Approving fees: A guide for creditors

Information sheet – 85

> This is **Information Sheet 85 (INFO 85)**. It provides creditors with information about the external administrator's fees in a liquidation of a company, voluntary administration or deed of company arrangement. This information sheet outlines the rights that creditors have in approving the external administrator's fees.

The fees of a receiver are fixed by the secured creditor that appoints the receiver and is not discussed in this information sheet.

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Entitlement to fees and costs

An external administrator is entitled to receive:

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

External administrators are only entitled to fees that are 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 'statutory' tasks such as reporting to ASIC about potential breaches of the law and lodging forms and notices with ASIC. The external administrator is entitled to be paid for undertaking statutory tasks.

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

- legal fees
- valuers', real estate agents' and auctioneers' fees
- stationery, photocopying, telephone and postage costs
- retrieval costs for recovering company computer records
- storage costs for company books and records.

Creditors have a direct interest in the level of fees and costs because the external administrator will generally be paid from the company's available assets before any payments are made 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, an external administrator is sometimes not paid (or only partially paid) for the work they do.

Who may approve fees

An external administrator's fees must be approved by:

- resolution of creditors
- a committee of inspection (if there is a committee of inspection and if no resolution has been passed by creditors), or
- the court if neither the creditors or a committee of inspection have passed a resolution.

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

The external administrator must provide enough information to allow creditors to help you assess whether the fees are reasonable.

If fees are not approved by creditors in one of the above ways, the liquidator is entitled to receive reasonable fees up to a maximum default amount (indexed annually).

Creditors' approval of fees at a creditors' meeting

Creditors can approve fees by passing a resolution at a creditors' meeting. To vote on any resolution at a creditors' meeting, creditors state aloud their agreement or disagreement (called a 'vote on the voices') or a 'poll' is taken.

Unless creditors call for a poll, the resolution passes if a simple majority of creditors present and voting, in person or by proxy, indicates they agree to the resolution.

If a poll is taken, a majority in number and value of creditors present and voting must agree. A poll requires the votes of each creditor to be counted and recorded.

A separate creditors' resolution 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 vote on their behalf. A proxy can be a general or 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 certain 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 approving their fees – they must hold a special proxy to do this. All special proxies must vote as directed, even those against approval of 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 entitled to receive notice of a meeting, and:

- include a statement of 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 without a meeting
- specify a reasonable time for the external administrator to receive creditors' replies.

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

Creditors can vote 'yes' or 'no' on the proposal and/or object to the proposal 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 25% or less in value of the creditors who responded objected to the proposal without a creditors' meeting.

The external administrator should provide you with enough information to make an informed decision. Contact the external administrator if you require further information to help you decide.

The external administrator must lodge with ASIC the outcome of the proposal. You can get a copy of the outcome of the proposal by searching ASIC Connect for a fee.

Committee of inspection approval

Where creditors have not passed a resolution approving fees, a committee of inspection can approve an external administrator's fees. In doing so, the members of the committee 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) and Information Sheet 74 *Voluntary administration: A guide for creditors* (INFO 74).

Calculation of fees

Fees may be calculated on a:

- time basis, based on time spent by the external administrator and their staff
- quoted fixed fee, based on an upfront estimate
- 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 based on the expected 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 exceeds this figure, the external administrator will have to ask creditors/committee to approve further fees, after accounting for the fees already incurred.

An external administrator is also entitled to ask for approval to pay their estimated future fees (for work yet to be done). Usually this is requested to allow the external administrator to continue doing work up to a certain point in time (e.g. to achieve a particular outcome) or to the completion of the external administration.

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.

It is up to the external administrator to justify why the method chosen for calculating fees is appropriate. As a creditor or committee member you have a right to question the external administrator about the calculation method used and how the calculation was made. You can also ask whether the hourly rates are negotiable.

Hourly rates

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 fees. It is important to note 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 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.

Initial remuneration notice

If the external administrator proposes to seek fee approval, the external administrator must send creditors a notice setting out the following information:

- the method by which they seek to be paid (e.g. time basis, quoted fixed price)
- the rate of fees
- an estimate of the expected total fees
- how out-of-pocket costs will be calculated
- a brief explanation of the different methods to calculate fees
- an explanation why they chose a particular fee method
- 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 creditors' 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 how the costs were calculated
- when the funds will be drawn to pay the fees
- an estimated total amount, or a range of total fees
- an explanation of the likely impact the fees will have on any payment to creditors

- other information that will assist creditors to assess 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 information about the tasks involved, see INFO 45 and INFO 74.

Deciding if fees are reasonable

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

The external administrator must provide you with certain information to help you decide if you should approve their fees. To decide if the fees claimed are reasonable and for necessary work properly performed, you might find the following additional information the external administrator provides useful:

- 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 assets or property dealt with
- the level of risk or responsibility involved with the external administration
- whether there are any extraordinary issues that the external administrator had to deal 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, let the external administrator 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 think the fees claimed are not reasonable, you should raise your concerns with the external administrator. You decide whether to vote in favour of, or against, a resolution to approve fees.

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

A creditor can also apply for ASIC to appoint a reviewing liquidator: see Form 5605 *Application for ASIC to appoint a reviewing liquidator*.

Where creditors resolve to appoint a reviewing liquidator, the review is limited to:

- remuneration approved within the six months before the reviewing liquidator is appointed
- costs or expenses incurred during the 12 months 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 written consent 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 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.

You 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 the external administrator may incur and get reimbursed for.

Questions and complaints

Contact the external administrator to raise questions or complaints. If this fails to resolve your concerns, including any concerns about their conduct, you can lodge a report of misconduct with ASIC. ASIC does not usually become involved in matters of an external administrator's commercial judgement.

More information

- Information Sheet 39 *Insolvency information for directors, employees, creditors and shareholders* (INFO 39)
- Australian Restructuring Insolvency & Turnaround Association (ARITA) website
- 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. We encourage you to seek your own professional advice to find out how the applicable laws apply to you, as it is your responsibility to determine your obligations.

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.

> Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.
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> This information sheet was reissued in June 2023.