

'If I Could Turn Back Time' – Changes made by the *Insolvency Law Reform Act 2016* (Cth) to the definition of relation-back day in the *Corporations Act 2001* (Cth)

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Summary

On 1 March 2017, the definition of 'relation-back day' found in the *Corporations Act 2001* (Cth) (the Act) was amended by the *Insolvency Law Reform Act 2016* (Cth). The amendment will have a significant impact for directors, creditors and external administrators.

From 1 March 2017, in circumstances where a court application seeking orders that a company be wound up in liquidation has been made prior to that company entering voluntary administration, the relation-back day will be the date of the application and the relation-back day period will extend further into the past.

Relation-Back Day

The relation-back day is used to determine what date to relate back from in respect of clawing-back voidable transactions incurred during a prescribed period under sections 588FE and 588FF of the Act.

The Change

Prior to 1 March 2017, the relation-back day was the day:

- on which an application for an order for winding-up was filed against the company being wound up; or
- otherwise, the day on which the winding up is taken to have begun because of Div. 1A of Part 5.6 of the

Act (i.e. such as when the company being wound up entered administration).

From 1 March 2017, the relation-back day will be determined by section 91 of the Act. Section 91 alters the 'relation-back day' by reference to the circumstances in which the company was placed into liquidation.

Section 91 is set out in tabular form and can be accessed via the following link: http://www.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s91.html

In a number of circumstances the relation-back day will remain the same as it was under the old regime.

Why the change?

Deferral of the relation-back day may have a significant impact on the transactions a liquidator may pursue as voidable transactions under the Act. Judges have inferred in prior decisions that directors have used voluntary administration for the purpose of deferring the relation-back period to avoid certain payments being the subject of voidable transaction claims under the Act.

Before the change, a company's directors could defer the relation-back date by voluntarily appointing an administrator over the company, despite a winding up application having already been filed against the company. If during the administration the company's directors or the company's creditors then resolved to wind the company up, the relation-back date would have been taken to be the date the administration commenced, rather than the date of filing of the winding up application.

After 1 March 2017, in the above scenario the relation-back date will be the date of filing of the winding up application, as opposed to the date that the administration commenced.

Implications

As noted above, the change is likely to be of most benefit to liquidators trying to recover voidable transactions under the Act, as it preserves the greatest duration for the relation-back period in which voidable transactions may arise.

Creditors exposed to voidable transaction claims by liquidators should be alert to the fact that the legislative change will mean that in certain circumstances there are more payments that will be exposed to claw back than previously.

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