REGULATORY GUIDE 76

Related party transactions

March 2011

About this guide

This guide sets out our guidance to promote better disclosure and governance for related party transactions. It is designed for public companies, responsible entities of registered managed investment schemes, experts, public company directors and their professional advisers.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This guide was issued in March 2011 and is based on legislation and regulations as at the date of issue. On 27 July 2020, we updated the process for submitting an application for relief in RG 76.52 and lodging meeting materials in RG 76.116. We also updated the references to the regulatory guides in RG 76.150.

Previous versions:

- Superseded Policy Statement 76, issued December 1993, updated January 1994, January 1995 and March 1997, and rebadged as a regulatory guide 5 July 2007

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

Contents

A Overview

Key points

There is a risk that the interests of a related party may influence the decision-making of directors to the detriment of the interests of members of the entity as a whole when an entity is considering whether to enter into a transaction with a related party.

Together with the provisions about directors' duties, the *Corporations Act 2001* (Corporations Act) imposes a number of protections to help manage this risk, including:

- Div 2 of Pt 2D.1, which excludes directors of public companies with material personal interests in certain matters attending director meetings about, or voting on, these matters; and
- Ch 2E and Pt 5C.7, which require public companies and responsible entities of registered managed investment schemes to obtain member approval to provide a financial benefit to a related party, subject to certain exceptions.

This guide provides guidance for public companies and registered managed investment schemes (registered schemes) on the application of the Corporations Act and ASIC's expectations in relation to various aspects of related party transactions. These include the decision to enter into a related party transaction, whether to seek member approval, and what information to include in meeting materials for the approval of related party transactions and other disclosure documents.

What this guide is about

RG 76.1 A 'related party transaction' is any transaction through which a public company or registered managed investment scheme 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 its provision.

RG 76.2 This regulatory guide covers the matters set out in Table 1.

Table 1: Summary of our guidance on related party transactions

What decision is being made	What our guidance covers	Where to find it
Whether to enter into a related party transaction	Voting restrictions for directors at directors' meetings and when we may give relief from these restrictions Note: This guidance applies when a director has an interest in the matter being considered at the meeting, regardless of whether the matter is a related party transaction.	Section B
Whether to seek member approval	The 'arm's length' exception in s210, including factors to consider when applying this exception	Section C
What to include in notices of meeting and explanatory statements (meeting materials) if member approval is sought	The requirements of s218 and 219, the focus of our review of meeting materials and the exercise of our powers to shorten the 14-day review period or issue comments on the meeting materials	Section D
Which votes to count at a members' meeting	Voting exclusions for related parties at members' meetings and when we may give relief from the relevant provisions	Section D
What to include about related party transactions in other disclosures	The content of other disclosures to investors (including prospectuses, Product Disclosure Statements (PDSs) and takeover documents)	Section E

Purpose of this guide

RG 76.3 This guide aims to encourage transparency and best practice in the market, with a view to facilitating informed member decisions. It sets out our views about the type of information that is material to member decisions.

RG 76.4 In relation to disclosure about related party transactions, we seek to promote informed decision-making by:

(a) members of public companies and registered schemes, when deciding how to vote on proposed related party transactions; and

(b) investors considering a new or changed level of investment in entities that have established and ongoing arrangements with related parties.

RG 76.5 This guide is also intended to promote consistent market practice for the application of the arm's length exception from the requirement to seek member approval under Ch 2E.

RG 76.6 In addition, we clarify in this guide some of our expectations in relation to the procedures under the Corporations Act for directors' meetings and members' meetings. This guide is intended to provide useful information to persons who might wish to request that we exercise our relief powers concerning material personal interests of directors and member approval of related party transactions.

Overview of legal framework for related party transactions

RG 76.7 The objective of the related party provisions in Ch 2E and Pt 5C.7 is to protect the interests of members of public companies and registered schemes by requiring member approval for giving financial benefits that could endanger members' interests: s207 and 601LB.

Member approval

RG 76.8 Under s208, for a public company or an entity it controls to give a financial benefit to a related party of the public company:

(a) the company's members must approve the transaction in the way set out in s217–227; or

(b) giving the financial benefit must fall within an exception set out in s210–216.

RG 76.9 Directors of companies also have statutory duties (s180–184) and common law duties. These duties apply regardless of whether a transaction receives member approval in accordance with the Corporations Act (s230).

RG 76.10 Similar restrictions apply when a registered scheme provides a financial benefit to a related party. Part 5C.7 applies the related party provisions in Ch 2E to registered schemes, subject to some modifications to take into account the different features of registered schemes.

RG 76.11 Section 601LC modifies s208 so that member approval in accordance with s217–227 is required if an exception in s210–212, 215 or 216 does not apply, where:

(a) the benefit is given by any of the responsible entity, an entity it controls, its agent or a person it engages;

(b) the benefit is given out of scheme property or could endanger scheme property; and

(c) the benefit is given to any of the responsible entity, an entity it controls, its agent or a person it engages, or a related party of any of those persons.

RG 76.12 This is in addition to the responsible entities' obligations to act in the best interests of members: s601FC(1)(c).

Exceptions

RG 76.13 Member approval is generally not required for:

(a) transactions that are on arm's length terms (s210);

(b) benefits that are reasonable remuneration or reimbursement of officers' and employees' expenses (s211); and

(c) certain other transactions (s212–215) or financial benefits given under a court order (s216).

Note: Sections 213 and 214 do not apply for registered schemes.

RG 76.14 The arm's length exception in s210 provides that member approval is not needed to give a financial benefit on terms that would be reasonable in the circumstances if the public company and the related party were dealing at arm's length, or on terms that are less favourable to the related party than these terms.

RG 76.15 If giving the financial benefit to the related party does not come within any of the exceptions, member approval must be obtained by using the procedure set out in s217–227.

Application of this guide

Public companies and registered schemes

RG 76.16 In this guide a reference to a 'public company' or a 'company' is a reference to a public company as defined in s9 of the Corporations Act. The definition of public company, being a company other than a proprietary company, is expanded for the purposes of s195 and Ch 2E to include bodies corporate (other than prescribed bodies corporate) that are:

(a) incorporated in a State or internal Territory, but not under the Corporations Act; and

(b) included in the official list of a prescribed financial market.

However, for the purposes of Ch 2E, the s9 definition does not include a company that does not have 'Limited' after its name because of s150 or 151.

RG 76.17 A reference to a 'registered scheme' is to a registered managed investment scheme. A reference to a PDS is to a PDS prepared for a registered scheme other than a scheme to which Div 4 of Pt 7.9 of the Corporations Regulations applies.

RG 76.18 We use the words 'entity' and 'member' where the relevant guidance can apply to either a public company or a registered scheme. Section B only refers to 'public company' or 'company' because it applies to a public company that is considering matters either in its own capacity or in its capacity as the responsible entity of a registered scheme.

Interaction with other ASIC guidance

RG 76.19 This guide describes our overall approach to the disclosure of related party arrangements in prospectuses and PDSs (and other disclosure documents). In other regulatory guides relating to specific products and/or industry sectors, we have set out specific disclosure principles, benchmarks and other guidance for related party arrangements: see RG 76.150. We expect this specific guidance to be followed, where applicable, in conjunction with this guide.

B Directors' meetings—voting restrictions

Key points

Directors of public companies with certain material personal interests in a matter may not vote on the matter or attend directors' meetings while the matter is being considered, unless approved by non-interested directors.

A quorum may not be present for a particular matter if not enough non-interested directors entitled to vote are present, as required under the Corporations Act or the constitution. If there is not a quorum because of the application of the Corporations Act, the Act expressly provides that the directors may call a general meeting to deal with the matter.

ASIC may declare that, despite having a material personal interest in a matter, a director of a public company may be present while the relevant matter is being considered at the meeting and/or vote on the matter.

Directors making decisions about related party transactions need to consider issues other than voting restrictions.

Restrictions on voting—section 195

RG 76.20 If a director of a public company has a material personal interest in a matter being considered at a directors' meeting, they must not:

(a) be present while the matter is being considered at the meeting (s195(1)(a)); or

(b) vote on the matter (s195(1)(b)).

Note: See RG 76.31–RG 76.38 for a discussion about 'material personal interest'.

RG 76.21 In our view, the s195(1) requirement that an interested director not be present and not vote applies to all meetings of the board, however held.

