

JCU NOMINEE DIRECTORS

GUIDELINES FOR INDEMNITY OF JCU NOMINEE DIRECTORS

Related Policies

- Indemnity, Insurance and Legal Claims Policy
- Policy for the Establishment and Management of the University's Part-Ownership or Significant Interest in a Non-controlled Entity
- Policy for the Establishment and Oversight of University-Controlled Entities

Operation of Guidelines

These Guidelines set out the procedure to be followed and matters to be considered by the Finance Committee when assessing applications made by JCU Nominee Directors (see paragraph 2 of Guidelines) for indemnity by JCU under the Pro-Forma Deed of Indemnity contained in **Attachment 3** to these Guidelines.

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Guidelines

1. The giving of the indemnity provided for under the Deed is a Type 1 financial arrangement for the purposes of section 60A of the *Statutory Bodies Financial Arrangements Act 1982* (Qld) (**SBFA**). As such, JCU is not permitted to enter into the Deed within the approval of the Queensland Treasurer.
2. On 3 September 2003, the Treasurer issued a general approval (**the SBFA Approval**) for JCU to provide an indemnity in certain circumstances. This approval relates only to the indemnity of –
 - (a) members of the JCU Council and
 - (b) members of JCU committees;
 - (c) JCU employees;
 - (d) consultants or contractors engaged by JCU; and
 - (e) students of JCU

where these persons are undertaking activities associated with discharging the statutory functions of the university;

and

provided that the Council has endorsed that JCU's risk mitigation and control strategies are appropriate to manage the risk of providing the indemnities.

3. For convenience, the persons (of whatever category referred to in paragraph 2) who serve on a board of directors of a company at the request of, and with the approval of JCU, **and** who are recognised by the Vice-Chancellor as nominee directors of JCU, are referred to in these Guidelines as Nominee Directors.
4. The provision of an indemnity outside of these circumstances is prohibited unless the further approval of the Treasurer is first obtained. The Deed must **not** be used to indemnify a person whose identity, activities or circumstances do not fall within the scope of the Treasurer's general approval.
5. Where JCU does not hold appropriate insurance coverage for the activities of indemnified persons, the Council must also be satisfied that risks are mitigated and warranted prior to the granting the indemnity.
6. These Guidelines are for use **only** in connection with the Deed and are not applicable in relation to other forms of indemnity, including by way of deed.
7. The Deed has been prepared as a pro forma and Recital B of the pro forma Deed of Indemnity states that "*the Officer holds office in the Company as a result of the Officer's employment by JCU or at the request of JCU*".
8. The Deed must **not**, under any circumstances, be used by JCU to indemnify any person **unless** that person is a JCU nominee director.

9. The Deed must **not**, under any circumstances, be used by JCU to indemnify a person in his or her capacity as:
 - (a) a member of the committee of an unincorporated association;
 - (b) a member of the managing committee of an incorporated association;
 - (c) an individual trustee of a charitable or other trust; or
 - (d) an office holder on any public or quasi public body that is not also a company under the *Corporations Act 2001* (Cth).
10. Whilst the Deed has been approved for use by the Council, it is the Council who must ultimately form the view on each application for indemnity. It is the role of the Finance Committee to assess each application and the surrounding circumstances and to make a recommendation to the Council.
11. Applications **must** be made in the form of the Statutory Declaration in **Attachment 2**. Incomplete or improperly completed Applications must not be considered. This includes Applications lodged where the applicant's signature has not been appropriately witnessed.
12. If an applicant holds multiple directorships, a separate application **must** be lodged for each directorship and different risks will be associated with each directorship in each company.
13. When assessing the risk to JCU of granting the indemnity and considering whether or not to recommend to the Council the granting of the indemnity to the applicant, the Finance Committee must consider the following points:
 - (a) What is the nature of the company's activities? Are its activities of a higher risk for directors than usual? For example, in some circumstances, workplace accidents or environmental incidents can result in directors being personally liable. Does the company's activities have a higher than usual risk of workplace accidents or environmental incidents?
 - (b) How did the applicant become a director and of how great an importance to JCU, and its aims and goals, is the applicant's participation in the company?
 - (c) What is the nature of any liability on the part of the applicant in existence as at the date of the applicant's Statutory Declaration that has not been met by the applicant or the applicant's company or that remains unresolved or is continuing liability?
 - (d) What is the nature of any acts or omissions by the applicant or the applicant's company prior to the date of the applicant's Statutory Declaration that may give rise to liability on the part of the applicant (as an officer of the his or her company) at some future date?
 - (e) What is the nature of any matters occurring in the course of or in relation to the applicant's company's activities (including the applicant's activities as

director) that may give rise to liability on the part of the applicant in his or her capacity as director at some future date?

