



ASIC

Australian Securities & Investments Commission

CONSULTATION PAPER 180

ASIC's power to wind up abandoned companies

July 2012

About this paper

This consultation paper sets out our proposals on how we will implement ASIC's new power to wind up a company when the company has been abandoned by its director(s) (in certain circumstances): Pt 5.4C of the *Corporations Act 2001* (Corporations Act).

The purpose of this paper is to seek your views on our proposed implementation.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Document history

This paper was issued on 12 July 2012 and is based on the Corporations Act as at 12 July 2012.

Disclaimer

The proposals, explanations and examples in this paper do not constitute legal advice. They are also at a preliminary stage only. Our conclusions and views may change as a result of the comments we receive or as other circumstances change.

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The consultation process

You are invited to comment on the proposals in this paper, which are only an indication of the approach we may take and are not our final policy.

As well as responding to the specific proposals and questions, we also ask you to describe any alternative approaches you think would achieve our objectives.

We are keen to fully understand and assess the financial and other impacts of our proposals and any alternative approaches. Therefore, we ask you to comment on:

- any likely costs;
- the likely effect on competition; and
- other impacts, costs and benefits.

Where possible, we are seeking both quantitative and qualitative information.

We are also keen to hear from you on any other issues you consider important.

Your comments will help us develop our policy on ASIC's power to wind up abandoned companies.

Making a submission

We will not treat your submission as confidential unless you specifically request that we treat the whole or part of it (such as any financial information) as confidential.

Comments should be sent by 10 August 2012 to:

Belinda Sandonato
Lawyer
Strategic Policy
Australian Securities and Investments Commission
email: policy.submissions@asic.gov.au

What will happen next?

Stage 1	12 July 2012	ASIC consultation paper released
Stage 2	10 August 2012 August– September 2012	Comments due on the consultation paper Drafting of regulatory guide
Stage 3	October 2012	Regulatory guide released

A ASIC's power to wind up abandoned companies

Key points

One of the measures of the Australian Government's Protecting Workers' Entitlements Package (announced July 2010) is to assist employees of abandoned companies to access the General Employee Entitlements and Redundancy Scheme (GEERS) when they are owed certain employee entitlements.

When the employer is a corporation, it must be in liquidation before GEERS can assist an employee.

Amendments to the *Corporations Act 2001* (Corporations Act) have given ASIC the power to wind up an abandoned company in specific circumstances.

ASIC may appoint a registered liquidator over a company when exercising its power to wind up an abandoned company.

Protecting workers' entitlements

- 1 The General Employee Entitlements Redundancy Scheme (GEERS) is a scheme funded by the Australian Government and administered by the Department of Education, Employment and Workplace Relations (DEEWR). It assists eligible employees who are owed certain employee entitlements due to the liquidation or bankruptcy of their employer.
- 2 When the employer is a corporation, a precondition for an employee receiving a payment from GEERS is that the company be placed into liquidation.
- 3 However, companies are sometimes abandoned by their directors without appointing a liquidator, and there may be no incentive for creditors other than employees to fund the winding up of the company. This may result in employees who are owed employee entitlements being unable to access GEERS.
- 4 The Protecting Workers' Entitlements Package was announced by the Australian Government in July 2010. One of the aims of this package was to assist employees of companies abandoned by their directors to receive payments from GEERS.

- 5 As part of this package, the *Corporations Amendment (Phoenixing and Other Measures) Act 2012*¹ amends the Corporations Act to add a new Pt 5.4C into Ch 5. Part 5.4C introduces an administrative process for the winding up of a company started by ASIC to facilitate payment of employee entitlements when a company has been abandoned.

