



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 81

Destruction of books

Chapter 5 — External administration

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From 5 July 2007, this document may be referred to as Regulatory Guide 81 (RG 81) or Policy Statement 81 (PS 81). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 81.1) or their policy statement number (e.g. PS 81.1).

Headnotes

Section 542; early destruction of books; liquidators.

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Purpose

RG 81.1 This guide sets out ASIC's policy on applications by liquidators under s 542 of the Corporations Law (Law). It deals with applications for the early destruction of books of companies that have been wound up by the court, and of companies that have been wound up voluntarily.

The Law

RG 81.2 Where a company has been wound up, the liquidator must keep the books referred to in s542(1) (see RG 81.3) for five years from the date of the company's deregistration (s542(2)). The liquidator may destroy them after five years, subject to s262A of the *Income Tax Assessment Act 1936* (Cth).

RG 81.3 The books referred to in s542(1) are all the liquidator's and company's books that are relevant to the affairs of the company at or subsequent to the commencement of the winding up of the company.

RG 81.4 However, when a company has been wound up, the books referred to in s542(1) may be destroyed within five years after the company is deregistered:

“s542(3)

- (a) in the case of a winding up by the Court — in accordance with the directions of the Court given pursuant to an application of which at least 14 days notice has been given to the Commission;
- (b) in the case of a members' voluntary winding up — as the company by resolution directs; and
- (c) in the case of a creditors' voluntary winding up — as the committee of inspection directs, or, if there is no such committee, as the creditors of the company by resolution direct.”

RG 81.5 Nevertheless, the liquidator must not destroy the books in the circumstances referred to in s542(3)(b) and 542(3)(c) unless ASIC consents to their destruction (s542(4)).

Winding up by the court

Notice of applications under section 542(3)(a)

RG 81.6 The liquidator must give ASIC notice of an application made under s542(3)(a) at least 14 days before the date on which the application or summons for directions about the early destruction of books is to be heard (s542(3)(a)).

RG 81.7 The liquidator should provide ASIC with a photocopy of the application or summons and any documentation filed or proposed to be filed with the Court in support of the application. This must be done at least 14 days before the date upon which the application or summons is to be heard. ASIC would normally consider this to be adequate notice of the application.

RG 81.8 Notice of the application should be directed to the Regional General Counsel at the ASIC Regional Office in the state or territory where the application is issued. It should be accompanied by a covering letter setting out the nature of the application and the date on which it is to be heard. This will ensure that the application is allocated to the relevant staff member promptly.

ASIC response

RG 81.9 When ASIC receives the notice of the application under s542(3)(a) of the Law, it will advise the liquidator in writing whether or not it intends to object to the application.

RG 81.10 When ASIC is deciding whether to object to the application it will consider matters that are relevant to companies that have been wound up voluntarily as set out in RG 81.19, where applicable.

Voluntary winding up

RG 81.11 ASIC accepts applications for the early destruction of books from two months before the company's final meeting is to be held under s509 of the Law. However, books may not be destroyed before a company is deregistered (s542(3)) and therefore ASIC cannot consent to books being destroyed before the deregistration date.

RG 81.12 ASIC will advise the liquidator in writing if it is unable (due to s542(3)) or unwilling to consent to the books being destroyed at the date of the application. In these circumstances ASIC will, if

possible, form a preliminary view as to whether it is likely to consent to the books being destroyed at a specified date after deregistration and advise the liquidator in writing of that view. The specified date may be expressed as a period of time (ie “six months after the company is deregistered”). This preliminary view will enable the liquidator to include a more accurate estimate of the anticipated cost of storing the books in the company’s final accounts.

RG 81.13 The advice to the liquidator of ASIC’s preliminary view does not authorise the liquidator to destroy the books. The liquidator may not destroy the books until ASIC’s written consent is obtained. When exercising its discretion under s542(4) ASIC is required to take into account all relevant factors which exist at the time the decision to consent is made, including matters which have arisen since ASIC gave its preliminary view.

RG 81.14 The liquidator may write to ASIC on or after the specified date asking ASIC to consent to the destruction of the books under the original application. The letter must state that, as at that date, the statements the liquidator made in the original application are still accurate or, if they are no longer accurate, the letter must set out any changes to them.

RG 81.15 After the company is deregistered, if ASIC is satisfied that the books may be destroyed, it will give the liquidator its written consent under s542(4).

Applications

RG 81.16 The application must be in writing, signed by the liquidator.

It must include:

- (a)
 - (i) for a members’ voluntary winding up, a minute of the company’s resolution directing that the books be destroyed; or
 - (ii) for a creditors’ voluntary winding up, a minute of the committee of inspection’s resolution (or of the creditors if no committee of inspection was appointed) directing that the books be destroyed;

- (b) a statement showing the following amounts:
 - (i) funds remaining in the administration (including the estimated value of any assets yet to be realised);
 - (ii) total outstanding costs of the winding up estimated to the date of deregistration of the company (excluding storage costs of books);
 - (iii) estimated cost of storage of books based on a five year retention period;
 - (iv) amount owing to remaining creditors; and
 - (v) surplus/deficiency of funds
 $(v) = (i) - (ii) - (iii) - (iv)$;
- (c) a statement as to whether any requests have been received by the liquidator for access to the books or the information contained in them;
- (d) a statement as to whether, to the best of the liquidator's knowledge, any circumstance exists in relation to the company or an associate of the company (as defined in s11 of the Law) which may result in the books being required by any person within five years of the company's deregistration; and
- (e) a statement setting out why ASIC should exercise its discretion to consent (see RG 81.19).

RG 81.17 If the application is made before the company is deregistered, it must also include:

- (a) the proposed date of the final meeting to be held under s509;
- (b) a statement that all lodging and reporting requirements applicable at the date of the application have been met, including a statement that the liquidator does not propose to lodge a report under s533 of the Law; and
- (c) a statement that the liquidator does not propose to take legal action in the name of or on behalf of the company.

Consent

RG 81.18 When ASIC is deciding whether to exercise its discretion to consent to an early destruction of books, its paramount consideration is whether the books are likely to be needed for any investigation, prosecution or other litigation. If it does not think this is

likely, it will balance the anticipated cost of storage against the likelihood that the books will be required.

RG 81.19 Matters ASIC will consider include:

- (a) whether an investigation, prosecution or other litigation is pending or on foot in relation to the company or an associate of the company;
- (b) whether ASIC has received any complaints in relation to the company or its associates;
- (c) whether any reports have been lodged in relation to the company or its associates under s422 or 533 of the Law or under s438D of the Law;
- (d) whether the liquidator or ASIC has received requests for access to the books, or the information contained in them;
- (e) the funds remaining in the administration;
- (f) the estimated cost of storage of books;
- (g) the surplus or deficiency of funds in the administration;
- (h) the time between the date of the final meeting held under s509 of the Law and the date the books would be destroyed; and
- (i) whether it is a creditors' or members' winding up.

Application fee

RG 81.20 The liquidator may apply to any ASIC Regional Office enclosing the prescribed fee. The application fee is prescribed by the Corporations (Fees) Regulations Item 27 (because it is an application for which a fee is not provided by any other item).