



ASIC

Australian Securities & Investments Commission

Your company and the law

If you are a director or secretary of a small company, you need to follow the requirements set out in the Corporations Act 2001.

The Australian Securities and Investments Commission (ASIC) is the company law watchdog. We've put together this guide to let you know about the most important things the law requires directors and secretaries of small companies to do.

The law imposes a number of legal obligations on company directors and secretaries. Obviously we can't explain every responsibility or cover every situation here. At times you may need professional legal advice.

Please note that even if you appoint an agent to look after the company's affairs, you — not the agent — may still be held responsible for those legal obligations.

1 What does the law expect of you personally?

As a director, you must:

- be honest and careful at all times
- know what your company is doing
- take extra care if your company is operating a business because you may be handling other people's money
- make sure that your company can pay its debts
- see that your company keeps proper financial records
- act in the company's best interests, not just in your own interests, even though you may have set up the company just for personal or taxation reasons, and
- use any information you get through your position properly and in the best interests of the company. It is a crime to use that information to gain, directly or indirectly, an advantage for yourself or for any other person, or to harm the company. This information need not be confidential; if you use it the wrong way and dishonestly, it may still be a crime.

If you have personal interests that might conflict with your duty as a director, you must generally disclose these at a directors' meeting. This rule does not apply if you are the only director of a proprietary company.

2 What work must a director do?

You and any other directors will control the company's business. Your company's constitution (if any) or rules may set out the directors' powers and functions.

You must be fully up to date on what your company is doing:

- Find out for yourself how any proposed action will affect your company's business performance, especially if it involves a lot of the company's money.
- Get outside professional advice when you need more details to make an informed decision.
- Question managers and staff about how the business is going.
- Take an active part in directors' meetings.

Only be a company director or a company secretary if you are willing to put in the effort.

Avoid any company where someone offers to make you a director or secretary on the promise that 'you won't have to do anything' and 'just sign here'. You could be exposing yourself to many legal liabilities.

Can anyone be a director or secretary?

You must not act as a director or secretary (or manage a company) without court consent if you:

- are an undischarged bankrupt,
- are subject to an arrangement under Part X of the Bankruptcy Act 1966 that has not been fully complied with,
- are subject to a composition under Part X of the Bankruptcy Act 1966 and final payment has not been made, or
- have been convicted of various offences such as fraud or offences under company law, such as a breach of your duties as a director or insolvent trading.

If you have been convicted of one of these offences you must not manage a company within five years of your conviction. If imprisoned for one of these offences, you must not manage a company within five years after your release from prison.

If you become bankrupt or are convicted of a relevant offence at a time when you are a director or secretary then you automatically lose that

office. In such cases, the company must notify ASIC that you have ceased to act as a director or secretary of the company.

ASIC can also ban you from being a company director in certain situations.

If you are not allowed to be a company director or secretary, you are not allowed to manage a company. It is a serious offence to set up dummy directors while you really manage the company.

Also, directors must be older than 18.

4 Can you sell shares to the public?

Proprietary companies are generally not allowed to raise money from the public by selling shares. Avoid anything to do with illegal fundraising.

5 What records must you make sure your company keeps?

As a director, the law makes you personally responsible for keeping proper company records.

You must see that the company keeps up-to-date financial records that:

- correctly record and explain its transactions (including any transactions as a trustee), and
- explain the company's financial position and performance.

Even the smallest company must have financial records so that:

- true and fair financial statements of the company can be prepared if needed,
- financial statements can be conveniently and properly audited if necessary, and
- the company can obey the tax laws.

If your company is a 'small proprietary company' (as defined in the Corporations Act 2001) it will generally not have to prepare formal financial reports under the Corporations Act each year. However, you must still keep financial records, and may need financial reports for managing and measuring your company's progress, tax purposes or raising finance.

Large proprietary companies and public companies — even non-profit public companies — must prepare financial reports, have them audited and lodge them with ASIC.

6 What are financial records?

This list shows some of the basic financial records that accountants might expect a company to keep:

- general ledger, recording all the company's transactions and balances (revenues, expenses, assets, liabilities etc.) or summarising transactions and balances detailed in other records
- cash records — e.g. bank statements, deposit books, cheque butts, petty cash records
- debtor and sales records — e.g. a list of debtors and their balances, delivery dockets, invoices and statements issued, a list of all sales transactions
- creditor and purchases records — e.g. purchase orders, invoices and statements received and paid, unpaid invoices, a list of all purchases, a list of all creditors and their balances
- wages and superannuation records
- a register of property, plant and equipment showing transactions and balances in relation to individual items
- inventory records
- investment records — e.g. contract notes, dividend or interest notices, certificates
- tax returns and calculations — e.g. income tax, group tax, fringe benefits tax and GST returns and statements
- deeds, contracts and agreements.

