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When Did That Director Resign?

The Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 was passed in February of 2020. It essentially grants new powers to ASIC so that, with effect from 18 February 2021:

- If ASIC is not notified of a person's resignation as a Director within 28 days, then the person's resignation as a Director will be recorded as effective on the day that written notice is lodged with ASIC. ASIC will essentially override the actual date of the resignation with the lodgement date of the Form 484 or Form 370.

Example: If a Director resigned on 1 April, 2021 and the Company lodged a Form 484 to notify ASIC of the resignation on 1 June 2021, ASIC would record the effective date of the resignation as 1 June 2021 (the day ASIC was notified). It is understood that late fees would remain payable.

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- The person or the Company would need to apply to ASIC (within 56 days) or the Court for the record to be corrected to the actual date of resignation.

Exactly what an application to ASIC for this purpose looks like and what fees, if any, are payable remains to be seen. ASIC's website stipulates that *more information about these changes will be made available in coming weeks*. We have contacted ASIC as recently as 16 February and were advised that *information relating to reviews has not been finalised, as yet*.

Update – 18 February 2021

ASIC has advised that a Form 502 - Application to change the cessation date of a director should be used to fix a resignation date, however this form remains under development. ASIC has also indicated that a fee will apply, but have not yet advised the amount.

Update – 26 February 2021

ASIC has released Form 502 - Application to change the cessation date of a director which incurs a fee of \$42 and can **only** be lodged by paper.

- If ASIC is notified within 28 days, then the effective date of the resignation will remain as the day it actually occurred.
- Companies will no longer be able to cease the last remaining Director on ASIC records:
 - The resignation or removal of a Director of a Company will not take effect if, at the end of the day that the resignation or removal is to take effect, the Company does not have at least one remaining Director.
 - A Form 484 or Form 370 submitted to ASIC to cease the last appointed Director of a Company without replacing that appointment will be **rejected**.

The Purpose of the New ASIC Powers

The purpose of the new legislation is to hold Directors accountable in the context of illegal phoenixing activity, and to prevent the improper backdating of Director resignations.

We foresee, however, that most applications will genuinely fall outside the scope of that purpose, but could inadvertently be caught up in the administrative process of the new provisions. This will cost firms time and money.

Whilst it's appreciated that processes are generally in place to ensure forms are lodged on time, late lodgements happen, and from 18 February they'll carry significantly more complexities. Anyone lodging ASIC forms should be aware of the new provisions and conscious of the process required.

ASIC's records are not always a correct reflection of the legal record – the public record contains information provided to ASIC by a Company. In addition, the public record will soon also contain information overridden by ASIC. That said, it is easy to see how ASIC's records could cause considerable administrative complications requiring your clients to produce evidence of the correct legal position.

Case Studies

Case study 1 – SMSF compliance

Consider the situation where a company is the trustee of a SMSF. Husband and wife are the directors of the company and, due to separation, the husband rolls his member balance to another fund and resigns as a director of the corporate trustee on 25 March 2021. There is delay in getting the relevant forms to the adviser and consequential delay in lodging the Form 484 with ASIC to advise of the husband's resignation. The Form 484 is lodged on 3 October 2021.

Rather than incurring a late penalty and having the effective date of resignation recorded correctly as 25 March 2021, ASIC overrides the effective date to the lodgement date of the Form 484 and records the resignation on ASIC's records as effective on 3 October 2021.

The resignation date being recorded as 3 October 2021 creates a compliance issue for the SMSF and so an application must be made to ASIC within 56 days (otherwise to the Court) to have the date corrected, adding another administrative step to the process.

Case study 2 – Business exits

Consider a new business venture in which two business associates are directors and shareholders of a company. A few months into the venture it is decided that one will exit the arrangement and they voluntarily resign as a director of the company on 1 May 2021.

The Form 484 to advise ASIC of the resignation is lodged on 5 June 2021. As this is more than 28 days after the date of resignation, ASIC overrides the effective date to the lodgement date of the Form 484 and records the resignation on ASIC's records as effective on 5 June 2021.

In the meantime, the remaining, sole Director negotiates for the company to buy a property and signs a contract on 3 June 2021.

In the process of obtaining finance for the purchase, the bank conducts a search of ASIC records and sees that, according to ASIC's records, there were two directors on the date that the company signed the contract and thus ensues an administrative delay whilst:

1. The remaining Director attempts to convince the bank that the resignation actually occurred and was effective on 1 May 2021, despite ASIC's records; and
2. After presumably being unsuccessful in option 1, applying to ASIC for the record to be corrected.

It would be reasonable to envisage that this would create substantial and avoidable costs and delay.

Case study 3 – Lost corporate key

Consider a situation where a Director resigns on 1 September 2021. Attempted lodgement of the Form 484 to advise ASIC was made on 20 September 2021 (i.e. within 28 days); however, it is discovered at that time that the Corporate Key on record is invalid and the form can therefore not be lodged.

It would then take up to 14 days for a new corporate key to be sent to the company's registered address, meaning despite best efforts to lodge within 28 days, lodgement could in fact be longer than 28 days after the date of resignation.

This would then, of course, result in the need for an application to be made to ASIC (or the Court) to have the date correctly recorded on ASIC's record.

Notes:

- Form 484 - Change to company details; Form 370 - Notification by officeholder of resignation or retirement.
- See sections 203AA, 203ABB & 203CA Corporations Act 2001(Cth).
- See ASIC's website for more information: [InFocus February 2021 - Volume 30 Issue 1](#)
[| ASIC - Australian Securities and Investments Commission](#)