



Australian Government

Office of the Registrar of Indigenous Corporations



## POLICY STATEMENT 18

# Property of deregistered corporations

<b>Policy</b>	PS-18: Property of deregistered corporations
<b>Relevant legislative provisions</b>	CATSI Act Parts 12-2 and 12-3 CATSI Act section 617-1, item 44
<b>Last updated</b>	7 October 2015
<b>Other relevant policies</b>	PS-14: Reviewable decisions PS-17: Deregistrations and reinstatements

## **PS-18: Property of deregistered corporations**

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## **PS-18: Property of deregistered corporations**

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### **1 Purpose**

- 1.1 This policy statement provides guidance on how the Registrar of Aboriginal and Torres Strait Islander Corporations (the Registrar) deals with property of deregistered corporations.
- 1.2 References to sections in this policy statement are references to sections of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (the CATSI Act) unless otherwise specified. References to corporations in this policy statement are references to Aboriginal and Torres Strait Islander corporations unless otherwise specified. In addition, references in this policy statement to the Registrar are also references to a delegate who is lawfully exercising the powers of the Registrar.
- 1.3 For further information about the process of deregistration and reinstatement for Aboriginal and Torres Strait Islander corporations—see ‘PS-17: Deregistrations and reinstatements’.

### **2 Property vested in the Registrar**

#### **A. Property which vests in the Registrar**

- 2.1 Corporation property is usually sold or transferred before deregistration. However, sometimes a corporation’s property is only discovered after the corporation has been deregistered.
- 2.2 When a corporation is deregistered, it ceases to exist as a legal entity and all of its remaining property interests vest in the Registrar—sections 546-20(1) and 546-20(2).<sup>1</sup>
- 2.3 This extends to:
  - corporation property vested in a liquidator immediately before deregistration
  - property outside Australia
  - property held by a corporation on trust immediately before deregistration.
- 2.4 In this context ‘property’ means all legal and equitable interests in real or personal property, whether tangible or not. It includes land, bank accounts, shares, motor vehicles, other assets, interests in contracts, mining interests, insurance policies and intellectual property.

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<sup>1</sup> Property of deregistered amalgamating corporations does not vest in the Registrar. It becomes the property of the amalgamated corporation—section 546-10(4).

**B. Property disposition or transfer by the deregistered corporation**

- 2.5 After deregistration a corporation or anyone else (other than the Registrar) may not dispose of or deal with a deregistered corporation's property. Any purported disposition or transfer by the deregistered corporation or anyone else (other than the Registrar) will be invalid.

**C. Rights attaching to property vested in the Registrar**

- 2.6 The Registrar has all of the powers of an owner in relation to property vested in the Registrar after deregistration—section 546-20(4).
- 2.7 Where the property is not held on trust, the Registrar may dispose of or deal with the property as the Registrar sees fit, and apply any money received to defraying expenses and paying liabilities imposed on the property—section 546-25(2).

**D. Liabilities attaching to property vested in the Registrar**

- 2.8 Where property of deregistered corporations is vested in the Registrar, the Registrar only has the same property rights that the corporation itself had and takes the property subject to any securities or other interests or claims that the property was subject to at the time of deregistration—section 546-20(3).
- 2.9 Property vested in the Registrar also remains subject to all liabilities imposed on the property. These liabilities include rates, taxes and other charges or claims arising under law and any other charges or claims over the property—section 546-25(3).
- 2.10 If the Registrar is already a party to litigation or proceedings, legal documents should be served at the address for service nominated by the Registrar in those proceedings. Legal notices and other documents, seeking to institute litigation or proceedings to enforce liabilities imposed on the property of deregistered corporations vested in the Registrar, may be served on the Registrar at the Registrar's Canberra office.
- 2.11 The Registrar's obligation in relation to liabilities is limited to the extent that the property is properly available to satisfy the liabilities—section 546-25(4).
- 2.12 Generally, the Registrar will not pay out creditors on behalf of a deregistered corporation and operate a de facto winding up service. The appropriate course available to a creditor is to reinstate the corporation and appoint a liquidator. See 'PS-17: Deregistrations and reinstatements'.

## **E. Registrar's general power to fulfil outstanding obligations of a deregistered corporation**

- 2.13 The Registrar may act on behalf of a deregistered corporation or its liquidator if the Registrar is satisfied that the corporation or liquidator would be bound to do the act if the corporation still existed—section 546-30.
- 2.14 This is a general power and not limited to acts in relation to property vested in the Registrar. The procedure for applying to the Registrar to use this power is set out below.
- 2.15 Generally the Registrar will not enter into a new contract or vary an existing contract on behalf of a deregistered corporation.

