

TECHNICAL ISSUES – Your Company and the law



If you're a director or secretary of a small company, you must follow the requirements set out in the Corporations Act 2001 (Corporations Act).

Even if you appoint an agent to look after the company's affairs, you, not the agent, may still be held responsible for those legal obligations.

What does the law expect of you personally?

As a director, you must:

- Be honest and careful in your dealings at all times;
- Know what your company is doing;
- Take extra care if your company is operating a business because you may be handling other people's money;
- Make sure that your company pays its debts on time;
- See that your company keeps proper financial records;
- Act in the company's best interests, even if this may not be in your own interests, and even though you may have set up the company just for personal or taxation reasons, and
- Use any information you get through your position properly and in the best interests of the company. Using that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company may be a crime or may expose you to other claims. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.

If you have personal interests that might conflict with your duty as a director, you must generally disclose these at a director's meeting. This rule does not apply if you are the only director of a proprietary company.

What work must a director do?

You and any other directors will control the company's business. Your company's constitution (if any) or rules may set out the directors' powers and functions.

You must be fully up-to-date on what your company is doing:

- Find out and assess for yourself how any proposed action will affect your company's business performance, especially if it involves a lot of the company's money;
- Get outside professional advice when you need more details to make an informed decision;
- Question managers and staff about how the business is going;
- Take an active part in director's meetings.

You should only be a company director or a company secretary if you are willing, able and have enough time to put in the effort.

Avoid any company where someone offers to make you a director or secretary on the promise that 'you won't have to do anything' and 'just sign here'. You could be exposing yourself to many legal liabilities.

Can you sell your shares to the public?

Proprietary companies are generally not allowed to raise money from the public by selling shares. Avoid anything to do with illegal fundraising.

Can anyone be a director or secretary?

You must not act as a director or secretary (or manage a company) without court consent if you:

- Are an undischarged bankrupt;
- Are subject to a personal insolvency agreement or an arrangement under Part X of the Bankruptcy Act 1966 (Bankruptcy Act) that has not been fully complied with;
- Are subject to a composition under Part X of the Bankruptcy Act and final payment has not been made, or
- Have been convicted of various offences such as fraud or offences under company law, such as a breach of your duties as a director or insolvent trading. If you have been convicted of one of these offences you must not manage a company within five years of your conviction. If imprisoned for one of these offences, you must not manage a company within five years after your release from prison.

If you become bankrupt, enter into personal insolvency agreement or are convicted of a relevant offence at a time when you're a director or secretary then you automatically lose that office. The company must then notify ASIC that you're no longer a director or secretary of the company. ASIC can also ban you from being a company director in certain situations.

If you're not allowed to be a company director or secretary, you're not allowed to manage a company. It is a serious offence to set up dummy directors while you really manage the company.

Directors must also be 18 years or older.

What happens to dishonest directors?

Every year, the courts send dishonest and reckless company officers to prison, and impose heavy fines and award damages.

As the company watchdog, ASIC investigate corporate crime. ASIC may take a number of steps against directors who fail in their duties.

What company records must you keep?

As a director, the law makes you personally responsible for keeping proper company records.

You must see that the company keeps up-to-date financial records that:

- Correctly record and explain its transactions (including any transactions as a trustee); and
- Explain the company's financial position and performance.

All companies must have financial records so that:

- True and fair financial statements of the company can be prepared if needed;
- Financial statements can be conveniently and properly audited if necessary, and
- The company can obey the tax laws.

Company housekeeping: other records and registers

All company officers must make sure that the company attends to some basic 'housekeeping' matters. The directors remain ultimately responsible for the company's compliance with the Corporations Act.

When a company is set up, you must:

- Register your company name with ASIC and obtain an Australian Company Number (ACN);
- Have a registered office. (If your company doesn't occupy the same address as the registered office, then you must have written consent from the person who occupies the registered office).

Make sure that you:

- Display the company name at every place at which your company carries on business and that is open to the public. Also, the company must display its name and the words 'registered office' prominently at its registered office.
- Display the company name, the words 'Australian Company Number' (or ACN) or 'Australian Business Number' (or ABN) and the relevant number on:
 - The common seal (if the company has one);

- Every public document of the company;
- Every negotiable instrument (eg. cheque, promissory note) of the company, and
- All documents lodged with ASIC.

Your company must keep:

- Registers of members (shareholders);
- Registers of option holders (if you have them);
- Minutes of general meetings;
- Minutes of meetings of directors;
- Registers of charges created by the company over company property (s271 of the Corporations Act was removed from registration under the *Personal Property Securities Act 2009*. You are required to have this register and make entries up until this point in time), and
- Financial records that enable an assessment of the company's financial position and performance and are sufficient for financial statements to be prepared (and audited if necessary) for at least seven years after the transactions are completed.

Your Annual Statement

Each year within a few days after your company's review date (usually the anniversary of your company's registration) ASIC will send your company annual statement to one of the following:

- Your electronic inbox if you have registered to use the electronic lodgement systems;
- The address of your registered agent if you have appointed one (eg. Nash Solutions Pty Ltd);
- Your nominated mailing address if you aren't registered to use our electronic lodgement systems, or
- Your company's registered office address if none of the above apply.

If you have not received your annual statement within five days after the review date, you should contact us.

Check your annual statement

The annual statement sets out the company's details recorded in ASIC's register, such as the names and addresses of its directors and secretary, registered office, principal place of business, ultimate holding company (if any), share details and member's details (members' names and addresses only apply to proprietary companies).

If these details are correct and no other changes have occurred that require you to notify ASIC, then within two months after the review date:

- You need to pay the annual review fee shown in the invoice that accompanies the annual statement, and
- The director(s) need to pass a solvency resolution.

If any details on the statement are no longer correct, you must update them using Form 484 *Change to Company Details*. You have 28 days from the statement's issue date to lodge the form. ASIC may also require information to be lodged (eg. where they notice that data is missing).

Pay fees

To avoid the payment of late fees or other non-compliance action you must:

- Pay the annual review fee within two months after the review date;
- Lodged Form 484 to update your company's details if they change during the year, within 28 days after the change, and
- Lodge Form 484 (if required) to update your company's details, within 28 days after your annual statement's issue date.

Pass a solvency resolution

The company's directors must pass a solvency resolution within two months after the company's review date, unless the company has lodged a financial report with ASIC within twelve months before the review date.

A **positive** solvency resolution means that the directors think that there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable. You don't have to lodge notification of a positive solvency resolution with ASIC, but you must pay the company's annual review fee. Payment of the fee is taken to be a representation by the directors that the company is solvent.

A **negative** solvency resolution means that the directors think that there are not reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable. If the directors pass a negative solvency resolution we must be notified using Form 485 *Statement in relation to company solvency* within seven days after the resolution has been passed.

If the directors don't pass a solvency resolution within two months after the company's review date, ASIC must be notified using Form 485 within seven days after the end of the two month period following the review date.

Please contact us for more information or if you believe your company details require updating.

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