



MEMO

To: Board of Directors
From: Company Secretary
Subject: **TRANSFER OF SHARE OPTIONS HELD BY DIRECTOR**

You have asked if the options for issue to directors approved by shareholders at the Annual General Meeting can be issued in, or transferred to, the name of a related party prior to exercise of the options.

To put the matter into context I mention some of the general elements of share options:

- options are, effectively, a right to require a company at some future time to issue shares in the company on payment of an agreed exercise price
- options are 'securities' under the Corporations Act and subject to the various relevant sections and provisions of that Act
- an Option Certificate, with terms and conditions attached, is issued as 'evidence' of the grant of options to a holder
- options can be transferred like any other security
- a company must maintain an Options Register, with copies of option documentation attached, pursuant to section 170 of the Act.

The terms of the options were set out in the AGM notice and they did not include any restrictions on the transfer of the options.

The options were issued to you in reliance on the exemption contained in section 708(12) of the Act, and not pursuant to a disclosure document (e.g., a prospectus). This exemption allows a company to issue securities (including options) without disclosure to:

1. a senior manager of the company, a related body of that senior manager, or a spouse of that senior manager; or
2. a body corporate controlled by the senior manager, a body corporate controlled by a related body of the senior manager, or a body corporate controlled by a spouse of the senior manager.

By ASIC Class Order 04/899 the definition of 'senior manager' is expanded to cover directors and the Company Secretary.

The expressions used in the above exemption – that it also covers a 'related body' or 'body corporate' controlled by the senior manager – are sufficiently broad to cover the



situation where options are transferred to a related party of the director (such as a corporate trustee administering a superannuation fund) controlled by either the director or his wife.

Whether the director/wife controls the body corporate to which it is intended to transfer the options depends upon whether either the director or his wife have the capacity to determine the outcome of decisions about operating and financial policies of the body corporate. In the event that the director intends to transfer the options to a corporate trustee of a superannuation fund of which he/his wife are directors, the element of control will be clearly satisfied, and the above exemption would apply to the transfer of the options to the corporate trustee. Similar considerations would apply if the trustees were the director and/or his wife personally.

It is suggested, as a 'formality', that a board resolution be passed approving the transfer. Such action would also have the effect of recording the related party transaction in the minute book as required for a public company.

Sample resolution (extract from a company's board minutes):

Directors' Share Options Transfers

The Board noted advices from the Company's lawyers to the effect that there seemed to be no impediment under the options terms, the Company's constitution, the ASX listing rules or the Corporations Act to the options granted to Directors A & B at the AGM being transferred into their super funds.

RESOLVED to approve Directors A & B transferring the 2,000,000 options held by each of them into their related party superannuation funds. A&B abstained from voting.

In order to effect the transfer of the options, it will be necessary to prepare a transfer form. This can be a 'normal' "off-market transfer" used for shares, suitably amended to include relevant details of the options issue, which should be acceptable to the share registry. As far as I am aware – at least in Queensland – stamp duty is no longer payable on an options transfer, at least for stock exchange listed company.

On receipt of the transfer form the Options Register should then be updated and a new Options Certificate issued.

As a listed company, directors will also have an obligation to disclose the transfer to the market on ASX Appendix 3Y.

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.