RG 76.22 We apply s195(1) on the basis that 'meeting' includes any procedure by which the board or the directors resolve any matter. For example, we consider that the prohibition on voting extends to resolutions of a board made without a meeting (i.e. 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 (i.e. vote) and would deny the section its intended operation.

RG 76.23 Section 195(1) also applies to meetings of directors other than board meetings, such as audit committee (or other committee) meetings.

Participation for certain types of material personal interest

RG 76.24 The prohibition in s195(1) does not apply where the interest does not need to be disclosed under s191. Section 191(2) sets out various types of interest that do not need to be disclosed.

Participation with approval of other directors

RG 76.25 The prohibition in s195(1) does not apply where the board has passed a resolution:

(a) specifying the director, the nature and extent of the director's interest in the matter, and its relation to the affairs of the company (s195(2)(a)); and

(b) stating that the directors voting for the resolution are satisfied that the interest should not disqualify the director from voting or being present (s195(2)(b)).

RG 76.26 Section 195(1) has the effect that no interested director may be present or vote on this resolution.

Quorum of directors

The Corporations Act and the constitution apply

RG 76.27 The quorum requirements for a directors' meeting are set out in the company's constitution, or the replaceable rule set out in s248F, as applicable. Directors who are not entitled to vote do not count when determining whether a quorum exists.

Note: See *McGellin v Mount King Mining NL* (1998) 144 FLR 288 (*McGellin*) at 306 and *Claremont Petroleum NL v Cummings and Fuller* (1992) 110 ALR 239 (*Claremont Petroleum*) at 260.

RG 76.28 When determining whether there is a quorum of directors who are entitled to vote, the following should not be counted:

(a) a director ineligible to vote under the constitution; and

(b) a director who has a material personal interest and so is ineligible to vote under s195.

RG 76.29 Any restrictions on directors voting contained in a company's constitution are in addition to the restrictions in s195. It is therefore possible that a meeting will lack a quorum because of the combined effect of a director, or a number of directors, having a material personal interest under s195, and a restriction in the company's constitution.

General meeting of the company

RG 76.30 If there is not a quorum of directors who are eligible to vote on a matter because of the operation of s195(1), one or more directors may call a general meeting and the general meeting may deal with the matter: s195(4). The voting prohibition in s195(1) does not apply to a proposal to call a general meeting to consider a matter in which one or more directors have a material personal interest—that is, a director with a material personal interest may consider and vote on such a proposal.

Material personal interest

RG 76.31 'Material personal interest' is not defined in the Corporations Act. However, the word 'material' implies that the interest needs to be of some substance or value, rather than merely a slight interest. An interest of small value does not warrant further notice or inquiry: see *Grand Enterprises Pty Ltd v Aurium Resources Ltd* (2009) 256 ALR 1 (*Grand Enterprises*) at 15–16.

RG 76.32 An interest that has the capacity to influence the vote of a director would be considered material. Where this is the case, the nature of the interest—that is, whether it is direct, indirect, contingent or contractual, is not important.

> Note: See *McGellin* at 304 and *The Bell Group Limited (in liq) v Westpac Banking Corporation (No 9)* (2008) 70 ACSR 1 (*Bell Group*) at 261.

RG 76.33 The prohibition on voting at and attending meetings applies when a director's interest is personal, as well as material. To be personal, an interest need not be pecuniary: see *Bell Group* at 261 and *The Queen v District Council of Victor Harbour; Ex parte Costain Australia Ltd* [1983] 34 SASR 188 at 190. However, it will not be personal if it is an interest of someone else only. For example, where the interest at stake is only that of a beneficiary of a trust of which the director is a trustee: see *Grand Enterprises* at 16. An interest may not be personal if it affects a director as a member of a wide group or class, such as ordinary customers of a bank or shop, in the same manner and to the same degree that it affects the other members of the group or class.

RG 76.34 In interpreting the phrase, 'material personal interest', and in considering whether the prohibition applies, companies should bear in mind that a purpose of the prohibition is to minimise risks or harm to the company arising from conflicts of interest.

RG 76.35 For example, under s191(2)(a)(i), the prohibition does not apply if the interest arises merely because the director is a member of a company and the interest is held in common with the other members of the company. This exception is probably only available where the interest is in common with *all* members of the company as members of the company: see *Grand*

Enterprises at 18. 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 76.36 Under common law, as persons in a fiduciary position, directors have duties not to profit from a position of trust or place themselves in a position where duty and interest might conflict. A director also has general duties under s180–184. A fiduciary must not, without informed consent, promote their personal interest where there is a real and substantial conflict between that personal interest and the interests of those the fiduciary is bound to protect. Further, a fiduciary must account for a profit or benefit if it was obtained when such a conflict existed or by reason of the fiduciary taking advantage of an opportunity or knowledge derived from that position. The objective of these principles is to preclude fiduciaries from being swayed by considerations of personal interest and from actually misusing their position for personal advantage.

Note: See generally *Grand Enterprises* at 9–10; *Bell Group* at 258–260; *Streeter v Western Areas Exploration Pty Ltd* [No 2] [2011] WASCA 17 at 20–24 and 89–103; *Warman International Ltd v Dwyer* (1995) 182 CLR 544 at 557; *R v Byrnes & Hopwood* (1995) 183 CLR 501 at 513–524; *Chan v Zacharia* (1984) 154 CLR 178 at 198–199; *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 103; *Boardman v Phipps* [1967] 2 AC 46 per Upjohn LJ and *Bray v Ford* [1896] AC 44 at 51; *Boulting v ACTAT* [1963] 2 QB 606 at 638 per Upjohn LJ and *Transvaal Lands Co v New Belgium (Transvaal) Lands & Development Co* [1914] 2 Ch 488 per Astbury J.

RG 76.37 While conflict of interest principles are relevant to the concept of material personal interest, s195(1) does not refer to conflict of interest as the basis of having a material personal interest. Therefore, it is possible for a matter that does not give rise to a conflict of interest to nonetheless be a material personal interest, in which event, the board must decide if the relevant director can be present and vote at the directors' meeting. A court could find that the prohibition on voting at and attending board meetings applies even if the interests of the company and the director coincide.

RG 76.38 Ultimately, whether a director has a material personal interest will depend on the particular circumstances. If in doubt, directors should seek specific legal advice.

ASIC's relief powers

RG 76.39 We have discretion under s196 to declare that, despite having a material personal interest, a director of a public company may be present while a relevant matter is being considered at a meeting, or vote on the matter, or both, but only if we are satisfied that:

(a) a quorum of directors who are present and entitled to vote cannot be obtained (s196(1)(a)); and

(b) the matter is urgent or there is some other compelling reason for the matter to be dealt with at the directors' meeting, rather than by a general meeting called under s195(4) (s196(1)(b)).

We must be satisfied that both conditions are met.

RG 76.40 We may make a declaration subject to conditions: s196(2).

RG 76.41 Relief under s196 is not an assurance by us that an interested director voting at a meeting has not otherwise breached their common law or statutory duties to the company. Also, relief from s195 does not exempt the director or the company from restrictions on voting or quorum requirements in a company's constitution.

Content of applications and relief

First condition—No quorum (s196(1)(a))

RG 76.42 Applications for relief under s196 must satisfy us that the quorum requirement prevents a matter being dealt with at meetings. An application for a declaration under s196 must set out:

(a) details of the material personal interest of the director and each other director to which s195(1) applies; and

(b) the reasons why the quorum requirement cannot be met, which may include the operation of the company's constitution.

RG 76.43 We will not reject an application as unnecessary if there is a significant risk that the Corporations Act will be contravened.

Second condition—Urgent or compelling reasons (s196(1)(b))

RG 76.44 We must be satisfied that a general meeting is clearly inappropriate. Section 196(1)(b) gives a 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 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.

RG 76.45 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 seeking relief and demonstrate why they are compelling.

RG 76.46 We will not prescribe other reasons that might be sufficiently compelling. This is partly because the paragraph requires us to consider the reasons in the context of the material personal interests in question. Depending on the circumstances, other reasons may include:

(a) the company has given approval in a 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 76.47 Depending on the nature of the material personal interests in question, the high cost of calling a general meeting may be a compelling reason.

RG 76.48 It is implicit in s196(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. Compliance with Ch 2E, if applicable, will also be a relevant consideration for us.

RG 76.49 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. Where relevant, applications should also include cost estimates relating to the commercial benefit if relief is granted: see Regulatory Guide 51 *Applications for relief* (RG 51) at RG 51.58–RG 51.59.