- (f) Has the applicant's company taken out a Directors' and Officers' Insurance Policy? The extent and content of this policy (if any) should be considered.
- (g) Is the applicant currently covered by any of JCU's insurance policies? Consider both the identity of the applicant, the nature of the applicant's activities and the extent of coverage.
- (h) The extent of and nature of the indemnity contained in the Deed in terms of:
 - (i) the timing of the event giving rise to the liability and the time the liability arises; and
 - (ii) the types of liability covered by the Deed; and
 - (iii) the types of liability excluded under the Deed.

14. Relevant to JCU managing its risk in relation to JCU Nominee Directors as required by the SBFA Approval is the establishment of a system for appropriate information to be provided by JCU Nominee Directors (in their capacity as a Director of the relevant company) to JCU. It is recommended that this matter is dealt with by the relevant company adopting a policy which allows for the provision of information to JCU in relation to the affairs of the relevant company. A draft policy is set out in **Attachment 4**.

15. More detailed information in relation to the duties and responsibilities of Nominee Directors can be obtained by contacting the Manager, Legal and Compliance Services.

16. Where JCU is one of a number of shareholders, consideration should be given to the entering into of a shareholders agreement. Such agreements frequently contain clauses which regulate the types of arrangements which may or may not be entered into by a company only with the approval of the shareholders (or a specified percentage of them). This arrangement can be useful as shareholders, when considering whether or not they give their approval in such cases, are not bound by the same fiduciary obligations which bind company directors.

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ATTACHMENT 1

JCU NOMINEE DIRECTORS

APPLICATION FOR INDEMNITY

Applicant's name: _____ ("You")

Applicant's address: _____

Company's name:* _____ **ACN**

* A separate application form should be completed for each company

Nature of Company's Activities: _____

* attach separate sheet if you have insufficient space

Date of commencement as director: _____

* if you have served multiple periods, include the date of commencement of this period as director

- Reason for holding office:
- Nominee of JCU
- Required under terms of employment with JCU
- Requested by JCU to hold office
- * please provide details of this request

If you do not come within one of these categories you are ineligible under this Pro-Forma Deed of Indemnity and cannot apply for indemnity.

- Do you or the Company hold a current D&O Insurance Policy:
- Yes
- * attach copy of the policy/and or advise the name of the insurer and the policy number
- No

- Additional Information:
- * attach copies
- **attach any additional relevant information
- Copy of latest approved financial statements of the Company
- Copy of latest management accounts for the Company
- Copy of Constitution of the Company
- Copy of Shareholders' Agreement (if applicable)

JCU is permitted under section 60A of the *Statutory Bodies Financial Arrangements Act 1982* (Qld) to enter into Type 1 Financial Arrangements such as the granting of indemnities where JCU has the approval of the Treasurer. The Treasurer has issued a general approval to JCU that permits JCU to indemnify JCU employees and certain other persons where those persons are undertaking activities associated with discharging the statutory function of JCU.

However, this approval is granted on the basis that the Council of JCU endorses that JCU's risk mitigation and control strategies are appropriate to manage the risk of providing indemnities. Where JCU does not hold appropriate insurance coverage for the activities of JCU employees the Council must be satisfied that the risks are mitigated and warranted prior to the provision of the indemnity. Details of the persons who may be indemnified are set out in paragraph 2 of the Guidelines.

To facilitate the required endorsement by Council, you must complete and return the attached Statutory Declaration. You must have your signature witnessed by a solicitor, Justice of the Peace or Commissioner for Declarations.