Get professional advice if you have any doubt about the content or type of financial records to keep. The list above gives examples only, because the financial records you need will vary from company to company.

You may keep some financial records electronically, but you must be able to convert them into hard copy so that you can give them to anyone entitled to inspect them. Make backup copies of electronic records regularly, for example weekly or daily.

A company would also normally prepare the following statements regularly (say, monthly) for management purposes, providing to lenders etc:

- Statement of Financial Performance — a statement showing the company's revenues and expenses and the profit or loss that results from these items
- Statement of Financial Position — a statement showing the things of value the company owns and the debts the company owes, and

- Statement of Cash Flows — a statement summarising cash inflows and outflows.

Our information sheet *What books and records should my company keep?* has more information. It is available from our website, Infoline or any ASIC Service Centre.

Your company must also keep some other basic records — see ‘Company housekeeping’.

7 What if your company can't pay its debts?

You must stop your company trading if it is unable to meet its existing debts. You must prevent the company from taking on a new debt if that would mean that it could not meet that debt and its existing debts. If you have reasonable grounds to suspect that the company cannot meet its debts, or won't be able to if you take on more debt, stop and get professional advice.

Your company is ‘insolvent’ if it can't pay its debts. You would be breaking the law if you let the company trade while insolvent. You could be sued personally by a liquidator or creditors for your own assets, not just the assets of your company, and you could face civil or criminal action.

Common signs of financial trouble are:

- low operating profits or cash flow from the main business
- problems paying trade suppliers and other creditors on time
- trade suppliers refusing to extend further credit to the company
- problems with meeting loan repayments on time or difficulty in keeping within overdraft limits
- legal action taken, or threatened, by trade suppliers or other creditors over money owed to them.

If your company is having difficulties paying its debts, get professional advice quickly. Don't assume that you will be able to trade out of the problem. Delay could be damaging to the company and to you personally.

8 What happens to dishonest directors?

Every year, the courts send dishonest and reckless company officers to prison, and impose heavy fines and award damages.

As the company watchdog, we investigate corporate crime. You can report dishonest company directors to us. We may take a number of steps against directors who fail in their duties. Our Infoline on 1300 300 630 can help you.

9 What can you find out about other companies?

Our information sheet *Don't get burned* has tips on avoiding shonky operators and fly-by-night companies. It is available from our website, Infoline or any ASIC Service Centre.

You can find out more about a company you are dealing with by checking its identity to make sure that it really exists. You can also see if it is up to date with its fees and documents.

Tell us if you think another company is trading while it cannot pay its debts. We may not be able to investigate everything, but we do keep detailed records of all complaints and may take action if we have evidence of serious wrongdoing. Tell our Infoline on 1300 300 630 if you think that a company director is acting dishonestly.

10 Company housekeeping — records, registers etc.

The officers of every company must make sure that the company attends to some basic 'housekeeping' matters. The directors remain ultimately responsible for the company's compliance with the Corporations Act.

When a company is set up, you must:

- register your company name and obtain an Australian Company Number
- have a registered office. (If your company doesn't occupy the same address as the registered office, then you must have written consent from the person who occupies the registered office.)

Make sure that you:

- display the company name at every place at which your company carries on business and that is open to the public. Additionally, a public company must also display its name and the words 'registered office' prominently at its registered office.
- display the company name, the words 'Australian Company Number' (or 'ACN') or 'Australian Business Number' (or 'ABN') and the relevant number on:
 - the common seal (if the company has one)
 - every public document of the company
 - every negotiable instrument (e.g. cheque, promissory note etc.) of the company, and
 - all documents lodged with ASIC.

Your company must keep:

- registers of members (shareholders)
- registers of option holders (if you have them)
- minutes of general meetings
- minutes of meetings of directors
- registers of charges created by the company over company property, and
- financial records sufficient for financial statements to be prepared (and audited if necessary) for at least seven years after the transactions are completed.

We have an information sheet about the ASIC forms that companies must lodge, called *Checklist for registered companies and their officers*, which is available from our website, Infoline or any ASIC Service Centre.

11 What do you have to tell us about your company?

Each year you must:

1 Pay your company's annual review fee

We will send an annual Statement of Company Details to your company or its Registered Agent within two weeks of its annual review date. Your company's review date will usually coincide with the anniversary of its registration. The Statement may be sent electronically, where arrangements have been made with us to do so.

The Statement of Company Details sets out the company's details recorded in ASIC's database, such as the names and addresses of its directors and secretary, registered office, principal place of business, ultimate holding company (if any), shareholders and share details. If these details are correct and no other changes have occurred that require notification to be given to ASIC, then the director(s) need only pass a solvency resolution within two months of the review date and pay the annual review fee invoice that accompanies the Statement.

