



ASIC

Australian Securities & Investments Commission

Insolvency Law Reform Bulletin 2

Guide for registered liquidators: This bulletin is one of a series about implementing changes in the Corporations Amendment (Insolvency) Act 2007, the Corporations Amendment Regulations 2007 and the Australian Securities and Investments Commission Regulations 2007. These changes, collectively referred to as 'insolvency law reform' or 'the amendments', generally come into effect on 31 December 2007.

Information sheets

This bulletin informs registered liquidators about the content of new and revised information sheets prepared to provide information to directors, shareholders and creditors (including employee creditors) about various aspects of external administration. The new and revised information sheets take effect on 31 December 2007.

Additional information sheets

In addition to revising the current suite of information sheets to reflect the amendments, we have prepared two additional information sheets:

- *Independence of external administrators: a guide for creditors;* and
- *Approving fees: a guide for creditors.*

IPA endorsement

The IPA generally endorses the information sheets issued by ASIC and encourages its members to use them. There has been insufficient time while implementing the insolvency law reform for the IPA to review these information sheets. For this reason the IPA logo does not yet appear on them.

Contents

1. List of forms
2. Glossary of terms
3. Revised information sheets for creditors, employees, directors and shareholders
4. New information sheets on independence and approving fees

Important note: This bulletin contains general information from ASIC to assist registered liquidators to comply with the amended Corporations Act 2001, Corporations Regulations 2001 and Australian Securities and Investments Commission Regulations 2001 as at 31 December 2007. The information does not purport to be, and is not, a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to the specific circumstances of a registered liquidator or a company subject to an external administration.



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Insolvency information for directors, employees, creditors and shareholders

ASIC has 11 insolvency information sheets to assist you if you're affected by a company's insolvency and have little or no knowledge of what's involved.

These plain language information sheets give directors, employees, creditors and shareholders a basic understanding of the three most common company insolvency procedures—liquidation, voluntary administration and receivership. There is an information sheet on the independence of external administrators and one that explains the process for approving the fees of external administrators. A glossary of commonly used insolvency terms is also provided.

The Insolvency Practitioners Association (IPA), the leading professional organisation in Australia for insolvency practitioners, endorses these publications and encourages its members to make their availability known to affected people.

List of information sheets

- Insolvency: a glossary of terms
- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

Important note: The information sheets contain a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. These documents may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

Getting copies of the information sheets

To get copies of the information sheets, visit ASIC's website at www.asic.gov.au/insolvencyinfosheets. The information sheets are also available from the IPA website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



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INFORMATION SHEET 41

Insolvency: a glossary of terms

This is a brief explanation of some of the terms you may come across in company insolvency proceedings. Please note that this glossary is for general guidance only. Many of the terms have a specific technical meaning in certain contexts that may not be covered here.

Asset

Any property of value owned by a person. Can include tangible and intangible assets.

Bankruptcy

An insolvency procedure that applies to a natural person, not to a company.

CALDB

The Company Auditors and Liquidators Disciplinary Board—the body that disciplines external administrators.

Charge

A form of security for a debt taken by a creditor over company assets. A mortgage is a type of charge.

Committee of creditors

A small group of creditors, or their representatives, often appointed by the creditors of a company at the first meeting in a voluntary administration. The committee's role is to consult with the voluntary administrator and to receive and consider reports by the voluntary administrator. The voluntary administrator must report to the committee when it reasonably requires.

Committee of inspection

A small group of creditors and shareholders, or their representatives, often appointed by the creditors and shareholders of a company in liquidation to assist the liquidator. The committee is often called on to approve the liquidator's fees and sometimes to approve the compromise of debts or the entry into contracts extending beyond 3 months by the liquidator.

Compromise

Agree to accept a lesser sum in full payment of a debt.

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Contingent asset

An asset that might arise if a certain event occurs (e.g. a current legal action being taken by a company might result in an asset if the company wins the case).

Contingent liability

A liability that might arise if a certain event occurs (e.g. a current legal action against a company might result in a liability if the company loses the case).

Contributory

A shareholder who may be liable to contribute towards a company's debts in a liquidation if their shares are not fully paid.

Controller

A person appointed by a secured creditor to deal with assets subject to a charge. Includes a receiver, and receiver and manager.

Court liquidation

A liquidation that starts as a result of a court order, made after an application to the court, usually by a creditor of the company.

Creditor

A person who is owed money.

Creditors' trust

A separate legal arrangement set up to deal with creditor claims. Creditor claims can be transferred to a creditors' trust as part of a deed of company arrangement.

Creditors' voluntary liquidation

A liquidation for insolvent companies, initiated by the company. Creditors may replace the liquidator appointed by the company in this type of liquidation.

Debenture

A document acknowledging that a company undertakes to repay a sum of money lent to the company by the holder of the document.

Debt

An amount owed.

Debtor

A person who owes a debt.

Declaration of indemnities

A declaration that must be provided to creditors by a voluntary administrator informing them about any indemnities given to the voluntary administrator to cover fees or other debts incurred in acting as voluntary administrator of the company. The declaration provides information to enable creditors to make an informed decision about whether they wish to replace the administrator over concerns about independence.

Declaration of relevant relationships

A declaration that must be provided by a voluntary administrator or a liquidator in a creditors' voluntary liquidation informing creditors about certain relationships. The declaration provides

information to enable creditors to make an informed decision about whether they wish to replace the administrator over concerns about independence.

Deed administrator

The external administrator appointed to oversee a deed of company arrangement.

Deed of company arrangement

A binding arrangement between a company and its creditors governing how the company's affairs will be dealt with, which may be agreed to as a result of the company entering voluntary administration. Aims to maximise the chances of the company, or as much as possible of its business, continuing, or to provide a better return for creditors than an immediate winding up of the company, or both.

Director

A natural person appointed as a director of a company who is then responsible for directing and managing the affairs of a company. Also includes a shadow director.

Dividend

A share of the profit of a solvent company paid to shareholders. Also used to describe a sum paid to creditors out of the assets of an insolvent company.

Eligible employee creditor

A creditor (including the Australian Taxation Office in respect of the superannuation guarantee charge) who, in a winding up of a company, would normally be paid their employment-related entitlements in priority to other unsecured debts. These creditors are given a special right to vote on a deed of company arrangement proposal that seeks to modify their priority.

Eligible unsecured creditor

A creditor who is entitled to have a say in a pooling determination made by a liquidator. The term generally covers the external unsecured creditors of the group, but excludes debts owing between companies in the pooled group. A pooling determination relates to a decision to treat the affairs of a group of companies as if it were a single external administration.

Excluded employee

An employee who has also been a director of the company, or a relative of a director, at any time in the 12 months before the appointment of an external administrator. Excluded employees are entitled to only limited priority for repayment of their outstanding entitlements.

External administrator

A general term for an external person formally appointed to a company or its property. Includes provisional liquidator, liquidator, voluntary administrator, deed administrator, controller, receiver, and receiver and manager. Other than a liquidator for a members' voluntary liquidation and a controller who is not a receiver or receiver and manager, an external administrator is required to be registered by ASIC. An external administrator is sometimes also referred to as an insolvency practitioner.

Fixed charge

A charge taken by a lender over particular assets of a company. The company may not dispose of these assets without the consent of the lender.

Floating charge

A charge taken by a lender over general assets of a company. The company is usually able to use and dispose of these assets (e.g. stock, debtors) in the ordinary course of business without the secured creditor's consent. A floating charge converts to a fixed charge over those assets if certain events listed in the charge document occur. These usually include the appointment of a liquidator or other external administrator.

GEERS

The General Employee Entitlements and Redundancy Scheme—a basic payment scheme to assist employees who have lost their jobs as a result of their employer's liquidation or bankruptcy, and are owed certain employee entitlements.

Indemnity

An agreement between the external administrator and a third party to cover the fees and other debts incurred by the external administrator.

Insolvent

Unable to pay all debts when they fall due for payment.

Intangible asset

An asset with no identifiable physical form (e.g. a contractual right, copyrights, patents and goodwill).

IPA

The Insolvency Practitioners Association—the leading professional organisation in Australia for external administrators/insolvency practitioners.

Liability

A legal obligation to pay a person.

Liquidation

The orderly winding up of a company's affairs. It involves realising the company's assets, cessation or sale of its operations, distributing the proceeds of realisation among its creditors and distributing any surplus among its shareholders. The three types of liquidation are: court, creditors' voluntary and members' voluntary.

Liquidator

A natural person appointed to administer the liquidation of a company.

Member (of a company)

A shareholder.

Members' voluntary liquidation

A liquidation for solvent companies, initiated by the company.

Officer (of a company)

A director, secretary or external administrator (in most cases) of the company.

Person

A natural person or a company.

Poll (of creditors)

A voting procedure where both the number of creditors voting a particular way and the value of their debts is considered in deciding if a resolution is approved or not.

Pooling

The practice of treating the affairs of a group of companies as if it were a single external administration.

Prescribed provisions

Provisions that the *Corporations Act 2001* takes to be included in a deed of company arrangement, unless the deed specifically excludes them.

Priorities

The order set down by the *Corporations Act 2001* for the payment of unsecured creditors of an insolvent company by an external administrator.

Priority creditor

An unsecured creditor entitled to be paid ahead of other creditors (e.g. employees).

Proof of debt

A prescribed form to be completed by creditors at the liquidator's request, setting out details of their claim against the company, including how the debt arose and the amount claimed.

Provisional liquidator

A liquidator appointed by the court to preserve a company's assets until a winding-up application is decided.

Proxy

A person appointed by another person to represent them at a meeting. A proxy is usually entitled to attend and vote on behalf of the person who appointed them. In an external administration, the appointer is usually a creditor or shareholder.

Proxy form

A prescribed form that must be completed by creditors or shareholders to appoint a proxy for a creditors' or shareholders' meeting.

Public examination

A liquidator, voluntary administrator, deed administrator, ASIC or a person authorised by ASIC to do so can apply to the court to question an externally administered company's directors or any other person who may be able to give information about the affairs of the company.

Realise

Convert assets into cash, often by selling them.

Receiver

An external administrator appointed by a secured creditor to realise enough of the assets subject to the charge to repay the secured debt. Less commonly, a receiver may also be appointed by a court to protect the company's assets or to carry out specific tasks.

Receiver and manager

A receiver who has, under the terms of their appointment, the power to manage the company's affairs.

Receivership

An insolvency procedure where a receiver, or receiver and manager, is appointed over some or all of the company's assets.

Report as to affairs

A prescribed form required to be completed by the directors and secretary of a company in liquidation or receivership, giving details of the company's assets and liabilities, and the identities of the creditors and debtors.

Secured creditor

A creditor who has a security (e.g. charge or mortgage) over some or all of a company's property.

Shadow director

A natural person not on the public register as a director of a company but who directs and manages the company's affairs and is taken by the *Corporations Act 2001* to be a director.

Tangible asset

An asset with a physical form (e.g. stock or real estate).

Uncommercial transaction

A transaction that was unreasonable for a company to have entered into. It may be able to be set aside by the company's liquidator provided it occurred within 2 years prior to the winding up, and when the company was insolvent or if the company became insolvent by entering into the transaction.

Unfair preference

A payment made or other benefit given to a creditor by an insolvent company which causes that creditor to be in a more favourable position than other unsecured creditors in a liquidation. The company's liquidator can seek to recover an unfair preference provided it occurred within 6 months prior to the liquidation, and when the company was insolvent or if the company became insolvent by making the payment or giving the benefit.

Unsecured creditor

A creditor who does not hold a security over a company's property.

Voluntary administration

An insolvency procedure where the directors of a financially troubled company or a secured creditor with a charge over most of the company's assets appoint an external administrator called a 'voluntary administrator'. The role of the voluntary administrator is to investigate the company's affairs, to report to creditors and to recommend to creditors whether the company should enter into a deed of company arrangement, go into liquidation or be returned to the directors.

Voluntary administrator

An external administrator appointed to carry out the voluntary administration of a company.

Winding-up order

A court order for the winding up of a company. The first step in a court liquidation. Usually made after an application by a creditor.



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INFORMATION SHEET 74

Voluntary administration: a guide for creditors

If a company is in financial difficulty, it can be put into voluntary administration.

This information sheet provides general information for unsecured creditors of companies in voluntary administration.

Who is a creditor?

You are a creditor of a company if the company owes you money. Usually, a creditor is owed money because they have provided goods or services, or made loans to the company. An employee owed money for unpaid wages and other entitlements is also a creditor.

A person who may be owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company) is also a creditor, and is sometimes referred to as a 'contingent' creditor. There are generally two categories of creditor: secured and unsecured.

A secured creditor is someone who has a 'charge', such as a mortgage, over some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan.

An unsecured creditor is a creditor who does not have a charge over the company's assets.

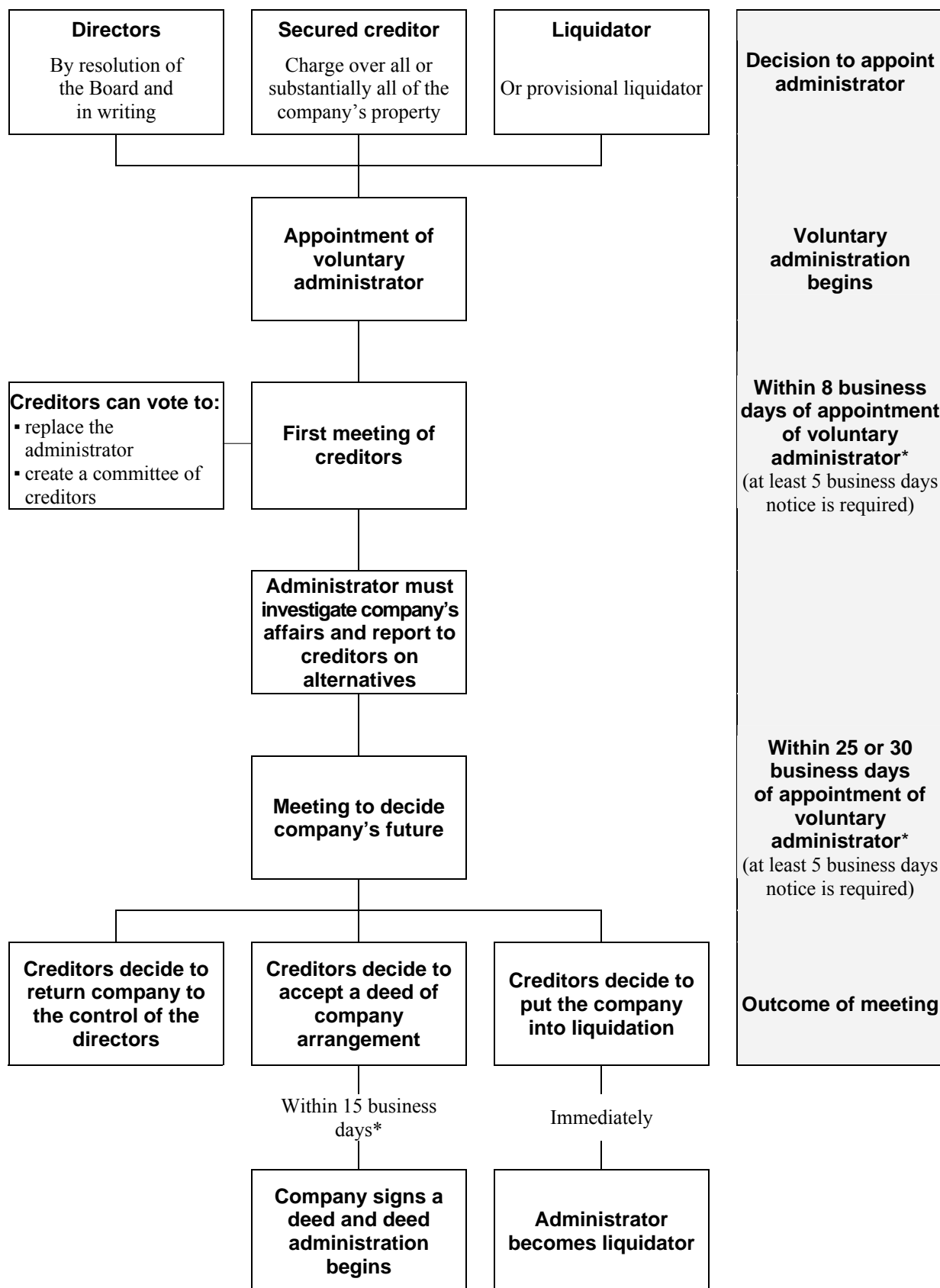
Employees are a special class of unsecured creditors. Their outstanding entitlements are usually paid in priority to the claims of other unsecured creditors. If you are an employee, see our related information sheet 'Voluntary administration: a guide for employees'.

