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A call out to all Directors - When is a resignation really a resignation?

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Significant changes regarding resignations of company directors come into effect today.

Last year, amendments to the *Corporations Act* were made by the *Treasury Laws Amendment (Combatting Illegal Phoenixing) Act 2020* (Cth) ("**Act**") to combat the rise of phoenix companies.

The new laws, discussed below, increase the liability of directors and include:

- changes to key requirements relating to director resignations;
- the introduction of creditor-defeating dispositions; and
- new tax liabilities.

Due to a year long transition period for certain amendments, the changes to director resignations come into effect from today.

When is a resignation a resignation?

Previously, ASIC would allow resignations of company directors to be backdated. Now, if ASIC is notified of a director's resignation more than 28 days after it occurs, the effective date of resignation will be the date ASIC receives notice of the resignation.

If you resign as a director, you should make sure that the company notifies ASIC immediately, otherwise you could end up being liable for conduct that occurs after you left the company.

Don't be left as the last one standing

Directors are also no longer allowed to resign if they are the last remaining director of the company. Except for certain extenuating circumstances, lodgements to cease the last appointed director will be rejected by ASIC, unless a replacement director is also appointed.

How do these changes relate to phoenixing?

Illegal phoenixing occurs where a new company is created to continue the business of an existing company, which has been liquidated to avoid paying outstanding debts, including taxes. The directors of the existing company transfer its assets to a new company at less than market value. Once this has occurred, the existing company is liquidated, leaving no assets to sell to pay off creditors.

The changes coming into effect today impose increased liability on directors and ensure that phoenixing activity cannot be circumvented by simply resigning from the company.

What are the other changes?

Aside from the changes to director resignations, the Act:

- creates the concept of a "**creditor-defeating disposition**" which is a disposal of company property for less than market value, which has the effect of preventing, hindering or significantly delaying the property becoming available to meet the demands of the company's creditors in winding-up;
- creates a **new criminal offence** for an officer of a company to engage in or encourage conduct that results in a creditor-defeating disposal when:
  - the company is insolvent or becomes insolvent as a result of the disposal; or
  - the company goes into external administration or ceases to trade less than 12 months after the disposal;

  Individuals can face a $495,000.00 fine and 10 years imprisonment, whereas a company could be hit with a fine of $4,950,000.00 or 10% of its annual turnover.
- gives **new powers of recovery to ASIC**: When a creditor-defeating disposal has been made, ASIC now has powers to direct a person or company to transfer the property back to the company who originally held the asset, or an amount that “fairly represents” the benefit that the person or company has received;
- makes **tax amendments** which reduce a company’s ability to avoid paying taxes by:
  - increasing a director's personal liability for GST if the company does not pay; and
  - withholding tax refunds where there are outstanding tax lodgements.

If you would like more information on this article, or you would like advice on your rights and obligations as a director, please contact Chris Kintis on 02 8235 1251.