



Australian Government

Office of the Registrar of Indigenous Corporations



## POLICY STATEMENT 30

# Effect of invalid appointment of directors

<b>Policy</b>	PS-30: Effect of invalid appointment of directors
<b>Relevant legislative provisions</b>	CATSI Act Divisions 104, 246, 249, 279 CATSI Act section 683-1
<b>Last updated</b>	23 October 2018
<b>Other relevant policies</b>	PS-27: Suspension of members and directors

## Contents

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1	About this policy statement.....	3
2	Valid and invalid appointments of directors .....	3
3	Eligibility for appointment as a director .....	4
4	Procedures for appointing directors.....	4
	A. Examples of invalid appointments .....	4
	B. Examples of appointments which may not be invalid .....	5
5	Deemed directors .....	5
	A. Appointment of a person known to be ineligible .....	5
6	Effectiveness of acts by ceased directors.....	6
7	Effectiveness of acts by invalidly appointed directors.....	6
8	Assumptions people dealing with a corporation can make about the validity and powers of directors .....	7
9	Scenarios .....	8
	A. Ineligible person invalidly appointed as a director and acts .....	8
	B. Ineligible person invalidly appointed as a director but does not act .....	8
	C. Appointment at a meeting with no quorum .....	8
	D. Validly appointed director becomes ineligible .....	9
	E. Members wish to appoint an ineligible person .....	9
	F. General meeting called without authority to do so.....	9
10	Removal of invalidly appointed and ceased directors.....	10
	A. Removal of invalidly appointed director .....	10
	B. Stopping a ceased director from continuing to act.....	10

## **PS-30: Effect of invalid appointment of directors**

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### **1 About this policy statement**

- 1.1 In this policy statement, the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) provides guidance on:
- what makes a director’s appointment valid or invalid
  - the difference between an invalid appointment and no appointment at all
  - whether the acts of an invalidly appointed director can be legally effective
  - whether the acts of a person who is acting as a director, but has not been appointed at all, can be legally effective.
- 1.2 References to sections in this policy statement are references to sections of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) unless otherwise specified. References to corporations in this policy statement are references to Aboriginal and Torres Strait Islander corporations unless otherwise specified. In addition, a reference in this policy statement to the Registrar is also a reference to a delegate who is lawfully exercising the powers of the Registrar.
- 1.3 It is important to note that this policy statement has been prepared by the Registrar to provide general guidance only on the issues set out in paragraph 1.1. In some cases, the circumstances will not be as straightforward as those set out in the examples provided below. In such cases, the corporation may need to approach the Registrar’s office for guidance and it may even become necessary in some cases for the corporation to seek legal advice on a particular issue.

### **2 Valid and invalid appointments of directors**

- 2.1 The appointment of a director is valid if:
- at the time of their appointment, the person is eligible to be appointed as director, and
  - the appointment complies with the procedures set out in the CATSI Act and the corporation’s rule book.
- 2.2 The appointment of a director is invalid if the person was ineligible to be appointed or the appointment did not follow the correct procedures.

### **3 Eligibility for appointment as a director**

3.1 The eligibility requirements for appointment as a director are set out in section 246-1. To be eligible, at the time of their appointment a person must:

- be at least 18 years old
- not be disqualified from managing corporations under Part 6-5 (unless they have permission of the Registrar under section 279-30, or a court under section 279-35)
- unless the corporation's rule book says otherwise, be:
  - a member of the corporation
  - an Aboriginal or Torres Strait Islander person.

3.2 A corporation's rule book may also provide additional rules for eligibility.

### **4 Procedures for appointing directors**

4.1 Before a person can be appointed as a director, the person must give the corporation a signed consent to act as director. The corporation must keep a copy of that consent—section 246-10.

4.2 There are several ways for a person to be appointed as a director, including:

- by being identified in the application for registration of the corporation—section 246-25
- unless a corporation's rule book says otherwise, by members passing a resolution at a general meeting—section 246-15
- by being appointed by other directors to make up a quorum for a directors' meeting—section 246-20. If a person is appointed in this way, the corporation must confirm the appointment by resolution at the next annual general meeting.

