



ASIC

Australian Securities & Investments Commission

## Insolvency: A guide for shareholders

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

This information sheet (INFO 43) gives general information for shareholders on the two most common forms of external administration (liquidation and voluntary administration) and receivership. Schemes of arrangement are beyond the scope of this information sheet.

It explains:

- [liquidation](#)
- [voluntary administration](#)
- [receivership](#)

### 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:

- when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement
- when an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator.

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 preference payments that may be recoverable, any uncommercial transactions that may be set aside, and any possible claims against the company's officers
- inquire 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.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to incur an expense in relation to the winding up 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. A liquidator must keep books about the administration that give a complete and correct record of the administration of the company's affairs, and shareholders are entitled to inspect these books at the liquidator's office. The liquidator must also lodge with ASIC a detailed list of their receipts and payments (known as an annual administration return) annually on the anniversary of their appointment and at the end of their administration. A copy of these returns may be obtained by searching the [ASIC registers](#) and paying the relevant fee.

**Note:** If the liquidation commenced prior to 1 September 2017, the liquidator will continue to lodge the six-monthly [Form 524 Presentation of accounts and statement](#) until the six-month period ending on the first anniversary of their appointment date. Thereafter, they will lodge the annual administration return.

A transfer of shares in a company or alteration of status of shareholders during 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's creditors 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 affected 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 of shareholders 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 and annual general meeting (AGM) requirements

The Corporations Act imposes financial reporting obligations on listed and very large companies. ASIC has relieved these companies from their reporting obligations if they are in liquidation. Also, public companies in liquidation don't need to hold AGMs. Companies that are in liquidation that are also AFS licensees may only rely on our relief from the financial reporting and AFS licensee reporting obligations if they have cancelled and do not hold an AFS license as at the date on which they would otherwise be required to lodge the relevant report with ASIC. See ASIC Corporations (Externally-Administered Bodies) [Instrument 2015/251](#).

## 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:

- 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
- 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

Shareholders don't get to vote on the future of the company. A voluntary administrator isn't required to report to shareholders on the progress or outcome of the voluntary administration. A voluntary administrator must keep books about the administration that give a complete and correct record of the administration of the company's affairs, and shareholders are entitled to inspect these books at the voluntary administrator's office. The voluntary administrator (and administrator of a deed of company arrangement) must lodge with ASIC a detailed list of their receipts and payments (known as an annual administration return) annually on the anniversary of their appointment and at the end of their administration. A copy of these lists of receipts and payments may be obtained by searching the [ASIC registers](#) and paying the relevant fee.

**Note:** If the voluntary administration (or deed of company arrangement) commenced prior to 1 September 2017, the voluntary administrator (or deed administrator) will continue to lodge the six-monthly [Form 524 Presentation of accounts and statement](#) until the six-month period ending on the first anniversary of their appointment date. Thereafter, they will lodge the annual administration return.

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's creditors 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 affected 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 of shareholders 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

Listed and very large companies must still comply with their statutory financial reporting obligations while subject to voluntary administration or under a deed of company arrangement. ASIC provides relief so that a company in voluntary administration automatically has a six-month extension of time for lodging financial reports that are due when the administrator is appointed or will become due in the six-month period after the appointment. The automatic relief applies even if the company enters into a deed of company arrangement during the six-month period after the voluntary administrator's appointment.

To get the benefit of this automatic deferral relief, the voluntary administrator must have arrangements in place during the deferral period to answer, free of charge, reasonable questions from shareholders about the administration. At the end of this deferral period, if the company remains in voluntary administration or under a deed of company arrangement, the company may apply to ASIC for further deferral relief.

A public company in voluntary administration may also apply for an extension of time to hold an AGM. A public company under a deed of company arrangement may also apply for an extension of time to hold an AGM in certain circumstances.

Listed companies should also inform the relevant securities exchange if the company relies on automatic relief or is granted further relief or an extension of time to hold an AGM. This information should also be available on the company's website and the voluntary administrator's website.