RG 76.50 An example of when we are likely to grant relief is where directors propose to enter into a contract that is subject to member approval, provided that, if members do not approve the contract, the company will have no liability and will not forfeit any deposit.

RG 76.51 In granting relief, we will consider the effect of such relief on the interests of members, other investors and creditors.

RG 76.52 Applications for relief should be submitted through the ASIC Regulatory Portal. Fees will apply to an application. We have provided details about payment options in the portal. For more information, see how you apply for relief.

Pro forma for relief

RG 76.53 Pro Forma 90 *Voting by interested directors* (PF 90) sets out the form of relief we will grant under s196.

Publication of relief

RG 76.54 Our relief under s196 may require the company to publish a copy or notice of the instrument to ensure that members know that a director prevented from voting or attending meetings under the Corporations Act has been granted relief by ASIC.

Other obligations

RG 76.55 Section 195 does not negate the operation of the Corporations Act and Australian accounting standards on general disclosure obligations by directors of a company, or the general duties of a director under the common law and s191.

Interested directors

RG 76.56 We consider that a director who has a conflict of interest in relation to a proposed transaction should generally not be in a position to influence decision-making in relation to the transaction.

RG 76.57 In certain circumstances, conflicted directors may have a duty to take reasonable steps to protect a company from suffering serious harm by entering into a transaction in which they are interested. Notifying the board of an interest, abstaining from voting and not attending meetings may not always be sufficient.

> Note: See *Permanent Building Society (in liq) v Wheeler* (1994) 14 ACSR 109 at 160; *Fitzsimmons v The Queen* (1997) 23 ACSR 355 at 358; *Duke Group Ltd (in liq) v Pilmer* [1999] SASC 97 at [667]–[670]; and *Centofanti v Eekimitor Pty Ltd* (1995) 65 SASR 31 at 33.

The role of non-interested directors

RG 76.58 '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 considered by the board.

RG 76.59 When making decisions to provide financial benefits to a related party, non-interested directors should:

(a) make appropriate inquiries of management and seek appropriate advice, to the extent necessary, about the proposal;

(b) independently assess the information provided to them; and

(c) exercise 'special vigilance' with 'scrupulous concern' to ensure the necessary corporate approvals are obtained (see *Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler and Others* (2002) 41 ACSR 72 (*ASIC v Adler*) at 168, 183 and 250).

C The 'arm's length' exception

Key points

One of the exceptions in Ch 2E to the requirement to obtain member approval for giving a financial benefit to a related party is where the benefit is given on arm's length terms (s210).

When considering whether this exception applies, public companies and responsible entities should consider all of the following factors:

- how the terms of the overall transaction compare with those of any comparable transactions on an arm's length basis;
- the nature and content of the bargaining process;
- the impact of the transaction on the company or registered scheme;
- any other options available to the entity; and
- any expert advice received by the entity.

Companies and responsible entities may determine the appropriate weight to give each factor in the relevant circumstances. There may be other factors that are also relevant.

The s210 exception and the meaning of 'arm's length'

RG 76.60 If public companies and responsible entities decide that it is in the best interests of the entity to enter into a related party transaction, they will then need to consider whether to obtain member approval for the purposes of Ch 2E and Pt 5C.7. In doing so, they may consider whether the exception in s210 applies. Many of the factors considered when deciding whether to enter into the transaction will also be relevant in determining whether this exception applies.

RG 76.61 Section 210 provides that member approval is not needed to give a financial benefit on terms that would be reasonable in the circumstances if the entity and the related party were dealing at arm's length, or on terms that are less favourable to the related party than these terms.

> Note: The terms used in s210 are modified for registered schemes in accordance with s601LA.

RG 76.62 It is important that the arm's length exception in s210 is applied correctly so that members are given an appropriate opportunity to vote on a proposed related party transaction where the terms of that transaction are not truly arm's length terms.

Meaning of 'arm's length'

RG 76.63 The Corporations Act does not define 'arm's length'. Case law on the meaning of 'arm's length' suggests that this phrase refers to a relationship between parties where neither bears the other any special duty or obligation, they are unrelated, uninfluenced and each acts in its own interests.

> Note: See *Orrong Strategies Pty Ltd v Village Roadshow Ltd* [2007] VSC 1 (*Orrong*) at [723]; *Australian Securities and Investments Commission (ASIC) v Australian Investors Forum Pty Ltd & Others (No 2)* [2005] NSWSC 267 (*ASIC v Australian Investors Forum*) at [456]; and *ACI Operations Pty Ltd v Berri Limited* [2005] VSC 201 (*Berri*) at [201]–[243].

RG 76.64 This meaning of 'arm's length' is supported in recent case law that applies the phrase as it appears in taxation and other legislation.

> Note: See *Granby Pty Ltd v Federal Commissioner of Taxation* (1995) 129 ALR 503 (*Granby*) at 505–508; *Trustee for the Estate of the Late AW Furse No 5 Will Trust v FCT* (1990) 21 ATR 1123 (*Furse*) at 1132; and *Australian Trade Commission v WA Meat Exports Pty Ltd* (1987) 75 ALR 287 at 289–292.

RG 76.65 Specifically, *ASIC v Australian Investors Forum* at [456] indicates that, in determining the objective standards that would characterise arm's length terms, courts should consider the transaction terms that would result if:

(a) the parties to the transaction were unrelated in any way (e.g. financially, or through ties of family, affection or dependence);

(b) the parties were free from any undue influence, control or pressure;

(c) through its relevant decision-makers, each party was sufficiently knowledgeable about the circumstances of the transaction, sufficiently experienced in business and sufficiently well advised to be able to form a sound judgement as to what was in its interests; and

(d) each party was concerned only to achieve the best available commercial result for itself in all the circumstances.

RG 76.66 In deciding whether the exception applies, the terms on which the financial benefit is given should be compared to the objective range of possible terms that these unrelated, uninfluenced and self-interested parties would reasonably arrive at in the circumstances: see *ASIC v Australian Investors Forum* at [455] and *Orrong* at [716] and [721].

RG 76.67 In determining the outcomes that hypothetical unrelated parties would reasonably achieve, the following points should also be considered:

(a) commercial prudence should be applied and expert guidance may be required in considering the terms of the related party transaction (see *ASIC v Australian Investors Forum* at [458]) and ascertaining common market practice; and

(b) if the terms of the financial benefit are extraordinary or excessively generous, or do not include safeguards to manage conflicts of interest, it

is less likely that the terms can be considered 'reasonable' and so may not be arm's length terms for the purposes of s210 (see *Orrong* at [730]–[734], *Furse* at 1134 and *ASIC v Adler* at 183, 244, 250).

Meaning of 'in the circumstances'

RG 76.68 For a transaction to be on 'arm's length' terms within the s210(1)(a) exception, its terms must be reasonable 'in the circumstances' if the entities were 'dealing at arm's length'.

RG 76.69 The 'circumstances' could include, but are not limited to:

(a) whether there are alternative transactions open to the entity that are not with related parties (e.g. whether a related party is the only supplier of a certain component or suitable premises);

(b) prevailing economic conditions and their impact on the parties and their relevant industries; and

(c) any special value to the transaction (e.g. synergies available to the related party, other than those arising because it is a related party, that may not be available to other purchasers).

Note: This is separate to the assessment of fair value of consideration by experts that does not take special value into account if it is only available to a particular purchaser: see Regulatory Guide 111 *Content of expert reports* (RG 111) at RG 111.11.

RG 76.70 When considering the circumstances in which the hypothetical unrelated parties would be transacting, we consider that, generally, all circumstances of the related party transaction that have a bearing on determining the terms are relevant, except for the fact of their relationship.

Relevant factors to consider when applying the s210 exception

RG 76.71 At a minimum, public companies and responsible entities should take into account all of the following factors when deciding whether to seek member approval or whether the arm's length exception in s210 applies:

(a) how the terms of the overall transaction compare with those of any comparable transactions between parties dealing on an arm's length basis in similar circumstances (see RG 76.76–RG 76.80);

(b) the nature and content of the bargaining process, including whether the entity followed robust protocols to ensure that conflicts of interest were appropriately managed in negotiating and structuring the transaction (see RG 76.81–RG 76.86);

(c) the impact of the transaction on the company or registered scheme (e.g. the impact of dealing on those terms on the financial position and

performance of the company) and non-associated members (see RG 76.87–RG 76.89);

(d) any other options that may be available to the entity (see RG 76.90); and

(e) expert advice received by the entity on the transaction (if any) (see RG 76.91–RG 76.92).

