Chapter 1
The Role of Director

Introduction
The title ‘director’ is prestigious. It is often associated with wealthy companies and clever takeover battles. It evokes the smart executives who attract advertising and media attention. Public interest focuses on directors of large, listed public corporations. Such directors dominate the news and control top industries and businesses. Apart from the federal and State governments and some trade unions, these corporations are the most powerful and wealthiest institutions in Australia. Their chief management is influential and socially prominent. Corporations such as these will often have thousands of shareholders, hundreds of employees and large groups of management executives.

Not so prominent are the directors of the small, proprietary companies, typically with small family memberships, little paid-up capital and

1. Pursuant to the Formal Agreement entered on 22 December 1978, the Commonwealth and State governments of Australia set up a ‘national scheme’ for companies and securities regulation. This was the culmination of moves toward uniformity in corporate law which dated back to the 1950s. In 1961, there were uniform Companies Acts enacted in each State and participating Territory — referred to as ‘the UCA’. In time, it became evident that further major reforms were needed. In 1980 a permanent body, the National Companies and Securities Commission — the NCSC or ‘Commission’ — came into being to administer the proposed national scheme which took over from the UCA.

State and Territory corporate affairs commissions (CAC) carry out the administration of company and securities regulation within the States or Territories, subject to the direction of the NCSC. Four main operative Codes were enacted to form the core of the national scheme, the most important of which is the Companies Act 1981 (Cth), which operates directly in the ACT and was adopted with minor variations only by each State as the Companies Code. In this book, this statute is called ‘the Code’ or sometimes the ‘Australian Code’ or the NCC (National Companies Code). The Ministerial Council for Companies and Securities, which consists of the Commonwealth and State Ministers in charge of corporate law, is ultimately responsible for overseeing the NCSC and the operation of the scheme. The Ministerial Council is also the body in charge of amendments to the statutes. It considers proposals for amendment and those it approves are submitted to the Commonwealth Parliament. Once enacted, the amendments have automatic effect in each State and participating Territory. For a comprehensive discussion of the constitutional background and the development of the cooperative or national schemes, see Baxt, Ford, Samuels and Maxwell, An Introduction to the Securities Industry Codes (2nd ed, 1982) esp Chs 2-4.

This book uses the terms ‘holding’, ‘subsidiary’ and ‘related’ companies (defined in s 7 of the Code), ‘AASE’ (Australian Associated Stock Exchanges), ‘corporation’ as well as ‘company’ (see s 5 of the Code), ‘public’, ‘listed’, ‘proprietary’, ‘no liability’ and ‘foreign companies’ (see also s 5 of the Code) and ‘Table A’ (of Schedule 3 to the Code) on the basis that the reader is familiar with them.
modest operations. Often, all members of the company are directors. These companies will not be listed on the Stock Exchange and their often rather informal general meetings, whilst no doubt of interest to the participants, will rarely be the subject of public controversy. Such companies form the vast bulk of registered companies in Australia.

However small a company, its directors are every bit as much directors in the eyes of the law as are the managing directors of the large multinational corporations. Their fiduciary duties are the same. The 'national' Companies Code 1981 (as amended) applies to them with as much and as little rigour as to their more illustrious 'peers'. This fact, even if known, is not always fully appreciated by the family director. The law reports are replete with accounts of flagrant abuses of powers and ignorance of duties by directors of small, proprietary companies.

This book deals with the powers and duties of all directors, from all types of companies. Although companies are separate entities or 'persons' at law, they must act through the 'agency' of natural persons, through 'authorised' personnel. Invariably, the company's articles empower the directors (collectively called the 'board' of directors or the directorate) to manage the company's business. It is impossible to list completely the tasks that directors perform, such is their variety. They include making decisions on marketing, management, accounting procedures, investment and development matters, cash flows, the company's performance and many other matters. The directors, especially those of larger companies, usually 'manage' in the sense of giving direction, focus and overall leadership on 'macro' issues, rather than by handling the everyday 'micro' concerns of the company; day-to-day work is generally in the hands of employed executives.

### Executive and non-executive directors

Boards can be made up of both executive (inside or working) directors and non-executive (outside) directors. Executive directors are full-time employees of the company; non-executive directors are not. A director who performs only the usual tasks of a director, such as attending and making decisions at board meetings, is not considered an employee of the company (that is, he does not have a contract of employment with...
the company). However, directors may be appointed to executive posts within the company (such as managing director), and work full-time as part of the company’s ‘labour force’. They will then be employees as well as directors (for example, a marketing manager, the company secretary, a full-time solicitor, accountant or personnel manager). Employee directors will have greater knowledge of the company’s operations and will have more time to spend on the company’s affairs.

