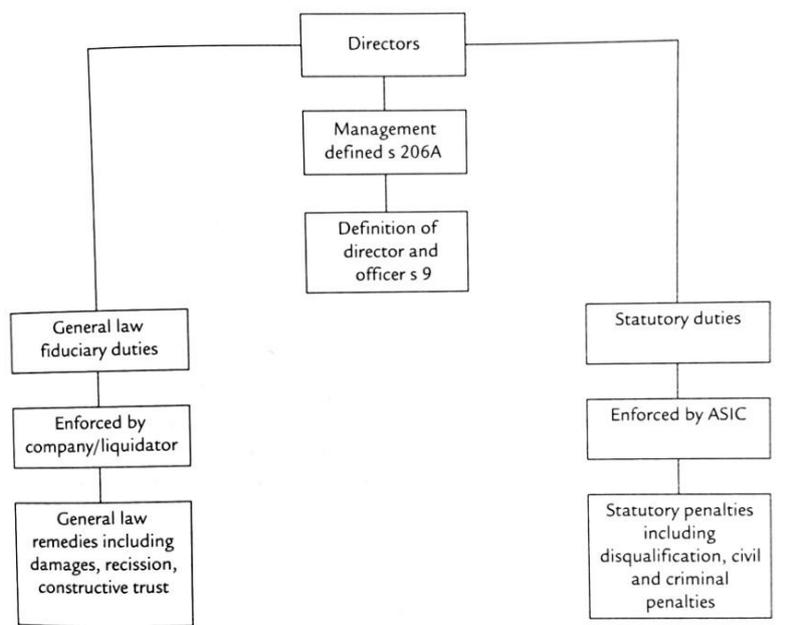


Topic 5 – Directors and Management



- A director of a company is defined in **s9** as a person who is appointed to the position of a director or alternate director regardless of the name given to their position.
 - They act in the position of a director (“de facto director”); or
 - The directors are accustomed to act in accordance with the person’s instructions or wishes (“shadow director”). Shadow director – a person whose instructions or wishes are customarily followed by the directors of a company. A person is not regarded as a director merely because the directors act on advice given by the person in the performance of functions attaching to the person’s professional capacity, or the person’s business relationship with the directors. A creditor may be a shadow director of a company.
- **s249C** – power to call meetings of a company’s members
- **s251A(3)** - signing minutes of meetings; and
- **s205B** – notice to ASIC of change of address

There are distinctions in the types of directors:

- Managing director – appointed pursuant to **s201J** and may take all of the board’s power under **s198C**.
- Chair of directors – exercises procedural control at the meetings (**s248E**) and signs the minutes (**s249U**).
- Governing director – a proprietary company’s constitution can be amended to give a director tenure and control of the board for life. This is not the case for public companies.
- Nominee director – represents the interests of a particular group. For example, employees may be entitled, pursuant to the company constitution, to elect a director.
- Alternate director – fills in during a director’s absence.
- Executive director – full-time employee of the company.

- Non-executive director – not involved in full-time management of the company and not an employee. A person who is free of any business or other relationship that could materially interfere with the independent exercise of their judgement. Often these are experts who can provide specific expertise in relation to certain areas of the company’s business.

Resolutions

- directors make decision at board meetings by passing resolutions
 - The replaceable rule in **s248G** provides that a directors’ resolution must be passed by a majority of the votes cast by directors entitled to vote on the resolution.
 - **s248A** – a resolution of directors can be passed if all the directors entitled to vote on the resolution sign a document containing a statement that they are in favour of the resolution set out in the document
- A company's internal management may be governed by: provisions of the Corporations Act 2001 (the Corporations Act) that apply to the company - known as **replaceable rules**; a Constitution; or a combination of both (s135 and 136).

Corporations Act 2001 (Cth), s 198A

Powers of directors (replaceable rule—see section 135)

(1) The business of a company is to be managed by or under the direction of the directors.

