

If a company is solvent

A company that has ceased trading can be deregistered through a voluntary application to ASIC, provided eligibility criteria are met.

In order to voluntarily deregister the following conditions must be met:

- all members (ie. shareholders) of the company agree to deregister
- the company is not conducting business i.e. has ceased trading
- the company's assets are worth less than \$1000
- the company has no outstanding liabilities (e.g. debts)
- the company is not involved in any legal proceedings
- the company has paid all fees and penalties payable to ASIC.

This summary is sourced from the ASIC website. For more information, go to <https://asic.gov.au/for-business/closing-your-company/deregistration/>.

Usually, all assets would be disposed of (i.e. converted to cash) and used to pay debts or otherwise distributed to shareholders prior to deregistration. On deregistration, if there are any company assets remaining, these become the property of ASIC (although there are some exceptions). See <https://asic.gov.au/for-business/closing-your-company/effects-of-deregistration> for more information.

NOTE: A court may reinstate a deregistered company if debts are subsequently identified and a creditor wishes the company to be subject to a formal liquidation process.

If a company is insolvent

Unfortunately, most financial counsellors engage with businesses that are, or are likely to be, insolvent.

If a director 'shuts the door and walks away', the company will continue to exist while it is registered. There are ongoing consequences, including fees, potential penalties, regulatory costs, continuing director duties/obligations, ASIC requirements to lodge forms, ATO requirements to lodge BAS, as well as likely continuing debt collection activity against the company and directors. In addition, the director may continue to be pursued by creditors, causing continued stress.

There must be at least one director of a private company. The final/sole director cannot resign as director, leaving no directors.

Many small businesses in financial difficulty, or who are insolvent, do not meet the requirements for voluntary deregistration (usually because they have debt), and there are no assets to pay for the appointment of a liquidator so that the company can be deregistered. Creditors are also unlikely to incur the cost of appointing a liquidator if there are no or minimal assets to recover.

Unfortunately, it can be difficult to deregister or close a business unless it is driven by creditors/suppliers or, in some cases, ASIC.

ASIC-driven deregistration (strike-off) and ‘abandoned companies’

ASIC **may** deregister a company if it is apparent that it has ceased trading, has outstanding ASIC fees and penalties, and has not responded to compliance notices or lodged documents. It can be 12 to 18 months before these factors become apparent. However, the decision to deregister a company in this situation is at the discretion of ASIC.

There is no formal ‘application process’ by which a company can request ASIC to deregister it. Further, if there remains an ATO debt, ASIC will consult with the ATO, and the ATO may or may not agree to the deregistration of the company. Even if ASIC deregisters the company, the ATO can have the company subsequently reinstated to allow it to lodge any default assessments and demand payment. A court may also reinstate a deregistered company if a creditor (including the ATO) wishes the company to be subject to a formal liquidation process.

In some cases, companies may be abandoned where employees have outstanding entitlements. The Fair Entitlements Guarantee (FEG) may help employees with unpaid entitlements if the employer (company) has been subject to an ‘insolvency event’. ASIC may, in the appropriate circumstances, intervene to appoint a liquidator to wind up the company to allow employees to access the FEG. For more information, refer to ASIC’s regulatory guide, ASIC’s power to wind up abandoned companies, at <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-242-asic-s-power-to-wind-up-abandoned-companies/>.

Failing ASIC discretion to deregister a non-trading company with net debts, the director/s remain director/s of the ‘registered’ company, despite its situation. Creditors will continue to pursue the company, and potentially the director/s, for company debts, while the company remains registered.

How can a financial counsellor assist in these situations?

Your client needs to be aware of their personal financial position and that of their company.

For many small business clients, there are no assets and little ability to refinance or inject more funds. If it is unlikely that creditors will take action (no or limited assets or funds) then it may be worth corresponding with ASIC to confirm that fees have not been paid and that the company is not operating (including the date it ceased trading), and to explain (and provide evidence if required) that there is no ability to pay, no/limited assets and no current [legal] actions in play. If the director/s are personally bankrupt, this may make the application to ASIC more likely to succeed, although that is not certain.

The client could write to all creditors advising the company has ceased trading and has no assets. Creditors can be invited to wind the company up by court order and that this will not be defended.

If creditors continue to pursue company debts with the director/s, response along the above lines should be repeated.

A discussion about the pros and cons of bankruptcy should be offered to the client, including that they cannot be a director of a company during bankruptcy, and there may be restrictions on operating a business.

Inform the client that deregistration of a company does not absolve its debts (as the company can be re-registered) unless it has been liquidated by an insolvency practitioner.

Referral to a registered liquidator for an initial free consultation should be encouraged. For further information, see the FCVic factsheet '*Things to consider: Choosing an insolvency practitioner*'.