



MEMO

To: Board of Directors
From: Company Secretary
Subject: **CHANGE TO PUBLIC COMPANY TYPE**

The Board of a company may seek to change its “type” to “public” for a number of reasons, the principal one usually being to enable it to undertake public capital raising to expand its business.

The process to change from a “proprietary” to “public” company involves the following steps:

1. Board Meeting

The Board needs to meet to discuss and minute the reasons for the proposed change, to formally resolve to recommend to shareholders a change to “public” company type and to call an [Extraordinary] General Meeting for that purpose, to approve the wording of the EGM Notice and to authorise its signing by the Company Secretary.

The Board also needs to decide whether a new Constitution is necessary. Often a new “public company” specific Constitution is appropriate although the existing Constitution will usually suffice (subject to any Corporations Act provisions for public companies then over-riding any conflicting articles of the Constitution).

2. EGM Documents

The EGM Notice, Explanatory Memorandum, Proxy Form and Letter to Shareholders are finalised, printed and despatched.

If a new Constitution is proposed shareholders would usually be advised in the EM or Letter that it is available in need (by hard copy or by email) or posted on the Company’s website, rather than mail it to all shareholders.

3. Timing

A minimum 21 days’ clear advance notification is necessary for the EGM – subject to the Company’s Constitution and/or unless any Circulating Resolution and/or ‘short notification’ (requires 95% of voting rights to approve in writing)



procedures are utilised – so, including Notice posting/delivery days I would normally say a minimum 4 weeks to be on the safe side.

4. Extraordinary General Meeting

A resolution in favour of a change to “public” company type requires the passing of a “special resolution”; ie, the consent of 75% of shareholders present in person and/or by proxy (subject to any contrary wording in the existing Constitution not in conflict with the Corporations Act).

5. ASIC

Forms 205 & 206 are lodged with ASIC after the EGM – together with any new Constitution.

Then follows the “gazettal period”; ie, one month after publication (which may not be until up to a couple of weeks after lodging the Forms) of the Company’s intention to change type in the Commonwealth Government Gazette. After the one month date – if there have been no objections (eg, by creditors) – ASIC issues a new “Certificate of Registration on Conversion to a Public Company”. This is the date the change takes effect.

6. Following Change of Type

With the change to “public” company a number of things/matters must be dealt with/ actioned/have effect, etc. In particular:

- By no later than the effective date (which will be known in advance because of the gazettal period) the Company must have a minimum three (3) Directors and a Company Secretary. [Note: for a public company at least 2 of the Directors and the Company Secretary must be Australian residents.]
- Directors need to be more conscious of the Corps Act sections covering ‘related party interests’ – particularly in relation to voting restrictions (Sec. 195) – and difficulties that could arise with ‘related party benefits’ – Chapter 2E.
- The Company must clearly display a notice showing “Registered Office of [the Company]”. And all stationery, cheque book, written references to the Company, use of Company name, etc must indicate its new type.
- Within 1 month of the effective date an Auditor must be appointed, although his written consent must first be obtained. Such appointment must be ratified at the next AGM. Ref CA Secs. 327-328.



- Annual Accounts must be audited and lodged with ASIC by 31 October each year (as well, if the Company becomes a Disclosing Entity – ie, have 100+ shareholders following a prospectus raising – it must lodge audit-reviewed half yearly accounts) and must be sent to shareholders (usually as part of an Annual Report) by 31 October.
- An AGM must be held by 30 November.
- Annual ASIC fee increases to \$1,000.

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.