#### **A. Examples of invalid appointments**

4.3 There are many possible ways that non-compliance with procedures can lead to invalid appointments of directors. Some common examples are:

- proper notice was not given for the general meeting at which the director was appointed
- there are not enough members at the general meeting to form a quorum for the purpose of appointing directors
- the person appointed as director was bankrupt at the time of the appointment (i.e. the person was an 'undischarged bankrupt' at the time)
- the person appointed as director was disqualified from managing a corporation
- the person has been convicted of certain criminal offences as specified in subsection 279-5(1).

## **B. Examples of appointments which may not be invalid**

4.4 There are many possible ways that non-compliance with procedures may not necessarily mean that an appointment is invalid. Some common examples are:

- the person appointed as a director did not give the corporation a signed consent to act as director before being appointed, where this was a mere oversight, and all other aspects of the appointment were valid<sup>1</sup>
- the appointment of a director by someone who had ceased to be a director.<sup>2</sup>

## **5 Deemed directors**

5.1 Even if a person is not validly appointed as a director, that person may nevertheless be deemed to be a director if either:

- the person acts in the position of a director of the corporation—subparagraph 683-1(2)(b)(i)—unless at the time of the appointment, the people making the appointment knew the person was ineligible (see paragraph 7.2) (note: acting in the position of a director includes attending directors meetings, voting at those meetings, making decisions and taking actions which properly appointed directors might usually make or undertake), or
- the directors of the corporation are accustomed to act in accordance with the person’s instructions or wishes—subparagraph 683-1(2)(b)(ii) (note: this sometimes happens when a person who is not validly appointed as a director significantly controls or directs the actions and decision-making processes of persons who are properly appointed as directors).

5.2 However, a person is **not** a director merely because the other directors act on advice given by that person:

- in the person’s professional capacity, or the person’s business relationship with the directors of the corporation—subsection 683-1(4), or
- as a common law holder of native title—subsection 683-1(6).

## **A. Appointment of a person known to be ineligible**

5.3 A person is **not** a director where the people making the appointment knew the person was ineligible. In those circumstances there has been no appointment at all and, therefore, subsection 683-1(2) (see 5.1 above) does

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<sup>1</sup> *Collins and Ors v Zernike Australia Pty Ltd and Anor* [2006] WASC 67; see also *Albert Gardens (Manly) Pty Ltd v Mercantile Credits Ltd* (1973) 131 60 CLR where security documents were executed by “directors” who had been previously appointed as directors but lacked the share qualification required by the articles. Here the Court held that the appointment was defective rather than non-existent.

<sup>2</sup> *Weinstock v Beck* (2013) 251 CLR 396; (2013) 297 ALR 1; (2013) 87 ALJR 554; (2013) 93 ACSR 231; [2013] HCA 14; BC201302023

not apply. Neither this section nor any other section can be used to deliberately ignore the eligibility requirements of the CATSI Act or a corporation's rule book.<sup>3</sup>

## **6 Effectiveness of acts by ceased directors**

- 6.1 Cases involving a person who was validly appointed as a director and continues to act as a director after their appointment ceases are not cases of invalid appointment (see 7, below). They are simply not a director at all and cannot be deemed to be a director (see 5.1 above).
- 6.2 Any action taken by a person after they cease to be a director is not legally effective. For example, a vote by that person at a meeting of directors would not be effective and, therefore would not be counted.
- 6.3 Section 249-1 provides that a person ceases to be a director of a corporation if the person:
- dies
  - resigns—section 249-5
  - reaches the end of the term of their appointment as a director
  - is removed as a director by the members—section 249-10
  - is removed as a director by the other directors for failing to attend three or more consecutive directors' meetings—section 249-15
  - becomes disqualified from managing corporations under Part 6-5—section 249-1.
- 6.4 Where the terms of all directors expire at the same time, and no replacement directors are appointed, the terms of the expired directors are automatically extended until the next general meeting—subsection 246-25(4). Note however that this section permits only one such automatic extension.<sup>4</sup>

