

COVID-19 | How to ensure decision making is not disrupted by incapacity of officers or key employees

Whilst everyone hopes their business and their people will not be directly impacted by COVID-19 infection, the reality is that some of the people in our businesses will likely be infected, some seriously. As part of Business Continuity Planning, we have some thoughts about how to **ensure that the business can still make decisions in case an officer of a company is materially incapacitated – impacting on the ability of the company to make key decisions or sign important documents.**

Pass a board resolution now to authorize a range of activities – the directors might consider passing a board resolution now which authorises certain named people to make certain decisions / sign certain types of documents / or otherwise have the authority to bind the company.

Tips and suggestions: make the resolution as general as you need but try to be specific about key aspects such as:

- set limits or caps on decision making powers delegated in this way, e.g. - person A can enter into contracts for the company to the value of a maximum amount of \$Z per contract or \$X in total in a given period;
- limit the resolution to apply for a particular period of time only;
- perhaps only make the resolution applicable to particular types of contracts or specific decisions;
- consider naming a specific group of authorised people but require that two of them must sign any document, to provide a check and balance and limit the risk of any maverick or aberrant behaviour.

Grant a power of attorney – similar to the idea of the board resolution, but a more formal and importantly something which can be executed by the company in a manner contemplated by the Corporations Act. A power of attorney granted by a company naming one or more attorneys will almost certainly be required where a company needs to execute a document as a deed. This level of formality may be relevant for some counter-parties such as lessors and banks. The board can resolve to grant a generic power of attorney to a specified person or group of people for a limited period of time (say, 3 - 6 months) to execute documents on behalf of the company. Again the balance is in getting it right for what your particular business needs.

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Tips and suggestions: See the suggestions set out for a general board resolution. In particular the board should give some thought to the limits of that power of attorney and in particular whether it includes ability to amend documents, ability to carry out the transactions contemplated in the documents which the attorney is authorised to execute and whether the appointed attorney has a power to appoint a sub attorney.

Appoint alternate directors – we suggest given the current circumstances a prudent step for any private company might be to require each director to appoint an alternate director for a period of at least the next 3 months. This will enable to board to continue to meet and make decisions and for the company to sign documents even if one director is suddenly materially incapacitated and unable to participate in a board meeting.

Tips and suggestions: It is important to check the governance documents for the company first and to understand the Corporations Act formalities:

- Sometimes a company’s Constitution (or shareholders agreement, if there is one) will limit who is eligible to be an alternate director (e.g. only another director, or only person acceptable to the other directors).
- An alternate director must consent in writing to act as a director and their appointment must be notified to ASIC.
- Alternate directors have the same duties (and protections) under the Corporations Act as the directors so issues such as indemnification of directors and whether your D&O cover extends to alternate directors should also be considered.

Appoint additional directors – to give the company additional “redundancy” protection to the company, if you have a director who is incapacitated, oftentimes directors can still meet, so long as there is a quorum and will often have a power to appoint additional directors. If not, the company’s members can meet or sign a circular resolution and appoint additional directors.

Appoint an additional company secretary – as documents can be signed under the Corporations Act by either two directors or by one director and one company secretary, it may be wise to consider appointing a company secretary if you don’t already have one (or appointing an additional company secretary if you do) for the next few months so that you have more options to get documents signed if one or more of your officeholders become less available due to enforced self-isolation, illness or inability to travel.

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Important to note:

The information set out above is general guidance only and is not intended to be relied on as a substitute for legal advice. Liability limited by a scheme approved under Professional Standards Legislation.

Each company's circumstances will be different. Before making any changes you should check your company's governance documents (including any Constitution and/or shareholders agreement) for any delegation restrictions that apply.

This note assumes most businesses run through companies. Powers of attorney and general authorisations (as opposed to board delegations) can also be useful to sole traders and partnerships.

Ash St. Can Help You

The Ash St. Corporate and M&A team are highly experienced professionals who pride themselves on providing clients with practical business solutions. If you are concerned or would like some advice in relation to your specific circumstances, please contact +61 2 8651 8700 or email info@ashstreet.com.au

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