

Assetless Administration Fund reaps results



ASIC UPDATE

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The Assetless Administration Fund (**AA Fund**) plays a significant role in assisting liquidators to carry out more detailed investigations into the circumstances of a company failure and, where appropriate, in referring director misconduct to ASIC.

With difficult economic conditions continuing and the number of companies becoming insolvent rising considerably, the AA Fund will be an important and effective tool for liquidators.

The AA Fund was established by the Australian Government in October 2005 and finances 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.

It aims to:

- encourage appropriate conduct by directors who may otherwise escape scrutiny due to lack of liquidator funds to carry out a proper investigation;
- discourage 'phoenix activity'; and
- improve the quality of reports lodged by liquidators to assist ASIC in identifying and pursuing misconduct.

Now in its third full year, the AA Fund is increasingly recognised and utilised by the insolvency profession. As evidence of this, for the first time, we expect the funding allocation for the 2008/09 financial year to be exhausted.

Working with the profession

ASIC continues to work closely with the IPA and the profession to improve the **participation rate** by liquidators and to implement improvements to the administration of the Fund.

Since inception of the Fund, ASIC has visited over 150 insolvency firms a number of times to promote use of the Fund and to discuss the impact of changes

(being an increase in the monetary cap for reports prepared for the purpose of director bannings and expanding the definition of 'assetless administration' to include liquidations where some work has been undertaken and as a result, less than \$10,000 remains in net realisable assets).

In conjunction with the IPA, we have conducted a joint national training program to better inform liquidators about the information they should include and address in their applications to increase the likelihood of funding being granted. Over 420 insolvency practitioners and staff attended.

Late last year, the IPA also provided invaluable feedback as part of a workshop held to examine measures that ASIC can implement to improve the use and effectiveness of the AA Fund.

It is clear these efforts are reaping results. Not only has the participation rate by liquidators improved significantly but importantly, the resulting investigations and reports of offences under the *Corporations Act 2001* (Cth) have assisted ASIC to pursue a number of **insolvent trading actions** and to **ban directors** repeatedly involved in failed companies or illegal **phoenix activity**. Disbursements from the Fund have also assisted liquidators to conduct **public examinations** and shed light on the circumstances of a company's failure.

More information about the application of funds, and the outcomes they have delivered, is discussed further below.

Participation rates

ASIC is encouraged by the significant improvement in the participation rate. Last financial year (2007/08), ASIC received 129 director banning and 103 other (non-banning) matter funding applications, totalling 232 applications. Between 1 July 2008 and the end of April 2009, we received 219 director banning applications and 105 other matter funding

applications, totalling 324 applications in just ten months. This represents a 68 percent increase over the two periods.

In April this year, the AA Fund achieved another milestone, reaching over 1,000 applications since the inception of the Fund, and paying or accruing approximately \$5.4 million to liquidators over the life of the Fund. As mentioned earlier, the funding allocation for the 2008/09 financial year is likely to be fully utilised.

Insolvency firms participating in the AA Fund

In accordance with the Finance Minister's Instructions dated 14 December 2007, ASIC maintains a list of all liquidators that have received AA funding since 14 December 2007. A snapshot of the top 10 firms, by value of funding approved since that time, is provided below.

Note	Firm	Funding Approved \$
1	PPB	359,477
2	Ferrier Hodgson	244,127
3	Cor Cordis	123,750
4	Sims Partners	108,565
5	Lawler Partners	101,950
6	Grant Thornton	91,300
7	Smith Hancock	89,965
8	KordaMentha	89,870
9	Pitcher Partners	88,787
10	Rodgers Reidy	85,173

A full list of recipients can be obtained from ASIC's website at www.asic.gov.au/aafund.

Examples of successful AA-Funded matters

Acting against illegal phoenix behaviour

A primary objective of the AA Fund is to reduce and pursue illegal phoenix activity, including action against the promoters and facilitators. ASIC currently has several deterrence investigations into illegal phoenix-facilitation that have been assisted by the AA Fund.

An example is a current action against North Sydney solicitor, Mr Timothy Donald Somerville, and eight company directors over their involvement in alleged phoenix-style transactions.

These proceedings follow an ASIC investigation into eight non-related companies. ASIC alleges that the directors of those eight financially distressed companies transferred business or assets to a new company controlled by the same directors for a negligible consideration.

In each instance, the assets of the distressed vendor company were transferred through a sale agreement signed by the same person, as director of both the vendor and purchaser companies. The vendor company was then placed into liquidation after the sale of its assets. ASIC contends that no tangible consideration was received from the sale of the assets, there were various unpaid tax debts, and that the business continued to operate under the name of the new company.

ASIC alleges that Mr Somerville recommended the transaction to each of the directors, prepared the necessary documentation, including the sale agreements, and in most instances, formed the new company.

ASIC alleges that the transactions caused detriment to the vendor company by removing assets from the reach of unpaid creditors. ASIC further alleges that the directors contravened their duties as directors of the financially distressed company, and that Mr Somerville contravened the Corporations Act through his involvement.

Insolvent trading

The AA Fund is also assisting with the conduct of investigations and commencement of proceedings in relation to insolvent trading. ASIC has a number of investigations on foot, which follow the receipt of detailed and substantially-funded (over \$50,000 in each instance) reports from liquidators.

