



Company Powers of Attorney

How can a company execute a document if some or all of the directors and/or secretary are not available?

There are many occasions where it is not possible for a director, directors, or a company secretary to be available to make decisions or execute documents to which the company is to be bound.

Executing Documents – Background Law

Part 2B.1 of the *Corporations Act 2001* (Cth) (the **Act**) sets out how a company may execute a document but does not statutorily limit the way in which a company can execute a document.¹

Section 127² of the Act sets out the conventional ways in which a company executes a document. This is typically by having the following execute the document:

- two directors; or
- a director and a secretary; or
- one director (in the case of a sole director sole secretary company).

Whilst the Act purports to widen the methods by which a document can be executed by a company, there are practical limits that reduce these methods, for example, the other party to a document insisting on a particular method because of the dealing assumption found in Section 128(5) of the Act.

There are a number of ways that a director or directors of a company are able to delegate the ability to execute a document. These are:

Appointment of a director

The existing company directors or shareholders can appoint an **additional director** or directors who are available to execute a document.

The appointment process is outlined in the Act, and the ability to appoint additional directors is usually specified in the company constitution.

The benefit of this method is that there is less of a chance a third party will object to the validity of the director signing on behalf of the company, however, the director will be subject to the statutory duties of a director, and potential liabilities³ that follow. Therefore, care should be taken by any prospective director to ensure he or she will not be affected by these liabilities.

Alternate Director

A company director can appoint an **alternate director**, the process of which is usually outlined in the company's Constitution. Generally, the role of an alternate director is far more limited in scope than as with an ordinary director.

¹ It does note that such powers may be curtailed by a company's constitution or by operation of law (e.g., the contract to which the company is to be bound restricts the methods by which it can be executed).

² Note also that Section 127(4) states that "This section does not limit the ways in which a company may execute a document (including a deed)."

³ For example, insolvent trading.



The process of appointment and resignation of the alternate director is the same as the process of appointment of an ordinary director. Assuming this process is followed, it would leave little scope for any third party dealing with the company to challenge the validity of an act done by the alternate director.

A drawback from the perspective of the alternate director is that he or she is far more likely to be subject to same potential liabilities as with ordinary directors. Therefore, the same care should be taken by any prospective alternate director prior to being appointed.

Appointment of a secretary

A **secretary** can be appointed by following the process in the Act.

The appointment of a secretary is particularly useful when the company is not a sole shareholder, sole secretary company, and only one director is available to execute a document.

The prospective secretary is far less exposed than a director and alternate director, as a secretary is not subject to the same potential liabilities.

Delegation of Authority

The company constitution may provide the **board of directors** with the ability to **delegate** the execution of a document on behalf of a company to a third party.

Typically, this process involves a unanimous or special resolution (75%) of directors. The use of circulating resolutions is particularly helpful when the directors are not conveniently accessible.

The benefit of this method is that the delegate is essentially an agent for the company, and generally⁴ does not inherit any of the director's liabilities and duties.

A party relying on the validity of the execution will generally be reluctant to accept a delegation, as it is not entitled to rely on the dealing assumption in the Act. However, providing the resolution of delegation and a copy of the company's constitution may reduce that party's reservations.

Director Power of Attorney

The director can personally appoint a power of attorney **if the constitution allows for it**.⁵

The attorney is less likely to have any of the statutory responsibilities of the director,⁶ and can maintain a long standing residual authority to be exercised only in the event that the director is unavailable.

When using this method of delegation, care must be taken as to when the power of attorney can be exercised, and the scope of authority granted under it.

A power of attorney granted by a director will cease to have effect upon the director's death.

Company Power of Attorney

A company generally has all of the power of an individual person. Accordingly, a company itself may grant to one or more other persons a power of attorney.

The benefit of a company granting a power of attorney is that the death of a director will not necessarily invalidate the company power of attorney.

⁴ This depends on the scope of the delegation, as a broad scope may invoke the shadow director provisions.

⁵ *Cheerine Group (International) Pty Ltd v Yeung* [2006] NSWSC 1047 confirms that a power of attorney given by a director of a corporation cannot confer authority on the attorney to appoint an alternate director or to exercise other directorial functions on behalf of the donor, even if the attorney is himself a director and the power of attorney is cast in very wide terms.

⁶ This depends on the scope of the power of attorney and the extent of its use, as a broad scope and heavy use may in theory invoke the shadow director provisions.



The directors must resolve - on behalf of the company - to grant the company power of attorney, but thereafter the attorney acts on behalf of the company, (and not on behalf of any director).

The following points should be noted:

- The Company (not the individual Director(s)) needs to appoint an attorney. This power would ordinarily be contained in the **Company Constitution** (but not always, and it is not a Replaceable Rule under the Corporations Act). Therefore, there is some question as to whether a company power of attorney can be validly appointed if the Company does not have a Constitution which specifically allows the appointment of a Power of Attorney. On balance, it is probably valid because the Company has "all the powers of a natural person".
- A **Company Resolution** should be executed at the same time as the company power of attorney to make it clear that the Company itself intends to execute the power of attorney, as opposed to the individual director.

In the case of sole director companies, we strongly recommend the company executes a power of attorney. In the event of the death of the sole director the affairs of the company can continue to be managed until probate of the sole director's Will. A company power of attorney may be stated to only come into effect in certain circumstances, e.g. the death or legal incapacity of the sole director.

What next?

We recommend that you review your company's constitution, to ensure that it adequately provides for the orderly continuation of control of the company in all the likely scenarios.

If you would like to speak to someone about putting in place a Company Power of Attorney, call us on 1300 654 590 or email us at wehelp@adlvlaw.com.au.

Further information can also be found on our website at www.adlvlaw.com.au.