

Freehills

Director's appointment paper

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1 Purpose

The purpose of this paper is to provide an overview of the process of appointing a new director to the board of a public company limited by guarantee. This paper discusses:

- 1 relevant considerations;
- 2 process for appointing or electing a new director; and
- 3 ASIC notice requirements.

The attachments to this paper are:

- 1 sample director's consent to act form;
- 2 list of issues for a director's letter of appointment; and
- 3 list of issues for a director's induction pack.

2 Relevant considerations for proposing a new director

2.1 Initial considerations

When proposing or looking for a new director, the board should consider:

- the composition of the board, including any requirements in the constitution and the required number of directors; and
- skills and qualifications required of the new appointee.

New directors are often sourced through the existing directors' networks. Consider broadening this by searching the websites of the various volunteering organisations, eg:

- Leadership Victoria - <http://www.leadershipvictoria.org>;
- Australia Business Arts Foundation (for arts organisations) - <http://www.abaf.org.au>;
- Our Community - <http://www.ourcommunity.com.au/>;
- Pro Bono Australia - <http://www.probonoaustralia.com.au/>;

and similar organisations. Also consider approaching an executive recruitment agency.

2.2 Composition and constitutional requirements

The board should refer to any requirements in the company's constitution and in any company policy relating to composition of the board. If the company does not have a policy covering board matters such as nomination, composition, review and retirement or term, we recommend it is considered.

Some boards have requirements for independent directors, representation of certain company stakeholders or particular skills. In some cases, the constitution may contain

particular requirements to achieve diversity of membership or specific representation of a particular group or gender.

The constitution may also contain requirements for a minimum and maximum number of directors.

The constitution may require a specific nomination and election process by the members of the company.

When calling for or requesting nominations consider explaining the role, the expectations and the desired skills for a director.

If relevant, the board should also consider its sub-committees (eg fundraising, advisory, finance and grant evaluation) and determine whether the new appointee is well-positioned to meet any existing areas of need.

2.3 Skills and qualifications

(1) Legislation

The *Corporations Act 2001* (Cth) provides that a company director must be an individual who is at least 18 years of age and who has not been disqualified from managing a company. The constitution (and if the organisation is the trustee of a trust, the trust deed) may contain further requirements as to the qualifications of directors.

(2) ATO requirements

Additional requirements apply to associations which are:

- on the Register of Environmental Organisations;
- on the Register of Cultural Organisations;
- on the Register of Harm Prevention Charitable Institutions;
- specifically listed;
- school building funds;
- scholarship funds;
- library funds; or
- the trustee of an ancillary fund,

to list the more common categories.

The public fund in these companies must be managed by a majority of 'responsible persons' or to establish a specific management committee with a majority of 'responsible persons'. Responsible persons include, but are not limited to, people with honours, clergy, judges, magistrates, doctors, accountants and past or present office holders of other community organisations.

(3) Skills

The company should ensure the board has an appropriate balance of skills, experience and personal attributes. This will enhance board performance and maximise the board's potential to achieve the objects of the company as outlined in the company's constitution.

3 Process

3.1 Nominations

A company with a large membership base may already have procedures in place for the nomination and election of members to the board. The board should refer to these procedures and check these comply with the constitution.

If the directors can appoint directors under the constitution, if it may wish to set a process for nomination and selection, having regard to:

- the capability of the candidate to devote the necessary time and commitment to the role. This involves consideration of matters such as the candidate's other board or executive appointments; and
- potential conflicts of interest and independence.

3.2 Shortlist

The board can shortlist and interview appropriate candidates. Detailed background information in relation to potential candidates should be provided to all directors and reference checks of candidates should be undertaken prior to appointment.

3.3 Consent to act

The new director must sign a consent to act as a director form prior to their appointment. The company must keep the consent.

Attachment 1 is an example consent to act form. This form contains sections where the new director can insert their personal details, which must be collected in order for the company to provide notice to ASIC. The company should also ask the director to complete a standing disclosure document which records potential or actual conflicts, such as other directorships or shares held in other companies.

3.4 Method of appointment

(a) Casual vacancy or addition to the board

Casual vacancies or additional directors are usually filled by resolution of the board, rather than by the members of the company. The board should always refer to the provisions of their constitution that deal with appointing a person to a casual vacancy, or as an addition to the board.

The constitution may require a director appointed to fill a casual vacancy or as an additional director to stand for election at the next AGM.

(b) Appointment by election

A company may elect a person as a director by resolution passed at a general meeting. Generally the explanatory memorandum to the general meeting will set out a photo and some information as to the proposed new director to enable the members to form an opinion.

3.5 Letter of appointment

We recommend the new director is given a letter of appointment. A copy of this letter should be signed by the director indicating their agreement to the terms of their appointment and returned to the company.

Attachment 2 sets out the issues that could be covered in the letter of appointment.

3.6 Induction pack

A new director should be given an induction pack which contains information about the company, the board and their legal duties.

Attachment 3 sets out what could be included in the induction pack.

4 ASIC notice requirements

The company must notify ASIC of the appointment of a new director using *Form 484 – Change to Company Details* within 28 days of the appointment.

Fees apply for late lodgement of the form (currently \$65 for up to one month late and \$270 for over one month late).

Attachment 1

Consent to appointment as director and notification of interests

To: The Directors
[Company Name]

I consent to my appointment as a director of the company.

I disclose the following information for the purposes of the *Corporations Act 2001* (Cth):¹

Personal details (section 205C)

Present given and family names: [insert details]

Address:² [insert details]

Date of birth [insert details]

Place of birth: [insert details]

All former given and family names: [insert details]

¹ If you need more space attach a separate page. The information in paragraph 1 of the Consent is required so that the company can notify the ASIC of the personal details of each director of the company within 28 days of appointment, as required by section 205B of the *Corporations Act 2001*.

