



ASIC

Australian Securities & Investments Commission

## 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 (INFO 54) provides general information for unsecured creditors of companies in receivership. It covers:

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### 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.

A retail customer of a company in receivership may also be a creditor if they have partly or fully paid for goods or services that they have not received.

An employee owed money for unpaid wages and other entitlements is 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 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.
- An unsecured creditor is a creditor who does not hold a security interest in 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 [Information Sheet 55 Receivership: A guide for employees](#) (INFO 55).

## 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 security interest held by the secured creditor under which the appointment of a receiver is made may comprise:

- a non-circulating security interest (e.g. a security interest in land, plant and equipment)
- a circulating security interest in assets that are used and disposed of in the course of normal trading operations (e.g. a security interest in debtors, cash and stock).

The powers of the receiver are set out in the security agreement 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 (collateral) 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
- report to ASIC any possible offences or other irregular matters they come across.

The receiver's primary duty is to the secured creditor that appointed them. The main duty owed to unsecured creditors 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.

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 receiver must lodge with ASIC a detailed list of their receipts and payments (known as the annual administration return) annually on the anniversary of their appointment. A copy of these detailed 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 administration return.

## 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 is distributed as follows:

- money from the sale of non-circulating assets is paid to the secured creditor after the costs and fees of the receiver in collecting this money have been paid
- money from the sale of circulating assets is paid out in the following order:
  - the receiver's costs and fees in collecting this money

- certain priority claims, including employee entitlements (if the liability for these hasn't been transferred to a new owner)
- 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 a security interest comprising both non-circulating and circulating security interests (which is common), there will be costs and fees of the receivership that cannot be directly allocated to realising the non-circulating assets or circulating assets. These costs are allocated in proportion to the amount realised from the non-circulating assets and circulating assets.

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

- outstanding wages and superannuation
- outstanding leave of absence
- 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 (and the next class or classes will be paid nothing).

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 as a provider of goods or services to a company in receivership, 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 seven days from the beginning of the receivership. The receiver can avoid this liability by informing the other party within seven 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 collateral. How the fees are calculated is usually set out in the security agreement 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 collateral 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
- the ability of the liquidator to review the validity of the appointment of the receiver and of the security interest, 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 [Information Sheet 45 Liquidation: A guide for creditors](#) (INFO 45).

## 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 six 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
- 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 and 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 security interest 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 collateral, 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 collateral.

## Conclusion of receivership

A receivership usually ends when the receiver has collected and sold all of the collateral or enough collateral 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 report of misconduct with ASIC – see [How to complain](#).

Lodging your report of misconduct online will ensure the quickest response from ASIC to your concerns.

ASIC usually does not become involved in matters of commercial judgement by a receiver.

Reports of misconduct against companies and their officers can also be made to ASIC.

If you are unable to report misconduct to ASIC online, you can contact us on 1300 300 630.

## 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 external administration, see ASIC's 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](#).

## 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 54 (INFO 54)** updated on 1 September 2017. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.