ATTACHMENT 2
JCU NOMINEE DIRECTORS
STATUTORY DECLARATION

QUEENSLAND
TO WIT

I, _____ (insert your name) of _____
_____ (insert your address) in the State of
Queensland do solemnly and sincerely declare that:

1. I am a director of _____ (insert company name) ("**The Company**").
2. I have been a director of the Company since _____ (insert date).
3. I am not aware of any liability on my part (as an officer of the Company) that has arisen as at the date of this Statutory Declaration that has not been met by myself or the Company or that remains unresolved or is continuing liability, other than those matters (if any) set out in Annexure A.
4. I am not aware of any acts or omissions by me or the Company prior to the date of this Statutory Declaration that may give rise to liability on my part (as an officer of the Company) at some future date other than those matters (if any) set out in Annexure B to this Statutory Declaration, to the extent that they are not otherwise referred to in Annexure A.
5. I am not aware of any matter whatsoever occurring in the course of or in relation to the Company's activities (including my activities as director) that may give rise to liability on my part in my capacity as director at some future date, other than those matters (if any) set out in Annexure C to this Statutory Declaration, to the extent that they are not otherwise referred to in Annexures A and B.

I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1867*.

Declared by _____)
This day of _____)
in the presence of: _____)

A Solicitor/Justice of the Peace/Commissioner for Declarations

ATTACHMENT 3
JCU NOMINEE DIRECTORS
PRO FORMA DEED OF INDEMNITY

THIS DEED is made on the _____ day of _____ 20____

BETWEEN: JAMES COOK UNIVERSITY of Angus Smith Drive, Townsville in the State of Queensland
("JCU")

AND: THE PARTY IDENTIFIED IN ITEM 1 OF THE SCHEDULE of **ADDRESS** SET OUT IN **ITEM 2 OF THE SCHEDULE**
(the "Officer")

RECITALS:

- A. The Officer is an officer of the Company.
- B. The Officer holds office in the Company as a result of the Officer's employment by JCU or at the request of JCU.
- C. Subject to the terms of this Deed, JCU has agreed to indemnify the Officer to the extent that JCU would be permitted to indemnify the Officer under the Law if JCU was a company regulated by the Law and the Officer were an officer of JCU.

AGREEMENT:

1. DEFINITIONS AND INTERPRETATION

Definitions

In this Deed, unless the context otherwise requires:

- (a) **Company** means the Company identified in Item 3 of the Schedule;
- (b) **Excluded Liability** means any liability for which JCU would not be permitted under the Law to indemnify the Officer if JCU were a company regulated by the Law and the Officer was an officer of JCU;
- (c) **Law** means the Corporations Act 2001 (Cth);
- (d) **Liability** means civil liabilities, claims, actions, suits, proceedings, demands, losses, damages, costs, fees and expenses;
- (e) **Related Body Corporate** has the meaning given to that term in the Law;
- (f) **Relevant Liability** means a Liability arising after the date of this Deed where (or to the extent that) the act or omission giving rise to the Liability occurred

after the date of this Deed unless JCU has agreed in writing that that Liability is a Relevant Liability for the purposes of this Deed;

- (g) **Term** means the period of time commencing on the date of the Deed and continuing until this Deed is terminated by JCU or otherwise determined by law;
- (h) **Third Party** means any party other than the Company or a Related Body Corporate of the Company.

Interpretation

In the interpretation of this Deed:

- (a) singular includes plural and vice versa;
- (b) references to a person include a corporation, association, partnership, Government Authority, or any legal entity;
- (c) references to statutes include statutes amending, consolidating or replacing the statutes referred to and all regulations, orders in council, rules, by-laws and ordinances made under those statutes;
- (d) headings are used for convenience only and are to be disregarded in interpretation;
- (e) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
- (f) references to "writing" include all means of reproducing words in a tangible, permanently visible form in the English language;
- (g) a reference to anything after the words "includes" or "including" does not limit what else might be included.

2. INDEMNITY

2.1 JCU indemnifies the Officer against any Relevant Liability owed to any Third Party incurred by the Officer in the Officer's capacity as an officer of the Company.

