

Insolvent companies

This fact sheet provides information about the role of an insolvency practitioner when the director of a company under external administration lodges a complaint.

It does not cover insolvency practitioners appointed to a financial firm that is an AFCA member.

Can an insolvent company lodge a complaint?

AFCA commonly receives complaints from insolvent companies, and in particular, complaints about:

- a financial firm's response to requests for financial difficulty assistance; and
- whether a financial firm complied with its obligations to lend responsibly when it granted the loan.

An insolvent company may mean the company is under administration, receivership, or liquidation. In many cases, whether AFCA can consider a complaint submitted by an insolvent company depends on the consent of its insolvency practitioner (being its administrator, receiver and manager, or liquidator).

Seeking the consent of an insolvency practitioner

Controllers

A controller is not an insolvency practitioner and is not an agent of the company. Instead, a controller is appointed to take possession and management of the secured asset as agent of a financial firm as secured creditor.

The company does not need the consent of a controller to lodge a complaint.

AFCA requires the financial firm (if it appointed the controller) to instruct its agent to stop any further recovery action while AFCA considers the company's complaint.

Administrators

A voluntary administrator may be appointed when the directors resolve that their company is or may become insolvent. The voluntary administrator has all the powers of the company and its directors.

The administrator will assess the company's ability to trade and the prospects of an arrangement with creditors. Creditors must resolve whether to accept the administrator's proposal, return the company to the control of its directors, or place the company into liquidation.

While a company is under administration, it requires the consent of the administrator to lodge a complaint with AFCA.

Receivers or Receivers and Managers

Directors of a company in receivership may retain control of the company if a receiver is only appointed over a single company asset. If this is the case, the receiver's consent for the company to submit an AFCA complaint is not required. AFCA will review the Deed of Appointment to confirm the extent of the receiver's appointment.

A receiver is known as a receiver and manager if it has the power to manage the company's affairs under the terms of its appointment. Directors have lost control of the company once a receiver and manager is appointed.

Although control of the company vests in the receiver and manager, its directors have a residual power to challenge the validity of the appointment of the receiver and manager. The directors may only submit an AFCA complaint without the receiver and manager's consent if the complaint is about:

- whether the financial firm was entitled to appoint a receiver and manager; or
- the financial firm's acts or omissions prior to the appointment of the receiver and manager

Other than in these circumstances, AFCA cannot consider a complaint submitted by a director of a company in receivership without the receiver and manager's consent. AFCA also cannot intervene in or review any actions taken by the receiver. For example, if the director seeks a remedy which would interfere in the receiver's role, AFCA would not consider the complaint.

While AFCA cannot make any enforceable directions against the receiver and manager, if we conclude that the financial firm was not entitled to appoint the receiver and manager, we would expect the financial firm to direct the receiver and manager to retire.

Whether AFCA can consider a complaint about the conduct of a financial firm depends on whether:

- the receiver is an agent of the financial firm or the company
- the complaint is about the financial firm's conduct before or after the receiver's appointment.

Liquidators

Directors of a company in liquidation cannot submit an AFCA complaint without the consent of the liquidator. If AFCA awards compensation for financial loss, the financial firm will be directed to make the payment to the liquidator because it controls the company's assets.

We may close a complaint where we cannot effectively investigate the issues raised without the involvement or consent of another person. See AFCA Rule C.2.2(i) for more information, which is available on our website: afca.org.au/rules.

