



ASIC

Australian Securities & Investments Commission

REGULATORY GUIDE 83

Reinstatement of companies

Chapter 1—Introductory and general topics

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From 5 July 2007, this document may be referred to as Regulatory Guide 83 (RG 83) or Policy Statement 83 (PS 83). Paragraphs in this document may be referred to by their regulatory guide number (e.g. RG 83.1) or their policy statement number (e.g. PS 83.1).

What this guide is about

RG 83.1 This guide covers:

- A when we will reinstate a company's registration under s601AH(1)
see RG 83.3–RG 83.18
- B how to apply for a court order to reinstate a company's registration under s601AH(2)
see RG 83.19–RG 83.36
- C what will happen after a company's registration has been reinstated
see RG 83.37–RG 83.40

RG 83.2 It applies to companies deregistered under the *Corporations Act 2001* (the Act) and under previous legislation. References to legislative provisions are references to those provisions in the Act unless otherwise stated.

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A When we will reinstate a company's registration under s601AH(1)

Our policy

RG 83.3 We will reinstate a company's registration under s601AH(1) of the Act (administrative reinstatement) if:

- (a) it is demonstrated to our satisfaction that a company should not have been deregistered, that is, information is provided to us which substantiates the claim that the company should not have been deregistered;
- (b) information is provided which satisfies us that the company would be solvent if its registration were to be reinstated;
- (c) any outstanding response to the company compliance notice or other required documents have been submitted to us for lodgement and all lodgement and late fees arising from the late lodgement of the response and other documents have been paid;
- (d) all outstanding annual review fees, and late review fees have been paid;
- (e) all outstanding penalties due under penalty notices issued to the company and any of the company's former officers have been paid;
- (f) the prescribed fee is paid to us; and
- (g) all legal costs ordered by a court to be paid to ASIC.

RG 83.4 For example, we will consider reinstating a company's registration where:

- (a) there was a procedural defect or oversight in the procedure leading to the deregistration (e.g. if a company was deregistered under s601AB(1A) and the review fee had been received by ASIC before the company was deregistered); or
- (b) where a company was deregistered under s601AB(1), the company was carrying on business or was in operation at the time it was deregistered.

RG 83.5 The application to reinstate should include the information in paragraphs (a) and (b) of RG 83.4 above and must take the form of a statutory declaration by a person who would be a director of the company on its reinstatement.

Exception if third party involvement in property of company

RG 83.6 We will not reinstate a company where there have been any dealings with the property of the deregistered company that give rise to third party rights. If third parties have become involved, reinstatement will generally need to proceed through the court.

Other exceptions

RG 83.7 If a company was voluntarily deregistered under s601AA (or former s573 of the Corporations Law) or if the company was no longer active when it was deregistered, we may not be able to reinstate the company's registration under s601AH(1).

Fee waiver

RG 83.8 We may waive the fee in paragraph (f) of RG 83.3 if the company was deregistered because of an administrative oversight on our part.

How to apply for reinstatement of a company's registration

Written applications for administrative reinstatement should be addressed to:

Reinstatement Applications
Compliance & Business Systems
Australian Securities and Investments Commission
PO Box 4000
Gippsland Mail Centre VIC 3841

You can also contact ASIC Call Centre on 03 5177 3988 for information and assistance.

Underlying principles

RG 83.9 We cannot reinstate a company's registration merely because it is convenient for the applicant to have the company reinstated. An applicant for reinstatement needs to satisfy us that the company should not have been deregistered, otherwise an application to a court will need to be made under s601AH(2).

Explanations

When can we deregister a company?

RG 83.10 The Act provides that we may decide to deregister a company:

- (a) under s601AB(1), if:
 - (i) the response to a return of particulars given to a company is at least 6 months late; and
 - (ii) the company has not lodged any other documents under the Act in the last 18 months; and
 - (iii) we have no reason to believe that the company is carrying on business (s601AB(1)).
- (b) under s601AB(1A), if the company's review fee in respect of a review date has not been paid in full at least 12 months after the due date for payment;
- (c) under s601AB(2), if the company is being wound up and we have a reason to believe that:
 - (i) the liquidator is no longer acting;
 - (ii) the company's affairs have been fully wound up and a return to be lodged by the liquidator is at least 6 months late; or
 - (iii) the company's affairs have been fully wound up under Part 5.4 and the company cannot cover the costs of obtaining a court order for the company's deregistration;
- (d) under s601AA, on application by the company, a director or member of the company or a liquidator of the company; or
- (e) under the old law (see for example s1447 in regards to non-lodgement of annual returns).