If any details on the Statement are no longer correct, you must update them using Form 484 within 28 days after the Statement of Company Details issue date.

We may also require information to be lodged, e.g. where data are missing.

To avoid the payment of late fees or other non-compliance action, the annual review fee must be paid within two months of the review date.

2 Pass a solvency resolution

The company's directors must pass a solvency resolution within 2 months after the company's review date, unless the company has lodged a financial report with ASIC within the 12 months before the review date.

A positive solvency resolution means that the directors are of the opinion that there are reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable. Notification of a positive solvency resolution does not have to be lodged with ASIC, but you must pay the company's annual review fee. Payment of the fee is taken to be a representation by the directors that the company is solvent.

A negative solvency resolution means that the directors are of the opinion that there are not reasonable grounds to believe that the company will be able to pay its debts as and when they become due and payable. If the directors pass a negative solvency resolution ASIC must be notified using Form 485 within seven days after the resolution has passed.

If the directors do not pass a solvency resolution within two months of the company's review date, ASIC must be notified using Form 485 within seven days after the end of the two-month period following the review date.

3 Keep us informed of various changes in your company's details

Some of the more common things you must tell us are set out in the following table. The Corporations Act requires you to tell us about these changes within a certain time period. If you tell us after this time, you may have to pay a late fee.

Send the correct form and fee to:

Australian Securities & Investments Commission (ASIC)
PO Box 4000
Gippsland Mail Centre VIC 3841

You can also use our internet lodgement service to update company records through our website.

12 Keeping ASIC informed

Type of activity or duty	Form
If you want to keep registers of shares, options or charges at an address other than the company's registered office or principal place of business, you must tell us where they are being kept within 7 days after the change.	909

Type of activity or duty	Form
If the officers of the company change, or if any personal details change, such as their residential address, you must tell us within 28 days after the change. You must also lodge the terms of appointment when appointing an alternate director.	484
A director or secretary can tell us directly if they retire or resign. A copy of their letter of retirement or resignation from the company must be sent with the form.	370
If you change the company's registered office or principal place of business, you must tell us within 28 days after the change.	484
If you create a charge on company property, you must tell us within 45 days.	309 & 350
If you vary a charge over the company's property, you must tell us within 45 days from the date of the variation.	311
You don't have to notify us when a charge is satisfied, but it may be in your interest to do so.	312
If the company changes its name, you must tell us within 14 days after the resolution was passed. (New names are subject to availability criteria.)	205
If you issue new shares, you must tell us within 28 days from the date of issue.	484
Proprietary companies must advise us within 28 days of changes to the top 20 members in each class of share held. Such changes include changes of name and address, increase or decrease in shares held and cessation of membership.	484
Proprietary companies must advise us within 28 days of changes to their ultimate holding company.	484
If you divide or convert shares into different classes, you must tell us within 14 days from the date of the change.	211
You must notify us of a negative solvency resolution within 7 days of the resolution.	485
If no solvency resolution is passed within 2 months of the review date you must notify us within 7 days after that period	485
You may apply to change your company's review date if it is considered unsuitable. You must, however, be able to satisfy certain conditions to have the review date varied.	488

13 Getting the forms you need

You can get the most commonly used forms from our website, from legal stationers (for bulk forms) or from an ASIC Service Centre (for single forms).

If you use a lot of forms, interactive software is available, such as ASIC Forms on CD-ROM (call CPD on 1800 036 186). For a list of software products registered by ASIC, contact one of our Service Centres.

Our website also list the fees you must pay for lodging each forms.

14 How do you close down your company?

You can apply to have the company deregistered if certain conditions are met, using Form 6010.

The main conditions are that the company:

- is not carrying on business
- has assets of less than \$1000
- has paid all its fees and penalties under the Corporations Act
- has no outstanding liabilities
- is not a party to any legal proceedings, and
- all its members have agreed to the deregistration.

If these conditions are not met, the process is more complex and you will need the help of a professional adviser.

15 A final word

Finally, you are unlikely to get into trouble if you:

- are honest
- are open with colleagues
- do all the required homework
- get advice or more information when you are in doubt, and
- give the interests of the company, its shareholders and its creditors top priority.

16 Need more help?

For help about your duties as a director or company secretary, contact our Infoline by email at infoline@asic.gov.au.

For help about company fees, forms and other documents, or information concerning foreign companies (for example how to register a foreign

company and post-registration obligations), see our website www.asic.gov.au to obtain an Information Sheet or call our Information Processing Centre on 03 5177 3988 or your nearest ASIC Service Centre.

We provide general information about the law and how we interpret it without considering your particular circumstances. We are not your professional legal advisers. You must decide at your own risk whether what we say is applicable to you. In most cases you will need a qualified professional adviser to take your particular circumstances into account to tell you how the law applies to you.