

## Protection for employee entitlements



For many businesses, the old adage is true – employees are their most important asset. So it's only natural for business owners to be worried about the impact on employees when a business fails.

We've seen company directors put off appointing a liquidator over concerns of where it would leave their staff. Others delay the inevitable simply because the company didn't have enough resources to pay the entitlements of long term employees that were no longer required.

Many proprietors are unaware of the safety net scheme established by the Federal Government to protect employee entitlements in the event of liquidation<sup>1</sup>. The Fair Entitlements Guarantee (FEG) is a legislated scheme operated by the Department of Jobs and Small Business (DJSB) and, in various forms, has been helping employees for close to 20 years. Annually, FEG distribute approximately \$250m to assist employees.

FEG provides a safety net for employee entitlements, but only in the event of liquidation (but irrespective of whether it was a voluntary appointment). It therefore can't be used as a restructuring tool outside of a formal appointment, and not even through a Deed of Company Arrangement.

### Who is eligible?

All citizens and permanent residents can apply for FEG in circumstances where their employment ceased as a result of the insolvency of a company - which may include if they resigned prior to liquidation. Directors and immediate relatives are ineligible to claim from FEG, but will still receive a limited priority claim in the winding up of the company.

### What is covered?

An employee's claim is calculated by considering the award, enterprise agreement or contract that governs their employment. However, the National Employment Standards also provide a minimum level of entitlements that can't be undercut by the employee's specific employment instrument.

Eligible employees can claim the following entitlements:

- Unpaid / underpaid wages for up to 13 weeks prior to the appointment of an external administrator;
- Unpaid annual leave and leave loading;
- Unpaid long service leave;
- Payment in lieu of notice, up to a maximum of 5 weeks; and
- Redundancy pay up to a maximum of 4 weeks per completed year of service

Importantly, FEG does not cover outstanding superannuation.

The wage calculation will include allowances, loadings and penalty rates plus any other regular payments under the employment instrument, but does not include discretionary payments (ie bonuses), reimbursements or travel and relocation costs.

### Are there any other limits?

High income earners will be capped at \$2,451 per week for the calculation of their entitlements.

There is also a 12 month time limit for claims to be lodged, commencing on the date of liquidation.

### So how does it work?

Employees register a FEG claim online with DJSB and provide supporting documents regarding their employment. The DJSB contacts the liquidator to confirm claims can be verified, seeks documents from the company's records and will ultimately make a determination after consulting with the appointee on any discrepancies in the calculation of eligible entitlements.

### How long does it take?

Timeframes for payment vary according to the FEG caseload, however it can take 12 to 16 weeks from the date an employee submits their claim for the employee to receive their FEG payment.

Clifton Hall staff are well-skilled in the calculation of entitlements and work efficiently with the DJSB to minimise the time taken for employees to receive their entitlements.

### Do the FEG advances get repaid?

Monies paid to employees are an advance on what they would otherwise be entitled to in the liquidation. However, as it can take months or even years for a liquidator to recover enough funds to declare a dividend (and often only a partial dividend) in respect of employee claims, FEG ensures that employees are paid quickly regardless of the outcome of the liquidation.

The DJSB will then lodge a claim in the liquidation to receive any dividend that might be paid, recognising that employee entitlements receive a priority in a liquidation (as do the advances made by FEG).

### How can Clifton Hall help?

A recent submission to a parliamentary committee into wage theft estimated one in five South Australian workers is underpaid, calculated at \$282.3 million of ordinary wages.<sup>ii</sup> However, much of this is often unintentional, caused by complex payroll structures that include a variety of employment instruments across a workforce, with constant changes to the classifications and sub-classifications for employees.

Clifton Hall has significant experience in dealing with employee entitlements in our insolvency work. We have also used these skills to assist businesses and their advisers confirm outstanding entitlements when looking to sell or wind down operations.

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<sup>i</sup> While employees of a bankrupt may also be eligible for FEG, for the purposes of this newsletter we have simply referred to the liquidation of a company

<sup>ii</sup> <http://www.adelaidenow.com.au/news/south-australia/news-story/02b0d7f23270dd12057ed86d2d52727c>