



## MEMO

To: Board of Directors  
From: Company Secretary  
Subject: **SHAREHOLDERS**

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The shareholders (members) of a company are the owners of the company.

In some companies the members do not hold shares; they are merely co-owners with a membership certificate. Such companies are typically charities or 'not-for profit' companies and the liability of their members is limited by guarantee whereby the members have undertaken that if the company is in financial difficulties they will each contribute up to the amount of their guarantee, in need. A member's guarantee is usually for only a nominal amount, typically between say \$1 and \$100, but may even be nil. On the other hand, in such companies members can never personally benefit from any profits the company might make.

In most companies their members are 'shareholders'; they own a portion of the company, can benefit from the company's successes by receiving dividends paid out of profits, and the extent of their liability, which they would have to contribute to the company if in financial difficulties, is usually limited to the amount paid up (or payable if partly-paid shares) on their shares. In fact, in a 'no liability' company a shareholder does not even have to meet a call on partly-paid shares.

The company itself has a separate legal existence and its assets belong to the company, and its liabilities, generally, have to be met by the company. A shareholder is not liable (in his capacity as a shareholder) for the company's debts (other than for any amount unpaid on shares, if applicable).

Whilst shareholders elect or appoint (or ratify board appointed) directors to manage the company on their behalf, shareholders can also make decisions about the company, its operations and its business, by passing resolutions, usually at a general meeting (and shareholders of proprietary companies can even pass resolutions by all signing a 'circulating resolution' without actually meeting). Shareholders can also vote to remove a director (subject to complying with the relevant provisions in the law).

### **Becoming a Shareholder / Member**

All companies must have at least 1 member/shareholder.

Proprietary companies must have no more than 50 shareholders, other than employee shareholders. There is no limit on the maximum number of shareholders/members of a public company.



A member must be an entity that can own property, sue or be sued – either a real person, a body corporate (e.g. a company incorporated under the Corporations Act or other jurisdiction), or a body politic (e.g. an Australian State). A business name is not a legal entity and therefore cannot be a member. Estates and trusts cannot hold shares in their own right; they must nominate an executor or a trustee. There is no age limit, so even if under 18 years a person can become a member of a company.

Someone can become a shareholder/member of a company in one of a number of ways. They can:

- be listed as a member at the time of registration of the company. They must have given their written consent to be a member, and signed the constitution or agreed to using the Replaceable Rules (in the Act), before the application for registration is lodged with ASIC. The names and addresses of all persons who have consented to be members form part of the application for registration as an Australian company.
- agree to become a member of a company after its registration with ASIC, in one of 2 ways:
  - (i) by signing an application form whereby they agree to abide by the constitution, and paying for any shares they are being issued. The new member's name is then entered on the register of members/ shareholders and a membership/share certificate (or Holding Statement if uncertificated) is issued. Additionally, the company is responsible for notifying ASIC of changes in share capital and, if a proprietary company, updating the 'top 20' shareholders.
  - (ii) by transfer from one shareholder to another using a duly completed and signed (and duty stamped, if applicable) Share Transfer Form. The transfer must be lodged with the company and, subject to meeting any constitutional requirements (eg preemptive rights), the transferee's name is then entered on the register of shareholders and a share certificate/Holding Statement is issued. Again, if applicable, for a proprietary company ASIC's 'top 20' shareholders must be updated.

## **Shareholder Changes**

Most changes to a company's share capital and issued shares must be lodged with ASIC.

In particular, proprietary companies must advise ASIC of any changes to shareholder details (including resulting from share transfers) and share structure including the issue or cancellation of shares, share conversion or division.

Public companies are only required to advise ASIC of changes to share structure - including the issue or cancellation of shares, share conversion or division. They are



not required (or, in fact, able) to advise ASIC of changes to shareholder (member) details.

For obvious reasons a shareholder/member should inform a company of any change in address so that the company can update its register of shareholders (members). Additionally, a proprietary company is required to lodge any changes to the 'top 20' shareholders with ASIC.

### **Shareholder Access to Company Information**

Shareholders/members have limited access to certain company information, although public companies are required to provide more than proprietary companies.

#### *Share Register*

The register of shareholders must be held at the company's registered office or principal place of business (or other place approved by ASIC). It contains the name and address of each shareholder (member), share class, the number of shares held and the amount paid and unpaid on the shares.