Note: See section 198E for special rules about the powers of directors who are the single director/shareholder of proprietary companies.

(2) The directors may exercise all the powers of the company except any powers that this Act or the company’s constitution (if any) requires the company to exercise in general meeting.

Note: For example, the directors may issue shares, borrow money and issue debentures.

Corporations Act 2001 (Cth), s 201

Appointment of managing directors (replaceable rule—see section 135)

The directors of a company may appoint 1 or more of themselves to the office of managing director of the company for the period, and on the terms (including as to remuneration), as the directors see fit.

Corporations Act 2001 (Cth), s 198C

Managing director (replaceable rule—see section 135)

(1) The directors of a company may confer on a managing director any of the powers that the directors can exercise.

(2) The directors may revoke or vary a conferral of powers on the managing director.

Appointment of directors

- **s201A** requires:
 - public company must have at least 3 directors
 - proprietary company to have at least 1 director
- **s201G** (replaceable rule) – shareholders in general meeting
- **s201H** (replaceable rule) enables the directors to appoint other directors provided that the appointment is confirmed by shareholders

- **s201M** has the effect of validating subsequent (generally procedural) acts. This section doesn't affect the company's dealing with outsiders
- **s201D** director consent to the appointment

Restrictions on appointment

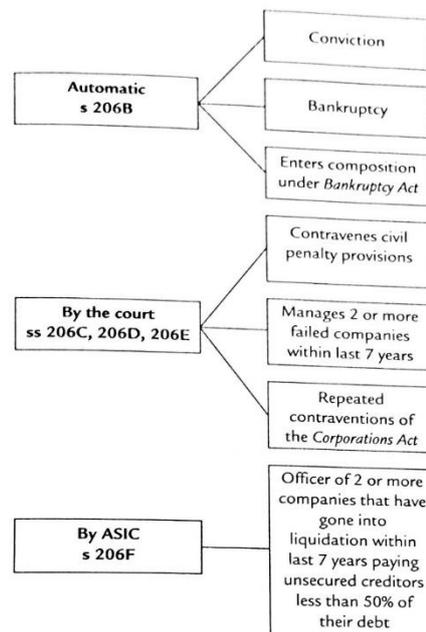
- must be an **individual** and not a company (**s201B(1)**)
- must be at least **18 years old** (**s201B(1)**)
- the person must **consent** to appointment as a director (**s201D**)
- must **not be disqualified** from being a director (**s201B(2)**)

Removable of directors

- directors can be removed by the shareholders in general meeting
- in proprietary companies – the replaceable rules or constitution govern removal of directors (**s203C**)
- in public companies – the directors can be removed by shareholder resolution regardless of any provisions in the constitution (**s203D**)

Disqualification from management

Disqualification: section summary
[15.130]



➤ **Automatic disqualification (s203B)**

- convicted of certain offences – involves dishonesty and punishable by imprisonment for at least months
- bankruptcy

- entering a personal insolvency agreement
- **By court order**
 - **s206C** (unlimited disqualification) - contravention of civil penalty provisions
 - **s206D** – manage 2 or more failed companies within last 7 years; disqualify from management for up to 20 years. Failure includes liquidation, voluntary administration and company ceasing to carry on business leaving creditors unpaid
 - **s206E** (unlimited disqualification) – repeated contraventions of the Corporations Act. Primary object is the protection of the public.
- **Disqualification by ASIC**
 - **s206F** – a director of 2 or more companies that have gone into liquidation within last 7 years paying unsecured creditors less than 50% of their debt

Remuneration

- s202A – the replaceable rule provides that directors are to be paid the remuneration that the company determines by resolution
- shareholders with at least 5% of the votes or at least 100 members have the right to demand disclosure of the remuneration paid to each director
- Termination payments to directors are a significant corporate governance issue. Excessive termination payments may be regarded as a reward for failure and by their nature; they do not link remuneration to performance. For this reason certain termination payments require shareholder approval