

Senate Economics Legislation Committee

ANSWERS TO QUESTIONS ON NOTICE

Treasury Portfolio

Additional Estimates

2016 - 2017

Division/Agency: Australian Securities and Investment Commission

Question No: 176

Topic: Phoenix Activity

Reference: Written

Senator: Ketter, Chris

Question:

1. Can you confirm that the Assetless Administration Fund finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to us that enforcement action may result from the investigation and report, with a particular focus on curbing fraudulent phoenix activity?
2. Can you confirm that for the period 27 September 2016 to 6 February 2017, 80 grants totalling \$1,619,824 were made to liquidators?
3. Has there been annual increases in the number of grants delivered in the past three years? What are the reasons for increases?
4. What is the allotted annual amount in the AAF? Is it exhausted annually? If not, why not? What happens to excesses in the fund? Does the allotment roll-over?
5. Would you agree with the characterisation that the AAF fund is designed to allow liquidators to amass evidence to allow ASIC to take action? If not, why not?
6. Would you broadly agree that the role of liquidators is to recover assets for creditors and close down the company?
7. (If yes) Do you think the AAF then shifts the focus away from the core function of liquidators to be more like performing enforcement investigations?
8. How much background information does a liquidator have to amass before applying for AAF grant?
9. What is the success rate for AAF applications? Can a breakdown please be given?
10. Is \$8,250 the base amount for a grant? Is it the most common grant?
11. What is a reasonable amount of information returned to ASIC from a base grant?
12. How many ASIC investigations and prosecutions have resulted from information retrieved via an AAF grant?
13. Is it possible to apply for AAF money for asset recoveries in phoenix circumstances?
14. How many asset recovery AAF applications has ASIC received?
15. Were any asset recovery AAF applications successful?

Answer:

1. The Assetless Administration Fund (**AAF**) finances preliminary investigations and reports by liquidators into the failure of companies with few or no assets, where it appears to ASIC that enforcement action may result from the investigation and report. A particular focus of the AAF is to curb fraudulent or illegal phoenix activity. This is set out in ASIC's Regulatory Guide 109 *Assetless Administration Fund: Funding criteria and guidelines* (**RG109**) at paragraphs 109.5 and 109.6.

There are three types of funding applications:

- a) Possible director banning under section 206F of the *Corporations Act 2001* (**the Act**). Funding available to liquidators for such applications is capped at \$7,500 (excluding GST) (\$8,250 including GST).
- b) Matters, other than director banning, where funding is provided to the liquidator to investigate and report alleged misconduct to ASIC where enforcement action may be warranted. Funding in this category is not capped.
- c) Matters where funding is provided to the liquidator to take action to recover assets where fraudulent or unlawful phoenix activity is suspected. This funding, introduced in 2012, is not capped.

The AAF also funds liquidators where ASIC exercises the administrative power to wind up abandoned companies under section 489EA of the Act to assist employees owed employee entitlements to access an advance under the *Fair Entitlements Guarantee Act 2012*. Each liquidator is funded \$8,000 (excluding GST) to undertake the appointment. Since 2013, ASIC has wound up 84 companies owing 258 employees more than \$4.4m in entitlements.

2. In the period 27 September 2016 to 6 February 2017, ASIC approved 80 grants totalling \$1,619,824 to liquidators. Grant recipients and the respective funding values are listed on our website: <http://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/assetless-administration-fund/#Grant>
3. The number of applications approved over the past three financial years:

AAF approvals	FY15	FY16	FY17 (to 28 Feb)
Approved	294	312	169

The number of approvals marginally increased from FY15 to FY16. There are many factors that may impact grant approvals including:

- The number of applications received;
- The quality of applications received;

- Whether applications received meet the relevant criteria;
- The specific circumstances of each case; and
- The number of liquidations in the relevant year.

The specific factors ASIC considers in assessing applications vary according to each case and therefore, the approval of grants will also vary, depending on the application. However, all applications must meet the four criteria set out in RG109.10.

Broadly, and as outlined in RG109.19-109.20, ASIC considers the strategic significance of the matter, benefits of pursuing misconduct, issues specific to the case (such as seriousness, age of the alleged misconduct and whether admissible evidence is likely to be available to prove allegations of misconduct) and alternatives available, (such as ASIC's Liquidator Assistance Program to assist liquidators obtain relevant information from directors and officers). We also consider the total funds available in the AAF and likely future requirements for funding. These factors all impact on the grants approved.

4. The following table shows the AAF allocation, monies spent and monies committed (not yet due and payable) for the past three financial years.

AAF monies spent and accrued	FY15 (\$m)	FY16 (\$m)	FY17 (to 28 Feb) (\$m)
Allocation	3.571	3.58	3.591
Disbursed	2.6	2.716	2.473
Committed	3.544	3.575	2.654

The fund is not fully exhausted annually. ASIC has systems in place to ensure that expenditure does not exceed the annual funding allocation. As there are limited grant monies, as outlined at 3., ASIC applies certain criteria to assess applications and make funding decisions. Importantly, not all matters are deemed appropriate for funding.