The purpose of voluntary administration

Voluntary administration is designed to resolve a company's future direction quickly (Figure 1 summarises the process). An independent and suitably qualified person (the voluntary administrator) takes full control of the company to try to work out a way to save either the company or its business.

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Figure 1: The voluntary administration process



* Unless the court allows an extension of time.

If it isn't possible to save the company or its business, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation. A mechanism for achieving these aims is a deed of company arrangement.

A voluntary administrator is usually appointed by a company's directors, after they decide that the company is insolvent or likely to become insolvent. Less commonly, a voluntary administrator may be appointed by a liquidator, provisional liquidator, or a secured creditor.

A company in voluntary administration may also be in receivership.

The voluntary administrator's role

After taking control of the company, the voluntary administrator investigates and reports to creditors on the company's business, property, affairs and financial circumstances, and on the three options available to creditors. These are:

- end the voluntary administration and return the company to the directors' control
- approve a deed of company arrangement through which the company will pay all or part of its debts and then be free of those debts, or
- wind up the company and appoint a liquidator.

The voluntary administrator must give an opinion on each option and recommend which option is in the best interests of creditors.

In doing so, the voluntary administrator tries to work out the best solution to the company's problems, assesses any proposals put forward by others for the company's future, and compares the possible outcomes of the proposals with the likely outcome in a liquidation.

A creditors' meeting is usually held about 5 weeks after the company goes into voluntary administration to decide on the best option. In complex administrations, this meeting may be held later if the court consents.

The voluntary administrator has all the powers of the company and its directors. This includes the power to sell or close down the company's business or sell individual assets in the lead up to the creditors' decision on the company's future.

Another responsibility of the voluntary administrator is to report to ASIC on possible offences by people involved with the company.

Although the voluntary administrator may be appointed by the directors, they must act fairly and impartially.

Effect of appointment

The effect of the appointment of a voluntary administrator is to provide the company with breathing space while the company's future is resolved. While the company is in voluntary administration:

- unsecured creditors can't begin, continue or enforce their claims against the company without the administrator's consent or the court's permission
- owners of property (other than perishable property) used or occupied by the company, or people who lease such property to the company, can't recover their property
- except in limited circumstances, secured creditors can't enforce their charge over company property
- a court application to put the company in liquidation can't be commenced, and
- a creditor holding a personal guarantee from the company's director or other person can't act under the personal guarantee without the court's consent.

Voluntary administrator's liability

Any debts that arise from the voluntary administrator purchasing goods or services, or hiring, leasing, using or occupying property, are paid from the available assets as costs of the voluntary administration. If there are insufficient funds available from asset realisations to pay these costs, the voluntary administrator is personally liable for the shortfall. To have the benefit of this protection, you should ensure you receive a purchase order authorised in the manner advised by the voluntary administrator.

The voluntary administrator must also decide whether to continue to use or occupy property owned by another party that is held or occupied by the company at the time of their appointment.

Within 5 business days after their appointment, the voluntary administrator must notify the owner of property whether they intend to continue to occupy or use the property. If the voluntary administrator decides to continue to do so, they will be personally liable for any rent or amounts payable arising after the end of the 5 business days.

Amounts that become due to employees after the date of the appointment of the voluntary administrator have a priority claim against the company's assets as a cost of the administration. However, the voluntary administrator does not become personally liable for such amounts unless the voluntary administrator adopts employees' contracts of employment or enters into new employment contracts with them.

Creditors' meetings

Two meetings of creditors must be held during the voluntary administration.

First creditors' meeting

The voluntary administrator must call the first creditors' meeting within 8 business days after the voluntary administration begins.

At least 5 business days before the meeting, the voluntary administrator must notify as many creditors as practical in writing and advertise the meeting. The advertisement must appear in a newspaper circulating in the states or territories in which the company has its registered office or carries on its business.

The voluntary administrator must send to creditors, with the notice of meeting, declarations about any relationships they may have, or indemnities they have been given, to allow creditors to consider the voluntary administrator's independence and make an informed decision about whether they want to replace them with another voluntary administrator of the creditors' choice.

The purpose of the first meeting is for creditors to decide two questions:

- whether they want to form a committee of creditors, and, if so, who will be on the committee, and
- whether they want the existing voluntary administrator to be removed and replaced by a voluntary administrator of their choice.

The role of a committee of creditors is to consult with the voluntary administrator about matters relevant to the voluntary administration and receive and consider reports from the voluntary administrator. The committee can also require the voluntary administrator to report to them about the voluntary administration. It may also approve the voluntary administrator's fees.

A creditor who wishes to nominate an alternative voluntary administrator must approach a registered liquidator before the meeting and get a written consent from that person. The proposed alternative administrator must give to the meeting declarations about any relationships they may have, or indemnities they have been given. The voluntary administrator will only be replaced if the resolution to replace them is passed by the creditors at the meeting.

To be eligible to vote at this meeting, you must lodge details of your debt or claim with the voluntary administrator (discussed further below).

This meeting can be chaired by either the voluntary administrator or one of their senior staff.

Second creditors' meeting (to decide the company's future)

After investigating the affairs of the company and forming an opinion on each of the three options available to creditors (outlined above), including an opinion as to which option is in the best interests of creditors, the administrator must call a second creditors' meeting. At this meeting, creditors are given the opportunity to decide the company's future.

This meeting is usually held about 5 weeks after the company goes into voluntary administration (6 weeks at Christmas and Easter).

However, in complex voluntary administrations, often more time is needed for the voluntary administrator to be in a position to report to creditors. In these circumstances, the court can approve an extension of time to hold the meeting.

The voluntary administrator must chair this meeting.

In preparation for the second meeting, the voluntary administrator must send creditors the following documents at least 5 business days before the meeting:

- a notice of meeting

- the voluntary administrator's report, and
- a statement about any proposals for a deed of company arrangement.

These will be accompanied by:

- a claim form (usually a 'proof of debt' form), and
- a proxy voting form.

The meeting must also be advertised.

Either or both the first and second creditors' meeting may be held using telephone or videoconferencing facilities.

Voluntary administrator's report

You should read the voluntary administrator's report before you attend the second meeting or decide whether you want to appoint someone else to vote on your behalf at that meeting. This report must give sufficient information to explain the company's business, property and affairs, and the reasons for the current financial situation, to enable you to make an informed decision about the company's future.

The report should also provide an analysis of any proposals for the future of the company, including the possible outcomes, as well as a comparable estimate of what would be available for creditors in a liquidation.

Finally, the report should include the voluntary administrator's opinion on each of the options available to creditors, as well as an opinion on which is in the best interests of creditors. As noted above, the options are:

- end the voluntary administration and return the company to the directors' control
- approve a deed of company arrangement (if one is proposed), or
- put the company into liquidation.

Voluntary administrator's statement about deed

If there are proposals for a deed of company arrangement, the voluntary administrator must provide creditors with a statement giving enough details of each proposal to enable creditors to make an informed decision. The types of proposals allowed in a deed of company arrangement are very flexible.

Typically, a proposal will provide for the company to pay all or part of its debts, possibly over time, and then be free of those debts. It will often provide for the company to continue trading. How these things will happen varies from case to case, as the terms allowed in a deed of company arrangement are also very flexible. The contents of a deed of company arrangement are discussed below.

You should insist on being provided with as much information about the terms of the proposed deed as possible, before the creditors' meeting. The minimum contents of a deed of company arrangement, discussed below, provide a guide on the information you might request if it hasn't already been provided.

You should also contact the voluntary administrator before the meeting if you believe the report to creditors does not contain sufficient information to enable you to make a decision about the company's future.

Voting at a creditors' meeting

To vote at any creditors' meeting you must lodge details of your debt or claim with the voluntary administrator. Usually, the voluntary administrator will provide you with a form called a 'proof of debt' to be completed and returned before the meeting.

The chairperson of the meeting decides whether or not to accept the debt or claim for voting purposes. The chairperson may decide that a creditor does not have a valid claim or the amount of the debt cannot be determined with any certainty at the date of the meeting. In this case, they may not allow the creditor to vote at all, or only to vote for a debt of \$1. This decision is only for voting purposes. It is not relevant to whether a creditor will receive a dividend.

An appeal against a decision by the chairperson to accept or reject a proof of debt or claim for voting purposes may be made to the court within 14 days after the decision.

A secured creditor is entitled to vote for the full amount of their debt without having to deduct the value of their security.

Voting by proxy

You may appoint a proxy to attend and vote at a meeting on your behalf. A proxy can be any person who is at least 18 years old. Creditors who are companies will have to nominate a person as proxy so that they can participate in the meeting. This is done using a form sent out with the notice of meeting. The completed proxy form must be provided to the voluntary administrator before the meeting. You can fax the proxy form to the voluntary administrator, but must lodge the original within 72 hours of sending the faxed copy.

An electronic form of proxy may be used if the liquidator allows electronic lodgement, provided there is a way to authenticate the appointment of the proxy (e.g. by scanning and e-mailing a signature or using a digital signature).

You can specify on the proxy form how the proxy is to vote on a particular resolution and the proxy must vote in accordance with that instruction. This is called a 'special proxy'. Alternatively, you can leave it to the proxy to decide how to vote on each of the resolutions put before the meeting. This is called a 'general proxy'.

You can appoint the chairperson to represent you either through a special or general proxy. The voluntary administrator or one of their partners or employees must not use a general proxy to vote in favour of a resolution approving payment of the voluntary administrator's fees.

Manner of voting

A vote on any resolution put to a creditors' meeting may be taken by creditors stating aloud their agreement or disagreement, or by a show of hands. Sometimes a more formal voting procedure called a 'poll' is taken.

If voting is by show of hands or by verbally signalling agreement, the resolution is passed if a majority of those present indicate agreement. It is up to the chairperson to decide if this majority has been reached.

After the vote, the chairperson must tell those present whether the resolution has been passed or lost. If the chairperson is unable to determine the outcome of a resolution on a show of hands, they may decide to conduct a poll.

Alternatively, a poll can be demanded by at least two people present who are entitled to vote, or someone who holds more than 10% of the votes of those entitled to vote at the meeting. The chairperson will determine how this poll is taken.

If you intend to demand that a poll be taken, you must do so before, or as soon as, the chairperson has declared the result of a vote taken by show of hands or voices.

When a poll is conducted, a resolution is passed if:

- more than half the number of creditors who are voting (in person or by proxy) vote in favour of the resolution, and
- those creditors who are owed more than half of the total debt owed to creditors at the meeting vote in favour of the resolution.

This is referred to as a 'majority in number and value'. If a majority in both number and value is not reached under a poll (often referred to as a deadlock), the chairperson has a casting vote.

Chairperson's casting vote

When a poll is taken and there is a deadlock, the chairperson may use their casting vote either in favour of or against the resolution. The chairperson may also decide not to use their casting vote.

The chairperson must inform the meeting, and include in the written minutes of meeting that are lodged with ASIC, of the reasons why they cast their vote in a particular way or why they chose not to use their casting vote.

If you are dissatisfied with how the chairperson exercised their casting vote or failed to use their casting vote, you may apply to the court for a review of the chairperson's decision. The court may vary or set aside the resolution or order that the resolution is taken to have been passed.

Votes of related creditors

If they are creditors of the company, directors and shareholders, their spouses and relatives and other entities controlled by them are entitled to attend and vote at creditors' meetings, including the meeting to decide the company's future.

If a resolution is passed, or defeated, based on the votes of these related creditors, and you are dissatisfied with the outcome, you may apply to the court for the resolution to be set aside and/or for a fresh resolution to be voted on without related creditors being entitled to vote.

Certain criteria must be met before the court will make such an order (e.g. the original result of the vote being against the interests of all or a class of creditors).

Deciding how to vote at the second meeting

How you vote at the meeting on the three possible options, including any competing proposals for a deed of company arrangement, is a commercial decision based on your assessment of the company and its future prospects, and your personal circumstances. The information provided by the voluntary administrator, including opinions expressed, will assist you. However, you are not obliged to accept the administrator's recommendation.

If you do not consider that you have been given enough information to decide how to vote, and particularly whether to vote for any deed proposal, you can ask for a resolution to be put to creditors that the meeting be adjourned (up to a maximum of 45 business days in total) and for the administrator to provide more information. You must make this request before a vote on the company's future. This resolution must be passed for the adjournment to take place.

Creditors also have the right when a deed of company arrangement is proposed and considered at the meeting to negotiate specific requirements into the terms of the deed, including, for example, how the deed administrator is to report to them on the progress of the deed.

Any request to vary the deed proposal to include such requirements should be made before the deed proposal is voted on.

Minutes of meeting

The chairperson must prepare minutes of each meeting and a record of those who were present at each meeting.

The minutes must be lodged with ASIC within 14 days of the meeting. A copy may be obtained from any ASIC Business Centre on payment of the relevant fee.

Company returned to directors

If the company is returned to the directors, they will be responsible for ensuring that the company pays its outstanding debts as they fall due. It is only in very rare circumstances that creditors will resolve to return the company to the control of its directors.

Liquidation

If creditors resolve that the company go into liquidation, the voluntary administrator becomes the liquidator unless creditors vote at the second meeting to appoint a different liquidator of their choice. The liquidation proceeds as a creditors' voluntary liquidation with any payments of dividends to creditors made in the order set out in the *Corporations Act 2001* (Corporations Act). To find out more, see ASIC's 'Liquidation: a guide for creditors' information sheet.

Deed of company arrangement

If creditors vote for a proposal that the company enter a deed of company arrangement, the company must sign the deed within 15 business days of the creditors' meeting, unless the

court allows a longer time. If this doesn't happen, the company will automatically go into liquidation, with the voluntary administrator becoming the liquidator.

The deed of company arrangement binds all unsecured creditors, even if they voted against the proposal. It also binds owners of property, those who lease property to the company and secured creditors, if they voted in favour of the deed. In certain circumstances, the court can also order that these people are bound by the deed even if they didn't vote for it. The deed of company arrangement does not prevent a creditor who holds a personal guarantee from the company's director or another person taking action under the personal guarantee to be repaid their debt.

Contents of the deed

Whatever the nature of the deed of company arrangement, it must contain certain information, including:

- the name of the deed administrator
- the property that will be used to pay creditors
- the debts covered by the deed and the extent to which those debts are released
- the order in which the available funds will be paid to creditors (the deed of company arrangement must ensure that employees have a priority in payment of outstanding employee entitlements unless the eligible employees agree by a majority in both number and value to vary this priority)
- the nature and duration of any suspension of rights against the company
- the conditions (if any) for the deed to come into operation
- the conditions (if any) for the deed to continue in operation, and
- the circumstances in which the deed terminates.

