



MEMO

To: Board of Directors
From: Company Secretary
Subject: **ALTERNATE DIRECTOR: TERMS – SCOPE**

As discussed, the Corporations Act ('CA') requires that when notice of an Alternate Director ('Alternate') appointment is lodged with ASIC under sec 205B(2) "the terms of their appointment (including terms about when the alternate director is to act as a director)" must also be lodged. The relevant Form 484 states that "these terms must include details such as ... capacity to sign instruments and attend meetings".

Your appointment was pursuant to Rule 65 of the company's former Constitution which states in the first sub-section "... a director may appoint an alternate to exercise some or all of the director's powers for a specified period". It is these 'powers' and/or when they can be exercised and to what extent that must now be clarified/quantified.

I set out below what I see as matters to be considered and/or decided on in this regard:

1. Receive notice of board meetings

The former Constitution, under which you were appointed, states that "If the appointing director requests the Company to give the alternate notice of directors' meetings, the Company must do so." Whereas, by the way, the new Constitution states " the Company must provide the Alternate Director with notice of Board meetings, as if that Alternate Director was a Director of the Company."

In my experience the former is the more common wording – so perhaps our brand new Constitution should be amended to reflect the former! Also, note that the CA [sec 201K Replaceable Rule] only provides that if the permanent/appointing Director requests the Company to give the Alternate notice of board meetings then the Company must do so.

Recommendation: That the Alternate only be given notice of board meetings when specifically requested by the appointing Director. In practice this would probably only be if/when the Director knows he will be absent from a board meeting and actually wants his Alternate to attend.

2. Provision of board papers



If the Alternate is not receiving notice of meetings then I would suggest he should also not be given the board papers. Conversely, if the Alternate is to receive notices then I would think he must also be given the board papers.

Recommendation: That the Alternate be given board papers only if/when so requested by the appointing Director.

3. Attend board meetings

Whether or not the Alternate is given notice/papers, his ability to actually attend – speak and/or vote at – meetings must be clear. In my opinion, the principal reason for appointing an Alternate is for him to attend and participate in board meetings in the absence of the permanent Director.

This is not covered in the old Constitution, but is clear in the new one which states “An Alternate Director may attend Board meetings and vote in place of the Director who has appointed them (provided that Director is not present at the Board meeting).”

Recommendation: That the Alternate be entitled to attend board meetings if/when requested by the appointing Director and that he have the same full powers as the Director would have at such meeting.

4. Sign Circulating Resolutions

The new Constitution states that a Circulating Resolution is valid (in lieu of a resolution passed at a formal board meeting) “if all the Directors entitled to vote on a resolution sign a document”. Basically the same words were in the former Constitution. But in neither case is there specific reference to an Alternate’s powers in such cases.

So, if the appointing Director is entitled to vote but is absent then I believe the Alternate could sign instead. However, I think such ability should only be exercised if the Director has specifically advised of his unavailability for a certain day/period and has asked the Alternate to sign. I don’t think the Alternate should sign merely because the Director ‘cannot be found’ at the time of seeking signatures on a Circulating Resolution.

But if the appointing Director is not entitled to vote then I think the situation is different.

There appears to be no reference in either Constitution as to whether in cases where some directors are not entitled to vote (eg, because of a related party interest) there still needs to be a minimum number of directors signing (ie, compared with a formal board meeting where the quorum is 2). So the question arises, would there in fact be any need to even involve the Alternate in signing a Circulating Resolution just because the permanent Director is not entitled to vote. I suppose in theory there could be a situation where all permanent Directors are not entitled to vote, but surely in such a case they would put the matter to shareholders rather ask the Alternate to sign.



Recommendation: That the Alternate be empowered to sign Circulating Resolutions only when the Director has in advance advised that he would not be available for a period and asked that the Alternate sign during his absence.

5. Distribution of board minutes

If the Alternate attends a board meeting then I believe he should receive a copy of the minutes of that meeting. For other meetings he is probably not legally entitled to see the minutes – but I can find no cases/references on this. However, perhaps it is a good idea if in fact the board did provide a copy of all minutes to the Alternate so that, even if he gets nothing else, he is aware of what is happening/being decided at board level in case he does have to attend and participate in a board meeting and then can meaningfully contribute with at least some background knowledge.

Recommendation: That the Alternate be provided with a copy of the minutes of all board meetings.

6. Seek information and inspect records

It is a normal 'right' of a Director to be able to discuss, to the extent appropriate, the company's affairs with company executives (subject to any necessary protocols), obtain relevant/background information, inspect records/files and review financial accounts.

