



ASIC

Australian Securities & Investments Commission

Approving fees: A guide for creditors

If a company is in financial difficulty, it can be put under the control of an independent external administrator.

This information sheet (INFO 85) gives general information for creditors on the approval of an external administrator's fees in a liquidation of an insolvent company, voluntary administration or deed of company arrangement (the fees of a receiver are fixed by the secured creditor that appoints the receiver and are not discussed in this information sheet). It outlines the rights that creditors have in the approval process.

It covers:

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Entitlement to fees and costs

A liquidator, voluntary administrator or deed administrator (i.e. an 'external administrator') is entitled to be:

- paid reasonable fees, or remuneration, for the necessary work they properly perform, once these fees have been approved by creditors, a committee of inspection or a court
- reimbursed for out-of-pocket costs incurred in performing their role.

External administrators are only entitled to an amount of fees that is reasonable for the necessary work that they and their staff properly perform in the external administration. What is reasonable will depend on the type of external administration and the issues that need to be resolved. Some are straightforward, while others are more complex.

External administrators must undertake some tasks that may not directly benefit creditors. These include reporting potential breaches of the law and lodging with ASIC a detailed listing of receipts and payments, known as an annual administration return, annually on the anniversary of their appointment and at the end of their administration.

The external administrator is entitled to be paid for completing these statutory tasks.

Note: If the external administration commenced prior to 1 September 2017, the external 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.

Out-of-pocket costs that are commonly reimbursed include:

- legal fees
- valuer's, real estate agent's and auctioneer's fees

- stationery, photocopying, telephone and postage costs
- retrieval costs for recovering the company's computer records
- storage costs for the company's books and records.

Creditors have a direct interest in the level of fees and costs, as the external administrator will generally be paid from the company's available assets before any payments to creditors. If there are not enough assets, the external administrator may have arranged for a third party to pay any shortfall. As a creditor, you should receive details of such an arrangement. If there are not enough assets to pay the fees and costs, and there is no third party payment arrangement, any shortfall is not paid.

Who may approve fees

An external administrator's fees must be approved by one of the following ways:

- by resolution of creditors
- by a committee of inspection (if there is a committee of inspection) if no resolution has been passed by creditors
- by the court if neither the creditors nor a committee of inspection have passed a resolution.

Note: An external administrator in a members' voluntary winding up must have fees approved by a resolution of the company, or the court.

The external administrator must provide sufficient information to enable the relevant decision-making body to assess whether the fees are reasonable.

If fees are not approved by the relevant decision-making body, the liquidator is entitled to be paid reasonable fees up to a maximum of \$5,000 excluding GST (indexed annually).

Creditors' approval at a creditors' meeting

Creditors can approve fees by passing a resolution at a creditors' meeting. Unless creditors call for a poll, the resolution passes if a simple majority of creditors present and voting, in person or by proxy, indicates that they agree to the resolution.

If a poll is taken, rather than a vote being decided on the voices, a majority in number and value of creditors present and voting must agree. A poll requires the votes of each creditor to be recorded.

A separate resolution of creditors is required for approving fees for an administrator in a voluntary administration and an administrator of a deed of company arrangement, even if the administrator is the same person in both administrations.

A proxy is where a creditor appoints someone else to represent them at a creditors' meeting and to vote on their behalf. A proxy can be either a general proxy or a special proxy. A general proxy allows the person holding the proxy to vote as they wish on a resolution, while a special proxy directs the proxy holder to vote in a particular way.

A creditor will sometimes appoint the external administrator as a proxy to vote on the creditor's behalf. An external administrator, their partners or staff must not use a general proxy to vote on approval of their fees; they must hold a special proxy in order to do this. They must vote all special proxies as directed, even those against approval of their fees.

Creditors' approval without a creditors' meeting

Instead of convening a creditors' meeting, the external administrator can put proposals to creditors by giving notice in writing.

This notice must be given to each creditor who would be entitled to receive notice of a meeting and:

- include a statement of the reasons for the proposal and the likely impact the proposal will have on creditors
- invite the creditor to either:
 - vote 'yes' or 'no' for the proposal
 - object to the proposal being resolved without a meeting

- specify a reasonable time for creditors' replies to be received by the external administrator.

To vote on the proposal, a creditor must lodge details of your debt or claim with the external administrator and complete the voting documents provided by the external administrator.

