



MEMO

To: Board of Directors
From: Company Secretary
Subject: **REMOVING A DIRECTOR**

You have asked for my thoughts on how to 'get rid of' Mr AZ from the board.

Without going into the reasons why he should no longer be a board member, as I see it the options available to the board are:

A. Letter of Resignation

Ask him 'nicely' to simply resign – by providing his written resignation (and he does not have to give a reason – section 203A of the Corporations Act).

In this regard he has already, privately, phoned me as a 'listening ear' to his grievances with the rest of the board and has indicated that if it gets to this he will probably put in his letter words along the lines of: "I find I no longer have any confidence in the actions and rationale of the major shareholders' representatives."

He has said that he will also probably be stating in his letter something like: ".....have the directors consider approaching the minority shareholders and request that they locate and submit a person for the vacant board position."

B. Shareholder's Removal

Call a shareholders' meeting (EGM) and have a vote on removing Mr AZ. As you know directors are primarily the representatives of the shareholders and, generally speaking, they can appoint and/or remove directors as they like (subject to complying with the legal requirements of such action).

As I see it, Mr SX controls/influences around 50% of the company's shares, so if an EGM was called he and his supporters would probably sway the vote as only an ordinary resolution (ie, >50%) is required.

Sections 203C/D cover removal by shareholders. For a private (Pty Ltd) company it is a relatively simple process by passing a resolution to that effect (subject to complying with the requirements for calling an EGM or signing a shareholders' resolution).

For a public company there is a little more involved – see 'Convening Meeting' below.



C. Other Processes

For your additional information, in a private company it is not uncommon to have a rule in the constitution stating that a director can be removed 'by a majority of the directors' or, for example, not attending board meetings without prior approval for a prescribed period of time (usually 3 or 6 months).

But as we are a public company this is not available, not just because such words are not in our constitution, but because s.203E expressly prohibits [the other] directors from removing a director or 'requiring' him to resign or even intimating such.

Convening Shareholders' Meeting

Under s.203D(2) a 'notice of intention' [given by a shareholder] for a motion to remove a director must be given to the company at least 2 months before an EGM is to be held – although such meeting can be held before the 2 months is up. The company must give the subject director a copy of the notice as soon as possible after receipt.

The director is entitled to put his case to shareholders by giving the company a written statement for circulation to shareholders (unless it is defamatory or over 1,000 words long) and to speak to the motion at the meeting – s.203D(5)/(6).

Note that the usual 21 days' notice (28 days for a listed company) applies as the 'short notice' provision is not available for removal of a director – s.249H(3).

An EGM can be 'called' by either 1 director – s.249C/CA – or the shareholders. As s.249C is a Replaceable Rule (which most public companies, at least, would not have adopted) and s.249CA only applies to listed companies, the usual provision applying in other companies as per their constitution is that an EGM can be called by 'the directors' (ie, more than 1).

The provision allowing 'the directors' to call an EGM may not be readily available or practical where 1 director is the subject of the said meeting (although in theory this could happen with that 1 director voting against).

However, as it appears to be that the need to remove Mr AZ is being promoted by the major share-owning/influencing director, Mr SX, then the least belligerent approach would seem to be for that shareholder to just call the meeting.

Simply put –

1. Under s.249D shareholders (at least 100, or 1 or more providing he/they hold at least 5% of the votes) should request in writing that the directors call an EGM – which would be at the company's cost (ie, printing/postage, etc).



In this circumstance the directors must call the EGM within 21 days after the request is received, and such meeting must be held within 2 months after the request.

If the directors fail to call the meeting the shareholders may intervene and take over the calling themselves – s.249E.

2. Under s.249F shareholders (with at least 5%) may circumvent the board entirely and go about calling the EGM themselves at their cost. I realise that in our case the cost is not much – but in the circumstances this may be the best way to go about things although the shareholders calling the meeting should be very careful to follow the requirements of the Act and the procedure (which is very similar to how the directors would call a shareholders' meeting, in any case).

Form of Resolution

Typical wording for a director removal resolution, adapted from another recent public company meeting, is as follows:

“That, pursuant to section 203D of the Corporations Act, Mr A_____ Z_____ be removed as a director of the Company effective immediately on the passing of this resolution and that the Company seek an appropriately qualified person as a replacement director.”

In summary, unless Mr AZ provides [uncoerced] a resignation letter, the only reasonable alternative is to call a shareholders' meeting as described above.

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.