

LI 2023/2 - Explanatory statement -



Explanatory Statement

Corporations (Eligible Officer Exclusion – non-individuals and resigned directors) Determination 2023

Corporations (Aboriginal and Torres Strait Islander) (Eligible Officer Exclusion – resigned directors) Determination 2023

General outline of the instruments

1. The instruments are made under:
 - (a) subsection 1272B(3) of the *Corporations Act 2001* (Corporations Act); and
 - (b) subsection 308-15(3) of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).
2. The instruments specify classes of persons who are not eligible officers. This effectively relieves those classes of persons from having to obtain a director identification number (director ID) under the Corporations Act or CATSI Act.
3. The instruments are legislative instruments for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.
5. In accordance with section 5C of the *Corporations Act 2001*, the relevant version of the *Acts Interpretation Act 1901* that applies to the *Corporations Act 2001* and this instrument is the version as at 1 January 2005.

Date of effect

6. The instruments will relieve particular classes of persons from the obligation to obtain a director ID. To ensure that affected classes of persons benefit from this relief and do not become liable to any penalties for not applying for a director ID, the instrument for resigned and removed directors and non-individual directors under the Corporations Act must take effect from 1 December 2022. The instrument for resigned and removed directors under the CATSI Act must take effect from 1 December 2023.
7. As a consequence of the timing of the registration of this instrument, it is necessary to give the instrument made under the Corporations Act retrospective commencement from 1 December 2022.
8. The instrument made under the CATSI Act can commence prospectively.

Background

9. There is a requirement for directors of a company, or of a body corporate that is a registered Australian body or registered foreign company, who is appointed to the position of a director or

alternate director acting in that capacity (eligible officer), to obtain a director ID. The requirement to obtain director IDs:

- (a) promotes good corporate conduct and deters and penalises illegal phoenix activity in order to protect those who are negatively affected by such fraudulent behaviour;
- (b) assists regulators and external administrators to investigate director's involvement in other unlawful activities; and
- (c) provides traceability of a director's relationships across companies, enabling better tracking of directors of failed companies and will prevent the use of fictitious identities.

10. The director ID regime achieves this by requiring eligible officers to satisfy the Registrar of their identity and requiring the Registrar to record a unique identifier (the director ID) for each individual who consents to being an eligible officer.

11. The director ID regime also provides the Registrar with the power to exclude persons from being an eligible officer. This power allows the Registrar to provide relief to eligible officers from needing to obtain a director ID in circumstances where the requirement would have unintended consequences or would otherwise be unsuitable.

Effect of the instruments

12. The instruments will exclude certain classes of persons from being an eligible officer, relieving them of the obligation to apply for a director ID in certain circumstances.

13. Broadly there are two categories of persons excluded from being an eligible officer:

- (a) Resigned and removed directors – persons who have ceased to hold any role as a 'director or alternate director acting in that capacity' (directors) prior to 1 December 2022 (for directors under the Corporations Act) or 1 December 2023 (for directors under the CATSI Act), and
- (b) Corporate directors – non-individual entities that hold a role as a director under the Corporations Act.

Compliance cost impact

14. Minor – There will be no additional regulatory impacts as the instruments are minor and machinery in nature OBPR22-03644 and OBPR-03645.

Detailed explanation

Resigned and removed directors

15. The law presently provides the following transitional timeframes for certain eligible officers to apply for a director ID:

- (a) ***Transitional period for existing eligible officers under the Corporations Act:*** persons who were an eligible officer prior to commencement of the director ID provisions on 4 April 2021 must apply for a director ID no later than 30 November 2022;
- (b) ***Transitional period for new eligible officers under the Corporations Act:*** persons who were not an eligible officer prior to commencement of the director ID provisions on 4 April 2021, but became an eligible officer between 4 April 2021 and 31 October 2021, must apply for a director ID no later than 30 November 2022;
- (c) ***Transitional period for existing eligible officers under the CATSI Act:*** persons who were an eligible officer prior to commencement of the director ID provisions on 4 April 2021 must apply for a director ID no later than 30 November 2023; and

- (d) **Transitional period for new eligible officers under the CATSI Act:** persons who were not an eligible officer prior to commencement of the director ID provisions on 4 April 2021, but became an eligible officer between 4 April 2021 and 31 October 2022, must apply for a director ID no later than 30 November 2023.

16. These instruments do not apply to eligible officers who are not in the above categories. People who are not in these categories have different dates to apply for a director ID, depending on when they were appointed.

17. Broadly, the law requires that eligible officers have a director ID before their appointment.¹ However, eligible officers in the above categories were provided with transitional timeframes to accommodate the establishment of director ID systems and processes, and to allow sufficient time for those eligible officers to understand the new requirement and apply for a director ID.

