

A PRACTICAL GUIDE TO COMPANY SECRETARIAL OBLIGATIONS

A COURTESY GUIDE PREPARED BY SWAAB ATTORNEYS 2018

APPOINTMENT AND REMOVAL

APPOINTMENT OF SECRETARY

A proprietary company is not required to have a company secretary. However, if one or more persons are appointed as company secretary, at least one of them must ordinarily reside in Australia. Further, a company secretary must be:

- > a natural person; and
- > at least 18 years of age.

RESIGNATION OR RETIREMENT OF SECRETARY

A secretary may resign by written notice to the company. Often, the notice given includes a statement that the resigning or retiring secretary does not have any claims against the company.

REMOVAL OF SECRETARY

The directors of a company may resolve to remove the company secretary.

OBLIGATIONS OF A COMPANY SECRETARY

STATUTORY DUTIES

For the purposes of the *Corporations Act 2001*, both a director and a company secretary are “officers” of a company and as such, must comply with the statutory duties set out in sections 180 – 184. See the Swaab Practical Guide to Directors’ Duties for more information.

CHANGES IN PARTICULARS

1. The Company must give ASIC notice of certain changes that may occur within the Company. The most common changes are those involving directors, secretaries, the registered office,

share capital, charges, the constitution and the company name.

2. A proprietary company is also required to notify ASIC of any change to its register of members and any change to any ultimate holding company.
3. Notice of any changes are given to ASIC online or using forms issued by ASIC.

ANNUAL GENERAL MEETING

1. The Company must hold an annual general meeting:
 - a. at least once in every calendar year; and
 - b. within five months after the end of its financial year.
2. The first annual general meeting must be held within 18 months after registration.

GENERAL MEETINGS

1. All meetings of members other than the annual general meeting are called extraordinary general meetings.
2. Under the *Corporations Act 2001* (Cth) and the Company’s constitution, certain matters can only be dealt with at a general meeting of members. For example, a general meeting is required to change a company’s name or constitution.
3. The *Corporations Act 2001* (Cth) and the Company’s constitution also set out procedures for calling and conducting general meetings. The Company must follow those procedures.
4. The company secretary is responsible for preparing and sending the Notice of Meeting, producing the Minutes, and lodging the relevant forms at ASIC.

DIRECTORS’ MEETINGS

1. Directors’ meetings should be held on a regular basis and when needed. Directors’ meetings must be held to authorise

the fixing of the Company's common seal (if applicable and in accordance with the constitution), to appoint a new office holder and to accept the resignation of an office holder.

General meetings of members (including annual general meetings) are usually convened by the directors.

2. The Company's constitution sets out procedures for convening and conducting directors' meetings. The Company must follow those procedures.
3. The Company Secretary is responsible for preparing an agenda, briefing directors and producing the Minutes.

COMPANY STATEMENT - EXTRACT OF PARTICULARS

1. A company is no longer required to lodge an annual return with ASIC.
2. Instead, ASIC issues a company with a Company Statement - Extract of Particulars and a review fee invoice within two weeks of its review date. A company's review date is usually the anniversary of its registration or incorporation. A Company Statement sets out the company's particulars as recorded on ASIC's database, like the names and addresses of each director and company secretary, the address of the registered office and member details.
3. If the details set out in the Company Statement are correct, the company does not have to lodge any documents with ASIC and the company is only required to pay the review fee.
4. However, if the company has notified ASIC of changes to its details but those changes are not reflected in the Company Statement, the company must notify ASIC of the corrections within 28 days of issue of the Company Statement. The response must be in the form prescribed by ASIC.
5. If any of the details on the Company Statement are incorrect and those changes have not been previously notified to ASIC or ASIC requests additional information, you must notify ASIC of the details within 28 days of issue of the Company Statement. The response must be in the form prescribed by ASIC.
6. Late penalty fees apply if the review fee invoice or the corrections to the Company Statement or additional information is not lodged with ASIC in the required time.

