

Schedule 7
Preferential claims

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Schedule 7: substituted, on 1 November 2007, by section 40(1) of the Companies Amendment Act 2006 (2006 No 56).

1 Priority of payments to preferential creditors

- (1) The liquidator must first pay, in the order of priority in which they are listed,—
- (a) the fees and expenses properly incurred by the liquidator in carrying out the duties and exercising the powers of the liquidator, and the remuneration of the liquidator; and
 - (b) the fees and expenses properly incurred by the administrator in carrying out the duties and exercising the powers of the administrator and the remuneration of the administrator; and
 - (c) the reasonable costs of a person who applied to the court for an order that the company be put into liquidation, including the reasonable costs incurred between lawyer and client in procuring the order; and
 - (d) the actual out-of-pocket expenses necessarily incurred by a liquidation committee; and
 - (e) to any creditor who protects, preserves the value of, or recovers assets of the company for the benefit of the company's creditors by the payment of money or the giving of an indemnity,—
 - (i) the amount received by the liquidator by the realisation of those assets, up to the value of that creditor's unsecured debt; and
 - (ii) the amount of the costs incurred by that creditor in protecting, preserving the value of, or recovering those assets.
- (2) After paying the claims referred to in subclause (1), the liquidator must next pay, to the extent that they remain unpaid, the following claims:
- (a) subject to clause 3(1), all wages or salary of any employee, whether or not earned wholly or in part by way of commission, and whether payable for time or for piece work, in respect of services provided to the company during the 4 months before the commencement of the liquidation:
 - (aa) subject to clause 3(1), all untransferred amounts of an employee's payroll donations by an employer or PAYE intermediary under section 24Q of the Tax Administration Act 1994 during the 4 months before the commencement of the liquidation:
 - (b) subject to clause 3(1), any holiday pay payable to an employee on the termination of his or her employment before, or because of, the commencement of the liquidation:
 - (c) subject to clause 3(1), any compensation for redundancy owed to an employee that accrues before, or because of, the commencement of the liquidation:
 - (d) subject to clause 3(1), amounts deducted by the company from the wages or salary of an employee in order to satisfy obligations of the employee (including amounts payable to the Commissioner of Inland Revenue in accordance with section 163(1) of the Child Support Act 1991 and section 167(2) of the Tax Administration Act 1994 as applied by section 25 of the Student Loan Scheme Act 1992):
 - (e) subject to clause 3(1), any reimbursement or payment provided for, or ordered by, the Employment Relations Authority, the Employment Court, or the Court of Appeal under section 123(1)(b) or section 128 of the Employment Relations Act 2000, to the extent that the reimbursement or payment does not relate to any matter

set out in section 123(1)(c) of the Employment Relations Act 2000, in respect of wages or other money or remuneration lost during the 4 months before the commencement of the liquidation:

- (f) amounts that are preferential claims under section 263(2);
 - (g) all amounts payable to the Commissioner of Inland Revenue in accordance with section 167(2) of the Tax Administration Act 1994 as applied by section 67 of the KiwiSaver Act 2006;
 - (h) all sums that, by any other enactment, are required to be paid in accordance with the priority established by this subclause.
- (3) After paying the claims referred to in subclause (2), the liquidator must next pay all sums, for which a buyer is a creditor in the liquidation of the company under section 11 of the Layby Sales Act 1971,—
- (a) paid by the buyer to a seller on account of the purchase price of goods; or
 - (b) to which the buyer is or becomes entitled to receive from a seller under section 9 of the Layby Sales Act 1971.
- (4) After paying the claims referred to in subclause (3), the liquidator must next pay the amount of any costs referred to in section 234(c).
- (5) After paying the claims referred to in subclause (4), the liquidator must next pay, to the extent that it remains unpaid to the Commissioner of Inland Revenue or to the Collector of Customs, as the case may require, the amount of—
- (a) tax payable by the company in the manner required by Part 3 of the Goods and Services Tax Act 1985; and
 - (b) tax deductions made by the company under the PAYE rules of the Income Tax Act 2004; and
 - (c) non-resident withholding tax deducted by the company under the NRWT rules of the Income Tax Act 2004; and
 - (d) resident withholding tax deducted by the company under the RWT rules of the Income Tax Act 2004; and
 - (e) duty payable within the meaning of section 2(1) of the Customs and Excise Act 1996.

Schedule 7 clause 1(2)(aa): inserted, on 6 January 2010, by section 862 of the Taxation (International Taxation, Life Insurance, and Remedial Matters) Act 2009 (2009 No 34).

2 Conditions to priority of payments to preferential creditors

- (1) The claims listed in each of subclauses (2), (3), (4), and (5) of clause 1—
- (a) rank equally among themselves and, subject to any maximum payment level specified in any Act or regulations, must be paid in full, unless the assets of the company are insufficient to meet them, in which case they abate in equal proportions; and
 - (b) in so far as the assets of the company available for payment of those claims are insufficient to meet them,—
 - (i) have priority over the claims of any person under a security interest to the extent that the security interest—
 - (A) is over all or any part of the company's accounts receivable and inventory or all or any part of either of them; and
 - (B) is not a purchase money security interest that has been perfected at the time specified in section 74 of the Personal Property Securities Act 1999; and
 - (C) is not a security interest that has been perfected under the Personal Property Securities Act 1999 at the commencement of the liquidation and that arises from the transfer of an account receivable for which new value is provided by the transferee for the acquisition of that account receivable (whether or not the transfer of the account receivable secures payment or performance of an obligation); and
 - (ii)

must be paid accordingly out of any accounts receivable or inventory subject to that security interest (or their proceeds).

