



YOUR RESPONSIBILITIES AS A DIRECTOR OF A COMPANY

JULY 2024



INTRODUCTION

As a director of a company you have numerous responsibilities.

In this booklet we detail the important information and issues you should be aware of. We hope the information will be educational and provide support in the running of your company.

If you need further assistance or advice, please contact Moore Australia (WA) at +61 08 9225 5355.

THE BASICS

1. COMPANY NAME, ACN AND ABN

- 1.1 The full name of the company and the Australian Company Number (ACN) should be quoted in all dealings with the Australian Securities and Investments Commission (ASIC) and shown on all company documents and contracts. The Australian Business Number (ABN) is the number required to be used on tax invoices and dealings with the Australian Taxation Office (ATO). However, if your business is run through a trust and the company is just acting as trustee of that trust, you would quote the trust's ABN.

2. REGISTERED OFFICE

- 2.1 A company must have a registered office within Australia that all communications and notices may be addressed. Any change to that address must be notified to ASIC within 28 days of the change.
- 2.2 If the company does not occupy the premises, the occupier of the premises must give written consent for the use of that address as the registered office of the company.

A city skyline at dusk, featuring several tall skyscrapers with illuminated windows. The sky is a mix of blue and orange. In the foreground, a large white sculpture with concentric circular rings stands on a waterfront. The water in the foreground reflects the buildings and the sky. A large, semi-transparent white triangle is overlaid on the right side of the image, containing the text.

**‘A company must
have a registered office
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3. PRINCIPAL PLACE OF BUSINESS

3.1 This is the address in Australia where the principal activities of the company are conducted. If a company has not already done so, it is required to provide ASIC with the address of the principal place of business. Any change to that address must be notified to ASIC within 28 days of the change.

4. DIRECTOR ID

4.1 What is a Director ID?

A Director ID is a unique 15-digit identification number for each person who consents to be a company director. It is underpinned by an online identity verification process. Once a person obtains a Director ID, it can be linked to a director's role on the company's register. You will only ever have one Director ID, even if you:

- change companies
- stop being a director
- change your name
- move interstate or overseas.

4.2 Who needs a Director ID?

You will need a Director ID if you are a director of:

- A company.
- An Aboriginal and Torres Strait Islander corporation.
- A registered Australian body, for example, an incorporated association that is registered with ASIC and trades outside the state and territory that it is incorporated.
- A foreign company registered with ASIC and carrying on business in Australia, regardless of where you live.
- A corporate trustee, for example, of a self-managed superfund.
- A charity or not-for-profit organisation that is a company or Aboriginal and Torres Strait Islander corporation.

4.3 Applying for a Director ID

To apply for a Director ID, directors will need to set up a myGovID account if they don't already have one. Learn more about setting up a myGovID and download the app by visiting the ABRIS website www.abris.gov.au.

Directors will need to provide the following information when making their application:

- tax file number
- residential address as held by the ATO
- information from two documents to verify your identity.

Non-Australian residents are to apply for a Director ID by completing a paper form application, together with two certified supporting documents.

While Moore Australia cannot make the application on your behalf, we have put together a step-by-step guide for you to follow. If you require any assistance or would like to find out more, including completing a paper form application, please contact our team at corpsecwa@moore-australia.com.au or on (08) 9225 5355.

4.4 Next steps

Once you receive your Director ID, you will need to provide your Director ID to your business' record-holder. This can be the company secretary, another director or an authorised agent of the company (i.e. Moore Australia).

If appointed as a director of any other business in the future, you will need to provide your Director ID to the person(s) responsible for maintaining the records of those companies.

Once you have your Director ID, you can view, update and manage your details online at any time. Your Director ID confirms your identity and will in the future show any businesses you're linked to.

5. YOUR RESPONSIBILITIES AS A DIRECTOR – WHAT DOES THE LAW EXPECT OF YOU?

- 5.1 'Director' includes any person who occupies, or acts in, the position of director irrespective of the title they are given. It also includes any person upon whose directions or instructions the director/s of a company are accustomed to act.
- 5.2 As a director, you have to be honest and careful at all times and you are required to know what your company is doing.
- 5.3 You must take extra care if your company is operating a business because you may be handling other people's money. You must ensure your company can pay its debts, as and when they fall due, and ensure that your company keeps proper financial records. Directors who ignore these fundamental duties are those most commonly prosecuted and end up facing jail sentences, fines and claims for damages.
- 5.4 You must act in the company's best interests, not your own, even though you may have set up the company for personal or taxation reasons.
- 5.5 Any information you get through your position must be used properly and in the best interests of the company. It is a crime to use that information to gain, directly or indirectly, an advantage for you, any other person or to harm the company. This information doesn't need to be confidential; if you use it the wrong way and dishonestly it may still be a crime.
- 5.6 If you have personal interests that might conflict with your duties as a director, you must generally disclose these at a directors' meeting. This rule does not apply if you are the only director of a proprietary company.



