

## Industry guideline: Appointing investigating accountants and insolvency practitioners to small businesses and primary producers

This industry guideline does not have legal force or prescribe binding obligations on individual banks. While the Australian Bankers' Association (**ABA**) industry guidelines are voluntary, they are developed with input from, and agreed support by, member banks. The ABA encourages members to use this industry guideline in their internal processes, procedures and policies.

### Purpose

This industry guideline outlines the minimum standards expected of banks when working with small businesses, commercial or agricultural businesses in cases of financial difficulty. Banks have a legal right to enforce security over a loan obligation where a customer has defaulted. Banks and insolvency practitioners appointed by banks should act fairly, responsibly and transparently throughout this process.

The industry guideline highlights good practices and expectations when using investigating accountants and insolvency practitioners, including measures to reduce potential conflicts of interest.

The first section of this document provides guidance for banks, acknowledging that each situation will need to be assessed on individual merit.

The second section includes FAQs and is designed to help customers and other interested parties understand how banks approach working with customers in financial difficulty, to assist them when dealing with banks.

### Section 1: Principles for industry practice

Banks understand that the potential loss of a business or farm would be a very difficult experience for a customer and their family. To ensure fair, ethical and transparent practices when appointing receivers, voluntary administrators or investigating accountants, banks will at all times endeavour to follow these principles:

#### Communicate clearly and honestly

- Banks should provide clear information to customers about the loan, including a summary of key terms and conditions, and notice of changes to terms and conditions.
- Inform the customer if the bank is concerned about the customer's business, noting the bank's own understanding of the situation may depend on the quality of information provided by the customer.
- Ensure the business owner or farmer is aware of the next steps in any review of their loan or credit facility. Banks should provide clear timeframes and information wherever possible.
- Encourage the business owner or farmer to get independent professional legal and/or financial advice (including from rural financial counsellors), to communicate with their bank, and disclose early any difficulties or potential difficulties.

#### Treat customers with dignity and respect

- Banks should encourage customers to keep in contact with the bank, particularly if their personal circumstances or financial and business situation changes. Early engagement with their bank is important.



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- Provide customers with information about financial hardship support, including how to access financial difficulty assistance and other support arrangements.

### Try to resolve the financial problems early and by negotiation

- Banks should encourage the customer and their adviser/s to identify and develop actions, including financial and business goals that will improve their position.
- Be flexible with the options to assist resolution of debt issues, and put in place suitable and practical arrangements that allow customers to meet ongoing living expenses.
- For farming businesses in New South Wales, Victoria and Queensland, banks and customers can use farm debt mediation (**FDM**) to try to resolve disputes. Under legislated FDM, a bank cannot enforce its security over farm properties until a FDM process has been completed.

### Explain the role and purpose of third parties such as investigating accountants

- Banks should inform the customer of the bank's concerns about the business and why it believes further investigation by an investigating accountant is necessary.
- The bank will inform the customer of the appointment, outline the role of the investigation and give the customer a copy of the instructions provided to the investigating accountant. It will be important to explain how the report helps the bank assess the situation and highlight that the findings may lead to enforcement action.
- Explain that while the investigating accountant will be reporting to the bank, the customer will be paying for the report. This is because the report assists in understanding the business' financial viability and this is part of the administration of the credit facility. This will be included in terms and conditions of your loan agreement and/or there will be a specific written agreement between the customer and the bank at the relevant time.
- Banks should explain that the customer will need to provide the investigating accountant with reasonable access to additional information such as financial accounts, business plans and management reports. Failure to provide this may impact the outcome of the report.
- When providing instructions to the investigating accountant, banks can highlight specific concerns about the business but must not influence the report or recommendations of the investigating accountant.
- Banks should be clear on what information will be shared with the customer and why certain information will not be shared. At a minimum the customer will be provided with:
  - The instructions given to the investigating accountant.
  - Sections of the report that require details to be verified by the customer. The customer can correct and challenge these details if they believe these to be incorrect. These details tend to be in respect of information that is factual in nature and not open to opinion or interpretation, e.g. outline of company strategy, historical and current trading information, rather than forecast data or opinions surrounding asset valuation.
- Banks should notify the customer so they are aware that some sections of the report, such as the findings and security assessment information, are made to the bank on a confidential basis. These sections may include sensitive commercial and legal information, for example, instances where the investigating accountant might uncover fraud or illegal activity.
- Banks should endeavour to communicate the findings with the customer, where appropriate, and discuss the bank's proposed actions with the customer.



