

Issues to consider when developing a policy on disclosure of and voting on matters involving a director's material personal interests

Board structure

It is considered **good governance** for all entities to have in place a process or policy governing the conduct of directors where there is a realistic possibility that the director may have:

- a material personal interest in a matter that is being considered or will be considered at a meeting of the board or a committee, or
- a conflict or perceived conflict between the duties which he or she may owe to another entity of which he or she is a director or salaried executive and his or her duties as a director of the company in considering a matter that is to be brought before a meeting of the board.

Material personal interest

'Material personal interest' is not defined in the Corporations Act. The materiality of an interest will depend on the circumstances of each case and it will be a matter of judgment for the director, to be determined having regard both to what is material to the company and what is material to the director.

Where a conflict of interest exists, 'material' can be interpreted to mean the matter has 'a capacity to influence the vote of a particular director on the decision to be made'.

The material personal interest need not be the subject of a conflict of interest at the time it is disclosed. Furthermore, the interest need not necessarily be of a financial or pecuniary nature.

Directors' duties

Under ss 182 and 183 of the Corporations Act, directors have a duty not to improperly use their position, or information available to them in their position as a director to gain an advantage for themselves or someone else or to cause detriment to the entity.

The common law imposes fiduciary duties on directors which prevent directors using their position to personal advantage. These fiduciary duties overlap with the statutory duties imposed on directors under the

Corporations Act. The courts have classified these fiduciary duties as the obligation to act bona fide in the best interests of the company; exercise powers for a proper purpose; retain discretion; and avoid conflicts of interest.

A conflict of interest arises where a director has interests that conflict with the interests of the company or where the director has interests that may reasonably be perceived to conflict with the interests of the company.

It is a personal statutory obligation on each director to disclose conflicts of interest. Directors may look to the company secretary for assistance on managing these disclosures.

Disclosure of material personal interests

Directors are required under the Corporations Act, the ASX Listing Rules and, as a general rule, the entity's constitution to make various disclosures about their interests to the board in particular circumstances.

Corporations Act

Sections 191—195 of the Corporations Act deal with conflicts of interest.

Directors (but not other officers) who have a material personal interest in a matter that relates to the affairs of the company must disclose that interest to the other directors (s 191) unless a s 191(2) exception applies.

Upon being appointed as a director, it is good practice for a director to disclose any material personal interests in a 'standing notice'. The entity should set out the guiding principles for the disclosure of those interests.

The standing notice should record details of:

- the nature and extent of the interest
- if applicable, the date upon which the interest arose, and
- how the interest relates, or may relate, to the affairs of the company.

Register of directors' material personal interests

Directors have a legal obligation to give and update notices of their material personal interests. This obligation can be supported by a company secretary filing all standing notices, minuting them and tabling and circulating them as and when appropriate.

It is good practice for a company secretary to maintain a register of material personal interests. The details of the interests recorded in the register may include:

- all other directorships of or executive positions held in listed entities
- directorships or memberships of or executive positions held in entities that may be relevant to the company
- all changes in their shareholding in the company
- all substantial shareholdings in other companies with which this company transacts or in which it owns shares
- other interests that may be relevant, for example, the interests of a director's spouse or other associate.

This register should be updated with subsequent disclosures. If there is a change to such conflict or related-party transactions, then a further oral or written notice should be provided at the board meeting or a written notice submitted to the company secretary who will advise the board of the changes.

A director may instruct the company secretary to withhold board papers from him or her where it relates to a material personal interest.

Directors should be asked to disclose at the commencement of each meeting if they have a conflict of interest in relation to any of the items on the meeting agenda. If they do, the meeting must then determine the extent to which the director may or may not participate in the discussion and vote on that matter. Any declared conflicts of interest and board decisions relating to these must be recorded in the minutes.

There may be additional obligations under the Corporations Act or ASX Listing Rules if the matter is determined to be a related party matter.

ASX Listing Rules

Listed companies should consider any shareholder approval requirements, disclosure requirements or voting restrictions required by the ASX Listing Rules concerning directors having a notifiable interest in a relevant contract with the company or by being a party or otherwise connected to a transaction with the company that is subject to the ASX Listing Rules.