RG 83.11 Most companies are deregistered:

- (a) for failure to pay their annual review fee in full (s601AB(1A));
- (b) for failure to lodge a response to a company compliance notice (return of particulars) and other required documents (s601AB(1));
- (c) for failure to lodge annual returns and other required documents (by operation of s1447); or
- (d) on application by or on behalf of the company or a company's liquidator.

When can we reinstate a company's registration?

RG 83.12 Before changes to the Corporations Law enacted under the *Company Law Reform Act 1998*, we would reinstate a company's registration only if we were satisfied that a company was deregistered as the result of an error on our part.

RG 83.13 Section 601AH(1) now allows us to reinstate the registration of a defunct company if we are satisfied that the company should not have been deregistered.

RG 83.14 In considering whether to reinstate a company's registration under s601AH(1), we will ask: 'Has the applicant demonstrated to us that the company should not have been deregistered?' We will not be reversing the effects of valid decisions made in good faith and after proper inquiries, even though the decision may later prove to have been contrary to fact.

RG 83.15 To be satisfied that the company should not have been deregistered, we must determine each consideration for reinstatement on its own merits.

RG 83.16 We must form a view about the state of affairs at the time the company was deregistered. It is not enough to agree that it would be just or convenient for the company to be on the register at some later date.

Companies deregistered under s601AB(1A)

RG 83.17 We deregister a company under s601AB(1), 1447 and 601AB(2) (or former s572 and 574 of the Corporations Law) (see paragraphs (b) and (c) of RG 83.11 above) on the grounds that the company may not be carrying on business or in operation: see Regulatory Guide 64 *Failure to lodge documents* (RG 64).

RG 83.18 However, when deregistering a company under s601AB(1A), the only criteria we consider is that company's annual review fee has not been paid. We cannot consider whether the company was carrying on business. Therefore, when considering an application to reinstate a company that was deregistered under s601AB(1A), we are not required to consider whether that company was carrying on business at the time of deregistration in a reinstatement application.

B How to apply for a court order to reinstate a company's registration under s601AH(2)

Our policy

RG 83.19 Where a company is deregistered, an aggrieved person or a former liquidator may apply to either the Federal Court of Australia or the Supreme Court of a State or Territory for an order that we reinstate the company's registration under s601AH(2) (court reinstatement).

RG 83.20 When a person applies to a court for reinstatement of a deregistered company under s601AH(2), the court generally seeks ASIC's view on the application. We will consider the material provided in support of the application when making a response to the court.

RG 83.21 We will usually not object to the application if:

- (a) the application has been made under the appropriate legislation;
- (b) in the case of applications under the *Companies Act 1981* and Codes (Companies Code), it is made within any relevant time limit;

Note: See s459(6) of the Companies Code and RG 83.32–RG 83.33.

- (c) the applicant shows that it is 'a person aggrieved' by the deregistration or, if the application is under s601AH(2), a former liquidator of the company;

Note: A person is not allowed to make an application to court unless they are a former liquidator or a person aggrieved by the deregistration of the company.

- (d) the application states the grounds on which it is made (i.e. that it is just that the registration of the company be reinstated, and provides satisfactory material in support of the grounds);
- (e) the applicant (except where the applicant is a creditor) provides information sufficient to satisfy the court that the company would be solvent if its registration was to be reinstated;
Note: if the applicant is a creditor the applicant does not need to provide this information.

- (f) within 14 days of the applicant lodging the reinstatement order with us, either the relevant officeholders or the applicant undertakes to:
 - (i) lodge notification of registered office, notification of change of office-holders and all outstanding annual returns (if required by us);
 - (ii) pay all outstanding fees and penalties payable to us; and
 - (iii) meet all outstanding judgments against the company or any officer of the company relating to the failure to lodge documents with us;
- (g) the applicant pays our legal costs (if any) on the application; and

Note: These costs must be paid directly to us within an agreed time period of the hearing of the application and, if an order is made reinstating the company, before lodging a copy of the order and a completed Form 105. Our costs are not related to the success or otherwise of the application.

- (h) the applicant provides evidence that the members and directors at the time of the deregistration have been made aware that, if the application for reinstatement is successful, their roles and responsibilities will resume.

RG 83.22 If the former directors cannot be contacted or will not undertake their roles and responsibilities, the applicant must provide an undertaking to the court to ensure that director/s and a secretary will be appointed within 14 days of lodging the reinstatement court order with ASIC: see RG 83.25–RG 83.26. Alternatively, an order may be sought that the company also be wound up on the ground it is just and equitable under s461(1)(k) and a liquidator appointed.

RG 83.23 The matters in RG 83.21 can generally be addressed in affidavits filed in support of the application.