## **7 Effectiveness of acts by invalidly appointed directors**

- 7.1 Subsection 246-35(1) gives effect to the acts of invalidly appointed directors in certain limited circumstances as discussed below. In particular an act done by a director is effective even if the director's appointment is invalid, or an originally valid appointment has become invalid, because the corporation or director did not comply with the CATSI Act or the corporation's rule book.
- 7.2 The purpose of subsection 246-35(1) is to give effect to acts where there has been an unintended slip in the procedures for appointing a director. The section cannot be relied on or used to:

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<sup>3</sup> *Sheahan v Londish* (2010) 244 FLR 64.

<sup>4</sup> *Sandy v Yindjibarndi* [2016] 306 FLR 205.

- give effect to acts if, for example, at the time of the invalid appointment, the people making the appointment knew that the appointment was invalid<sup>5</sup>
- deliberately ignore the requirements of the CATSI Act or a corporation's rule book.<sup>6</sup>

7.3 Subsection 246-35(1) does not extend to cases where:

- the person was appointed by someone lacking authority to make the appointment (for example, if the corporation's rule book provides that only members can vote to appoint directors, and persons who are non-members vote to appoint directors)<sup>7</sup>
- a director's term of appointment has expired or they were removed by way of resolution.<sup>8</sup>

7.4 The scope of subsection 246-35(1) is limited to the kinds of acts that can only be performed by a director. For example:

- calling a meeting of the corporation's members in the exercise of a power conferred on a director
- signing a document as a director to be lodged with the Registrar
- signing minutes of a meeting as a director.

7.5 It cannot be used to permit invalidly appointed directors to attend directors' meetings or participate in actions and decisions which are usually undertaken by properly appointed directors.

## **8 Assumptions people dealing with a corporation can make about the validity and powers of directors**

8.1 Persons dealing with a corporation are entitled to assume that:

- the corporation has complied with its rule book and any replaceable rules under the CATSI Act—subsection 104-5(1)
- officers and agents of the corporation have properly performed their duties—subsection 104-5(5)
- anyone listed as a director or corporation secretary on the public Register of Aboriginal and Torres Strait Islander Corporations (available at [oric.gov.au](http://oric.gov.au)) has been duly appointed and has the authority to exercise the powers and perform the duties usually performed by a director or corporation secretary—subsection 104-5(2).

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<sup>5</sup> Austin RP and Ramsay IM, *Ford's Principles of Corporations Law*, LexisAdvance, at [15.030](current at November 2017).

<sup>6</sup> *Sheahan v Londish* (2010) 244 FLR 64.

<sup>7</sup> *Permanent Trustee Co Ltd v Bernera Holdings Pty Ltd* (2004) 182 FLR 431.

<sup>8</sup> *Morris v Kanssen* [1946] AC 459, [76].

- 8.2 However, as soon as a person knows or suspects that an assumption was incorrect, such as a defective appointment, then they can no longer rely on the assumptions—subsection 104-1(4).

## 9 Scenarios

- 9.1 The following scenarios are examples of situations which give rise to questions of validity. These scenarios are not intended to cover all situations that potentially arise. As noted in paragraph 4.4, there are many possible ways that non-compliance with procedures can lead to invalid appointments of directors.

### A. Ineligible person invalidly appointed as a director and acts

- 9.2 If an ineligible person (see paragraph 3.1) is appointed as a director and acts as a director, he or she may be considered to be a director—subparagraph 683-1(2)(b)(i) – see paragraph 5.1 above. Such a scenario may arise where the person appointed, the members and other directors do not have knowledge of the person’s ineligibility.

- 9.3 In this scenario, an act of the director is effective even though his or her appointment is invalid—subsection 246-35(1). However, only certain limited types of acts will be effective (see paragraphs 7.3 and 7.5).

