



# MEMO

To: Board of Directors  
From: Company Secretary  
Subject: **DIRECTORS' MEETING - QUORUM**

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Our constitution is similar to most .....in Rule 59(b) a quorum to hold a valid meeting of the board of directors is two (2) – directors or their alternates, present in person or by video/teleconference (unless electronic medium is not allowed – but our constitution does allow .....in Rule 60).

So, subject to appropriate notice of a meeting being given (or deemed to be given), a valid directors' meeting can be held, and binding decisions made, when a quorum is present.

If no quorum is stated in the constitution, or a company is operating under the Replaceable Rules in the Corporations Act, then the quorum is 2 directors – ref s.248F – except when there is only 1 director appointed, in which case the quorum is 1 director – ref s.248B.

A quorum must be present at all times for a meeting of the board of directors to be validly held, including where technology is used – s.248D – so it is important to 'keep checking' to confirm that the director on the other end of a telephone is always connected.

Similarly, if a director 'steps out' for a short time – eg, for a 'comfort break' – or arrives late/leaves early from a meeting, then a quorum may not be present at such time(s) and so the board is not validly constituted during that time and cannot pass any resolution(s).

When questioned by a chairman once on what I had put in minutes and/or whether a resolution was validly passed, I noted in response:

“.....and I see that I did put in the minutes that Robert left the meeting during General Business, as is my practice for late arrivers/early leavers. What I do not bother with is the time (they arrived/left) as I see it more important to note that they are present/not present when some matter is discussed/resolved or other decision made (and putting in times can, in my opinion, suggest/record a disproportionate time appearing to be spent on other matters prior to or after the quoted time).”

## **Director Precluded**

If a company's constitution precludes a director from voting in respect of a matter – eg, in which he is interested and/or has a conflict – then that director cannot be counted towards the quorum to vote on the matter (see: *AM Spicer & Son Pty Ltd vs. Spicer*). And if the company is public, then under s.195 the same applies, except in certain circumstances, even if the constitution is silent.



However, an alternate director who is not so interested/conflicted may attend in his stead and be counted towards a quorum.

### **No Notice Given**

If no notice of a board meeting is given (ie, notice is less than required under the constitution, or is not reasonable – s. 248C – or the meeting is called ‘on the spot’), then all directors must be present for the meeting to be valid.

Similarly, if no notice is given, a decision made even by a majority of directors is invalid, and cannot be validated by the subsequent consent of the other directors.

Whilst such situations are not specifically covered by the Act, the principles have been determined by case law: eg, *Bullfinch Surprise Gold Mining vs. Butler*.

### **Noting in Minutes**

Some chairmen like to have noted in the minutes, right near the beginning of the meeting, words such as:

“The Chairman welcomed all attendees and formally declared the meeting open, noting that a quorum constituted by at least 2 Directors present was in attendance.”

or

“It was noted that a quorum (of 3 Directors) was present.”

### **Lack of Quorum**

There is one exception to the general quorum requirements, and that is when the number of directors falls below the statutory or constitutional minimum (eg, when a director dies), in which case the remaining members of the board can meet for the sole purpose of bringing the board back up to the statutory/constitutional minimum number – by resolving to appoint an additional director.

In this regard our constitution (Rule 45) says:

“The continuing Directors may act notwithstanding any vacancy in their body, but if and so long as their number is reduced below the number fixed by or pursuant to this Constitution as the necessary quorum of Directors, the continuing Directors or Director may act for the purpose of increasing the number of Directors to that number or summoning a General Meeting of the Company, but for no other purpose.”

An alternative, therefore, if preferred/considered more appropriate, is for the shareholders to meet to appoint another director.

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#### **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.*