



**Australian Government**

**Office of the Registrar of Indigenous Corporations**



## **POLICY STATEMENT 09**

# Member approval for related party benefits

<b>Policy</b>	PS-09: Member approval for related party benefits
<b>Relevant legislative provisions</b>	CATSI Act Part 6-6
<b>Last updated</b>	4 February 2013
<b>Other relevant policies</b>	

## **PS-09: Member approval for related party benefits**

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## **PS-09: Member approval for related party benefits**

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### **1 Purpose**

- 1.1 Under Part 6-6 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) a corporation must obtain member approval to give a financial benefit to a related party of the corporation, unless giving the benefit falls within certain specific exceptions—section 284-1.
- 1.2 In this policy statement, the Registrar provides guidance on when:
- the exceptions to the related party benefit provisions may apply (Division 287)
  - the Registrar may exercise his or her power to shorten the period between lodging documents and giving notice of the relevant meeting (section 290-5)
  - the Registrar may comment on the documents lodged including the proposed resolution to allow payment of a related party benefit (section 290-15)
  - the Registrar may allow a related party or an associate of a related party to vote on the proposed resolution (section 290-35).
- 1.3 References to sections in this policy statement are references to sections of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) unless otherwise specified. References to corporations in this policy statement are references to Aboriginal and Torres Strait Islander corporations unless otherwise specified. In addition, references in this policy statement to the Registrar are also references to a delegate who is lawfully exercising the powers of the Registrar.

### **2 Related party benefits**

- 2.1 A corporation must obtain the approval of the corporation's members to give a financial benefit to a related party of the corporation, unless giving the benefit falls within certain exceptions set out in section 284-1. In obtaining member approval for the payment of a related party benefit, a corporation must follow the procedure set out in Division 290.
- 2.2 The related party benefit provisions are based on similar provisions in the *Corporations Act 2001*. They are designed to protect members' interests and to ensure a corporation's directors act in a transparent and accountable manner.
- 2.3 The Revised Explanatory Memorandum to the Corporations (Aboriginal and Torres Strait Islander) Bill (the CATSI Bill) provides guidance on the related party provisions (at paragraph 5.342):
- Proposed section 284-1 is based on the member approval requirement for related party benefits in section 208 of the Corporations Act. Section 208 of the Corporations Act applies to public companies. This standard is appropriate for

CATSI corporations to soundly protect the interests of members and recognises the large degree of public and essential services that are funded via CATSI corporations.

- 2.4 In applying Part 6-6, the Registrar may be guided by case law on the meaning of the related party provisions in the *Corporations Act 2001*. The Registrar's approach to these provisions may also take into account the diversity and special circumstances of corporations and the need to preserve members' rights and foster good corporate governance.

### **3 Who is a related party?**

- 3.1 A related party is defined as (section 293-1):
- an entity that controls a corporation
  - directors of the corporation
  - directors of any entity that controls the corporation
  - if the corporation is controlled by an entity that is not a body corporate—each of the persons making up the controlling entity
  - spouses of the persons referred to above
  - parents and children of those people referred to above
  - any entity which is controlled by a related party (unless the entity in question is also controlled by the corporation).
- 3.2 In addition an entity is a related party of a corporation if the entity:
- was a related party of the corporation at any time within the previous six months—section 293-1(5)
  - believes or has reasonable grounds to believe that it is likely to become a related party of the corporation—section 293-1(6) or
  - acts in concert with a related party of the corporation on the understanding that the related party will receive a financial benefit if the corporation gives the entity a financial benefit—section 293-1(7).
- 3.3 An entity for the purposes of Part 6-6 is defined in the CATSI Act as any of the following (section 700-1):
- a body corporate
  - a partnership
  - an unincorporated body
  - an individual
  - for a trust that has only one trustee—the trustee
  - for a trust that has more than one trustee—the trustees together.

### **4 Related parties and financial benefits**

- 4.1 It is not possible to list all benefits that would be considered related party financial benefits under the CATSI Act.

4.2 Examples of related party financial benefits are provided in section 293-5(3). These are:

- giving or providing finance or property to a related party
- buying an asset from or selling an asset to a related party
- leasing an asset from or to a related party
- supplying services to or receiving services from a related party
- issuing securities or granting an option to a related party
- taking up or releasing an obligation of the related party.

4.3 A related party benefit also includes [section 293-5(2)]:

- giving a financial benefit indirectly—for example, through one or more interposed entities
- giving a financial benefit by making an informal agreement, oral agreement or an agreement that has no binding force
- giving a financial benefit that does not involve paying money—for example, by conferring a financial advantage.

## **5 Registrar’s policy—giving advice on related party financial benefits**

5.1 The Registrar may provide the following assistance to corporations in relation to the related party provisions:

- general information on the types of benefits that ordinarily require member approval (consider the examples of ‘giving a financial benefit’ set out in section 293-5)
- information on the process to be followed in obtaining member approval for a related party benefit.

## **6 Procedure to obtain member approval**

6.1 Member approval for a related party benefit is given by passing a resolution at a general meeting of the corporation in the way set out in Division 290—section 284-1(a).