5.7 You and any other directors will control the company's business. Your company's constitution or rules will set out the directors' powers and functions.

You must:

- be fully up to date on what your company is doing
- find out for yourself how any proposed action will affect your company's business performance, especially if it involves a lot of the company's money
- get outside professional advice when you need more details to make an informed decision
- question managers and staff about how the business is going
- take an active part in directors' meetings.

5.8 As a director you also have responsibilities under Occupational Health and Safety (OH & S) legislation to:

- maintain a safe workplace
- ensure tools and equipment are safely maintained
- maintain safe systems of work and provide adequate training and supervision to ensure safe work.

As a director you can be imprisoned and fined for failing in your OH & S responsibilities. We will not go further with your responsibilities under OH & S rules in this booklet, but would strongly suggest you read up on this matter.

5.9 Only be a company director or a company secretary if you are willing to put in the effort. Avoid any company where someone offers to make you a director or secretary on the promise that 'you won't have to do anything' and 'just sign here'. You are exposing yourself to many legal liabilities.

- 5.10 You must see that the company keeps up-to-date financial records. As a director, the law makes you personally responsible. Even the smallest company must have up-to-date financial records that:
- correctly record and explain its transactions (including any transactions as trustee)
 - explain the company's financial position and performance
 - enable true and fair financial statements of the company to be prepared if needed
 - enable financial statements to be conveniently and properly audited if that becomes necessary
 - ensure the company can obey the tax laws.
- 5.11 If your company is a 'small proprietary company' – as defined in the Corporations Act 2001 (the Act) – it will generally not have to prepare formal financial reports under the Act each year; however, you must still keep financial records and may need financial reports for managing and measuring your company's progress, tax purposes or raising finances.
- 5.12 Large proprietary companies and public companies – even not-for-profit public companies – must prepare financial reports, have them audited and lodge them with ASIC.

6. WHAT HAPPENS TO DISHONEST DIRECTORS?

- 6.1 Every year, the courts send dishonest and reckless company officers to prison, impose heavy fines and award damages.

7. CAN YOU SELL SHARES TO THE PUBLIC?

- 7.1 No. Proprietary companies are generally not allowed to raise money from the public by selling shares. Avoid anything to do with illegal fundraising.

8. ANNUAL REVIEW AND ANNUAL COMPANY STATEMENT

The annual review process is completed on the anniversary of the registration of the company. ASIC is required to provide companies with an annual company statement and annual review fee invoice within 14 days of the company's annual review date.

Companies are required to pass a solvency resolution and pay the ASIC fee within 2 months of the annual review date. Annual returns are no longer required to be lodged with ASIC.



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9. NOTIFIABLE CHANGES

TYPE OF ACTIVITY OR DUTY	
Change of place where you keep registers	If you want to keep registers of members, officers and allotments etc. at an address other than the company's registered office address or principal place of business address, you must tell ASIC where they are being kept within 7 days of the change.
Change of officeholders or details of officeholders	If the officeholders (e.g. director, secretary or alternate director) of the company change or if any personal details change, such as their residential address, you must tell ASIC within 28 days after the change. You must also lodge the terms of appointment when appointing an alternate director.
Resignation of director or secretary	A director or secretary can tell ASIC directly if they retire or resign. A copy of their letter of retirement or resignation from the company must be lodged with the form. You must inform ASIC within 28 days from the date of resignation. If the notification is not within 28 days, the effective resignation date will be the lodgement date and the late penalty fee will be incurred. The last director of the company cannot resign unless the company is wound up. The resignation form will be rejected if there is no director replacement.
Change of company addresses	If you change the company's registered office address or principal place of business address, you must tell ASIC within 28 days from the date of the change.
Charge on company property	As of 30 January 2012, the Charges Register, maintained by ASIC, was transferred to the Personal Property Securities Register. Visit www.ppsr.gov.au for more information.
Change of company name	If the company changes its name, you must tell ASIC within 14 days after the resolution was passed (new names are subject to availability criteria).

