



Australian Government

Fair Work OMBUDSMAN

Our reference: FOI-000672

30 May 2017

Mr Jason Simpson

By email to: foi+request-3458-c4fd96f4@righttoknow.org.au

Dear Mr Simpson

Notice of Decision – Freedom of Information Request

I refer to your request received on 1 May 2017 under the *Freedom of Information Act 1982* (FOI Act), in which you sought “...information...in regards to the Fair Work Ombudsman's powers under the Fair Work Act in regards to the recovery or enforcement of unpaid employee entitlements being held by a registered liquidator or administrator of a company.’

DECISION AND STATEMENT OF REASONS FOR DECISION

I am authorised by the Fair Work Ombudsman (FWO), under s. 23 of the FOI Act, to make decisions on requests for access to documents. In making my decision, I took into account your request, the FOI Act and the Australian Information Commissioner’s Guidelines and discussions with FWO staff.

In accordance with s. 26 of the FOI Act, this is my statement of reasons.

Access Granted

I have arranged for a search of the FWO’s internal records and can confirm the only documents relevant to your request are:

1. An article published on the FWO website on our online library about Voluntary Administration https://www.fairwork.gov.au/library/k600441_voluntary-administration
2. An article published on the FWO website about Bankruptcy and Liquidation <https://www.fairwork.gov.au/ending-employment/bankruptcy-and-liquidation>

I have decided to release these two publically available documents to you in full and have attached them to this letter (as detailed in **Attachment A**).

There are no separate documents containing information about the FWO’s powers under the *Fair Work Act 2009* available in regards to the recovery or enforcement of unpaid employee entitlements being held by a registered liquidator or administrator of a company.

Background Information - Voluntary Administration

An insolvency procedure is where an external administrator is appointed because the company is in financial trouble.

The 'voluntary administrator' is appointed by:

- The directors after they have decided the company is or is likely to become insolvent;
- A secured creditor who has the charger over most of the company's assets,
- A liquidator, or
- A provisional liquidator.

The role of a voluntary administrator is to look into the company's affairs and report to the creditors. They recommend whether the company should; enter into a deed of company arrangement; go into liquidation; or be returned to the directors.

When a business is in voluntary administration the Fair Work Ombudsman **can** provide advice and investigate entitlements.

Our [Compliance and enforcement policy](#) provides a summary of the services we offer to support compliance with workplace laws.

Most issues can be resolved at the workplace level. Our policy focuses on early intervention and resolution of workplace issues through the provision of advice and support. The policy outlines how we identify and act on opportunities to offer assistance before workplace issues escalate. It also discusses the different factors that we take into account when deciding how to respond to requests for assistance.

If the business is bankrupt or in liquidation

The FWO doesn't have jurisdiction to investigate or recover entitlements in this situation. Employees should contact the Fair Entitlements Guarantee scheme on 1300 135 040 administered by the Department of Employment (Commonwealth Government).

More information about the Fair Entitlements Guarantee is available on the Department of Employment website <https://www.employment.gov.au/fair-entitlements-guarantee-feg>

Review Rights

I have attached a document setting out your rights of review of this decision (**Attachment B**).

Website Publication

Section 11C of the FOI Act requires agencies to publish online any information in documents released in response to a freedom of information request. This must be done within 10 working days of the documents being released.

Section 11C contains some exceptions to this general requirement. These exceptions include when the document contains business or personal information that it would be unreasonable to publish.

Because there is no personal or business information in the document we are releasing to you, there is no reason not to publish it. However, as these documents are already published on the FWO website, there is no need to republish them.

Contact details

If you need further information, or would like to discuss this decision further, please direct your enquiries by email to foi@fwo.gov.au.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Sally Dennington', written in a cursive style.

Sally Dennington
Director – Customer Feedback and Information Access
Fair Work Ombudsman

Pages	Date	Author	Addressee	Description	Decision	Exemptions Applied
001	24.05.17	FWO	N/A	An article published on the FWO website on our online library about Voluntary Administration https://www.fairwork.gov.au/library/k600441_voluntary-administration	Release	
002 – 003	24.05.17	FWO	N/A	An article on the FWO website about Bankruptcy and Liquidation https://www.fairwork.gov.au/ending-employment/bankruptcy-and-liquidation	Release	

INFORMATION ON RIGHTS OF REVIEW & COMPLAINTS

Rights of review

If you are dissatisfied with this decision you can apply for internal review by this agency (Option 1 below) or external review by the Australian Information Commissioner (IC Review) (Option 2 below).

You do not have to apply for internal review before seeking IC review. However, the Information Commissioner has expressed the view that it is preferable for a person to seek internal review by the agency before applying for IC Review. If you choose Option 1 (internal review), you can also apply for IC review of the internal review decision within 60 days after receiving notice of our decision.

Option 1 – Internal review

You can seek internal review of the decision. An application for internal review must be made in writing within 30 days after the date you were notified of the decision, or within such further period as the Fair Work Ombudsman allows. The internal review will be conducted by a senior officer who had no involvement in the initial decision.

There is no particular form required to make a request for internal review. However, it would help the reviewer if you said, in writing, why you think the decision should be reviewed.

An application for an internal review of the decision should be sent to:

Email: foi@fwo.gov.au
Fax: (02) 6204 2364
or
FOI Manager
GPO Box 9887
MELBOURNE VIC 3001

Option 2 – Review by the Australian Information Commissioner

Alternatively, you can apply in writing to the Australian Information Commissioner for IC review of the decision. An application for IC Review must be made within 60 days after the day you were given notice of this decision.