ACCOUNTS

1. The Company must keep written financial records that:
 - a. correctly record and explain its transactions and financial position and performance; and
 - b. would enable true and fair financial statements to be prepared and audited.
2. A large proprietary company must prepare a financial report and a directors' report. A company is a large proprietary company if it satisfies at least two of the following:
 - a. consolidated gross operating revenue of \$25 million or more;
 - b. value of consolidated gross assets of \$12.5 million or more; or
 - c. the company and any entities it controls have 50 or more employees.
3. A small proprietary company (one that is not a large proprietary company) does not have to prepare a financial report and a director's report unless it is foreign controlled and not included in any financial statements lodged with ASIC, or is

directed by shareholders or ASIC in certain circumstances.

4. A public company must prepare a financial report for ea year.
5. The financial report for a financial year consists of:
 - a. the financial statements for the year (the profit and loss statement, balance sheet, statement of cash flows and, if required, consolidated financial statements);
 - b. disclosures and notes required by the regulations and accounting standards;
 - c. the directors' declaration about the financial statements and notes.
6. The directors' declaration (made in accordance with a resolution of the directors) is a declaration:
 - a. that the financial statements and notes:
 - i.) comply with accounting standards;
 - ii.) are in accordance with the *Corporations Act 2001* (Cth); and
 - iii.) give a true and fair view; and
 - b. whether, in the director's opinion, there are reasonable grounds to believe that the company will be able to pay its debts as and when they became due and payable.
7. The financial report must be audited and an auditors' report obtained.
8. The directors' report contains general information concerning the operations and the likely future developments in the Company's operations and the expected results from those operators. It also contains specific information like dividends for distribution, names of directors and indemnities and insurance premiums.
9. The financial report, auditor's report and directors' report must be sent to members and lodged with ASIC.

AUDITOR

1. A proprietary company will need to appoint an auditor if it must prepare an audited financial report. The directors may appoint an auditor if one has not been appointed by the company in a general meeting.
2. A public company must appoint an auditor.
3. If an auditor has not been appointed by the Company at a general meeting within one month after the date it is incorporated, the directors must appoint an auditor within this one month time limit. Any auditor appointed by the directors holds office until the first annual general meeting of the company, at which the members may confirm the appointment or appoint new auditors.
4. An auditor whose appointment is confirmed, or who is appointed, at the first annual general meeting, holds this office until the auditor dies, resigns or is removed from office.
5. An auditor must give written consent to a company before being appointed.

INTERESTED DIRECTORS

The directors must give notice of any material personal interest in a matter that relates to the affairs of the Company. Any disclosures made by a director must be minuted at a directors' meeting.

MINUTES

1. The Company must keep minute books in which it records resolutions of the directors and members and proceedings of

- their meetings. Minutes must be recorded within one month of the relevant meeting, and signed within a reasonable time by the chair of the meeting or the next meeting.
2. Minutes that are recorded and signed are evidence of the proceedings, resolutions or declarations to which they relate, unless the contrary is proved.
 3. A company must keep its minute books at:
 - a. its registered office;
 - b. its principal place of business in Australia; or
 - c. another place approved by ASIC.

REGISTERS

1. Under the *Corporations Act 2001* (Cth) a company must keep and maintain the following registers:
 - a. register of members;
 - b. register of debenture holders;
 - c. register of option holders and copies of option documents (if the Company grants options over unissued shares or interests); and
 - d. register of charges.
2. The registers must be kept at:
 - a. the company's registered office;
 - b. the company's principal place of business in Australia;
 - c. a place in Australia where the work involved in maintaining the register is done; or
 - d. another place in Australia approved by ASIC.
3. The company must give notice to ASIC within seven days of any change in address where the company registers are being kept.
4. A member of a company, a registered option holder or a registered debenture holder may inspect a register without charge. Other people may inspect the register on the payment of any fee required by the company.
5. The company must give a person a copy of the register within seven days, if the person has asked the company for a copy and pays the required fee and has requested a copy for a proper purpose.

MAINTAINING COMPANY RECORDS

The Company's officers are responsible for maintaining all aspects of the Company's statutory records.

FORM OF REGISTERS AND BOOKS

1. The Company may keep or prepare its registers and books:
 - a. by making entries in a bound or looseleaf book;
 - b. in a computer but the matters recorded must be able to be reproduced in writing at any time; and
 - c. in any other manner approved by ASIC.
2. The Company must take all reasonable precautions to guard against damage to, destruction of or falsification of any of the registers.

