



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 55

Receivership: a guide for employees

If a company is in financial difficulty, a secured creditor or the court may put the company into receivership.

This information sheet provides general information for employees of companies in receivership. Employees should also read ASIC's 'Receivership: a guide for creditors' information sheet.

Who is an employee?

You are likely to be classified as an employee if you are:

- engaged by a company under an award, Certified Agreement, Australian Workplace Agreement, or a contract of employment, and
- paid a salary, wages or commission.

Contractors are not employees. They are ordinary unsecured creditors of the company.

If you are an employee who is owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed in priority to the company's other creditors.

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 beyond the scope of this information sheet.)

A secured creditor is someone who has a 'charge', such as a mortgage, over some or all of the company's assets, to secure a debt owed by the company. Lenders usually require a charge over company assets when they provide a loan. The charge, or security, held may be:

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.

- a fixed charge over particular assets of the company (e.g. land, plant and equipment), and/or
- a floating charge over assets that are used and disposed of in the course of normal trading operations (e.g. debtors, cash and stock).

The powers of the receiver are set out in the charge document 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 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, and
- report to ASIC any possible offences or other irregular matters they come across.

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

The receiver has no obligation to report to unsecured creditors, including employees, about the receivership. If the receiver continues to trade the business, they must pay out of the company assets available to them, ongoing employee wages for services provided and other employee entitlements that arise after the date of appointment. These payments are treated as an expense of the receivership.

The appointment of a receiver and manager does not automatically terminate the employment of the company's employees. As a result, unless the receiver adopts the employment contracts or enters into new contracts of employment with employees, they are not personally liable for any employee entitlements that arise during the receivership.

If the company's business is sold by the receiver as a going concern, it may be that most, if not all, of the company's employees will keep their jobs. In this case, it is usual for the new owner to take over the company's liability for outstanding employee entitlements. You should seek advice about how the terms of the proposed sale of the business affect the payment of your entitlements.

If there are insufficient funds to pay all creditors in full, the money from the realisation of assets must be distributed as follows:

- money from the sale of fixed charge assets is paid to the secured creditor after the costs and fees of the receiver in collecting this money have been paid, and

- money from the sale of floating charge assets is paid out as follows: first, the receiver's costs and fees in collecting this money; second, certain priority claims, including employee entitlements (if the liability for these hasn't been transferred to a new owner); and, third, 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 both fixed and floating charges, which is common, there will be costs and fees of the receivership that cannot be directly allocated to realising the fixed or floating charge assets. These costs are allocated in proportion to the fixed and floating realisation amounts.

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

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
- 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.

The priority claims of directors and their spouses or relatives for the period they are a director, spouse or relative of a director are limited to a maximum of \$2000 for outstanding wages and superannuation, and \$1500 for outstanding leave entitlements. Directors and their spouses or relatives are not entitled to any priority retrenchment pay for the period they are a director, spouse or relative of a director.

If you are employed by a company that is in receivership, and the receiver was appointed on or after 1 November 2005, you are not eligible for the General Employee Entitlements and Redundancy Scheme (GEERS) until and unless the company enters liquidation.

For more on liquidation, refer to our related information sheets. For more on GEERS, including eligibility if a receiver was appointed before 1 November 2005, visit www.workplace.gov.au/employeeentitlements or contact the Department of Employment and Workplace Relations on 1300 135 040 or email GEERS@dewr.gov.au.

Establishing your claim

If a receiver must pay outstanding priority employee entitlements, they may advise you beforehand how much they believe you are owed. Promptly contact the receiver if you disagree with their calculation.

You may be required to complete an employee entitlement claim form. In this case, you should contact the receiver's office to agree and settle the amount.

You may need to provide evidence to justify your claim. It is important that you keep your pay records or other records of the terms of your employment. You may also need these

records to help you complete your income tax return and establish any entitlement to GEERS if the company enters liquidation.

When submitting a claim, ask the receiver to acknowledge receipt of your claim and advise if any further information is needed.

If the receiver rejects your claim after you have taken the above steps, seek legal advice. If you have a query about the timing of the payment, discuss this with the receiver.

Payment Summaries and Separation Certificates

Most employees require a PAYG Payment Summary (group certificate) to complete and lodge their income tax return. A Separation Certificate may also be required before an employee who loses their job can apply for social security.

If a receiver pays you any employee entitlements, they must provide you with a PAYG Payment Summary recording the entitlements paid and any income tax deducted. Contact the receiver to find out if they are going to prepare your PAYG Payment Summary for entitlements paid by the company prior to their appointment and, if so, what period it will cover. If you can't obtain a PAYG Payment Summary for any period, contact the Australian Taxation Office on 13 28 61 to find out how to meet your obligations.

A receiver must prepare a Separation Certificate for any employee whose employment is terminated during the receivership. They are not obliged to prepare one for terminations that occurred prior to the receivership.

Contact Centrelink on 13 10 21 to find out what you should do if you can't obtain a Separation Certificate.

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 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 a receiver. 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
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- 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.