

# Article

Corporate & Commercial



## Disqualifications and Jail Time: ASIC Increasing Pressure on Directors for Mismanagement

By Helene Chryssidis

The Australian Securities and Investments Commission (**ASIC**) has published a media release providing a quarterly report on its actions against directors who fail to properly manage their company and assist liquidators.

During the quarter 1 July 2024 to 30 September 2024, ASIC prosecuted 68 individuals who failed to assist liquidators following the liquidation of their company. Further, they disqualified three company directors, including two for the maximum period of five years.

Comparatively, during the period 1 January 2024 to 31 March 2024, ASIC banned four directors from managing corporations following their role in the collapse of multiple small proprietary companies.

### ASIC's regulatory power

Section 206F of the *Corporations Act 2001* (Cth) provides ASIC extensive powers to disqualify a person from managing companies for a maximum period of five years. The purpose of section 206F is to provide ASIC the ability to quickly restrain conduct without the need to apply to the court.

ASIC may exercise this power if within seven years immediately before ASIC issues a notice:

1. the person has been an officer of two or more corporations; and
2. while the person was an officer, or within 12 months after the person ceased to be an officer:

- (i) each of the corporations were wound up, and in each liquidation, the liquidator lodged a section 533(1) report about the corporation's inability to pay its debts (when the corporation is unable to pay unsecured creditors more than 50 cents in the dollar);

3. ASIC has given the person a notice requiring them to prove why they should not be disqualified and has given them an opportunity to be heard; and
4. ASIC is satisfied that the disqualification is justified.

Registered liquidators may also request assistance from ASIC if directors or officers of an entity in external administration fail to comply with legislative requirements, such as failing to provide the liquidator with books and records.

### When does ASIC disqualify a person?

Not every company that is wound up in insolvency will result in ASIC disqualifying a person. ASIC's powers are discretionary and exercised in justifiable circumstances.

ASIC will generally consider the person's conduct in managing the companies, and whether the disqualification is justified and in the public interest. ASIC will also consider whether the failed companies are related, and or should be treated as separate failures, or as a failure of one overall business operation.

Disqualification orders are made by the ASIC Hearing Delegates. The delegates receive a brief of evidence, which generally includes information about creditors,

the type of suspected misconduct and any relevant information about the director. These hearings are conducted with little formality and technicality as ASIC is not bound by the rules of evidence.

Directors can seek a review of ASIC's decision by the Administrative Appeals Tribunal.

### Recent disqualifications by ASIC

ASIC recently disqualified a director for a four-year period following his involvement in seven failed companies that owed a combined total of over \$35 million.

In another recent decision, ASIC disqualified a director for the maximum period of five years due to serious misconduct. The director, amongst other things:

1. failed to lodge activity statements and income tax returns with the Australian Taxation Office;
2. deleted books and records and produced false records;
3. authorised payments that were not in the best interests of the companies, including unfair preferential payments; and
4. allowed companies to continue to trade for significant periods of time after there were numerous indicators that the companies were insolvent.

ASIC disqualified another director for the maximum five-year period following findings that the director, amongst other things:

1. was involved in a tax avoidance scheme;
2. failed to make out and submit a Report on Company Activities and Property, and failed to deliver books and records to the liquidator;
3. failed to take reasonable steps to ensure one of the companies kept adequate books and records;
4. failed to ensure that two companies complied with

its statutory obligations to lodge income tax returns with the Australian Taxation Office; and

5. allowed two companies to continue to operate when those companies were insolvent.

### What does this mean for directors and officers?

ASIC has indicated its commitment to using its regulatory powers on persons who have demonstrated an inability to manage companies and failures to comply with their legal duties. As corporate insolvencies continue to increase, these statistics, together with ASIC's attitude, indicate ASIC may increase its reliance on section 206F in the future.

A decision by ASIC to disqualify a director has serious consequences on their reputation and livelihood. Company directors should obtain professional advice about their legal obligations when managing a company, or if they are concerned about the company's solvency.

If a director receives a notice from ASIC pursuant to section 206F, a director should take immediate steps to obtain advice. It is critical to be proactive and provide reasons why a director should not be disqualified.



[MORE INFO](#)

**Helene Chryssidis** Director

p: +61 8 **8124 1847**

[helene.chryssidis@dwft.au](mailto:helene.chryssidis@dwft.au)

**DW Fox Tucker Lawyers**

L14, 100 King William Street, Adelaide, SA 5000

p: +61 8 **8124 1811** e: [info@dwft.au](mailto:info@dwft.au) [dwfoxtucker.com.au](http://dwfoxtucker.com.au)

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