In making your application, you need to provide an address for notices to be sent (this can be an email address) and a copy of this decision. It would also help the Australian Information Commissioner if you set out the reasons for seeking IC review in your application.

To apply for IC review, please refer to the FOI Fact Sheet 13 issued by the Office of the Australian Information Commissioner (http://www.oaic.gov.au/images/documents/freedom-of-information/foi-factsheets/FOI_factsheet12_your-rights_online_July2012.pdf). You can file your application online at <https://forms.business.gov.au/aba/oaic/foi-review/> or download a complaint form from the OAIC's website www.oaic.gov.au

Complaints

You can complain to the Australian Information Commissioner about action taken by the Fair Work Ombudsman in relation to your freedom of information request. Your complaint must be in writing and it is the Information Commissioner's preference that an online complaint form be completed. The form can be found at https://forms.business.gov.au/aba/landing.htm?formCode=ICCA_1. Alternatively, you can send a letter to the Office of the Australian Information Commissioner, GPO Box 5218, Sydney NSW 2001 or send an email to enquiries@oaic.gov.au.



Voluntary administration

What is voluntary administration?

An insolvency procedure where an external administrator is appointed because the company is in financial trouble.

The 'voluntary administrator' is appointed by:

- the directors after they have decided the company is or is likely to become insolvent
- a secured creditor who has a charger over most of the company's assets,
- a liquidator, or
- a provisional liquidator.

When a business is in voluntary administration the Fair work Ombudsman can provide advice and investigate entitlements.

What is the role of a voluntary administrator?

To look into the company's affairs and reports to the creditors. They recommend whether the company should:

- enter into a deed of company arrangement
- go into liquidation, or
- be returned to the directors.

What happens to entitlements accumulated before an administrator is appointed?

The voluntary administrator doesn't have to pay employee entitlements accumulated before the appointment date.

If an employee resigns during the administration period, they may not get their accumulated leave entitlements. They become a creditor if the company owes them money, they need to speak to the administrator about outstanding entitlements.

If the business is bankrupt or in liquidation

FWO doesn't have jurisdiction to investigate or recover entitlements in this situation. Employees should contact the Fair Entitlements Guarantee scheme on 1300 135 040.

References

Page reference No: K600441

The Fair Work Ombudsman is committed to providing advice that you can rely on.

The information contained on this website is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or workplace relations professional.

Visitors are warned that this site may inadvertently contain names or pictures of Aboriginal and Torres Strait Islander people who have recently died.

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Bankruptcy & liquidation

Sometimes businesses shut down because they aren't profitable or run out of money. This can mean that employees lose their jobs, and in some cases, the employer may not be able to pay them the wages and entitlements they are owed.

When a business is bankrupt, also known as going into liquidation or insolvency, employees can get help through the Fair Entitlements Guarantee (FEG).

The FEG, previously known as the General Employee Entitlements and Redundancy Scheme or GEERS, is available to eligible employees to help them get their unpaid entitlements. This can include:

- wages – up to 13 weeks of unpaid wages (capped at the FEG maximum weekly wage)
- annual leave
- long service leave
- payment in lieu of notice of termination – maximum of 5 weeks
- redundancy pay – up to 4 weeks per full year of service.

It doesn't include:

- superannuation
- reimbursement payments
- one-off or irregular payments
- bonus payments
- non-ongoing or irregular commissions.

Find out who is an eligible employee and how to make a claim on the [Department of Employment's Fair Entitlements Guarantee \(FEG\) page](https://www.employment.gov.au/fair-entitlements-guarantee-feg) (<https://www.employment.gov.au/fair-entitlements-guarantee-feg>).

Before a business goes bankrupt

Before a business goes bankrupt it might go into voluntary administration. Voluntary administration happens when a business can't pay its debts. An administrator is appointed to work out if the business can keep operating or should go into liquidation.

When a business is in voluntary administration (before it goes into bankruptcy or liquidation) we can provide advice and help employees get entitlements that haven't been paid.

What to do next

- Visit the [Fair Entitlements Guarantee website](http://employment.gov.au/fair-entitlements-guarantee-feg) (http://employment.gov.au/fair-entitlements-guarantee-feg)
- Learn about [How we will help](http://www.fairwork.gov.au/How-we-will-help/How-we-help-you/Help-resolving-workplace-issues/default) (http://www.fairwork.gov.au/How-we-will-help/How-we-help-you/Help-resolving-workplace-issues/default) if entitlements haven't been paid during voluntary administration
- Visit the [Australian Securities and Investments Commission website](http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Emp20-%20Voluntary%20administration) (http://www.asic.gov.au/asic/ASIC.NSF/byHeadline/Emp20-%20Voluntary%20administration) to find out more about voluntary administration

Help for small business

- Use the [Small Business Fair Dismissal Code and checklist](http://www.fairwork.gov.au/ArticleDocuments/715/Small-Business-Fair-Dismissal-Code-2011.rtf.aspx) (71.9KB) (http://www.fairwork.gov.au/ArticleDocuments/715/Small-Business-Fair-Dismissal-Code-2011.rtf.aspx) to make sure that a dismissal is fair
- Find tools, resources and information you might need on our [Small business page](http://www.fairwork.gov.au/Find-help-for/Small-business/default) (http://www.fairwork.gov.au/Find-help-for/Small-business/default).

You might also be interested in

- [Notice and final pay](http://www.fairwork.gov.au/Ending-employment/notice-and-final-pay/default) (http://www.fairwork.gov.au/Ending-employment/notice-and-final-pay/default)

Page reference No: 2070

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