

CORPORATIONS LAW
SIMPLIFICATION PROGRAM

DEFUNCT COMPANIES
DEREGISTRATION AND REINSTATEMENT

PROPOSAL FOR SIMPLIFICATION

TASK FORCE

AUGUST 1994

Simplification Task Force
Attorney-General's Department
BARTON ACT 2600

DEFUNCT COMPANIES: DEREGISTRATION AND REINSTATEMENT

This proposal suggests a number of changes to the provisions in the Corporations Law on deregistration and reinstatement of defunct companies (sections 571-579). A description of the current law on these issues is at pages 5 and 6.

Current problems

There are a number of problems with the existing provisions.

Voluntary deregistration

Current procedures for voluntary deregistration are costly and complex:

- all outstanding annual returns must be lodged, including financial data
- lengthy advertisements must be published in newspapers, some costing in excess of \$200.

Easier and cheaper procedures are needed, but creditors must be adequately protected.

Deregistration by the ASC

Current procedures for deregistration by the ASC are lengthy and involve multiple notices. The procedures can be streamlined and made more efficient, without prejudicing company operators.

Consequences of deregistration

The ASC's powers to preserve and deal with the assets of deregistered companies are complex and in some areas the extent of the power is unclear. These need to be clarified and simplified.

Reinstatement

Sometimes, companies are deregistered by the ASC even though they are still carrying on business. The ASC needs to have clear powers to reinstate a company in such circumstances, so as to avoid the cost of a court application for reinstatement.

Claims against insurers of deregistered companies

Sometimes, a third party with a claim against a deregistered company has to apply to the court to have the company reinstated just to enable an action to be brought against the company's insurers. This is time consuming and expensive.

This problem has already been addressed in section 51 of the Insurance Contracts Act 1984 and the various State and Territory Motor Vehicle and Workers Compensation Acts, which allow third parties a right to proceed directly against insurers to pursue claims, without the expense of court reinstatement. The Corporations Law should adopt a similar approach.

The proposal

The proposed changes are to:

- make the voluntary deregistration procedure easier and cheaper
- streamline the ASC deregistration procedure
- simplify and clarify the rules about the assets of deregistered companies

- allow third parties to enforce their rights against insured deregistered companies, without the need for court reinstatement
- clarify the ASC's reinstatement powers.

Benefits of the proposal

The proposal will result in:

- less cost and paperwork for company operators deregistering their companies
- less need for expensive court reinstatement procedures
- fewer defunct companies on the register
- improving the position of people with claims against deregistered companies.

THE PROPOSAL

Proposal	Issues for consideration
<p><u>Voluntary deregistration</u></p> <p>1. Voluntary deregistration will be available if the following are satisfied:</p> <ul style="list-style-type: none"> • the company has ceased to carry on business • any fees or penalties owed by the company to the ASC have been paid • there are no outstanding liabilities • outstanding assets are worth less than \$1000 • all the members agree to the deregistration. <p>2. Those able to apply for voluntary deregistration will be the company or an officer or member of the company.</p> <p>3. The applicant must supply to the ASC any outstanding information about current or past company officers.</p> <p>4. After giving 30 days' notice of the intended deregistration in the Gazette, the ASC will be able to deregister the company.</p>	<p>Should the limit on assets be defined by reference to a general test (eg 'minimal') or by reference to a dollar amount? If a dollar amount is used, is \$1000 the right amount?</p> <p>Is the definition of officer (which includes employees) too broad for this purpose?</p> <p>Should this Gazettal notice be required, or would it be sufficient to rely on the ASC including the information in its database for at least 30 days?</p> <p>Should the ASC be required to notify the deregistration in the Gazette?</p>
<p><u>Deregistration by the ASC</u></p> <p>5. the ASC will be able to deregister a company if the following are satisfied:</p> <ul style="list-style-type: none"> • the company has not lodged any annual return or other notice with the ASC for 18 months • the ASC has given 30 days' notice of intention to deregister to: <ul style="list-style-type: none"> – the company; and – at least 1 of the company's directors (provided there is a remaining director) • the ASC has no reason to believe that the company is carrying on business. 	<p>Should the ASC also have to publish the notice of intention to deregister in the Gazette, as at present, or is the record on the ASC's database sufficient?</p> <p>Is 30 days a sufficient length of time?</p> <p>Should the ASC be required to notify the deregistration in the Gazette?</p>

