

WHO DOES WHAT, IN A COMPANY?

This paper tells you the legal function of people involved in running a company.

It assumes a proprietary company registered under the *Corporations Act (Act)*. ASIC administers the Act.

The Act is the source of many, but not all rules, on this topic. A comprehensive view of this topic requires a reading of:

- the Act (including the “replaceable rules” regime)
- the Constitution (memorandum and articles of association) of the company, if any
- any Shareholders’ Agreement (or Joint Venture Agreement) binding the company
- any Employment Agreement (or similar) binding the company.

The **company** itself. The Act makes the company a legal person; separate from its shareholders, officers and employees. It can hold property, sue and be sued in its own name and exercise a wide range of powers conferred by the Act. On registration, a company is allocated an Australian Company Number (ACN) that must appear on all public documents of the company. A company continues to exist until wound up or deregistered. A change in the shareholders, officers or employees has no effect on the company. If its controlling shareholder is another company, it is a subsidiary of the parent company; another subsidiary of the same parent company is a sibling; the parent company and its subsidiaries together are a group of companies. Even if a company is part of a group, it is still legally separate. A company must keep financial records and also update ASIC as to certain of its affairs.

Shareholders own the company by holding shares issued by the company. A shareholder (as such) is not liable for the company’s debts; their only obligation is to fully pay up to their issue price the shares they hold. A share usually carries rights to vote at general meetings and (hopefully) to receive dividends and on winding up a return of the capital paid up on the share. Shares may be issued with different rights and issue prices. Shareholders do not have executive control of the business; they appoint and remove directors, who have executive control. The shareholders have

no right to interfere in management. Nor does a shareholder usually have a right to access the records of the company. Shareholders must usually act only within a general meeting. There must be at least one shareholder at any time. That shareholder may be another company. A shareholder may vote their shares as they think fit to serve their own interests. A shareholder is sometimes called a “member” of the company.

Directors have executive control of the business and general affairs of the company. That control usually extends, for example, to whether to issue extra shares or declare a dividend. Usually they are not obliged to consult with or obtain the consent of the shareholders before taking action. The directors usually act only within a board meeting. A director has statutory rights of access to the records of the company. A director is not necessarily an employee of the company. There must always be at least one director in office. A director must be at least 18 years old. One director must be resident in Australia. A director is usually entitled to vote on a matter involving his personal interests. The directors may appoint one of them as the senior general manager of the business – often with the title “managing director”. They may also appoint a chairman of their board meetings, with the title “chairman” or, if that person is also an employee, “executive chairman”. The shareholders may remove a director at any time. The Act may remove a director who is insolvent or guilty of bad behaviour. A director owes a fiduciary duty to the company and a range of statutory duties to the company and the public generally. The statutory duties include to act in good faith, without negligence and always in the best interests of the company as a whole. A director may be personally liable for company debts incurred when the company is insolvent.

A **secretary** is not necessarily an employee of the company. Indeed, the company need not even have a secretary. If one is desired, the directors make the appointment. A secretary must be at least 18 years old and (if there is only one secretary) resident in Australia. A company secretary may also be a director. A secretary owes a fiduciary duty to the company and a range of statutory duties to the company. The directors may, and usually do, vest a secretary with administrative duties (such as keeping minutes of meetings and keeping the register of members) and some executive power (such as liaising with accountants and other providers). Specific

statutory duties of a secretary include to ensure that the company has a registered office and also lodges with ASIC some notices of changes in the company's affairs.

The **employees** are persons the company pays a wage or salary (as distinct from say a director's fee). The directors, or their delegate, have the executive power to hire, fix the remuneration and duties of, and dismiss, employees. The employees ultimately report to and take direction from the directors.

The **public officer** has a function required by statutes other than the Act. The federal and state taxing statutes often require a company to put forward an individual as its public officer to serve as the conduit for information exchanged between the company and the taxation authority. WorkCover has a similar requirement. These statutes may also impose specific duties on a public officer. The directors appoint and remove a public officer. A public officer is not necessarily a director, secretary or employee of the company. Often the secretary is given the role.

The **auditor** is a qualified accountant who makes an audit report about the annual financial statements. The auditor must not hold another office or position within the company. The Act only requires an auditor for proprietary companies in exceptional circumstances. The directors appoint the initial auditor. After that, the shareholders may appoint and remove the auditor.

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