SHARE CERTIFICATES

1. A company must complete, have ready for delivery and (unless otherwise instructed) deliver to the new holder a certificate for shares issued or transferred within:
 - a. two months of the issue, unless the conditions of allotment

- provide otherwise; or
 - b. one month after the transfer is lodged with the company.
2. The certificate must state:
 - a. the name of the company and the fact that it is registered under the *Corporations Act 2001* (Cth);
 - b. the class of shares; and
 - c. the amount (if any) unpaid on the shares.
3. A certificate specifying shares held by a member is prima facie evidence of the title of the member to the shares. If, however, the certificate has been improperly issued, the company can cancel the certificate.

DETAILS REQUIRED FOR COMPANY REGISTERS AND BOOKS

REGISTER OF MEMBERS

1. The register of members of a company limited by shares must contain the following information about each member:
 - a. the member's name and address; and
 - b. the date of which the entry of the member's name is made in the register;
 - c. the date on which every allotment of shares take place;
 - d. the number of shares in each allotment;
 - e. the shares held;
 - f. the class of shares;
 - g. the share numbers, if any, or share certificate numbers, if any, of the shares;
 - h. the amount paid on the shares;
 - i. whether or not the shares are fully paid; and
 - j. the amount unpaid on the shares.
2. If a company has more than 50 members, the company must include in the register an up to date index of members' names.
3. A company's register of members (except a listed company) must indicate whether the shares held by a member are held beneficially or non-beneficially.
4. A register of members must also show the name and details of each person who stopped being a member of the company within the last seven years and the date on which the person stopped being a member.

REGISTER OF OPTION HOLDERS

1. A company's register of option holders must contain the following information about each holder of options over unissued shares in a company:
 - a. the option holder's name and address;
 - b. the date on which the entry of the option holder's name in the register is made;
 - c. the date of grant of the options;
 - d. the number and description of the shares over which the options are granted;
 - e. the period during which the options may be exercised or the time when the options may be exercised;
 - f. any event that must happen before the options can be exercised;
 - g. any consideration for the grant of the options; and
 - h. any consideration for the exercise of the options or the method by which that consideration is to be determined.
2. The register must be updated whenever options are exercised or expired. Information about the grant of an option must be

entered into the register within 14 days after the grant of an option. Where an option is transferred the company is only required to amend the register if the person transferring the option gives the company written notice of the transfer.

3. The company must keep with the register a copy of every document that grants an option over unissued shares in the company.

REGISTER OF DEBENTURE HOLDERS

A company's register of debenture holders must contain the following information about each holder of a debenture:

1. the debenture holder's name and address; and
2. the amount of debentures held.

REGISTER OF CHARGES

1. A company must keep a register of the charges/ security interests created on the property of the company. The register must contain the following information about each charge:
 - a. the date of the creation of the charge/ security interest or the acquisition of the property subject to the charge/ security interest;
 - b. a short description of the liability secured by the charge/ security interest;
 - c. a short description of the property charged/secured;
 - d. the name of the chargee/ secured party; and
 - e. the name of the person whom the company believes to be the holder of the charge/ security interest.
2. A company must keep with the register a copy of every document relating to a charge on/ security interest over property of the company. The register must be open for inspection by creditors or members of the company without charge/ security interest.
3. A company must send a copy of the register to any person who requests a copy, within 21 days.

CONTACT US

The corporate team at Swaab Attorneys is committed to working with companies to help them meet their ambitions. If we can help you with any of the issues raised in this Guide, please contact Alistair Jaque. We would be very pleased to discuss any issues with you



Alistair Jaque
PARTNER
T 61 2 9777 8363 (direct)
E afj@swaab.com.au

For more information or for copies of other Swaab publications please visit our website www.swaab.com.au

This Guide is only intended to give an overview of the issues involved. It is not intended to be fully comprehensive or to be a substitute for legal advice.

Swaab

ABN 71 028 846 652

Level 1, 20 Hunter Street, Sydney NSW 2000

DX 522 Sydney NSW

T +61 2 9233 5544

F +61 2 9233 5400

www.swaab.com.au