Article Information

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Restrictions on director resignations effective 18 February 2021

Resigning directors are subject to new requirements under the *Corporations Act 2001* (Cth) as a result of the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* (Cth) (Act). The new requirements are effective from 18 February 2021.

The Act was passed in February 2020 to assist the regulator and liquidators to combat so-called 'phoenix' activity, which occurs when a company is deliberately liquidated to escape paying its debts and a new company is created to continue its business. The Act seeks to prevent directors from improperly backdating resignations and/or resigning if they are the last remaining director. The new provisions are aimed at ensuring directors do not avoid legal responsibility to creditors and impact the resignation of all directors.

Last director standing

Where a director's resignation would result in the company not having any directors left, the resignation does not take effect. Further, if a members' resolution of a proprietary company purporting to remove a director of the company would result in the company having no directors left, the resolution is void. ASIC have advised that notices submitted to ASIC to cease the last remaining director without replacing that director, will be rejected with effect from 18 February 2021.

There are some limited exceptions, including where the last director is deceased, the company is being wound up, or the director never consented to the appointment.

Resignation date

If notice of a director's resignation is lodged with ASIC more than 28 days following the day that the person ceased being a director, the resignation date will be taken to be the day the written notice is lodged with ASIC.

Both ASIC and the Court are empowered to determine a different resignation date if an application is made within certain timeframes and certain circumstances are met. The applications will be closely reviewed.

These changes are in addition to others that were introduced as part of the Act, which came into effect on 18 February 2020. One of the most notable changes was the introduction of a new type of voidable transaction known as a creditor-defeating disposition. This now appears at section 588FDB of the *Corporations Act 2001* (Cth).