Creditors can vote 'yes' or 'no' on the proposal or object to the proposal being resolved without a creditors' meeting. You should return your response to the external administrator within the time specified in the notice which must be at least 15 business days after the notice is given to creditors.

A resolution is passed if the majority of creditors in number and value who responded to the notice voted 'yes' and if not more than 25% in value of the creditors who responded objected to the proposal being resolved without a creditors' meeting.

The external administrator should provide creditors enough information to allow them to make an informed decision about the proposal. A creditor should contact the external administrator to obtain further information if they think it necessary for them to make a decision.

The external administrator must lodge with ASIC the outcome of the proposal. A copy of the outcome of the proposal may be obtained by searching the [ASIC registers](#) and paying the relevant fee.

Committee of inspection approval

If there is a committee of inspection, the committee of inspection can approve an external administrator's fees. In approving the fees, the members represent the interests of all creditors or employees, not just their own individual interests.

A committee of inspection makes its decision by a majority in number of its members present at a meeting, but it can only act if a majority of its members attend.

To find out more about committees of inspection and how they are formed, see [Information Sheet 45 Liquidation: A guide for creditors](#) (INFO 45), [Information Sheet 74 Voluntary administration: A guide for creditors](#) (INFO 74) and [Information Sheet 41 Insolvency: A glossary of terms](#) (INFO 41).

Calculation of fees

Fees may be calculated using one of a number of different methods, such as:

- on the basis of time spent by the external administrator and their staff
- a quoted fixed fee, based on an upfront estimate
- a percentage of asset realisations.

Charging on a time basis is the most common method. If an external administrator seeks approval for charging wholly or partly on a time basis, and the work is yet to be carried out, the approval sought must include a maximum limit ('cap') on the amount of remuneration the external administrator is entitled to receive. For example, future fees calculated according to time spent may be approved on the basis of the number of hours worked at the rates charged (as set out in the provided rate scale) up to a cap of \$X. If the work involved then exceeds this figure, the external administrator will have to ask the creditors/committee to approve a further amount of fees, after accounting for the fees already incurred.

The external administrator and their staff will record the time taken for the various tasks involved, and a record will be kept of the nature of the work performed.

External administrators have a scale of hourly rates, with different rates for each category of staff working on the external administration, including the external administrator. If the external administrator intends to charge on a time basis, you should receive a copy of these hourly rates soon after their appointment and before you are asked to approve the fees. It is important to note that the hourly rates do not represent an hourly wage for the external administrator and their staff. The external administrator is running a business – an insolvency practice – and the hourly rates will be based on the cost of running the business, including overheads such as rent for business premises, utilities, wages and superannuation for staff who are not charged out at an hourly rate (such as personal assistants), information technology support, office equipment and supplies, insurances, taxes, and a profit.

External administrators are professionals who are required to have qualifications and experience, be independent and maintain up-to-date skills. Many of the costs of running an insolvency practice are fixed costs that must be paid, even if there are insufficient assets available to pay the external administrator for their services. External administrators compete for work and their rates should reflect this.

These are all matters that committee members or creditors should be aware of when considering the fees presented. However, regardless of these matters, creditors have a right to question the external administrator about the fees and whether the rates are negotiable.

It is up to the external administrator to justify why the method chosen for calculating fees is an appropriate method for the particular external administration. As a creditor, you also have a right to question the external administrator about the calculation method used and how the calculation was made.

Initial remuneration notice

The external administrator must send creditors a notice setting out the following information if they propose to seek fee approval for the external administration:

- the method by which they seek to be paid
- the rate of fees
- an estimate of the expected amount of total fees
- the method how out-of-pocket costs will be calculated
- a brief explanation of the different methods to calculate fees
- an explanation why they chose the particular fee method by which they seek to be paid
- if a time-cost basis was chosen, the hourly rates of the external administrator and other staff who will work on the external administration.

This initial remuneration notice must be sent to creditors:

- in a voluntary administration – at the same time as the notice of the first meeting of creditors is sent
- in a court liquidation – within 20 business days after the liquidator's appointment
- in a voluntary liquidation – within 10 business days after the day of the meeting at which the resolution to wind up the company is passed.

Report on proposed fees

When seeking approval of fees, the external administrator must send creditors/committee members a report setting out:

- a summary description of the major tasks performed, or likely to be performed
- the costs associated with each of these tasks and the method of calculation of the costs
- the periods when funds will be drawn to pay the fees
- an estimated total amount, or range of amounts, of total fees
- an explanation of the likely impact the fees will have on any dividends to creditors
- such other information that will assist in assessing the reasonableness of the fees claimed.

