Law."]

Second condition — Urgent or compelling reasons (s232B(1)(b))

RG 76.27 ASIC must be satisfied that a meeting of the company is clearly inappropriate. Paragraph 232B(1)(b) gives one general example of inappropriateness because the matter is urgent. In the context of the paragraph, "urgent" can be taken to mean that a decision needs to be made (and action taken) before a general meeting can be held or a quorum of ~~disinterested~~ directors *who are eligible to vote*, is available. If urgency is the reason for seeking relief, an applicant must demonstrate that this is the case.

[Historical note: RG 76.27 amended 23/1/1995 by deleting the word "disinterested" in the phrase "quorum of disinterested directors" and adding the words "who are eligible to vote" after the same phrase.]

RG 76.28 The paragraph allows that there may be other compelling reasons for concluding that a general meeting is inappropriate. If urgency is not the principal reason, the application must identify the reasons for relief and demonstrate why they are compelling.

RG 76.29 ASIC will not prescribe other reasons which might be sufficiently compelling. This is partly because the paragraph requires ASIC to consider the reason in the context of the material personal interests in question. Depending on the circumstances, reasons may include:

- (a) the company has given approval in general meeting to the basic principles or parameters of a transaction and left actual implementation to the directors;
- (b) the matter will ultimately be put to a general meeting of the company for approval (or forms part of or relates to a larger matter which will be put to a general meeting);
- (c) there is a need or obligation to maintain confidentiality; and
- (d) possessing the material personal interest is a prerequisite to appointment as a director either under the company's constitution or as a practical matter.

RG 76.30 Depending on the nature of the material personal interests in question, the high cost of calling a general meeting may be a compelling reason. ASIC will compare the cost of holding a general meeting with the amount at stake in which the director has a material personal interest. The amount at stake will be discounted where appropriate by factors such as the marginal materiality of the director's interests.

[*Historical note:* RG 76.30 amended 23/1/1995 by adding the last two sentences to the end of the paragraph.]

RG 76.31 It is implicit in s232B(1)(b) that whether it is inappropriate to call a general meeting must be judged according to the best interests of the company and its members as a whole.

RG 76.32 Applications for relief should include an assessment of the benefit to the company if relief is given and/or the disadvantage to the company if it is not.

Examples when relief is likely

RG 76.33 Some companies' articles of association provide for the shareholders to approve a total amount for directors' remuneration. If shareholders *have* approved an amount which cannot be altered without their consent, directors should be able to decide how that aggregate amount will be divided between them. They should not need to refer that decision to shareholders, even though each director may have a "material personal interest" in the matter.

RG 76.34 A similar situation arises when shareholders have set a maximum total directors' remuneration and left the directors to decide whether they will allocate that amount or a lesser amount between them.

RG 76.35 Another example when relief is likely is where directors propose to enter into a contract which is subject to shareholder approval,

provided that, if shareholders do not approve the contract the company will have no liability and will not forfeit any deposit.

[*Historical note:* RG 76.35 amended 23/1/1995. The paragraph formerly read: “Another example when relief is likely is where directors propose to enter into a contract which is subject to shareholder approval”.]

RG 76.35A In granting relief ASIC will consider the effect of such relief on the interests of shareholders, other investors and creditors.

[*Historical note:* RG 76.35A inserted 23/1/1995.]

Pro Forma for relief

RG 76.36 Pro Forma 90 [PF 90] sets out the form of relief ASIC will grant under s232B(1).

Financial benefits to related parties

Section 243A

RG 76.37 According to s243A, the object of Pt 3.2A of the Law is:

“to protect:

- (a) a public company’s resources (in particular, those available to pay the company’s creditors); and
- (b) the interests of its members as members,

by requiring that, in general, financial benefits to related parties that could diminish or endanger those resources, or that could adversely affect those interests, be disclosed, and approved by a general meeting, before they are given.”