### B. Ineligible person invalidly appointed as a director but does not act

- 9.4 In contrast to scenario A, a situation may arise where an ineligible person is appointed as a director and:

- the person who is appointed and the other validly appointed directors know that he or she is not eligible, and
- the validly appointed directors exclude the person from attending directors’ meetings or participating in other director activities.

- 9.5 In this situation, the invalidly appointed person is not a director under subsection 683-1(2) (see paragraph 5.1) because he or she has not been permitted to act as a director. Since the person was never considered to have been appointed or allowed to act as a director, neither the directors or the corporation are required to take any further action to remove this person as a director.

### C. Appointment at a meeting with no quorum

- 9.6 A person cannot be appointed as a director unless a quorum is present in accordance with the CATSI Act and the corporation’s rule book. If there is no quorum, then there is no power to make an appointment (see paragraph 7.3).



9.7 In such a case, similar to the case in scenario B, there is no appointment at all (i.e. not even an invalid appointment).<sup>9</sup> Therefore, the acts of a person appointed at such a meeting cannot be made effective by subsection 246-35(1) or any other section.

#### **D. Validly appointed director becomes ineligible**

9.8 A situation may arise where a person ceases to be a director but continues to perform the functions of a director (see paragraph 6.1). In some cases a person may even refuse to vacate the position and insist on continuing to act as a director.

9.9 A person in this situation is not a director, even where the reason for ceasing to be a director is not known to either the members or the other directors.

9.10 Some examples of ineligibility arising after appointment are where:

- a director becomes disqualified from being a director (see paragraph 3.1).
- the term of a director's appointment has expired but that fact is simply overlooked. In this case, the person is no longer a director because his or her term of appointment has expired (note: under subsection 246-25(4), the term of a director's appointment is automatically extended until the next general meeting if the terms of all the directors have expired such that there are no directors at a particular time. Such an automatic extension may occur once only).

9.11 In these cases, the acts of the persons are not made effective under subsection 246-35(1) (see paragraph 7.3).

#### **E. Members wish to appoint an ineligible person**

9.12 A situation may arise where members at a properly convened AGM seek to appoint a person who is known by the members to be ineligible. As the members know about the ineligibility but consciously choose to ignore it, subsection 246-35(1) cannot be relied on to give effect to the acts of the person appointed (see paragraph 7.2), nor can any other section.

#### **F. General meeting called without authority to do so**

9.13 A situation may arise where a 'general meeting' is called and held by persons who have no power to do so. Any appointment of directors at such a meeting is invalid and has no legal effect (see paragraph 7.3). Neither subsection 246-35(1) nor any other section can be relied on in this situation to give effect to the acts of the person appointed at the meeting.

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<sup>9</sup> *Woods v Inglis* (2008) 68 ACSR 420.

## **10 Removal of invalidly appointed and ceased directors**

10.1 How a corporation responds to the discovery of an invalidly appointed director will depend on the facts of the particular case.

### **A. Removal of invalidly appointed director**

10.2 In a case where an invalidly appointed director is deemed to be a director because of subsection 683-1(2) (see paragraph 5.1), members can either:

- remove the director through a resolution of members in a general meeting—section 249-10, or
- retain the director by doing either or both of the following:
  - amending the eligibility requirements in the corporation’s rule book (if possible and relevant)
  - correcting any irregular meeting procedure by which the person was appointed with an appropriate resolution under section 246-15 or the equivalent provisions in the corporation’s rule book (section 246-15 is a replaceable rule).

### **B. Stopping a ceased director from continuing to act**

10.3 As soon as it becomes known that a person has ceased to be a director, the other validly appointed directors, or the members in general meeting, or perhaps even the Registrar if so requested by the corporation, should inform the person. They should request, or if necessary direct, the person to stop performing any acts ordinarily performed by directors. If the person refuses to do so, court proceedings may be necessary.

10.4 Because the person is no longer a director, a resolution to remove the person as a director under section 249-10 is not necessary. Likewise, it is not necessary for the person to give written notice of his or her resignation as a director under section 249-5.

**END OF POLICY STATEMENT**