



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:

- 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
- 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.