There are also certain terms that will be automatically included in the deed, unless the deed says they will not apply. These are called the 'prescribed provisions'. They include such matters as the powers of the deed administrator, termination of the deed and the appointment of a committee of creditors (called a 'committee of inspection').

The voluntary administrator's report should tell you which prescribed provisions are proposed to be excluded or varied, and, if varied, how.

Monitoring the deed

It is the role of the deed administrator to ensure the company (or others who have made commitments under the deed) carries through these commitments. The extent of the deed administrator's ongoing role will be set out in the deed.

Creditors can also play a role in monitoring the deed. If you are concerned that the obligations of the company (or others) under the deed are not being met, you should take this up promptly with the deed administrator. Matters that may give rise for concern include deadlines for payments or other actions promised under the deed being missed.

Creditors also have the right when a deed of company arrangement is proposed and considered at the second meeting to negotiate consequences of failure to meet such deadlines into the terms of the deed. Any request to vary the deed proposal to include such consequences should be made before the deed proposal is voted on.

The deed administrator must lodge a detailed list of receipts and payments with ASIC every 6 months.

Varying the deed

The deed administrator can call a creditors' meeting at any time to consider a proposed variation to the deed or a resolution to terminate the deed. The proposed resolutions must be set out in the notice of meeting sent to creditors.

Creditors owed at least 10% in value of all creditor claims can, by written request, also require the deed administrator to call such a meeting. However, it is unusual for this to happen, as those who make the request must pay the costs of calling and holding the meeting.

Payment of dividends under a deed

The order in which creditor claims are paid depends on the terms of the deed. Sometimes the deed proposal is for creditor claims to be paid in the same priority as in a liquidation. Other times, a different priority is proposed.

The deed must ensure employee entitlements are paid in priority to other unsecured creditors unless eligible employees have agreed to vary their priority.

Before you decide how to vote at the creditors' meeting, make sure you understand how the deed will affect the priority of payment of your debt or claim.

You may wish to seek independent legal advice if the deed proposes a different priority to that in a liquidation, or if creditors approve such a deed.

Establishing your claim under a deed

How debts or claims are dealt with under a deed of company arrangement depends on the deed's terms. Sometimes the deed incorporates the Corporations Act provisions for dealing with debts or claims in a liquidation.

Before any dividend is paid to you for your debt or claim, you will need to give the deed administrator sufficient information to prove your debt. You may be required to complete a claim form (this is called a 'proof of debt' in a liquidation). You should attach copies of any relevant invoices or other supporting documents to the claim form, as your debt or claim may be rejected if there is insufficient evidence to support it.

If a creditor is a company, the claim form should be signed by a person authorised by the company to do so.

When submitting a claim, you may ask the deed administrator to acknowledge receipt of your claim and advise if any further information is needed.

If the deed administrator rejects your claim after you have taken the above steps, first contact the deed administrator. You may also wish to seek your own legal advice. This should be done promptly. Depending on the terms of the deed, you may have a limited time in which to take legal action to challenge the decision.

If you have a query about the timing of the payment, discuss this with the deed administrator.

How a deed comes to an end

A deed may come to an end because the obligations under the deed have all been fulfilled and the creditors have been paid. Alternatively, the deed may set out certain conditions where the deed will automatically terminate.

The deed may also provide that the company will go into liquidation if the deed terminates due to these conditions being met.

Another way for the deed to end is if the deed administrator calls a meeting of creditors, and creditors vote to end the deed. This may occur because it appears unlikely that the terms of the deed can be fulfilled.

At the same time, creditors may be asked to vote to put the company into liquidation.

The deed may also be terminated if a creditor, the company, ASIC or any other interested person applies to the court and the court is satisfied that:

- creditors were provided false and misleading information on which the decision to accept the deed proposal was made
- the voluntary administrator's report left out information that was material to the decision on accepting the deed proposal
- the deed cannot proceed without undue delay or injustice, or
- the deed is unfair or discriminatory to the interests of one or more creditors or against the interests of creditors as a whole.

If the court terminates the deed as a result of such an application, the company automatically goes into liquidation.

Approval of administrator's fees

Both a voluntary administrator and deed administrator are entitled to be paid for the work they perform. Generally, their fees will be paid from available assets, before any payments are made to creditors. They may have also arranged for a third party to pay any shortfall in their fees if there aren't enough assets.

The fees cannot be paid until the amount has been approved by a creditors' committee, creditors or the court. Creditors, the voluntary administrator/deed administrator or ASIC can ask the court to review the amount of fees approved.

If you are asked to approve fees, either at a meeting of a creditors' committee or in a general meeting of creditors, the voluntary administrator or deed administrator must give you, at the same time as the notice of the meeting, a report that contains sufficient information for you to

assess whether the fees claimed are reasonable. This report should be in simple language and set out:

- a description of the major tasks performed
- the costs of completing these tasks, and
- such other information that will assist in assessing the reasonableness of the fees claimed.

For further information, see ASIC's information sheet 'Approving fees: a guide for creditors'. If you are in any doubt about how the fees were calculated, ask for more information.

Apart from fees, the voluntary administrator and deed administrator are entitled to reimbursement for out-of-pocket expenses that have arisen in carrying out their administration. This reimbursement does not usually require approval.

Creditors' committee

A creditor's committee may be formed, following a vote of creditors, to consult with the voluntary administrator or deed administrator and receive reports on the conduct of their administration. A creditors' committee can also approve the administrator's fees.

In a voluntary administration, this committee is called a 'committee of creditors' and may be formed at the first creditors' meeting. While the company is under a deed of company arrangement, it is called a 'committee of inspection'.

All creditors, including a representative of the company's employees, are entitled to stand for committee membership to represent the interests of all creditors. However, to operate efficiently, the committee should not be too large.

If a creditor is a company, the creditor can nominate a director or employee to represent it on the committee.

Directors and voluntary administration

Directors cannot use their powers while the company is in voluntary administration. They must help the voluntary administrator, including providing the company's books and records, and a report about the company's business, property, affairs and financial circumstances, as well as any further information about these that the voluntary administrator reasonably requires.

If the company goes from voluntary administration into a deed of company arrangement, the directors' powers depend on the deed's terms. When the deed is completed, the directors regain full control, unless the deed provides for the company to go into liquidation on completion.

If the company goes from voluntary administration or a deed of company arrangement into liquidation, the directors cannot use their powers. If creditors resolve that the voluntary administration should end, control of the company goes back to the directors.

Queries and complaints

You should first raise any queries or complaints with the voluntary administrator or deed administrator. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a voluntary administrator or deed administrator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 75

Voluntary administration: a guide for employees

If a company is in financial difficulty, it can be put into voluntary administration.

This information sheet provides general information for employees of companies in voluntary administration. Employees should also read ASIC's 'Voluntary administration: a guide for creditors' information sheet.

Who is an employee?

You are likely to be classified as an employee if you are:

- engaged by a company under an award, Certified Agreement, Australian Workplace Agreement, or a contract of employment, and
- paid a salary, wages or commission.

Contractors are not employees. They are ordinary unsecured creditors of the company.

If you are an employee who is owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed in priority to the company's other creditors.

The purpose of voluntary administration

Voluntary administration is designed to resolve a company's future direction quickly. An independent and suitably qualified person (the voluntary administrator) takes full control of the company to try to work out a way to save either the company or its business.

If it isn't possible to save the company or its business, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation. A mechanism for achieving these aims is a deed of company arrangement.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

A voluntary administrator is usually appointed by a company's directors, after they decide that the company is insolvent or likely to become insolvent. Less commonly, a voluntary administrator may be appointed by a liquidator, provisional liquidator, or a secured creditor.

A secured creditor is someone who has a charge, such as a mortgage, over company assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan.

A company in voluntary administration may also be in receivership.

The voluntary administrator's role

After taking control of the company, the voluntary administrator investigates and reports to creditors on the company's business, property, affairs and financial circumstances, and on the three options available to creditors (including employees). These are:

- end the voluntary administration and return the company to the directors' control
- approve a deed of company arrangement through which the company will pay all or part of its debts and then be free of those debts, or
- wind up the company and appoint a liquidator.

The voluntary administrator must give an opinion on each option and recommend which option is in the best interests of creditors. In doing so, the voluntary administrator tries to work out the best solution to the company's problems, assesses any proposals put forward by others for the company's future, and compares the possible outcomes of the proposals with the likely outcome in a liquidation.

A creditors' meeting is usually held about 5 weeks after the company goes into voluntary administration to decide on the best option. In complex administrations, the meeting may be held later if the court consents. Employees are entitled to vote at creditors' meetings. You should lodge details of your claim with the voluntary administrator before the meeting to enable you to vote.

The voluntary administrator has all the powers of the company and its directors. This includes the power to sell or close down the company's business, or sell individual assets in the lead up to the creditors' decision on the company's future.

Another responsibility of the voluntary administrator is to report to ASIC on possible offences by people involved with the company.

Employee entitlements

If the voluntary administrator continues to trade the business, they must pay out of the assets available to them ongoing wages for services provided and other employee entitlements that arise after the date of their appointment. These payments are treated as an expense of the voluntary administration.

The appointment of a voluntary administrator does not automatically terminate the employment of the company's employees. As a result, unless the voluntary administrator adopts the employment contracts or enters into new contracts of employment with employees,

they are not personally liable for any employee entitlements that arise during voluntary administration.

As voluntary administration is an interim form of external administration, employee entitlements that arose prior to voluntary administration are not usually paid during voluntary administration.

How and when these employee entitlements are paid depends on the option passed at the creditors' meeting (i.e. company returned to directors, a deed of company arrangement, or liquidation).

Company returned to directors

If the company is returned to the directors, the directors will be responsible for ensuring that the company pays outstanding entitlements as they fall due. It is only in very rare circumstances that creditors will resolve to return the company to the control of its directors.

Deed of company arrangement

If creditors approve a deed of company arrangement, the priority in which outstanding employee entitlements are paid depends on the terms of the deed. Sometimes the deed proposal is for these entitlements to be paid in the same priority as in a liquidation. Other times, a different priority is proposed.

A deed of company arrangement must ensure that employees have the same priority as in a liquidation to be paid outstanding employee entitlements unless the eligible employees agree by a majority in both number and value to vary this priority.

This means that, in a deed of company arrangement, employees have the right, if there are funds left over after payment of the fees and expenses of the voluntary administrator and deed administrator, to be paid their outstanding entitlements in priority to other unsecured creditors.

Priority employee entitlements are grouped into classes and paid in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
- retrenchment pay.

Each class is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis. To find out more, see ASIC's 'Liquidation: a guide for employees' information sheet.

If a deed proposal seeks to vary the priority for employee entitlements, the voluntary administrator must call a meeting of eligible employees giving at least 5 business days notice of the meeting. They must give to creditors at the same time as the notice of meeting a statement setting out:

- their opinion about whether the proposed variation would result in the same or better outcome for employees than if the company went into liquidation
- their reasons for this opinion, and

- any other information to help them make an informed decision about varying the priority.

Before you make a decision on how to vote at the meeting of eligible employee creditors or the creditors' meeting where the decision is made whether or not to accept the deed of company arrangement proposal, make sure you understand how the deed will affect the priority of payment of your outstanding entitlements.

If you are employed by a company that went into voluntary administration on or after 1 November 2005, and which is now subject to a deed, you are not eligible for the General Employee Entitlements and Redundancy Scheme (GEERS) until and unless the company goes into liquidation.

If the liquidation has been preceded by a deed within 12 months of the liquidation, and the deed had a different priority for payment of outstanding employee entitlements to that in a liquidation, this will affect your ability to make a claim under GEERS.

You may wish to seek independent legal advice if the deed proposes a different priority to that in a liquidation, or if creditors approve such a deed.

For more on liquidation, refer to our related information sheets (listed below).

For more on GEERS, including eligibility where a voluntary administrator was appointed before 1 November 2005, visit www.workplace.gov.au/employeeentitlements or contact the Department of Employment and Workplace Relations on 1300 135 040 or email GEERS@dewr.gov.au.

If the deed provides for your ongoing employment, you may wish to seek advice on how this affects payment of your outstanding entitlements.

Liquidation

If creditors resolve that the company is to be wound up, the priority given to outstanding employee entitlements in a liquidation will apply.

Employees have the right, if there are funds left over after payment of the fees and expenses of the administrator and liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors.

The grouping of outstanding employee entitlements and order of payment in a liquidation is the same as discussed above.

To find out more, see ASIC's 'Liquidation: a guide for employees' information sheet.

You may also be entitled to make a claim under GEERS when the company enters into liquidation.

Establishing your claim under a deed of company arrangement

How claims are dealt with under a deed of company arrangement depends on the deed's terms. Sometimes the deed incorporates the *Corporations Act 2001* provisions for dealing with claims in a liquidation.

Regardless of the deed's terms, if the deed administrator must pay outstanding priority employee entitlements, they may advise you beforehand how much they believe you are owed. Contact the deed administrator promptly if you disagree with their calculation.

You may be required to complete an employee entitlement claim form (this is called a 'proof of debt' in a liquidation). In this case, contact the deed administrator's office to agree and settle the amount.

You may need to provide evidence to justify your claim. It is important that you keep your pay records or other records of the terms of your employment. You may also need these records to help you complete your income tax return and establish any entitlement to GEERS if the company proceeds to liquidation.

When submitting a claim, ask the deed administrator to acknowledge receipt of your claim and advise if any further information is needed.

If the deed administrator rejects your claim after you have taken the above steps, you may wish to seek your own legal advice. This should be done promptly. Depending on the terms of the deed, you may have a limited time in which to take legal action to challenge the decision. If you have a query about the timing of the payment, discuss this with the deed administrator.

For details on proving your claim in a liquidation, see ASIC's 'Liquidation: a guide for employees' information sheet.

Payment Summaries and Separation Certificates

Most employees require a PAYG Payment Summary (group certificate) to complete and lodge their income tax return. A Separation Certificate may also be required before an employee who loses their job can apply for social security.

If a voluntary administrator or deed administrator pays you any employee entitlements, they must provide you with a PAYG Payment Summary recording the entitlements paid and any income tax deducted. Contact the voluntary administrator or deed administrator to find out if they are going to prepare your PAYG Payment Summary for entitlements paid by the company prior to their appointment, and, if so, what period it will cover.

If you can't obtain a PAYG Payment Summary for any period, contact the Australian Taxation Office on 13 28 61 to find out how to meet your obligations.

A voluntary administrator and deed administrator must prepare a Separation Certificate for any employee whose employment is terminated during the voluntary administration or deed of company arrangement. They are not obliged to prepare one for terminations of employment that occurred prior to voluntary administration.

Contact Centrelink on 13 10 21 to find out what you should do if you can't obtain a Separation Certificate.

Creditors' committee

A creditors' committee may be formed to consult with the voluntary administrator or deed administrator, and receive reports on the conduct of their administration. In a voluntary

administration, this committee is called a 'committee of creditors'. While the company is under a deed of company arrangement, it is called a 'committee of inspection'.

Employees may wish to nominate a representative to be on the committee and have a say in matters that may impact on their interests.

Queries and complaints

You should first raise any queries or complaints with the voluntary administrator/deed administrator. If this fails to resolve your concerns, including any concerns about the administrator's conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a voluntary administrator or deed administrator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

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- Voluntary administration: a guide for creditors
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
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- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 45

Liquidation: a guide for creditors

If a company is in financial difficulty, its shareholders, creditors or the court can put the company into liquidation.

