



ASIC

Australian Securities & Investments Commission

## 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 (INFO 46) provides general information for employees of companies in liquidation. It covers:

- [who is an employee](#)
- [the purpose of liquidation](#)
- [the liquidator's role](#)
- [employee entitlements](#)
- [proving your claim](#)
- [payment summaries and separation certificates](#)
- [committee of inspection](#)
- [right to request information](#)
- [queries and complaints](#)

Employees should also read [Information Sheet 45 Liquidation: A guide for creditors](#) (INFO 45).

### Who is an employee?

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

- engaged by a company under an award, enterprise agreement, agreement-based transitional instruments (which are agreements that were in force before the commencement of the Fair Work Act 2009) or a contract of employment
- 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
- 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
- an insolvent company's shareholders resolve to liquidate the company and appoint a liquidator.

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 [Information Sheet 55 Receivership: A guide for employees](#) (INFO 55) 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 that may be recoverable, any uncommercial transactions that may be set aside, and any possible claims against the company's officers
- inquire 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.

Except for lodging documents and reports required under the *Corporations Act 2001* (Corporations Act), a liquidator is not required to incur any expense in relation to the winding up 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:

- outstanding wages and superannuation
- outstanding leave of absence
- 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 \$2,000 for outstanding wages and superannuation, and \$1,500 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 (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.

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 lodge a report of misconduct with 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 the 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)

Employees who are owed certain employee entitlements after losing their job because their employer went into liquidation may be able to get financial help from the Australian Government.

This help is available through the FEG.

The FEG is a scheme of last resort, to assist employees who have lost their job because their employer entered liquidation. The FEG operates in relation to claims for assistance for unpaid employee entitlements for all employer insolvency events that occur on or after 5 December 2012. For more information visit the [FEG website](#), call the FEG hotline on 1300 135 040 or email [FEG@employment.gov.au](mailto:FEG@employment.gov.au).

FEG does not cover unpaid superannuation contributions. To pursue your outstanding superannuation entitlements, you may wish to contact the Australian Taxation Office. For more information about unpaid superannuation contributions, visit the Australian Taxation Office website.

## 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

A committee of inspection may be formed to assist and advise the liquidator. The committee of inspection also monitors the conduct of the liquidation, may approve certain steps in the administration and may give directions to the liquidator. The liquidator must have regard to, but is not always required to comply with, such directions. To find out more about committees of inspection see [INFO 45](#).

All creditors, including a representative of the company's employees, are entitled to stand for committee membership to represent the interests of all creditors. Employees and large creditors can appoint their own member.

## Right to request information

As a creditor, you can request the liquidator to give information, provide a report or produce a document.

The liquidator must provide this information, report or document provided that the request is reasonable, relevant to the liquidation of the company and complying with the request will not cause the liquidator to breach their duties in relation to the liquidation.

## 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 report of misconduct with ASIC – see [How to complain](#).

Lodging your report of misconduct online will ensure the quickest response from ASIC to your concerns.

ASIC usually does not become involved in matters of commercial judgement by a liquidator.

Reports of misconduct against companies and their officers can also be made to ASIC.

If you are unable to report misconduct online to ASIC, you can contact us on 1300 300 630.

## Where can I get more information?

For an explanation of terms used in this information sheet, see [Information Sheet 41 Insolvency: A glossary of terms](#) (INFO 41).

For more on external administration, see the related information sheets listed in [Information Sheet 39 Insolvency information for directors, employees, creditors and shareholders](#) (INFO 39).

Further information is available from the [Australian Restructuring Insolvency & Turnaround Association \(ARITA\) website](#). The ARITA website also contains the [ARITA Code of Professional Practice for Insolvency Practitioners](#).

## Important notice

Please note that this information sheet is a summary giving you basic information about a particular topic. It does not cover the whole of the relevant law regarding that topic, and it is not a substitute for professional advice. You should also note that because this information sheet avoids legal language wherever possible, it might include some generalisations about the application of the law. Some provisions of the law referred to have exceptions or important qualifications. In most cases your particular circumstances must be taken into account when determining how the law applies to you.

This is **Information Sheet 46 (INFO 46)** updated on 1 September 2017. Information sheets provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Last updated: 01/09/2017 07:48