

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

**11 April 2025 by Matthew Burgess, View Legal**

Section 117 of the Corporations Act imposes obligations on the ASIC agent attending to the registration of a company that they must (amongst other requirements) have the consents and key details of officeholders when the application is lodged - 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).

In this regard, section 201D of the Corporations Act specifically requires a director to consent in writing prior to being appointed (whether that be on registration of a new company, or if a person is to become a director of an existing company).

The decision in *One Tree Agriculture Pty Ltd v Lye* [2025] FCA 126 highlights the material second order consequences that can flow from a failure to comply with section 201D – and is a stark warning for all online providers and advisers alike of the perils of a lax approach to clear legislative mandates.

Broadly the factual matrix was as follows:

1. on initial establishment of a trading company, the wife was appointed the sole shareholder and sole director;
2. some years later the wife retired as director and the husband was appointed;
3. less than one year later, the husband was declared bankrupt and the wife was reappointed as sole director;
4. 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;
5. 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 court to have the change of directorship effective from a date before the company was insolvent (which was well outside the 28 day period that the Corporations Act allows changes of directorship to be notified within, see section 203AA).

In holding that the wife had remained the sole director throughout the insolvent trading period, the court confirmed:

(a) suggestions by the husband that he had not been capable (eg due to depression) to instruct his accountants to update ASIC records were given no weight, at least partly because 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;

(b) section 203AA is designed to ensure that directors are held accountable for misconduct by preventing the improper backdating of their resignations (see *Re Deterra Royalties Ltd* [2024] FCA 891);

(c) a director may resign orally, and the company may subsequently accept this, however there must still be at least one director of the company (see section 203AB) - and nothing in the evidence supported such a conclusion in this matter (see *Knight v Bulic* (1994) 13 ACSR 553);

(d) while management of the corporate affairs of small companies can be achieved with a degree of informality and casualness, it is inappropriate to devine the actions of a company by mere inference when conformity with the necessary processes — being those in the Corporations Act and constitution — are not in the director's contemplation at the relevant time;

(e) 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;

(f) thus, 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 (see *In Hedges v NSW Harness Racing Club Ltd* (1991) 5 ACSR 291 and *Re Whitsunday Clean Sands Pty Ltd* [2017] NSWSC 1199);

(g) a company's obligations are to have the signed director consent prior to the appointment and to retain it - and the importance of those requirements for the purposes of establishing the validity of a director's acts is self-evident; and reinforced by the imposition of a penalty (which is indicative of the importance which the legislature attributes to compliance with these statutory obligations).

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.