TYPE OF ACTIVITY OR DUTY	
Issue of new shares	If you issue new shares, you must advise ASIC within 28 days from the date of issue.
Change to members (shareholders)	Proprietary companies must advise ASIC within 28 days of changes to the top 20 members in each class of share held. Such changes include changes of name and address, increase or decrease in shares held and cessation of membership.
Changes to holding company	Proprietary companies must advise ASIC within 28 days of changes to their ultimate holding company.
Division or conversion of shares	If you divide or convert shares into different classes, you must advise ASIC within 14 days from the date of change.
Share cancellation	Generally, shares can be cancelled by either a capital reduction or share buy-back. The reduction can be either an equal reduction or a selective reduction. The reduction can only be made if certain conditions are met. A copy of the proposed members resolution must be lodged with ASIC before the shareholders meeting to approve the reduction.
Negative solvency resolution	You must notify ASIC of a negative solvency resolution within 7 days of the resolution.
Solvency resolution	If no solvency resolution is passed within 2 months of the review date you must notify ASIC within 7 days after that period.
Change of company review date	You may apply to change your company's review date if it is considered unsuitable. You must; however, be able to satisfy certain conditions to have the review date varied.

10. ASIC PENALTY FEES

10.1 As of 1 July 2024, the following ASIC penalty fees are payable in addition to any prescribed fee and are not subject to GST.

ANNUAL REVIEW LATE PAYMENT FEE – review fees must be paid within 2 months of review date.	FEE
If the payment is received within 1 month after the payment due date.	\$96
If the payment is received more than 1 month after the payment due date.	\$401
LATE LODGEMENT OF NOTIFIABLE CHANGES FEE – documents containing notifications of prescribed changes must be lodged within the time prescribed in the Act.	Fee
If the document is received within 1 month after the prescribed time.	\$96
If the document is received more than 1 month after the prescribed time.	\$401
ANNUAL COMPANY STATEMENT LATE NOTIFICATION OF CHANGES FEE – any changes to the information appearing on the annual company statement must be made within 28 days of the issue date shown on the statement.	Fee
If the information is updated within 1 month after the 28 day period.	\$96
If the information is updated more than 1 month after the 28 day period.	\$401

NOTE:

A document can be charged both a late lodgement fee and a late review fee. For more information please contact our office.

When actioning any changes to your company details with ASIC, it is also a legal requirement to produce and execute the correct corresponding minutes, resolutions, consents and notices. Your ASIC registered agent can assist with these.

10.2 The law requires that:

- The full name, residential address, date of birth, place of birth and Director ID (for directors only) are provided when notifying ASIC of the appointment of any office-holding including the date of consent to act.
- A company notifies ASIC of any changes to the following details within 28 days of the change:
 - the registered office
 - the principal place of business
 - company officers (appointments or cessations, changes to officer's name and address)
 - company members (notification of change to share structure, changes to member's name and address)
 - ultimate holding company.

10.3 If any discrepancies on an annual company statement are not notified to ASIC within 28 days of the occurrence, then the company will be charged late fees for each late change. These late fees will be charged in addition to any late fees that may be payable on the annual company statement itself.

10.4 Be aware that ASIC has the power to fine a company director, including alternate directors and company secretaries, for failure to notify a change in residential address within the prescribed time.


11. SOLVENCY

- 11.1 A company is 'insolvent' if it can't pay its debts. You are breaking the law if you let the company trade while insolvent. You can be sued personally by a liquidator or creditors for your own assets, not just the assets of your company, and you can face criminal prosecution.
- 11.2 You must stop your company trading if it is unable to meet its existing debts. You must prevent the company from taking on a new debt if that means that it would not meet both the existing and new debts. If you have reasonable grounds to suspect the company cannot meet its debts or won't be able to if you take on more debt, stop and get professional advice.
- 11.3 Directors of struggling companies can't just wait for the problem to go away.
- 11.4 Directors of companies experiencing financial problems, who do not act quickly enough to address them, could face heavy fines and put their personal assets at risk.
- 11.5 Under the Act, the directors of a company are required to make a resolution regarding the solvency of the company. This resolution must be made by the directors of the company within 2 months after each review date for the company.
- 11.6 Common signs of financial trouble are:
- low operating profits or cash flow from the main business
 - problems with paying trade suppliers and other creditors on time
 - trade suppliers refusing to extend further credit to the company
 - problems with meeting loan repayments on time or difficulty in keeping within overdraft limits
 - legal action taken, or threatened, by trade suppliers or other creditors over money owed to them.

