



MEMO

To: Board of Directors
From: Company Secretary
Subject: **DIRECTOR QUALIFICATIONS & DISQUALIFICATIONS**

The Corporations Act (sec.9) defines a director of a company as 'a person who is appointed to the position of director'.

There are no statutory academic, business or other qualifications to be appointed as a director of an Australian company, either public or proprietary. The only legal requirement is that a director must be at least 18 years of age to be appointed (sec.201B).

It is usual for a company's constitution to state that a director need not be a shareholder, but in some companies this is a prerequisite. Also, a constitution may specify certain other requirements to be a director.

A person can, however, be disqualified from being a director unless ASIC or the Court consents – see sec.206A and below.

A person cannot be appointed as a director unless they give their prior written consent (sec.201D) and provide relevant information.

A proprietary company must have at least 1 director who is a resident of Australia, and a public company must have at least 3 directors of which at least 2 must be Australian residents – sec.201A.

Usually directors are appointed by the board (to fill a vacancy or as an additional director), but directors may also be approved – or removed – by shareholders in general meeting.

ASIC must be notified within 28 days of any change in directors (names and/or particulars) using Form 484 – sec.205B.

Disqualification

A person must not act as a director (or manage a company) without court consent if they:

- become bankrupt and/or are an undischarged bankrupt
- are subject to a personal insolvency agreement or an arrangement under Part X of the Bankruptcy Act that has not been fully complied with



- are subject to a composition under Part X of the Bankruptcy Act and final payment has not been made; or
- have been convicted of various offences such as fraud or offences under company law, such as a breach of duties as a director or insolvent trading. Convicted persons cannot manage a company for five years. And if imprisoned for one of these offences, they cannot manage a company within five years after release from prison.

A person who finds themselves in one of the above categories must lodge a Form 296 with ASIC. Furthermore, they automatically cease to be as director on the happening of the event, in which case the company must lodge a Form 484 (within 28 days).

Note, under mutuality arrangements the Australian director disqualification provisions are recognised and apply in New Zealand and vice versa.

Cessation of Appointment

Most company constitutions have a section which covers when a person ceases to be a director; for example if they:

- die
- become of unsound mind
- are physically or mentally incapable of acting as director
- fail to attend board meetings for a continuous period of 3 months without first obtaining a leave of absence
- are not permitted under the Act to be a director
- become disqualified, as discussed above
- resign by notice in writing
- fail to be re-elected/elected by shareholders (where the constitution requires shareholders to ratify/approve an appointment); or
- are removed from office (which can usually only be done by shareholders).

When a director's appointment ceases, for any reason, Form 484 must be lodged with ASIC within 28 days.

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.