



MEMO

To: Board of Directors
From: Company Secretary
Subject: **CALLING A DIRECTORS' MEETING**

You have asked what notice [period] must be given to directors to call a valid board meeting.

The only Corporations Act reference is sec. 248C (Replaceable Rule) which states that directors must be given 'reasonable' notice.

Otherwise a company's constitution (and/or a Shareholders' Agreement, if there is one) governs directors meetings - see Article 46 of our Constitution.

There is no specific notice period that I can see in our Constitution for holding directors' meetings and, in fact, Article 46.3 states (with wording similar to a great majority of constitutions):

"A Director may at any time convene a meeting of the Directors."

However, Articles 46.5 & 46.6* of our Constitution may be relevant given the circumstances you have outlined - particularly the latter in this case I assume - although perhaps the strict requirements stated there may be considered a bit 'old fashioned' – eg, what is 'visible communication' and what is the relevance these days of addresses in/out-side the State. But I believe the issue today was that it was unclear whether all directors had received adequate notice and/or had agreed to such meeting at short notice. I am sure common/case law would say that a couple of hours notice was not reasonable and if one of the directors did not agree because he could not make it then, in my opinion, such meeting should not happen - particularly if that director is the one to which any contentious matter relates.

For case law refer to:-

- *Mitropoulos v. Greek Othodox Church* and *Roma Industries v. Bliim* regarding the entitlement of directors to receive notice
- *Toole v. Flexihire* regarding the notice period being 'fair and reasonable' and that all directors should be entitled to attend if they want to and represent their interests
- *Barron v. Potter* where the meeting was found to be invalid because one director did not agree to holding the board meeting.

Notice of Meeting



Whatever provisions are contained in a constitution about a notice period and method of giving due notice, such notice must be given 'somehow'.

In the constitution of another company with which I'm involved it says:

“Reasonable notice must be given individually to every director by phone or other means.”

In practice, then, the most common way of calling a board meeting – outside of what may be regular [monthly] meetings – is by the chairman, company secretary or another director phoning each other director to ask if it suited them to hold a board meeting at such and such a time/ date and to advise the reason/agenda items for such meeting. This could be followed up by written confirmation (if time allowed). An alternative is to foreshadow/arrange a board meeting by email, but in that case it would probably be 'polite' if possible to at least phone all directors and say “there's an email coming about an urgent board meeting”.

There is no set format at law to call a board meeting, but written notice is probably the most appropriate ('safest') as it makes it clear when it will be, plus it facilitates the agenda/matters which will be considered to be clearly enunciated. Again, there is no formal/legal requirement as to how an agenda should be structured.

If a company holds a regular monthly board meeting (on say the 3rd Friday in the month at 10:00am) so all directors know about it well in advance and have it noted in their diary for the year, then there should be no doubt about when meetings are due. Moreover, when board papers are sent out – say a week beforehand – then that too is a reminder to directors of an impending meeting.

Shareholders' Agreement

In some companies there is a Shareholders Agreement in place which covers a number of areas that regulate the ownership and control of a company. And those areas can include the calling of board meetings (which may be more stringent to what is in the constitution, and will override it).

Typical wording can be a clause such as:

“Unless all directors agree otherwise, each director and his alternate (if any) will be given not less than 7 Business Days notice of each Board meeting and 3 Business Days notice of the agenda for the meeting and of the matters proposed to be discussed at the meeting (such notice being accompanied by a copy of all the Board papers relating to that meeting) unless he consents otherwise. Failure to give notice of a meeting to each director and each alternate director will, unless waived by a Special Resolution of the Board [ie, at least 75% voting in favour], invalidate the meeting.”

and may be quite restrictive with a clause like:



“At any meeting of the Board, the Board may not discuss or otherwise deal with any significant item of business of which notice was not given in the notice of the Board meeting.”

* for reference these Articles read:

“46.5 Unless otherwise decided by the Directors, notice of every meeting of Directors, shall be given by delivering the same to, or by letter, facsimile or other form of visible communication to each Director at an address notified by him to the Secretary as his address for receipt of notice. If such address is outside the State then a copy of such notice shall also be given in any of the aforementioned modes to the address (if any) within the State notified by such Director to the Secretary as his address in the State for the receipt of notices.”

“46.6 If, prior to any meeting of Directors, the Secretary is advised by the Chairman of Directors or by any other Director that any urgent or contentious business is or may be transacted at such meeting, notice of such meeting shall be given by letter, facsimile, or other form of visible communication to the address of a Director outside the State notified by him to the Secretary as his address for the receipt of notices. The notice under this Article shall contain a statement of the general nature of the urgent or contentious business to be transacted.”

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.