



Special administrations: what funding agencies, creditors and employees should know

This fact sheet provides general information for funding agencies, creditors and employees of corporations. It is about special administrations under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act).

What is a special administration?

A special administration is a process where the Registrar appoints an independent and suitably qualified person to look after and fix problems at a corporation. The problems might be short-term financial troubles, poor internal business or governance (the corporation is not running as it should), or the structure of the corporation needs to be changed. The aim is to return control of a better corporation to its members.

The corporation will usually continue to deliver services during a special administration.

Special administration is a special measure under the CATSI Act. It is different to an administration under the *Corporations Act 2001* (Corporations Act). Only Aboriginal and Torres Strait Islander corporations can be placed under special administration.

How does a special administration start?

Only the Registrar can place a corporation under special administration.

The Registrar looks at many issues when making a decision to place a corporation under special administration. For instance, if a corporation is funded by government, the Registrar will usually ask the key funding agencies for their views on the corporation.

The Registrar does not need to apply to a court, but must usually give a corporation the opportunity to say why they think a special administrator should not be appointed (this is called a 'show cause procedure').

To protect public money or to ensure that essential or significant services are not interrupted, the Registrar can place a corporation under special administration without the show cause procedure.

The directors or members of a corporation can write to the Registrar to ask for their corporation to be placed under special administration.¹

A creditor, funding body or employee can make a complaint or provide information about a corporation to the Registrar. The Registrar may use this when making a decision to place a corporation under special administration. For information about making a complaint see ORIC's policy statement PS-02 *Complaints involving corporations*.

The Registrar can appoint one or more people to act as special administrator.

A corporation cannot be placed under special administration if the corporation is being wound up or a liquidator has been appointed.

Can someone disagree with the decision?

A decision to place a corporation under special administration or extend an administration is a reviewable decision. The CATSI Act says the first step is to ask the Registrar to reconsider the decision. A person who is affected by the decision, which may or may not include an employee, creditor or funding body, has 28 days after they have notice of the decision to ask the Registrar for a review. If after the review the person still disagrees with the Registrar's decision, they can ask the Administrative Appeals Tribunal to review it.

1. A majority of directors or the required number of members is needed. The number of members required depends on the size of the corporation. See ORIC's policy statement PS-20 *Special administrations*.

What changes when a special administration starts?

A special administrator takes the place of the directors. The directors and secretaries of the corporation no longer hold office (unless the Registrar decides otherwise) and cannot use their powers. They also cannot use or deal with the corporation's property without the permission of the special administrator.

What the special administrator does

A special administrator takes full control of the corporation, its business and property. Only the special administrator can deal with the corporation's property.

The special administrator's job is to resolve the issues why the corporation was placed under special administration. The special administrator will:

- collect and manage the corporation's assets (for example, bank accounts, vehicles and office premises)
- review the corporation's financial and operational activities to find out the financial position
- meet with funding agencies to work out and secure funding, and confirm service delivery expectations
- contact creditors about arrangements to pay the corporation's debts
- improve internal business and governance practices, if necessary (for example, introduce rules about how money is spent)
- review the corporation's rule book and make changes if needed
- check the register of members and update it when it is not correct or out of date
- send regular reports to the Registrar about what's happening at the corporation.

To do their job the special administrator works with people associated with the corporation—the members, funding agencies, creditors, employees, former directors and other interested parties. But the special administrator is an independent officer and is not subject to direction from any of these people.

Funding agencies, creditors and employees have no formal role in the special administration process.

Special administrators can set up an advisory group which may include some of the corporation's former directors. It may include an important funding agency, creditor or employee but this is not usually the case. Special administrators will talk with this group about the steps forward and rule book issues such as who can become members.

The Registrar expects that the special administrator will also hold community meetings and send out regular newsletters. This is to keep members, funding agencies, creditors, employees, former directors and other interested parties, up to date with the progress of the special administration and plans for the future.

To receive the newsletters or for more information on the advisory group funding agencies, creditors and employees can contact the special administrator.

You can look at newsletters sent out by special administrators in the public register on ORIC's website at www.oric.gov.au.

Use the 'Search for a corporation' function. Look in the corporation's documents.



Who's who?

Funding agencies are government bodies that provide grants or make payments to a corporation under an agreement. Sometimes a funding agency may also be a creditor of the corporation.

A **creditor** is someone the corporation owes money to. Usually, a creditor has given goods or services, or a loan of money. An employee owed money for unpaid wages and other entitlements is also a creditor. Other creditors might be a person who may be owed money if a certain event occurs (for example, if they succeed in a legal claim against the corporation). These people are sometimes called a 'contingent' creditor.

An **employee** is a person hired by a corporation under an award, certified agreement, workplace agreement or a contract of employment. They could be paid a salary, wages or commission. Contractors are not employees. They are creditors of the company.

Effect of special administration on creditors

Special administration places a corporation's debts 'on hold' and provides a corporation with breathing space while its future is resolved by the special administrator. In most cases a creditor can't take any action to have their debt paid, such as apply to wind up the corporation, unless the special administrator or the court agrees.

Any debts a corporation incurs during the special administration must be paid by the special administrator. These debts could be for purchasing goods or services; hiring, leasing, using or occupying property; or loans. The special administrator must also pay certain tax liabilities of the corporation. If the corporation does not have enough money to pay these debts the special administrator must pay them. For creditors to have the benefit of this protection, the special administrator will need to authorise purchases by the corporation, for example, with a purchase order.