RG 76.38 Section 243H of the Law contains two prohibitions:

- (a) a public company must not give a financial benefit to a related party; and
- (b) a child entity of a public company must not give a financial benefit to a related party of the public company.

RG 76.39 Exceptions to these prohibitions are outlined in Div 4 of Pt 3.2A of the Law.

RG 76.40 If giving the financial benefit to the related party does not come within any of the exceptions in Div 4, shareholder approval must be obtained by using the procedure set out in Div 5.

When ASIC will grant relief

Shortening period for document lodgment (s243U(3))

RG 76.41 At least 14 days before the company sends a notice convening a shareholders' meeting, it must lodge copies of documents to be given to shareholders with ASIC. These documents include the proposed notice, resolution, explanatory statement and any other documents to be put to the meeting which could reasonably be expected to be material to the shareholder in deciding how to vote (see s243U and 243V).

RG 76.42 The 14-day period in which ASIC may review and comment on the documents, may be shortened with ASIC approval (s243U(3)). Where ASIC has reviewed the documents within 14 days it will notify the applicant and grant approval for a shorter period. Applicants requesting short approval must provide reasons why the application should be dealt with in less than 14 days.

[*Historical note:* RG 76.42 amended 23/1/1995 by adding the last sentence to the end of the paragraph.]

ASIC comments on lodged documents (s243W)

RG 76.43 ASIC may make comments on the lodged documents, other than whether the proposed resolution is in the company's best interests (s243W(1)).

RG 76.44 ASIC will usually comment if, in its view, the documents do *not* comply with the requirements of s243U and 243V (for example, there is no explanatory statement or it does not include the information set out in s243V(1)(a) to 243V(1)(e)).

RG 76.45 In determining whether to make further comments on the documents, ASIC will consider case law and general principles governing notices of meetings. In particular, it will consider whether the documents fully disclose material facts and whether they are clear and unambiguous.

Fully disclose material facts

RG 76.46 ASIC will consider whether:

- (a) the documents fully inform the shareholder about the matter upon which he or she will have to vote, and in particular whether they

sufficiently explain the practical consequences of accepting the proposed resolution; or

- (b) the documents omit a material matter.

Clear and unambiguous

RG 76.47 ASIC will consider:

- (a) whether the information is presented in a manner that is not misleading;
- (b) whether the documents are clear, unambiguous and not confusing; and
- (c) the effect the information will have on the shareholder as an ordinary person in commerce or as an ordinary investor.

(For case law on this area, see generally: *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (1988) 14 ACLR 375; *Re Rossfield Group Operations Pty Ltd* (1981) 5 ACLR 237.)

RG 76.47A The notice and accompanying documents may vary from those lodged with ASIC in ways which are not material (s243X) but the resolution must be the same as that lodged with ASIC (s243ZA).

[Historical note: RG 76.47A inserted 23/1/1995.]

Allowing related parties and their associates to vote (s243ZF(4))

RG 76.48 Subsection 243ZF(1) provides that a related party of a public company or an associate of a related party, may not vote on a proposed resolution to approve a financial benefit to the related party except where:

- (a) the vote is cast as a directed proxy for a non-related party or associate (s243ZF(2)); or
- (b) ASIC has declared that s243ZF(1) does not apply (s243ZF(4)).

RG 76.49 ASIC may only make such a declaration if satisfied that it will not cause unfair prejudice to the interests of any member of the company.

RG 76.50 It is unlikely that ASIC will often make such a declaration. However, since the definition of related party in the Law is so broad, a declaration may be made, for example, if the applicant could show:

- (a) that the association between the parties was strictly technical; and
- (b) no real conflict of interest exists (for example, an associate has no interest in the outcome of the transaction, or the interests of the related party are the same as that of the company or where all the parties are related parties).

[*Historical note:* RG 76.50(b) amended 23/1/1995 by inserting the words “or where all the parties are related parties” at the end of the sentence.]

RG 76.50A In granting such relief the ASIC will consider the affect of such relief on the interests of shareholders, other investors and creditors.

