

WHAT'S A DIRECTOR'S DEED?

This paper informs about the uses of a Director's Deed in private and public companies, particularly for directors who do not have a significant equity in the company.

A Director's Deed is a contract made between a company and an incoming or existing director, on matters where the *Corporations Act* or company law generally is not adequate. Those matters can be as follows.

Access to books and records: A serving director has a legal right to inspect the company's books and records. A former director however does not have the same general right, not even as regards the time in which the person was a director. A former director is entitled for 7 years to inspect the books only for the purposes of a legal proceeding in which the person is, or may become, a party. The 7 year limit could be a problem, because legal proceedings can arise after that and there seems to be no right at all as regards inspection for parliamentary or administrative enquires. A Director's Deed can expand those rights of inspection.

Ownership of books and records: Sometimes a company will want back from a former director any books or records (board papers in particular) still in their custody. The law might regard the things as owned by the company (so they must be handed back) or by the former director (so they can be kept by him or her). Board papers are a hot topic because they show what the former director was, or was not, told when making decisions as a director and, if he or she made notes on them, they may show his or her thinking at the time of decision. A Director's Deed can make clear the issue of ownership. The deed can also go further, for example by requiring the company to actively keep and preserve records relating to the time the director is a director.

Insurance: A director has no legal right to require the company to pay a premium for an insurance contract for the director. Nor is a former director entitled to require the company to fund "run out" insurance for the benefit of the former director for a period of years. The Director's Deed can address this.

Indemnity: The Act puts limits on a company's ability to indemnify an officer (as such) from a liability to the company, or from a liability to a third party that did not arise out of conduct in good faith. That aside, the Constitution of a company will customarily contain an indemnity by the company to the officers (directors included) for liabilities they incur as officers. Under the Act, a director can enforce the Constitution against the company, and so enforce the right to indemnity. Not so a former director. If the former director is (still) a shareholder when the need arises, he or she can enforce the Constitution against the company but there are interesting (difficult) questions as to whether that extends to a right to indemnity claimed by the shareholder, not as a shareholder, but as a former director. A Director's Deed can avoid these problems by giving the parties legal rights and obligations that are independent of the Constitution.

It would be wise to have the shareholders resolve to approve the making of the deed and, if the company is likely to enter into deeds in the future, ask the shareholders to approve a corporate policy that identifies the key elements. This is because various legal issues arise if the directors cause the company to make deeds with themselves, which naturally benefit the directors to some extent:

- Do the directors have power to vote (as directors) on a matter affecting their own interests? In a public company they usually cannot, in a private company it depends on the Constitution of the company.
- If they can and do vote as directors, was that done in good faith and in the best interests of the company? What benefit did the company itself expect to obtain?
- A public company (or subsidiary of a public company) may want comfort that the deed does not contravene the statutory prohibition against such a company giving a "financial benefit" (which is broadly defined) to its director.

A shareholders' resolution overcomes these issues if gone about the right way.

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