Creditors/committee members may be asked to approve fees for work already performed or an estimate of work yet to be carried out. For more on the tasks involved, see [INFO 45](#) and [INFO 74](#).

Deciding if fees are reasonable

If asked to approve an amount of fees, your task is to decide if that amount of fees is reasonable, given the work carried out in the external administration and the results of that work.

In addition to the information the external administrator must provide to you before seeking approval of fees, you may find the following additional information from the external administrator useful in deciding if the fees claimed are for necessary work properly performed and reasonable:

- an explanation of why the work performed was necessary

- the size and complexity (or otherwise) of the external administration
- the value and nature of the property dealt with
- the level of risk or responsibility involved with the external administration
- whether there are any extraordinary issues that were required to be dealt with
- the amount of fees (if any) that have previously been approved
- if the fees are calculated, in whole or in part, on a time basis:
 - the period over which the work was or is likely to be performed
 - the time spent by each level of staff on each of the major tasks performed or likely to be performed
 - if the fees are for work that is yet to be carried out, whether the fees are capped.

If you need more information about fees than is provided in the external administrator's report, you should let them know before the meeting at which fees will be voted on.

What can you do if you think the fees are not reasonable?

If you do not think the fees claimed are reasonable, you should raise your concerns with the external administrator. It is your decision whether to vote in favour of, or against, a resolution to approve fees.

Generally, if creditors or a committee of inspection approves fees and you wish to challenge this decision, you may apply to the court and ask the court to review the fees.

You may wish to seek your own legal advice if you are considering applying for a court review of the fees.

As well as a court review of the external administrator's fees, creditors (by resolution of creditors) or one or more creditors (with the external administrator's consent) can appoint a registered liquidator to carry out a review of fees and/or costs incurred by the external administrator of the company.

Note: A creditor can also apply to ASIC in the approved form for it to appoint a reviewing liquidator (see Form 5605 *Application for ASIC to appoint a reviewing liquidator*).

This review is limited to:

- remuneration approved within the six months before the reviewing liquidator is appointed
- costs or expenses incurred during the 12-month period before the reviewing liquidator is appointed (unless the external administrator agrees to a longer period).

The reviewing liquidator must be a registered liquidator. A creditor who wishes to appoint a reviewing liquidator must approach a registered liquidator to get a written consent from that person that they would be prepared to act as reviewing liquidator. The person must also make a written declaration about any relationships they or their firm may have that might affect their independence to act as reviewing liquidator.

The external administrator and their staff, must cooperate with the reviewing liquidator.

If creditors pass a resolution to appoint the reviewing liquidator, the reviewing liquidator's costs form part of the expenses of the external administration of the company. If one or more of the creditors appoint the reviewing liquidator with the consent of the external administrator, the reviewing liquidator's costs are borne by the creditor(s) appointing the reviewing liquidator.

Reimbursement of out-of-pocket costs

An external administrator should be very careful incurring costs that must be paid from the external administration – as careful as if they were dealing with their own money. Their report on fees must also include information on the out-of-pocket costs of the external administration.

Out of pocket expenses (or disbursements) can be categorised into:

- external services or costs such as legal fees, valuation fees, travel, accommodation and search fees
- internal services or costs such as photocopying, printing and postage.

External costs are usually charged at cost and do not require prior approval of creditors.

Internal costs may be charged at a rate higher than actual cost in order to recover overheads and similar costs. In instances where costs are charged at a rate higher than cost, the external administrator will need to obtain creditor approval before being reimbursed.

When seeking approval of out-of-pocket expenses, the external administrator must send creditors/committee members a report setting out:

- a summary description of the out-of-pocket expenses
- how they were calculated
- the total amount the external administrator is seeking reimbursement for
- why the expenses were necessary.

Creditors/committee members may be asked to approve reimbursement of out-of-pocket expenses for expenses already incurred or an estimate of expenses to be incurred.

If the expenses are yet to be incurred, a maximum limit ('cap') should be placed on the amount that the external administrator may incur and reimbursed for.

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 report of misconduct with ASIC – see [How to complain](#).

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

ASIC usually does not become involved in matters of an external administrator's commercial judgement.

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

If you cannot report misconduct online to ASIC, 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 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](#).

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 85 (INFO 85)**, updated on 1 September 2017. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

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