In 1983 the Australian Institute of Directors surveyed Australian public companies’ boards.\(^5\) The survey showed that the average board size for the ‘top 500’ public companies in Australia (by market capitalisation) was seven members. The average board had only 2.1 executive and 4.9 non-executive or outside members. These proportions were about the same in 1975. The size of boards is usually smaller in proprietary companies. Outside, or non-executive, directors are rare in small, family-centred, proprietary companies.

Outside directors are increasing in number on the boards of Australian public companies. The Beckingsale Management Services Pty Ltd survey of Australian and New Zealand companies in 1969 reported that outside directors were in a majority on 60% of public company boards. This percentage has probably increased. In the United Kingdom, non-executive directors fill from one-quarter to one-third of the seats on boards. Such directors are usually recruited by the chairman or the chief executive officer.\(^6\)

In Canada and the United States, many public, listed companies appoint audit committees. Consisting mainly or wholly of non-executive directors, the major role of an audit committee is to review the company’s financial performance. The company’s auditors usually attend the audit committee’s meetings and both they and the non-executive directors, with more precisely defined roles to play, have enhanced their power in the corporate structure.\(^7\) Canadian public companies (registered under the federal Act) and Connecticut corporations now have to appoint audit committees.\(^8\) The American Securities and Exchange Commission encourages them, and the UK Department of Trade has also commented favourably on them.\(^9\) Although they appear to be suitable for Australian business organisations, Australian companies, like those in the United Kingdom, show little enthusiasm at present.

The UK Institute of Directors has issued a Code of Practice for non-executive directors.\(^10\) Its aim is to inform appointees of their responsi-

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5. Survey conducted by Dr Blair Hunt: reported in (1984) 14 The Australian Director at 12–18.
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The Institute is also campaigning for the placing of a minimum of two non-executive directors per board, and has even accepted that non-executive directors be paid under contracts of employment.

The outside director offers objectivity, prestige, expertise, ‘outside’ experience and independent judgment of the company’s management. It is difficult for the executive director to have the same objectivity and breadth of experience, because of his close involvement in the operations of the company and its hierarchy. Strong arguments exist for having outsiders in the majority on the boards of middle to large companies. Inside directors, who would include the company’s lawyer and banker’s representative, may tend to toe the chief executive’s line. Professor Mace is adamant:

If the [chief executive officer] perceives the role of the board to be the fulfilment of the three functions [source of advice, counsel and some sort of discipline], but if in addition he wants the board to represent the stockholders’ interests by determining objectives, strategies, and policies, asking discerning questions, and selecting, evaluating, and measuring the [chief executive officer’s] performance — then it is apparent that there should be no insiders on the board other than the chairman and the [chief executive officer]. The logical extension of this conclusion is, of course, that the board should be made up entirely of outsiders, and that the chairman and the [chief executive officer] should not be on the board themselves.11

‘Non-executive’, ‘outside’ or ‘independent’ directors have recently been championed as effective checks on abuses by large companies of corporate power. Some commentators value them highly as independent monitors of management decisions; others as representatives appointed to look after specific groups or interests (for example, consumers, minorities, the environment).

[S]ome contemplate ‘public interest’ directors to represent the public in general and not particular constituencies — for example, by encouraging corporate compliance with law and responses to negative externalities and public needs.12

There are trends towards having more independent directors on boards and special committees of the board, such as nominating (directors’ selection), compensation (senior management remuneration) and audit committees, with the overall intention of keeping corporate governance vigilant, active and responsive to shareholder and public needs. Legislatures, stock exchanges through listing requirements and corporate law reformers encourage these developments. The future of corporate governance law reform in Australia lies in these areas. It is hoped that

11. Mace, above n 7 at 199.
boardroom misconduct will be limited by good governance procedure, although some commentators are apprehensive about the cumbersome procedures and costs of "increased layers of bureaucracy".13

**Employee representation on boards**

Employees are increasingly involving themselves in corporate boardrooms. Worker participation or employee representation on boards has, as one writer puts it, "dominated [company law] discussion over the last 10 years" in the European Economic Community.14 The traditional view, reflected in the law, was that employees were not part of the company in the way that members were. Management owed them no duties in the same sense. Directors were responsible exclusively to the shareholders and creditors. However, legislators and reformers in Europe even in the 19th century saw this as undesirable. Employees, it was felt, should have a say in management decision-making, both because they had something to offer in that process and because their financial security was as much tied up with the affairs of the company as that of members and creditors. Given a real share in the decision-making within their company, they would also bear a share in the responsibility for its success.

There are several variations of "industrial democracy". The practice of workers or employees acquiring shares in their companies is a familiar one. Many large companies, such as ICI Ltd, use such a scheme. Sometimes, these schemes are merely cosmetic — the shares may not carry voting rights and the employees may get only a small fraction of the total shares in the company. In times of economic hardship, however, it has not been unusual for employees to buy their company out, taking it over more or less as a cooperative venture.