2.2 This indemnity does not extend to:

- (a) any Excluded Liability; or
- (b) any Relevant Liability to the extent that the Officer is indemnified in respect of the Relevant Liability pursuant to an insurance policy that JCU, the Company or the Officer may have taken out in respect of the Officer or under which coverage is provided for the Officer.

2.3 Without limiting clause 3.1, this indemnity continues notwithstanding that the Officer ceases to be an officer of the Company or an employee of JCU.

2.4 This indemnity is subordinate to, but does not derogate from, any other indemnity given to any Officer including (without limitation) under the Company's constitution.

3. TERMINATION

3.1 JCU may terminate this Deed at any time by giving written notice to the Officer of such termination.

3.2 Termination of this Deed shall not affect JCU's obligations pursuant to this Deed prior to the giving of notice. For the sake of clarity, the indemnity contained in this Deed continues to apply to Relevant Liability:

(a) arising during the Term of this Deed; and

(b) Relevant Liability arising after the Term of this Deed to the extent that the act or omission giving rise to the Relevant Liability occurred during the Term of this Deed.

4. ASSIGNMENT

4.1 A party may not assign its rights under this Deed without the prior written consent of the other party.

5. THIRD PARTY RIGHTS

5.1 No person other than the parties to this Deed has or is intended to have any right, power or remedy or derives or is intended to derive any benefit under this Deed.

6. PROPER LAW

6.1 This Deed must be construed in accordance with and governed by the laws of Queensland.

6.2 Each party irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of Queensland and courts of appeal therefrom. Each party waives any right it has to object to an action being brought in those courts including, without limitation, by claiming that the action has been brought in an inconvenient forum or that those courts do not have jurisdiction.

Executed as a Deed by the parties on the date set out above.

The Seal of the **JAMES COOK UNIVERSITY**
was hereto affixed by the University Secretary

as the officer duly authorised by the
University Council.

SIGNED, SEALED & DELIVERED by)
_____)
in the presence of:)

.....
Signature

.....
Witness

.....

SCHEDULE

ITEM 1 - Officer _____

ITEM 2 - Officer's address _____

ITEM 3 - Company _____

ITEM 4 - A.C.N. _____

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**POLICY ON DISCLOSURE OF INFORMATION
BY DIRECTORS**

Company:

A.C.N.

Effective Date:, 20.....

1. BACKGROUND

- 1.1 The Appointor is member of or stakeholder in the Company.
- 1.2 As a consequence of the Appointor's interest in the Company, the Appointor has appointed a Nominee Director to the Board.

2. DEFINITIONS

"Act" means the *Corporations Act 2001* (Cth);

"Appointor" means, with respect to each Nominee Director, the person or entity set out in Column 2 of the table in Schedule 1 to this Policy, and includes any appointor of a director appointed to the Board after the Effective Date where that director is a Nominee Director, irrespective of whether the director is noted in Schedule 1;

"Approved Materials" means any Materials identified in Schedule 2 to this Policy;

"Board" means the Board of Directors of the Company;

"Company" means the company identified above;

"Effective Date" means the date set out above, being the date on which the Policy was approved by resolution of the Board;

"Materials" means any:

- (a) written or electronic document of any kind whatsoever; and
- (b) information or knowledge obtained orally that is not otherwise recorded in written or electronic form,

of which the Nominee Director becomes aware or otherwise obtains in the course of his or her duties as director of the Company;

“Nominee Director” means the director or directors of the Company recorded in Column 1 of the table in Schedule 1 to this Policy who are a nominee director of the appointor identified in Column 2 of the table in Schedule 2, and also includes any director appointed to the Board after the Effective Date and who is a nominee director of an appointor, irrespective of whether the director is noted as such in Schedule 1;

“Related Party” has the meaning attributed to it by the Act;

“Subsidiary” has the meaning attributed to it by the Act;

“Unapproved Materials” means Materials other than Approved Materials and includes any Materials identified in Schedule 3 to this Policy.

