

What do I do if my builder is insolvent?

Whether you are building a house or undertaking renovations or extensive rectification works, if your builder is insolvent, it is essential to know what to do. This guide is designed to assist consumers if their builder becomes bankrupt or goes into voluntary administration or liquidation.

Step 1 – Is your builder an individual or a company?

The first step is to review your building contract and identify whether you have entered into a building contract with an individual (that is, a sole trader) or a company. A builder that has only one employee can still be a company.

Step 2 – What can happen if your builder is, or is likely to become, insolvent?

If your builder is, or is likely to become, insolvent, then your builder may become subject to external administration. The type of external administration that your builder may become subject to depends on whether your builder is an individual or a company.

If your building contract is with an individual who is insolvent, or likely to become insolvent, they may become bankrupt or enter into a Part IX or Part X agreement with creditors (also called a 'personal insolvency agreement').

If your building contract is with a company that is insolvent, or the directors consider that the company may become insolvent, then:

- an administrator may be appointed to the company; or
- the company may go into liquidation.

Alternatively, if your builder is in breach of arrangements with a secured creditor, such as a lender with security over the builder's assets, the lender may appoint a receiver (or receiver and manager) to the builder's assets.

For more information about each of these company insolvency procedures, see the information for creditors prepared by the Australian Securities and Investments Commission (ASIC) here:

<https://asic.gov.au/regulatory-resources/insolvency/insolvency-for-creditors/>.

Step 3 – How do I check if my builder is in external administration?

If your builder is bankrupt, in voluntary administration or in liquidation, you may receive a letter from the insolvency practitioner appointed to administer the affairs of the builder notifying you of what has happened, providing you with information about what to do next and inviting you to lodge a proof of debt if you are a creditor of the builder. Sometimes, not all creditors are contacted, and you may not receive such a letter.

If you think that your builder may be insolvent, you should check whether they have gone into voluntary administration or liquidation, or become bankrupt. You should also obtain the details of the insolvency practitioner conducting your builder's particular external administration.

If your builder is an individual, you can do this by searching the National Personal Insolvency Index at <https://services.afsa.gov.au/brs/search>.

If your builder is a company, you can do this by searching ASIC's register of companies at <https://connectonline.asic.gov.au>.

Step 4 – What do I do if I suspect my builder is insolvent, but it is not in external administration?

If your builder claims to be insolvent, has abandoned the site, or is not returning your calls, but is not subject to external administration, the builder may still be insolvent and may become subject to external administration in due course. You should review your contract and, if

necessary, get legal advice before paying any further money.

Step 5 – What should you do if your builder is in external administration?

You should follow these steps if your builder enters external administration.

a) Make contact

If your builder is bankrupt, in voluntary administration or in liquidation, you should make contact immediately with the insolvency practitioner that has been appointed to your builder. The insolvency practitioner may not be aware that you have engaged the builder, that your building work is incomplete or defective, or that you are owed money.

b) Make a claim

If you are owed money by the builder (for building defects, incomplete building works or otherwise), you should consider lodging a claim (also called a 'proof of debt') using the relevant form obtained from the insolvency practitioner.

You can lodge a claim for debts, as well as contingent amounts owing, that have not yet been quantified. The builder may not ultimately have any money to pay a dividend to creditors. However, creditors who lodge a claim:

- receive reports about the affairs of the builder under external administration;
- participate in meetings to decide whether to change the insolvency practitioner with carriage of the external administration; and
- participate in meetings to decide whether to accept any compromise with creditors that may be proposed, or whether the builder should instead be made bankrupt or placed into liquidation.

Your claim may be rejected if there is insufficient evidence to support it. You should attach to the 'proof of debt' form copies of any relevant agreements, invoices, reports, photos or other supporting documents.

Where a building defect has been identified but not yet been remedied, or the builder's responsibility for the defect is disputed, you will need to supply the external administrator with sufficient information to enable a 'just estimate' of the builder's liability to be determined, in order to have your claim accepted. You should consider obtaining legal advice as to how you might justify your claim. You may consider whether other creditors with similar claims (for example, other apartment owners in a multi-unit development affected by the defective work) are willing to share the cost of preparing an expert's report that can be provided in support of each claim.

Appeal from rejection of proof of debt

The insolvency practitioner appointed to your builder may accept or reject, in whole or in part, your claim. There is a statutory mechanism to appeal the decision to a court. If you wish to dispute the decision, you should promptly seek legal advice.

Disputes that are on foot

If you are in a dispute with your builder, and the dispute is the subject of an arbitration, adjudication or court proceeding, external administration of the builder may impact your ability to continue with the proceeding. You should get legal advice about the impact of external administration on your dispute before taking any additional steps and before incurring any additional costs.

Building contracts that are still on foot

If your building contract is still on foot, you should consider taking legal advice before you decide whether to terminate the contract, exercise a contractual right to 'take the work out of the hands' of the builder and engage a new builder, or agree to an assignment or novation of the building contract to a new builder. A legal

advisor is the best person to help you make this decision.

Domestic building insurance

In relation to residential buildings, you may be able to claim against a domestic building insurance policy if your builder becomes bankrupt or goes into liquidation. To find out more about domestic building insurance, contact Consumer Affairs Victoria on 1300 55 81 81 or visit their website:

<https://www.consumer.vic.gov.au/housing/building-and-renovating/defects-delays-and-insolvency/insurance-and-insolvency>.

Choice of suitable external administrator

External administrators have statutory duties owed to creditors as a whole, and should be independent of the key stakeholders (particularly any directors or shareholders). If you are concerned about whether an external administrator is independent, you should consider taking steps to remove the external administrator at a meeting of creditors, or alternatively seek a court order that they be removed. This will generally require co-ordination between key creditors and the identification of suitable replacement external administration. Taking legal advice is a good first step.

Review of any proposed compromise with creditors

Both voluntary administrations and bankruptcies are sometimes resolved through a compromise with all or a subset of creditors. If your builder becomes bankrupt, the proposed compromise will be called a 'personal insolvency agreement'. If a building company goes into voluntary administration, the proposed compromise will be called a 'deed of company arrangement'.

If you have lodged a claim or 'proof of debt' in the external administration, you may be able to vote on whether to approve the compromise. You should carefully review the information

provided by the external administrator in deciding whether the outcome under the proposed compromise provides you with a better outcome than the alternative (generally, bankruptcy or liquidation). This is likely to be a function of the proposed compromise and the value of the assets otherwise available, if the compromise is not accepted. If you think there are gaps in the information provided by the insolvency practitioner, or further inquiries should be made before creditors have to vote on the proposal, you should contact the insolvency practitioner's office and consider obtaining legal advice.

For more information or assistance, please contact the Building Information Line of Consumer Affairs Victoria on 1300 55 75 59 during business hours.

You can also contact the Australian Building and Construction Commission on 1800 003 338.

This information sheet provides general information only and is not intended to be, and is not a substitute for obtaining, legal advice.