## **F. Accounts to be kept by the Registrar**

- 2.16 The Registrar must keep a record of all property of deregistered corporations that the Registrar knows is vested in the Registrar. The Registrar must keep records of all dealings with the property and all money received from those dealings and copies of all accounts, vouchers, receipts and papers relating to the property and that money—section 546-25(5).

## **3 Property held on trust by the corporation before deregistration**

- 3.1 Property held by a corporation on trust immediately before deregistration vests in the Registrar. However the unclaimed property provisions in Part 12-3 of the CATSI Act and section 546-25(2) of the CATSI Act have no application to the trust property.
- 3.2 Under the CATSI Act, the Registrar may continue to act as trustee or apply to a court for the appointment of a new trustee for any of the property of a deregistered corporation that was held by the corporation on trust—section 546-25(1). However, the Registrar will only exercise these powers as a last resort.
- 3.3 In most cases where a person is endeavouring to obtain an interest in trust property previously held by a corporation that is deregistered, applicants should apply to reinstate the corporation. See 'PS-17: Deregistrations and reinstatements'.

## **4 Insurance contracts and claims against insurers**

- 4.1 The CATSI Act provides a right to a person to proceed directly against an insurer under a relevant insurance contract held by a corporation immediately before its deregistration even though the corporation's rights under the insurance contract vest in the Registrar.

- 4.2 A person may recover from the insurer of a deregistered corporation an amount under the insurance contract if the corporation had a liability to the person and the insurance contract covered that liability immediately before deregistration—section 546-35.

## **5 Unclaimed property**

- 5.1 Unclaimed property is property vested in the Registrar that was not held on trust by the corporation before being deregistered—section 551-1.
- 5.2 Unclaimed property that is money at the time it becomes unclaimed property is held by the Registrar, on behalf of the Commonwealth, on trust under Part 12-3 of the CATSI Act—section 551-5(1). The money must be credited to the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account.
- 5.3 Unclaimed property that is not money at the time it becomes unclaimed property is held by the Registrar, on behalf of the Commonwealth, on trust under Part 12-3 of the CATSI Act until it is sold or disposed of by the Registrar. The Registrar then holds the proceeds on trust—section 551-5(2). The proceeds from sales or disposals must also be credited to the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account.
- 5.4 For further information about the sale or disposal of unclaimed property, refer below in this policy statement.

## **6 Unclaimed money account**

### **A. Special account**

- 6.1 Section 551-20 of the CATSI Act establishes the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account (the account). The account is a special account for the purposes of the *Financial Management and Accountability Act 1997*—section 551-20.
- 6.2 Unclaimed property that is money and proceeds from selling unclaimed property must be credited to the account—section 551-25.
- 6.3 The purposes for which amounts may be debited from the account are:
- to pay people whom the Registrar is satisfied under section 551-15(2)(b) are entitled to the money—section 551-30(1)(a)
  - to reduce the balance of the account without making a payment to any person if six years have passed since the unclaimed property was first held by the Registrar—section 551-30(1)(b).
- 6.4 If (after the Registrar has held the unclaimed money for six years) the money has not been paid out under section 551-30, the account must be debited by an amount equivalent to that money—section 551-30(2).

- 6.5 If a person makes a claim to money after six years have passed since the money was first held by the Registrar and the Registrar is satisfied that the person is entitled to the money, the Registrar must pay the money to the person. It must be paid out of money that is appropriated by the Australian Parliament for this purpose—section 551-30(3).

**B. Registrar and Commonwealth not liable to pay calls on shares etc.**

- 6.6 If unclaimed property is or includes shares in a body corporate, the Registrar and the Commonwealth are not obliged to:

- pay any calls
- make any contribution to the debts and liabilities of the body corporate
- discharge any other liability or
- do any other act or thing,

whether there is an obligation before or after the shares become unclaimed property, but this does not affect the right of the body corporate to forfeit a share—section 551-10.

**C. Claims of disposition of money to incorrect payee**

- 6.7 If a person claims to be entitled to money (or an amount equivalent to that money) and the money has been paid to another person, the Registrar is not liable to the claimant for that money.