RG 76.72 The following subsections explain each of these factors. This list of factors is not exhaustive. Companies and responsible entities should also consider any other relevant factors.

RG 76.73 We expect entities to consider all the factors in RG 76.71, but some may not be as relevant as others after consideration. Companies and responsible entities may determine the appropriate weight to give each factor in the relevant circumstances. However, entities should not make an assessment of whether the transaction is on arm's length terms based on a single factor in isolation from each of the other factors.

RG 76.74 For example, it would be insufficient for a company or responsible entity to make this assessment based only on the nature of the bargaining process without considering other relevant factors, such as comparable transactions and other available options.

RG 76.75 We expect that the factors in RG 76.71 can be considered using information already obtained in connection with the transaction (which may include expert advice: see RG 76.91), the knowledge and experience of directors, officers, employees and advisers, and publicly available information. However, separate advice could be sought or inquiries made on the particular factors in RG 76.71 if the directors believe this is necessary.

Comparable transactions

RG 76.76 A good indicator of arm's length terms is whether the terms of the proposed related party transaction are comparable to those of similar transactions completed in similar circumstances between unrelated parties in a contract for legitimate commercial bargain. Entities should seek to establish the contractual terms that prevail in the open market for similar transactions between unrelated parties. Common experience and usual terms of trade can be taken as a guide: see *ASIC v Australian Investors Forum* at [457].

RG 76.77 Common sense and commercial prudence should be applied and expert guidance may be required when considering the terms of the related party transaction (see *ASIC v Australian Investors Forum* at [457]–[458]) and determining the terms on which unrelated parties would transact in the same circumstances.

RG 76.78 We expect that, in many cases, entities will have already contemplated this when considering whether to enter into the proposed related party transaction and whether it is in the best interests of the company or registered scheme.

RG 76.79 In assessing the terms of the related party transaction, consideration should also be given to whether any key provisions (such as consideration, warranties, indemnities, term and termination) are excessively onerous or excessively generous. If so, the terms are less likely to be considered 'reasonable' or comparable with terms achieved by other parties on the open market in similar circumstances, and therefore not arm's length terms for the purposes of s210: see *Orrong* at [730]–[734], *ASIC v Australian Investors Forum* at [458] and *Furse* at 1134. Terms that are extreme or unlikely should therefore not be used in the comparison because they may generally be unreasonable.

RG 76.80 If there is no reliable data about comparable transactions between parties dealing at arm's length, it will be more difficult to determine with certainty the hypothetical reasonable arm's length terms that could be reached by unrelated parties. In this event, other factors may be more important in determining whether to obtain member approval.

Bargaining process

RG 76.81 Consideration of the nature and content of the bargaining process, including how the transaction was initiated, structured, negotiated and disclosed to directors, is also relevant in determining whether the terms of a proposed related party transaction are arm's length.

RG 76.82 If the parties have dealt with each other as unrelated parties would normally do, and engaged in a process of real bargaining, it is more likely that the outcome of their dealings can be considered to be arm's length terms: see *Furse* at 1132 and *Granby* at 507.

RG 76.83 It is not necessary to show that the parties negotiated on an arm's length basis to decide whether the terms of a proposed transaction are arm's length terms for the purposes of s210 (in fact, due to their relationship, they may not have done so). However, factors relating to how the parties conducted themselves in forming the terms of the transaction will be relevant in assessing whether the outcome of their negotiations could reasonably have been achieved by uninfluenced, self-interested parties in the circumstances.

RG 76.84 These factors include:

(a) whether the proposed transaction is contractual in nature, including whether it is adequately documented in binding form (see *Orrong* at [729], *ASIC v Australian Investors Forum* at [463] and *ASIC v Adler*);

(b) the involvement in the negotiations of professional advisers representing or advising each party (see *Orrong* at [795]); and

(c) the nature of the negotiation process, including the length and sincerity, whether there was 'hard' or 'real' bargaining (e.g. a disinterested bargaining process that is characteristic of strangers, who are each applying their independent separate wills), and whether any of the terms were negotiated at all (see *Orrong* at [721]–[726], *Furse* at 1132, *Berri* at [205]–[214] and *Granby* at 506–507).

RG 76.85 If a director has a material personal interest in the related party transaction and has participated in, or been privy to, negotiations with the related party, this aspect of the bargaining process and its potential impact on the terms of the transaction should be taken into account when assessing whether the terms are arm's length.

RG 76.86 It may also be relevant to consider the entity's bargaining position. This is not only determined by reference to the knowledge and experience the entity has, including through its advisers, but also by the relevant circumstances in which the transaction is contemplated. Circumstances include the entity's desire and need to complete the transaction (e.g. if an entity is in financial distress).

Impact on company or registered scheme

RG 76.87 In assessing whether the terms of a transaction would be reasonable if the entity were dealing at arm's length, entities should also consider the implications of dealing on those terms on the financial position and performance of the company or registered scheme. The implications for non-associated members should also be considered. Both short-term and long-term implications will be relevant. This includes considering whether:

(a) there is a negative effect on the company's or registered scheme's financial position or performance that is not sufficiently balanced by the positive effects;

(b) the transaction fits within the entity's business plan or affects whether the entity is able to pursue its business plan; and

(c) the terms are fair, given the expected return on the relevant asset, the risks to which the asset is exposed and the relative liquidity of the asset.

RG 76.88 Companies and responsible entities should also consider whether the contract or agreement adequately protects the interests of the entity giving the financial benefit: see *ASIC v Adler* at 182–183, 232, 250.

RG 76.89 Generally, when dealing at arm's length, entities acting in their own interests have the option not to proceed, or to conduct business in a different way, if the terms do not satisfy their performance expectations or present a significant risk to the entity's performance, financial position or prospects.

Alternative options available to the entity

RG 76.90 If the proposed related party transaction is one of a number of options open to the entity:

(a) the terms of these options can provide a good comparison of the terms that can reasonably be obtained between unrelated parties in the circumstances; and

(b) if the terms of the proposed transaction are less favourable to the related party than the terms of these options, the arm's length exception is more likely to apply.

Expert advice for directors

RG 76.91 Directors should ensure they have, or have access to, enough knowledge or expertise to assess all aspects of proposed related party transactions—where necessary, they should obtain appropriate professional and expert advice from any appropriately qualified person. This may include the advice referred to in RG 76.75.

RG 76.92 The directors will need to be satisfied that it is appropriate to rely on the expert advice, including that the opinion given by the expert is directly relevant to the decision at hand. However, directors relying on information, professional advice or expert advice provided by others must make their own independent assessment of the information or advice: see s189. Advice does not replace careful judgement by the directors.

Seeking member approval when there is uncertainty

RG 76.93 Under Ch 2E, entities must obtain member approval to give a related party benefit unless an exception applies.

RG 76.94 When there are potential conflicts of interest, directors have a heightened obligation to ensure that the necessary corporate approvals are obtained: see *ASIC v Adler* at 250.

> Note: For public companies that are Australian financial services (AFS) licensees, compliance with the obligation in s912A(1)(aa) to manage conflicts adequately will generally involve documenting the reasons for relying (or not relying) on the arm's length exception: see Regulatory Guide 181 *Licensing: Managing conflicts of interest* at RG 181.33 and RG 181.45.

RG 76.95 Directors should only rely on the exception when they are persuaded that the exception does apply, rather than it being merely arguable that it applies.

RG 76.96 Accordingly, if after taking into account all the factors in RG 76.71 and any other relevant factors, it is not clear that the transaction falls within the arm's length exception (or any other exception in Ch 2E), member approval should be sought.

D Member approval process

Key points

If it is determined that member approval is required under Ch 2E, entities must lodge with ASIC the material that will be put to members.

We expect explanatory statements for the approval of financial benefits lodged with us under Ch 2E to include certain information: see Table 2.

In some circumstances, it may be necessary for entities to include a valuation from an independent expert with a notice of meeting and explanatory statement.

Meeting materials must be lodged with us at least 14 days before the notice convening the meeting is given to members, unless we approve a shorter period on application.

In rare circumstances, we may grant relief from the voting exclusion requirements that prohibit related parties receiving financial benefits (or their associates) voting on the resolution to approve that transaction.