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### Provide reasonable notice of enforcement action

- Banks will seek to provide reasonable notice (as outlined in the contract) before taking enforcement action with small business customers. The time period may be influenced by the circumstances of the individual case, such as:
  - The circumstances leading up to the demand.
  - The borrower's ability to meet the demand and the severity of the borrower's financial position.
  - The level of cooperation of the borrower and the borrower's willingness to work through the issues.
  - The nature of the security and amount owed.
  - If the customer is suspected of committing any illegal/fraudulent activity.
- For customers who are farmers and primary producers, banks will only appoint receivers once FDM (or a voluntary mediation process in states with no mandatory FDM scheme) has been undertaken and subject to the outcome of the mediation, or in the event a borrower declines to participate in FDM.

### Appoint an appropriately qualified practitioner

- Banks should only appoint an investigating accountant who has the relevant qualifications and experience for the role they are to perform, appropriate professional indemnity and fidelity insurance, and who are members of a professional association that:
  - Requires members to follow a code of practice that imposes appropriate standards around independence, integrity, and professionalism, and
  - Has a complaints process that a customer can access if they wish to complain about the conduct of the practitioner.
- Banks will only appoint receivers and voluntary administrators with appropriate skills and experience. Receivers and voluntary administrators must be registered under the *Corporations Act 2001* by the Australian Securities and Investments Commission (**ASIC**), be members of a professional association that:
  - Requires members to follow a code of practice that imposes appropriate standards around independence, integrity, and professionalism, and
  - Has a complaints process that a customer can access if they wish to complain about the conduct of the practitioner.
- The receiver or voluntary administrator may also then engage people (as may be necessary) with suitable expertise, for example a farm manager who is known to have the experience and knowledge required to adequately look after agricultural property and livestock.

### Ensure the appointment of receivers or voluntary administrators is appropriate and transparent

- Where a bank has come to the view that it is necessary to appoint a receiver or voluntary administrator, unless there are particularly sensitive commercial issues involved, the bank should have a discussion with the customer about the appointment. This would cover why a receiver or voluntary administrator should be appointed, who is to be appointed, and why they have been chosen (i.e. their qualifications or specialised knowledge of an industry).
- It should not be automatically assumed that the investigating accountant will be appointed as receiver. This should be made clear to the investigating accountant.



- Banks will implement procedures to reduce the potential conflicts of interest of **investigating accountants** subsequently being appointed as receivers or voluntary administrators, by:
  - Only appointing practitioners who are registered to act as receivers and/or voluntary administrators and who are members of professional organisations with appropriate codes of conduct.
  - Explaining to the customer the potential advantages of time and cost in appointing the same person as the investigating accountant and receiver or voluntary administrator (if relevant).
  - Ensuring the investigating accountant understands that it is at the bank's discretion to appoint them as a subsequent receiver.
  - Requiring an additional internal oversight of the appointment of investigating accountants as receivers, to ensure that the decision is necessary and to review the circumstances leading to the appointment.
- Banks understand that for customers, periods of financial difficulty and uncertainty can be stressful and tense. If the bank is aware that the relationship between the bank customer and the investigating accountant has deteriorated (for example has become unworkable), the bank may consider the appointment of an alternative qualified practitioner as the receiver or voluntary administrator. The bank should explain this may be a more expensive option for the customer however the customer may prefer this outcome.
- The bank will also inform the proposed receiver or voluntary administrator of the customer's objection and give the proposed receiver the option to decline the appointment if they consider the objection could impede their ability to comply with ethical and professional standards.
- The bank should endeavour to keep the customer informed of the progress of the receivership, noting that there may be a need to keep some information confidential, particularly during the sale of the asset where the customer may have a direct or indirect interest in a potential purchaser.
- While a receiver appointment is permitted under the terms of the loan arrangement, the appointment is also covered by Corporations Act requirements. The Corporations Act requires receivers to take all reasonable care to sell assets for market value (if there is one) or at the best price reasonably obtainable in the circumstances<sup>1</sup> It is in the interests of all parties to ensure that the assets are sold on the best possible terms and that the receivership and other costs are reasonable and proportionate.

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<sup>1</sup> 420A(1) of the *Corporations Act 2001 (Cth)*: In exercising a power of sale in respect of property of a corporation, a controller must take all reasonable care to sell the property for:

(a) if, when it is sold, it has a market value not less than that market value; or

(b) otherwise the best price that is reasonably obtainable, having regard to the circumstances existing when the property is sold.



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## Section 2: Understanding your rights and obligations as a customer

When you borrow money from a bank for a business it's important that you understand your rights and obligations under the loan agreement. This includes knowing what can happen if you get into financial difficulty and have trouble making repayments. Customers are encouraged to get independent financial and legal advice before signing a loan agreement.

