

# Changes to director resignations: improving the accountability of resigning directors

18 February 2021

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From today, 18 February 2021, important changes commence in relation to whether and when a resignation by a director (or alternate director) takes effect.

## Key points:

- A resignation will only take effect on the date it occurs if ASIC is notified of the resignation within 28 days.
- A resignation will generally be void if it leaves a company without a director.

The legislation was introduced in February 2020 in the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020*, with the stated aim of targeting directors, who are the principal offenders of illegal phoenixing. Various changes have already commenced. However, the most recent changes will affect all directors – not just those involved in bad faith restructuring.

## When does a resignation take effect?

A resignation will only take effect on the date the director resigned if ASIC is notified of the resignation within 28 days of the resignation occurring. In any other case, the resignation takes effect on the day the written notice is lodged with ASIC. Effectively, this will prevent outgoing directors backdating their resignations by more than 28 days. It also imposes a greater practical obligation on outgoing Directors to either:

- ensure the company notifies ASIC of the resignation via the online ‘change to company details’ form in the 28-day timeframe; or
- take the initiative and lodge a Form 370 themselves.

The risk for outgoing directors if they fail to meet this lodgement deadline is that they will be deemed to have continued to be a director of the company following their resignation and accordingly be responsible for the actions taken by the company while they remain a director.

It should be noted that a person may apply to ASIC or a Court to fix a different resignation day. The power to change a resignation date is discretionary, must be made within a limited timeframe, and any decision is to be determined by the circumstances of the case.

## Can a resignation take effect?

A resignation will be void if, at the end of the day on which the director resigns, there will be no other directors of the company. However, this change doesn’t apply where the company is being wound up already.

This change is designed to prevent directors ‘abandoning the ship’ prior to the company becoming insolvent or otherwise engaging in some wrongdoing. It will apply regardless of how many directors resign – so if all directors resign on the same day their resignations will be ineffective unless there is

one remaining director.

In practice, where internal disputes arise within the company, directors should be mindful of being the 'last director standing' and having to account for the actions of the former directors.

With the implementation of these changes it is increasingly important that all directors are fully aware of their obligations and potential liabilities as a director and the timing and circumstances in which they can resign from their position.

In the event you have any queries in relation to resignations of directors, please contact our [\*\*Corporate Advisory and Governance\*\*](#) team.

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