The Federal Republic of Germany, the Netherlands and other European countries have long had consultative or 'works councils', which are elected committees of workers and management representatives. They ensure consultation between management and labour and have reportedly been successful in those countries. In the Netherlands, under statutory powers, the works councils have access to meaningful company information and regular consultation with management boards. The courts may also interfere. Where the works councils' advice is not followed, there is a right of appeal to the courts for review.15


14. Gower's Principles of Modern Company Law (referred to as Gower in the text) (4th ed) at 66. There is a movement to 'harmonise' European company law. Corporate law 'directives' have been enacted, founded on s 54(3)(g) of the European Economic Community (EEC) Treaty. They bind member states.

15. This right of appeal is very rarely used: see Ottervanger and Pais, 'Employee Participation in Corporate Decision Making: The Dutch Model' (1981) 15 International Lawyer 393.
A more controversial proposal is that workers or employees should actually be on the boards of companies. This idea originated in its more sophisticated form in West Germany. It was spurred on during the occupation period after the Second World War when the Allies were anxious to make it more difficult for a dictatorial power to dominate German business for undemocratic purposes. Since the early 1950s, elected employee representatives have taken up to one-half of the places on the supervisory and even management boards of large German companies.

Since around 1870, many German companies have had two quite distinct boards rather than one. These are the ‘supervisory board’, which appoints and monitors the performance of management and controls the company’s basic policy, and the ‘management board’, which is more akin to the boards of directors we are used to in Australia. The management board deals with the company’s day-to-day life. This two-tier structure has, with some modifications, been adopted throughout Europe. Some countries, such as Sweden, still have unitary boards, but they also have worker or employee representation on their boards.

The EEC is presently ‘harmonising’ the company laws of member States. In the EEC’s controversial Fifth Company Law Directive (1972) on worker participation in management, it was proposed that companies with more than 500 employees have two-tier boards, with significant employee representation on the membership of the boards. There was significant initial opposition to this proposal in the United Kingdom, Ireland and Denmark, ironically from both employer and employee organisations. British industry was afraid that with such reforms its company structures would collapse. In 1982, a compromise was reached: companies may choose between the unitary and two-tier board systems. However, there is still an obligation to include employees in the decision-making processes of the company if 1000 or more are employed by the company (including its dependent companies). Participation can be through the appointment of employee representatives to the supervisory board (if there is one), or as non-executive directors in a unitary board system. A further possibility is the establishment of employees’ representative bodies, which are distinct from the boards, with rights to information and consultation.  

Although critics of worker participation foresee problems, such as delays in decision-making and excessive bureaucratisation, one benefit of the system as it operates in some EEC countries is that enterprises seem to be more sensitive to the impact on society of their decisions. A reduction or minimisation of industrial unrest may be another advantage. Some commentators argue that the Federal Republic of Germany’s reputation for a p

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for industrial peace speaks for itself\(^{17}\) — the employees or workers have a permanent voice on and access to top decision-making committees. Thus, employees' objections to changes in policy can be more freely aired and the employer's point of view may be better understood. Such developments may not be far away in Australia.

**Definition of 'director' under the Code**

Section 5 of the Code defines 'director' as including:

(a) any person occupying or acting in the position of director of the corporation, by whatever name called and whether or not validly appointed to occupy or duly authorised to act in the position; and

(b) any person in accordance with whose directions or instructions the directors of the corporation are accustomed to act.

Section 5(2) should also be borne in mind:

... a person shall not be regarded as a person in accordance with whose directions or instructions the directors of a body corporate are accustomed to act by reason only that the directors act on advice given by that person in the proper performance of the functions attaching to his professional capacity or to his business relationship with the directors or the body corporate.

Zelling J in *Harris v Shepherd*\(^ {18}\) at first instance held that a 'Scheme Manager', appointed under a scheme of arrangement to replace the directors, did not come within the second limb of the statutory definition of director, (that is, the directors were not 'accustomed' to act on the Scheme Manager's orders but rather *compelled* to so act). But his Honour felt that the first limb (which in the *UCA* had a more restricted wording than in the Code's definition) may have applied (that is, the Scheme Manager was 'occupying or acting' in the position of director). Members of the SA Full Court, on appeal, doubted Zelling J's dictum on the first limb.\(^ {19}\) The specific point at issue was whether or not the Scheme Manager was a director for the purposes of prosecution under s 124 of the *UCA* — now s 229 of the Code. The Full Court held that the Scheme Manager was not a 'director' under s 5 of the *UCA*, even though he was a de facto director (that is acting as and carrying out the functions of a director).