- (2) For the purposes of subclause (1)(b), the terms **account receivable, inventory, new value, proceeds, purchase money security interest, and security interest** have the same meanings as in the Personal Property Securities Act 1999.
- (3) To the extent that the claims to which subclause (1) applies are paid out of assets referred to in paragraph (b) of that subclause, the amount so paid is an unsecured debt due by the company to the secured party.
- (4) Clause 9 of this schedule, as was in force immediately before the commencement of the Personal Property Securities Act 1999, continues to apply in respect of a company whose property was subject to a floating charge that, before the commencement of that Act, became a fixed or specific charge.

3 Provisions concerning preferential payments to employees

- (1) The total sum to which priority is to be given under any, or all, of paragraphs (a) to (e) of clause 1(2) must not, in the case of any one employee, exceed \$18,700 or any greater amount that is prescribed under subclause (2) at the commencement of the liquidation.
- (2) The sum stated in subclause (1) must be adjusted as follows:
 - (a) subject to paragraph (d), an adjustment must be made, by the Governor-General by Order in Council, after the 3-year period starting on 1 July 2006 and ending on 30 June 2009 and after every 3-year period following that (an **adjustment period**):
 - (b) subject to paragraph (d), the Order in Council must be made within 3 months of the end of an adjustment period:
 - (c) each adjustment must reflect any overall percentage increase, over the relevant adjustment period, in average weekly earnings (total, private sector), calculated by reference to the last Quarterly Employment Survey published by Statistics New Zealand (or, if that survey ceases to be published, a survey certified by the Government Statistician as an equivalent to that survey) within the relevant adjustment period:
 - (d) if, in an adjustment period, there is no change, or an overall decrease, in the percentage movement in average weekly earnings (total, private sector), as so calculated, no adjustment may be made for that adjustment period:
 - (e) if, in accordance with paragraph (d), no adjustment is made, the next adjustment made for any succeeding adjustment period must reflect any overall percentage increase in average weekly earnings (total, private sector) between the date of the last adjustment and the end of the relevant adjustment period for which the adjustment is to be made:
 - (f) all adjustments are cumulative and must be rounded to the nearest \$20:
 - (g) any correction to the Quarterly Employment Survey on which an adjustment is based must be disregarded until the adjustment that takes effect in the following adjustment period, which must reflect the corrected information in the calculation of that adjustment and must otherwise be made in accordance with this subclause.
- (3) The sum stated in subclause (1), or any greater amount prescribed under subclause (2) that applies on the date of commencement of a liquidation, continues to apply to that liquidation regardless of any change to that sum that is prescribed after the date of commencement of the liquidation.
- (4) For the purposes of this clause and clause 1,—
 - (a) remuneration in respect of a period of holiday or of absence from work through sickness or other good cause is to be treated as wages in respect of services rendered to the company during that period:
 - (b) **employee** means any person of any age employed by an employer to do any work for hire or reward under a contract of service (including a homeworker as defined in section 5 of the Employment Relations Act 2000); but does not include a person who is, or was at any time during the 12 months before the commencement of the

liquidation, a director of the company in liquidation, or a nominee or relative of, or a trustee for, a director of the company:

- (c) **holiday pay**, in relation to a person, means all sums payable to that person by the company under subpart 1 of Part 2 of the Holidays Act 2003, and includes all sums that by or under any other enactment or any award, agreement, or contract of service are payable to that person by the company as holiday pay.

Schedule 7 clause 3(1): amended, on 30 September 2009, pursuant to clause 3 of the Companies (Maximum Priority Amount) Order 2009 (SR 2009/227).

4 Subrogation of persons if payment has been made

If a payment has been made to a person (A) on account of any preferential claim set out in this schedule out of money advanced by another person (B) for that purpose, then B has, in a liquidation, the same right of priority in respect of the money so advanced as A would have if the payment had not been made.

5 Priority given to person who distrains on goods

If a person has distrained on goods or effects of the company during the 20 working days before the commencement of the liquidation, the preferential claims set out in this schedule are a first charge on the goods or effects so distrained, or the proceeds from their sale; but if any money is paid to a claimant under that charge, the person has the same rights of priority as that claimant.

Schedule 7 clause 5: amended, on 1 January 2008, by section 370(2) of the Property Law Act 2007 (2007 No 91).

6 Saving provision for liquidation that has commenced

If a liquidation of a company commenced before the Companies Amendment Act 2006 came into force, that company's property must be applied in accordance with the priorities stated in this schedule on the date the liquidation commenced as if the Companies Amendment Act 2006 had not come into force.