

ASIC orders about creditor-defeating dispositions: Template request form

This template is for liquidators who are requesting ASIC to make an order to undo the effect of a voidable creditor-defeating disposition: see s588FGAA of the *Corporations Act 2001* (Corporations Act). It should be used in conjunction with [Information Sheet 261](https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/asic-orders-about-creditor-defeating-dispositions/) *ASIC orders about creditor-defeating dispositions* (INFO 261).

Such a request must contain sufficient information to enable us to decide whether to exercise ASIC’s power to make an order. You should include detailed answers to the questions below, together with supporting documents for each answer.

At each question we have provided a reference to the legislative basis for the question.

There are limitations on the circumstances in which we can make an order: see s588FGAA(4) of the Corporations Act. Those circumstances are set out in questions 13–16. Before submitting a request for an order, you should consider each of these circumstances. You should not submit a request for an order if you believe that one or more of those circumstances apply to the alleged creditor-defeating disposition.

# How to submit your request

Once completed, submit this form and all supporting evidence to ASIC.CDD.requests@asic.gov.au.

# Details of your appointment

1. What are the particulars of your appointment as liquidator? (s588FGAA(1)(a) and s588FGAA(2))

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| --- | --- |
| *Company name:* |  (the company) |
| *Australian Company Number:* |  |
| *Appointment date:* |  |

1. What is the relation-back day for the purposes of your appointment?

*[Insert date]*

Guidance on question 2

Section 91 of the Corporations Act defines the ‘relation-back day’: see s588FGAA(2).

# The proposed order

1. What kind of order are your requesting? (s588FGAA(3))

*I am requesting an order (check one or more):*

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| --- |
|[ ]  *directing the person to transfer to the company the property that was the subject of the disposition* |
|[ ]  *requiring the person to pay to the company an amount that, in ASIC’s opinion, fairly represents some or all of the benefits that the person has received (directly or indirectly) because of the disposition, or* |
|[ ]  *requiring the person to transfer to the company the property that, in ASIC’s opinion, fairly represents the application of proceeds of the property that was the subject of the disposition.* |

1. Who are you requesting we make the order against? (s588FGAA(1)(c))

|  |  |
| --- | --- |
| *The person’s name and contact details****:*** |  |
| *Details of their legal representative (if known)****:*** |  |

Guidance on question 4

An order can be made against the person who has received money or property, as a direct or indirect result of:

* the disposition, or
* the person’s acquisition of the property after the disposition.
1. If you are requesting an order that requires a person to pay to the company an amount that represents some or all of the benefits that they have directly or indirectly received because of the disposition, what is the value of the benefit that they have received? (s588FGAA(3)(b))

[Insert amount]

Guidance on question 5

Please include details of your method of calculating the benefit.

1. If you are requesting an order that requires a person to transfer property to the company that represents the application of proceeds of the property that was the subject of the disposition:

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| (a) when and how did the person acquire the property to be transferred? |
| [Insert information] |

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| (b) why do you believe the property to be transferred represents the application of proceeds of the property that was the subject of the alleged creditor-defeating disposition? (s588FGAA(3)(c)) |
| [Insert information] |

# The disposition of property

1. What is the disposition of property of the company that you believe is a creditor-defeating disposition?

Your response to this question should:

| (a) identify the property (s588FDB(1) and (2)): |
| --- |
| [Insert information] |

Guidance on question 7(a)

Note that, under s588FDB(2), ‘if a [company](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html#company) does something that [results](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html#result) in another [person](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s761a.html#person) becoming the owner of [property](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s601c.html#property) that did not previously exist, the [company](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html#company) is taken to [have](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s9.html#have) [made](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s1371.html#made) a disposition of the [property](http://www5.austlii.edu.au/au/legis/cth/consol_act/ca2001172/s601c.html#property)‘.

You must describe the property so that it is discernible from all other property. For example, you might include a serial number, a vehicle identification number, a colour or a location.

When describing a receivable, you might include the name of the debtor, the balance of the debt and the document that shows evidence of the debt.

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| (b) explain why you believe the property to have been property of the company (s588FDB(1)): |
| [Insert information] |

Guidance on question 7(b)

You should provide information that shows that the company held the property. This may include:

* invoice(s) issued by the person who sold the property to the company
* invoice(s) issued by the company to the person who acquired the property
* an asset register or asset ledger
* a motor vehicle registration notice
* an electronic funds transfer notice
* a stocktake sheet.

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| (c) explain the circumstances, nature and terms of the transaction that you believe constituted the disposition, and details of the action(s) that the company took that resulted in another person becoming the owner of the property (s588FDB(1) and (2) and s588FGAA(5)(c)): |
| [Insert information] |

Guidance on question 7(c)

You should provide information that:

* identifies the date of the disposition (and if the date is an estimation, the basis of the estimation)
* describes any communications (e.g. letters and emails) about the disposition between the company and a person involved in the transaction (e.g. the acquirer of the property or an intermediary, such as a broker or agent)
* describes any agreement entered to facilitate the disposition and details any consideration paid or payable for the property.

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| (d) explain why you believe the disposition of the property is a creditor-defeating disposition, having regard to the consideration payable to the company for the disposition and the effect of the disposition on creditors in the winding up of the company (s588FDB(1)): |
| [Insert information] |

Guidance on question 7(d)

You should:

* provide information about the market value for the property at the time of the disposition (e.g. comparable sales or a valuer’s report)
* detail the best price that was reasonably obtainable for the property at the time of the disposition
* explain why the disposition prevented, hindered or delayed the property becoming available for creditors in the winding up (e.g. unsuccessful attempts to recover the property).