This information sheet provides general information for unsecured creditors of companies in liquidation.

Who is a creditor?

You are a creditor of a company if the company owes you money. Usually, a creditor is owed money because they have provided goods or services, or made loans to the company. An employee owed money for unpaid wages and other entitlements is also a creditor.

A person who may be owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company) is also a creditor, and is sometimes referred to as a 'contingent' creditor. There are generally two categories of creditor: secured and unsecured.

A secured creditor is someone who has a 'charge', such as a mortgage, over some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan.

An unsecured creditor is a creditor who does not have a charge over the company's assets.

Employees are a special class of unsecured creditors. In a liquidation, some of their outstanding entitlements are paid in priority to the claims of other unsecured creditors. If you are an employee, see ASIC's information sheet 'Liquidation: a guide for employees'.

All references in this information sheet to 'creditors' relate to unsecured creditors unless otherwise stated.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

The purpose of liquidation

The purpose of liquidation of an insolvent company is to have an independent and suitably qualified person (the liquidator) take control of the company so that its affairs can be wound up in an orderly and fair way for the benefit of all creditors.

There are two types of insolvent liquidation: creditors' voluntary and court. The most common type is a creditors' voluntary liquidation, which usually begins in one of two ways:

1. when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement, or
2. when an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator. Within 11 days of being appointed by shareholders, the liquidator must hold a meeting of creditors who may confirm the liquidator's appointment or appoint another liquidator of the creditors' choice.

In a court liquidation, a liquidator is appointed by the court to wind up a company, following an application, usually by a creditor. Others, including a director, a shareholder and ASIC, can also make a winding-up application.

After a company goes into liquidation, unsecured creditors can no longer commence or continue legal action against the company, unless the court permits.

It is possible for a company in liquidation to also be in receivership.

The liquidator's role

When a company is being liquidated because it is insolvent, the liquidator has a duty to all the company's creditors. The liquidator's role is to:

- collect, protect and realise the company's assets
- investigate and report to creditors about the company's affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- enquire into the failure of the company and possible offences by people involved with the company and report to ASIC
- after payment of the costs of the liquidation, and subject to the rights of any unsecured creditor, distribute the proceeds of realisation—first to priority creditors, including employees, and then to unsecured creditors, and
- apply for deregistration of the company on completion of the liquidation.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to do any work unless there are enough assets to pay their costs.

If the company is without sufficient assets, one or more creditors may agree to reimburse a liquidator's costs and expenses of taking action to recover further assets for the benefit of creditors.

In this case, if additional assets are recovered, the liquidator or particular creditor can apply to the court for the creditor to be compensated for the risk involved in funding the liquidator's recovery action.

If a liquidator suspects that people involved with the company may have committed offences and the liquidator reports this to ASIC, the liquidator may also be able to apply to ASIC for funding to carry out a further investigation into the allegations.

Recoveries from creditors

A liquidator has the ability to recover, for the benefit of all creditors, certain payments (known as unfair preferences) made by the company to individual creditors in the 6 months before the start of the liquidation.

Broadly, a creditor receives an unfair preference if, during the 6 months prior to liquidation, the company is insolvent, the creditor suspects the company is insolvent, and receives payment of their debt (or part of it) ahead of other creditors. To be an unfair preference, the payment must put the creditor receiving it in a more favourable position than other unsecured creditors.

Not all payments from the company to a creditor in the 6 months before liquidation are unfair preferences. The Corporations Act provides various defences to an unfair preference claim.

If a liquidator seeks to recover a payment that has been made to you, you may wish to obtain independent legal advice on the merits of the liquidator's claim before repaying any money.

Creditors' meetings

A liquidator may call a creditors' meeting from time to time to inform creditors of the progress of the liquidation, to find out their wishes on a particular matter or seek approval of the liquidator's fees.

You may also use a creditors' meeting to ask questions about the liquidation and inform the liquidator about your knowledge of the company's affairs.

In a court liquidation, the liquidator is not required to call a creditors' meeting unless a matter requires creditor approval.

The only exception is that if the creditors pass a resolution requiring a creditors' meeting to be called, or at least one-tenth in value of all the creditors request the liquidator in writing to do so, the liquidator must call a creditors' meeting. However, it is unusual for this to happen, as those who make the request or pass the resolution must pay the costs of calling and holding the meeting.

In a creditors' voluntary liquidation, the liquidator may choose to hold an annual meeting of the creditors or lodge a report with ASIC on the progress in the administration. If they choose not to hold the meeting, the liquidator must tell creditors that the report has been prepared and give them a copy free of charge if asked. The report must set out:

- an account of the liquidator's acts and dealings and the conduct of the winding up in the preceding year

- a summary of the tasks yet to be done in the liquidation, and
- an estimate of when the liquidation is expected to be finalised.

The liquidator in a creditors' voluntary winding up must also hold a joint meeting of the creditors and members at the end of the winding up. Creditors can require the liquidator to call a creditors' meeting at other times, the same as in a court liquidation, as long as they pay the associated costs.

The chairperson of a creditors' meeting (usually the liquidator or one of their senior staff) must prepare minutes of the meeting and a record of those who were present at the meeting and lodge them with ASIC within one month. A copy may be obtained from any ASIC Business Centre on payment of the relevant fee.

Voting at a creditors' meeting

To vote at a creditors' meeting you must lodge details of your debt or claim with the liquidator. Often, the liquidator will provide you with a form called a 'proof of debt' to be completed and returned before the meeting. Proofs of debt are discussed further below.

The chairperson of the meeting decides whether or not to accept the debt or claim for voting purposes. The chairperson may decide that a creditor does not have a valid claim or the amount of the debt cannot be determined with any certainty at the date of the meeting. In this case, they may not allow the creditor to vote at all, or only to vote for a debt of \$1. This decision is only for voting purposes. It is not relevant to whether a creditor will receive a dividend.

An appeal against a decision by the chairperson to accept or reject a proof of debt or claim for voting purposes may be made to the court within 14 days after the decision.

Voting by proxy

You may appoint a proxy to attend and vote at a meeting on your behalf. A proxy can be any person who is at least 18 years old. Creditors who are companies will have to nominate a person as proxy so that they can participate in the meeting. This is done using a form sent out with the notice of meeting. The completed proxy form must be provided to the liquidator before the meeting. You can fax the proxy form to the liquidator, but must lodge the original within 72 hours of sending the faxed copy.

An electronic form of proxy may be used if the liquidator allows electronic lodgement provided there is a way to authenticate the appointment of the proxy (e.g. by scanning and e-mailing a signature or using a digital signature).

You can specify on the proxy form how the proxy is to vote on a particular resolution and the proxy must vote in accordance with that instruction. This is called a 'special proxy'. Alternatively, you can leave it to the proxy to decide how to vote on each of the resolutions put before the meeting. This is called a 'general proxy'.

You can appoint the chairperson to represent you either through a special or general proxy. The liquidator or one of their partners or employees must not use a general proxy to vote in favour of a resolution approving payment of the liquidator's fees.

Manner of voting

A vote on any resolution put to a creditors' meeting may be taken by creditors stating aloud their agreement or disagreement, or by a show of hands. Sometimes a more formal voting procedure called a 'poll' is taken.

If voting is by show of hands or by verbally signalling agreement, the resolution is passed if a majority of those present indicate agreement. It is up to the chairperson to decide if this majority has been reached.

After the vote, the chairperson must tell those present whether the resolution has been passed or lost.

The chairperson may decide to conduct a poll, or a poll can be demanded by at least two people present who are entitled to vote, or someone who holds more than 10% of the votes of those entitled to vote at the meeting. The chairperson will determine how this poll is taken.

If you intend to demand that a poll be taken, you must do so before, or as soon as, the chairperson has declared the result of a vote taken by show of hands or voices.

When a poll is conducted, a resolution is passed if:

- more than half the number of creditors who are voting (in person or by proxy) vote in favour of the resolution, and
- those creditors who are owed more than half of the total debt owed to creditors at the meeting vote in favour of the resolution.

This is referred to as a 'majority in number and value'. If no result is reached, the chairperson has a casting vote.

Chairperson's casting vote

When a poll is taken and there is a deadlock, the chairperson may use their casting vote either in favour of or against the resolution. The chairperson may also decide not to use their casting vote.

The chairperson must inform the meeting, and include in the written minutes of meeting that are lodged with ASIC, of the reasons why they cast the vote a particular way or why they chose not to use their casting vote.

If you are dissatisfied with how the chairperson exercised their casting vote or failed to use their casting vote, you may apply to court for a review of the chairperson's decision. The court may vary or set aside the resolution or order that the resolution is taken to have been passed.

Votes of related creditors

Directors and shareholders, their spouses and relatives and other entities controlled by them are entitled to attend and vote at creditors' meetings if they are creditors of the company.

If a resolution is passed, or defeated, based on the votes of these related creditors, and you are dissatisfied with the outcome, you may apply to court for the resolution to be set aside and/or for a fresh resolution to be voted on without related creditors being entitled to vote. Certain

criteria must be met before the court will make such an order (e.g. the original result of the vote being against the interests of all or a class of creditors).

Committee of inspection

In both types of liquidation, the liquidator may ask creditors if they wish to appoint a committee of inspection and, if so, who will represent the creditors on the committee.

A committee of inspection assists the liquidator, approves fees and, in limited circumstances, approves the use of some of the liquidator's powers, on behalf of all the creditors.

Committee meetings can be arranged at short notice, which allows the liquidator to quickly obtain the committee's views on urgent matters. Shareholders may also be members of the committee.

At the first meeting in a creditors' voluntary liquidation, creditors can decide to appoint a committee of inspection.

Creditors in both types of liquidation can also request at any time that the liquidator call separate meetings of shareholders and creditors to decide whether a committee of inspection should be appointed and, if so, who will represent the shareholders and creditors on the committee. This doesn't usually happen, as the creditor making the request must pay the costs of calling and holding these meetings.

A member of the committee of inspection must not, without permission from the court, accept a gift or benefit from the company or any other person, including another creditor, or purchase any of the company's property.

A committee of inspection acts by a majority in number of its members present at a meeting, but it can only act if a majority of its members attend.

A liquidator must consider any directions given by the committee of inspection, but is not bound to follow them.

Minutes of committee of inspection meetings must be prepared and lodged with ASIC within one month. A copy may be obtained from any ASIC Business Centre on payment of the relevant fee.

Approval of liquidator's fees

A liquidator is entitled to be paid for the work carried out on the liquidation, but only if there are assets available. The liquidator cannot be paid until the amount of fees has been approved by one of the methods set out in the Corporations Act.

In a court liquidation, the amount of fees is approved by:

- agreement with a committee of inspection (if there is one), or
- a resolution passed at a creditors' meeting, or
- the court.

The liquidator must try to get approval by each of these methods, in turn.

In a creditors' voluntary liquidation, a committee of inspection or creditors may approve the fees.

If no fees have been approved in a court liquidation or a creditors' voluntary winding up, the liquidator may draw fees to a maximum of \$5000 where they have called a meeting of creditors but not obtained approval for their fees because the meeting did not have a quorum.

The court has the power to review the amount of fees approved.

If you are asked to approve fees, either at a meeting of a committee of inspection or in a general meeting of creditors, the liquidator must give you, at the same time as the notice of the meeting, a report that contains sufficient information for you to assess whether the fees claimed are reasonable. This report should be in simple language and set out:

- a description of the major tasks performed
- the costs of completing these tasks, and
- such other information that will assist in assessing the reasonableness of the fees claimed.

For further information, see ASIC's information sheet 'Approving fees: a guide for creditors'.

If you are in any doubt about how the fees were calculated, ask the liquidator for more information.

In a court liquidation, the liquidator must also send creditors a statement of all receipts and payments for the liquidation.

Apart from fees, the liquidator will also be entitled to reimbursement for out-of-pocket expenses that have arisen in carrying out the liquidation. This reimbursement does not require committee, creditor or court approval. However, creditors have a right to know what funds were spent on these costs and why they were spent.

Payment of dividends

If there are funds left over after payment of the costs of the liquidation, and payments to other priority creditors, including employees, the liquidator will pay these to unsecured creditors as a dividend. Generally, the order in which funds are distributed is:

- costs and expenses of the liquidation, including liquidators' fees
- outstanding employee wages and superannuation
- outstanding employee leave of absence (including annual leave, sick leave—where applicable—and long service leave)
- employee retrenchment pay, and
- unsecured creditors.

Each category is paid in full before the next category is paid. If there are insufficient funds to pay a category in full, the available funds are paid on a pro rata basis.

Proving your debt

Before any dividend is paid to you for your debt or claim, you will need to give the liquidator sufficient information to prove your debt.

The liquidator will notify you if there are likely to be funds available for distribution and must call for formal proof of debt forms to be lodged. At least 14 days notice of the deadline for lodging the proof must be given.

This notice must be given to each person claiming to be a creditor whose debt or claim has not already been admitted by the liquidator. It must also be published in a daily newspaper in the states where the company carried out its business. A copy of the formal proof of debt form will be sent to you with the notice.

You should attach copies of any relevant invoices or other supporting documents to the proof of debt form, as your debt or claim may be rejected if there is insufficient evidence to support it.

If a creditor is a company, the proof of debt form must be signed by a person authorised by the company to do so.

The completed proof of debt form must be delivered or posted to the liquidator. When submitting your claim, ask the liquidator to acknowledge receipt of your claim and advise if any further information is needed.

The liquidator must notify you within 7 days if they reject your claim. If you are dissatisfied with the decision, your first step should be to promptly contact the liquidator to see if you can resolve the matter.

If you can't resolve the matter with the liquidator, you may wish to seek your own legal advice, as you have a limited time to appeal to the court. The liquidator will notify you of this time in the notice of rejection. It must be at least 14 days after you receive the notice. The court has the power to extend the time to appeal. If you don't appeal within this time, the liquidator's decision on your claim is final.

If you have a query regarding the calculation of your claim, or the timing of the payment, discuss this with the liquidator.

Other creditor rights

As well as the various rights involving meetings and participation in dividends discussed above, the other rights of unsecured creditors include the right to:

- receive written reports to creditors about the liquidation
- inspect certain books of the liquidator
- inform the liquidator about your knowledge of matters relevant to the affairs of the company in liquidation, and
- complain to ASIC or the court about the liquidator's conduct in connection with their duties.

Written reports

The number of written reports a liquidator sends to creditors about the liquidation varies. If there are no funds at all available in the liquidation, it is possible that no written report will be sent, although many liquidators will send creditors a brief report even if there are no funds.

Liquidator's books

Liquidators must keep sufficient books to give a complete and correct record of their administration of the company's affairs. These include minutes of meetings and details of all the receipts and payments for the liquidation. These books must be available at the liquidator's office for inspection by creditors and shareholders.

Copies of minutes of meetings and 6-monthly detailed lists of receipts and payments, as well as a number of other documents, must also be lodged with ASIC. Copies may be obtained from any ASIC Business Centre on payment of the relevant fee.

Creditors are unable to access the company's books and records without court permission.

Informing the liquidator

The liquidator must report to ASIC if they suspect that anyone connected to the company may have committed an offence. If you have any information that might assist in preparing such a report, you should let the liquidator know.

These reports are not available for inspection. ASIC reviews these reports and decides whether to take further action, such as banning a person from acting as a company director for a period of time or charging the person with a criminal offence.

