

Commercial Insights

Clipping the wings of phoenix activity: New requirements for resigning directors

New laws came into effect on 18 February 2021, under the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020* which provide that a company director will not be able to back date his or her resignation more than 28 days. A director will also not be able to resign as a director of a company if it means that the company will be left without a director.

Under the new regime, the resignation of a director takes effect:

1. if within 28 days after the day the person stops being a director of the company, ASIC is notified of that fact; or
2. the day that written notice is lodged with ASIC stating that the person has stopped being a director of the company, if this written notice is lodged with ASIC after 28 days of actual resignation.

This means if a written notice is lodged with ASIC after 28 days from the day that the person stopped being a director, his or her resignation will only take effect on the day that written notice is lodged with ASIC.

It is a common tactic of illegal phoenix activity for directors to reduce their exposure to a company's operations and activities by backdating to an earlier date their resignation as a director – this has the effect of obscuring the director's role in the company after the earlier date. Phoenix activity involves creating a new company to continue the business of an existing company that has been deliberately liquidated, to avoid paying outstanding debts including taxes, creditors and employee entitlements.

An important take away is that directors who resign from a company should not leave it to the company, or to others, to lodge the appropriate documentation with ASIC. They should ensure for themselves that the appropriate documentation is lodged within 28 days of the resignation date, or potentially be exposed to risks in relation to the company's trading activities when they were not in fact a director.

The new laws will also prevent a company being left without any director. If you are the last director remaining, you will be unable to resign as a director.

The amendments in their entirety can be accessed [here](#).

This article was written by Principals, Georgina Odell and Mark Fitzgerald, and Solicitor, Yashila de Silva. If you have any questions about the impact of the new Treasury Laws Amendment Act, please contact Georgina.



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