

Can the Australian Alpaca Association Limited (AAA) make a payment or waive fees to a member in a case of hardship?

The AAA will be able to give a member a financial benefit where that member suffers financial hardship provided that doing so does not contravene the Corporations Act 2001 or the AAA's Constitution.

Does giving such a financial benefit contravene the Corporations Act 2001?

Section 254SA of the *Corporations Act 2001* provides: "A company limited by guarantee must not pay a dividend to its members."

Dividends are not defined in the dictionary to the Corporations Act 2001 but are taken to be payments made out of profits of a company issued to members and in the case of public companies and subject to a company's constitution issued in proportion to the number of shares held.

A company limited by guarantee does not issue shares and therefore cannot issue dividends by reference to shareholdings, however, section 254SA must be regarded as a prohibition on the distribution of profits to a company's members. A financial benefit given to alleviate hardship is not usually of the nature of a distribution of profits and therefore should not be in contravention of section 254SA. That a company can give a financial benefit to a member that does not constitute paying a dividend is borne out by the provisions of Part 2E.1 of the Act.

Part 2E.1 of the Corporations Act 2001 deals with circumstances where member approval might be required for a public company to give a financial benefit to a related party (including to a member). Section 208 provides that for a public company to give a financial benefit to a related party of the public company the public company must:

- a) Obtain the approval of the public company's members (in the manner set out in the Act) and give the benefit within 15 months after the approval; or
- b) The giving of the benefit must fall within an exception set out in sections 210 to 216.

There are two exceptions that might apply to the AAA in giving a financial benefit to a member. They are:

- 1) **Section 213** Member approval is not needed to give a financial benefit to a related party in a financial year if the total of the financial benefit(s) given to the member within that financial year is less than or equal to the amount prescribed by the Corporations Regulations 2001; or
- 2) **Section 215** Member approval is not needed to give a financial benefit if:
 - (a) the benefit is given to the related party in their capacity as a member of the public company; and

- (b) giving the benefit does not discriminate unfairly against the other members of the public company.

Regulation 2E.1.01 provides: "For subsection 213(1) of the Act, \$5,000 is prescribed."

Therefore, the AAA would not need to seek member approval to provide a financial benefit to a member in case of hardship if the total benefit provided in a given financial year is not more than \$5,000 or if the benefit does not discriminate unfairly against the other members of the AAA. Ideally, the AAA should keep any hardship benefits given to a member to under \$5,000 in a given financial year. As a matter of practice, financial hardship benefits would usually be considerably less than that figure.

If the AAA wished to give financial hardship benefits to a member of more than \$5,000 in a given financial year it would need to consider whether such a payment did not discriminate unfairly against other members of the company. It is arguable that, whether it discriminated unfairly would depend on whether another member in a similar hardship situation would be eligible for and likely to receive a similar benefit. This might depend on the proportion of the net assets of the company that provision of such a benefit would represent. If a hardship payment of \$5,000 to every member of the company would exceed the net assets of the company then perhaps it could be argued that a financial benefit of that magnitude would discriminate unfairly against other members of the company.

Does giving such a financial benefit fall outside the AAA Constitution?

Clauses 2.1(w) 3.2 and 3.3 of the AAA Constitution state:

Clause 2 Objects of the Company

- (w) To expend money in any way deemed fit by the Company with a view to improving the value of any business or property of the Company or of otherwise directly or indirectly advancing its interests or that of some or all of its Members:

Clause 3.2 Payments in good faith to an Officer or Member

Nothing in this Constitution prevents the payment in good faith to an Officer, Director or Member:

- a) Remuneration for services rendered to the Company;
- b) Goods supplied to the Company in the ordinary course of business;
- c) Interest at a rate not exceeding for the time being fixed for the purposes of this clause by the Board on money borrowed by the Company from an Officer, Director or Member;
- d) Out-of-pocket expenses incurred by the Officer, Director or Member on behalf of the Company where the amount payable does not exceed an amount previously approved by the Board; or

- e) Reasonable rent for premises let to the Company by an Officer, Director or Member.

Clause 3.3 Not for Profit

The Company shall operate for the pursuit of the objects and not for the pursuit of profit for distribution to the Members.

The provisions of the Constitution make it clear that the AAA may make payments to Members as recompense for services provided or actions undertaken for the benefit of the Company but does not specify that the AAA may make payments or forego income to support members suffering financial hardship.

Sub-clause 2.1(w) of the Constitution does indicate that the AAA may make payments to or on behalf of members where that would directly or indirectly advance its interests or that of some or all of its members. Assisting members suffering financial hardship as the result of illness, accident or environmental disaster can be seen as advancing both the interests of the AAA (as the peak alpaca industry body) and that of some or all of its members.

Conclusion

The AAA can give a financial benefit to a member where that member suffers financial hardship provided that:

- a) The total financial benefit does not exceed \$5,000 in a financial year or does not discriminate unfairly against the other members of the AAA;
- b) Giving the financial benefit will advance the interest of the AAA, the alpaca industry or the member and other members in a similar position, directly or indirectly; and
- c) The provision of the financial benefit falls within the guidelines given under the AAA's Hardship Policy.