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RECENT CHANGES: RESIGNATION OF COMPANY DIRECTORS

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From 18 February 2021, the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2020 (Cth)* took effect. It introduced new laws to combat the rise of illegal phoenixing activities in Australia.

Our article titled "[Phoenix Activity: When Legality Turns Murky](#)" provided some helpful tips to assist businesses identify and protect themselves from potential illegal phoenixing activity.

This article will discuss how the Act affects a director's ability to resign and the date on which a director's resignation is deemed effective.

WHAT ARE THE CHANGES?

It is an objective of the Act to ensure directors are held accountable for misconduct. In order to achieve this objective, the Act introduced specific measures that:

1. prevent directors from improperly backdating their date of resignation; and
2. prevent directors from resigning in circumstances which would leave the company with no directors.

Backdating resignations is a common tactic used by directors to engage in illegal phoenix activity. They shift accountability to a director who has no real involvement in the company.

EFFECTIVE DATE OF RESIGNATION

The Act requires a director to notify ASIC about his or her resignation with 28 days. Otherwise, the resignation is not treated as effective until the day ASIC is notified.

However, if a director believes he or she can prove the resignation occurred, the director may apply to ASIC or the Court to give effect to the resignation.

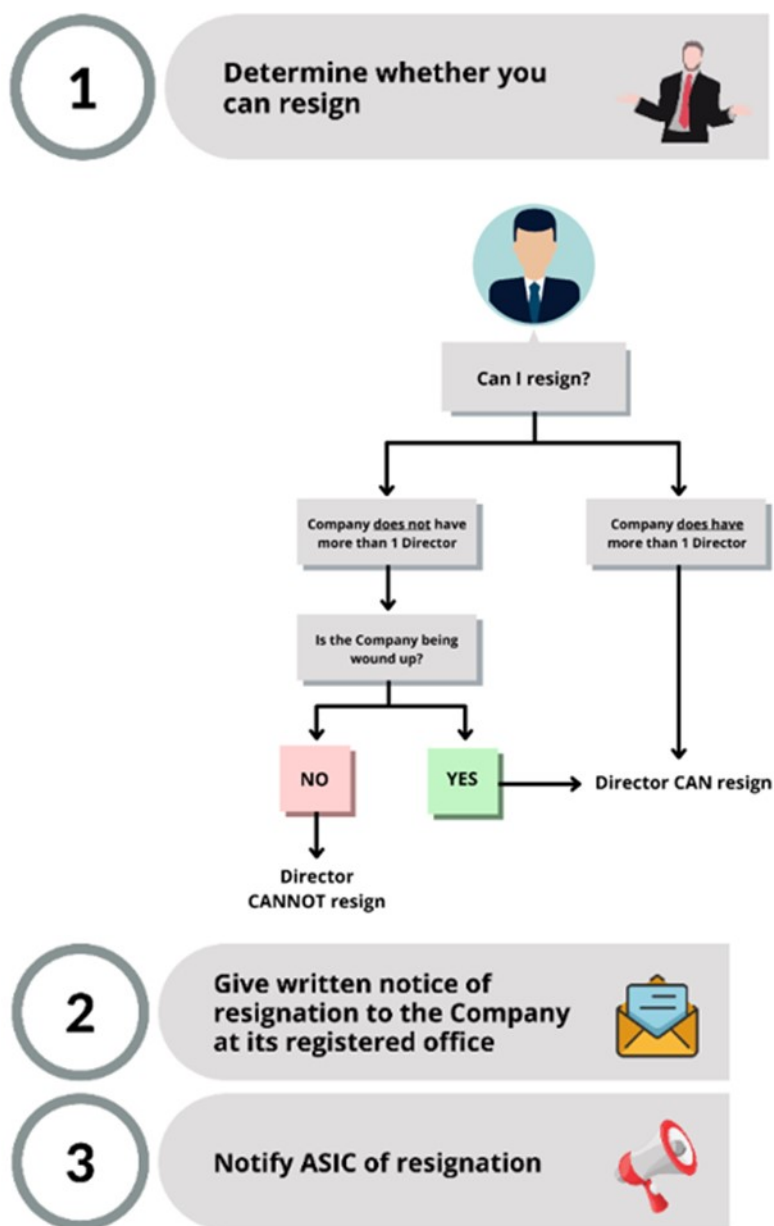
DIRECTORS' ABILITY TO RESIGN UNDER THE ACT

To prevent directors from resigning and leaving the company without anyone accountable for corporate failures, the Act says a resignation is ineffective if it leaves the company with any directors.

HOW CAN A DIRECTOR RESIGN UNDER THE ACT?

Here is a process diagram to assist. Directors seeking to resign from their roles.

Steps to Resign as Director:



KEY TAKEAWAYS

A company director:

- ⇒ cannot backdate his/her resignation more than 28 days.
- ⇒ cannot resign if it leaves the company without any directors (unless the company is being wound up)
- ⇒ should ensure ASIC is notified promptly about his or her resignation.

CONTACT US

If you would like assistance or further information, please do not hesitate to contact Special Counsel **John Hodgkinson** at Kreisson on (02) 82396500 or at excellence@kreisson.com.au.

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