6.2 Strict procedures must be followed by the corporation in order for a resolution to be validly passed.

6.3 The corporation must lodge certain documents (refer to heading ‘Material to be lodged with the Registrar’ in this policy statement) at least 14 days before the notice convening the relevant meeting is given to members. Failure to lodge these documents is an offence under the CATSI Act.

6.4 The Registrar may give written comments on the documents to the corporation—section 290-15. If the Registrar gives comments, the corporation must give a copy of these comments to each member of the corporation—section 290-20.

- 6.5 The documents given to members must be the same in all material respects as the documents lodged with the Registrar—sections 290-20 and 290-25. Failure to comply with this requirement is an offence under the CATSI Act. Changes in style or format or additional explanation in the documents provided to members will not ordinarily change the content of these documents. However, the proposed resolution provided to members must be the same as that lodged with the Registrar.
- 6.6 Related parties and their associates (see Division 686 for the meaning of associate), who are to receive a benefit if the resolution is passed are generally not to vote on the proposed resolution—section 290-35.

## **7 Exceptions**

- 7.1 A number of limited exceptions may apply to section 284-1. These are set out in Division 287.
- 7.2 Member approval for a financial benefit will not be required where:
- the benefit is remuneration to a related party as an employee, director or officer of the corporation (or entity) and the remuneration is reasonable in the circumstances  
Note: remuneration includes for an officer (or their dependants), a superannuation contribution; and for an employee or officer, a severance payment.
  - the benefit is payment of expenses incurred or to be incurred, or reimbursement for expenses incurred by a related party in performing duties as an officer or employee of the corporation (or entity) and the benefit is reasonable in the circumstances
  - the benefit is given by a body corporate to a closely-held subsidiary of the body or by a closely-held subsidiary of a body corporate to the body or an entity it controls
  - the benefit is given to the related party in their capacity as a member of the corporation and the giving of this benefit does not discriminate unfairly against any other member of the corporation
  - the benefit is given to the related party to comply with native title legislation
  - the benefit is to be given under an order of a court—section 287-15.

## **8 Registrar's policy—Corporations Act 2001 exceptions**

- 8.1 The exceptions in Division 287 are modelled on similar provisions in the *Corporations Act 2001*. If the Registrar is required to interpret or apply these exceptions he or she will ordinarily consider his or her approach in accordance with case law and by taking into account the diversity and special circumstances of corporations.

- 8.2 However, there are several exceptions which are available under the *Corporations Act 2001* which have not been included in the CATSI Act. These exceptions have been deliberately excluded from the CATSI regime in order to provide increased protection to members of corporations.
- 8.3 The provisions from the *Corporations Act 2001* which are not in the CATSI Act are:
- section 210—which allows for the giving of benefits on ‘arm’s length terms’ (this is a transaction between two related parties that is conducted as if they were unrelated)
  - section 212—which provides an exception for payments which are for indemnities, insurance or legal costs
  - section 213—which provides an exception for payments under \$2000 to directors or their spouses.
- 8.4 According to the Revised Explanatory Memorandum to the CATSI Bill (at paragraph 5.345):
- Not replicating these provisions is important for the sound protection of members and will act as a strong deterrent to nepotistic behaviour.

## **9 Registrar’s policy—remuneration for employees and officers**

- 9.1 The Registrar may be asked by a corporation for assistance as to whether remuneration for an employee or other officer under section 287-1 is a related party benefit and is reasonable in the circumstances.
- 9.2 In providing information to the corporation on this matter, the Registrar may have regard to the circumstances of the related party, including [section 287-1(1)(b)(ii) and (2)(b)(ii)]:
- the responsibilities involved in the office or employment
  - the officer’s or employee’s experience and performance record
  - the officer’s or employee’s length of service.
- 9.3 In addition to these statutory criteria, the Registrar may also have regard to whether the payment:
- is acceptable according to commercial or industry standards
  - is nepotistic (for example, where the remuneration has been paid to an employee who is also a relative of a director or other office holder of the corporation) or
  - unfairly discriminates against any other member of the corporation.

## **10 Material to be lodged with the Registrar**

- 10.1 At least 14 days before the notice convening a general meeting to obtain member approval for a related party benefit is given, the corporation must lodge with the Registrar a proposed notice of meeting with the text of the proposed resolution, a proposed explanatory statement and any other document that is proposed to accompany the notice or to be given to members before the meeting and relates to the proposed resolution—section 290-5.
- 10.2 A proposed explanatory statement lodged under section 290-5 must be in writing and must contain the following information (section 290-10):
- the related parties who will receive the financial benefits
  - the nature of the financial benefits
  - if any recommendation is to be made to members by a director or directors of the corporation on the proposed resolution, the reasons for the recommendation
  - if a director of the corporation does not make such a recommendation, the reasons why the director has not made the recommendation
  - if a director was not available to consider the proposed resolution, the reasons why the director was not available
  - whether a director has an interest in the outcome of the proposed resolution and what this interest is
  - all other information (that is known to the corporation or any of its directors) that is reasonably required by members in order for them to decide if it is in the corporation's interests to pass the proposed resolution.
- 10.3 An example of the kind of information referred to as 'all other information' is information about what, from an economic and commercial point of view, are the true potential costs and detriments of, or resulting from, giving financial benefits as permitted by the proposed resolution including:
- opportunity costs (what else the money or financial benefit could have been spent on or used for)
  - taxation consequences
  - benefits forgone by whoever would give the benefit.

