Who can be a director?

Duties of directors

What are the basic requirements for a director of a company incorporated under the Corporations Act 2001?

Section 201B of the Corporations Act 2001 (Act) provides that a director must:

- be an individual, not a body corporate;
- be at least 18 years of age; and
- not be disqualified from managing corporations under Part 2D.6 unless the appointment is made with ASIC’s permission as provided for under s 206F of the Act or leave is granted by the Court under s 206G of the Act.

There is no upper age limit specified in the Act for a director. However, a company’s constitution may have age and other restrictions which impact on the general principles discussed below.

Does a director need to hold shares in the company?

There is no requirement in the Act that a director must hold shares in his or her company. The constitution of a company however may specify that a person has to hold a certain number of shares before being appointed a director. Other constitutions may require the new director to buy shares within a certain time frame of being appointed. A failure to meet these conditions is likely to void any appointment as a director.

How many directors are needed?

Directors are usually appointed at a general meeting of members or shareholders such as an annual general meeting (AGM).

In public companies, there needs to be at least three directors, two of whom ordinarily reside in Australia. If a person is appointed as a director by the other directors of a public company (and not at an AGM as noted above), the appointment must be confirmed by ordinary resolution at the company’s next AGM or that person will cease to be a director at the end of the AGM (s 201H(3) of the Act).

Similarly, where a person is appointed as a director of a proprietary company (not by members at an AGM), the company must confirm the appointment by resolution within two months after the appointment is made or that person will cease to be a director at the end of the AGM (s 201H(2) of the Act).

A proprietary company must have at least one director, who must ordinarily reside in Australia (s 201A of the Act). For single director/single shareholder proprietary companies, a second director can be appointed by the original director recording the appointment and signing the record (s 201F).

Is written consent required?

A person must give the company their written consent to act as a director of the company before being appointed and the company has to keep the consent (s 201D of the Act). A failure to do so constitutes an offence under the Act.
The company, provided it is not a charity registered with the Australian Charities and Not-for-profits Commission, must notify ASIC of appointments, retirements and resignations of directors from office. The notifications must include certain personal details (for example address and date of birth) (s 205B). Currently, this can be achieved by informing ASIC within the prescribed 28 day period. If the company is registered as a charity with the Australian Charities and Not-for-profits Commission these details will be notified to the Australian Charities and Not-for-profits Commission.

Situations where directors can be disqualified or removed

Corporations Act 2001
The Act provides for the removal of directors by shareholders provided certain conditions are met (s 203D (public company), s 203C (proprietary company)).

The Act also provides that automatic disqualification from a position of director occurs when a director:

• is convicted on indictment of certain serious offences (for example an offence relating to the business or financial standing of the company) (s 206B(1));
• is an undischarged bankrupt or has failed to comply with any prescribed insolvency procedures (s 206B(3),(4));
• is convicted of certain offences against the Act and is punishable for a period of imprisonment for a period of greater than 12 months (s 206B(1)(b)(i));
• is convicted by an offence that involved dishonesty and is punishable by imprisonment for at least three months (s 206B(1)(b)(ii)).

There is an automatic disqualification for a director who is convicted on indictment under s 206B(1) of Act (see s 206B(2)) with the possibility of extending the disqualification by up to 15 years on the application of ASIC (s 206BA).

Both ASIC and the courts can also disqualify a person from acting as a director (ss 206C–206G). Please note that there are other ways in which a director of a company incorporated under the Act may be disqualified or removed. For example, the Australian Charities and Not-for-profits Commission Act 2012 provides for its own regime to disqualify or remove.

A person who is disqualified from managing a corporation commits an offence if that person:

• makes, or participates in the making, decisions that affect the whole, or a substantial part, of the business of the corporation; or
• exercises the capacity to significantly affect the corporation’s financial standing; or
• communicates instructions or wishes (other than advice given by the person in the proper performance of functions attaching to the person’s professional capacity or their business relationship with the directors or the corporation) to the directors of the corporation:
  - knowing that the directors are accustomed to act in accordance with the person’s instructions or wishes; or
  - intending that the directors will act in accordance with those instructions or wishes.

Company’s constitution
A company’s constitution may also have provisions for removal from office. These can include if the director:

• Resigns in writing
• Becomes of unsound mind
• Is absent from meetings of the directors held during a certain period of time (commonly three to six months) without the consent of the other directors
• Fails to declare an interest in a contract or proposed contract with the company.

It should be noted that for the purpose of public companies, the directors cannot remove another director by resolution (s 203E of the Act).