



MEMO

To: Board of Directors
From: Company Secretary
Subject: **DEFINITION OF SPOUSE**

I am responding to the request from a shareholder for the Board to approve the transfer of shares to his 'de facto'.

As you know, the provisions in our Constitution require that a shareholder must follow the pre-emptive rights process if he wants to transfer shares to someone else, except in certain circumstances – which include transfer to a 'spouse'.

So the question arises – does 'spouse' include a 'de facto' partner?

The short answer is "yes".

Explanation

1. Clause 2(e) of Schedule 1 to our Constitution states that:

Unless the context indicates a contrary intention:

- (i) an expression in a provision of this Constitution that deals with a matter dealt with by a provision of the Corporations Act has the same meaning as in that provision of the Corporations Act; and
- (ii) an expression in a provision of this Constitution that is defined in section 9 of the Corporations Act has the same meaning as in that section.

2. Section 9 of the Corporations Act states that:

spouse of a person includes a de facto partner of the person within the meaning of the Acts Interpretation Act.

3. Sections 22A~C of the Acts Interpretation Act state that:

22A References to de facto partners

For the purposes of a provision of an Act that is a provision in which de facto partner has the meaning given by this Act, a person is the *de facto partner* of another person (whether of the same sex or a different sex) if:

- (a) the person is in a registered relationship with the other person under section 22B; or
- (b) the person is in a de facto relationship with the other person under section 22C.



22B Registered relationships

For the purposes of paragraph 22A(a), a person is in a **registered relationship** with another person if the relationship between the persons is registered under a prescribed law of a State or Territory as a prescribed kind of relationship.

22C De facto relationships

(1) For the purposes of paragraph 22A(b), a person is in a **de facto relationship** with another person if the persons:

- (a) are not legally married to each other; and
- (b) are not related by family (see subsection (6)); and
- (c) have a relationship as a couple living together on a genuine domestic basis.

(2) In determining for the purposes of paragraph (1)(c) whether 2 persons have a relationship as a couple, all the circumstances of their relationship are to be taken into account, including any or all of the following circumstances:

- (a) the duration of the relationship;
- (b) the nature and extent of their common residence;
- (c) whether a sexual relationship exists;
- (d) the degree of financial dependence or interdependence, and any arrangements for financial support, between them;
- (e) the ownership, use and acquisition of their property;
- (f) the degree of mutual commitment to a shared life;
- (g) the care and support of children;
- (h) the reputation and public aspects of the relationship.

(3) No particular finding in relation to any circumstance mentioned in subsection (2) is necessary in determining whether 2 persons have a relationship as a couple for the purposes of paragraph (1)(c).

(4) For the purposes of paragraph (1)(c), the persons are taken to be living together on a genuine domestic basis if the persons are not living together on a genuine domestic basis only because of:

- (a) a temporary absence from each other; or
- (b) illness or infirmity of either or both of them.

(5) For the purposes of subsection (1), a de facto relationship can exist even if one of the persons is legally married to someone else or is in a registered relationship (within the meaning of section 22B) with someone else or is in another de facto relationship.

(6) For the purposes of paragraph (1)(b), 2 persons are **related by family** if:

- (a) one is the child (including an adopted child) of the other; or
- (b) one is another descendant of the other (even if the relationship between them is traced through an adoptive parent); or
- (c) they have a parent in common (who may be an adoptive parent of either or both of them).

For this purpose, disregard whether an adoption is declared void or has ceased to have effect.

(7) For the purposes of subsection (6), **adopted** means adopted under the law of any place (whether in or out of Australia) relating to the adoption of children.



DISCLAIMER

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

© Copyright Company Secretarial Services Pty Ltd ABN: 41 074 535 345
www.companysecretary.com.au