



MEMO

To: Board of Directors
From: Company Secretary
Subject: **APPOINTMENT OF COMPANY SECRETARY**

Part 2D.4 (sections 204A ~ 204G) and Part 2D.5 (secs. 205A ~ 205G) of Chapter 2D of the Corporations Act cover the appointment and other principal requirements of a Company Secretary.

Appointment

Sec. 204A states that a public company must appoint at least 1 person to be the Company Secretary and a proprietary (private) company may appoint a Company Secretary. In both cases at least 1 Company Secretary must be an Australian resident.

A Company Secretary must be at least 18 years old [sec. 204B(1)]. However, by sec. 204B(2) a person disqualified from managing corporations under Part 2D.6 of the Act is generally disallowed from being appointed – refer sec. 204B(2).

Under sec. 204D the Company Secretary can only be appointed by the Board of directors (unlike directors who can be appointed by the shareholders).

Consent

Before being appointed Company Secretary a person must give their prior written consent (which document must be retained by the company) – sec. 204C.

Terms and Conditions of Office

A company's constitution usually provides for the appointment of a Company Secretary, and usually states that they hold office on the terms and conditions 'as agreed by the directors' or 'as set down by the Board'.

This usual constitutional provision is mirrored in Replaceable Rule 204F (for companies which do not have a constitution) that states:

“A secretary holds office on the terms and conditions (including as to remuneration) that the directors determine.”



Such terms and conditions may also be varied by the Board at any time. Further the Board can terminate or remove a Company Secretary at any time, subject to any notice period in any agreement or contract of employment.

Clause 54 of our Constitution provides:

“The Board may appoint one or more Secretaries, for any period and on any terms (including as to remuneration) as the Board resolves. Subject to any agreement between the Company and the Secretary, the Board may vary or terminate the appointment of a Secretary at any time, with or without cause.”

Acts of the Company Secretary

Sec. 204E refers to the effectiveness of acts by Company Secretaries, although it does not really address the validity of such (other than to say that an act is not invalid even if the Company Secretary's appointment is ineffective).

Secs. 128 ~ 130 contain rules about the assumptions people are entitled to make when dealing with a company and its officers – including the Company Secretary.

The Board may vary any decision previously made by it in respect of a Company Secretary.

Public Information

When a new company is formed details of any initial Company Secretary are lodged with ASIC on Form 201 “Application for Registration as an Australian Company”.

The subsequent appointment or change of a Company Secretary must be lodged with ASIC on Form 484 “Change to Company Details” within 28 days after appointment – sec. 205B(1).

The information to be provided on Form 484 [sec. 205B(3)] is:

- given and family names
- any former name/s
- date and place of birth
- residential address (or ASIC approved alternative address which may be allowed in exceptional circumstances under sec. 205D).

These details are publicly available information on the ASIC website.

Under sec. 205C any change in the relevant personal details of a Company Secretary must be advised to the company within 7 days to facilitate its compliance with sec. 205B(4) which requires that such changes be lodged with ASIC on Form 484 within 28 days of the change.



For public companies the name, qualifications and experience of the Company Secretary must be included in the annual Directors' Report – sec. 300(10)(d).

In addition, for stock exchange listed companies, the appointment or cessation of a Company Secretary must be announced to the market – see ASX Listing Rule 3.16.1.

Cessation of Appointment

The following events will cause a person to be removed from the position of Company Secretary:

- resignation by notice in writing to the Company
- removal from office pursuant to the Constitution of the Company (by the Board of directors passing a resolution to that effect)
- the person is no longer permitted by the Act (or an order made under the Act) to be Company Secretary
- under sec. 204G, they become disqualified from managing corporations under Part 2D.6 of the Act, unless ASIC or the Court give permission or leave under sec. 206F or 206G
- they become of unsound mind or physically or mentally incapable of performing the functions of Company Secretary.

The resignation or retirement of a Company Secretary must be lodged with ASIC on Form 484 within 28 days – sec. 205B(5).

As allowed under sec. 205B(6), the Form 484 referred to under sec. 205B(5) need not be lodged with ASIC if, following cessation as Company Secretary, the person lodges a Form 370 “Notification by Officeholder of Resignation or Retirement” with ASIC, as provided for in sec. 205A(1). Lodgement of Form 370 is optional but if it is used then a copy of the Company Secretary's letter of resignation to the company must be attached to the Form – sec. 205A(2).

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.