MEMO

To: Board of Directors

From: Company Secretary

Subject: **APPOINTMENT OF ALTERNATE DIRECTOR**

---

1. The basic principle is that no Director, including an Alternate, can be appointed until he consents IN WRITING (see section 201D of the Corporations Act). Also, the appointing Director should make any such appointment in writing signed by him and specifying the terms of appointment.

2. Unless a Company's Constitution specifically prohibits Alternate Directors then they are allowed under the Corporations Act (even if the Constitution is silent on the matter).

3. In fact, many Constitutions actually include rules governing the appointment of Alternates, in which case such rules must be followed.

4. The rules may, for example, either allow the permanent Director to simply appoint an Alternate OR (more usually) require the Board to actually approve the appointment. In some Constitutions 'the Directors' can appoint the Alternate, that is by all individually or collectively agreeing, because there might be some urgency about the matter with the appointment required before the next Board meeting can be held.

5. Where the Constitution is silent then the appointment MUST, in any case, be approved by the Board.

6. If the Board appoints the Alternate Director (or approves the appointment) then the operative date is the date of Board approval.

7. Once appointed, the appropriate form must be lodged with ASIC (within 28 days) and include – pursuant to section 205B(2) of the Corporations Act – the terms of the appointment covering, for example, terms, duties and conditions of what the Alternate is empowered/entitled to do.

8. An Alternate's terms should be clear on, for example, attendance at board meetings, receiving notices/documents/board papers, power to vote, etc and the circumstances in which/when the Alternate is to perform other acts in the capacity of a Director, any restrictions on his acting, ability to sign (documents, cheques, etc) on behalf of the Company, remuneration, benefits, etc, as well as his responsibilities and obligations as Alternate.

9. An Alternate Director continues in office either for a specific period, until he resigns or until his appointment is terminated by the permanent Director.

10. When an Alternate exercises the Director's powers, that is just as effective as if the permanent Director was exercising them.

11. An Alternate is not the agent of the appointing Director and so, conversely, the Director cannot be held responsible for acts or omissions of the Alternate.

12. Unfortunately, the liability position of an Alternate Director is somewhat unclear – there is nothing specific in the Act and enquiries with ASIC merely say it "depends on the terms of appointment" and "seek your own legal advice". Enquiries to other practising company secretaries suggest that, on the majority opinion, an Alternate's liability may be no less than that of the permanent Director whilst he is actually acting on behalf of that Director.

13. In other words, it seems that an Alternate is legally responsible for his own acts just as he would be if he were a permanent 'full' Director and he is subject to all the statutory duties and obligations imposed on a Director, including general fiduciary duties and liabilities, and must act honestly. And perhaps he may be additionally under a duty to exercise active discretion.

14. Moreover, appointing an Alternate does not constitute the assignment of the office of Director by the appointor, the Alternate being authorised to act only in the absence or unavailability of the appointing Director.

15. In a case (*Playcorp v Shaw* [1993]) on these points it was held the Alternate had no status whenever the appointing Director was present. Whilst I have not read the case, I understand that it means at the very least that if, for example, the Director is somewhere in the office then the Alternate cannot sign documents/cheques as Alternate – the Director would have to be physically away from the office (and probably should have specifically empowered the Alternate to so act during his absence).

16. In some situations it may be that an Alternate is just appointed for one meeting and the statutory procedures/filings are not fully observed – but there are in fact no statutory exemptions allowing this situation – so all processes must be followed in every case.

17. There is nothing in the Act – but there could be in a Constitution – to prohibit the appointment of multiple Alternate Directors; i.e., a Director might appoint 2 Alternates, just in case 1 is not available (although having 2 Alternates would no doubt require very clear rules on how/when they act as it may be 'awkward' if both turned up for a meeting).

18. Another variation is that 1 person can be the Alternate for 2 or more Directors – and he would get a vote for each. Similarly a Director can be the Alternate for another so, again, he would get 2 votes (i.e., 1 for himself and 1 as Alternate of the other).