Voting

The policy should include a process for managing conflicts of interest when directors are voting on decisions at board meetings where such conflicts arise.

Unless varied in the constitution, the Corporations Act (s 194) permits directors of proprietary companies who have a material personal interest in a matter and have disclosed the nature and extent of the interest before the transaction is entered into to vote on matters that relate to the interest and retain benefits under the transaction.

Directors of public companies who have a material personal interest in a matter being considered at a directors' meeting:

- must not be present while the matter is being considered at the meeting, and
- must not vote on the matter.

This does not apply to a proprietary company that only has 1 director (s 191 (5)).

However, a director of a public company may be present and vote if the directors who do not have an interest pass a resolution identifying the director with the interest; the nature and extent of the director's interest and its relation to the affairs of the company; and states that the directors without a material personal interest are satisfied that the interest should not disqualify the director with the interest from being present at the meeting or voting on the matter (s 195(2)). This would occur if the directors had formed a view that allowing the director to be present and vote was in the best interests of the company and the interest is not material.

The board may resolve that it is administratively practical to maintain a quorum to avert having to issue a notice of general meeting of members to resolve the matter of business. This approach must not contravene

the law or the constitution of the company and ought to be objectively considered in the circumstances as they exist and as an approach of 'last resort'. As a matter of good governance, the director having declared the conflict or interest ought to abstain from voting on the resolution and serve no purpose other than to maintain a quorum. This must be entirely minuted. Should the board resolve to take this approach for proper purpose, then ss 191(5) and 195(5)(a) excuse a contravention of sections 191 and 195. A court may make a declaration under 1332 (4)(a) that any action taken in contravention of the Act is not invalidated because of any procedural irregularity, unless the court deems the irregularity to have caused substantial injustice. Governance Institute of Australia maintains that this approach is not advocated as a means to subvert legal process or procedural fairness and recommends that prior legal advice be obtained.

Section 195(1AB) notes that voting restrictions do not apply where a disclosure is not required by the director in line with the exemptions provided in s 191(2), for example, matters concerning the director's remuneration. As the company's shareholders are often interested in matters of remuneration, however, it is good practice for a director to speak to the issues concerning remuneration, to recuse themselves from the further discussions of the board, and to let the rest of the committee discuss and resolve, as necessary. The director may also be present and vote if a declaration or order by the Australian Securities and Investments Commission exists under s 195(3) or s 196.

Policy content

A comprehensive policy will:

- set out the purpose of the policy
- set out the scope, that is, who the policy applies to and under what circumstances
- explain the legislative framework behind the need for such a policy
- provide a definition of 'material personal interest', noting that materiality is to be tested by reference to both the company and the director
- set out the guiding principles for the disclosure of material personal interests and any other directors' interests that have the potential to become 'material' or which could become the subject of a conflict of interest
- describe how, when and to whom the disclosure is to be made
- describe s 192 standing notice requirements as set out in the Corporations Act, including the obligation to recirculate standing notices should there be a change of director in order for the notices to remain valid
- set out what the company requires from its directors in relation to standing notices and how the company will deal with them
- describe if the company has a standard agenda item for dealing with the register of directors' interests and receiving any new notices, and noting any conflicts in relation to items on that day's agenda and considering how these will then be handled according to the board policy
- describe the procedures the company follows for handling a conflict of interest
- in relation to the director with the conflict of interest who has been excluded from the meeting, consider whether the director will be kept informed, even if only in general terms
- comment on the role of the company secretary and chairman when preparing agendas to refer to the register of directors' interests to determine if any

directors may be conflicted in relation to business on the upcoming agenda, and what pre-emptive actions the company will take, for example, withholding papers from a director. While directors are entitled to all board papers, a director who has an interest in a matter before the board may instruct the company secretary that they are not to receive papers relating to that matter

- describe the board's dispute-handling procedures, for example, if a director disagrees that they have a conflict and does not want to be excluded from the meeting for that item
- describe what is expected of a director if the conflict is significant
- provide a cross-reference to other related policies, such as the directors' code of conduct and the securities trading policy
- include reference to how regularly the policy will be reviewed.