

Builder insolvency and financial difficulty

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

What is insolvency?

Insolvency is when a company or person is unable to pay debts when they are due.

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

Irrespective, a sole trader, partnership or company is unable to operate when insolvent.

The most common company insolvency procedures for an insolvent company are liquidation, voluntary administration and receivership. Company insolvency is regulated by the Australian Securities and Investments Commission (ASIC).

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').

Personal insolvency is regulated by the Australian Financial Security Authority. 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.

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

When a building practitioner or company is reported (by the Australia Securities & Investments Commission) to be in external administration, the VBA follows a process that can result in suspending their registration.

The engagement process can include:

- Sending a formal 'letter before action' to any directors who are registered building practitioners advising of potential immediate suspension of their individual registration.
- On response, assessing submissions by the practitioner, providing information to clarify their legislative obligations in respect of open building permits and issuing a show cause notice (SCN).
- In the event of no response being received, proceeding to immediately suspend their registration and issue a SCN proposing cancellation.
- If a suspension means the company no longer has the required nominee director, writing to the company about any related corporate registration and proceeding accordingly.

What should I do if my builder is insolvent?

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 a sole trader or partnership or a company. A builder that has only one employee can still be a company.

Is your builder an individual or a company?

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 have been declared bankrupt. You should also obtain the details of the insolvency practitioner conducting your builder's particular external administration.

If your builder is a sole trader or partnership, search the AFSA National Personal Insolvency Index at: <https://services.afsa.gov.au/brs/search>.

If your builder is a company, search ASIC's register of companies at: <https://connectonline.asic.gov.au>.

If you are not sure whether your builder is a company, sole trader or partnership, search both the AFSA National Personal Insolvency Index and ASIC register of companies or contact both regulators.

Domestic building insurance

In relation to residential buildings, you may be able to claim against a domestic building insurance (DBI) policy if your builder becomes bankrupt or becomes insolvent.

If practitioners undertake domestic building work worth more than \$16,000, DBI is a mandatory requirement.

Before taking a deposit or any money, building practitioners must provide their client with a copy of the policy and a certificate of currency covering the client's property.

DBI covers the client if, before work is complete, the practitioner dies, is declared insolvent or disappears.

It covers costs up to \$300,000 to fix structural defects for six years, and non-structural defects for two years.

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>.

Insolvent builders and work valued at more than \$16,000

You should be able to claim on the domestic building insurance policy if the builder is insolvent. To make a claim:

- Lodge your claim within 180 days of becoming aware of the builder's insolvency
- Contact the insurer to lodge a claim. If you do not have a copy of the policy or certificate of currency, the builder, building surveyor or local council may be able to provide it. If not, then you can contact insurance companies that provide domestic building insurance to check whether they issued insurance for your building.

If the work required a building permit, you may choose to seek legal advice on the building surveyor's obligations to require a domestic building insurance certificate.

Insolvent builders and work valued at less than \$16,000

Builders are not required to have domestic building insurance for work valued at less than \$16,000.

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

If you suspect your builder is insolvent, seek legal advice and contact the Building Information Line on 1300 55 75 55 between 9:00am and 5:00pm, Monday to Friday (except public holidays). Calling this number costs the same as a local call. Additional charges may apply if you are calling from overseas, on a mobile, or payphone.

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

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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.