- 6.8 If the person making the claim is entitled to that money (or an amount equivalent to that money), they may recover it from the person the money has already been paid to—section 551-35(1) and (2).

**D. Commonwealth or Registrar not liable for loss or damage**

- 6.9 Neither the Commonwealth nor the Registrar is liable for any loss or damage suffered by a person because of the exercise of, or the failure to exercise, any of the Registrar's powers regarding unclaimed property under Part 12-3 of the CATSI Act—section 551-40.

## **7 Claims of entitlement to money from the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account**

**A. Claim of entitlement to money**

- 7.1 If a person claims to be entitled to money that is unclaimed property or the proceeds of the disposal of unclaimed property, and the Registrar is satisfied that the person is entitled to the money, the Registrar must pay the money to the person under section 551-30 of the CATSI Act—section 551-15.

- 7.2 In this context, ‘entitled to’ means having a legal right. See *Re Producers’ Oilwell Supplies* [1943] VLR 141; *Caratti v National Companies and Securities Commission* (1984) 2 ACLC 790; *In the matter of Tandova Pty Ltd, Commonwealth Bank of Australia v ASIC* [2003] VSC 39. The entitlement should be absolute and not contingent upon other factors. See *Re Schmid and Comcare and the Commonwealth* (1991) 24 ALD 494.
- 7.3 A person entitled to money that is unclaimed property might be, for example:
- a creditor that was owed money by the corporation before the corporation was deregistered
  - a person that has a legal right to payment of money from the deregistered corporation.

## **B. Application**

- 7.4 Persons (including outstanding creditors) who claim to be entitled to money that is unclaimed property should apply in writing to the Registrar. An application must contain or be accompanied by the following:
- A covering letter requesting that the Registrar act under section 551-30. This letter should include the claimant’s name, address, telephone number and any other contact details and the former corporation’s name and Indigenous Corporation Number (ICN).
  - One or more statutory declarations explaining the background to the matter and why the claimant is entitled to the money. The declaration can be made by the applicant, or any other person, with personal knowledge of the circumstances or transaction giving rise to the applicant’s entitlement.
  - A further statutory declaration from a former director or liquidator (if any) of the deregistered corporation confirming the circumstances or transaction giving rise to the applicant’s entitlement and indicating that there is no objection to the Registrar paying the entitlement. Details of the former directors and liquidator (if any) can be obtained from the Registrar’s website, [www.oric.gov.au](http://www.oric.gov.au).
  - If the former directors or liquidator (if any) cannot be located, supporting documentary evidence must be included with the application. This could include receipts or contracts signed by the corporation, letters sent by the corporation or provisions in a body corporate’s constitution or rule book documenting the applicant’s entitlement, including the completion of any relevant transactions.
- 7.5 Copies of any other relevant supporting documentation should be included with the application.
- 7.6 Specific requirements for applications may vary with circumstances. For example, the Registrar may require an applicant to publicly advertise the details of an application. The Registrar will, if required, consult further with applicants once an application is lodged. Applications will usually be responded to within 28 days.

- 7.7 A deed of indemnity may also be required by the Registrar in some circumstances.
- 7.8 Applicants may wish to contact the Registrar's office or seek independent legal advice if they are unsure as to how to proceed with an application.
- 7.9 A decision by the Registrar to refuse a claim under section 551-15(2) is a reviewable decision—section 617-1. For more information about reviewable decisions see 'PS-14: Reviewable decisions'.
- 7.10 Generally, the Registrar will not pay out creditors on behalf of a deregistered corporation and operate a de facto winding up service. The appropriate course may be to reinstate the corporation and appoint a liquidator. See 'PS-17: Deregistrations and reinstatements'.

## **8 Applications seeking the Registrar to fulfil the outstanding obligations of deregistered corporations**

### **A. Application**

- 8.1 Persons seeking the Registrar to fulfil an outstanding obligation of a deregistered corporation should apply in writing to the Registrar. An application must contain or be accompanied by the following:
- A covering letter requesting that the Registrar act under section 546-30. This letter should include the claimant's name, address, telephone number and any other contact details and the former corporation's name and ICN.
  - Details of the circumstances, nature and extent of the deregistered corporation's outstanding obligation that the applicant believes the Registrar should fulfil.
  - One or more statutory declarations explaining the background to the matter, why the obligation was not completed before the corporation's deregistration (giving details of any property involved and transactions to be completed) and stating how the applicant or other relevant party honoured their part of any agreement. The declaration can be made by the applicant, or any other person, with personal knowledge of the transaction and property concerned.
  - A further statutory declaration from a former director or liquidator (if any) of the deregistered corporation confirming that the transaction has otherwise been completed, that the corporation would be obliged to execute the document or complete its part of the transaction if the corporation still existed, and indicating that there is no objection to the Registrar executing the final documents. Details of the former directors and liquidator (if any) can be obtained from the Registrar's website, [www.oric.gov.au](http://www.oric.gov.au).
  - If the former directors or liquidator (if any) cannot be located, supporting documentary evidence must be included with the application. This could

