

Checklist for Application for Discharge Expired Encumbrance under s601AF

IMPORTANT INFORMATION FOR APPLICANTS

PLEASE READ CAREFULLY BEFORE STARTING YOUR APPLICATION

Timeframes

ASIC usually makes a decision within **60 days of receipt of all requested materials**. You need to take this timeframe into account and if necessary, re-schedule any transactions (e.g. settlement dates) to include this 60 day period. Delays occur when incomplete applications are submitted.

Please allow at least 30 days before enquiring about the progress of your application.

General Information

ASIC generally exercises its powers under the Act to deal with vested property as a last resort. If another remedy (e.g. ASIC reinstatement or State/Territory legislative provisions) is unavailable, then you may apply for ASIC to deal with the property. The cost of alternative remedies by itself is not a sufficient basis for ASIC to exercise its powers to deal with property.

Applications are considered by ASIC on a case-by-case basis and there is no guarantee the application will be successful. If ASIC requires information or material in addition to those stated in this Checklist, ASIC will advise you and allow you an opportunity to provide that information.

ASIC will not consider an application until all requirements have been satisfied. You should therefore read this Checklist very carefully and ensure you have completed it properly before submitting your application. This will minimise inconvenience and delay in receiving a decision on your application. ASIC can assist if you have any questions about the requirements. However, you need to engage a solicitor if you require legal advice.

Urgent applications

In very limited situations ASIC may consider the assessment of an application on an urgent basis (i.e. within a specific and shorter timeframe). However, ASIC will only do so in exceptional circumstances because this would give the urgent application priority over other applications lodged in a timely manner.

Applicants must therefore clearly demonstrate that the urgency results from factors beyond their reasonable control, that they could not have reasonably foreseen. Settlement of a contract is not a sufficient basis for urgent consideration.

APPLICANT DETAILS

Full name (if a company, include ACN):

Ph: Email:

Postal address:

1. I have read and understood the above section called "IMPORTANT INFORMATION FOR APPLICANTS"

No then do not proceed any further until you have read the important information above

Yes then proceed to Requirement 2

2. DEREGISTERED COMPANY DETAILS

NOTE: You can obtain relevant company details by purchasing an historical company extract via asic.gov.au. If that does not reveal the necessary information (e.g. due to the age of deregistration), then you need to enquire with the relevant State/Territory Archives Department.

a. Name of deregistered company:

b. ACN of deregistered company: c. Date of deregistration:

3. LAND TITLES REMEDY

NOTE FOR SOUTH AUSTRALIAN LAND: ASIC understands that in certain cases the Registrar-General of Land Services may dispense with the requirement for ASIC to discharge the encumbrance on behalf of deregistered encumbrancees. Such dispensation is unlikely to be granted if the encumbrance specifically includes a clause that requires encumbrancee consent for discharge. You must check the specific wording of the encumbrance and enquire with Land Services as to whether ASIC's execution of a discharge is necessary. If required, ASIC can provide you with a letter confirming its position. If such a remedy is available then it may be cheaper and more convenient for you than applying to ASIC for a discharge. Therefore, you must have tried using such a remedy before applying to ASIC.

Have you enquired at the relevant Titles Office as to whether it can remove the encumbrance without ASIC's execution of a Discharge?

No then do not proceed further until you have enquired with the Titles Office

Yes however there is no remedy under State/Territory legislation, then proceed to Requirement 4

4. SUPPORTING DOCUMENTS

Have you attached a copy, not the original, of all the following?

a. Recent title search showing the encumbrance in the deregistered company's name *NOTE: The document must be no older than 3 months*

No then do not proceed any further until document obtained from the land titles office

Yes then proceed to Requirement 4b

b. The encumbrance clearly showing it has expired

No then do not proceed any further until document obtained from the land titles office *NOTE: ASIC will not discharge an encumbrance unless it is clear it has expired e.g. it contains a clause specifying an expiry date*

Yes then proceed to Requirement 4c

c. Written confirmation by the company's former liquidator (or former director if there was no liquidator):

1) the encumbrance has expired

2) the company if it still existed would be bound to discharge the encumbrance and

3) they have no objection to ASIC discharging the encumbrance on the company's behalf.

