



ASIC

Australian Securities & Investments Commission

## REGULATORY GUIDE 93

# Reimbursing liquidation costs

## Chapter 5 — External administration (Part 5.1)

Issued 13/2/1995

*From 5 July 2007, this document may be referred to as Regulatory Guide 93 (RG 93) or Policy Statement 93 (PS 93). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 93.1) or their policy statement number (e.g. PS 93.1).*

## Headnotes

*Taxed costs may be reimbursed on application for winding up of company where fraud believed to have been committed; s466(2) and (3).*

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## Purpose

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RG 93.1 This guide sets out the ASC's views on reimbursing applicants' costs under s466(3) of the Corporations Law (Law) for proceedings in a winding up.

## Applications usually granted

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RG 93.2 If the applicant satisfies all the criteria set out in para 6–13 below, the ASC will reimburse the applicant the full amount allowed under s466(3). It will reimburse the applicant unless there are exceptional circumstances when it would be inappropriate for the ASC to reimburse moneys. Some of the circumstances in which reimbursement would be inappropriate are set out in para 17 and 18.

RG 93.3 Reimbursement will generally be appropriate because there is an element of public interest in a company being wound up by the court when there has been fraud in the company's affairs. The winding up procedure may increase the likelihood of persons who have committed fraud being brought to justice.

## Background

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RG 93.4 A person may apply to the court at their own expense for a company to be wound up. The ASC may reimburse an applicant's taxed costs up to \$1000 if the following criteria are met:

- (a) the ASC believes that a person has committed fraud in the promotion or formation of the company, or a company officer has committed fraud in relation to the company after it was formed;
- (b) the company does not have sufficient property to reimburse the applicant;
- (c) all or part of the taxed costs have not already been reimbursed under s466(2); and
- (d) the applicant is not the company or the liquidator.

This power is contained in s466(3) of the Law.

RG 93.5 The ASC cannot reimburse costs under s466(3) unless every element of this subsection is completely satisfied. If they are not satisfied, the ASC cannot reimburse the costs because it could amount to a misapplication of public funds. The relevant criteria are set out in para 6–13 below.

# Fraud

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## What is fraud?

RG 93.6 The ASC must believe that fraud has been committed. In this context, “fraud” means more than mere equitable fraud (which can be committed without an element of bad faith). It has the primary meaning given by the *Concise Oxford Dictionary*: “criminal deception”. The fraud concerned must involve some element of dishonesty or deception. Normally, it will have been a criminal offence.

## ASC belief

RG 93.7 It is only necessary for the ASC to believe that a fraud has been committed. A clear situation in which the ASC would have such a belief is where a person has been convicted of fraud. However, the ASC may still consider there is fraud even if the person has not been convicted.

RG 93.8 If the person has not been convicted, the ASC will require clear evidence or credible information to form the opinion that a fraud was committed. The ASC must have the kind of evidence or credible information that would usually cause it to commence proceedings for the fraud.

## Types of fraud

RG 93.9 The fraud must be one of two types:

- (a) a fraud committed by a person in the promotion or formation of the company; or
- (b) a fraud committed by an officer of the company in relation to the company since it was formed. An “officer” of the company is defined in s 9 of the Law.

RG 93.10 The fraud may have been committed during the promotion or formation of the company or at any time since. It does not need to be recent, or be connected with the liquidation. It must relate to the company. An applicant who had put a company into liquidation may show evidence of frauds which relate only to a related body corporate of the company. The ASC would not consider this to be relevant fraud for the purposes of this guide.

## **Insufficient funds**

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RG 93.11 The company being wound up must have insufficient funds or other property available to meet the taxed costs of the applicant in full. To establish this, the applicant must give the ASC a statement from the liquidator setting out:

- (a) whether the company has any funds or property to reimburse the applicant's costs;
- (b) whether the company has or will be reimbursing the applicant; and
- (c) how much the company will be reimbursing the applicant, if it will be reimbursing them.

## **Taxed costs**

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RG 93.12 The applicant's costs must have been taxed before application is made under s466(3). They must give the ASC a certified copy of the certificate of taxation to the ASC.

## **Costs already reimbursed**

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RG 93.13 The ASC cannot reimburse an applicant if the liquidator has fully reimbursed the applicant's taxed costs under s466(2). The ASC will reimburse the difference between the sum reimbursed by the liquidator and the taxed costs up to \$1000.

## **How much the ASC will reimburse**

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### **Discretion to reimburse**

RG 93.14 The ASC has a discretion whether or not to reimburse the costs and is not obliged to reimburse them under s466(3).

### **All or nothing**

RG 93.15 The ASC will not reimburse only part of the applicant's costs unless the liquidator has already reimbursed part of the applicant's costs (see para 13 above). It will either reimburse all of the

costs or none of them. This is because there is no reasonable basis for apportioning the costs.

RG 93.16 For example, if the applicant's taxed costs are \$1500 and it applies for reimbursement of \$1000, the ASC will reimburse the applicant \$1000 or nothing. (Section 466(3) only allows for reimbursement up to \$1000). If the applicant's taxed costs are \$500, and it applies for reimbursement of \$500, the ASC will reimburse \$500 or nothing.

## Exceptions

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RG 93.17 The court may order the liquidator not to reimburse the applicant the taxed costs (s466(2)). In this case, the ASC would not normally grant an application under s466(3). The application should include a declaration that there has not been a court order under s466(2) stating that the liquidator should not reimburse the applicant the taxed costs.

RG 93.18 The ASC will not reimburse costs if there is any evidence that the applicant is implicated in fraud related to the liquidated company. This includes situations when the applicant did not personally commit a fraud, but their default may have contributed to the fraud being able to be committed. For example, a director who in breach of their duty as a director failed to establish a proper system of internal control, thus making it easier for the fraud to be committed, will not be eligible for reimbursement.

## Applications

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RG 93.19 Applicants should apply in writing to the ASC Regional Office in their region.