



ASIC

Australian Securities & Investments Commission

INFORMATION SHEET 46

Liquidation: a guide for employees

If a company is in financial difficulty, its shareholders, creditors or the court can put the company into liquidation.

This information sheet provides general information for employees of companies in liquidation. Employees should also read ASIC information sheet INFO 45 *Liquidation: a guide for creditors*.

Who is an employee?

You are likely to be classified as an employee if you are:

- engaged by a company under an award, Certified Agreement, Australian Workplace Agreement, or a contract of employment, and
- paid a salary, wages or commission.

Contractors are not employees. They are ordinary unsecured creditors of the company.

If you are an employee who is owed money for unpaid wages, superannuation, annual leave, sick leave, long service leave, retrenchment pay or other benefits, you are a creditor of the company. You may be entitled to some or all of what you are owed in priority to the company's other creditors.

The purpose of liquidation

The purpose of liquidation of an insolvent company is to have an independent and suitably qualified person (the liquidator) take control of the company so that its affairs can be wound up in an orderly and fair way for the benefit of creditors.

There are two types of insolvent liquidation:

- creditors' voluntary liquidation, and
- court liquidation.

The most common type is a creditors' voluntary liquidation, which usually begins in one of two ways:

- creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement, or
- an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator. Within 11 days of being appointed by shareholders, the liquidator must call a meeting of creditors who may confirm the liquidator's appointment or appoint another liquidator of the creditors' choice.

Important note: This information sheet contains a summary of basic information on the topic. It is not a substitute for legal advice. Some provisions of the law referred to may have important exceptions or qualifications. This document may not contain all of the information about the law or the exceptions and qualifications that are relevant to your circumstances. You will need a qualified professional adviser to take into account your particular circumstances and to tell you how the law applies to you.

In a court liquidation, a liquidator is appointed by the court to wind up a company, following an application, usually by a creditor. Others, including a director, a shareholder and ASIC, can also make a winding-up application to the court.

It is possible for a company in liquidation to also be in receivership: see ASIC information sheet INFO 55 *Receivership: a guide for employees* for more information.

The liquidator's role

When a company is being liquidated because it is insolvent, the liquidator has a duty to all the company's creditors. Their role is to:

- collect, protect and realise the company's assets
- investigate and report to creditors about the company's affairs, including any unfair preferences which may be recoverable, any uncommercial transactions which may be set aside, and any possible claims against the company's officers
- enquire into the failure of the company and possible offences by people involved with the company, and report to ASIC
- after payment of the costs of the liquidation, and subject to the rights of any secured creditor, distribute the proceeds of realisation—first to priority creditors, including employees, and then to other unsecured creditors, and
- apply for deregistration of the company on completion of the liquidation.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to do any work unless there are enough assets to pay their costs.

Employee entitlements

In most cases, the liquidation of a company terminates the employment of employees.

Employees have the right, if there are funds left over after payment of the fees and expenses of the liquidator, to be paid their outstanding entitlements in priority to other unsecured creditors. Priority employee entitlements are grouped into classes and paid in the following order:

1. outstanding wages and superannuation
2. outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
3. retrenchment pay.

Each class is paid in full before the next class is paid. If there are insufficient funds to pay a class in full, the available funds are paid on a pro rata basis (and the next class or classes will be paid nothing).

The priority claims of directors and their spouses or relatives for the period they are a director, spouse or relative of a director are limited to a maximum of \$2000 for outstanding wages and superannuation, and \$1500 for outstanding leave entitlements. Directors and their spouses or relatives are not entitled to any priority retrenchment pay for the period they are a director, spouse or relative of a director.

Employees may also be entitled to make a claim against the Fair Entitlements Guarantee — that is, (FEG) (see below).

If the liquidator continues to trade the business for a short period to help in the winding up, employee entitlements accruing during this period (on terms agreed with the liquidator) are paid out of available assets as a cost of the winding up and before other outstanding employee entitlements.

Attempts to avoid employee entitlements

It is an offence for anyone to enter into an agreement or transaction with the intention of avoiding employee entitlements of a company.

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If the company is in liquidation and the employees suffer damage or loss as a result of a person entering into such an agreement or transaction, that person is liable to pay compensation for the loss suffered. Employees have priority to any compensation recovered by a liquidator.

If you believe such an offence has been committed, tell the liquidator. You can also make a complaint to ASIC (see below).

Proving your claim

Before any amount is paid to you for your outstanding entitlements, you will need to give the liquidator sufficient information to prove your debt. The relevant form is called a 'proof of debt', and can be obtained from the liquidator.

The liquidator will notify you if there are likely to be funds available for distribution and will call for proofs of debt to be lodged.

The liquidator may be able to tell you what the company records state is owed to you. However, as the records of a company in liquidation are often not well maintained, it is important that you keep your pay records or other records of the terms of your employment. You may also need these records to help you complete your income tax return and establish your entitlement to FEG.

If company records are inadequate and you have insufficient information to justify your claim, it may be rejected.

When submitting your claim, ask the liquidator to acknowledge receipt of your claim and advise if any further information is needed.

If you have a query regarding the calculation of your claim, or the timing of the payment, discuss this with the liquidator.