3. RELEASE OF APPROVED MATERIALS

- 3.1 Subject to clause 3.2 and in recognition of the Appointor’s interest in the Company and its activities, the Board authorises the release of Approved Materials by the Nominee Director to the Appointor without the need for further permission or consent by the Board.
- 3.2 The Board may restrict or otherwise prohibit the release of Approved Materials by the Nominee Director to the Appointor by giving notice in writing to the Nominee Director at the time the Approved Materials are provided to or otherwise become available to the Nominee Director.
- 3.3 A notice given by the Board pursuant to clause 3.2 must set out the manner in which the release of the Approved Materials is restricted or otherwise prohibited.
- 3.4 If the Nominee Director is in doubt as to whether certain Materials are Approved Materials, the Nominee Director should seek clarification from the Board prior to releasing the Materials to the Appointor.

4. RELEASE OF MATERIALS OTHER THAN APPROVED MATERIALS

- 4.1 The Nominee Director must not release Unapproved Materials to the Appointor other than in accordance with this clause 4.
- 4.2 If a Nominee Director wishes to release Unapproved Materials to the Appointor the Nominee Director must obtain the consent of the Board in writing prior to releasing the Unapproved Materials.
- 4.3 The Board may impose on the consent to release the Unapproved Materials to the Appointor such conditions as it considers appropriate having regard to the circumstances of the release and the nature of the Unapproved Materials in question, including the signing of confidentiality agreements or deeds of restraint relating to the use of the material by the Appointor.

4.4 For the purposes of clause 4.2:

- (a) a reference to “in writing” includes a minute recorded in the minutes of meeting of the Board; and
- (b) the Nominee Director is not permitted to vote in respect of any resolution of the Board on the subject of whether or not the Unapproved Materials may be released.

5. CONFIDENTIALITY

5.1 The Nominee Director must take all reasonable steps to ensure that Materials released by the Nominee Director to the Appointor are:

- (a) kept confidential by the Appointor, its officers, employees and agents; and
- (b) not disclosed to any person without the consent of the Board.

5.2 The obligations upon the Nominee Director under clause 5.1 do not apply to any disclosure of Materials:

- (a) required by law;
- (b) to solicitors, barristers or other professional advisers under a duty of confidentiality to the Appointor;
- (c) to an insurer or financial institution with whom the Appointor deals in connection with its operations;
- (d) to a government body or other competent authority in relation to the Appointor reporting obligations as a tertiary education provider in Australia including but not limited to reports required in connection with the Appointor’s government funding (if applicable); and
- (e) containing information already in the public domain (other than because of an unauthorised breach of confidentiality by the Appointor, its officers, employees or agents).

6 USE OF MATERIAL TO GAIN ADVANTAGE OR CAUSE DETRIMENT

6.1 Notwithstanding any clause of this Policy or terms or conditions upon which the Board may authorise the release of Materials to the Appointor, materials released by the Nominee Director to the Appointor are authorised on the condition that the Appointor does not improperly use the Materials or information contained in the Materials to:

gain an advantage for the Appointor or someone else; or

to cause detriment to the Company.

6.2 When releasing Materials to the Appointor, the Nominee Director must take all reasonable steps to ensure that the Appointor does not breach clause 6.1.

7 DATE OF EFFECT

7.1 This Policy is effective from the Effective Date and remains in effect until repealed by the Board.

SCHEDULE 1

Nominee Directors and Appointors

Column 1	Column 2		
Director	Appointor	Start Date	End Date

SCHEDULE 2

Approved Materials

If any of the Materials identified in this Schedule are also identified in Schedule 3, Schedule 3 prevails and the Materials are Unapproved Materials.

Information that is generally available. Information is considered generally available if:

- (a) it consists of a readily observable matter;
- (b) it consists of information or data that can be obtained by searching a public register;
- (c) it consists of deductions, conclusions or inferences made or drawn from other information or data that is generally available.

Financial statements of the Company or a Subsidiary, whether audited or not and including management accounts, balance sheet and profit and loss prepared for the Board.

Board papers and minutes of Board meeting or board papers and minutes of board meetings of a Subsidiary.

Minutes of meetings of committees and any reports prepared by Board committees for the Board – including but not limited to audit and risk committees howsoever named.

Information relating to any action by a regulator or government authority against the Company or a Subsidiary that may have an impact of the Company's financial situation, reputation or ability to lawfully continue its operations or an impact on the Subsidiary's financial situation, reputation or ability to lawfully continue its operations.