- 11.7 If your company is having difficulties paying its debts, get professional advice quickly. Don't assume that you will be able to trade out of the problem. Delay could be damaging to the company and to you personally.
- 11.8 Company directors should be very careful when signing the annual solvency declaration required for all companies. By paying the annual fee, directors are effectively advising ASIC that they believe the company can pay all its debts as and when they are due.
- 11.9 If the annual fee is paid, and the company is trading while insolvent, directors can face fines of up to \$220,000, imprisonment for up to 5 years, or both.

12. YOUR RESPONSIBILITIES TO THE ATO AND OTHERS

- 12.1 ASIC and the ATO are getting tougher on business owners who fail to meet their obligations.
- 12.2 This approach can vary depending on how the business is operated and what taxes are not being paid. Businesses that fail to pay the withholding tax deducted from employees' wages to the ATO can expect the harshest treatment.
- 12.3 Where an individual owns and operates the business as a sole trader or through a partnership, his or her personal assets are available to meet the tax debt. In such situations the ATO is able to put business owners into bankruptcy to recover tax owed.
- 12.4 If a director of a company receives a Director penalty notice (DPN) they are personally liable for a debt to the ATO relating to PAYG, and other withholding taxes, and for their company's unpaid superannuation guarantee charge. If one of these notices is received there is only a 21 day period allowed to avoid personal liability by taking one of four actions:
- pay the outstanding debt
 - enter into an agreement with the ATO to pay off the debt
 - place the company in liquidation
 - place the company in administration.



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- 12.5 The law has recently been changed and director penalty notices can now be issued for unpaid GST, LCT or WET debts of a company. This marks a departure from the previous rules that limited director penalty notices to employee entitlements of PAYG withholding and superannuation, and were introduced to combat 'phoenix' activity. Phoenix activity is typically a company 'rising from the ashes', and often occurred when companies went into liquidation and the ATO was forced to write off the company tax debt. This extension of director liability is very serious.
- 12.6 It is crucial for directors to ensure their company's tax and superannuation reporting and payments are up to date to avoid the risk of personal financial consequences. If a company has not reported its PAYG withholding, GST or superannuation guarantee charge (SGC) liabilities within 3 months of the due date, lockdown director penalties may be issued by the ATO.
- Lockdown penalties in Australia refer to a more severe type of DPN. Under a lockdown DPN, directors have very limited options to avoid personal liability. The only way for directors to avoid personal liability under a lockdown DPN is to ensure the company pays the outstanding amounts in full. Unlike non-lockdown DPNs, where directors can also avoid liability by appointing an administrator or liquidator to the company, lockdown DPNs do not provide these options.
- 12.7 There is a final dilemma for directors who receive a director penalty notice. Under the Act, directors must personally indemnify the ATO for any preferential payment they receive. This can mean that if a director organises payment by the company of the debt to the ATO, and the company still goes into liquidation, a liquidator can regard the payment as a preferential payment. As the director must indemnify the ATO, they can be forced to repay the liquidator the tax paid to the ATO.
- 12.8 The best course of action for anyone who operates a business through a company in financial difficulty, and wants to avoid getting into trouble with ASIC for making false declarations or being held personally liable for a tax debt, is to act quickly and not hope the problems will go away. Professional advice should be sought from an accountant or insolvency specialist.

13. COMPANY 'HOUSEKEEPING'

13.1 The officers of every company must make sure that the company attends to some basic 'housekeeping' matters. Although the directors remain ultimately responsible for the company's compliance with the Act.

13.2 Your company must keep:

- a register of officeholders (directors, secretaries and alternates)
- a register of members (shareholders)
- a register of option holders (if you have them)
- minutes of general meetings
- minutes of meetings of directors
- a register of charges created by the company over company property
- financial records sufficient to enable financial statements to be prepared (and audited if necessary) for at least 7 years after the transactions are completed.

14. EXECUTION OF DOCUMENTS AND THE COMMON SEAL

The use of a common or company seal is not compulsory. If a company does have a seal, then a document can be executed by sealing it with the stamp, an imprint or the signature of two directors or of both a director and secretary. If a company does not have a seal, a document is legally executed by the signature of two or more of the directors.

