



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's 'Liquidation: a guide for creditors' information sheet.

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

1. when creditors vote for liquidation following a voluntary administration or a terminated deed of company arrangement, or

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.

2. when 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 hold a meeting of creditors who may confirm the liquidator's appointment or appoint another liquidator of the creditors' choice.

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.

It is possible for a company in liquidation to also be in receivership.

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:

- outstanding wages and superannuation
- outstanding leave of absence (including annual leave and sick leave, where applicable, and long service leave), and
- 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.

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 General Employee Entitlements and Redundancy Scheme—that is, GEERS (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.

Employee entitlement proceedings

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 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 GEERS.

If there is 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.

GEERS

GEERS is a basic payment scheme administered by the Department of Employment and Workplace Relations (DEWR), in accordance with the GEERS Operational Arrangements. Employees may be eligible for assistance under GEERS if they:

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

Assistance is not available if:

- the 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.
- the claimant was not an employee (i.e. they were a contractor, sub-contractor or an agent), or
- funds will be available from the insolvent company to pay outstanding entitlements within 16 weeks of DEWR receiving a GEERS claim.

Under the scheme, 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) or 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
- unpaid annual leave
- unpaid long service leave
- unpaid pay in lieu of notice, and
- unpaid capped redundancy pay.

Under GEERS, directors and their spouses or relatives may be eligible for a maximum of \$2000 for unpaid wages, and \$1500 in total for annual leave and long service leave. They are not entitled to payment in lieu of notice or redundancy pay.

Employees who earn more than the GEERS maximum annual wage at the date that their employment was terminated will have their GEERS advance calculated as if they earned that limit. The maximum annual wage is indexed annually.

GEERS advances are treated as advances under the *Corporations Act 2001* (Corporations Act). This means that if funds become available during the insolvency process, DEWR will

seek to recover payments from the insolvent employer up to the amounts employees received under GEERS.

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

For more on GEERS, visit the Australian Workplace website at www.workplace.gov.au/geers or contact DEWR on 1300 135 040 or email GEERS@dewr.gov.au.

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, or write to:

Manager National Assessment & Action
ASIC
GPO Box 9827
IN YOUR CAPITAL CITY

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, email ASIC through infoline@asic.gov.au, or call ASIC's Infoline on 1300 300 630 for the cost of a local call.

To find out more

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

- Voluntary administration: a guide for creditors
- Voluntary administration: a guide for employees
- Liquidation: a guide for creditors
- Receivership: a guide for creditors
- Receivership: a guide for employees
- Insolvency: a guide for shareholders
- Insolvency: a guide for directors
- Independence of external administrators: a guide for creditors
- Approving fees: a guide for creditors

These are also available from the Insolvency Practitioners Association (IPA) website at www.ipaa.com.au. The IPA website also contains the IPA's Code of Professional Practice for Insolvency Professionals, which applies to IPA members.