We may also grant relief to stapled entities from the requirement to obtain member approval where there is no value leakage from the group.

Content of explanatory statements

RG 76.97 If public companies and responsible entities decide that member approval is required to enter into a related party transaction, they will then need to consider what information to include in the meeting materials.

RG 76.98 Meeting materials seeking member approval for related party transactions must provide sufficient information to members to enable them to decide whether or not the financial benefit to be given to a related party is in the interests of the entity: s219.

RG 76.99 Information about the valuation and details of the financial benefit are important to members' voting decisions: see RG 76.107–RG 76.112. Where possible, members should be able to understand the value of the financial benefit and its impact on the entity in dollar terms. The matters set out in s219(2) indicate the importance of providing members with information about value.

RG 76.100 Members also need to understand the circumstances in which the financial benefit is proposed to be given. Information about the existing arrangements between the entity (and its related entities) and the related party (and its related entities) receiving the financial benefit may be important. For example, the related party may be a shareholder, lender, contractor or

manager of the entity giving the financial benefit. Without this information, members may not have sufficient context for making their decision.

RG 76.101 The discussion in RG 76.143–RG 76.150 about information to include in disclosure documents sets out information that may also need to be included in the meeting materials to ensure that investors have all the information reasonably required to decide whether it is in the entity's interests to approve the proposed financial benefit.

RG 76.102 We also expect explanatory statements for the approval of financial benefits lodged with us under Ch 2E to include information about:

(a) the directors' recommendations and the reasons for them;

(b) alternative options to the related party transaction and the reasons for choosing the related party transaction (as well as the implications of not proceeding with the transaction); and

(c) the impact of the transaction on the company or registered scheme.

More detailed guidance on the information to include in meeting materials is set out in Table 2.

RG 76.103 Directors have a duty to give full and proper disclosure. Under common law, a notice of meeting must contain all the information needed to fully and fairly inform members of the nature of the proposed resolutions, and to enable members to judge for themselves whether to attend the meeting and vote for or against the proposed resolutions.

> Note: See generally *Devereaux Holdings Pty Ltd v Parry Corporation* (1985) 9 ACLR 956 (*Devereaux*) at 958–959; *Bulfin's Limited v Bebarfald* (1938) 38 SR (NSW) 423; *Fraser v NRMA Holdings Limited* (1995) 55 FCR 452 at 466; *ENT Pty Ltd v Sunraysia Television Ltd* (2007) 61 ACSR 626 (*Sunraysia*); and *Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd and Others* (2005) 55 ACSR 583 at 594–598.

RG 76.104 We consider that the information set out in RG 76.99–RG 76.102, and in Table 2 below, to be material to members' decisions about how to vote on a proposed related party transaction and that members expect to see this information in meeting materials.

Table 2: Content of related party meeting materials

Topic	Guidance
Identity of the related party: s219(1)(a)	The party receiving the financial benefit must be clearly identified, including an explanation of the nature of the related party relationship. For group structures, the nature of these relationships should be disclosed for all group entities and related parties involved in each transaction that is disclosed. For example, if an entity is acquiring a substantial interest in an asset from a related party, it will be relevant and should be disclosed that: • other entities within the same corporate group as the related party may also have an interest (either directly or indirectly) in that asset, and the nature of those interests; and • ongoing management services on arm's length terms in relation to the asset may be provided by another entity within the same corporate group as the related party.
Nature of the financial benefit: s219(1)(b)	Complete details of the financial benefit to be given must be provided to members. This includes not only details of what the benefit is (both in nature and quantity), but also the reason for giving the benefit and the basis on which it is given. For example, if options are to be granted to a director, we expect the following information, at a minimum, to be disclosed: • the number of options to be granted to the director; • the terms of the options; • an explanation as to why the options are to be granted, particularly where alternative forms of remuneration or incentive may be required to be expensed by the entity in future years; and • an explanation as to why the specified number of options is to be granted and why the specified value of the options was chosen. Entities should be careful to disclose the substantive effect of a transaction if necessary in order to explain the financial benefit. For example, if a company, instead of granting options, proposes to lend a director money to acquire shares in the company but the repayment terms of the loan effectively create an option-like situation, this should be disclosed.

Topic	Guidance
Directors' recommendations: s219(1)(c)	For each proposed related party resolution, each director of the company or responsible entity must either: • make a recommendation about the resolution and state their reasons for it; or • if they do not make a recommendation, state why they do not. If, for some reason, a director is not able to make either of these statements, they must also state why this is the case. We consider that detailed reasons for director recommendations should be provided, including a discussion of any alternative options considered. This may also include a discussion of the opportunity costs involved (s219(2)) and the implications of not proceeding with the transaction. It is not enough simply for a director to state that they approve of the resolution. This is because we consider this information is material to members when deciding how to vote, and, in some cases, the omission of this information could be misleading. We also consider it is good practice for directors to avoid making a recommendation for resolutions about each other's remuneration as there may be a conflict of interest: see *Claremont Petroleum* at 261–263. The reason for not making a recommendation must be disclosed: s219(1)(c)(ii). For example: • if a proposal to issue options to a non-executive director will mean that a listed company will no longer comply with the ASX Corporate Governance Council's *Corporate governance principles and recommendations* (2nd edn)—the reasons supporting the director's recommendation should include an explanation of why the director considers this is appropriate, and a discussion of other relevant options; • if a company's reason for granting options to a director is as an incentive for future performance but the options are in the money—the reasons should address how the director has reconciled these facts; and • if a proposed related party transaction is chosen over other alternative transactions with non-related entities—the reasons for choosing the related party transaction over the alternatives (including not proceeding with the transaction) should be explained.
Directors' interest in the outcome: s219(1)(d)	Each director must state whether or not they have an interest in the outcome of the proposed resolution. If a director does have an interest in the outcome, they must state what that interest is. If the director's interest in the outcome is considered a material personal interest, this should be disclosed, along with whether the director voted on the transaction at the relevant board meeting. Further, if a director has a material personal interest in the outcome, there should also be an explanation as to whether the director has been excluded as a related party for the purposes of voting at the general meeting and the reasons for this.

Topic	Guidance
Other: s219(1)(e)	The explanatory statement must contain all other information that is reasonably required by members to decide whether or not it is in the entity's interests to pass the related party resolution: s219(1)(e). To the extent that it may reasonably be required by members, information leading to the conclusion that the arm's length exception does not apply should be included in the explanatory statement—for example, where the amount of the financial benefit paid to a related party under a service agreement is far in excess of market rates. For transactions with multiple steps and approvals, entities should assess what information is to be disclosed for each step, and the information provided should enable a member to understand the transaction as a whole. Even where only one or a few steps comprise related party transactions requiring approval, the overall transaction and the cumulative impact of each step on the entity are important contextual information that should be disclosed. In preparing this information, the directors should keep in mind: • in the case of companies, the general requirement that information included in a notice of meeting is presented in a clear, concise and effective manner (s249L(3)); and • the obligations stated in a note at the end of s219—that is: 'Sections 180 and 181 require an officer of a corporation to act honestly and to exercise care and diligence. These duties extend to preparing an explanatory statement under this section. Section 1309 creates offences where false and misleading material relating to a corporation's affairs is made available or furnished to members.'
Valuation of the financial benefit	Meeting materials must adequately value the financial benefit, preferably in dollar terms. This is especially the case where: • the financial benefit is the issue of shares, options or convertible notes or interests in a registered scheme; or • the financial benefit involves the sale or purchase of an asset, such as a mining tenement or an existing business. An adequate valuation requires the basis of the valuation, and the principal assumptions behind the valuation, to be disclosed. In some circumstances, it may also be necessary to provide a valuation by an independent expert. This may be particularly important where the directors have a conflict of interest in relation to the transaction. Options must be valued in accordance with Australian Accounting Standards Board (AASB) accounting standard AASB 2 *Share-based payment* and all material assumptions used in valuing the options must be disclosed. For example, if a company is purchasing an asset from a related party in exchange for shares, it may be necessary to include both a valuation of the asset and a valuation of the shares. Where relevant, the valuation methodology should be consistent with that required to be adopted in the entity's financial reports.

