

Article Information

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A Helping Hand - Receiving Financial Assistance from a Company (Section 260A Corporations Act)

The Corporations Act 2001 (Cth) (the Act) restricts a company from providing financial assistance to acquire shares in itself unless certain conditions are satisfied. Financial assistance by a company can include loaning money for the purpose of acquiring shares in it's company but can also extend to granting a guarantee with or without other security and / or the payment of any stamp duty and / or due diligence costs.

It is important for companies that are considering providing financial assistance to prospective shareholders to be aware of their obligations under the Act.

The provisions

Under section 260A(1)(a) of the Act, there is a general prohibition on companies providing financial assistance to either a person or another company to acquire shares in the company. However, a company may only provide financial assistance in two circumstances:

1. Where there is no material prejudice to:
 - o the interests of the company or its shareholders; or
 - o the company's ability to pay its creditors.
2. If shareholder approval is granted.

The first approach is generally unfavourable as the validity of the financial assistance and whether it is considered to have been materially prejudicial, would ultimately be determined by the court. While financial assistance is not defined, the High Court has conveyed that financial assistance includes "*all conduct in connection with the process of acquiring the shares*"^[3] in itself and / or extends to the payment of any stamp duty and / or due diligence costs.

Alternatively, the most preferable approach is to obtain shareholder approval under s260B of the Act, which is colloquially known as a "whitewash procedure". This is done by a company passing a special resolution with no votes being cast by the individual or company acquiring the shares. In doing so, this removes any discretion as to whether the financial assistance meets the test under section 260A(1)(a) and therefore provides a full-proof procedure to follow to ensure the financial assistance is valid.^[4]

The procedure under section 260B

The procedure under section 260B of the Act requires the following:

1. the company must provide notice to its members of a meeting and provide the members with a statement setting out all material information to the decision on how to vote on the resolution;
2. prior to the notice of meeting being sent to the members, the notice of meeting and any accompanying documents must be lodged with ASIC;
3. the company must receive shareholder approval by way of a special resolution or a resolution agreed to by all ordinary shareholders;
4. if a special resolution is reached, this must be lodged with ASIC within 14 days of it passing; and
5. once shareholder approval has been given, a notice must be lodged with ASIC confirming that assistance has been

approved under section 260B of the Act.^[5]

Consequences for failing to comply with s260A

In the event there is a contravention of 260A, the financial assistance and any contract that may be in place will remain valid and the company is not guilty of an offence.^[6] However, any person involved in the loan, including any lenders, may be liable and subject to a civil penalty or criminal penalties where the person's involvement is dishonest.^[7]

Exemptions under s260C

There are some exemptions to the general prohibition in s260A, for example:

1. General exemptions where financial assistance is provided in the ordinary course of commercial dealing and consists of:
 - a. acquiring or creating a lien on partly paid shares in the company; or
 - b. entering into an agreement to make payments to the company on shares by instalments.
2. Special exemptions in certain circumstances for:
 - a. financial institutions,
 - b. subsidiaries of debenture issuers, and
 - c. employee share schemes.
3. Other exemptions include a reduction of share capital, a share buy-back, assistance under court orders or a discharge on ordinary commercial terms of a liability that the company incurred as a result of a transaction entered into on ordinary commercial terms. ^[8]

Summary

- Financial assistance may be provided by companies in certain circumstances. The most preferable approach is to seek shareholder approval of the assistance, known as the 'white-wash procedure'. This is because it eliminates any ambiguity as to whether the assistance is materially prejudicial to the company, its shareholders and / or its ability to pay creditors.
- It is important for companies considering providing financial assistance to be aware of all of their obligations under the Act.

For further information relating to financial assistance by a company, please contact Banking and Finance Partner, Greg Conomos.

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[\[1\]Corporations Act 2001 \(Cth\) s260A\(1\)\(a\) \('Corporations Act'\)](#)

[\[2\]Ibid. s260B.](#)

[\[3\]Connective Services Pty Ltd v Slea Pty Ltd \[2019\] HCA 33, \[35\].](#)

[\[4\]Ibid.](#)

[\[5\]Corporations Act \(n 1\) s 260B.](#)

[\[6\]Corporations Act \(n 1\) s 260D\(1\).](#)

[\[7\]Corporations Act \(n 1\) s 260D\(2\).](#)

[\[8\]Corporations Act \(n 1\) s 260C.](#)