Proposal	Issues for consideration
<p><u>Consequences of deregistration</u></p> <p>6. The ASC's power to deal with the assets of deregistered companies will be clarified and simplified.</p> <p><u>Reinstatement by the ASC</u></p> <p>7. The ASC will be able to reinstate a company if:</p> <ul style="list-style-type: none"> • the company was carrying on business when it was deregistered; or • the company was otherwise deregistered in error. <p><u>Claims against insurers of deregistered companies</u></p> <p>8. A third party may recover from an insurer to the extent of the insurer's liability under an insurance contract with a company if the following are satisfied:</p> <ul style="list-style-type: none"> • the company is liable in damages to the third party • the company has been deregistered • the contract provides insurance cover in respect of the liability. 	<p>If a deregistered company is later found to have had significant debts or other liabilities, should the directors of that company be liable to disqualification? Should disqualification be by the ASC or the court?</p>

THE CURRENT LAW

Deregistration

Under the current law, a defunct company can be deregistered or dissolved in 3 ways:

- by all the members agreeing that the company should be deregistered (section 573)
- by having its registration cancelled by the ASC where the company does not appear to be carrying on business (section 574)
- dissolution as part of a winding up or reconstruction (sections 413, 480 and 509).

Voluntary deregistration

The main conditions for voluntary deregistration are:

- the company is not carrying on business
- all members agree with the deregistration
- outstanding financial statements of the company are supplied
- outstanding annual returns of the company are supplied
- a newspaper notice of intending deregistration is published in every State and Territory in which the company carried on business within the last 5 years
- the newspaper notice is lodged with the ASC as soon as practicable after publication.

ASC deregistration

The ASC has in recent years conducted an active program of deregistering defunct companies.

Where the ASC has reasonable cause to believe that a company is not carrying on business or in operation, the ASC can notify the company in writing that, unless cause to the contrary is shown within 1 month from the date of notification, a deregistration notice will be published by the ASC in the Gazette.

Unless evidence of continuing business is given to the ASC within 3 months of the publication of the deregistration notice, the ASC cancels the registration by a second Gazette notice.

Dissolution

A court can order a company to be dissolved without winding up if the whole of the company's undertakings is to be transferred under a compromise or arrangement (section 413).

A court may dissolve a company upon the application of the liquidator, after the liquidator has made a final dividend (section 480).

A company can also be dissolved by following a final meeting of the company and lodgement of a final return by a liquidator (section 509).

Consequence of deregistration

All outstanding assets of a deregistered company vest in the ASC (section 576). The ASC is able to act as the representative of a deregistered company where the company would have been bound to carry out or complete a transaction (section 575).

The rules governing the powers and obligations of the ASC to deal with such assets are complex, depending for example upon whether the ASC holds the assets beneficially or as trustee. The ASC sells the assets and puts the proceeds in the Companies Unclaimed Money Account (section 755(4)).

Reinstatement

There are 3 situations in which a deregistered company can be reinstated:

- if a company has been deregistered after winding up, the liquidator of the company or an 'interested person' can apply to the court seeking an order that the dissolution is void (section 571)
- if the ASC is satisfied that the company was deregistered due to an error on the ASC's part, it can reinstate the company (section 574(2))
- a person aggrieved by the deregistration of the company can apply to the court seeking reinstatement at any time within 15 years after deregistration (section 574(3)).

Court powers not changed

The Task Force does not propose any change to the current powers in the Corporations Law for dissolution and reinstatement of defunct companies by the court.

Directors of defunct companies

The court can disqualify a person from managing a corporation if the person has twice been the director of a company that encountered one of various kinds of solvency difficulties, and the manner of management of the company contributed to the solvency difficulties (section 599).

The ASC can disqualify a person from managing a corporation if the person has twice been a director of a company that was liquidated and returned less than 50¢ in the dollar to its creditors (section 600).