include receipts or contracts signed by the corporation, letters sent by the corporation or provisions in a body corporate's constitution or rule book documenting the applicant's entitlement, including the completion of any relevant transactions.

- Information regarding whether any of the former officers or senior employees of the corporation are involved or associated with the application.
- The applicant must give details of all relevant legal and beneficial interests and registered and unregistered encumbrances where a property transaction is involved; the applicant will need to satisfy the Registrar that the property vested is not held on trust (if it is proposed to deal with the property interest).
- If applicable, duly completed original legal documents to be executed by the Registrar (i.e. a transfer of land or release of charge) where property transactions are involved. The Registrar cannot prepare or lodge legal documents on behalf of applicants. If an application is successful the Registrar will return the executed legal document to the applicant for lodgement by the applicant at the applicant's expense.

8.2 Copies of any other relevant supporting documentation should be included.

8.3 Supporting documents typically required with specific applications under section 546-30 involving property rights may include:

- discharge of mortgage—a copy of the mortgage and any variations and an up-to-date title search of the relevant land
- release of charge—a copy of the instrument purporting to create the charge
- transfer of land—a copy of the contract of sale or other relevant agreement and an up to date title search and any other relevant searches
- withdrawal of caveat—a copy of the instrument purporting to create the caveatable interest, an up-to-date title search of the relevant land, including the details of the caveat.

8.4 The following representative and execution clauses should be used when preparing any legal documents for execution by the Registrar on behalf of a deregistered corporation:

- Representative clause: The Registrar of Aboriginal and Torres Strait Islander Corporations acting pursuant to s. 546-30 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* in relation to (*corporation name and ICN*) formerly of (*address*), a corporation that was deregistered on (*date of deregistration*).
- Execution clause: The common seal of the Registrar of Aboriginal and Torres Strait Islander Corporations is affixed pursuant to s. 546-30 of the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*.

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- 8.5 Specific requirements for applications may vary with circumstances. For example, the Registrar may require an applicant to publicly advertise the details of an application, The Registrar will, if required, consult further with applicants once an application is lodged. Applications will usually be responded to within 28 days.
- 8.6 A deed of indemnity may also be required by the Registrar in some circumstances.
- 8.7 Applicants may wish to seek independent legal advice if they are unsure as to how to proceed with an application.
- 8.8 Generally, the Registrar will not enter into a new contract, vary an existing contract or pay out creditors on behalf of a deregistered corporation. Mortgages will not be discharged without recovering all principal and interest due after deregistration.

## **9 Sale or disposal of unclaimed property**

- 9.1 Under section 551-5(2)(b) the Registrar has a discretion to sell or dispose of unclaimed property that is not money and hold the proceeds on trust on behalf of the Commonwealth.
- 9.2 When property is disposed of it may be sold by public auction, public tender or private contract. The method of sale will depend on the nature of the property in question.
- A. Applying to buy property**
- 9.3 In all cases, the Registrar will only sell property as a last resort. The Registrar will always consider whether reinstating the corporation is a preferred course of action. See 'PS-17: Deregistrations and reinstatements'.
- 9.4 However, occasionally there may be persons who wish to buy property of deregistered corporations. Those persons must apply to the Registrar in writing.
- 9.5 The Registrar recommends that potential applicants carefully consider the provisions of this policy statement. If the Registrar sells an asset or disposes of an asset to an applicant under section 546-25(2), it will not be sold with any warranties whatsoever. The Registrar sells or disposes of nothing more than the Registrar's interest.
- 9.6 The onus is on an applicant to make their own thorough and comprehensive searches regarding ownership, liabilities and encumbrances in respect of a property, and the quality of the property.
- 9.7 It is a matter for the applicant to put sufficient evidence before the Registrar to satisfy him or her that the discretion to sell vested property should be exercised in the way the applicant requests.

