Appointing a new director

Role of the board

Periodically a company will have to appoint a new director. In public companies, directors are appointed by shareholders. This information guide will focus on the basic legal requirements for appointing a new director for companies with shareholders operating under the Corporations Act 2001 (‘Act’).

The board’s role in appointing new directors is to present suitable candidates to shareholders for election. In larger companies, this task may be delegated to the nominations committee.

Generally, once a new director has been selected, he or she gives formal signed consent to the company. The company then confirms the appointment with a letter of appointment and disclosure to the Australian Securities and Investments Commission (ASIC). Basic appointment procedures are explained in the Act and/or the company’s constitution. The Act deals with consent and disclosure to the regulators. The company’s constitution will deal with the minimum and maximum size of the board, terms of appointment to the board and any shareholding qualifications for directors. Note that listed companies must abide by additional requirements (see below).

There are some limitations on who can be appointed as a director. For example, an individual must be at least 18 years old. A person who is disqualified from managing companies can only be appointed as a director if the appointment is made with the permission granted by ASIC or leave granted by a court.

Who can appoint directors?

A company can appoint a director by resolution at a general meeting (s 201G). A board may occasionally need to appoint a director to retain a quorum or to fill a casual vacancy. This may be provided for in the constitution but is also allowed under s 201H of the Act (this is a replaceable rule), or they can use a combination of both.

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In proprietary companies, the appointment has to be confirmed by a resolution of the company within two months otherwise the appointment ceases at the end of this period. Public companies must confirm the appointment by a resolution of shareholders at the next annual general meeting (AGM) or the appointment ceases at the end of the AGM.

The director of a proprietary company who is the sole director and shareholder may appoint another director by recording the appointment and signing the record (s 201F).
Must a director give consent to act as a director?

To be properly appointed, a person must give written and signed consent to the company prior to appointment. The company must keep this consent (s 201D). Failure to give consent results in the appointment being void.

Written consent can take a simple form such as:

I, [insert name] consent to act as a director for [insert organisation’s name]. In accordance with section 205B of the Corporations Act 2001, I give notice of the following:

- Given names and surname, plus any former names;
- Date and place of birth;
- Address.

Signed [insert signature]

Date [insert date]

This information must be lodged with ASIC within 28 days of the director’s appointment.

Do alternate directors have to give consent?

The appointment of an alternate director has to be approved by the other directors on the board. The director appointing an alternate must give official notice.

Again this need only be simple, such as:

[Name]

[Address]

[Date]

I [insert name], with reference to clause [insert clause number] of the constitution of [insert organisation’s name], appoint [insert alternates name] to be an alternate director in my place for the period [date] to [date] or until I terminate the appointment in writing.

Signed [insert signature]

Date [insert date]

Alternate directors must also lodge their details with ASIC within 28 days of their appointment.

What is a letter of appointment?

Once a director has given his or her formal consent, the company usually sends a letter of appointment signed by the chairman. This is not formally required by the Act but is an opportunity for the company to provide more information to the new board member.

The terms suggested below should not conflict with any legal requirements of the constitution, ASX Listing Rules or the Act. Letters of appointment typically include the following information:

- Duration of the appointment
- Role of the board in the organisation and extent of powers
- Board’s expectations of the director
- Expected time commitment
- Standard time and location of board meetings and a statement that occasionally other meetings will be needed
- Induction process and requirements for continuing professional education
- Participation in board committees
- Special duties relating to the director’s special knowledge and experience (if a director is being appointed to the board on the basis of special knowledge and experience they will be required to exercise such knowledge and experience in carrying out their duties as a director and the duties applied to that director would be higher than applied to a director without such special knowledge and experience)
- Outside interests and other directorships including conflicts policy and disclosure of interests
- Shareholdings in the company by directors and, for listed companies, a trading policy for company shares
- Procedures regarding conflicts of interest
- Performance reviews and appraisal
- Remuneration including frequency of payment, for example paid quarterly in arrears, and reimbursement of expenses
- Superannuation arrangements
- Access to independent advice
- Confidentiality
- Insurance arrangements
- Copy of the constitution
What has to be disclosed and to whom?

According to s 205B, ASIC must be notified within 28 days of an appointment being made, whether as a director or an alternate director. ASIC must be given the director’s personal details, defined in s 205B (3) as the given and family names, all of their former given and family names, as well as date and place of birth and residential address. Any changes to these details must also be supplied to ASIC within 28 days.

Are there special requirements for listed companies?

Listed companies have additional responsibilities set out in the ASX Listing Rules (‘LR’). Directors may initially be appointed by the board to fill a casual vacancy or as an addition to the board but they must formally resign and (assuming they wish to continue as a director) stand for election by shareholders at the next AGM.

The ASX Listing Rules also specify the following:

- A company with directors must hold elections each year (LR 14.5).
- Directors (other than one managing director who is exempt from this requirement) must stand for re-election every three years, although there is no limit on the number of terms they can serve (LR 14.4).
- A company must accept nominations for the election of directors up to 35 business days prior to the AGM, unless the company’s constitution provides otherwise (LR 14.3).
- On appointment a director must disclose his or her interests in securities of the company within 5 days of appointment so that the company can submit an Appendix 3X form to the ASX within the required time (LR 3.19A.1).
- Companies must immediately notify the ASX of changes to the chairman, directors, CEO or company secretary (LR 3.16.1).

Notices of meetings should include information which allows shareholders to make informed decisions about the election of the directors.

The ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations 3e (2014) (“Principles”) also recommend the establishment of a nominations committee containing a majority of independent directors, and recommend public disclosure of:

- a description of the procedure for the selection and appointment of new directors;
- the committee’s charter;
- the committee’s policy for the appointment of directors.

The Principles recommend that this information be posted on the company’s website in a clearly visible section relating to corporate governance. According to the Principles, if the company chooses not to follow these principles, it must explain the reasoning behind their decision.

The Principles acknowledge that for a smaller board, it may not be efficient to establish a separate nominations committee. The Principles state that companies without a formal nominations committee should ensure they have other processes in place which raise the issues which a nominations committee would otherwise be considered by a nominations committee.

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Is there a requirement for directors to have ‘good fame and character’?

In general, there is no requirement as to a director’s ‘good fame and character’. However, since 1 January 2012, any organisation wishing to list on the ASX must satisfy the ASX that each director or proposed director of the organisation at the date of listing is of ‘good fame and character’ (see ASX Listing Rules 1.1, Condition 17).

The applicant must provide ASX with a criminal history check and bankruptcy check for each director or proposed director, and a statutory declaration from each director or proposed director affirming that they have not been the subject of action by an exchange or securities market regulator. Applicant organisations should ensure that they leave sufficient time to obtain the required documentation for ASX.

Are there any special requirements for APRA-Regulated organisations?

The Australian Prudential Regulation Authority’s Prudential Standard CPS 520 ‘Fit and proper’ (effective 1 January 2013) provides that a regulated institution (for example, banks, building societies, insurance companies) must generally assess the fitness and propriety of a responsible person (which includes a director) before their initial appointment and then reassess these things annually. The criteria for determining whether a person is fit and proper to hold a responsible person position include:

“Whether it would be prudent for a regulated institution to conclude that the person possesses the competence, character, diligence, honesty, integrity and judgement to perform properly the duties of the responsible person position.”

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