Topic	Guidance
Disclosure of a relevant director's total remuneration package	Where the financial benefit is to be conferred by way of remuneration or incentive, the amount of the total remuneration package must be disclosed to the members. For example, if options are to be granted to a director, the company or responsible entity must provide a proper valuation of those options as well as give members details of other remuneration the director will receive. Members must be able to assess the value of the overall remuneration package the director will receive when taking into account the financial benefit to be conferred. It is not usually sufficient to include only the past remuneration of directors. However, if the remuneration a director will receive is not known but is anticipated to be similar to that received in the previous year, it may be sufficient to include the previous year's remuneration and a statement to that effect.
Related party's existing interest	Details of the related party's existing interest in the entity should be disclosed. For example, where securities in the entity are to be granted to a related party, that party's existing interest will be relevant because it allows the members to determine the likely extent of the related party's influence or control if the financial benefit were to be granted.
Dilution effect of the transaction on existing members' interests	Where an entity intends to provide equity-related financial benefits to a related party, the meeting materials should state the possible dilution effects of that issue on the interests held by other members.

Expert reports

RG 76.105 To ensure that members are provided with sufficient information to assess a proposed related party transaction and decide how to vote, it may be necessary for entities to include a valuation from an independent expert with a notice of meeting for member approval under Ch 2E or Pt 5C.7 where:

(a) the financial benefit is difficult to value;

(b) the transaction is significant from the point of view of the entity (see RG 76.113); or

(c) the non-interested directors do not have the expertise or resources to provide independent advice to members about the value of the financial benefit.

RG 76.106 A valuation from an independent expert may also be required to be included:

(a) under Chapter 10 of the ASX Listing Rules; or

(b) if the related party transaction is also a control transaction for which the entity is commissioning an expert report (e.g. for member approval under item 7 of s611).

Importance of valuation information

RG 76.107 Independent valuation advice on a proposed related party transaction can help members better understand and assess the proposal and make an informed decision about how to vote. Independent valuation advice can also play an important part in maintaining investor confidence in the management of the entity.

RG 76.108 Members receive independent expert reports relating to acquisitions or disposals of a substantial asset from or to a related party (or an associate of the related party) that require member approval under Chapter 10 of the ASX Listing Rules. The ASX Listing Rules do not include an arm's length exception and so all transactions of this nature must be approved by members.

RG 76.109 There is no express requirement in Ch 2E for an independent expert report to be obtained for provision to members with a notice of meeting. However, we encourage independent expert reports to be obtained and sent to members with the accompanying explanatory material in the circumstances set out in RG 76.105.

RG 76.110 In our view, under Ch 2E and directors' duties, directors have a general obligation to include information about the value of a financial benefit in a notice of meeting for member approval of a related party benefit. The directors' fiduciary duty of disclosure generally requires notices of meeting for approval of asset sales or acquisitions to include the material information necessary for members to assess whether a transaction is for a fair price, and whether the terms and conditions are onerous or disadvantageous: see *Sunraysia* at 635.

RG 76.111 The economic and commercial considerations addressed in the examples in s219(2) would often require directors to provide information about the value of the benefit.

RG 76.112 In some cases, a notice of meeting for approval of a related party benefit could include information about the value of the financial benefit in the form of advice from the non-interested directors. However, given the complexities and inherent conflicts of interest involved in many related party transactions, it is sometimes more appropriate for an entity to commission an independent expert to give an opinion on the proposed transaction.

Significant transactions

RG 76.113 A transaction can be significant from the point of view of an entity—so that an independent expert report may be necessary (see RG 76.105(b))—for reasons other than the dollar value involved. For example, a transaction may be considered to be significant if it involves a change of business activities or strategic direction, the replacement of the full board, substantial dilution of existing members, or if it is very complex.

How experts should assess related party transactions

RG 76.114 Regulatory Guide 111 *Content of expert reports* (RG 111) provides guidance on the content of expert reports for related party and other transactions and how experts should assess related party transactions.

RG 76.115 If an independent expert has prepared a report, it must also comply with Regulatory Guide 112 *Independence of experts* (RG 112).

ASIC's review of meeting materials

RG 76.116 At least 14 days before the entity sends a notice convening a members' meeting, it must lodge copies of documents to be given to members with us. These documents include the proposed notice, resolution, explanatory statement and any other documents to be put to the meeting that could reasonably be expected to be material to the members in deciding how to vote (see s218 and 219). Documents should be lodged through the ASIC Regulatory Portal using the 'Submit shareholder meeting materials – related party transactions or acquisition approvals' transaction. For more information, see how you lodge fundraising and corporate finance documents.

RG 76.117 If we consider that the meeting materials do not contain adequate disclosure to members, we can issue a comment letter that the entity is required to distribute to members along with the meeting materials: see s220(1) and RG 76.121–RG 76.126. The comment letter will also be available on ASIC's Australian Company Register.

Shortening period for document lodgement (s218(3))

RG 76.118 Entities may apply to us in writing to shorten the 14-day period in which we may review and comment on the documents: s218(3). Where we have reviewed the documents in a shorter period, we will notify the applicant and grant approval for a shorter period.

RG 76.119 Approval of the shorter review period does not suggest that the meeting materials comply with the requirements of the Corporations Act. Applications for shorter approval periods must be in writing, clearly outlining the reasons why the meeting materials should be dealt with in less than 14 days, and must be accompanied by the prescribed fee.

RG 76.120 Where an entity has applied for a shorter review period but re-lodges meeting materials with us under s221 (see RG 76.127), a new application must also be lodged in respect of the re-lodged documents.

ASIC comments on lodged documents (s220)

RG 76.121 We may make comments on the lodged documents, other than about whether the proposed resolution is in the entity's best interests: s220(1).

RG 76.122 We will usually issue a comment letter if, in our view, the meeting materials do not comply with the requirements of s218 and 219 (e.g. if the information set out in Table 2 is not included, or if the meeting materials include an independent expert report that does not analyse the transaction in accordance with our guidance: see RG 111.55).

RG 76.123 In determining whether to comment on the documents, we will consider case law and general principles governing notices of meetings. In particular, we will consider whether the documents fully disclose material facts and whether they are clear and unambiguous. In considering these matters, we will apply the guidance contained in this regulatory guide.

Full disclosure of material facts

RG 76.124 We will consider:

(a) whether the documents fully inform a member about the matter on which they will have to vote, and, in particular, whether the documents sufficiently explain the practical consequences of accepting the proposed resolution; or

(b) whether the documents omit a material matter.

RG 76.125 We will also consider the guidance outlined in this section about what should be included in meeting materials.

Clear, concise and effective

RG 76.126 We will consider:

(a) whether the information is presented in a manner that is not misleading;

(b) whether the documents are clear, concise and effective (as required by s249L(3) for notices of meeting issued by companies); and

(c) the effect the information will have on the member as an ordinary person in commerce or as an ordinary investor.

Note: See generally *Residues Treatment and Trading Co Ltd v Southern Resources Ltd* (1988) 14 ACLR 375 at 377–378; and *Devereaux* at 958.

Variation in lodged documents

RG 76.127 The notice and accompanying documents may vary from those lodged with us in ways that are not material (s221), but the resolution about the related party transaction must be the same as that lodged with us: s223. If there is a material change to the meeting materials that have been lodged with us under s218, regardless of whether the change relates to the related party resolution, the meeting materials should be re-lodged with us: s221(a)–(c).

Voting exclusions for resolutions at members' meetings

RG 76.128 Section 224 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 be given to the related party except where:

(a) the vote is cast as a directed proxy for a non-related party or associate (s224(2)); or

(b) we have declared that s224(1) does not apply (s224(4)) (see RG 76.131).

RG 76.129 Section 601LD provides that s224 does not apply to voting by members of a registered scheme on a resolution to approve a related party transaction. Instead, the voting exclusion set out in s253E, which excludes a responsible entity and its associates from voting on a resolution in which they have an interest, will apply. The courts have interpreted s253E strictly: see *Everest Capital Ltd as Trustee of the EBI Income Fund v Trust Co Ltd and Others* [2010] NSWSC 231.

RG 76.130 A resolution to approve the giving of a related party benefit will not be effective if it would not have been passed but for votes cast by excluded persons: s225(1). Entities should ensure that proper procedures are in place to implement the voting exclusions, and that the steps taken to implement the exclusions can be verified.

ASIC's relief powers

Shareholder resolutions

RG 76.131 We may only make a declaration for the purposes of s224(4), allowing a related party or an associate of a related party to vote, if we are satisfied that it will not cause unfair prejudice to the interests of any member of the company.

