

Removing a Public Company Director

- Section 203D of the *Corporations Act 2001*

7 August 2015

A director of a public company cannot be removed by other directors.¹ This is a mandatory rule under the *Corporations Act 2001* that cannot be displaced or modified by the constitution of a public company.²

A director of a publicly listed company must only be removed by an ordinary resolution of members. The mechanisms contained in section 203D of the Act must be strictly adhered to notwithstanding what is written in the company's constitution.³ See *Scottish & Colonial Ltd v Australian Power & Gas Co Ltd & Ors* [2007] NSWSC 1266. But see different holding in the earlier Supreme Court of NSW decision of Barratt J in *Gosford Christian School Ltd v Totonjian* [2006] NSWSC 725. See also *Allied Mining & Processing Ltd & Anor v Boldbow Pty Ltd* [2002] WASC 195 and *Bisan Ltd v Cellante* [2002] VSC 504 per Dodds-Streeton J at [28] and [29]. The reasoning of Bryson AJ in *Scottish & Colonial Ltd* is very persuasive authority for the proposition that section 203D is a mandatory provision which is to operate whether or not some provision in the constitution providing some other procedural course for the removal of a director which affords the director less or no procedural fairness. As of the date of this publication, until such time as a full appellate court decides on this issue, or there is an enactment to clarify, a public company is well advised to err on the side of caution and use the mechanism contained in section 203D.

Failure to comply with some of the mandatory requirements under section 203D may result in the prosecution of a company by the Australian Securities and Investments Commission or the Commonwealth Director of Public Prosecutions for a strict liability offence⁴ carrying a penalty of up to \$850.⁵

Although reasons for the removal do not have to be given under section 203D, companies should be aware that a director's contracts of service may entitle them to compensation if removed from office prematurely. It is recommended that any company or members contemplating the removal of a director seek legal advice before doing so.

Important Notice

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The Procedure:

1. Notice of Intention to the Company⁶

- (a) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.
- (b) The notice should be issued by members with at least 5% of the votes that may be cast at general meeting or at least 100 members who are entitled to vote at a general meeting.⁷
- (c) The notice should:
 - (i) be in writing; and
 - (ii) set out the wording of the proposed resolution;
 - (iii) be signed by the members proposing to move the resolution; and
 - (iv) to avoid any confusion as to which process is being used, the notice should be clearly labelled as *"Notice of intention to move resolution for removal of director – Section 203D of the Corporations Act 2001"*.
- (d) Separate copies of a document setting out the notice may be used for signing by members if the wording of the notice is identical in each copy.
- (e) The percentage of votes that members have is to be worked out as at the midnight before the members give the notice.

2. Notice to the Members

- (a) At least 21 days notice must be given of a meeting of a company's members. However, if a company has a constitution, it may specify a longer minimum period of notice.⁸

- (b) Shorter notice to the members cannot be given for the removal or appointment of a director.⁹ Any notice period under the constitution may be longer than 21 days but not shorter.

3. Notice to the Director/s

The company must give the director a copy of the notice as soon as practicable after it is received.¹⁰

4. Meeting & Natural Justice

- (a) The director is entitled to put their case to members by:
 - (i) giving the company a written statement for circulation to members; and
 - (ii) by speaking to the motion at the meeting (whether or not the director is a member of the company).
- (b) The written statement is to be circulated by the company to members by:
 - (i) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or
 - (ii) if there is not time to circulate the written statement, having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.
- (c) The director's statement does not have to be circulated to members if it is more than 1,000 words long or defamatory.

5. Voting

Ordinary resolution only required.¹¹

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End Notes

¹ **CORPORATIONS ACT 2001 - SECT 203E**

Director cannot be removed by other directors--public companies

A resolution, request or notice of any or all of the directors of a public company is void to the extent that it purports to:

- (a) remove a director from their office; or
- (b) require a director to vacate their office.

² Refer to sections 134, 135, 141 and 203E of the *Corporations Act 2001* (**the Act**).

³ **CORPORATIONS ACT 2001 - SECT 203D**

203D Removal by members—public companies

Resolution for removal of director

(1) A public company may by resolution remove a director from office despite anything in:

- (a) the company's constitution (if any); or
- (b) an agreement between the company and the director; or
- (c) an agreement between any or all members of the company and the director.

If the director was appointed to represent the interests of particular shareholders or debenture holders, the resolution to remove the director does not take effect until a replacement to represent their interests has been appointed.

Note: See sections 249C to 249G for the rules on who may call meetings, sections 249H to 249M on how to call meetings and sections 249N to 249Q for rules on members' resolutions.

Notice of intention to move resolution for removal of director

(2) Notice of intention to move the resolution must be given to the company at least 2 months before the meeting is to be held. However, if the company calls a meeting after the notice of intention is given under this subsection, the meeting may pass the resolution even though the meeting is held less than 2 months after the notice of intention is given.

Note: Short notice of the meeting cannot be given for this resolution (see subsection 249H(3)).

Director to be informed

(3) The company must give the director a copy of the notice as soon as practicable after it is received.

Director's right to put case to members

(4) The director is entitled to put their case to members by:

- (a) giving the company a written statement for circulation to members (see subsections (5) and (6)); and
- (b) speaking to the motion at the meeting (whether or not the director is a member of the company).

(5) The written statement is to be circulated by the company to members by:

- (a) sending a copy to everyone to whom notice of the meeting is sent if there is time to do so; or
- (b) if there is not time to comply with paragraph (a)—having the statement distributed to members attending the meeting and read out at the meeting before the resolution is voted on.

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- (6) The director's statement does not have to be circulated to members if it is more than 1,000 words long or defamatory.

Time of retirement

- (7) If a person is appointed to replace a director removed under this section, the time at which:

(a) the replacement director; or

(b) any other director;

is to retire is to be worked out as if the replacement director had become director on the day on which the replaced director was last appointed a director.

Strict liability offences

- (8) An offence based on subsection (3) or (5) is an offence of strict liability.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

⁴ See subsection (3) and (5) of section 203D of the Act.

⁵ Schedule 3 of the Act - 5 penalty units where 1 penalty unit is currently \$170. See also section 1312 which allows a court to impose a pecuniary penalty 5 times the maximum where the offender is a body corporate. Not pursuant to *Crimes Legislation Amendment (Penalty Unit) Act 2015* a penalty unit will increase to \$180 on 31 July 2015.

⁶ Sub-section (2) of section 203D of the Act.

⁷ It is recommended that the procedure laid out for general meetings under section 249N of the Act be followed.

⁸ Section 249H of the Act.

⁹ Sub-section (3) of section 249H of the Act.

¹⁰ Sub-section (3) of section 203D of the Act.

¹¹ See section 203D of the Act.

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