



## MEMO

To: Board of Directors  
From: Company Secretary  
Subject: **DIRECTORS & SECRETARIES – MINIMUM NUMBER & RESIDENCY**

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Australian registered companies are required to have certain minimum numbers of officers (directors and secretaries) and minimum residency requirements, as stipulated in the Corporations Act.

### **Proprietary Companies**

A proprietary company must have at least 1 director and that director must ordinarily reside in Australia – sec.201A(1).

A proprietary company is not required to have a secretary but, if it does have 1 or more company secretaries, at least 1 of them must be an Australian resident – sec.204A(1).

### **Public Companies**

A public company can generally be identified by the company name ending with the word 'Limited' or the abbreviation 'Ltd' (without the word 'Proprietary' or abbreviation 'Pty'). A company may be able to drop the 'Limited' ending if it meets certain criteria, eg, a charity. There are also other styles of public company name endings such as 'No Liability' or 'NL' or 'Unlimited'.

A public company must have at least 3 directors, of which at least 2 directors must ordinarily reside in Australia – sec.201A(2).

And a public company must have at least 1 secretary, but can have more. At least 1 company secretary must be an Australian resident – sec.204A(2).

### **General**

A company's constitution may stipulate higher minimum officer numbers than the Act, and usually stipulates the maximum number of directors (although there are no statutory maximums).

Directors can appoint alternates, but they are not counted in the above minimum requirements.



Australian resident company officers must provide the company (who in turn lodges with ASIC) their usual residential address, unless they have received ASIC's consent to use an alternative address (for personal security or other reasons).

### **Rectification of Minimum Directors**

There is no provision in the Act for a company to exist/function without these minimum director/secretary requirements being met. So if, for example, an officer dies or suddenly resigns which results in a breach of one of the minimums, the company must make every effort to rectify the situation as quickly as reasonably possible to meet its obligations under the Act.

Failure to act promptly could result in the company being prosecuted and monetary penalties being imposed.

Whilst the number of directors is below the statutory minimum the board cannot meet to make any decisions/pass any resolutions; they can generally only meet for the sole purpose of reinstating the required minimum number of directors.

Some company constitutions also allow the 'below minimum number' of directors to act in emergencies or to convene a shareholders' meeting.

Example board minutes to appoint a 3<sup>rd</sup> director to a public company board:

#### *Appointment of Director*

The Company Secretary tabled a letter of resignation received from R\_\_\_\_\_ M\_\_\_\_ dated 18 March 200X and effective immediately.

It was agreed that as the 2 remaining Directors are below the statutory minimum number of 3 the purpose of this meeting is solely to appoint an additional Director.

Mr S\_\_\_\_\_ was invited to become a Director and, after an explanation to him of the responsibilities and risks of being a director were given by the Company Secretary, and he was advised that the Company does not hold D&O insurance cover, he agreed that he fully understood the situation, the risks and the obligations of a director, and then signed a letter of consent.

**RESOLVED** that A\_\_\_\_\_ B\_\_\_\_\_ S\_\_\_\_\_ be appointed as a Director of the Company pursuant to Rule 13.2 of the Constitution to fill the casual vacancy.

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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.*