Banks are improving small business loan contracts by explaining terms and conditions in plain language, reducing the number of non-monetary covenants (specific events that could result in the bank calling in the loan), and by including a clear summary of covenants – their purpose and how and when they can be used.

### How do banks work with small businesses in financial difficulty?

Banks will work with small business owners and farmers to identify appropriate solutions if a customer indicates, or the bank identifies, they are experiencing financial difficulties, have missed payments, or are struggling to manage their financial obligations. The bank's preference is to work with a customer to try and find a solution that can help to turn the business around. It is better for customers to speak with their bank early and explain their situation, rather than missing repayments and going into arrears or taking decisions without advice which might cause problems later. The sooner the issue is raised, usually the more options there are available.

### Why would banks appoint an investigating accountant, receiver or voluntary administrator?

Investigating accountants are used in a small number of cases where the bank has concerns about the financial viability of a business or whether the amount of debt is sustainable, and it does not have access to quality and up-to-date information from the customer or where an independent second opinion is required. Investigating accountants can also be used to assist the bank to make a decision about a customer's request for additional funding. In the majority of circumstances the customer will pay for the work undertaken by an investigating accountant.

If a customer has defaulted on their loan agreement and all other options have been exhausted, an insolvency specialist such as a receiver or voluntary administrator may be appointed as permitted under the loan agreement or the Corporations Act.

### What is the role of an investigating accountant?

An investigating accountant may be appointed by the bank to review a company's historical and/or projected financial information, with emphasis on the latter. An investigating accountant report, also known as an Independent Business Review (**IBR**), is a useful way for a bank to gain a more detailed understanding of the performance of a business using specialist input from qualified industry professionals. The investigating accountant will need the co-operation of the customer to undertake their work.

It is usual practice for an investigating accountant to provide the customer with relevant sections of their draft report to enable factual details to be verified and/or corrected by the customer.

The investigating accountant will not usually recommend a specific course of action to the bank but instead provide information to enable the bank to decide future steps. This information is provided to the bank on a confidential basis. Parts of the report may include sensitive information, for example, security assessments that need to be kept confidential if a sale process is necessary.

### What is the role of a receiver?

A receiver may be appointed by a secured creditor such as a bank to take control of the borrower's assets or business which was given as security for the loan. This appointment will happen if there is a default by the borrower under the terms and conditions of the loan contract. A receiver's role is to



recover and sell enough of the secured assets to repay the debt owed. If the receiver is appointed as a receiver and manager, the role will include managing and running the business which may allow for the business to be sold as a going concern. Banks will only appoint receivers with appropriate skills and relevant experience and the Corporations Act sets out certain requirements relating to the role of a receiver. ASIC has issued useful information sheets to explain the roles and responsibilities of receivers.<sup>2</sup>

While receivers are agents of the borrower, not agents of the appointing secured creditor (e.g. the bank), the borrower is not able to instruct, direct or control the receivers. The bank should endeavour to keep the customer informed of the progress of the receivership.

As agents of the borrower, receivers have statutory duties owed to the borrower under the Corporations Act while their principal duty is to their appointor (the Bank). These duties include exercising care and diligence, not gaining personally or for another party, or improperly acting to the detriment of the borrower.

The receiver has a legal obligation under the Corporations Act to take all reasonable care to sell the assets for market value (if there is a market value), or at the best price reasonably obtainable in the circumstances.

The money from sale is used to pay the receiver's costs and fees and then the secured creditor. Depending on the type of security given, other priority claims may also be required to be paid (for example employee entitlements). Fees are calculated based on the terms of appointment by the bank. The bank will assess the fees to ensure they are reasonable, necessary and proportionate.

It is possible that the proceeds from sale may not be sufficient to cover the debt. In this case the bank will discuss the remaining debt and options with the customer. If the receiver has breached the law, professional codes of conduct or behaved inappropriately, a complaint should be made with ASIC and any relevant professional body.

### What is the role of a voluntary administrator?

Voluntary administrators are usually appointed by the directors of a company due to the insolvency or questionable solvency of the company. Directors may take this action if they think the company is insolvent or likely to become insolvent. This procedure is often called 'voluntary administration' because usually it is the directors who have chosen to make this appointment. However, a bank can also decide to appoint this type of administrator to the borrower's company if it has security over all, or substantially all, of the company's assets and the security has become enforceable.