The High Court in *CAC v Drysdale*,\(^ {20}\) however, was of a different mind. Drysdale had continued acting as director after his term of office had

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19. The *UCA* definition of director read: "'director' includes any person occupying the position of director of a corporation by whatever name called. . . [cf wording para (a) of Code's definition]."

expired. He attended board meetings, voted on resolutions and took part in management, even though under the articles his directorship automatically ended at the first annual general meeting following his appointment to a casual vacancy on the board. Although no longer de jure, he was a de facto director. Aickin J in the High Court noted:

In [Harris v Shepherd] the view was taken that the words ‘by whatever name called’ were the governing words so far as the first phrase of the definition was concerned and that, because of the use of the word ‘corporation’ (an expression defined as including foreign companies and a variety of other bodies corporate) the words ‘by whatever name called’ were directed at least primarily to foreign companies where different words such as ‘governor’, ‘controller’ etc may be used. That Court held that the words did not bring into the meaning of ‘director’ a person who was not in law a director, but who purported to be a director in that he acted as, and carried out the functions of, a person properly so appointed.

. . . I think, however, that the better view is that it is directed simply to the question of the name by which a person was known, who in fact occupied a position to which were attached the powers and obligations which the Act attaches to a ‘director’. 21

His Honour went on to discuss de facto directors — in this context, persons whose offices are vacated pursuant to s 222(1) of the Code but who continue to act in management — who commit offences by commission or omission. They are liable, he said, as if they had been de jure and not just de facto directors. He cited from Coventry and Dixon’s case, where it was said:

We do not dispute that if these gentlemen [who were acting as directors without having taken up their qualification shares] had wasted the moneys of the company, they would have been liable under this section. If they had acted as directors it would not have lain in their mouths to say they were not directors, for the purpose of escaping liability [under equivalent of s 305 of the UCA which has been repealed], but no improper acts were alleged against them.22

Thus it was confirmed that de facto directors were subject to the same penalties and liabilities under the Act as directors duly and properly appointed and holding office. They are also in the same fiduciary position as de jure directors. The Code clarified the position.

The s 5 definition of director now includes persons ‘acting in the position of director of the corporation . . . and whether or not validly appointed to occupy or duly authorised to act in the position’. 23

23. The Exposure Draft of Companies and Securities Legislation (Miscellaneous Amendments) Bill 1983, released by the Ministerial Council on 21 December 1982, proposed a new s 5 definition of ‘director’. It did not survive to become law. In essence, it proposed to legislate that holding oneself out as a director (or allowing another to do so) would attract the usual directors’ duties and liabilities to the party held out. The provision was based on Professor Gower’s 1963 Ghanaian Companies Code, s 179.
Validation of de facto directors' acts

In the interests of business efficacy, the legislature has been concerned to validate acts of de facto directors. Persons who have not been validly appointed, or who are not qualified to act but who stand in the position of director, can bind the company.

Section 224 of the Code (formerly s 119 of the UCA) and reg 78 of Table A are similar in effect:

s 224(1) The acts of a director or secretary are valid notwithstanding any defect that may afterwards be discovered in his appointment or qualification.

(2) Where a person whose office as a director of a corporation is vacated pursuant to sub-section 222(1) purports to do an act as director of the corporation, that act is as valid, in relation to the person dealing with the corporation in good faith and for value and without actual knowledge of the matter referred to in that sub-section by reason of which the office of the first-mentioned person was vacated, as if that office had not been vacated.

Section 224(2) affirms that acts of de facto directors bind the company as against outsiders.24

Aickin J commented in CAC v Drysdale25 that s 119 of the UCA (now s 224(1) of the Code) 'is confined to cases where there has been a purported appointment in which some defect is later discovered'. He cited Morris v Kanssen, where Lord Simonds said:

... the section and the article [equivalents of s 224(1) and reg 78 of Table A], being designed as machinery to avoid questions being raised as to the validity of transactions where there has been a slip in the appointment of a director, cannot be utilized for the purpose of ignoring or overriding the substantive provisions relating to such appointment.26

Aickin J concluded that the section thus gave no basis for regarding the de facto director in Drysdale as a director, 'or for his acts to be treated as if they were the acts of a director'.27 In other words, the provision cannot repair or validate a defective appointment; it can only repair or validate the acts of officers not properly appointed.