The appointment of a receiver, manager, liquidator or administrator in respect of any loan, credit, trade debt, borrowing or securities held by the Company or a Subsidiary of the Company.

The terms and conditions of significant contracts to which the Company or a Subsidiary is a party, including where those contracts are entered into with a Related Party of the Company.

Agreements entered into between the Company and a Related Party of the Company.

Changes in senior management, auditors and officers of the Company or a Subsidiary (including Chief Financial Officer and Chief Executive Officer).

The fact that the Company or a Subsidiary had resolved to, or is considering, entering into new of business or the discontinuance of an existing business.

The financial condition, results of operations, forecasts and earning performance of the Company or a Subsidiary.

Changes in the Company's financial forecasts or expectations or in the financial forecasts or expectations of a Subsidiary.

Details of actual or potential negative publicity for the Company, a Subsidiary or either of company's senior management and officers.

Legal proceedings threatened or commenced against the Company, a Subsidiary or any of either company's officers, whether civil or criminal.

Allegations of any breach of the law by or in respect of the Company or a Subsidiary, whether the punishment for which is civil or criminal.

Significant changes in technology or the application of technology which could affect the Company's business or the business of a Subsidiary.

Natural disasters or accidents that have particular relevance to the business of the Company, a Subsidiary or either of their suppliers or customers.

Events or occurrences that have an impact on the operations of the Company or a Subsidiary.

A proposed acquisition or disposal of a material asset of the Company or a Subsidiary.

Details of transactions for which the consideration payable or receivable is 5% or more of the written down value of the Company's assets or the assets of a Subsidiary.

A change in accounting policy adopted by the Company or a Subsidiary.

SCHEDULE 3

Unapproved Materials

If any of the Materials identified in this Schedule are also identified in Schedule 2, this Schedule prevails and the Materials are Unapproved Materials.

1. Materials which, if released or disclosed, would result in the Company, a Subsidiary or a Related Party of the Company being in breach of law (for example privacy obligations) or a term of a contract to which the Company, the Subsidiary or the Related Party of the Company, as the case may be, is a party.
2. Materials sufficiently relating to, involving or affecting the Appointor that the interests of the Appointor could be considered to be in conflict with the interests of the Company, a Subsidiary or a Related Party of the Company (as the case may be), including but not limited to situations where the Appointor is in competition with the Company, a Subsidiary or a Related Party of the Company (as the case may be).

SCHEDULE 4

Overview of Legal Issues

1. NOMINEE DIRECTORS AND APPOINTORS

- 1.1 *A nominee director is a person appointed as a director of a company by another party, called an appointor, who has an interest or stake in that company. The appointment is intended to give the appointor a voice on the board.*
- 1.2 The right that appointors have to appoint a nominee director to a company's board may be derived from a term in a shareholders' agreement, the company's constitution or from historical convention or practice.

2. REPORTING AND DEALING WITH INFORMATION – CASE LAW

- 2.1 A nominee director is often expected to report material information about the company to his or her appointor where the nominee director becomes aware of the information in the course his or her appointment. Directors, however, are under a fiduciary duty not to disclose confidential information received in their capacity as directors. In addition, directors have a duty under the Act not to use information improperly to gain an advantage for themselves or others, including their appointors, or to cause detriment to the company.
- 2.2 There is some discrepancy in the case law dealing with this issue. In the NSW Supreme Court case of *Bennetts v Board of Fire Commissioner*, a strict approach was adopted in the context of a nominee director appointed by union to the board of a statutory body. In that case, the nominee director sought to acquire a copy of a legal opinion obtained by the statutory body. The body had commissioned the opinion whilst seeking a basis upon which to appeal a decision by the appointor union. The nominee director refused to give the statutory body an undertaking that the copy of the legal opinion would not be provided to his appointer, the union. The Court refused the nominee director access to the legal opinion because it was not in the interests of the statutory body to disclose that information to the union.
- 2.3 In *Harkness v Commonwealth Bank of Australia*, the NSW Supreme Court held that a nominee director's duty of confidentiality to the company overrides his or her duty to communicate information that comes to the director's attention in the course of the position to the appointor. In that case, Mr Coran, an officer of the Commonwealth Bank, was appointed as the bank's representative on the Disputes Committee of a company named Austraclear. In the course of his appointment, Coran was provided with confidential information about the solvency of Spedley, a client of the bank. Coran did not disclose this information to the bank. Spedley later made a substantial payment to the bank which Spedley's liquidator subsequently claimed was a preference on the basis that the bank was imputed with Coran's knowledge.

