MEMO

To: Board of Directors

From: Company Secretary

Subject: **SOLE DIRECTOR'S DEATH**

Ordinarily, if a director of a company dies, the surviving directors can continue to manage the company. Equally, if the sole shareholder of a company dies, the directors can continue to manage it until the beneficiaries under the will have the shares transferred to them.

But when there is only one director – a sole director – the situation is different.

Section 201F(2)* of the Corporations Act provides that, in the event of the death of a sole director/shareholder of a [proprietary] company with a valid will, the executor or other personal representative appointed to administer the deceased's estate may appoint a new director to the company. The new director has all the powers, rights and duties of the deceased director and can keep the company running until shares are transferred to beneficiaries who may then appoint new directors if they wish.

Director Without a Will

However, if a sole director dies without leaving a will it can create significant difficulties for a company. The death will usually leave the company without any person properly authorized to immediately manage the company.

If the sole director is not also the sole shareholder, then the other shareholder(s) can appoint a replacement director. But where the sole director is also the sole shareholder the problems are compounded and the risk of uncertainty is even greater.

ASIC's information sheet (INFO 73) outlines some of the issues:-

In such a situation, where there is no will, a near relative or other appropriate person would have to apply to the local Supreme Court for letters of administration to manage the estate and this could take some time- possibly weeks if not months. Alternatively, in the absence of any immediate relatives or other obvious people to deal with the estate, the Public Trustee may step in and administer the deceased estate but this process can also take months.

During that period when there is no director, the company may be completely unable to operate. With no-one properly authorized to make management decisions or act for the company, it may be unable to trade. Banks and other financial institutions in particular may be unwilling to accept instructions in relation to a company's trading

account if they are not satisfied there is someone properly authorized to act for it. Equally, staff and suppliers may not be able to be paid, which can quickly have a deleterious effect on the reputation and value of the company to the beneficiaries of the estate.

If, on the other hand, a person is willing to purchase the company, they may not be able to do so quickly because there will be no recognized owner of the shares who can authorize their transfer until the testator has been appointed and settled the estate. Even if the final decision is taken to wind up the company so all beneficiaries can be paid out, the delay of possibly several months may mean the value of the company will be much less than it might otherwise have been if it had been able to continue operating in the interim period.

In summary, if you are a sole director/shareholder of a company it is highly recommended that you have a will and that the will clearly provides for who is the beneficiary of your shares; otherwise you could leave someone a major problem!

* This sub-section also, similarly, covers the situation where a person can no longer manage a company because of their mental capacity and the next sub-section [Sec. 201F(3)] covers bankruptcy of a sole director/shareholder.