Anyone has a right to inspect and/or obtain a copy of a company's share register (register of shareholders or members), provided they do not use the information in a manner or for uses prohibited by law. A shareholder may inspect the register free of charge, however the company may charge other people to inspect the register.

A company must provide a copy of the register within 7 days if a person asks for a copy. The fee for supplying a copy or inspecting the register by a non-member is prescribed by law.

#### *Company Constitution*

A company must send a copy of its constitution to a shareholder or anyone else within 7 days of a written request. The company may charge the prescribed fee for this service.

Any changes to a company's constitution must be made by a special resolution (ie, passed by at least 75% of the shareholders voting). For a public company a copy of the resolution must be lodged with ASIC within 14 days after the special resolution is passed.

#### *Financial Statements*

Public companies must prepare and lodge with ASIC a copy of their audited annual financial accounts and send a copy to all shareholders/members who have requested them at least 21 days before the Annual General Meeting and within 4 months of the end of the financial year. All other shareholders must be informed, usually with the AGM notice, that the annual accounts are available and make them available on their



website or by some other electronic means (eg, by email).

Most proprietary companies are not required to lodge accounts with ASIC. However, if a proprietary company is classified as 'large' (ie, meets any 2 of the following criteria: revenue \$25m, assets \$12.5m, 50 employees) it too must have its annual financial accounts audited and lodge them with ASIC within 4 months.

If a shareholder has (or, together with others, controls) at least 5% of the votes they can write to the company asking for a copy of the annual financial accounts and directors' report, and can require that the accounts be audited.

### **Shareholder Meetings**

Shareholders have the right to not only attend general meetings, but to call such meetings in certain circumstances.

Most commonly shareholders meetings are called by the board of directors, either as general meetings (involving all shareholders) or class meetings (of only those shareholders who hold a particular class of share – eg, shares to which different rights, benefits and/or restrictions are attached).

Shareholders who hold (or, with others, can control) at least 5% of the votes that may be cast at a general meeting of the company, have the power to:

- call and hold a meeting themselves, or
- require the directors to call and hold a meeting.

Public companies must hold an AGM. Proprietary companies can generally chose to hold an AGM if they wish (although for some their constitution may require them to do so) – although most do not hold one.

There are other reasons or circumstances that might arise during the year when a company might need to call an [extraordinary] general meeting between AGMs. For example, if the company wishes to change its name, or there is the need to amend the constitution.

A public company must actually hold a physical meeting for shareholders resolutions to be considered. However, a proprietary company can pass a 'circulating resolution' if all members entitled to vote on the resolution sign a document stating that they are in favour of the resolution. This does not apply to a resolution to remove a company auditor or in some other circumstances.

### *Quorum*

For a meeting of company shareholders, a quorum of at least 2 shareholders (or such greater number as stated in a company's constitution) must be present for the full meeting. A 'quorum' is the minimum number of members required to be present to legally transact business.



## *Voting*

At most general meetings resolutions are passed on a show of hands and, unless specified by the company's constitution, each shareholder has one vote. If there is a poll then usually there is 1 vote for each share held. Different rights to vote at meetings of shareholders may attach to different classes of shares.

A shareholder who is entitled to attend and cast a vote at a general meeting may appoint a person as their proxy to attend and vote for them at the meeting. Appointing a 'proxy' is to allow someone else to do something on your behalf.

An ordinary resolution must be passed by a simple majority (of greater than 50%) of the votes cast by shareholders entitled to vote on the resolution and who vote at the meeting. Voting is normally on a show of hands at first, by those present at the meeting in person or by proxy (if proxies are allowed under the constitution for that purpose). Only if there is a call for a poll will the decision be based on the number of shares held and voted, which must then always include proxy votes in the count.

A special resolution must be passed by at least 75% of the votes cast by shareholders entitled to vote on the resolution and who vote at the meeting – procedurally similar to the above paragraph.

A company must record and maintain minutes of general meetings and the resolutions considered, which shareholders are entitled to inspect, free of charge. However, if a shareholder requests a copy of the minutes, the company may charge the prescribed fee. The minute books of a company must generally be kept at its registered office address or principal place of business.

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*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.*