## **B. Requirements for applications**

- 9.8 A statutory declaration must be completed by an applicant seeking to buy property of a deregistered corporation that:
- identifies the property to be sold—together with verified copies of any evidence of title such as a certificate of title or share certificates
  - provides the name and ICN of the former corporation
  - gives details of the circumstances, nature and extent of the interest that the applicant believes vests in the Registrar; the applicant must give details of all legal and beneficial interests and registered and unregistered encumbrances; the applicant will need to satisfy the Registrar that the property vested is not held on trust
  - states the results of all inquiries made as to any interests of the former corporation's officers, including secretary, liquidator (if any), shareholders or secured creditors and attaching copies of all correspondence sent and replies received.
- 9.9 A valuation of the property must be supplied. The Registrar requires an independent sworn valuation by a person experienced and licensed (if appropriate) in valuing such property. All valuation fees are the responsibility of the applicant. A purchase offer price must also be submitted, with submissions as to why the Registrar should accept a discrepancy (if any).
- 9.10 Copies of any other relevant supporting documentation should be included.
- 9.11 Supporting documents typically required with specific applications under section 546-25(2)(a) of the CATSI Act may include:
- discharge of mortgage—a copy of the mortgage and any variations and an up-to-date title search of the relevant land
  - release of charge—a copy of the instrument purporting to create the charge
  - transfer of land—a copy of the contract of sale or other relevant agreement and an up to date title search and any other relevant searches
  - withdrawal of caveat—a copy of the instrument purporting to create the caveatable interest and an up-to-date title search of the relevant land, including the details of the caveat.
- 9.12 All applications for the purchase of property vested in the Registrar must include duly prepared transfer documents using the following clauses:
- Representative clause: The Registrar of Aboriginal and Torres Strait Islander Corporations acting pursuant to *Corporations (Aboriginal and Torres Strait Islander) Act 2006*, s 546-25 in relation to (*corporation name and ICN*) formerly of (*address*), a corporation that was deregistered on (*date of deregistration*).
  - Execution clause: The Common Seal of the Registrar of Aboriginal and Torres Strait Islander Corporations is affixed pursuant to the *Aboriginal and Torres Strait Islander) Act 2006*, s 546-25(2).

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- 9.13 Specific requirements for applications may vary with circumstances. For example, the Registrar may require an applicant to publicly advertise the details of an application. The Registrar will, if required, consult further with applicants once an application is lodged. Applications will usually be responded to within 28 days.
- 9.14 A deed of indemnity may also be required by the Registrar in some circumstances.
- 9.15 The Registrar may not always exercise his or her discretion to sell an asset to an applicant. For example, there may be a competing application or some statutory restriction on the transfer of the asset. In some cases a private treaty may be inappropriate.

## **10 Other matters**

### **A. Evidence of identity**

- 10.1 The Registrar may require that an application made by a natural person in accordance with this policy statement include evidence of the applicant's identity. In the case of an applicant that is a body corporate, the Registrar may require evidence of the identity of the officer authorising the application. Evidence of identity will take the form that the Registrar considers satisfactory in all the circumstances.

### **B. Advertising of applications**

- 10.2 The Registrar may require advertisements to be placed in major newspapers or on websites notifying:
- a claim to money from the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account
  - an application for the Registrar to fulfil an outstanding obligation of a deregistered corporation, particularly where it affects significant property rights
  - an application to purchase or dispose of the property of a deregistered corporation.
- 10.3 The Registrar will consult with applicants on the wording of the required advertisement. Applicants will be responsible for the cost of these advertisements.
- 10.4 The purpose of an advertisement is to enable any other person with an interest in the money or property or a person who objects to, or would be aggrieved by, the proposed payment or action of the Registrar, to make representations to the Registrar.

**C. Fees**

- 10.5 No fees are payable to the Registrar for lodging:
- a claim of entitlement to money from the Aboriginal and Torres Strait Islander Corporations Unclaimed Money Account
  - an application for the Registrar to fulfil an outstanding obligation of a deregistered corporation
  - an application to purchase or dispose of the property of a deregistered corporation.
- 10.6 However an applicant will be responsible for any costs, charges or expenses e.g. transfer fees, stamp duty or taxation associated with an application in accordance with this policy statement and any dealing with a deregistered corporation's property.

**END OF POLICY STATEMENT**