This point was taken up by the New Zealand Court of Appeal in Re Northwestern Autoservices Ltd.28 A resolution appointing a director was invalid, first, because notice of the general meeting purporting to make the appointment was not given to one of the two shareholders (or to the Official Assignee), and second, because there was no quorum present at

24. Section 224 of the Code differs from s 119 of the UCA in that it does not also apply to acts of a manager whose appointment is defective.
25. Above n 21 at 32,019.
27. Above n 21 at 32,020.
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that meeting. The majority of the Court held that the actions of the purported appointee were not validated by the NZ s 183 and an article to the same effect (equivalents of the Australian s 224(1) and reg 78 of Table A):

It is, I think, implicit in the section and in the article that the appointer must have had power to make the appointment. It is not an apt use of language to speak of a defect in the appointment if there is no power to appoint at all . . . . A purported appointment by persons lacking power to make such an appointment confers no protection.29

But compare the view of Cooke J:

If one stands back from the authorities and textbooks and looks simply at the language of the section, it appears well capable of covering the case of an appointment made and acted on in fact and in good faith but having an undiscovered defect making it void in law, in that the meeting was either not properly convened or lacked a quorum or was an unauthorised one-man meeting.30

An example of where s 224 would now apply is Dawson v African Consolidated Land and Trading Co,31 where a director for a short time ceased to hold his ‘qualification’ shares (that is, that number of shares which the articles require a person to hold in the company before he can become or remain a director). In parting with his shares, he automatically ceased to be a director and he had not subsequently been formally reappointed. Nevertheless, the court held that an article, similar in terms to s 224(1), validated the director’s actions. Thus, a call made on shares by the directors was valid.32 In Albert Gardens (Manly) Pty Ltd v Mercantile Credits,33 the High Court held that although the articles required the appointees to hold a share qualification before appointment as directors, the annual general meeting, acting bona fide, still had power to make appointments where the requirement had not been met, ‘though an appointment of such a person will be defective’.34

Thus, either the then equivalent of s 224(1) (concerning validation of acts) or the art 109 at issue in Albert Gardens could operate to validate the

29. Ibid per Richardson J at 310. See also McMullin J at 313.
30. Ibid at 308. Cf Morgan v 45 Flers Avenue Pty Ltd (1986) 10 ACLR 692, 702 where Young J held that s 224 of the Code did not help because the court was dealing with ‘a void as opposed to an irregular appointment’. The number of directors was increased from two to three by the board, without a resolution of the shareholders as required by the articles. However, as everyone in the company acquiesced to the appointee acting as director, the Court inferred ‘that the appointment should be treated as valid and operative as being adopted by the shareholders by acquiescence’ (702).
32. If the director had not been held able to act there would have been too few directors to resolve to make the call.
34. Ibid per Barwick C J at 27,720.
acts of the defectively appointed directors.\textsuperscript{35} This was not a case of the non-existence of the power in the general meeting to appoint. If the general meeting lacked that power (for example, because of lack of a quorum or an invalidating lack of notice), or if there had been no appointment at all (for example, a director's term of office has expired and he has not been reappointed), then s 224(1) and reg 78 would not validate any acts by the persons purporting to be directors. As the law stands, first, the appointers of the 'director' must have the power to appoint directors and, second, there must in fact be a purported appointment or an attempt to appoint (albeit a defective or ineffective attempt).

Managing Director

The managing director is, as the title suggests, both a member of the board and manager of the company — both a director and an employee. As described in Hopkinson \textit{v} Newspaper Proprietary Syndicate Ltd, a managing director 'is only an ordinary director entrusted with some special powers'.\textsuperscript{36} Generally, companies entrust day-to-day management to one or more managing directors. They usually have great power. The chief executive or 'principal executive officer'\textsuperscript{37} of large companies is often a managing director. Not all chief executives are on the board. In some companies, the chief executive will be simply a manager or general manager. He may, on invitation, attend board meetings, but he lacks the voting powers of a director. In the United States and Canada, corporations often have 'presidents'. They are the closest equivalent to the Australasian or English managing director. A president is usually the company's chief executive officer, although sometimes he is simply the chairman of the board, with no extra powers.

Articles, like reg 79(1) of Table A, invariably give the directors power to appoint one or more of their number to be managing director. They also usually provide that the appointee(s) receive such remuneration as the directors determine (reg 80), that they shall not be subject to retirement by rotation or be taken into account in determining the rotation of retirement of directors (reg 79(2)), and that they shall exercise powers delegated by the board (reg 81). Any person dealing with the company through its managing director (or its manager) may assume that, subject to the memorandum and articles, the usual powers for carrying on the company's business have been delegated to that person. Contracts made

\textsuperscript{35} See the discussion of a validation article in \textit{Venture Acceptance Corporation Ltd} \textit{v} \textit{Kirton} (1985) 3 ACLC 3 at 13–14; (on appeal) (1986) 4 ACLC 158 at 163. The defendants argued, unsuccessfully, that calls were invalid because the directors had been invalidly appointed. An article, similar to reg 78 of Table A, applied to 'cure' a defect — the directors did not hold a sufficient number of shares as required by the articles.

\textsuperscript{36} [1900] 2 Ch 349 at 350. See also Cohen J in \textit{Trussed Steel Concrete Co Ltd} \textit{v} \textit{Green} [1946] Ch 115 at 121, holding that a managing director had a contract of employment.

