



MEMO

To: Board of Directors
From: Company Secretary
Subject: **DEEDS OF ACCESS & INDEMNITY**

You have enquired about what is involved in establishing “Deeds of Access & Indemnity” for the Company’s Directors, and what additional benefits and/or protection this might afford Directors over the Company’s Constitution, the Corporations Act and common law.

Briefly, the aim of such Deeds is that a contract is entered into (between the Company and each Director) whereby the Company will:

- provide each Director with access, whilst a Director and for 7 years after ceasing to be a Director, to Company board papers, minutes and financial and other records which have been either prepared for and/or provided to him in relation to carrying out his duties as a Director; and
- indemnify* each Director in relation to the period of his directorship in respect of certain claims that may be made against him in his capacity as a Director and any liability, cost, damage or expense suffered or incurred by him in the proper discharge of his duties;
- pay all of the Director’s reasonable legal costs and outlays of defending or opposing any claim; and
- provide a level of Directors’ & Officers’ Insurance cover;

to the extent allowable by law.

Many consider that, notwithstanding anything provided for in the Act, or other laws, it is better for a Director to establish specific contractual obligations on the Company to provide “access” and an “indemnity” by entering into such Deeds.

These matters are also both provided for in the Act, as follows:

Access

Sec. 198F(1) of the Act provides Directors with a statutory right to inspect the books of the Company for the purposes of a legal proceeding to which the Director is or may be a party.



Sec.290 additionally provides for a Director to inspect the financial records of the Company.

Sec.198F(2) allows similar access to both the books and financial records for 7 years after he ceases to be a Director.

These provisions also, generally, allow the current/former Director to take copies.

Indemnity

A Company cannot exempt a Director (or officer) from any liability to the Company incurred whilst a Director/officer – Sec.199A(1) of the Corporations Act.

Also – under Sec.199A(2) – the Company cannot indemnify a Director (or officer) against the following liabilities incurred whilst a Director/officer:

- (a) a liability owed to the Company
- (b) liabilities for penalties or compensation orders under the Act
- (c) a liability to another party which did not arise out of conduct in good faith.

A Company may indemnify a Director (or officer) for legal costs, other than any relating to Sec.199A(2) liabilities, criminal proceedings and certain court orders – Sec.199A(3). And a Company can provide a loan to cover legal costs (see also Sec.212).

A Company may also pay premiums for insurance against a Directors (or officers) liability and/or legal costs, except to cover a willful breach of duty and for making improper use of information or position – Sec.199B.

Additionally, most Constitutions have provisions that cover the indemnification of current and former Directors (and other officers) against losses and liabilities incurred whilst a Director (or officer), including liability for negligence and legal costs, to the maximum extent allowed by law. Constitutions usually also allow the Company to take out appropriate insurance cover (“D & O Insurance”).

* to “indemnify” is to make good a loss which one person has suffered in consequence of the act or default of another and an “indemnity” is a collateral contract where the parties agree on the matters, remedies, etc, in relation to the indemnification

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.