

23 August 2023

Our ref: [WD:NFP]

MTA Coordination
Law Division
Treasury
Langton Cres
Parkes ACT 2600

By email: [REDACTED]

Dear MTA Coordination Branch,

Miscellaneous Amendments to Treasury Portfolio Laws 2023

Thank you for the opportunity to provide feedback on the draft legislation 'Miscellaneous Amendments to Treasury Portfolio Laws 2023'.

The Queensland Law Society (QLS) is the peak professional body for the State's legal practitioners. We represent and promote over 14,000 legal professionals, increase community understanding of the law, help protect the rights of individuals and advise the community about the many benefits solicitors can provide. QLS also assists the public by advising government on improvements to laws affecting Queenslanders and working to improve their access to the law.

This response has been compiled by the QLS Not for Profit Law Committee, whose members have substantial expertise in this area.

Executive summary

- QLS welcomes the intent of the amendments to streamline the resignation processes for directors of registered charities and not-for-profits.
- However, QLS is concerned the proposed amendments will not prevent entities from seeking to rely on ASIC register due to the statutory assumptions in section 129 of the *Corporations Act 2001* (Cth) (**Corporations Act**).
- QLS recommends amending section 129(2) of the Corporations Act to extend the statutory assumptions in relation to the valid appointment of directors and company secretaries to entries for responsible persons on the Australian Charities and Not-for-profits Commission (**ACNC**) register.
- The proposed amendments also will not address the legacy issue of past resignations. If the statutory assumptions in section 129(2) of the Corporations Act are not extended

we recommend further resources be dedicated to ensuring the ASIC register is updated promptly to reflect ACNC register changes.

- We have also had the opportunity to review a draft of the submission from the Law Council of Australia and we support the concerns raised.

When resignation of directors of registered charities and not-for-profits takes effect

Reforms¹ such as the inclusion of section 203AA to the Corporations Act were introduced to address the increasing economic harms caused by the illegal phoenixing of companies. Section 203AA of the Corporations Act provides that written notice to the Australian Securities and Investments Commission (**ASIC**) of the resignation of a company director is required before changes can take effect.

As a result of these reforms, charitable companies limited by guarantee (**CLGs**) registered with the ACNC were captured by the newly introduced section 203AA.

Presently, section 111N of the Corporations Act provides that only certain information conveyed to the ACNC by a not-for-profit body corporate is considered to have also been provided to ASIC.

Section 111N of the Corporations Act does not apply to a notification to the ACNC that a director of an entity registered with the ACNC has resigned. The draft legislation seeks to amend section 111N of the Corporations Act so that notice to the Commissioner of the ACNC of the resignation of a director of an entity registered with the ACNC will also satisfy the obligation to notify ASIC of a resignation under section 203AA of the Corporations Act.

QLS notes, however, that these changes may not prevent entities (e.g. banking corporations) from preferring to rely on company details listed in the ASIC register, instead of utilising the ACNC register.

We anticipate this preference to rely on the ASIC register might arise given the reassurances of the statutory assumptions in section 129 of the Corporations Act. In particular, the assumption that anyone who appears on the ASIC register to be a director or company secretary of the company has been duly appointed and has authority to exercise the powers and perform the duties customarily exercised or performed by a director or company secretary of a similar company.²

Therefore, if there is any disparity between the ACNC register and the ASIC register, it is likely that the ASIC register will be preferred.

To address this, QLS recommends amending section 129(2) of the Corporations Act to extend the statutory assumptions in relation to the valid appointment of directors and company secretaries to entries for responsible persons on the ACNC register.

QLS recognises that the ACNC register is not an 'historical record' as such, unlike the ASIC register which comprises searchable details of both current and past directors and company secretaries.

¹ As introduced by the *Treasury Laws Amendment (Combating Illegal Phoenixing) Act 2010* (Cth).

² Section 129(2) of the *Corporations Act 2001* (Cth)

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However, for the purposes of identifying the current responsible persons for entities registered with the ACNC, we consider the ACNC register should be treated in the same way as the ASIC register in section 129(2) of the Corporations Act.

Dealing with the legacy of past ACNC entity directors and company secretaries

QLS also considers that the proposed amendments will not adequately address the inaccuracies of the ASIC register for directors and company secretaries that have been appointed or have resigned since the inception of the ACNC, as our members are aware that many resigning directors ceased updating the ASIC register with company details at that time.

QLS understands the ACNC is obliged to advise ASIC about changes to directors and company secretaries which are registered with the ACNC. However, in the experience of our members, the ASIC register is rarely updated with this information after it is passed on.

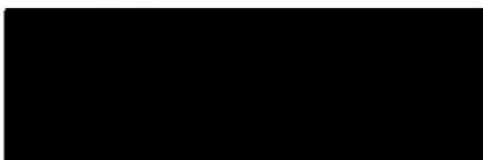
We recognise and welcome the confirmation from ASIC that if a charity wishes to update its details on the ASIC register, ASIC will not charge a late fee.

However, it would be preferable if the information was updated automatically by virtue of a consistently applied administrative arrangement between the ACNC and ASIC.

If our recommendation to extend the statutory assumptions in section 129 of the Corporations Act is not acceptable, QLS recommends further resources be dedicated to ensuring the ASIC register is updated promptly to reflect ACNC register changes.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [REDACTED], [REDACTED], [REDACTED] or [REDACTED].

Yours faithfully



Chloé Kopilović
President