RG 76.132 It is unlikely that we will often make such a declaration. However, since the definition of related party in the Corporations Act is so broad, a declaration may be made, for example, if the applicant can show:

(a) that the association between the parties is strictly technical; and

(b) no real conflict of interest exists (e.g. an associate has no interest in the outcome of the transaction, the interests of the related party are the same as that of the company, or where all the parties are related parties).

RG 76.133 In granting this relief, we will consider the effect of relief on the interests of members, other investors and creditors.

Registered schemes

RG 76.134 We may use our powers under Ch 5C to grant relief from the voting exclusion in s253E.

Stapled entities

RG 76.135 Related party transactions are common in the context of stapling transactions involving registered schemes, where an interest in a registered scheme may only be traded with an interest in another registered scheme or a company, or other combinations of interests. In this situation, the entities that comprise the stapled group may be one economic entity. If a related party transaction within the stapled group does not transfer value outside the group, the transaction may not have a material effect on the value of a member's stapled securities and may not require a new investment decision.

RG 76.136 In these circumstances, we may exercise our powers under s601QA to grant relief from the member approval requirements under Pt 5C.7. If multiple registered schemes are involved, we may grant incidental relief under Div 1 of Pt 5C.2 in relation to the duties of:

(a) the responsible entity, set out in s601FC(1)(c) and s601FC(1)(e);

(b) officers of the responsible entity, set out in s601FD(1)(c), s601FD(1)(d) and s601FD(1)(e); and

(c) employees of the responsible entity, set out in s601FE(1)(a) and s601FE(1)(b).

Pro forma for relief

RG 76.137 Pro Forma 113 *Related parties or associates—voting* (PF 113) sets out the form of relief we will grant under s224(4). There is no pro forma for the relief we may grant under Ch 5C: see RG 76.134 and RG 76.136.

Publication of instruments

RG 76.138 Our relief under s224(4) will require the entity to publish a copy or a notice of the relief instrument, unless the application relates to confidential matters and it is impossible to publish it without defeating the purpose of the relief.

RG 76.139 We must publish a notice of the relief granted under s601QA in the *ASIC Gazette*: s601QA(4).

RG 76.140 We consider that members should know who can vote at the meeting and when a person, normally prevented from voting under the Corporations Act because they are receiving a financial benefit, may vote due to relief granted by ASIC. We generally expect entities to include in meeting materials an explanation of the types of relief granted to facilitate the lawful implementation of the proposed related party transaction, including relief from the voting exclusion provisions of the Act.

E Disclosure documents

Key points

Information about related party arrangements is information that investors reasonably require to make informed decisions about whether to acquire securities or managed investment products, and therefore should be included in disclosure documents.

Disclosure about related party arrangements should be made in a manner that ensures that investors understand how related party arrangements affect the entity overall and, if these arrangements are significant, the benefits and risks associated with them.

Disclosure to investors about related party transactions

RG 76.141 If entities that have entered into related party arrangements wish to offer securities or managed investment products, they will need to decide what information should be disclosed about those arrangements in the relevant disclosure documents.

RG 76.142 Table 3 identifies some relevant types of disclosure documents and summarises the legislative tests for the content of these documents. In applying these tests, entities must have regard to related party arrangements. Disclosure of information about related party transactions may also be required in other documents, such as continuous disclosure announcements and financial reports.

Context of the related party transaction

RG 76.143 The nature, extent and complexity of related party arrangements that exist for an entity, or within a corporate structure, is information that we consider investors reasonably require to make informed decisions about whether to acquire a security or managed investment product. For instance, details of a related party transaction involving payment of large financial benefits over a long period could be information investors reasonably require about the financial position of a company, as required by the s710 prospectus test.

RG 76.144 In deciding what disclosure about related party transactions should be included in a disclosure document, entities should consider the context in which the related party transaction occurs. A related party transaction may not be relevant to an investor's decision when considered on its own, but when grouped together with other transactions (for instance, transactions of a similar nature or with the same related party) and their cumulative impact on the entity is considered, they may become relevant and should be disclosed.

RG 76.145 Related party arrangements can be indicative of certain aspects of an entity's business model and the risks relating to that business model. This information can also show that some members may have different economic interests in an entity to others (i.e. some members may lend to, or provide other services to, the entity), which will affect the future prospects of the entity. Entities may need to disclose ongoing related party transactions because the conflicts of interest in connection with those transactions may continue to exist and pose particular risks to investors.

RG 76.146 Where possible, investors should be given information about the value of the financial benefits paid under related party arrangements in dollar terms. This information, as well as details about the proportion of the company's or registered scheme's revenue, expenses, assets or liabilities that is attributable to related party arrangements, is important to investors' decisions. (See Table 2 above for how information about the valuation of the financial benefit should be disclosed.)

RG 76.147 We expect entities to disclose information about existing related party transactions in disclosure documents except to the extent that:

(a) such disclosure may confuse investors by dealing with inconsequential matters; or

(b) investors already have adequate information about the related party transactions as a result of past disclosures so it is not reasonable for the information to be repeated in full.

RG 76.148 In meeting the legislative tests for disclosure documents in relation to related party arrangements, an entity should focus on presenting investors with the key information they need to know rather than making detailed yet confusing disclosures.

RG 76.149 Prospectuses and PDSs (and other disclosure documents, such as those identified in Table 3) should describe related party arrangements relevant to the investment decision. The description should address:

(a) the value of the financial benefit;

(b) the nature of the relationship (i.e. the identity of the related party and the nature of the arrangements between the parties, in addition to how the parties are related for the purposes of the Corporations Act or ASX Listing Rules—for group structures, the nature of these relationships should be disclosed for all group entities);

(c) whether the arrangement is on arm's length terms, is reasonable remuneration, some other Ch 2E exception applies or we have granted relief;

(d) whether member approval for the transaction has been sought and, if so, when (e.g. where member approval was obtained prior to the initial public offering (IPO) of securities in the entity);

(e) the risks associated with the related party arrangement; and

(f) the policies and procedures that the entity has in place for entering into related party transactions, including how compliance with these policies and procedures is monitored.

Other guidance

RG 76.150 We have given guidance in other regulatory guides about what we consider investors need to know about related party transactions in relation to certain industries and products. Our general view about related party disclosure outlined above should be interpreted with the benefit of this more specific guidance.

Note: For other guidance and proposals on the disclosure of information about related party arrangements in prospectuses and PDSs, see Regulatory Guide 45 *Mortgage schemes: Improving disclosure for retail investors* (RG 45), Regulatory Guide 46 *Unlisted property schemes: Improving disclosure for retail investors* (RG 46), Regulatory Guide 69 *Debentures: Improving disclosure for retail investors* (RG 69), Regulatory Guide 132 *Funds management: Compliance and oversight* (RG 32), Consultation Paper 133 *Agribusiness managed investment schemes: Improving disclosure for retail investors* (CP 133), Consultation Paper 134 *Infrastructure entities: Improving disclosure for retail investors* (CP 134) and Consultation Paper 141 *Mortgage schemes: Strengthening the disclosure benchmarks* (CP 141).

Table 3: Summary of content requirements for disclosure documents

Disclosure document	Content requirements relevant to related party arrangements
Prospectus	All the information that investors and their professional advisers would reasonably require to make an informed decision about the financial position, performance and prospects of the company: s710. Information about the nature and extent of interests, or amounts paid, given or agreed to be paid or given, to directors, proposed directors or promoters of the company: s711. All the information that investors and their professional advisers would reasonably require to make an assessment of the effect of the offer on the body (s713), including information excluded from a continuous disclosure notice reasonably required to make an informed decision about the financial position, performance and prospects of the company: s713(5).
Product Disclosure Statement (PDS)	Any information that might reasonably be expected to have a material influence on the decision of a reasonable person, as a retail client, whether to acquire the product: s1013E. Note: For registered schemes to which Div 4 of Pt 7.9 of the Corporations Regulations applies, the specific disclosures required by that division apply instead of s1013E. (For example, in the case of a simple managed investment scheme to which the division applies, all information required by Sch 10B of the Corporations Regulations must be disclosed, which includes the risks of the scheme.)

