



MEMO

To: Board of Directors

From: Company Secretary

Subject: **ALTERNATE DIRECTOR – ACTING WITHOUT SPECIFIC REQUEST**

At our recent board meeting regular director Mr S was absent (he had sent in an apology because he was unable to attend) – but he had not indicated that Mr D, his Alternate Director should attend the meeting as his alternate.

As you know, I queried that and suggested that if Mr S had not specifically requested Mr D act as his alternate then perhaps Mr D did not have the authority/power to so act. The chairman then said that he would accept Mr D was present as Mr S's alternate, but that I should look into the matter and advise.

In the subsequent board discussion Mr D asked also if my view meant that he did not have the authority to sign Circulating Directors' Resolutions either if Mr S was 'out of town' or otherwise appeared to be unavailable, without Mr S's express authority or knowledge.

One could even take this question a little further and ask what if Mr S actually told Mr D not to attend the board meeting as his alternate, but Mr D did in any case – perhaps at the express request of the chairman (knowing Mr S was not able to attend, but perhaps not knowing what he had said to Mr D) – would his (i.e., Mr D's) vote on a matter be validly cast. On this point some commentators suggest that an alternate is 'bound' to follow the directions of the appointor, in which case surely Mr D could not act as Mr S's alternate if Mr S told him not to attend the board meeting (regardless of whether or not the chairman wanted him to be present).

I have searched legal and other sources for an answer to these issues, but cannot come up with a specific article/reference on the point. So all I can do is offer my comments and thoughts.

Alternate Director's Powers

Mr D was appointed pursuant to Rule 5 of the company's constitution and I note the following extracts in relation to an Alternate Director:

5.1 ".....to attend a Board meeting or act as a Director at any time when that Director is not available"

5.2 ".....the Company must provide the Alternate Director with notice of Board meetings....."

5.3 ".....may attend Board meetings and vote in place of the Director who has appointed them"



5.4 “.....appointed by more than one Director, then that Alternate Director is entitled to one vote for each appointment”
on which I comment:

5.1 certainly suggests that Mr D could attend board meetings (and sign CDR's) when Mr S is not available, even if Mr S knows nothing about it nor given specific direction.

5.2 was Mr D given notice of the board meeting – I believe so. I mention that Mr D is also alternate to Mr S in ServCo and in that company's constitution (which, again, provides the terms of appointment in Rule 67) the notice of meeting can only be given to Mr D if so requested by Mr S – this is the same provision as Sec 201K of the Corporations Act and, in fact, the same wording as our previous constitution (under which Mr N was appointed alternate to Mr T).

5.3 he is clearly entitled to vote.

5.4 whilst not relevant to this point, would allow Mr D – who has, in fact, been appointed by more than 1 director – to be present as alternate to all directors for which he is alternate and to have more than 1 vote. However, you are reminded that when the board first approved Mr D's appointment the condition was imposed that he could not act for more than one regular director at any one time.

In summary then, having reviewed the matter and the constitution, I have reached the conclusion that the chairman's view is correct and Mr D's acting as alternate for Mr S – even without Mr S's knowledge – was valid.

However, I would suggest that I may well reach a different conclusion on reviewing another company's constitution.

Board Papers

The only area which is not touched on by our constitution is whether Mr D is entitled to a copy of the board papers – that might accompany the meeting notice, or be distributed later or handed out at the board meeting. On the other hand, in ServCo, if the requirement is that Mr S must request that Mr D be given notice of the meeting, one would assume that, at the very least, Mr S would have to request/authorise Mr D getting a copy of the board papers.

Some constitutions cover this off too – again, some saying a copy of all board papers must be given to the Alternate Director, others saying only if requested by the regular director.

Of course, as you know, access to board papers/minutes is a very sensitive area and generally can only be given to 'directors' – but does that extend to an Alternate Director. In my opinion, this is one that we should get legal advice on.

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.