18. Some eligible officers may have stopped being a director in the transitional period, before they were due to obtain a director ID (that is, before 30 November 2022, or 30 November 2023 for directors of Indigenous corporations). Requiring these persons to obtain a director ID would not achieve the policy intent underlying the director ID regime and would impose a compliance burden on them.

19. The Registrar considers that requiring a director ID in these circumstances is unsuitable. He has determined, via these instruments, that persons within the prescribed classes are not eligible officers and are therefore not required to obtain a director ID.

20. Where directors, who have stopped being a director, do not return and take a subsequent appointment as a director, these persons will be excluded as eligible officers in perpetuity. However, persons within the prescribed class, who stopped being a director, before 1 December 2022 (or 1 December 2023, for directors of Indigenous corporations) and later become a director again are only excluded from being an eligible officer for the period 4 April 2021 to 30 November 2022 (or 4 April 2021 to 30 November 2023, for directors of Indigenous corporations).

21. This ensures persons who later become a director again are not permanently excluded from being an eligible officer. They will need to obtain a director ID prior to any subsequent appointments as eligible officer.

Corporate directors

22. Registrable Australian bodies and registered foreign companies (as defined in section 9 of the Corporations Act) may have directors that are non-individuals (otherwise known as ‘corporate directors’). Under the director ID regime, directors are given unique identifiers following verification of their identity. Corporate directors are not individuals and can be sufficiently identified by their Australian Company Number or Australian Registered Body Number. Therefore, the Registrar is of view that the requirement to obtain a director ID is unsuitable for corporate directors.

23. The instrument made under the Corporations Act excludes corporate directors from being eligible officers. There is no equivalent provision in the instrument made under the CATSI Act because it is not possible for corporate directors to be appointed under that Act.

Consultation

24. Subsection 17(1) of the *Legislation Act 2003* requires, before the making of a determination, that the Registrar is satisfied that appropriate and reasonably practicable consultation has been undertaken.

¹ *Corporations Act 2001* subsection 1272C(1); *Corporations (Aboriginal and Torres Strait Islander) Act 2006* subsection 308-25(1).

25. For this instrument, broad consultation was undertaken for a period of 24 days, commencing on 15 November 2022. The draft instruments and the draft explanatory statement were published on the Australian Taxation Office (ATO) website.

26. Seven written submissions were received from:

- (a) Affinity Accounting;
- (b) An individual, Ainslie R;
- (c) Australian Securities and Investments Commission;
- (d) Governance Institute of Australia;
- (e) Nexia Australia;
- (f) NowInfinity; and
- (g) SMSF Association.

27. Comments were generally supportive of the instrument, with suggestions for minor edits to provide further clarity on the class of persons relating to resigned or removed directors.

Legislative references

Acts Interpretation Act 1901

Corporations (Aboriginal and Torres Strait Islander) Act 2006

Corporations Act 2001

Legislation Act 2003

Statement of compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*

Corporations (Eligible Officer Exclusion – non-individuals and resigned directors) Determination 2023;

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These legislative instruments are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the legislative instruments

The instruments determine that particular classes of persons are not ‘eligible officers’ under the *Corporations Act 2001* (Corporations Act) and the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). This effectively relieves those classes of persons from the obligation to obtain a director identification number (director ID) under those Acts.

The classes of persons who are determined not to be eligible officers are:

- (a) under the Corporations Act:
 - (i) persons who were eligible officers immediately before 4 April 2021, but never hold a role of ‘director, or alternate director when acting in that capacity’ (director) after 30 November 2022;
 - (ii) persons who were not eligible officers immediately before 4 April 2021, but became eligible officers between 4 April 2021 and 31 October 2021, and never hold a role of director after 30 November 2022;
 - (iii) persons who are not natural persons;
- (b) under the Corporations Act, for the period 4 April 2021 to 30 November 2022:
 - (i) persons who were eligible officers immediately before 4 April 2021, but retired or have been removed as director prior to 1 December 2022;
 - (ii) persons who were not eligible officers immediately before 4 April 2021, but became eligible officers between 4 April 2021 and 31 October 2021, and stopped being a director prior to 1 December 2022;
- (c) under the CATSI Act:
 - (i) persons who were eligible officers immediately before 4 April 2021, but never hold a role of director after 30 November 2023;
 - (ii) persons who were not eligible officers immediately before 4 April 2021, but became eligible officers between 4 April 2021 and 31 October 2022, and never hold a role of director after 30 November 2023;
- (d) under the CATSI Act, for the period 4 April 2021 to 30 November 2023:
 - (i) persons who were eligible officers immediately before 4 April 2021, but retired or have been removed as director after prior to 1 December 2023; and
 - (ii) persons who were not eligible officers immediately before 4 April 2021, but became eligible officers between 4 April 2021 and 31 October 2022, and stopped being a director prior to 1 December 2023.

Human rights implications

The legislative instruments do not engage any of the applicable rights or freedoms.

Conclusion

The legislative instruments are compatible with human rights as they do not raise any human rights issues.