ASIC's power to wind-up a company

- 6 Part 5.4C states that ASIC may order the winding up of a company when:
- (a) the company has not responded to a return of particulars or lodged any other documents with ASIC in the last 18 months, and we have reason to believe that the company is not carrying on a business and that ordering the winding up of the company is in the public interest;
 - (b) the company's review fee has not been paid and it has been due for 12 months or more;
 - (c) we have reinstated the registration of the company in the last six months and consider ordering the winding up of the company would be in the public interest; or
 - (d) we have reason to believe that the company is not carrying on a business and we have given the company and its director(s) an opportunity to object to the winding up, to which no objection was received.
- 7 Part 5.4C gives ASIC a discretion to decide whether to wind up an abandoned company. We are not required to wind up an abandoned company in every situation.
- 8 If ASIC exercises its power to wind up a company, the company is deemed to have passed a special resolution under s491 of the Corporations Act that the company be wound up voluntarily. This resolution is deemed to have been made on the day that ASIC uses its administrative power to order the winding up and does not require a declaration of solvency to have been made under s494.
- 9 If ASIC exercises its power to order the winding up of a company, it may appoint a registered liquidator to administer the winding up. ASIC will determine the liquidator's remuneration and how it will be structured.

¹ The Hon Bernie Ripoll MP, Parliamentary Secretary to the Treasurer, Media Release No. 011, *Release of draft regulation to implement a key part of the plans to reform and modernise the insolvency framework*, 16 May 2012, <http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2012/011.htm&pageID=003&min=bfr&Year=&DocType=>

B When we will wind up a company

Key points

We propose that:

- In considering when to exercise its power to wind up a company, ASIC's primary consideration will be to facilitate employee access to GEERS.
- A public interest test will then be applied to determine if it is appropriate for ASIC to wind up the abandoned company.
- We will generally not reinstate a company that has been deregistered in order to wind it up.

Public interest test

Proposal

- B1** We propose to consider the public interest when deciding to order the winding up of a company. Our primary consideration will be whether ordering the winding up of the company would facilitate employee access to GEERS. Once this is established we will then apply a public interest test that considers:
- whether there is a creditor capable of winding up the company and if sufficient time has passed to enable that creditor to take their own winding up action;
 - whether the cost of liquidation, including ASIC's costs, would exceed the amount of employee entitlements owed;
 - the number of employees affected by the company's abandonment;
 - whether there are any current businesses or operations of the company that may have a value or incur significant liquidation costs; and
 - the amount of funds available in the Assetless Administration Fund used to pay for the winding up and how the limited funds available would best be utilised.

Your feedback

- B1Q1 Do you agree with this proposal? Why or why not?
- B1Q2 Should we consider any other factors when applying this public interest test? Why?
- B1Q3 Do you agree that we should allow sufficient time to enable creditors to take their own action before ASIC action is commenced?
- B1Q4 How long do you believe sufficient time to be? Would one year be sufficient time? Would two years be sufficient time?

Rationale

- 10 The aim of Pt 5.4C of the Corporations Act is for ASIC to assist employees of companies abandoned by their directors to receive payments from GEERS by winding up the company.
- 11 The legislation gives ASIC a discretion to exercise its power to wind up a company. In exercising this discretion, our primary consideration should be to assist employees of abandoned companies, when practical, to claim unpaid entitlements from GEERS. However, we also consider that we have an obligation to take into account the best use of public resources when delivering government objectives. We need to balance this obligation against any decision to exercise ASIC's powers.
- 12 We consider that we should exercise our discretion by taking into account the public interest in each of the four situations outlined in paragraph 6.
- 13 We consider it would be in the public interest to:
- (a) determine whether there is a creditor capable of winding up the company. The law gives creditors a right to apply to the court to have a company wound up in situations where the company owes them money. We do not consider it is in the public interest for ASIC to wind up a company before sufficient time has passed to allow a well-resourced creditor to take action through the usual court process;
 - (b) determine whether the cost of liquidation would exceed the amount of employee entitlements owed. If the cost of liquidation would exceed the amount of entitlements owed, we do not generally consider it would be in the public interest for ASIC to order the winding-up of a company;
 - (c) take into account the number of employees affected by the company's abandonment. In assessing how best to use our resources, it is relevant to consider how many employees would benefit from ASIC ordering the winding up of a company; and
 - (d) determine how the limited funds available in the Assetless Administration (AA) Fund can best be utilised. The AA Fund is used to fund various liquidator actions and we will need to consider how we prioritise and administer these funds among the various areas of activity, including winding up an abandoned company.
- 14 As a result of this public interest test, it is possible that not all abandoned companies with outstanding employee entitlements will be wound up by ASIC. In particular, when there is a significant creditor (apart from employees) that will benefit from the liquidation, we will expect that creditor to take action. Generally, we propose that we will not act until sufficient time has passed to determine that other creditors are not going to act.