Applications to the court

Creditors can apply to the court if they are dissatisfied with an act, omission or decision of a liquidator. This includes if a creditor seeks:

- to challenge the liquidator's decision not to admit a proof of debt or claim, either for voting or dividend purposes, and
- a review of the liquidator's fees, in certain circumstances.

Making an application to the court can be costly. You should attempt to resolve any problems with the liquidator and only go to court if this fails.

Liquidators, ASIC and other people can also make applications to the court. For example, a liquidator might apply to have questions decided or powers exercised in a liquidation.

Complaining to ASIC about a liquidator's conduct is discussed below.

Secured creditors' rights

If a company fails to meet its obligations under a charge (e.g. mortgage), a secured creditor can appoint an independent and suitably qualified person (a receiver) to take control of and realise some or all of the charged assets, in order to repay the secured creditor's debt. This right continues after the company goes into liquidation. For more on receivership, see ASIC's information sheet 'Receivership: a guide for creditors'.

Another option available to a secured creditor is to ask the liquidator to deal with the secured assets for them and account to them for the proceeds and costs of collecting and selling those assets.

A secured creditor is entitled to vote at creditors' meetings for the amount the company owes them that exceeds the amount they are likely to receive from realisation of the charged assets. The secured creditor can participate in any dividend to unsecured creditors on a similar basis.

Directors and liquidation

Directors cannot use their powers after a liquidator has been appointed. They have an obligation to assist the liquidator by:

- advising the liquidator of the location of company property and delivering any such property in their possession to the liquidator
- providing the company's books and records to the liquidator
- advising the liquidator of the whereabouts of other company records
- providing a written report about the company's business, property and financial circumstances within 14 days of the appointment of the liquidator by the court or within 7 days of the appointment of a liquidator in a creditors' voluntary liquidation
- meeting with, or reporting to, the liquidator to help them with their enquiries, as reasonably required, and
- if required by the liquidator, attending a creditors' meeting to provide information about the company and its business, property, affairs and financial circumstances.

A liquidator has the power to apply to the court to conduct a public examination, under oath, of a director (or other person with information about the company).

Compensation proceedings for amounts lost by creditors as a result of the company trading while insolvent can be initiated against a director personally by ASIC, a liquidator or, in certain circumstances, a creditor.

Conclusion of liquidation

A liquidation effectively comes to an end when the liquidator has realised and distributed all the company's available property and made their report to ASIC.

In a creditors' voluntary liquidation, the liquidator must hold a final joint meeting of the creditors and members to give an account of how the liquidation has been conducted and how company property has been disposed of. After the final meeting is held, the company is automatically deregistered by ASIC 3 months after a return of the holding of the meeting is lodged.

In a court liquidation, the liquidator is not required to hold a final meeting of creditors. After the liquidator decides that the company's affairs are fully wound up, they may:

- seek an order for release from the court
- seek an order for release and that ASIC deregister the company, or
- if there are insufficient assets to obtain a court order for the company's deregistration, request that ASIC deregister the company.

A company ceases to exist after it has been deregistered.

Queries and complaints

You should first raise any queries or complaints with the liquidator. If this fails to resolve your concerns, including any concerns about the liquidator's conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a liquidator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

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- Voluntary administration: a guide for employees
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 46

Liquidation: a guide for employees

If a company is in financial difficulty, its shareholders, creditors or the court can put the company into liquidation.

This information sheet provides general information for employees of companies in liquidation. Employees should also read ASIC's 'Liquidation: a guide for creditors' information sheet.

Who is an employee?

You are likely to be classified as an employee if you are:

- engaged by a company under an award, Certified Agreement, Australian Workplace Agreement, or a contract of employment, and
- paid a salary, wages or commission.

Contractors are not employees. They are ordinary unsecured creditors of the company.

If you are an employee who is owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed in priority to the company's other creditors.

The purpose of liquidation

The purpose of liquidation of an insolvent company is to have an independent and suitably qualified person (the liquidator) take control of the company so that its affairs can be wound up in an orderly and fair way for the benefit of creditors.

There are two types of insolvent liquidation: creditors' voluntary and court. The most common type is a creditors' voluntary liquidation, which usually begins in one of two ways:

1. when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement, or

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

2. when an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator. Within 11 days of being appointed by shareholders, the liquidator must hold a meeting of creditors who may confirm the liquidator's appointment or appoint another liquidator of the creditors' choice.

In a court liquidation, a liquidator is appointed by the court to wind up a company, following an application, usually by a creditor. Others, including a director, a shareholder and ASIC, can also make a winding-up application.

It is possible for a company in liquidation to also be in receivership.

The liquidator's role

When a company is being liquidated because it is insolvent, the liquidator has a duty to all the company's creditors. Their role is to:

- collect, protect and realise the company's assets
- investigate and report to creditors about the company's affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- enquire into the failure of the company and possible offences by people involved with the company and report to ASIC
- after payment of the costs of the liquidation, and subject to the rights of any secured creditor, distribute the proceeds of realisation—first to priority creditors, including employees, and then to other unsecured creditors, and
- apply for deregistration of the company on completion of the liquidation.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to do any work unless there are enough assets to pay their costs.

Employee entitlements

In most cases, the liquidation of a company terminates the employment of employees.

Employees have the right, if there are funds left over after payment of the fees and expenses of the liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors. Priority employee entitlements are grouped into classes and paid in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
- retrenchment pay.

Each class is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis.

The priority claims of directors and their spouses or relatives for the period they are a director, spouse or relative of a director are limited to a maximum of \$2000 for outstanding wages and

superannuation, and \$1500 for outstanding leave entitlements. Directors and their spouses or relatives are not entitled to any priority retrenchment pay for the period they are a director, spouse or relative of a director.

Employees may also be entitled to make a claim against the General Employee Entitlements and Redundancy Scheme—that is, GEERS (see below).

If the liquidator continues to trade the business for a short period to help in the winding up, employee entitlements accruing during this period (on terms agreed with the liquidator) are paid out of available assets as a cost of the winding up and before other outstanding employee entitlements.

Employee entitlement proceedings

It is an offence for anyone to enter into an agreement or transaction with the intention of avoiding employee entitlements of a company.

If the company is in liquidation and the employees suffer damage or loss as a result of a person entering into such an agreement or transaction, that person is liable to pay compensation for the loss suffered. Employees have priority to any compensation recovered by a liquidator.

If you believe such an offence has been committed, tell the liquidator. You can also make a complaint to ASIC (see below).

Proving your claim

Before any amount is paid to you for your outstanding entitlements, you will need to give the liquidator sufficient information to prove your debt. The relevant form is called a 'proof of debt', and can be obtained from the liquidator.

The liquidator will notify you if there are likely to be funds available for distribution and will call for proofs of debt to be lodged.

The liquidator may be able to tell you what the company records state is owed to you. However, as the records of a company in liquidation are often not well maintained, it is important that you keep your pay records or other records of the terms of your employment. You may also need these records to help you complete your income tax return and establish your entitlement to GEERS.

If there is insufficient information to justify your claim, it may be rejected.

When submitting your claim, ask the liquidator to acknowledge receipt of your claim and advise if any further information is needed.

If you have a query regarding the calculation of your claim, or the timing of the payment, discuss this with the liquidator.

If the liquidator rejects your claim and you are dissatisfied with the decision, your first step should be to promptly contact the liquidator to see if you can resolve the matter. If you can't, you have a limited time to appeal to the court. The liquidator will notify you of this time in the notice of rejection. It must be at least 14 days after you receive the notice. The court has

the power to extend the time to appeal. If you don't appeal within this time, the liquidator's decision on your claim is final.

A liquidator may also ask you to submit a proof of debt for the purposes of voting at a creditors' meeting.

GEERS

GEERS is a basic payment scheme administered by the Department of Employment and Workplace Relations (DEWR), in accordance with the GEERS Operational Arrangements. Employees may be eligible for assistance under GEERS if they:

- lost their employment because their former employer had a liquidator appointed
- are owed certain employee entitlements, and
- lodge their claim within 12 months of the date they lost their job or the date their former employer went into liquidation, whichever is the latest.

Assistance is not available if:

- the former employer is under the control of an administrator, receiver and manager, or is subject to a deed of company arrangement or a creditors' trust.
- the claimant was not an employee (i.e. they were a contractor, sub-contractor or an agent), or
- funds will be available from the insolvent company to pay outstanding entitlements within 16 weeks of DEWR receiving a GEERS claim.

Under the scheme, employees may be eligible to receive payment for eligible entitlements that are provided for in legislation, an award, a statutory agreement (such as an Australian Workplace Agreement or Collective Agreement) or a written contract of employment, or otherwise evidenced in writing, for amounts outstanding for:

- unpaid and underpaid wages in the three-month period prior to the appointment of the insolvency practitioner
- unpaid annual leave
- unpaid long service leave
- unpaid pay in lieu of notice, and
- unpaid capped redundancy pay.

Under GEERS, directors and their spouses or relatives may be eligible for a maximum of \$2000 for unpaid wages, and \$1500 in total for annual leave and long service leave. They are not entitled to payment in lieu of notice or redundancy pay.

Employees who earn more than the GEERS maximum annual wage at the date that their employment was terminated will have their GEERS advance calculated as if they earned that limit. The maximum annual wage is indexed annually.

GEERS advances are treated as advances under the *Corporations Act 2001* (Corporations Act). This means that if funds become available during the insolvency process, DEWR will

seek to recover payments from the insolvent employer up to the amounts employees received under GEERS.

Any GEERS advance may affect your entitlement to a government allowance provided by Centrelink. To discuss the effect of GEERS, Centrelink can be contacted on 13 10 21.

For more on GEERS, visit the Australian Workplace website at www.workplace.gov.au/geers or contact DEWR on 1300 135 040 or email GEERS@dewr.gov.au.

Payment Summaries and Separation Certificates

Most employees require a PAYG Payment Summary (group certificate) to complete and lodge their income tax return. A Separation Certificate may also be required before an employee who loses their job can apply for social security.

If a liquidator pays you any employee entitlements, they must provide you with a PAYG Payment Summary recording the entitlements paid and any income tax deducted. Contact the liquidator to find out if they are going to prepare your PAYG Payment Summary for entitlements paid by the company prior to their appointment and, if so, what period it will cover. The liquidator is not obliged to prepare this.

If you can't obtain a PAYG Payment Summary for any period, contact the Australian Taxation Office on 13 28 61 to find out how to meet your obligations.

Also contact the liquidator to find out if they are going to prepare your Separation Certificate. Contact Centrelink on 13 10 21 to find out what you should do if you can't obtain a Separation Certificate.

Committee of inspection

In a liquidation, a creditors' committee, called a 'committee of inspection', may be formed to assist the liquidator, approve their fees and, in limited circumstances, approve the use of some of their powers. Employees may wish to nominate a representative to be on this committee and have a say in matters that may impact on their interests.

Queries and complaints

You should first raise any queries or complaints with the liquidator. If this fails to resolve your concerns, including any concerns about the liquidator's conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a liquidator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

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ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 54

Receivership: a guide for creditors

If a company is in financial difficulty, a secured creditor or the court may put the company into receivership.

This information sheet provides general information for unsecured creditors of companies in receivership.

Who is a creditor?

You are a creditor of a company if the company owes you money. Usually, a creditor is owed money because they have provided goods or services, or made loans to the company. An employee owed money for unpaid wages and other entitlements is also a creditor.

A person who may be owed money by the company if a certain event occurs (e.g. if they succeed in a legal claim against the company) is also a creditor, and is sometimes referred to as a 'contingent' creditor. There are generally two categories of creditor: secured and unsecured.

A secured creditor is someone who has a 'charge', such as a mortgage, over some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan. Charges over many types of assets are required to be registered with ASIC. You can find out if a company has a registered charge from ASIC's Companies Register and obtain a copy of the registered charge, on payment of the relevant fee.

An unsecured creditor is a creditor who does not have a charge over the company's assets.

Employees are a special class of unsecured creditors. In a receivership, in certain circumstances, some of their outstanding entitlements are paid in priority to the debt of the secured creditor. If you are an employee, see ASIC's information sheet 'Receivership: a guide for employees'.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

The purpose of receivership

A company goes into receivership when an independent and suitably qualified person (the receiver) is appointed by a secured creditor, or in special circumstances by the court, to take control of some or all of the company's assets. (Court receiverships are not covered in this information sheet.)

The charge, or security, held by the secured creditor under which the appointment of a receiver is made may be:

- a fixed charge over particular assets of the company (e.g. land, plant and equipment), and/or
- a floating charge over assets that are used and disposed of in the course of normal trading operations (e.g. debtors, cash and stock).

The powers of the receiver are set out in the charge document and the *Corporations Act 2001* (Corporations Act).

If a receiver has, under the terms of their appointment, the power to manage the company's affairs, they are known as a receiver and manager.

It is possible for a company in receivership to also be in provisional liquidation, liquidation, voluntary administration or subject to a deed of company arrangement.

The receiver's role

The receiver's role is to:

- collect and sell enough of the charged assets to repay the debt owed to the secured creditor (this may include selling assets or the company's business)
- pay out the money collected in the order required by law, and
- report to ASIC any possible offences or other irregular matters they come across.

The receiver's primary duty is to the company's secured creditor. The main duty owed to unsecured creditors is an obligation to take reasonable care to sell charged property for not less than its market value or, if there is no market value, the best price reasonably obtainable. A receiver also has the same general duties as a company director.

The receiver has no obligation to report to unsecured creditors about the receivership, either by calling a meeting or in writing. However, the receiver will usually write to all of the company's suppliers to inform them of their appointment. Unsecured creditors are not entitled to see the receiver's reports to the secured creditor.

A detailed list of the receiver's receipts and payments for the receivership must be lodged with ASIC every 6 months. Copies of these detailed lists of receipts and payments may be obtained from any ASIC Business Centre, on payment of the relevant fee.

Distribution of money

The most common way a receiver will obtain money from the assets they are appointed over is to sell them. In the case of a company's business, the receiver may continue to trade the business until they sell it as a going concern.

The money from the realisation of assets must be distributed as follows:

- money from the sale of fixed charge assets is paid to the secured creditor after the costs and fees of the receiver in collecting this money have been paid, and
- money from the sale of floating charge assets is paid out as follows: first, the receiver's costs and fees in collecting this money; second, certain priority claims, including employee entitlements (if the liability for these hasn't been transferred to a new owner); and, third, repayment of the secured creditor's debt.

In both cases, any funds left over are paid to the company or its other external administrator, if one has been appointed.

If the receiver is appointed under both fixed and floating charges, which is common, there will be costs and fees of the receivership that cannot be directly allocated to realising the fixed or floating charge assets. These costs are allocated in proportion to the fixed and floating realisation amounts.

If employee entitlements are to be paid by the receiver under a floating charge, the payments must be made in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave, sick leave—where applicable—and long service leave), and
- retrenchment pay.

Each class of entitlement is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis.

The receiver has no obligation to pay any other unsecured creditors for outstanding pre-appointment debts.

Purchases of goods and services by receiver

Any debts that arise from the receiver authorising the purchase of goods or services during the receivership are paid from asset realisations as costs of the receivership. If there are insufficient funds available from asset realisations to pay these costs, the receiver is personally liable.

To have the benefit of this protection, you should ensure you receive a purchase order authorised in the manner advised by the receiver.

If the receiver continues to use, occupy or hold property owned by another party that is in the company's possession or occupied by the company, they are personally liable for any rent or amounts payable arising after 7 days from the beginning of the receivership. The receiver can avoid this liability by informing the other party within 7 days from their appointment that they don't intend to use the property.

