



MEMO

To: Board of Directors
From: Company Secretary
Subject: **COMPANY SECRETARY: LIABILITY UNDER CORPORATIONS ACT**

Part 2D.4 of the Corporations Act prescribes in relation to a Company Secretary:

- must be appointed for a Public Company (and is optional for a Proprietary Company)
- can be more than one, but at least one must be an Australian resident
- must give prior consent in writing
- defines responsibilities in Section 188.

The Company Secretary may be personally liable under Section 188 of the Act for contraventions by the company in relation to:

- Registered Office (Sec 142)
- registered office open to the public (Sec 145)
- responding to the Extract of Particulars (Sec 346C)
- responding to the Return of Particulars (Sec 348D)
- lodgement of notices with ASIC in relation to personal details of directors and secretaries (Sec 205B)
- Principal Place of Business (Sec 146)
- Share Register (Sec 178A)
- share structure (Sec 178C)
- share issues (Sec 254X)
- lodgement of Financial Reports (Sec 319(1))
- Ultimate Holding Company (Sec 349A).

If there is no Company Secretary in a Proprietary Company then each and all of the directors are responsible for these functions – Section 188(2).

Any contravention of Section 188 is a *strict liability offence*, which means it is not necessary to prove intention, knowledge, recklessness or negligence (see Section 6.1 of Criminal Code).

However, a “took all reasonable steps to comply” defence is available (see Section 13.4 of Criminal Code) and, under the CA Section 188(3) specifically provides that a person does not contravene the Act if they took all reasonable steps to ensure that the company complies.

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.