As ASIC only administers the AAF (ASIC does not actually receive the full allotted annual amount but only amounts sufficient to pay approved grants), any unspent allocation remains with Government and does not roll over to the following year.

5. The AAF enables a liquidator of assetless companies to carry out a proper investigation and prepare a report for ASIC. The report helps ASIC decide whether to commence its own investigation or enforcement action (as outlined in RG109.8).

The AAF helps close the regulatory gap that arises when a failed company is not properly investigated. In liquidations with insufficient assets, liquidators are not liable to incur any expense in relation to the winding up of a company, but that does not absolve them from meeting their ordinary lodgement obligations. As a result, when a company is left with few or no assets, the liquidator often performs only a basic investigation to meet their duty to investigate. A liquidator is obliged to perform a degree of investigation such that they can meet their obligation to creditors and ASIC. However, a basic investigation may not allow discovery and reporting of misconduct in the lead up to a formal insolvency.

In administering the fund, and as outlined in RG109.10, ASIC considers the level of evidence the liquidator holds or would be able to obtain. Accordingly, while it can be said that the AAF enables the liquidator to gather evidence for the purposes of enforcement action, including the liquidator's own action, a certain level of evidence must be available, or able to be obtained before funding is approved.

Moreover, the investigations a liquidator undertakes (whether funded through the AAF or not) not only support reports to ASIC for action, but may also assist the liquidator in uncovering assets (including recovery of assets) for the benefit of creditors and payment of liquidator costs and remuneration.

6. An important part of a liquidator's role is to recover assets for creditors; however, liquidators have a statutory duty to investigate the causes of failure of a company's failure, report any misconduct to ASIC and wind the company up in accordance with the law. Reporting to ASIC, not only alerts ASIC of any misconduct, but also reveals any voidable transactions that the liquidator may recover for the benefit of creditors and payment of remuneration and expenses.
7. Refer to our response at 6.

A core function of a liquidator is to investigate the company's affairs and report to creditors and ASIC.

AAF funding enables liquidators of assetless companies to investigate the affairs of the company and report misconduct to ASIC. Investigation and reporting, together with enforcement action against misconduct, builds confidence that the corporate insolvency regime operates effectively.

Further, funded investigations may also identify assets and support action by the liquidator to recover assets for the benefit of creditors and to pay the liquidator's remuneration and expenses.

8. Any assertion of possible wrongdoing needs to be supported by documents or witnesses to support that assertion. The relevant evidence varies depending on the misconduct and the funding type requested. ASIC's RG109.28-109.29 outlines ASIC's position regarding the relevant evidence to support a funding decision.

Appendix 10: *Allegations of possible misconduct – Substantiation guide* to RG109 also guides liquidators about the types of information and supporting documents that may be relevant for contraventions or offences. ASIC, in assessing applications for AAF, considers whether this information is, or will be, available to assist the liquidator in preparing his/her report.

ASIC's Liquidator Assistance Program also assists liquidators to obtain relevant information compulsorily from directors or officers. ASIC expects liquidators to utilise this program prior to applying for funding.

9. The following table outlines the success rate for AAF applications:

AAF success rates (% of applications reviewed)	FY15 %	FY16 %	FY17 (to 28 Feb) %
Approvals for banning style reports	32	35	30
Approvals for matters other than banning	53	47	27
Approvals for recovery of assets	0	0	100*

**One application received and one approved.*

ASIC funding criteria aim to ensure that only appropriate matters are funded under the AAF.

ASIC has recently completed a review of funding applications and will shortly engage with liquidators whose applications ASIC did not approve to assist them identify appropriate matters for funding from the AAF and to lodge applications that satisfy the funding criteria set out in RG 109.

10. As outlined in RG109.41 and at 1., where ASIC funds a matter for the purposes of preparing a director banning style report, ASIC expects that most liquidator investigations and reports will be funded up to a capped \$8,250 (inclusive of GST). ASIC may agree to fund less than this amount. Matters funded for other purposes are not capped.

Banning style report grants are the most common grants.

11. Appendix 3: *Sample layout of a supplementary s533 report – Director banning* to ASIC's RG109 sets out a sample layout of a supplementary report. Appendix 10 also

guides liquidators regarding evidence to support allegations of possible misconduct. Evidence should be both credible and relevant to establish the offence or misconduct to the standard required for either civil or criminal proceedings.

12. ASIC investigations and prosecutions summary where Assetless Administration Funding provided:

ASIC action	FY15	FY16	FY17 (to 28 Feb)
Director disqualification achieved	27	30	16
Matters accepted for investigation (including director disqualification)	103	89	77

Not all funded matters result in action. ASIC maintains these reports on our database to support future action, should further intelligence come to light.

13. Please refer to 1. above.
14. Since the introduction of grants for asset recovery for suspected fraudulent or illegal phoenix activities in 2012, ASIC has received a total of eight (8) AAF asset recovery applications.
15. ASIC has funded one application for asset recovery. Other applications did not meet the criteria set out in RG109.