Pre-existing contracts

The appointment of a receiver does not automatically terminate pre-receivership contracts with the company. If you have such a contract, you may wish to seek legal advice, as the law

in this area is complex. It is possible for the contract to remain current without the receiver having personal liability for the company's obligations under the contract.

Receiver's fees

The receiver is generally entitled to be paid their fees from the money realised from the charged assets. How the fees are calculated is usually set out in the charge document and appointment document. Unsecured creditors have no role in setting or approving the receiver's fees.

ASIC, a liquidator, voluntary administrator or deed administrator of the company may apply to the court for the receiver's remuneration to be reviewed.

Other implications for unsecured creditors

Legal action may be commenced or continued against the company despite the appointment of a receiver. This means that an unsecured creditor can apply to the court to have the company put into liquidation on the basis of an unpaid debt. Reasons you might wish to do this, particularly if the company owes you a large amount, include:

- an expectation that there will be money or property left over after realisation of the charged assets and payments by the receiver
- possible recoveries that may be available to a liquidator for the benefit of unsecured creditors, which are not available to a receiver
- a desire for a liquidator to investigate potential offences by those associated with the company, or
- the ability of the liquidator to review the validity of the appointment of the receiver and of the charge, and to monitor the progress of the receivership.

Surplus property

If there are any assets or money left over when the receivership is complete, they will be returned to the company (and therefore the control of the company's directors) unless a liquidator or another external administrator is appointed.

If a liquidator is appointed, they must carry out the liquidation for the benefit of all unsecured creditors. For more on liquidation, see ASIC's information sheet 'Liquidation: a guide for creditors'.

Recoveries available to a liquidator

Recoveries that may be available to a liquidator for the benefit of unsecured creditors, and which are not available to a receiver, include:

- recovery of payments (unfair preferences) made by the company to individual creditors in the 6 months prior to liquidation that put those creditors in a more favourable position than other unsecured creditors
- recoveries from setting aside uncommercial transactions entered into by the company, and
- compensation from directors for amounts lost by creditors as a result of the company trading while insolvent.

Investigation by liquidator

Although a receiver must report to ASIC on any possible offences or irregularities they come across, they don't have a specific duty to investigate and report on the affairs of the company generally.

A liquidator will usually carry out a more detailed investigation on behalf of all unsecured creditors. This investigation into the company's affairs looks into reasons for the failure of the company, what assets may be recoverable for the benefit of unsecured creditors, as well as possible offences.

The liquidator must lodge a report with ASIC if they believe that offences may have been committed or that the company may be unable to pay ordinary unsecured creditors a dividend of more than 50 cents in the dollar. ASIC may take action based on these reports. This includes, in certain circumstances, action to ban a person as a director if that person has been a director of two or more companies that have gone into liquidation. Similar grounds for banning a person as a director do not apply to directors of companies that have only gone into receivership.

Review of receivership

If a liquidator is appointed over a company in receivership, they will review the validity of the charge and of the appointment of the receiver.

A liquidator is usually also better placed than individual unsecured creditors to monitor the progress of the receivership and report back to all unsecured creditors.

Directors and receivership

Receivership does not affect the legal existence of the company. The directors continue to hold office, but their powers depend on the powers of the receiver and the extent of the assets over which the receiver is appointed.

Control of the charged property, which often includes the company's business, is taken away from the directors.

Directors must provide the receiver with a report about the company's affairs and must allow the receiver access to books and records relating to the charged property.

Conclusion of receivership

A receivership usually ends when the receiver has collected and sold all of the assets or enough assets to repay the secured creditor, completed all their receivership duties and paid their receivership liabilities. Generally, the receiver resigns or is discharged by the secured creditor. Unless another external administrator has been appointed, full control of the company and any remaining assets goes back to the directors.

Queries and complaints

You should first raise any queries or complaints with the receiver. If this fails to resolve your concerns, including any concerns about the receiver's conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a receiver. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 56

Receivership: a guide for employees

If a company is in financial difficulty, a secured creditor or the court may put the company into receivership.

This information sheet provides general information for employees of companies in receivership. Employees should also read ASIC's 'Receivership: a guide for creditors' information sheet.

Who is an employee?

You are likely to be classified as an employee if you are:

- engaged by a company under an award, Certified Agreement, Australian Workplace Agreement, or a contract of employment, and
- paid a salary, wages or commission.

Contractors are not employees. They are ordinary unsecured creditors of the company.

If you are an employee who is owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed in priority to the company's other creditors.

The purpose of receivership

A company goes into receivership when an independent and suitably qualified person (the receiver) is appointed by a secured creditor, or in special circumstances by the court, to take control of some or all of the company's assets. (Court receiverships are beyond the scope of this information sheet.)

A secured creditor is someone who has a 'charge', such as a mortgage, over some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan. The charge, or security, held may be:

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

- a fixed charge over particular assets of the company (e.g. land, plant and equipment), and/or
- a floating charge over assets that are used and disposed of in the course of normal trading operations (e.g. debtors, cash and stock).

The powers of the receiver are set out in the charge document and the *Corporations Act 2001* (Corporations Act).

If a receiver has, under the terms of their appointment, the power to manage the company's affairs, they are known as a receiver and manager.

It is possible for a company in receivership to also be in provisional liquidation, liquidation, voluntary administration or subject to a deed of company arrangement.

The receiver's role

The receiver's role is to:

- collect and sell enough of the charged assets to repay the debt owed to the secured creditor (this may include selling assets or the company's business)
- pay out the money collected in the order required by law, and
- report to ASIC any possible offences or other irregular matters they come across.

The receiver's primary duty is to the company's secured creditor. The main duty owed to unsecured creditors is an obligation to take reasonable care to sell charged property for not less than its market value or, if there is no market value, the best price reasonably obtainable. A receiver also has the same general duties as a company director.

The receiver has no obligation to report to unsecured creditors, including employees, about the receivership. If the receiver continues to trade the business, they must pay out of the company assets available to them, ongoing employee wages for services provided and other employee entitlements that arise after the date of appointment. These payments are treated as an expense of the receivership.

The appointment of a receiver and manager does not automatically terminate the employment of the company's employees. As a result, unless the receiver adopts the employment contracts or enters into new contracts of employment with employees, they are not personally liable for any employee entitlements that arise during the receivership.

If the company's business is sold by the receiver as a going concern, it may be that most, if not all, of the company's employees will keep their jobs. In this case, it is usual for the new owner to take over the company's liability for outstanding employee entitlements. You should seek advice about how the terms of the proposed sale of the business affect the payment of your entitlements.

If there are insufficient funds to pay all creditors in full, the money from the realisation of assets must be distributed as follows:

- money from the sale of fixed charge assets is paid to the secured creditor after the costs and fees of the receiver in collecting this money have been paid, and

- money from the sale of floating charge assets is paid out as follows: first, the receiver's costs and fees in collecting this money; second, certain priority claims, including employee entitlements (if the liability for these hasn't been transferred to a new owner); and, third, repayment of the secured creditor's debt.

In both cases, any funds left over are paid to the company or its external administrator, if one has been appointed.

If the receiver is appointed under both fixed and floating charges, which is common, there will be costs and fees of the receivership that cannot be directly allocated to realising the fixed or floating charge assets. These costs are allocated in proportion to the fixed and floating realisation amounts.

If employee entitlements are to be paid by the receiver under a floating charge, the payments must be made in the following order:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
- retrenchment pay.

Each class of entitlement is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis.

The priority claims of directors and their spouses or relatives for the period they are a director, spouse or relative of a director are limited to a maximum of \$2000 for outstanding wages and superannuation, and \$1500 for outstanding leave entitlements. Directors and their spouses or relatives are not entitled to any priority retrenchment pay for the period they are a director, spouse or relative of a director.

If you are employed by a company that is in receivership, and the receiver was appointed on or after 1 November 2005, you are not eligible for the General Employee Entitlements and Redundancy Scheme (GEERS) until and unless the company enters liquidation.

For more on liquidation, refer to our related information sheets. For more on GEERS, including eligibility if a receiver was appointed before 1 November 2005, visit www.workplace.gov.au/employeeentitlements or contact the Department of Employment and Workplace Relations on 1300 135 040 or email GEERS@dewr.gov.au.

Establishing your claim

If a receiver must pay outstanding priority employee entitlements, they may advise you beforehand how much they believe you are owed. Promptly contact the receiver if you disagree with their calculation.

You may be required to complete an employee entitlement claim form. In this case, you should contact the receiver's office to agree and settle the amount.

You may need to provide evidence to justify your claim. It is important that you keep your pay records or other records of the terms of your employment. You may also need these

records to help you complete your income tax return and establish any entitlement to GEERS if the company enters liquidation.

When submitting a claim, ask the receiver to acknowledge receipt of your claim and advise if any further information is needed.

If the receiver rejects your claim after you have taken the above steps, seek legal advice. If you have a query about the timing of the payment, discuss this with the receiver.

Payment Summaries and Separation Certificates

Most employees require a PAYG Payment Summary (group certificate) to complete and lodge their income tax return. A Separation Certificate may also be required before an employee who loses their job can apply for social security.

If a receiver pays you any employee entitlements, they must provide you with a PAYG Payment Summary recording the entitlements paid and any income tax deducted. Contact the receiver to find out if they are going to prepare your PAYG Payment Summary for entitlements paid by the company prior to their appointment and, if so, what period it will cover. If you can't obtain a PAYG Payment Summary for any period, contact the Australian Taxation Office on 13 28 61 to find out how to meet your obligations.

A receiver must prepare a Separation Certificate for any employee whose employment is terminated during the receivership. They are not obliged to prepare one for terminations that occurred prior to the receivership.

Contact Centrelink on 13 10 21 to find out what you should do if you can't obtain a Separation Certificate.

Queries and complaints

You should first raise any queries or complaints with the receiver. If this fails to resolve your concerns, including any concerns about the receiver's conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by a receiver. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 43

Insolvency: a guide for shareholders

If a company is in financial difficulty, it can be put under the control of an independent external administrator. The role of the external administrator depends on the type of external administration.

This information sheet gives general information for shareholders on the three most common forms of external administration (liquidation, voluntary administration and receivership). Other forms of external administration are beyond the scope of this information sheet.

Liquidation

There are two types of liquidation for an insolvent company: creditors' voluntary and court. The most common type is a creditors' voluntary liquidation, which usually begins in one of two ways:

1. when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement, or
2. when an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator. Within 11 days of being appointed by shareholders, the liquidator must hold a meeting of creditors who may confirm the liquidator's appointment or appoint another liquidator of the creditors' choice.

In a court liquidation, a liquidator is appointed by the court to wind up a company following an application, usually by a creditor.

The liquidator's role

The liquidator's role is to:

- collect, protect and realise the company's assets
- investigate and report to creditors about the company's affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- enquire into the failure of the company and possible offences by people involved in the company and report to ASIC

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

- after payment of the costs of the liquidation, and subject to the rights of any secured creditor, distribute the proceeds of realisation—first to priority creditors, including employees, and then to unsecured creditors, and
- apply for deregistration of the company on completion of the liquidation.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to do any work unless there are enough assets to pay their costs.

The directors' role

Directors cannot use their powers after a liquidator has been appointed. They must help the liquidator, including providing the company's books and records, and a report about the company's affairs.

Shareholders and liquidation

The liquidator's primary duty is to all of the company's creditors. The shareholders rank behind the creditors and are unlikely to receive any dividend in an insolvent liquidation.

In a court liquidation, the liquidator is not required to report to the shareholders on the progress or outcome of the liquidation.

The liquidator is not required to hold a meeting of shareholders during a creditors' voluntary liquidation. A joint meeting of the creditors and shareholders (a 'section 509 meeting') must be held at the conclusion of the winding up.

Shareholders in both types of insolvent liquidation can request that the liquidator call separate meetings of shareholders and creditors to decide whether a committee of inspection should be appointed and, if so, who will represent the shareholders and creditors on the committee. However, the shareholder(s) making the request must pay the costs of calling and holding these meetings. A committee of inspection assists the liquidator, approves their fees and, in limited circumstances, approves the use of some of their powers.

A transfer of shares in a company or alteration of status of shareholders during a liquidation will not be effective unless the liquidator gives their written consent or the court permits. The liquidator or the court will need to be satisfied that the transfer of shares, or the alteration in the status of members, is in the best interest of the company as a whole and does not breach other sections of the Corporations Act that deal with the rights of shareholders.

The liquidator can call on the holders of any unpaid or partly paid shares in the company to pay the amount outstanding on those shares.

If a liquidator makes a written declaration that they have reasonable grounds to believe there is no likelihood that shareholders will receive any further distribution in the winding up, shareholders can realise a capital loss. To realise a loss, the shares in the company must have been purchased on or after 20 September 1985. If no such declaration is made by the liquidator, the deregistration of a company at the end of the liquidation also enables realisation of any capital loss.

Financial reporting

Listed and very large companies usually have financial reporting obligations under the Corporations Act. ASIC has given relief so that such companies don't need to comply with these obligations if they are in liquidation. Also, public companies in insolvent liquidation don't need to hold annual general meetings (this does not apply to a section 509 meeting).

The liquidator must lodge a detailed list of their receipts and payments for the liquidation with ASIC every 6 months. A copy of these statements of receipts and payments may be obtained from any ASIC Business Centre, on payment of the relevant fee. The liquidator must also make them available at their office for inspection by shareholders and creditors.

Voluntary administration

Voluntary administration is designed to resolve a company's future direction quickly. An independent and suitably qualified person (the voluntary administrator) takes full control of the company to try to work out a way to save either the company or the company's business.

If this isn't possible, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation. A mechanism for achieving these aims is a deed of company arrangement.

The voluntary administrator's role

After taking control of the company, the voluntary administrator investigates and reports to creditors on the company's business, property, affairs and financial circumstances, and on the three options available to creditors. These are:

1. end the voluntary administration and return the company to the directors' control
2. approve a deed of company arrangement through which the company will pay all or part of its debts and then be free of those debts, or
3. wind up the company and appoint a liquidator.

The voluntary administrator must give an opinion on each option and recommend which option is in the best interests of creditors.

The voluntary administrator has all the powers of the company and its directors. This includes the power to sell or close down the company's business or sell individual assets in the lead up to the creditors' decision on the company's future.

The voluntary administrator must also report to ASIC on possible offences by people involved with the company.

If a deed of company arrangement is approved, the voluntary administrator will usually become the deed administrator and oversee its operation.

The directors' role

Directors cannot use their powers while the company is in voluntary administration. They must help the voluntary administrator, including providing the company's books and records, and a report about the company's business, property, affairs and financial circumstances, as

well as any further information about these that the voluntary administrator reasonably requires.

If the company goes from voluntary administration into a deed of company arrangement, the directors' powers depend on the deed's terms. When the deed is completed, the directors regain full control, unless the deed provides for the company to go into liquidation on completion.

If the deed is not completed and the company goes into liquidation as a result, the directors cannot use their powers, as discussed in the liquidation section above.

Shareholders and voluntary administration

A voluntary administrator isn't required to report to shareholders on the progress or outcome of the voluntary administration. Shareholders don't get to vote on the future of the company.

A transfer of shares in a company or alteration of status of shareholders during a voluntary administration will not be effective unless the voluntary administrator gives their written consent or the court permits. The voluntary administrator or the court will need to be satisfied that the transfer of shares, or the alteration in the status of members, is in the best interest of the company as a whole and does not breach other sections of the Corporations Act that deal with the rights of shareholders.

Shareholders are bound by a deed of company arrangement approved by creditors. Also, the deed administrator may transfer shares in the company with the written consent of the shareholder or with the court's permission.