The Corporations Act sets out requirements for the appointment, role and responsibilities of voluntary administrators. ASIC has issued useful information sheets to explain the roles and responsibilities of voluntary administrators.<sup>3</sup>

The voluntary administrator is responsible to all creditors, will report to creditors on the company's affairs and make a recommendation to creditors. In such situations the bank is entitled to protect its own position by the appointment of a receiver if it has security over all, or substantially all, of the company's assets. In some cases, the bank may decide not to appoint a receiver and will be prepared to rely on the voluntary administrator to deal with the situation, including the sale of the assets.

The objective of a voluntary administrator is to provide for the business, property and affairs of an insolvent company in a way that (a) maximises the chances of the company, or as much as possible of its business, continuing in existence; or (b) if it is not possible for the company or its business to

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<sup>2</sup> ASIC Information Sheet 55 A guide for employees (<http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/receivership-a-guide-for-employees/>); ASIC Information Sheet 54 A guide for creditors (<http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/receivership-a-guide-for-creditors/>)

<sup>3</sup> ASIC Information Sheet 75 Voluntary administration: A guide for employees (<http://asic.gov.au/regulatory-resources/insolvency/insolvency-for-employees/voluntary-administration-a-guide-for-employees/>)



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continue in existence - results in a better return for the company's creditors and members than would result from an immediate winding up of the company.

If the voluntary administrator has breached the law, professional codes of conduct or behaved inappropriately, a complaint should be made with ASIC and any relevant professional body.

### How do banks manage potential conflicts of interest?

#### **Can an investigating accountant be appointed as a receiver or voluntary administrator?**

An investigating accountant can be appointed as a receiver or voluntary administrator of the company but this is not always the case.

The decision by the bank to appoint a receiver or voluntary administrator is made only after careful consideration of a broad range of factors. An investigating accountant report is only one input into the decision of whether to appoint a receiver.

If a receiver or voluntary administrator needs to be appointed, there may be advantages in using the investigating accountant as they already understand the business and have worked with the customer. A 'new' receiver or voluntary administrator would require additional time to get up to speed, possibly resulting in a loss of enterprise value and potentially imposing additional costs. Therefore, the decision as to who to appoint as a receiver or voluntary administrator is very important.

Banks understand that periods of financial difficulty and uncertainty can be stressful and tense. If a bank customer believes the relationship between them and the investigating accountant has deteriorated and is therefore unworkable, they should advise their bank and ask the bank to consider the appointment of an alternative qualified practitioner if the bank's proposal was to use the investigating accountant.

#### **Qualifications and professional standards for insolvency practitioners**

The investigating accountant or receiver appointed by a bank will be a member of a recognised professional association. These associations require their members to follow ethical and professional standards, including requirements relating to conflicts of interest and competency. Relevant professional associations also require their members to run appropriate complaints schemes.

Relevant professional associations include the Australian Restructuring, Insolvency and Turnaround Association (**ARITA**), CPA Australia and Chartered Accountants Australia and New Zealand (**CAANZ**).

Receivers and administrators have statutory roles subject to the requirements of the Corporations Act. Those acting in these roles must be registered liquidators who are subject to ASIC approval and supervision.

### Resolving a dispute with your bank

Where you have a significant concern about the report or behaviour of an investigating accountant and/or receiver you should talk to your bank.

All banks have internal procedures in place to deal with complaints from customers. In many cases, a complaint regarding a bank and its products and services will be resolved internally by the bank with no further action required.

If the dispute can't be adequately resolved, the customer can lodge a dispute with the Financial Ombudsman Service (**FOS**), the independent external dispute resolution scheme. FOS can require a bank to pay a customer monetary compensation. It has time limits for lodging a dispute.



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### Code of Banking Practice

The Code of Banking Practice sets out the banking industry's key commitments and obligations to customers on standards of practice, disclosure and principles of conduct. The Code applies to personal and small business bank customers.

For a copy of the Code visit the ABA website (<http://www.bankers.asn.au/consumers/code-of-banking-practice/>) or ask your bank.

### Complaint about a insolvency practitioner

The professional associations representing investigating accountants and insolvency practitioners are referenced earlier in this guideline. All have codes of professional practice which their members are required to comply with. In the event that you have a complaint about a practitioner, these organisations have the power to investigate complaints against members in relation to their professional conduct.

The conduct of insolvency practitioners can also be investigated by ASIC.



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## About the ABA

With the active participation of 24 member banks in Australia, the Australian Bankers' Association (**ABA**) provides analysis, advice and advocacy for the banking industry and contributes to the development of public policy on banking and other financial services.

The ABA works with government, regulators and other stakeholders to improve public awareness and understanding of the industry's contribution to the economy and to ensure Australia's banking customers continue to benefit from a stable, competitive and accessible banking industry.