During the special administration the special administrator will try to make arrangements to pay as many of the corporation's debts as possible. If this cannot be done before the end of the special administration, the corporation is once again responsible for paying its outstanding debts and creditors can start action to recover the debts.

WARNING!

technical content

More information for creditors

If a corporation uses or occupies a property the special administrator has five business days from the time they are appointed to tell the owner of the property whether they will continue to occupy or use it. If the special administrator decides to continue to do so, they will be personally liable for any rent or amounts payable arising after the end of the five business days.

To claim against a corporation or deal with its property written permission from the special administrator or court is needed for:

- unsecured creditors to begin or continue their claims
- secured creditors to enforce their charges (except in limited circumstances)
- administrators appointed under the applied provisions of the Corporations Act and receivers to exercise their powers.

Permission from the court is needed for:

- enforcing claims
- a creditor to act on a personal guarantee from a director of the corporation or any other person.

What happens to employees?

Employees of a corporation are not automatically dismissed when a corporation is placed under special administration. The special administrator is responsible for the operation of the corporation and has the power to hire or dismiss employees on behalf of the corporation. The special administrator will decide whether to continue or start a new employment contract with each employee.

Separation certificates

An employee who is dismissed and wants to apply for social security may need an employment separation certificate.

A special administrator must prepare a separation certificate for a person if their employment ends during the special administration. They are not obliged to prepare one for people that stopped being employed before the special administration.

Contact Centrelink on 133 202 to find out what to do if you receive a separation certificate.

What happens to employees' entitlements?

Employees owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits are a creditor of the corporation. Payment of some or all of these entitlements may be given priority over other debts of the corporation.

If the special administrator continues to employ the staff of the corporation their wages and other employee entitlements during the special administration must be paid by the special administrator. If the corporation does not have enough money to pay the employees the special administrator must pay them.

The special administrator will try to make arrangements to pay wages and entitlements earned before the corporation was placed under special administration. But if the corporation is in a difficult financial position they may not be paid during the special administration.

If the special administration ends and the corporation is placed into liquidation, priority will be given to paying outstanding employee entitlements. Employees may also be entitled to make a claim under the General Employee Entitlements and Redundancy Scheme (GEERS). For more information on GEERS, visit www.deewr.gov.au/geers, call 1300 135 040 or email GEERS@deewr.gov.au.

Payment summaries

Most employees require a PAYG payment summary (group certificate) to complete and lodge their income tax return.

If a special administrator pays an employee, they must give them a PAYG payment summary that says what wages and entitlements were paid and any income tax deducted. Contact the special administrator to find out if they are going to prepare a PAYG payment summary for employee entitlements paid by the corporation before the special administration started. And if so, what period it will cover.

If an employee can't get a PAYG payment summary for any period, they should call the Australian Taxation Office on 13 28 61 to find out what to do.

Who pays the special administrator?

The Registrar sets the special administrator's costs, including their fees, charges and expenses. The Registrar may pay these costs or decide that the corporation or a related organisation is to pay some or all of these costs.

Special administrator's protection from civil proceedings

A special administrator is protected from certain legal action² while exercising their functions, powers and duties. This protection is provided if they act in good faith.

The Registrar requires special administrators to have insurance for public liability, professional indemnity and worker's compensation.

Complaints or concerns about a special administrator?

If a funding agency, creditor or employee is not satisfied with what a special administrator has done or is doing they can contact ORIC to make a complaint or ask about what they can do. For information about making a complaint see ORIC's policy statement PS-03 *Complaints about the Registrar's staff and contractors*.

2. Section 609-1 of the CATSI Act.

Further information

freecall: 1800 622 431
(free except for mobiles)

email: info@oric.gov.au

website: www.oric.gov.au

Effect of special administration on other forms of external administration

Generally, a special administration takes priority over other forms of external administration. Administrators appointed under the Corporations Act and receivers need written permission from the special administrator to exercise any powers or deal with the corporation's property. Transactions involving the corporation's property may also be entered into under a court order.

A corporation under special administration has some limited protection from winding up. Only the Registrar or the special administrator can apply to the court for the corporation to be wound up. Creditors cannot do this. Also, members or creditors cannot voluntarily wind the corporation up.

How does a special administration end?

When a corporation is ready to be handed back to its members, new directors will be chosen by the members. The new directors will start their duties when the special administration ends.

If it isn't possible to fix the corporation's problems an application can be made to the court to place the corporation into liquidation. The application can be made by the special administrator, the Registrar or, at the end of the special administration, by a director, creditor or member. At the end of a special administration a corporation can also move to an administration under the Corporations Act. But this doesn't happen very often. Contact ORIC for more information on these other processes.

The Registrar expects that when a special administration is straightforward it should not take more than six months and when it is complex not more than 12 months. The Registrar can extend or end a special administration.

To find out more

For more information about special administrations see ORIC's policy statement PS-20 *Special administrations*. Get a copy from www.oric.gov.au, call 1800 622 431 (free call except for mobiles) or email info@oric.gov.au.

Note: This fact sheet contains basic information only and should not be taken as a substitute for legal advice. Please see your lawyer to take into account your particular circumstances.