If a deed administrator makes a written declaration that they have reasonable grounds to believe there is no likelihood that shareholders will receive any further distribution at any time in the future, shareholders can realise a capital loss. To realise a loss, the shares in the company must have been purchased on or after 20 September 1985.

Financial reporting

The statutory financial reporting obligations of listed and very large companies remain while they are in voluntary administration or under a deed of company arrangement. ASIC has given relief so that a company in voluntary administration may defer meeting its financial reporting obligations for 6 months after the appointment of the voluntary administrator. ASIC may grant relief to a company under voluntary administration or subject to a deed of company arrangement from the requirement to hold an annual general meeting.

To get the benefit of this relief, ASIC must be notified that it is being relied on and the administrator must answer, free of charge, reasonable inquiries from shareholders about the administration during the deferral period. If the company is listed, the relevant stock exchange must also be told. The relief also provides for the use of alternative methods of distributing an annual report to shareholders at the end of the period.

At the end of this deferral period, if the company is still in voluntary administration or under a deed of company arrangement, ASIC may give the company an exemption or further deferral from all or some of their financial reporting obligations in certain circumstances.

ASIC may also give an extension of time for the annual general meeting or decide to take no action for failure to hold the annual general meeting if a public company is in voluntary administration or under a deed of company arrangement.

A voluntary administrator and a deed administrator must lodge a detailed list of receipts and payments with ASIC every 6 months and at the end of their administration. A copy of these statements of receipts and payments may be obtained from any ASIC Business Centre, on payment of the relevant fee.

Receivership

A company goes into receivership when an independent and suitably qualified person (the receiver) is appointed by a secured creditor or, in special circumstances, by the court to take control of some or all of the company's assets. A secured creditor is someone who has a charge, such as a mortgage, over all or some of a company's assets.

Court receiverships are not covered in this information sheet.

The powers of the receiver are set out in the charge document and the Corporations Act.

If a receiver has, under the terms of their appointment, the power to manage the company's affairs, they are known as a receiver and manager.

The receiver's role

The receiver's role is:

- to collect and sell enough of the charged assets to repay the debt owed to the secured creditor
- if they have been appointed under a fixed charge (e.g. over land, plant or equipment), to pay out the money collected:
 - first, to pay the secured creditor, and
 - second, if there are any funds left over, to pay this surplus to the company or its other external administrator if one has been appointed
- if they have been appointed under a floating charge (e.g. over cash, debtors or stock), to pay out the money collected:
 - first, to pay priority claims (including certain employee entitlements)
 - second, to pay the secured creditor, and
 - third, if there are any funds left over, to pay the company or its other external administrator if one has been appointed, and
- to report to ASIC any possible offences or other irregular matters.

The receiver is usually paid from the money collected during the receivership.

The directors' role

Receivership does not affect the legal existence of the company. The directors continue to hold office, but their powers depend on the powers of the receiver and the extent of the assets over which the receiver is appointed.

Control of the charged property, which often includes the company's business, is taken away from them.

Directors must provide the receiver with a report about the company's affairs and must allow the receiver access to books and records relating to the charged property.

Shareholders and receivership

The receiver's primary duty is to the company's secured creditor. The main duty owed to unsecured creditors and shareholders is an obligation to take reasonable care to sell charged property for not less than its market value or, if there is no market value, the best price reasonably obtainable. A receiver also has the same general duties as a company director.

There is no obligation for the receiver to report to the shareholders on the progress or outcome of the receivership.

Financial reporting

The statutory financial reporting obligations of listed and very large companies remain while it is in receivership, as do the requirements for public companies to hold annual general meetings.

However, ASIC has given relief so that a company with a receiver appointed to the whole or substantially the whole of its property may defer meeting its financial reporting obligations for 6 months after the receiver's appointment.

To get the benefit of this relief, the receiver must tell ASIC they are relying on it, and agree to answer, free of charge, reasonable inquiries from shareholders about the receivership during the deferral period. If the company is listed, the relevant stock exchange must also be told. The relief also provides for the use of alternative methods of distributing an annual report to shareholders at the end of this period.

At the end of this deferral period, ASIC may give an exemption or further deferral from all or some of the financial reporting obligations, in certain circumstances. ASIC may also give an extension of time for the annual general meeting, or decide to take no action for failure to hold the annual general meeting.

The receiver must lodge a detailed list of their receipts and payments for the receivership with ASIC every 6 months. A copy of these statements of receipts and payments may be obtained from any ASIC Business Centre, on payment of the relevant fee.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on voluntary administration, liquidation and receivership, see ASIC's related information sheets, available at www.asic.gov.au/insolvencyinfosheets:

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.

You may also wish to check the website of the external administrator's firm and the company's website for any information on a particular external administration.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 42

Insolvency: a guide for directors

This information sheet provides general information on insolvency for directors whose companies are in financial difficulty, or are insolvent, and includes information on the most common forms of external administration.

An insolvent company is one that is unable to pay all its debts when they fall due for payment. There are serious penalties for allowing your company to trade while insolvent. If your company is in financial difficulty, you should seek independent advice on your duties and the options available.

Who is a director?

A director is not just a person appointed to that role. Under the *Corporations Act 2001* (Corporations Act), a person may also be a director if they are not formally appointed but act in that role, or if the directors of the company act in accordance with their instructions or wishes.

Directors' duties

Generally, in addition to the requirement to ensure compliance with general and specific laws applying to your company's operations, your primary duty is to the shareholders. However, if your company is insolvent, or there is a real risk of insolvency, your duties expand to include creditors (including employees with outstanding entitlements).

General duties

General duties imposed by the Corporations Act on directors and officers of companies include:

- the duty to exercise your powers and duties with the care and diligence that a reasonable person would have, which includes taking steps to ensure you are properly informed about the financial position of the company and ensuring the company doesn't trade if it is insolvent
- the duty to exercise your powers and duties in good faith in the best interests of the company and for a proper purpose

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- the duty not to improperly use your position to gain an advantage for yourself or someone else, or to cause detriment to the company, and
- the duty not to improperly use information obtained through your position to gain an advantage for yourself or someone else, or to cause detriment to the company.

Duty to not trade while insolvent

As well as general directors' duties, you also have a positive duty to prevent your company trading if it is insolvent. A company is insolvent if it is unable to pay all its debts where they are due. This means that before you incur a new debt you must consider whether you have reasonable grounds to suspect that the company is insolvent or will become insolvent as a result of incurring the debt.

An understanding of the financial position of your company only when you sign off on the yearly financial statements is insufficient. You need to be constantly aware of your company's financial position.

Duty to keep books and records

Your company must keep adequate financial records to correctly record and explain transactions and the company's financial position and performance. A failure of a director to take all reasonable steps to ensure a company fulfils this requirement contravenes the Corporations Act.

For the purposes of an insolvent trading action against a director, a company will generally be presumed to have been insolvent throughout a period where it can be shown to have failed to keep adequate financial records.

Consequences of insolvent trading

There are various penalties and consequences of insolvent trading, including civil penalties, compensation proceedings and criminal charges.

The Corporations Act provides some statutory defences for directors. However, directors may find it difficult to rely upon these if they have not taken steps to keep themselves informed about the company's financial position.

Civil penalties

Contravening the insolvent trading provisions of the Corporations Act can result in civil penalties against directors, including pecuniary penalties of up to \$200,000.

Compensation proceedings

Compensation proceedings for amounts lost by creditors can be initiated by ASIC, a liquidator or a creditor against a director personally. A compensation order can be made in addition to civil penalties.

Compensation payments are potentially unlimited and could lead to the personal bankruptcy of directors. The personal bankruptcy of a director disqualifies that director from continuing as a director or managing a company.

Criminal charges

If dishonesty is found to be a factor in insolvent trading, a director may also be subject to criminal charges (which can lead to a fine of up to \$220,000 or imprisonment for up to 5 years, or both). Being found guilty of the criminal offence of insolvent trading will also lead to a director's disqualification.

ASIC has successfully prosecuted directors for allowing companies to incur debts when the company is insolvent, and has sought orders making directors personally liable for company debts. ASIC is also acting to reduce insolvent trading and has a national team dedicated to visiting directors to make them aware of their responsibilities to prevent insolvent trading.

The good news is that taking steps to ensure your company remains financially sound will minimise the risk of an insolvent trading action. It may also improve your company's performance.

What to do if you suspect financial difficulty

If you suspect your company is in financial difficulty, get proper accounting and legal advice as early as possible, as this increases the likelihood of the company surviving. One of the most common reasons for the inability to save a company in financial distress is that professional advice was sought too late. Do not have a 'head in the sand' attitude, hoping that things will improve—they rarely do. Table 1 lists some of the warning signs of insolvency.

Table 1: Signs that may indicate your company is at risk of insolvency

- | |
|---|
| <ul style="list-style-type: none"> • ongoing losses • poor cash flow • absence of a business plan • incomplete financial records or disorganised internal accounting procedures • lack of cash-flow forecasts and other budgets • increasing debt (liabilities greater than assets) • problems selling stock or collecting debts • unrecoverable loans to associated parties • creditors unpaid outside usual terms • solicitors' letters, demands, summonses, judgements or warrants issued against your company • suppliers placing your company on cash-on-delivery (COD) terms • issuing post-dated cheques or dishonouring cheques • special arrangements with selected creditors • payments to creditors of rounded sums that are not reconcilable to specific invoices • overdraft limit reached or defaults on loan or interest payments • problems obtaining finance • change of bank, lender or increased monitoring/involvement by financier • inability to raise funds from shareholders • overdue taxes and superannuation liabilities • board disputes and director resignations, or loss of management personnel • increased level of complaints or queries raised with suppliers • an expectation that the 'next' big job/sale/contract will save the company |
|---|

An insolvency practitioner can conduct a solvency review of your company and outline available options. You need to be aware of your options so that you can make informed decisions about your company's future. Options may include refinancing, restructuring or changing your company's activities, or appointing an external administrator.

The three most common forms of external administration are:

1. voluntary administration (which may lead to a deed of a company arrangement)
2. liquidation, and
3. receivership.

Of these, only the first two are normally options for directors, as a receiver is usually appointed by a secured creditor. (Other forms of external administration are not explained in this information sheet.)

To find an insolvency professional, visit the Insolvency Practitioners Association website at www.ipaa.com.au. This site lists insolvency accountants and lawyers, and you can search for members in your location.

Tax office s222AOE penalty notice

If you receive a s222AOE penalty notice from the Commissioner of Taxation for your company's unpaid tax, you should immediately seek professional advice. Failure to take appropriate steps within 14 days may result in the Commissioner taking recovery action against you personally for an amount equivalent to the unpaid tax.

What to do if your company is insolvent

If your company is insolvent, do not allow it to incur further debt. Unless it is possible to restructure, refinance or obtain equity funding to recapitalise the company, generally your options are to appoint a voluntary administrator or a liquidator.

Voluntary administration

Voluntary administration is designed to resolve the company's future direction quickly. An independent and suitably qualified person (the voluntary administrator) takes full control of the company to try to work out a way to save either the company or the company's business.

If it isn't possible to save the company or its business, the aim is to administer the affairs of the company in a way that results in a better return to creditors than they would have received if the company had instead been placed straight into liquidation.

A mechanism for achieving these aims is a deed of company arrangement.

Putting a company into voluntary administration is a simple and quick process. It can be done by the board of the company resolving that the company is insolvent, or likely to become insolvent, and an administrator should be appointed. The directors also need to obtain the written consent of a registered liquidator to act as voluntary administrator.

Liquidation

The purpose of liquidation of an insolvent company is to have an independent and suitably qualified person (the liquidator) take control of the company so that its affairs can be wound up in an orderly and fair way for the benefit of its creditors.

An insolvency professional will be able to advise you of the steps required to appoint a liquidator. Generally, a director-initiated liquidation involves calling a meeting of members to vote on winding up the company and the appointment of a liquidator.

Receivership

A company most commonly goes into receivership when a receiver is appointed by a secured creditor who holds security over some or all of the company's assets. The receiver's primary role is to collect and sell sufficient of the company's charged assets to repay the debt owed to the secured creditor.

A director who is also a secured creditor should seek advice before appointing a receiver.

Consequences of external administration

As well as the possibility of insolvent trading action, discussed earlier, there are other consequences for directors of a company that goes into external administration. These vary depending on the type of external administration.

Directors' powers

Directors of companies in voluntary administration or liquidation lose control of the company. If a company goes from voluntary administration into a deed of company arrangement, the powers of the directors depend on the deed's terms. When the deed is completed, the directors regain full control unless the deed provides for the company to go into liquidation on completion.

In a receivership, the powers of the directors depend on the powers of the receiver, as detailed in the charge document, and the extent of the assets over which the receiver is appointed. If the receiver is appointed over all or most of the assets of a company, the receiver effectively has control, although the directors still have certain responsibilities and duties, and may retain residual control.

Directors' obligations

Generally, directors have an obligation to assist the external administrator by:

- advising the external administrator of the location of company property and delivering any such property in their possession to the external administrator
- providing the company's books and records to the external administrator (voluntary administration and liquidation) or giving access to the books and records to the external administrator (receivership)
- advising the external administrator of the whereabouts of other company records
- providing a written report about the company's business, property and financial circumstances within either 5 business days (voluntary administration), 7 days (creditors'

voluntary liquidation) or 14 days (receivership and court liquidation) of the appointment of the external administrator, and

- meeting with, or reporting to, the external administrator to help them with their enquiries, as reasonably required.

Directors, officers and other people with relevant books and records have a responsibility to the company and to creditors, and must not obstruct external administrators in carrying out their duties.

Creditors' meetings

Meetings of creditors are held in voluntary administrations and liquidations.

Both a voluntary administrator and liquidator can also require a director to attend a creditors' meeting to provide information about the company and its business, property, affairs and financial circumstances.

Public examination

A voluntary administrator or liquidator has the power to apply to the court to conduct a public examination, under oath, of a director. A receiver can also apply for a public examination, if ASIC consents.

Being summonsed to appear for a public examination is a serious matter and should not be ignored. Seek immediate legal advice if you are in any way concerned about the public examination process or your rights.

The external administrator conducting the public examination may be interested in your personal financial position or further details about assets or transactions the company undertook. Often the need for a public examination can be avoided by cooperating with the external administrator.

Disqualification

If a director has been involved with two or more companies that have gone into liquidation within the last 7 years and paid their creditors less than 50 cents in the dollar, ASIC may disqualify them from managing corporations for up to 5 years. This effectively bans a person from acting as a director.

ASIC can also apply for orders disqualifying a person from managing corporations for up to 20 years if they have been an officer of two or more companies that have failed within the last 7 years, and the way in which the companies were managed contributed to the failures.

Employee entitlement proceedings

It is an offence for anyone, including a director, to enter into an agreement or transaction with the intention of avoiding employee entitlements of a company. The maximum penalty is \$110,000 or 10 years imprisonment, or both.

If the company is in liquidation and the employees suffer damage or loss as a result of a person entering into such an agreement or transaction, that person is liable to pay compensation for the loss suffered. This liability can arise even if the person has not been

convicted of an offence for the contravention. A recovery action for compensation can be taken by the liquidator or, in certain circumstances, by an employee.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on voluntary administration, liquidation and receivership, see ASIC's related information sheets, available at www.asic.gov.au/insolvencyinfosheets:

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Liquidation: a guide for employees
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Practitioners, which applies to IPA members.



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 84

Independence of external administrators: a guide for creditors

If a company is insolvent or in financial difficulty, it can be put into external administration. The three most common forms of external administration are:

1. voluntary administration (which may lead to a deed of a company arrangement)
2. liquidation, and
3. receivership.