## **11 Notice for general—shortening the statutory period**

- 11.1 Under section 290-5 the corporation must lodge the notice and accompanying documents at least 14 days before the notice convening the relevant meeting is given. However, under section 290-5(3)(a) the Registrar can shorten that period.



11.2 Under section 290-15, the Registrar may comment on the documents provided to him or her under section 290-5 within 14 days after they are lodged. Under section 290-20(1)(d), if the Registrar has given comments, the notice convening the meeting must be accompanied by a copy of those comments.

11.3 The impact of these rules is that if the Registrar approves a shortening of the 14-day period the Registrar will have a similarly shortened period to provide comments. For example, if the Registrar shortens the first time period to seven days then the Registrar will need to provide any comments within those seven days or run the risk that the notice of the relevant meeting will be sent out before the comments are provided.

## **12 Registrar's policy—shortening the statutory period**

12.1 In order for the Registrar to approve a shortened application period, applicants must provide reasons why the application should be dealt with in less than 14 days.

12.2 In shortening the timeframe, the Registrar may take into account the special needs of the corporation, particularly, the geographic isolation of members and whether circumstances necessitate an earlier meeting.

## **13 Proposed resolution for a related party benefit—comments by the Registrar**

13.1 The Revised Explanatory Memorandum to the CATSI Bill provides (at paragraph 5.353):

Proposed section 290-15 enables the Registrar to comment on the material lodged under proposed section 290-5. The Registrar providing comment is entirely discretionary and proposed subsection 290-15(4) makes it clear that any comments provided or not provided do not affect the exercising of any other power by the Registrar.

### **A. Registrar's policy—documents lodged by a corporation in relation to a related party benefit**

13.2 The Registrar may comment on the documents lodged by a corporation under section 290-5 if:

- the documents do not comply with the statutory criteria in Division 290 (for example, the material specified in section 290-5 has not been provided or the explanatory statement does not meet the statutory requirements set out in section 290-10)
- the documents do not fully disclose the material facts of the proposed resolution or
- the documents are unclear or ambiguous.

- 13.3 In making these comments, the Registrar seeks to identify any deficiencies in the documents provided by the corporation and notify members of his or her concerns. However, the Registrar may not comment about whether the proposed resolution is in the corporation's best interests—section 290-15(1).
- 13.4 Not providing a copy of the Registrar's comments on the proposed resolution is an offence with a penalty of up to five penalty units—section 290-20.
- 13.5 Where incomplete or insufficient material has been lodged by a corporation, the Registrar may seek further information from the corporation or its directors. The Registrar may also take into account the difficulties some corporations may face in meeting the procedural requirements of sections 290-5 and 290-10.

## **B. Fully disclose material facts**

- 13.6 In determining whether the documents fully disclose the material facts of the proposed resolution, the Registrar may consider whether the documents:
- fully inform members about the matter upon which they will have to vote
  - fully explain the practical consequences of accepting the proposed resolution
  - omit any matters which the Registrar considers of relevance to the proposed resolution.

## **C. Clear and unambiguous**

- 13.7 In determining whether the documents fully disclose the material facts of the proposed resolution, the Registrar may consider whether the documents:
- are presented in a manner which is misleading to members
  - are clear, unambiguous and not confusing
  - contain sufficient information for members to make an informed decision.
- 13.8 The Registrar may also take into consideration any language or conceptual difficulties that some members of the corporation may experience in understanding the proposed resolution.

## **14 Voting on proposed resolution**

- 14.1 A related party, or an associate of a related party, is not permitted to vote on a proposed resolution to approve a financial benefit to the related party—section 290-35(1).
- 14.2 However, the Registrar may by writing declare—section 290-35(4)—that section 290-35(1):
- does not apply to a specified proposed resolution

- does not prevent the casting of a vote on a specified proposed resolution by a specified entity or on behalf of a specified entity.
- 14.3 The Registrar will only make a declaration under section 290-35(4) if satisfied that such a declaration will not unfairly prejudice the interests of any other member of the corporation.
- 14.4 A declaration may, however, be made by the Registrar under section 290-35(4) if the applicant can show that no real conflict of interest exists, or, where the declaration is in relation to an associate of a related party, the applicant can demonstrate:
- that the association between the parties is strictly technical or
  - no real conflict of interest exists.
- 14.5 For example, a declaration may be made by the Registrar if an applicant can demonstrate that an associate has no interest in the outcome of the transaction, where the interests of the related party are the same as that of the company or where all the parties are related parties.
- 14.6 In order for the Registrar to make a declaration under section 290-35(4), applicants must provide reasons why the Registrar should allow a related party or an associate of a related party to vote on the proposed resolution.

**END OF POLICY STATEMENT**