



MEMO

To: Board of Directors
From: Company Secretary
Subject: **REMOVAL OF DIRECTOR – PTY LTD COMPANY**

A company's directors are appointed by the company's shareholders (members) to act on their behalf.

And so shareholders can also remove a director, or vote against him being reappointed (where applicable; e.g., where, under the company's constitution, an initial appointment by the board of directors must be ratified by shareholders within 2 months) by ordinary resolution at a general meeting in terms of the company's constitution or the Corporations Act.

There could be many reasons why shareholders may wish to remove a director, including loss of confidence in him, animosity or antipathy, or simply that there are too many directors (and removing 1 or more will save fees).

The Act, in s203D, is quite prescriptive in relation to removal of a director of a public company.

But for a proprietary company (Pty Ltd) the power of shareholders to remove a director is usually contained in the company's constitution or Replaceable Rule s203C(a) of the Act. The Act, and usually the constitution, also allows for another director to be appointed by resolution at the same meeting – Replaceable Rule s203C(b) – if that is desired.

Note that any contradictory provisions in a Shareholders' Agreement may vary and/or over-ride the constitution in relation to removing a director.

A director may also be removed by a majority of the board of directors if the constitution allows it (although the Act is silent on this issue). In doing this, and if the person is an executive director, the company needs to be mindful of the terms of employment for that director, unfair dismissal laws and natural justice requirements.

So, the process would usually be for a shareholders' meeting (Extraordinary General Meeting) to be called – by the board/a director – or the requisite number/percentage of shareholders/votes.

An EGM requires at least 21 days' clear notice [s249H(1)] – or shorter period if agreed by 95% of shareholders' votes [s229H(2)] – or **all** shareholders can sign a Circulating Resolution [s249A] to pass a resolution.



Notwithstanding all of the above, the board or the shareholders may consider it prudent or appropriate to apply part of the s203D(2) procedure for public companies – and at least give some written or other form of notice of the shareholders' intentions – say 24 hours or 7 days depending on the circumstances. But it is definitely not obligatory or required for any Pty Ltd company.

Note too that removal of a director prior to expiry of term may not necessarily stop that director taking action for damages (e.g., loss of director fees, reputation).

Following the EGM (or signing Resolution) the affected director should be formally advised – preferably in writing (at least in confirmation) – of his removal – and Form 484 “Change to Company Details” (Section B1) needs to 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.