



ASIC

Australian Securities & Investments Commission

REPORT 310

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

November 2012

About this report

This report highlights the key issues arising out of the submissions received on Consultation Paper 180 *ASIC's power to wind up abandoned companies* (CP 180) and details our responses in relation to those issues.

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.

Disclaimer

This report 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 report are purely for illustration; they are not exhaustive and are not intended to impose or imply particular rules or requirements.

This report does not contain ASIC policy. Please see Regulatory Guide 242 *ASIC's power to wind up abandoned companies* (RG 242).

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A Overview/Consultation process

- 1 In Consultation Paper 180 *ASIC's power to wind up abandoned companies* (CP 180), we consulted on the proposed implementation of our new power under Pt 5.4C of the *Corporations Act 2001* (Corporations Act) to wind up a company when the company has been abandoned by its director(s).
- 2 This report highlights the key issues arising from the submissions received in response to CP 180, as well as our response to those issues.
- 3 This report is not meant to be a comprehensive summary of all submissions received, nor a detailed report on every question posed in CP 180. This report is limited to the key issues.
- 4 For a list of the non-confidential respondents to CP 180, see the appendix. All public submissions can be found on the ASIC website at www.asic.gov.au/cp under CP 180.

ASIC's power to wind up an abandoned company

- 5 Part 5.4C of the Corporations Act gives ASIC a discretionary power to wind up a company where we believe that the company has been abandoned.
- 6 Part 5.4C was introduced into law in July 2012 as part of the Australian Government's 'Protecting Workers' Entitlements Package' announced in 2010 to facilitate employees of abandoned companies accessing their entitlements under the General Employee Entitlements and Redundancy Scheme (GEERS).
- 7 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.
- 8 GEERS may be available to an employee for eligible unpaid entitlements if:
 - (a) their employer has been subject to an insolvency event;
 - (b) there are insufficient funds or assets available to the employer to pay those entitlements; and
 - (c) no other source of funds is available to pay those entitlements.

Note: 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.

- 9 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.
- 10 Where this is the case, ASIC may exercise its power to wind up an abandoned company under Pt 5.4C to facilitate employees claiming unpaid entitlements through GEERS.
- 11 CP 180 discussed our proposals for implementing this power, including the circumstances in which we will seek to wind up a company, the means by which the process will be funded, and a proposed implementation period.

Responses to consultation

- 12 We received three confidential responses and six public responses to CP 180. One response was made anonymously, though its content remains public. We are grateful to all respondents for taking the time to consider our proposals, and for sending us their comments.
- 13 In summary, the primary issues raised by respondents related to:
- (a) the factors we proposed to consider in determining whether or not to wind up an abandoned company—in particular, whether considering the number of employees affected would disadvantage employees of smaller companies;
 - (b) limiting the exercise of our power to situations where winding up a company would facilitate access to GEERS;
 - (c) not acting to wind up a company solely on the basis that unlawful phoenix activity has taken place, or is likely to take place;
 - (d) concerns that our proposal not to reinstate de-registered companies for the purpose of winding up may unfairly affect small creditors and employees and whether, in some cases, it would be appropriate for us to reinstate these companies; and
 - (e) the extent to which the Assetless Administration Fund (AA Fund) should be used to finance the winding up of abandoned companies.
- 14 Section B provides more details on the issues raised and our response to these issues.
- 15 The feedback received on CP 180 was helpful in finalising our guidance, which is published in Regulatory Guide 242 *ASIC's power to wind up companies* (RG 242). Where relevant, this report explains where we have modified key aspects of our proposals in CP 180 in producing our final guidance.

B Response to submissions on CP 180

Key points

This section outlines the key issues covered in submissions to CP 180 and our response to those issues.

This includes:

- when we will exercise our power to wind up an abandoned company;
- our approach to deregistered companies;
- funding an ASIC-initiated winding up; and
- when we will commence using our power.

When we will wind up a company

- 16 In CP 180, we proposed that our primary consideration in determining whether or not to wind up a company under Pt 5.4C of the Corporations Act would be whether an ASIC-initiated winding up of a company would facilitate employee access to GEERS. If this primary consideration was satisfied, we proposed to implement a further test to decide when to exercise our power.
- 17 We proposed to consider the following five elements as part of this test:
- (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 is any current company business or operations that may have a value, or incur significant liquidation costs; and
 - (e) the amount of money available in the Assetless Administration Fund (AA Fund) for an ASIC-initiated winding up and how the limited money available would best be used.
- 18 Most respondents agreed that, given ASIC's limited resources, some form of test was required to decide which companies should be wound up.

Facilitating access to GEERS

- 19 Some submissions suggested that ASIC's focus should not be limited to facilitating access to GEERS, but that consideration should also be given to the interests of creditors, as well as to the deterrence and prevention of unlawful phoenix activity.
- 20 It was suggested that the intention of the legislature was to prevent unlawful phoenix activity, and that winding up action should be taken with this intention in mind.

ASIC's response

The Australian Government introduced ASIC's power under Pt 5.4C of the Corporations Act as part of its 'Protecting Workers' Entitlements Package' and to facilitate employee access to GEERS. This is our primary consideration when determining how best to use government funding. This power was not introduced to protect creditors who can pursue their own action through the courts.

After a company has been placed into liquidation, the liquidator can investigate any possible unlawful phoenix activity and report this to ASIC.

