



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 242

ASIC's power to wind up abandoned companies

January 2013

About this guide

This guide is for employees of abandoned companies who are owed employee entitlements and other interested persons, including creditors, administrators and liquidators.

It explains when we will use our power to wind up an abandoned company under Pt 5.4C of the *Corporations Act 2001* (Corporations Act).

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 guide was issued in January 2013 and is based on legislation and regulations as at the date of issue.

Previous version:

- Superseded Regulatory Guide 242, issued November 2012

Disclaimer

This guide does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

Examples in this guide are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

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A Overview

Key points

ASIC has a discretionary power to wind up an abandoned company in certain circumstances: s489EA of the *Corporations Act 2001* (Corporations Act).

We will exercise this power to help employees of abandoned companies who are owed employee entitlements to access an advance under the *Fair Entitlements Guarantee Act 2012* (Fair Entitlements Guarantee Act).

ASIC's power to wind up a company

- RG 242.1 Under the Corporations Act, ASIC has the power to wind up a company in any of the following circumstances:
- (a) the company has not responded to a return of particulars or lodged any other documents with ASIC in the last 18 months, leading us to believe that the company is not carrying on business and that the making of a winding-up order is in the public interest (s489EA(1));
 - (b) the company's review fee has not been paid after 12 months of when it became due (s489EA(2));
 - (c) we have reinstated the registration of the company in the last six months and believe that making the order would be in the public interest (s489EA(3)); or
 - (d) we have reason to believe that the company is not carrying on business and have given the company and its director(s) an opportunity to object to the wind-up, to which no objection was received (s489EA(4)).
- RG 242.2 These circumstances may indicate that the company has been abandoned by its director(s). Where we believe that the company has been abandoned based on one of these circumstances, we may exercise our discretion to wind up the company. However, we are not required to wind up the company in every situation.

Helping employees access an advance under the Fair Entitlements Guarantee Act

- RG 242.3 Directors sometimes abandon their companies without paying employee entitlements.
- RG 242.4 The Fair Entitlements Guarantee Act establishes a scheme funded by the Australian Government and administered by the Department of Education,

Employment and Workplace Relations (DEEWR) to assist eligible employees who are owed certain employee entitlements obtain an advance.

RG 242.5 An advance may be available to an employee for eligible unpaid entitlements if their employer has been subject to an 'insolvency event' and if the eligibility requirements in Pt 2 of the Fair Entitlements Guarantee Act are met.

Note 1: The Fair Entitlements Guarantee Act commenced on 5 December 2012. It operates in relation to claims for assistance for unpaid entitlements for employer insolvency events that occur on or after 5 December 2012. Claims for assistance for employer insolvency events that occurred before 5 December 2012 will continue to be considered under the General Employee Entitlements and Redundancy Scheme (GEERS). For more information on GEERS, go to the DEEWR website at www.deewr.gov.au.

Note 2: Where the employer is an incorporated entity, an 'insolvency event' refers to a situation where a provisional liquidator or liquidator has been appointed under the Corporations Act.

Note 3: For the purposes of applying to ASIC to wind up a company, a reference to the Fair Entitlements Guarantee Act in this document is also a reference to GEERS.

RG 242.6 If a director has abandoned a company without paying employee entitlements, we may exercise our power to wind up the company under s489EA of the Corporations Act so that employees can claim an advance for unpaid entitlements under the Fair Entitlements Guarantee Act.

RG 242.7 For more information on applying for an advance, go to the DEEWR website at www.deewr.gov.au.

B When we will exercise our power to wind up an abandoned company

Key points

Employees of abandoned companies who are owed employee entitlements can lodge a request with ASIC to wind up the company.

We can use our discretion to decide whether to wind up an abandoned company. We are not required to wind up an abandoned company in every situation.

In determining whether to exercise our power to wind up a company, our primary consideration will be to facilitate employees accessing an advance. We will then consider how government funding would best be used.

We will generally not reinstate a company that has been deregistered in order to wind it up.

How to lodge a request with ASIC

- RG 242.8 If you are owed employee entitlements by a company that has been abandoned and you cannot access an advance under the Fair Entitlements Guarantee Act because the company has not been put into liquidation, you can lodge a request with ASIC to wind up the company.
- RG 242.9 Requests to ASIC to wind up a company are handled by our Misconduct and Breach Reporting team. Lodge your request as a report of misconduct through the ASIC website at www.asic.gov.au by clicking on 'How to complain'.
- RG 242.10 You should only lodge a request with ASIC if you believe you are eligible for an advance under the Fair Entitlements Guarantee Act. Your request should be accompanied by evidence that you were employed by the company and, where available, that you are owed employee entitlements.

Note: For more information on lodging a request to ASIC to wind up a company, see Information Sheet 160 *Disputes about employee entitlements* (INFO 160) at www.asic.gov.au/infosheets.

How we assess requests to wind up a company

- RG 242.11 We may exercise our power to wind up an abandoned company where a request has been lodged with us and we believe there is sufficient evidence that:
- (a) the company is an abandoned company; and
 - (b) winding up the company would help the employee access an advance under the Fair Entitlements Guarantee Act.

RG 242.12 If this preliminary test is met, we will consider other factors such as how best to use government funding: see Table 1. Based on these considerations, it is possible that we will not wind up all abandoned companies with outstanding employee entitlements.