For more on ASIC's automatic relief or applying for other relief, see [Regulatory Guide 174](#) *Relief for externally administered companies and registered schemes being wound up* (RG 174).

## 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 holds a security interest, such as a mortgage, in some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a security interest in company assets when they provide a loan. Security interests over personal property other than land are registered on the Personal Property Securities Register (PPSR) if the creditor wants to ensure their security interest is enforceable and accorded priority in an insolvency. You can search the PPSR to find out if anyone holds a security interest (other than a mortgage over land) in the company's assets.

Court receiverships are not covered in this information sheet.

The powers of the receiver are set out in the security agreement between the company and the secured creditor, and in the Corporations Act.

When a secured creditor appoints a receiver the terms of the appointment may include the power for the receiver to manage the company's affairs. In that case the receiver is known as a receiver and manager.

### The receiver's role

The receiver's role is:

- to collect and sell enough of the secured assets to repay the debt owed to the secured creditor
- if they have been appointed under a non-circulating security interest (e.g. over land, plant or equipment), to pay out the money collected:
  - first, to pay the secured creditor
  - 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 circulating security interest (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
  - third, if there are any funds left over, to pay the company or its other external administrator if one has been appointed
- to report to ASIC any possible offences or other irregular matters.

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

**Note:** A non-circulating security interest is an interest held by a secured creditor in non-circulation assets of the company. Non-circulating assets are assets the company may not dispose of unless the secured creditor agrees.

**Note:** A circulating security interest is a security interest held by a secured creditor in circulating assets of a company (previously known as a floating charge). Circulating assets are assets that a company is usually able to use and deal with in the ordinary course of business without the need to obtain the secured creditor's consent.

## 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 collateral, 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 collateral 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

Listed and very large companies must still comply with their statutory financial reporting obligations while in receivership. Public companies must also comply with their requirement to hold AGMs.

ASIC has given relief so that a company with a receiver and manager appointed to the whole or substantially the whole of a company's property automatically has a six-month extension of time for financial reports that are due when the receiver and manager is appointed or will become due in the six-month period after the appointment. If a voluntary administrator is appointed before the receiver and manager is appointed, then our automatic deferral relief will apply from the date the voluntary administrator is appointed.

To get the benefit of this automatic deferral relief, the receiver and manager must have arrangements in place during the deferral period to answer, free of charge, reasonable questions from shareholders about the receivership. At the end of this deferral period, if the company is still in receivership, then the company may apply to ASIC for further deferral relief.

A public company in receivership may also apply for an extension of time to hold an AGM in certain circumstances.

Listed companies should also inform the relevant securities exchange if the company is relying on our automatic deferral relief, or has been given further relief or an extension of time to hold an AGM. This information should also be available on the company's website and the receiver and manager's website.

For more on ASIC's automatic relief or applying for other relief, see [RG 174](#).

The receiver must lodge with ASIC a detailed list of their receipts and payments annually on the anniversary of their appointment and at the end of their administration. A copy of these lists of receipts and payments may be obtained by searching the [ASIC registers](#) and paying the relevant fee.

**Note:** If the receivership commenced prior to 1 September 2017, the receiver will continue to lodge the six-monthly [Form 524 Presentation of accounts and statement](#) until the six-month period ending on the first anniversary of their appointment date. Thereafter, they will lodge the annual return by a controller.

## Where can I get more information?

For an explanation of terms used in this information sheet, see [Information Sheet 41 Insolvency: A glossary of terms](#) (INFO 41). For more on voluntary administration, liquidation and receivership, see the related information sheets listed in [Information Sheet 39 Insolvency information for directors, employees, creditors and shareholders](#) (INFO 39).

Further information is available from the [Australian Restructuring Insolvency & Turnaround Association \(ARITA\) website](#). The ARITA website also contains the [ARITA Code of Professional Practice for Insolvency Practitioners](#).

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.

## Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.

This is **Information Sheet 43 (INFO 43)** updated on 1 September 2017. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.