



Committee	Parliamentary Joint Committee on Corporations and Financial Services
Inquiry	Inquiry into Corporate Insolvency in Australia
Question No.	001
Topic	Response to ASIC mentions and claims made by hearing participants
Reference	Spoken, 14 December 2022, Hansard page 62
Committee member	Senator Deborah O'Neill

Question

CHAIR: Can I indicate that there have been quite a number of comments about ASIC. There's very much awareness of the criticality of ASIC in the ecosystem, but I think it's fair to say there were a lot of negative comments about engagement and the level of scrutiny, data points, data sharing and responsiveness to insolvency practitioners in particular, the use of AI to respond to reports from insolvency practitioners not picking up malfeasance, for example. That's kind of the shape of the critique. Can I ask you on notice to review the transcript when it's provided. Where ASIC is mentioned and claims are made, I seek your response to those, to provide you with the opportunity to rebut if required but also to fill out for the committee any understanding that we might miss without your knowledge coming into those claims.

Mr Day: We will endeavour to do our best.

Answer

ASIC has reviewed the transcripts and identified the following key issues about which we provide comments:

- Deregistration of companies
- The size, scope and activity of the Assetless Administration fund
- Market failure and cross-subsidisation of registered liquidator remuneration

Deregistration of companies

ASIC notes that as part of the Modernising Business Registers Program, the responsibility for the registration and deregistration of companies will be with the Registrar (of the Australian Business Registry Service (ABRS)) in the future. ASIC also notes that since April 2021, the ABRS has been operating the registry business (which includes the registration and deregistration of companies) as a delegate of ASIC. At a later stage the Registrar will assume primary responsibility for these functions under law.

The data

The following data is extracted from ASIC's corporate register and relates to the number of companies deregistered and registered during the period 1 July 2016 to 30 June 2022.

During the relevant period there were:

- 807,232 entities deregistered (including Australian companies, registered Australian bodies, registered foreign companies and registered schemes)
- 1,512,329 new companies registered.

Number of company deregistrations

There were 807,232 companies deregistered during the period 1 July 2016 to 30 June 2022.



Financial Year	Voluntary Deregistration	ASIC/ABRS Initiated (Unpaid review fees)	ASIC/ABRS Initiated (Form 578)	Other	Total
2016-17	71,020	40,127	5,584	4,825	121,556
2017-18	74,848	44,701	5,252	4,493	129,294
2018-19	80,446	47,916	3,485	5,729	137,576
2019-20	84,929	49,605	2,463	6,370	143,367
2020-21	80,420	47,824	2,319	7,196	137,759
2021-22	82,431	47,767	1,225	6,257	137,680
Total	474,094	277,940	20,328	34,870	807,232

Note: ASIC initiated deregistrations includes deregistrations resulting from lodgements of Forms 578 by liquidators after the affairs of the company have been fully wound up. These are separately disclosed in the Table but were not separately disclosed in the material referred to by witnesses during the public hearings of the Inquiry held on 13 and 14 December 2022.

Voluntary Deregistration

- This category includes an application by the company under s601AA of *The Corporations Act, 2001 (the Act)* or by the responsible entity of a registered scheme under s601PA of the Act. For an application under s601AA of then Act Form 6010 *Application for voluntary deregistration of a company* is lodged declaring, amongst other matters, the company is not carrying on business, has assets worth less than \$1,000, has no outstanding liabilities and is not a party to any legal proceedings.
- This option is available to directors where there are no assets requiring distribution to shareholders.

ASIC/ABRS Initiated

- This category includes deregistration of a company under s601AB of the Act principally utilised for failure to pay the company's annual review fee in full at least 12 months after the due date for payment. ASIC/ABRS initiated, deregistration also occurs under s601AL of the Act following transfer of registration under s601AI of the Act, the deregistration of a scheme under s601PB of the Act and deregistration following lodgement by liquidators of Form 578 after the affairs of the company have been fully wound up.
- If ASIC decides to deregister a company under s601AB of the Act it must:
 - give notice of the proposed deregistration to the company and its directors;
 - give notice of the proposed deregistration on ASIC database; and
 - publish notice of the proposed deregistration on the Published Notices Website.
- Therefore, when ASIC initiates deregistration for non-payment of the annual review fee, a significant period of time will have lapsed before the company is deregistered during which no creditor has acted to wind up the company. This may indicate that if any creditors exist, the debts are very small and/or they are aware there are little or no assets available to pay costs in a winding up.
- It is likely that if the law was changed to require the company to be wound up by ASIC or otherwise rather than deregistered:
 - only incomplete company records, if any, would be available to enable a liquidator to investigate the company's affairs
 - the company would be without assets to pay the remuneration and costs of the liquidator, or that sufficient property may be recovered to pay these costs and a dividend to unsecured creditors, and



- funding to meet the costs of either registered liquidators or a government liquidator (if such an office was established) would be necessary.
- ASIC notes that an ASIC initiated deregistration may also result from a liquidator lodging a [Form 578 Deregistration request \(liquidator not acting or affairs fully wound up\)](#) instead of or as well as a [5603 End of administration return](#) to signal that the winding up is complete. 20,328 companies were deregistered following lodgement of Form 578 during the period 1 July 2016 to 30 June 2022.