\textsuperscript{37} See s 5 definition.
with the managing director may be binding, even if there has been no express delegation from the board.\textsuperscript{38}

**Company Secretary**

Although the managing director’s powers are usually wide, the company secretary has comparatively much less ostensible authority. Older authorities\textsuperscript{39} asserted that the secretary had no authority to make any contracts or representations on the company’s behalf; he was a servant only. However, the English Court of Appeal in *Panorama Developments v Fidelis Fabrics*\textsuperscript{40} noted the increasing importance of the secretary as the chief administrative officer of the company and thus his enlarged ostensible authority (for example, to sign contracts involving administrative matters on behalf of the company).

**Board meetings**

Directors generally carry out their role in board meetings. The company’s members are entitled to enjoy the benefit of the collective wisdom and experience of all directors and to expect that the proceedings of management are carried out in an orthodox and reasonably efficient manner.\textsuperscript{41} Accordingly, every director has the right to attend board meetings and to be informed of what is going on at the meetings.\textsuperscript{42} Improper exclusion can be restrained by an injunction.\textsuperscript{43} Unless the articles say otherwise, the elected members of the board must meet in person; proxy attendance and even telephone meetings are not recognised.\textsuperscript{44} One concession that Table A makes to informality in board decision-making is in reg 77, a common form of article. Under reg 77, a resolution in writing is deemed to have passed a board meeting providing it is signed by all the directors. Two or more documents may together be deemed to constitute one, providing they contain statements ‘in identical terms’.\textsuperscript{45} The law is properly concerned with the company getting the benefit of the combined wisdom of directors who have full knowledge of its affairs. As communications technology develops, the law will no doubt grow more tolerant of meetings without the physical presence of directors under one roof. In principle, the ‘presence’ of a director by telephone or by other means of

\textsuperscript{38} See Biggerstaff v Rowatt’s Wharf [1896] 2 Ch 93 and reg 79(1) of Table A.

\textsuperscript{39} For example, *George Whitechurch Ltd v Cavanagh* [1902] AC 117 at 124, per Lord Macnaghten.

\textsuperscript{40} [1971] 3 WLR 440 at 443, 444, per Lord Denning MR and Salmon LJ respectively.

\textsuperscript{41} See Romer J in *Re H R Harmer Ltd* [1958] 3 All ER 689 at 706.

\textsuperscript{42} *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch D 610 at 612.

\textsuperscript{43} Ibid.

\textsuperscript{44} *Harris v English Canadian Co* (1905) 3 Western Law Reporter 5; *Re Portuguese Consolidated Copper Mines Ltd* (1889) 42 Ch D 160 at 165; *Re Bankruptcy of Associated Color Laboratories Ltd* (1970) 73 WWR 566.

\textsuperscript{45} See reg 77(2) of Table A. Cf reg 90 of the UCA’s Table A.
telecommunication is not objectionable. The author regards as being no longer of great force the conclusions of the *Lawrence Committee's Report:*

... directors of publicly-held companies should normally, if not invariably, carry out their legal duties and obligations by means of action taken at duly constituted meetings. The collective consideration and interchange of ideas among directors of publicly-held companies is conducive to good management. 46

Companies wishing to ensure legitimacy of board meetings by telecommunication could regulate accordingly in their articles. 47

A director may, with the approval of other directors, appoint an alternate director to stand in for and exercise the powers of the appointer, and to vote and speak at board meetings. 48 The alternate director has the same duties as any other director, even though his or her powers may be restricted by the articles. 49 It is, of course, common for the board to delegate powers to committees of the board and to a managing director, other officers and employees. 50

**Quorum requirement**

The quorum for board meetings is normally fixed by the articles or, in some jurisdictions, by statute. Resolutions passed when there is no quorum are invalid. Regulation 73 of Table A says that a quorum is such number 'as is determined by the directors and, unless so determined, is 2'. Presumably, the board may resolve to have a quorum of one, although there must be doubt, on fundamental principles, that there has been any 'meeting of directors'. 51

A quorum must be 'capable of voting on the business before the board; otherwise it is idle'. 52 Thus, if directors are unable to vote because of, say, a conflict of interests, they do not count towards the quorum, even if present and vocal. Providing that the quorum is present, and proper notice of the date, time and place of the meeting has been provided, that minimum number of directors, meeting as directors and acting jointly and as a board, can act for the company in management matters. 53 But, as Martin J cautioned in *Harris v English Canadian Co:*

To hold that certain directors could form a quorum by coming upon another in a room, or in the street, and, despite the protest of that other, could, by merely declaring the body of persons so gathered together to be a meeting, actually give it that complexion, would be