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| (e) explain whether the person who received the property gave some or all of the consideration for the property to a third party and, if so, to whom the consideration was given (s588FDB(3)): |
| [Insert information] |

Guidance on question 7(e)

You should provide any information showing:

* the consideration that was given to a third party
* any basis, or reason given, for the consideration being paid to a third party.

For example, the person may have paid the third party to discharge some or all of a debt owed to them by the company. Alternatively, there may be an arrangement under which the third party would discharge some or all of the debts of the company – usually this would occur when a related party enters an arrangement with the company to assume the company’s business.

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| (f) explain whether the person who received the property disposed of that property to another person and, if so, the circumstances, nature and terms of the disposal (s588FGAA(1)(c)(ii)): |
| [Insert information] |

Guidance on question 7(f)

You should provide information that:

* identifies the date of the further disposal (and, if the date is an estimation, the basis of the estimation)
* describes any communications about the further disposal between the initial acquirer of the property and the subsequent acquirer of the property (e.g. letters and emails)
* describes any agreement entered to facilitate the further disposal and shows any consideration paid or payable for the property.

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| (g) state if the alleged creditor-defeating disposition is a voidable transaction and, if so, why (s588FE(6B)): |
| [Insert information] |

Guidance on question 7(g)

If it is a voidable transaction, you should advise ASIC of the date of insolvency and set out information that substantiates that date as the date of insolvency.

# Considerations in deciding whether to make an order

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| 1. What was the conduct of the company and its officers in relation to the creditor-defeating disposition?(s588FGAA(5)(a))
 |
| [Insert information] |

Guidance on question 8

For example, did:

* the company and/or its officers, before the liquidation, take steps to conceal the features of the creditor-defeating disposition or act in a non-commercial manner (e.g. by not obtaining a valuation)?
* the officers, following the liquidation, fail to respond or adequately reply to your inquiries?
* the officers, following the liquidation, transfer the property after you made inquiries?

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| 1. What was the conduct of the person against whom you are requesting an order about the creditor-defeating disposition? (s588FGAA(5)(b))
 |
| [Insert information] |

Guidance on question 9

For example, did the person:

* before the liquidation, take steps to conceal the features of the creditor-defeating disposition or act in a non-commercial manner (e.g. by not obtaining a valuation)?
* following the liquidation, fail to reply or adequately respond to your inquiries?
* following the liquidation, take steps to transfer or dispose of the property after you made inquiries?

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| --- |
| 1. What is the relationship (if any) between the company and who you are requesting we make an order against? (s588FGAA(5)(d))
 |
| [Insert information] |

Guidance on question 10

There may be, for example, a family relationship, a pre-existing business relationship or an employer–employee relationship. If you are requesting we make an order against another company, there may be common shareholders, common officers or common employees.

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| 1. Are there any other matters that you believe we should consider when making the order? (s588FGAA(5)(e))
 |
| [Insert information] |

Guidance on question 11

This might include:

* an explanation for the disposition from those with an association with the company
* why you have requested a property order rather than a monetary order
* whether you seek an expedited decision from ASIC, and the reasons why expedition is necessary.

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| 1. What effect would the undoing of the creditor-defeating disposition have on the likely distribution to unsecured creditors in the winding up of the company? (s588FGAA(5)(e))
 |
| [Insert information] |

Guidance on question 12

You should include an estimate of the increase (if any) in the likely distribution to unsecured creditors and your method of calculation.

# Circumstances in which an order cannot be made

ASIC cannot make an order if any of the circumstances in questions 13–16 apply. Please explain, in detail for each circumstance, why you believe the circumstance does not apply.

1. The order you have requested would materially prejudice a right or interest of a person (other than a party to the transaction) who (s588FGAA(4) and s588FG(1)):
2. received no benefit because of the transaction, or
3. received the benefit in good faith and at the time had no reasonable grounds to suspect (nor would a reasonable person in the circumstances) that the company was insolvent, or would become insolvent as a result of the transaction.

Does this circumstance apply?

|  |
| --- |
|[ ]  *Yes* |
|[ ]  *No* |

|  |
| --- |
| If no, explain why: |
| [Insert information] |

1. The order you have requested would materially prejudice a right or interest of a person who (s588FGAA(4) and s588FG(2)):
2. became a party to the transaction in good faith and, at the time, had no reasonable grounds to suspect (nor would a reasonable person in the circumstances) that the company was insolvent, or would become insolvent as a result of the transaction
3. provided valuable consideration under the transaction or has changed their position in reliance on the transaction.

Does this circumstance apply?

|  |
| --- |
|[ ]  *Yes* |
|[ ]  *No* |

|  |
| --- |
| If no, explain why: |
| [Insert information] |

1. The safe harbor provision applies to the person and the disposition. (s588FGAA(4) and s588FG(8))

Does this circumstance apply?

|  |
| --- |
|[ ]  *Yes* |
|[ ]  *No* |

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| --- |
| If no, explain why: |
| [Insert information] |

1. The order you have requested would materially prejudice a right or interest of a person (other than a party to the creditor-defeating disposition) and the person later acquired the property in good faith. (s588FGAA(4) and s588FG(9))

Does this circumstance apply?

|  |
| --- |
|[ ]  *Yes* |
|[ ]  *No* |

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| --- |
| If no, explain why: |
| [Insert information] |