- 2.4 The Court confirmed the general rule that all directors are ordinarily under a duty to communicate to their company information that they know is important to the affairs of the company. However, the Court held that nominee directors' duty of confidentiality to the company on whose board they sit will subsume any duty they might otherwise owe to their appointor.
- 2.5 In *Fitzsimmons v R*, the WA Court of Criminal Appeal considered the conflict between a director's duty of confidentiality to one company and his or her statutory duty to act in good faith in the best interests of his or her company. In that case, a director of Company D was aware of the Company D's financially desperate position. Notwithstanding this knowledge, the director took part in a decision by the board of Company K to enter into a transaction involving the payment of money by Company K to Company D. Information that had come to the director in his capacity as a director of Company D and which would have affected Company K's decision to deal with Company D was not communicated by the director to Company K. The Court found the director to be in breach of his statutory duty to Company K.
- 2.6 The Court held that a nominee director could not avoid his or her obligations to a company to which he or she was appointed simply because he or she owed a duty of confidentiality to another company that appointed him or her.
- 2.7 These cases appear to be at odds – *Harkness* suggests that the duty of confidentiality overrides any other duty owed by a nominee director to his or her appointor, whereas *Fitzsimmons* suggests that a director's statutory duty to act honestly in the affairs of the company is not subject to the duty of confidentiality. It is possible to reconcile the cases on the basis of whether a director is in a position to actually take positive steps upon a conflict of interest arising. The decision in *Fitzsimmons* may be confined in its application to directors who are actively involved in making decisions which they know are disadvantageous to the company upon whose board they are appointed.

3. REPORTING AND DEALING WITH INFORMATION – KEY POINTS

- 3.1 By reference to the decisions discussed above, the best approach for a nominee director dealing with information is as follows:
- (a) when reporting to his or her appointor, a nominee director should take care not to divulge confidential information without obtaining prior consent from the company on whose board the director sits. It is sometimes difficult to classify what is confidential and what is not, and indeed board members may have differing views. The safest course to take is to obtain approval from the board by resolution to the communication of any information outside the board. The company's constituent documents (such as the shareholder's agreement) may authorise specific types of information to be disclosed;

- (b) if a nominee director becomes aware of confidential information about his or her appointor and this information is important to the affairs of the company, then the director should ensure that he or she does not breach any duty of confidentiality which he or she owes to his or her appointor by disclosing that information to the company without the prior consent of the appointor. However in order to discharge his or her duty to act in the best interests of the company as a whole, the nominee director will have to consider his or her position and adopt an appropriate course of action regarding his or her role and actions as a board member. By reference to the comments of the Court in *Fitzsimmons*, the circumstances may warrant any one or more of the following responses:
- (i) disclosure of interest;
 - (ii) steps to refrain from voting or even to absent himself or herself from the meeting during discussion of the impugned business;
 - (iii) positive action to identify clearly the perceived conflict and to suggest a course of action to limit the possible damage; or
 - (iv) resignation from the board.

What is required will vary from case to case depending on the subject matter, the state of knowledge of the adverse information, the degree to which the director has been involved in the transaction, whether the director has been promoting the cause, the gravity of the possible outcome, the exigencies and commercial reality of the situation and so on;

- (c) on the other hand, if through the nominee director's involvement on the board of a company, the director becomes aware of confidential information that is important to the affairs of his or her appointor, the director will again have to consider the issues in (b) above. It is difficult to say what will be required and much will depend on the nature of the particular duties owed to the appointor by the nominee director. However, based on the decision in *Bennetts*, the nominee director will not ordinarily be at liberty to disclose the confidential information to his or her appointor. However, as discussed above, this position may be altered by the company's constitution or shareholders agreement.