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47. Delaware permits telephone board meetings: Del Code Ann, tit 8, §141(i).
48. Regulation 72 of Table A.
49. See *Jenkins Committee Report,* Cmnd 1749 (1962) para 83. See also Thomas J in *Markwell Bros Pty Ltd v CPN Diesels (Qld) Pty Ltd* (1982) 7 ACLR 425 at 433.
50. See regs 76 and 79 of Table A.
51. Cf *Sharp v Davie* (1876) 2 QBD 26; *Re Fireproof Doors Ltd* [1916] 2 Ch 142 at 149.
52. Farwell J in *Re Greymouth Point Elizabeth Railway and Coal Co Ltd* [1904] 1 Ch 32 at 34.
53. See reg 66(1) of Table A.
going, in my opinion, to unwarrantable lengths, and encourage the carrying on of business by 'a trick or artifice'...\(^{54}\)

In *Barron v Potter*,\(^{55}\) an attempted directors' meeting on a railway station platform was ineffective. One director met another alighting from a train and with but a few introductory words, tried to hold a meeting and elect additional directors while the pair were walking down the platform. A director cannot force another into a meeting against the other's will. That is not to say, though, that 'casual' meetings are invalid. If a quorum of directors is able and willing to hold board meetings 'they may do so under any circumstances'.\(^{56}\) However, there must be some formality. The directors would have to intend and be aware of a meeting; a casual discussion of company affairs would not suffice.\(^{57}\)

**Notice of board meetings**

By reg 69(2) of Table A, a director may at any time (and a secretary shall, on requisition of a director) convene a board meeting. It is still an open question whether s 246 of the Code empowers the court to order a meeting of directors if 'it is impracticable to convene a meeting'.\(^{58}\) Board meetings are rarely as formal as general meetings of the company. Some informality is bound to be present when, as we have seen, instant meetings may be held by willing directors. The notice requirement can be expressly or impliedly waived.\(^{59}\) In general, however, every director is entitled to reasonable notice of meetings.\(^{60}\) Directors who are overseas, severely ill, or not reasonably able to be contacted usually cannot complain of lack of notice.\(^{61}\)

What is reasonable notice depends on the circumstances of each case, or, as Street J put it at first instance in *Petsch v Kennedy*, on 'the context of the company's structure, practice and affairs'.\(^{62}\) The general rule of reasonable notice flows naturally from the underlying principle that the members are entitled to the advice of a fully informed board. Verbal notice can be sufficient. A director who objects to the lack of notice should complain immediately, and even refrain from taking part in any meeting that may eventuate.\(^{63}\) Participation may be read as acquiescence to the lack of or shortness of notice.\(^{64}\)

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54. Above n 44 at 5. See also *Barron v Potter* [1914] 1 Ch 895.
55. Ibid.
56. *Barron v Potter*, ibid at 901.
58. See *South Downs Packers Pty Ltd v Beaver* (1984) 8 ACLR 990 at 1004, per Connolly J.
59. Above n 57 at 27,197.
61. Ibid; see also *Young v Ladies' Imperial Club Ltd* [1920] 2 KB 523 at 528.
62. Above n 57 at 27,192.
64. *Spicer v Mytrent Pty Ltd* (1984) 2 ACLC 214 at 222; see also *Brown v La Trinidad* (1887) 37 Ch 1 at 17–18.
It is not strictly necessary at law to give notice of the business to be transacted at the meeting as well as of the meeting itself, even if the proposed business is extraordinary. ‘As a matter of prudence it is very often done, and it is a very wise thing to do it’, 65 but imposed as a general rule, it would be inconvenient for business. This implies a distinction between board meetings and general meetings of the company; the latter are more formal and certain notice requirements are necessary. By contrast, directors will often meet, perhaps on a regular date, without any idea of the business to be conducted. Again, the law acknowledges a need for flexibility.

Section 539 says that a proceeding under the Code is not invalidated by reason of any ‘procedural irregularity’ unless there is or may be ‘substantial injustice’ arising that cannot be remedied by a court order. The absence of a quorum at a meeting of directors is one such ‘procedural irregularity’. 66 So, too, is ‘a defect, irregularity or deficiency of notice or time’. 67 Absence of a quorum or reasonable notice, then, will not necessarily be fatal. However, s 539 cannot be used to cure a purported appointment of directors where the voting method used contravened s 223(1) of the Code.

The subsection [s 539(4)] is a remedial provision intended to permit to be made perfect what is imperfect in respect of some failure to comply with the provisions of the Code or the articles of the company. It is not intended to breathe life into something which is a nullity by reason of another provision of the statute. 68

Proceedings at board meetings

Directors can deal with matters on the agenda in such order as they deem fit, 69 although it may be usual to follow the order on the agenda. The directors normally elect their chairman and may decide how long he or she will hold office. 70 If there is no such chairman, or the chairman is at least 10 minutes late or is unwilling to act, the directors can elect one of their number to chair the meeting.