De-registered companies will generally not be reinstated

- 15 Section 489EA(3) of the Corporations Act gives ASIC the power to order the winding up of a company if ASIC has reinstated the registration of the company in the last six months and it is in the public interest.

Proposal

- B2** We propose that we will generally not reinstate companies that have been deregistered to then order the winding up of that company, unless directed to by the court.

Your feedback

- B2Q1 Do you agree with this proposal? Why or why not?

Rationale

- 16 Reinstatement of a company to the register by ASIC once it has been deregistered presents a number of difficulties.
- 17 On deregistration, all of a company's property (excluding that which is held on trust by the company or a liquidator of the company) is vested in ASIC. ASIC has all the powers of an owner over property vested in it, including disposing of the property or applying money received to defray expenses.
- 18 If a company is reinstated, the company is taken to have continued in existence as if it had not been deregistered and any property that is still vested in ASIC is vested back in the company.
- 19 This can potentially prejudice the rights of third parties, particularly where such reinstatement would increase the company's debt. The courts have stated that reinstating an insolvent company in this situation, for the purpose of dealing with issues not dealt with at the time of deregistration, would not be just.²
- 20 Section 601AH of the Corporations Act provides that a court may make an order that we reinstate the registration of a company, under an application made by a person aggrieved by the deregistration or by a former liquidator of the company, if the court is satisfied that the company should not have been deregistered. Employees can use this provision to request that the court order the reinstatement of a company to the register by ASIC.
- 21 We consider that the court is the more appropriate body to determine whether there is merit in reinstating the registration of a company.
- 22 We will also be updating our processes regarding deregistration of companies. We will seek to prevent deregistration where there is sufficient

² *Casali v Crisp* (2001) 165 FLR 79; [2001] NSWSC 860.

evidence of wrongful phoenix activity. We will be seeking to improve information sharing with the Australian Tax Office, DEEWR and the Fair Work Ombudsman, to help identify wrongful phoenix activity.

- 23 In particular, we will seek to halt deregistration of a company if there is any indication of outstanding employee entitlements. Applications for deregistration require directors to declare that there are no outstanding liabilities. The declaration will incorporate a reminder that this includes unpaid employee entitlements and that making a false declaration to ASIC is an offence.

C Funding an ASIC-initiated winding up

Key points

We propose to use the AA Fund to fund the appointment of a registered liquidator in an ASIC-initiated winding up of a company.

When administering the fund, we will also consider how the AA Fund can best be used to deter breaches of directors' duties.

ASIC-appointed registered liquidator

Proposal

- c1 We propose that the appointment of a registered liquidator in an ASIC-initiated winding up will be funded from the AA Fund.

Any decision to fund a company winding up from the AA Fund will involve ASIC considering the amount of funds available in the AA Fund, and how the limited funds available should be best utilised to achieve the objectives of the fund.

Your feedback

c1Q1 Do you agree with this proposal? Why or why not?

Rationale

- 24 The AA Fund is an Australian Government grant program that is administered by ASIC. A fixed amount is paid into the fund each year. In the 2012–13 financial year, this amount is \$3.56 million.
- 25 We can use the AA Fund to fund:
- (a) preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report;
 - (b) other activities that deter, prevent or reverse phoenix activity;
 - (c) action against persons who have benefitted from uncommercial transactions, to the detriment of the company, employees or creditors.
 - (d) an ASIC-initiated winding up of a company.
- 26 Funding an ASIC-appointed registered liquidator to wind up an abandoned company from the AA Fund would promote the Australian Government's aim of identifying and pursuing breaches of directors' duties, including phoenix activity.

