

# Heat turned up on illegal phoenixing

## Changes to director resignations now in effect

Over several years, the Federal Government has been amending federal legislation in an attempt to clamp down on illegal phoenixing – and the latest effort was the passing of the Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth).

On 18 February 2021, changes to the Corporations Act 2001 in relation to director resignations came into effect. While the new provisions commenced on 18 February 2020, due to a 12-month transitional period, they now apply.

The changes prevent directors – including alternate directors – from avoiding responsibility by backdating resignations or ceasing to be a director if this would leave the company with no directors. The aim of the legislation is to close loopholes previously used by some illegal phoenix operators.

## What are the changes?

### ***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)***

The new section clearly determines that a person's resignation as a director of a company takes effect on the day that written notice is lodged with ASIC, stating that the person stopped being a director of the company. The exception is where a notice is lodged within 28 days of that resignation, whereupon the resignation date is the date of the actual resignation. The aim is to encourage companies to lodge the requisite notice with ASIC promptly.

If the notification to ASIC (see Notifying ASIC of director changes below) is lodged within 28 days of the change, the resignation is effective from the date they stopped being a director. However, if it is lodged after that 28-day period:

- the date of lodgement of the Form 484 will be the date of resignation;
- 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.

The Court or ASIC can order a correction to the resignation date, however, an application for such an order needs to be made to ASIC within 56 days of the actual resignation date, or within 12 months of the actual resignation date if the application is to the Court.

### ***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 (i.e., 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 member's 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).

## Notifying ASIC 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 incur 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.

Now that a number of “[safety nets](#)” have been removed, directors need to be more aware than ever of their obligations and their personal exposure. If you or any of your clients have any questions about the new legislation and how it increases company directors' personal accountability or if they are struggling to meet any of their obligations, please don't hesitate to contact us on 1300 547 724 or email [enquiries@jirschsutherland.com.au](mailto:enquiries@jirschsutherland.com.au) for an obligation-free consultation.