



ASIC

Australian Securities & Investments Commission



Insolvency Practitioners Association of Australia

INFORMATION FOR CREDITORS **Companies under Part 5.3A Administration**

1. If a company is in financial difficulty, its Directors, a Secured Creditor or the company's Liquidator can put the company under the control of an independent person who is known as the Administrator. It is possible for a company in Administration to also be placed in Receivership.
2. This leaflet, from the Insolvency Practitioners Association of Australia (IPAA) and the Australian Securities and Investments Commission (ASIC), is a general information guide only to highlight the differences between various types of appointments or administrations.

Creditors should seek their own advice about specific circumstances since this is not intended to be a summary of the law. This leaflet outlines the:

- Rights and duties of Administrators and Creditors of companies in *Administration*, and
- Role of ASIC and the Court.

Administrator's Rights and Duties

3. An Administrator is normally appointed by a company's directors, though sometimes a Liquidator or a Creditor holding security over the whole or substantially the whole of the assets of the company can also make an appointment.
4. The Administrator is an agent of the company, with all the powers of the company and its directors. The powers of the directors and company officers are suspended while a company is under Administration.
5. The Administrator is required to hold a first meeting of Creditors within five business days of appointment. The main purpose of this meeting is to allow Creditors to determine whether to appoint a Committee of Creditors and who are to be its members. The primary function of the Committee is to consult with the

Administrator about matters relating to the Administration and to receive and consider reports from the Administrator.

6. Creditors may also at this first meeting, by resolution, remove the Administrator and appoint someone else. To do so, Creditors need to obtain written consent to act from an alternative Administrator, who, if possible, should notify the existing Administrator, at least 24 hours before the meeting, of his/her consent.
7. The initial period for an Administration may run for 28 days or if adjourned to a maximum period of a further 60 days. The Administrator will take control of the company and its assets, impose a moratorium on the recovery rights of all Unsecured Creditors and certain Secured Creditors, and investigate the company's situation.
8. If an Administrator decides to continue trading the company during the initial period he/she is personally liable for debts authorised by him/her if the debts are unable to be met from the company's assets.
9. Prior to the end of the initial period, the Administrator will convene a "proposal" meeting and report to creditors.

The Report shall contain information about the company's business, property, affairs and financial circumstances and the following options which are available to creditors: -

- End the Administration;
- Approve a Deed of Company Arrangement through which the company will pay all or part of its debts in full satisfaction during the Administration of the Deed;
- Wind up the company and appoint a Liquidator.

The Report shall contain the Administrator's opinion on each of the three options and which in his/her opinion is in the best interests of creditors. Creditors are then able to vote on the company's future at this meeting.

To pass one of the three options more than 50% in number of Creditors present at the meeting must vote in favour. Where a poll is demanded a majority in number and more than 50% in value is requested to pass the Resolution.

If a Deed of Company Arrangement is approved by creditors which is based on continuing the business and the Deed provides that the directors resume control of the company's operations then the Administrator is not personally liable for debts incurred after the signing of the Deed.

10. The Administrator is required to obtain Creditor approval for his or her remuneration incurred during the period of Administration. This approval would normally occur at the second or "proposal" meeting. However, at the first meeting, Creditors should ask the Administrator to advise the basis on which he/she intends to seek remuneration at the second meeting.
11. If creditors at the second meeting approve a Deed of Company Arrangement, the terms of the Deed Administrator's remuneration covering both the basis of calculation and an estimate of total remuneration, should be disclosed in the Notice convening the meeting. The remuneration should then be voted on and included as a term of the Deed as approved by creditors.

If the Administrator/Deed Administrator is a member of the IPAA, the IPAA Guide to Hourly Rates may be used as the basis for remuneration.

If creditors fail to approve the remuneration of either the Administrator or Deed Administrator, they are able to have their remuneration fixed by the Court.

Creditor's Rights

12. A Secured Creditor holds a charge over a part or all of the company's assets. The rights of the Secured Creditor are set out in a document called a Mortgage Debenture document or Deed of Registered Charge. One right is the power to appoint a Receiver when the company fails to meet its obligations under the debenture or charge. You can obtain a copy of the Charge documentation from any ASIC Business Centre.
13. If Creditors resolve to accept a Deed of Company Arrangement then they are bound by the terms of that Deed including those who did not attend the meeting. If the company fails to

fulfil the terms of the Deed a further meeting should be convened to either vary or terminate the Deed. If the creditors resolve to terminate the Deed and the Company is to be wound up, the Administrator becomes the Liquidator of the company.

14. When an Administrator is appointed, debts which arose before the appointment cannot be enforced until the Creditors have decided whether the company will continue in business, execute a Deed of Company Arrangement or be placed into Liquidation. If either of the latter two occur, Creditors will be bound by the terms of the Deed or the law of liquidation respectively.
15. Creditors should attend all meetings called by the Administrator as it is the best chance to ask questions, learn about the company's affairs and to determine its future.

In particular creditors should be aware of:

- The proposed distribution to creditors (e.g. how many cents in the dollar);
- When and how the distribution is to be paid;
- What are the protective measures to ensure fulfilment of the Deed's terms;
- How much will it cost to administer the Deed.

ASIC's Role

16. ASIC may investigate complaints against companies, their officers and Insolvency Practitioners.
17. ASIC may look into matters concerning an Administrator. However, ASIC will usually not become involved in matters of commercial judgement. Creditors should attempt to resolve matters with the appointed Administrator and only come to ASIC if this fails.

The Court's Role

18. The Court will decide on matters referred to it by Administrators, Creditors, ASIC or other parties and make any orders it thinks fit. Such matters include an Application:
 - To have questions decided or powers exercised while the company is under Administration;
 - To hear an appeal from a person who has a complaint about any act, omission or decision of an Administrator, eg to set aside the Deed.

Creditors should attempt to resolve such matters with the Administrator concerned and only go to Court if this fails.