Disclosure document	Content requirements relevant to related party arrangements
Offer information statement	A copy of an annual financial report with a balance date that occurs within the past six months before the offer of securities. The annual financial report must be audited and prepared in accordance with the Australian accounting standards: s715(2). Related party disclosure in accordance with AASB 124 *Related party disclosures* must be included in the annual financial report.
Bidder's statement	If any securities (other than managed investment products) are offered as consideration under the bid—all material that would be required for a prospectus for an offer of those securities by the bidder under s710–713 (see above): s636(1)(g). If any managed investment products are offered as consideration under the bid—all material that would be required by s1013C (which refers to s1013E) to be included in a PDS given to a person in an issue situation for those managed investment products (see above): s636(1)(ga). In any case—information that is material to the decision-making by a holder of bid class securities whether to accept the offer under the bid: s636(1)(m).
Target statement	All the information that holders of bid class securities and their professional advisers would reasonably require to make an informed assessment about whether to accept the offer under the bid: s638(1).
Scheme booklet	All the information that is material to the decision-making by a creditor or member of the body that is known by the directors of the body and has not previously been disclosed to the creditors or members of the body: s412(1)(a).

Key terms

Term	Meaning in this document
AASB 124 (for example)	An Australian accounting standard made for the purposes of the Corporations Act (in this example numbered 124)
AFS licence	An Australian financial services licence under s913B of the Corporations Act that authorises a person who carries out a financial services business to provide financial services Note: This is a definition contained in s761A of the Corporations Act.
AFS licensee	A person who holds an AFS licence under s913B of the Corporations Act Note: This is a definition contained in s761A of the Corporations Act.
arm's length exception	The exception, set out in s210, to the requirement for public companies and registered schemes to obtain member approval to give a financial benefit to a related party
ASIC	Australian Securities and Investments Commission
Australian accounting standards	Standards made for the purposes of the Corporations Act
Australian Company Register	The register of companies maintained by ASIC
Ch 2E (for example)	A chapter of the Corporations Act (in this example, numbered 2E), unless otherwise specified
Corporations Act	*Corporations Act 2001*, including regulations made for the purposes of that Act
director	A director of a public company
disclosure document	Includes a prospectus, PDS, profile statement, offer information statement, scheme booklet or takeover document for the offer of securities or managed investment products, as the case may be
entity	A public company or a registered scheme
general meeting	A meeting of the members of a public company or registered scheme, as the case may be
meeting materials	The notice of meeting and explanatory statement
members' meeting	A meeting of the members of a public company or registered scheme, as the case may be
PDS	Product Disclosure Statement

Term	Meaning in this document
prescribed financial market	Has the meaning given to that term in s9 of the Corporations Act
Product Disclosure Statement	A document that must be given to a retail client in relation to the offer or issue of a financial product in accordance with Div 2 of Pt 7.9 of the Corporations Act Note: See s761A for the exact definition.
Pt 5C.7 (for example)	A part of the Corporations Act (in this example, numbered 5C.7)
registered managed investment scheme	A managed investment scheme registered under s601EB of the Corporations Act
registered scheme	Registered managed investment scheme
related party	Has the meaning given to that term in s228, or as modified by Pt 5C.7 for registered schemes, as the case may be
responsible entity	The public company named in ASIC's record of the scheme's registration as the responsible entity or temporary responsible entity of a registered scheme
RG 76 (for example)	An ASIC regulatory guide (in this example, numbered 76)
s208 (for example)	A section of the Corporations Act (in this example, numbered 208)
takeover document	A bidder's statement, target statement or explanatory statement for a scheme of arrangement

Related information

Headnotes

allowing directors with a material personal interest to attend and vote at board meetings and quorum requirements (s195, 196), allowing related party or its associates to vote on a resolution at shareholders' meeting (s224(4)), ASIC comments on documents (s220), content of notices of meeting and explanatory statements (s219), disclosure about related party transactions in other disclosure documents (s412, 636(1), 638(1), 710, 711, 713(5), 715(2), 1013E), factors to consider when deciding if a related party transaction is on arm's length terms (s210), shortening period for ASIC comments on lodged documents (s218(2))

Pro formas

PF 90 *Voting by interested directors*

PF 113 *Related parties or associates—voting*

Regulatory guides

RG 45 *Mortgage schemes: Improving disclosure for retail investors*

RG 46 *Unlisted property schemes: Improving disclosure for retail investors*

RG 51 *Applications for relief*

RG 69 *Debentures: Improving disclosure for retail investors*

RG 74 *Acquisitions agreed to by shareholders*

RG 111 *Content of expert reports*

RG 112 *Independence of experts*

RG 132 *Funds management: Compliance and oversight*

RG 136 *Funds management: Discretionary powers*

RG 181 *Licensing: Managing conflicts of interest*

Legislation

Corporations Act, s9, 189, 191, 195, 196, 208, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 230, 249L(3), 253E, 412(1)(a), 601LA, 601LB, 601LC, 601LD, 601LE, 601FC(1), 611, 636, 638, 710, 711, 713, 715, 1013C, 1013E and 1317D

Cases

ACI Operations Pty Ltd v Berri Limited [2005] VSC 201 (*Berri*)

ASIC v Australian Investors Forum Pty Ltd & Others (No 2) [2005] NSWSC 267 (*ASIC v Australian Investors Forum*)

Australian Trade Commission v WA Meat Exports Pty Ltd (1987) 75 ALR 287

The Bell Group Limited (in liq) v Westpac Banking Corporation (No 9) (2008) 70 ACSR 1 (*Bell Group*)

Boardman v Phipps [1967] 2 AC 46

Boulting v ACTAT [1963] 2 QB 606

Bray v Ford [1896] AC 44

Bulfin's Limited v Bebarfald (1938) 38 SR (NSW) 423

Centofanti v Eekimitor Pty Ltd (1995) 65 SASR 31

Chan v Zacharia (1984) 154 CLR 178

Claremont Petroleum NL v Cummings and Fuller (1992) 110 ALR 239 (*Claremont Petroleum*)

*Devereaux Holdings Pty Ltd v Parry Corporation (*1985) 9 ACLR 956 (*Devereaux*)

Duke Group Ltd (in liq) v Pilmer [1999] SASC 97

ENT Pty Ltd v Sunraysia Televisions Ltd (2007) 61 ACSR 626 (*Sunraysia*)

Everest Capital Ltd as Trustee of the EBI Income Fund v Trust Co Ltd and Others [2010] NSWSC 231

Fitzsimmons v The Queen (1997) 23 ACSR 355

Fraser v NRMA Holdings Limited (1995) 55 FCR 452

Granby Pty Ltd v Federal Commissioner of Taxation (1995) 129 ALR 503 (*Granby*)

Grand Enterprises Pty Ltd v Aurium Resources Ltd (2009) 256 ALR 1 (*Grand Enterprises*)

Re HIH Insurance Ltd (in prov liq) and HIH Casualty and General Insurance Ltd (in prov liq); ASIC v Adler and Others (2002) 41 ACSR 72 (*ASIC v Adler*)

Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41

Lion Nathan Australia Pty Ltd v Coopers Brewery Ltd and Others (2005) 55 ACSR 583

McGellin v Mount King Mining NL (1998) 144 FLR 288 (*McGellin*)

Orrong Strategies Pty Ltd v Village Roadshow Ltd [2007] VSC 1 (*Orrong*)

Permanent Building Society (in liq) v Wheeler (1994) 14 ACSR 109

The Queen v District Council of Victor Harbour; Ex parte Costain Australia Ltd [1983] 34 SASR 188

R v Byrnes & Hopwood (1995) 183 CLR 501

Residues Treatment and Trading Co Ltd v Southern Resources Ltd (1998) 14 ACLR 375

Streeter v Western Areas Exploration Pty Ltd [No 2] [2011] WASCA 17

Transvaal Lands Co v New Belgium (Transvaal) Lands & Development Co [1914] 2 Ch 488

Trustee for the Estate of the Late AW Furse No 5 Will Trust v FCT (1990) 21 ATR 1123 (*Furse*)

Warman International Ltd v Dwyer (1995) 182 CLR 544

Consultation papers and reports

CP 133 *Agribusiness managed investment schemes: Improving disclosure for retail investors*

CP 134 *Infrastructure entities: Improving disclosure for retail investors*

CP 141 *Mortgage schemes: Strengthening the disclosure benchmarks*

CP 142 *Related party transactions*

REP 233 *Response to submissions on CP 142 Related party transactions*

Media releases

04-206MR *Valuing options for directors and executives* (28 June 2004)

04-257MR *ASIC cracks down on related party disclosure* (10 August 2004)