A current matter in South Australia involves a director and alleged shadow director who sought advice regarding the financial position of a company from an insolvency practitioner. In this case, the director and shadow director are alleged to have not acted on advice to seriously consider the appointment of a voluntary administrator and instead, continued to trade for a further 12 months.

ASIC Commissioner, Michael Dwyer, has recently made public statements encouraging directors of companies in financial difficulty to seek appropriate professional advice, and warning that ASIC may pursue directors who fail to seek advice in relation to their company's insolvent trading and directors' duties obligations, or fail to act on that advice.

Another example of a matter that was funded by the AA Fund, under the original pilot program, involved the former director of International Consulting Group Pty Limited (**ICG**), Dr Anula Daui Kumari Kauye.

ASIC has brought criminal proceedings against Dr Kauye, involving 64 counts of trading while insolvent under the Corporations Act, 18 counts of theft under the Victorian Crimes Act, and one count of providing false information in an affidavit to the Victorian Supreme Court.

The charges arise from Dr Kauye's conduct while a director of ICG. The company is alleged to have continued to trade while insolvent between July 2003 and October 2004. ASIC specifically alleges that Dr Kauye incurred debts to contractors and retail and service providers and stole approximately \$1.5 million from US-based companies during this period.

A committal mention date has been set for 1 July 2009 in the Melbourne Magistrates' Court.

In early 2007, ASIC also approved funding for a Victorian practitioner, primarily in respect of alleged breaches of the insolvent trading provisions. The practitioner undertook investigations into the alleged insolvent trading and received funding in excess of \$30,000 for the provision of a report to ASIC under section 533(2) of the Corporations Act.

The investigations undertaken, and the details included in the funded report, were subsequently used by the practitioner to successfully obtain litigation funding to enable civil recovery action to be pursued. As a result of this action, the practitioner has recently settled the matter during mediation for in excess of \$1.1 million.

Court bannings of company directors

In addition to the numerous administrative actions ASIC takes to ban company directors under s 206F of the Corporations Act, ASIC may also apply to the Court to ban people for substantially longer periods. This is often the case where there is a range of misconduct identified.

A Sydney liquidator was funded substantially (over \$100,000) under the AA Fund to investigate and report to ASIC the conduct of the former director of the Sydney Investment House Group (SIH Group), Mr Edwin Goulding.

The liquidator's investigation and reporting involved extensive tracing of fund flows and intercompany transactions.

The liquidator's work helped further ASIC's investigation and as a result, the Supreme Court of New South Wales found that Mr Goulding had breached his duties as a director by allowing companies within SIH Group to make intercompany loans to insolvent entities and false or misleading statements to investors, and to operate an unregistered managed investment scheme.

On 21 November 2008, Justice Hamilton found that Mr Goulding misappropriated \$4.2 million of company funds and breached his duties as a director.

On 12 March 2009, Mr Goulding was banned by the Supreme Court of NSW from managing corporations for a period of 25 years. In determining the period of banning, the Court had regard to the fact that '*a large body of serious breaches of duty has been established against him*' and that two principal factors in the assessment of the banning were, '*... first the necessity of protection of the public; and secondly, the element of retribution and deterrence that is expressed in the banning*'.

Public examinations

While less common, the AA Fund has also assisted liquidators to conduct public examinations. In assessing applications to conduct public examinations, ASIC's considerations are based upon, but not limited to, factors such as:

- the severity of the alleged misconduct;
- the evidence currently available to support the alleged misconduct and associated offences;
- the likelihood that additional evidence will be attained via the conduct of public examinations;
- the extent of deficiencies; and
- broader public interest considerations.

A recent, high-profile example of a matter where the AA Fund assisted the liquidator to successfully conduct public examinations was that of Chartwell Enterprises Pty Ltd (In Liquidation) (**Chartwell**).

Messrs Bruno Secatore and Daniel Juratowitch, of Cor Cordis, were appointed joint and several voluntary administrators of Chartwell on 22 April 2008 and liquidators on 28 May 2008. Mr Secatore subsequently applied for funding from the AA Fund, to assist in undertaking investigations into Chartwell, including the conduct of public examinations of the company's officers.

ASIC subsequently approved funding of \$99,000 (including legal fees, other disbursements and GST) to enable the liquidator to conduct public examinations and to prepare and lodge a report with ASIC under s 533(2) of the Corporations Act. The examinations of Chartwell's officers, and other parties separate from the AA Fund application, were undertaken on 15, 16 and 17 April 2009 in the Victorian Supreme Court.

Mr Secatore said:

The AA fund has allowed the Liquidators to undertake investigations and procedures, namely public examinations of company officers, which otherwise

could not have been performed at this stage of the liquidation. The examinations have proved invaluable given the lack of books and records in the matter and will assist in our ongoing investigations and preparation of our reports to ASIC.

As the above cases demonstrate, the application of money from the AA Fund and the outcomes achieved are significant and far-reaching.

In the current environment, ASIC strongly encourages liquidators to consider making applications to the AA Fund. We appreciate that insolvency practitioners are operating under increasingly heavy workloads, however, for the benefit of creditors and company employees, and in order to maintain the integrity of the market, it is important that liquidators play their part in bringing directors who ignore their solvency obligations and director duties to account.

Further information for liquidators about participation in the AA Fund, including eligibility for funding, can be found at www.asic.gov.au/aafund 

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