

# Appointing a new director

## *Role of the board*

Periodically an organisation will have to appoint a new director. The board's role in appointing new directors is to present suitable candidates to members for election. In larger organisations, this task may be delegated to a nominations committee.

Generally, once a new director has been selected (the ACNC refers to this position as a 'responsible person'), he or she gives formal signed consent to the organisation. The organisation then confirms the appointment with a letter of appointment and disclosure to either:

- ACNC for registered charities;
- ASIC for companies limited by guarantee and not registered with the ACNC;
- Relevant state or territory government departments, if required, for incorporated associations.

Basic appointment procedures, including consent and disclosure to the regulators, are covered in the relevant legislation (either the *Corporations Act 2001* ('Act') or the relevant state or territory incorporated association legislation). The organisation's constitution will deal with the minimum and maximum size of the board, terms of appointment to the board and any member requirements for directors.

There are some limitations on who can be appointed as a director: for example, an individual must be at least 18.

A person who is disqualified from managing companies – or who might otherwise meet the disqualification guidelines, such as for undischarged bankruptcy – can only be appointed as a director if the appointment is made with 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 of the Act). 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 a combination of both.

Companies limited by guarantee (public companies) must confirm the appointment by a resolution of members at the next annual general meeting (AGM) or the appointment ceases at the end of the AGM. Other incorporation types may have different requirements.

### Must a director give consent to act as a director?

To be properly appointed, a person must give written and signed consent to the organisation prior to appointment. The organisation must keep this consent (s 201D of the Act). 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]*

The company secretary must ensure this information is lodged with ASIC within 28 days of the director's appointment or the ACNC as appropriate.

### Alternate directors

An alternate director is appointed by a director to exercise some or all of the appointing director's powers for a specified period. Appointing an alternate is the most useful way that directors can fulfil their duties and responsibilities if they know they will be absent for one or more board meetings (for example, due to surgery, jury duty or a long holiday)

Section 201K of the Act, a replaceable rule, covers alternate directors. This section may be replaced by specific provisions in the company's constitution.

At law, alternate directors have the same rights, powers, duties and responsibilities as other directors. Specific roles, duties and responsibilities of an alternate director will usually be specified in the constitution or other formal company documentation.

### 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 alternate's 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]*

The company secretary must also ensure the alternate directors details are lodged with ASIC within 28 days of their appointment or the ACNC as appropriate.

### What is a letter of appointment?

Once a director has given his or her formal consent, the organisation usually sends a letter of appointment signed by the chair. This is not formally required by the Act but

is an opportunity for the organisation to provide more information to the new board member.

Many non-executive directors in the not-for-profit sector are volunteers. Sometimes there is a misconception that volunteering as a director only involves attending board meetings. It is important any new directors understand what their responsibilities are and what are the expectations of the board in terms of time and workload commitment.

A letter of appointment is used to explain the role, the responsibilities and board expectations. Obviously there will also be some administration issues that will need to be addressed as well.

### What has to be disclosed and to whom?

The points suggested below should not conflict with any legal requirements under the organisation's constitution or relevant legislation (such as the Corporations Act 2001 or incorporated associations legislation).

#### ACNC

Organisations registered with the ACNC have a responsibility to inform the ACNC of any changes of details, including responsible people and governing documents. Notification times will vary depending on the size of the organisation:

- Medium and large charities have 28 days to notify any changes;
- Small charities have 60 days to notify any changes.

The ACNC must be informed every time a responsible person changes. This is the case for new appointments and for changed appointments (for example, from the treasurer to the chair).

For new responsible persons, the organisation will need to provide the following:

- Name
- Date of birth
- Residential address
- Position held
- Date of becoming a responsible person
- Confirmation that the organisation has searched the ASIC Register of Banned or Disqualified Persons for the individual concerned.

## ASIC

For organisations required to report to ASIC, s 205B of the Corporations Act 2001 requires ASIC to be notified within 28 days of an appointment being made. This is the case whether the appointment is for a director or an alternate director. Any changes to these details must also be supplied to ASIC within 28 days.

ASIC must be given the director's personal details, defined in s 205B (3) as:

- Given and family names
- Former given and family names
- Date and place of birth
- Residential address.

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