



Committee	House of Representatives Standing Committee on Economics
Inquiry	Review of the Australian Securities and Investment Commission Annual Report 2020
Question No.	ASIC26QW
Reference	Written
Topic	Small business insolvency
Committee Member	Dr Andrew Leigh MP

Question:

In regards to small business insolvency measures:

For small businesses to be eligible for the simplified liquidation and small business restructuring measures that commenced on 1 January 2021, a company must:

- have total debts of less than \$1 million;
 - be up to date with all ATO lodgements;
 - be up to date with payment of all employee entitlements; and
 - not have had any of its directors or former directors previously involved with a Small Business Debt Restructuring (SBDR) process in the last 7 years.
- (a) Has ASIC calculated the number and ratio of small business insolvencies during the 2017-18, 2018-19 and 2019-20 financial years that would not have met these criteria?
- (b) Does ASIC see a need for further changes that would help small businesses that are not eligible to take advantage of the 1 January 2021 reforms to restructure their debt while remaining in control of their business?
- (c) Does ASIC have a view on further steps required to ensure owners and directors of small businesses are able to restructure debt while maintaining control of their business?

Answer:

Background

Insolvency reforms for small business (including new simplified liquidation and restructuring processes commenced on 1 January 2021. Between 1 January 2021 and 15 August 2021 there were:

- 15 appointments of a restructuring practitioner;
- 10 restructuring plans made; and
- 28 liquidators had adopted the simplified liquidation process.

The following Table summarises the eligibility criteria for the restructuring and the simplified liquidation processes:

Eligibility criteria	Restructuring	Simplified liquidation
Level of indebtedness	Must not exceed \$1 million	Must not exceed \$1 million
Status of tax lodgements	Lodgements are up to date, or substantially up to date, before the restructuring plan proposal is sent to creditors (tax debts do not have to be paid)	Lodgements are up to date at the time the liquidator is appointed (tax debts do not have to be paid)

Payment of employee entitlements	Employee entitlements due for payment must be paid before the restructuring plan proposal is sent to creditors (not at the time the restructuring practitioner is appointed)	Not applicable
Company's or director's prior involvement in the restructuring or simplified liquidation process	Ineligible if involved within the 7 preceding years (subject to an exemption)	Ineligible if involved within the 7 preceding years (subject to an exemption)

Responding to the 3 questions:

Question A

ASIC does not collect, and the law does not require any party to give ASIC, data that would enable ASIC to calculate the number and ratio of small business insolvencies during the 2017-18, 2018-19 and 2019-20 financial years that would not have met these eligibility criteria.

Against each of the eligibility criteria referred to in the question:

I. Level of indebtedness

Registered Liquidators are required to lodge documents with ASIC that include limited data on the level of debt owed by a company that enters external administration.

II. Status of ATO lodgements

ASIC is not required to, and does not, collect data on whether a company is substantially up to date with its tax lodgement obligations.

The ATO might provide this data.

III. Payment of employee entitlements

ASIC is not required to, and does not, collect data on whether a company is up to date with paying its employee entitlements when they become due for payment.

Being up to date with paying employee entitlements is not an eligibility criteria for a liquidator to adopt the simplified liquidation process and nor does a company need to have employee entitlements paid up to date at the time of appointing the restructuring practitioner. The company can appoint a restructuring and only must pay those employee entitlements that are due for payment before the restructuring proposal is sent to creditors.

We collect data (from documents lodged by the registered liquidator) about total amounts outstanding to employees which includes amounts not yet due and payable e.g. long service leave, annual leave etc.

Data extracted for Form 5601 *Statutory report by liquidator to creditors* (required to be provided to creditors within 3 months of the appointment of a liquidator under section 70-40 of the *Insolvency Practice Rules (Corporations) 2016*) and lodged with ASIC discloses the

following amounts owed to employees for wages and superannuation (including statutory guarantee charge) at the date of the liquidator's appointment:

Outstanding Employee Entitlements for Wages and Superannuation	Number of Reports	Percentage
Nil	14,025	55%
\$1 to \$10,000	2,724	11%
\$10,001 to 25,000	2,058	8%
\$25,001 to 50,000	2,012	8%
\$50,001 to 75,000	1,192	5%
\$75,001 to 100,000	751	3%
\$100,001 +	2,561	10%

Source – Form 5601 *Statutory report by liquidator to creditors* (25,323 forms lodged between 1 September 2017 and 5 August 2021)

As the amount outstanding to employees increases, we anticipate it less likely a company in financial distress would have the cash resources to pay amounts due to employees before a restructuring plan is sent to creditors, and would, therefore, be ineligible for restructuring.

IV. Director prior involvement with the restructuring process

To be ineligible on these grounds a director would have had to have prior involvement in a restructuring or simplified liquidation process which commenced post 1 January 2021.

Question B

It is a matter for government to determine whether the eligibility criteria for small business restructuring should be changed.

Question C

ASIC supports measures to promote restructuring of viable small business.

It is a matter for government whether further legislative measures should be introduced to educate and assist small business owners restructure debt while remaining in control of the business.

ASIC has published information on its website to raise awareness of these reforms with small business owners.