

CORPORATIONS ACT CHANGES AFFECTING DIRECTOR RESIGNATIONS

AUSTRALIA CORPORATE ALERT

Date: 16 February 2021

By: Ben Benson, Susan Parker

On 18 February 2021, changes to the *Corporations Act 2001* (Cth) in relation to director resignations made by the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) will take effect. The new provisions commenced on 18 February 2020 but due to a 12 month transitional period, are only now about to apply.

They amend the Corporations Act to prevent directors from avoiding responsibility by backdating resignations or ceasing to be a director if this would leave the company with no directors. A director includes an alternate director.

WHAT'S NEW FOR DIRECTOR RESIGNATIONS?

Corporations Act Section 203AA (applies to a director's resignation if they stop being a director of the company on or after 18 February 2021)

From 18 February 2021, the effective date of a director's resignation will depend on when ASIC is notified of the resignation. If the ASIC form 484 notifying ASIC of the change is lodged within 28 days of the change, the resignation is effective from the date they stopped being a director. However, if the Form 484 is lodged after that 28 day period:

- the date of lodgement of the Form 484 will be the date of resignation, and
- ASIC late fees will still apply to a Form 484 lodged after the 28 day period.

A company or the director may apply to ASIC or the Court to give effect to the resignation despite the delay in reporting the change to ASIC. Fees are payable for such an application.

Applications made to ASIC under this section must be made within 56 days after the day the person stopped being a director. Applications to the Court must be made within 12 months after the day the person stopped being a director, unless the Court allows a longer period.

Corporations Act Section 203AB (applies to a director's resignation if they stop being a director of the company on or after 18 February 2021)

A director may not resign if doing so would leave the company without a director at the end of the day that the resignation is to take effect (unless the company is being wound up). With limited exceptions, Form 484 or Form 370 lodgements submitted to cease the last appointed director without replacing that appointment will be rejected by ASIC.

There may be circumstances where a replacement director cannot be appointed before the outgoing director leaves office. Section 203AB accommodates this by providing that the resignation will be effective as long as another director is appointed the same day as the resignation (ie by the end of the day). The end of day test also applies in situations where multiple directors resign on the same day. In this case, all the resignations will be ineffective unless at least one director remains or is appointed to the company at the end of the day.

Corporations Act Section 203CA (applies to a members resolution that is to take effect on or after 18 February 2021)

A director may not be removed by a resolution of members of a proprietary company if doing so would leave the company without a director (unless the company is being wound up).

HOW CAN ASIC BE NOTIFIED OF DIRECTOR CHANGES?

ASIC Form 484

Companies can lodge an ASIC Form 484 to notify ASIC of director resignations. The form should be lodged within 28 days from the date of the change to avoid the effective date of the resignation being deferred and late fees.

ASIC form 370

A resigning or retiring director or alternate director (or secretary) can also personally give ASIC written notice of the retirement or resignation using an ASIC Form 370. That form is lodged by post and does not need a corporate key. A copy of the letter of resignation or retirement the officer sent to the company must be submitted with the form and the letter must set out certain information, as explained in the ASIC Guide to the Form 370.

This process enables the outgoing director to control the notification process, if they want to make sure the resignation takes effect without delay or there are any concerns that the company may not attend to this in a timely manner.

If a Form 370 is sent, the company does not also need to lodge a Form 484 in relation to that change.

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.