Appearance by ASIC

RG 83.24 Usually, if the particular court agrees, we will not appear at the hearing of an application for a reinstatement to which we do not object. Instead, we will provide a letter to the applicant advising that we have no objection to the application and do not propose to appear at the hearing of the matter. The letter should be tendered in evidence at the hearing as an indication of our attitude to the application. It is unlikely that a judge or master would proceed to hear an application unless our views on the matter were made known.

Serving a copy of a reinstatement court order on ASIC

RG 83.25 Under s601AH(2) the court can only make an order that we reinstate the company. Therefore, you must serve a copy of the reinstatement court order on us so that we can reinstate the company's registration and give notice of the reinstatement in the *ASIC Gazette* as required under s601AH(4). Unless and until we receive notice of the court order we cannot reinstate the registration of the company nor can we give the notice required by s601AH(4)

RG 83.26 The reinstatement order must be accompanied by a cover page in Form 105 *Cover page for an office copy of a court order* identifying the legislative provision under which the order was made and the nature of the order.

Underlying principles

RG 83.27 As the application for reinstatement is to the court, it is the court that must determine if it is satisfied that it is 'just' that the registration of the company be reinstated.

RG 83.28 The fact that we do not object to the reinstatement of a company's registration does not mean that the court will automatically approve its reinstatement.

Explanations

RG 83.29 The court has a wide discretion when determining whether it would be 'just' that the registration of a company be reinstated. Some considerations are:

- (a) whether the company is insolvent; and
- (b) whether the directors have a 'track record' of management of failed companies.

RG 83.30 We recommend that an applicant check the rules of the court under which he or she proposes to proceed before drafting the court documents for the application.

RG 83.31 In part, the rules of the relevant court will govern the means of making an application to the court. These rules are not uniform throughout Australia. In some jurisdictions, an applicant is required to serve a copy of all documents on us and we are required to be named as a respondent. Even in those jurisdictions that do not have such an obligation, the ordinary practice is to serve a copy of the documents on us so that we can determine whether to make any

submissions about the application. The court generally will require ASIC to provide its position before determining the application.

Reinstatement of companies deregistered under the Companies Code

RG 83.32 Our view is that 601AH(2) does not apply to companies deregistered under the Companies Code or previous companies legislation. These companies can still be reinstated under s458 or 459(6) of the Companies Code. The application must be made to the Supreme Court of the jurisdiction in which the company was incorporated or must be accompanied by an application under the Jurisdiction of Courts (Cross-Vesting) Acts.

RG 83.33 We will apply the criteria in RG 83.21 when considering applications under the Companies Code.

Specific purpose reinstatements

RG 83.34 A company cannot be reinstated for a specific purpose. If reinstated, it exists for all purposes.

RG 83.35 In the past, applications were made to reinstate companies to access insurance held by them. Section 601AG now allows such claims to be brought directly against the insurers of those companies. However, in some cases, litigators may seek reinstatement of companies to ensure that there is an entity to enter and execute judgment against should the need arise.

RG 83.36 If companies still need to be reinstated for this purpose, the same considerations will apply as for 'general purpose' reinstatements: see RG 83.21. We may seek an undertaking to be notified after the proceeding against the company is completed so that we can then deregister the company.

C What will happen after a company's registration has been reinstated

Our policy

RG 83.37 When a company's registration is reinstated, the company is taken to have continued in existence as if its registration had never been cancelled: s601AH(5). Persons who were directors at the time of deregistration become directors as from the time the company is reinstated. However, if the company was in liquidation at the time of deregistration, it will be taken to have continued in liquidation before and after its reinstatement. On reinstatement property of the company vested in us is re-vested in the company.

RG 83.38 The reinstated company is subject to all the requirements of the Act.

Consequences of non-lodgement of documents

RG 83.39 We may prosecute a secretary of a company (or, if there is no secretary in the case of a proprietary limited company, its director/s) for non-lodgement of relevant documents before cancellation of a registration.

RG 83.40 However, we will not normally prosecute the reinstated company or the relevant officeholder for previous lodgement offences if:

- (a) we had not commenced a prosecution before the company was deregistered; and
- (b) all outstanding documents and all outstanding fees and penalties are paid before the reinstatement of the company.

Related information

RG 83.41

Regulatory guides

RG 64 *Failure to lodge documents*

Legislation

Corporations Act s573, 601AA, 601AB(1) (formerly 572),
601AB(1A), 601AB(3) (formerly 574), 601AH, 601AH(1),
601AH(2), 601AH(5), 1362CH, 1447

Companies Code s458, 459(6)