



MEMO

To: Board of Directors
From: Company Secretary
Subject: **COMPANY CHAIRMAN**

A Chairman is an indispensable part of the meeting procedures (ref *Woonda Nominees v Chng* [2000]) of both Directors and Shareholders.

A meeting cannot proceed without a Chairman; it needs someone to be in procedural control of, and smoothly run, the meeting.

For a Board of Directors' meeting the Chairman must be a Director, because the Chairman has a vote [and may in fact have a casting vote – in many Constitutions, but that provision is not in ours (with Rule 59.2 specifically saying the opposite)]. It is incongruous that anyone other than a Director have a vote at a Directors' meeting.

Furthermore, if a non-Director is chairing/running a Board meeting he may in fact be deemed to be a Director [ie, a defacto Director] and without realising it become personally encumbered with all the legal responsibilities and obligations of being a Director.

To this end Section 248E (which is a Replaceable Rule) of the Corporations Act effectively states that the Chairman of a Directors' meeting must be one of the Directors, and provides that the Directors may elect a Chairman [of the Company] in an on-going role or must elect a Chairman for a meeting if there is no Company Chairman. These provisions are largely mirrored in Rule 64 of our Constitution.

The Chairman's duties will usually extend to:

- chairing Board of Directors meetings
- chairing General Meetings (of Shareholders)
- being the Company's main public representative/spokesman
- performing any other tasks delegated to him by the Board, within the Board's powers to so delegate.

However, the Chairman has only limited ostensible authority to bind the Company.

Set out below is a proforma "Terms of Reference" for a Company Chairman.

The positions of Chairman and Managing Director may be held by the one person, but it could create a situation where this person has more 'power and influence' over the Board, its decisions and the Company's affairs than is reasonably desirable. This



is certainly not seen as 'best practice' and is frowned upon by the ASX for listed companies under its 'good governance principles'.

Section 249U (also a Replaceable Rule) requires a Chairman to chair a meeting of Shareholders.

This is also effectively mirrored in our Constitution where Rule 34 starts off by stating that the Chairman [of the Company] must chair Shareholders' meetings. However, at a Shareholders meeting, if the appointed Company Chairman is not present, or is unwilling to chair the meeting, and neither is any other Director/s, the Shareholders can elect any Shareholder to chair the meeting.

In fact, if there is no appointed Chairman (i.e., the Board has not appointed one), the Shareholders themselves also have the power to appoint any one of the Directors, or any Shareholder, as Company Chairman. In fact, they can also vote to change an incumbent Chairman.

I cannot see any reference to a Company Secretary [ie, one who is not also a Director or/and Shareholder] being 'authorised' to chair Board or Shareholders' meetings.

TERMS OF REFERENCE FOR CHAIRMAN OF THE BOARD OF DIRECTORS

General

The Chairman of the Board of Directors of the Company is responsible for ensuring that the Board carries out its responsibilities effectively, independently of management and in the long term best interests of the Company and its shareholders. The Chairman acts as the liaison between management and the Board and as the primary representative and spokesperson for the Board.

Responsibilities

The Chairman shall be appointed [annually] by the Board from among those directors who are "independent". If the Chairman is not an independent director, a 'lead director' may be appointed, in need, in addition to the Chairman, to act as an independent representative of the Board and to carry out the specific functions noted below.

The specific responsibilities of the Chairman are to:



1. ensure that the Board functions effectively, cohesively and independently of management;
2. provide leadership to, and with any Board committees assist, the Board in understanding and meeting its obligations and responsibilities, including those relating to any Board charter or mandate and other corporate governance matters, and in assessing the Board's success in meeting its obligations;
3. chair shareholder meetings;
4. consider and if appropriate conduct a portion of each Board meeting with only the independent directors present;
5. arrange chair and conduct Board meetings in accordance with guidelines established by the Board;
6. with the assistance of the CEO or Company Secretary, prepare the agenda and direct the preparation and distribution of information packages for Board meetings;
7. liaise with the CEO to promote open and effective relations between management and the Board;
8. oversee the performance of the CEO and senior management and lead the Board's review of the CEO's performance;
9. provide leadership to the CEO and act as a sounding board and advisor for the CEO;
10. coordinate communication between the Board and committee chairs, including required committee reports to the Board, to optimize the effectiveness of the Board and its committees; and
11. assist in succession planning for the CEO and other senior management and in identifying potential new board members.

The Chairman will be expected to devote adequate time to perform the obligations and responsibilities set forth in these Terms of Reference.

DISCLAIMER

The comments in this memo reflect some commercial aspects and observations on the matter experienced or observed by the writer in practice as he understands them. The information is given as a guide only and does not represent a definitive or legal view of any of the issues raised, covered or referred to and the reader is urged to seek his own professional advice on all aspects of, or pertaining to, this and any related matter.