4. MODIFICATION AND ATTENUATION OF DUTIES

- 4.1 The pressure that nominee directors might otherwise face in relation to conflicts of interest can be somewhat relieved by modification and attenuation of duties through careful drafting of the constituent documents of the company. Guidance may be had to the company's constitution and the shareholders agreement in determining the extent and scope of the fiduciary duties of the nominee directors and deciding what is in the best interests of the company.

- 4.2 In *Levin v Clark*, directors nominated to the board of the company by a mortgagee were held to have been entitled to act primarily in the interests of the mortgagee after a default by the mortgagor company. The plaintiff acquired the majority shareholding in a company and at the same time mortgaged the shares to the vendor to secure payment of the purchase price. In accordance with the terms of the share sale agreement, the articles of association were amended so that the powers of the governing directors (who were nominated by the vendor) were exercisable only if the majority shareholder defaulted on the loan.
- 4.3 The Court found that the breadth of the fiduciary duty had been narrowed by agreement amongst the body of shareholders. He held that the parties agreed that the vendor's representatives would remain on the board so that upon default arising under the security document they could immediately commence to act in the affairs of the company in order to protect the interests of the mortgagee. The Court held that in the circumstances the nominee directors did not cease to act in the interests of the company by acting solely in the interests of the mortgagee. Importantly, the judge recognised that the extent and degree of the fiduciary duty depends on the circumstances and in particular, the instrument governing the exercise by the fiduciary of its powers.
- 4.4 In *Japan Abrasive Materials Pty Ltd v Australian Fused Materials Pty Ltd & Ors*, one of the nominee directors refused to agree to a proposal to expand the company's plant by building a second furnace. It was contended that the director was in breach of obligations embodied in the shareholder's agreement, in particular, the duty to act with regard only to the interests of the company. The director relied on a clause in the shareholders agreement that provided that major expansion projects required the unanimous approval of all directors or all shareholders at a general meeting.
- 4.5 The Court found that this provision permitted the directors to vote in accordance with the wishes of the shareholders who appointed them, so that the same result is achieved as if the shareholders had voted themselves at a general meeting. It is well established that shareholders voting at a general meeting are not under a fiduciary duty when exercising that power.
- 4.6 The Court stated that:
- "It is always open to shareholders by unanimous agreement, to attenuate the fiduciary duties which the directors of their company would otherwise owe to it".*
- 4.7 Unfortunately the case law has not dealt with attempts to modify duties imposed by the Act. It is doubtful whether these statutory duties can be contracted out of through agreement between the shareholders.
- 4.8 While constituent documents may not allow the nominee director to avoid their statutory duty to exercise powers and discharge duties in good faith in the best interests of the corporation, careful drafting may assist in shaping a judge's view of what is in the best interests of the company.

- 4.9 Similar steps may be taken to specify, in the shareholders agreement, the circumstances in which a nominee director is at liberty to pass information on to his or her appointor. However this is unlikely to address a nominee director's possible liability for breach of the statutory duty not to improperly use their position or information to gain an advantage for themselves or someone else or cause detriment to the corporation.
- 4.10 Under section 187 of the Act, a director of a wholly owned subsidiary will be taken to act in good faith, in the best interests of the wholly owned subsidiary if:
- (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;
 - (b) the director acts in the best interests of the holding company; and
 - (c) the company is not insolvent at the time the director acts, or does not become insolvent due to that act.
- 4.11 This section will only be of benefit to an appointor if the subsidiary company in question is a wholly owned subsidiary of that appointor. It will not be of use where the subsidiary company has members other than the appointor.

5. CONCLUSION

- 5.1 The law surrounding nominee directors is complex and in some circumstances, conflicting court precedent may be difficult to reconcile. On this basis, it is desirable for the board of directors of a company to have a policy on the disclosure of information by nominee directors to their appointors.
- 5.2 A policy on disclosure provides useful guidance to boards and nominee directors on the circumstances in which information may and may not be disclosed to appointors. It also outlines the circumstances in which further conditions are placed on this disclosure and when steps may be taken to prohibit disclosure in respect of information that may otherwise be disclosed.
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