



IP Fact Sheet - Employee Entitlement Verification Frequently Asked Questions

The Department of Employment and Workplace Relations (the department) values the service provided by insolvency practitioners (IPs) in verifying employee entitlements claimed under the *Fair Entitlements Guarantee Act 2012* (FEG Act).

Prompt and accurate provision of information to the department is vital to ensure former employees of an insolvent entity receive payment of their lawful entitlements as soon as possible.

This fact sheet offers guidance to help insolvency practitioners resolve common difficulties with compiling employee entitlement information from the books and records of an insolvent entity. It addresses the most common questions and issues that arise when undertaking the initial questionnaire and verification spreadsheet.

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Questions about initial stages

How do I know that there is FEG interest in an insolvency?

Generally, a FEG staff member from the *Case Administration and Payments Processing Unit* will call the firm of the appointed liquidator to let them know the first FEG claim has been received from an employee of an insolvent entity, and that FEG will be seeking verification services.

What is the usual sequence of tasks in the FEG claim processing process?

The usual sequence of case management and claim assessment tasks requested of insolvency practitioners through FEG IP Online by various units of the department's FEG team is as follows.

1. Initial Information Pack
 - a. Initial Questionnaire (for important background information)
 - b. Deed of Undertaking (Deed Poll for providing the verification service)
 - c. Verification Spreadsheet (for employee data from books and records)
 - d. Additional Employee Information (for additional entitlement information)
 - e. Creditors Reports (for important background information)
2. Proxies, Proposals or Resolutions (for reports and proposals)
3. Invoice for Services (submitted by IP after delivery of services)
4. Claimant/Case Discrepancy Report (department's proposed assessment)
5. Confirmation Report (agreed resolution of assessment discrepancies)
6. Proof of Debt (IP's confirmation requested)
7. Recovery Questionnaire (for obtaining case finalisation information)

What are the due dates for task requests?

The department asks that requested information and documents be authorised by the liquidator (with signature where applicable) and returned as soon as possible, but not later than the following timeframes:

FEG Initial Questionnaire form:

- seven calendar days from the date of the '**Initial Questionnaire**' task.

Deed of Undertaking (Deed Poll):

- seven calendar days from the date of the '**Deed of Undertaking**' task.

Verification Spreadsheet:

- 28 calendar days from the date of the '**Verification Spreadsheet**' task.

Where it is not possible to meet one of these timeframes due to obstacles in obtaining the insolvent entity's books and records, please call us as soon as possible.

What other types of tasks might I be sent?

Three other task categories that may be assigned 'ad hoc' through FEG IP Online are:

- **'Updated Deed of Undertaking'** (e.g. if you advise us of changes to the scope of your delivery of FEG verification services)
- **'Ad-Hoc task'** (e.g. we request some information that does not relate to an existing assigned task, or another standard category of task)
- **'Creditors' Report task'** (e.g. please attach any Reports to Creditors, and where applicable, the 439A Report to Creditors).

Questions about the FEG Initial Questionnaire

What if we can't fill in the FEG Initial Questionnaire?

On appointment, insolvency practitioners often know very little about the case. Please provide any initial information that you are able to on the Initial Questionnaire form. Once you obtain additional information, please edit the Initial Questionnaire and submit the updated information in FEG IP Online. Submitted questionnaires can be accessed against the case in FEG IP Online. The sooner we receive this information the sooner we can progress the FEG matter.

How important is 'Question 9) What is the nature of the business'?

Without knowing the industry that employees work in it can be difficult to assign correct 'governing instruments' (Awards, contracts, etc) to FEG claimants. Governing instruments underpin the calculation of employment entitlements for claimants.

Some Awards, e.g. the *Clerks Private Sector Award 2010*, are role specific. However, others e.g. the *Educational Services (Post Secondary Education) Award 2010*, are industry specific Awards and cover all employees (including clerks) within that particular industry. Having an indication of the industry the business was engaged in can be a critical step in identifying the relevant governing instruments.

Questions about verification

What happens if I haven't received the books and records?

The department aims to advance accurate FEG payments to eligible employees as quickly as possible.

To achieve this, the department works closely with insolvency practitioners during initial contact phases of a FEG case to ascertain whether:

- there are difficulties in accessing company books and records
- records are of insufficient quality to verify FEG entitlements.

If you are having difficulties obtaining data from the books and records of the entity, please let us know as soon as possible. In most cases, where access to company records cannot be confirmed within four weeks of initial contact, the department will proceed with an alternative form of claim assessment.

Once you have received the books and records, please provide the verified data as soon as possible.

We are still waiting for claimants to provide us documents. We asked weeks ago...

The department can request supporting documents from claimants, and stipulate a timeframe for their return. Therefore, if you require documents from a claimant in order to verify certain information in the books and records, e.g. incomplete data in company MYOB files, please contact us and we can request information to assist the insolvency practitioner and the department's assessment of the claim.

How are FEG caps on employee entitlements dealt with?

