



## MEMO

To: Board of Directors  
From: Company Secretary  
Subject: **SOLVENCY RESOLUTION**

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Under the Corporations Act Section 588G a company's directors should ensure that at all times it is solvent; a company cannot trade whilst insolvent.

Sec. 95A states that a company is solvent if it is able to pay all its debts as and when they become due and payable; and that a company which is not solvent is insolvent.

### Annual Solvency Resolution

Following receipt of a Company's Annual Statement ('extract of particulars'), on the anniversary of the company's formation (or some other approved date) – its 'annual Review Date' – the directors must, inter alia, within 2 months resolve that the company is solvent (unless exempted because the company has lodged a financial report with ASIC within the 12 months before the Review Date [Sec. 347A(2)]). Note too, the solvency resolution is 'as at' the actual date of signing, not back at the annual Review Date.

Lodgment of a financial report/statements with ASIC is required under Chapter 2M of the Act, annually for

- public companies
- disclosing entities (unlisted and Australian stock exchange listed)
- large proprietary companies
- most foreign-controlled small proprietary companies

and also half-yearly for all disclosing entities.

Unless exempted, the company's directors are also obliged to pass a solvency resolution (or otherwise notify ASIC) in a form such as:

***“RESOLVED** that, pursuant to Section 347A(1) of the Corporations Act with respect to the Annual Company Statement as at its Review Date of XX July 200X, and having reviewed and considered the Company's current and projected financial position, in the Directors' opinion the Company is solvent (with the continued support of its immediate parent company, \_\_\_\_\_ Pty Ltd, and its Ultimate Holding Company, \_\_\_\_\_ Limited, in need) and there are reasonable grounds to believe that the Company will be able to pay its debts as and when they become due and payable.”*



Of course, before passing such a resolution the directors must examine the company's current financial position (eg, by reviewing the latest available financial statements/management accounts) and cash flow forecast to satisfy themselves that they believe they can in fact meet all current and projected actual and contingent liabilities, as at the date of passing/signing the solvency resolution, from presently available and projected funds, so that there is no question about whether or not the company appears to be solvent.

Also, if the directors are relying on support from a parent company then they should obtain a letter of support or comfort to that extent backed up if appropriate with a copy of a resolution of the parent company board agreeing to support its subsidiary in need, in a form such as:

*“**RESOLVED** to confirm that the Company continue to assist all subsidiary companies as required and, in need, with any necessary financial support to ensure that they remain solvent.”*

However, under Sec. 347B, if the directors are unable to pass a solvency resolution, OR resolve that the company is not solvent (ie, pass a negative solvency resolution\*), they must within 7 days lodge a Form 485 with ASIC (signed by any company officer).

If there is a majority of directors with the opinion that the company is solvent, that would still be a positive solvency resolution. Similarly if there are a majority of directors with the opinion that the company is NOT solvent, that would be a negative solvency resolution. If the directors are equally divided about the solvency of the company, the chairman of the meeting may cast a deciding vote, if allowed under the company's Constitution, otherwise the solvency resolution would be lost (because it is not be passed by a majority – ie, greater than 50% – of directors).

Our Constitution, in Rule 59.5, provides that: *“The chair has a casting vote if necessary in addition to any vote they have in their capacity as a director.”*

There can be instances where it may be difficult to determine whether or not a company is solvent. If this is the case then the directors should probably seek legal and/or accounting advice on the matter and/or consider advising ASIC in writing of the circumstances.

\* that, in their opinion, there are reasonable grounds to believe that the company **WILL NOT** be able to pay its debts as and when they become due and payable.

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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.*