

RIGHTS OF CREDITORS - REQUESTING INFORMATION FROM LIQUIDATORS AND ADMINISTRATORS

23 January 2018 | Australia
Legal Briefings - By **David John**

The Insolvency Practice Schedule (Corporations) set out in Schedule 2 of the *Corporations Act 2001* (Cth) (**Schedule**), and the *Insolvency Practice Rules (Corporations) 2016* (**Rules**), grant individual creditors increased rights to information in the conduct of an external administration.

Importantly, individual creditors, and creditors as a whole, have the right to request information, reports or documents from an external administrator. This article considers the obligations of an external administrator when he or she receives a request for information, reports or documents from an individual creditor.

In this context, an external administrator is defined as:

- a. the administrator of the company; or
- b. the administrator under a deed of company arrangement that has been entered into in relation to the company; or
- c. the liquidator of the company; or
- d. the provisional liquidator of the company,

(see section 5-20 of the Schedule). Receivers are not bound by these obligations.

If an external administrator receives a request from a creditor, they must comply unless:

- a. it is not relevant to the external administration of the company;
- b. compliance with the request would be a breach of the external administrator's duties; or
- c. it is otherwise not reasonable to comply with the request,

(see section 70-45(2) of the Schedule).

The Rules distinguish between reasonable and unreasonable requests. A request is reasonable if none of the factors which make a request unreasonable apply (see section 70-15(4) of the Rules).

The factors which make a request unreasonable are set out at section 70-15(2) of the Rules. A request is not reasonable if the external administrator is of the opinion that:

- a. complying with the request would substantially prejudice a creditor or third party's interests, and that prejudice outweighs the benefits of complying with the request;
- b. legal professional privilege would attach to the document in legal proceedings;
- c. disclosure would found an action for breach of confidence;
- d. there is no property to comply with the request (as to which see discussion below);
- e. the document or information has already been provided;
- f. the request is for a document or information which the external administrator is already required to provide pursuant to Corporations legislation within 20 days of when the request was made; or
- g. the request is vexatious.

It will be apparent from (a) to (c) above that the Rules enable an external administrator to avoid compliance with a request in those circumstances which would be expected, namely situations of confidentiality, privilege and where there is prejudice as a consequence of compliance with the request. Of course, the need for the external administrator to attempt to assess the relative prejudice of disclosure compared with the benefit to be gained by the creditor from compliance has the potential for different weighting and interpretation (and therefore dispute).

A request is not reasonable where the request is made for a document or information which the external administrator is already required to provide pursuant to Corporations legislation within 20 days of when the request was made (ground (f) above). For example, it seems that the Rule is aimed at a situation where the external administrator is required, by the Corporations legislation, to provide a document or information within 20 days of a particular date and a creditor makes a request for that same document or information inside these 20 days. Such a request is deemed unreasonable by the Rules.

Further, a request which is vexatious is not reasonable (ground (g) above). There is no guidance in the Schedule or the Rules as to the meaning of 'vexatious', except that a request may be vexatious if a request is made within 20 business days of receiving a similar request from creditors (see section 70-15(3) of the Rules). We anticipate that this ground has the potential to become a 'catch all', which may be used by external administrators to avoid provision of documents or information in a wide variety of circumstances (ie particularly where there is an on-going dispute with this creditor, where numerous requests have been made, or where there is a significant volume of material which may be discoverable in the dispute anyway, or which is only marginally relevant).

If the request is unreasonable because there is no property to comply with the request (ie there are no assets in the estate to fund compliance (ground (d) above)), that request will become reasonable, and the external administrator will be required to comply with the request, if the creditor agrees to bear the cost of complying with request, and security for that cost is given (ie if the external administrator requires) (see section 70-15(5) of the Rules).

If the request is reasonable, the external administrator must comply with the request (see section 70-1(2) of the Rules):

- a. within 5 business days; or
- b. within such later time as agreed with the person making the request.

Although 5 business days is a short time, the external administrator can extend the time for responding to the request (ie effectively unilaterally) if the external administrator is reasonably of the view that the nature of the request requires an extension (see section 70-1(3) of the Rules). If this occurs, the external administrator must:

- notify the requesting party in writing of the extension;
- state the period within which it will comply with the request; and
- specify the reasons for the extension.

If a request is not reasonable, then the external administrator must notify the party making the request that it is not reasonable to comply with the request, and the reasons why it is not reasonable (see section 70-5(2) of the Rules).

This right to request information, reports or documents applies to all new and also all ongoing external administrations (see section 1591 of the Corporations Act 2001 (Cth)). Section 1578 indicates that an 'ongoing external administration' is an external administration that starts before the commencement day and is still ongoing. Additionally, the provisions discussed above apply whether or not the information, report or document:

- a. was obtained or generated; or
- b. was made or prepared; or
- c. is in respect of actions or events that occurred;

before, on or after the commencement day, being 1 September 2017 (see section 1597 of the Corporations Act 2001 (Cth)).

As will appear from the matters set out above, while it is clear that external administrators have had a real administrative burden imposed upon them by these provisions of the Insolvency Schedule, the Schedule and the Rules limit the burden by:

- a. not requiring an external administrator to respond to unreasonable or irrelevant

requests;

- b. requiring the creditor to pay for compliance with the request, if the insolvent estate is assetless; and
- c. granting (effectively) unilateral discretion to the external administrator to extend the time for responding to a request (ie subject to providing reasons).

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



DAVID JOHN
PARTNER, PERTH

+61 8 9211 7742
David.John@hsf.com

LEGAL NOTICE

The contents of this publication are for reference purposes only and may not be current as at the date of accessing this publication. They do not constitute legal advice and should not be relied upon as such. Specific legal advice about your specific circumstances should always be sought separately before taking any action based on this publication.

SUBSCRIBE TO STAY UP-TO-DATE WITH INSIGHTS, LEGAL UPDATES, EVENTS, AND MORE

Close

© HERBERT SMITH FREEHILLS LLP 2021