Issues arising at a board meeting are generally to be decided by a majority of directors present and voting, the chairman usually having a

65. See La Compagnie de Mayville v Whitley [1896] 1 Ch 788 at 797ff, 805, per Lindley and Kay LJJ respectively. See also Eastern Resources of Australia Ltd v Glass Reinforced Products Pty Ltd, above n 60 at 500–501; while affirming the general rule, Connolly J held that a quorum of directors could not, without notice to their fellow directors, adjourn a board meeting to a date of which their fellows had no notice, and then transact unusual business (ie, the allotment of a large block of shares which enabled the allottee to remove the unnotified directors from the board).
66. See s 539(1)(b)(i) of the Code.
67. See s 539(1)(b)(ii). This section was applied in Roma Industries Pty Ltd v Blinn (1983) 1 ACLC 1079 at 1080.
68. See Harman v Energy Research Group Aust Ltd (1985) 3 ACLC 536 at 539, per Brinsden J.
69. Re Cawley & Co (1888) 42 Ch D 209 at 216, per Chitty J.
70. See reg 75 of Table A.
deliberative and casting vote. However, the Australian Associated Stock Exchanges’ Listing Requirements, s 3L(4) says there should be no casting votes where only two directors form a quorum. There is no right to a casting vote at common law or in the Code, so this right must be found in the articles.

Under s 228(1) and (5) of the Code, a director interested, directly or indirectly, in a contract or proposed contract with the company, or who has a conflict of interest with the company, must declare that interest or conflict to the board. The section says nothing about voting. However, articles such as reg 71 of Table A will usually prohibit the interested director from voting on any such contract or proposed contract. This means that he or she may attend the board meeting and speak on the matter, subject to articles to the contrary. The statute, then, does not prohibit a director from entering contracts with his own company or render them voidable or void, or make the director liable to account. It merely imposes a punishment for non-compliance: three months’ imprisonment or $1000 or both. But the general law does make the interested director liable to account for profits, and unsanctioned contracts between a company and its directors are voidable at the company’s option. Therefore, except where the articles authorise it (and such articles are common), directors cannot enter contracts with their companies merely by disclosing to the board, even if they refrain from attending that meeting and voting. They must also disclose to and get the approval of the general meeting.

Under s 253, minutes of meetings of directors must be entered in minute books, the minutes must be signed by the chairman and the books must be kept at the registered office or principal place of business. Minute books of general meetings are open to inspection and copying by members under s 254, but not those of board meetings. The minutes are prima facie evidence of the proceedings to which they relate.

The director’s right to information

By virtue of his fiduciary position, a director is prima facie entitled to access to corporate information and documents: ‘The right or power of a director of a company or corporation to inspect, to advance the interests of the company or corporation is well recognised’. There are exceptions to this general rule and in some circumstances the director may have to

71. See reg 70(2) of Table A.
72. See Nell v Longbottom [1894] 1 QB 767 at 771: ‘The institution of a second or casting vote, as it is called, is a creature of the statute law introduced for the purpose of avoiding the deadlock which would otherwise ensue.’
73. See also s 3L(6) of the AASE Listing Requirements.
74. These remedies are discussed below in Ch 9.
75. See s 253(2) of the Code.
76. Molomby v Whitehead and Australian Broadcasting Corporation (1985) 63 ALR 282 at 292; see also Berlei Hestia (NZ) Ltd v Fernyhough [1980] 2 NZLR 150 at 162–166; Edman v Ross (1922) 22 SR (NSW) 351 at 361.
establish good reason or a ‘need to know’. Section 267(9) of the Code gives directors access to the company’s accounting records and ss 267(8) and (10) allow a director to seek an order to permit an auditor to inspect the records and report to the director on the information so acquired. ‘A director is entitled to know what is going on in the company, and if his accounting knowledge does not equip him to find out what is going on, then he should have the assistance of an expert.’ If a director threatens to use corporate information for the benefit of competitors or otherwise breach his fiduciary duties, the right to information may be denied by the company. But a refusal to supply information is rarely justified, as the directors have duties to perform; to deny them information is tantamount to a dismissal, it may be argued. Generally the court assumes the director will exercise his right or power to get information for the benefit of the company.

Under a 1986 amendment to the Code, a member can also get access to the company’s books. Under s 265B, providing the member is acting in good faith and that the inspection is to be made for a proper purpose, the Court may grant an access order. Hostility, even litigation, between the shareholder and the company of itself is no bar to such orders, which authorise only auditors or legal practitioners acting on the member’s behalf to inspect the books.

77. Molomby v Whitehead, ibid at 292.
78. Re Funerals of Distinction Pty Ltd [1963] NSWR 614 at 615.
79. See Berlei Hestia (NZ) Ltd v Fernyhough, above n 76 at 162–166.