FEG has four capping arrangements that set the maximum entitlements that can be paid under FEG:

- Unpaid wages – 13 weeks
- Payment in lieu of notice (PILN) – 5 weeks
- Redundancy pay – 4 weeks per year of service
- Maximum weekly wage – currently \$2,673 per week.

The unpaid wages cap operates for the 13 week 'wages entitlement period' prior to the date of the insolvency practitioner's appointment or termination of a claimant's employment (whichever comes first). The cap and wages entitlement period applies to all wage related payments including rostered days off (RDOs), commissions, salary sacrifice and other categories defined in section 7(1) of the FEG Act.

All FEG caps are calculated and applied by the department's FEG claims database system ('eFEG'). IPs should verify the claimant's **full legal entitlement** without reference to capped amounts or other payments including winding up costs or redundancy trust payments.

The department's FEG assessment outcome letter will show claimants both their full eligible entitlement and the capped amount of payment payable under the FEG Act. When you view this outcome letter or the *Claimant Entitlements By Case* report in FEG IP Online you will be able to see which employees retain some standing as an employee creditor in the winding up because their full entitlements have not been met under FEG.

What are the minimum requirements for the verification spreadsheet?

The minimum requirements are:

- for permanent employees; Name, DOB, start date, termination date, average weekly hours and hourly wage rate, base and total weekly wage, annual leave accrual (if applicable), and long service leave (LSL) accrual (if applicable)
- for casual employees; Name, DOB, start date, termination date, unpaid wages (weekly wage rate is not required) and LSL accrual (if applicable).

If you are able to average casual or part time hours please provide this in the *Verification Spreadsheet* and advise us how you have averaged the hours in the Comments section of the FEG IP Online task.

Can I change the verification spreadsheet column headings or formula?

No, please do not change the FEG *verification spreadsheet* column headings or formulas. The *FEG verification spreadsheet* is designed to be uploaded to eFEG. In order for it to upload correctly it must be in the original format. Please also take care if you are adding an extra column to the *FEG verification spreadsheet*, and please be aware that any additional content will be visible to FEG once uploaded.

IPs have the option to provide verified employee entitlement data to FEG using their own master spreadsheet. However, an alternative verification spreadsheet template must first be created in FEG IP Online by the IP firm system administrator and fields mapped. Please refer to FEG IP Online Help Guide for instructions. For further assistance, please contact FEG via FEGIPOnline@dewr.gov.au.

Who are excluded employees?

Section 11 of the FEG Act specifies persons as excluded from eligibility for FEG assistance if they are an 'excluded employee' under section 556 of the *Corporations Act 2001*.

Excluded employees include company directors, their spouses (including de facto partners) and their relatives, where the person was a company director (or spouse or relative of a company director) within the 12-month period prior to the day when the winding up commenced. A 'relative' includes a parent, child, brother or sister. Other persons who satisfy the relevant definition include grandparents and great-grandparents.

Non-linear relatives such as aunts, uncles, cousins and nephews are not excluded employees.

Do I verify entitlements owed to excluded employees?

No, you do not need to verify employee entitlements of 'excluded employees'.

However, please note the names of any employees who are not eligible for FEG in the Comments section of FEG IP Online *Verification Spreadsheet* task.

What is the hierarchy of governing instruments?

There is a hierarchy of instruments that set minimum employee entitlements:

- The **National Employment Standards** (NES; Part 2-2 of the *Fair Work Act 2009*) – applies to all employees except people who are excluded from certain parts of the coverage, for example building and construction industry tradesmen and labourers.
- The **Relevant Award** – it is important to note that the Award applies even if the employer and employee are not aware of, or recognise it. Very specific terms must be met to exclude award provisions and these are detailed in the Awards.
- **Enterprise Agreements** – these are at the same hierarchical level as Awards. Depending on how they are worded they may or may not replace some or all Award provisions. These types of agreements must be approved by the Fair Work Commission (FWC) and can be found in Agreement Finder on the FWC's website.
- **Individual contracts** and similar arrangements – these can provide for more generous provisions, but importantly cannot strip away the minimum entitlements of the NES, an applicable Award or Enterprise Agreement.

You can view the governing instruments assigned to each employee in FEG IP Online.

If you have any queries regarding these instruments, please contact the FEG Governing Instruments team by ringing the IP Helpline on:

- (02) 6240 0440, Mon - Fri, 9 am - 5 pm (AEST/ADST)

Do I need to provide governing instruments?

No. We do not ask you to determine the instruments that govern the employment terms and conditions of each employee. However, if you have access to employee contracts, Enterprise Agreements or other company records that will help the department to quickly determine the applicable legal instruments that govern the terms and conditions of employment of employees, please provide copies as soon as possible.

Please upload scanned copies of the documents to the Ad hoc task (known as 'additional Employee Entitlements information') in FEG IP Online.

What defines small employer for redundancy entitlement?

