

# Rights of creditors to request information under the *Insolvency Law Reform Act 2016*

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## Summary

The *Insolvency Law Reform Act 2016* (ILRA), with effect from 1 March 2017, significantly changed creditors' rights to access information from trustees and liquidators.

The ILRA amends the *Bankruptcy Act* (Cth) 1966 and the *Corporations Act* (Cth) 2001, by adding what is called "Insolvency Practice Schedules" (IPS) to both Acts.

For the purpose of this summary, we have looked at the provisions relevant to external administrators, but similar provisions have been introduced in respect of bankruptcy trustees.

## What do the relevant provisions say?

The relevant provisions can be found in Schedule 2, Part 1 of the ILRA, from 70-40 onwards.

Creditors now have a formal right to request information and documents (including a report) from an external administrator by way of resolution (70-40).

An individual creditor (or member of a company in the case of a members' voluntary winding up) may also request information, a report and/or a document from the external administrator (70-45 & 70-46).

In both instances, the external administrator is obliged to comply unless the information sought is not relevant to the external administration of the company, or the information would breach his or her duties in relation to the external administration, or if "it is otherwise not reasonable" to comply with the request.

In addition, with effect from 1 September 2017, the Insolvency Practice Rules provide a strict timeframe for compliance.

Part 3, Division 70 of the *Insolvency Practice Rules (Corporations)* 2016, provide:

- if an external administrator receives a request for information under Division 70 of the IPS (Corporations), the external administrator must send the information, report or document within 5 business days of receiving the request; or such later period as agreed with the person or body making the request.

- the external administrator may extend the time for compliance if they are satisfied it is reasonable to do so due to the nature of the request.
- Any extension must be done by way of a written notice to the creditor (or member) making the request. The notice must specify the reasons for the extension and the time period the request will be complied with.

### What is “not reasonable”?

The big question is when will it be not reasonable to comply with a request?

The Insolvency Practice Rules provide some guideline as to when a request is unreasonable, although the test is a subjective one, namely if the external administrator, acting in good faith, holds an opinion that:

- complying with the request would substantially prejudice the interests of one or more creditors or a third party and that prejudice outweighs the benefit; or
- the information, report or document would be privileged from production in legal proceedings; or
- disclosure would breach a confidentiality agreement/ clause; or
- there is insufficient information available to properly comply with the request; or
- the information, report and/or document has already been provided; or
- the request is vexatious; or
- the information, report or document is already required to be provided under the Corporations legislation, within 20 business days of the request being made.

A reasonable request is one where the above doesn't apply.

It should also be noted that a reasonable request is also one where the creditor agrees to bear the cost of production and security is given to the external administrator prior to compliance.

### What happens if the external administrator doesn't comply?

Importantly, if an external administrator refuses a request made under Division 70 of the IPS, and ASIC is satisfied that the request ought to have been complied with, ASIC may make a direction that the external administrator provide the relevant material within 5 business days (provided that notice is given to the external administrator).

If an external administrator does not comply with a direction made by ASIC, the Court may order that the external administrator provide the information on the application by the person making the request, or by ASIC where there has been non-compliance with a direction.

The changes now place a formal obligation on external administrators (and trustees) to promptly respond to reasonable requests for information made by creditors.

What is “reasonable” remains subjective, but information relating to the external administration is relevant and particular creditors, such as ongoing suppliers, may benefit from the provisions. The onus will be on the external administrator, certainly initially, to respond promptly to creditor's requests and provide sufficient reasons if he or she is unable to do so.

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