

MOORE STEPHENS



**Your Responsibilities as
a Director of a Company**



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 of support in the running of your company.

If you need further assistance or advice please contact Moore Stephens.

The Basics

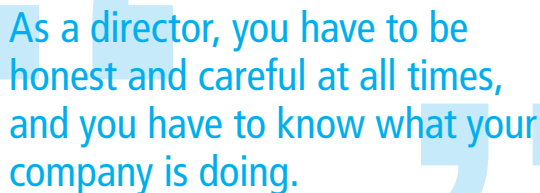
1. Company Name, ACN and ABN

- 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. From a taxation and business point of view, the Australian Business Number (ABN) is the number required to be used on tax invoices and dealings with the Australian Taxation Office. However, if your business is run through a trust and the company is just acting as trustee of that trust, the ABN you will quote is the trust's ABN.

2. Registered Office

- 2.1 A company must have a registered office within Australia to which 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.

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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 also be notified to ASIC within 28 days of the change.

4. Your responsibilities as a Director—what does the law expect of you?

- 4.1 **'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 in accordance with whose directions or instructions the director/s of a company are accustomed to act.
- 4.2 As a director, you have to be honest and careful at all times, and you have to know what your company is doing.
- 4.3 You must take extra care if your company is operating a business because you may be handling other people's money. You must make sure that your company can pay its debts, and you must see that your company keeps proper financial records.
Directors who ignore these fundamental duties are those most commonly prosecuted and who end up facing jail sentences, fines and claims for damages.
- 4.4 You must act in the company's best interests, not just your own interests even though you may have set up the company just for personal or taxation reasons.
- 4.5 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 or for any other person, or to harm the company. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.

- 4.6 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.
- 4.7 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; and
 - take an active part in directors' meetings.
- 4.8 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.

- 4.9 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.



- 4.10 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); and
 - 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, and
 - ensures the company can obey the tax laws.
- 4.11 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 finance.
- 4.12 Large proprietary companies and public companies—even non-profit public companies—must prepare financial reports, have them audited, and lodge them with ASIC.

5. What happens to dishonest Directors?

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

6. Can you sell shares to the public?

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

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7. 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 two months of the Annual Review Date.

Annual Returns are no longer required to be lodged with ASIC.

8. Notifiable Changes

Type of activity or duty	
Change 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 after 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.
Change of registered office address	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 30th January 2012 the Charges Register maintained by ASIC was transferred to the Personal Property Securities Register. Visit www.ppsr.gov.au for more information.

Type of activity or duty	
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.)
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	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.

9. ASIC Penalty Fees

- 9.1 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 two months of review date.	FEE
If the payment is received within one month after the payment due date.	\$78
If the payment is received more than one month after the payment due date.	\$323

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 one month after the prescribed time.	\$78
If the document is received more than one month after the prescribed time.	\$323

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 one month after the 28 day period.	\$78
If the information is updated more than one month after the 28 day period.	\$323

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.

9.2 The law requires that:

- the full name, residential address, date of birth and place of birth are provided when notifying ASIC of the appointment of any office-holding including the date of consent to act; and that
- 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/cessations, changes to officers name and address); and
 - Company Members (notification of change to Share Structure, changes to member's name and address).

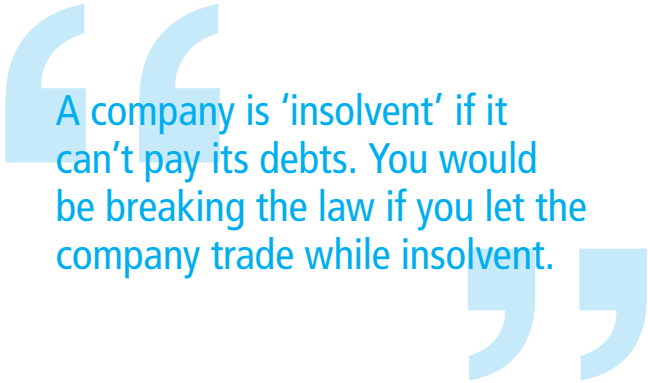
9.3 If any discrepancies on an Annual Company Statement are not notified to ASIC within 28 days of the occurrence then the company will be charged late fees for each late change. These late fees will be charged in addition to any late fees that may be payable on the Annual Company Statement itself.