- 27 As there is a limited, fixed amount available in the AA Fund, we will need to consider how we prioritise and administer this amount among the four areas of activity permitted by the AA Fund (outlined in paragraph 25). This is likely to mean that not all companies that are abandoned with outstanding employee entitlements will be wound up by ASIC.

D Proposed implementation period

Key points

We propose to commence using ASIC's power to wind up abandoned companies during November 2012.

Date of commencement

Proposal

D1 We propose to commence using ASIC's power to wind up abandoned companies, according to Proposals B1, B2 and C1, during November 2012.

Your feedback

D1Q1 Do you agree with the proposed timeframe for the implementation of Proposals B1, B2 and C1?

Rationale

- 28 While we consider that it is appropriate to implement ASIC's new power to wind up abandoned companies (outlined in Section A) as soon as possible, we believe that it is important to ensure we have the correct processes in place and have conducted an adequate consultation process.
- 29 Also, we will appoint a liquidator to wind up abandoned companies on our behalf and we intend to issue a tender for this work. We anticipate this will take three to six months.

Key terms

Term	Meaning in this document
AA Fund	Assetless Administration Fund
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i> , including any regulations made for the purposes of the Act
DEEWR	Department of Education, Employment and Workplace Relations
GEERS	General Employment Entitlements and Redundancy Scheme
Protecting Workers' Entitlements Package	A package of Government initiatives, including the <i>Corporations Amendments (Phoenixing and Other Measures) Act 2012</i> , intended to enhance the protection of workers' entitlements
Pt 5.4C	A part of the Corporations Act (in this example numbered 5.4C), unless otherwise specified
public interest test	A test we will apply to determine if the winding up of a company would be in the public interest. The factors we will consider are set out in Proposal B1(a)–B1(e)
registered liquidator	A person registered by ASIC under s1282(2)
s491 (for example)	A section of the Corporations Act (in this example numbered 491), unless otherwise specified

List of proposals and questions

Proposal	Your feedback
<p>B1 We propose to consider the public interest when deciding to order the winding up of a company. Our primary consideration will be whether ordering the winding up of the company would facilitate employee access to GEERS. Once this is established we will then apply a public interest test that considers:</p> <ul style="list-style-type: none"> (a) whether there is a creditor capable of winding up the company and if sufficient time has passed to enable that creditor to take their own winding up action; (b) whether the cost of liquidation, including ASIC's costs, would exceed the amount of employee entitlements owed; (c) the number of employees affected by the company's abandonment; (d) whether there are any current businesses or operations of the company that may have a value or incur significant liquidation costs; and (e) the amount of funds available in the Assetless Administration Fund used to pay for the winding up and how the limited funds available would best be utilised. 	<p>B1Q1 Do you agree with this proposal? Why or why not?</p> <p>B1Q2 Should we consider any other factors when applying this public interest test? Why?</p> <p>B1Q3 Do you agree that we should allow sufficient time to enable creditors to take their own action before ASIC action is commenced?</p> <p>B1Q4 How long do you believe sufficient time to be? Would one year be sufficient time? Would two years be sufficient time?</p>
<p>B2 We propose that we will generally not reinstate companies that have been deregistered to then order the winding up of that company, unless directed to by the court.</p>	<p>B2Q1 Do you agree with this proposal? Why or why not?</p>
<p>C1 We propose that the appointment of a registered liquidator in an ASIC-initiated winding up will be funded from the AA Fund.</p> <p>Any decision to fund a company winding up from the AA Fund will involve ASIC considering the amount of funds available in the AA Fund, and how the limited funds available should be best utilised to achieve the objectives of the fund.</p>	<p>C1Q1 Do you agree with this proposal? Why or why not?</p>
<p>D1 We propose to commence using ASIC's power to wind up abandoned companies, according to Proposals B1, B2 and C1, during November 2012.</p>	<p>D1Q1 Do you agree with the proposed timeframe for the implementation of Proposals B1, B2 and C1?</p>