

## Topic 7: Corporate Contracting

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### 1. A company can enter into a contract one of two ways

#### a. Direct: the directors execute the document so that the document is recognised in law as having the company's signature on it 127

##### i. A company must comply with the requirements of 127:

- **(1)** A company may execute a document without using a common seal if the document is signed by:
  - **(a)** 2 directors of the company; or
  - **(b)** a director and a company secretary of the company; or
  - **(c)** for a proprietary company that has a sole director who is also the sole company secretary that director.
  - NB: A pty company may now be formed with just one director who is also the sole shareholder and it doesn't have a secretary. The section does not cover this situation.
- **(2)** A company with a common seal may execute a document if the seal is fixed to the document and the fixing of the seal is witnessed by:
  - **(a)** 2 directors of the company; or
  - **(b)** a director and a company secretary of the company; or
  - **(c)** for a proprietary company that has a sole director who is also the sole company secretary--that director.

##### ii. Documents duly executed

- **129(5)** A person may assume that a document has been duly executed by the company if the document **appears** to have been signed in accordance with subsection **127(1)**. For the purposes of making the assumption, a person may also assume that anyone who signs the document and states next to their signature that they are the sole director and sole company secretary of the company occupies both offices.
- **129(6)** A person may assume that a document has been duly executed by the company if:
  - **(a)** the company's common seal **appears** to have been fixed to the document in accordance with subsection **127(2)**; and
  - **(b)** the fixing of the common seal **appears** to have been witnessed in accordance with that subsection.

#### b. Indirect/Agent: the document is signed by an agent for and on behalf of the company 126

##### i. Section 126

- **(1)** A company's power to make, vary, ratify or discharge a contract may be exercised by an individual acting with the company's express or implied authority and on behalf of the company. The power may be exercised without using a common seal.

##### ii. Express actual authority:

- An agent's actual authority may derive from a principal expressly giving the agent authority.
- Can arise in a number of ways:
  - A board resolution authorising the individual to contract on the company's behalf
  - Constitutional provisions stating the scope of an officer's authority to contract for the company
  - Company operations policies
  - The individual's employment contract

##### iii. Implied actual authority:

- The extent of this authority, is not expressly agreed upon as between the agent and the principal. The authority is implied from the conduct of the

parties and the circumstances. Arises in two circumstances: implied from the position and implied for acquiescence

- **Implied from the position held (e.g. MD, CEO)**

- Unless expressly limited, the agent's implied authority extends to all those acts that are customarily done by persons occupying that office

- **Examples:**

- i. Individual director:

- Has NO authority that customarily attaches. Power resides in the collective only unless they have received a specific delegation *NAB v Sparrow Green*

- ii. Managing director

- Customary authority: to enter into contracts relating to the day to day management of the company. This will depend on the type and size of the company. *Hely-Hutchinson*

- iii. Chair

- Customary authority to enter into contracts: none. Similar to an individual director *Hely-Hutchinson*

- iv. Company secretary

- authority to enter in contracts which relate to the administration of the company *Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd*

- v. Other executive officers

- Other executive officers: authority to engage in contracts relating to their function (ordinary trading activities). Usually limits to how much they can spend
- **NB:** distinguished from board members (NEDs, SC, NE, Chair) whose authority is to vote at the meeting along with other board members. It is to act with the cohort, not appointed with individual responsibility *Northside*

- **Implied by acquiescence:**

- This is typically the case where anyone in the position above the person acting has the power to stop them, but allows them to act anyway – such that the actor thinks they have the power to do so because they have not been stopped *Hely-Hutchinson*
- Additionally, the board can acquiesce to giving a particular person authority (by resolution)
- Acquiescence must be by some body with actual authority
  - i. In the case of the board, this requires acquiescence by the entire Board, not just one or two individual director
- Conduct needs to reflect a pattern (one-off event unlikely to be enough)

- iv. ***Apparent (Ostensible) Authority***

- An agent's apparent or ostensible authority arises if a principal gives the impression to an outsider that an agent has authority to act on the principal's behalf. It does not depend on any agreement between principal and agent.
- **Three step test *Freeman v Lockyer***
  1. Representation that the agent had authority to enter into a contract of this kind was made to a 3P