9.4 Also 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.



10. Solvency


- 10.1 A company is 'insolvent' if it can't pay its debts. You would be 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.
- 10.2 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 would mean that it could not meet that debt and its existing 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.
- 10.3 Directors of struggling companies can't just wait for the problem to go away.



A company is 'insolvent' if it can't pay its debts. You would be breaking the law if you let the company trade while insolvent.

- 10.4 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.
- 10.5 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 two months after each review date for the company.
- 10.6 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, or
 - legal action taken, or threatened, by trade suppliers or other creditors over money owed to them.
- 10.7 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.
- 10.8 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 fall due.
- 10.9 If this is not the case, and the company is **trading** while **insolvent**, directors can face fines of up to \$220,000, imprisonment for up to 5 years, or both.



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11. Your responsibilities to the ATO and others

- 11.1 ASIC and the Australian Tax Office are getting tougher on business owners who fail to meet their obligations.
- 11.2 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 Tax Office can expect the harshest treatment.
- 11.3 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 Tax Office is able to put business owners into bankruptcy to recover tax owed.

- 11.4 If a director of a company receives a 'director penalty notice' he or she is 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 Tax Office to pay off the debt.
 - Place the company in liquidation.
 - Place the company in administration.
- 11.5 The director penalty will not be remitted if the underlying liability remains unpaid and unreported three months after the due date unless the company pays its liability ('lockdown' director penalties). That is, in those circumstances, the directors will not be able to avoid liability for a director penalty by placing the company into administration or begin winding up.
- 11.6 There is a final dilemma for directors who receive a director penalty notice. Under the *Act*, directors must personally indemnify the Tax Office for any preferential payment they receive. This can mean that if a director organises payment by the company of the debt to the Tax Office, and the company still goes into liquidation, a liquidator can regard the payment as a preferential payment. As the director must indemnify the Tax Office, he or she can be forced to repay the liquidator the tax paid to the Tax Office.
- 11.7 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.



12. Company 'housekeeping'

- 12.1 The officers of every company must make sure that the company attends to some basic 'housekeeping' matters. But the directors remain ultimately responsible for the company's compliance with the *Act*.
- 12.2 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; and
 - financial records sufficient to enable financial statements to be prepared (and audited if necessary) for at least seven years after the transactions are completed.

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.

13. Execution of documents and the common seal

The use of a common/company seal is not compulsory. If a company does have a seal then a document can be executed by sealing it with the stamp/imprint and the signature of two directors or the signature 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.

However, if a company has a sole director then this director must also be appointed as a secretary to legally execute documents.

14. Constitution and replaceable rules

- 14.1 A company's internal management may be governed by:
- provisions of the *Act* that apply to the company—known as Replaceable Rules;
 - a Constitution; or
 - a combination of both.
- 14.2 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

- 14.3 A table of replaceable rules can be found in the *Act*. Section 141 details various rules of 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.
- 14.4 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.

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15. The importance of sole Company Directors/shareholders of having a will

Why do directors need a will?

- 15.1 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 Public Trustee steps in to manage the estate, or letters of administration are granted by the Court to someone else to administer it.
- 15.2 But 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.
- 15.3 Ordinarily, 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.
- 15.4 Equally, 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.
- 15.5 Where the sole director is also the sole shareholder, however, the risk of uncertainty is much greater.
- 15.6 The Act provides that, in the event of the death of a single member/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.
- 15.7 As mentioned above, the executor is ordinarily and most efficiently appointed by means of a valid will.
- 15.8 Where there is no will, however, a near relative or other person would have to apply to the local Supreme Court for letters of administration to manage the estate and 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.

- 15.9 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. Equally, 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.
- 15.10 If, on the other hand, a person is willing to purchase the company, they may not be able to do so quickly because there will be no recognised owner of the shares who can authorise their transfer until the testator has been appointed and settled the estate. 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.
- 15.11 It may be appropriate for a company to issue a special class of non-participating shares to other family members and in these situations they may appoint a new director. Please contact Moore Stephens to discuss and implement if appropriate.

...the executor is ordinarily and most efficiently appointed by means of a valid will

For further information please visit our website:

www.moorestephenswa.com.au

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