However, I don't believe this 'right' would automatically extend to an Alternate at all times during his tenure, but perhaps be limited to situations where he has been provided with the board papers because he has been requested to attend a particular board meeting by the Director. Apart from that I would have thought he should approach either the appointing Director or the chairman for additional information.

Recommendation: That the Alternate's right to seek information and inspect records generally be restricted to when he has been specifically requested by the Director to attend a board meeting, or undertake some other task, and he needs such information/ details to properly equip himself to carry out his directorial role.

7. Attend committee meetings

There appears to be no legislative or Constitution guidance on being Alternate for the appointing Director in such situations, but I'm sure it would depend on the circumstances. For example, if the Director is a member of the Audit Committee then it may be appropriate that his Alternate stand in for him at such meetings if he can't be there himself.



Recommendation: That the Alternate attend (and receive papers, minutes, etc) committee meetings when specifically requested by the Director, subject to the concurrence of the company (or committee) chairman.

8. Capacity to sign documents

In practice I have never come across an Alternate doing anything other than attending board meetings in the stead of his appointing Director.

However, given that our former Constitution – under which your appointment terms are based – refers to an Alternate having “some or all of the director’s powers” (and similar words are in the new Constitution) and that the relevant ASIC form requires terms to be stated “such as capacity to sign instruments” then it seems appropriate that this aspect be clarified.

Again, I would suggest that this power devolve to the Alternate only during a ‘planned’ period of absence of the permanent Director when he has specifically requested the Alternate to cover this role for a certain period. I don’t think the Alternate should sign merely because the Director is temporarily absent from the office.

Recommendation: That the Alternate’s ability to sign company documents be restricted to periods when the appointing Director has specifically asked him to stand in during his absence.

9. Capacity to sign cheques

Again, something I’ve never come across, but I think policy should be similar to signing documents. Obviously, surely the Alternate could not sign a cheque twice (ie, once under his personal authority or capacity in some other role and once as Alternate) under any circumstance.

Recommendation: That the Alternate’s power to sign cheques be restricted to periods when the appointing Director has specifically asked him to stand in during his absence.

10. Assume executive powers

I cannot see any intention in the Constitution – or case/common law – that being appointed an Alternate would/could also extend to taking over general executive powers, at least for brief periods, where the appointing Director is an executive. In my opinion this could only apply if the Alternate was ‘formally’ taking over the executive role, for example whilst the Director is on leave.

Recommendation: That an Alternate’s terms not include the assumption of general executive powers that an appointing Director might have without the sanction of the full board.

11. Assume delegated authorities



Similarly to some of the above situations, I would think that as a general rule an Alternate should not 'automatically' assume a permanent Director's delegated authority levels to act/approve/authorise certain matters/actions/expenditure, etc within the company and/or commit the company to anything.

Recommendation: That the Alternate not assume any delegated authorities unless approved by the full board.

12. Undertake company business

In general I would not think it an Alternate's role to, at least formally, undertake company business, perform duties and/or act as if he was a full Director. If he does such I would think that would be in the capacity only as a company representative without any formal powers or authorities.

Recommendation: That the Alternate not be generally empowered to undertake company business (acting as an Alternate), although he may otherwise utilise such/similar powers in some other capacity (eg, as an executive, employee or representative) acting for the company.

13. Qualify for benefits

It appears to be unusual for an Alternate to receive any remuneration, fees or other benefits for acting in that role, but I cannot see anything prohibiting that, or indeed the Director himself paying his Alternate for so acting.

Note that whilst the former Constitution was silent on this matter, the new Constitution clearly states "Alternate Directors are not entitled to any remuneration from the Company."

However, it is normal that an Alternate be reimbursed for expenses and again in the new Constitution it clearly states "An Alternate Director is entitled to reasonable travelling, accommodation and other expenses incurred in attending meetings of the Board or of the Company or while otherwise engaged on the business of the Company on the same basis as other Directors."

Recommendation: That the company not pay Directors fees to an Alternate but that he be reimbursed expenses when acting as an Alternate.

14. Acting as Alternate for more than one Director

As you have been appointed Alternate to 2 different permanent Directors then the question arises on the extent of your terms where acting for both.

Whilst our former Constitution doesn't cover this, nor is there anything in the CA, our new Constitution states "If an Alternate Director has been appointed



by more than one Director, then that Alternate Director is entitled to one vote for each appointment.” This appears to cover voting in meetings, but probably little else. So, in my opinion, an Alternate could not, for example, sign a document requiring 2 Directors’ signatures (eg, a contract or agreement being executed pursuant to CA sec 127) twice – nor, I believe, would it be wise corporate governance – as Alternate to both appointing Directors.

Recommendation: That the Alternate’s power to act in that capacity representing 2 different Directors be restricted to when present and voting at a board meeting.

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.