

## STAKEHOLDER

# Appointing a new director

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* (the 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 nomination 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.<sup>1</sup>

### 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.

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.

1. See AICD Director Tools Key Competencies for Directors and Letter of Appointment.

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.



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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]*

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 chair. 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;
- access to corporate information;
- confidentiality;
- insurance arrangements;
- copy of the constitution.

Recommendation 1.3 of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations*<sup>2</sup> (ASX Principles) contains a list of key matters which companies should consider when drafting a director's letter of appointment. These include that the agreement includes the requirement to:

- to notify the company of, or to seek the company's approval before accepting, any new role that could impact upon the time commitment expected of the director; and
- to comply with key corporate policies, including the company's code of conduct, anti-bribery and corruption policy and trading policy.

### 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 chair, directors, CEO or company secretary (LR 3.16.1)

2. ASX Corporate Governance Council, 2019, *Corporate Governance Principles and Recommendations*, 4th edition, February, <https://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-fourth-edn.pdf>, (accessed 8 May 2019).

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

The ASX Principles recommend the establishment of a nomination committee containing a majority of independent directors, and recommends public disclosure of the committee’s charter, which should include the committee’s role in the appointment and re-election of directors (Recommendation 2.1).<sup>3</sup>

This information be disclosed either in a company’s annual report or on its website. According to the ASX Principles, if the company chooses not to follow these principles, it must explain the reasoning behind their decision.

The ASX Principles state that companies without a formal nomination committee should disclose that fact and the processes it employs to address board succession issues and to ensure that the board has the appropriate balance of skills, knowledge, experience, independence and diversity to enable it to discharge its role effectively.

### 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 Rule 1.1, Condition 20). 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 (see further ASX Listing Rules Guidance Note 1). Applicant organisations should ensure that they leave sufficient time to obtain the required documentation for ASX.

3. See AICD Director Tool *Remuneration Committees*.

4. Ibid p 7.

5. APRA, 2019, *Prudential Standard CPS 520 Fit and Proper*, July, paragraph 30(a).

In addition to the ASX Listing Rule requirements, the ASX Principles also recommend that boards undertake appropriate checks before appointing a director or putting someone forward for election as a director. The commentary to Recommendation 1.2 states that “appropriate checks would usually include checks as to the person’s character, experience, education, criminal record and bankruptcy history.”<sup>4</sup>

### Are there any special requirements for APRA-regulated organisations?

The Australian Prudential Regulation Authority’s (APRA) Prudential Standard CPS 520 Fit and Proper (effective 1 July 2019) 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 an APRA-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.*<sup>5</sup>

The Banking Executive Accountability Regime (BEAR), which is currently administered by APRA, is set out in Part IIAA of the *Banking Act 1959* (Cth). The regime establishes accountability obligations for authorised deposit-taking institutions (ADIs) and their directors and senior executives including the requirement for ADIs to identify and register accountable persons. Further, in accordance with subsection 37HA(2)(c) of the *Banking Act 1959* (Cth), ADIs must provide a signed declaration that the ADI is satisfied each director or senior executive they register is suitable to be an accountable person.

In its information paper on implementing BEAR, APRA states that:

*The application to register an accountable person must include a signed declaration that the ADI is satisfied that the person is suitable to be an accountable person. APRA's expectation is that this declaration will be made by the chair of the relevant board committee, or a person delegated to sign on the Board's behalf.<sup>6</sup>*

APRA also expects individual accountable persons to sign an accountability statement with a brief acknowledgement that they have read, understood and accepted that the areas of accountability and accountability obligations, has occurred. APRA expects accountability statements to:

- clearly articulate what an accountable person is accountable for with respect to the ADI, covering all areas of responsibility of an accountable person;
- align with the actual practices and governance arrangements of the ADI; and
- when considered collectively, articulate and delineate accountability across an ADI or ADI group.

It should be noted that BEAR is likely to be extended beyond ADIs. In the *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, Commissioner Hayne recommended that provisions modelled on BEAR should apply to all APRA-regulated entities, and that ASIC should administer those regimes, and BEAR, along with APRA. The Australian Government has indicated it would implement a corresponding conduct-focused accountability regime, regulated by ASIC to non-prudentially regulated entities.

### Are there any special requirements for ACNC registered entities?

The Australian Charities and Not-for-profit Commission (ACNC) requires charities to meet its Governance Standards. Under Governance Standard 4, a charity must make sure its Responsible Persons are suitable. This means that a charity must take reasonable steps to be satisfied that its directors or committee members are not disqualified from:

- managing a corporation under the *Corporations Act 2001 (Cth)*, or
- being a Responsible Person by the ACNC Commissioner, within the previous 12 months.

6. APRA, 2018, *Information Paper: Implementing the Banking Executive Accountability Regime*, 17 October, pp 13-14, <https://www.apra.gov.au/banking-executive-accountability-regime>, (accessed 19 April 2019).

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