A small business is defined in section 23 of *Fair Work Act 2009* ('FW Act') as one employing fewer than 15 employees. Information that is relevant to working out the size of the employer includes:

- Employees of Associated Entities (as defined within section 50AAA of the *Corporations Act 2001*) must be counted when determining whether an employer is a large or small employer.
- Casual employees who are regularly and systematically employed need to be included in the number of employees. This often means casuals working to a fixed roster or schedule.
- Excluded Employees should be included when determining the number of employees.

FEG Practice Note #1, 2018-19 provides further information on how FEG approaches assessing employer size for redundancy.

What is the relevant termination date for determining the size of the employer?

The starting point for determining the relevant date for assessing the number of employees is section 121 of the FW Act. It refers to the date 'immediately before the time of the termination of employment', or the time when the employee(s) were given notice of termination, whichever occurs first. The determination of the relevant date can be complex, for example, when the circumstances of the notice of termination of employment are not clear.

Early provision of relevant company records assists the department to determine how and when employees were provided with notice of termination.

FEG Practice Note #1, 2018-19 provides further information on how FEG approaches assessing employer size for redundancy.

How do I deal with employees who are 'stood down' for a period?

The FEG Act defines an employee's 'wages entitlement' as 'the amount of wages the person is entitled to under the governing instrument from the employer **for work done**, or paid leave taken, in the wages entitlement period.' As such, where employees are stood down and not performing work they are not entitled to wages within the meaning of the FEG Act; even if the employee may otherwise have a legal entitlement to wages from the employer. Please inform the department of the details of any employees who were 'stood down' for a period during which they performed no work, whether or not they received wages for that period.

There appears to have been a Transmission of Business. What information does FEG need?

It is important that you identify and notify us of any asset sales or business assumptions however minor they may appear.

We need to know if the entities were associated at the time. Was there a sale document? Did employees transfer? What state were they employed in? LSL entitlements may or may not transfer with the employee to another entity, depending on the state of employment.

As there are many variables, please contact us when you are aware of an actual or potential transmission.

How are 'winding up costs' dealt with?

Employment entitlements that are the costs of the winding up or bankruptcy are not covered by the FEG Act as they are expenses required to be borne by the insolvency practitioner under section 558 of the *Corporations Act 1999* or section 109A of the *Bankruptcy Act 1966*.

The Calculating Costs of winding up information sheet (located in the FEG IP Online resource centre) can assist insolvency practitioners to identify and calculate costs of the winding up.

The department's *FEG verification spreadsheet* includes items to assist insolvency practitioners report winding up costs:

- Insolvency practitioners should verify all entitlements up to the date of termination **not** to date of appointment where the employees have worked past the date of appointment of the IP
- Automatically calculated 'Service at IP appointment' and 'Service at termination' fields to assist in identifying and calculating costs of winding up
- 'Costs of winding up' fields located next to each entitlement category to support a logical workflow.

What is needed to verify the long service leave entitlement?

The department requests the insolvency practitioner to provide:

- the total hours of LSL owed to the employee at the time of termination (only when the LSL entitlement has crystallised), and if relevant
- the dollar amount of LSL accrued during the insolvency practitioner's appointment period (this is the cost of winding up).

Crystallisation of LSL entitlement may occur when the employee has greater than five, seven or 10 years' service depending on the applicable governing instrument. Information on calculating the dollar amount of LSL accrued as a cost of winding up is included in the fact sheet for insolvency practitioners, Fair Entitlements Guarantee – Calculating costs of winding up, located in the FEG IP Online resource centre.

If you have any further questions about LSL please call the IP Helpline on **(02) 6240 0440** and ask to speak to the FEG Governing Instruments team.

Questions about contact from FEG

Why do you keep ringing us?

Timely communication is key to achieving the objective of paying accurate FEG advances as quickly as possible.

If you have a delay or question, let us know as soon as you can. FEG staff may be able to assist to help you resolve issues that are causing delay.

Contact and correspondence

Insolvency practitioners can complete and track all work associated for FEG cases assigned to them in FEG IP Online. In addition, insolvency practitioners can access case and claim status information and all claimant outcome letters (including ineligible decisions).

For technical assistance in registering for and using FEG IP Online please send an email to FEGIPOnline@dewr.gov.au.

If you need to speak with a FEG team member and do not know their direct number, you can ring the IP Helpline on **(02) 6240 0440, Mon - Fri, 9 am - 5 pm (AEST/ADST)** to be transferred directly to the appropriate FEG team member.

For written correspondence, we prefer using FEG IP Online since this provides a 'one stop shop' to locate and action all records of your contacts with us (and ours with you) on a given FEG case. If you have a user account in FEG IP Online any case related correspondence will be sent to you as a task via FEG IP Online.

The information contained in this fact sheet is of a general nature and explains, in summary form, the intended operation of the *Fair Entitlements Guarantee Act 2012* - it is not legal advice. Where necessary, you should seek your own independent legal advice relevant to your particular circumstances. The Commonwealth does not make any representation or warranty about the accuracy, reliability, currency or completeness of the information contained in this fact sheet and is not liable for any loss resulting from any action taken or reliance made by you on the information contained in this fact sheet.