[*Historical note:* RG 76.50A inserted 23/1/1995]

Pro forma for relief

RG 76.50B Pro Forma 113 [PF 113] sets out the form of relief ASIC will grant under s243ZF(4).

[*Historical note:* The heading “Pro forma for relief” and RG 76.50B inserted 23/1/1995.]

Corporate trustees of superannuation fund

[*Historical note:* Heading amended 23/1/1995. It formerly read “Corporate trustees of superannuation funds review”.]

[*Historical note:* RG 76.51 deleted 23/1/1995. The paragraph formerly read: “RG 76.51 The ASC has received very few applications for relief under any of the above provisions. The ASC proposes to review this Policy Statement after June 1994 in the light of experience.”]

RG 76.52 Section 232A may apply to directors of a public company acting as trustee of a superannuation fund (although in practice ASIC has received very few applications for relief). Where this is the case, ASIC will grant relief in the following circumstances:

- (a) where the company acts solely as trustee of the superannuation fund;
- (b) the matter is one in which a director has a material personal interest; and
- (c) the director has that interest:
 - (i) as a beneficiary of the fund; and
 - (ii) in common with other members of the fund.

[Historical note: RG 76.52 replaced 23/1/1995. The paragraph formerly read: “Submissions to the Senate Select Committee on Superannuation have argued that s232A is not appropriate for directors of a public company where the sole function of the company is to act as trustee of a superannuation fund. However, it is arguable that directors who are members of the superannuation fund do not have a material personal interest and therefore s232A does not apply. Also, it is unclear at this stage, whether or not a significant number of public companies will be established to act as trustees of superannuation funds. If there are, then s232A may need to be amended so that it does not apply to directors of such companies. This is a matter for law reform. The ASC will consult with the Insurance and Superannuation Commission, the Attorney-General’s Department and others on this issue.”]

Applications

RG 76.53 Applicants under this guide should mark the section under which relief is sought at the top of each page of the application. This will help applications to be processed quickly.

RG 76.54 Applications may be lodged at any ASIC Regional Office with the relevant fee (see [DIR 215]). Applications which do not sufficiently address all factors in support of the granting of relief cannot be considered until all relevant information is provided. In the case of an application for relief under s232B, applicants should address the issues identified in RG 76.26, either RG 76.27(urgency) or RG 76.28 (otherwise compelling) and RG 76.28.

RG 76.55 Applicants should be aware of the offences under s1308 (false or misleading statements).

Publication of instruments

[Historical note: Heading inserted 23/1/1995.]

RG 76.56 There is no provision requiring instruments under s232B or 243ZF to be gazetted. However, ASIC must (unless it is not warranted) notify persons who are affected by any of its decisions that the decision has been made and that they have the right to have it reviewed (s1317D). The persons potentially affected by relief under s232B and 243ZF are shareholders, other investors and creditors in the relevant company.

[Historical note: RG 76.56 inserted 31/1/1994. Amended 23/1/1995 by deleting the words “(as is reasonable under the circumstances)”, after the phrase “(unless it is not warranted)” and the penultimate sentence which read: “(s27A of the Administration Appeals Tribunal Act, as modified by regulation 5C under that Act)”. The word “and” was also removed from the last sentence in the phrase “shareholders, and other investors”.]

RG 76.57 ASIC will generally publish either a copy or a notice of each instrument made under s232B and 243ZF in the ASIC Digest. However, it will not publish the instrument or notice if the application relates to confidential matters and it is impossible to publish it without defeating the purpose of the relief. (This is consistent with ASIC's practice on s1317D, previously s27A AAT Act as modified by reg 5C.) Applicants which would be prejudiced by publication should specify in their application how they would be affected.

[*Historical note:* RG 76.57 inserted 31/1/1994. Amended 23/1/1995 by deleting "s27A" in the phrase "the ASC's practice on s27A s1317D".]