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When a missing director consent can lead to loss of the family home

by Keeli Cambourne, Deputy Editor, SMSF Adviser and Matthew Burgess, Director, View Legal

A recent Federal Court decision is a warning for all online providers and advisers of the dangers of a lax approach to clear legislative mandates, a legal specialist has said.

Matthew Burgess, director of View Legal, has said the decision in One Tree Agriculture Pty Ltd v Lye [2025] FCA 126 highlights the second-order consequences that can flow from a failure to comply with section 201D of the Corporations Act which requires a director to consent in writing before being appointed, whether upon the registration of a new company, or being appointed to an existing company.

“Section 117 of the Corporations Act imposes obligations on the ASIC agent attending to the registration of a company that they must, among other requirements, have the consents and key details of officeholders when the application is lodged,” Burgess said.

“This is a requirement that anecdotally is often ignored by many online company registration providers and those that avail themselves of the services offered by such providers.”

The facts of the case as presented to the court stated that on initial establishment of a trading company, the wife was appointed the sole shareholder and sole director. She retired some years later as director, and her husband was appointed.

Less than a year later, the husband was declared bankrupt, and the wife was reappointed as sole director. Following his discharge from bankruptcy, the parties claimed the husband was reappointed as director, with the wife resigning. However, no documentation supported this contention and ASIC records were not updated.

The court heard that when insolvent trading proceedings were commenced against the wife, who owned the family home, which would likely be lost if the proceedings were successful, the couple applied to the court to have the change of directorship effective from a date before the company was insolvent. This date was outside the 28 days that the Corporations Act allows changes of directorship to be notified.

Burgess said that in holding that the wife had remained the sole director throughout the insolvent trading period, the court confirmed there was no weight to suggestions made by the husband that he had not been capable due to depression to instruct his accountants to update ASIC records.

“This was because at least partly the husband engaged in significant trading activity throughout the relevant period. Similarly, suggestions by the wife that she was disinterested in complying with the administrative aspects imposed by the Corporations Act and ASIC rules did not lessen her obligations and duties to do so,” Burgess said.

“The court also stated that section 203AA is designed to ensure that directors are held accountable for misconduct by preventing the improper backdating of their resignations (Re Deterra Royalties Ltd [2024] FCA 891), and although a director may resign orally, and the company may subsequently accept this, there

must still be at least one director of the company and nothing in the evidence supported such a conclusion in this matter (see Knight v Bulic (1994) 13 ACSR 553)."
The decision also noted that while management of the corporate affairs of small companies can be achieved with a degree of informality and casualness, it was inappropriate to "divine the actions of a company by mere inference" when conformity with the necessary processes – being those in the Corporations Act and constitution – were not in the director's contemplation at the relevant time.

"It was also noted in the ruling that it is possible that where a director's appointment is invalid, they nevertheless take up the position and, with the consent and knowledge of the company, act in the position of director and in this way, any deficiency in the appointment process under the Corporations Act is overcome – however this was not the case in this matter," Burgess said.

"Therefore, as was the case here, when a person has not consented to appointment as director, either by a written consent or by consent in fact, then their appointment will be invalid, not only by reason of the Corporations Act, but also at general law (In Hedges v NSW Harness Racing Club Ltd (1991) 5 ACSR 291 and Re Whitsunday Clean Sands Pty Ltd [2017] NSWSC 1199)."

Burgess said the court concluded that a company's obligations are to have the signed director consent before the appointment and to retain it.

"The importance of those requirements for the purposes of establishing the validity of a director's acts is self-evident."

"Ultimately, the decision reinforces the material risks advisers arguably enable when not requiring directors to consent in writing before being appointed to a company, either on registration or otherwise, and ensuring ASIC records are updated with the required 28-day notice period."