Winding up by creditor(s)

- 21 Most respondents agreed that ASIC should allow sufficient time for a creditor that is capable of taking winding up action to do so, but disagreed with our proposal that this could be one to two years. Respondents differed in how long constituted 'sufficient time', and periods of between three to twelve months were proposed as adequate.
- 22 Shorter periods were seen as important as respondents were concerned about employees having to wait an excessive amount of time before being able to access their unpaid entitlements. Respondents noted that a creditor is likely to have made a commercial decision soon after the company was abandoned whether or not to petition for a winding up, so waiting more than a year was excessive.
- 23 Two respondents argued that by the time ASIC receives a request to wind up a company, the company may have been abandoned for up to 12 months or more. In this case, any creditor that was likely to have taken action would have already done so and no additional waiting period should be applied.

ASIC's response

We are sensitive to the impact of delays on employees waiting for a payment from GEERS. However, we have determined that where there is a significant creditor who may act, it is appropriate to wait up to six months before appointing a liquidator to allow that creditor sufficient time to act.

Cost of liquidation

- 24 Most respondents who addressed this issue thought that ASIC should not consider whether the cost of liquidation, including ASIC's costs, would exceed the amount of employee entitlements owed in determining whether to wind up a company.
- 25 One respondent argued that if large amounts were outstanding, the employee or employees may be in a position to take their own action to appoint a liquidator.
- 26 Another respondent expressed concern that where small amounts are owing, the cost of liquidation may make the recovery of unpaid employee entitlements uneconomical, and legislation should fix the rate of remuneration of the liquidator as a percentage of the entitlement pool.

ASIC's response

We may consider it is not the best use of government funding to wind up a company if:

- the cost of doing so would exceed the amount of employee entitlements owed; or
- the amount of outstanding employee entitlements owed is substantial enough to enable an employee, or the employees jointly, to petition the court to wind up the company.

Number of employees affected

- 27 Most submissions argued that considering the number of employees affected by the company's abandonment was unfair to employees of smaller companies.
- 28 Respondents pointed out that employees of larger companies may already have assistance from unions or be able to attract special consideration from the Minister responsible for GEERS, or could bond together to jointly petition for the winding up of the company. Employees from smaller companies are in effect 'friendless' and are therefore particularly in need of ASIC's assistance.
- 29 It was further suggested that considering the number of employees affected would be inconsistent with the GEERS Operational Arrangements, which do not limit access to GEERS based on a smaller number of employees.
- 30 Only one submission agreed that the number of employees affected should be an important consideration for ASIC in determining whether to wind up a company.

ASIC's response

We have reviewed our position and decided that the number of employees affected by a company's abandonment should generally not form part of our considerations.

Current company business or operations

- 31 Three submissions addressed this issue. One respondent agreed that ASIC should consider any current company business or operations.
- 32 The other two respondents disagreed on the basis it was unlikely that an abandoned company would have any current business or operations, and that this could only be determined *after* the appointment of a liquidator.

ASIC's response

We can only exercise our power to wind up where companies have been abandoned. A company is unlikely to be abandoned if it has current business or operations.

Assetless Administration Fund

- 33 Respondents expressed concern that the AA Fund did not have sufficient funding to enable ASIC to initiate the winding up of an abandoned company.

ASIC's response

We have committed to the Australian Government that we will continue to monitor the money available in the AA Fund when exercising our power to wind up abandoned companies.

Deregistered companies

- 34 In CP 180, we proposed that we would not reinstate a deregistered company for the purpose of a wind up. Most respondents agreed with this proposal, although this was qualified by a number of scenarios where respondents thought this general rule could be unfair to employees. Respondents thought that our approach to deregistered companies should be more flexible.
- 35 Respondents argued that flexibility could be exercised, for example, where it is proven that employee access to GEERS would be facilitated, or where ASIC suspects unlawful phoenix activity.
- 36 A number of submissions raised concerns that directors often deregister a company to facilitate unlawful phoenix activity, and that ASIC must ensure its processes do not compound this problem. It was suggested that ASIC could make it more difficult to deregister a company, or put measures in place to assess the liabilities, creditor claims and employee entitlements of companies before deregistering a company.
- 37 Respondents also submitted that it would be unfair to employees to have to apply to the court for an order to reinstate the company, as they are unlikely to have the financial resources to do so.

ASIC's response

We will generally not reinstate a deregistered company for the purpose of winding it up unless directed to reinstate the company by the court.

Wherever possible, we will seek to improve our deregistration process to ensure that companies are not deregistered with employee entitlements owing.

Funding an ASIC-initiated winding up

- 38 In CP 180, we proposed to use the AA Fund to finance winding up of abandoned companies. Some respondents agreed with this proposal, while others believed that the AA Fund should not be used for this purpose.
- 39 All respondents were concerned about the level of funding in the AA Fund and whether it would be sufficient to meet its existing objectives, as well as fund ASIC-initiated winding-ups.
- 40 One respondent suggested that government funding to the AA Fund could be increased to meet this new purpose.

ASIC's response

We recognise that there will be increasing demands on the AA Fund as a result of paying liquidators to wind up companies on behalf of ASIC. We will consider and prioritise these demands to achieve the best allocation of money in the AA Fund.

We have undertaken to monitor the money available in the AA Fund and periodically report this to Treasury.

Date of commencement

- 41 Respondents agreed with our proposed timeframe for exercising the power to wind up and some noted that the implementation was a matter for ASIC.

ASIC's response

We plan to commence exercising our power and assessing requests to wind up abandoned companies by mid-November 2012.

Appendix: List of non-confidential respondents

- Anderson, Helen (Associate Professor, University of Melbourne)
 - Insolvency Practitioners Association
 - Member of the public (personal details to remain confidential)
 - Moore Stephens
 - Parker, Roger
 - Wong, Shine
 - Woodgate & Co
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