



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 call 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
- 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

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.

- 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 unless they also have a claim as a creditor.

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 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 shareholders, 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.

When giving written consent to a transfer of shares in a company or alteration of status of shareholders, the liquidator can impose conditions which must be satisfied before the transfer or alteration is effective. In the case of a transfer of shares, the current shareholder, the prospective shareholder, or a creditor, may apply to the court to set aside any or all of these conditions. Similarly, a shareholder or a creditor may apply to the court to set aside any or all conditions that must be satisfied for an alteration in the status to have effect. A shareholder or a creditor may also apply to the court to authorise an alteration in the status of shareholders if the liquidator refuses the alteration.

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 six 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 shareholders, 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.

When giving written consent to a transfer of shares in a company or alteration of status of shareholders, the voluntary administrator can impose conditions which must be satisfied before the transfer or alteration is effective. In the case of a transfer of shares, the current shareholder, the prospective shareholder, or a creditor, may apply to the court to set aside any or all of these conditions. Similarly, a shareholder or a creditor may apply to the court to set aside any or all conditions that must be satisfied for an alteration in the status to have effect. A shareholder or a creditor may also apply to the court to authorise an alteration in the status of shareholders if the voluntary administrator refuses the alteration.

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. A shareholder, a creditor, ASIC or any other interested person can oppose an application to the court by the deed administrator to approve a share transfer.

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 six 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 six 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 six 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 six 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 information sheet INFO 41 *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:

- INFO 74 *Voluntary administration: a guide for creditors*
- INFO 75 *Voluntary administration: a guide for employees*
- INFO 45 *Liquidation: a guide for creditors*
- INFO 46 *Liquidation: a guide for employees*
- INFO 54 *Receivership: a guide for creditors*
- INFO 55 *Receivership: a guide for employees*
- INFO 42 *Insolvency: a guide for directors*
- INFO 84 *Independence of external administrators: a guide for creditors*
- INFO 85 *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.