The valid execution of company documents is governed by section 127 of the Corporations Act. Section 127 of the Corporations Act states that a document can be validly executed where, in the case of a sole director company, one director signs. In the case of a company with two or more directors, two directors must sign in order for a document to be validly executed.

Please note this is general information and you should always seek legal advice before execution of documents, particularly company documents.



‘A company’s records and registers can be maintained electronically; however, they must be able to be reproduced and provided if requested within a reasonable timeframe.’

15. CONSTITUTION AND REPLACEABLE RULES

15.1 A company's internal management may be governed by:

- provisions of the Act that apply to the company – known as replaceable rules
- a Constitution
- a combination of both.

15.2 The Constitution, for most companies, is drawn up prior to the registration of the company. The Constitution has the effect of a contract between:

- the company and each member
- the company and each director
- the company and the company secretary
- a member and each other member.

REPLACEABLE RULES


15.3 A table of replaceable rules can be found in the Act. Section 141 details various rules on how a company is to operate. Replaceable rules govern the internal relationship of the officers and members, but do not cover more practical rules relating to how a company is run on a day-to-day basis. Replaceable rules do not apply to a proprietary company where the same person is both its sole director and sole shareholder.

15.4 A company may include in its Constitution, by reference or otherwise, a replaceable rule that does not otherwise apply to it. Also, a provision of a section or subsection that applies to a company as a replaceable rule can be displaced or modified by the company's Constitution.



16. THE IMPORTANCE OF HAVING A WILL AS A SOLE COMPANY DIRECTOR OR SHAREHOLDER?

- 16.1 Difficulties can arise when an ordinary person dies without leaving a will. Their estate cannot be quickly wrapped up and dependants (widows, children, etc.) can be left waiting lengthy periods before either the state or territory's Public Trustee steps in to manage the estate, or letters of administration are granted by the Court to someone else to administer it.
- 16.2 When a sole director of a company dies without leaving a will the complications and distress can have an even greater impact. The death will usually leave the company without any person properly authorised to immediately manage the company.
- 16.3 If a director of a company dies, the surviving directors can continue to manage the company and may even make a temporary appointment, pending the appointment of a new director by the members (shareholders) of the company.
- 16.4 If the sole shareholder of a company dies, the directors can continue to manage it until the beneficiaries under the will have the shares transferred to them.
- 16.5 Where the sole director is also the sole shareholder, the risk of uncertainty is much greater.
- 16.6 The Act provides that, in the event of the death of a single member or director of a proprietary company, the executor or other personal representative appointed to administer the deceased's estate may appoint a new director to the company. The director has all the powers, rights and duties of the deceased director and can keep the company running until shares are transferred to beneficiaries who may then appoint new directors if they wish.

A blurred background image showing three men in dark blue suits standing in a modern office environment, possibly a meeting room. They are positioned in the upper half of the frame, with large windows in the background. The image is out of focus, emphasizing the text overlay.

' A company may include in its constitution (by reference or otherwise a replaceable rule that does not otherwise apply to it.'



- 16.7 As mentioned on page 21, the executor is ordinarily and most efficiently appointed by means of a valid will.
- 16.8 Where there is no will, a near relative or other person would have to apply to the local Supreme Court for letters of administration to manage the estate, this could take some time possibly weeks if not months. Alternatively, in the absence of any immediate relatives or other obvious people to deal with the estate, the Public Trustee may step in and administer the deceased estate, but this process can also take months.
- 16.9 During that period when there is no director, the company may be completely unable to operate. With no one properly authorised to make management decisions or act for the company, it may be unable to trade. Banks and other financial institutions in particular may be unwilling to accept instructions in relation to a company's trading account if they are not satisfied there is someone properly authorised to act for it. Staff and suppliers may not be able to be paid, which can quickly have a damaging effect on the reputation and value of the company to the beneficiaries of the estate.
- 16.10 On the other hand, a potential buyer may not be able to purchase the company quickly because there will be no recognised owner of the shares who can authorise their transfer until the estate has been settled. Even if the final decision is taken to wind up the company so all beneficiaries can be paid out, the delay of possibly several months may mean the value of the company will be much less than it might otherwise have been if it had been able to continue operating in the interim period.
- 16.11 It may be appropriate for a company to issue a special class of non-participating shares to other family members, in these situations they may appoint a new director. Please contact Moore Australia (WA) to discuss and implement if appropriate.

MOORE AUSTRALIA (WA)

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