When a company enters into voluntary administration, a deed of company arrangement or a liquidation, it is important that the person put in charge (the 'external administrator') is independent of the company and its directors, and acts in the interests of creditors as a whole.

This information sheet provides general information for unsecured creditors in a liquidation, voluntary administration or deed of company arrangement to help assess whether the external administrator is independent.

The independence requirement in other forms of external administration (e.g. receivership) is not discussed in this information sheet.

What it means to be independent

There are different groups of people with different interests involved in the insolvency of a company. These include directors, shareholders, creditors who hold security over assets of the company, unsecured creditors, employees (who may also be creditors) and customers. The external administrator must treat all of these groups fairly and in accordance with their legal rights. For an external administrator to be independent, they must:

- not be biased towards any person or group
- not have, or have had, a close personal or business relationship with any person involved in the insolvency where that relationship would lead someone to suspect that they would favour the interests of that person, and

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

- not be in a position where their own personal or private interests conflict with their duties in the insolvency.

It is important that the external administrator is, at all times, both independent, and accepted as being independent, by those people interested in the affairs of the insolvent company. An external administrator may not be accepted as being independent if there is a real chance that circumstances exist that may threaten the person's independence in the future.

Who may be appointed

A person appointed as an external administrator of an insolvent company must be a registered liquidator. They must also be an official liquidator if the appointment as liquidator is made by the court.

At the time of agreeing to take the appointment, the person must both be, and be accepted as being, independent. If the person knows at the time there is the real prospect of a threat to independence arising in the future, the person should not take the appointment (even if they tell creditors about the threat) without the court's approval.

Relationships that prevent appointment

A person must not be appointed as an external administrator of an insolvent company if they have any of the following relationships with the insolvent company, unless the court gives its approval:

- either the person or a company where the person is a substantial shareholder owes more than \$5000 to the insolvent company or a related company
- the person is owed more than \$5000 by the insolvent company or a related company (other than fees they are owed through their role as an external administrator)
- the person is a director, secretary, senior manager or employee of the insolvent company
- the person is a director, secretary, senior manager or employee of a company that is a mortgagee of the property of the insolvent company
- the person is an auditor of the insolvent company
- the person is a partner or employee of an auditor of the company
- the person is a partner, employer or employee of an officer of the company, or
- the person is a partner or employee of an employee of an officer of the company.

Even if none of these relationships exists, the person must not take on the appointment if, in the circumstances, there is a real risk they cannot be independent and be accepted as being independent by those interested in the affairs of the insolvent company.

Disclosing relationships

If a liquidator is appointed by the court, they act as an officer of the court and they should tell the court before they are appointed of any circumstances they are aware of that might cause doubts about their independence.

A person who is consenting to be appointed as voluntary administrator or liquidator in a creditors' voluntary liquidation must send to creditors, with the notice of the first meeting of creditors, a declaration about any relationships they may have. The declaration must:

- set out whether the person, their partners in a firm or their company or an associated company has, or has had in the past 2 years, a relationship with either:
 - the insolvent company
 - an associate of that company
 - a former liquidator or former provisional liquidator of that company, or
 - a secured creditor with security over the whole or substantially the whole of the company's property, and
- state the person's reasons for believing that none of the relationships result in the person having a conflict in accepting the appointment.

The declaration must also be tabled at the meeting of creditors.

If the voluntary administrator or liquidator later realises that the original declaration is out-of-date or contains an error, they must distribute a replacement declaration.

A person who is consenting to be appointed as voluntary administrator must also disclose in writing any indemnities provided to the person to cover their fees and costs (for an explanation of the meaning of an indemnity, refer to ASIC's 'Insolvency: a glossary of terms').

The declarations must be given to creditors to allow them to consider the person's independence and make an informed decision about whether they want to replace the person with someone of the creditors' choice.

If, as a creditor, you receive a declaration of relationships or indemnities, and you are concerned whether the circumstances might cast doubt upon whether the person would be independent, you should ask the person about the circumstances that lie behind the declaration. You may also consider whether they should be replaced.

Replacing an external administrator

Before a person takes an appointment as an external administrator, they must make reasonable inquiries to ensure there are no real threats to their independence. The person must also continue to monitor their independence during the period of the appointment and take action should such a threat arise. Depending on the threat, this may involve applying to court or calling a meeting of creditors to give details of the potential threat and allow a decision to be made by the court or the creditors about how the threat should be managed and whether the person should continue to act or be replaced.

As discussed below, in some circumstances, you may seek to remove the person if you have doubts as to their independence and replace them with an external administrator of the creditors' choice. Any replacement must also prepare the relevant declaration(s) about their relationships with various specified parties and, in a voluntary administration, also any indemnities they have been given for their fees and costs.

Voluntary administration

In a voluntary administration you are given an opportunity to replace an administrator at the first meeting of creditors, if there is another administrator who has consented to taking on the role and a majority of creditors (in number and value) approve the appointment of that replacement administrator. If you are a creditor, see ASIC's 'Voluntary administration: a guide for creditors' for more information about this meeting.

Deed of company arrangement

At the second creditors' meeting in the voluntary administration where creditors agree to accept the proposal for a deed of company arrangement, they can also choose who they wish to be deed administrator. This person does not have to be the current voluntary administrator, but may be someone else of the creditors' choosing.

If the deed of company arrangement fails and creditors resolve to terminate the deed and wind up the company, they can also choose someone other than the deed administrator to be the liquidator (provided the other person has agreed, in writing, to act as liquidator).

Liquidation

If the liquidator has been appointed by the court, only the court can remove the liquidator from acting. Creditors cannot remove them by passing a resolution at a meeting of creditors.

In a creditors' voluntary liquidation, the creditors may, by a majority in number and value, vote to replace the liquidator appointed by members at the first meeting of creditors. This meeting must be held within 11 days of the liquidator being appointed. See ASIC's information sheet 'Liquidation: a guide for creditors'.

If, at the second meeting of creditors in a voluntary administration, creditors vote that the company go into liquidation, it is usual for the voluntary administrator to become the liquidator of the company. Creditors, by majority in number and value, may vote to appoint another person to act as liquidator.

Queries and complaints

You should first raise any queries or complaints with the external administrator. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by an external administrator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

For an explanation of terms used in this information sheet, see ASIC's 'Insolvency: a glossary of terms'. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

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- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Approving fees: a guide for creditors

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ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 85

Approving fees: a guide for creditors

If a company is in financial difficulty, it can be put under the control of an independent external administrator.

This information sheet gives general information for creditors on the approval of an external administrator's fees in a liquidation of an insolvent company, voluntary administration or deed of company arrangement (other forms of external administration are not discussed in this information sheet). It outlines the rights that creditors have in the approval process.

Entitlement to fees and costs

A liquidator, voluntary administrator or deed administrator (i.e. an 'external administrator') is entitled to be:

- paid reasonable *fees*, or remuneration, for the work they perform, once these fees have been approved by a creditors' committee, creditors or a court, and
- reimbursed for out-of-pocket *costs* incurred in performing their role (these costs do not need creditors' committee, creditor or court approval).

External administrators are only entitled to an amount of fees that is reasonable for the work that they and their staff properly perform in the external administration. What is reasonable will depend on the type of external administration and the issues that need to be resolved. Some are straightforward, while others are more complex.

External administrators must undertake some tasks that may not directly benefit creditors. These include reporting potential breaches of the law and lodging a detailed listing of receipts and payments with ASIC every 6 months. The external administrator is entitled to be paid for completing these statutory tasks.

For more on the tasks involved, see ASIC's information sheets 'Liquidation: a guide for creditors' and 'Voluntary administration: a guide for creditors'.

Out-of-pocket costs that are commonly reimbursed include:

- legal fees

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

- valuer's, real estate agent's and auctioneer's fees
- stationery, photocopying, telephone and postage costs
- retrieval costs for recovering the company's computer records, and
- storage costs for the company's books and records.

Creditors have a direct interest in the level of fees and costs, as the external administrator will, generally, be paid from the company's available assets before any payments to creditors. If there are not enough assets, the external administrator may have arranged for a third party to pay any shortfall. As a creditor, you should receive details of such an arrangement. If there are not enough assets to pay the fees and costs, and there is no third party payment arrangement, any shortfall is not paid.

Who may approve fees

Who may approve fees depends on the type of external administration: see Table 1. The external administrator must provide sufficient information to enable the relevant decision-making body to assess whether the fees are reasonable.

Table 1: Who may approve fees

	Creditors' committee	Creditors	Court
Administrator in a voluntary administration	✓ ¹	✓	✓
Administrator of a deed of company arrangement	✓ ¹	✓	✓
Creditors' voluntary liquidator	✓ ¹	✓ ^{3, 6}	✗ ⁴
Court-appointed liquidator	✓ ¹	✓ ^{5, 6}	✓ ²

¹ If there is one.

² If there is no approval by the committee or the creditors.

³ If there is no creditors' committee.

⁴ Unless an application is made for a fee review.

⁵ If there is no creditors' committee or the committee fails to approve the fees.

⁶ If insufficient creditors turn up to the meeting called by the liquidator to approve fees, the liquidator is entitled to be paid up to a maximum of \$5000, or more if specified in the *Corporations Regulations 2001*.

Creditors' committee approval

If there is a creditors' committee, members are chosen by a vote of creditors as a whole. In approving the fees, the members represent all the creditors, not just their own individual interests.

There is not a creditors' committee in every external administration. A creditors' committee makes its decision by a majority in number of its members present at a meeting, but it can only act if a majority of its members attend.

To find out more about creditors' committees and how they are formed, see ASIC's information sheets 'Liquidation: a guide for creditors', 'Voluntary administration: a guide for creditors' and 'Insolvency: a glossary of terms'.

Creditors' approval

Creditors approve fees by passing a resolution at a creditors' meeting. Unless creditors call for a poll, the resolution is passed if a simple majority of creditors present and voting, in person or by proxy, indicate that they agree to the resolution. Unlike committee members, creditors may vote according to their individual interests.

If a poll is taken, rather than a vote being decided on the voices or by a show of hands, a majority in *number* and *value* of creditors present and voting must agree. A poll requires the votes of each creditor to be recorded.

A separate resolution of creditors is required for approving fees for an administrator in a voluntary administration and a deed of company arrangement, even if the administrator is the same person in both administrations.

A proxy is where a creditor appoints someone else to represent them at a creditors' meeting and to vote on their behalf. A proxy can be either a *general* proxy or a *special* proxy. A general proxy allows the person holding the proxy to vote as they wish on a resolution, while a special proxy directs the proxy holder to vote in a particular way.

A creditor will sometimes appoint the external administrator as a proxy to vote on the creditor's behalf. An external administrator, their partners or staff must not use a general proxy to vote on approval of their fees; they must hold a special proxy in order to do this. They must vote all special proxies as directed, even those against approval of their fees.

Calculation of fees

Fees may be calculated using one of a number of different methods, such as:

- on the basis of *time spent* by the external administrator and their staff
- a quoted *fixed fee*, based on an upfront estimate, or
- a *percentage of asset realisations*.

Charging on a time basis is the most common method. External administrators have a scale of hourly rates, with different rates for each category of staff working on the external administration, including the external administrator.

If the external administrator intends to charge on a time basis, you should receive a copy of these hourly rates soon after their appointment and before you are asked to approve the fees.

The external administrator and their staff will record the time taken for the various tasks involved, and a record will be kept of the nature of the work performed.

It is important to note that the hourly rates do not represent an hourly wage for the external administrator and their staff. The external administrator is running a business—an insolvency practice—and the hourly rates will be based on the cost of running the business, including overheads such as rent for business premises, utilities, wages and superannuation for staff

who are not charged out at an hourly rate (such as personal assistants), information technology support, office equipment and supplies, insurances, taxes, and a profit.

External administrators are professionals who are required to have qualifications and experience, be independent and maintain up-to-date skills. Many of the costs of running an insolvency practice are fixed costs that must be paid, even if there are insufficient assets available to pay the external administrator for their services. External administrators compete for work and their rates should reflect this.

These are all matters that committee members or creditors should be aware of when considering the fees presented. However, regardless of these matters, creditors have a right to question the external administrator about the fees and whether the rates are negotiable.

It is up to the external administrator to justify why the method chosen for calculating fees is an appropriate method for the particular external administration. As a creditor, you also have a right to question the external administrator about the calculation method used and how the calculation was made.

Report on proposed fees

When seeking approval of fees, the external administrator must send committee members/creditors a report with the notice of meeting setting out:

- information that will enable the committee members/creditors to make an informed assessment of whether the proposed fees are reasonable
- a summary description of the major tasks performed, or to be performed, and
- the costs associated with each of these tasks.

Committee members/creditors may be asked to approve fees for work already performed or based on an estimate of work yet to be carried out.

If the work is yet to be carried out, it is advisable to set a maximum limit ('cap') on the amount that the external administrator may receive. For example, future fees calculated according to time spent may be approved on the basis of the number of hours worked at the rates charged (as set out in the provided rate scale) up to a cap of \$X. If the work involved then exceeds this figure, the external administrator will have to ask the creditors' committee/creditors to approve a further amount of fees, after accounting for the fees already incurred.

Deciding if fees are reasonable

If asked to approve an amount of fees either as a committee member or by resolution at a creditors' meeting, your task is to decide if that amount of fees is reasonable, given the work carried out in the external administration and the results of that work.

You may find the following list of factors useful in deciding if the fees claimed are reasonable. This list includes those factors that a court takes into account in setting or reviewing fees for external administrators, and not all these factors may be relevant to a particular external administration. Factors to consider include:

- the extent to which the work performed, or likely to be performed, was reasonably necessary
- the period during which the work was, or is or likely to be, performed
- the quality of the work performed, or likely to be performed
- the complexity (or otherwise) of the work performed, or likely to be performed
- the extent (if any) to which the external administrator was, or is likely to be, required to deal with extraordinary issues
- the extent (if any) to which the external administrator was, or is likely to be, required to accept a higher level of risk or responsibility than is usually the case
- the value and nature of any property dealt with, or likely to be dealt with
- whether the external administrator was, or is likely to be, required to deal with other external administrators
- the number, attributes and behaviour, or the likely number, attributes and behaviour, of the company's creditors, and
- if the remuneration is ascertained, in whole or in part, on a time basis:
 - the time properly taken, or likely to be properly taken, in performing the work
 - whether the remuneration is capped, and
- any other relevant matters.

If you need more information about fees than is provided in the external administrator's report, you should let them know before the meeting at which fees will be voted on.

What can you do if you think the fees are not reasonable?

If you do not think the fees being claimed are reasonable, you should raise your concerns with the external administrator. It is your decision whether to vote in favour of, or against, a resolution to approve fees.

Generally, if fees are approved by a creditors' committee/creditors and you wish to challenge this decision, you may apply to the court and ask the court to review the fees. Special rules apply to court liquidations.

You may wish to seek your own legal advice if you are considering applying for a court review of the fees.

Reimbursement of out-of-pocket costs

An external administrator should be very careful incurring costs that must be paid from the external administration—as careful as if they were dealing with their own money. Their report on fees should also include information on the out-of-pocket costs of the external administration.

If you have questions about any of these costs, you should ask the external administrator and, if necessary, bring it up at a creditors' committee/creditors' meeting. If you are still concerned, you have the right to ask the court to review the costs.

Queries and complaints

You should first raise any queries or complaints with the external administrator. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a complaint with ASIC at www.asic.gov.au, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

ASIC will usually not become involved in matters of commercial judgement by an external administrator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

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