If the liquidator rejects your claim and you are dissatisfied with the decision, your first step should be to promptly contact the liquidator to see if you can resolve the matter. If you can't, you have a limited time to appeal to the court. The liquidator will notify you of this time in the notice of rejection. It must be at least 14 days after you receive the notice. The court has the power to extend the time to appeal. If you don't appeal within this time, the liquidator's decision on your claim is final.

A liquidator may also ask you to submit a proof of debt for the purposes of voting at a creditors' meeting.

The Fair Entitlements Guarantee (FEG)

FEG is a basic payment scheme designed to assist employees whose employment has been terminated due to the liquidation or bankruptcy of their employer and who are owed certain employee entitlements. FEG is administered by the Department of Employment, in accordance with the FEG Operational Arrangements. You may be eligible for assistance under FEG if you:

- lost your employment because your former employer had a liquidator appointed
- are owed certain employee entitlements, and
- lodge your claim within 12 months of the date you lost your job or the date your former employer went into liquidation, whichever is the latest.

Assistance is not available if:

- your former employer is under the control of an administrator, receiver and manager, or is subject to a deed of company arrangement or a creditors' trust.
- you were not an employee (i.e. you were a contractor, sub-contractor or an agent), or
- funds will be available from your insolvent employer to pay your outstanding entitlements within 16 weeks of Department of Employment receiving your FEG claim.

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Under FEG, employees may be eligible to receive payment for eligible entitlements that are provided for in legislation, an award, a statutory agreement (such as an Australian Workplace Agreement or Collective Agreement), a written contract of employment, or otherwise evidenced in writing, for amounts outstanding for:

- unpaid and underpaid wages in the three-month period prior to the appointment of the insolvency practitioner (including amounts deducted from your wages, but not paid on; for example voluntary superannuation contributions made by you, but not passed on to your superannuation fund)
- all unpaid annual leave
- all unpaid long service leave
- up to maximum of 5 weeks of unpaid pay in lieu of notice, and
- up to a maximum of 4 weeks per full year of service redundancy pay.

Employees who earn more than the FEG maximum annual wage at the date that their employment was terminated will have their FEG advance calculated as if they earned that limit. The maximum annual wage is indexed annually and available at www.employment.gov.au/FEG.

In liquidations, FEG advances are treated as advances under the Corporations Act. This means that if funds become available during the insolvency process, Department of Employment will seek to recover payments from the insolvent employer up to the amounts employees received under FEG.

Any FEG advance may affect your entitlement to a government allowance provided by Centrelink. To discuss the effect of FEG, contact Centrelink on 13 10 21.

For more on FEG, visit the website at www.employment.gov.au/FEG or contact the FEG Hotline on 1300 135 040 or email feg@employment.gov.au.

Employer superannuation contributions are not covered by FEG. To pursue your outstanding superannuation entitlements, you may wish to contact the Superannuation Infoline, administered by the Australian Taxation Office, on 13 10 20.

Payment Summaries and Separation Certificates

Most employees require a PAYG Payment Summary (group certificate) to complete and lodge their income tax return. A Separation Certificate may also be required before an employee who loses their job can apply for social security.

If a liquidator pays you any employee entitlements, they must provide you with a PAYG Payment Summary recording the entitlements paid and any income tax deducted. Contact the liquidator to find out if they are going to prepare your PAYG Payment Summary for entitlements paid by the company prior to their appointment and, if so, what period it will cover. The liquidator is not obliged to prepare this.

If you can't obtain a PAYG Payment Summary for any period, contact the Australian Taxation Office on 13 28 61 to find out how to meet your obligations.

Also contact the liquidator to find out if they are going to prepare your Separation Certificate. Contact Centrelink on 13 10 21 to find out what you should do if you can't obtain a Separation Certificate.

Committee of inspection

In a liquidation, a creditors' committee, called a 'committee of inspection', may be formed to assist the liquidator, approve their fees and, in limited circumstances, approve the use of some of their powers. Employees may wish to nominate a representative to be on this committee and have a say in matters that may impact on their interests.

Queries and complaints

You should first raise any queries or complaints with the liquidator. If this fails to resolve your concerns, including any concerns about the liquidator's conduct, you can lodge a complaint with ASIC at www.asic.gov.au/complain, or write to:

ASIC Complaints
PO Box 9149
TRARALGON VIC 3844

ASIC will usually not become involved in matters of commercial judgement by a liquidator. Complaints against companies and their officers can also be made to ASIC. For other enquiries, contact ASIC's infoline on 1300 300 630 or make an enquiry at www.asic.gov.au/question.

To find out more

For an explanation of terms used in this information sheet, see ASIC's information sheet INFO 41 *Insolvency: a glossary of terms*. For more on external administration, see ASIC's related information sheets at www.asic.gov.au/insolvencyinfosheets:

- INFO 74 *Voluntary administration: a guide for creditors*
- INFO 75 *Voluntary administration: a guide for employees*
- INFO 45 *Liquidation: a guide for creditors*
- INFO 54 *Receivership: a guide for creditors*
- INFO 55 *Receivership: a guide for employees*
- INFO 43 *Insolvency: a guide for shareholders*
- INFO 42 *Insolvency: a guide for directors*
- INFO 84 *Independence of external administrators: a guide for creditors*
- INFO 85 *Approving fees: a guide for creditors*

These are also available from the Australian Restructuring Insolvency & Turnaround Association (ARITA) website at www.arita.com.au. The ARITA website also contains the ARITA's Code of Professional Practice for Insolvency Professionals, which applies to ARITA members.