Table 1: Other factors in our assessment

Factor	Explanation
Winding up by creditor(s)	<p>We will consider if:</p> <ul style="list-style-type: none"> • there is a creditor capable of winding up the company; and • sufficient time has passed for that creditor to take its own winding-up action. <p>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 to be the best use of government funding to wind up a company before sufficient time has passed to allow a well-resourced creditor to take action through the usual court process.</p> <p>We may wait up to six months from when we receive a request to wind up a company to appoint a liquidator. We believe six months allows sufficient time for a creditor to have commenced its own winding-up action.</p>
Cost of liquidation	<p>We may consider it not to be the best use of government funding to exercise the power to wind up a company if the cost of taking winding-up action would exceed the amount of employee entitlements claimed. The cost of taking winding-up action is generally estimated to be about \$15,000. This figure comprises ASIC's costs and the liquidator's remuneration.</p> <p>We may also consider it not to be the best use of government funding to wind up a company where the amount of outstanding employee entitlements claimed is substantial enough to enable an employee, or the employees jointly, to petition the court to wind up the company.</p>
Company business or operations	<p>We will consider whether there is any current company business or operations that may have a value, or incur significant liquidation costs.</p> <p>If there is current business or operations, it is less likely the company will be abandoned and therefore it is unlikely that we will wind it up.</p>
Assetless Administration Fund (AA Fund)	<p>We will consider:</p> <ul style="list-style-type: none"> • the amount of money available in the Assetless Administration Fund (AA Fund); and • how the limited money available would best be used. <p>The AA Fund was established by the Australian Government to fund a range of preliminary investigations, reports and liquidator actions for assetless administrations. ASIC administers the AA Fund. We will consider how best to prioritise and administer this fund across the various activities it is intended to support, including winding up of abandoned companies.</p> <p>We have undertaken to monitor the money available in the AA Fund and periodically report this to Treasury.</p> <p>Note: For more information about the AA Fund, see Regulatory Guide 109 <i>Assetless Administration Fund: Funding criteria and guidelines</i> (RG 109).</p>

Deregistered companies

- RG 242.13 ASIC has the power to order the winding up of a company if we have reinstated the registration of the company in the last six months, and it is in the public interest to do so: s489EA(3) of the Corporations Act.
- RG 242.14 We will generally not reinstate a company that has been deregistered for the purpose of ordering it to be wound up, unless so directed by the court.
- RG 242.15 Employees of a company that has been deregistered can apply to the court for an order that ASIC reinstate the registration of a company under s601AH of the Corporations Act.

What happens if we decide to wind up a company

- RG 242.16 If we exercise our 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 is wound up voluntarily. This resolution is deemed to have been made on the day that we use our power to order the winding up and does not require a declaration of solvency to have been made under s494.
- RG 242.17 We may appoint a liquidator to administer the winding up of the company from a panel of liquidators. The panel of liquidators will be established through an open selection process. Each liquidator appointed for a particular company will be required to enter into a funding agreement with ASIC. We will pay the liquidator from the AA Fund.

What happens if we decide *not* to wind up a company

- RG 242.18 If you are owed employee entitlements and we have notified you of a decision not to exercise our powers to wind up a company, the following apply:
- (a) you can apply to the court for an order that the company is wound up (you should seek private legal advice about this process);
 - (b) you may have a right to seek review of ASIC's decision by the Administrative Appeals Tribunal;
 - (c) you can seek access to documents about the decision under the *Freedom of Information Act 1982*; and/or
 - (d) you can seek private legal advice about what other options may be available to you.
- RG 242.19 For further information about your rights in connection with a decision not to wind up a company, see Information Sheet 9 *ASIC decisions: Your rights* (INFO 9). See also Regulatory Guide 57 *Notification of rights of review* (RG 57), which gives more details about your rights of review.

Key terms

Term	Meaning in this document
AA Fund	Assetless Administration Fund
abandoned company	A company that meets the criteria set out in s489EA(1)–(4) of the Corporations Act
advance	As defined in s5 of the Fair Entitlements Guarantee Act
ASIC	Australian Securities and Investments Commission
Corporations Act	<i>Corporations Act 2001</i> , including regulations made for the purposes of that Act
DEEWR	Department of Education, Employment and Workplace Relations
Fair Entitlements Guarantee Act	<i>Fair Entitlements Guarantee Act 2012</i> , including regulations made for the purposes of that Act
GEERS	General Employee Entitlements and Redundancy Scheme—being a scheme funded by the Australian Government and administered by DEEWR. It assists eligible employees who are owed certain employee entitlements due to the liquidation or bankruptcy of their employer. GEERS is only for assistance for employer insolvency events that occurred before 5 December 2012
INFO 160 (for example)	An ASIC information sheet (in this example numbered 160)
insolvency event	Where the employer is an incorporated entity, a situation where a provisional liquidator or liquidator has been appointed under the Corporations Act
Pt 5.4C (for example)	A part of the Corporations Act (in this example numbered 5.4C)
RG 109 (for example)	An ASIC regulatory guide (in this example numbered 109)
s489EA (for example)	A section of the Corporations Act (in this example numbered 489EA), unless otherwise specified

Related information

Legislation

Corporations Act, Pt 5.4C, s489EA, 491, 494 and 601AH

Fair Entitlements Guarantee Act, Pt 2

Freedom of Information Act 1982

Consultation papers and reports

CP 180 *ASIC's power to wind up abandoned companies*

REP 310 *Response to submissions on CP 180 ASIC's power to wind up abandoned companies*

Regulatory guides

RG 57 *Notification of rights of review*

RG 109 *Assetless Administration Fund: Funding criteria and guidelines*

Information sheet

INFO 9 *ASIC decisions: Your rights*

INFO 160 *Disputes about employee entitlements*

Media and other releases

12-160MR *ASIC proposals on winding up abandoned companies* (12 July 2012)

12-268MR *ASIC releases guidance on insolvency reforms: Winding up of abandoned companies and Assetless Administration Fund* (8 November 2012)