NOTE: Former liquidator or director details can be obtained by purchasing an historical company extract via asic.gov.au

No then outline in your statutory declaration (at Requirement 5) all your attempts to obtain their written confirmation and attach all correspondence sent and proceed to Requirement 4d

Yes then proceed to Requirement 4d

d. Written consent by all parties with a registered interest in the property (e.g. mortgagee, caveator)

No then outline in your statutory declaration (at Requirement 5) all your attempts to obtain their written confirmation and attach all correspondence sent

Yes then proceed to Requirement 5

5. COMMONWEALTH STATUTORY DECLARATION

a. Is your statutory declaration a Commonwealth declaration?

No then do not proceed any further until you have downloaded a template for a Commonwealth statutory declaration from the Australian Attorney-General's Department at ag.gov.au

Yes then proceed to Requirement 5b

- b. Does your statutory declaration specifically:
- 1) identify the deregistered company and its ACN
 - 2) explain what ASIC is being requested to do (e.g. discharge an expired encumbrance)
 - 3) confirm the encumbrance has expired with reference to the specific clause in the encumbrance
 - 4) confirm that you have sought confirmation from the land titles office that the only way to remove an expired encumbrance is to lodge a discharge of encumbrance and attach evidence (e.g. copy of correspondence with the land titles office)
 - 5) provide the reason if any documents listed in Requirement 4a – 4c above are not attached
 - 6) show clearly that the urgency results from factors beyond your reasonable control that you could not have reasonably foreseen (if claiming your application is urgent).

NOTE: Please adopt the above numbering format as closely as possible

- No then do not proceed any further until you have amended your statutory declaration to address all the above matters where applicable (otherwise another statutory declaration may be required)
- Yes then proceed to Requirement 6

6. INDEMNITY

NOTE: The indemnity protects ASIC against claims brought against ASIC due to it providing the consent. If the applicant (or registered proprietor) is a company, the indemnity must be signed by each of the directors in their personal capacity and by the company either under its seal or according to s127 of the Act.

Have you fully completed and attached the indemnity signed by the applicant and the registered proprietor (if the registered proprietor is not the applicant)?

- No then do not proceed any further until you have downloaded and completed the indemnity "Consent under Encumbrance" from asic.gov.au
- Yes then proceed to Requirement 7

7. APPLICATION FEE

NOTE: This fee is required by law and payable regardless of whether the application is approved or not. Applications will not be considered until this fee is paid. This fee may increase on 1 July each year. Applications received from 1 July each year are subject to the new fee.

Have you attached a cheque or money order payable to ASIC for \$934, being payment of the application fee?

- No then do not proceed any further until you have attached payment of the application fee
- Yes then proceed to Requirement 8

8. DISCHARGE FORM

NOTE: If the application is successful then ASIC will execute and return the original Discharge. The applicant is responsible for lodgement of the Discharge and payment of any registration/lodgement fees, any stamp duty or other associated costs.

a. Have you correctly inserted in the original Discharge form the following representative and sealing clauses:

<u>Representative clause:</u> (i.e. description/name of encumbrancee)	"The Australian Securities and Investments Commission acting under s601AF of the <i>Corporations Act 2001</i> on behalf of [insert name and ACN of deregistered company], a company deregistered on [insert date of deregistration]."
<u>Sealing clause:</u> (i.e. where encumbrancee signs)	"The Common Seal of the Australian Securities and Investments Commission is affixed on behalf of [insert name and ACN of deregistered company] under s601AF of the <i>Corporations Act 2001</i> An Authorised Officer of the Australian Securities and Investments Commission Witness: Solicitor, ASIC Level 20, 240 Queen Street, BRISBANE QLD 4001"

- No then do not proceed further until both those clauses are inserted properly on the Discharge
- Yes then proceed to Requirement 8b

b. Have you enclosed an express-post envelope?

- No I would like the executed Discharge to be returned by regular/standard post

Yes I would like the executed Discharge returned via a faster postal method

You are now ready to submit your application

HOW TO SUBMIT YOUR APPLICATION

ASIC prefers to receive documents in digital format (i.e. PDF) except for the original Discharge form which requires ASIC to affix its seal and the application fee.

Please post the original Discharge form, application fee and if applicable, an express-post envelope to:

ASIC Property Law Group
GPO Box 9827
BRISBANE QLD 4001

Attach all other materials to this Checklist and email to property.law@asic.gov.au. If we require the original of a document previously received electronically, we will advise you.

Please direct any initial questions to property.law@asic.gov.au or ph: 1300 300 630.