Other

- This includes automatic deregistration under s509 of the Act when the affairs of the company are fully wound up and the liquidator lodges only a Form 5603 *End of administration return*, the court orders the deregistration of the company under s481 of the Act, deregistration by court order under s413 of the Act, the strike-off from the register of a registered Australian body under s601CC of the Act after it has ceased to carry on business interstate, the removal from the register of a registered foreign company under s601CL of the Act after it has ceased to carry on business.

Opportunity to abuse deregistration process

The law does not require ASIC to carry out investigations about a company before deregistering it nor does ASIC have the resources to investigate every company’s affairs before:

- processing an application for voluntary deregistration; or
- initiating the deregistration process.

As noted above, ASIC does not deregister a company, either through processing an application for voluntary deregistration or an ASIC initiated deregistration, until two months have passed since a notice of proposed deregistration is published on the Published Notices Website.

Persons who are aware of good reason why ASIC should not deregister a company can lodge a report of misconduct with ASIC within that time, providing evidence to support their allegation. ASIC will consider and assess each report of misconduct. Good reason may include evidence that the company is carrying on business, has liabilities, or is a party to legal proceedings.

Where there is evidence, ASIC will prosecute directors for making a false or misleading statement in an application for voluntary deregistration ([Form 6010 Application for voluntary deregistration of a company](#)) asserting that the company complies with the requirements of s601AA(2) of the Act (see [22-255MR](#), [22-232MR](#), [22-069MR](#), [22-056MR](#), [22-018MR](#)).

Assetless Administration Fund

The Assetless Administration Fund (AA Fund), a Commonwealth Grant scheme, was [announced](#) in October 2005 as part of a reform package to improve the operation of Australia’s insolvency laws.

As outlined in paragraph 120 of ASIC’s submission to the Inquiry, there are five types of grant opportunities made through the AA Fund. These are:

Grant type	How originated	Fixed or variable grant
Director Banning	Application by registered liquidator	Fixed
Matters Other than Director Banning or Other Matters	Application by registered liquidator	Variable
Asset Recovery	Application by registered liquidator	Variable



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Grant type	How originated	Fixed or variable grant
Abandoned Company	Appointment of panel registered liquidator by ASIC	Fixed
Reviewing Liquidator	Appointment of panel registered liquidator by ASIC	Variable

ASIC administers the AA Fund in accordance with the Commonwealth Grants Rules and Guidelines to ensure all grants under the AA Fund achieve 'value with relevant money'. Grant Guidelines are now published after consultation with the Department of Finance.

To ensure 'value with relevant money' is achievable it is necessary for the liquidator to undertake some investigation prior to submitting an application for funding to show that there are prospects that the liquidator, as grant recipient, can achieve a worthwhile outcome rather than the prospects of a outcome being purely speculative.

ASIC does not determine the size of the AA Fund or the types of Grant Opportunities that are available. Changes to the size of the AA Fund and/or the type of Grant Opportunities offered are a matter for government.

The following Table sets out the number of funding applications received, and funding approved during the period from the inception of the AA Fund to 13 December 2022:

Type	Funding Applications Received #	Funding Applications Approved #	Funding Amount Approved \$m Ex GST
Director Banning	7,444	2,979	21.986
Matters other than director banning	2,021	830	29.775
Asset recovery	155	28	3.193
Total	9,620	3,837	54.954

In addition, grants approved under the AA Fund have been used to fund the appointment of:

- liquidators by ASIC to 152 abandoned companies under s489EA of the Act to facilitate access by employees to the Fair Entitlements Guarantee Scheme (total grants \$2.192 million ex GST).
- 11 reviewing liquidators by ASIC in relation to 23 companies to review a matter, or matters, relating to the external administration of a company (total grants approved \$747,052 ex GST).

Market failure and cross-subsidisation of registered liquidator remuneration

The hearings heard evidence of potential market failure in the corporate insolvency sector, with the law requiring registered liquidators to undertake work that is unfunded to comply with legislative requirements, and to investigate and lodge statutory reports of alleged misconduct (which is for the public benefit) that in the majority of cases is not further investigated by ASIC. Evidence was that the cost of this unfunded work is recovered through increased practitioner charge out rates such that external administration and controller appointments that have realisable assets cross-subsidise work undertaken in those external administration and controller appointments that do not have sufficient assets to pay the practitioners remuneration and expenses.

Potential options mentioned to address this concern included:



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- imposing a levy on the cost of registering companies
- increasing the annual review fee charged for company renewals
- undertake a review of corporate insolvency law to simplify the legislation and reduce unnecessary work [reference to root and branch review]
- establish the Office of a government funded liquidator to undertake unfunded work

ASIC would welcome the opportunity to participate in the further consideration of these issues.

ASIC refers to paragraphs 228-230 in its submission about consideration of possible reform to the threshold for misconduct required to be reported and the impact this may have on the cost of formal insolvency appointments and cost of the potential loss of intelligence to ASIC, the ATO and other interested parties.