A company will be in breach of section 201D of the *Corporations Act 2001* if a person does not give the company a signed consent to act as a director of the company before being appointed.

² A person's address must be their usual residential address, unless either:

(a) their name, but not their residential address, is on an electoral roll under the Commonwealth Electoral Act 1918 because of section 104 of that Act (which allows a person to request that his or her name not appear on an electoral roll on the grounds that it would place that person or a member of that person's family at risk); or

(b) their name is not on an electoral roll under that Act and the ASIC has determined, in writing, that including their residential address in the notices required by section 205B of the *Corporations Act 2001* would put at risk their personal safety or that of their family. A person may apply to use an alternative address using form 378: (see section 205D(2)).

If either (a) or (b) applies, you are entitled to provide an alternative address which must be in Australia and be one at which documents can be served on you. A person who is entitled to use an alternative address must also notify the ASIC of their usual residential address (and any change in it) under section 205D(3), using form 379.

Standing notice about interests³ (section 192)

I give standing notice that I have an interest in the following matters that relate to the affairs of the company. I also set out below details of the nature and extent of my interest:

- (a) The interests that I have in contracts or proposed contracts with the company are:
[insert details]
- (b) I am an officer or member of the following corporations and firms and must be regarded as interested in any contract with these corporations or firms. I have also set out the nature and extent of my interest:
[insert details]
- (c) The offices and property that I hold where duties or interests might be created in conflict with my duties or interests as a director of the company, and the nature, character and extent of the conflict, are:
[insert details]
- (d) Details of the nature and extent of interests in matters that relate to the affairs of the company not disclosed above are as follows:
[insert details]

³ Under section 191(1) a director of a company (whether public or proprietary) who has a material personal interest in a matter that relates to the affairs of the company must give the other directors notice of the interest subject to certain exceptions. One exception is that the director has given a standing notice of the nature and extent of the interest under section 192 and the notice is still effective in relation to the interest.

This is a standing notice to be given by you to the other directors of the nature and extent of your interest in matters. The standing notice may be given to the other directors before the interest becomes a material personal interest.

The introductory words of the standing notice contemplate that you will not identify each notified interest as a material personal interest. This is because:

- (a) to do so might make it difficult for you to take the position later that the interest is not a material personal interest which, under the *Corporations Act 2001*, would or might preclude you from being present at a meeting of directors at which the matter in which you have the notified an interest is being considered and voting on it; and
- (b) it is consistent with good corporate governance practice for the directors to notify interests that relate to the affairs of the company even though they might fall short of a material personal interest (an undefined expression).

The notice must be given at a directors' meeting or to the other directors individually in writing. If the notice is given to the other directors individually in writing, it must be tabled at the next directors' meeting after it is given to every director.

Section 192 also contains provisions for 'refreshing' the standing notice where:

- (a) there is a material change in the nature or extent of the interest; or
- (b) a new director is appointed.

Notification of change in personal details

I agree to notify the company of any change in my personal details within 7 days after the change.⁴

date _____

sign here ► _____

print name _____

⁴ You must give to the company notice of any change in your personal details within 7 days after the change (section 205C(2)). The company must notify ASIC of any change within 28 days after the change (section 205B(4)). Penalties apply to late notification by the company to ASIC.

Attachment 2

Director's letter of appointment

Address the following issues in the director's letter of appointment, where relevant:

- 1 acknowledgement of the role to carry out the objects of the company and to support the company;
- 2 advice on retirement by rotation provisions or policy and timing of any performance reviews;
- 3 expected time commitment and whether any interstate or overseas travel may be required;
- 4 schedule of meetings for the year, if set;
- 5 the expectations as to involvement in fundraising events and with committee work;
- 6 any special studies attaching to the position having regard to the director's qualification and experience;
- 7 any policy on reimbursement of expenses;
- 8 details of any insurance cover; and
- 9 the expectation of the board that the director will comply with all statutory, constitutional, internal policies and regulatory requirements applicable to the company.

Induction Pack

The induction pack could contain the following information, where applicable:

- (a) Details about the company
- what the company is, what it does and how it provides its services;
 - a summary of programs;
 - a summary of sources of funding, government grants and donations;
 - a brief history of the organisation;
 - any recent media releases or publications; and
 - brochures, flyers and promotional materials.
- (b) Company documents:
- constitution;
 - mission statement;
 - strategic plan;
 - most recent annual report and auditor's report;
 - current budget;
 - relevant policies and board charter of the company;
 - glossary of any industry-specific terms.
- (c) Board information:
- current board members' names and contact details;
 - board and committee meeting schedules (meeting times, dates and venues);
 - copies of board reviews, reports or evaluations;
 - details about any board sub-committees; and
 - process for distribution of board papers.
- (d) Management and staff information:
- names, titles and areas of responsibility;
 - contact information; and
 - organisational chart.
- (e) The induction pack could also set out what is expected of each director and an overview of their governance obligations:
- Directors are expected to attend each meeting and to have read the papers, ask questions and make suggestions;
 - Directors are expected to attend strategy days and are expected to contribute to the agenda and participate in the sessions;
 - Where required, directors are expected to participate in at least one sub-committee;

- Directors are expected to attend fundraising events and contribute to the invitation list;
- Directors must keep confidential information learnt as a result of being a director. Disclosure of this information can only be made after consultation with the board; and
- Directors should always act in a manner to promote the public profile and integrity of the company.